

Testimony of
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WRITTEN TESTIMONY: Anne Gordon: Philadelphia Inquirer

Mr. Chairman, members of the committee, thank you for allowing me to share my experience with you today as you consider this important legislation. I am not in the habit of coming before this esteemed group to urge changes in federal law. As a journalist, I work hard to keep my beliefs out of public life. But you have asked me here today to speak on behalf of journalism; a profession I hold dear and believe is bedrock to a free and open society.

I have traveled here from Philadelphia, a city with roots deep in the days of our nation's founding. And so I am fortunate to be able to walk past the site of Ben Franklin's home and even pause at his grave to reflect on what it must have been like to help craft a constitution that is such a marvel to behold two centuries later. I can imagine a chain of hard-working men and women who believed as I do that a free press is a living, breathing demonstration of democracy. Most of the people in that chain of life were not journalists. They were judges and lawyers, and priests and rabbis, electricians like my father, housewives like my mother, legislators and immigrants who now call this country home because of the freedom it offers to all, especially those who want to speak out against injustice.

But despite the fact that generation after generation has added its voice to those of our founding fathers in support of those who dare to speak out, there is today renewed conflict among the government, the judiciary and the press. I urge you to put this conflict to rest.

By passing Sen. Richard Lugar and Sen. Mike Pence's bill, the Free Flow of Information Act which creates a federal shield law, you have the opportunity to protect the press when it exposes secrets that benefit the public and national security. The Justice Department has told you this bill is bad policy and a threat to law enforcement and national security. The implication is that when the press tells its readers, as the Inquirer recently did, for example - that nearby refineries are vulnerable to attack and accidents that would imperil hundreds of thousands, it is threatening national security. The threat comes not from inadequate protection of these sites; the Justice Department seems to reason, but from the use of confidential sources to reveal these types of stories. In fact, NOT publishing this material threatens national security.

Some of the information needed to tell such stories does indeed come from confidential sources - sources that would not speak out, leak documents, and point the way to change if it were not for the assurance of the Inquirer's journalists that they will be protected from reprisals.

If you think that fear is mere rhetoric, let me give you some examples. The fear of exposure exists at all levels, stories large and small from those involving the government to those

involving private industry and our most sacred institutions. Consider the recent case of a local school board that stood accused by a whistleblower of misusing tax money. That whistleblower came to the Inquirer seeking help to right a wrong. She was frightened at the potential consequences of her actions but enraged by the misuse of funds. We gave her anonymity and reported the story. But the school board president has since been relentless in trying to find out who the Inquirer's source was for the story, repeatedly, publicly asking her and others if they talked to our reporters. Or consider the victims and priests who spoke to the Inquirer about the sex scandals that have rocked the Catholic Church in Philadelphia well before the local DA began her investigation. The victims feared that if their names were known, they would be further humiliated. The priests feared they would be shunned by others for speaking out.

These are not cases involving political intrigue in Washington D.C., but real, daily examples of wrong doing exposed because of the promise to protect a courageous individual who wants to see justice done. The debate over a federal shield law has been warped by the cycle of political leaks in Washington, but the reality is that those sorts of confidentiality discussions are a minor part of the larger field of reporting that uses confidential sources. It is also important to note that very often the confidential source is merely the starting point in an investigation - but without the promise at the onset, the fuller story would never be told.

A few years ago, the Inquirer reported widespread mistreatment of victims by the very Philadelphia police they had sought help from after a rape. The Inquirer relied, in part, on information from confidential sources - people with knowledge of Police Department practices who were afraid of retaliation if they spoke out openly. As a result of that series of stories, new investigations were opened into rapes and criminals were brought to justice. The police department changed its way of investigating and reporting rapes as a direct result of the stories. The public was served.

Just recently, well-placed sources helped us to report that a nationwide criminal investigation is being conducted by federal authorities into tens of thousands of legal claims asserting heart damage from the former diet drug known as fen-phen. Earlier this year, we reported that a shortage of armored vehicles was endangering American troops - a shortage largely the result of Pentagon miscalculations and not industrial shortfalls as had been claimed. We received some help from documents and other information forwarded to us on a confidential basis by sources in the federal government. The public's interest was served when - as a result of our stories - manufacturing was increased.

Last year, in the United States, more than two dozen reporters have been subpoenaed or questioned about their confidential sources in federal court cases. Six journalists from across the country were jailed or fined for refusing to disclose a source. That number may seem small to you, but consider that action against these six individuals sent doubt into the minds and spines of whistleblowers and journalists alike.

You might be asking yourselves why you should pass a federal shield law. Today, 31 states and the District of Columbia provide shield laws that protect journalists from testifying about confidential sources and 18 other states have recognized reporter's privilege as a result of judicial

decisions. Why does the federal government need to get involved if states have already acted? First of all, a significant number of states have no shield laws. More importantly, even when there are state shield laws those laws offer, little, if no help, in federal proceedings. Confidential sources are left without any protection other than the hope that the journalist will be willing to violate a court order to testify. And, having no shield in federal proceedings undermines the state shields that do exist.

Let me give you an example. The Pennsylvania Shield law is absolute. Confidential sources are protected under all circumstances. Thus, there is a certainty that the promise of confidentiality between a source and a reporter is protected and can not be compelled. This privilege applies to anyone employed by a newspaper, press association, magazine or television station who is involved in the process of gathering, procuring, covering, editing, or publishing news.

Because Pennsylvania's Shield Law is absolute, it allows reporters' and sources' expectations to be firmly set: they will be protected. As a result, sources are more likely to provide information when they know their identities cannot be forced out into the open.

BUT the LACK of a federal shield law destroys that certainty and undermines the right-minded policy of the Pennsylvania legislature. Without a federal shield law, a source cannot be confident that his or her identity will be protected as Pennsylvania law contemplates. If a journalist is subpoenaed in a federal court, even though the reporting was done in Pennsylvania, the journalist can be ordered to disclose a confidential source--something that the Pennsylvania legislature has otherwise prohibited in our Commonwealth. Rather than having confidence that his identity will be protected, the source is left knowing that confidentiality is not guaranteed because the journalist in federal court may be left with the Hobson's choice of violating a court order and going to jail or breaking a promise.

Giving the important function of confidential sources, their identities need to be given the highest protection. While the Justice Department fears that having this protection, undercuts law enforcement efforts, the reality is that Shield Laws have existed in many states for many years, including in Pennsylvania, without jeopardizing the security of the nation. Indeed, I know of no case where the disclosure of a confidential source would have protected the citizens of either my state or our nation. On the other hand, disclosure of such sources' identity, will, indeed, jeopardize the public interest and security because concerned individuals, who fear for their own safety, protection and well being, will be too afraid to bring information to light.

The Free Flow of Information Act that is before you today does not allow for absolute protection - which is why it has been supported by all the major news organizations in this country and the American Bar Association. It allows for disclosure when disclosure of a source would, in fact, be necessary to prevent imminent and actual harm to this nation's security. Therefore, the security concerns have been addressed.

The very act of subpoenaing an Inquirer journalist for notes, the names of sources, or eye witness testimony disrupts the newsgathering process and chills the flow of information to the public. Newspapers are not another arm of the government. When the government subpoenas the work of reporters and uses that work or testimony to convict someone, it undermines the public's view of newspapers as neutral observers of events. The primary job of a free press is to serve as a

check on the abuses of government. Not to help convict or indict. And the Free Flow of Information Act, in addition to protecting confidential sources, recognizes those interests and assures that the journalist, even when confidential sources are not involved, will not be the first witness called, but rather the one when no else is available and the information is critical to the case. This protection is essential to maintaining the proper function of journalists in our society.

In sum, we can all - each of us - understand why a promise of confidentiality is crucial to disclosure. How many of us have simply asked a friend for a vow of confidence? Our lawyers are bound by confidentiality, our rabbis and our priests, our doctors as well. Our society respects these promises. Whistleblowers need to be given the same assurances - the promise that the Inquirer would stand beside them as they exposed wrongdoing. These are never promises made lightly or without deliberation, but rather promises made because there was fear and the fear was made to disappear when The Inquirer gave its word. What is most important here is that the wrongdoing was exposed. Wrongdoers were punished. Taxpayers no longer had to fear that the school board was playing with their money instead of helping their children learn. I could give you a hundred examples. But I don't need to. You read about them every day in the newspaper. You see them on TV and hear about these promises on the radio - but you may not know that what you are hearing about is the promise of confidentiality that one journalist made to a man or woman who had a story to tell. When we hear, as a nation, about Watergate, or the fact that tobacco companies worked to make cigarettes more addictive, or that Enron was a financial nightmare, we are hearing about promises made and kept - about a pact with our forefathers that this nation would respect a free press.

I urge you today, to pass the Free Flow of Information Act.

Pass this bill so that all Americans understand that confidential newsgathering is an important part of a free press and that journalists who protect their sources are not criminals. Pass this law because the lack of clarity at the federal level undercuts state law.