

GOVERNMENTAL AFFAIRS  
OFFICE

AMERICAN BAR ASSOCIATION

Governmental Affairs Office

740 Fifteenth Street, NW  
Washington, DC 20005-1022  
(202) 662-1760  
FAX: (202) 662-1762

DIRECTOR

Robert D. Evans  
(202) 662-1765  
rdevans@staff.abanet.org

DEPUTY DIRECTOR

Denise A. Cardman  
(202) 662-1761  
cardmand@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL

R. Larson Frisby  
(202) 662-1098  
frisbyr@staff.abanet.org

Lillian B. Gaskin

(202) 662-1768  
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL

Kristi Gaines  
(202) 662-1763  
gainesk@staff.abanet.org

Kenneth J. Goldsmith

(202) 662-1789  
goldsmithk@staff.abanet.org

Kerry M. Lawrence

(202) 662-1766  
lawrenck@staff.abanet.org

Ellen McBarnette

(202) 662-1767  
mcbarnee@staff.abanet.org

E. Bruce Nicholson

(202) 662-1769  
nicholsonb@staff.abanet.org

DIRECTOR GRASSROOTS  
OPERATIONS/LEGISLATIVE COUNSEL

Julie M. Strandlie  
(202) 662-1764  
strandlj@staff.abanet.org

INTELLECTUAL PROPERTY  
LAW CONSULTANT

Hayden Gregory  
(202) 662-1772  
gregoryh@staff.abanet.org

STATE LEGISLATIVE COUNSEL

Rita C. Aguilar  
(202) 662-1780  
aguilarr@staff.abanet.org

EXECUTIVE ASSISTANT

Julie Pasatiempo  
(202) 662-1776  
jpasatiempo@staff.abanet.org

STAFF DIRECTOR FOR  
INFORMATION SERVICES

Sharon Greene  
(202) 662-1014  
greenes@staff.abanet.org

EDITOR WASHINGTON LETTER

Rhonda J. McMillion  
(202) 662-1017

**June 28, 2006**

**Honorable Arlen Specter, Chair  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510**

**Dear Chairman Specter:**

**We understand that the Senate Judiciary Committee is expected this week to mark up S. 2831, the Free Flow of Information Act of 2006, which would codify a qualified federal shield law for journalists. We are writing to express our support for this bipartisan compromise bill, which reflects the concerns and criticisms expressed by law enforcement and the media over versions of the legislation introduced earlier this Congress. S. 2831 has been carefully crafted to preserve the free flow of information to the public through a free and active press while protecting the public's right to effective law enforcement and ensuring the fair administration of justice.**

**It is indisputable that journalists play a critical role in an informed democracy. Reporters who have relied on confidential sources have informed us about undisclosed governmental activities, corporate scandals and drug rings and other criminal activities -- revelations that have prompted citizens to take action, Congress to pass remedial legislation and prosecutors to file lawsuits.**

**The ability and willingness of the press to uncover information to which the American people would not otherwise have access is a hallmark of our democracy. A free press acts as an additional check and balance, and promotes public confidence in both our government and social institutions. Maintaining the free flow of information may not always be a popular position, especially during trying times, but it is essential in a democracy.**

**That 49 states and the District of Columbia already recognize an absolute or qualified privilege for journalists to protect their sources is strong evidence that a national consensus exists over the need to shield reporters**

so that they can undertake independent, objective investigations on behalf of the public and share information that would not otherwise be forthcoming. That not one state or the District of Columbia has repealed its reporters' shield law similarly suggests that these laws are working and are not interfering with criminal investigations or the daily work of government.

Despite the wealth of experience at the state level, federal protections lag far behind. In the absence of a uniform federal law and clear Supreme Court precedent, federal courts have applied different judicial standards developed on a case-by-case basis. Not only is there no uniformity between the circuits, often there is no uniformity within a circuit. The resulting state of confusion has created unpredictability and encouraged litigation.

Reporters and news agencies are, with increasing frequency, finding themselves embroiled in contentious federal lawsuits. In recent years, prosecutors and other litigants around the country have pursued reporters zealously in an effort to learn the identity of their confidential sources and obtain unpublished information. News media leaders have warned Members of Congress and the public that many in the industry have reached the point where the absence of a clearly defined federal reporters' privilege is affecting their editorial decisions, which in turn affects the free flow of information to the public. Others have echoed the same or similar concerns. In the last two years, more than 70 journalists and news organizations have been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information; dozens have been asked to reveal their sources.

Recognizing the critical role that journalists play in an informed democracy and concerned by recent trends, the ABA adopted policy in August 2005 urging Congress to enact a federal shield law that would require any party seeking to subpoena a journalist to force disclosure of information to demonstrate that:

1. the information sought is essential to a critical issue in the matter;
2. all reasonable alternative sources for acquiring the information have been exhausted; and
3. the need for the information clearly outweighs the public interest in protecting the free flow of information.

The ABA supports S. 2831 because it respects these principles while responding to the concerns of government officials that a federal shield law must not impede legitimate criminal investigations or threaten national security. Under this bill, reporters would not have an absolute privilege against disclosure in any situation; rather, the degree to which journalists would be shielded from having to disclose their confidential sources or work products would depend on who seeks the information (U.S. attorney or litigant) and the purpose for which it will be used (criminal or civil proceeding). Further, this

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**legislation would not confer any privilege on a reporter if a court determines that the information sought is the result of the journalist's eyewitness observations or participation in criminal or tortuous conduct, is reasonably necessary to prevent death or substantial bodily harm, or is important to prevent an act of terrorism or harm to our national security (including harm caused by the disclosure of properly classified government information) and the value of disclosure clearly outweighs the harm to the public interest in the free flow of information.**

**There is a pressing need for Congress to follow the lead of the states and enact a qualified federal shield statute that will eliminate the current confusing patchwork of court rulings and provide a clear, uniformly applied federal standard. We hope you will vigorously support S. 2831 in committee and work for its enactment this Congress.**

Sincerely,

A handwritten signature in cursive script that reads "Robert D. Evans".

**Robert D. Evans**

**cc: Members of the Committee**