

September 16, 2009

Honorable Patrick Leahy, Chair
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Senator Leahy:

We understand that the Senate Judiciary Committee is expected this week to mark up S. 448, the Free Flow of Information Act of 2009, which would codify a qualified federal shield law for those who regularly investigate events and gather material with the intent of disseminating news and information to the public. We are writing to express our support for this legislation because it preserves 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.

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 That not one state or the District of Columbia has repealed its reporters' shield law similarly suggests that these laws are working and are not interfering with criminal investigations or the daily work of government.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 resulted in litigation.

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.

S. 448 respects these principles. The bill recognizes a qualified privilege and requires a finding, by a preponderance of the evidence, that: the information is essential; the person seeking to compel disclosure has exhausted all reasonable alternative sources; and nondisclosure would be contrary to the public interest. The bill also recognizes other limits and circumstances in which disclosure may be appropriate and therefore provides exceptions for certain criminal conduct and instances where death, kidnapping, substantial bodily injury, terrorist activity, or national security harm can be prevented.

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. 448 in committee and work for its prompt enactment.

Sincerely,



Thomas M. Susman
Director

cc: Members of the Committee