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November 19, 2009

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

RE: ABA Support for Federal Shield Law Substitute

Dear Senator Leahy:

I am writing on behalf of the American Bar Association to express our support for the Specter-Schumer substitute to S. 448, the Free Flow of Information Act of 2009, scheduled for consideration by the Senate Judiciary Committee this week. The culmination of years of deliberation and negotiations, this bipartisan compromise is the first federal shield proposal to be vigorously supported by both the news industry and the Department of Justice. Their joint support signifies that this substitute strikes the right balance and will protect the free flow of information to the public through a free and active press without impeding legitimate criminal investigations or threatening national security.

This compromise legislation has several significant new features that deserve mention. The definition of who is covered by the bill has been broadened, reflecting the changing nature of the delivery of news to the public. The substitute also shifts the burden of proof in criminal cases, requiring journalists to show through "clear and convincing evidence" that revealing source materials would be contrary to the public interest. The national security exception has been broadened to apply if the information "would materially assist the Government in preventing, mitigating, or identifying the perpetrator of an act of terrorism or other significant and articulable harm to national security." Finally, the substitute authorizes a federal judge, upon a showing of good cause, to review evidence in camera or ex parte.

There is a pressing need for Congress to follow the lead of the states and enact a qualified federal shield statute. On balance, we believe that the substitute offers a

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significant improvement over the current patchwork of procedures used by the federal courts by establishing a definitive, uniform federal standard that will ensure reporters, bloggers and others covered by the bill. We urge your Committee to proceed to markup and to approve the Specter-Schumer substitute to S. 448.

Sincerely,

A handwritten signature in black ink, reading "Thomas M. Susman" with a long horizontal flourish extending to the right.

Thomas M. Susman  
Director

cc: Members of the Committee on the Judiciary