
Cathy Packer

Follow this and additional works at: https://repository.uchastings.edu/hastings_comm_ent_law_journal
Part of the Communications Law Commons, Entertainment, Arts, and Sports Law Commons, and the Intellectual Property Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_comm_ent_law_journal/vol31/iss3/3

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Communications and Entertainment Law Journal by an authorized editor of UC Hastings Scholarship Repository.
I. Introduction

When the U.S. Congress failed to enact a federal shield law in 2008, media organizations and other shield law supporters immediately announced they would renew their efforts to persuade Congress to protect journalists. The executive director of the Reporters Committee for Freedom of the Press said, “We will reconfigure, reassemble our coalition and try to get [shield law legislation] reintroduced as soon as possible.”

---

* PhD and Associate Professor, School of Journalism and Mass Communication, University of North Carolina at Chapel Hill


U.S. House Speaker Nancy Pelosi promised, “As soon as we have a new Congress and a new president, we will have a new shield law.”

Despite the determination of shield law supporters, the issues that thwarted adoption of a shield law by the 110th Congress could again derail efforts to legislate a testimonial privilege for reporters, and thus those issues deserve close scrutiny. The issues are extremely contentious and likely to be at the center of future shield law debates because they are about how power should be distributed among the branches of the federal government and the media. This article identifies and analyzes the power-distribution issues at the center of the 2005-2008 Congressional shield law deliberations. Some of those issues were: Would a federal shield law hamper the U.S. Department of Justice’s power to combat terrorism and other crimes? Would the law protect the media from the chilling effects of federal subpoenas? Or would the law unwisely grant the already powerful media legal rights denied to other citizens? And who should have the power to decide whether to allow the media to refuse to comply with federal subpoenas?

The conceptual framework for this research is the idea that law distributes power among groups in society, creating the nation’s social architecture. Social architecture is an extremely useful metaphor. As developed by privacy scholar Daniel J. Solove in his book The Digital Person, the notion of social architecture rests on the principles that “legal and social structures are products of design” and that law can define the power relationships in society. Solove explained that just as the architecture of a building can be designed to determine how people interact, social architecture can be designed by law to determine how

---

3. This quote was reported by two bloggers who covered an American Magazine Conference in New York City. See Posting of Michael Calderone to Politico.com, Pelosi: “We Will Have a New Shield Law,” http://www.politico.com/blogs/michaelcalderone/1008/Pelosi_We_will_have_a_new_shield_law.html (Oct. 6, 2008, 10:35 EST); Post of Jeff Bercovici to Condé Nast Portfolio.com, Pelosi Promises Shield Law for Journalists, http://www.portfolio.com/views/blogs/mixed-media/2008/10/05/pelosi-promises-shield-law-for-journalists (Oct. 6, 2008, 20:06 EDT).


6. Solove, Identity Theft, supra note 4, at 1239.

7. Id. at 1241.

8. Solove, Digital Dossiers, supra note 4, at 1114 (citing Neal Kumar Katyal, Architecture as Crime Control, 111 YALE L.J. 1039 (2002)).
groups in society interact. He said this architectural metaphor "captures how legal regulations—or the lack thereof—structure social interaction as well as the degree of social control and freedom in a society." Solove said lawmakers can construct social architecture to address two fundamental problems of government. The first problem is "how to control the population without stifling liberty, in other words, how to balance order and freedom." The second problem is "how to control the government so that it remains accountable to the people. This includes preventing officials from abusing their power, and guarding against excessive growth in government power that threatens to override the power of the people."

Senate and House hearings and a House debate have provided platforms for the major shield law proponents and opponents to discuss—in terms both explicit and implicit—how power should be distributed. For example, during the shield law deliberations in Congress, some of the most explicit concerns about the distribution of power were voiced by New York Times political columnist William Safire. In 2005 Safire described for the Senate Judiciary Committee the power of the media and the effect of government subpoenas on the media: "We have the power of trust. We

9. Solove, Identity Theft, supra note 4, at 1239, 1241.
10. Id. at 1239 (applying a social architecture analysis to information privacy law issues). For other examples of the application of social architecture analysis to communication law issues, see Cathy Packer & Johanna Cleary, Rediscovering the Public Interest: An Analysis of the Common Law Governing Post-Employment Non-Compete Contracts for Media Employees, 24 CARDOZO ARTS & ENT. L.J. 1073 (2007); Cathy Packer, Don’t Even Ask! A Two-Level Analysis of Government Lawsuits Against Citizen and Media Access Requestors, 13 COMM. L. & POL’Y 29 (2008).
11. Solove, Digital Dossiers, supra note 4, at 1087.
12. Id.
13. Id.
14. The Senate Judiciary Committee held two hearings on the federal shield law in 2005 and one hearing in 2006. In 2007 the House Judiciary Committee held a hearing on the proposed law, and then the House debated the bill for one hour before approving the legislation.
15. The terms “proponents” and “opponents” are applied somewhat tentatively here. A person might support one proposed bill but not another, and statements made by a member of Congress at a hearing might not correlate with that person’s final vote—if there was a vote. Hearing and debate testimony is not always a reliable indicator of what people really think or how they will vote. It is, however, the most reliable indication available.
have the ability to say to a source, you can trust us, we won’t reveal who you are, you won’t be involved, what’s the truth? Now, that’s our power, that’s our weapon, and it’s being seized and taken away from us.”

While the social architecture metaphor is new in the law, the idea that law distributes power among groups in society is not new at all. More than 200 years ago, for example, the Framers of the U.S. Constitution created three separate branches of government in order to avoid a dangerous concentration of government power. Then the Framers added the First Amendment to enable citizens to curb the power of the new government by speaking and publishing. Those decisions by the Framers were decisions about who would have the power to govern in the new United States.

Examining the federal shield law issue through the lens of social architecture broadens our inquiry beyond the language of a particular bill or the bill’s politics; the social architecture perspective requires us to focus on what are arguably more important considerations in lawmaking. For example, if we were analyzing the language of a shield law bill, our focus logically might be on specific questions such as whether a blogger or a

18. See infra notes 25-31 and accompanying text.
19. See infra notes 51-55 and accompanying text.
21. Interestingly, the issue of whether bloggers would be covered by a shield law was given only passing mention in the 2005 and 2006 hearings. See, e.g., Reporter’s Privilege Legislation: An Additional Investigation of Issues and Implications: Hearing on S. 1419 Before the S. Comm. on the Judiciary, 109th Cong. (2005) (unpublished hearing, no C.I.S. number assigned) [hereinafter Senate Hearing 2005-B] (statement of Sen. Leahy, Chair, Senate Comm. on the Judiciary) (noting that the committee faced challenges in defining terms because bloggers were “participating fully in the 24-hour news cycle.”), available at http://judiciary.senate.gov/hearings/hearing.cfm?id=1637. The issue was not debated at length until the 2007 House Judiciary Committee hearing. See, e.g., House Hearing 2007, supra note 16, at 60 (statement of Randall D. Eliason, Law Professor) (observing that the testimonial privilege “would appear to apply equally to an individual pajama-clad blogger and a reporter for the New York Times” and arguing that “the scope of such a privilege in the Internet age is breathtaking.”); House Hearing 2007, supra note 16, at 9-10 (statement of Rep. Smith, Member, House Comm. on the Judiciary) (questioning whether bloggers are journalists and confessing that he once worked as a newspaper reporter).
journalist working for a terrorist organization\textsuperscript{22} could qualify as a "covered person"\textsuperscript{23} entitled to protection under the law. When we analyze the deliberations in terms of social architecture, however, we find the issues are broader and fundamental. Thus, in the context of the proposed federal shield law, this social architecture analysis focuses on the proper distribution of power among the U.S. Department of Justice, Congress, and the media, and what a proposed federal shield law might contribute to—or subtract from—that optimal distribution of power. My social architecture analysis also focuses on the context within which a federal shield law would operate. Differing views as to the context in which power is being distributed appear to explain much of the disagreement over the shield law.

The next section of this article explores what the Constitution and the First Amendment suggest is the appropriate distribution of power among the three branches of the federal government, the press, and citizens. Then this article demonstrates that the social architecture drawn by the Framers is today inadequate for anyone to say with certainty whether the First Amendment properly affords journalists a testimonial privilege. The U.S. Supreme Court, the Congress, and the lower federal courts have not resolved the issue either. The third section of this article summarizes the most important shield law bills that came before the 109th and 110th Congresses. The fourth section describes in detail the social architecture arguments in the shield law hearings and debate in Congress. Finally, this article summarizes these arguments and suggests how they should be addressed by Congress with passage of a federal shield law. The final section also suggests useful changes in the social architecture metaphor.

II. The Nation’s Original Social Architecture and the Reporter’s Privilege

Most of what is known about the Framers’ thinking as they drew the first, broad outlines of the nation’s social architecture comes from The
Federalist Papers. A series of articles published in 1787 and 1788 that advocate the ratification of the U.S. Constitution, The Federalist Papers discuss the philosophical underpinnings of the new federal government. James Madison wrote at length in The Federalist about the distribution of power among the branches of the federal government, a subject that is both the foundation of our social architecture and the root of the debate over the federal shield law. Madison warned: "The accumulation of all powers legislative, executive and judiciary in the same hands... may justly be pronounced the very definition of tyranny." He wrote, "It is of great importance in a republic... to guard the society against the oppression of its rulers..." Madison did not, however, define the concept of separation of powers or clarify what he meant by "executive," "legislative," or "judicial" powers. Law Professor Keith Werhan attributed those lapses to Madison's belief that nobody could clearly define the powers of the branches and that the Framers did not design a government in which the branches were completely separate. It is clear, however, that Madison envisioned a complicated government in which powers were divided in ways that ultimately preserved the power of citizens by ensuring that no one branch would be sufficiently powerful to oppress them.

The Framers were heavily influenced by the writings of John Locke, a seventeenth century Enlightenment philosopher. In his book Second Treatise of Government, Locke proposed a government based on the

25. THE FEDERALIST NOS. 47-51 (James Madison).
27. Id.
29. Id.
30. Id. at 2684-85. One example of the lack of separation between the branches is that the branches share the task of interpreting the Constitution. See, e.g., Louis Fisher, Constitutional Interpretation by Members of Congress, 63 N.C. L. REV. 707 (1985); Neal Kumar Katyal, Legislative Constitutional Interpretation, 50 DUKE L.J. 1335 (2001).
consent of the governed. Locke said citizens would enter into a social contract to create a government that would allow them to live safe, enjoyable lives and to protect their property. The basic terms of the contract were that the government would act with the consent of the majority, and, if the government failed to act with the consent of the majority, citizens were not obligated to obey. In other words, Locke proposed a social architecture in which power ultimately belonged to citizens, not those who governed them. Although Locke did not explicitly say so, historians expect that Locke would have believed that the government should be judged by citizens through the free exchange of ideas, including the exchange of ideas in the free press. Locke would have believed citizens needed as much knowledge about government as possible.

Little is known about how much power the Framers thought should be afforded to the press. Because the language of the First Amendment’s press clause is so sparse and The Federalist says little on the topic, discerning the meaning of the First Amendment usually has involved studying the writings of philosophers such as John Milton and eighteenth-

34. Id. at 47-48, 111.
35. Id. at 108.
36. Copeland, supra note 32, at 92 (observing that Locke’s ideas about citizens judging the actions of the government were similar to those of the Levellers and of John Milton, and they all advocated an open marketplace of ideas).
37. Id. at 92-93 (citations omitted).
38. Id. at 92.
39. See, e.g., LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 268 (Oxford University Press) (1985) (observing that “[n]o one can say for certain what the Framers had in mind, because enough evidence does not exist to justify cocksure conclusions . . . .”); RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 38 (Alfred A. Knopf, Inc.) (1992) (observing that “[o]ne can keep going round and round on the original meaning of the First Amendment, but no clear, consistent vision of what the framers meant by freedom of speech will ever emerge.”).
41. There also is evidence of uncertainty on the part of the Framers, as evidenced by these questions raised by Alexander Hamilton in The Federalist: “What signifies a declaration, that ‘the liberty of the press shall be inviolably preserved’? What is the liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion? I hold it to be impracticable . . . .” THE FEDERALIST NO. 84, at 456 (Alexander Hamilton) (J.R. Pole ed., Hackett Publishing Co., 2005) (1788).
42. Locke, supra note 33, at 47-48.
century journalists such as John Trenchard and Thomas Gordon. In the 1644 essay *Areopagitica*, the English philosopher and poet John Milton laid the foundation for many later theories of the free press by arguing that truth would defeat falsity if the two were allowed to compete freely. Milton penned this famous quote:

And though all the winds of doctrine were let loose to play on the earth, so Truth be in the field, we do injuriously by licensing and prohibiting misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?

Around 1720, Trenchard and Gordon began publishing the famous "Cato" essays. The writers "thoroughly incorporated Locke's [idea] of ... consent of the governed ... with Milton's marketplace concept to produce a series of essays explaining that a free and open press was a natural right of all who lived in a state where government created laws to meet the will of the majority," according to free-expression historian David A. Copeland. Trenchard and Gordon argued that freedom of expression was "the Right of every Man, as far as by it he does not hurt and controul the Right of Another; and this is the only check which it ought to suffer, the only Bounds which it ought to know." They further argued that the people had a right to scrutinize the behavior of public officials.

It is the Part and Business of the People, for whose sake alone all publick Matters are or ought to be transacted, to see whether

43. Id. at 48.
45. JOHN MILTON, AREOPAGITICA AND OTHER POLITICAL WRITINGS OF JOHN MILTON (Liberty Fund 1999).
46. Id.
47. Cato, the name of a Roman statesman known for his honesty, was the joint pseudonym of the two authors. Trenchard and Gordon published the essays in London newspapers from 1720 to 1723. The essays then were republished in newspapers in the American colonies. Historian Leonard W. Levy said *Cato's Letters* were quoted in every colonial newspaper from Boston to Savannah. One especially popular essay was "Reflections upon Libelling," which was about libel law and freedom of the press. LEONARD W. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON xxiii (Leonard W. Levy ed., Carolina Academic Press 1966) (citations omitted) (reprinting the Cato essays that focus on freedom of the press).
they be well or ill transacted; so it is the Interest, and ought to be the Ambition of all honest Magistrates, to have their Deeds openly examined and publickly scanned.\textsuperscript{50}

The idea that the free press is a tool to be used by citizens to learn about and respond to their government was well developed by the time of the American Revolution. "Americans from the 1720s on used the printed word for a multitude of purposes, and one of them was to engage in debate," Copeland wrote.\textsuperscript{51} By the mid-1770s, Copeland observed, the press was viewed as a tool of freedom:

[W]hen [John] Adams reflected on all that had happened in the turbulent decades of the 1760s and 1770s, he said that the fighting of 1775 on was not the revolution. The revolution was found in the hearts and minds of the people. Anyone who wanted to find out what they thought, he suggested, need only consult the pamphlets and newspapers, "by which the public opinion was enlightened and informed." The press... was the means to an end. In order to obtain freedom, people needed a press that would allow them to discuss and debate matters of importance. Adams... would have said that nothing was more important than freedom from tyranny, and the chief catalyst in obtaining it was the press.\textsuperscript{52}

Clearly the First Amendment was designed to limit government power over citizens and the media. However, neither the First Amendment itself nor the historical record concerning its adoption—or the adoption of the Constitution—delineates a social architecture that is sufficiently well developed to answer all the modern questions about media rights and government power.\textsuperscript{53} Therefore, the courts and Congress often have had to fill in the lines between the broad strokes set down by the Framers.

\begin{itemize}
\item[50.] Id.
\item[51.] Copeland, supra note 32, at 184.
\item[52.] Id. at 185-86.
\item[53.] But see Scott J. Street, Note, Poor Richard's Forgotten Press Clause: How Journalists Can Use Original Intent to Protect Their Confidential Sources, 27 LOY. L.A. ENT. L. REV. 463 (2007) (arguing that the historical record "clearly indicated that the Framers intended to protect the press from government investigations, especially when reporters published articles confidentially or obtained information through confidential sources." Id. at 495. Street said the Framers learned the importance of confidential sources by observing the case of John Peter Zenger, a colonist who published a criticism of New York's crown governor and then refused to identify its author to the government. Id. at 463.).
\end{itemize}
An excellent example of how the U.S. Supreme Court has filled in those lines in libel law and has used the First Amendment to distribute power between the government and the governed is the landmark case of *New York Times v. Sullivan.* In that 1964 case, the Supreme Court decided that government officials who sue for libel must prove the allegedly libelous statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not." This difficult-to-prove First Amendment standard was imposed on government officials in order to empower critics of the government. Writing for the *Sullivan* majority, Justice William Brennan explained the rule, in part, with this quote from James Madison: "[T]he censorial power is in the people over the Government, and not in the Government over the people." The social architecture created by *Sullivan* tipped the balance of power toward government critics and away from government officials.

Just as the Framers left no record of what they thought were the ideal rules of libel law, they left no recorded opinion as to whether the First Amendment should allow reporters to protect their confidential sources and information. In the area of reporter's privilege, as in libel, the U.S. Supreme Court accepted the task of filling in some of the lines between the broad strokes of the social architecture set down by the Framers. In *Branzburg v. Hayes,* the landmark reporter's-privilege case, the Supreme Court distributed power between federal grand juries and the media when it ruled that journalists do not have a First Amendment right to refuse to testify before a federal grand jury.

Writing for the *Branzburg* majority, Justice Byron White discussed the important role of the grand jury in the criminal justice system and why the grand jury needs the power to subpoena witnesses. He pointed out that the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." Historically, White said, the grand jury has protected "the innocent against hasty, malicious and oppressive persecution; it serves the invaluable function in our society of standing between the accuser and the accused . . . to determine whether a charge is founded upon reason or was dictated by an intimidating power or by malice and personal ill will."
More directly to the issue of the power of the grand jury, White said:

Because its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments, its investigative powers are necessarily broad. "It is a grand inquest, a body with powers of investigation and inquisition, the scope of whose inquiries is not to be limited narrowly by questions of propriety or forecasts of the probable result of the investigation, or by doubts whether any particular individual will be found properly subject to an accusation of crime."61

To fulfill its role as a criminal investigator, the grand jury has the power to subpoena witnesses. Thus the Court declined to create a testimonial privilege for journalists subpoenaed to testify before a federal grand jury.62 The Court noted that whereas a number of states had provided reporters a testimonial privilege, most states had not done so63 and neither had Congress.64

Justice Potter Stewart, writing for four dissenters, agreed with White that the grand jury played an important role in the administration of justice and that to fulfill that role "the grand jury must have available to it every man's relevant evidence."65 However, Stewart expressed concern about the grand jury's "unbridled subpoena power"66 and argued that the rule that every person's evidence must be available to the grand jury never had been and never should be absolute.67 Stewart pointed out that the rule that every person's evidence must be available to the grand jury long had been limited by the evidentiary privileges of the Fifth and Fourth Amendments and those of common law.68 Stewart also cited cases in which the Supreme Court previously had ruled that "for special reasons"69 or to protect "a very

61. 408 U.S. at 688 (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).
62. Id. at 690.
63. At the time Branzburg was decided, seventeen states had shield laws. Id. at 691 (citations omitted).
65. Branzburg, 408 U.S. at 737 (Stewart, J., dissenting).
66. Id. at 732-33.
67. Id. at 737.
68. Id.
69. Id. (citing Blair v. United States, 250 U.S. 273, 281 (1919)).
real interest” witnesses could not be compelled to testify. One such interest “must surely be the First Amendment protection of a confidential relationship . . . ,” Stewart argued.71

Continuing his critique of the way the Court majority was distributing power between grand juries and the media, Stewart argued that safeguards developed by the Court to limit the power of legislative and executive investigators should apply to grand juries, too.72 “Surely the function of the grand jury to aid in the enforcement of the law is no more important than the function of the legislature, and its committees, to make the law,” he reasoned.73

Justice Lewis Powell’s concurring opinion demonstrated a similar concern about the proper distribution of power between grand juries and the media. Powell wrote that he wanted to emphasize that the Court’s ruling “does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”74 Also, he wrote, it does not mean

. . . that state and federal authorities are free to “annex” the news media as “an investigative arm of government.” The solicitude repeatedly shown by this Court for First Amendment freedoms should be sufficient assurance against any such effort, even if one seriously believed that the media—properly free and untrammeled in the fullest sense of these terms—were not able to protect themselves.75

Powell warned that government harassment of journalists would not be tolerated.76

The Branzburg Court did not decide whether journalists have a First Amendment right to refuse to testify in federal proceedings other than grand juries or how power should be distributed in cases that do not involve grand juries.77 The Court explicitly left that task to Congress.78

70. Id. (citing United States v. Bryan, 339 U.S. 323, at 332 (1950)).
71. Id.
72. Id. at 740-41.
73. Id. at 741.
74. Id. at 709 (Powell, J., concurring).
75. Id.
76. Id. at 709-10.
77. Id. at 682 (explaining that “[t]he sole issue before us is the obligation of reporters to respond to grand jury subpoenas . . . ”).
78. Id. at 706 (noting that “[a]t the federal level, Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and
Members of Congress responded by quickly introducing six shield law bills, and, within a year, sixty-five bills had been introduced. Ninety-nine bills were introduced between 1973 and 1978. In fact, Congress had been discussing a federal shield law off and on since 1929. None of the bills was adopted, however. Wendy N. Davis explained that the bills failed because the media "disagreed about what the bills should include."

With the Framers, the Supreme Court, and the Congress all having failed to draw a social architecture that fully resolved the reporter's privilege issue, the lower federal courts assumed the task. The lower federal courts issued a series of opinions between 1972 and 2003 that granted journalists generous protection against having to reveal confidential sources and information in judicial proceedings other than federal grand jury proceedings. Those lower courts recognized a First Amendment-based testimonial privilege for reporters based on their reinterpretation of the Supreme Court's opinion in Branzburg. The lower courts emphasized the limited nature of the majority's opinion in Branzburg and read Justice Powell's "enigmatic concurring opinion" as a vote in favor of a qualified First Amendment privilege. They concluded that a majority of the Court favored a qualified reporter's privilege.
This support for a reporter’s privilege began to unravel in the late 1990s when two U.S. Courts of Appeals ruled there was no federal privilege for reporters to refuse to reveal nonconfidential information in criminal or civil cases. Then in 2003 in McKevitt v. Pallasch the U.S. Court of Appeals for the Seventh Circuit “appeared to question the existence of any journalist’s privilege in federal courts.” The influential Judge Richard Posner wrote for the unanimous court:

Some of the cases that recognize the privilege... essentially ignore *Branzburg*,... some treat the “majority” opinion in *Branzburg* as actually just a plurality opinion,... some audaciously declare that *Branzburg* actually created a reporter’s privilege.... The approaches that these decisions take to the issue of privilege can certainly be questioned....

this case. Mr. Justice White, writing for the majority of five justices, stated that “the sole issue before [the Court] is the obligation of reporters to respond to grand jury subpoenas as other citizens do and to answer questions relevant to an investigation into the commission of crime.” No such criminal overtones color the facts in this civil case. The Court in *Branzburg*... applied traditional First Amendment doctrine, which teaches that constitutional rights secured by the First Amendment cannot be infringed absent a “compelling” or “paramount” state interest,... and found such an overriding interest in the investigation of crime by the grand jury which “[secures] the safety of the person and property of the citizen.”

We note that Mr. Justice Powell, in a separate concurrence, emphasized the limited nature of the Court’s holding, and expressly stated that in his view *Branzburg* did not compel a journalist “to give information bearing only a remote and tenuous relationship to the subject of the [grand jury] investigation.” Significantly, he said that even in criminal proceedings, “[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.” (citations omitted).

88. In 1998, the U.S. Courts of Appeals for the Fifth Circuit ruled that there was no federal privilege protecting nonconfidential information subpoenaed in a criminal case. United States v. Smith, 135 F.3d 963, 972 (5th Cir. 1998). Later that same year, the U.S. Court of Appeals for the Second Circuit ruled that there was no federal privilege for protecting nonconfidential information subpoenaed in a civil case. Gonzales v. NBC, 155 F.3d 618 (2d Cir. 1998). The Second Circuit reversed itself in part on reconsideration. Gonzales v. NBC, 194 F.3d 29, 35 (2d Cir. 1999) (recognizing a qualified journalist’s privilege to protect both confidential and nonconfidential materials in a civil case).

89. McKevitt v. Pallasch, 339 F.3d 530 (7th Cir. 2003).

90. See Fargo, *The Year*, supra note 20, at 1086.

91. *McKevitt*, 339 F.3d at 532 (7th Cir. 2003) (citations omitted).
Beginning in 2001, unprecedented numbers of journalists who refused to comply with federal grand jury subpoenas began being sent to jail or fined. Among them was Vanessa Leggett, an aspiring book author who spent 168 days in jail in 2001 and 2002. More famously, New York Times reporter Judith Miller spent 85 days in jail in 2005. The record for the longest time in jail was set by Joshua Wolf, a California video blogger and freelance journalist who was incarcerated for 226 days in 2006 and 2007. In all, five journalists have spent time in jail or under house arrest since 1998. Many others have paid costly fines or settlements.

The Supreme Court’s decision in Branzburg v. Hayes and the lower courts’ interpretation of that case obviously have not resolved questions about the extent to which journalists are protected by a First Amendment-based testimonial privilege. Neither have the courts conclusively drawn a social architecture that clarifies how power should be distributed between the federal government and the media. Consequently, Congress again has begun considering shield law proposals.


93. See Ross E. Milloy, Writer Who Was Jailed in Notes Dispute is Freed, N.Y. TIMES, Jan. 5, 2002, at A8. Leggett went to jail for refusing to hand over research materials she had gathered while working on a book about a Houston murder. Id.

94. See David Johnston & Douglas Jehl, Times Reporter Free From Jail; She Will Testify, N.Y. TIMES, Sept. 30, 2005, at A1. Miller went to jail for refusing to reveal who in the federal government told her Valerie Plame was a CIA agent. Id.

95. See Elizabeth Soja, Behind Bars: Josh Wolf Has Become the Longest-jailed Journalist in Recent American History, NEWS MEDIA & THE L., Winter 2007, at 14. Wolf went to jail for refusing to turn over to a federal court his videotape of a political protest during which a police car was damaged. Id.


III. Recent Federal Shield Law Proposals

Six shield law bills were introduced in the 109th Congress (2005-2006), but none was passed. The most important bills were the Free Speech Protection Act bill (S. 369) introduced by Sen. Christopher Dodd (D-Conn.) in 2005 and the Free Flow of Information Act bills (Senate Bill 1419 and House Bill 3323) introduced by Sen. Richard Lugar (R-Ind.) and Rep. Mike Pence (R-Ind.) that same year. The Lugar and Pence bills were identical.

The bills varied in terms of the protection they would have afforded to journalists who did not want to reveal the identities of confidential sources, the protection the bills would have afforded to journalists attempting to protect other information and materials, exceptions to the privilege, definitions of those who could claim the privilege, and the types of proceedings in which the privilege could be claimed. For example, Sen. Dodd’s bill would have created an absolute privilege for reporters to protect the identities of their sources, even without a promise of confidentiality. The Lugar/Pence bill would have granted reporters the right to protect the identities of sources in all but some national security cases. Both would have provided a qualified privilege not to reveal other information. Under Dodd’s bill, the qualified privilege meant that the party seeking to compel a journalist to reveal information other than the identity of a source would have had to prove three things: “(1) the news or information is critical and necessary to the resolution of a significant legal issue . . . ;” “(2) the news or information could not be obtained by any alternative means; and (3) there is an overriding public interest in the

---

99. In addition to the three bills from the 109th Congress discussed in this section, there were earlier versions of the Lugar/Pence legislation. See Bridget Sweeney, Lugar, Pence push shield law, http://news.medill.northwestern.edu/washington/news.aspx?id=35541. There were also the Free Flow of Information Act, S. 340, 109th Cong. (2005), and the Free Flow of Information Act, H.R. 581, 109th Cong. (2005), which were identical, and a 2006 amended bill introduced by Lugar, the Free Flow of Information Act, S. 2831, 109th Cong. (2006).

100. They were the most important shield law bills introduced in the 109th Congress in terms of the numbers of co-sponsors they had. See Fargo, Analyzing, supra note 20, at 49 (comparing the Dodd and Lugar/Pence bills in the 109th Congress). They also were most important in terms of the attention they received at Senate Judiciary Committee hearings. See, e.g, Senate Hearing 2005-B, supra note 21 (discussing Lugar’s bill); Senate Hearing 2005-A, supra note 16 (discussing the Lugar/Pence and the Dodd bills).


105. Id. at § 2(a)(1); id. at § 2(a)(2)(A)(i)-(ii); id. at § 2(a)(2)(B); S. 369 at § 3(a)(1); id. at § 3(a)(2)(A)-(F).
disclosure." The qualified privilege outlined in the Lugar/Pence bills was similar but more complicated. For example, like Dodd's bill, the Lugar/Pence bills required a party seeking to compel a journalist to testify to prove the journalist's information was essential to the resolution of the case and could not be obtained elsewhere. The Lugar/Pence bills, however, had slightly different rules for criminal and civil cases and stipulated that a journalist's compelled testimony should be narrowly tailored in terms of both subject matter and period of time covered and, to the extent possible, "be limited to the purpose of verifying published information or describing any surrounding circumstances relevant to the accuracy of such published information . . . ."

The Dodd bill would have granted the testimonial privilege to anyone who "engages in the gathering of news or information" and "has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public." The Lugar/Pence bills would have protected any entity or employee who "disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means . . . ." Finally, whereas Dodd's bill would have applied in proceedings of all three branches of the federal government, the Lugar/Pence bills would have applied to judicial and executive branch proceedings, but not to Congressional proceedings.

Shield law bills came closer than ever to becoming law in the 110th Congress (2007-2008). The Free Flow of Information Act bill (House Bill 2102), which was introduced by Rep. Rick Boucher (D-Va.), was passed overwhelmingly by the House in 2007. At about the same time that the House approved its bill, the Senate Judiciary Committee sent a similar bill with the identical name to the Senate floor, where no vote was taken. The Senate's bill, 2035, was introduced by Sen. Arlen Specter (R-Pa.).
Both of the 2007 bills were more complex and included more exceptions to the testimonial privilege than earlier bills.

For example, the bill passed by the House would have provided a qualified privilege for the protection of both confidential sources and information.\(^{117}\) In the context of that bill, the qualified privilege meant journalists could not be compelled to reveal confidential sources or information unless the sources or information were needed for one of four purposes: "to prevent, or to identify a perpetrator of, an act of terrorism" or other harm to national security; to prevent "imminent death or significant bodily harm"; to reveal the sources of leaks of trade secrets of significant value, individually identifiable health information, or other personal or financial information revealed in violation of existing federal laws; or to identify persons who illegally disclosed classified information that can harm national security.\(^{118}\) In all cases the shield law also would have required a court to balance "the public interest in compelling disclosure of the information or document involved" against "the public interest in gathering or dissemination of news or information."\(^{119}\)

The privilege outlined in the House bill would have protected a person "who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public for a substantial part of the person's livelihood or for substantial financial gain."\(^{120}\) The proposed law also would have protected a reporter's supervisor and employer.\(^{121}\) The law explicitly did not cover terrorists, terrorist organizations, foreign powers, or agents of foreign powers acting as journalists.\(^{122}\) It also would not protect a journalist who was an eyewitness to alleged criminal or tortuous conduct.\(^{123}\) Finally, the House bill's privilege would have applied any time the federal executive or judicial branch or an administrative agency—but not Congress—attempted to compel testimony from a journalist in any matter arising under federal law.\(^{124}\)

While the 2007 Senate bill (Senate Bill 2035) was similar to the House bill, there were several significant differences. Like the House bill, the Senate bill would have provided journalists a qualified testimonial privilege

\(^{117}\) H.R. 2102 at § 2(a).
\(^{118}\) Id. at § 3(a)-(c).
\(^{119}\) Id. at § 2(a)(4).
\(^{120}\) Id. at § 4(2).
\(^{121}\) Id.
\(^{122}\) Id. at § 4(2)(A)-(E).
\(^{123}\) Id. at § 2(e).
\(^{124}\) Id. at § 4(4).
to protect both confidential sources and other information.\textsuperscript{125} The qualifications were different, however. Under the Senate bill, reporters could not be compelled to testify unless the party seeking to compel testimony could prove that he had "exhausted all reasonable alternative sources"\textsuperscript{126} of the information and that "nondisclosure of the information would be contrary to the public interest."\textsuperscript{127} Then, in a criminal case, the party seeking to compel testimony also would have had to demonstrate that "(i) there are reasonable grounds to believe that a crime has occurred" and that "(ii) the testimony or document sought is essential to the investigation or prosecution or to the defense against the prosecution . . . ."\textsuperscript{128} In a criminal case involving the unauthorized disclosure of properly classified information by a person with authorized access to such information, the party seeking to compel testimony also would have had to prove the disclosure of the classified information "has caused or will cause significant, clear, and articulable harm to the national security . . . ."\textsuperscript{129} In a non-criminal case, the party seeking to compel disclosure would have had to show "the testimony or document sought is essential to the resolution of the matter . . . ."\textsuperscript{130}

Like the House bill, the Senate bill would not have granted a testimonial privilege when a journalist had been an eyewitness to criminal or tortuous conduct; when a reporter's testimony was needed to prevent death, kidnapping, or substantial bodily harm; or when the testimony was needed to prevent terrorist activity or harm to national security.\textsuperscript{131} The Senate bill would not, however, have denied the privilege in cases in which a journalist was subpoenaed to identify a person who had leaked trade secrets, as the House bill did.

Unlike the House bill, which would have protected nonconfidential as well as confidential information, the Senate bill would have protected only sources and information obtained by a reporter who made a promise of confidentiality with the source.\textsuperscript{132} Also, in defining who would be covered by the bill, the Senate bill did not require that a covered person gather and disseminate information "for a substantial part of their livelihood," as the House bill did.\textsuperscript{133}

\begin{itemize}
  \item \textsuperscript{125} Free Flow of Information Act, S. 2035, 110th Cong. § 2(a) (2007).
  \item \textsuperscript{126} Id. at § 2(a)(1).
  \item \textsuperscript{127} Id. at § 2(a)(3).
  \item \textsuperscript{128} Id. at § 2 (a)(2)(A)(i)-(ii).
  \item \textsuperscript{129} Id. at § 2 (a)(2)(A)(iii).
  \item \textsuperscript{130} Id. at § 2 (a)(2)(B).
  \item \textsuperscript{131} Id. at §§ 3-5.
  \item \textsuperscript{132} Id. at § 7(1)-(2).
  \item \textsuperscript{133} Free Flow of Information Act, H.R. 2102, 110th Cong. § 4(2) (2007).
\end{itemize}
IV. The Shield Law Hearings and Debate: Drawing Social Architecture

In terms both explicit and implicit, the federal shield law hearings and debate focused largely on issues of power. For example, participants in the proceedings discussed at length the law's possible impact on the separation of powers among the branches of the federal government and two closely related issues: the law's effect on the power of the executive branch to fight terrorism and other crimes, and the law's effect on the power of the media to scrutinize the operation of the government and contribute to an informed citizenry. All of these issues are fundamental to social architecture. Congress also discussed the context of the anticipated social architecture. Context, in these discussions, meant the current events that argued either for or against a shield law.

A. Separation of Powers

At the heart of the debate over the proposed shield law was disagreement about how power should be divided among the branches of the government. The U.S. Department of Justice opposed the shield law on the grounds that the law would improperly reassign some of its national security responsibilities to the judicial branch by allowing unqualified judges, not the Justice Department, to decide whether journalists could be compelled to testify. Others countered that judges are qualified to decide how to apply a shield law in cases with national security implications because judges already deal with national security matters. Moreover, the Justice Department argued in 2005 that Congress did not have the power to adopt a shield law because the U.S. Supreme Court already had ruled there was no reporter's privilege.

134. See infra notes 137-63 and accompanying text; see also, House Hearing 2007, supra note 16, at 25-26 (statement of Rachel L. Brand, Asst. Att'y Gen.) (testifying that a shield law would make a “dramatic structural change” in current law enforcement practice by giving the courts the power to decide national security questions. This, she said, “would transfer to the judiciary authority over law enforcement determinations reserved by the Constitution to the Executive branch.”).

135. See infra notes 164-257 and accompanying text.

136. See infra notes 258-89 and accompanying text.

137. See infra notes 142-49 and accompanying text; see also, House Hearing 2007, supra note 16, at 25-26 (statement of Rachel L. Brand, Asst. Att’y Gen.) (arguing that the proposed shield law “not only cedes to the judiciary the authority to determine what does and does not harm the national security, it also gives courts to authority to override the national security interest where the court deems that interest insufficiently compelling—even when harm to the national security is established.”).

138. See infra notes 150-56 and accompanying text.

139. See infra note 158 and accompanying text.
Justice Department representatives were the most outspoken opponents of the federal shield law. Testifying before the Senate Judiciary Committee in 2005, U.S. Attorney Chuck Rosenberg enumerated five specific objections to the proposed law. The objection most obviously about the separation of powers within the federal government was that the shield law would take away some of the Justice Department’s authority—its authority to use its own rules to decide whether to subpoena journalists—and would give that authority to the courts. In the view of the Justice Department, the issue was the proper scope of the law enforcement and national security powers of the executive branch relative to the powers of the judicial branch.

Rosenberg said that “any legislation that would impair the discretion of the Attorney General to issue press subpoenas—or to exercise any other investigative options in the exercise of the President’s constitutional powers—is unwarranted.” Likewise, Deputy Attorney General Paul J. McNulty reminded the Senate Judiciary Committee in 2006 that the U.S. Constitution assigned responsibility for national security to the executive branch of the federal government. He told the committee that the shield law would undermine the separation of powers by shifting law enforcement decisions from the executive branch to the judicial branch, a shift he called “extraordinarily serious in the national security area . . . .” He said the

140. The U.S. Department of Justice was represented at different times by U.S. Attorney Chuck Rosenberg, Assistant Attorney General Rachel L. Brand, and Deputy Attorney General Paul J. McNulty.

141. Rosenberg’s objections were that 1) the shield law would replace the department’s flexible, voluntary guidelines for issuing subpoenas to journalists, which worked well, with “inflexible, mandatory” standards; 2) the law would bar the government from obtaining information from the media with the too-narrow exception of cases involving “imminent and actual harm to security;” 3) the law would take away the Justice Department’s authority to decide whether to subpoena journalists and give that power to the courts; 4) the law would bar Justice Department subpoenas to third parties that could lead to the identification of a reporter’s confidential source; and 5) the law would protect potentially dangerous foreign media, including those sponsored by terrorist organizations. Senate Hearing 2005-B, supra note 21 (statement of Chuck Rosenberg, U.S. Att’y). See also, House Hearing 2007, supra note 16, at 20-28 (statement of Rachel L. Brand, Asst. Att’y Gen.) (offering a similar list of concerns on behalf of the Department of Justice).


145. See Senate Hearing 2006, supra note 143, at 6 (statement of Paul J. McNulty, Deputy Att’y Gen.).

146. Id. at 4.
executive branch has "the full array of information necessary to make informed and balanced national security judgments," and the shield law would thrust courts "into altogether unfamiliar territory of having to weigh national security interests against the public's interest in receiving certain news. As numerous judges have recognized, the courts lack the institutional resources and expertise to make those decisions."  

McNulty said the proposed legislation also would assign the courts the task of deciding whether information is properly classified in cases involving government leaks. He cautioned that this would be "a big undertaking" for judges because it would require them to know what harm would occur if classified information were to get into the hands of the enemy.  

Countering that argument, Bruce A. Baird, a former assistant U.S. attorney, responded at the same Senate hearing that he could not understand the argument that federal judges are incapable of deciding national security issues. He told the Senate Judiciary Committee:  

We rely on judges to make very complicated decisions about balancing tests. We require that in many areas of law. We require it every day . . . . I recall a judge who taught himself patent law and electrical engineering to decide a case, wrote a 300-page opinion full of circuit diagrams.  

. . . You put judges on the bench who have that ability . . . .

Theodore B. Olson, a former solicitor general, testified that judges already are involved in deciding whether reporters must testify in national security cases, and they will continue to be involved even if there is no federal shield law. He said:

147. Id. (arguing also that the proposed legislation presents "an impossible task for the court because it requires the court to know so much about the significance of a harm and be able to say that this disclosure, which might, by the way, involve some tactic or some effort by the Government that is controversial and a matter of public discussion, and a judge is going to look at that, every different judge looking at it in a different way, and say that that outweighs this harm." Id. at 6.).  

148. Id. at 8.  

149. Id.  

150. See id. at 20 (statement of Bruce A. Baird, Former U.S. Att'y).  

151. Id.  

What I think Mr. McNulty [of the Justice Department] did not acknowledge is that there is going to be judicial analysis of this process anyway. The Department standards do not require the Department to go to a judge. But what is going to happen is the reporter is going to decline to respond to the subpoena. He is going to make a motion to quash. There is going to be a motion before a judge to hold the reporter in contempt for not responding to the subpoena.... So a judge is going to be considering these questions...." 153

Furthermore, Olson 154 and Baird 155 both pointed out that federal judges make national security decisions in several other contexts, including Foreign Intelligence Surveillance Act (FISA) cases. 156

Also debated during the 2005 Senate hearings was the core issue of who should have the power—the courts or Congress—to decide whether there should be a federal reporter's privilege. 157 U.S. Attorney Rosenberg, speaking on behalf of the Justice Department, opposed the shield law in part because he said it would "effectively overrule" the Supreme Court's decision in Branzburg v. Hayes by creating a privilege that has not been recognized by the Court. 158 In Branzburg, the Court held journalists had no First Amendment right to refuse to testify before a federal grand jury.

First Amendment attorney Floyd Abrams countered that the Branzburg case "could hardly be clearer" that Congress has the power to decide whether to adopt a federal shield law. 159 Abrams said:

The language of the court is clear. At the federal level, the court said, Congress has the freedom to determine whether a statutory newsman's privilege is necessary and desirable, and to fashion

154. Id.
155. Id. at 21 (statement of Bruce A. Baird, Former U.S. Att'y).
157. This issue was raised briefly in the 2007 House hearing. See House Hearing 2007, supra note 16, at 9 (statement of Rep. Conyers, Chair, House Comm. on the Judiciary).
standards and rules as narrow [or as] broad as deemed necessary. So this is within your purview and it is up to you to decide what steps if any, to take in this area.\(^{160}\)

David Westin, president of ABC News, agreed with Abrams.\(^{161}\) He testified,

More than once, the federal courts—beginning with the Supreme Court more than 30 years ago [in *Branzburg*] and continuing right through to the court of appeals in Ms. [Judith] Miller’s case—have invited Congress to step in and to create a uniform, federal rule governing whether and when federal prosecutors can force reporters to reveal their confidential sources.\(^{162}\)

He said, “the time has come” for Congress to “take up the Supreme Court’s invitation at long last . . . .”\(^{163}\)

B. Executive Branch Power to Fight Terrorism and Other Crimes

In addition to focusing on the distribution of power among the branches of government, much of the federal shield law debate has focused more narrowly on the power of the Justice Department itself. Department officials argued that the shield law would impair the department’s ability—its power—to fight terrorism and other crimes by making it more difficult, if not impossible, to obtain critical information from journalists and others.\(^{164}\) Justice Department officials also posited that a shield law was unnecessary because existing Justice Department guidelines for issuing subpoenas to journalists already struck the proper balance between the

\(^{160}\). *Id.*

\(^{161}\). Senate Hearing 2005-B, supra note 21 (statement of David Westin, President, ABC News).

\(^{162}\). *Id.*

\(^{163}\). *Id.; see also, Senate Hearing 2005-A, supra note 16, at 20 (statement of Lee Levine, Att’y) (agreeing with Abrams’s reading of *Branzburg*); id. at 33 (statement of Sen. Feingold, Member, Senate Comm. on the Judiciary) (explaining that “*Branzburg* stands for the proposition that the protection of the identity of anonymous sources is not required in the First Amendment. But many judges in these cases have invited Congress to legislate. This is an area where Congress has the power and the responsibility to set out the parameters under which testimony of this kind can be compelled.”). In fact, the Court said in *Branzburg*, “At the federal level, Congress has freedom to determine whether a statutory newsman’s privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned and, equally important, to refashion those rules as experience from time to time may dictate.” 408 U.S. at 706.

\(^{164}\). *See infra* notes 167-94 and accompanying text.
needs of law enforcement and the needs of the media. Shield law supporters, on the other hand, argued that a shield law would actually help fight crime while also reining in the Justice Department’s “overzealous” special prosecutors.

U.S. Attorney Rosenberg testified before the Senate Judiciary Committee in 2005 that a federal shield law would “interfere . . . in an unnecessary and harmful way” with the department’s ability “to effectively enforce the law, fight terrorism, and protect national security.” Specifically, Rosenberg argued that the proposed shield law would deprive the department of the flexibility it needs to fight crime and prevent the government from obtaining information from media sources except in cases involving “imminent and actual harm to national security.” He said, further, a shield law would require the Justice Department to reveal in open court the reasons it needed a subpoena, and bar subpoenas to non-media parties that could lead to the discovery of the identity of a source. “This [the shield law] may make it difficult, if not impossible, to obtain vital information on how national security information was disclosed [by those illegally leaking classified government information] and to whom it was disclosed,” Rosenberg said.

Rachel L. Brand, an assistant attorney general who represented the Department of Justice at the 2007 House Judiciary Committee hearing, noted that President Bush objected to the shield law because of his concern about leaks of classified information. “As President Bush has said, . . . leaks [of classified information] have threatened our national security, damaged our ability to pursue terrorists, and put our citizens and armed forces at risk,” Bland testified. Bland said that one of the Justice Department’s most significant concerns about the proposed shield law was that the law would make it “virtually impossible” to investigate and prosecute leaks of classified national security information.

165. See infra notes 207-09 and accompanying text.
166. See infra notes 195-206 and accompanying text.
168. Id.
169. Id. (discussing the Free Flow of Information Act, S. 1419, 109th Cong. (2005)).
170. Id.
171. Id.
173. Id.
174. Id. at 18.
Rep. Darrell E. Issa (R-Calif.) agreed that federal prosecutors must be empowered to investigate illegal leaks of national security information to the news media. He said:

We simply cannot erect obstacles which hamstring Federal law enforcement when sensitive government secrets are divulged. Such disclosures can be treasonous, and reporters should not be able to protect individuals who jeopardize our national security. American lives are more important than the privilege of anonymity that reporters promise to a source who is compromising our nation’s secrets.

Rep. Lamar S. Smith (R-Tex.) said that if the shield law is adopted, “[t]he Department of Justice will be hamstrung as it goes about the business of conducting investigations and prosecuting criminals.” He explained that under the bill being debated by the House, media subpoenas would be allowed in national security cases only when there was a threat of “imminent and actual harm.” Thus, he said, the media could be subpoenaed to testify only about prospective events, not past events.

For example, the Department may be able to acquire information about a source’s identity to prevent a terrorist attack like September 11; but if al Qaeda decides to tell a media outlet on September 12 how it planned and carried out the attack, DOJ could not compel that media outlet to reveal its terrorist sources while conducting an investigation.

Furthermore, shield law opponents complained that the proposed law listed several instances in which reporters could be subpoenaed, but those exceptions to the testimonial privilege would not allow the Justice Department to subpoena reporters in most of its criminal cases. For

---

176. Id.
177. Id. at 11590 (statement of Rep. Smith).
178. Id. (discussing the Free Flow of Information Act, H.R. 2102, 110th Cong. (2007)).
179. Id.
180. Id.
181. See, e.g., Free Flow of Information Act, H.R. 2102, 110th Cong. § 2(a)(3)(A)-(C) (2007) (listing these three exceptions to the reporter’s privilege: 1) when disclosure of the identity of a source is necessary to prevent imminent and actual harm to national security; 2) when disclosure would prevent imminent death or significant bodily harm; or 3) when disclosure is
example, members of Congress said the government would not be able to compel journalists to testify in cases involving child pornography,\(^\text{182}\) child molestation,\(^\text{183}\) sexual assault,\(^\text{184}\) international smuggling,\(^\text{185}\) gang violence,\(^\text{186}\) murder,\(^\text{187}\) and murder for hire,\(^\text{188}\) or the illegal leaking of individuals' Social Security numbers,\(^\text{189}\) sealed court documents,\(^\text{190}\) or of the location of a domestic violence safe house.\(^\text{191}\)

U.S. Attorney Rosenberg also testified that requiring the Justice Department to reveal in a public evidentiary hearing the reasons it needed to subpoena the media would "place an unreasonable burden" on the department\(^\text{192}\) and "would pose serious threats to grand jury secrecy and the confidentiality of on-going [sic] criminal investigations."\(^\text{193}\) A provision of the bill that would bar subpoenas to non-media parties that could lead to the discovery of the identity of a source was "impractical" and would hamper law enforcement efforts, he added.\(^\text{194}\)

While the Justice Department feared the shield law would undermine its law enforcement power, shield law supporters argued that, to the contrary, the law would actually empower the media to help fight crime and would rein in the Justice Department's "overzealous" special prosecutors.\(^\text{195}\) For example, Philadelphia Inquirer Managing Editor Anne Gordon said the Justice Department was wrong when it posited the shield law would hamper law enforcement and threaten national security.\(^\text{196}\) To the contrary, Gordon said, forcing journalists to reveal their confidential sources deprives the public of information it needs, and thereby hampers law enforcement and threatens national security.\(^\text{197}\) She explained that

\(^{182}\) House Debate, supra note 175, at 11596 (statement of Rep. King).
\(^{183}\) Id. at H11590 (statement of Rep. Smith).
\(^{184}\) Id. at H11596 (statement of Rep. King).
\(^{185}\) Id.; see also, id. at H11590 (statement of Rep. Smith).
\(^{186}\) Id. (statement of Rep. Smith).
\(^{187}\) Id. at H11593 (statement of Rep. Smith).
\(^{188}\) Senate Hearing 2003-B, supra note 21 (statement of Chuck Rosenberg, U.S. Att'y).
\(^{189}\) House Debate, supra note 175, at 11596 (statement of Rep. King).
\(^{190}\) Id.
\(^{191}\) Id.
\(^{192}\) Senate Hearing 2003-B, supra note 21 (statement of Chuck Rosenberg, U.S. Att'y).
\(^{193}\) Id.
\(^{194}\) Id. (referring to the Free Flow of Information Act of 2005, S. 1419, 109th Cong. (2005)).
\(^{195}\) See, e.g., Senate Hearing 2005-B, supra note 21 (statement of Anne Gordon, Managing Editor, PHILADELPHIA INQUIRER).
\(^{196}\) Id.
\(^{197}\) Id.
forcing the disclosure of media sources would "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." Gordon also said:

The implication [of the Justice Department's objections to the shield law] 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; [sic] 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.

Many who participated in the hearings and debate expressed concern that federal special prosecutors had too much power. There were numerous references to "overzealous prosecutors" and to the fact that the Justice Department guidelines governing media subpoenas do not apply to subpoenas from special prosecutors. In addition, Sen. Dodd referred to reporters landing "in a spider web spun by the Federal prosecutors." Norman Pearlstine, then editor-in-chief of Time magazine, quoted a federal court judge in the Valerie Plame case as saying special prosecutors have "vast power and immense discretion" and there is a "a concomitant

198. Id.
199. Id.
200. See, e.g., Senate Hearing 2005-A, supra note 16, at 15 (statement of William Safire, Columnist, NEW YORK TIMES) (testifying that forty-nine states and the District of Columbia have laws "to stop overzealous prosecutors from . . . forcing reporters to identify sources"); House Debate, supra note 175, at 11597 (statement of Rep. Jackson-Lee) (describing Vanessa Leggett as the victim of "threats and intimidation by an overzealous prosecution . . . ").
risk of overzealousness . . .". New York Times columnist Safire said he could not tell the Senate Judiciary Committee his true feelings about the conduct of federal prosecutors because he feared government retaliation against Judith Miller, who was then in federal prison. "I am seething inside because I cannot tell you—with no holds barred—what I think of the unchecked abuse of prosecutorial discretion . . .," Safire said.

Deputy Attorney General McNulty countered that since the Justice Department had never abused its subpoena power, a federal shield law that would curtail that power was unnecessary. He reported that the Justice Department had subpoenaed source information from the media in fewer than 20 cases in the past 15 years; this fact, he said, was evidence that the department's guidelines governing media subpoenas adequately balanced the department's need for evidence in criminal proceedings against the interests of the free press. The Justice Department guidelines require that the news media be subpoenaed only as a last resort to obtain important information about a criminal case, and then the attorney general must approve each contested subpoena.

Rep. Pete Stark (D-Calif.) offered different figures on subpoenas and described a too-powerful executive branch in need of public and press scrutiny. Stark said:

Predictably, George Bush's Department of Justice opposes today's legislation, in part because the Administration issued more than 300 subpoenas last year alone. That's

---

204. Id. (quoting In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 999 (D.C. Cir. 2005)).


206. Id.; see also, House Hearing 2007, supra note 16, at 69 (statement of William F. Safire, Columnist, NEW YORK TIMES) (testifying that he curbed his criticism of the government's treatment of Judith Miller because "I was chilled. And what chilled me? The prospect of the prosecutor getting angry. And under the law, he had the right then to . . . take the next step and cite her for criminal contempt and keep her in jail for years.").

207. Senate Hearing 2006, supra note 143, at 3 (statement of Paul J. McNulty, Deputy Att'y Gen.).

208. Id.; see also, House Hearing 2007, supra note 16, at 21 (statement of Rachel L. Brand, Asst. Att'y Gen.) (testifying that "[t]he effectiveness of this policy, and the seriousness with which it is treated within the Department, contradict the allegations some have made about the Justice Department's alleged disregard for First Amendment principles."). Brand also testified that "it is a reflection of the Department's abiding respect for First Amendment principles and the vital role played by the press in our free society" that the Department had never prosecuted a journalist for violating federal statutes that prohibit the disclosure of classified information. House Hearing 2007, supra note 16, at 22.


understandable. If I had a track record of wasting money on a failing war, abusing civil liberties, suppressing scientific research, and failing to enforce important consumer protections and environmental regulations, I too would want to keep the press and the public in the dark.211

At the 2007 House hearing, Department of Justice representatives and others were still debating the number of subpoenas issued by the department.212

Sen. Specter agreed with Rosenberg that the Justice Department’s guidelines worked well.213 In fact, he said, that assumption is where he and his bill’s co-sponsors started when they drafted their bill.214 However, Specter voiced two concerns about the Justice Department’s guidelines. Both concerns suggest that Specter viewed the Justice Department as more powerful than it should be and that he believed a shield law could remedy that problem. First, Specter pointed out that the Justice Department’s guidelines do not apply to special prosecutors.215 “Special prosecutors are often called upon in cases that are politically sensitive, may potentially be embarrassing to senior government officials, and are high profile—those cases that seem to carry the greatest risk of an overzealous prosecutor needlessly subpoenaing journalists,” he said.216 Second, Specter said the guidelines are enforced by the attorney general—not a neutral court.217 “This places the Attorney General in a difficult position; namely, the primary check on Federal prosecutors’ ability to subpoena journalists is the nation’s highest Federal prosecutor,” Specter said.218 “Most Americans, I

211. Id.
212. Compare House Hearing 2007, supra note 16, at 75 (statement of Lee Levine, Att’y) (testifying that two dozen reporters currently or recently had been the subject of subpoenas for confidential sources and “another dozen” had been held in contempt of court for refusing to testify since 2001), and House Hearing 2007, supra note 16, at 91 (statement of Randall D. Eliason, Law Professor) (testifying that “[y]ou have heard everybody here talk about the same three or four cases all morning. It really is a handful of cases, and by and large, those cases involved sources that were committing wrongdoing by leaking to the press.”).
214. Id.
215. Id. The Justice Department guidelines also do not apply to any part of the executive branch of the federal government beyond the Justice Department, to the administrative agencies, or to civil cases in federal court. That undoubtedly accounts for the disparity in the numbers of subpoenas reported by McNulty and Stark. The proposed shield law would apply to the entire executive branch and to the judicial branch, but not to Congress. See Senate Hearing 2006, supra note 143 (statement of Sen. Specter).
217. Id.
218. Id.
believe, would feel more comfortable having the competing interests weighed by a neutral judge instead of a political appointee who answers to the President. 219 Specter said his proposed shield law would “in large part” codify the Justice Department guidelines, but the law would also apply those guidelines to special prosecutors and rely on courts rather than “a political official” to decide whether a media subpoena is warranted. 220

Likewise, former Solicitor General Olson said:

Naturally the Department of Justice does not want its judgments second-guessed by judges. . . . But we do not recoil from judicial oversight of these types of decisions when it comes to attorney-client or physician-patient privileges or search warrants or FISA warrants. And there is no reason we should reject it when it comes to a journalist’s source of information. 221

He noted that thirty-nine state attorneys general were “not bashful about protecting law enforcement prerogatives” and, yet, they supported a federal shield law. 222

Sen. Charles E. Schumer (D-N.Y.) told the Senate Judiciary Committee that the legislation being debated, which he cosponsored, “recognizes there must be a balance. It recognizes we have to preserve a free press but ensures that criminals are brought to justice.” 223 He said that when there is “an overriding public interest against disclosure, . . . the press must bend to the needs of law enforcement.” 224

C. Media Power to Scrutinize the Government and Inform Citizens

The shield law hearings and debate also included lengthy discussions of media power, specifically: 1) the role of the media in a democratic society and whether a shield law was needed to empower the media to fulfill that role; 2) whether by issuing subpoenas to journalists the government was making the media an arm of law enforcement and undermining the independence of the media; and 3) whether the shield law

219. Id.
220. Id.
221. Senate Hearing 2006, supra note 143, at 15 (statement of Theodore B. Olson, Former Solicitor Gen.).
222. Id. (referring to the brief the state attorneys general filed with the U.S. Supreme Court in the Valerie Plame case. Brief for States of Oklahoma, Texas et al. as Amici Curiae Supporting Petitioners, Miller v. United States, 545 U.S. 1150 (2005), 2005 WL 1317523).
223. Senate Hearing 2006, supra note 143, at 9 (statement of Sen. Schumer, Member, Senate Comm. on the Judiciary).
224. Id.
would inappropriately place the media above the law. These issues often were debated in the lofty language of the Founding Fathers and democratic principles.

During the 2007 House debate, Rep. John Conyers, Jr. (D-Mich.) described the role of the press in a democracy and the value of the shield law in helping the media fulfill that role:

Today, we are here in an attempt to reclaim one of the most fundamental principles enshrined by the Founding Fathers in the first amendment to the Constitution. Freedom of the press is the cornerstone of our democracy. Without it, we cannot have a well-informed electorate and a government that truly represents the will of the people.

The measure before us... helps restore the independence of the press so that it can perform its essential duty of getting information to the public. The bill will ensure that members of the press are free to utilize confidential sources without causing harm to themselves or their sources...

In 2006, Sen. Dodd expressed similar lofty sentiments, quoting James Madison as saying, "Popular government without popular information or the means of acquiring it is but a prologue to a farce, or tragedy, or perhaps both." Pearlstine quoted from two U.S. Supreme Court cases to the

225. See infra notes 228-57 and accompanying text.
226. See infra notes 227-30 and accompanying text; see also, House Hearing 2007, supra note 16, at 15 (statement of Rep. Pence, Member, House Comm. on the Judiciary) (quoting Thomas Jefferson as warning, "[o]ur liberty cannot be guarded but by the freedom of the press, nor that limited without the danger of losing it.").
227. House Debate, supra note 175, at 11589 (statement of Rep. Conyers); see also, Senate Hearing 2005-A, supra note 16, at 30 (statement of Sen. Durbin, Member, Senate Comm. on the Judiciary) (describing the role of the free press as "to put a check on the government, to expose corruption, deception, abuse of power – clearly in the public interest of the United States."), 151 Cong. Rec. 13, S1215 (daily ed. Feb. 9, 2005) (statement of Sen. Lugar) (testifying that the "cornerstone of our society is the open market of information which can be shared through ever expanding mediums. The media serve as a conduit of information between our governments and communities across the country."), 151 Cong. Rec. S1199-02, at *S1215 (Westlaw); Senate Hearing 2006, supra note 143, at 9 (statement of Sen. Schumer, Member, Senate Comm. on the Judiciary) (testifying that there is "a need to protect press independence. In order for the media to do their job, we know it is important for them to use confidential sources."). He explained that in cases in which disclosure will not harm national security "I think every one of us would want the reporter to be able to get the information and have it out, unless we want to change the whole fabric as to the way this Government has been going for over 200 years.").
effect that the press "was designed to serve as a powerful antidote to any abuses of power by governmental officials" and "has been a mighty catalyst in awakening public interest in government affairs [and] exposing corruption among public officers and employees . . . ."

Former Solicitor General Olson testified in 2006 about the watchdog function of the media:

One of the most vital functions of our free and independent press is to function as a watchdog on behalf of the people—working to uncover stories that would otherwise go untold. Journalists in pursuit of such stories often must obtain information from individuals who, for fear of retribution or retaliation, are unwilling to be publicly identified.

Rep. Greg Walden (R-Or.), who graduated from journalism school and owns radio stations, said during the 2007 House debate: "A vote for the Free Flow of Information Act is a vote to protect citizens and taxpayers from an ominous and oppressive government that seeks to silence its critics. And in America, such government power would threaten our freedom and our informed democracy."

While supporters of the shield law used famous examples of investigative reporting to substantiate the importance of reporters' use of confidential sources, opponents of the shield law used similar examples to argue that a federal shield law was unnecessary—that reporters were doing just fine without a shield law. For example, attorney Lee Levine testified in 2005 and 2007 that media subpoenas would threaten important reporting like that on the Watergate scandal, on the BALCO performance-enhancing-drugs scandal, and on the abuse of detainees at Abu Ghraib prison in Iraq. Levine explained that those stories relied on confidential sources who might not have talked to journalists if they had not been confident the


230. Id. (quoting Estes v. Texas, 381 U.S. 532, 539 (1965)).

231. Senate Hearing 2006, supra note 143, at 14 (statement of Theodore B. Olson, Former Solicitor Gen.).

232. House Debate, supra note 175, at 11593 (statement of Rep. Walden); see also, id. at H.11596 (statement of Rep. Pelosi) (testifying that "[s]peaking truth to power is vital to our democracy today, as it has been throughout our history.").

At a hearing the following year, Cornell University Law Professor Steven D. Clymer pointed to two similar stories—the National Security Agency wiretapping program and the CIA detention of al Qaeda operatives overseas—as evidence that journalists can and do investigate important stories without a federal shield law.\footnote{Senate Hearing 2006, supra note 143, at 16 (statement of Steven D. Clymer, Law Professor); see also, House Debate, supra note 175, at 11590 (statement of Rep. Smith) (arguing that “the first amendment of the Constitution guarantees the press their freedom to report. And for 200 years in this Nation, the press, in fact, has flourished. Information has flowed freely. And this is why I believe the bill is simply a solution in search of a real problem.”).} Clymer said the debate “boils down to the question of whether the present law in its present form is an impediment to the free flow of information. And, quite frankly, I think that is a hard case to make.”\footnote{Id.} Clymer said the media’s continuing use of confidential sources “suggests to me that people who are inclined to make leaks of that kind of information are going to make leaks whether or not there is Federal protection for anonymous sources.”\footnote{See infra notes 239-41 and accompanying text.}

Media representatives, in addition to expressing concern about preserving their watchdog powers, expressed concern that by forcing the media to testify, the government was making the media an arm of law enforcement.\footnote{Senate Hearing 2006, supra note 21 (statement of Anne Gordon, Managing Editor, PHILADELPHIA INQUIRER).} Media representatives insisted that they are not an arm of law enforcement and being perceived as such would hamper their news-gathering efforts. For example, Gordon of the \textit{Philadelphia Inquirer} testified:

\begin{quote}
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.\footnote{Senate Hearing 2005-B, supra note 21 (statement of Anne Gordon, Managing Editor, PHILADELPHIA INQUIRER).}
\end{quote}

Westin, president of ABC News, agreed:

\begin{quote}
In our system of government, the press is—and must be perceived to be—entirely independent of the government. If
those with whom we deal were to conclude that we were, in effect, acting as potential fact-finders for the government, they would be far less willing to tell us what they know. Indeed, when it comes to our working overseas, such a perception could literally endanger the lives and well-being of our reporters. 240

Safire said the media were "not the fingers at the end of the long arm of the law" and argued that the government has "huge, powerful methods of gaining evidence" about crime—without relying on the media. 241 He observed that the government can "put people under oath and threaten to jail them if they don’t tell the truth, it can subpoena e-mails. It can wiretap. It can offer immunity that overcomes the Fifth Amendment." 242

U.S. Attorney Rosenberg said the Justice Department realized that the media play "a crucial role in keeping the American people informed of what is happening overseas, in Washington, and in their hometown." 243 Moreover, he said the media are "critical" to the department’s crime-prevention efforts. 244 "Every day across the country, reporters file stories on the important work of the Department and thereby help to deter others from committing crimes in the future," he said. 245

The third issue regarding the media’s power was whether a federal shield law would improperly place the media above the law. 246 Rep. Smith said, for example:

Our Founders created a legal system where no one is above the law. But if the media shield law passes, we will be carving out an exception to that rule . . . . This is not what our Founders intended when they created a free press. No one should be above the law, not even the press. 247

240. Id. (statement of David Westin, President, ABC News).
242. Id.
244. Id.
245. Id.
246. See, e.g., House Hearing 2007, supra note 16, at 14 (statement of Rep. Boucher, Member, House Comm. on the Judiciary) (opining that the bill “does not give reporters a license to break the law in the name of gathering news.”).
Sen. Jeff Sessions (R-Ala.) said the Senate needed to “be careful” about protecting the press with a shield law.\textsuperscript{248} He explained:

I was thinking that if a spy comes into our country and gets secure information and gives it to our enemy, we put him in jail, and they can be convicted, I guess, of treason. If a reporter gets information and published it to our enemies and to the whole world, they get the Pulitzer Prize.\textsuperscript{249}

Rep. Steve King (R-Iowa) agreed, “Some of the people who hide behind the shield of journalism today routinely release classified national security data and publish it as if it were their patriotic duty and hide behind the shield of journalism.”\textsuperscript{250} King said classified information had been leaked to the New York Times, which published the information and jeopardized national security.\textsuperscript{251}

Rep. Pence disagreed: “It is important to know what the bill does not do. It does not give reporters a license to break the law, the right to interfere with police or prosecutors; it simply gives journalists certain rights and abilities to seek sources and report information without intimidation.”\textsuperscript{252} Similarly, Sen. Dodd said the legislation was not about conferring special rights on journalists.\textsuperscript{253} He said the law would not permit “rule breaking, give reporters a license to break the law, or permit reporters to interfere with crime prevention efforts.”\textsuperscript{254} He said that “it is intended to protect the rights of all citizens to be informed and to inform, including those speaking with journalists in confidence.”\textsuperscript{255}

Rep. Mark Udall (D-Colo.) seemed to concede that the shield law might place the media above the law—but not unnecessarily.\textsuperscript{256}

\begin{itemize}
\item \textsuperscript{248} Introduction, supra note 201, at S4803 (statement of Sen. Sessions).
\item \textsuperscript{249} Id.
\item \textsuperscript{250} House Debate, supra note 175, at 11596 (statement of Rep. King).
\item \textsuperscript{251} Id. King did not clarify this reference; see also, House Hearing 2007, supra note 16, at 53 (statement of Randall D. Eliason, Law Professor) (testifying that “[r]eporters don’t go to jail because of the lack of a Federal privilege law. They go to jail because they are placing themselves above the law that does exist and refusing to honor valid court orders, even when there is a privilege.”).
\item \textsuperscript{252} House Debate, supra note 175, at 11592 (statement of Rep. Pence).
\item \textsuperscript{253} Senate Hearing 2005-A, supra note 16, at 6 (statement of Sen. Dodd).
\item \textsuperscript{254} Introduction, supra note 201, at S4801 (statement of Sen. Lugar); see also, Senate Hearing 2005-A, supra note 16, at 5 (statement of Sen. Lugar) (arguing that “the legislation does not permit rule breaking. It does not give reporters a license to break the law in the name of gathering news. It does not give reporters the right to interfere with police and prosecutors who are trying to prevent crimes. The legislation does not prohibit compelling a reporter to testify.”).
\item \textsuperscript{255} Senate Hearing 2005-A, supra note 16, at 6.
\item \textsuperscript{256} See House Debate, supra note 175, at 11598 (statement of Rep. Udall).
\end{itemize}
quoted from a newspaper article: "Reporters do not expect to be above the law. But they should receive some protection so they can perform their public service in ensuring the free flow of information and exposing improper conduct without risking jail sentences."257

D. The Context of the Social Architecture

Context—especially the post-9/11 terrorist threat and the weakening federal testimonial privilege for reporters—was at the heart of much of the disagreement over the proposed federal shield law. Almost every participant in the debate seemed to want to make law, or not, based on the immediate situation as he or she saw it. Shield law opponents said the government must be able to compel journalists to testify because the nation continued to be threatened by terrorists.258 Shield law supporters said a shield law was needed because uncertainty over the scope of the federal reporter’s privilege was having a chilling effect on the media.259

For example, in 2005, U.S. Attorney Rosenberg, who spoke in opposition to the shield law, said that “[t]he events of the past four years have shown that law enforcement must be more, rather than less, flexible to meet the challenges posed by international terrorist organizations and sophisticated criminal enterprises.”260 Also, Rep. Smith reported that the president’s advisers “believe the stakes are too high in a post-9/11 world to support the Free Flow of Information Act.”261

Sen. Specter and others, on the other hand, offered the current disarray of reporter’s privilege law as evidence of the need for a shield law. Specter said, “Rather than a clear, uniform standard for deciding claims of journalist privilege, the Federal courts currently observe a ‘crazy quilt’ of different judicial standards.”262 Pointing to the variations in reporter’s privilege law among the federal circuits and among the states, he concluded: “There is little wonder that there is a growing consensus concerning the need for a uniform journalists’ privilege in Federal courts. The system must be simplified.”263 Former Solicitor General Olson argued
that a federal shield was needed to eliminate the inconsistencies in the "hodgepodge" of federal reporter's privilege law that hampered the press in its performance of its watchdog function.\textsuperscript{264} He said, "Reporters cannot foresee where and when they may be summoned into court for questions regarding a particular story, and their editors, publishers, and lawyers are similarly hamstrung by the confusion and can provide little help."\textsuperscript{265}

Sen. Dodd said journalists were in jail because "they have committed the 'offense' of being journalists" and "[t]he chilling effect is obvious."\textsuperscript{266}

We can only speculate as to how many editors and publishers put the brakes on a story for fear that it could land one of their reporters in a spider web spun by the Federal prosecutors that could include prison. If citizens with knowledge of wrongdoing could not or would not come forward to share what they know in confidence with members of the press, serious journalism would cease to exist, in my view. Serious wrongs would remain unexposed. The scandals known as Watergate, the Enron failure, the Abu Ghraib prison photos—none of these would have been known to the public but for good journalists doing their work.\textsuperscript{267}

Dodd also said that when journalists and ordinary citizens fear prosecution for exposing wrongdoing, it is "more difficult to hold accountable those in power."\textsuperscript{268}

---

\textsuperscript{264} Senate Hearing 2006, supra note 143, at 14 (statement of Theodore B. Olson, Former Solicitor Gen.).

\textsuperscript{265} Id. at 15. However, Olson also testified that the shield law would not "work a dramatic expansion of the reporters' privilege or a realignment of public policy ... ." Id.

\textsuperscript{266} Introduction, supra note 201, at S4803 (statement of Sen. Dodd).

\textsuperscript{267} Id.; see also, House Debate, supra note 175, at 11592 (statement of Rep. Pence) (expressing concern that under current conditions "there may never be another Deep Throat."); id. (statement of Rep. Keller) (noting that confidential sources exposed "the cooked books at Enron, and the unacceptable treatment of soldiers recovering at Walter Reed."); id. at 11593 (statement of Rep. Conyers) (noting the use of confidential sources to explore fertility clinic fraud, a hospital scandal involving "patient dumping" by an emergency aid program, and steroid use in Major League Baseball); id. at 11599 (statement of Rep. Stark) (adding the torture of Iraqi prisoners at Abu Ghraib to the list of important stories based on confidential sources. Stark said, "If we left it up to the administration to decide what went into news stories, we would have headlines that told us the war in Iraq is a smashing success and that Dick Cheney's hunting technique is unparalleled." Id.).

\textsuperscript{268} Introduction, supra note 201, at S4803 (statement of Sen. Dodd).
Of course, many members of Congress and witnesses specifically noted the numbers of journalists in jail or threatened with jail. First Amendment attorney Abrams testified in the summer of 2005 that 70 journalists had battled federal prosecutors in the previous year and a half.269 "Some are or were virtually at the entrance to jail, and Judith Miller, not far from here, sits in a cell one floor removed from that of Zacarias Moussaoui. It is time to adopt a federal shield law."270

Time magazine reporter Matthew Cooper, who was subpoenaed by a special prosecutor in 2005,271 testified that the Justice Department guidelines worked for many years because there was "a civil peace between prosecutors, who have avoided subpoenaing journalists, and the two camps have generally stayed out of each other's way."272 Recently, however, "we have seen a run of federal subpoenas of journalists . . . .," Cooper said.273 He called for a Congress to provide "a clear set of rules."274

Several people testified that the uncertainty in federal reporter's privilege law was having a chilling effect on journalists. Attorney Levine, for example, said that in the wake of recent court decisions ordering reporters to reveal their sources, the Cleveland Plain Dealer cancelled publication of two investigative reports based on information from confidential sources.275 Levine said the Plain Dealer's editor told him that publishing the stories would have led to a leak investigation "and the ultimate choice, talk or go to jail, [and] because talking isn't an option, and jail is too high a price to pay, these two stories will go untold for now."276

271. Cooper was subpoenaed in the Valerie Plame case and ordered to testify about who told him Valerie Plame was a CIA agent. Michael Isikoff, Matt Cooper's Source, NEWSWEEK, July 18, 2005, at 44. He avoided going to jail by agreeing to testify after his source released Cooper from his promise of confidentiality. Id.
272. Senate Hearing 2005-A, supra note 16, at 12 (statement of Matthew Cooper, Reporter, TIME); see also, Senate Hearing 2005-B, supra note 21 (statement of Geoffrey Stone, Law Professor) (testifying that for 180 years there was a tradition in this country that prosecutors did not subpoena journalists even though there was no law prohibiting it. He described the current situation as "a serious anomaly in our history . . . ").
274. Id.
Miller of the *New York Times* countered the arguments of shield law opponents concerned about the post-9/11 terrorist threat with this argument: A shield law is needed to enable reporters to break through the wall of secrecy that had been built around federal government since the 2001 terrorist attacks. She explained:

[Dramatically increased amounts and types of information are being classified as secret, and hence, are no longer available for public review. Last year, more documents were classified secret and top secret than ever before in American history. In such a climate, confidential sources, particularly in the national security and intelligence areas, are indispensable to government accountability.]

Government secrecy was more often cited in 2007 as a reason the nation needed a shield law. For example, Rep. William D. Delahunt (D-Mass.) testified before the House that he supported the shield law as a response to the “surge of secrecy” in the Bush Administration. He complained:

So what we have is a growing sense of secrecy or growing secrecy within the executive branch . . . . [T]he American public is being denied information that they have to have to make informed decisions.

[Secrecy] is the predicate . . . for the need for this law . . . , and until we address it, we are putting at risk our democracy.

Finally, shield law supporters argued that jailing journalists who refused to comply with subpoenas put the United States in bad company internationally and exposed the nation to criticism for applying one standard of freedom to itself and a different standard to other nations. As

---

278. Id.
280. Id. at 85 (statement of Rep. Delahunt, Member, House Comm. on the Judiciary).
281. Id. at 86.
he introduced shield legislation into the Senate in 2006, Sen. Lugar pointed out that Reporters Without Borders, an international press freedom organization, had reported that more than 100 journalists were then in jail around the world, more than half of them in China, Cuba, and Burma.\(^{283}\) "This is not good company for the United States of America," Lugar said.\(^{284}\) "Global public opinion is always on the lookout to advertise perceived American double standards .... When we support the development of free and independent press organizations worldwide, it is important to maintain these ideals at home."\(^{285}\) Attorney Abrams observed:

[V]irtually every other democratic country outside the United States, countries without a First Amendment, provide such protection. The notion that we provide or may provide no protection in federal courts when countries such as France, Germany, Austria, provide full protection and countries from Japan to Argentina and Mozambique to New Zealand provide such protection using language we would understand as being First Amendment like in its nature is, it seems to me, unacceptable.\(^{286}\)

George Washington University Law School Professor Randall Eliason countered in 2007 that arguments comparing the jailing of U.S. journalists to the treatment of journalists in countries such as China, Burma, or Cuba "miss the mark."\(^{287}\) Eliason testified:

In totalitarian societies, journalists are jailed because of the content of what they write. When journalists are jailed in the United States, it is because they are refusing to abide by a lawful court order, entered after a full and fair hearing and due process of law. Rather than demonstrating that the United States is akin to a totalitarian regime, these jailings demonstrate just the opposite; that we are a society governed by the rule of law, and that no one gets to pick and choose for herself which laws she will obey.\(^{288}\)


\(^{284}\) Id. (statement of Sen. Lugar).

\(^{285}\) Id.


\(^{288}\) Id.
Only Rep. Pence seemed to take the long view when he said he wanted to look beyond "our times and their controversies and seize the opportunity to develop clear national standards that will protect the news-gathering function and promote good government."

V. A Messy but Important Job for Congress

Much if not most of the testimony at the Congressional hearings and debate on the proposed federal shield law focused on issues of social architecture—that is, on issues of how power should be distributed among groups in society. The research conducted for this article demonstrates that the federal shield law debate is above all else a debate about the allocation of power to the Justice Department and to the media. The debate is about how much power the Justice Department already has, how much power the department needs, and whether the courts and the media need a shield law to check that executive power. Likewise, the debate directly addresses the question of media power. Do the media have too much power, or do they need more?

Another finding of this research is that members of Congress and others who testified at the hearings appeared to disagree about the context of the power arrangements they were contemplating. To the Justice Department and other shield law opponents, the post-9/11 terrorist threat was the most important contextual consideration. The media and other shield law supporters instead focused primarily on the current uncertainty in reporter's privilege law, the numbers of journalists incarcerated for refusing to comply with federal subpoenas, and the resulting chilling effect on the media.

Deep divisions remain among the interested parties, whose arguments have changed very little since 2005. The bills before the Congress did change, however. The bills contained increasing numbers of exceptions as shield law supporters in Congress attempted to craft legislation that would satisfy at least some of the law's opponents.

Beyond these findings about the power-distribution arguments in the shield law hearings and debate, this research suggests two reasons that shield legislation was not enacted. Shield law legislation died in Congress because members of Congress and others were bogged down in a fight about power and because both sides of the debate were operating in a context of fear. The power issues are contentious, and deciding how to distribute power proved to be a messy business. Complicated bills with

growing lists of exceptions to the testimonial privilege were introduced in attempts to protect the media without stripping too much power from the executive branch. Each proposed change raised new concerns, however.

This research also reveals two weaknesses in the social architecture metaphor as a tool for analyzing and explaining congressional lawmaking. The social architecture metaphor seems better at describing the result of lawmaking than the lawmaking process because it fails to convey adequately the messiness of the task before Congress. The social architecture metaphor suggests an architect sitting in a quiet office drawing precise lines. As this research demonstrates, that is not how Congress worked on the shield law issue. One should, more aptly, think of a county planning commission negotiating between a developer and a group of angry residents over plans for a new shopping mall. The image of the architect working in a quiet office more closely depicts the work of an appellate court judge, although even that comparison ignores the give and take among judges.

One should not be surprised that Congressional lawmaking is messy: Power rarely is ceded graciously. Therefore, the social architecture metaphor should be expanded to recognize that the process of distributing power very much differs, depending on whether decisions are made by one person or by a large group. Failure to recognize that difference oversimplifies the lawmaking process. Expanding the metaphor to recognize that difference increases its explanatory power.

The social architecture metaphor also fails to acknowledge the critical importance of context to the arguments on both sides of the debate. This research shows that both sides of the federal shield-law debate operated in the context, or climate, of fear. The Department of Justice, President Bush, and others who wanted to protect or increase executive branch power were operating in a post-9/11 context; they feared a shield law as a too-dangerous threat to an already vulnerable nation. Journalists and others who testified about the current rash of media subpoenas and the chilling effect created by those subpoenas also operated in a climate of fear. Those shield law supporters viewed the media as under attack by the federal government and in need of a strong shield law to save investigative journalism.

As Rep. Pence told the Senate Judiciary Committee, lawmakers need to look beyond "our times and their controversies and seize the opportunity to develop clear national standards that will protect the news-gathering function and promote good government." Lawmakers should not allow

their fears to induce them to make bad law. History is replete with examples of bad lawmaking that resulted from fear.291

In the future, researchers utilizing the social architecture metaphor should pay close attention to the perceived context in which power is being distributed by lawmakers. This research makes it clear that people can disagree strongly about the context of lawmaking and that their disagreement can make it extremely difficult to reach consensus. In the language of social architecture, one reason parties interested in the shield law could not agree on an architectural plan was that they could not agree on the shape and slope of the site—the context—on which the structure was to be built.

The implications of these research findings for the current Congress are clear and important. A Congressional decision to adopt a federal shield law would alter the nation’s existing social architecture by taking power away from the Justice Department and giving it to the courts and the media. A Congressional decision not to adopt a shield law—or to make no decision at all—affirms the existing social architecture, including our increasingly powerful executive branch and our weakened media.

How does the Obama presidency affect prospects for a federal shield law? During his election campaign, Obama promised to support a shield law.292 If the Justice Department follows Obama’s lead and withdraws its opposition to the legislation, House Speaker Pelosi’s prediction might come true; the current Congress might enact a shield law. The Justice Department has, after all, been the major shield law opponent.293 However, the new Congress has the very pressing business of the economic recession to address, among other issues, so there is no way to predict when Congress will find the time or have the inclination to consider the shield law again. Also, while Obama appears less determined than his predecessor to augment the power of the executive branch, political commentators

291. One famous example is the enactment of the Alien Registration Act, also known as the Smith Act, by Congress in 1940. The law required all resident aliens to register with the government and made it a crime to “advocate, abet, advise or teach the duty, necessity, desirability or propriety of overthrowing the Government of the United States or of any State by force or violence . . . .” The Smith Act, ch. 439 §§ 2, 30, 54 Stat. 670 (1940) (current version at 18 U.S.C. § 2385 (2008)). Legal Historian Geoffrey R. Stone wrote that Congress passed the law “[a]s even civil libertarians began to rethink the role of civil liberties in an increasingly dangerous world.” GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 251 (W. W. Norton & Co.) (2004). He said that the “shocking fall of France [to the Germans] . . . triggered a sense of alarm and vulnerability in the United States . . . .” Id. The law was used to prosecute Communists until, in the 1950s, the U.S. Supreme Court declared unconstitutional a number of convictions under the Smith Act. See, e.g., Yates v. United States, 354 U.S. 298 (1957).

292. David Jackson, McCain, Obama Back Law Shielding Reporters, USA TODAY, April 17, 2008, at 12A.

293. See supra notes 140-46 and accompanying text.
disagree about whether Obama is likely to redirect power from the executive branch to the other branches of government. All this suggests that it might be some time before Congress revisits shield legislation, but when Congress does, power issues again will be at the heart of the debate.

When it next considers shield law legislation, Congress should recognize that the shield law debate is largely about the distribution of power. Congress should address the power issues directly and explicitly. The nation deserves a deliberately drawn social architecture, not one made haphazardly or by accident. Congress should look first to the Framers and attempt to stay true to the broad outlines of the social architecture drawn by Madison, Hamilton, and their fellow writers. Although, unfortunately, we do not know much about what the Framers were thinking when they crafted the Constitution and the Bill of Rights, we do know what they did: The Framers distributed power among the branches of the federal government in order to prevent a dangerous concentration of power in any one branch. Then the Framers guaranteed a powerful press that would help citizens check the power of the federal government and help keep citizens informed about what their government was doing. The Framers took a long view and kept the design simple, which the Congress should do also. The Framers have given Congress ample guidance for the lawmaking task it faces today.

The nation needs a shield law that prevents an unhealthy concentration of power in the executive branch of the government—or in any other branch. And the nation needs a powerful press. That means the nation needs a strong shield law that will enable journalists to report on the workings of the federal government and other matters without fear of facing incarceration or other penalties if they later refuse to reveal the identities of their confidential sources or to hand over confidential information or materials. This is a fundamental matter of the proper distribution of power among government, media, and citizens. Those in the executive branch who oppose the shield law should trust that a good government—one drawn as the Framers intended—can protect national security.

294. See, e.g., James Rosen, Obama Sets Ambitious Bar in Pledge to Rein In Executive Power, FoxNews.com (Dec. 24, 2008), http://www.foxnews.com/politics/elections/2008/12/24/obama-sets-ambitious-bar-pledge-rein-executive-power/ (reporting that “students of the presidency as well as constitutional law suggest any shift of power between the branches over the next four years will likely be incremental, not radical.”). Id. Rosen quoted one scholar as saying, “No president lightly gives up all of [his office’s] prerogatives.” Rosen reported that the same scholar predicted Obama will “likely try to strike compromises when it comes to the power dynamic between the president and the rest of Washington.” Id.