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## The Judith Miller Case and the Relationship between Reporter and Source: Competing Visions of the Media's Role and Function

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## The Judith Miller Case and the Relationship between Reporter and Source: Competing Visions of the Media's Role and Function

### Cover Page Footnote

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## The Judith Miller Case and the Relationship between Reporter and Source: Competing Visions of the Media's Role and Function

Daniel Joyce\*

“Confidential sources are the life’s blood of journalism. Without them, whether they are in government, large or small companies, or in non-profit organizations, people like me would be out of business. As I painfully learned while covering intelligence estimates of Saddam Hussein’s weapons of mass destruction, we are only as good as our sources. If they are wrong, we will be wrong. And a source’s confidence that we will not divulge their identity is crucial to his or her readiness to come to us with allegations of fraud or abuse or other wrongdoing, or even a dissenting view about government policy or business practices that the American public may need to know.”<sup>1</sup>

–Judith Miller, during testimony before the Senate Judiciary Committee.

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\* Ph.D. Candidate, Trinity College, Cambridge. This essay was written while a Visiting Research Fellow at Columbia Law School in 2005–06. I would like to thank Professor Richard N. Winfield especially for his encouragement and support of this research. Thanks are also due to Professor Susan Marks, Professor Monroe Price, Professor Michael Doyle and the Center on Global Legal Problems. This research and my year at Columbia was generously supported by the Hollond Fund, Trinity College, Cambridge.

<sup>1</sup> Judith Miller, Testimony Before the Senate Judiciary Committee of the U.S. Senate, Oct. 19, 2005, available at [http://judiciary.senate.gov/testimony.cfm?id=1637&wit\\_id=4698](http://judiciary.senate.gov/testimony.cfm?id=1637&wit_id=4698) (last visited on Jan. 16, 2007) [hereinafter *Miller Testimony*].

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## INTRODUCTION

In 2005, the prize-winning yet controversial *New York Times* reporter Judith Miller spent eighty-five days in prison.<sup>2</sup> She claimed to do this for a principle: that a reporter should not reveal the identity of an anonymous source. It is argued that doing so would endanger the media and their sources, and also jeopardize their ability to gather news and critical information for the public and to expose wrong-doing and corruption.<sup>3</sup> On March 6, 2007, I. Lewis Libby, the former chief of staff to Vice President Dick Cheney, was convicted of obstruction of justice, making false

<sup>2</sup> William E. Lee, *The Priestly Class: Reflections on a Journalist’s Privilege*, 23 *CARDOZO ARTS & ENT. L.J.* 635, 639 (2006).

<sup>3</sup> *See id.* at 638 (quoting Miller as saying before the Court that “[i]f journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press.”).

statements to the F.B.I. and two counts of perjury.<sup>4</sup> These charges arose out of *Miller* and the federal grand jury investigation into the leaking of the identity of a CIA operative Valerie Wilson (also known as Plame) to the press.<sup>5</sup>

The controversy and mystery the case generated have focused attention on the wider social role of the media.<sup>6</sup> This in turn highlights the law's complex relationship in both defending and articulating the role of the media in democracy and also in potentially subverting this role in the interests of the administration of justice.<sup>7</sup> This case and the issue of the protection of journalistic sources are significant then in the ongoing development of competing visions of the media in American life.<sup>8</sup> This essay looks at the Judith Miller case, but does so to highlight the issues underlying the role of the media and its relationship with the courts. Post-Watergate, different visions of the media have crystallized—one, a heroic vision of the journalist as muckraker and watchdog, the other, of the media as an increasingly powerful force in American life—complicit in corruption and governmental power, rather than a useful check on such power.<sup>9</sup> The Judith Miller example is significant for the way in which it highlights the tensions that exist between our desire for a heroic media and our increasing fear of media power.<sup>10</sup> Who is to watch the watchdog?

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<sup>4</sup> Neil A. Lewis, *Libby, Ex-Cheney Aide, Guilty of Lying in C.I.A. Leak Case*, N.Y. TIMES, Mar. 7, 2007, at A1.

<sup>5</sup> United States v. Libby, 432 F. Supp. 2d 26, 29 (D.D.C. 2006).

<sup>6</sup> See Laura Durity, *Shielding Journalist-“Bloggers”: The Need to Protect Newsgathering Despite the Distribution Medium*, 2006 DUKE L. & TECH. REV. 0011 (2006), available at <http://www.law.duke.edu/journals/dltr/articles/2006dltr0011.html> (discussing the response to Miller by Congress in pushing legislation forward to protect the reporter's privilege); see also *infra* text accompanying notes 204, 205.

<sup>7</sup> See *id.*; see also text accompanying notes 204, 205.

<sup>8</sup> See *id.*; see also text accompanying notes 204, 205.

<sup>9</sup> *Recent Case: Evidence—Journalist Privilege—District of Columbia Circuit Holds That Privacy Act Suit Satisfies Two-Prong Test to Overcome Journalist Privilege to Conceal Confidential Source—Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005), 119 HARV. L. REV. 1923, 1930 (2006); see *infra* text accompanying notes 52, 53.

<sup>10</sup> See Lee, *supra* note 2 (discussing the impact of the Miller controversy on the reporter's privilege and the public's view of the media); see *infra* text accompanying notes 52, 53.

And just who are the watchdogs in an age of media de-professionalization, citizen media and blogging?<sup>11</sup>

This essay considers the issues arising from the Judith Miller controversy in the context of federal United States law concerning the protection of journalistic sources, what is termed the reporter's privilege.<sup>12</sup> It does so against a comparative backdrop of developments in the European Court of Human Rights ("ECtHR") in Strasbourg and in the International Criminal Tribunal for the Former Yugoslavia ("ICTY") in The Hague. This is done to highlight the different ways in which the protection of journalistic sources has been approached at the domestic and international levels.

In the Miller example, much has hung on the fact that the relationship between reporter and source has been one not only of confidence and trust, but also of secrecy.<sup>13</sup> In the *Goodwin* case at the ECtHR, which this article considers, the identity of the source was also initially undisclosed.<sup>14</sup> There, however, the context was one of a commercial whistle blower, involving arguments not only for the protection of the source, but also for the legal protection of confidential commercial information. The *Randal* case before the ICTY,<sup>15</sup> with which this article concludes, concerns the disclosure of a source by the *Washington Post*.<sup>16</sup> This case does not concern the issue of whether a journalist can be forced to reveal the identity of a source, but rather presents the issue of whether a journalist, after the event, should be forced to testify in the prosecution of his source for crimes under international criminal law.<sup>17</sup> Here the

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<sup>11</sup> Stephanie J. Frazee, Note, *Bloggers as Reporters: An Effect-Based Approach to First Amendment Protections in a New Age of Information Dissemination*, 3 VAND. J. ENT. & TECH. L. 609, 623 (2006) (discussing who is protected by the reporter's privilege); see Durity, *supra* note 6 (discussing who qualifies as a journalist).

<sup>12</sup> See Durity, *supra* note 6.

<sup>13</sup> See *Miller Testimony*, *supra* note 1.

<sup>14</sup> *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 484, available at <http://worldii.org/eu/cases/ECHR/1996/16.html> (last visited Jan. 14, 2007); see also *infra* text accompanying notes 157–184.

<sup>15</sup> *Prosecutor v. Brdjanin*, Decision on Interlocutory Appeal, Case No. IT-99-36-AR3.9, Decision on Interlocutory Appeal, (Dec. 11, 2002).

<sup>16</sup> See *id.*; see also *infra* text accompanying notes 188–203.

<sup>17</sup> See *id.*; see also *infra* text accompanying notes 188–203 (discussing underlying issues of the *Randal* case).

sensitivity derived from the relationship between reporter and source necessary for effective news-gathering, not merely the confidentiality of the source's identity.<sup>18</sup> By focusing on the Judith Miller case, this essay examines, against a comparative background, our conflicting desires for the media at an historical moment when the fear of media power and lack of accountability challenge our heroic vision of the press.

### I. THE FACTS OF THE MILLER CASE: AN EMERGING STORY

The facts of the Miller case are confusing and to some degree contested. Many details have only recently emerged, and continue to do so as this article goes to press against the background of the ongoing Libby trial.<sup>19</sup> In early 2002, former ambassador Joseph Wilson traveled to Niger for the CIA to investigate the claim that Iraq had purchased uranium from the African country.<sup>20</sup> This trip occurred in the context of fears of the development of weapons of mass destruction ("WMD") by Iraq, and the threat this posed.<sup>21</sup> In March 2003, a US led coalition invaded Iraq.<sup>22</sup> Arguments concerning WMD formed a backdrop to the invasion and this led to media interest in the validity of such claims.<sup>23</sup> On July 6, 2003, Wilson wrote an op-ed for the *New York Times* in which he contradicted government claims about Iraq's purchase of uranium from an African country.<sup>24</sup> This led to government clarification that the Niger story had been misleading.<sup>25</sup>

On July 14, 2003, commentator Robert Novak revealed in his column that Wilson's wife, Valerie Plame, was a CIA operative,

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<sup>18</sup> See *id.*; see also infra text accompanying notes 188–203.

<sup>19</sup> See NPR.org, *Timeline: The CIA Leak Case*, <http://www.npr.org/templates/story/story.php?storyId=4764919> (last visited Jan. 11, 2007); NYTimes.com, *Timeline of a Leak*, [http://www.nytimes.com/ref/washington/2006\\_LEAKTIMELINE\\_GRAPHIC.html](http://www.nytimes.com/ref/washington/2006_LEAKTIMELINE_GRAPHIC.html) (last visited Jan. 11, 2007).

<sup>20</sup> See *Timeline: The CIA Leak Case*, *supra* note 19; see also *Timeline of a Leak*, *supra* note 19 (discussing Wilson's travel to Niger).

<sup>21</sup> See *Timeline: The CIA Leak Case*, *supra* note 19.

<sup>22</sup> See *id.*

<sup>23</sup> See, e.g., *id.* (discussing media interests).

<sup>24</sup> See *id.*

<sup>25</sup> See *id.* (discussing further clarifications by the government).

information only recently revealed to have been originally sourced from former deputy Secretary of State Richard Armitage (Novak's other sources were also recently revealed as being Karl Rove and Bill Harlow), who is also said to have revealed her identity to Bob Woodward.<sup>26</sup> Shortly after, on July 17, an online *Time* article by Matthew Cooper, Massimo Calabresi and John Dickerson also indicated that government officials had revealed to them the identity of Plame in the context of the Wilson/Niger controversy.<sup>27</sup> This led to speculation about the White House leaking the information to damage Wilson, and that senior presidential advisor Karl Rove may have been involved in the leaking of this information.<sup>28</sup> On September 28, the CIA called for an investigation into the leak and two days later the Justice Department launched a criminal investigation.<sup>29</sup> Revealing the identity of a CIA operative in certain contexts can form the basis for a federal offense.<sup>30</sup>

On December 30, 2003, the Justice Department appointed Patrick Fitzgerald as special counsel and a grand jury investigation continued involving administration officials and the press.<sup>31</sup> The investigation went as high as the President who was questioned in private by a team of federal prosecutors.<sup>32</sup> On August 9, 2004, U.S. District Court Judge Thomas Hogan held Cooper in contempt of court for refusing to reveal his confidential source's identity to the grand jury and ordered him to jail.<sup>33</sup> Cooper subsequently avoided jail and agreed to questioning by prosecutors.<sup>34</sup> On

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<sup>26</sup> Neil A. Lewis, *First Source of C.I.A. Leak Admits Role, Lawyer Says*, N.Y. TIMES, Aug. 30, 2006; Eric Lichtblau, *Journalists said to Figure in Strategy in Leak Case*, N.Y. TIMES, Nov. 16, 2005; Jim VandeHei and Carol D. Leonnig, *Woodward Was Told of Plame More Than Two Years Ago*, WASH. POST, Nov. 16, 2005.

<sup>27</sup> Matthew Cooper, Massimo Calabresi & John F. Dickerson, *A War On Wilson?*, TIME, July 17, 2003, <http://www.time.com/time/nation/article/0,8599,465270,00.html?internalid=ACA>.

<sup>28</sup> *Timeline: The CIA Leak Case*, *supra* note 19.

<sup>29</sup> *Id.*

<sup>30</sup> *See id.*; *see also*, Richard W. Stevenson & Eric Lichtblau, *The Struggle for Iraq: Intelligence; President Orders Full Cooperation in Leaking of Name*, N.Y. TIMES, Oct. 1, 2003, at A6.

<sup>31</sup> *Timeline of a Leak*, *supra* note 19.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* The order was stayed pending an appeal. *Id.*

<sup>34</sup> *Timeline: The CIA Leak Case*, *supra* note 19.

August 12, Judith Miller was subpoenaed to appear before the grand jury and on October 7 she was held in contempt for refusing to name her confidential sources, with the order sending her to jail again stayed pending her appeal.<sup>35</sup> Several days later, on October 13, Cooper was again held in contempt for refusing to name his confidential source.<sup>36</sup> On June 27, 2005, the U.S. Supreme Court declined to review the appeals of Cooper and Miller,<sup>37</sup> and several days later *Time* agreed to hand over their reporter Cooper's notes and emails to prosecutors.<sup>38</sup> On July 6, 2005, Miller was jailed and Cooper agreed to cooperate claiming that his confidential source (later revealed as Karl Rove) had waived their agreement and that consequently he had been released from his obligation to protect the source's identity.<sup>39</sup>

The investigation continued, as did speculation concerning the role and motives of Rove, Cheney and others.<sup>40</sup> Cooper eventually revealed that he had spoken to Rove and learned certain details about Plame's work for the CIA. Speculation and confusion also continued about Novak's role and the identity of his sources until the recent revelation that Armitage was the original leaker.<sup>41</sup> Judith Miller was released from jail on September 29, 2005, having secured an uncoerced waiver from her source.<sup>42</sup> The next day she gave evidence to the grand jury and the *New York Times* identified her source as being Lewis Libby, Chief of Staff to the Vice President.<sup>43</sup> Rove gave further evidence and Miller initially claimed Libby did not name Plame although he did discuss her

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Miller v. United States, cert. denied*, 125 S. Ct. 2977 (2005); *Cooper v. United States, cert. denied*, 125 S. Ct. 2977 (2005).

<sup>38</sup> *Timeline: The CIA Leak Case, supra* note 19.

<sup>39</sup> *Id.*

<sup>40</sup> *See generally Timeline: The CIA Leak Case, supra* note 19; *see also Timeline of a Leak, supra* note 19.

<sup>41</sup> *See also* Robert Novak, *My Role in the Plame Leak Probe*, CHI. SUN TIMES, July 12, 2006, at 14; David Johnston, *Novak Told Prosecutor His Sources in Leak Case*, N.Y. TIMES, July 12, 2006, A16; Rupert Cornwell, *Bush Officials Cleared as Powell's Former Deputy Admits Unmasking CIA Agent*, INDEP. (London), Sept. 9, 2006, at 36.

<sup>42</sup> *Timeline: The CIA Leak Case, supra* note 19.

<sup>43</sup> *Timeline of a Leak, supra* note 19.

CIA work.<sup>44</sup> Consequently, there is confusion over the naming of Plame/Wilson in Miller's notebook, and in her testimony in Libby's trial she appears to be saying now that Libby did name Plame/Wilson in their conversations.<sup>45</sup> Cooper also has testified that Rove first talked to him about Wilson and that this was confirmed by Libby in a subsequent conversation.

On October 28, 2005, Libby was indicted on charges relating to obstruction of justice, perjury and the making of a false statement.<sup>46</sup> He has resigned and was convicted in 2007 on four of five charges.<sup>47</sup> At present, the investigation looks to have run its course, but questions have been raised about its conduct following the revelation that Armitage (along subsequently with Rove and Harlow) was the original source for Novak, and that Fitzgerald knew of this from the beginning.<sup>48</sup> Some have argued that this damages theories about Rove and a high level government initiated smear campaign against the Wilsons.<sup>49</sup> With Rove being advised on June 13, 2006 that he will not be charged, some of the mystery over the investigation is beginning to abate.<sup>50</sup> Controversy of course remains, especially with a suit filed by the Wilsons against Cheney, Libby and Rove.<sup>51</sup> As this article goes to press, Libby's trial has finished, triggering renewed media attention, promising new revelations and increased attention to the issues with which this article is concerned. Libby's defense appears to be that he has been scapegoated by the administration in an effort to protect Karl Rove and others.

The Miller example, in particular, is an unfortunate test case for the journalistic privilege because the context of the relationship between Miller and her source does not fit neatly into the heroic

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*; see also Neil A Lewis & Scott Shane, *Reporter Who Was Jailed Testifies in Libby Case*, N.Y. TIMES, Jan. 31, 2007.

<sup>46</sup> *Timeline of a Leak*, *supra* note 19.

<sup>47</sup> *Libby, Guilty of Lying*, *supra* note 4.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

paradigm typically asserted in defense of the privilege.<sup>52</sup> Yet, while an exceptional case, it will arguably continue to shape the wider debate over the protection of sources and the now contentious role for the media in democratic politics. Miller herself has come under attack from a wide range of parties and interest groups.<sup>53</sup> Since her release from jail, Miller has been the subject of criticism from her own newspaper, leading to her resignation from the *New York Times*.

It has been hard to determine whether Miller has indeed been a watchdog or a lap dog in this process, and the case has also sparked wider political controversy flowing from her role in articulating the government's case for the war in Iraq in a number of prominent articles in the *New York Times*.<sup>54</sup> To this degree, part of the debate also concerns the responsibilities and role of the *Times* as "the paper of record" in the United States.<sup>55</sup> In this context, and in the present controversy, some have questioned her close relationship with government officials, and criticized the style of "access" journalism which she (and others such as Woodward in recent times) has practiced. From this perspective it can be seen that the treatment of Miller has reflected a trend towards public skepticism regarding the mass media and its power in American political life.<sup>56</sup> There has been comparatively little public protest at her jailing, though of course there has been intense media interest and speculation.<sup>57</sup> Another dimension has been the issue of corporate ownership of the media and the

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<sup>52</sup> See, e.g., Daniel J. Solove, *Journalist Privilege and Law Enforcement Leaks*, available at [http://www.concurringopinions.com/archives/2005/11/journalist\\_priv\\_1.html](http://www.concurringopinions.com/archives/2005/11/journalist_priv_1.html) (last visited Jan. 11, 2007) (arguing that the journalist privilege should apply when the leak is in the public interest, which does not apply to the Valerie Plame leak).

<sup>53</sup> See, e.g., Dan Froomkin, *Miller's Big Secret*, WASH. POST, available at <http://www.washingtonpost.com/wp-dyn/content/blog/2005/09/30/BL2005093000669.html> (last visited Mar. 16, 2007).

<sup>54</sup> See generally Michael Massing, *Now They Tell Us?*, N.Y. REV. BOOKS, vol. 51, no. 3, Feb. 26, 2004.

<sup>55</sup> See generally HOWARD FRIEL & RICHARD FALK, *THE RECORD OF THE PAPER: HOW THE NEW YORK TIMES MISREPORTS U.S. FOREIGN POLICY* (Verso 2004).

<sup>56</sup> See ROBERT W. MCCHESENEY, *RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES* (New Press 2000).

<sup>57</sup> See Nicholas Lemann, *The Wayward Press: Telling Secrets: How a Leak Became a Scandal*, NEW YORKER, Nov. 7, 2005, at 48.

perception that this may lessen media companies' advocacy for their journalists.<sup>58</sup> It is important then to see the broader historical and political context within which the arguments for the protection of sources occur. The position of the journalist as an actor in American life is also part of the story, along with the wider institutional role of the media.

## II. JOURNALISTS AND THEIR SOURCES: THE NATURE OF THE RELATIONSHIP AND WHAT IS BEING PROTECTED

When considering the legal status of the reporter's privilege in U.S. law, it must first be noted that the Miller case and the position in U.S. federal law as discussed in this essay is the exception rather than the rule. First, this is due to the fact that the Miller case concerns the question of whether the privilege is available in a grand jury criminal law context (the end of the spectrum for the privilege most likely to conflict with the concern for due process and the efficient and effective operation of criminal law proceedings before the courts).<sup>59</sup> Second, the setting for Miller and Cooper's requested testimony is in a federal law context where exceptionally there is no federal shield legislation to consider as of yet.<sup>60</sup> This is in contrast to the great majority of states of the Union and the District of Columbia where such legislation exists in varying forms.<sup>61</sup> However, free speech advocates such as Judith Miller's lawyer Floyd Abrams warn of complacency, and characterize the situation regarding the reporter's privilege as bleak

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<sup>58</sup> See Editorial, *Who Has Your Back? Journalism in the Corporate Age*, COLUM. JOURNALISM REV., Sept.-Oct. 2005, at 7.

<sup>59</sup> See *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 965 (D.C. Cir. 2005).

<sup>60</sup> The U.S. Senate Judiciary Committee has held a number of hearings regarding this issue and the reporter's privilege. See, e.g., *Reporters' Privilege Legislation: Issues and Implications*: Hearing Before S. Comm. on the Judiciary, 109th Cong. (2005), available at <http://judiciary.senate.gov/hearing.cfm?id=1579> (last visited Nov. 14, 2006); see also Free Flow of Information Bill, H.R. 3323, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.3323.IH>: (last visited Nov. 14, 2006); Free Flow of Information Bill, S. 1419, 109th Cong. (2005), available at <http://thomas.loc.gov/cgi-bin/query/z?c109:S.1419>: (last visited Sept. 27, 2006).

<sup>61</sup> See *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 993 (D.C. Cir. 2005) (Tatel, J., concurring).

especially in contrast to the more protective European jurisprudence as typified by the *Goodwin* case.<sup>62</sup> Abrams writes:

While forty-nine of the fifty states have provided total or partial protection for confidential sources, and many federal courts have done so as well, a number of courts in recent years have provided little or no protection at all. Worse yet, a spate of “leak investigations,” in which journalists have been targeted to reveal the identities [of confidential sources] . . . have posed increasing threats to the ability of the press to do its job.<sup>63</sup>

Generally, what is sought to be protected by the media is the identity of confidential sources relied upon by journalists in their news-gathering and reporting, especially where without such an offer of confidentiality, the source, typically a whistleblower or insider, would be unable or unwilling to give valuable information to the reporter.<sup>64</sup> What is at issue then is the ability of journalists to perform their work in the central, but difficult, genres of political reportage, news, and investigative reporting.<sup>65</sup> What is at stake is the freedom of the press as configured in a constitutional context, but also the right of the public to receive information as it relates to core political speech and political communication.<sup>66</sup>

In a society where deliberation lies at the heart of democratic theory and where speech is strongly protected by the Constitution, the idea of the reporter's privilege is a significant one. The protection sought varies according to context. The privilege is more likely to be recognized in civil rather than criminal contexts, and also where the source to be protected is confidential rather than non-confidential, although as we shall see this is not always the case in an international criminal law context.<sup>67</sup> A journalist's

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<sup>62</sup> See FLOYD ABRAMS, *SPEAKING FREELY: TRIALS OF THE FIRST AMENDMENT* (Viking 2005).

<sup>63</sup> *Id.*

<sup>64</sup> See *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972).

<sup>65</sup> See generally Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201 (2005).

<sup>66</sup> *Id.*

<sup>67</sup> See discussion *infra* The International Criminal Law Dimension: The Randal Case.

argument for resisting giving evidence will be strongest where they are seen to be a non-party to proceedings and where there are other means for the courts to gather such information.<sup>68</sup> Generally, journalists are seen as citizens and no different from others, when they directly eyewitness events and are thus expected to give evidence in such a context.<sup>69</sup> In fact, in the Miller case the prosecutor argued this eyewitness exception in relation to the journalists, as the crime alleged might be committed directly through disclosure by the source to the journalist. In a sense then, Special Prosecutor Fitzgerald earlier argued from a rationale that the journalists involved should testify due to their proximity not only to the evidence sought, but more so to the commission of the offense being investigated.<sup>70</sup>

It must be remembered too that Miller (unlike Matthew Cooper or Robert Novak) did not publish an article and thereby disclose sensitive information to the wider public.<sup>71</sup> So, what is sought to be protected from the journalist's perspective can be (often beyond even a particular story or scoop) the relationship established between reporter and source, and the trust and ongoing confidence flowing from this, both in terms of the specific relationship, say between Libby and Miller, and also the wider reputation of the media in the eyes of potential sources.<sup>72</sup> Miller was, on her account, prepared to go to jail for the principle at stake even where no story was directly at issue.<sup>73</sup> What was at issue was her credibility, the credibility of her paper, the *New York Times*, and the broader legal protection for and societal status of the media at large.

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<sup>68</sup> See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160, 185 (2d Cir. 2006).

<sup>69</sup> See *id.*

<sup>70</sup> *United States v. Libby*, 432 F. Supp. 2d 26, 44 (D.D.C. 2006). Litigation is ongoing in the Libby prosecution concerning his subpoenas concerning various news organizations and journalists. In the opinion of Judge Walton of the District Court for the District of Columbia, "this Court concludes that the First Amendment does not protect a news reporter, or that reporter's news organization, from producing documents pursuant to a Rule 17(c) subpoena in a criminal prosecution when the news reporter is personally involved in the activity that forms the predicate for the criminal offences charged in the indictment." *Id.*

<sup>71</sup> *Timeline: The CIA Leak Case*, *supra* note 19.

<sup>72</sup> See *Miller Testimony*, *supra* note 1.

<sup>73</sup> *Id.*

Given the complexity of rationales and the competition between legal and media principles and ethics which arises, I argue that a useful means to approach the privilege and the cases is by focusing on the relationship between journalist and source. This will require the courts to cede some ground in a sense to the concerns of the media in any given case, but this is perhaps appropriate given the courts final authority in any matter and to avoid the situation as illustrated by Judith Miller, where the courts' rationales and the media's internal culture seem irreconcilable.<sup>74</sup> Without legislative intervention, the troubling result is the jailing of increasing numbers of reporters without any great evidentiary or procedural outcome in terms of the administration of justice.<sup>75</sup> If we accept that the media should approach more carefully their relationship with confidential sources, especially when such relationships fall outside traditional heroic understandings of the media as a watchdog or fourth estate, then so too must the courts, and perhaps more importantly zealous prosecutors, come to understand why journalists are prepared to suffer incarceration to protect their relationships with sources.

The Miller affair then can also be seen as a clash of cultures: media and legal.<sup>76</sup> From this flow assumptions within each culture of the position and power of each institution in a democratic society and also of the capacities of each in terms of truth-seeking, fact-finding, and the monitoring of centers of political power<sup>77</sup> in any constitutional arrangement. Beyond the dichotomy involved in such 'clash of cultures' analysis it is also necessary to see that there remains some confusion even within each culture as to how the relationship and the privilege is to be characterized.

Some see the privilege as belonging to the source and deriving from the relationship of confidence, such that it might be waived at a later point. Even here, as illustrated by the Miller case, there are differing opinions as to what might constitute such a waiver, for

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<sup>74</sup> See *In re* Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 986 (Tatel, J., concurring).

<sup>75</sup> Nestler, *supra* note 65, at 243–46.

<sup>76</sup> *Id.* at 247–48.

<sup>77</sup> For a discussion of this as the function of journalism, see ROBERT FISK, *THE GREAT WAR FOR CIVILIZATION: THE CONQUEST OF THE MIDDLE EAST* (Knopf 2005).

Miller has argued that she waited for a full and uncoerced waiver from Libby before agreeing to testify.<sup>78</sup> Media lawyers have tended to say that the privilege belongs to the media and thus it is for the reporter to waive. This underscores the personal nature of the relationship under scrutiny and helps to explain the differences of opinion that result even within the media itself. As Miller testified before the Senate Judiciary Committee, there needs to be a resolution of the issue of waiver, with the present system designed for stalemate:

Yes, the legal machinations in my case were enormously complex, but the principle I was defending was fairly straightforward: once reporters give a pledge to keep a source's identity confidential, they must be willing to honor that pledge and not testify unless the source gives explicit, personal permission for them to do so, and they are able—*toi* [sic] protect other confidential sources.

Eventually, when the fuss over my case dies down, I hope journalists and politicians will begin examining the real issues at stake here, especially the question of when and under what circumstances a waiver can be considered voluntary. Struggling with such a weighty question alone in jail was hardly ideal. I did the best I could under rather challenging circumstances.<sup>79</sup>

### III. THE UNITED STATES SUPREME COURT'S APPROACH: JUDITH MILLER AND BEYOND

From the outset it should be noted that the privilege derives from a number of sources, depending on the specific setting for its claim: the First Amendment of the U.S. Constitution, state constitutional provisions, the various state shield statutes and also arguably from the common law which recognizes a set of traditional privileges.<sup>80</sup> For the purposes of this essay, I shall focus on the law as it applies to the exceptional case of Judith Miller at

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<sup>78</sup> *Timeline: The CIA Leak Case*, *supra* note 19.

<sup>79</sup> *Miller Testimony*, *supra* note 1.

<sup>80</sup> *See Lee*, *supra* note 2, at 683–84.

the federal level, focusing in particular on the Supreme Court's jurisprudence.

The *Branzburg* case<sup>81</sup> is the leading, if somewhat ambiguous, authority in the US on the reporter's privilege in the case of a grand jury. The 1972 Supreme Court case, and in particular the judgment of Justice Powell, has been variously interpreted by federal courts as both opening up the possibility for a common law privilege, and as excluding it in the grand jury context.<sup>82</sup>

The case of *Branzburg* arose from three appeals involving reporter testimony before grand juries in a criminal law context, one federal, another from Massachusetts where no shield laws applied, and the other from Kentucky where the relevant shield law was inapplicable.<sup>83</sup> The reporter, Branzburg, was involved in two cases from Kentucky where he had observed and written about marijuana use. The Massachusetts case involved newsgathering in relation to the Black Panthers, and the federal case involved a *New York Times* reporter also covering the Black Panthers and other militant groups.<sup>84</sup> All refused to testify before grand juries. Justice White delivered the majority opinion, in which the court, with the ambiguous support of Justice Powell, refused to recognize an absolute or qualified privilege for reporters from testifying before grand juries in relation to their confidential sources, where no shield law applies.<sup>85</sup>

As Justice White noted “[t]he heart of the claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information.”<sup>86</sup> While recognizing the importance of confidential sources in journalistic practice, Justice White argued with the majority that reporters could not be distinguished from other citizens when it came to their duty to give evidence when subpoenaed before grand juries in relation to criminal

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<sup>81</sup> *Branzburg v. Hayes*, 408 U.S. 665 (1972).

<sup>82</sup> *See Nestler*, *supra* note 65, at 220–25.

<sup>83</sup> *Branzburg*, 408 U.S. at 665.

<sup>84</sup> *Id.* at 667–79.

<sup>85</sup> For Justice White's majority opinion, see *id.* at 667–709. For Justice Powell's concurrence, see *id.* at 709–10.

<sup>86</sup> 408 U.S. at 681.

investigations.<sup>87</sup> Justice White noted that the right of a reporter to gather information is not unrestrained.<sup>88</sup> He wrote:

A number of States have provided newsmen a statutory privilege of varying breadth, but the majority have not done so, and none has been provided by federal statute. Until now the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self-incrimination. We are asked to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.<sup>89</sup>

The majority considered appearance in such a context to be a citizen's duty. Ultimately, the majority held there to be no danger for reporter or source except where either were implicated in criminal activity themselves, and hence undeserving of protection. Justice White insisted too that this involved no prior restraint, and that the Court could not condone the "theory that it is better to write about crime than to do something about it."<sup>90</sup> Justice White considered the argument about the negative consequences that might result for the flow of news and information, but without clear evidence for this he regarded much of this line of reasoning as "speculative."<sup>91</sup> The majority noted that "the privilege claimed is that of the reporter,"<sup>92</sup> but concluded that "[f]rom the beginning of our country the press has operated without constitutional protection for press informants, and the press has flourished."<sup>93</sup> The majority also seemed to indicate that while a qualified privilege was being sought in this case, at essence, the question of resolving competing legal and media values was all or nothing. "For them, it would appear that only an absolute privilege would

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<sup>87</sup> *Id.* at 682–91.

<sup>88</sup> *Id.* at 689–90.

<sup>89</sup> *Id.*

<sup>90</sup> *Branzburg*, 408 U.S. at 692.

<sup>91</sup> *Id.* at 693–94.

<sup>92</sup> *Id.* at 695.

<sup>93</sup> *Id.* at 698–99.

suffice.”<sup>94</sup> It is this failure to reconcile and compromise that has seen the tension over this issue grow with time.

As in other cases, and with the issue of a federal shield law, the practical issue of how to define a journalist, and whether this would let “the lonely pamphleteer”<sup>95</sup> or the blogger of the present day, claim such a privilege, weighed against its recognition.<sup>96</sup> The argument being that without a system of licensing, odious to the media and likely ineffective, anyone could claim to be a journalist.<sup>97</sup> This is an issue with particular poignancy in the present era with the de-professionalization of journalism, the rise of the celebrity blogger and the turn to citizen media.<sup>98</sup> Justice White also appeared to be arguing that the press were powerful enough without such protection, and further that where testimony was sought, it would be done under the careful supervision of the courts.<sup>99</sup>

Justice Powell’s concurring opinion has been considered ambiguous as he felt the need to “emphasize . . . the limited nature of the Court’s holding.”<sup>100</sup> In essence he argued that there was constitutional protection for reporters who could argue the merits on a case by case basis such that a balance between “freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct” is achieved.<sup>101</sup> It would be possible for journalists to resist such subpoenas and for accommodation by means such as protective orders to be achieved. Justice Stewart’s powerful dissent was also referred to by Justice

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<sup>94</sup> *Id.* at 702.

<sup>95</sup> *Id.* at 704.

<sup>96</sup> See also Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371 (2003).

<sup>97</sup> See Geoffrey R. Stone, *Testimony on a Proposed Journalist-Source Privilege to the Senate Committee on the Judiciary*, University of Chicago Law School Occasional Paper Number 46, at 11, available at <http://www.law.uchicago.edu/files/occasional-papers/stone-46.pdf> (2005).

<sup>98</sup> See, e.g., DAN GILLMOR, *WE THE MEDIA: GRASSROOTS JOURNALISM BY THE PEOPLE, FOR THE PEOPLE* (O’Reilly Media 2004).

<sup>99</sup> *Branzburg*, 408 U.S. at 706–07.

<sup>100</sup> *Id.* at 709 (Powell, J., concurring).

<sup>101</sup> *Id.* at 710.

Powell,<sup>102</sup> especially where Stewart had written of the danger of the state's annexation of "the journalistic profession as an investigative arm of government."<sup>103</sup> And Stewart himself wrote that "Justice Powell's enigmatic concurring opinion gives some hope of a more flexible view in the future . . ."<sup>104</sup>

Justice Stewart (joined by Justices Brennan and Marshall) wrote powerfully of the dangers confronting the freedom of the press and their ability to function, but also to the administration of justice, if the flow of information was impeded, and in doing so he recognized the significance of the news-gathering process.<sup>105</sup> He wrote: "[t]he right to gather news implies, in turn, a right to a confidential relationship between a reporter and his source."<sup>106</sup> In doing so he focused on the relationship between reporter and source as being critical, something later picked up by both European and international criminal jurisprudence as subsequently noted.<sup>107</sup> The focus was not on the motives of the source, but on the relationship in the context of the flow of information and the media's constitutional role in this dimension.<sup>108</sup> Justice Stewart also argued, as have others, that the majority's position would lead to self-censorship and send the wrong signal to future whistleblowers.<sup>109</sup> The conflicting need for evidence before grand juries was not absolute as illustrated by other common law evidentiary privileges and the Fourth and Fifth Amendments.<sup>110</sup> Rather what would be lost would be the free and open debate necessary to democracy and decision-making and recognized in cases such as the 1964 landmark U.S. Supreme Court First Amendment decision of *New York Times Co. v. Sullivan*.<sup>111</sup> Justice Stewart indicated that a qualified privilege would be better suited than the majority's apparent refusal, and proposed a three-

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<sup>102</sup> *Id.* at 709.

<sup>103</sup> *Id.* at 725 (Stewart, J., dissenting).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at 726–28.

<sup>106</sup> *Id.* at 728.

<sup>107</sup> *Id.* at 729–30.

<sup>108</sup> *Id.* at 726 n.1, 730.

<sup>109</sup> *Id.* at 731.

<sup>110</sup> *Id.* at 737.

<sup>111</sup> *Id.* at 738; *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

point alternative formulation which has been adopted in subsequent cases in lower courts which have recognized the privilege. The government must:

- (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternate means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.<sup>112</sup>

As discussed earlier, the legacy of *Branzburg* has been controversial with a divergence at the federal appellate court level in terms of how the decision has been interpreted in the context of the reporter's privilege.<sup>113</sup> The Supreme Court denied Miller and Cooper's petition for writ of certiorari,<sup>114</sup> and consequently in terms of the Miller case, the final appellate interpretation remains at the Court of Appeals for the District of Columbia Circuit. It seems clear that despite the need for the Supreme Court to revisit this case or for federal legislation to remedy its troubling outcomes, that the majority position in *Branzburg* refusing to recognize a reporter's privilege in the context of criminal grand jury investigations remains the law.<sup>115</sup>

This was certainly the position taken by the U.S. Court of Appeals for the District of Columbia Circuit in *Miller*.<sup>116</sup> Because of the similarity of *Miller* to the *Branzburg* facts, Judge Tatel

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<sup>112</sup> *Branzburg*, 408 U.S. at 743.

<sup>113</sup> For recent decision flatly rejecting the privilege in criminal cases, see *United States v. Smith*, 135 F.3d 963 (5th Cir. 1998). For decisions recognizing various degrees of qualified privilege, in addition to those discussed in this article, see, for example, *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000).

<sup>114</sup> *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *reh'g denied*, 405 F.3d 17 (2005), *cert. denied*, 125 S. Ct. 2977 (2005).

<sup>115</sup> See, e.g., *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669–670 (1991) (harmonizing *Branzburg* with a “well-established line of decisions” holding that the press has no special immunity from the application of general laws); *Miller*, 397 F.3d at 970 (“The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter.”).

<sup>116</sup> *Miller*, 397 F.3d 964.

concurrent in the majority decision, while indicating that there might be some scope for future elaboration of the reporter's privilege from a common law foundation.<sup>117</sup> Tatel further recognized the tension underlying *Miller* and the unsatisfactory nature of the law at present, recognizing from the beginning that, "[t]his case involves a clash between two truth-seeking institutions: the grand jury and the press."<sup>118</sup> Tatel was also prepared to find *Branzburg* "more ambiguous than do my colleagues."<sup>119</sup> He concurred with the majority but made it clear that the context for consideration of the privilege had changed since *Branzburg*, continuing: "I believe that the consensus of forty-nine states plus the District of Columbia—and even the Department of Justice—would require us to protect reporters' sources as a matter of federal common law were the leak at issue either less harmful or more newsworthy."<sup>120</sup>

Judge Tatel's concurring opinion in fact appears to revive the ambiguity with which Justice Powell's involvement in the *Branzburg* majority has been interpreted. Though *Branzburg* is presently settled law, *Miller* seems to indicate that it may be time for the Supreme Court to reconsider *Branzburg* with a future case whose facts are more deserving of the heroic paradigm of the journalist as a public watchdog, especially so outside of the context of criminal investigations and national security concerns.<sup>121</sup> There is much in Judge Tatel's opinion to spark future challenges as he stated ominously, "I am uncertain that *Branzburg* offers 'no support' for a constitutional reporter privilege in the grand jury context."<sup>122</sup>

However, in the subsequent case of *Lee v. Dep't of Justice*,<sup>123</sup> which concerned a Chinese-American scientist accused of espionage involving the transfer of nuclear weapons information to

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<sup>117</sup> *Id.* at 986–87.

<sup>118</sup> *Id.* at 986.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 986–87.

<sup>121</sup> *Id.* at 994.

<sup>122</sup> *Id.* at 987.

<sup>123</sup> 413 F.3d 53 (D.C. Cir. 2005), *reh'g denied*, 428 F.3d 299 (2005). *But see Lee*, 428 F.3d 299 (Tatel, J., dissenting) (arguing for a public importance requirement to be attached to the *Zerilli* test).

China while working at the Los Alamos National Laboratory, the courts have kept to their tough approach to the recent claims of journalists regarding their anonymous sources.<sup>124</sup> The Supreme Court has yet again denied a petition for writ of certiorari, leaving *Branzburg* intact.<sup>125</sup> In *Lee*, the scientist had, having agreed to a plea deal for the lesser charge of mishandling classified information, initiated a privacy case against federal agencies, and sought discovery orders against reporters to determine whether information about him had been aggressively leaked to the press during the investigation by senior government officials such as the then Secretary of State for Energy, Bill Richardson.<sup>126</sup>

A district court had held five journalists in contempt for refusing to disclose their anonymous sources to Lee.<sup>127</sup> The Court of Appeals for the District of Columbia upheld the contempt orders for all appellants save for one, Jeff Gerth, where the court found there was insufficient evidence.<sup>128</sup> Judge Sentelle gave the opinion for the Court and focused on a two-prong test for overcoming the privilege in such a civil action (in contrast to *Miller*), set out in the earlier case of *Zerilli v. Smith*.<sup>129</sup> According to the court's interpretation of this test, two conditions must be satisfied to determine::

[w]hen a plaintiff may compel a non-party journalist to testify to the identity of his confidential sources. First, the information sought must go to “the heart of the matter” and not be merely marginally relevant. . . . Second, the plaintiff must have exhausted “every reasonable alternative source of information” so that journalists are not simply a default source of information for plaintiffs.<sup>130</sup>

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<sup>124</sup> *Lee*, 413 F.3d at 64.

<sup>125</sup> *See Recent Case: Evidence—Journalist Privilege—District of Columbia Holds that Privacy Act Satisfies Two-Prong Test To Overcome Journalist Privilege to Conceal Confidential Sources*, *Lee v. Department of Justice*, 413 F. 3d 53 (D.C. Cir. 2005), 119 HARV. L. REV. 1923, 1930 (2006).

<sup>126</sup> *See Lee*, 413 F.3d at 62.

<sup>127</sup> *Id.* at 55.

<sup>128</sup> *Id.*

<sup>129</sup> 656 F.2d 705 (D.C. Cir. 1981).

<sup>130</sup> *Lee*, 413 F.3d at 57.

Given the exhaustive and unsuccessful discovery efforts Lee employed with regard to the government agencies, the District Court had found these elements to be satisfied. Judge Sentelle emphasized that the Supreme Court in *Branzburg* had “flatly rejected the existence of any such constitutional privilege”<sup>131</sup> with regard to the First Amendment, and here the court refused to enter into the controversy over the nature of a federal common law privilege.<sup>132</sup> Having found that any such privilege would be qualified in any event, the court emphasized that the context for the source protection and the behavior of the media would be significant elements in any determination. Again the court seemed to be saying that the privilege would have to fit a heroic paradigm of the media performing a watchdog role.<sup>133</sup> This was contrasted with “a civil action such as this one, where testimony of journalists is sought because government officials have been accused of illegally providing the journalists with private information.”<sup>134</sup> Here, too Judge Sentelle emphasized that:

this case does not involve a claim of “forbidden intrusion on the field of free expression.” There is no suggestion that the court or any branch of government in any fashion attempted to interfere with or now attempts to interfere with the Appellant journalists’ right to print or communicate anything they choose.<sup>135</sup>

In other words, these facts did not fit the classic First Amendment territory of a case such as *New York Times v. Sullivan*.<sup>136</sup> Further, this reveals a narrow view of the rationale for the protection, neglecting to emphasize the systemic importance of source protection as an ongoing modus operandi for the media.<sup>137</sup> The court concluded that the *Zerilli* test had been met and deferred to the judgment of the lower courts.<sup>138</sup>

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 57 n.2.

<sup>133</sup> *See id.* at 59–60.

<sup>134</sup> *Id.* at 59.

<sup>135</sup> *Id.* at 58.

<sup>136</sup> *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>137</sup> *Lee v. Dep’t of Justice*, 413 F.3d 53, 60–61 (D.C. Cir. 2005).

<sup>138</sup> *Id.*

Another recent decision involving Judith Miller and the New York Times continues in this hardening approach towards the media and their anonymous sources in the courts.<sup>139</sup> The case involved attempts by the United States government to subpoena the phone records of New York Times reporters, including Judith Miller.<sup>140</sup> Such records were sought during an investigation of an alleged disclosure of information concerning raids and asset freezing in relation to organizations suspected of raising finances for and supporting terrorism in the aftermath of the September 11th attacks.<sup>141</sup> The reporters concerned refused to cooperate with a grand jury investigation and the government sought the records from the phone companies.<sup>142</sup>

The New York Times sought a declaratory judgment that the records were protected by the reporter's privilege derived from both the common law and First Amendment. The District Court judge at first instance granted this motion on the grounds of both a common law and First Amendment qualified privilege and the failure of the government to overcome such a privilege. Judge Winter, for the majority in the Court of Appeals for the Second Circuit, overturned this decision on the basis of *Branzburg* as concerns the First Amendment claim, and on the facts involving threats to national security in relation to any common law privilege. Having dismissed the First Amendment claim, Judge Winter would not decide whether in fact a common law privilege existed at all "because any such privilege would be overcome as a matter of law on the present facts."<sup>143</sup> In a strongly worded opinion, Judge Winter points to the fact that the evidence from the media is critical to the grand jury investigation, regarding "disclosures of upcoming asset freezes/searches and informing the

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<sup>139</sup> *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006); see also *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), along with the commentary on the post-*Branzburg* jurisprudence in Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, 1 J. INT'L MEDIA & ENT. L. 1, 18–21 (2006).

<sup>140</sup> *N.Y. Times v. Gonzales*, 459 F.3d at 162.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 163.

targets of them”<sup>144</sup> and that there is a “compelling governmental interest in the investigation.”<sup>145</sup> Again, the courts seem to be saying that to qualify for First Amendment or common law protection, the media’s activity has to fit the parameters of traditional notions of a watchdog ideal. Context is the key to any protection and the vision of the role the media should be playing, as against the one it played here, is clear in the following passage:

We see no danger to a free press in so holding. Learning of imminent law enforcement asset freezes/searches and informing targets of them is not an activity essential, or even common, to journalism. Where such reporting involves the uncovering of government corruption or misconduct in the use of investigative powers, courts can easily find appropriate means of protecting the journalists involved and their sources.<sup>146</sup>

The message from the court is that the privilege is to protect the media from “[o]fficial harassment” but not to protect the press when it is linked to potential criminal activity,<sup>147</sup> especially where there are national security implications. In an important corrective opinion, the dissenting Judge Sack reflects on the implications of disclosure of telephone records for the profession of journalism, and disagrees with the majority’s narrow reading of *Branzburg*.<sup>148</sup> Further, the dissenting opinion joins in the approach of Judge Tatel in *In re Grand Jury Subpoena, Judith Miller*.<sup>149</sup> For Judge Sack there is “no doubt that there has been developed . . . federal common-law protection for journalists’ sources . . .”<sup>150</sup> Judge Sack writes of the privilege, “[i]t is palpable; it is ubiquitous; it is widely relied upon; it is an integral part of the way in which the American public is kept informed and therefore of the American democratic process.”<sup>151</sup>

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<sup>144</sup> *Id.* at 171.

<sup>145</sup> *Id.* at 171.

<sup>146</sup> *Id.* at 171–72.

<sup>147</sup> *Id.* at 172; *see also*, *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

<sup>148</sup> *N.Y. Times v. Gonzales*, 459 F.3d at 178 (Sack, J., dissenting).

<sup>149</sup> *See* 397 F.3d 964 (D.C. 2005).

<sup>150</sup> *N.Y. Times v. Gonzales*, 459 F.3d at 181.

<sup>151</sup> *Id.*

In doing so, the dissent also makes reference to international practice in the protection of confidential sources and the case of *Goodwin*.<sup>152</sup> The dissent also argues that leaks, though damaging in certain contexts, play an important role in combating corruption and in improving the functioning of government.<sup>153</sup> In matters of secrecy, the government, the public and the press necessarily operate in “healthy adversarial tension,”<sup>154</sup> befitting a conflict model of press and government relations.<sup>155</sup> This is an important opinion, but in the recent cases discussed the tide appears to have turned against such a protective view of the legal rights of the media.<sup>156</sup>

Despite the strength of protection for speech offered by the United States Constitution’s First Amendment and the highly developed protections for the media in other contexts, the confused approach presently taken at a Supreme Court level, and the toughening stance towards the protection of journalistic sources being taken in recent United States appellate decisions, contrasts with the European human rights jurisprudence which has emerged following consideration of the role and function of the media in democracy in the context of Article 10.<sup>157</sup> I now turn to discuss both the European framework and the leading case of *Goodwin* to amplify this contrast.

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<sup>152</sup> *Id.* at 181 n.9.

<sup>153</sup> *Id.* at 183.

<sup>154</sup> *Id.* at 184.

<sup>155</sup> *Id.*

<sup>156</sup> *See, e.g.,* Lee v. Dep’t of Justice, 413 F.3d 53 (D.C. Cir. 2005).

<sup>157</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, 4 Nov. 1950), 312 E.T.S. 5, as amended by Protocol No. 3, E.T.S. 45; Protocol No. 5, E.T.S. 55; Protocol No. 8, E.T.S. 118; and Protocol No. 11, E.T.S. 155; entered into force 3 Sept. 1953 (Protocol No. 3 on 21 Sept. 1970, Protocol No. 5 on 20 Dec. 1971, Protocol No. 8 on 1 Jan. 1990, Protocol 11 on 11 Jan. 1998), available at <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf> (last visited Jan. 18, 2006).

IV. THE EUROPEAN HUMAN RIGHTS PERSPECTIVE:  
THE GOODWIN CASE

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter 'ECHR') is presently the most successful and established of regional human rights frameworks, and provides a detailed right to freedom of expression in its Article 10 which has been the subject of a good deal of litigation and comment. Article 10 and its interpretation is of increasing significance for member states of the Council of Europe who are required to conform with the European Court of Human Rights jurisprudence at the domestic level. Article 10 is formulated as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>158</sup>

Article 10 of the ECHR focuses on opinion, information, ideas and political processes, but also envisages state regulatory and licensing regimes.

A number of recent cases before the European Court in Strasbourg have dealt with freedom of expression and the role of

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<sup>158</sup> *Id.*

the media.<sup>159</sup> The European case of *Goodwin v. United Kingdom*<sup>160</sup> involved the United Kingdom's contempt laws, and for our purposes offers an illustration of the court's approach to the reporter's privilege from the perspective of Article 10.<sup>161</sup> A journalist received confidential and potentially damaging financial information from an unsolicited source relating to a major company's corporate plan.<sup>162</sup> It turned out, subsequently, that the file had been stolen, and a judge ordered the publishers to disclose information regarding the source.<sup>163</sup> The European Court felt that there had been an interference with the right to freedom of expression, but examined whether this had been justified.<sup>164</sup> Following its approach in earlier cases the Court highlighted the centrality of the right and the particular importance of media safeguards such as the protection of journalistic sources in the context of press freedom and democracy.<sup>165</sup> In a very strong statement the ECtHR emphasized the vital role of the media: "Without such protection . . . the vital public-watchdog role of the press may be undermined and the ability of the press to provide accurate and reliable information may be adversely affected."<sup>166</sup>

They then applied the necessity and proportionality tests from the landmark *Sunday Times* case,<sup>167</sup> noting that the member state's margin of appreciation is "circumscribed by the interest of democratic society in ensuring and maintaining a free press."<sup>168</sup> In finding that Article 10 had been violated, the Court found in this case that the company's interests were outweighed by the broader public interest in a free press.<sup>169</sup> Again there was a strong dissent,

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<sup>159</sup> See, e.g., Jon Gauslaa, *European Court Takes Action*, BELLONA, Sept. 30, 2005, [http://www.bellona.org/english\\_import\\_area/international/russia/envirorights/pasko/40027](http://www.bellona.org/english_import_area/international/russia/envirorights/pasko/40027).

<sup>160</sup> *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 484, available at <http://worldii.org/eu/cases/ECHR/1996/16.html> (last visited Jan. 14, 2007).

<sup>161</sup> See *id.*

<sup>162</sup> *Id.* § 11.

<sup>163</sup> *Id.* § 15.

<sup>164</sup> See *id.* §§ 23, 39.

<sup>165</sup> *Id.* § 39.

<sup>166</sup> *Id.*

<sup>167</sup> *Sunday Times v. United Kingdom*, 30 Eur. Ct. H.R. (ser. A) (1979).

<sup>168</sup> *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 484, § 40, available at <http://worldii.org/eu/cases/ECHR/1996/16.html> (last visited Jan. 14, 2007).

<sup>169</sup> *Id.*

but this is a generous interpretation of the right to freedom of expression in the context of the media, and an illustration of the European Court's protection of the media's functional role within democracy as well as the special protection it deems necessary for journalistic sources within this arrangement.

Though the outcome in *Goodwin* is more comfortable for the media as a profession than the recent *Miller*, *Lee* and *Gonzales* cases discussed above, the ECtHR also relies on a vision of a noble media as public watchdog in its reasoning.<sup>170</sup> The vision of a 'worthy' media that emerges is again one of the press as involved in exposing corruption rather than linked to it.<sup>171</sup> The difference in part is to be found in the ECtHR's location of the protection within the parameters of Article 10.<sup>172</sup> By contrast, the recent United States decisions appear to minimize the First Amendment's role and are ambiguous on the availability of the privilege at the common law.<sup>173</sup> Further, the majority judgment in *Goodwin* makes the important point that the systemic value of anonymous sources and the ongoing relationships between reporters and their sources are what need to be protected.<sup>174</sup> All such relationships, and consequently the critical news-gathering and investigative reporting reliant upon them, are thus put at risk from approaching these cases on the basis only of whether the particular ad hoc facts fit a heroic or corrupt vision of the media.<sup>175</sup> As the Court recognizes, "[a] source may provide information of little value one day and of great value the next; what mattered was that the relationship between the journalist and the source was generating the kind of information which had legitimate news potential."<sup>176</sup>

Thus, a key difference in the jurisprudence is that the European Court has recognized the systemic importance of the protection of sources to the media and the "chilling effect" of intruding upon the

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<sup>170</sup> See *id.* § 39.

<sup>171</sup> *Id.*

<sup>172</sup> See *supra* notes 157–169 and accompanying text.

<sup>173</sup> See the recent opinion of Judge Walton of the District Court for the District of Columbia in *United States v. Libby*, 432 F. Supp. 2d 26 (D.D.C. 2006).

<sup>174</sup> *Goodwin v. United Kingdom*, 1996-II Eur. Ct. H.R. 484, § 37, available at <http://worldii.org/eu/cases/ECHR/1996/16.html> (last visited Jan. 14, 2007).

<sup>175</sup> See *id.*

<sup>176</sup> *Id.*

relationship between reporter and source.<sup>177</sup> The European Court grounded the protection of sources firmly within the sphere of freedom of expression, worthy of the highest 'constitutional' protection.<sup>178</sup> In this vein the majority declares, "[p]rotection of journalistic sources is one of the basic conditions for press freedom. . ."<sup>179</sup>

There is also an emerging policy and soft law framework at the European level within which the reporter's privilege might further develop, following *Goodwin*. This is best illustrated by a ministerial recommendation within the Council of Europe on the right of journalists not to disclose their sources of information.<sup>180</sup> However, lest it be thought that *Goodwin* was the final chapter in this issue for Europe, there are ongoing tensions regarding the reception of the European jurisprudence in domestic systems.<sup>181</sup> In 2005 the European Commission won a legal battle to obtain a German journalist's notes, address books, copies of hard disks and e-mail records, following the reporter's Brussels-based investigative reporting concerning alleged corruption in the Commission's statistical office.<sup>182</sup> There was at the time concern that this might reveal the identity of his sources and the reporter, Hans Martin Tillack, indicated that he might have to seek relief with the ECHR.<sup>183</sup> The difficulty in such a case is that his claim lay against the EU which itself is not a party to the European human rights court.<sup>184</sup> Any such action would likely have to be mounted against Belgium, which is bound by, and a party to, the ECHR. Thus, the case also highlighted issues of systemic

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<sup>177</sup> *Id.* § 39.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> See also Council of Europe, Committee of Ministers, Recommendation No. R (2000) 7, "Of the Committee of Ministers to Member States On the Right of Journalists Not to Disclose Their Sources of Information," Adopted by the Committee of Ministers on March 8, 2000, at the 701st meeting of the Ministers' Deputies, principles 1-7.

<sup>181</sup> See Julia Day, *Brussels Reporter Loses Battle To Protect Sources*, GUARDIAN, Apr. 22, 2005, available at <http://www.spinwatch.org/content/view/1049/9/>.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> For a discussion of the European human rights system, see Human Rights Education Associates, *European Human Rights System*, at <http://www.hrea.org/learn/guides/europe.html#EU> (last visited Jan. 18, 2007).

integration regarding European institutions, courts and tribunals, echoes of which can be seen in the confusion of approaches in contemporary appellate jurisprudence in the United States.<sup>185</sup>

#### V. THE INTERNATIONAL CRIMINAL LAW DIMENSION: THE RANDAL CASE

The approach of the International Criminal Tribunal for the former Yugoslavia to the role of war correspondents in international criminal justice as witnesses,<sup>186</sup> has some continuity with the European human rights jurisprudence examined above and in particular with the representations of the role of the media and concerns that this role might be threatened by an overt witnessing function in international trials. The *Randal* decision has, however, been criticized for limiting protection to “war correspondents” only and thereby creating different standards within the profession and failing to apply the more universal analysis developed in human rights cases such as *Goodwin* to all journalists.<sup>187</sup>

Journalists themselves have been divided over the issue of whether they should take a direct role in international criminal trials by giving evidence for the prosecution. This is especially controversial when giving evidence may compromise their function or relationship with sources and future sources. Some have done so voluntarily, but others see the danger of such a role as compromising their independence and objectivity, as hampering their public function via a consequent loss of trust, and even as leading to their being further targeted by combatants in conflict zones.<sup>188</sup>

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<sup>185</sup> *See id.*

<sup>186</sup> *See also* Steven Powles, *To Testify or Not to Testify—Privilege from Testimony at the Ad Hoc Tribunals: The Randal Decision*, 16 LEIDEN J. INT’L LAW 511 (2003); Anastasia Heeger, *Securing a Journalist’s Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT’L L.J. 209 (2005).

<sup>187</sup> Nina Kraut, *A Critical Analysis of One Aspect of Randal in Light of International, European, and American Human Rights Conventions and Case Law*, 35 COLUM. HUM. RTS L. REV. 337, 339 (2004).

<sup>188</sup> *See* DENISE LEITH, BEARING WITNESS: THE LIVES OF WAR CORRESPONDENTS AND PHOTOJOURNALISTS (Random House 2004).

These issues arose for the first time in an international legal context in the *Brdjanin and Talic* case at the ICTY.<sup>189</sup> This case highlighted the role of war correspondents as evidence gatherers in international criminal law, and the threat this poses to their work.<sup>190</sup> Jonathan Randal, now a retired correspondent for the Washington Post had interviewed Brdjanin, one of the accused, with the assistance of an interpreter. An article appeared in 1993. The article included several quotes attributed to the accused. The prosecution sought to have the article admitted into evidence to help prove intent on the part of Brdjanin. The defense objected, disputing the accuracy of the quotes and representations in the article, and requiring Randal to be called and cross-examined if the article were tendered. The Trial Chamber refused to recognize “a testimonial privilege for journalists when no issue of protecting confidential sources was involved.”<sup>191</sup> The subpoena was upheld and the article found to be admissible.<sup>192</sup> This was appealed and an amicus brief was filed by a consortium of media companies and journalist associations.<sup>193</sup>

Both the Trial and Appeal Chambers of the ICTY recognized the “vital role” conflict journalists “play . . . in bringing to the attention of the international community the horrors and realities of the conflict. . . .”<sup>194</sup> Nevertheless, the Trial Chamber took the view that due process was of greater importance than the protection of the media, especially as it discerned that the jurisprudence in human rights (which arguably pointed to a strong presumption to protect the media’s public function) was aimed more at cases where journalists were attempting to protect the confidentiality of their sources (and thus the relationship between reporter and source).<sup>195</sup> The Trial Chamber felt that the test should be whether the evidence would be “pertinent”<sup>196</sup> to the case, a

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<sup>189</sup> Prosecutor v. Brdjanin, Decision on Interlocutory Appeal, Case No. IT-99-36-AR3.9, Decision on Interlocutory Appeal (Dec. 11, 2002).

<sup>190</sup> *Id.* § 2.

<sup>191</sup> *Id.* § 5.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* § 7.

<sup>194</sup> *Id.* § 8.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* § 9.

low threshold. Randal raised a number of arguments, including reliance on European human rights cases earlier discussed, such as *Goodwin*.<sup>197</sup> He argued for a qualified testimonial privilege for war correspondents, and that any subpoena should only be issued as a last resort.<sup>198</sup>

The Appeals Chamber, by contrast, took quite a vigorous position in protecting the role of war correspondents, discussing their role in the context of the international community's right to receive "vital information from war zones . . ."<sup>199</sup> The Appeals Chamber asserted that the news-gathering function of the media must be protected, that human rights jurisprudence and standards went further than the protection of confidential sources, but went to the heart of the media's institutional role and capacity to function.<sup>200</sup> The Chamber stated: "[w]hat really matters is the perception that war correspondents can be forced to become witnesses against their interviewees."<sup>201</sup> This again cuts to the heart of the relationship between reporter and source. The dilemma was configured as a balancing exercise between the public interest in accommodating the work of conflict journalists and the public interest in the courts having all relevant evidence in such cases.<sup>202</sup> The Appeals Chamber formulated a middle way test and sent the matter back to the Trial Chamber. The two-pronged test, which has some continuity with the dissenting Justice Stewart's three-pronged formulation in *Branzburg*, aims to minimize the need to call journalists in such cases (which so far appears to have been successful) and involves the following, "[f]irst, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere."<sup>203</sup>

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<sup>197</sup> *Id.* § 13.

<sup>198</sup> *Id.* § 14.

<sup>199</sup> *Id.* § 38.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* § 43, *cf. id.* § 44.

<sup>202</sup> *Id.* § 43.

<sup>203</sup> *Id.* § 50.

While some journalists have opted to give evidence in international criminal trials, they remain in the minority. In general the media continue to claim this qualified privilege, and there have been arguments made for further reform of this area in the practice of the International Criminal Court and in the Rome Statute itself, to give certainty in what remains a rapidly developing field.<sup>204</sup>

## VI. CONCLUSION

The case of Judith Miller is now both murkier and clearer than was first thought, and its precedential value also remains uncertain. The case does not conform to broader heroic narratives of the role of the journalist in American public life, yet its significance lies in highlighting the competing visions of the media's power and role emerging in the post-Watergate era. It reveals at one level the historical and political contexts which are crucial to the development of legal protections for the media and to related ideas about the First Amendment. It also highlights the ways in which we are torn between what we want journalism to be and how we expect the courts to have a role in articulating this role for the media.

On the one hand there is a vision of the media as a democratic watchdog that has emerged in traditional First Amendment jurisprudence<sup>205</sup> and which has been picked up in different legal contexts at the regional European level and in the work of international courts and tribunals, themselves increasingly faced with questions regarding media power, its benefits and its dangers. This comparative backdrop reveals different and competing visions

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<sup>204</sup> Anastasia Heeger, *Securing a Journalist's Testimonial Privilege in the International Criminal Court*, 6 SAN DIEGO INT'L L.J. 209 (2005).

<sup>205</sup> Note, however, that Kyu Ho Youm has recently argued provocatively that despite the successful U.S. export of the notion of the watchdog internationally, the U.S. courts themselves have in recent times refused to recognize institutional protections for the news media. He writes that the watchdog and free flow of information concepts have been given "little more than perfunctory attention" in recent decisions regarding the privilege and even in the *Branzburg* case itself. Kyu Ho Youm, *International and Comparative Law on the Journalist's Privilege: The Randal Case as a Lesson for the American Press*, 1 J. INT'L MEDIA & ENT. L. 1, 53-54 (2006).

emerging in international and local contexts for the role of the media in political life.<sup>206</sup>

On the other hand there is a vision of the media as a threat to democracy and distorting influence on the democratic public sphere. As so much of social and political life is mediated, we both desire and fear a powerful press and are confused as to the role it might play in our lives. This has caused confusion in the courts and in the media, and has revealed at times a press not seen as living up to its lofty ideals, and a court system which both trumpets media freedom and free speech, yet is quick to quash such freedom when it threatens the administration of justice or national security.

*Miller* reveals both the importance of the media in American life, but also a shift away from a heroic image of the press in recent times. It also reveals the ambivalence now felt by many about the media, and the law's toughening stance. Ultimately we are caught between a vision of the media as watchdog and our suspicion that in certain cases the dog has jumped the fence and may now need watching itself. Similar concerns are attached to public understandings of judicial power and it is no surprise that the courts have had difficulty with the role of watching the watchdogs.

The cases discussed in this essay also reveal differences in approaches to the protection of sources depending upon the context, jurisdiction and specific facts. The trend away from protection in the United States is particularly strong as regards criminal law cases involving grand juries such as *Branzburg* and *Miller*, or in a case like *Gonzales* with its national security implications. However, the recent civil case of *Lee* appears to be following in this direction too. *Goodwin*, by contrast was a civil case with facts that related to commercial confidence and did not involve a Judith Miller style scenario. While finding a violation of Article 10, the European court did not object to the prior restraint of Goodwin's article, a matter which tempers some of the gloss of *Goodwin*. Perhaps different facts may have yielded a different result, though now the case's broad protection for journalistic sources seems well entrenched in the European jurisprudence. As

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<sup>206</sup> See *id.*

noted, this has not prevented continuing attempts to subpoena journalists. Lastly, the international criminal case of *Randal* also saw the ICTY dealing with a less problematic set of facts than in *Branzburg* or *Miller*. Different facts might have threatened the finding as to the privilege, especially if such facts involved say Randal having exculpatory evidence which he refused to divulge. As such it was relatively uncontroversial for the court to find a privilege and it limited such a privilege to the heroic ideal at its highest, the conflict journalist.<sup>207</sup>

There is at present confusion in the cases in the United States federal context as competing visions of the media and of *Branzburg*'s legacy have emerged. If the Supreme Court is to revisit *Branzburg*, it will need to consider closely the political and historical forces which underscore the competing visions of the journalist in American life. In so doing the court will have to come to terms with our complex and often contradictory desires for and fears of media power and spectacle in a post-Watergate era. It may also be useful to consider comparative approaches to the protection of journalistic sources at the European and international level.

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<sup>207</sup> I am grateful to Professor Richard N. Winfield for helping to clarify these distinctions.