

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ARMED FORCES

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In re CBS BROADCASTING INC., )	)	)
) Petitioner. )	)	)
_____ )	)	)
CBS BROADCASTING INC., )	)	BRIEF ON BEHALF OF
) Petitioner, )	)	<i>AMICI CURIAE</i>
) v. )	)	NEWS MEDIA ORGANIZATIONS
) )	)	IN SUPPORT OF PETITIONER
) )	)	CBS BROADCASTING INC.
) )	)	)
UNITED STATES NAVY-MARINE )	)	)
CORPS COURT OF CRIMINAL )	)	)
APPEALS, UNITED STATES, and )	)	NMCCA No. 200800183
FRANK D. WUTERICH, Staff )	)	)
Sergeant, E-6, U.S. Marine )	)	USCA Misc. Dkt. No. 08-8020
Corps, )	)	)
) Respondents. )	)	)
_____ )	)	)

BRIEF OF *AMICI CURIAE* ABC, INC., ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, CABLE NEWS NETWORK, INC., THE E. W. SCRIPPS COMPANY, GANNETT CO., INC., HEARST CORPORATION, THE NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL PUBLIC RADIO, INC., NBC UNIVERSAL, INC., NEWSWEEK, INC., THE ONLINE NEWS ASSOCIATION, PROPUBLICA, THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, REPORTERS WITHOUT BORDERS, TRIBUNE COMPANY AND THE WASHINGTON POST IN SUPPORT OF PETITIONER CBS BROADCASTING INC.

US COURT OF APPEALS  
FOR THE ARMED FORCES

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UNITED STATES NAVY-MARINE )  
CORPS COURT OF CRIMINAL )  
APPEALS, UNITED STATES, and )  
FRANK D. WUTERICH, Staff )  
Sergeant, E-6, U.S. Marine )  
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BRIEF ON BEHALF OF  
AMICI CURIAE  
NEWS MEDIA ORGANIZATIONS  
IN SUPPORT OF PETITIONER  
CBS BROADCASTING INC.

NMCCA No. 200800183  
USCA Misc. Dkt. No. 08-8020

TO THE HONORABLE, THE JUDGES OF THE UNITED STATES COURT OF  
APPEALS FOR THE ARMED FORCES

ISSUE PRESENTED

Whether the Navy-Marine Corps Court of Criminal Appeals erred in concluding that the military judge abused his discretion by declining to conduct *in camera* review of unpublished newsgathering materials.

INTEREST OF THE AMICI CURIAE



The *amici curiae* are news media and supporting organizations that research, gather, produce, and distribute news via print, radio, broadcast television, cable television, the internet, and other distribution channels.<sup>1</sup> To produce the finished news product, the *amici* must generate and rely on large amounts of newsgathering material. This material includes videotapes, audiotapes, handwritten notes, photographs, and many other materials. Compelled disclosure of these materials is an intrusive interference with the operation of a vigorous press, and the excessive entanglement between journalists and the Government that it creates threatens the ability of journalists to do their jobs. Even compelled disclosure to judges for *in camera* review can frustrate the journalistic endeavor.

The *amici* believe that the standard the Court of Criminal Appeals applied for mandating *in camera* review of newsgathering materials is deeply flawed and undermines their important journalistic interests. The *amici* therefore respectfully suggest that this Court should require a substantial threshold showing before a military judge reviews *in camera* newsgathering materials.

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<sup>1</sup> A complete list of the *amici* is set out in Appendix A to this brief.

## STATEMENT OF FACTS

On November 19, 2005, Respondent Staff Sergeant Wuterich and a group of Marines killed twenty-four Iraqi civilians near Haditha, Iraq. Wuterich contends that the Marines' actions were justified. The Government contends that they were not, and it has charged Wuterich with dereliction of duty and voluntary manslaughter. See *United States v. Wuterich*, 66 M.J. 685, 686 (N-M. Ct. Crim. App. 2008). The amici take no position on the merits of the criminal charges at issue in this case.

In response to the events at Haditha, the military conducted an extensive investigation. Tr. 87-88. Military investigators collected forensic evidence from the scene, and they analyzed that evidence thoroughly. *Id.* at 87. They also interviewed Wuterich and the other Marines involved in the incident at length, and during those interviews, they had the opportunity to ask all of the Marines any questions to which they wanted answers. *Id.*

The war in Iraq is among the most controversial issues in American and world politics, and the killings of two dozen Iraqi civilians by United States Marines raised important questions about the United States's conduct of the war. Therefore, unsurprisingly, the killings at Haditha generated intense public interest and news media

coverage. CBS Broadcasting Inc. ("CBS") investigated these events, and as part of the investigation, CBS News Correspondent Scott Pelley interviewed Wuterich for several hours. *Id.* at 27. Pelley and other CBS employees selected the newsworthy parts of the interview and produced a twenty-six minute segment that aired on the *60 Minutes* program on March 18, 2007.

Even though its own investigators had interviewed Wuterich, and even though it had had an opportunity to ask him anything it wanted to know, the Government subpoenaed "any and all video and/or audio tape(s), to include out-takes and raw footage" of Wuterich's interview with Pelley. *Wuterich*, 66 M.J. at 686. CBS provided the Government with the twenty-six minute segment it had broadcast on *60 Minutes*, but it claimed a newsgathering privilege over the material that it had decided not to broadcast. *Id.* (This material has been described as the "out-takes.") CBS therefore moved to quash the subpoena. *Id.*

Lt. Col. Jeffrey Meeks, the military judge presiding over the court-martial, granted the motion to quash. Tr. 88. He first held that the contents of the finished *60 Minutes* program – the statements that were broadcast – were "clearly relevant" because they contained "statements of the accused concerning his involvement in

the charged offenses." *Id.* He nevertheless reserved judgment on whether they were necessary to the Government's case and thus whether they would be admitted into evidence. *Id.*

As to the materials that CBS decided not to include in the broadcast, Lt. Col. Meeks stated his concern that the subpoena "qualifies as a fishing expedition." *Id.* He then held that the information in the out-takes would be cumulative of the extensive information the Government already possessed, and that "the requirement of necessity has not been met." *Id.* He also stated that, if it were necessary to reach the issue, he would find that the out-takes were protected by a qualified First Amendment reporter's privilege and that the Government had failed to show that the privilege should be breached. *Id.* He noted that his conclusion that the out-takes were privileged was "dicta" and that he was not reaching the issue. *Id.*

The Government filed an interlocutory appeal, and the United States Navy-Marine Corps Court of Criminal Appeals vacated Lt. Col. Meeks's ruling. *See Wuterich*, 66 M.J. at 692. The court rejected as "arbitrary" the military judge's ruling that the out-takes were not necessary. *Id.* at 690. The court held that CBS must produce its newsgathering materials to the military judge,

and that the military judge must engage in *in camera* review of the newsgathering tapes. *Id.* at 691-92.

The court stated that, despite the military judge's explicit conclusion to the contrary, the military judge's findings with respect to the material that was broadcast "provides a specific basis demonstrating a reasonable likelihood that the whole of the requested out-takes – the source of the broadcast footage – would also yield admissible evidence." *Id.* at 691. According to the Court of Criminal Appeals' assumption about the out-takes, "the aired *60 Minutes* excerpts would not be as focused and well-organized without the information discussed in the out-takes." *Id.* The court also maintained that the witness statements already in the Government's possession, which the military judge cited and relied upon, did not convey "the subjective knowledge, impressions, and thought processes" of Wuterich "at the time of the alleged offenses." *Id.* Similarly, according to the appellate court, Wuterich's written statements did not contain substantially the same information as the broadcast. *Id.*

Therefore, the court held, the military judge abused his discretion. *Id.* at 686. Based on these conclusions, the court ordered the military judge to

undertake an *in camera* review of the out-takes. *Id.* at 692.

#### SUMMARY OF ARGUMENT

Courts should order *in camera* review of newsgathering material, if at all, only in limited circumstances, and those circumstances are not present in this case. Newsgathering material is essential to the craft of journalism, as is the exercise of editorial judgment to communicate news to the public. Compelled disclosure of the newsgathering material underlying the finished journalistic product interferes with a news media organization's ability to cover the news.

Although *in camera* review is less onerous than compelled disclosure to litigants, it too interferes with the operation of a vigorous press, especially if the threshold for *in camera* review is too low. The threshold that the Court of Criminal Appeals adopted in this case is deeply flawed and threatens to create substantial problems for the *amici* news media organizations. This Court should adopt a higher threshold for *in camera* review and make clear that the military judge did not abuse his discretion in determining that the Government has not met that threshold in this case.

I. NEWSGATHERING MATERIAL IS ESSENTIAL TO JOURNALISM.

News media organizations are not simply passive conduits for the transmission of information. See *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) ("A newspaper is more than a passive receptacle or conduit for news, comment, and advertising."). Rather, the craft of reporting the news is active and labor-intensive. It requires judgment, discretion, selection, and diligence. The journalistic enterprise often requires reporters to ferret out information that the subjects of the story would prefer went unreported. In the course of their labor, journalists generate an enormous amount of newsgathering material - handwritten notes, internet research trails, video and audio tapes of interviews, computer files, photographs, and countless other tools of the journalistic trade.

As the process unfolds, whether for a fast-breaking development or for a months-long investigation, journalists sift through their newsgathering material and assemble a story. The essence of telling the story is the exercise of editorial discretion. Which segments of the interview should be broadcast or published? Which perspective on the story should be presented first? Who should have the last word? Which of the stories assembled

should be broadcast? Is the story too long? What can be cut? The process continues until the story is ready to be printed, broadcast, posted, published, or distributed.

The newsgathering process, even for a story only a few paragraphs long or a news segment lasting only a few minutes, can last for months. For each paragraph of newspaper, magazine, or internet copy, or each minute of radio, television, or multimedia coverage, there may be hundreds of pages of interview notes or hours of videotape left on the editing room floor. News media organizations and reporters may retain these materials after a story is published or broadcast because the unused notes may trigger a follow-up story or suggest an entirely new line of investigation. But without an opportunity to follow the story where the newsgathering material leads, a journalist will be unable to produce news coverage consistent with the important role that the press should play in our society.

The cases addressing subpoenas for newsgathering material vividly illustrate how much newsgathering material may underlie even a short published news segment. For example, this Court has once before considered a subpoena for newsgathering material, and it refused to compel the news media organization to produce it. In that case, the story that was broadcast constituted only a short segment



on the *NBC Nightly News*. See *United States v. Rodriguez*, 60 M.J. 239, 244 (C.A.A.F. 2004). Yet that segment would not have been possible had a journalist not spent three months gathering videotape to support a story on networks of gun smugglers. *Id.* Likewise, in this case, Scott Pelley recorded "several hours" of videotaped footage of his interview with Staff Sergeant Wuterich. *Wuterich*, 66 M.J. at 686; Tr. 27. Through the exercise of the journalistic craft, Mr. Pelley and others reduced the hours of tape into a twenty-six minute segment that aired on *60 Minutes*. Had Mr. Pelley not had access to this extensive newsgathering material, it would have been impossible to report as much information in twenty-six minutes as he was able to do.

In short, newsgathering materials are essential to the journalistic craft.

## II. JUDICIALLY MANDATED PRODUCTION OF NEWSGATHERING MATERIAL THREATENS IMPORTANT INTERESTS.

This case presents the question of the standard for requiring *in camera* review of newsgathering materials. In order to address that issue, however, it is essential first to understand the threat presented by compelled disclosure to litigants of newsgathering materials.

Judicial enforcement of subpoenas by litigants for newsgathering information can threaten the ability of news media organizations to report the news.<sup>2</sup> Courts of appeals have identified at least four ways the compelled disclosure of newsgathering material can infringe on the news media's ability to gather and report information of public import:

the threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve nonbroadcast material; and the burden on journalists' time and resources in responding to subpoenas.

*Shoen v. Shoen*, 5 F.3d 1289, 1294-95 (9th Cir. 1993) (quoting *United States v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (internal quotation marks omitted)).

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<sup>2</sup> Although the recognition of a First Amendment newsgathering privilege is not before this Court at this time, the *amici* note that, in cases involving both civil and criminal matters, a majority of the federal courts of appeals and at least three military judges, including Lt. Col. Meeks, have recognized that newsgathering materials are protected by a qualified First Amendment privilege. See *Shoen v. Shoen*, 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) (collecting cases); Tr. 88; *United States v. Bennett*, U.S.M.C., Sierra Judicial Circuit, Apr. 6, 1999 (CBS Motion to Quash, Attach. 12, Tab 2); *United States v. Ashby*, U.S.M.C., Piedmont Judicial Circuit, Feb. 4, 1999 (CBS Motion to Quash, Attach. 13); see also Jaynie Randall, Comment, *Freeing Newsgathering from the Reporter's Privilege*, 114 Yale L.J. 1827 (2005).

Courts have refused to risk impeding the news by intruding into the exercise of editorial judgment. See, e.g., *Tornillo*, 418 U.S. at 258 ("The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials - whether fair or unfair - constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press . . . ."); see also *Brunette v. Humane Soc'y of Ventura County*, 294 F.3d 1205, 1214 (9th Cir. 2002) ("Newsgathering is the quintessential private activity, jealously guarded from impermissible government interference."). This intrusion into the editorial process is a "lurking and subtle threat to journalists and their employers." *LaRouche*, 841 F.2d at 1182.

The newsgathering process is also undermined when litigants seek to enlist the court's aid in appropriating the newsgathering work of journalists to their cause. Litigants often would prefer to limit or avoid the time and expense necessary to develop the facts necessary to make their case, especially when an experienced professional journalist has already done the legwork. Most courts have

not allowed litigants to take this discovery short-cut, and they have, on multiple grounds, refused to enforce subpoenas for newsgathering material. See *supra* note 2.

In addition to undermining the exercise of editorial discretion, compelled disclosure interferes with the gathering of sources. It is difficult enough for journalists to convince reluctant sources to submit to rigorous interviews; it is even more challenging when the sources doubt journalistic independence because they suspect that journalists may be investigative arms of the Government.

The concern that compelled disclosure may lead the Government and private parties to exploit a news outlet's investigative newsgathering is illustrated by the facts of this case. Here, the Government had ample opportunity to ask Staff Sergeant Wuterich anything it wanted to know, and it continues to have access to all of the Marines that served with him at Haditha. However, rather than rely on the questions it asked Staff Sergeant Wuterich, the Government now seeks to co-opt the work of CBS.<sup>3</sup>

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<sup>3</sup> Government access to newsgathering materials may lead to shoddy investigations. A government investigator who knows that he will have access to the work product of a

The other problems created by compelled disclosure of newsgathering material led the *Shoen* court to express concern that if "compelled disclosure becomes commonplace, it seems likely indeed that internal policies of destruction of materials may be devised and choices as to subject matter made, which could be keyed to avoiding disclosure requests or compliance therewith rather than to the basic function of providing news and comment." 5 F.3d at 1295. Such aggressive policies might prevent journalists from using their source material to report follow-up stories or to generate new leads. They might also interfere with the collaborative editing process common within many news media organizations. Although journalists take seriously their professional obligation to report the news, pressures such as those elucidated by the *Shoen* court may subtly influence the ways in which journalists and their editors choose to exercise editorial judgment.

**III. THESE IMPORTANT INTERESTS REQUIRE A SUBSTANTIAL THRESHOLD SHOWING TO OBTAIN *IN CAMERA* REVIEW.**

A low threshold for *in camera* review undermines and undervalues the press's important interests and

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professional journalist may be less thorough than he otherwise would be.

encourages additional subpoenas for newsgathering materials. It is therefore very important for this Court to adopt a standard that requires a substantial threshold showing before *in camera* review of newsgathering materials.

*In camera* review can impair the newsgathering function because it leads to court entanglement with the journalistic process. "[A] loss of confidentiality, even to the eyes of a judge alone, by itself impinges on constitutionally guaranteed press freedoms. News media files are private files, and when they are privileged an *in camera* inspection by a judge necessarily destroys that privileged status in at least some part." *State v. Rinaldo*, 673 P.2d 614, 621 (Wash. Ct. App. 1983). Here, the Court of Criminal Appeals has ordered that the military judge review several hours of videotape that journalists decided, in experienced professional judgment, not to air. By thrusting the Court into intensive review and evaluation of unpublished newsgathering material, *in camera* review constitutes a subtle form of judicial intrusion into the newsgathering process.

Regular resort to *in camera* review may also impose costs on news media organizations that can distort editorial choices. A news media organization that receives a subpoena must devote extensive time and resources to

determine what sort of response to the subpoena is justified and frequently will need to engage counsel to aid in that process. This determination requires an inquiry both into whether the subpoenaed information is relevant and necessary and into whether it is privileged. If the organization decides to contest the subpoena, these costs will grow. "[F]requency of subpoenas would not only preempt the otherwise productive time of journalists and other employees but measurably increase expenditures of legal fees." *Shoen*, 5 F.3d at 1295. These costs will increase further if a low threshold requires courts to conduct *in camera* review of the material, and further still if the appellate review standard encourages litigants to contest a military judge's determination that *in camera* review is unnecessary.<sup>4</sup>

The costs of contesting subpoenas are especially problematic because they are unlikely to fall evenly on all types of newsgathering activities. The reporter who covered the story at issue in this case declared that, if

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<sup>4</sup> Although the *amici* do not address the details of the appellate jurisdictional issue, the *amici* agree with CBS's argument that the Court of Appeals exceeded its appellate jurisdiction. A determination by this Court that the Court of Criminal Appeals exceeded its jurisdiction would require vacating the appellate court's decision, including its troubling standard for *in camera* review.

subpoenas of newsgathering materials were easily obtained, "the press might well decide to avoid certain controversial subjects - or subjects likely to lead to criminal prosecutions - altogether." Pelley decl. at ¶8 (CBS Petition, tab 3).

The lower the threshold for *in camera* review, the more harmful these effects are likely to be. A low standard will invite more subpoenas. Drafting a subpoena is easy and inexpensive. With ready access to *in camera* review, litigants may decide that they have little to lose and much to gain from subpoenaing newsgathering material. Therefore, the lower the bar that this Court sets for *in camera* review, the higher the resulting costs will be on news media organizations.

It bears noting that a low threshold for *in camera* review imposes substantial costs on the judiciary as well. Judges have to devote time to reviewing the contested materials. This drain on judicial resources has led other courts to restrict *in camera* review. The D.C. Circuit has held that "[i]n camera inspection requires effort and resources and therefore a court should not resort to it routinely on the theory that 'it can't hurt.'" *Ray v. Turner*, 587 F.2d 1187, 1195 (1978). Moreover, *in camera* review presupposes that judges will do more than



just view the frequently voluminous materials; they will need to analyze the materials and consider difficult issues of evidence and privilege.

Notwithstanding these costs to the judiciary, a military judge may on occasion determine that *in camera* review is necessary. But the decision not to conduct an *in camera* review of newsgathering material should be left to the sound discretion of the military judge. Military appellate courts have, for other evidentiary privileges, affirmed military judges' choices to review material *in camera* before determining whether it is privileged. See, e.g., *United States v. Rivers*, 49 M.J. 434, 437 (C.A.A.F. 1998) (government privilege over information detrimental to the public interest); *United States v. Klemick*, 65 M.J. 576, 580 (N-M. Ct. Crim. App. 2006) (psychotherapist privilege). Other courts have on occasion also sanctioned *in camera* review as a method for resolving contested newsgathering privilege claims. See, e.g., *LaRouche*, 841 F.2d at 1179. To the extent that *in camera* review of newsgathering material is appropriate, it should be reserved for situations where the relevance, materiality, and necessity of the newsgathering material are not subjects of mere speculation and conjecture.

*In camera* review of newsgathering materials may impede the operation of the press, and it consumes valuable judicial resources. Given these interests, this Court should adopt a high threshold for *in camera* review of newsgathering materials.

**IV. THE COURT OF CRIMINAL APPEALS' APPROACH TO *IN CAMERA* REVIEW IS INADEQUATE TO PROTECT IMPORTANT JOURNALISTIC INTERESTS.**

In its decision requiring the military judge to review *in camera* out-takes from the Wuterich interview, the Court of Criminal Appeals adopted and applied an appellate review standard that threatens to undermine important journalistic interests. The Court of Criminal Appeals erred in mandating that, because the material in the published report met certain elements of the Rule for Courts-Martial 703 standard, the military judge must review the out-takes. The Court of Criminal Appeals also erred in affording insufficient deference to the military judge's determination that newsgathering materials were not necessary to the Government's case. Although the Court of Criminal Appeals did not have occasion in this case to address the First Amendment newsgathering privilege (that issue remains to be resolved, if necessary, in later proceedings), it should have recognized that application of the Rule 703 standard should be informed by the First

Amendment interests at stake in the determination whether to order *in camera* review.

The Court of Criminal Appeals held that the military judge acted arbitrarily when, in its view, he determined that the broadcast material was necessary but the out-takes were not.<sup>5</sup> It is possible to read the Court of Criminal Appeals' holding as establishing a *per se* rule that a military judge must automatically review *in camera* the out-takes any time he finds that broadcast material is relevant, material, and, in the Court of Criminal Appeals' view, necessary.

This rule would open the door to the possibility of routine *in camera* review of newsgathering material every time a broadcast or published story itself is found presumptively admissible. In this case, the military judge would have to review videotapes that were not broadcast, and the sole reason he would have to do so is that the broadcast interview itself met certain requirements. The Court's opinion also might be argued to apply to other newsgathering materials in other contexts, such as

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<sup>5</sup> As CBS points out, the Court of Criminal Appeals' conclusion that the military judge had ruled that the *60 Minutes* broadcast was "necessary" was erroneous; the Court found only that it was relevant and material, but did not reach the question whether it was necessary. Tr. 88.

reporter's notes of a print interview deemed presumptively admissible. In various circumstances, the military courts might be required to review enormous volumes of newsgathering materials that were created in the newsgathering process, which would be highly intrusive in journalistic operations.

The Court of Criminal Appeals' rule also reflects a serious misunderstanding of the process of producing a news story.<sup>6</sup> Whereas with other privileged conversations, the privileged party has a strong incentive to hold back the most important information, the news media has overwhelming professional incentives to publish the most relevant facts. At a minimum, therefore, the court should not adopt a nearly conclusive presumption that if the published material is relevant, material, and necessary, the unpublished material must be relevant, material, and necessary as well.

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<sup>6</sup> The Court of Criminal Appeals stated that "[t]he military judge determined that a *subset of the contested out-takes* – the *60 Minutes* broadcast – contained clearly relevant, material and admissible statements of the appellee." *United States v. Wuterich*, 66 M.J. 685, 691 (N-M. Ct. Crim. App. 2008) (emphasis added). The broadcast material, however, is not a "*subset*" of the "*out-takes*." They are separate and distinct materials, and there is a fundamental difference, for press freedom, between judicial review of broadcast or published material and judicial review of unpublished newsgathering materials.

Recognition of reporters' incentives led the Government to question in the *Rodriguez* litigation "'why any diligent news reporter would choose to air a short, uneventful segment of a traffic stop and leave on the cutting room floor a videotape of a coerced confession.'" *United States v. Rodriguez*, 44 M.J. 766, 778 n.7 (N-M. Ct. Crim. App. 1996); *set aside* 50 M.J. 38, 38 (C.A.A.F. 1998); *remanded to* 57 M.J. 765 (N-M. Ct. Crim. App. 2002); *aff'd* 60 M.J. 239 (C.A.A.F. 2004) (quoting, with apparent agreement, the Government's Reply Brief); *see also United States ex rel. Vuitton Et Fils S.A. v. Karen Bags, Inc.*, 600 F. Supp. 667, 669 (S.D.N.Y. 1985) (finding it "hard to believe" that "outtakes" contained more relevant information "than what CBS chose to broadcast"). Far from supporting a rule of *in camera* review when broadcast or published material is pertinent, courts have recognized that the context and reality of journalism point in exactly the opposite direction.<sup>7</sup>

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<sup>7</sup> For these reasons, it is inappropriate simply to transplant language into the newsgathering context from other evidentiary contexts where different interests are at stake. *See, e.g., United States v. Romano*, 46 M.J. 269, 275 (C.A.A.F. 1997) (constitutional right to exculpatory evidence); *United States v. Reece*, 25 M.J. 93, 95 (C.M.A. 1987) (same).

Finally, in ordering the military judge to review the out-takes of Wuterich's interview *in camera*, the Court of Criminal Appeals gave no indication that it had considered the First Amendment implications of its application of Rule 703. Civilian courts have held that a trial court must weigh First Amendment interests when it considers a motion to quash a subpoena. See *In re Grand Jury Subpoena: Subpoena Duces Tecum*, 829 F.2d 1291, 1300 (4th Cir. 1987) ("Even when the first amendment . . . problems raised by subpoenas duces tecum do not, in and of themselves, rise to the level of constitutional violations, the concerns that underlie those constitutional provisions must enter into the balancing of interests that is required by a motion to quash under Fed. R. Crim. P. 17(c)."); *United States v. R. Enters., Inc.*, 498 U.S. 292, 303 (1991) (directing lower court to consider on remand whether First Amendment implications require heightened scrutiny of grand jury subpoena under Federal Rule of Criminal Procedure 17(c)).

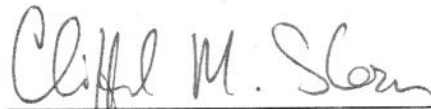
Here, a low standard of *in camera* review threatens important First Amendment interests by entangling the judiciary in intrusive review of newsgathering materials. These interests should be considered, even before the ultimate First Amendment newsgathering privilege

issue is reached. These important interests further support the conclusion that the military judge exercised sound discretion in quashing the subpoena and declining in camera review, and he certainly did not abuse his discretion.

CONCLUSION

The amici respectfully submit that CBS's petition for a writ of prohibition and/or mandamus should be granted.

Respectfully submitted,



Date: July 21, 2008

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## APPENDIX A

ABC, INC., is a broad-based communications company with significant holdings in the United States and abroad. Alone or through its subsidiaries, it owns ABC News, abcnews.com, and local broadcast television stations that regularly gather and report news to the public. ABC News produces the television programs *World News with Charles Gibson*, *20/20*, *Primetime*, *Good Morning America* and *Nightline*, among others.

ADVANCE PUBLICATIONS, INC., directly and through its subsidiaries, publishes over 25 magazines with nationwide circulation, daily newspapers in over 25 cities, and weekly business journals in over 40 cities throughout the United States. These include *The New Yorker*, *Vanity Fair*, and *Wired*. It also owns many internet sites and has interests in cable systems serving over 2.3 million subscribers. Advance Publications, Inc. has no parent corporations, and no publicly held corporation owns 10% or more of its stock.

THE ASSOCIATED PRESS ("AP") is a mutual news cooperative organized under the Not-for-Profit Corporation Law of New York. AP has no parents, subsidiaries or



affiliates that have any outstanding securities in the hands of the public.

**CABLE NEWS NETWORK, INC.** ("CNN"), a division of Turner Broadcasting System, Inc., a Time Warner Company, is the most trusted source for news and information. Its reach extends to nine cable and satellite television networks; one private place-based network; two radio networks; wireless devices around the world; CNN Digital Network, the No. 1 network of news Web sites in the United States; CNN Newsource, the world's most extensively syndicated news service; and strategic international partnerships within both television and the digital media.

Cable News Network, Inc. is a wholly-owned subsidiary of Turner Broadcasting System, Inc., which itself is a wholly-owned subsidiary of Time Warner Inc., a publicly traded corporation.

**THE E.W. SCRIPPS COMPANY** is a diverse media concern with interests in newspaper publishing, broadcast television and interactive media. Nationwide, it operates 18 daily newspapers, 10 broadcast television stations and a variety of interactive Web sites. The E.W. Scripps Company, a publicly traded company, has no parent corporations and no publicly held corporation owns 10 percent or more of its stock.

**GANNETT CO., INC.** is an international news and information company that publishes 85 daily newspapers in the United States, including USA TODAY and nearly 900 non-daily publications, including Army Times, Armed Forces Journal, Navy Times, Marine Corps Times, Air Force Times and Defense News. The company also owns 23 television stations and more than 100 websites that are integrated with its publishing and broadcasting operations

**HEARST CORPORATION** ([www.hearst.com](http://www.hearst.com)) is one of the nation's largest diversified media companies. Its major interests include 12 daily and 31 weekly newspapers, including the Houston Chronicle, San Francisco Chronicle, and Albany Times Union; nearly 200 magazines around the world, including Cosmopolitan and O, The Oprah Magazine; 29 television stations through Hearst-Argyle Television (NYSE:HTV) which reach a combined 18% of U.S. viewers; ownership in leading cable networks, including Lifetime, A&E, The History Channel and ESPN; as well as business publishing, including a joint venture interest in Fitch Ratings; Internet businesses, television production, newspaper features distribution and real estate.

Hearst Corporation is a privately held company.

**THE NATIONAL ASSOCIATION OF BROADCASTERS** ("NAB") is a nonprofit trade association that advocates on behalf

of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and other federal agencies, and the Courts. NAB's members cover, produce and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to disseminate freely programming and information of all types.

**NATIONAL PUBLIC RADIO, INC., ("NPR")** is an internationally acclaimed producer and distributor of noncommercial news programming. A privately supported, not-for-profit membership organization, NPR serves a growing audience of 26 million Americans each week by providing news programming to 285 member stations which are independently operated, noncommercial public radio stations. In addition, NPR provides original online content and audio streaming of its news programming. NPR.org offers hourly newscasts, special features and ten years of archived audio and information. NPR has no parent company and does not issue stock.

**NBC UNIVERSAL, INC.** is one of the world's leading media and entertainment companies in the development, production, and marketing of news, entertainment and information to a global audience. Among other businesses,

NBC Universal owns and operates the NBC television network, the Spanish-language television network Telemundo, NBC News, several news and entertainment networks including MSNBC and CNBC, and a television stations group comprised of 23 owned-and-operated television broadcast stations that produce substantial amounts of local news, sports and public affairs programming. NBC News produces the "Today" show, "NBC Nightly News with Brian Williams," "Dateline" and "Meet the Press." NBC Universal is 80%-owned by General Electric Company, with 20% controlled by Vivendi Universal S.A.

**NEWSWEEK, INC.** is a wholly-owned subsidiary of The Washington Post Company, a publicly-held corporation traded on the New York Stock Exchange. Berkshire Hathaway, Inc., a publicly-held company, has a 10% or greater ownership interest in The Washington Post Company.

Newsweek, Inc. publishes the weekly news magazines Newsweek and Newsweek International, distributed nationally and internationally, respectively, Newsweek.com, and Arthur Frommer's Budget Travel magazine, distributed nationally, and BudgetTravel.com.

**THE ONLINE NEWS ASSOCIATION** ("ONA") is the premier U.S.-based organization of online journalists. ONA's members include reporters, news writers, editors,

producers, designers, photographers and others who produce news for distribution over the Internet and through other digital media, as well as academics and others interested in the development of online journalism. ONA is dedicated to advancing the interests of online journalists and the public, generally, by encouraging editorial integrity, editorial independence, journalistic excellence, freedom of expression and freedom of access.

**PROPUBLICA** is a new, independent, non-profit newsroom that publishes investigative journalism in the public interest on its web site, <http://ProPublica.org>, and through publishing partners including *60 Minutes*. ProPublica is headquartered in Manhattan, led by some of the nation's most distinguished editors, and staffed at levels unprecedented for a non-profit organization. Indeed, ProPublica is already the largest investigative journalism operation in the United States.

**THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION** ("RTNDA"), based in Washington, D.C., is the world's largest professional organization devoted exclusively to electronic journalism. RTNDA represents local and network news directors and executives, news associates, educators and students in broadcasting, cable and other electronic media in over 30 countries. RTNDA is committed to

encouraging excellence in electronic journalism, and upholding First Amendment freedoms.

**THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS** is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the media. The Reporters Committee has provided representation, guidance and research in First Amendment and freedom of information litigation in state, federal and international courts since 1970.

**REPORTERS WITHOUT BORDERS**, an international non-profit organization, has fought for press freedom on a daily basis since it was founded in 1985. The organization defends journalists and media assistants who are imprisoned or persecuted for doing their job, exposes the mistreatment and torture of media personnel, fights against censorship and laws that undermine press freedom, gives financial aid to journalists and media outlets in difficulty and works to improve the safety of journalists, especially those reporting in war zones. Reporters Without Borders is present on all five continents through its national branches and works closely with local and regional press freedom groups that are members of the Reporters Without Borders Network. The organization has consultant status at

the United Nations and in 2005 won the European Parliament's Sakharov Prize for Freedom of Thought. The organization keeps a constantly updated website, at [www.rsf.org](http://www.rsf.org), with press releases, publications and a list of journalists killed or imprisoned around the world. It also contains detailed reports on special cases and invites the public to sign online petitions for the release of jailed journalists. Reporters Without Borders is currently spear-heading an international campaign to highlight press freedom abuses in China before the Beijing Olympics.

**TRIBUNE COMPANY** operates businesses in publishing, broadcasting and on the Internet. It reaches more than 80 percent of U.S. households. In publishing, Tribune operates nine daily newspapers, including the Chicago Tribune, the Los Angeles Times, Newsday, The (Baltimore) Sun, and the South Florida Sun-Sentinel. In broadcasting, Tribune owns 23 television stations and Superstition WGN on national cable. These publishing and broadcasting interests are complemented by high-traffic news and information web sites. Tribune Company is 100 percent owned by the Tribune Company Employee Stock Ownership Plan. No publicly held company owns any of its stock.

THE WASHINGTON POST is a leading newspaper with a nationwide daily circulation of over 666,000 and a Sunday circulation of over 912,000. The newspaper is a wholly-owned subsidiary of The Washington Post Company, a publicly held corporation. Berkshire Hathaway, Inc., a publicly held company, has a 10% or greater ownership interest in The Washington Post Company.



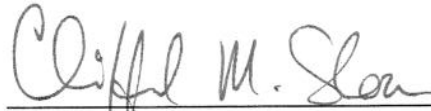
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July 21, 2008

CERTIFICATE OF FILING AND SERVICE

I hereby certify that the original and seven copies of the foregoing Brief *Amici Curiae* were filed with the Clerk of Court via hand-delivery on July 21, 2008.

I further certify that on July 21, 2008, true and correct copies of the foregoing Brief were delivered to FedEx for overnight delivery to counsel for the parties as follows:

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