

AZ33WA
1hylzyywyf

URGENT

CBS-Congress-FCC

Selling of the Pentagon —

WASHINGTON AP - For the second time in 10 days, CBS refused Friday to turn over to congressional investigators the nontelecast material that has been subpoenaed in connection with the program "The Selling of the Pentagon."

The network supplied the House Commerce Committee's special investigating subcommittee with its legal reasoning behind this refusal. And the network said in a letter to the panel:

"We must advise the subcommittee that we remain of the view that compliance with the subpoena would have a chilling effect on the ability of journalists at CBS and throughout the profession to report and interpret the news-including, of course, the conduct of government officials-with consequential injury to the right of the public to receive such reports."

In addition, attorneys for the network argued:

"We believe that the public's interest demands that a free press must strenuously resist government encroachment on the right to report the news, and that the press cannot retain the public's trust without vigorous self-examination and an open-minded willingness, voluntarily to strive to improve its service to the American people."

Also Friday, the Federal Communications Commission asked the Columbia Broadcasting system to reply within 20 days to charges that the network failed to meet fairness requirements in "The Selling Of The Pentagon."

In a letter to Rep. Harley O. Staggers, D-W.Va., chairman of the House Commerce Committee, who asked what action the FCC was taking in the matter, the commission noted that CBS presented an hour-long special program April 18 to present contrasting views on issues raised by the original program, Feb. 23.

"The commission, however, is still requesting the comments of CBS as to whether it has complied with the requirements of the Fairness Doctrine in this matter," it said, referring to commission policy requiring balanced presentation of all sides of controversial issues.

rz420ped april 30

A254WX cbs lead

lbylwyyfui v WX

Cbs-Congress Bjt Lead 180

By CARL C. CRAFT

Associated Press Writer

WASHINGTON AP - CBS moved closer to a major confrontation with congressional investigators Friday when the network again refused to turn over material that the public didn't see on "The Selling of the Pentagon."

While the clock was running out on the 10 days of grace which CBS had been granted to reconsider its April 20 initial refusal to submit such things as nontelecast material, attorneys for the network gave the House Commerce Committee's special investigating subcommittee a lengthy document defending its decision.

With this second refusal to comply with its subpoena, an attorney for the panel told a reporter that no more action will be taken until the subcommittee has a chance to inspect the network's case. That, he added, means it will be probably late next week or early the following week before congressmen make their next move.

This possibly could include a recommendation that the full committee urge Congress to hold CBS in contempt—thus prompting a clash in court.

The network said in its letter to the subcommittee:

"We must 3rd graf A235WX

.sr536 ped april 30

Selling of Pentagon

April 30, 1971

MEMORANDUM FOR: VIC GOLD

FROM: CHARLES W. COLSON

I assume the Vice President has already seen the FCC decision in the Selling of the Pentagon case; if not, it should be brought to his attention (copy attached).

The Commission could not reach a finding of "deliberate distortion" because as it is defined under the law it must almost go to the point of malice. The Commission has laid out the facts, however, which fully substantiate the Vice President's charge that the tape was deliberately edited in such a way as to change answers. The mere laying out of the facts in this instance probably gives CBS as black an eye as they can get. You might want to do a little crowing here because you are entitled to.

Note also that Burch's separate statement he has taken a public crack at Nicholas Johnson -- for the first time.

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

April 28, 1971

IN REPLY REFER TO:

Honorable F. Edward Hebert
House of Representatives
Washington, D. C. 20515

Dear Mr. Hebert:

This is in further response to your inquiries concerning the CBS program "The Selling of The Pentagon".

The Commission has taken the action set forth in detail in the enclosed letter to Chairman Harley O. Staggers. My separate statement is also enclosed. Commissioner Johnson's separate statement will be forwarded at a later date.

Please contact me if you have any questions concerning this matter.

Sincerely,


Dean Burch
Chairman

Enclosures

cc - Columbia Broadcasting System

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D. C. 20554

April 28, 1971

IN REPLY REFER TO:

Honorable Harley O. Staggers
Chairman, Special Subcommittee on
Investigations
Committee on Interstate and
Foreign Commerce
House of Representatives
Washington, D. C. 20515

Dear Mr. Chairman:

This is in response to your letter of March 9, 1971, in which you register a complaint concerning the CBS news documentary, "The Selling of the Pentagon". You ask "what action the Commission will take" in light of allegations by Assistant Secretary of Defense Daniel Z. Henkin that his answers to questions posed by CBS newsman Roger Mudd had been so edited and rearranged as to misrepresent their content, and that a statement was attributed to a Marine colonel "when, in fact, the officer was reading a quotation of the Prime Minister of Laos". You also enclose a letter to Dr. Frank Stanton, President of CBS, asking for comment on Mr. Henkin's allegations and on techniques of editing whereby "through the editing process, answers to questions may easily be curtailed or rearranged. . .and [made] to appear to have been given in response to different questions". Similar inquiries and complaints were also received from Chairman Hebert of the House Armed Services Committee, from other members of the Congress, and from the public.

Taken together, two principal questions have thus been raised:

(1) whether CBS adhered to the requirements of the fairness doctrine to afford reasonable opportunity for the presentation of contrasting viewpoints on issues of public importance covered in the program; and
(2) whether CBS slanted or deliberately distorted its presentation of persons interviewed on the program. As to (1), we note that CBS presented an hour-long news special on April 18 for the stated purpose of affording an opportunity for the presentation of contrasting viewpoints on the issues of substance raised in the original program. The Commission, however, is still requesting the comments of CBS as to whether it has complied with the requirements of the fairness doctrine in this matter. A copy of the letter is attached. In this Statement, therefore, the Commission will address question (2) above.

The Factual Record

On February 23 and again on March 23, in the documentary at issue, the CBS network stated that the Department of Defense would spend

\$30 million this year in "public relations funds not merely to inform but to convince and persuade the public on vital issues of war and peace".

The original broadcast aroused controversy as inquiries and complaints to this Commission have attested. As a consequence, following the March 23 rebroadcast, CBS ran a series of edited film clips of critical comments derived from previous addresses and interviews by Vice President Agnew, Secretary Laird, and Chairman Hebert, plus a rebuttal by Mr. Richard Salant, President of CBS News.

The controversy has focused on two aspects of "The Selling of the Pentagon" in particular, and the essential facts are not really in dispute. One concerns a film-clip from an address delivered by Colonel MacNeil at a symposium held in Peoria, Illinois,^{1/} featuring presentations by what CBS described as "the traveling colonels" (military and civilian spokesmen supplied, on request, to local civic and professional organizations). As far as the viewer could tell -- and neither Colonel MacNeil nor CBS made it clear -- the speaker seemed to be affirming the "domino theory" as applied to Southeast Asian nations under Communist pressure, although as the printed transcript shows he was in fact quoting the Prime Minister of Laos to this effect. Later in the course of his remarks, Col. MacNeil did return to the "domino theory" and he did affirm it in virtually the same words as the Laotian Prime Minister. As Mr. Salant observed in his March 23 rebuttal, it was "difficult to tell where Souvanna Phouma left off and the Colonel started."

The other aspect of principal controversy concerns an interview between Mr. Henkin and Mr. Mudd. In it, some portions of Mr. Henkin's answers were cut; and what appeared as answers to particular questions were in fact rearranged from answers to quite different questions. What follows is a detailed analysis of the interview as shown on the program, compared with the verbatim transcript of the original interview:

This is what the viewers of the CBS documentary were shown as a single exchange:

^{1/} CBS, in its documentary, stated that the Defense Department's participation in the symposium "was arranged by Peoria's Caterpillar Tractor Company, which did 39 million dollars of business last year with the Defense Department." The Defense Department has stated, however, that the event was arranged and sponsored by the Peoria Association of Commerce with a Caterpillar employee serving as chairman of the symposium.

Roger Mudd: What about your public displays of military equipment at state fairs and shopping centers? What purpose does that serve?

Mr. Henkin: Well, I think it serves the purpose of informing the public about their armed forces. I believe the American public has the right to request information about the armed forces, to have speakers come before them, to ask questions, and to understand the need for our armed forces, why we ask for the funds that we do ask for, how we spend these funds, what we are doing about such problems as drugs--and we do have a drug problem in the armed forces, what we are doing about the racial problem--and we do have a racial problem. I think the public has a valid right to ask us these questions.

This, on the other hand, is how Mr. Henkin actually answered the question cited above:

Mr. Henkin: Well, I think it serves the purpose of informing the public about their armed forces. [This is the only sentence that was retained intact in the answer as broadcast.] It also has the ancillary benefit, I would hope, of stimulating interest in recruiting as we move or try to move to zero draft calls and increased reliance on volunteers for our armed forces. I think it is very important that the American youth have an opportunity to learn about the armed forces. [Both the latter sentences were dropped entirely.]

The answer Mr. Henkin was shown to be giving had in fact been transposed from his answer to another and later question that dealt not only with military displays but also with the availability of military speakers. At that later point in the interview, Mr. Mudd asked Mr. Henkin whether such things as drug and racial problems constituted "the sort of information that gets passed out at state fairs by sergeants who are standing next to rockets."

Mr. Henkin replied as follows:

Mr. Henkin: No, I didn't--wouldn't limit that to sergeants standing next to any kind of exhibits. I knew--I thought we were discussing speeches and all.

But this is how the sequence was shown over the air:

Mr. Mudd: Well, is that the sort of information about the drug problem you have and the racial problem you have and the budget problems you have--is that the sort of informa-

tion that gets passed out at state fairs by sergeants who are standing next to rockets?

Mr. Henkin: No. I wouldn't limit that to sergeants standing next to any kind of exhibits. Now, there are those who contend that this is propaganda. I do not agree with this.

The second sentence of Mr. Henkin's actual answer -- the part about "speeches and all" -- had been omitted. And the "new" material -- about propaganda -- came from an earlier point in the interview and was in fact a reference to charges that the Pentagon was using talk of an "increasing Soviet threat" as propaganda to influence the size of the military budget.^{2/}

Policy Considerations and Conclusions

In view of all the facts at our disposal, we conclude that further action by this Commission would be inappropriate--and not because the issues involved are insubstantial. Precisely to the contrary, they are so substantial that they reach to the bedrock principles upon which our free and democratic society is founded. Our basis for this conclusion is set forth in prior Commission rulings, of which two are particularly apposite: In re Complaints Concerning CBS Program, Hunger In America, 20 FCC 2d 143 (1969), and Network Coverage of the Democratic National Convention, 16 FCC 2d 650 (1969).

Lacking extrinsic evidence or documents that on their face reflect deliberate distortion, we believe that this government licensing agency cannot properly intervene. It would be unwise and probably impossible for the Commission to lay down some precise line of factual accuracy--dependent always on journalistic judgment--across which broadcasters must not stray. As we stated in the Hunger in America ruling, "the Commission is not the national arbiter of the truth" (20 FCC 2d at p. 151). Any presumption on our part would be inconsistent with the First Amendment and with the profound national commitment to the principle that debate

^{2/} An inquiry has been made concerning a third aspect of "The Selling of the Pentagon" in connection with edited coverage of a news briefing of Pentagon reporters by Deputy Assistant Secretary of Defense Jerry Friedheim. The facts are that CBS recorded the entire session, with answers to approximately 34 questions; only six questions and answers were shown in the documentary and, of these six, three answers were of the "no comment" type -- the only such answers Mr. Friedheim gave during the entire briefing. Mr. Henkin asserts that answers to any of the "no comment questions" would have "revealed classified national security information." Coverage of the briefing followed comments by Mr. Mudd to the effect that Mr. Friedheim, as a "careful and respected adversary" of Pentagon reporters, does not "tell all he knows" and "wouldn't have his job long if he did."

on public issues should be "uninhibited, robust, [and] wide-open" (New York Times Co. v. Sullivan, 376 U. S. 254, 270). It would involve the Commission deeply and improperly in the journalistic functions of broadcasters.

This function necessarily involves selection and editorial judgment. And, in the absence of extrinsic evidence, documentary or otherwise, that a licensee has engaged in deliberate distortion, for the Commission to review this editing process would be to enter an impenetrable thicket. On every single question of judgment, and each complaint that might be registered, the Commission would have to decide whether the editing had involved deliberate distortion. Although we can conceive of situations where the documentary evidence of deliberate distortion would be sufficiently strong to require an inquiry--e.g., where a "yes" answer to one question was used to replace a "no" answer to an entirely different question--we believe that such a situation is not presented here.

We are not saying that CBS' or any other broadcaster's editorial judgment is above criticism. As we said in Hunger in America (20 FCC 2d at p. 151), allegations of distortion "should be referred to the licensee for its own investigation and appropriate handling." And again:

. . . [W]e stress that the licensee must have a policy of requiring honesty of its news staff and must take reasonable precautions to see that news is fairly handled. The licensee's investigation of substantial complaints. . . must be a thorough, conscientious one, resulting in remedial action where appropriate.

Our point is that this licensing agency cannot and should not dictate the particular response to thousands of journalistic circumstances. Above all, we affirm that we must ". . . eschew the censor's role, including efforts to establish news distortion in situations where government intervention would constitute a worse danger than the possible rigging itself." But to say that such intervention would be a remedy far worse than the disease is not to say that we can afford to shrug off the deeper questions involved.

This Commission is charged with ". . . promoting the public interest in the larger and more effective use of radio" (Section 303(g) of the Communications Act). Surely there is no issue bearing more heavily on the public service role of broadcasting than the integrity of the licensee's news operation.

We have allocated so much spectrum space to broadcasting precisely because of the contribution it can make to an informed public. Thus it follows inevitably that broadcasting must discharge that function responsibly, without deliberate distortion or slanting. The nation depends on broadcasting, and increasingly on television, fairly to illumine the news.

We particularly urge the need for good faith, earnest self-examination. In our view, broadcast journalists should demonstrate a positive inclination to respond to serious criticism. Indeed, Mr. Chairman, the thrust of your and other congressional inquiries--reflected also in criticism in print media--was to raise questions about the editing process, particularly with respect to the Henkin interview.

It seems to us that CBS has failed to address the question raised as to splicing answers to a variety of questions as a way of creating a new "answer" to a single question. The very use of a "Question and Answer" format would seem to encourage the viewer to believe that a particular answer follows directly from the question preceding. Surely important issues are involved here, ones that every broadcast journalist should ponder most seriously.

What we urge--because we believe it will markedly serve the public interest--is an open, eager and self-critical attitude on the part of broadcast journalists. We urge them (as we did in Hunger in America, cited above) to examine their own processes, to subject them to the kind of hard critical analysis that is characteristic of the best traditions of the journalistic profession.

Our objective is to encourage broadcast journalism, not to hurt or hinder it. We have made clear in the past that the Commission seeks a larger role for broadcast journalism, including newscasts and documentaries. We reiterate that commitment today. For what ultimately is at stake in this entire matter is broadcasting's own reputation for probity and reliability, and thus its claim to public confidence.

In view of the foregoing discussion, we do not propose to inquire of CBS as to the second issue referred to on p. 2, supra. A copy of this letter will be sent to CBS so that it is informed fully of the Commission's position in this important area. We shall, of course, also keep you informed of any further developments as to the application of the fairness doctrine.

This letter was adopted by the Commission on April 28, 1971.

Commissioners Burch, Chairman, and Johnson issuing separate statements.

BY DIRECTION OF THE COMMISSION


Dean Burch
Chairman

Encl: Statement of Chairman Burch
(Statement of Commissioner
Johnson to be forwarded
subsequently).

cc: Columbia Broadcasting System

SEPARATE STATEMENT OF CHAIRMAN DEAN BURCH

As Commission Chairman, I feel I must address one further aspect of this case. In my view, Commissioner Johnson should not have participated in the decision.

The role of a Commissioner is both varied and difficult. At times in general rule making proceedings, a Commissioner is a quasi-legislator, with considerable freedom to speak out publicly on broad policy considerations. At other times, a Commissioner acts in adjudicatory proceedings, and then his role is quasi-judicial -- that is, akin to that of a judge. And, at all times, a Commissioner must strive to act in a fair and impartial manner. Indeed, "... to perform its high functions in the best way, 'Justice must satisfy the appearance of justice'..." (In re Murchison, 349 U.S. 133, 136).

The "Selling of the Pentagon" aroused a storm of controversy, with Administration spokesmen, Congressmen, and many others speaking out on one side or another. On March 5 and March 9, respectively, Chairmen Hebert and Staggers filed their letters with the Commission, raising questions as to the fairness of the program and whether it contained distortions in view of the DOD charges. Thus, from early March on, this was an adjudicatory case -- one which we knew we would be called upon to decide as judges.

Commissioner Johnson was therefore clearly on notice as to the adjudicatory posture of this matter. Yet at this point, he authored an article in the Washington Post, March 28th, entitled, "A Defense of TV vs. the White House," whose initial thrust is to defend the program in question. Indeed, the article opens by asserting that CBS News "... has rightfully come in for special praise for its February 23rd showing...", then quotes the praise given the program by two reviewers, and states that "this evaluation and praise were shared by most of the nation's television critics...".

Commissioner Johnson has a perfect right to speak out on this or any other controversial issue. But he cannot have it both ways. He cannot be both a public advocate -- defending the program in print -- and then sit as a judge on charges alleging unfairness and distortion in the program.

I do not say that Commissioner Johnson's personal views in any way colored his decision. Indeed, by whatever routes, both of us reached the same conclusions. I am saying that this Commission has an obligation beyond the mere absence of demonstrable bias; it must avoid even the appearance of bias. In his dual role of advocate and judge, Commissioner Johnson falls short of that standard and thus diminishes the Commission's standing. Having freely chosen the role of a public advocate, Commissioner Johnson should have refrained from that of a judge.

April 28, 1971

Columbia Broadcasting System, Inc.
51 West 52nd Street
New York, New York 10019

Gentlemen:

The Commission has received complaints that you have not complied with the requirements of the fairness doctrine with respect to the presentation of controversial issues of public importance during your two recent broadcasts of a program titled "The Selling of the Pentagon."

We ask that you submit a statement within twenty days of the date of this letter as to whether, with respect to the controversial issues of public importance covered in the program, you have fulfilled or plan in the near future to fulfill the obligation "to encourage and implement the broadcast of all sides" of such controversial issues, as set forth in the Commission's Report on Editorializing by Broadcast Licensees, 13 FCC 1246 (1949).

We are also enclosing for your information a copy of our letter to Chairman Staggers adopted this day.

BY DIRECTION OF THE COMMISSION

Ben F. Waple
Secretary

Frank Stanton
President
Columbia Broadcasting System, Inc.

Reproduced at the Richard Nixon Presidential Library



Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

April 30, 1971

CBS RESPONSE ON SUBPOENA ISSUE

Enclosed is a copy of the letter from CBS General Counsel Robert V. Evans delivered today to the Special Subcommittee on Investigations, House Interstate and Foreign Commerce Committee, which had subpoenaed outtakes and other materials related to the preparation of THE SELLING OF THE PENTAGON.

Also enclosed are copies of an earlier CBS letter, the April 8 statement by CBS President Frank Stanton, a copy of the subpoena itself and a sampling of representative comment on the issues raised by the subpoena.



Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

Robert V. Evans
Vice President and General Counsel

Dear Mr. Chairman:

This will supplement our April 20 letter to the Subcommittee, concerning the Subcommittee's April 7 subpoena seeking outtakes, and other materials not broadcast, in connection with the CBS News documentary "The Selling of the Pentagon."

In that letter we noted that the demands set forth in the subpoena raise fundamental constitutional issues as to whether journalistic news judgments can be subjected to legislative surveillance, and as to whether films, scripts and other materials not broadcast could be subpoenaed for this purpose. At the Subcommittee's April 20 hearing, you placed in the record a statement setting forth the Subcommittee's position on issuance of the subpoena. CBS has given careful consideration to the matters set forth in that statement.

We must advise the Subcommittee that we remain of the view that compliance with the subpoena would have a chilling effect on the ability of journalists at CBS and throughout the profession to report and interpret the news -- including, of course, the conduct of government officials -- with consequential injury to the right of the public to receive such reports. Because of the significance of the issues that have been raised, we attach a copy of a formal opinion of counsel, prepared at the request of CBS. Counsel have advised us that the Subcommittee statement does not set forth a valid constitutional basis for demanding production of the wide range of materials called for in this subpoena, and that we have no obligation to comply with it. In these circumstances, we respectfully decline to comply with the subpoena.

Without conceding the right of the Subcommittee to compel the production of the information required by the subpoena, we note that on April 20 we voluntarily supplied films and written transcripts of "The Selling of the Pentagon", and comments on it, as broadcast. Further, we voluntarily advise you that except in a few incidental cases the names of those individuals appearing and speaking in the documentary are contained in such films or transcripts, and that under standard CBS policy

applicable to this documentary there was no payment to those persons except for reimbursement of out-of-pocket expenses such as meals or travel, and nominal payments to provide legal consideration for formal releases. (Total payments, to 13 individuals appearing in the broadcast, aggregated about \$300.) We will also furnish a copy of a sample of our standard release form to Subcommittee counsel. All of this information is being provided voluntarily, and not in compliance with the subpoena.

Our decision embodies no disrespect for the Subcommittee or the House. But if the reporting of broadcast journalists -- reporting often critical of the Government -- is to be subject to official examination as to its "truth" by the Government, which also licenses broadcast stations, the vigor of the broadcast press will be sapped and the public's right to receive news and information will be impaired. We do not believe that the Subcommittee wishes to bring about this result.

CBS' position rests not on the contention that "The Selling of the Pentagon" or any other of its news broadcasts is, or should be, immune from criticism. Rather it rests on the fundamental proposition that compliance with the subpoena would impinge upon press freedoms under the First Amendment. While the First Amendment bars governmental surveillance of the press, it is essential that the press itself review its own performance and that journalists continually engage in self-analysis and criticism and encourage, from multiple sources, such criticism, evaluation and analysis by their professional colleagues. Thus, in a 1969 speech before the Syracuse Press Club, Richard Salant, President of CBS News, took note of this need, stating:

"What I suggest is that all of us in journalism make sure first that we search our souls, examine and criticize ourselves; second, that we welcome and encourage systematic professional criticism and review."

CBS recognizes that comments on "The Selling of the Pentagon" by other journalists have raised genuine issues as to the standards that ought to be applied in the editing of documentary broadcasts. While responsible journalists may reasonably differ concerning particular practices in particular cases, we do not intend to ignore

these issues or to shrink from continuing self-examination of our standards and practices.

In essence, we believe that the public's interest demands that a free press must strenuously resist governmental encroachments on the right to report the news, and that the press cannot retain the public's trust without vigorous self-examination and an open-minded willingness, voluntarily to strive to improve its service to the American people.

On the basis of our April 20 letter and this further response, we again respectfully urge the Subcommittee to reconsider the issuance of this subpoena.

Sincerely,

s/ Robert V. Evans

The Honorable Harley O. Staggers
Chairman
Special Subcommittee on Investigations
Committee on Interstate and Foreign Commerce
House of Representatives
Washington, D.C. 20515

April 30, 1971

Wilmer, Cutler & Pickering
Of Counsel

cc The Hon. William L. Springer
The Hon. J. J. Pickle
The Hon. Ray Blanton
The Hon. Richard G. Shoup

WILMER, CUTLER & PICKERING
900 SEVENTEENTH STREET, N. W.
WASHINGTON, D. C. 20006

April 27, 1971

Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019

Dear Sirs.

You have asked for our opinion as to whether Columbia Broadcasting System, Inc. (CBS) is legally obligated to comply with the subpoena issued on April 7, 1971, by the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee and served on April 8, 1971, on Frank Stanton, President of CBS.

We conclude that compelled production of materials and documents to support the Subcommittee's investigation will inevitably and unconstitutionally restrain the presentation of controversial issue programming over the broadcast medium, and deter broadcast journalists from making the kind of investigation into governmental activities on which such programming depends. No agency of the government has the constitutional power to cause such restraint. The First Amendment's guarantee of freedom of the press applies to the broadcast media as it applies to any other

journalistic medium, and this subpoena is an unconstitutional abridgment of that guarantee.

The relevant facts and the reasons for our conclusions are set out below.

THE SUBPOENA

The subpoena is in the form of a subpoena duces tecum directed to Frank Stanton, President of CBS, or any corporate officer, requiring the production of a wide range of materials connected with the preparation of the CBS documentary broadcast, "The Selling of the Pentagon."

The subpoenaed material includes: (1) film copies and transcripts of the broadcast itself and of a broadcast of commentary that followed the documentary's rebroadcast on March 23, 1971, (2) "all film, workprints, outtakes, sound tape recordings, written scripts and/or transcripts prepared, obtained, or utilized" in the preparation or broadcast of the documentary and the subsequent commentary; (3) the names and addresses of all persons (except military, governmental, or CBS employees) who appeared in the documentary or were filmed or recorded in the preparation of the documentary; (4) a statement (certified by CBS) of all disbursements of money, items of value or legal consideration of any kind made by CBS to any individual covered by item 3; and (5) copies of all written agreements, contracts, or releases (or where they were verbal, a written description thereof) entered

into by CBS and individuals named in item 3.

On April 20, 1971, the Subcommittee, through Chairman Harley O. Staggers, convened in executive session and issued a Statement outlining the general legislative subjects and the specific subject matter into which the Subcommittee is inquiring. Of the seven legislative areas identified, four constitute no more than a description of the jurisdiction of the Subcommittee regarding communications matters -- the Federal Communications Act of 1934, as amended, the Rules and Regulations of the Federal Communications Commission, the Commission's administration and enforcement of its rules, and the desirability of additional or remedial legislation for the "benefit and protection of the public." (Statement, p. 4)

The remaining three legislative subjects evidence Subcommittee interest in the "applicability, if any," of the FCC's Fairness Doctrine "to questions of factual accuracy"; the adequacy of present laws and their administration to deal with the "preparation and presentation of" news documentaries; and whether certain (unidentified) technological advances or the employment of certain production and editing techniques by networks and others require new laws to protect the public "through disclosure requirements or other suitable means." (Id., pp. 4-5.)

Beyond these general legislative considerations, the

statement suggests several more specific items of inquiry. Thus, the Subcommittee states its concern "that the public be protected from deliberate staging and distortion of purportedly bona fide news . . .," and indicates that it intends to consider "whether the public has a right to be advised when edited sequences are presented . . . under conditions which might suggest that they have not been edited, whether it has a right to be advised when an apparently continuous event is actually the result of splicing together film and sound tracks which were obtained at different times and places; and whether it has a right to be advised when apparently spontaneous news coverage has been obtained through staging or other prearrangements."^{*/}

The Subcommittee states that with respect to the CBS broadcasts, allegations have been made that "incidents and events made to appear spontaneous and bona fide were, in fact, the product of questionable production techniques which distorted the original events." (Id., p. 10.) Finally, the Committee identifies the "sole question under inquiry" as being whether "the producers of television news documentary programs [are] engaging in factually false and misleading filming and editing practices, consisting of rearranging, staging, or misrepresenting events, giving viewers an erroneous impression that what they are seeing

^{*/}(Id., p. 9.) We understand that CBS knows of no allegations that any scenes in "The Selling of the Pentagon" were "staged."

has really happened, or that it happened in the way or under the circumstances in which it is shown." (Id., pp. 10-11.)

The Subcommittee defends the sweep and relevance of the subpoena in these terms

"One of the things we have discovered in the light of our previous investigations in this area is that once such a distortion has been accomplished and incorporated into a final broadcast, it is virtually impossible to detect. This is why the original, uncut, and unedited material must be examined." (Id., p. 9.)

The Subcommittee disclaims any purpose to determine whether CBS has been "biased" against the Department of Defense in its documentary or to "seek . . . to curtail the presentation of controversial issues or of unpopular causes or personalities." (Id., pp. 10, 12.) Despite these disclaimers, it is clear from the statement of purposes that the Subcommittee will necessarily be engaged in far-reaching surveillance of the specific news judgments and editorial decisions made by CBS in the preparation and broadcast of "The Selling of the Pentagon." The subjects to be investigated are the "production and editing techniques" or the "filming and editing practices" employed by CBS and others in the preparation and presentation of "The Selling of the Pentagon" and other news documentaries. These techniques and practices are to be judged for "factual accuracy." A determination

is to be made whether they are "factually false and misleading" and whether they give viewers "an erroneous impression that what they are seeing has really happened, or that it happened in the way or under the circumstances in which it is shown." Upon this basis, a further determination is to be made whether the public should be "protected" against such falsehood or error "through disclosure requirements or other suitable means."

Such an inquiry involves an effort to establish the truth or falsity of factual information which news documentaries may contain by comparing the raw data which journalists have gathered with the finished broadcast they have presented, and determining whether their decisions to include, exclude, organize, rearrange or otherwise depart from the raw data are in some sense "distortions" or convey a "misleading impression." Thus, the Subcommittee will be inevitably involved in an effort to apply a presumed objective criterion of truth both to the product of journalism and to the very heart of the journalistic process. ^{*/}

^{*/}As we demonstrate later, the courts have consistently recognized that there can be no such test for journalistic truth, since "[n]ews is history . . . and history is not total recall, but a deliberate pruning of, and calling from the flux of events . . .," and that journalism produced against such a monolithic standard of truth would be "immeasurably wearisome and utterly fatuous." United States v. Associated Press, Inc., 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (L. Hand, J.), aff'd., 326 U.S. 1 (1945).

DISCUSSION

I. Broadcast Journalism Is, For All Relevant Purposes, Entitled To First Amendment Protection Identical To That Afforded Any Other Medium Of The Press.

Implicit in the April 20 Statement of the Subcommittee, and explicit in other statements of its Chairman and another Subcommittee member, is the assumption that sufficient difference exists between broadcasting and other journalistic media to legitimize the subpoena directed to CBS, even if such process would be unconstitutional if directed to a newspaper.^{*/} This viewpoint would permit governmental intrusion into the news

*/As to the validity of the subpoena under the First Amendment, the Subcommittee's statement is limited to brief treatment of general language in two Supreme Court opinions and contains no discussion of the applicability of any cases proscribing abridgment of freedom of the press. Television Digest, Vol. 11, No. 15 (April 12, 1971) purports to quote Chairman Staggers' views on the constitutionality of such a subpoena as follows (p. 2.):

"Q--Are a print reporter's notes different from TV's outtakes?

A--I've always believed they were different. You know that.

Q--Do you have power to subpoena my notes from this interview?

A--No.

Q--What if I were a reporter for TV talking to you on the phone?

A--Well, then, that would be different. The Committee could subpoena your notes.

Q--Why?

A--TV is different. It's very important that the networks be accurate.

Q--Is a congressional committee qualified to determine what's accurate?

A--Yes. By using the outtakes, then we can determine if what was aired was fair & accurate. . . ."

See also remarks of Rep. Springer, Transcript, pp. 55-56, 59-60.

judgments of the journalistic medium that, according to recent surveys, is looked to and relied upon by more Americans than any other news source.^{*/}

Judicial precedents, however, are to the contrary. The Supreme Court and lower courts have consistently held that broadcast journalists are entitled to First Amendment protection. See, e.g., United States v. Paramount Pictures, Inc., 334 U.S. 131, 166 (1948) ("We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment"); Superior Films, Inc. v. Department of Education, 346 U.S. 587, 589 (1954) (concurring opinion); Rumely v. United States, 197 F.2d 166, 177 (D.C. Cir. 1952), aff'd. on other grounds, 345 U.S. 41 (1953) ("[S]peech and press by these new means -- on the radio, on television, and in the movies -- are freedoms protected by the First Amendment"); American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953), aff'd. on other grounds, 347 U.S. 284 (1954) ("Broadcasting and television are entitled to the protection of the First Amendment to the Constitution, guaranteeing freedom of speech and of the press"), Estes v. Texas, 381 U.S. 532, 539-40, 589, 604, 614-15 (1965) (majority, concurring and dissenting opinions), St. Amant v. Thompson, 390 U.S. 727 (1968), Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) (discussed more fully below).

^{*/}See Broadcasting, Nov. 2, 1970, p. 48.

The United States Court of Appeals for the Third Circuit has perhaps most succinctly summarized the state of the law

"[T]he fact that the news medium [involved in the libel case before the court] . . . is a radio station rather than a newspaper does not make the First Amendment discussion, in particular with regard to freedom of the press, any less germane. Radio and television were, of course, unknown media when freedom of the press was written into the Bill of Rights, but no rational distinction can be made between radio and television on the one hand and the press on the other in affording the constitutional protection contemplated by the First Amendment." Rosenbloom v. Metromedia, Inc., 415 F.2d 892, 895 (3rd Cir. 1969), cert. granted on other grounds, 397 U.S. 904 (1970) (emphasis supplied).

There is nothing new in this concept. It is, in fact, a constitutional interpretation which Congress affirmed almost forty-five years ago. The Radio Act of 1927 contains a provision, unchanged to the present, that explicitly bars the Federal Communications Commission from exercising "the power of censorship over the radio communications or signals transmitted by any radio station," or from acting to "interfere with the right of free speech by means of radio communication." See 47 U.S.C. § 326 (1964). Enactment of this provision was viewed at the time not merely as a Congressional limitation on agency power, but as a recognition of the First Amendment rights

of broadcasters, which are not subject to Congressional trespass. As Rep. Scott, the House floor manager of the conference report, stated in response to a complaint that the proposed Radio Act supplied only very limited control over licensee programming.

"Yes, and you are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place a supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle." 68 Cong. Rec. 2567, 69th Cong., 2d Sess. (1927)(emphasis supplied).

To be sure, differing characteristics among the various media justify some distinctions as to what constitutes permissible regulation without contravening the First Amendment. See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). In the case of broadcasting, some government regulation is required to deal with the scarcity of frequencies available for this form of communication. Thus, the Commission has been upheld in limiting portions of the broadcast spectrum to certain specialized uses, such as amateur, aircraft, police, defense, navigation, and industrial operation.^{*/} Courts have also upheld the

^{*/}See, e.g., California Citizens Band Ass'n. v. United States, 375 F.2d 43 (9th Cir.), cert. denied, 389 U.S. 844 (1967); Lafayette Radio Electronics Corp. v. United States, 345 F.2d 278 (2d Cir. 1965).

Commission's power to place some limits on the types of programming that may be employed by new forms of broadcast service (such as Pay-TV), in order to increase the diversity of service offered to the public and, at the same time, protect the viability of existing commercial uses of the broadcast spectrum. National Ass'n. of Theater Owners v. FCC, 420 F.2d 194 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970).

In sum, these cases have established that the First Amendment does not bar the Federal government from regulating access to the spectrum, in order to maximize efficient utilization and augment the diversity of communication services. Such decisions are entirely irrelevant to the curtailment of historic First Amendment rights posed by the Subcommittee's subpoena. That Amendment protects the press from governmental intrusion into its internal journalistic processes,^{*/} whether such intrusion be a direct attempt to regulate or an indirect attempt to chill free exercise of those processes by compelling their disclosure. And no case has ever held or indicated that such constitutional protection is not available to those broadcast media subject to governmental regulation.

In this respect, the Subcommittee's reliance upon National Broadcasting Co. v. United States, 319 U.S. 190 (1943)

^{*/}See Part II of this memorandum.

and Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969) is misplaced. In NBC, the Court upheld the constitutionality of Commission rules banning licensee-network arrangements which restricted the freedom of licensees to choose programs that in their judgment best served the public interest. The Court's decision specifically noted that the Commission's justification for the rules was the need to protect the right of licensees to select program material in the first instance. 319 U.S. at 199.

In Red Lion, the Court faced the question whether the Commission could in certain limited circumstances create a right to reply to ensure that competing viewpoints on controversial issues of public importance receive adequate opportunity for expression over the airwaves. The Fairness Doctrine (under which these "personal attack" rules were established) and Section 315 of the Communications Act (providing for "equal opportunities" for political candidates) are designed to serve occasionally competing First Amendment interests -- the right of the public to obtain conflicting views on important issues, and the right of broadcast journalists to report and interpret events and to conduct discussions of important topics.^{*/} Neither the

^{*/}We do not understand anything in the Subcommittee's April 20 statement to suggest that CBS has violated the Fairness Doctrine or personal attack rules, or to suggest that in its coverage of the controversial issues raised in the broadcast, CBS has failed to afford an opportunity for the expression of conflicting

(footnote continued)

rules before the Court nor the decision of the Court were intended to limit the right of the broadcaster to select programs and program material in the first instance. To the contrary, their goal was to ensure that, consistent with the **First** Amendment, once the licensee had broadcast views that attacked another person, that person was given an opportunity to air his reply.

By contrast, the specific effect of the subpoena and the legislative surveillance it represents will be to chill the freedom of CBS journalists to select news and documentary material for broadcast in the first instance. While the Court in Red Lion had no such issue before it, it strongly suggested that the First Amendment would not permit such a serious constitutional intrusion. The Court, in discussing the constitutional protections applicable to television, emphasized that speech on public issues and public affairs is at the core of the interests protected by the First Amendment, and that there is a First Amendment "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences . . ."

*/(footnote continued)

views. As we understand the matter, after the rebroadcast on March 23, CBS broadcast vigorous criticisms of "The Selling of the Pentagon" by some of the government officials interviewed on the documentary, and on April 18, CBS broadcast an hour-long discussion of the issues raised by the documentary, featuring two critics and two supporters. Moreover, CBS has afforded critics of the documentary extensive coverage in its news programs.

which "may not constitutionally be abridged either by Congress or by the FCC." 395 U.S. at 390.

Thus, the Court described the First Amendment as having "a major role to play as the Congress itself recognized in § 326, which forbids FCC interference with 'the right of free speech. . . .'" Id., at 389-90. The opinion underscores "the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee." Id., at 390. And the Court specifically noted that "more serious First Amendment issues" would be raised by action that restricted a licensee's right to decide what to broadcast in the first instance. Id., at 396.

Congress and the courts have not been alone in concluding that the First Amendment applies with full force to broadcasting. The Attorney General's recent guidelines regarding the propriety of compelling production of reporters' notes by grand jury subpoena explicitly are made applicable without distinction to broadcast journalism as well as other journalistic forms. In introducing these guidelines, the Attorney General counted the nation's radio and television as part of the "numerous, vigorous and diverse" press that has resulted in "more

freedom of speech and freedom of the press in this country than in any country in the world." "Free Press and Fair Trial: The Subpoena Controversy," an address by Hon. John N. Mitchell, Attorney General of the United States, before the House of Delegates, American Bar Association, August 10, 1970, at p. 10.

In sum, in their application to broadcasting, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952). And one of those principles, as we demonstrate below, is the right of journalists and news organizations to engage in news reporting and editing without having to face subsequent government examination of all their filmed and written notes in order to weigh, on the basis of hindsight, the accuracy and truth of their news judgments.^{*/}

The Subcommittee's implied assertion that a subpoena invalid against other forms of journalism can be constitutional if applied to broadcasting is thus contrary to the applicable judicial, congressional, and executive precedents.

^{*/}The Subcommittee's Statement relies on earlier investigations of quiz programs and the resulting legislation that banned certain fraudulent practices in such programs. (pp. 6-7.) The control of outright fraud and bribery in entertainment programs that are not designed as vehicles for the communication of ideas is of course a far cry from efforts to investigate and regulate news broadcasts criticizing Government activities.

II. The First Amendment Forbids The Congress From Compelling Production Of The Filmed And Written Materials Compiled In The Preparation Of "The Selling Of The Pentagon".

- A. Congress may not regulate the manner in which the press reports and interprets current events, particularly when such reports are critical of the government.
-

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of . . . the press" The language of the Amendment is unequivocal, and the Supreme Court has repeatedly, and often with great eloquence, reaffirmed the principles implicit in it. "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society." Associated Press v. United States, 326 U.S. 1, 20 (1945). "A free press stands as one of the great interpreters between the government and the people. To allow it to be fettered is to fetter ourselves " Grosjean v. American Press Co., 297 U.S. 233, 250 (1936).

In order to preserve these principles, the Court has often emphasized the nearly absolute degree of protection to which freedom of the press is entitled. For example, in striking down certain governmental restrictions on the right of the press to comment on judicial proceedings, the Court has declared that "the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to

liberty of the press, as to other liberties, the broadest scope that could be countenanced in an orderly society." Bridges v. California, 314 U.S. 252, 265 (1941). Similarly, in United States v. Rumely, 345 U.S. 41, 56-57 (1953), the concurring opinion emphasized the "preferred position granted speech and the press by the First Amendment . . .," and declared that the Amendment "expresses the confidence that the safety of society depends on the tolerance of government for hostile as well as friendly criticism, that in a community where men's minds are free, there must be room for the unorthodox as well as the orthodox views."^{*/}

Where, as here, a governmental threat to freedom of the press arises as a result of a journalistic effort to criticize aspects of governmental operations, the Court has been

^{*/} In Rumely, the Court blocked an effort by the House Select Committee on Lobbying Activities to compel a witness to reveal the names of those who had made bulk purchases of books distributed by the witness' organization. In condemning this misuse of a Congressional subpoena, the concurring opinion also declared that "[i]f the present inquiry were sanctioned, the press would be subjected to harassment that in practical effect might be as serious as censorship The books and pamphlets that are critical of the administration, that preach an unpopular policy in domestic or foreign affairs, that are in disrepute in the orthodox school of thought will be suspect and subject to investigation. . . . Through the harassment of hearings, investigations, reports, and subpoenas government will hold a club over speech and over the press. Congress could not do this by law. The power of investigation is also limited. . . ." Id., 345 U.S. at 57-58 (footnotes and citations omitted).

particularly sensitive to "the primary need of a vigilant and courageous press . . .," Near v. Minnesota ex rel. Olson, 283 U.S. 697, 720 (1931), and to the fact that "[t]he free press has been a mighty catalyst in awakening public interest in governmental affairs. . . ." Estes v. Texas, 381 U.S. 532, 539 (1965). The Court's view that freedom to comment on the operations of government represents one of the most fundamental forms of expression protected by the First Amendment derives from its conviction that "speech concerning public affairs is more than self-expression, it is the essence of self-government."^{*/} Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964).^{*/} "The liberty of opinion keeps governments themselves in due subjection to their duties." Erskine's Speech in Defense of Paine, quoted in Grosjean v. American Press Co., supra, 297 U.S. at 247-48. Indeed, the freedom of the press to criticize the government is so absolute that "no court of last resort in this country has ever held, or even suggested, that prosecutions for libel on government have any place in the American system of jurisprudence." New York Times v. Sullivan, 376 U.S. 254, 291 (1964) (quoting from City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).

^{*/} "[S]ince informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgement of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." Grosjean v. American Press Co., supra, 297 U.S. at 250.

Recognition has been given to the danger that "[c]harges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal" -- but "the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication " Near v. Minnesota ex rel. Olson, supra, 283 U.S. at 722. Furthermore, the Court has gone so far as to rule that "erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive. . . '" New York Times Co. v. Sullivan, supra, 376 U.S. at 271-72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

The efforts of the Subcommittee to force production of the working materials involved in "The Selling of the Pentagon," on the grounds of alleged distortion and on the premise that remedial legislation may be necessary, fly squarely in the face of these constitutional principles. Because (as we show below) the Subcommittee's actions will inhibit the news judgments of the press, they are the constitutional equivalent of an attempt to formulate a "law abridging the freedom of . . . the press. . . ." For in the First Amendment area, the courts do not distinguish between laws that abridge free speech and other lawmaking activities that have the same effect

"Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly.

While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by law-making." Watkins v. United States, 354 U.S. 178, 197 (1957).

In presuming that it may regulate the editorial judgments of newsmen, the Subcommittee has chosen to ignore the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, supra, 376 U.S. at 270.

B. To compel production of filmed and written materials compiled in preparing news documentaries would have an unconstitutionally chilling effect on First Amendment freedoms.

The underlying assumption of the Subcommittee is reflected in its April 20th Statement -- that the Subcommittee is entitled to investigate, and has the power to determine, whether television news documentary producers are engaging in "factually false and misleading filming and editing practices. . . ." (p. 10). It is for this purpose of judging the editorial fairness involved in the portrayal of the CBS documentary that the Subcommittee has subpoenaed the background scripts, recordings, and outtakes from which the final program was assembled. (pp. 11-12).

This investigatory effort is wholly illusory, regardless of the well-meant intentions from which it may have sprung. As CBS asserted in its letter of April 20, 1971 to Chairman Staggers, truth or accuracy is not the same to all men. The final published or broadcast product represents a news organization's best judgment of the truth. Journalists may, of course, often differ with one another as well as with those whose conduct or views they report. They may even differ with the government as to whether the accounts they publish or broadcast are "true."

Perhaps no one to date has captured this wisdom better than Judge Learned Hand in United States v. Associated Press, 52 F Supp. 362, 372 (S.D.N.Y. 1943), aff'd., 326 U.S. 1 (1945)

"News is history, recent history, it is true, but veritable history, nevertheless, and history is not total recall, but a deliberate pruning of, and calling from, the flux of events. Were it possible by some magic telepathy to reproduce an occasion in all its particularity, all reproductions would be interchangeable, the public could have no choice, provided that the process should be mechanically perfect. But there is no such magic; and if there were, its result would be immeasurably wearisome, and utterly fatuous. In the production of news every step involves the conscious intervention of some news gatherer, and two accounts of the same event will never be the same. Those who make up the first record -- the reporters on the spot -- are themselves seldom first hand witnesses, they must take the stories of others as their raw materials, checking their veracity, eliminating their irrelevancies, finally producing an ordered version which will evoke and retain the reader's attention and convince him of its truth. And the report so prepared, when sent to his superiors, they in turn 'edit', before they send it out . . . , a process similar to the first. A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable."

First Amendment rights comprehend the reality that there is no universal standard of journalistic truth. In the Supreme Court's words "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any tests of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker." New York Times Co. v. Sullivan, supra, 376 U.S. at 271.

An "untrammelled press as a vital source of public information"^{*/} is one of our most precious heritages. "The threat of sanctions may deter . . . [its] exercise almost as potently as the actual application of sanctions. . . ."^{**/} A quixotic governmental search for ultimate truth in journalism necessarily can stifle this "delicate and vulnerable" freedom, especially when it is conducted by compulsory process. The recent landmark case of Caldwell v. United States, 434 F.2d 1081 (9th Cir. 1970) (cert. pending), is specific on this point. "[I]t is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to

^{*/} Grosjean v. American Press Co., supra, 297 U.S. at 250.

^{**/} NAACP v. Button, supra, 371 U.S. at 433. See Dombrowski v. Pfister, 380 U.S. 479 (1965).

submit to interrogation. The First Amendment guards against governmental action that induces such self-censorship." Id., at 1086.^{*/}

Similarly, the Attorney General of the United States has recognized that an unrestricted and unwise use of the subpoena "may seriously affect the vigor of our press institutions and their relationships with the federal government, the bar and the courts." "Free Press and Fair Trial The Subpoena Controversy," address by the Hon John N Mitchell, Attorney General of the United States, before the House of Delegates, American Bar Association, August 10, 1970, at page 17.

^{*/} The District Court for the District of Columbia, in granting a judgment of acquittal from a conviction of contempt of Congress, has expressed very similar views

"[T]hese hearings consisted of the questioning of persons employed in the newspaper field, in radio and television. The danger inherent in such an investigation is found not only in the effect upon those investigated but also in the potential effect upon others in the same field. There is no need to stress the importance to our society of a free press -- and, therefore, of the necessity of enabling writers to formulate ideas and associations freely and without fear of governmental retribution by investigation or otherwise. History is replete with instances in which writers and philosophers have been penalized by the state, but it is always the writers and philosophers who are remembered and admired, never their prosecutors or inquisitors. It is difficult to draw the line between investigations of the political beliefs of newspapermen and investigations of newspapers. For newspapers consist of news stories and editorials, and news stories and editorials are written by newspapermen. To inhibit the freedom of thought and association of newspapermen is to infringe upon the freedom of the press. It is also a temptation to those investigating newspapermen to wander into the field of press content, and at times during these hearings the Subcommittee was unable to resist even this direct invasion." United States v. Peck, 154 F.Supp 603, 605 (D D C 1957) (footnote omitted).

The outtakes, and other material not broadcast, sought in the subpoena are the broadcast journalist's equivalent of the newspaper reporter's notes, the "work papers" from which the final story is produced. The "chill" created by the Subcommittee's subpoena derives from its effect on the journalist's information-gathering techniques as well as on the accessibility of news sources. The knowledge that their notes, films and tapes are subject to compulsory process will inevitably cause newsmen to curtail the scope of their news-gathering activities. The accuracy and fairness of news reporting and editorial judgment, the American public's "right to know" -- the very goals the Subcommittee purports to be serving (Statement, p. 13) -- will suffer. Moreover, key confidential sources of news will be silenced if every person filmed, taped, or interviewed, whether or not included in the ultimate broadcast, must risk being identified as a result of governmental compulsion. As the Court of Appeals put it in Caldwell "The very concept of a free press requires that the news media be accorded a measure of autonomy, that they should be free to pursue their own investigations to their own ends without fear of governmental interference, and that they should be able to protect their investigative processes." Caldwell v. United States, supra, 434 F 2d at 1086.

The chilling effect of the Subcommittee's subpoena on press freedom is potentially a far more powerful inhibition, and reaches at least equal if not more fundamental rights, than

governmental activities the Court has found unacceptable in a host of prior cases. E.g., Smith v. California, 361 U.S. 147 (1959) (requirement that a bookseller examine the contents of the books he sells), Manual Enterprises, Inc. v. Day, 370 U.S. 478, 492-93 (1962) (opinion of Harlan, J.) (requirement that a magazine publisher investigate his advertisers), Talley v. California, 362 U.S. 60 (1960) (requirement that names and addresses of sponsors be printed on handbills), Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963) (requirement that an organization supply membership lists), Louisiana ex rel. Gremlion v NAACP, 366 U.S. 293 (1961) (Id.), Bates v. City of Little Rock, 361 U.S. 516 (1960) (Id.); NAACP v. Alabama ex rel Patterson, 357 U.S. 449 (1958) (Id.)

In fact, the severity of the inhibition brings into question the very power of Congress to investigate the editorial judgments of the press, let alone its power to do so by compulsory process against journalists and their records

"The theory of our Free Society is that government must be neutral when it comes to the press -- whether it be rightist or leftist, orthodox or unorthodox. The theory is that in a community where men's minds are free, all shades of opinion must be immune from governmental inquiry lest we end with regimentation. Congress has no more authority in the field of the press than it does where the pulpit is involved. Since the editorials written and the news printed and the policies advocated by the press are none of the Government's business, I see no justification for the Government investigating the activities, leanings, ideology, qualifications, prejudices or politics of those who collect or write the news." Russell v. United States, 369 U.S. 749, 776-77 (1962) (concurring opinion).

In the Subcommittee's Statement of April 20 (pp. 7-9), much is made of the fact that on three previous occasions, it has investigated the manner in which CBS produced news documentaries and that, in two of these cases, it subpoenaed unbroadcast film outtakes and other materials without objection from CBS.

The Subcommittee's prior predilection for investigating CBS journalists and demanding their records in no way supports the legality of the present subpoena, if anything, it adds to the subpoena's illegal chilling effect. The fact that CBS did not challenge previous subpoenas does not concede or sustain their validity.^{*/}

Moreover, and without prejudice to the right of CBS to challenge similar subpoenas in the future, it should be noted that in the one previous case in which non-broadcast material was supplied CBS was being investigated not merely for an alleged attempt to distort or falsify the news, it was also accused of violating or having knowledge of violations of substantive criminal laws of general application not directed at journalists as such. Under such circumstances, as the Attorney General's promulgation of subpoena guidelines reflects, there may be a constitutional basis for balancing First Amendment rights against the need to enforce the general laws. No such balancing can be justified, however, when the object of the government's inquiry is not to enforce the

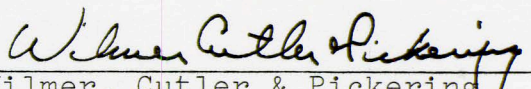
^{*/} In one of these instances, as the Subcommittee states, the items requested had already been destroyed, so that CBS did not possess materials with which to respond.

general laws, but to regulate the practice of journalism itself, and to enforce some governmental standard of good journalistic practice. As the Ninth Circuit noted in Caldwell, supra, 434 F 2d at 1083, n. 1

"Where, as here, the alleged abridgment of First Amendment interests occurs as a by-product of otherwise permissible governmental action not directed at the regulation of speech or press, 'resolution of the issues always involves a balancing by the courts of the competing private and public interests at stake in the particular circumstances shown.' Barenblatt v. United States, 360 U.S. 109. . . ."

CONCLUSION

For all the facts and reasons stated above, it is our opinion that the Subcommittee may not constitutionally require the production of film and script materials not actually broadcast and that CBS is under no legal duty to comply.


Wilmer, Cutler & Pickering

*/ In addition, there is a narrower, but related First Amendment ground which renders the subpoena invalid. Even if the Subcommittee's purpose to investigate "filming and editing" practices were constitutional, the Subcommittee still would be required to adhere to the basic precept that such a purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). Even when considered in light of the Subcommittee's stated goals, the list of subpoenaed materials is overly broad and reflects the Subcommittee's failure to apply this constitutional standard to the situation before it. Had the Subcommittee done so, a much narrower set of materials would have been subpoenaed.



Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

Robert V. Evans
Vice President and General Counsel

Dear Mr. Chairman:

Columbia Broadcasting System, Inc., hereby delivers to the Subcommittee films and written transcripts of (1) its documentary entitled "The Selling of the Pentagon" as broadcast on February 23 and March 23, 1971, and (2) the broadcast comments on that documentary immediately following its rebroadcast on March 23, 1971. These materials are furnished voluntarily and not in compliance with the subpoena dated April 7. CBS respectfully reserves its right to challenge the validity of the subpoena in its entirety.

It is our view that the wide-ranging demands of the Subcommittee's April 7 subpoena -- for film, recordings, outtakes, transcripts, identifications of individuals, disbursements, and releases -- raise fundamental constitutional issues as to whether journalistic news judgments can be subjected to legislative surveillance. We believe that the Congress cannot constitutionally compel journalists to produce such a wide range of materials.

With all respect for the rights and duties of the Congress, and with full recognition of the importance of the Congressional power to investigate, we cannot conceive of any legitimate legislative purpose to which the materials requested would be relevant. The First Amendment is sweeping and explicit; it says that "Congress shall make no law... abridging the freedom of speech, or of the press."

Outtakes and other materials not broadcast are the television equivalent of a newspaper reporter's notes. They are the "work papers" of the intimate, personalized profession of journalism. Journalists frequently make comprehensive records of what they see and hear, amassing more than will finally be reported. Selectivity is an essential part of this winnowing process. The material may be selected or passed over because of its relative

significance compared to other materials, because of judgments as to its accuracy, or because of considerations related to the confidentiality of a source. As Clifton Daniel has remarked: "Discrimination is the very essence of the editing process. You must discriminate or drown."

The final published or broadcast product represents a news organization's best judgment of the truth. Truth, of course, is not the same to all men. Journalists may differ with one another. They may differ with those whose conduct or views they report. They may even differ with the Government as to whether the accounts they publish or broadcast are "true".

Indeed, the basic theory of the First Amendment is that there is no universal standard of journalistic truth. In the Supreme Court's words: "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker." New York Times v. Sullivan, 376 U.S. 254, at 271 (1964).

As Judge Learned Hand observed in United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943):

"[The newspaper] industry serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.

"News is history; recent history, it is true, but veritable history, nevertheless; and history is not total recall, but a deliberate

pruning of, and calling from, the flux of events. Were it possible by some magic telepathy to reproduce an occasion in all its particularity, all reproductions would be interchangeable; the public could have no choice, provided that the process should be mechanically perfect. But there is no such magic; and if there were, its result would be immeasurably wearisome, and utterly fatuous. In the production of news every step involves the conscious intervention of some news gatherer, and two accounts of the same event will never be the same. Those who make up the first record -- the reporters on the spot -- are themselves seldom first hand witnesses; they must take the stories of others as their raw material, checking their veracity, eliminating their irrelevancies, finally producing an ordered version which will evoke and retain the reader's attention and convince him of its truth. And the report so prepared, when sent to his superiors, they in turn 'edit', before they send it out...; a process similar to the first. A personal impress is inevitable at every stage; it gives its value to the dispatch, which without it would be unreadable."

A policy of requiring news organizations to submit reporters' notes to the scrutiny of a Government body whenever someone makes a charge of distortion would have a chilling effect upon the exercise of the First Amendment right to gather and report the news. Reporters will take and preserve fewer notes, and television news teams will record and retain less film, if everything they take down is subject to the risk of Government scrutiny. And the quality and content of news reports will undergo subtle but significant self-censorship if reporters are warned in advance that their final product will be compared to the raw material, and that they will be called to account for any discrepancies.

The threat posed by the Subcommittee's investigation may already be working its chilling effect upon journalists

throughout the land. As the Ninth Circuit recently ruled in the landmark case of Caldwell v. United States, "It is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces such self-censorship." 434 F.2d 1081, 1086 (9th Cir. 1970) (cert. pending).

The Subcommittee has not yet supplied CBS with any explanation as to the Subcommittee's legislative purpose in seeking the material called for by the subpoena, any information regarding the nature of the resolution authorizing the issuance of the subpoena, any statement of reasons for the issuance of the subpoena, or any statement of the subject matter under inquiry by the Subcommittee, as requested by CBS in its letter to you dated and delivered to your office on April 15.

The Subcommittee will doubtless disclaim any desire to deter the exercise of First Amendment rights. It may say it is not concerned with "news judgment", but only with "falsification" or "distortion". No journalist is perfect, and we may make mistakes for which we can be fairly criticized. But Government investigations into allegations of "falsification" or "distortion", particularly when pressed to the point of compelling production of the filmed and written notes compiled by reporters, will inevitably restrict the free and full exercise of rights upon which our constitutional system depends. As the Court of Appeals noted in Caldwell:

"The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes."
Caldwell v. United States, supra, at 1086.

We therefore earnestly urge that the demand to furnish outtakes and other material not broadcast be reconsidered.

5

If further development of this vital issue is necessary, we will submit a more detailed memorandum of law promptly after we receive a reply to our letter of April 15.

Sincerely,

s/ Robert V. Evans

The Honorable Harley O. Staggers
Chairman
Special Subcommittee on Investigations
Committee on Interstate and
Foreign Commerce
House of Representatives
Washington, D.C. 20515

April 20, 1971

Wilmer, Cutler & Pickering
Of Counsel



Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

ANNUAL MEETING OF SHAREHOLDERS
COLUMBIA BROADCASTING SYSTEM, INC.

Special Remarks by CBS President FRANK STANTON

Los Angeles, April 21, 1971

This year, because of unusual circumstances, I would like to depart from our normal practice of presenting a fairly extensive report on operations, prospects and future developments. With your concurrence, I will dispense with the delivery of the President's Report and distribute copies for examination at your convenience. The reason for this change is that CBS is confronted with a problem of grave concern, which should be shared with you in some detail.

On April 8, the Special Subcommittee on Investigations of the House Interstate and Foreign Commerce Committee served CBS with a subpoena, demanding delivery on April 20 (yesterday) of materials relating to the preparation and broadcast of THE SELLING OF THE PENTAGON, a documentary devoted to the extensive public relations activities conducted by the National Military Establishment at the taxpayers' expense. Responding to this subpoena, we said:

"We will comply with that part of the subpoena which calls for a film copy and written transcript of the material actually broadcast.

"The subpoena also demands all outtakes and other materials used in connection with preparing the broadcasts, but not actually broadcast. It therefore raises an unprecedented issue in the history of the relationship between the Federal government and the press in this nation. No newspaper, magazine or other part of the press could

be required constitutionally to comply with such a subpoena with respect to material gathered by reporters in the course of a journalistic investigation but not published.

"Unlike other instances in which a Committee of the Congress has subpoenaed broadcasters' materials, this subpoena appears to involve no question of alleged violation of criminal law on the part of the broadcaster and no question of any governmental interest in whether the broadcaster has evidence pertinent to the criminal prosecution of third persons. Rather, the sole purpose of this subpoena, so far as we can ascertain it, is to obtain materials which will aid the Committee in subjecting to legislative surveillance the news judgments of CBS in preparing THE SELLING OF THE PENTAGON.

"The fact that television and radio stations are licensed by the government does not deprive the broadcast press of First Amendment protection, and the courts have so held. That protection does not depend upon whether the government believes we are right or wrong in our news judgments.

"We will respectfully decline to furnish to the Committee the outtakes and other materials used in connection with preparing the broadcasts, but not actually broadcast."

The subpoena was returnable 1:00 PM yesterday, at which time an officer of CBS turned over 16mm prints and a transcript of the broadcasts in question and delivered a letter, the text of which stated in part:

"...It is our view that the wide-ranging demands of the Subcommittee's April 7 subpoena -- for film, recordings, outtakes, transcripts, indentifications of individuals, disbursements, and releases -- raise fundamental constitutional issues as to whether journalistic news judgments can be subjected to legislative surveillance. We believe that the Congress cannot constitutionally compel journalists to produce such a wide range of materials.

"We cannot conceive of any legitimate legislative purpose to which the materials requested would be relevant. The First Amendment is sweeping and explicit; it says that 'Congress shall make no law... abridging the freedom of speech, or of the press...'

"Outtakes and other materials not broadcast are the television equivalent of a newspaper reporter's notes. They are the 'work papers' of the intimate, personalized profession of journalism. Journalists frequently make comprehensive records of what they see and hear, amassing more than will finally be reported. Selectivity is an essential part of this winnowing process. The material may be selected or passed over because of its relative significance compared to other materials, because of judgments as to its accuracy, or because of considerations related to the confidentiality of a source...

"The final published or broadcast product represents a news organization's best judgment of the truth. Truth, of course, is not the same to all men. Journalists may differ with one another. They may differ with those whose conduct or views they report. They may even differ with the Government as to whether the accounts they publish or broadcast are 'true.'

"Indeed, the basic theory of the First Amendment is that there is no universal standard of journalistic truth. In the Supreme Court's words: 'Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth -- whether administered by judges, juries, or administrative officials -- and especially one that puts the burden of proving truth on the speaker'...

"A policy of requiring news organizations to submit reporters' notes to the scrutiny of a Government body whenever someone makes a charge of distortion would have a chilling effect upon the exercise of the First Amendment right to gather and report the news. Reporters will take and preserve fewer notes, and television news teams will record and retain less film, if everything they take down is subject to the risk of Government scrutiny. And the quality and content of news reports will undergo subtle but significant self-censorship if reporters are warned in advance that their final product will be compared to the raw material, and that they will be called to account for any discrepancies.

"The threat posed by the Subcommittee's investigation may already be working its chilling effect upon journalists throughout the land. As the Ninth Circuit recently ruled..., 'It is not unreasonable to expect journalists everywhere to temper their reporting so as to reduce the probability that they will be required to submit to interrogation. The First Amendment guards against governmental action that induces such self-censorship'...

"The Subcommittee will doubtless disclaim any desire to deter the exercise of First Amendment rights. It may say it is not concerned with 'news judgment,' but only with 'falsification' or 'distortion.' No journalist is perfect, and we may make mistakes for which we can be fairly criticized. But Government investigations into allegations of

'falsification' or 'distortion,' particularly when pressed to the point of compelling production of the filmed and written notes compiled by reporters, will inevitably restrict the free and full exercise of rights upon which our constitutional system depends. As the Ninth Circuit noted... 'The very concept of a free press requires that the news media be accorded a measure of autonomy; that they should be free to pursue their own investigations to their own ends without fear of governmental interference; and that they should be able to protect their investigative processes.'"

All this boils down to one central and vital question: Is this country going to continue to have a free press or is indirect censorship cynically masquerading as a "Federal standard" to be imposed upon it? The issue is as simple as that -- and as crucial.

We at CBS have rejected, in principle and in fact, this government invasion of one of this country's oldest and most fundamental freedoms. And we have rejected it totally.

I am delighted to report to you that we do not stand alone. Never has there been such an outpouring of support for a position taken by us. Never has there been a more alert demonstration of the old and still valid principle that "the price of liberty is eternal vigilance." Distinguished leaders in American life, associations of creative and professional people, outstanding publications, concerned individuals from all walks of life, and, not least, our competitors in broadcasting and in other media have expressed their deep and intense concern at the grim implications raised by this shocking subpoena action.

Among the most persuasive and eloquent of these expressions of dismay was a telegram sent to the leadership of the Congress by one of the bastions of the free press -- the American Society of Newspaper Editors -- which said:

"It is my duty as President of the American Society of Newspaper Editors to inform you that the Society, now assembled in Washington in annual meeting, has cast an almost unanimous vote condemning the action of the House's Commerce subcommittee in demanding from the Columbia

Broadcasting System all preliminary material collected by the network's news department in the preparation of its documentary program on the Pentagon.

"The Society agrees that every news report can be judged for accuracy and fairness. It disagrees totally with any attempts to pry into newspapers', broadcasters', or any other journalist's private files to seek to judge editing.

"The Society views the subcommittee's order an open attack on the First Amendment guaranteeing the nation a free press, and stand unwaveringly beside its journalistic colleagues in broadcasting in viewing the subcommittee action as a dangerous and unwarranted intrusion into journalistic freedom. The Society urges immediate reconsideration."

With this kind of support and with the firm conviction that we are doing the right thing -- right for the American people whom both government and journalism exist to serve, right for the tradition and exercise of a freedom as old as this republic, and right for CBS as a responsible institution -- we will take every step necessary and open to us to resist this unwarranted action of a Congressional Committee and to keep broadcast journalism free of government surveillance. Too much is at stake for us to do less.



Columbia Broadcasting System, Inc.
51 West 52 Street
New York, New York 10019
(212) 765-4321

April 8, 1971

CBS President Frank Stanton made the following statement about the subpoena served on CBS today by the Special Subcommittee on Investigations, House Interstate and Foreign Commerce Committee, demanding various materials relating to the CBS News broadcast, THE SELLING OF THE PENTAGON:

"We will comply with that part of the subpoena which calls for a film copy and written transcript of the material actually broadcast.

"The subpoena also demands all outtakes and other materials used in connection with preparing the broadcasts, but not actually broadcast. It therefore raises an unprecedented issue in the history of the relationship between the Federal government and the press in this nation. No newspaper, magazine or other part of the press could be required constitutionally to comply with such a subpoena with respect to material gathered by reporters in the course of a journalistic investigation but not published.

"Unlike other instances in which a Committee of the Congress has subpoenaed broadcasters' materials, this subpoena appears to involve no question of alleged violation of criminal law on the part of the broadcaster and no question of any governmental interest in whether the broadcaster has evidence pertinent to the criminal prosecution of third persons. Rather, the sole purpose of this subpoena, so far as we can ascertain it, is to obtain materials which will aid the Committee in subjecting to legislative surveillance the news judgments of CBS in preparing THE SELLING OF THE PENTAGON.

"The fact that television and radio stations are licensed by the government does not deprive the broadcast press of First Amendment protection, and the courts have so held. That protection does not depend upon whether the government believes we are right or wrong in our news judgments.

"We will respectfully decline to furnish to the Committee the outtakes and other materials used in connection with preparing the broadcasts, but not actually broadcast."

ORIGINAL

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES OF THE CONGRESS OF THE
UNITED STATES OF AMERICA

To James F. Broder and Mark Raabe, Special Subcommittee on Investigations,
House Interstate and Foreign Commerce Committee,

You are hereby commanded to summon FRANK STANTON, President, Columbia Broad-
casting System, Inc., 51 W. 52nd Street, New York, N.Y., or any officer of
said corporation

[PERSONAL APPEARANCE NOT REQUIRED.]

to be and appear before the Special Subcommittee on Investigations (vested under
authority of H. Res. 170, 92nd Cong.) of the Interstate and Foreign Commerce
Committee of the House of Representatives of the United States, of which the Hon.

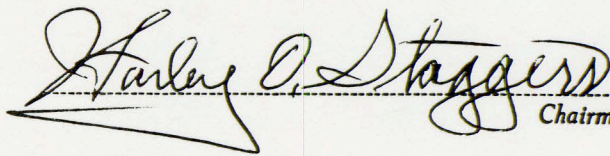
HARLEY O. STAGGERS is chairman, and to bring with
him all items shown on the attached list, hereby incorporated into this
subpoena

in their chamber in the city of Washington, on April 20, 1971, in Room 2323,
Rayburn House Office Building, at the hour of 10:30 a.m.

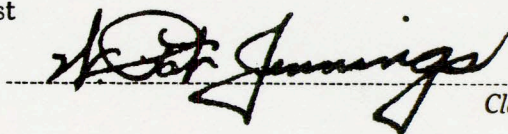
then and there to testify touching matters of inquiry committed to said Committee, and he is
not to depart without leave of said Committee.

Herein fail not, and make return of this summons.

Witness my hand and the seal of the House of Representatives
of the United States, at the city of Washington, this
7th day of April, 1971


Chairman.

Attest


Clerk.

ATTACHMENT INCORPORATED INTO THE SUBPOENA DATED
APRIL 7, 1971, ISSUED BY HARLEY O. STAGGERS, CHAIRMAN,
SPECIAL SUBCOMMITTEE ON INVESTIGATIONS OF THE HOUSE
INTERSTATE AND FOREIGN COMMERCE COMMITTEE TO
FRANK STANTON, PRESIDENT, COLUMBIA BROADCASTING
SYSTEM, INC., 51 WEST 52ND STREET, NEW YORK, NEW YORK.

1. A 16-millimeter sound film copy, and a written transcript, of each of the following broadcasts: (a) the CBS documentary entitled "The Selling of the Pentagon" as broadcast on February 23 and March 23, 1971, and (b) the broadcast carried on March 23, 1971, immediately following the broadcast of "The Selling of the Pentagon", and composed of comment on the aforesaid program together with the reply of Mr. Richard Salant on behalf of CBS. Provided, that in the event that a 16-millimeter sound film copy of either of the above broadcasts is unavailable to CBS, videotape copies may be substituted.
2. All film, workprints, outtakes, sound tape recordings, written scripts and/or transcripts prepared, obtained, or utilized in whole or in part by CBS in connection with the preparation and/or presentation of the broadcasts described in Paragraph 1, above, whether or not such material was incorporated into the actual broadcasts. Provided, that this paragraph 2 shall not apply to materials that relate solely and exclusively to the remarks of Mr. Richard Salant referred to in paragraph 1(b), above, and Provided further, that where official United States Government film was utilized, full identification of all such film may be supplied in lieu of actual film.
3. The names and addresses of all persons appearing in "The Selling of the Pentagon" and/or filmed or recorded in connection with its preparation. Provided, that this paragraph 3 shall not apply to Government officials (including Members of Congress), military personnel, persons who were regular CBS employees as of January 1, 1970, or to persons whose inclusion in the said program arises solely by reason of their appearance in official United States Government films incorporated into the program.
4. A statement of all disbursements of money, things of value, or legal consideration of any kind, for any purpose, made by CBS to any individual named in response to paragraph 3, above, together with the amount and/or nature of such disbursement, and the purpose for which it was made. This statement shall be certified to be correct by CBS.

5. Copies of any written agreements, contracts, or releases entered into with, or obtained from, any individual named in response to paragraph 3, above, and a descriptive statement of any such agreements, contracts, or releases, which were entered into, or obtained, verbally.