

**UNITED STATES ARMY TRIAL JUDICIARY
SECOND JUDICIAL CIRCUIT, FORT BRAGG, NORTH CAROLINA**

UNITED STATES OF AMERICA

v.

**SGT Robert B. Bergdahl
HHC, STB, U.S. Army FORSCOM
Fort Bragg, NC 28310**

**Findings of Fact, Conclusions of Law
and Ruling -- Supplement to Seventh
Defense Motion to Compel**

9 August 2017

1. The defense moves this court, pursuant to RCM 703, to order the Government to issue a subpoena to CNN to obtain un-aired footage of the 2015 Anderson Cooper interview with Senior Chief Petty Officer (Retired) James Hatch. I have considered the pleadings of the parties, documents appended thereto, relevant case law, as well as the arguments of counsel.

FINDINGS OF FACT

2. I find the following facts by a preponderance of the evidence:

a. On 11 September 2015, CNN aired a news program, hosted by Anderson Cooper, in which SCPO Hatch was interviewed about losing his leg as a result of enemy fire in Afghanistan while searching for SGT Bergdahl. The interview also focused on Hatch's work with service dogs as he recovered physically and emotionally from the trauma of losing his leg. The aired interview appears to have been edited.

b. On 19 June 2017, the defense moved this court to compel the government to produce the outtakes from that recorded interview as well as the draft book SPCO Hatch has written. At that time, the court ruled that the defense had failed to show that any outtakes exist and, therefore, denied the request. The court did order the government to obtain and provide the draft book to the defense. The government complied with that order.

c. On 1 August 2017, SGT David E. Johns, a defense paralegal, spoke with Kelly Black-Holmes, Assistant General Counsel for Time Warner (parent company of CNN) and determined that there are "a good chunk" and "not de minimis" un-aired footage from Mr. Cooper's interview with Hatch.

LAW AND ANALYSIS

3. The defense now contends that, because they have established that the un-aired outtakes do exist, the government should be ordered to subpoena the footage and provide to the defense.¹

4. Article 46, UCMJ, guarantees that parties to a court-martial are entitled to an "equal opportunity to obtain witnesses and other evidence . . ." This right can be secured by compulsory process, if necessary. RCM 703(a). And, each party is entitled to the production of evidence which is "relevant and necessary." RCM 703(f)(1). MRE 401 defines relevant evidence as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Relevant evidence is necessary when it is not cumulative and when it would contribute to the party's presentation of the case in some positive way on a matter in issue. *United States v. Rodriguez*, 60 MJ 239, 246 (2004).

5. While it is true that the defense has established by a preponderance of the evidence that outtakes of the CNN interview with Hatch exist, they have offered nothing beyond mere speculation that the outtakes are relevant and necessary -- that is not cumulative. While it may be safe to speculate that the outtakes have something to do with Hatch's involvement in and injuries from the mission he describes in the CNN interview² involving searching for the accused, assuming that such outtakes would not be cumulative with the book Hatch wrote on the same subject is not a reasonable assumption. And, the defense has offered nothing to establish that Hatch has said or written anything different at any time than what he wrote in his book. In fact, logic would dictate that if a person were going to publish a book and give interviews to news shows about the facts from his book, the facts set forth in both media would be the same. The defense has offered no evidence otherwise. Consequently, they have not established the outtakes are necessary.

¹ In their argument, the defense points out that during the pendency of this case, the government went to court in order to obtain outtakes from telephone interviews the accused gave to someone producing a Serial Podcast about the accused. The government contends that is not true. Whatever the case, whether the government is using their subpoena power to gain a tactical advantage over the defense has not been established one way or the other and need not be resolved to decide the defense motion, as explained in this ruling.

² The same information Hatch provided in testimony before this court.

RULING

6. The Defense motion to compel the CNN outtakes is DENIED.



**JEFFERY R. NANCE
COL, JA
Military Judge**