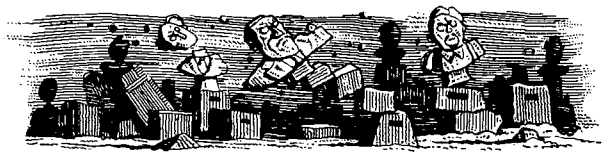

by Reid Collins

CNN's Real Mistake

Hang in there, Peter Arnett. It has happened before, with a bigger star and a bigger network. Only, that network didn't have to apologize. It stonewalled and won awards in the process.

On February 23, 1971, CBS News broadcast an hour-long documentary, "The Selling of the Pentagon," an examination of the Pentagon's public relations activities, the network said. "Millions of the American taxpayer's dollars are spent each year," said producer Peter Davis. "We plan to look at how and why that money is being spent."

"The Selling of the Pentagon" produced an outcry. Some of the participants claimed they had been had, their remarks distorted, answers deftly rearranged. An assistant secretary of defense charged "unethical" editing of his remarks. CBS rebroadcast the program allowing airtime for some critics at the end. A House Commerce Subcommittee chaired by Harley Staggers, a West Virginia Democrat, prepared hearings.

It was widely accepted in network circles that the correspondent who narrated the program, Roger Mudd, had no role in the editing process, and the brickbats went past him to the producer Davis and to the network brass.

The Staggers committee subpoenaed the material that went into the broadcast and, particularly, the "outtakes," the material not used but which, compared with that which was, would render the extent of distortion or bias.

Outtakes are the DNA of journalistic truth. Citing the First Amendment, CBS defied Congress. President Frank Stanton was dispatched to Washington, where his reported confrontations with Chairman Staggers provided much amusement for the press corps. In one such meeting Congressman Staggers was said to have suggested that they pray together. And he reportedly offered a compromise: if Dr. Stanton would just show *him* the outtakes, that might be sufficient.

Stanton would neither pray nor bargain. CBS escaped a contempt-of-Congress citation by a vote of 226 to 181. It had stonewalled and won, to the cheers of other media stirred by the specter of legislative oversight of the Fourth Estate. While Stanton was guarding the portcullis in Washington, News President Dick Salant changed some filming and editing procedures inside the castle in New York.

In 1998, CNN took just the opposite tack from CBS's. It *gave away* the outtakes from "Tailwind," supplied them willingly to the outside investigator, Floyd Abrams, with the producers' notes to boot. The First Amendment shield CBS had so effectively applied in dueling with the U.S. Congress was never even raised. In the space of a week's study, Abrams, aided by CNN's own lawyer, concluded that the outtakes did not support the broadcast (the "intakes"). That the United States had used nerve gas in Laos, perhaps against its own, was an unwarranted charge. CNN apologized, retracted, sacked two producers, put a reprimand in Arnett's paycheck, and invited the sobriquet, the Culpa News Network.

In what is presumed to be an exculpatory phrase, the Abrams report says "Tailwind" "reflected the deeply held beliefs of the CNN journalists who prepared it." What a far cry from the time when CBS refused to explore in public any of its employees' "deeply held beliefs." Within a year, Peter Davis was out of CBS. But at the time, CBS was greatly supported by the awards committees that showered kudos on its broadcast: The University of Georgia's journalism school broke with its own tradition to confer a special Peabody on "The Selling of the Pentagon" even though it occurred after the close of the calendar year! Emmys went without saying. And Davis would later be honored by Hollywood with an Academy Award for his film, again critical of the U.S. presence in Indochina, *Hearts and Minds*. At the Awards Ceremony his co-producer read a thank you message from the Vietcong.

True, the early seventies were different times. Networks were few and powerful. Anything anti-military and anti-war was looked upon with favor. Richard Nixon was president.

True also, the sum of the CBS allegations would not approach a violation of international law. But what if CNN had taken its cue from CBS, the broadcast behemoth Ted Turner once longed to own? What if it had stonewalled? Does the thought ever occur to CNN President Tom Johnson as sleep approaches? If CNN had thrown up a First Amendment shield around the notes of producers April Oliver and Jack Smith, refusing to reveal the outtakes, who could have said what the network really knew or should have known? Hell, they could have trotted out Arnett's old Pulitzer from Vietnam, too. (Oliver and Smith contend that their bosses caved early for fear of Pentagon reprisal. But does Ted Turner—the man who sleeps with Jane Fonda, gives a billion dollars to the United Nations, and wants to junk the "Star Spangled Banner" because it's a war song—sound like a guy who fears offending the military?)

We'll never know what would have happened. The awards committees will never get their chance at a supporting role this time. No network president will be invited to say a little prayer with a committee chairman. And no new rules will have to be written for the documentation of deeply held beliefs.

REID COLLINS *is a former CBS and CNN correspondent.*

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by Jeremy Rabkin

The Supreme Feminist Court

Sexual harassment claims make a stunning comeback.

Many people have had the thought: whatever else emerges from the Clinton scandals, at least they have put a stop to feminist ranting about sexual harassment. The Supreme Court, however, is not ready to offer that consolation. In late June, at the end of its term, the Court decided to dig in more deeply on this matter.

Prior to this term, the Court had only seen fit to take up three cases on sexual harassment in a dozen years. This year it took up four. All were docketed before the Lewinsky and Willey scandals came to light, so the Court was not making a subtle point about the president's abuses. Rather, the justices were responding to the enormous number and complexity of cases working their way through the lower courts. But the Court's decisions this term, rather than reduce the mess, simply confirm that it will all have to be thrashed out in federal courts for years and years.

Oncale v. *Sundowners* was in some ways the simplest, and in fact, was the only decision to receive unanimous approval from the justices. At issue was whether the general prohibition on "sex discrimination" in Title VII of the 1964 Civil Rights Act—the statutory basis for most federal harassment claims—extends to harassment of a male employee by other males. Despite disagreement among the lower courts, the opinion by Justice Scalia found the issue quite straightforward—by analyzing it with antiseptic legalism. In past cases, Scalia noted, the Court had been willing to consider whether affirmative action policies on behalf of women had discriminatory impact on men, even when the responsible managers were also male. So, he concluded, it must be possible to have men discriminating against fellow men "on the basis of sex."

Though this satisfied the entire Supreme Court, it is hardly a satisfying argument. Joseph Oncale had been employed on an off-shore drilling rig and quit his job after rowdy conduct by other drillers made him uncomfortable. He did not claim that they were sexually attracted to him, simply that they made lewd, demeaning, and sexually explicit remarks that generated a "hostile environment."

Justice Scalia's opinion acknowledges the warning from business groups that "liability for same-sex harassment will transform Title VII into a general civility code for the American workplace." His answer is remarkably complacent: "Common sense and an appropriate sensitivity to social context will enable courts and juries to distinguish between simple teasing or rough-housing, among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."

With all respect to Justice Scalia, this is surely wishful thinking. In *Oncale* itself, "in the interest of both brevity and dignity," his opinion declines to describe the relevant facts in any detail. In Scalia's view, it seems, the question is not whether the conduct relates in any way to "sex," but simply whether it is "severely hostile and abusive." To say that the judge and jury will consider "the context" is not much help when that context is quite removed from the experience of judges and juries. How do men usually relieve stress and boredom during long hours of isolation on a mid-ocean drilling platform with only eight people?

In two other cases this term, with more conventional settings but equally troubling facts, the Court (over dissents by Justices Scalia and Thomas) gave plaintiffs a much bigger club to wield against employers. In *Beth Ann Faragher* v. *City of Boca Raton*, the plaintiff worked as a life guard at the Boca Raton city beach. It was a summer job she held while working her way through college. She came back for five summers. Although the city had a formal policy against sexual harassment, Faragher never invoked it. Two years after she stopped working for the city, another female lifeguard filed a harassment case that led to immediate disciplinary sanctions against her supervisors. Faragher then decided to file her own lawsuit, insisting that one of her bosses had "put his arm around [her], with his hand on her buttocks," "once made contact with another female lifeguard in a motion of sexual simulation," "made crudely demeaning references to women generally," and so on.

In *Burlington Industries* v. *Kimberly Ellerth*, the plaintiff complained that her immediate supervisor had invited her to the hotel lounge during a business trip, and once there, had made comments about her breasts. He then told her to "loosen up," warning, "You know, Kim, I could make your life very hard or very easy at Burlington." On a subsequent occasion, this same supervisor expressed reservations about giving her a promotion and "touched her knee." She did get the promotion, however, and never filed

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