

NEWS MEDIA UPDATE District of Columbia · September 17, 2008 · Reporter's privilege

Highest military courts hears arguments in CBS subpoena case

The U.S. Court of Appeals for the Armed Forces heard oral arguments Wednesday on whether CBS must give the government unaired footage of an interview with a Marine staff sergeant who faces manslaughter charges.

Staff Sergeant Frank Wuterich was leading a marine convoy near Haditha, Iraq, in November 2005 when they killed 24 Iraqi citizens, including men, women and children as young as 2 years old, in the aftermath of a roadside bomb explosion. Wuterich was subsequently charged by the U.S. government with dereliction of duty and voluntary manslaughter.

Last year, [CBS interviewed Wuterich for a segment on 60 Minutes](#) about his experiences in Haditha. After the interview, the government subpoenaed CBS for both the broadcast footage and the un-aired outtakes of the interview.

In a victory for CBS, the military judge quashed the subpoena.

The case was then appealed to the U.S. Navy-Marine Corps Court of Criminal Appeals, [which held](#) that the military judge erred by not first reviewing the videotape *in camera*, or alone in chambers, to determine whether it was relevant. That appellate decision was under review by the highest military court on Wednesday.

The direct issue before the court was a procedural one, dealing with what legal standard courts should apply in determining whether to grant an *in camera* review of subpoenaed material. But the outcome of the decision will bear on whether CBS has to turn over its un-aired tapes.

Many of the judges' questions focused on the CBS outtakes, and how a court would gauge their relevance to a case without first watching the tapes. No one other than CBS knows whether the tapes have evidence that help or hurt Wuterich, the panel pointed out.

Lee Levine, attorney for CBS, argued that there was no difference between the information Wuterich provided in the outtakes and the account he gave in the court record.

"This isn't a case where material facts are in dispute," Levine argued. "It's a fallacy that the government thinks there are distinctions between the tape and the other information the government has."

Levine also urged the court not to develop a legal standard that would make it easier and more common for military courts to conduct *in camera* reviews of journalistic materials. Even though such reviews are less intrusive than requiring that the material be disclosed to all parties in a case, Levine argued that *in camera* reviews still impinge upon journalists' ability to gather news.

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The government attorney, Timothy Delgado, argued that the outtakes of the CBS interview are highly relevant to the government's prosecution of Wuterich. And the government has no other way to get the tapes other than through CBS, Delgado argued.

"It's really common sense that [all the information the government needs] is already there," Levine said.

The Reporters Committee joined several news organizations in a friend-of-the-court brief in this case.

— [Samantha Fredrickson](#), 6:09 pm [\[link\]](#) Keywords: [military](#); [Subpoenas](#); [U.S. Marines](#); [Videotapes](#) Comments: 0 · [Comment](#)

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