

# FIRST GITMO HABEAS CASE MAKES WAY TO SCOTUS

In March of this year, Marcy reported about a Center for Constitutional Rights (CCR) petition to the Supreme Court on behalf of Guantanamo Lawyer Thomas Wilner and cited the CCR press release:

Last night, the Center for Constitutional Rights (CCR) asked the Supreme Court to take up its warrantless surveillance case, *Wilner v. National Security Agency (NSA)*. CCR and co-counsel argue that the Executive Branch must disclose whether or not it has records related to the wiretapping of privileged attorney-client conversations without a warrant. Lawyers for the Guantánamo detainees fit the officially acknowledged profile of those subject to surveillance under the former administration's program, and the Executive Branch has argued in the past that it has a right to target them.

Yesterday, the petition for cert on behalf of Tom Wilner was denied on the Court's traditional First Monday announcements.

But the story will not end there for Tom Wilner in this nascent Supreme Court term, in a move that will prove ultimately much more significant than the somewhat weak FOIA case CCR was pursuing, Wilner has petitioned for cert on the Habeas case of his client Fawzi al-Odah. This will be a critical test to see how the Supremes are going to deal with the progeny of their decision in *Boumediene v. Bush*.

From Andy Worthington:

Last week, two years and three months after the US Supreme Court granted the

prisoners held at Guantánamo constitutionally guaranteed habeas corpus rights in *Boumediene v. Bush*, Fawzi al-Odah, a Kuwaiti prisoner held for nearly nine years, became the first prisoner to appeal to the Supreme Court “to protest federal court interpretations of detainees’ right to contest their detention,” as AFP described it.

Over the last two years, the prisoners have won 38 out of the 55 cases in which the District Court judges in Washington D.C. have made a ruling, but al-Odah is one of the 17 whose appeals have been denied. As I reported when he lost his petition in August 2009:

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Although the burden of proof is on the government in the habeas cases, the “preponderance of evidence” standard is considerably lower than in criminal cases, for example, where a case must be established beyond reasonable doubt. However, the Circuit Court dismissed al-Odah’s complaint “under binding precedent in this circuit,” and also dismissed his complaint about the use of hearsay evidence, pointing out that the use of hearsay evidence had been approved by the Supreme Court in *Hamdi v. Rumsfeld*, the 2004 case that approved the detention of prisoners under the Authorization for Use of Military Force, the legislation passed by Congress the week after the 9/11 attacks, which authorized (and still authorizes) the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001” (or those who harbored them).

....

In his petition to the Supreme Court, al-Odah argues that the courts have “applied a burden of proof lower than any ever approved by this Court in a case involving prolonged imprisonment, allowing the government to justify indefinite detention by a mere preponderance of the evidence, rather than by clear and convincing evidence.” He also argues that “both the District Court and the Court of Appeals have ... allowed the indiscriminate admission of hearsay, denying the detainees any meaningful opportunity to test the reliability of statements made against them.”

Here is the official Petition for Certiorari in al-Odah. al-Odah will be an important bellwether to see if the Court accepts cert and, if so, what they do with the case.