

CCR FIGHTS TO UPHOLD ATTORNEY-CLIENT PRIVILEGE

So al-Haramain, at least for the moment, has won its case against the government. But there's an aspect of the case that often gets forgotten: al-Haramain argued not just that some of its employees were wiretapped, but that lawyers working for al-Haramain, Wendell Belew and Asim Ghafoor, were wiretapped. We seem to have forgotten that this country once believed that attorney-client conversations should be protected to ensure the legal process.

The Center for Constitutional Rights hasn't forgotten. They, too, had a suit arguing that the government wiretapped attorney-client conversations (though unlike al-Haramain, they never got a wiretap log reflecting those conversations, nor were they able to make a prima facie case they were wiretapped). Last night, they appealed their suit to the Supreme Court. From their 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.

The plaintiffs in the case are 23 attorneys who have represented Guantánamo detainees. They filed a

Freedom of Information Act (FOIA) request seeking records of any surveillance of their communications under the NSA's warrantless surveillance program, which began after 9/11 but was only disclosed to the public in December 2005. The government refused to either confirm or deny whether such records existed, and the lower courts refused to order the government to confirm whether it had eavesdropped on attorney-client communications. The question before the Supreme Court is whether the government can refuse to confirm or deny whether records of such surveillance exist, even though any such surveillance would necessarily be unconstitutional and illegal.

"Illegal surveillance of attorney-client communications makes it nearly impossible to challenge other illegal behavior by the government," said Shayana Kadidal, Senior Managing Attorney of the CCR Guantánamo Global Justice Initiative. "The new administration has no legal basis for refusing to come clean about any violations of attorney-client privilege by the NSA."

The petition filed last night includes declarations from the Guantánamo attorneys detailing how the threat of illegal surveillance by the NSA has made it harder for them to gather evidence in their cases from witnesses overseas, including family members of detainees, who are often unwilling to speak freely on the phone given the threat that the government may be listening in.

I'm in the process of writing a post on why I think the government will not appeal Judge Walker's ruling in al-Haramain. But who knows—SCOTUS might get a warrantless wiretap case sooner rather than later.

Update: Here's their petition. I'll have some comment on that later.