

Interview with Thoms Wilner



24/05/2006

Thomas Wilner is a partner in the Washington, D.C. office of the law firm of Shearman & Sterling. Mr. Wilner represents twelve Kuwaiti nationals who are, or have been, detained by the United States military at Guantanamo Bay, Cuba. On May 15, 2006, I had the privilege of interviewing Mr. Wilner, by telephone. My interview notes, as corrected where appropriate by Mr. Wilner, are below.

The Talking Dog: *In my own case, the answer was "across the street from the WTC"; the answers I get are always interesting... the first question is "Where were you on September 11th"?*

Thomas Wilner: Everyone indeed has an interesting answer. In my case, on the night of September 10th, I was on an Aeromexico flight to Mexico City, and was then supposed to travel on to Culiacan on the West Coast of Mexico, a "vegetable capital", where I was to meet with a number of Mexican clients and U.S. Dept. of Commerce representatives. The flight was 11 hours late. Eventually, I got to Culiacan, and met my Mexican clients, who told me "the towers were blown up". On September 11th and 12th, I was in Culiacan with Mexican clients and Commerce officials, and we watched the 9-11 events on TV. There was a great deal of fellowship-- the Mexicans were appalled and sympathetic. At that time, of course, no planes were flying in the United States, so I got a flight to Tijuana, walked over the border into San Diego, and waited two days before I could get a flight down to Washington. My memories are about how sympathetic the Mexicans were...

The Talking Dog: *Do you find it a tad ironic that the President will be talking about moving National Guard troops to that border tonight?*

Thomas Wilner: Ironic indeed...

The Talking Dog: I understand that you were among the first (if not the first) attorney to bring a habeas corpus case on behalf of a Guantanamo detainee, in your case, twelve Kuwaiti nationals in a case called "[Al-Odah v. United States](#)". Can you tell me the current procedural status of that case... am I correct it is fully briefed and argued and awaiting decision by the D.C. Circuit Court of Appeals?

Thomas Wilner: At the end of February or March, 2002, the [Rasul case](#) was filed. By May 1st, Al-Odah was filed. The [Center for Constitutional Rights](#) filed *Rasul*, as a straight habeas corpus case. We styled our case somewhat differently, alleging different civil causes of action. Those were the original two cases that were decided by the Supreme Court. The *Rasul* guys are now out, except for David Hicks, who is one of the few guys charged before a military commission, and he is really now part of the [Hamdan case](#) challenging the validity of the military commission. In June of 2004, the Supreme Court ruled in our favor, finding that the federal courts had jurisdiction to hear complaints by detainees at Guantanamo. The first thing the government did after that decision was insist that the detainees were not entitled to lawyers, or that if they were, the lawyers could be eavesdropped on "for national security" purposes. Judge Kollar-Kotelly of the District Court in Washington, D.C. held that the detainees had an absolute right to unmonitored communications with their lawyers. The government then moved to dismiss the cases, arguing that, even if the detainees could go to court, they had no substantive rights that could be vindicated in court. By that time, thirteen cases had been filed. Judge Joyce Hens Green ruled in eleven of those cases, finding that the detainees had the constitutional right to due process and had been denied that right. Judge Richard Leon ruled in the two other cases and found the detainees had no rights. Those two decisions are now on appeal to the D.C. Circuit Court. Even Judge Green bought in, to some extent, to the argument that we had to show that detainees had

some constitutional interest or constitutional rights as a precursor to get habeas relief. This is not the case: habeas simply compels the government to show a reasonable legal and factual basis for the detentions, and indeed, habeas pre-dates our Constitution. We believe we won on the merits at oral argument in September of 2005, and then the Government got Senator Graham to introduce and help pass what became the Graham Levin Amendment. The Court of Appeals *sua sponte* directed supplemental briefings on Graham Levin issues, which we have filed. These issues were also raised in *Hamdan*. Though we had asked the Court of Appeals to hold off on a decision until the Supreme Court decided *Hamdan*, as *Hamdan* would almost certainly be instructive, they wouldn't hold off. In any event, we first submitted a 15 page brief, then a 60 page brief. The appeal was then argued on March 22nd. The Court of Appeals case is fully submitted, and in the end, will likely be decided after *Hamdan* anyway (which should be decided by June).

The Talking Dog: *Of your Kuwaiti national clients, I understand that a number have been released, and they have some legal issues pending back in Kuwait?*

Thomas Wilner: Six have been released to Kuwait. Kuwait will not hold anyone more than a limited amount of time without charging them under their own laws. They can be prosecuted there more easily than here, but there still has to be some evidence worthy of prosecution. And they cannot be convicted without a fair trial. All are on bail, awaiting trial, and based on what we know, we would expect them all to be acquitted. By the way, there is no rhyme or reason as to why those six are released and the other six are still held. It's supposedly based on classified evidence, but again, there seems no rhyme or reason. For example, one still held at Guantanamo, Abdullah Al Kandari, is a great guy, and a member of Kuwait's national volleyball team... he is held because supposedly an alias of his name appeared on a hard drive two years after he was detained! He has no alias... He was also accused of wearing a Casio watch which they say terrorists wore.... though such a watch was also worn by the military's own Muslim chaplain, Mr. Yee. And Omar Amin was alleged to be in Bosnia... well, he was in Bosnia, helping out as head of the Bosnian national relief agency. [Editing note: Since the interview, it appears that at least five Kuwaitis previously held at Guantanamo and released to Kuwait [have been acquitted by a Kuwaiti court.](#)]

The Talking Dog: *I also understand that you were among the first (if not the first) attorney to travel to Guantanamo Bay to meet with your clients. Can you tell me your impressions-- or Guantanamo Bay, what you observed, and give me a brief impression of some of your clients (their names, something about them or their cases)? Am I correct that not one of them (1) was picked up by American forces "on the battlefield", or (2) has been charged with a war crime? How have they held up since you first met them?*

Thomas Wilner: You are correct that none was picked up by the United States, or on a "battlefield" and none has been charged. Our best information is that all were turned over for bounties. My general impressions are laid out in [the Los Angeles Times piece](#). The place is Kafkaesque. It is quite dry... it could be beautiful. The military escorts are very nice, very polite and friendly... It seems incongruous to have a place so evil, such an affront to American principles, to be introduced by such courteous soldiers, disguising just how evil it is.

The Talking Dog: *I understand that there have been complaints that the discipline system at Guantanamo involves progressive removal of religious items for various infractions, ranging from prayer beads and prayer mats to pants (to prevent prayer while being in the immodest position of not being covered head to toe), though a Koran is left even with the most recalcitrant prisoners... Are you aware of these complaints, and do your clients have these complaints?*

Thomas Wilner: The complaints I am aware of concern comfort items, not religious items per se, but things like blankets, toothbrushes, long pants...what I would call comfort items. I don't know about the

allegations of religious items as such, certainly some detainees have complained that removal of pants is intended as punishment by interfering with prayer... Certainly, there have been reports associated with the abuse of the Koran... as far as I know, those incidents (that is, abuse of the Koran) have stopped. Though there have certainly been what I'll call "freewheeling interrogations", which may have involved this kind of thing...

The Talking Dog: *I understand that in some cases, it [has been alleged that detainees have been encouraged not to cooperate with their own attorneys, in particular when their attorneys are Jewish.](#) Can you comment on this?*

Thomas Wilner: That issue came up with me. Interestingly, it didn't get that much play. But my clients were told by interrogators not to trust their lawyer "because he's a Jew" ". An interrogator told him "why would you trust him-- he's a Jew from a large Jewish law firm-- that represents the State of Israel--"

The Talking Dog: *Hey, you just picked up another client!*

Thomas Wilner: Anyway, this was printed by Nick Lewis in the *Times*... "Don't trust him, he's a Jew," but it didn't seem to get that much traction. But one of my clients, Faye al Kandari, told a female interrogator, code named "Megan" "I don't care who or what he is-- there are good people in every religion." That was his answer, from the depths of Guantanamo.

The Talking Dog: *Are any of your clients still on hunger strike? How many were on hunger strike, and what is their current status?*

Thomas Wilner: None are still on hunger strike, as alluded to in the *L.A. Times* piece. I am going down next Sunday (May 21)... we go down regularly, around every month, as it's the only way to see how our clients are doing. They have been forced off the hunger strike as I wrote in the *L.A. Times*, by the methods described, including force-feeding in the special chair.

The Talking Dog: *Others have told me that at one time, the medical personnel were comparable to veterinarians, but they brought in serious professionals when the hunger strike began. Can you comment on that? Also, can you comment on the allegation that the hunger strike is alleged by the government to be a tactic per "the [Manchester document](#)"?*

Thomas Wilner: Well, Fawzi (al Odah)'s impression was that they did indeed bring in better trained people later on in the hunger strike. He went on hunger strike last August... he lost a great deal of weight, and after some forced measures, he regained some. He does say, they changed the medical team at some point. He notes that he observed the chief doctor, when he was finally forced off the hunger strike, crying. As to the Government's calling the hunger strike an Al Qaeda tactic, were Gandhi's, or Bobby Sands' hunger strikes Al Qaeda tactics? This just gets too ridiculous for words at some point.

The Talking Dog: *Let me turn to Fawzi al-Odah and [the interview he gave to the BBC, via you](#), which is the only interview of a detainee while still at Guantanamo of which I am aware. I heard and read [remarks critical of your role in that interview](#) from a State Department spokesperson. I should point out that I heard an immediate reference to "the Manchester Document" indicating that all supposed Al Qaeda members are trained to complain about their detention conditions... I'd like you to comment on that, and if you can tell me if there have been any repercussions of that interview, such as a change in treatment to Al-Odah or your other clients, or if you have had other repercussions from the government of any kind?*

Thomas Wilner: There have been no repercussions to Al Odah. I should point out that we have no knowledge of conditions down there until we get down there,; there is no access or other

communication with the outside world, so we do try to go down once a month. As to me, there have been some consequences, as the government tried to prevent my access to my clients. At one time, the government refused to let me down after the interview, insisting that I somehow violated rules by doing it. Of course, the government has a system of reviewing notes, and if the information in them is not classified, the notes can be disclosed publicly. The government claimed I improperly brought something in-- to wit, the questions. But in this case, I simply added interview questions to my legal outline. So I did absolutely nothing wrong. The government backed down.

In any event, we negotiated, and the agreement now is that, before I conduct any such interview in the future, I notify the government so it has an opportunity to seek a court order trying to stop me from doing so.

The Talking Dog: *Had anyone besides the BBC ever asked you to do anything like the Al-Odah interview? Do you know if the BBC asked other attorneys to do it, or if other news organizations did?*

Thomas Wilner: As far as I know that's the first time anyone has done it. John Manel of BBC came up with the idea. As far as I know, no one else has done anything like it.

The Talking Dog: *One thing that interests me about Guantanamo is how little it seems to interest other Americans in general, or the media here; by my limited observation, there is far more interest in it in the Middle East (where most of the detainees are from) and in Europe. In fact, with limited exceptions (Jane Mayer of the New Yorker, Charlie Savage of the Boston Globe, Murray Waas of National Journal, maybe NPR, the Washington Post and New York Times once in a while) there just isn't that much interest here. Do you agree with that assessment? To what extent do you believe the government's decision to "offshore" Guantanamo supposedly "beyond the reach of law" has affected that or contributed to it, or do you not think it matters where the detainees are venued? Are Americans just too self-absorbed and happy to think "the President is protecting me from bad people" to even care about any of this?*

Thomas Wilner: When at some future time we look back at the history of Guantanamo, this will be just about the most interesting question. Why didn't it play? Why weren't more people interested? As you know, there was a great [National Journal piece](#) on Guantanamo. And the [Seton Hall reports](#). But the U.S. public is continually told "these are dangerous people" and stops thinking about it. Two and a half, three years ago I talked to a social scientist at the University of Chicago about this, who concluded that overall psychological conditions are kind of like during the rise of Nazism... people are afraid, and don't know what to do.... They suspect some things are being done that aren't right, but think maybe they're necessary ... and they don't want to know about it. For example, *60 Minutes* was all set to produce a Guantanamo piece in 2002, but killed it as "too political". The late Peter Jennings did a great piece on Guantanamo in 2004... but they buried it at 10 pm on a Friday night...

On my own reflections, as a Jewish boy growing up in this country, we like to think that things like this don't happen, we have too many checks and balances. But all the checks let us down. As David Cole has said, the detainees at Guantanamo have no domestic constituency.

The Talking Dog: *Let me ask you this on the psychology. By my observation in New York, where I live, and which, if God forbid we are attacked again, will be the most likely target, by and large we have come to realize that as dangerous as terrorism might be, our freedoms are more precious, and we have to keep things in perspective. Can you comment on that?*

Thomas Wilner: Certainly, I have noticed a similar reaction in Washington. New York and Washington had the immediacy-- and there was certainly great fear for perhaps a year or so... remember the anthrax attacks here? And certainly, Washington, like New York, would be the likeliest of terrorist targets. But yes, I have seen a similar reaction.

This Administration has traded on fear and hysteria. And the Democratic party has been too afraid to stand up to that.

The Talking Dog: *I've read descriptions of you as "an angry man" about the injustice of all this... Am I correct that this has been one of the most frustrating experiences of your legal career? Do you see any light at the end of the tunnel here, either from the outcome of the D.C. Circuit appeal(s), the Supreme Court's upcoming decision in Hamdan, the President's growing unpopularity, publicity over the Uighurs, general political pressure or any other cause?*

Thomas Wilner: The Administration keeps arguing that "we are at war"... rather than deal with substance, it stonewalls. The Graham Levin Act essentially suspended habeas corpus and relieved the government of the need to justify its detentions in court... the Administration can't do it. It has no legal basis.

In time, the hysteria will die out, and then this can, we hope, ultimately be resolved.

The Talking Dog: *Are there any questions I didn't ask you that I should have, or is there anything else either my readers or the American public need to know?*

Thomas Wilner: Well, I think you did a hell of a job--

The Talking Dog: *Me and Brownny, I suppose...*

Thomas Wilner: Yes... Brownny did a hell of a job, too! In all seriousness, how can people look at how the government reacted after New Orleans was hit by Katrina, and think that this government is competent to handle something as complex and difficult as the war on terror?

As the Denbeauxs' Seton Hall report tells us, most people held at Guantanamo are not even accused of terrorism. While some complain of the security conditions Moussaoui will now be sent to-- 23 hour a day lockdown and all-- he was convicted! My clients haven't even been charged! And yet while two are at Camp 4 with some human interaction, the others are in isolation for all but a few minutes of exercise a week, deprived of human conduct... and they are not even CHARGED.

The Talking Dog: *Mr. Wilner, I'm sure I join all of my readers in thanking you for that fascinating interview.*