Wednesday Round-Up

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Yesterday, the Court held its annual "long conference," in which the Justices discussed which of last summer's cert. petitions it will hear this term. Kent Scheidegger of Crime and Consequences has previewed the conference, highlighting a number of SCOTUSblog's "Petitions to Watch."

One of the petitions considered on Tuesday addresses the issue of whether federal judges have the power to release detainees into the United States. That issue is examined in a Washington Post editorial, which argues that the Court should take up the case, *Kiyemba v. Obama*, so that it can make a definitive determination on the prospects of freedom for some 17 Uighur detainees. The Bush Administration ordered the Uighurs freed years ago, but they cannot be returned to China, where they face the threat of torture, and as of now, it is unclear whether they can be released into the U.S. A decision to take the case, the editorial asserts, would "determine how much power federal judges have to deliver real and meaningful freedom." Another article in the Post criticizes President Obama's decision not to go to Congress to establish standards on these issues "delegates a profound and difficult policymaking exercise to the judiciary and, ultimately, to a single man on the Supreme Court," suggesting that the Court's potential ruling in *Kiyemba* or a similar case will be a deciding factor in the development of detention policy.

In a similar vein, the BLT reports on a ruling issued Monday in the Third Circuit, which dismissed a case in keeping with the Supreme Court's ruling last year. In *Munaf v. Geren*, the Court ruled that the appellate court should have dismissed the case brought by Shaqsi Ahmad Omar, who had asserted in his filings that laws against sending detainees to countries where they risked torture barred the U.S. from transferring him to Iraq. In its *Munaf* ruling, the BLT reports, the Supreme Court indicated that Omar's case should be thrown out because "judges do not have the authority to stop the executive branch from turning over an individual to another nation's authority if he is accused of a crime in that country and already detained in that country." Omar's attorneys, Jonathan Hafetz and Aziz Huq, filed a second *habeas corpus* petition last year, but today the Third Circuit rejected that petition on the basis that the circuit's ruling in *Kiyemba* (now up for review at the Court's conference) stripped it of the authority to hear the new argument.

The debate is heating up over next week's oral argument in *Salazar v. Buono*, which will determine whether an individual has standing to challenge the display of a religious symbol on government-owned land. In a Washington Post piece, Robert Barnes offers a comprehensive discussion of the case, observing that if the Court decides the case on the constitutional issues at hand, such a ruling "could provide clarity to the court's blurry rules on church-and-state separations." Barnes notes that the Supreme Court has historically issued relatively narrow rulings with regard to similar cases (as it did in two 2005 cases concerning the placement of Ten Commandments statues on government property), but he suggests that recent changes on the Court might sway the justices in this particular case. In a related article, Barnes profiles a California couple who have positioned themselves as some of the most ardent defenders of the religious display in question: a World War I memorial in the shape of a cross, which sits on federal land in the Mojave Desert. The controversy has pitted the U.S. government and veterans groups, who say the cross is a secular war memorial, against civil libertarians and Jewish and Muslim veterans, who have argued that the cross suggests government association with Christianity. The Daily Journal's Lawrence Hurley also covered the case yesterday, offering a profile of the ACLU attorney defending the respondent in the case; his article is available at How Appealing.

An editorial in the LA Times this week offers an analysis of the issues presented by *U.S. v. Stevens*, which the Court will hear on Tuesday. At stake in *Stevens* is a 1999 law which makes it a crime to create, possess, or sell "depiction of animal cruelty," and the Times editorial argues that this law should not be upheld. In its decision in *Stevens*, the Third Circuit indicated that if it upholds the law, the Supreme Court will be "recogniz[ing] a new category of speech that is unprotected by the 1st Amendment" for the first time in a quarter century; the last time such a determination was made was in 1982, when the Court ruled that child pornography was not protected speech. Agreeing with the Third Circuit's analysis, the editorial's author opines that the Court should not use *Stevens* to depart from its tradition of upholding the distinction between "acts and expression."

Citizens United is still in the news at ACSblog, which has an interview with litigator and Jenner & Block partner Paul M. Smith about the case. Smith tells ACS that it's "very likely" that the Court will issue a ruling overturning the current legal precedent on campaign finance, thereby "fundamentally altering the balance of power in elections." The blog also links to a recent interview with the Constitution

Accountability Center's Doug Kendall, also discussing *Citizens*.

Tony Mauro, writing for the First Amendment Center, discusses the implications of *Salazar*, *Stevens*, and *Citizens*, citing all three as examples of the "odd bedfellows" often faced by First Amendment advocates. With regard to *Stevens*, Mauro points to the potential "chilling effect" that a ban on such speech could have, and cites the Cato Institute's argument that such a ban could open a "Pandora's box" of legislation banning the depiction of unpopular activities. Discussing *Salazar*, Mauro mentions speculation that the Court will decide the case not on the merits but on the issue of whether respondent Frank Buono has a right to challenge the cross in question. And on *Citizens*, Mauro suggests that the Court might be ready to "challenge the underpinnings of campaign-finance law" by striking down a ban on independent corporate speech.

At Crime and Consequences Blog, Kent Scheidegger recaps a recent Michigan Law Review essay on the DNA testimony at issue in *McDaniel v. Brown*, which the Court will hear in early October. *McDaniel* will determine whether a convicted child rapist was erroneously awarded a new trial on the basis of insufficient evidence. Scheidegger indicates that the essay's bottom line lies in the assertion that, "although [a DNA expert] did err in response to questions from counsel, the errors are not as prejudicial as Judge Wardlaw's overheated opinion makes them out to be." However, he predicts that the Supreme Court's ruling will not turn on the sufficiency of the DNA evidence at hand.

Conglomerate Blog reports that petitioners in *Jones v. Harris* filed their reply brief on Monday, bringing the case's extensive briefing process to a close. At issue in the case, which will be argued on November 2, is whether the Seventh Circuit erred in its holding that shareholder claims of excessive investment advisor fees are not cognizable under Section 36(b), unless the shareholder can demonstrate that the directors who approved the fee were misled as well. Conglomerate also links to the brief, and to the Court's docket on the case.

An AP article published yesterday calls into question the Supreme Court's traditional hesitancy to hear cases which hold high-ranking government officials liable for constitutional violations. Pointing to two recent lower-court rulings (by Bush-appointed judges) refusing to dismiss suits against former Attorney General John Ashcroft and former DOJ official John Yoo, as well as ongoing *en banc* proceedings in the Second Circuit, Mark Sherman suggests that some Bush Administration officials' involvement in the legal justification of some domestic military operations might leave them open to successful lawsuits.

Reuters reports that a group of tobacco companies has asked the Supreme Court to reconsider a D.C. Circuit ruling that mandates more expansive disclosure of the dangers of cigarette smoking. The companies have asked the appellate court not to enforce its ruling until the Supreme Court has a chance to make a determination on the case. In their request to the D.C. Circuit, the companies argued that issues remained concerning their First Amendment rights, and that a delay in enforcement would be equitable since "no party would be prejudiced by the issuance of a stay."

If Justice Sotomayor's place on the Court wasn't official before, it is now. Yesterday, Sotomayor and her fellow Justices posed for the Court's annual photo, which the LA Times has posted. The Times quips that although the photo shows Sotomayor standing behind the traditionally conservative Justices Antonin Scalia and Clarence Thomas, "no one expects her to vote that way."

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