Court Denies Cert in Key First Amendment Cases

PAUL M. SMITH, JULIE M. CARPENTER, AND DEANNE E. MAYNARD

Sometimes the U.S. Supreme Court makes news when it *declines* to take a case. In recent weeks, that has occurred more than once.

Center for National Security Studies v. Department of Justice

Even as the Court got ready to weigh in on several important post-9/11 cases involving the power of the government to detain enemy combatants, it denied certiorari in a related case that concerned the power of the government to withhold information about its arrests and detentions. In *Center for National Security Studies v. Department of Justice*, the plaintiff-petitioners had sought review of a decision of the D.C. Circuit, which had reversed a district court ruling granting partial relief under the Freedom of Information Act (FOIA).

The information sought related to more than 700 Arabs and South Asians arrested and detained in secret by the federal government in the weeks immediately following the 9/11 attacks. These people were generally arrested on minor immigration charges. In most cases, the government very quickly concluded that it had no basis for suspecting them of complicity in terrorism. But their identities and location were carefully kept secret—to the point where their names did not even appear on lists of prisoners in the jails where they were being held.

A consortium of groups, including the Center for National Security Studies and the American Civil Liberties Union, filed suit under the FOIA and the First Amendment, claiming that the government had no basis for withholding basic information about this large group of people swept up in a wave of mass arrests. The government responded that to disclose the information would provide information vital to terrorists by telling them who was and was not in custody and by providing a "road map" to the investigation of 9/11. The district court was only partially convinced, directing the government to disclose the names of the detainees and of their counsel. But the court also stayed that order pending appeal and, on appeal, a panel of the D.C. Circuit reversed, two-to-one.

The majority opinion began by placing heavy emphasis on the deference owed to the executive in matters of national security. It then accepted the government's road map argument, claiming that revealing the names of individuals who were never charged with terrorism crimes could nevertheless give terrorists a "composite picture" of the government's investigation. Moreover, the panel concluded that releasing names would place any detained terrorists at risk for retaliation by terrorist groups. The panel also rejected any First Amendment claim to the information, declaring that while it would be unconstitutional for the government to secretly detain those charged with criminal offenses, there is no such protection for those detained on immigration charges.

Judge Tatel penned a strongly-worded dissent arguing that even in matters touching upon national security, the judiciary has an obligation to respect Congress's preference in FOIA for open government, particularly where the claim of executive abuse of power is so great. Rejecting the blanket approach taken by the majority, Judge Tatel emphasized that although a small percentage of those detained might have connections to terrorism, FOIA law did not permit that to be used as a justification for withholding all of the names.

The petition for certiorari argued that no amount of deference to the executive could justify secrecy here because the government had never alleged in its affidavits that any of the detainees had any connection to terrorism. Noting that the government had released much more detailed information about the terrorism suspects it had already apprehended, the petition argued that government had failed to explain what harm would result from releasing information about individuals who were innocent of any such charges.

The petition also argued that FOIA and the First Amendment prohibited secret arrests. On this point, the petition was supported by an amicus brief submitted on behalf of the Washington Post Company and twenty-two other leading media companies and associations. The brief recounted that secret arrests had been considered the ultimate abuse of executive power for over 200 years and argued that there was no principled distinction for barring secret arrests in the context of criminal but not immigration proceedings. Ultimately, however, the Supreme Court declined to grant the petition.

A Super-Sealed Cert Petition

On February 23, 2004, the Court denied certiorari in *M.K.B. v. Warden*, a post-9/11 case that raises questions about the extent to which courts can shield court records, including the very existence of a case, from public view. The Court also allowed the briefs in the Supreme Court to remain under seal, with only heavily redacted copies in the public record.

The case itself is a habeas corpus proceeding reportedly brought by an Algerian-born waiter in Florida who was detained for five months after the September 11, 2003, attacks. But the cert petition presented a question not about the rulings on the merits of the habeas claim, but about the extent of public access to the proceeding guaranteed by the First Amendment and common law.

From its inception through and including oral argument to the Eleventh Circuit, the case has been conducted entirely in secret. Indeed, the court docket in the district court initially did not even note its existence. According to the cert petition, the case only came to light when a clerk in the appellate court inadvertently listed the case on an oral argument calendar. Subsequently, in a sealed decision, the Eleventh Circuit ordered the case noted on the district court's public docket. But even once the case was noted on the docket, all of the entries remain sealed, including the names of the parties and counsel.

Paul M. Smith (psmith@jenner.com), Julie M. Carpenter (jcarpenter@jenner.com), and Deanne E. Maynard (dmaynard@jenner.com) are partners in the Washington, D.C., office of Jenner & Block, LLP.

The cert petition was the first publicly filed document in the case, and it is highly redacted, with several pages in the Statement of the Case—as well as the opinions, orders below, or both—completely blanked out. Even the number of the Circuit to which cert is sought is redacted.

Based on these facts, the petition sought to have the Supreme Court review the denial by the court below to unseal the case or at least portions of it so that the case and its issues would be open for public review and scrutiny. The petition claims that the lower courts made no record findings justifying the extensive sealing. Arguing that habeas proceedings are quasi-criminal, the cert petition relied upon the common law principle of the openness of judicial proceedings as well as cases establishing a First Amendment right to access to criminal cases. *See, e.g, Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984), and *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980) (plurality). When the Supreme Court requested a response from the United States, the solicitor general opposed the cert petition with a sealed filing. But a small unredacted portion of the response indicates that the United States contended that the case needed to remain under seal.

In addition to filing an amicus brief supporting the grant of cert, the Reporters Committee for Freedom of the Press, joined by twenty-two other interested media companies and associations, took the unusual step of requesting the Supreme Court to allow them to intervene as parties. The intervenors argued that their motion was timely, as the case had been hidden from public view when it was pending in the district court. The would-be intervenors sought information beyond that sought by petitioner, including access to unredacted versions of the Supreme Court filings and records from the proceedings below, and indicated that their participation might cure standing or mootness concerns, if any, raised by the government. The Court denied the motion to intervene.

Suzuki Motor Corp. v. Consumers Union

In *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984), the Supreme Court held that the First Amendment requires an appellate court to examine the whole record independently to ensure that a judgment does not improperly intrud on free expression. The question raised recently in *Suzuki Motor Corp. v. Consumers Union*, 330 F.3d 1127 (9th Cir. 2003) is when is a media defendant entitled to that independent examination in a product disparagement action—only after a full trial or on review of a summary judgment decision? But that question will go unanswered for some time yet since the Supreme Court has denied the petition for certiorari.

Suzuki claimed that *Consumer Reports* disparaged its Suzuki Samurai when it rated it unacceptable for rolling over too easily. The *Consumer Reports* article stated that the Samurai did well on its standard test, but when the testers modified the test route to make it more challenging, Suzuki did not perform as well as its competitors. Suzuki claimed that Consumers Union had essentially rigged its testing to produce a predetermined result. The district court granted Consumers Union's motion for summary judgment, finding that no reasonable jury could conclude that Consumers Union made the statements either with knowledge that they were false or with reckless disregard as to whether or not it was true because it disclosed the basis for the statements.

Applying the usual de novo review applied to all grants of summary judgment, the Ninth Circuit panel determined that a reasonable jury could find, by clear and convincing evidence, that Suzuki had demonstrated actual malice. Over a dissent, the court declined to apply a different summary judgment standard in the context of a First Amendment case. It held that its duty derived from the First Amendment to independently examine the record meant only that it must independently determine whether there was sufficient evidence from which a jury could find actual malice.

Consumers Union's request for en banc review was denied, but just barely. Judge Kozinski, joined by ten other Ninth Circuit judges, dissented from denying en banc review. Kozinski's spirited dissent articulated a different view of the First Amendment. Noting that the actual malice requirement is, in part, to keep expensive lawsuits, or the fear of them, from forcing critics to censor their own speech, the dissent emphasized that because *Consumer Reports* had fully disclosed the parameters of its testing and the basis for its views, it was impossible to demonstrate constitutionally sufficient malice.

Criticizing the majority for applying the general summary judgment review it would apply to a slip-and-fall case, the dissent argued that the First Amendment independent examination rule required appellate courts to *weigh* the evidence, not just determine whether a jury could find one way or another. And they would have held that because the court must ultimately review a plaintiff's verdict under that rule, "it necessarily follows that it must apply the same standard at summary judgment." 330 F.3d at 114.