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## What's So Special About Paper?

[Jacob Sullum](#) | September 10, 2009, 6:00pm

Yesterday, based on press reports, I [said](#) Solicitor General Elena Kagan, during the second round of oral arguments in *Citizens United v. FEC*, had "repudiated" the government's position that "the Constitution allows Congress to ban books published by corporations" if they support or oppose candidates for federal office and come out close to an election. Reading the [transcript](#) (PDF), I see that's not quite right. Although Kagan elicited laughter by declaring that "the government's answer" to the question of whether the First Amendment allows it to ban books "has changed," she still did not actually rule out that possibility.

Kagan noted, first of all, that the ban on "electioneering communications" imposed by the Bipartisan Campaign Reform Act (BCRA)—the provision cited by the Federal Election Commission (FEC) when it blocked pay-per-view distribution of *Hillary: The Movie*—"does not apply to books." No one claimed it did, of course; the question was whether Congress could extend the ban to print without violating the First Amendment, and Deputy Solicitor General Malcolm Stewart's answer was yes. Next Kagan noted that the pre-existing ban on "express advocacy" by corporations "does, on its face, apply to other media." She sought to reassure the justices about the vulnerability of books by noting that "the FEC has never applied this statute to a book." This was the comment that provoked Chief Justice John Roberts to say, "We don't put our First Amendment rights in the hands of FEC bureaucrats." It would have been more accurate to say "we *shouldn't* put our First Amendment rights in the hands of FEC bureaucrats," since this case shows that currently we do.

Kagan also said "the government's view is that although [the express advocacy ban] does cover full-length books...there would be [a] quite good as-applied challenge to any attempt to apply [the ban] in that context." In other words, anyone whose book was censored under this provision could argue, just as *Citizens United* did with respect to its movie, that in this particular case the FEC had gone too far. But that is quite different from agreeing that the First Amendment bars the government from banning books based on their political content. The government's current position, as tweaked by Kagan, seems to be that the constitutionality of such a ban depends on the details of the case.

This Cato Institute [video](#), based on the first round of arguments in *Citizens United*, highlights the lengths to which the government has been driven in defending BCRA's speech restrictions. It reminded me of a detail I had forgotten: Justice Anthony Kennedy [suggested](#) (PDF) that books are already covered by the electioneering communications ban, which applies to messages carried by satellite as well as cable and broadcasting, when they are read on devices like Amazon's Kindle. Stewart agreed.



Last week I [noted](#) the Institute for Justice's list of books that might have been banned for being too political. Damon Root and I rooted for Citizens United [here](#) and [here](#).

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