

National Journal's

Under *the* Influence

An Inside View of the Lobbying and Advocacy Industry

Thursday, September 10, 2009 12:13 PM

Citizens United Predicted To Win In High Court

By Sara Jerome

The Supreme Court reheard oral arguments on [Citizens United vs. the Federal Election Commission](#) yesterday morning, examining two decisions underpinning laws that constrain corporations from spending on elections.

Court-watchers walked away predicting a win for Citizens United. What remains debatable is how broad the Court's decision will be.

Most broadly, the Court could entirely scrap *Austin v. Michigan Chamber of Commerce* and part of *McConnell v. Federal Election Commission*, gutting some significant portions of campaign finance law including a ban on corporations using their treasury dollars to influence campaigns, and a ban on corporate funding for broadcast ads that mention federal candidates in the days leading up to a federal election.

The Court could also rule more narrowly, hewing closely to the particulars of the original issue, which involved whether the FEC was justified in limiting Citizens United's capacity to broadcast a disparaging film about then-candidate **Hillary Clinton** during the Democratic presidential primary.

The Court's decision might not come for a while--experts guessed anywhere between a few weeks to the end of the year. In the meantime, yesterday morning's arguments provided new fodder for predicting where this case is headed.

Below, a handful of experts weigh in on what they saw as yesterday's key indicators--from **Chief Justice Roberts'** demeanor to the seeming concessions of Solicitor General **Elena Kagan**. In particular, they looked for signals on how broadly the Court will rule--agreeing very little about what yesterday portended.

They also graded Kagan and new Associate Justice **Sonia Sotomayor** on their Supreme Court debuts.

Reading Roberts: What to glean the Chief Justice's reactions

"Everyone says the chief justice is the swing vote on this. His hostility to the government's position and some of the things he said--such as, 'We don't put our First Amendment rights in the hands of FEC bureaucrats'--suggests that it will be a broad ruling."

-**Ilya Shapiro**, senior fellow at the CATO Institute. Co-authored Cato's amicus brief siding with Citizens United

"The one reason I sensed that there might actually be some hope for those [in favor of campaign finance law] was when I saw how frustrated the chief justice got when realizing that all these different alternatives for resolving the case were being thrust up in front of him. There was this moment when the Solicitor General said that they should consider that this particular incorporated entity [Citizens United] might not have taken enough money from corporations [for its actions to be limited by the FEC]. That really angered him. What I saw there is that the Chief Justice is really going to have to look hard at the alternative bases for resolving the case. He didn't like hearing that. There are some very plausible statutory construction grounds for ruling on

the case that don't entail the broad striking down of law. To me, that was a pivotal moment because he was forced to realize that the government is saying you can have many different ways to resolve this case that would stop short of the most all-encompassing ruling that they may be contemplating."

-Scott Thomas, former FEC chairman and current board member at the Campaign Legal Center, which filed an amicus brief siding with the FEC

"I thought Roberts changed course during the arguments. When he was questioning [Citizens United lawyer] Ted Olson, he didn't seem as sympathetic to the corporate interests. I was feeling good during that, but then I didn't feel very good when he was questioning Kagan. I was left unclear. But I still think there is room for him to do something narrow. He may not want his biography to contain a bad decision on this."

-Karl Sandstrom, counsel to the Center for Political Accountability. Co-authored an amicus brief siding with the FEC

Kagan's Concessions: How to interpret changes in the government's argument since March, among them a reversal on whether the government can ban books funded by corporations. Kagan said it cannot.

"She conceded things that the truth of their position required her to concede. I wouldn't be surprised if she is criticized by some of the reformers who wanted her to in effect lie. But she didn't lie, nor she should she be expected to lie."

-James Bopp Jr., general counsel at the James Madison Center for Free Speech. Co-authored an amicus brief in favor of Citizens United on behalf of eight former FEC commissioners

"Kagan seemed to concede up front that the government wasn't expecting to win outright. That gives a very strong indication that the Court is going to be doing something rather substantial. The government was in a defensive position. It's always difficult to make arguments when you had to change your rationale before the court."

-Doug Pinkham, president of the Public Affairs Council

"Kagan might have made a tactical ploy to throw this case. She weakened her argument against Citizens United, but it might have been to reduce the possibility that entire statutes are overturned."

-Brad Smith, former chairman and commissioner to the FEC. Current chairman to Center for Competitive Politics. Co-submitted an amicus brief siding with Citizens United

"I was somewhat surprised by the government's concessions. I thought they conceded grounds about what would be proper justifications for Congress passing the original statutes, including the aggregation of wealth argument."

-Sandstrom, Center for Political Accountability

Signals from the rest of the Court

"I think one observation made by Justice Breyer was significant. Whether it signals the way he is ultimately going to come out or not, I don't know. He commented that the challengers to the McCain-Feingold law-if their position is upheld--will make a hash out of the campaign finance laws. I think it was apparent from all sides that everyone regards this as a highly consequential issue, and with his question there, he really put his finger on what's at stake here. It really hit the nail on the head."

-Scott Nelson, senior attorney at Public Citizen Litigation Group. Co-authored an amicus brief siding with the FEC to represent **Sen. John McCain**, R-Ariz., **Sen. Russ Feingold**, D-Wisc., former **Rep. Christopher Shays**, R-Conn., and former **Rep. Martin Meehan**, D-Mass.

"The best indicators were how the expected five-member majority dealt with the issues as well as how the four-member expected-dissenters dealt with the case. What I saw is that there were no qualms among those five about fully asserting the First Amendment interest here and striking down Austin and McConnell. I saw no expressions of reluctance, nor did I see any interest on their part on doing something narrower and less important. What I saw in the expected dissenters is that they might as well have run up a white flag."

-Bopp, James Madison Center

"There was nothing in the oral argument that indicated Alito, Thomas, or Scalia would be changing their mind, but also nothing saying it would be impossible for Kennedy and/or Roberts to do join in on a narrower

decision. But that may be wishful thinking."
-Sandstrom, Center for Political Accountability

Judging her debut: Sotomayor

"She spoke about deference to the political process--that the Court should be hesitant to overrule congressional or state legislative action. That kind of pegs her as a deferentialist--a restrained judge. It's unclear if that's going to be her overall philosophy on the Supreme Court, but it will be interesting to see how that plays out over the first few years of this Court."
-Shapiro, Cato Institute

"She spoke up a lot when Olson was making his arguments. She is going to be a very active member of the Court. And she asked clear questions in a way non-lawyers can understand, which I think people appreciate. She was surprisingly quiet in the second half, when I would've expected more from her."
-Pinkham, Public Affairs Council

"She showed that she isn't going to be reticent to ask questions. She certainly is not going to be a shrinking violet. She asked very good questions. And she's always been prepared throughout her career--today she showed she did the preparation. I don't see any real change ideologically on the Court, but of course time will tell."
- Sandstrom, Center for Political Accountability

"She was intelligent and informed and ready to step in and start participating. The issue is up her alley--she sat on the New York City campaign finance board."
-Smith, Center for Competitive Politics

"She only really interjected herself twice and they were perfectly appropriate questions and that's about all you can say about it."
-Bopp, James Madison Center

Judging her debut: Kagan

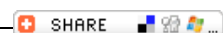
"It was an active greeting of the new Solicitor General. Scalia came right out of the box at her. She will become acquainted with this court very quickly."
-Sandstrom, Center for Political Accountability

"I think she did great--it was obviously a tough set of circumstances with some justices gunning for her. She had a good answer on every question asked, especially considering it was her first time ever before the Supreme Court. Justice Scalia obviously wanted to hammer her pretty hard with his argument that this law is unfair to small corporations. She weathered it quite well. I thought she was equally forceful in return."
-Thomas, Campaign Legal Center

"I thought she did a nice job. I've seen worse arguments. I don't think you could tell that it was her first time up there. She did a very workman-like job--which is a compliment."
-Bopp, James Madison Center

"High marks in terms of intellect and lawyering skills. But I think she was hampered by the fact that the government seemed to be backing away from its case."
-Pinkham, Public Affairs Council

Tags: [Rules of the Game](#)



Advertisement

WE TALK TO THE EXPERTS.

National **Expert**
Journal Blogs

Copyright 2009 by National Journal Group Inc.
The Watergate · 600 New Hampshire Ave., NW Washington, DC 20037
202-739-8400 · fax 202-833-8069 · NationalJournal.com is an Atlantic Media publication.