

CITIZENS UNITED V. FEDERAL ELECTIONS COMMISSION

✘ Adam Cohen of the New York Times is a fairly astute writer on legal issues, and he has a new article up on the interesting case of *Citizens United v. Federal Election Commission*. The case involves the ability of corporations to further pollute elections in the United States with unregulated big money. From Cohen's NYT article:

The founders were wary of corporate influence on politics – and their rhetoric sometimes got pretty heated. In an 1816 letter, Thomas Jefferson declared his hope to “crush in its birth the aristocracy of our moneyed corporations, which dare already to challenge our government to a trial of strength and bid defiance to the laws of our country.”

This skepticism was enshrined in law in the early 20th century when the nation adopted strict rules banning corporations from contributing to political campaigns. Today that ban is in danger from the Supreme Court, which hears arguments next month in a little-noticed case that could open the floodgates to corporate money in politics.

The court has gone to extraordinary lengths to hear the case. And there are worrying signs that there may well be five votes to rule that the ban on corporate contributions violates the First Amendment.

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If the ban is struck down, corporations may soon be writing large checks to the same elected officials whom they are

asking to give them bailouts or to remove health-and-safety regulations from their factories or to insert customized loopholes into the tax code.

The entire article is not that long and well worth a read for the history and set up for the case at bar. Cohen is right that the ban is in jeopardy; and the Roberts court does seem to have a hard on for this issue, having taken extraordinary steps to wade into this case, which is not that well set up for a Supreme Court determination on such a critical and far reaching issue.

The Court did indeed take a case in which the ban on corporate political contributions was not a central issue and instructed the parties to brief on the ban's constitutionality. The Court then accelerated oral argument on its calendar to a September date before the new SCOTUS term even starts. This sure looks to be the handiwork of Chief Justice John Roberts; anybody who says Roberts is not an "activist judge", and has no agenda, is nuttier than a fruitcake.

I do wish, however, that Cohen had written a longer piece and gone into some of the other fascinating aspects of this very important case. First off, Cohen did not even mention that this is the infamous "Hillary: The Movie" case from the 2008 primary election campaign. Citizens United is a right wing political hatchet group run by David Bossie, one of the key front men for the Congressional Republicans pressing the Whitewater investigations. There is a lot of wingnut skulduggery rooting around in the background here.

Secondly, Cohen (nor I) isn't kidding when he says the Court is reaching wildly to frame the issues as it has demanded on corporate campaign donations. The issues on appeal were originally: (1) did the 2003 decision in *McConnell v. FEC* resolve the constitutionality of as-applied challenges to the disclosure and disclaimer rules; (2) do said rules impose an

unconstitutional burden when applied to "political speech" protected by the *FEC v. Wisconsin Right to Life* decision; (3) did the *FEC v. Wisconsin Right To Life* decision require, for regulation, a definite call for a vote for or against a candidate; and (4) whether a feature-length documentary can be treated as if it were an "ad" of the kind at issue in the *McConnell v. FEC* decision. With, really, a fair amount of emphasis on "4", whether the movie was a political ad. This is a far cry from where the Roberts Court is now heading.

Third, Cohen doesn't mention the bizarre procedural history behind where the case sits now. SCOTUSWiki has an absolutely great history and explanation, written by Lyle Denniston, of the issues and process of *Citizens v. Federal Elections Commission*. Suffice it, for here, to say that the case has already been argued to the Court once and ought to be decided by now. Problem seems to be that Chief Justice Roberts was put off by the more liberal members questioning of Ted Olson after some passionate, but mostly tangential, First Amendment arguments he made at the first oral argument. Remember that horse manure that John Roberts pitched at his confirmation hearing about his "job being to call balls and strikes"? He lied through his teeth.

Lastly, there is the advance of the *femme fatales* Cohen forgot to mention. First, and foremost, is the newly sworn in Justice Sonia Sotomayor. It will be, of course, her very first case heard as the new junior member (Alito must be relieved to be off coffee and donuts duty) of the Court. Here is Russ Feingold questioning Sotomayor about *Citizens United v. FEC* at her confirmation hearing (as with all questioners, he didn't get much out of her).

And then, of course, we have Obama's crack Solicitor General Elena Kagan. At least Sonia Sotomayor has a long and deep history of work in trial and appellate courtrooms, both as an attorney and a jurist, under her belt. Not so

Elena Kagan. The Justice Department has confirmed Kagan will indeed personally argue the case on September 9. By all accounts, and all I have been able to discern, Kagan's first words on September 9 will be the first words she has ever uttered in battle in any kind of courtroom, anywhere, at any time, ever. That, in and of itself, is both fascinating and stupefying.

With all this time, and a whole Solicitor General's office of more experienced attorneys, not to mention the DOJ, to help her with the training wheels, she should at least not embarrass herself you would think. But, then again, she will be up against Ted Olson, as seasoned a SCOTUS pro as exists on the face of the earth (and a distinguished former Solicitor General himself). We shall see; ought to be worth paying attention to I think.