



Written by [Jack Kenny](#) on August 7, 2009

“Hillary: the Movie” Awaits Sotomayor

Hillary: the Movie, a controversial documentary about former U.S. Senator and current Secretary of State Hillary Clinton will be the first case newly confirmed Justice Sonia Sotomayor will hear when she takes her place on the U.S. Supreme Court early next month.

Sotomayor, the first Hispanic American and the third woman to reach the high court, was confirmed by the U.S. Senate on Thursday by a vote of 68-31. Nine Republicans joined 59 Democrats in what was otherwise a party-line vote to confirm President Obama's choice to succeed retired Justice David Souter. Senator Edward M. Kennedy is ill and was not present. Robert Byrd, the 91-year-old Democrat from West Virginia, was wheeled in a wheelchair to cast his affirmative vote.



The court has scheduled September 9 as the date for rehearing arguments in *Citizens United v. Federal Elections Commission*. At issue is whether Citizens United, a conservative advocacy group, was denied its First Amendment rights when it was prevented from showing *Hillary: the Movie*, a negative documentary about Clinton, on cable television last year during the New York senator's campaign for the Democratic presidential nomination. The non-profit corporation sued the Federal Elections Commission, seeking injunctive relief from enforcement of provisions of the Bipartisan Campaign Reform Act of 2002, better known as the McCain-Feingold law. Section 203 of the law prohibits the use of corporate funds for broadcast, cable, or satellite transmission of "electioneering communications," about a candidate for federal office within 30 days of primary election or 60 days of a general election in which that candidate is running.

A panel of judges at the U.S. District Court in Washington, D.C., last year denied the motion, ruling that Section 203 applied because the video was "susceptible of no other interpretation than to inform the electorate that Senator Clinton is unfit for office, that the United States would be a dangerous place in a President Hillary Clinton world, and that viewers should vote against her." Citizens United then abandoned its plans to show the documentary on a cable video-on-demand service and to broadcast advertisements for it. The group has shown the movie in theaters, however, and sold it as a DVD.

Though public interest in the controversy has waned since Clinton lost her bid for the nomination, it is still alive as both a political and legal issue. Citizens United has said it plans similar videos for future campaigns and is preparing one on Barack Obama.

The Supreme Court heard oral arguments on the case in March of this year. But in June, the justices ordered both sides to come back and reargue specifically over whether the court should overturn previous rulings upholding campaign finance regulations. The rulings at issue are in *Austin v. Michigan*



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State Chamber of Commerce, a 1990 decision in which the court upheld a state law forbidding the use of general corporate funds for an ad endorsing a political candidate; and *McConnell v. Federal Election Commission*, a 2003 challenge to McCain-Feingold in which the court ruled that an "issue advocacy" ad that does not explicitly call for the election or defeat of a candidate may be the "functional equivalent" of an "express advocacy" ad and subject to the same regulation. The call for reargument has prompted speculation that the court may be ready to change direction on campaign laws.

"The court is poised to reverse longstanding precedents concerning the rights of corporations to participate in politics," Nathaniel Persily, a law professor at Columbia, told the *New York Times* in June. "The only reason to ask for reargument on this is if they're going to overturn *Austin* and *McConnell*."

The court modified its stand on issue advocacy ads in 2007, in *Federal Elections Commission v. Wisconsin Right to Life*. Wisconsin RTL, a non-profit corporation, wanted to run TV ads in the summer of 2004 urging citizens to call the state's U.S. senators, Herb Kohl and Russ Feingold, and urge them to oppose filibusters against President Bush's judicial nominees. But Feingold was running for reelection that year and the ads would have run within 30 days of the primary election. The Supreme Court ruled in favor of Wisconsin Right to Life, holding that the "functional equivalent" rule applies only if the message lends itself to "no reasonable interpretation" other than that is an effort to bring about the election or defeat of a candidate.

Citizens United described *Hillary: the Movie* as a documentary that "includes interviews with numerous individuals and many scenes of Senator Clinton at public appearances.... It does not expressly advocate Sen. Clinton's election or defeat, but it discusses her Senate record, her White House record during President Bill Clinton's presidency and her presidential bid."

"Indeed this documentary is the very definition of robust, uninhibited debate of a subject of intense political interest that the First Amendment is there to guarantee," Theodore Olson, attorney for Citizens United, said during oral arguments in March. Ironically, Olson, as solicitor general in the Bush administration, argued in defense of the McCain-Feingold restrictions in the *McConnell* case in 2003. In the current case, Deputy Solicitor General Malcolm L. Stewart said in his Supreme Court argument that Congress has the power to also ban political books, signs, and Internet videos, if they are paid for by a corporation and distributed shortly before an election.



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