



SURPRISING ELEMENTS OF THE SUPREME COURT ARGUMENTS

By Tamar Jacoby
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On Wednesday, the Supreme Court considered the constitutionality of Arizona's divisive 2010 immigration law, which allows local police to check the immigration status of citizens they stop for other reasons, but believe could be in the U.S. illegally. The hearing boiled down to a central question: what power should a state have in regulating illegal immigration within its borders?

The Obama administration has argued that the federal government should have the ultimate power over immigration law: because Arizona's legislation conflicts with federal policy, it is therefore unconstitutional. Arizona contended that its law is meant to complement, not challenge, federal law – and that it is only trying to ameliorate a devastating local situation that Washington has thus far failed to improve.

Yesterday, most news outlets reached a similar verdict on the proceedings: Supreme Court justices seem sympathetic to Arizona.

Today, Delve approached New America Schwartz fellow and president of ImmigrationWorks USA Tamar Jacoby to find out what parts of the hearing she found surprising. Her thoughts are below.

As an immigration junkie obsessed with the law, I couldn't get enough of the oral argument in the Supreme Court this week about Arizona's controversial 2010 policing law SB 1070.

A lot of it was predictable, of course: liberal justice Sonia Sotomayor asking about probable cause, conservative Antonin Scalia asking about the rule of law.

But some of what was said over the 80 minutes surprised me – particularly the contributions of Justice Anthony Kennedy.

How much can you tell about a person from the questions they ask? Sometimes nothing – questions are just questions. But in other circumstances, how a person approaches a problem – what they ask and how – can tell you everything.

Unlike most of the other justices, who posed questions from a particular point of view, Justice Kennedy's questions were all over the map. He bent with every wind. He empathized with and followed up on every line of argument – both conservative and liberal, particularly from fellow justices.

Shouldn't we be concerned about the length of time people picked up by police under the Arizona law would remain in detention? the 75-year-old Reagan appointee inquired at one point, sounding for all the world like one of the court's most liberal members.

A few minutes later he pivoted, posing what was arguably the most conservative, states-rights question of the day: shouldn't states be able to pass their own laws to respond to an immigrant influx that caused a "massive emergency with social disruption, economic disruption, residents leaving the state because of the flood of immigrants?"

At first this seemed confusing, even untethered. But the closer I listened, the more I realized: Kennedy's vote is the one that counts – and his questioning is key to this. He was trying to decipher, by trying each point of view out in his own follow-up questions, if this or that party-line argument held water or not.

How will the court come down? I predict an amber light: upholding some provisions of the Arizona law and striking down others.

I'll be disappointed if it plays out that way. I think the Arizona statute is bad policy and Congress, not the states, should be making immigration law.

But for me, the oral argument was a lesson – unexpected and counterintuitive – about how to listen and think something through. Read the transcript, and zoom in on Justice Kennedy. Not a single one of his questions was predictable – and that's saying a lot.