

**ALASKA STATE LEGISLATURE
SENATE JUDICIARY STANDING COMMITTEE**

February 3, 2010

1:31 p.m.

MEMBERS PRESENT

Senator Hollis French, Chair
Senator Bill Wielechowski, Vice Chair
Senator Dennis Egan
Senator Lesil McGuire
Senator John Coghill

MEMBERS ABSENT

All members present

COMMITTEE CALENDAR

Overview: U.S. Supreme Court Decision - Citizens United v.
Federal Election Commission

HEARD

PREVIOUS COMMITTEE ACTION

No previous action to record.

WITNESS REGISTER

JOHN PTACIN, Assistant Attorney General
Civil Division
Labor and State Affairs
Department of Law
Anchorage, AK

POSITION STATEMENT: Provided an overview of the Citizens United v. Federal Election Commission opinion and responded to questions.

KATHRYN KURTZ, Attorney
Legislative Legal Services
Legislative Affairs Agency
Juneau, AK

POSITION STATEMENT: Provided information related to the Citizens United v. Federal Election Commission opinion.

ALPHEUS BULLARD, Attorney
Legislative Legal Services

Legislative Affairs Agency
Juneau, AK

POSITION STATEMENT: Provided an overview of the Citizens United v. Federal Election Commission opinion and responded to questions.

ACTION NARRATIVE

[1:31:13 PM](#)

CHAIR HOLLIS FRENCH called the Senate Judiciary Standing Committee meeting to order at 1:31 p.m. Senators McGuire, Coghill, Egan and French were present at the call to order. Senator Wielechowski arrived soon thereafter.

U.S. Supreme Court Decision - Citizens United v. Federal Election Commission

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CHAIR FRENCH announced the business before the committee is to hear an overview of the U.S. Supreme Court Decision - Citizens United v. Federal Election Commission ("Citizens United"). He outlined what is in the packet including the Alaska statutes that deal with campaign disclosure law, the memorandum from Mr. Bullard with legislative legal services, and a pair of amicus briefs to the Supreme Court representing both sides of the debate. John McCain and Russell Feingold argued to keep the rules in place before the decision was rendered, and the AFL-CIO urged the Court to overturn its previous holdings and embark on a new rule.

CHAIR FRENCH said this sweeping case will have great impact on state law and it brings to mind a remarkable statement made by Theodore Roosevelt in 1905. "All contributions by corporations to any political committee or for any political purpose should be forbidden by law."

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SENATOR WIELECHOWSKI joined the committee.

KATHRYN KURTZ, Assistant Revisor of Statutes, Legislative Legal Services, Legislative Affairs Agency, said she was previously the drafting attorney for campaign finance law. That is now Mr. Bullard's position.

ALPHEUS BULLARD, Attorney, Legislative Legal Services, Legislative Affairs Agency, said the most significant element in Citizens United is that it is a First Amendment case dealing with political speech by corporations in the form of independent

expenditures. Those are made without the cooperation or collaboration of a campaign, a candidate, or a political party. "This is not a case that affects contributions to candidates." Citizens United speaks only to independent expenditures by corporations.

Previous to the Citizens United decision, and still in First Amendment jurisprudence, much is determined by who is speaking. Under the First Amendment speakers have different breadths; speakers may be prisoners, students, foreign nationals, and previously, corporations. The significance of Citizens United is that the U.S. Supreme Court has ruled that a speaker's corporate identity is no longer a permissible distinction to regulate that speaker's political speech in the area of independent expenditure.

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Citizens United dealt with provisions of the Bipartisan Campaign Reform Act (BicRA), also known as the McCain-Feingold law, including the prohibition on certain corporations and unions from using monies from their general treasury to sponsor certain electioneering communications in certain set periods before a primary or federal election. The Court struck that down.

In striking down this provision, the Court went not to the particulars of the law, but to the concept of the speaker's corporate identity. This involved overturning previous precedent set in Austin v. Michigan Chamber of Commerce and McConnell v. Federal Election Commission. These fairly large cases had created a permissible rationale for suppressing various corporate speech in this venue. Also, in Citizens United the Court upheld various disclosure provisions in BicRA.

MR. BULLARD said that striking down the ability to suppress speech on the basis of the speaker's corporate identity is significant not just for what it does for federal elections; it has a bearing on Alaska statutes that prohibit various corporate expenditures in elections. "In light of this ruling those statutes are not repealed, they're void." They will no longer be enforced as written, Mr. Bullard stated.

SENATOR MCGUIRE asked if someone will walk through the provisions of Alaska law that will be affected.

CHAIR FRENCH said yes; that was one of the questions he asked legislative legal services to be prepared to discuss.

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JOHN PTACIN, Assistant Attorney General, Civil Division, Labor and State Affairs Section, Department of Law, Anchorage, said he represents the Alaska Public Offices Commission (APOC) and staff. He highlighted that Citizens United affects neither the law related to independent contributions to a candidate nor the prohibition against corporations and labor unions from making contributions directly to a candidate.

MR. PTACIN said this was a candidate election free speech case, not a ballot measure case. Citizens United did not interpret an Alaska law, but Alaska laws are certainly implicated because U.S. Supreme Court constitutional decisions are the supreme law of the land. States in this area do not have greater latitude than Congress to abridge the freedom of speech.

Citizens United dealt not only with independent expenditures but also with the reporting of those independent expenditures. The ruling essentially overturned one aspect of independent expenditure law, federal law U.S.C. 441b. That was a ban on any express corporate or labor union advocacy for or against a candidate made from a corporation or labor union coffer 30 days before a primary election and 60 days before a candidate election. The decision was specific to candidate elections and has no bearing on Alaska ballot measure laws. The Court ruled that the ban on corporations or labor unions making an independent expenditure leading up to primary and general candidate elections is in violation of the First Amendment.

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MR. PTACIN said one thing that is significant about the case is that it does apply First Amendment rights to a corporation. Citizens United as a corporation has certain legal rights including limited liability and perpetual life. The Court ruled that these favorable aspects were not a good enough reason to strike down their ability to speak under the First Amendment and that the First Amendment doesn't limit itself to personal speakers. In the late '70s the Court determined that corporations that it is actually looking at the specific expression and not at who is making the expression when determining whether a particular expression is afforded First Amendment rights. In this case, making a communication electioneering speech is essentially political speech and that's afforded high constitutional rights.

The government tried three different arguments in an attempt to save the law on compelling government interest grounds. One was

the anti-distortion interest argument that wealth dilutes the message of others. That rationale had been approved by the Court in Austin v. Michigan Chamber of Commerce in 1990. The essential element is that accumulation of wealth has a corrosive and distorting affect on the message. As a result of the ruling, this is no longer a rational for disallowing corporations and labor unions First Amendment political speech.

Second, they tried an anti-corruption interest as another compelling government interest to save the law but the Court did not agree with the rational.

The third argument was that shareholders are essentially powerless to stop the message of the large corporation or labor union. That too was struck down.

MR. PTACIN said the conclusion was that without a compelling government interest, the law in its face was unconstitutional. Now it constitutes the supreme law of the land.

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MR. PTACIN said DOL is currently reviewing the Citizens United case to see if it impacts Alaska law going forward. DOL is preparing internal decisions and determinations and looks forward to working with the Legislature on determining the next steps.

CHAIR FRENCH referenced the list of questions he had prepared and noted that the biggest question is which state laws are now "void" as a result of the superseding opinion by the U.S. Supreme Court. He asked for a list of those statutes.

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MR. PTACIN named AS 15.13.067(a) [AS 15.13.067] and AS 15.13.135 [AS 15.13.135(a)]. Current Alaska law states that corporations and labor unions may not make independent expenditures in a candidate election. This gets to the distinction of what is an expenditure and whether an expenditure is always considered political speech. Given the definition of expenditure, he said he would consider some of the definition to include political speech. Some arguably is not, but DOL is working internally to determine the extent to which there is a problem with the definition and Alaska statutes.

CHAIR FRENCH asked if Alaska statures have the same limitations as the federal government with respect to independent

expenditures by corporate and union money 30 days before a general election.

MR. PTACIN replied the laws are not exactly the same. Alaska law contemplates a ban on all independent expenditures by corporations and labor unions. Federal law allowed PACS to be formed and corporations and labor unions were allowed to speak through that method. However, a communication that hits more than 50,000 individuals would be considered banned speech under the federal regime. DOL is currently working to reconcile the Citizens United opinion and the internal DOL opinion.

CHAIR FRENCH commented that we've gone from a total ban to what looks like a total free-for-all.

MR. PTACIN responded he is looking at what the law says about disclosure and expenditure. The Court didn't interpret Alaska law, but it is subject to constitutional scrutiny given that Citizens United is the current law of the land.

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MR. BULLARD said he agrees with Mr. Ptacin, but the window that was opened isn't as large as the absolute window of the corporate form. Alaska law allows nonprofit corporations that fit under the definition of non-group entities to make independent expenditures. It isn't that all corporations were previously prohibited. It was "those corporations that participated in business activities who have shareholders who had a claim on corporate earnings and were independent of the influence of business corporations" that were prohibited.

CHAIR FRENCH asked if he believes that in the 2010 election cycle that any corporation doing business in the state of Alaska is free to spend money advocating for or against individual candidates.

MR. BULLARD replied it's difficult to speculate how Alaska state courts will interpret this federal case. "It's a complex and dynamic area of law and there may be other rationales that support some of our existing legal rationales that support our existing laws," he said.

CHAIR FRENCH asked if it will take subsequent legal action for the Alaska statutes to be void or if they are already void by virtue of the Citizens United decision.

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MR. BULLARD replied it is when an Alaska law is challenged that a court will rule. Whether DOL will try to enforce a statute that is arguably unconstitutional is a separate question that he would defer to Mr. Ptacin.

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CHAIR FRENCH asked Mr. Ptacin his view.

MR. PTACIN said DOL acknowledges that the law is subject to scrutiny and is reviewing how to go forward. DOL is working diligently on the issue and an internal opinion on that point is forthcoming.

CHAIR FRENCH asked for a timeline.

MR. PTACIN explained that DOL has been working on a related matter since last November. The attorney general hasn't been asked for a formal advisory opinion, but it may be an area where it is appropriate. He declined to speculate as to when it could be forthcoming, but given the time parameters it could be fairly soon.

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SENATOR WIELECHOWSKI asked if he agrees that this opinion overturned at least five prior U.S. Supreme Court opinions.

MR. PTACIN responded the two noteworthy opinions that the Court overturned were aspects of Austin v. Michigan Chamber of Commerce in 1990 and McConnell v. Federal Election Commission in 2003.

SENATOR WIELECHOWSKI added that Federal Election Commission v. Wisconsin Right to Life, Federal Election Commission v. Massachusetts Citizens for Life, and California Medical Association v. Federal Election Commission were cited by the dissent as cases that were either overruled or disavowed.

MR. PTACIN said the main holding in the Right to Life case was that electioneering communication has to be explicit. The Court overwhelmingly found in Citizens United that the communication was electioneering communication so WRTL was not overturned. Massachusetts Citizens for Life carved out the exception to the law with respect to smaller corporations whose primary purpose is for political speech, essentially nonprofits like the Alaska non-group entity law. "I don't think that WRTL and MCFL were essentially overturned by the Court's decision," he said.

SENATOR WIELECHOWSKI asked if corporations exist only because the state allows them to exist.

MR. BULLARD responded corporations are a legal fiction; they exist by virtue of state and federal law.

SENATOR WIELECHOWSKI asked if the state could impose restrictions and regulations on corporations if they're a legal fiction.

MR. BULLARD replied there are a lot of different corporations so it's difficult to provide a single answer. Some corporations exist in an arena that is only spoken to by state law and some, like a national bank, exist in a larger and more complex environment.

SENATOR WIELECHOWSKI observed that the Supreme Court held that corporations are entitled to First Amendment speech, but they only exist by virtue of the state allowing them to exist. He asked if there are federal corporations.

MS. KURTZ said the long standing language in USC 441b talks about "any corporation organized by authority of any law of Congress," but she doesn't know what corporations those are. The main thing is that the U.S. Supreme Court defined a right to speech in this area for corporations. It doesn't matter whether the State of Alaska tries to legislate in Title 15 or in the corporations code, we'll still encounter that right, she said.

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SENATOR WIELECHOWSKI asked if the state could say it didn't want to allow corporations to exist.

MS. KURTZ replied, "The consequences of that declaration could be quite wide ranging and interesting."

SENATOR WIELECHOWSKI asked if foreign stockholders in a corporation could potentially influence elections under the Citizens United case.

MS. KURTZ said the Court explicitly addressed foreign corporations in its opinion saying that this provision doesn't distinguish between foreign corporations and other corporations. She noted that a provision in BiCRA does limit the ability of those corporations to speak [in federal elections].

SENATOR WIELECHOWSKI asked if a foreign government could set up a corporation in Alaska and attempt to influence elections under Citizens United.

MS. KURTZ deferred the question because she isn't an expert in corporate law.

CHAIR FRENCH asked Mr. Ptacin if he had an opinion.

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MR. PTACIN reiterated that Citizens United did not invalidate USC 441e, which limits foreign nationals, including foreign corporations, from speech in federal and state elections. DOL is currently looking at the parameters of the federal expenditure law that doesn't allow foreign corporations to speak in state candidate elections. He opined that the public and Legislature need guidance with respect to how far the federal law goes and whether the State of Alaska wants to consider laws in this area since it essentially has a ban on all corporate expenditures. The question is if Alaska wants to distinguish between foreign or out-of-state or in-state corporations. DOL is working toward determinations in this area particularly with respect to federal law and foreign national corporations, he said.

SENATOR COGHILL offered his understanding that PACs organized under Section 527 of the federal tax code have not had their right to speech challenged so this breaks a vale between organizing as a political action and organizing as a corporation.

MR. PTACIN responded that Citizens United said that a PAC was not the same thing as a corporation; on a certain level it does break the need for a corporation to form a PAC in order to speak 30 days or 60 days before certain elections.

SENATOR COGHILL asked if there will still be accountability as to how [corporations and labor unions] speak.

MR. PTACIN said yes. He reiterated that DOL is looking at current reporting laws for corporations and labor unions given the present statutes.

SENATOR COGHILL said they're more restrictive than the individual now and we want to make sure that they don't become less restrictive than the individual.

MR. PTACIN clarified that "persons" is the law that applies when Alaska statutes contemplate disclosure and disclaimer laws for corporations and labor unions. Given that definition certain laws apply to corporations and labor unions, and certain laws do not. That will merit scrutiny going forward, he said.

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SENATOR EGAN queried what kind of corporations licensed in Alaska can contribute.

MR. PTACIN clarified that the Citizens United case was about independent expenditures made absent any coordination with a legislator. The case did not determine that corporations can make contributions directly to candidates.

SENATOR EGAN asked if DOL expects litigation.

MR. PTACIN replied it's difficult to say at this point.

SENATOR EGAN asked if APOC, which follows this on a day-to-day basis, will look at this independently and separate from DOL.

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MR. PTACIN replied he works closely with APOC. Any advice he gives the attorney general on the law going forward is after consulting with APOC staff

CHAIR FRENCH reported that Tom Dosik from APOC had been scheduled to testify, but a family tragedy prevented that.

SENATOR MCGUIRE observed that she sees nothing in the ruling that does not allow the Legislature to require disclosure and perhaps even some limitation of expenditures by for-profit corporations in this state. However, she would like clarification that if the Legislature were to do anything, that it should at least look at disclosure and reporting requirements so that these for-profit corporations aren't left in the dark.

MR. PTACIN said this area of the law does require scrutiny by the Legislature and DOL as to which disclaimer and disclosure laws apply to corporations today and which do not. A preliminary analysis suggests looking at which laws apply to persons and which do not. AS 15.13.040 subsections (c) and (e) say that corporations and labor unions are required no later than 10 days after an expenditure is made to report that expenditure.

CHAIR FRENCH cited subsection (d), "Every individual, person, nongroup entity, or group making an expenditure" and asked if he is putting unions and corporations under person, but not individual because individual means a natural person. "Every time I see "person" in these statutes I need to read in corporation and union," he said.

MR. PTACIN said yes; the inverse is that when you don't see "person" note that arguably that law may not apply to a corporation or labor union at this time.

CHAIR FRENCH asked what disclosure rules apply to nonprofit corporations that are allowed limited spending in elections.

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MR. BULLARD replied some nonprofits report under subsection (j) of AS 15.13.040.

CHAIR FRENCH read subsection (j) and noted that he's saying that "nongroup entity" means nonprofit. He asked if the disclosures are required to be made electronically or on paper.

MR. BULLARD replied that is determined by AS 15.13.110.

MS. KURTZ deferred the question to Mr. Ptacin.

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MR. PTACIN said his understanding is that those are filed on paper.

CHAIR FRENCH imagined that the Legislature will look at quicker disclosure. Corporations have an enormous ability to amass wealth so it's reasonable, if they want to participate in elections, that they disclose frequently and in a manner that gets the information to the public swiftly and without burdening APOC staff, he said.

SENATOR COGHILL noted that electronic disclosure has been a work in progress the last several years.

CHAIR FRENCH clarified that he's talking about disclosure by candidates.

SENATOR COGHILL agreed, but under this [opinion] it would involve all entities.

CHAIR FRENCH said he believes in electronic disclosure by candidates, but he realizes that there have been roadblocks. Some areas of the state don't have a lot of computers or phone service.

SENATOR COGHILL said that might be something that comes back on the radar.

CHAIR FRENCH clarified that his general point is that corporations are in a uniquely strong position to have access to computers and the Internet.

MS. KURTZ directed attention to AS 15.13.040(m) that talks about electronically submitting information required under the chapter. APOC could clarify how it is making that work.

CHAIR FRENCH said that may be the carve-out for candidates, but he agrees that it leans toward electronic disclosure. He then asked if there was anything in the Supreme Court decision or anything in Alaska statutes that would prohibit the Legislature from mandating disclosure of the three top contributors to a group or sub-corporation so that the people understand the funding source for advertisements.

MR. PTACIN replied the concern about formation of a different group to essentially do the speaking merits scrutiny, but AS 15.13.074(f) currently bars corporations and labor unions from making contributions to groups that are not ballot measure groups. He also pointed out that what was taken up in Citizens United was a corporation making independent expenditure speech from its own coffer. It did not go further to talk about pass-through issues.

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CHAIR FRENCH said he's trying to get behind the cover of the corporation so that citizens know who the individuals or corporations are that are advancing electioneering advertisements.

MR. PTACIN said what's required of a corporation at this point is outlined in AS 15.13.040(d) and (e). The Citizens United decision did not address the areas that are contemplated as corollary issues, but DOL is working on those, he said.

SENATOR WIELECHOWSKI asked what, if any, limitations the Legislature can place on corporations in regard to Citizens United and campaign disclosure, reporting requirements, and the

ability to do advertizing when the corporation has foreign shareholders.

MR. PTACIN restated that disclaimer and disclosure laws were held constitutional. The laws that were contemplated under Citizens United are similar to the disclosure and disclaimer laws that Alaska puts on groups and nongroup entities at this point. There is federal law and federal regulation on the foreign national and foreign corporation issue and this case did not determine any outward limit on disclaimer and disclosure. The ruling was on the actual expenditure on speech.

SENATOR WIELECHOWSKI asked if the Legislature could pass a law prohibiting corporations to advocate on behalf of candidates in Alaska if foreign shareholders constitute a majority stake in the corporation.

MR. PTACIN replied there is federal law on that matter and DOL has to determine whether additional state law is at all appropriate under BiCRA.

MS. KURTZ pointed out that AS 15.13.135 has some of the things the committee is talking about but it doesn't apply to corporations because existing Alaska statutes do not contemplate corporations being able to make independent expenditures. "If you're looking at how to fix the statutes to go in the direction you're indicating, that might be a place to start," she said.

CHAIR FRENCH asked what in AS 15.13.135 ought to be changed.

MS. KURTZ replied the first sentence is directly contrary to what came out of the Citizens United decision. It states, "Only an individual, group, or nongroup entity may make an independent expenditure supporting or opposing a candidate for election to public office." That could be invalidated by a court decision or the Legislature could look at it and realize it's not going to work.

CHAIR FRENCH observed that you could write "person" into that list so it includes corporations.

MS. KURTZ said she doesn't know if the solution would be that simple, but this statute in particular talks about individual, group, or nongroup entity. Some corporations are nongroup entities, but only the small select group that meet MCFL factors. It's been changed by the decision. The assumption that only MCFL nongroup entity-type corporations could make an

independent expenditure is no longer valid. This statute is now missing the disclosure and disclaimer requirements that it would apply to the communication by an individual, group, or nongroup entity. Corporation wouldn't obviously fall under that. AS 15.13.040 is a reporting statute so it's not clear. That's one of the issues; corporations are persons, but person is not included in AS 15.13.135.

SENATOR WIELECHOWSKI asked if the Legislature would need to change AS 15.13.135 or if a corporation would need to request a declaratory judgment.

MS. KURTZ replied it depends on what's going on, but a corporation might say that AS 15.13.135 doesn't apply because it doesn't say "person." "You can't assume that a corporation interested in making an independent expenditure will just do this," she cautioned. Legislative action is needed to make it clear under AS 15.13.135 that corporations are supposed to do this when they make independent expenditures.

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SENATOR WIELECHOWSKI said that if the Legislature takes no action, then a corporation is technically violating the law under AS 15.13.135.

MS. KURTZ replied she wouldn't say that because she doesn't know what they're doing.

SENATOR WIELECHOWSKI asked if it would be a technical violation of the law if the corporation was making an independent expenditure supporting or opposing a candidate.

MS. KURTZ said given the Citizens United precedent, Alaska law might be vulnerable. The Legislature can await that court challenge or proactively amend statutes in light of this decision. "This body does have the power to enact disclosure, disclaimer, identification requirements; it already has, but it's not clear under the existing statutes that those would apply to independent expenditures by corporations," she said.

SENATOR WIELECHOWSKI observed that under current Alaska law corporations have more freedom, more rights, and more ability to campaign than individuals.

MS. KURTZ declined to answer without first thinking about the implications of what he's saying.

MR. BULLARD said it's unclear how these statutes will be interpreted in light of the Citizens United ruling. "A lot would depend on the specifics and the facts in a given situation."

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SENATOR COGHILL said he tends to agree with the decision that corporations have the right to speak, but there needs to be accountability. If Alaska statute doesn't provide that accountability it should be amended to include reporting, identification, and whatever limits an individual may have so that the constitution will apply.

SENATOR WIELECHOWSKI expressed the view that it's imperative; in light of the decision, corporations have more rights to free speech than ordinary Alaskans. "I think we need to change that," he said.

At ease from 2:28 p.m. to 2:31 p.m.

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SENATOR MCGUIRE asked if there's been any thought given to a dollar threshold limitation.

MS. KURTZ said in Buckley v. Valeo the U.S. Supreme Court upheld a federal law that set limits on campaign contributions, but not expenditure limits. Thus, there is a limit on what the Legislature can do with expenditures despite the presence of dollar limits with the contributions.

SENATOR COGHILL said that if corporations have the same capacity to speak as an individual there has to be accountability and reporting, but he'd have difficulty limiting what they can talk about.

SENATOR WIELECHOWSKI expressed the view that this ruling is "the worst case of judicial activism" he's seen in his lifetime. He is interested in pursuing the issue of foreign companies and foreign shareholders; in light of this ruling they can now influence elections in Alaska. He requested that the committee look into that issue because that's not what Alaskans want to see.

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SENATOR COGHILL cited the PAC law and expressed the view that it will be difficult, but he's willing to look into it.

CHAIR FRENCH read the following two selections from Justice Stevens' dissent, which he described as one of the great works of his long and distinguished career.

In a state election ... the interests of nonresident corporations may be fundamentally adverse to the interests of local voters. Consequently, when corporations grab up the prime broadcasting slots on the eve of an election, they can flood the market with advocacy that bears 'little or no correlation' to the ideas of natural persons or to any broader notion of the public good, [494 U. S., at 660]. The opinions of real people may be marginalized.

At bottom, the Court's opinion is thus a rejection of the common sense of the American people, who have recognized a need to prevent corporations from undermining self government since the founding, and who have fought against the distinctive corrupting potential of corporate electioneering since the days of Theodore Roosevelt. It is a strange time to repudiate that common sense. While American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.

CHAIR FRENCH stated that over the next several weeks he will work with the committee and legislative legal to craft laws to contain this decision.

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There being no further business to come before the committee, Chair French adjourned the Senate Judiciary Standing Committee meeting at 2:37 p.m.