

**HB**

**358**



# Representative Scott Jiu Wo Kawasaki

Alaska State Legislature

District 9 Fairbanks

## MEMORANDUM

Date: Friday, February 26, 2010

To: Representative Bob Lynn, Chair of  
State Affairs Committee

From: Scott Kawasaki  
Representative District 9

RE: House Bill 358

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I respectfully request that you schedule a hearing in the House State Affairs Committee for HB 358, "Campaign expenditures"

A copy of the bill, a sponsor statement, sectional, and additional support material are attached.

There are several people who wish to testify from various locations around the state. Please provide teleconferencing capabilities in Fairbanks and Anchorage Legislative Information Offices.

If you have any questions or need additional information, please call Ben Molnia at 465-6890.

In Juneau o State Capitol Juneau, Alaska 99801

In Fairbanks o 1292 Sadler Way Fairbanks, Alaska 99701

Juneau o (907) 465-3466 o Fax (907) 465-2937 o Fairbanks o (907) 456-7423 o Fax (907) 451-9293

Email: Representative\_Scott\_Kawasaki@legis.state.ak.us



# Representative Scott Jiu Wo Kawasaki

Alaska State Legislature

District 9 Fairbanks

## HB 358: Corporate Campaign Disclosures and Disclaimers Sponsor Statement

HB 358 is an attempt to address the recent Supreme Court's 5-4 decision in Citizens United vs. FEC. The bill updates state statutes that deal with any kind of expenditure that is made by a corporation or union subject to full disclosure. The bill asks for the largest 5 contributors of any mailing, literature, advertisement or other communication that is sent.

HB 358 amends state election laws to clarify that corporations are covered by all applicable reporting requirements. Absent a change to state law, provisions could be declared unconstitutional. It expands communication identification requirements to require the approval of the content by the principal officer of the corporation and to require statements in each communication that its content has not been authorized or approved by the candidate. It also speeds reporting requirements for communications expenditures in the last nine days of the election so that expenditures over \$250 must be reported within 24 hours.

Elections are at the core of our democracy and opening the floodgates to new corporate or union spending for or against a candidate is objectionable. Whether we agree or disagree with the ruling, Alaska must comply with the Supreme Court ruling. While doing so, I hope the legislature will consider boundaries to protect the free speech of Alaska citizens as was intended by the Alaska Constitution.

Thank you for taking the time to consider HB 358.

In Juneau ◦ State Capitol Juneau, Alaska 99801

In Fairbanks ◦ 1292 Sadler Way Fairbanks, Alaska 99701

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Juneau, Alaska 99801-1182  
Deliveries to: 129 6th St., Rm. 329

## MEMORANDUM

February 22, 2010

**SUBJECT:** Sectional summary of House Bill No. 358 (Work Order No. 26-LS1369\R)

**TO:** Representative Scott Kawasaki  
Attn: Brodie Anderson

**FROM:** Alpheus Bullard *LAB*  
Legislative Counsel

You have requested a sectional summary of the above-described bill.

As a preliminary matter, note that a sectional summary of a bill should not be considered an authoritative interpretation of the bill and the bill itself is the best statement of its contents. If you would like an interpretation of the bill as it may apply to a particular set of circumstances, please advise.

**Section 1.** Amends language relating to the applicability of AS 15.13 (state election campaigns) to clarify that the chapter applies to all contributions, expenditures, and communications made for the purpose of influencing the outcome of an election covered by the chapter.

**Section 2.** Amends language relating to the duties of the Alaska Public Offices Commission (APOC) to clarify that the commission will assist all persons to comply with the requirements of AS 15.13.

**Section 3.** Amends AS 15.13.040(d) to clarify that every person making an expenditure must report to the commission unless the person is exempted from reporting by another provision of the chapter.

**Section 4.** Adds new requirements to the expenditure report required under AS 15.13.040(d) and specifies that the report must be filed in accordance with AS 15.13.110(g).

**Section 5.** Amends language in AS 15.13.040(h) to clarify that the reporting requirements of AS 15.13.040(d) do not apply to an expenditure made by certain individuals acting independently of any other person.

**Section 6.** Amends AS 15.13.040(p) to clarify that a person who is required to disclose contributions received by that person in an expenditure report under AS 15.13.040(d) must report the true source of the contributions as the "contributor."

**Section 7.** Amends AS 15.13.067 to allow any person who has registered under AS 15.13.050 to make an expenditure in a state election for public office.

**Section 8.** Provides that no person, other an individual exempt from reporting under AS 15.13.040(h), may make an expenditure unless the source of the expenditure has been disclosed.

**Section 9.** Amends language in AS 15.13.084 to clarify that a person may not make an expenditure anonymously unless it is made (1) for certain communications, (2) in connection with a ballot proposition as that term is defined by AS 15.13.065(c), and (3) by an individual acting independently of any other person.

**Section 10.** Amends language in AS 15.13.086 to conform with changes made by sec. 7 of the bill.

**Section 11.** Expands the communication identification requirements of AS 15.13.090 to apply to communications made by all persons, and additionally requires a person other than a candidate, individual, or a political party to (1) identify the person's principal officer, (2) include a statement from that officer approving the communication, (3) provide the address of the person's principal place of business, (4) identify the person's five largest contributors, and (5) in an election for elective office, state that the communication is not authorized or approved by a candidate.

**Section 12.** Requires expenditure reports filed under AS 15.13.040(e) to be filed within 10 days of the expenditure being made, except for an expenditure that exceeds \$250 and that is made within nine days of an election must be reported to APOC within 24 hours of the expenditure being made.

**Section 13.** Amends the language of AS 15.13. 111(a) to oblige all persons who are required to report under AS 15.13 to preserve certain records for a period of six years.

**Section 14.** Removes language from AS 15.13.135 that permitted only individuals, groups, or nongroup entities to make independent expenditures in support or in opposition to a candidate for public office. Adds language requiring all persons making certain independent expenditures to comply with AS 15.13.090.

**Section 15.** Repeals AS 15.13.140(a), a provision that provided that AS 15.13 should not be interpreted to prohibit a person from making independent expenditures in support or in opposition to a ballot proposition or question. As the chapter now reads, there is no ambiguity as to whether the chapter prohibits persons from making independent expenditures relating to a ballot proposition or question.

**Section 16.** Gives the Act an immediate effective date.

TLAB:med  
10-025.med

# LEGAL SERVICES

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## MEMORANDUM

January 25, 2010

**SUBJECT:** Citizens United v. Federal Election Commission  
(Work Order No. 26-LS1366)

**TO:** Representative Scott Kawasaki  
Attn: Brodie Anderson

**FROM:** Alpheus Bullard *TAB*  
Legislative Counsel

You requested a legal analysis of the United States Supreme Court's ruling in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. \_\_\_ (January 21, 2010), and its effect on Alaska law.

### **WHAT IS MOST SIGNIFICANT**

The Court held that the government cannot suppress political speech on the basis of the speaker's corporate identity.

### **WHAT THE DECISION DOES NOT DO**

This is a case about independent election campaign expenditures made by corporations. Because one of the statutes involved in this case and considered by the Court concerned labor unions, it also, arguably, is a case about independent election campaign expenditures made by labor unions, though that is not made explicit in the opinion. Laws regulating corporate and union contributions to candidates, party committees, and political action committees, whether direct or in-kind, are not directly affected by the ruling. Disclosure and disclaimer requirements for communications relating to elections for public office and laws requiring corporations and unions to identify the sources of money for their political activities are also unaffected.

### **FACTS AND PROCEDURAL POSTURE**

The case involved a documentary critical of the then potential presidential candidacy of Hillary Clinton. The documentary, "Hillary: The Movie," was produced by Citizens United, a nonprofit corporation. Anticipating that it would make the documentary available within a time period prohibited under the Bipartisan Campaign Reform Act of 2002 (BCRA),<sup>1</sup> Citizens United sought declaratory and injunctive relief in the United States District Court for the District of Columbia seeking to prevent the Federal Election

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<sup>1</sup> 2 U.S.C. § 431 *et seq.* (also known as the McCain-Feingold Act (Pub. L. No. 107-155, 116 Stat. 81)).

Commission (FEC) from enforcing provisions of the BCRA.<sup>2</sup> Citizens United argued that § 203 of the BCRA<sup>3</sup> violated the First Amendment on its face and as applied to the documentary and its related advertisements, and that §§ 201<sup>4</sup> and 311<sup>5</sup> of the Act, relating to disclosure, disclaimer, and reporting requirements were, as applied to the documentary, also unconstitutional.

The United States District Court denied the injunction, holding that under § 203 of the BCRA the documentary could not be shown on television in the 30 day period preceding the 2008 Democratic primaries. The court held that the BCRA prohibitions against corporate independent expenditures were constitutional, reasoning that the question had been answered by the Supreme Court in McConnell v. Federal Election Commission, 540 U.S. 93 (2003).<sup>6</sup> The United States District Court held that the documentary had no other purpose than to discredit Hillary Clinton and inform viewers that she was unfit for public office, and thus the provision of the BCRA relating to electioneering communications was not unconstitutionally applied. Lastly, the court ruled that the Act's disclosure, disclaimer, and reporting requirements were not unconstitutional as applied to the documentary or its advertisements.

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<sup>2</sup> Citizens United v. Fed. Election Commission, 530 F. Supp. 2d 274 (D.D.C. 2008).

<sup>3</sup> Section 203 of the BCRA regulates "electioneering communications." Generally, these are broadcast, cable, or satellite communications made within 60 days of a general election or 30 days of a primary election. 2 U.S.C. § 434(f)(3)(A)(i). Section 203 restricts corporations (other than media corporations) and labor organizations from funding electioneering communications from their general funds except under certain specific circumstances, e.g., get-out-the-vote campaigns. 2 U.S.C. § 441b(b)(2).

<sup>4</sup> Under § 201 of the BCRA, persons who disburse an aggregate of \$10,000 or more a year for the production and airing of electioneering communications are required to file a statement with the Federal Election Commission (FEC) that includes the names and addresses of persons who have contributed in excess of \$1,000 to accounts funding the communication. See 2 U.S.C. § 434(f)(1) and (2).

<sup>5</sup> Under the BCRA's § 311, the entity paying for a communication that is not authorized by a candidate or the candidate's political committee, must include in the communication a statement that the organization "is responsible for the content of this advertising." See 2 U.S.C. § 441d.

<sup>6</sup> In McConnell, the United States Supreme Court upheld § 203 as facially constitutional, reasoning that the justifications for regulating independent corporate expenditures constituting express advocacy "apply equally" to ads that are "the functional equivalent of express advocacy." Id. at 206. The Court held that the regulation of such independent expenditures was acceptable because the government has a compelling interest in countering the kind of "corrosive and distorting effect" identified in Austin. Id. at 205.

Citizens United appealed the decision and the Supreme Court docketed the case on August 18, 2008,<sup>7</sup> hearing oral arguments on March 24, 2009. However, on June 29, 2009, the Supreme Court ordered the parties to reargue the case on September 9 after submitting briefs on the larger questions of whether the Court should overrule Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990),<sup>8</sup> that portion of McConnell 540 U.S. 93 (2003) that found § 203 of the BCRA to be facially valid, or both.

#### ANALYSIS

In Citizens United, 558 U.S. \_\_\_\_ (January 21, 2010), the Supreme Court considered (1) the validity of § 203 of the BCRA, which prohibits corporations and unions from using their general treasury funds to make independent expenditures for speech that is an "electioneering communication"; (2) the Court's prior holding in Austin that political speech may be banned based on the speaker's corporate identity; and (3) whether §§ 201 and 311 of the BCRA, which mandate disclaimer and disclosure requirements for Citizens United's ads, were constitutionally invalid.

#### Prohibitions on Independent Expenditures

The Court held that § 203 of the BCRA, which prohibits certain corporations and unions from using funds from their general treasuries<sup>9</sup> for certain independent expenditures made to influence the outcomes of elections for federal public office, was unconstitutional.<sup>10</sup> It determined that prohibitions on corporate independent expenditures are an impermissible "ban on speech," *id.* at 22, and that political speech does not lose First Amendment protection "simply because its source is a corporation," *id.* at 26.<sup>11</sup>

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<sup>7</sup> Under § 403(a)(3) of the BCRA, the final decision of the district court in this case is "reviewable only by appeal directly to the Supreme Court of the United States."

<sup>8</sup> In Austin, the Court upheld a Michigan law that barred corporations from using their general treasury funds to support or oppose any state candidate, even though the spending occurred independently of that candidate's campaign operation.

<sup>9</sup> Prior to the ruling, to spend money on "electioneering communications" under federal law, corporations and unions were required to establish political action committees (PACS) that had a separate legal identity from the corporation or union. PACS could receive limited donations from employees, shareholders, or organization members. Now, after the Citizens United decision, corporations and unions may spend money directly from their treasuries on independent expenditures to influence elections for public office.

<sup>10</sup> While § 203 of the BCRA applied equally to corporations and unions, independent expenditures made by unions were not an issue before the Court, and it is not explicit in the ruling that the BCRA's independent expenditure prohibition is lifted for unions.

<sup>11</sup> Of less immediate consequence, in the absence of acknowledgement by the Court of any permissible First Amendment distinctions between corporate and natural persons, the case raises questions relating to whether corporations' newly realized equality under the First Amendment will affect (1) the constitutionality of existing prohibitions against

The Court held that the case could not be decided in an examination of the relevant provisions of the BCRA alone, because the fundamental legal rationale underlying the challenged provisions of the Act was itself unjustified by a sufficient governmental interest.<sup>12</sup> The Court held that this rationale, identified in Austin, the prevention of "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form that have little or no correlation to the public's support for the corporation's political ideas," *id.* at 660, is inconsistent with the protections offered speech and speakers by the First Amendment.<sup>13</sup>

#### **Precedent Overturned**

The Court overruled Austin, and those portions of McConnell that upheld the BCRA's restrictions on independent expenditures made by corporations and labor organizations. It did so holding that "no sufficient governmental interest justifies limits on the political speech of nonprofit or for-profit corporations[.]" and "[g]overnment may not suppress political speech on the basis of the speaker's corporate identity." Citizens United, 558 U.S. at 50.<sup>14</sup>

#### **Disclosure and Disclaimer Requirements**

The Court upheld the BCRA's disclosure and disclaimer requirements which were applied to the documentary (§§ 201 and 311 of the Act), holding that such requirements "may burden the ability to speak, but they 'impose no ceiling on campaign-related

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corporate contributions to candidates in elections for public office and (2) other corporate related constitutional jurisprudence. These remain for future litigation.

<sup>12</sup> "When constitutional questions are 'indispensably necessary' to resolving the case at hand, 'the court must meet and decide them.'" Citizens United v. Federal Election Commission, 558 U.S. at 4 of Roberts, C.J. (concurring opinion), quoting Ex parte Randolph, 20 F. Cas. 242, 254 (No. 11, 558) (CC Va. 1833) (Marshall, C.J.).

<sup>13</sup> The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

Given the Court's interpretation of the requirements of the First Amendment, existing distinctions between "express advocacy" versus "issue advocacy" and "independent expenditures" versus contributions to candidates are less clear. Citizens United does not address these distinctions, but the logic underlying the decision suggests that they may soon be revisited.

<sup>14</sup> In addition to overturning Austin, the Court dismissed arguments that independent corporate expenditures in elections for federal office give rise to corruption or its appearance (Citizens United at 41 - 45) and that the government has a compelling interest in regulating corporations' independent expenditures to protect dissenting shareholders from being compelled to fund corporate political speech. (Citizens United at 46 - 47).

activities,' [Buckley v. Valeo, 424 U.S. 1, 64 (1976)] and 'do not prevent anyone from speaking,' McConnell, [540 U.S.] at 201." Citizens United, 558 U.S. at 51. Citing Buckley and McConnell, the Court held that these requirements bear a substantial relation to the government's interest in ensuring that the electorate is able to evaluate the arguments to which it is being subjected, and that Citizens United did not demonstrate that the requirements imposed a chill on the organization's (or the organization's members') speech or expression. Id. at 51 - 56.

#### **EFFECT ON ALASKA LAW**

1. Under existing AS 15.13.067 (who may make expenditures in an election for candidates for elective office) and AS 15.13.135 (independent expenditures for or against candidates), only individuals, groups, and nongroup entities, as these terms are defined under AS 15.13.400, are permitted to make independent expenditures supporting or opposing candidates in elections under AS 15.13.<sup>15</sup> The terms "individual," "group," and "nongroup entity" are defined at AS 15.13.400. Together, these provisions effectively prohibit independent expenditures by for-profit corporations, and are likely to be interpreted by a court as unconstitutional in light of this decision.<sup>16</sup>

2. For-profit corporations are currently prohibited from making independent expenditures for or against candidates in elections under AS 15.13. Because of that, existing state statutes relating to (1) disclosure of expenditures, (2) limitations on expenditures, (3) identification of communications, and (4) filing of reports<sup>17</sup> under AS 15.13 do not currently account for independent expenditures and communications by for-profit corporations. Given the silence of our state statutes, and the likelihood that our existing statutes will not be enforced following the Court's holding in Citizens United, there are now no limits on independent expenditures made by for-profit corporations and no statutory disclosure, identification, or reporting requirements for these expenditures.

At your request, I am currently preparing a bill (Work Order No. 26-LS1369\A) relating to changes to AS 15.13's disclosure and communication identification requirements in light of this decision. If I may be of further assistance, please advise.

TLAB:med

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<sup>15</sup> Under AS 15.13.010(a), AS 15.13 applies to elections for governor, lieutenant governor, a member of the state legislature, a delegate to a constitutional convention, and a judge seeking judicial retention, and to elections for municipal office in municipalities with a population of more than 1,000 inhabitants unless the municipality has exempted itself from the provisions of the chapter.

<sup>16</sup> These statutes remain the law for the State of Alaska. If left unchanged, will they be enforced? The state could attempt to enforce them; however, enforcement would likely be quickly curtailed once the aggrieved party petitioned the state's courts.

<sup>17</sup> See AS 15.13.040, AS 15.13.082, AS 15.13.090, and AS 15.13.110.

January 22, 2010

# Public Agrees With Court: Campaign Money Is "Free Speech"

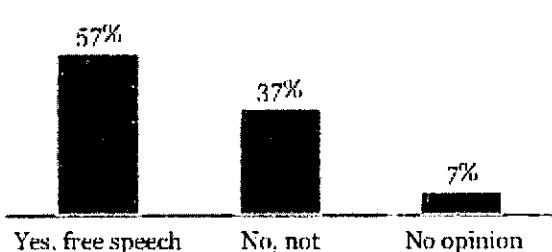
But have mixed views on other issues at heart of new Supreme Court ruling

by Lydia Saad

PRINCETON, NJ -- Americans' broad views about corporate spending in elections generally accord with the Supreme Court's decision Thursday that abolished some decades-old restrictions on corporate political activity. Fifty-seven percent of Americans consider campaign donations to be a protected form of free speech, and 55% say corporate and union donations should be treated the same way under the law as donations from individuals are. At the same time, the majority think it is more important to limit campaign donations than to protect this free-speech right.

### Is Campaign Giving "Free Speech"?

Do you consider money given to political candidates to be a form of free speech protected by the First Amendment to the Constitution, or not?

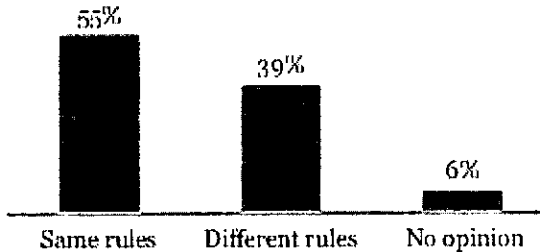


Gallup/First Amendment Center, Oct. 1-2, 2009

GALLUP

### Preference for Campaign Finance Laws

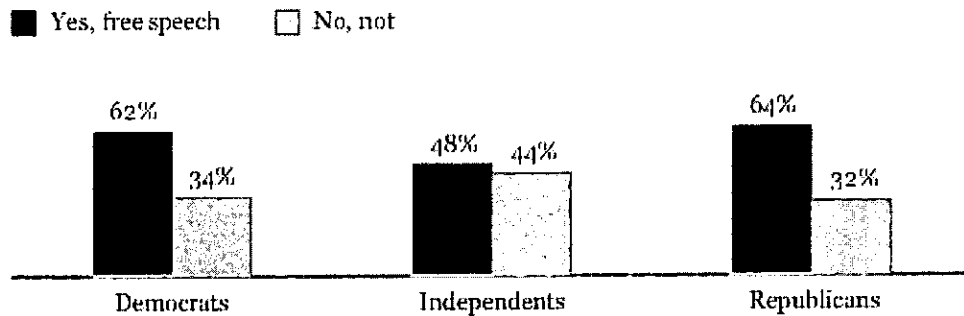
Should same rules apply to corporations, unions, and individuals or should different rules apply to corporations and unions?



Gallup/First Amendment Center, Oct. 1-2, 2009

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The free-speech question elicits uncommon agreement across party lines. More than 6 in 10 Republicans and Democrats believe campaign donations are a protected form of free speech, but fewer than half of independents (48%) agree.

*Opinions on Whether Campaign Contributions Are Free Speech, by Party ID*

Gallup/First Amendment Center, Oct. 1-2, 2009

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Public attitudes about the issues involved in the court's *Citizens United v. Federal Election Commission* decision come from a nationwide Gallup survey sponsored by the nonpartisan First Amendment Center. The poll was conducted Oct. 1-2, 2009, shortly after the high court heard concluding arguments in the case.

**Americans Favor Limits on Contributions**

While corporations and unions are still barred under a 1907 law from making donations directly to federal candidates, the court's decision Thursday allows organizations to run ads in direct support of or opposition to specific candidates; it also overturns 2002 McCain-Feingold restrictions on how close to elections corporate-sponsored ads can run.

The 5-4 decision in the *Citizens United* case underscores the tension between protecting free speech and giving certain groups or individuals undue influence over election campaigns. Another poll question asked Americans to weigh the two considerations and say which is the greater priority for them: placing limits on how much individuals, corporations, and unions can contribute to campaigns or protecting the rights of these groups to freely support political campaigns. By 52% to 41%, Americans say placing limits on contributions is paramount for them.

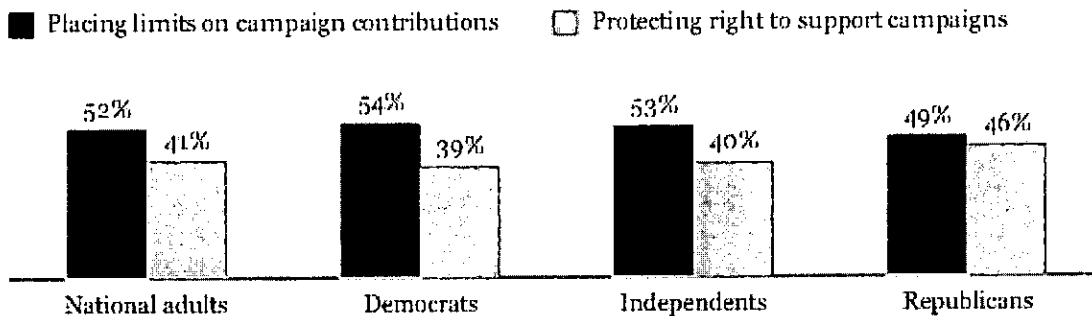
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"More specifically, 61% of Americans think the government should be able to limit the amount of money individuals can contribute to candidates and 76% think it should be able to limit the amount corporations or unions can give."

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*Prioritizing Limits on Campaign Contributions vs. Free Speech*

Thinking about political campaign contributions and free speech, which is the greater priority for you, personally -- [placing limits on how much individuals, corporations, or unions can contribute to political campaigns (or) protecting individuals', corporations', or unions' rights to freely support political campaigns]?



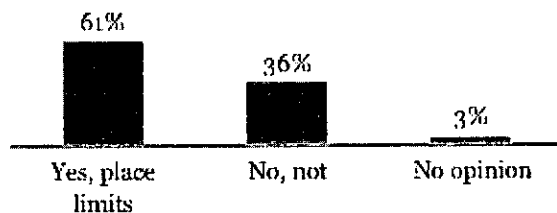
Gallup/First Amendment Center; Oct. 1-2, 2009

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More specifically, 61% of Americans think the government should be able to limit the amount of money individuals can contribute to candidates and 76% think it should be able to limit the amount corporations or unions can give.

*Campaign Finance Limits on Individuals*

Do you think the government should or should not be able to place limits on how much money individuals can give to a political candidate?

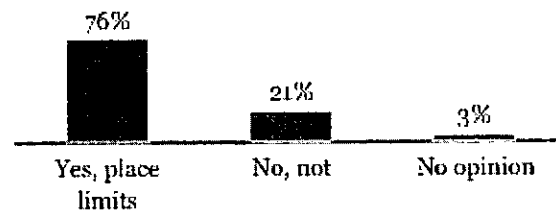


Gallup/First Amendment Center, Oct. 1-2, 2009  
Based on Form C half sample

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*Campaign Finance Limits on Groups*

Do you think the government should or should not be able to place limits on how much money corporations or unions can give to a political candidate?



Gallup/First Amendment Center, Oct. 1-2, 2009  
Based on Form D half sample

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Thus, it would appear that, regardless of Americans' support for the principle that campaign donations are a form of political speech, and that corporations and unions should get the same treatment as individuals, they are likely to have significant concerns about the practical effect of the court's ruling, that is, more corporate and union money being poured into elections.

**Bottom Line**

Prior to now, while corporations and unions could run issue-based ads, they could not spend a penny on candidates, except through political action committees. Now that they can run such ads, the country could be in store for major changes in the way campaigns are conducted. Does the ruling square with Americans' views on campaign contribution limits? In some respects, yes. In others, it depends on whether Americans decide that independent expenditures are tantamount to political "contributions" or are merely free speech.

## Survey Methods

Results are based on telephone interviews with 1,023 national adults, aged 18 and older, conducted Oct. 1-2, 2009, as part of Gallup Daily tracking. For results based on the total sample of national adults, one can say with 95% confidence that the maximum margin of sampling error is  $\pm 4$  percentage points.

For results for the sample based on 535 national adults in Form C and 488 national adults in Form D, the margin of error is  $\pm 5$  percentage points.

Interviews are conducted with respondents on land-line telephones and cellular phones.

In addition to sampling error, question wording and practical difficulties in conducting surveys can introduce error or bias into the findings of public opinion polls.

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