

**CAMPAIGN FINANCE REFORM: PROPOSALS IM-
PACTING BROADCASTERS, CABLE OPERATORS
AND SATELLITE PROVIDERS**

HEARING
BEFORE THE
SUBCOMMITTEE ON TELECOMMUNICATIONS AND
THE INTERNET
OF THE
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HOUSE OF REPRESENTATIVES
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CONTENTS

	Page
Testimony of:	
BeVier, Lillian R., Doherty Charitable Professor and Class of 1963, Research Professor, University of Virginia Law School	24
Morris, Dwight L., President, Campaign Study Group	42
Sander, Jack, Executive Vice President Media Operations, Belo Corporation	13
Sapan, Joshua, President and Chief Executive Officer, Rainbow Media Holdings	34
Taylor, Paul, Executive Director, Alliance for Better Campaigns	38
Wright, Andrew S., General Counsel, Vice President, Government Affairs, Satellite Broadcasting and Communications	21

(III)

CAMPAIGN FINANCE REFORM: PROPOSALS IMPACTING BROADCASTERS, CABLE OPERA- TORS AND SATELLITE PROVIDERS

WEDNESDAY, JUNE 20, 2001

HOUSE OF REPRESENTATIVES,
COMMITTEE ON ENERGY AND COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS
AND THE INTERNET
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 2322, Rayburn House Office Building, Hon. Fred Upton (chairman) presiding.

Members present: Representatives Upton, Stearns, Largent, Shimkus, Wilson, Ehrlich, Terry, Tauzin (ex officio), Markey, Engel, Green, McCarthy, Luther, Sawyer, and Dingell (ex officio).

Staff present: Jessica Wallace, majority counsel; Hollyn Kidd, legislative clerk; Andy Levin, minority counsel; and Brendan Kelsay, minority professional staff.

Mr. UPTON. Good morning, everyone. Before I give my opening statement I'd just like to note for the record, make a unanimous consent request that all members will be able to submit their statements as part of the record and I have a copy from Anna Eshoo that will be done.

I would also note that there is a reason why we switched rooms from downstairs to upstairs. There's a major hearing on cloning and a number of us are members of the Health Subcommittee and so there are a number of subcommittee hearings going on all at the same time, so we'll be seeing members coming in and out.

Let me state at the outset that I'm a strong advocate of campaign finance reform. I voted for the Shays-Meehan bill in the last Congress, not to mention many other reform measures throughout my years in the House.

Having said that, we are here today to learn more about how certain political advertising provisions contained in the Torricelli Amendment to the McCain-Feingold Bill would impact broadcasters, cable operators and satellite providers. Through our respective congressional campaigns, many of us on the subcommittee are familiar with the rules which govern political advertisements to the extent that these rules dictate the cost that we must pay to run them. So this issue has great bearing on every one of our political lives. But we cannot overlook the fact that advertising is the sole source of income upon which broadcasters rely to pay their bills so that they can serve their communities.

Under current law, unlike any other advertiser, a politician is entitled to the lowest unit to charge within the previous 45 or 60 days for the same class and period of time of advertisement regardless of the fact that the lowest unit charge is based on the broadcaster's charge to its best customers. Like the local auto dealer who might have an advanced contract to advertise numerous times every day of the year and get the best volume discount as a result. In other words, politicians are already given a tremendous price break over anyone else in town, but we have come to accept this as a balanced way for the broadcasters to fulfill their service to the public in exchange for being given use of the public airwaves.

Now we come to the Torricelli Amendment which puts the heavy thumb of government on the scale and suggests that the broadcasters should have to do even more to pay their debt to society. If the Torricelli Amendment were to become law, we would give politicians an even bigger leg up on the local auto dealer because we would no longer permit the broadcaster to distinguish between the most expensive non-preemptable time or the cheapest preemptable time in determining the politician's lowest unit cost.

Moreover, the broadcaster would no longer have any flexibility to preempt at all. In addition, the politician would be entitled to the lowest unit charged no matter when that might be derived in the preceding 365 days, never mind that in the dead of winter in February when advertising rates in Southwest Michigan may be at fire sale prices while in the summer the height of the tourist season they are at a premium, especially when the Cubs are in first place.

The politician would get the benefit of the February rates, not preemptable under the Torricelli Amendment. Moreover, for those broadcasters like those in my neck of the woods in Southwest Michigan, along the Indiana border, the broadcaster would have to give breaks under the Torricelli Amendment to any qualified Federal candidate, not to mention political parties.

This could mean that in a Presidential year with contested U.S. Senate races and numerous House races in both Michigan and Indiana and Illinois, those broadcasters would serve both Southwest Michigan and those States could be flooded with ads from candidates for all such offices from all those States which only compound the problem for the broadcasters.

My fear is that rather than reduce the amount on political advertising, the Torricelli Amendment will only make it eminently more affordable and result in just as much spending and certainly more political ads. The bottom line is that politicians do not like to pay any more in advertising than the local auto dealer, yet politicians are the only ones who could amend the law to cut themselves an even better break.

I want to see campaign finance system cleaned up and reformed, but in my mind the Torricelli Amendment not only would fail to reduce spending, but also would unfairly burden broadcasters, cable operators and satellite providers.

I look forward to today's hearing and its witnesses and I yield to the ranking member and friend and colleague, Mr. Markey of Massachusetts.

Mr. MARKEY. Thank you, Mr. Chairman, very much. In Boston, we do have this incredible fear this year that we are going to make

it to the World Series, but that we'd play the Cubs in the World Series and then lose to the Cubs. That's the nightmare scenario that looks like it could unfold this year.

Without question, this Congress may be the one that has the highest likelihood of actually succeeding in passing a campaign reform measure and sending it on to the President. With that in mind, it's important that we look to the telecommunications policy issues before us this morning in the broader context of campaign finance reform.

Now I've long been an advocate of the House version of the McCain-Feingold Bill, the Shays-Meehan Bill and have voted for it a number of times. In addition, I have long supported public financing as a way to help limit the overall cost of campaigns and to limit the amount of time and energy that politicians must exert in fundraising. Recognizing that comprehensive campaign finance reform that is beyond soft money bans may still be some time away, I have supported the policy put on the books many, many years ago that requires broadcast licensees to provide candidates with the lowest unit rate for their political advertisements.

Today gives us both an opportunity to look at new proposals such as those embodied in the so-called Torricelli Amendment which was successfully added to the McCain-Feingold Bill on the Senate side earlier this year, as well as examine the real-world operation of the lowest unit rate policy as it exists today.

The lowest unit rate provisions as they are currently constructed were put on the books as part of the Federal Election Campaign Act of 1971. These provisions require reasonable access to candidate advertisements and an obligation that broadcasters provide candidates with the lowest charge of that broadcast station for the same class and amount of time for the same time period. Classes refer to whether the ad buy is for preemptable or non-preemptable time with the latter obviously being the more expensive typically. Time period refers to the time of day and time refers to whether it's a 30 second or 60 second spot. The ability of these provisions are a window of 45 days prior to a primary and 60 days prior to a general election.

The proposal contained in the Senate bill extends this window out to 365 days, meaning that stations must provide candidates with the lowest rate for that slot that they charged anyone during the previous year.

In addition, the scope is expanded to include cable operators and satellite broadcasters. The broadcast industry is concerned that these new provisions will force them to charge candidates rock bottom prices and will hurt their bottom line. It is hard to imagine a proposal that would lower the cost of campaigns to candidates that wouldn't, by necessity, negatively impact the broadcast revenue from such candidates today.

Industry also asserts that lower advertisement cost doesn't necessarily mean candidates will raise less money or advertise less. Cheap ads may simply mean more ads. There may be some truth to this, depending upon the particular medium markets, how many contest races are going on simultaneously and whether the larger campaign finance reform bill includes any caps or voluntary limits on overall candidate spending.

I'm not sure at this point whether it is necessary or warranted to include cable operators or satellite broadcasters in this regime at this time. Advertisements on those media tend not to be as expensive as broadcast advertising. They also already have a form of free TV time. They call it must carry where they carry local broadcast stations on their service for free.

Yet as we look at this issue, we must keep in mind another cost as well and that is the cost to our democracy. There's no question that broadcasters who are FCC licensees and are required by those licenses to serve the public interest make a significant amount of money off of the public's interest in elections or at least on a candidate's interest in reaching the public.

How we quantify their responsibility to the public during election time is always a difficult question. However, it is hard to imagine a reform of our campaign system that doesn't look to the broadcast media as part of the solution because media remains a significant amount of the cost of many political campaigns.

Again, I look forward, Mr. Chairman, to the statements from our witnesses today and to ultimately our participation in this very important process.

Mr. Upton. Thank you. We recognize the vice chairman of the subcommittee, Mr. Stearns from Florida.

Mr. STEARNS. Good morning and thank you, Mr. Chairman. I also want to thank you for holding this hearing. When an amendment is offered by Senator Torricelli from New Jersey in the Senate and then it comes over here, it's not oftentimes that you have this opportunity to have a hearing on such an amendment. So I compliment you and I know the people in the audience also appreciate the fact that we can have an open forum on this amendment and not just vote on a component on it in the House or in a committee without fully understanding the full ramifications.

If this provision is enacted it would result in further, I think, socializing might not be the right word; price control, we already have some price controls, but this would be price control No. 2 for political campaign. And I think there's the law of unintended consequences that could result from this. And that's why, Mr. Chairman, I have an article from The Hill Magazine that I would ask unanimous consent to make part of the record.

Mr. Upton. Without objection.

Mr. STEARNS. This article is entitled "TV Stations Ration Campaign Advertising Citing High Demand." The article states that in 1998, primary campaign in California, the requests for political advertising were so overly demanding that complying with every request to purchase advertising space for political ads would have placed television stations in a huge economic bind. The stations in response to such high demands were forced to restrict local and State candidates, besides those running for Governor for airing political ads. As a result, some TV stations even refused to take ads from campaigns other than Federal campaigns and a Governor's race infuriating candidates who were put to the test in other offices.

The article cites a real-life consequences of discounted air time. During the 1998 election cycle, Ron Gonzales, a Democratic candidate for Mayor in San Jose, California could not even purchase

any time for political ads and was put into a competitive disadvantage that forced him into a run-off. But instead of making sure that all candidates in all groups have an equitable opportunity to acquire time to inform the public of their candidacies or the issues important to them, the proponents of the Torricelli Amendment will create a system of inequities, bestowing Federal candidates preferential status.

So unfortunately, sometimes we do not fully recognize the law of unintended consequences here in Congress. The Torricelli Amendment would do that, further regulate our society, our broadcast society and in the end, I think hurt local and State candidates.

Furthermore, broadcasters already have a significant financial commitment to make in transitioning to digital television. Broadcasters will have to spend tens of millions of dollars in order to transition to digital television. With Federal elections every 2 years, such proposals can easily threaten this conversion to high definition television.

The proposal before the subcommittee will have unintended consequences, severely harming broadcasters financially, damaging State and local candidates, insulating incumbents and the two major parties from challengers and from third parties, and in the end, harming our democracy and our notion of freedom.

So Mr. Chairman, I again commend you on having this hearing on the Torricelli Amendment. Thank you.

Mr. Upton. Thank you. Mr. Dingell, ranking member of the full committee.

Mr. DINGELL. Mr. Chairman, I thank you for recognizing me and I commend you for holding this hearing. The Torricelli Amendment about which this proceeding is, appears to be a wonderful piece of legislation and it appears to have almost every virtue that the American public would solicit of our campaign laws. It is supposed to reduce costs. It is supposed to be able to make time more readily available. It is supposed to equalize the differences between richer and poorer candidates. It is supposed to see to it that time is made more cheaply available to the candidates for public office and to increase the transparency and the democratic, with a small D, impact of television and television advertising on the public. Wonderful.

However, let us look a little more deeply at this legislation. And let us begin with some very important statements. First of all, it doesn't do what it's supposed to do. Second of all, it is badly drafted. Third of all, it has a number of unfortunate surprises which are contained in it which I will address as I go forward. There's no question in my mind that our Nation's campaign finance system has been severely corrupted, most notably by the enormous sums of unregulated soft money that have poured into campaigns over the past few years. It's equally clear that the public is fed up and disgusted with the amount of money which is spent and they believe that the entire system has been corrupted. Again, regrettably, the Torricelli Amendment does not resolve those problems.

The most recent elections in 2000 were the most expensive in history and seemingly created an endless cycle of fund raising and campaigning that quite frankly has raised questions in the minds of the public, and most office holders' minds, about the entire elec-

toral process. Reform is needed. Again, is this the reform needed? Clearly not. And I will discuss further as to why. The public deserves a more transparent process and no elected official should either be beholden to special interests or appear to be beholden to special interests. I think that the exorbitant sums spent in modern campaigns not only taint the election process and must be curbed, but quite honestly, they raise questions as to the faith of the people in the campaign process simply because of the enormous sums of money spent and the questions that attend it.

We should, however, be careful to craft solutions and to make sure that they have the desired effect. As the doctors would say in the Hippocratic Oath, first, do no harm. As we see too often, quick fixes rarely work and usually create larger problems down the road. Clearly that is the situation before us.

I have no doubt that the Torricelli Amendment to the McCain-Feingold Bill is well-intentioned, and it certainly looks great at first glance. Its proponents claim that it will drive down the cost of political advertising and, by extension, the cost of campaigns. If that were true, we should form bands of citizens to support it with great enthusiasm.

Regrettably, it is not so, and while I'm sure that every Member of this body, and of the Senate, and any other campaigning officer or rather persons seeking public office, joins in that view, I am not convinced that the provision meets the necessary tests. Is it constitutional? I doubt it. Is it fair? Clearly not. And I also doubt that it, in fact, would result in less campaigning, less expenditures, or in a better situation.

To the contrary, I believe this amendment is fraught with the potential to achieve precisely the opposite result. Instead of stemming the growing tendency toward protracted campaigns which causes more money to be raised and more money to be spent, the amendment would actually encourage perpetual campaigns by deepening advertising discounts and expanding them to apply on a permanent year-round basis. The money chase would accelerate, let me assure you, Mr. Chairman.

Instead of providing an incentive to improve the quality of political discourse, thereby decreasing the quantity of advertising needed, the Torricelli Amendment would actually stimulate the purchase of more ads by more political campaigns. Not only would this reduce the likelihood that campaigns would raise and spend money, but the resulting ad clutter would saturate the market and render all of the messages less effective. It is interesting to note that the amendment was drafted so quickly and without proper vetting that the legislation containing this amendment actually exempts radio ads from the current law requiring the lowest unit charged. Many candidates, Federal, State and local, rely exclusively on radio. Imagine the consequences of that.

It would further then seriously threaten the ability of State and local candidates, or less financed Federal candidates, to get on the air at all, since Federal candidates for elected office are afforded reasonable access to airwaves, but State and local candidates are not. In many markets, there may be little or no advertising inventory available for these races. I do not believe that it was the intent of Senator Torricelli to allow Federal candidates to corner this part

of the market. Of course, the Federal Communications Commission is likely to step in and better define just how much political advertising constitutes reasonable access.

Imagine, Mr. Chairman, the FCC contemplating a question such as this, with the limited competence that that Agency has shown during much of its history and an opportunity to interfere in the political process. Imagine the damage that that Agency could do.

Having said that, more concrete FCC rules in this area could result in less inventory being made available for candidates than is the case today. I would say be careful for what you ask for, you just might get it, and God help us if we do.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS
FROM THE STATE OF MICHIGAN

Thank you, Mr. Chairman, for holding this hearing today. There is no question in my mind that our Nation's campaign finance system has been severely corrupted, most notably by the enormous sums of unregulated soft money that have poured into campaigns over the past few years.

The most recent elections in 2000 were the most expensive in history, and the seemingly endless cycle of fundraising and campaigning cast a pall on the entire electoral process.

Clearly reform is in order. The public deserves a more transparent process, and no elected official should feel beholden to special interests. I believe the exorbitant sums spent on modern campaigns taint the election process and they must be curbed.

But we should be extremely careful to craft solutions that will actually have the desired effect. As we see too often, quick fixes rarely work, and usually create larger problems down the road.

I have no doubt that the Torricelli amendment to the McCain-Feingold bill is well-intentioned. Its proponents claim that it will drive down the cost of political advertising and, by extension, the cost of campaigns. And while I'm sure every Member would like to pay less for campaign ads, I am not convinced that the provision is fair, that it is constitutional, or that it would, in fact, result in less campaign spending.

To the contrary, I believe it is fraught with the potential to achieve precisely the opposite result. Instead of stemming the growing trend toward protracted campaigns—which causes more money to be raised and spent—the Torricelli amendment would actually encourage perpetual campaigns by deepening the advertising discounts and expanding them to apply on a permanent, year-round basis.

Instead of providing an incentive to improve the quality of political discourse, and thereby decrease the quantity of advertising needed, the Torricelli amendment would actually stimulate the purchase of many more ads by political campaigns. Not only would this reduce the likelihood that campaigns would raise and spend less money, but the resulting ad clutter would saturate the market and render the message less effective.

Furthermore, the Torricelli provision could seriously threaten the ability of state and local candidates to get on the air at all. Since federal candidates for elective office are afforded "reasonable access" to the airwaves, but state and local candidates are not, in many markets there may be little or no advertising inventory available for these races. I do not believe it was the intent of Senator Torricelli to allow federal candidates for office to corner this market.

Of course, the Federal Communications Commission (FCC) would likely step in and better define just how much political advertising constitutes reasonable access. But, perhaps ironically, more concrete FCC rules in this area could result in less inventory being made available to candidates than is the case today. So we must be careful what we ask for.

Mr. Chairman, it is clear that the amendment adopted in the Senate was intended to address a very serious problem. Unfortunately, I believe it falls short of achieving the desired result, and, worse, is likely to cause significant unintended consequences. I hope that we will deliberate very carefully over these provisions before proceeding to legislate in Committee.

Mr. UPTON. Thank you. Mr. Terry.

Mr. TERRY. Thank you, Mr. Chairman, for holding this important hearing and welcome witnesses.

I have, as well, concerns with the Torricelli-Corzine language included in McCain-Feingold. First, I believe it's entirely unfair to require broadcasters to provide candidates with rates equivalent to the least expensive spot in the same time period over 365 day period, a 1-year period. Should candidates be able to buy ads, unpreemptable at the same prices 4 days before an election at the same rate that the station sold an ad 140 days prior to that election? I don't think so. To me, that sounds absurd.

One columnist compared this to giving politicians a Lexus at the price of a Saturn. Now remember, the philosophy originally or the current status quo laws provide access to candidates to prevent the gouging, an ad that may be sold for \$1,000 to the long-term customer, advertising customer. We come in and maybe it's a \$10,000 ad for that period. The current law prevents that type of gouging and allows us the access. And now the philosophy is give us a political financial advantage on the backs of these TV stations. That's wrong.

Second, the backers of the Torricelli-Corzine language claim that it helps the process because now we, as candidates, can spend more time legislating than we have to be out on the phone raising dollars for these expensive ads and expensive campaigns. I would say that this type of amendment is what happens when the Torricellis and Corzines have too much time to think about legislation. But nothing can be further from the truth. The reality, other than maybe for a specific campaign in New Jersey, most of us have to raise money just to meet, just to do the basic things in a campaign.

So if we put the burden on you to help finance our campaigns, you as the broadcasters and TV stations, in reality, what we're going to do is take that windfall, I'm either going to buy more ads with it because we don't have enough money to really fully do everything we want at campaign unless we have \$60 million to pull out of our pockets which is very rare. So I'm going to use that to buy more ads or I'm going to move it to actually doing direct mail or radio or other things. It's not going to lower the cost of campaigns. It just won't happen.

So I want to focus a little bit on some of the alternatives. I've introduced with my colleagues, Chip Pickering and Joe Nolenberg, the Open and Accountable Campaign Financing Act of 2001 as an alternative and this focuses on disclosure and it does have a component that hits the broadcasters because when independent expenditures, when they place ads which I think is their constitutional right to do so, even if it's an ad to defeat Lee Terry, I'm going to protect their constitutional rights to do that, but we do place a burden in this Act to force broadcasters, in essence, to give us the information of who and what regard they're purchasing, the same thing that you have to do with political candidates today.

I think the answer is disclosure as opposed to what Mr. Stearns said in price controls.

So again, thank you, Mr. Chairman, and I am looking forward to hearing from our witnesses.

Mr. UPTON. Thank you. Mr. Green from Texas.

Mr. GREEN. Thank you, Mr. Chairman, for the hearing and I'd also like to begin by welcoming Jack Sander from Belo Corporation. Belo owns and operates a number of TV stations all over the country and also the Dallas Morning News, but more importantly, they own and operate KHOU TV, Channel 11, in Houston and their claim to fame and they've gotten more awards than anybody can count. They broke the story last year on the Firestone issue and I know after yesterday's hearing that it's still a hot topic.

The topic before us today though presents a delicate question on how to control our outrageous campaign spending driving our election process. During the last campaign cycle, Federal, State and local campaigns spend over \$1 billion in media and that number is expected to rise in the coming election. These rising costs discourage a lot of qualified individuals from entering public service on the Federal level and forces many of us to campaign full-time in preparation for the next election. However, as you look for ways to lower the costs for Federal campaigns, I believe we must exercise great care in not burdening the private sector with our problem.

In today's hearing, we're looking at an amendment that would allow Federal candidates preferential treatment over State and local candidates when purchasing media spots for campaign advertising. The amendment attached to the Senate version of our Campaign Finance Bill gives Federal candidates lowest units charge or LUCs rates for their political ads. This rate is typically is given only to the broadcaster's best customer.

In addition, Federal candidates would be allowed to this rate for 365 days a year which seems it goes against the intent of who can be campaigning all year and even raising more money to be able to have our ads up 365 days. While I understand the intent of the drafter, I believe the provision is going to have the opposite effect on campaign spending and if this new ability to purchase cheap air time for political ads, I believe the trend will be to buy more ads at an earlier time and thus flood the voters with a perpetual campaign and frankly voters already think they have a perpetual campaign.

Also, because of this provision, applies only to Federal candidates, it's going to freeze out State and local officials who need to purchase air time to get their message out to voters. I especially feel uncomfortable with this, Mr. Chairman, since our Districts are now being drawn by our colleagues in the State legislatures around the country and I surely would want our good friends in the legislature to think they're excluding them from anything, particularly at this time, certainly not me or anyone on this committee.

In conclusion, Mr. Chairman, I think the spirit of the legislation is good, but it needs further hearings before it should be allowed to move forward and also, Mr. Chairman, I ask unanimous consent that a statement by the University of Texas Law Professor Lucas Powell, be included in the record. Professor Powell is a noted constitutional scholar and he shares many of my concerns with the impacts of this legislation and I yield back my time.

Mr. UPTON. Without objection, the statement will be included as part of the record.

Mr. Largent.

Mr. LARGENT. Mr. Chairman, thank you for holding this morning's hearing to explore how the current lowest unit charge rules apply to various segments of the communication industry.

As Members of Congress, we know all too well the expense that is involved in running for public office. One of those expenses is the ability to get your message out to the greatest number of people. Generally, that involves buying air time. This last election cycle is estimated that politicians and wannabe politicians spend anywhere from \$800 to \$1 billion on TV ads.

Clearly, by anyone's standards that's a lot of money and it gives new meaning to the phrase free speech. But does it justify Congress telling network affiliates, cable operators and satellite providers that they can no longer charge different rates for different classes of advertising time?

In my opinion, it does not. Why? For one, the Torricelli Amendment unfairly singles out TV broadcasters in this attempt to create a political welfare system. Radio broadcasters are not covered. Newspapers are not covered. Internet providers, wireless providers and any other vendors to political campaigns for that matter are not covered. I believe the Torricelli Amendment creates a very troubling precedent under the guise of campaign finance reform.

I have to wonder what the local business owner in Tulsa, Oklahoma who advertises on cable or broadcast television would think about me getting preferential air time at reduced rates when they have to pay whatever the going preemptable or non-preemptable rate is. To be honest, I don't think they would be real thrilled about it.

Later we will hear from our witnesses, one of whom is Mr. Paul Taylor, Executive Director for the Alliance for Better Campaigns. Mr. Taylor's organization also has a website called greedytv.org. I'm familiar with this website because the TV broadcaster in Oklahoma City, Griffin Communications has the dubious distinction of being one of the top ten greediest broadcasters in the country, according to greedytv.org. This website alleges that Griffin Communications earned over \$500,000 from political advertisers last year.

Griffin Communications disputes that figure and believes it's closer to \$100,000. For the sake of accuracy, Griffin Communications has offered Mr. Taylor and his organization to check the books, what I would call full disclosure. The Alliance for Better Campaigns has declined the offer to look at the books and find out the facts. I think that greedytv is following the adage "never let the truth obscure a good sound byte."

I find that quite disappointing. Later, I'd like to ask Mr. Taylor how his organization came up with the \$500,000 figure and why they haven't bothered to make sure that their information is accurate.

Mr. Chairman, I have always strived to shoot straight with my constituents with my campaigns, and I would hope that those organizations that advocate for campaign finance reform would do the same and I look forward to hearing from our witnesses.

Mr. UPTON. Thank you, Mr. Largent. Mr. Luther.

Mr. LUTHER. Thank you, Mr. Chairman, and thanks for holding this hearing on this particular issue. I think there is a concern that the little programming time that broadcasters do spend on elec-

tions has shrunk dramatically in the last two decades and as a result, paid television ads have become the primary source of information for voters. However, the cost of television commercials for candidates has shot through the roof in recent years and I would note that this is of particular concern to challengers, who do not have the natural benefits of incumbency.

The questions before us are whether the Torricelli Amendment is a proper and fair way for broadcasters to serve our citizens who are, of course, the true owners of the airwaves and whether the Amendment, on balance, will advance the public interest.

I, along with other members, look forward to learning more about the effect of this particular proposal and I thank you, Mr. Chairman, for the time.

Mr. UPTON. Thank you. Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman. Thank you for recognizing me and for having this hearing. Like many of us, I'm a co-sponsor of the Shays-Meehan Campaign Finance Reform Bill. This Chamber has struggled for more than a decade to remake the funding regime of American politics. It has not been unanimous, but it has been a genuinely bipartisan effort, increasingly so and it has been frustrating, increasingly so.

This incessant money chase that everybody has referred to, to fund ever more costly campaigns diverts members' attention from important duties and diminishes public trust. Members of the House today operate in a state of perpetual campaigning. Too many of our Chamber view the legislative session primarily as an opportunity to frame issues and position for the next election. Shays-Meehan offers some real, if imperfect, relief from the pressure and problems of the money chase.

However, I'm not certain that the Torricelli Amendment helps address the problem. While campaigns are growing more costly, it's not at all clear that those costs are born disproportionately through advertising. It is clear, however, that advertising is a serious cost in campaigns and something that deserves our attention. But it's also not clear whether the Torricelli Amendment is constitutional, measured by the first or fifth amendment. So I ask, will it work? Is it fair? Those are the questions I hope we can illuminate today and I yield back the balance of my time, Mr. Chairman.

Mr. UPTON. Thank you. That concludes the opening statements. Again, all members—

Mr. SAWYER. Mr. Chairman, if I could add one comment?

Mr. UPTON. Go ahead.

Mr. SAWYER. I was interested in what Mr. Green had to say to Mr. Sander about the Firestone Ford issue that was broke earlier last year. Thank you.

Mr. UPTON. Thank you.

[Additional statement submitted for the record follows:]

PREPARED STATEMENT OF HON. ELIOT ENGEL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NEW YORK

Thank you Mr. Chairman: I realize that the main focus of this hearing is what impact the Torricelli Amendment would have on the broadcasters, cable system and satellite system operators. But, when I began thinking about this issue, I realized it is in fact a much larger question—one which has direct implications for our democracy. What we are discussing today is balancing political speech and commercial

speech. The courts have held, and I support, providing the strongest protections for political speech—the right to redress against one’s government. I haven’t had a long time to think about it in terms of the Torricelli amendment, so I have many questions—and hope to come to some conclusions today.

First, let me say that I am actually in my 24th year of public service—my 13th year of Congress and 12 years in the State Assembly before. All of that time I have represented a portion of New York City. Though I have thought about it many times, I have never advertised on TV because I know it is well beyond my campaign’s means to pay for television ads in the New York City media market.

Presently, we have the equal opportunity and reasonable access laws. The equal opportunity one is a law that I think we must be vigilant in enforcing. Today though, we are really discussing an issue about altering the reasonable access law. Presently, the law requires the lowest unit cost for the last 45 or 60 days depending on it being a primary or general election. However, I wonder if this is by coincidence artificially higher than other times in the year. Fall is when the shows start airing new episodes, new shows beginning, the Subway series—I mean the World Series! So, is it just by chance the campaigns have to compete in an more expensive time period?

The concern is that campaigns are getting more and more costly—and that it is because of the need to do TV ads. Inherent in this is that if our campaigns are more costly, then we need to spend more time raising money—leaving less time to be elected officials or less time for our families. Let me be clear to my constituents—*my wife* will tell you that my responsibilities as a Congressman are not suffering!

I am intrigued by the argument that one reason that campaigns cost more is because they are longer—certainly, I think that is true of the Presidential campaign. Also, I note that many incumbents raise large sums of money—most of which goes to support the campaign—not for advertising.

I found Professor BeVier’s written testimony very thought provoking! I am one who does believe that the public does own the broadcast airwaves. I do believe that the broadcasters have responsibilities—as does the government and as do the consumers. We may not have placed into law clear and defined substance and form of a legal trust. But, I think that this is more than a traditional legal trust anyway, I use the word “trust” in as much the legal term as the emotional one. We are trusting the broadcasters to do the right thing in the public’s interest. Sometimes, the government must intervene to help set ground rules—I don’t think anyone would like us to just to give up designating certain areas of spectrum for specific uses and instead let any and all start using a frequency for whatever they so choose.

However, how far the government goes—and in this case it has profound implications for federal candidates—is the question. I wonder about the inequity that develops between the national parties and state and local candidates. Does this create too high a protection solely for individual federal candidates?

Then, there is the question of editorial control. We are all ardent defenders of the First Amendment—but here we have a clash between two groups’ First Amendment rights. No one would fight harder than me if we were trying to tell the newscasters to only cover federal candidates—that would be wrong. But, we are in the murky world of advertising. Paid access for speech. Is an individual federal candidate TV or radio ad worthy of greater protections than a local candidate?

Finally, there is the question of fairness to the broadcasters. TV stations are not cheap. They require lots of equipment and highly skilled labor. Is it in the public interest to allow a federal candidate to pay what it would cost to advertise during Ishtar when in reality the Mets are in the playoffs? Is that fair to the broadcaster?

As you can see, I have many things going on in my mind about this. Right now, I have no set conclusions about anything. So, I look forward to discussing this more.

Thank you, Mr. Chairman.

Mr. UPTON. Our witnesses include the following this morning: Ms. Lillian Riemer BeVier, Doherty Charitable Professor and class of 1963, Research Professor, University of Virginia Law School; Mr. Dwight Morris, President of the Campaign Study Group of Springfield, Virginia; Mr. Andrew Wright, General Counsel, Vice President, Government Affairs for Satellite Broadcasting and Communications Association, Mr. Jack Sander, Executive V.P. of Media Operations for Belo Corporation in Dallas, Texas; Mr. Joshua Sapan, President and CEO of Rainbow Media Holdings in New York; and Mr. Paul Taylor, Executive Director, Alliance for Better Campaigns here in Washington, DC.

Your statements are made part of the record in their entirety. We'd like to limit your remarks to 5 minutes.

Mr. Sander, we'll start with you.

STATEMENTS OF JACK SANDER, EXECUTIVE VICE PRESIDENT MEDIA OPERATIONS, BELO CORPORATION; ANDREW S. WRIGHT, GENERAL COUNSEL, VICE PRESIDENT, GOVERNMENT AFFAIRS, SATELLITE BROADCASTING AND COMMUNICATIONS; LILLIAN R. BeVIER, DOHERTY CHARITABLE PROFESSOR AND CLASS OF 1963, RESEARCH PROFESSOR, UNIVERSITY OF VIRGINIA LAW SCHOOL; JOSHUA SAPAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, RAINBOW MEDIA HOLDINGS; PAUL TAYLOR, EXECUTIVE DIRECTOR, ALLIANCE FOR BETTER CAMPAIGNS; AND DWIGHT L. MORRIS, PRESIDENT, CAMPAIGN STUDY GROUP

Mr. SANDER. Good morning, thank you, Mr. Chairman. I'm pleased to be here representing the television broadcasting industry and Belo which owns 17 television stations, reaching 13.7 percent of the U.S. television households. These stations are spread from east to west. The industry opposes any unjustified modifications to the lowest unit charge or LUC charges such as the Torricelli Amendment. Broadcasters take these laws very seriously and Federal candidates always receive the LUC for the class of time they purchase. We believe the existing rules continue to serve the original intent of Congress and provide a proper balance to the rights of stations and candidates.

In enacting the Federal Elections Campaign Act, Congress specifically intended two things: limit the length of campaigns by establishing the LUC windows and provide candidates with rates equivalent to those enjoyed by the most favored commercial advertisers and in doing so, Congress rejected the notion that broadcasters must sell non-preemptable time to candidates at preemptable rates.

The Torricelli Amendment reverses this and fundamentally changes this law. Under Torricelli, television stations would face a 365-day LUC window. The Amendment removes class from the LUC definition requiring the candidates to receive non-preemptable time at the cheapest preemptable rate. This is like every candidate getting a first class seat on an airplane for the cheapest priced coach ticket from the previous year.

The true impact on broadcasters and the American public was clearly not evaluated during the Senate debate. A real world example paints a telling picture. In the fall, a mid-sized Fox affiliate sells a non-preemptable spot during their Sunday NFL football game for \$3500. Early in the year a preemptable spot in that same time period sold for \$15. Under Torricelli, a legally qualified candidate would be able to buy a non-preemptable spot during a Sunday Redskins game for \$15 because it would be the lowest charge for the same time period from the previous year. \$15 compared to \$3500. Outrageous, but true.

The proponents of the Senate Amendment cite twin goals: reducing the cost of campaigns and increasing political discourse. Neither of these goals will be achieved if the amendment is enacted into law.

Many are concerned about the increasing cost of campaigns, the Amendment will have the opposite effect: drastically reduced advertising rates and a 365-day LUC window provide an incentive for candidates to purchase more advertising, not less, and guarantee year-round campaign spending.

Political discourse also suffers. Stations have a limited number of spots that can be sold. With an increase in the amount of Federal candidate advertising who have a right of access, State and local candidates will find it difficult to advertise on television and if experience is any guide, most of the increased advertising will be negative attack ads.

Commercial advertisers will be impacted as well. Artificially low rates will make it nearly impossible for them to have access to the airwaves. A major impetus for the Torricelli Amendment was a recent Alliance for Better Campaign Report, their "study" was a select comparison of 10 stations out of approximately 1300 commercial stations, limited to 10 markets with some of the most hotly contested races in 2000.

We believe this flawed methodology translates into flawed results. Many inaccuracies in the Alliance Report can be found in my written testimony. Broadcasters provide substantial coverage of campaigns through their news, debates and public affairs programming. Belo has always been a leader and we are not alone.

In 1996, Belo inaugurated an unprecedented program called It's Your Time in all of our television markets. The program provides all qualified Federal and gubernatorial candidates 5 minutes of free, unedited air time. In the 2000 election cycle, 118 candidates participated in the program, but because we chose to use our own format, not his, Mr. Taylor's, Mr. Taylor does not credit our efforts.

Belo and other fellow broadcasters consider it a part of our responsibility to our community and good business to provide our viewers with coverage of local, State and national elections.

In conclusion, proposals to gut the LUC law, i.e., the Torricelli Amendment will have drastic consequences. They will extend the length and cost of campaigns, increase ad clutter, treat candidates more favorably than any commercial advertiser and drive away regular year-long advertisers. I urge members of the subcommittee to oppose any provisions that would alter the LUC law, the existing law works as intended by Congress.

Thank you.

[The prepared statement of Jack Sander follows:]

PREPARED STATEMENT OF JACK SANDER, EXECUTIVE VICE PRESIDENT/MEDIA OPERATIONS , BELO CORPORATION

I. INTRODUCTION

Thank you, Mr. Chairman, for the opportunity to appear before your subcommittee today to discuss the lowest unit charge ("LUC") law applied to broadcast stations, and how proposed modifications to that law will affect the television industry. My name is Jack Sander. I am Executive Vice President/Media Operations for Belo, which is a member of the National Association of Broadcasters (NAB) on whose behalf I am testifying today. I am a 30-year veteran of the broadcast industry—having started in 1965 at WLWC-TV in Columbus, Ohio. Throughout my tenure, I have served in many capacities, including various sales and sales management positions, and general manager/station manager positions at different television stations in a variety of markets. Belo owns 17 television stations (six in the top 17 markets) reaching 13.7 percent of U.S. television households. The stations are

clustered primarily in Texas, Arizona, the Pacific Northwest, and the mid-Atlantic, including WWL-TV our nationally recognized CBS affiliate in New Orleans. I'm pleased to represent my stations and the television broadcast industry at this hearing.

The television broadcasting industry opposes any modifications to the LUC laws. We believe the existing rule serves the original intent of Congress and provides a proper balance among the rights of stations and candidates. The proposals to alter the law will not achieve the intended goal and provide severe consequences for the television industry.

My written testimony will provide background on the existing rules, the intent of Congress, and outline the specifics regarding the Senate passed Amendment to fundamentally change the LUC law (i.e., the Torricelli Amendment). Additionally, I will outline the impact of such proposals. Finally, I will address recent criticism of the television industry regarding the LUC rules and show the substantial efforts my stations contribute to the campaign process.

II. BACKGROUND

a. Political Broadcasting Rules

Since the Federal Election Campaign Act of 1971, broadcasters have operated with a variety of different rules for political candidates. Legally qualified Federal candidates enjoy many rights with regard to broadcast stations: (1) reasonable access; (2) no censorship; (3) equal opportunities to respond to opponents; and (4) the lowest unit charge ("LUC") for advertising purchased during the 45 days prior to primary elections and the 60 days prior to general elections.

Under existing law, the LUC is the lowest charge of the station for the same class and amount of time for the same time period. There are three important variables in this definition: (1) Time period; (2) Amount of time; and (3) Class.

The "amount of time" refers to the length of the advertisement—whether it's a 30 second spot or a 60 second spot. "Time period" refers to the time of day the advertisement runs. Generally, different rates apply to different times of the day depending on how many viewers may be watching. For example, prime time rates will be higher than rates for daytime or late night programming.

Finally, stations may choose to sell a variety of different classes of time, each with its own benefits or privileges. Fixed or "nonpreemptible" time generally is the highest class of time and garners the highest rates. Stations may also choose to offer different levels of "preemptible" time, each providing a different level of protection from preemption. Finally, stations may offer an "immediately preemptible" class of time. This class generally is the cheapest to buy, but also is the first class to be preempted when other advertisements are purchased at higher classes of time.

The reality of having several different classes of time translates into a station having numerous LUCs—as each class will have its own lowest charge attached. For example, if a station chooses to offer five different classes of time and divides its day into five different time periods, there will be 25 different LUCs for that station. There will rarely be one lowest unit charge for the entire station because of the three variables contained within the definition.

Legally qualified candidates are guaranteed the LUC for the class of time purchased during the LUC "windows."¹ Thus, the LUC is only provided to candidates during the 45 days prior to a primary election, and the 60 days prior to a general or special election.² Outside of these windows, a candidate will receive comparable rates to other commercial advertisers for the same class and time period.

B. Intent of Congress in enacting the Federal Election Campaign Act of 1971

The last major overhaul of the federal election campaign law came in 1971, when Congress passed the Federal Election Campaign Act of 1971 ("FEC Act") (Pub.L. 92-225). Within the FEC Act, Congress imposed the reasonable access and lowest unit charge requirements on broadcasters.

There was considerable discussion and debate on the LUC provision of the FEC Act—in both the committees and on the Senate floor. The intention of Congress was best demonstrated during debate in the U.S. Senate on August 3, 1971. The Senate specifically intended to do two things with regard to the LUC provision: (1) limit the length of campaigns by establishing the LUC windows; and (2) it rejected the

¹A candidate must appear in the ad (either voice or likeness) and the ad must be paid for by the candidate (or an authorized committee) to qualify for the LUC during the windows.

²Third party issue advertisers always pay full commercial rates for advertising regardless of when purchased.

notion that broadcasters must sell nonpreemptible time to candidates at preemptible rates—as contemplated by the original bill language.

Senator John Pastore outlined the first intention when he stated:

“The committee limited it to 45 days for a primary election and to 60 days for a general election. We were shortening the campaign time, in effect. Not only that, but there is a tendency to wait to come within those 45 days and those 60 days because candidates will get the lower rates.” 117 Cong. Rec. 29, 028 (1971).

Clearly, it was recognized then that length of a campaign is one of the major factors contributing to the overall cost of campaigning. Congress, in 1971, specifically sought to limit the length of campaigns by adopting these short LUC windows to provide incentives to candidates to wait to run advertisements only when it is closer to Election Day.

With regard to the second intent of Congress—that candidates should be treated as favorably as a commercial advertiser—but not better than a commercial advertiser, Senator Ted Stevens (R-AK) offered an Amendment to clarify the intent of the LUC definition.

“I call my amendment the comparable rates provision. It requires that no one can discriminate against politicians in terms of their advertising. It says that they cannot charge us any more than they charge anyone else for the *same class of time*, the *same amount of time*, or the *same frequency of use*...” [emphasis added]

*Senator Ted Stevens, during debate on the FEC Act of 1971,
117 Cong. Rec. 29,026 (1971).*

The Amendment was agreed to by the Senate, and was acknowledged to be consistent with the original intent of the Senate Commerce Committee in an exchange between Senator John Pastore (D-RI) and Stevens:

“Mr. PASTORE: Mr. President, I want the Record to be clear that this in no way rejects the committee report recommendation as to the lowest unit cost.

Mr. STEVENS: That is absolutely correct. It is the lowest unit cost for the same class of time and the same period of the day, during the same 45- or 60-day period.” 117 Cong. Rec. 29,028 (1971).

Based on this record, there is no doubt that Congress intended the LUC law to be as the FCC has interpreted it.

C. Senate Passed “Torricelli Amendment”

On March 19, 2001, the Senate passed the “Torricelli Amendment” to the McCain-Feingold-Cochran Campaign Finance Reform legislation. The Torricelli Amendment provides that television broadcasters, cable companies, and satellite providers must give legally qualified candidates the LUC on the station for the same time period and amount of time over the previous 365-day period. It also requires that all candidate advertising be “nonpreemptible.” The Torricelli Amendment removes television stations from the LUC windows—opening the “window” to a year-round period. It provides that national political parties will receive LUC for advertising that is coordinated with candidates, regardless of whether a candidate appears in the advertisement.³ Finally, it requires the FCC to conduct extensive audits after election cycles.

Although the Torricelli Amendment passed by a wide margin in the Senate, the true impact on broadcasters and the electoral process were not adequately evaluated during debate. There are substantial unintended consequences to the Amendment, and any similar proposals in the House must be rejected.

III. IMPACT

A. Torricelli Amendment is a fundamental change in the law.

One of the arguments heard on the Senate floor during debate on the Torricelli Amendment was that it was merely a “clarification” of existing LUC rules. Others argued that a “loophole” was being closed in order to effectuate the original intent of Congress.

As noted above, in 1971, Congress specifically intended that the LUC law be limited in time by imposing the windows and it intended that stations could continue to sell time based on classes of time. The Torricelli Amendment turns this intent on its head and fundamentally changes the LUC law.

Television stations under the Amendment would have to provide the LUC to candidates for advertising for the entire length of a campaign. Plus, they must calculate

³ Under existing rules, political parties may qualify for LUC as long as the party is an authorized committee of the candidate and the candidate appears in the advertisement.

the LUC based on the rates charged from the previous 365 days regardless of when that rate was actually charged (or available) to a commercial advertiser. This translates into a substantial windfall for candidates at the detriment of broadcasters—the impact of which is further outlined below.

The Amendment removes “class” from the LUC definition and requires that candidates receive nonpreemptible time even though they will be charged the LUC for the cheapest class on the station. While many analogies exist, most illustrative is that it is like a candidate getting a first class seat on an airplane for the cheapest coach ticket price from the previous 365 days. Clearly, this is not what Congress intended in 1971, nor is it an accurate representation of the existing LUC law.⁴ The Torricelli Amendment should be recognized for what it is—a federal subsidy for candidates.

B. Modifying the LUC law will not achieve intended goals, but will have severe consequences.

There are twin goals cited by proponents of the Torricelli Amendment: (1) reducing the cost of campaigns; and (2) increasing political discourse. Neither of these goals will be achieved if the Torricelli Amendment is enacted into law. In fact, severe unintended consequences will result.

While many are concerned about the increasing costs of campaigns, gutting the existing LUC law and replacing it with the Torricelli Amendment will have the direct opposite impact on the cost of campaigns. By reducing the cost of advertising so drastically, it provides an incentive for candidates to purchase more advertising, not less. Further, the Torricelli Amendment guarantees year-round campaigning by opening the LUC window to 365 days. Why wouldn't a legally qualified opponent want to get a “jump start” on campaigning when it's cheaper to advertise all year-round? Finally, more advertising (and earlier in the campaign) means that there will be more advertising clutter which results in less effective message penetration. A candidate may feel pressured to advertise more in order to ensure his or her message is getting to voters. There is no doubt the consequence of the Torricelli Amendment is that costs will remain at existing levels—or increase—because there will be a perpetual television campaign.

Likewise, it is possible that political discourse will be reduced in a Torricelli Amendment “environment.” With an increase in the amount of advertisements likely to be purchased by Federal candidates (who have a right of access to broadcast stations), another consequence is that state and local candidates will be squeezed out because stations will have to allocate time for Federal candidates who may have never advertised before and also to provide equal opportunities to all the opponents. State and local candidates will find it difficult to gain access to television stations for their advertising. Additionally, organizations that advertise state and local referenda or other issues also may be left without availabilities due to tighter inventory schedules.

Finally, there is the potential that political discourse will be reduced because local television broadcasters will not be able to continue the same level of public service because the Torricelli Amendment may severely impact a station's revenues.

C. Modifying the LUC law will drastically impact the TV industry's ability to serve the public.

Commercial television stations' only source of revenue is through the sale of advertising time. Revenue is required to keep the station afloat and to provide capital to continue to serve the public with community service programming and projects. However, there are a finite number of advertising spots that can be sold. Many stations work year-round to develop on-going relationships with commercial advertisers. The Torricelli Amendment threatens those relationships because it will squeeze out those commercial advertisers during campaign season to make room for candidate advertising.⁵ Additionally, it will cut the station's revenue stream because it provides substantial discounts for candidates.

A few generic examples of how the Torricelli Amendment works in the real world paint a telling picture. The Torricelli amendment would undermine a positive revenue stream for television stations when applied to special programming. The Amendment removes “class” from the definition of lowest unit rate; thus, any special classes established during specific times of year will be treated the same as any other time period.

⁴Other fundamental changes include the FCC audit requirement and the national party qualification for LUC.

⁵See *TV to Advertisers: Please Get in Line Behind the Politicians*, Wall Street Journal, Oct. 27, 1998 at A-1.

For example, using an actual rate card from a mid-sized Fox affiliate, a basic “weekend rotator” for the Sunday, 12 Noon to 7 PM time period on a “tiered” rate schedule would look like this:

Sunday 12N-7 PM

- Level I—Nonpreemptible—\$75.00
- Level II—Preemptible w/2 days notice—\$50.00
- Level III—Preemptible w/7 days notice—\$30.00
- Level IV—Immediately preemptible—\$15.00

During the professional football season, this same station runs NFL Redskins games on Sunday during this same Noon-7 PM time period. The rates for a Sunday “Redskins” game would be as follows:

- Level I—Nonpreemptible—\$3500.00
- Level II—Preemptible w/2 days notice—\$2700.00
- Level III—Preemptible w/7 days notice—\$2100.00
- Level IV—Immediately preemptible—\$1500.00

Under Torricelli, a legally qualified candidate would be able to buy a nonpreemptible spot at the Level IV price of \$15.00 during a Sunday “Redskins” game because it would be the lowest charge for the same time period from the previous year. Compare that \$15.00 rate to the nonpreemptible rate of \$3500.00 the station would normally expect to receive for such programming.

The above example can also be applied to any network special: Monday Night Football, Academy Awards, Country Music Awards, NFL Football, Super Bowl, The Masters, Daytona 500, local college and high school sports, special news events and elections. Further, regular programming rates are affected. The Torricelli Amendment also impacts a station’s regular programming rate structure. For example, on a mid-sized market NBC affiliate, the rates for Meet the Press on Sunday in June may be similar to these below:

- Level I—Fixed—\$500
- Level II—Preemptible—\$300
- Level III—Immediately preemptible—\$150

Under Torricelli, a political candidate would get a nonpreemptible spot for the \$150 rate (assuming that is the lowest rate for that time period from the previous year), which translates into a 70% discount off of the normal nonpreemptible rate of \$500.

Clearly, the Torricelli Amendment provides candidates with unprecedented advantages. When the original lowest unit charge rules were imposed in 1971, it was Congress’ intent to provide candidates with the same privileges as a station’s most favored advertiser. The Torricelli Amendment tips the balance far beyond and puts legally qualified candidates above all others. At the same time, it has the impact of severely injuring a television station’s ability to raise revenue and provide substantial community service.⁶

IV. CRITICISM UNFOUNDED—ALLIANCE REPORT IS FLAWED

The impetus for the Torricelli Amendment has its roots from an Alliance for Better Campaigns report released on March 6, 2001, titled *Gouging Democracy: How the Television Industry Profiteered on Campaign 2000*. The Alliance claims that candidates for public office were overcharged for their airtime 65% of the time.⁷ They base this assertion on a very limited “study” of 10 stations (out of approximately 1,300 commercial stations) in 10 markets where there were some of the most hotly contested races in 2000.⁸ The broadcasting industry believes this flawed methodology translates into flawed results.

First, the Alliance concludes “candidates paid prices far above the lowest published rates.”⁹ As noted above, a “lowest published rate” may not be the same lowest unit charge for the class of time purchased by a candidate. Additionally, rates can vary during a political campaign due to ordinary business practices such as seasonal demand and changed ratings. A rate listed on a published rate card at the beginning of the campaign season may change as it gets closer to Election Day. Finally, even the Alliance report itself provides evidence that the conclusion is misrepresentative when it stated that Republican Media Buyer Brad Mont said, “Most of the time, I am able to get the best price in a given class of time.”¹⁰

⁶Examples of the voluntary efforts of Belo stations are outlined in Section V. of this Written Testimony.

⁷*Gouging Democracy*, at 5.

⁸*Id.* at 7.

⁹*Id.* at 2.

¹⁰*Id.* at 11.

Second, the Alliance report concludes, the LUC law has not worked as intended to keep down the cost of candidate ads.¹¹ The Alliance misinterprets the workings of the LUC law. Candidates always get the LUC for the class and time they purchase on stations. My stations, and most other stations, follow the FCC rules and are not in the business of gouging candidates. Also, the Alliance report cites a Brigham Young study that shows that Senate candidates in 2000 received a 27% discount from full commercial rates.¹² This is exactly what Congress intended to happen when it decided to impose LUC requirements on broadcasters.¹³

Third, the Alliance report concludes, “Stations steered candidates toward paying premium rates.”¹⁴ Again, this misrepresents the reality of time buying. Political time buyers frequently choose fixed buys when lower-priced preemptible spots would clear. This practice is common because it simplifies it for the time buyer and guarantees that the spot will run when the candidate wants it to run. Also, time buyers have no incentive to hold costs down, even as the Alliance report admits, because their “compensation is pegged to a percentage of gross air time purchased.”¹⁵

One of the other conclusions of the Alliance report is that broadcasters have cut back on the amount of political coverage.¹⁶ They cite that stations that voluntarily agreed to comply with the proposal to provide 5-minutes of coverage per night during the 30 days prior to Election Day fell short of the goal. The Alliance claims that a study done by the Norman Lear Center shows those stations averaged just 45 seconds of candidate-centered discourse per night.¹⁷

However, closer examination of the Norman Lear Center study¹⁸ reveals its results are skewed based on the unrealistic boundaries placed on the “5 minute/30 day” proposal. First, the proposal only counts political coverage during the hours of 5:00 PM-11:35 PM. Additionally, the Center did not include Election Day or coverage of the two Presidential debates that occurred during the 30-day period. The researchers acknowledge,

“To include either of these results would skew the results, in some cases dramatically. For example, if a station aired both Presidential debates and one Congressional or Senate debate, and no other coverage for the entire 30 day time period, under these accounting rules they would easily meet the 5/30 standard.”¹⁹

Basically, the Center admits that accurately counting all of the political coverage in that time period means the stations would have met the 5-minute goal. It is ludicrous to think that Presidential debates do not “count” as political discourse.

Further, the proposal itself is too limited in scope to provide a full accounting of the election coverage of broadcasters. With the advent of increased competition from all-day cable news channels and the Internet, viewers now have a variety of news choices throughout the broadcast day. In response, many television stations have morning, Noon, and 4:00 PM newscasts, as well as public affairs shows and debates that occur outside the proposal’s limited 5:00 PM-11:35 PM timeframe. It is inappropriate to discount these efforts. A study that reviews all of a station’s political coverage throughout a broadcast day would show entirely different results.

The Alliance for Better Campaigns report should be dismissed as a false and misleading attempt to smear broadcasters in the hopes of achieving the goal of mandatory free airtime requirements. However, a closer look at the report reveals its inaccuracies. Members of Congress should not base any decisions on such a report.

V. VOLUNTARY EFFORTS OF BROADCASTERS

Many broadcasters provide substantial voluntary coverage of campaigns through their news coverage, candidate debates, public affairs programming, and other efforts. Belo has always been a leader in the industry, and will continue our efforts. In

¹¹ *Id.* at 3.

¹² *Id.* at 10.

¹³ In debate on the Senate floor on August 3, 1971, Senator John Pastore (D-RI) commented with regard to the LUC provision that, “The discount may come to 30 percent or 50 percent—I don’t know—for radio or TV.” 117 Cong. Rec. 29,028 (1971).

¹⁴ *Gouging Democracy*, at 2.

¹⁵ *Id.* at 11.

¹⁶ The Alliance supports a proposal of the “Gore Commission,” an advisory panel appointed to assess the public interest obligations of digital television broadcasters. The Gore Commission recommended that digital television broadcasters voluntarily air five minutes a night of candidate-centered discourse in the 30 days before elections.

¹⁷ *Gouging Democracy*, p. 13.

¹⁸ Martin Kaplan and Matthew Hale, *Local TV Coverage of the 2000 General Election, The Norman Lear Center Campaign Media Monitoring Project*, USC Annenberg School for Communication, February 2000.

¹⁹ *Id.* at 6.

1996, Belo inaugurated an unprecedented program called "It's Your Time" in all of our television markets. The program provides all qualified federal and gubernatorial candidates five minutes of "free air time." The candidates answer two questions. The first is: "Why should the constituents of your district vote to elect you?" Candidates are given four unedited minutes to answer that question. The second question, which is developed by the news staff in each market, provides the candidate a one-minute opportunity to answer a market specific question. The four minute segments are developed into hour and half hour programs, which run in prime time and adjacent to news and public affairs programming, two weeks prior to the election. The one-minute pieces run several times in the two weeks prior to the election. In the 2000 election cycle, 118 candidates participated in the program.²⁰ In many cases the program also ran on the local PBS stations. Most station websites streamed the program and it remained on the website until after the election. "It's Your Time" was only one component to Belo's election coverage in 2000.

Our NBC affiliate in Seattle, KING-TV, sponsored debates in both the U.S. Senate primary and general elections. In addition, KING sponsored the gubernatorial debate. Stories covering local and national races ran almost every evening on KING in the 30-day period preceding the election. Its sister station, KONG, re-ran the debates and "It's Your Time" in different time periods and produced special primary night election coverage for Seattle viewers.

Following Election 2000, KING was particularly proud to receive the Walter Cronkite Award for Excellence in Broadcast TV Political Journalism for its one-hour program, "Adwatch," an insightful analysis of political campaign ads. The award was created to help induce network and local television news operations to create television formats that place candidates and their issues at the heart of political coverage. The award is sponsored by Reliable Resources, a project of the Norman Lear Center at the USC Annenberg School of Communications. Reliable Resources is funded by the Pew Charitable Trusts. I find it ironic that the Alliance for Better Campaigns, also partially funded by the Pew Trust, chose to criticize KING throughout their report on Election 2000.

I would also like to point out that it was not only our large market stations that provided extensive news coverage. Belo's station in Spokane, Washington, KREM-TV (market 78 in the United States), aired over 10 hours of statewide and local debates between September 10 and November 5, 2000. KTVB, our affiliate in Boise, Idaho, produced special programs and a debate to highlight the two Congressional races in Idaho.

The Pacific Northwest experienced one of the busiest election seasons in the country. However, even in markets with relatively quiet election years, Belo stations provided extensive news coverage geared to their local communities. For example, our flagship ABC station in Dallas, WFAA-TV, provided 13 Congressional candidates with access to the airwaves, through their "It's Your Time" program. WFAA also worked with our local PBS affiliate, KERA, on a groundbreaking project "Texas and the Latino Vote." Also, our ABC affiliate in Louisville, Kentucky sponsored four town hall meetings on a local imitative to merge City and County government functions.

I would also like to note that even in off year and special elections, our stations produce "It's Your Time." At WVEC our station in Norfolk, Virginia a special "It's Your Time" program aired last Sunday. It included the two candidates in the fourth district Congressional race.

I could list many, many more examples of election coverage from all of our stations and our competitors' stations. We consider it a part of our responsibility to our community and good business to provide our viewers with extensive coverage of local, state and national elections.

VI. CONCLUSION

I urge members of the subcommittee to oppose any provision that would alter the LUC law. The existing law works as intended by Congress. It provides a discount to candidates, treats them as favorably as commercial advertisers, and it limits the length of campaigns.

Existing proposals to gut the LUC law (i.e. the Torricelli Amendment) will entail drastic consequences. It will (1) extend the length and cost of campaigns; (2) increase ad clutter; (3) treat candidates more favorably than any commercial advertiser; (4) threaten to squeeze out state and local candidates; and (5) severely hurt some stations' ability to raise revenue and continue to serve to public.

²⁰It should be noted that the Alliance for Better Campaigns refused to include Belo efforts because we chose to use our format and not the "Gore Commission" proposal.

Mr. UPTON. Thank you.
Mr. Wright.

STATEMENT OF ANDREW S. WRIGHT

Mr. WRIGHT. Mr. Chairman, members of the subcommittee, I'm Andy Wright. I'm General Counsel and Vice President of Government Affairs for the Satellite Broadcasting and Communications Association.

We're pleased to have this opportunity to explain why it is not efficient to use a national satellite platform to deliver local political advertisements.

SBCA represents the direct to home consumer satellite industry. Our industry includes satellite provided two-way interactive broadband and radio services as well as the direct broadcast satellite television providers who would be potentially affected by this legislation.

Let me say up front that although we are subject to the provisions of the law, we have no DBS provider has received a request to purchase political advertising on an LUC basis. Further, as I will explain, LUC pricing is likely to have only a very limited impact on our industry.

The history of DBS, the area of political advertising is brief. The requirement that DBS provide, that DBS be subject to LUC and the other provisions of the law was contained in the Cable Act of 1992, but the FCC did not promulgate the rules, effectuating that law until 1998.

In that rulemaking, the Commission recognized the unique position of satellite services in the video distribution marketplace. Broadcasters and cable operators are regional and local programming distributors and distribute within a discrete geographic area. DBS, on the other hand, has a national footprint and therefore supplies the same subscription programming to all its subscribers all across the country at the same time.

Because of these national operating characteristics, DBS is not an attractive advertising medium for local congressional or even State-wide candidates. Therefore, there is no economic efficiency or even political common sense in utilizing a satellite's national footprint to bring a political campaign message to voters in a limited geographic area.

Neither the cost, which by necessity would be based on the national reach of satellite, nor the use of channel capacity can be justified by the handful of qualified voters that a candidate's message could actually reach. Further, voters in say the 6th District of Michigan, or the 7th District of Massachusetts, might be confused and perhaps even dissuaded from voting by viewing ads specifically aimed at voters from the 6th District of Florida or the 7th District of Missouri or vice versa.

Imagine if you will, Mr. Markey's campaign ads being viewed by Chairman Tauzin's constituents or the other way around. No doubt an interesting and confusing cultural experience for everybody involved.

Mr. UPTON. They have Chinese and Spanish as an option, but I don't know if they have either one of those.

Mr. WRIGHT. In the context of local into local network signal retransmission, Congress prohibited DBS providers who offer local into local service from altering the content of the signal being retransmitted in the broadcasters designated market area. Thus, a candidate may not purchase time on the satellite retransmission of a local television station's signal. Nor frankly would it be in a candidate's interest to do that because a satellite provider who is offering local into local signal would automatically retransmit any political advertising that is being carried in the signal of the local broadcaster, a valuable two for the price of one bargain for all advertisers.

With local into local service now available in 41 broadcast markets covering over 61 percent of the American population, many candidates can also reach their constituents in this manner. The must carry provisions of the Satellite Home Viewer Improvement Act remain the greatest impediment to expanding the provision of local in local service to more markets.

If Congress were to eliminate these forced carriage requirements or if we are successful in our constitutional challenge to them, DBS industry leaders have predicted that the number of markets receiving local into local service would quickly increase to over 60 markets serving over 80 percent of America.

Mr. Chairman, to sum up, first of all, there's no demand. No national, let alone State, local or congressional or Senate candidate has sought to purchase time on our national DBS platform.

Second, it just doesn't make sense. There's no efficiency or political common sense to utilizing scarce and valuable spectrum to beam local political ads to a national audience who would be at best uninterested or annoyed and at worst, perhaps even confused by them.

And finally, local political advertising is already carried on the broadcast signals that are retransmitted in the DMAs that have local into local service.

Thank you again for inviting the satellite industry to appear at this hearing. I look forward to answering your questions.

[The prepared statement of Andrew S. Wright follows:]

PREPARED STATEMENT OF ANDREW S. WRIGHT, GENERAL COUNSEL & VICE PRESIDENT, GOVERNMENT AFFAIRS, SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION

Mr. Chairman and Members of the Subcommittee, I am Andy Wright, Vice President and General Counsel of the Satellite Broadcasting and Communications Association. I am pleased to have this opportunity to testify before you today regarding proposed legislation dealing with the lowest unit charge for political advertising carried by satellite television providers. The SBCA represents the Direct-to-Home consumer satellite services industry. Our industry includes satellite provided two-way interactive broadband and radio services as well as the Direct Broadcast Satellite television providers (DBS) who would be potentially affected by this legislation.

Let me say up front that the DBS providers have no experience with Lowest Unit Charge (LUC) political advertising, and for the reasons I am about to explain, LUC pricing is likely to have a very limited impact on our industry. In fact, to date no DBS provider has received a request to purchase political advertising time on an LUC basis even though they are subject to the statute and the Federal Communications Commission rules that govern this area.

By way of background, the history of DBS in the area of political advertising is very brief. The requirement that DBS providers carry political advertising was contained in the Cable Act of 1992, incorporated into the section on public service obligations (Section 335). But because of intervening litigation surrounding certain un-

related sections of the Act, it was not until 1998 that the Federal Communications Commission finally promulgated rules dealing with the rates that DBS carriers are permitted to charge legally qualified candidates for federal office for access to a DBS platform. Under the broadcast model, those rates comprise the lowest unit charge that may not be “more than the station’s most favored commercial advertisers would be charged for comparable time.”

In the rulemaking, however, the Commission recognized the unique position of satellite service in the video distribution marketplace. In fact, in its Report and Order, the Commission stated, “We recognize the difficulties enumerated by commenters in applying the LUC requirements to DBS providers.” (FCC Docket 98-307, para. 47, November 1998). Broadcasters and cable operators are regional or local programming providers and distribute within a discrete geographic area. DBS, on the other hand, has a national footprint and therefore supplies the same subscription programming to all its subscribers throughout the country at the same time. Because of these national operating characteristics, DBS is not an attractive advertising medium for local, Congressional or even statewide candidates.

There is absolutely no economic efficiency—or political common sense—in utilizing a satellite’s transponder capacity, with a footprint that covers the entire nation, to bring a political campaign message to the voters in the limited geographic area that a candidate is interested in reaching. Neither the costs—which by necessity would be based on the national reach of the satellite—nor the use of channel capacity can be justified by the handful of qualified voters that a candidate’s message would reach. Even then, assuming that a candidate is willing to pay a national rate to reach a particular Congressional district, doing so by utilizing a satellite transponder would be a gross waste of valuable frequency spectrum. This would be especially inappropriate given the premium that is placed on spectrum usage today, and the many other entities that are clamoring for spectrum to deliver such valuable services as broadband Internet, business-to-business, and international fixed and mobile communications. Further, voters in, say, the 6th District of Michigan or the 7th District of Massachusetts might be confused and perhaps even dissuaded from voting by viewing ads specifically aimed at voters in the 6th District of Florida or the 7th District of Missouri—or vice versa.

In the context of local network signal distribution, Congress prohibited DBS providers who offer local-into-local service from altering the content of the signal being retransmitted in the broadcaster’s Designated Market Area (DMA) that they are serving. Thus, there is no possibility of a candidate asking for time on the satellite retransmission of a local television station signal. Nor would it be in a candidate’s interest to do so. What is frequently overlooked in this instance is the fact that a satellite provider automatically retransmits any political advertising that is already carried in the signal of a local broadcaster if that signal is being offered in a particular market as part of a local-into-local package—a valuable two-for-the-price-of-one bargain for all advertisers. With local-into-local service now available in 41 broadcast markets covering over 61% of the American population, many candidates for federal office can already reach their constituents who receive their local network broadcast signals via DBS service simply by advertising on the local broadcast stations in their Congressional districts that are subsequently retransmitted via satellite.

The must carry provision of the Satellite Home Viewer Improvement Act is the greatest impediment to expanding the provision of local-into-local service to more markets. If Congress were to eliminate these forced carriage requirements or if we are successful in our constitutional challenge of the statutory requirement¹, DBS industry leaders have predicted that the number of markets receiving local-into-local service would quickly increase to over 60 markets serving over 80% of Americans.

Mr. Chairman, to sum up, I would like to leave you with two important factors to think about regarding the applicability of any campaign finance rules to the DBS satellite industry. The first is the fact that no national, let alone, local, state, Congressional or Senate candidate has sought to purchase time on our national DBS platforms. The second related point is that there is no efficiency or political common sense to utilizing scarce and valuable frequency spectrum to beam local political ads to a national audience who would be, at best, uninterested and perhaps even confused by them. It doesn’t make sense; it is a waste of spectrum; and it is hard to

¹SBCA, DIRECTV and EchoStar have filed suit in United States Federal District Court for the Eastern District of Virginia presenting a facial challenge to the constitutionality of the satellite must carry provision of the Satellite Home Viewer Improvement Act (SHVIA). Simultaneously, SBCA and EchoStar, with the support of DIRECTV, using the same constitutional arguments, have asked the Fourth Circuit Court of Appeals to review the Order of the Federal Communications Commission that implements the must carry provisions of SHVIA.

visualize any political candidate benefiting from national coverage of specific, local election issues and having to pay a national rate to do so. Furthermore, political advertising is already carried on the broadcast signals that are retransmitted in DMAs that have local-into-local service. For these reasons, LUC pricing would have little applicability to satellite.

Thank you again for inviting the satellite industry to appear at this hearing. I would be happy to answer your questions.

Mr. UPTON. Boy, right on the nose. You can tell you're in broadcasting.

Ms. BeVier.

STATEMENT OF LILLIAN R. BeVIER

Ms. BEVIER. Thank you, Mr. Chairman, and thank you members of the committee for holding this important hearing. It's a privilege for me to be here today. I have published numerous scholarly articles about the first amendment in general and campaign finance regulation in particular and in that capacity I have come to address the question of whether the Torricelli Amendment violates the first amendment.

In my testimony today I will make three points. First, the changes wrought by the Torricelli Amendment in the lowest unit charge provisions are changes in kind, not just in degree, of regulation.

Second, even if the Supreme Court were to review the Amendment using the less rigorous Red Lion standard, the Amendment will almost certainly be held to violate the first amendment because it violates a number of fundamental premises of free speech that Red Lion did not put at risk.

Third, the purposes the Torricelli Amendment supposedly serves are neither compelling nor substantial, nor what's worse, even legitimate and the means it adopts for achieving those purposes are far, far indeed from being the least restrictive.

First as to the Amendment representing a change in kind, not in degree. The Amendment makes six major changes in the current regime. It extends the benefit of the lowest unit charge provision to ads sponsored by national committees of political parties. Second, it requires broadcasters to sell both candidates and national political parties the most desirable class of advertising time at the lowest price charged for the least desirable time. Third, it bars broadcasters from preempting any political ad. Fourth, it requires intrusive government monitoring to ensure compliance. Fifth, it extends the new requirements to cable and satellite providers. Sixth, it extends the period during which the lowest unit charge provision would apply.

These changes radically alter the lowest unit charge provision's impact. Consider: the requirement that broadcasters sell both to Federal candidates and national political parties the most desirable class of advertising time at the lowest price charged during the previous year for the least desirable time amounts to a requirement that broadcasters sell parties and candidates the equivalent of first class seats at stand-by prices, or the penthouse suite at the Plaza for Motel-6.

The Supreme Court is likely to perceive that the Amendment poses precisely the inherent risks of government favoritism and manipulation of political debate that strict first amendment scru-

tiny is designed to forestall, even in the area of broadcast regulation. It is practically certain therefore that the Court will subject the amendment to rigorous and skeptical evaluation which the amendment cannot survive.

Supporters of the Torricelli Amendment argue that it is a reasonable price for broadcasters to pay for their user of a "public resource." That argument cannot be sustained. While the image of broadcasters as public trustees is rhetorically attractive and though it has been used occasionally as a make weight to justify particular regulatory initiatives, no attempt has ever been made to give it legal substance. In fact, it has never had anything other than rhetorical force and it certainly has never done any real legal work.

The Torricelli Amendment poses a clear threat to several important canons of first amendment law. It encroaches to a much greater extent to current law upon editorial freedom of broadcasters. It represents a form of forced speech. It imposes a discriminatory burden on one class of speakers for the benefit of one class of participants in the political process, namely Federal candidates and national political parties.

My third point, the Amendment supposedly serves three interests, namely, the interest in lowering the cost of political campaigns, the interest in improving the quality of political debate and the interest in increasing candidate access. The Supreme Court has squarely held that neither of the first two interests is even legitimate for government in a free society to pursue, but even if the interests were held to be legitimate, the amendment very poorly serves them. There's no guarantee that it will lower the cost to the candidates and parties of political campaigns for they're likely to merely redirect the savings into other avenues of political persuasion. But more importantly, lowering the cost to candidates does not lower the cost of campaigns, it merely shifts a major portion of the cost to broadcasters. TV ad time will certainly not become less valuable because of the Torricelli Amendment.

Second, rather than enhancing political debate, the Torricelli Amendment is likely to lead to more negative attack ads, ads sponsored by parties in which the candidate being supported does not have to appear and thus cannot be held accountable. Most campaign reformers think that attack ads, especially those for which candidates cannot be held to account detract from, rather than enhance political debate.

It is perhaps true that the Torricelli Amendment increases candidate access to the electorate. The reality, however, is that it accomplishes this by means neither narrowly tailored nor the least restrictive. Indeed, it increases candidate access at the expense of all other political speakers and at considerable sacrifice to broadcasters' first amendment rights.

On balance, because it neither serves legitimate purposes, nor accomplishes its supposed ends effectively . I believe the Torricelli Amendment violates the first amendment.

Thank you.

[The prepared statement of Lillian R. BeVier follows:]

PREPARED STATEMENT OF LILLIAN R. BEVIER, DOHERTY CHARITABLE PROFESSOR AND CLASS OF 1963 RESEARCH PROFESSOR, UNIVERSITY OF VIRGINIA LAW SCHOOL

This memorandum analyzes the constitutionality of the proposed amendment to the “lowest unit charge” provisions of 47 U.S.C. § 315(b) (hereafter, the amendment). The amendment would fundamentally alter the present regime of broadcast rate regulation with regard to political candidate ads. It would operate to the substantial and disproportionate disadvantage of broadcasters, cable, and satellite operators, as well as of participants in political debate other than federal candidates and national political parties. Candidates and parties, on the other hand, would reap substantial benefits. In order to appreciate the extent of the changes that the amendment would effect and to understand why they represent changes in kind and not just in degree of regulation, and thus render the amendment itself constitutionally problematic, it is necessary briefly to recount salient aspects of current law and to offer a bit of historical context.

CURRENT LAW AND SOME HISTORICAL BACKGROUND

Since *Red Lion Broadcasting Corp. v. FCC*, 395 U.S. 367 (1969), the Supreme Court has applied a more lenient standard of First Amendment review to regulations of broadcasters than to regulations of either the print media, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), or to cable operators, *Turner Broadcasting System v. FCC (Turner I)*, 512 U.S. 622, 639 (1994). Commentators have long questioned the soundness of the “spectrum scarcity” rationale upon which Red Lion relied, and courts have increasingly challenged the argument as a justification for government control of the content of broadcast programming. See, e.g., *Turner I*, 512 U.S. 622, 637-38; *Telecommunications Research & Action Center & Media Access Project v. FCC*, 801 F.2d 501 (D.C. Cir. 1986). In light of cable and other technological advances, a factual foundation no longer exists for the argument that spectrum scarcity entitles the government, in the public interest, to control the content of broadcast speech.

Indeed the scarcity argument has been so profoundly discredited—its conceptual underpinnings so thoroughly undermined, its empirical premises so utterly annihilated—that it provides a wholly inadequate foundation for the current disparity in First Amendment protection enjoyed by broadcasters and the print media. For this reason, those who advocate the amendment’s passage have sought to find support in other theories. The metaphor of public ownership of the airwaves has proved fertile ground for them, and from it have sprung several variations of argument. The most often invoked is the “public trust” variation, which embodies the idea that the public is the beneficial owner of the airwaves for whom the licensee acts as trustee, and because it is so frequently put forth, it is worth examining. It turns out to resemble a cloud: from a distance it seems solid and impenetrable, but up close it turns out to be no more substantial than dense fog, vaporous yet capable of obscuring vision.

The public trust image admittedly packs rhetorical punch, especially in view of the fact that broadcast licenses are valuable and in the past broadcasters have received them at a price of zero: one can perhaps acknowledge that the claim that they should be burdened with “enforceable public obligations” analogous to those owed by a private trustee to the beneficiaries has superficial intuitive appeal. The problem with the public trust concept is that its persuasive force as an analogy depends on similarities between broadcasters and private trustees that do not in fact exist. In the first place, instead of a corpus of property to which a trustee’s duty might attach, there is only the metaphor of spectrum ownership. The spectrum itself is nothing more than a phenomenon produced by the transmission of electromagnetic energy through space, and to talk of it as “property” that the government once “owned” and that the broadcasters now hold “in trust” is really only to give a property label to a regulatory power that the government claims it possesses. In the second place, the fiduciary duties by which the acts of private trustees are governed are highly elaborated and quite clearly specified. There is considerable consensus about the nature and source of the trustee’s duties, their enforceability, and who has standing to object to their breach. By contrast, all attempts to specify the nature of broadcasters’ fiduciary obligations have failed. The Supreme Court has been able to come up with criteria no more specific than those loosely embodied in the twin assertions that broadcasters have “obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves,” *Red Lion*, 395 U.S. at 389, and that broadcasters’ obligations are the correlatives of “the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences,” *id.* at 390—whatever *that* might mean in concrete application. Though the trustee image

has been used occasionally to justify particular regulatory initiatives, no attempt has ever been made rigorously or systematically to give it legal substance or form. In fact it never has had anything other than rhetorical force, and it certainly has never done any real legal work.

Still, it is common for advocates of regulation to proceed on the apparent assumption that *Red Lion*, bolstered by the public trustee image, gives the government *carte blanche* to regulate broadcasters. In doing so, they vastly overestimate the extent to which the case has actually been read to sanction government interference with the editorial discretion of broadcasters, or permits government to impinge on broadcasters' freedom of speech. Since *Red Lion*, for example, the Court has emphasized that broadcasters are speakers entitled to exercise editorial discretion. *Arkansas Educ. Television Comm'n. v. Forbes*, 523 U.S. 666, 674 (1998) ("When a... broadcaster exercises editorial discretion in the selection and presentation of its programming, it engages in speech activity.") It has insisted that broadcasters are entitled to "the widest journalistic freedom consistent with [their] public [duties]." *CBS v. DNC*, 412 U.S. 94, 110 (1973). And it has issued reminders that congressional restrictions on broadcasters' editorial judgment and control "have been upheld only when [the Court] was satisfied that the restriction is narrowly tailored to further a substantial governmental interest." *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984). This First Amendment background is an important part of the historical context of broadcast regulation in behalf of political candidates.

As part of the Federal Election Campaign Reform Act of 1971, Congress amended the Communications Act of 1934 in two crucial respects. First, it added § 312(a)(7) to authorize the FCC to revoke any broadcast license "for willful or repeated failure to allow reasonable access to or to permit purchase of reasonable amounts of time for the use of a broadcasting station by a legally qualified candidate for Federal elective office on behalf of his candidacy." In *CBS v. FCC*, 453 U.S. 367 (1981), the Supreme Court sustained the section against a First Amendment challenge. The Court concluded that the section created an affirmative right of reasonable access to the use of broadcast stations for individual candidates during campaigns. Because it requires them to give "reasonable and good-faith attention to access requests," 453 U.S. at 387, and to consider each request "on an individualized basis," *id.*, § 312(a)(7) undeniably interferes somewhat with the editorial discretion of broadcasters. The fact remains, however, that, even as the Court construed the section in *CBS v. FCC*, broadcasters retain considerable decision-making freedom on the issue of whether to grant or deny any particular access request: the FCC must defer to the broadcasters' decisions so long as they "take the appropriate factors into account and act reasonably and in good faith." *Id.* And, of course, § 312(a)(7) has been squarely held to require reasonable access only "if the candidate is willing to pay." *Kennedy for President Committee v. FCC*, 636 F.2d 432 (D.C. Cir. 1980).

The second change wrought in the Communications Act of 1934 by the Federal Election Campaign Reform Act of 1971 was to section 315(b), which at that time provided that charges for the use of a broadcast station for political advertising not exceed the charges for comparable use of the station for other purposes. The 1971 amendment added the additional requirement that broadcasters and cable systems, within the 45 days preceding a primary or 60 days preceding a general election, charge candidates for public office "the lowest unit charge of the station for the same class and amount of time for the same period."

The debates on the changes to § 315(b) reflect Congress' concern that the rates charged candidates by broadcasters were sometimes higher than those charged commercial advertisers, on account of the fact that the short-term, cyclical and individually low-volume-per-candidate nature of political broadcasting made certain discounts—such as those offered to users with whom broadcasters had longer-term associations—unavailable to political candidates. *See Kennedy for President v. FCC*, 636 F.2d 432, 441 n. 68 (D.C. Cir. 1980). Congress legislated against a background of variations in the price of advertising to commercial advertisers according both to the size of the anticipated audience and also according to whether the advertiser wanted to buy fixed time (the most expensive), preemptible time (less expensive than fixed time since it permits the station to preempt the time when another advertiser is willing to pay the higher fixed rate), and immediately preemptible time (sold most cheaply since it permits the station to preempt in favor of a better-paying second advertiser without giving notice to the first advertiser).

In enforcing § 315(b), the FCC has consistently interpreted the section "to reflect the realities of the advertising marketplace." *FCC Report & Order*, FCC 91-403, FCC Rcd 678, 691 (December 23, 1991). Accordingly, the Commission has permitted broadcasters to continue the practice of varying rates according to the class of time involved and to whether the purchaser paid for fixed, preemptible, or immediately preemptible time. This policy has reflected the Commission's conviction that "Con-

gress enacted the lowest unit cost requirement to ensure that candidates are treated *as favorably as* [—*not more favorably than*—] the most favored commercial advertisers during the pre-election period.” Public Notice, *Licensees and Cable Operators Reminded of Lowest Unit Cost Obligations*, FCC 88-269 (August 4, 1988)(emphasis supplied). Broadcasters must give candidates the benefits of any quantity or package discounts that commercial advertisers receive, but just as commercial advertisers must pay more for fixed time than for preemptible time or immediately preemptible time, so must political candidates. Indeed, according to the Commission, Congress in 1971 “specifically rejected” requiring broadcasters to afford candidates “fixed’ status at a ‘preemptible’ rate.” *FCC Report & Order* at 691(December 23, 1991)(citing 117 Cong. Rec. 29, 026-29 (1971)). Thus § 315(b) currently puts political candidates “on a par” with the most favored commercial advertisers, as Congress intended it to do. Broadcasters have had no compelling reason to challenge the constitutionality of § 315(b) because, though the editorial discretion of broadcasters is limited by their being foreclosed from altering the content of ads by political candidates, it does not require them to charge federal candidates for valuable fixed spots rates far below those that any commercial advertiser would pay.

THE PROPOSED AMENDMENT

The proposed amendment to § 315(b) would effect six major changes in the nature of the electronic media’s obligation to charge political candidates the lowest unit charge. First, it would extend the benefits of the lowest unit charge provision, which presently extend to ads sponsored by candidates’ authorized committees in which candidates themselves appear, to ads sponsored by a national committee of a political party, whether or not they include an appearance by the candidate. Second, it would require broadcasters to sell both to candidates and national political parties *the most desirable* class of advertising time at the lowest price charged during the previous year for *the least desirable* time. Third, it would bar broadcasters from preempting any political ad. Fourth, it would require intrusive government monitoring to ensure compliance by mandating repeated audits of television stations by the FCC during campaigns. Fifth, it would extend the new requirements to cable and satellite providers.¹ Sixth, it would extend the period during which the lowest unit charge provision would apply.

These changes do not merely refine the section’s impact. They radically alter it. Consider: the requirement that broadcasters sell both to federal candidates and national political parties the most desirable class of advertising time at the lowest price charged during the previous year for the least desirable time amounts to a requirement that broadcasters sell parties and candidates the equivalent of first class seats at stand-by prices, or the penthouse suite at the Plaza for Motel-6 rates. This requirement markedly increases broadcasters’ financial burden, not only relative to what they have previously borne but relative to that borne by others who supply campaign resources to candidates—alternative media outlets, transportation and accommodation providers, office suppliers, consultants, and the like. In other words, the amendment would transform a requirement that broadcasters treat federal candidates equally as well as the most favored commercial advertisers with regard to rates into a requirement that they—and only they—offer federal candidates and political parties highly preferential rate treatment. Also, by significantly expanding the class of ads over which broadcasters cannot exercise editorial discretion (which now includes only the narrow class of federal candidate-purchased ads in which the federal candidate appears), and substantially increasing the intrusiveness of government enforcement, the amendment would significantly reduce broadcasters’ journalistic freedom. These drastic alterations—increased and disproportionate financial burdens, decreased journalistic freedom—give rise to a well-founded prediction that, if it passes, the amendment will be found to violate the First Amendment. This prediction gains credence when one scrutinizes the ends supposedly served by the amendment and assesses the effectiveness of the increased burdens and decreased freedoms as means to achieve them, for looking with care at them reveals that they are anything but “narrowly tailored to further a substantial governmental interest.” *FCC v. League of Women Voters*, 468 U.S. 364, 377 (1984).

¹ FCC regulations currently apply the statutory provisions requiring broadcasters to supply access to and to charge lowest-unit-rates for political candidates to satellite providers through regulation. 47 C.F.R. § 100.5. FCC regulations do not require cable television providers to grant access to political candidates, 47 C.F.R. § 76.205, but if they do grant access they must charge candidates the lowest-unit-rate. 47 C.F.R. § 76.206.

FIRST AMENDMENT ANALYSIS

The amendment to § 315(b) almost certainly violates the First Amendment. If the Court subjects the amendment to the strict—almost always fatal—scrutiny that it usually applies to regulations of individual speakers and the print media, it will require that the amendment serve governmental interests that are compelling and that it do so by the least restrictive means. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105 (1991). This is because, as it requires that preferential rates be offered only to speech in connection with campaigns of federal candidates during election campaigns, it is unquestionably a regulation of the content of speech to which the strictest standard of review applies. Even if the Court subjects the amendment to the somewhat less exacting scrutiny that it has applied to regulation of the speech of broadcasters, the amendment is not likely to pass muster, for the Court will insist that it be narrowly tailored to further a substantial government interest and that it be in fact likely to redress or prevent harms that “are real, not merely conjectural,” *Turner I*, 512 U.S. at 664. As the analysis that follows will confirm, the amendment serves governmental interests that are neither compelling nor substantial. Its means are neither the least restrictive nor narrowly tailored nor likely to redress real harms.

As noted above, *Red Lion* held that the unique physical limitations of the broadcast medium justified applying a less rigorous standard of First Amendment scrutiny to broadcast regulation than to regulation of print media. The Court has not applied this more relaxed standard of First Amendment review to cable regulation “because cable television does not suffer from the inherent limitations that characterize the broadcast medium.” *Turner I*, 512 U.S. at 622. The amendment to § 315 applies to both broadcasting and cable (as well as to satellite) providers. Thus it initially presents the question whether the Court would subject the amendment as a whole to the less rigorous scrutiny traditionally applied to broadcast regulations or treat it as a regulation of cable providers and subject it to more rigorous review. The latter option makes more sense, since the fact of its extension to cable and satellite operators demonstrates that the amendment cannot rest on the (discredited) scarcity rationale. Then again, perhaps the Court would subject the regulation of broadcasters to intermediate scrutiny and that of cable and satellite providers to more demanding review. The Court is likely to perceive that the amendment poses precisely the inherent risks of government favoritism and manipulation of political debate that strict First Amendment scrutiny is designed to forestall (even in the area of broadcast regulation). Thus it will probably subject the amendment, its supposed justifications, and the likelihood that it will achieve its alleged purposes to rigorous and skeptical evaluation, however it describes the intensity of its review.

No matter what level of scrutiny the Court applies, its analysis will have to take account of several bedrock First Amendment principles. In combination with § 312(a)(7), the amendment would operate, to a far greater extent than does current law, to deprive broadcasters of the right to exercise discretion over the content of advertising that they are required to accept, both by federal candidates themselves and by national parties in their behalf. Its supporters thus must somehow justify the fact that it defies the generally applicable prohibition on “forced speech,” a prohibition that embodies the nation’s long-standing commitment to protecting “the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.” *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977). In addition, the amendment would impose its onerous burdens only on broadcasters and cable and satellite operators. And it would extend benefits only to federal candidates and political parties, denying them to other participants in political campaigns such as independent advocacy groups. Thus its supporters must overcome the Court’s grave and understandable distrust of laws that single out certain elements of the press for special treatment or that impose differential burdens (or, by a parity of reasoning, confer differential benefits) on particular speakers. *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 591-93 (1983).

The First Amendment requires the Supreme Court to subject regulations of the content of speech in the print media and by individual citizens to the most exacting scrutiny. Regulations that “suppress, disadvantage, or impose differential burdens on speech because of its content” *Turner I*, 512 U.S. at 642 [which the amendment to § 315(b) clearly does] or “that compel speakers to utter or distribute speech bearing a particular message,” *id.*, [which the amendment to § 315(b) clearly does] carry the heaviest burden of justification. The reason for strict scrutiny of such regulations is that they “pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to . . . manipulate the public debate through coercion rather than persuasion.” *Id.* at 641. Laws that single out certain elements of the

press for special treatment “pose a particular danger of abuse by the State.” *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 228 (1987). Laws that target a small group of speakers and require them to subsidize the public debate create a particular danger of abuse by the state, a danger that is exacerbated by intrusive government enforcement mechanisms.

In the area of broadcast regulation, since *Red Lion* the Court has never sustained a regulation of broadcasters that is anywhere near so intrusive nor one with such significant financial implications as the amendment to §315(b). Although *Red Lion* sustained the fairness doctrine and personal attack rules, and *CBS v. FCC*, 453 U.S. 367 (1981), sustained the reasonable access requirements of §312(a)(7), the Court has never given its constitutional blessing to §315(b) because the section has not been challenged. Supporters of the amendment to §315(b) assert that it “is significantly less burdensome and less likely to interfere with the editorial discretion of broadcasters than either the fairness doctrine or the reasonable access requirement—both of which have been upheld by the Supreme Court,” *Memorandum to Members of Congress and Staff from Elizabeth Daniel, Brennan Center for Justice* (May 11, 2001). The claim is entirely specious.

The personal attack rules and the fairness doctrine that the Court sustained in *Red Lion* left broadcasters with significant discretion about what messages to carry in the first place (so as not to call the personal attack rules into play) as well as about the content of their overall programming (so as to comply with the general commands of the fairness doctrine). While the fairness doctrine was in effect, the FCC, mindful of the First Amendment risks entailed in a too-intrusive enforcement strategy, made commendable efforts to respect the editorial freedom of broadcasters. It is perhaps noteworthy, nonetheless, that the FCC abandoned the fairness doctrine in 1985, having become persuaded that it was ineffective at achieving its objective of increasing the diversity of broadcast content, that the hoped-for First Amendment benefits were illusory while the anticipated First Amendment costs were all too real.² In 2000, the District of Columbia Circuit Court, acknowledging that the personal attack and political editorial rules “interfere with editorial judgment of professional journalists and entangle the government in day-to-day operations of the media,” and that they “chill at least some speech, and impose at least some burdens on activities at the heart of the First Amendment,” *Radio-Television News Directors Association v. FCC*, 229 F.3d 269, 270 (D.C. Cir. 2000), directed the Commission immediately to repeal them.

The Court held in *CBS v. FCC*, 453 U.S. 367 (1981), that 47 U.S.C. §312(a)(7) imposed on broadcasters an “affirmative, promptly enforceable right of reasonable access” in favor of candidates. *Id.* at 377. But it simultaneously emphasized that §312(a)(7) leaves broadcasters with considerable editorial discretion. They must be permitted in the first instance to exercise their own judgment with regard to whether any particular request for access must be granted:

In responding to access requests . . . broadcasters may . . . give weight to such factors as the amount of time previously sold to the candidate, the disruptive impact on regular programming, and the likelihood of requests for time by rival candidates under the equal opportunities provision of §315(a) . . . If broadcasters take the appropriate factors into account and act reasonably and in good faith, their decisions will be entitled to deference even if the Commission’s analysis would have differed in the first instance. *Id.* at 387.

Mindful of its own injunction that the government’s licensing scheme for broadcasters calls “on both the regulators and the licensees to walk a ‘tightrope’ to preserve First Amendment values,” *CBS v. DNC*, 412 U.S. 94, 117 (1972), the Court in *CBS v. FCC* noted that candidates’ right of access was “limited,” and that, as so interpreted, the reasonable access provision properly “balances the First Amendment rights of federal candidates, the public, and broadcasters.” 453 U.S. at 397.

In terms of the impact on broadcasters’ editorial discretion and the intrusiveness of its contemplated enforcement mechanism—mandatory random audits by the FCC during the pre-election period—the regime contemplated by the amendment completely topples the delicate balance embodied in the current regime. While current law bars advertisers from rejecting *candidate* ads in which federal candidates appear, or from exercising any editorial judgment over them, 47 U.S.C. §312(a), the amendment would deprive broadcasters of discretion over the content of national political party ads as well, whether or not candidates appear in them. Moreover, presently §315(b) requires broadcasters merely to charge federal candidates *the same* rates they charge commercial advertisers for the same class of time. It does not re-

² This outcome is worth noting, if only as a cautionary tale; it teaches the wisdom of skepticism in assessing potential benefits of new broadcast regulation as well as the folly of neglecting to count the costs.

quire them to offer *preferential* rates either to candidates or to national political parties. And § 315(b)'s requirement of equality of rate treatment applies only to federal candidates whereas the amendment's requirement of preferential rate treatment applies both to candidates and to political parties. This memorandum noted early, and considers worth mentioning repeatedly, the *burden* of the amendment falls solely upon broadcasters and cable and satellite providers, leaving the rates charged by other media outlets and other suppliers of campaign resources unregulated, and that its *benefits* accrue only to federal candidates and national political parties, leaving other participants in the political process—such as independent advocacy groups—much disadvantaged. The amendment would create the reality, not merely the risk, “of an enlargement of Government control over the content of broadcast discussion of public issues” against which the Court has most emphatically warned. *CBS v. DNC*, 412 U.S. at 126. It also would create the reality, not merely the risk, that what the Government seeks to do by this amendment is “to manipulate the public debate through coercion rather than persuasion.” *Turner I*, 512 U.S. at 641.

To summarize, the amendment to § 315(b) poses a clear threat to several important canons of First Amendment jurisprudence. It encroaches to a much greater extent than current law upon the editorial freedom of broadcasters. It represents a form of forced speech. It imposes a discriminatory burden on one class of speakers (broadcasters, cable and satellite providers) for the benefit of one class of participants in the political process (federal candidates and national political parties speaking in their behalf).

Turning now to the governmental interest side of the First Amendment equation, it should be noted at the outset that, while conferring preferential benefits on candidates and imposing disproportionate burdens on broadcasters, the amendment serves neither a compelling nor even a substantial governmental interest. Indeed, one might argue that it fails to serve any legitimate *public* interest at all. For all that appears, in calling upon broadcasters to subsidize candidate campaigns, it serves only the interests of federal candidates and national political parties. It would seem improbable that such favored treatment for federal candidates (including, of course, incumbents; but excluding the independent advocacy groups that might want to raise questions about challengers' plans or incumbents' records³) could be said to serve the public interest; it is not obvious, in other words, why it is in the public's interest that federal candidates and political parties be subsidized by broadcasters. Moreover, because it leaves candidates free to spend the money saved on TV ads on other campaign activities, the amendment does not even offer a reliable guarantee that its implementation will ultimately reduce the cost to candidates of their election campaigns. Thus it seems likely to fail to achieve the objective that its supporters most loudly trumpet. Finally, because it will allow political parties to take advantage of the subsidies even for ads in which the candidate does not appear, and because candidates themselves benefit from attacks on their opponents but do not care to appear themselves in negative ads, the amendment is likely to increase the amount of negative attack ads. This may or may not have a negative effect on the quality of political debate, but it seems quite likely to redound to the harm of the broadcasters who are forced to run the ads without being able to exercise any editorial control over their content. The reason it would harm broadcasters is not that they would be liable for statements made in ads over which they have no right to exercise editorial control. They would not be. *Farmers Educ. & Coop. Union of America v. WDAY*, 360 U.S. 525, 535 (1959). Rather, broadcasters would be harmed because, whether or not attack ads are politically effective, many viewers do not like them and broadcasters who run them thus risk alienating their viewers.

The fact that the amendment is unsupported by findings that might serve to justify it hinders the quest to determine what governmental interests the amendment would serve, whether those interests are compelling or even substantial, and whether the amendment represents either the least restrictive or even a sufficiently narrowly tailored means for accomplishing it. This is troublesome in light of the requirement that “[w]hen the Government defends a regulation of speech as a means to redress past harms or prevent anticipated harms, it must do more than simply ‘posit the existence of the disease sought to be cured’... It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner I*, 512 U.S. at 664. The debates on the Senate floor suggest that the amendment's principal purpose is the straightforward one of securing low prices for federal candidates and political

³The McCain-Feingold bill disadvantages independent advocacy groups in so many ways relative to candidates and parties that it seems quite likely, if it were to be enacted and implemented in the form in which it passed the Senate, to cause a significant decrease in the number of voices heard and the variety of points of view expressed during political campaigns.

parties seeking to run television ads during the campaign season. The effect of achieving this purpose is said to be the benign one of lowering the overall cost of campaigns. Proponents of the amendment claim these purposes serve the public interest. They claim that the amendment “furthers First Amendment values by enhancing the political debate and candidate access to voters at a time when television news coverage of debates is diminishing and candidates must compete with independent issue groups for air time.” *Brennan Center Memorandum* at 2. As it seems likely that debate will focus on the amendment’s alleged public purposes, this memorandum will do the same.

To expand on some points noted above, consider first the purpose of lowering the overall cost of political campaigns. There are two difficulties with it. First, far from being either a compelling or a substantial governmental interest, it is a highly suspect one. The Supreme Court has proclaimed in no uncertain terms that “the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending. The First Amendment denies government the power to determine that spending to promote one’s political views is wasteful, excessive, or unwise.” *Buckley v. Valeo*, 424 U.S. 1, 57 (1976).

But, second, as previously remarked, there is no guarantee that the overall cost of political campaigns will decrease on account of the amendment. It is just as likely that candidates and national political parties will simply expend the funds they save on more of the short TV spot ads that campaign reformers decry, or on different campaign activities, while other participants in the political process—independent groups advocating positions on particular issues, for example—are likely to have to spend considerably more in order to buy any TV time at all. Thus, even assuming that the Court were to reconsider its aversion to the governmental purpose of lowering the cost of political campaigns, it would have a difficult time concluding that, in lowering the cost of TV ads to federal candidates and national political parties, the amendment achieves the purpose in a “direct and immediate way.” Perhaps even more fundamentally, a realistic perspective on the effect of the amendment reveals that the amendment does not, in fact, *lower* the cost of TV time even for federal political candidates and parties. Lowering the cost to federal candidates and parties does not reduce the *value* of TV time; it merely transfers the cost of paying for that value from federal candidates and national political parties to broadcasters and to other advertisers, both political speakers and commercial ones. Thus it is false to claim that the amendment lowers the cost of political campaigns. The costs will continue to be incurred; they will simply be borne by others than federal candidates and national political parties.

Consider next the claim that the amendment “enhances political debate.” Again, there are two difficulties. The first is that the Supreme Court’s frequent celebration of the value of maintaining the “opportunity for *free* political discussion,” *New York Times v. Sullivan*, 376 U.S. 254, 269 (1964)(citations omitted), has reference not to supposedly costless political discussion but rather to political discussion unfettered by government control or coercion. The Court has held, time and time again, that the quality of political debate is none of the government’s business. So, just as was the case with the objective of lowering the cost of political campaigns, far from being either a compelling or a substantial governmental interest, enhancing the quality of political debate is a highly suspect one.

This is a point that tends to get lost in the hand-wringing over the supposedly sorry state of our democracy. It should, instead, be the focal point of debate. When one has regard to the long line of cases confirming the principles of free political speech and individual political freedom that lie at the very heart of the First Amendment, it becomes clear that those who imply that enhancing the quality of political debate is a legitimate governmental interest bear a heavy burden of justification. The First Amendment guarantees that government may not interfere in the efforts of citizens to persuade their compatriots of the merits of particular proposals or of particular candidates, *Pickering v. Board of Education*, 391 U.S. 563 (1968); nor may it disrupt the free communication of their views, *Mt. Heathy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977); nor penalize them for granting or withholding their support from elected officials on the basis of the positions the officials espouse, *Elrod v. Burns*, 427 U.S. 347 (1976). Government may neither prescribe an official orthodoxy, *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943); require the affirmation of particular beliefs, *Wooley v. Maynard*, 430 U.S. 705 (1977); nor compel citizens to support causes or political activities with which they disagree, *Communication Workers of America v. Beck*, 487 U.S. 735 (1988). Far from giving government a legitimate interest in “enhancing the quality of political debate,” the “constitutional right of free expression . . . is designed and intended to remove governmental restraints from the arena of public discussion,

putting the decision as to what views shall be voiced largely into the hands of each of us.” *Cohen v. California*, 403 U.S. 15, 24 (1971). As the Court affirmed in *Buckley v. Valeo*, 424 U.S. 1, 57 (1976)(per curiam): “In the free society ordained by our Constitution it is not the government, but the people—individually as citizens and candidates and collectively as associations and political committees—who must retain control over the quantity and range of debate on public issues in a political campaign.”

Contrary to what advocates of the amendment appear to maintain, *Red Lion* does not render these principles of free political debate irrelevant in the context of broadcast regulation. While *Red Lion* sustained the fairness doctrine and personal attack rules on the theory that “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount,” 395 U.S. at 390, the Court thought its decision would help to secure, not access for a preferred group of speakers, but an “uninhibited marketplace of ideas” that would permit airing of a diversity of “social, political, esthetic, moral and other ideas and experiences.” *Id.* (emphasis supplied.)

But even were enhancing the quality of political debate a legitimate, compelling or substantial governmental interest, the overall effect of the amendment seems unlikely to achieve the goal. Certainly it does not achieve its posited objective in a “direct and immediate way.” As noted above, the amendment would guarantee its preferential rates not only to candidates but to national party committees, who could air TV ads that had no appearance by the candidate the party supports. A national party, therefore, could air attack ads without having to acknowledge or hold its own candidate accountable for the connection between the attack and the party’s preferred candidate. Many observers believe that attack ads—particularly those for which candidates themselves are able to avoid being held accountable—do the opposite of enhancing political debate; rather, they believe such ads reinforce “the very cynicism they exploit, and in the process drive citizens away from politics.” Alliance for Better Campaigns, *Campaigns & Television*, <http://www.bettercampaigns.org/resources.htm>.

Consider, finally, the claim that the amendment would enhance federal candidate access to voters. This, at least, appears at first glance to be a legitimate, perhaps even compelling or substantial, governmental interest, since more political speech is always better than less. Representative democracy benefits when “candidates have the . . . opportunity to make their views known so that they electorate may intelligently evaluate the candidates’ personal qualities before choosing among them on election day.” *Buckley v. Valeo*, 424 U.S. 1, 52-53 (1976). The difficulty comes when we try to assess whether the amendment would achieve the goal using either the least restrictive means or even sufficiently narrowly tailored ones.

For two reasons, it is difficult to conclude that the amendment satisfies either standard. In the first place, the amendment’s enhancement of federal candidate and political party access to voters comes at the expense of all other participants in the political process, none of whom are to receive the benefit of the preferential rates. Thus it is even possible that the amendment will ultimately reduce rather than increase the total amount of debate during political campaigns. In the second place, the amendment singles out one group of private actors to bear its burdens, one group to subsidize the provision of increased candidate access to voters. If increased candidate access is an important public interest, one would think that it ought to—and could more narrowly, less restrictively—be provided by the public itself rather than being imposed solely on broadcasters, cable, and satellite providers. If not by the public, then perhaps the burden should be shouldered by all those in the private sector who provide resources to political candidates for their campaigns: they too could be required to sell their products and services to candidates at deeply discounted prices. Or if not by all resource providers, then at least the burden of candidate media access should be shared by all First Amendment actors, or at least by the print media. Admittedly these alternatives are unlikely to be politically viable, but that is precisely the point, for it suggests that neither the need nor the demand for increased federal candidate and national party access that the amendment would provide are as widely felt as has been claimed. And the discriminatory nature of the burden creates the unseemly impression that the amendment reflects political opportunism rather than a genuine attempt to serve a legitimate public interest.

CONCLUSION

The proposed amendment to § 315(b) is of exceedingly dubious constitutional validity. Whether the Court subjects the amendment to strict or intermediate scrutiny, or some combination of the two, it will be gravely troubled by the fact that the amendment offends several venerable First Amendment principles. It encroaches, to a much greater extent than current law, upon broadcasters’ editorial freedom. It

amounts to forced speech. It imposes a disproportionate burden on one class of speakers (broadcasters, cable and satellite providers) for the benefit of one class of participants in the political process (federal candidates and national political parties speaking in their behalf). It serves very poorly indeed a number of purposes that the Court has found out-of-First-Amendment bounds, such as lowering the cost of political campaigns and improving the quality of public debate. This is because it does not lower, but merely shifts, the cost of political campaigns and it is likely to increase the number of negative attack ads. It serves one legitimate public purpose, that of increasing candidate access to the electorate, but this it does by neither narrowly tailored nor the least restrictive means. Its enhancement of candidate access comes both at the expense of other political speakers and at considerable sacrifice of broadcasters' and cable and satellite owners' First Amendment rights.

Mr. UPTON. Thank you.
Mr. Sapan.

STATEMENT OF JOSHUA SAPAN

Mr. SAPAN. Thank you, Mr. Chairman. I'm Josh Sapan, CEO of Rainbow Media Holdings which is a Division of Cablevision Systems. Rainbow Media provides national and local programming services among them American Movie Classics, Bravo and our local news 12 channels. In addition, my responsibilities include oversight of advertising from Rainbow Media and Cablevision systems. Cablevision is a cable company serving more than 3 million subscribers in the New York area.

We believe the changes in campaign advertising rules proposed by the Torricelli Amendment are not warranted. We support the approach taken by current law that requires cable operators like television and radio broadcasters to charge legally, qualified candidates for public office the best rate available for advertising time.

The Torricelli Amendment creates a new substantial subsidy for campaign advertising by giving political candidates better rates than those available to all other advertisers and expanding the time period those rates are available. There is simply no factual or policy basis for requiring this subsidy from cable systems.

During debate, proponents of the Torricelli Amendment cited two reasons for requiring below market advertising rates to be sold to political candidates. They first cited the rising cost of television advertising time. However, there is nothing in the Senate record to suggest that cable systems have charged excessive rates to political candidates. Cable systems, like radio broadcasters have long been viewed as the lower cost alternative for campaign and other advertisers.

At Cablevision, advertisements are telecast in a specific geographic area, targeting the message to relevant constituents. Prices for purchasing time on our cable system are generally lower because the services reach a smaller geographic area. For instance, if a candidate is purchasing time on Cablevision's Brooklyn system, the price would be less than purchasing the advertising time from a local station, broadcast station which covers the entire Tri-State area. Candidates can then customize the message of an advertisement to a smaller base of people.

The second argument cited by proponents of the Torricelli Amendment was that broadcasters have public interest obligations that result from their use of the public airwaves. Cable operators on the other hand do not use the public airwaves and have built their entire distribution system with private risk capital and with-

out any Federal subsidies. Cable systems are franchised at the State and/or local level and an aggregate across the country typically pay about \$2 billion in local franchising fees per year.

In addition, cable operators are subject to a cable specific public interest construct that includes public educational, government and leased access channels.

Finally, the cable industry is committed to providing the broadest variety and most complete coverage of politics on television. On the national level, the best examples of cable's commitment to full coverage of the political process is C-SPAN, private, not for profit, paid for entirely by the cable industry. Other national networks providing complete political coverage, include CNN, MSNBC and the Fox News Channel.

On the local level and the regional level, a growing number of cable channels provide viewers with a unique perspective on politics that only a neighborhood operation can do. For instance, Cablevision offers in the New York area no fewer than five News 12 local channels that serve an aggregate all of our subscribers. During the last election, these five news channels held more than 100 debates between local candidates as well as live election coverage of local races, numerous profiles of local candidates and political analysis of New York specific issues.

So to conclude, the cable industry does not believe that changes into the campaign advertising rules are necessary. We continue to support the approach taken by current law that requires cable operators and television and radio broadcasters to charge qualified candidates the best rate available for advertising time.

Cable provides a lower cost alternative for political advertising and cable offers what I think it's fair to say is the best and most complete election news coverage available on television. There appears to be no rationale for including cable under the Torricelli proposal.

Thank you very much for your time.

[The prepared statement of Joshua Sapan follows:]

PREPARED STATEMENT OF JOSHUA SAPAN, PRESIDENT AND CHIEF EXECUTIVE OFFICER, RAINBOW MEDIA HOLDINGS, INC., A DIVISION OF CABLEVISION SYSTEMS CORPORATION

Thank you Mr. Chairman and Members of the Committee for inviting me to testify before you today. I am Josh Sapan, President and CEO of Rainbow Media Holdings which is a division of Cablevision Systems. Cablevision is one of the nation's leading entertainment and telecommunications companies, serving more than 3 million video customers in the New York metropolitan area and providing high speed Internet access and competitive telecommunications services. As Cablevision's programming division, Rainbow owns and manages national cable channels American Movie Classics, Bravo, The Independent Film Channel, WE: WOMEN'S ENTERTAINMENT, and MuchMusic USA.

Perhaps most relevant for this discussion, Rainbow also has a 20-year history in regional programming. Our News 12 Networks provide truly local news for New Jersey, Long Island, The Bronx, Westchester and Connecticut. The MetroChannels showcase the diverse cultural landscape of the New York area, with original programming focused on comedy, music, food, fashion, theater and sports. Finally, Rainbow's Advertising Sales Corporation (RASCO), is the nation's largest regional network and spot cable advertising sales firm.

Advertising on cable is typically done at the network level. A business or a political candidate wishing to advertise on a cable channel can buy national or regional coverage by buying from a network. However, many political candidates and small businesses may wish to advertise on only targeted cable systems. Local cable systems, which provide service to specific franchise areas, are able to insert local adver-

tisements on cable channels. Typically, the licensing agreements between programmers and the cable operators set out the time made available to the cable operator to sell for advertising. In general, approximately 8-14 minutes per hour is used for paid advertising, and about 2 minutes of this time is made available to the cable operator to sell for advertising, including political advertising. The remaining advertising time is sold at the national level by individual cable networks.

Local advertisements can be bought in a number of ways. Businesses and political candidates can purchase time on a specific program (e.g. "Larry King Live") or can purchase time on specific networks (e.g. CNN, ESPN) with advertising to be run anytime during the day or within a specific time period (e.g. primetime versus fringe). Local advertising is also sold on a preemptible versus nonpreemptible basis. However, we should note that the policies and practices for ad sales differ from company to company and network to network.

I appreciate the opportunity to discuss political advertising in the context of campaign finance reform and to provide your committee with Cablevision's perspective as a member of the cable industry. I will also use this opportunity to highlight examples of the cable industry's efforts to provide television viewers the best and most comprehensive information about the political process, political candidates and their government at work.

Earlier this year the Senate passed the "Bipartisan Campaign Reform Act," with the addition of an amendment offered by Senator Robert Torricelli. This amendment requires television broadcast stations, and providers of cable or satellite television service, to sell qualified political candidates nonpreemptible advertising time at rates that do not exceed the lowest charge of the station during the preceding year for the same period and amount of time. In short, the amendment would require a cable operator to sell a political candidate a fixed spot advertisement (generally the most expensive class of advertising) at the system's lowest-priced preemptible rate (generally the least expensive class of advertising).

The changes in campaign advertising rules proposed by the Torricelli amendment are not warranted. We support the approach taken by current law that requires cable operators, like television and radio broadcasters, to charge legally qualified candidates for public office the best rate available for advertising time. This guarantees that political candidates get the same rate as the most favored commercial advertisers during the pre-election period. Unlike existing law, the Torricelli amendment creates a new substantial subsidy for campaign advertising by giving political candidates better rates than are available to all other advertisers. There is simply no factual or policy basis for requiring this subsidy from cable systems.

Originally, the Torricelli amendment did not include cable operators. However, prior to consideration of the amendment on the Senate floor, the language was changed to include cable. Neither the author of the amendment nor its supporters proffered any rationale for this last minute change. We are appreciative that this committee is taking a fresh look at this issue. We believe the evidence suggests that the expansion of the amendment to include cable is unnecessary and unmerited to achieve the goals stated by the authors.

The proponents of the Torricelli amendment cited the rising cost of buying advertising time from broadcasters and broadcasters' use of the public airwaves as the basis for requiring broadcasters to provide below-market advertising rates to political candidates. However, by expanding the Torricelli amendment to cover cable, the authors failed to account for the significant differences in the actual cost of advertising on a broadcast station versus cable, the fact that cable does not use the public airwaves, and the abundance of electoral and public affairs political programming services provided by the cable industry.

During debate on the Senate Floor, supporters of the Torricelli amendment argued that campaign finance reform legislation must do more than just limit the supply of political money, it must also decrease the demand for money. While many Senators argued that some broadcasters increase advertising rates during periods when airtime for political candidates is critical, the cost for advertising on cable was not cited as a rationale for amending current law. In fact, there is nothing in the Senate record to suggest that cable systems have charged excessive rates to political candidates. Cable systems, like radio broadcasters, have long been viewed as a lower cost alternative for campaign and other advertisers.

Cable advertising is generally a more efficient and effective use of political ad dollars. At Cablevision, advertisements are telecast in a specific geographic area, targeting the message directly to the relevant constituents. Further, prices for purchasing time on our cable system are generally lower because the services reach a smaller geographic area. For instance, if a candidate is purchasing time on Cablevision's Brooklyn system, the price would be less than purchasing the advertising from a local broadcast station, which covers the entire tri-state area. Can-

didates also benefit by being able to customize the message of an advertisement to a smaller base of people. Using New York as an example, a candidate can develop one spot for the Bronx and then customize another spot for Brooklyn.

The second key argument advanced by proponents of the Torricelli amendment is that broadcasters were given the public airwaves for free. Proponents cite this free grant of spectrum as a rationale for requiring broadcasters to offer below-market advertising rates to political candidates. However, cable operators do not use the public airwaves and have built their entire distribution systems with private risk capital and without any federal subsidies. Cable systems are franchised at the state and/or local level and typically pay 5% of gross revenues totaling approximately \$2 billion in local franchising fees annually for use of public rights of way. In addition, cable operators are subject to a cable-specific public interest regime, including the provision of public, educational, government and leased access channels. In fact, the proceedings of local governmental bodies, such as city and county council meetings, are often made available to cable customers on government access channels, and cable operators, through local programming, often do regular series of public issues shows with elected officials.

The cable industry is committed to providing the broadest variety and most complete coverage of politics on television. During Election 2000, cable was the leading source of primary, convention and general election political news on the national, regional and local level. Public opinion surveys showed that between 1996 and 2000, cable replaced broadcast television as the prime source of political news for Americans.¹ Viewers turned in force to national 24-hour cable news and public affairs networks as well as local and regional networks for their election coverage.

On the local level and regional level, a growing number of cable channels provide viewers with a unique perspective on politics that only a neighborhood operation can do. There are about 30 regional cable news networks around the country. There are also several state public affairs networks, similar to C-SPAN, that provide gavel-to-gavel coverage of state legislatures. These channels bring government into millions of homes and give Americans direct access to the decision-making process.

At Cablevision, we have a variety of programs aimed at increasing the visibility and accessibility of candidates. For instance, Cablevision offers News 12 Networks to all of our subscribers. There are five News 12 networks that provide local programming for the Bronx, Connecticut, Long Island, New Jersey and Westchester. During the last election News 12 coverage included more than 100 debates between candidates for local offices, live election coverage of local races, numerous profiles of local candidates as well as political analysis of New York specific issues. In addition, in our Westchester service area, Cablevision offers candidates the opportunity to tape a three minute spot which is then aired four times a week during the three week period prior to the election.

News 12's award-winning Website also provides viewers access to the issues and candidate profiles at their convenience. News 12 not only covers the election season, the networks also cover local politics and policy issues on a regular basis. With public affairs shows like Long Island's "At Issue" and the Bronx's "Two Reporters and the Person of the Week," News 12 presents a local perspective on politics. News 12 Networks also produce town meetings where topics specific to its regions such as Lyme disease, affordable daycare, and racism are discussed in depth with local experts. Viewers participate by phone or by email.

On the national level, perhaps the best example of cable's commitment to full coverage of the political process is C-SPAN. The C-SPAN networks offer not only gavel-to-gavel House and Senate action, but also cover events at the White House, the cabinet and the judicial branch. C-SPAN is a private, non-profit company, created over 20 years ago by the cable industry to provide public access to the political process. C-SPAN receives no government funding and operations are paid for by the cable industry.

During the 2000 election, C-SPAN carried live gavel-to-gavel coverage of the major party conventions, served as a pool for all news media at the Republican and Democratic conventions, provided live coverage of the Presidential debates and comprehensive coverage of the House and Senate campaigns.

Other national cable networks providing complete political coverage include CNN, MSNBC, and Fox News Channel. These cable networks offered the most complete, varied and thorough coverage of the primary season, national conventions, Presidential debates and continuing election reports. In fact, during the 2000 election

¹ Peter Johnson, *We Vote With Our Eyes, and the Cable Guys Win*, USA Today, Dec. 12, 2000.

campaign cable TV provided 375 hours of coverage of the national conventions as compared with broadcast coverage of 25 hours.²

To conclude, the cable industry does not believe that changes in the campaign advertising rules are necessary. We continue to support the approach taken by current law that requires cable operators and television and radio broadcasters to charge legally qualified candidates for public office the best rate available for advertising time. Cable provides a lower cost alternative for political advertising and cable offers the best and most complete election news coverage available on television. There is clearly no rationale for including cable under the Torricelli scheme.

Mr. UPTON. Thank you.

Mr. Taylor.

STATEMENT OF PAUL TAYLOR

Mr. TAYLOR. Thank you, Mr. Chairman. I'm Paul Taylor, Founder and Director of the Alliance for Better Campaigns and I'm here today to testify in support of lowest unit charge amendment that was added to the McCain-Feingold Bill by a vote of 69 to 31 and is expected to be part of the bill that Representatives Shays and Meehan will introduce on the floor of the House next month.

The amendment will advance the cause of campaign finance reform by closing loopholes that have gutted a 30-year old law designed to ensure that during the height of the campaign season political candidates receive the same low advertising rates that broadcasters make available to their best high volume product advertisers.

The main thrust of the bipartisan campaign finance bill that's before Congress is to reduce the supply of political money. This amendment would work hand in glove by reducing the demand for political money. It would do so by cutting the cost of the most essential part of any campaign, the act of communicating to voters. In order for democracy to thrive, candidates need to deliver and citizens need to receive information that enables voters to make informed choices on election day. But in the modern era, communication has become enormously expensive and in the year 2000, political advertisers spent an estimated \$1 billion on broadcast television ads, five times more in inflation adjusted dollars than political advertisers had spent just 20 years earlier. One reason is that there are more political communicators than there used to be. In recent years, parties and issue groups have joined candidates as major campaign advertisers.

But a second reason is that television stations have exploited this election-related spike in ad time demand by jacking up their ad rates and they've done so because the lowest unit charge law has been rendered ineffective by two loopholes this Amendment is designed to close.

First, the Amendment would guarantee that when candidates receive low rates their ads would not be preempted if other advertisers are willing to pay more. That's not the case under current law. Now unlike most product advertisers, candidates need such assurances for they're engaged in the fast-paced thrust and parry of a political campaign. As matters now stand, they're forced to pay high premiums for such non-preemptable ad time.

² Source: CNN, C-SPAN, MSNBC, Fox News Channel and Martin P. Wattenberg, University of California, Irvine.

The second loophole is to require that stations pay the candidate rate to the lowest rate the station has sold a comparable spot in a comparable time during the previous 365 days, rather than just during the previous 60 days as is now the case. Now there's been some misunderstanding on this point and to clear this up. This would not guarantee lowest unit rate over 365-day period. It would just create a 365-day look back period to establish the lowest unit rate and as in current law, those lowest unit rates would only apply to the 60 days prior to the election or the 45 days prior to a primary.

Let me illustrate how the loopholes in the current law, affect the current law by walking you through the rates the candidates paid last fall to advertise on KYW-TV, a Philadelphia station owned and operated by CBS. There were a total of 1,922 candidate spots on KYW from September 4th through November 6th of last year. Of these, 1,913 or 99.5 percent were purchased at the non-preemptable rate, and the cost was on average 55 percent above the preemptable rate for the same spots.

Now I would suggest to you that a lowest unit charge law that delivers its cost reduction to just one half of 1 percent of its intended beneficiaries isn't working very well and KYW is by no means unique. Our group took an audit of 10 stations geographically dispersed around the country and we found that on average candidates spent 65 percent more for their 16,000 political ads, candidate ads that ran on those 10 stations than the lowest candidate rate published on those stations' own rate cards.

But the preemptability loophole is not the only reason that candidates paid so much. The other reason is that during the election season everybody's rates are going up, product and nonproduct advertiser, candidate and noncandidate preemptable and non-preemptable and my testimony lays out how that happens.

What we have now really is a vicious cycle. We have more money than ever coming into the political system. That creates the opportunity for more gouging by stations and the gouging generates the need for more money from political candidates and the broadcast industry, it seems to me is at the heart of this problem and they are also the ones, of course, who have been given the airwaves free of charge in return for a commitment to serve the public interest.

In my testimony I lay out several myths that have been propagated against this Amendment by the National Association of Broadcasters. The argument, for example, that it's an infringement in first and fifth amendment rights was addressed by a Congressional Research Memorandum that I hope has been distributed and I would ask that it be included in the record. It makes it clear that there is a 60-year history here of legislation, regulation and jurisprudence which supports this kind of public interest standard being imposed upon the broadcast industry.

Another myth is that this won't reduce the cost of advertising. It may actually increase the number of ads. Look, to make this point very explicit, under current law, stations are obligated to provide reasonable access to Federal candidates, but they are not obligated to provide unlimited access. The FCC takes into account a variety of factors such as the number of political races in a given media market, the number of candidates seeking to advertise the

needs and demands of a station's regular product advertisers to determine what reasonable access means on a case by case basis. That would continue to be the case under the new law.

In summary, in order to make our democracy more robust, our politics less money driven and our campaign system more sensible, I urge you to support this Amendment. And thank you very much for the time.

[The prepared statement of Paul Taylor follows:]

PREPARED STATEMENT OF PAUL TAYLOR, EXECUTIVE DIRECTOR, ALLIANCE FOR
BETTER CAMPAIGNS

My name is Paul Taylor. I am the founder and director of the Alliance for Better Campaigns, a public interest group that promotes political campaigns in which the best information gets to the most number of citizens in the most engaging ways.

I am testifying here today in support of the so-called "lowest unit charge" amendment that was added to the McCain-Feingold campaign finance bill in the Senate on March 21, 2001, by a vote of 69-31. Representatives Shays and Meehan have indicated they plan to include this amendment in the bill they bring to the House floor next month.

This amendment will advance the cause of campaign finance reform by closing loopholes that have gutted a 30-year-old law designed to ensure that during the height of the campaign season, political candidates receive the same low advertising rates that broadcasters make available to their best, high-volume product advertisers. The main thrust of the bipartisan campaign finance bills before Congress is to reduce the supply of political money; this amendment would work hand-in-glove by reducing the demand for political money.

It would do so by cutting the cost of the most essential part of any campaign—the act of communicating to voters. In order for democracies to thrive, candidates need to deliver—and citizens to receive—information that enables voters to make informed choices on election day.

But in the modern era, communication has become enormously expensive. In 2000, political advertisers spent an estimated \$1 billion on broadcast television ads, five times more in inflation-adjusted dollars than political advertisers had spent just 20 years earlier.

One reason is that there are more political communicators than there used to be—in recent years, parties and issue groups have joined candidates as major campaign advertisers. A second reason is that television stations have exploited this election-related spike in ad time demand by jacking up their ad rates. They have been able to do so because the 30-year-old lowest unit charge law has been rendered ineffective by two loopholes that this amendment is designed to close.

First, the amendment would guarantee that when candidates receive low rates, their ads will not be preempted if other advertisers are willing to pay more. That is not the case under current law. Unlike most product advertisers, candidates need such assurances, for they are engaged in the fast-changing thrust and parry of a political campaign. As matters now stand, they are forced to pay high premiums for such "non-preemptible" ad time.

The second loophole the amendment would close is to require that stations peg the candidate rate to the lowest rate the station has sold a comparable spot in a comparable time slot during the previous 365 days—rather than to the lowest rate in the 60 day period immediately preceding an election, as is now the case. This new 365 day "look back" provision will help insulate candidates from the profiteering that drives up everyone's ad rates during the pre-election period—political and non-political advertisers alike.

Let me illustrate the loopholes in the current law by walking you through the rates that candidates paid last fall to advertise on KYW-TV, a Philadelphia station owned and operated by CBS. It was one of 10 local stations across the country where Alliance researchers conducted a detailed examination of the political advertising sales records and compared them to the lowest unit charge prices quoted on the stations' own rate cards. (I request that our full report, "Gouging Democracy: How the Television Industry Profiteered on Campaign 2000," be made a part of the subcommittee's record.)

Candidates purchased a total of 1,922 spots on KYW-TV from September 4, 2000 through November 6, 2000. Of these, 1,913—or 99.5 percent—were purchased at the non-preemptible rate, at a cost that on average was 55 percent above the preemptible rate for the same spots. Now, I would suggest to you that a "lowest unit

charge” law that delivers its cost reductions to just one half of one percent of its intended beneficiaries isn’t working very well. And KYW-TV was by no means unique; it actually treated candidates slightly better than the average of the 10 stations we studied. Within that universe, candidates on average spent 65 percent more for their 16,000 ads than the lowest candidate rate published on the stations’ own rate cards.

But the preemptibility loophole was not the only reason candidates paid so much. The other factor was that during the election season, all rates on the stations’ rate cards were rising—preemptible and non-preemptible rates alike. So for example, on September 6, a preemptible 30-second spot on KYW-TV’s 11 o’clock news program cost \$1,100 and a non-preemptible spot cost \$1,800. By November 6, the preemptible spot cost \$1,701, and the non-preemptible spot cost \$2,393. The biggest reason for these increases was the campaign itself—the spike in demand for political air time allowed advertisers to raise their rates for both political and non-political advertisers. And nothing in current law held them back.

This kind of demand pressure was never anticipated by lawmakers when they passed the LUC in 1971. In the 1972 campaign, just \$25 million was spent on political ads on television. In today’s dollars, that’s the equivalent of \$100 million, or about one-tenth of what political advertisers spent in 2000. So what we have now is a vicious cycle—more political money creates the chance for more gouging, and more gouging generates the need for more political money. At the heart of this cycle is broadcast television—where candidates spend more than 80 cents of each advertising dollar.

Not only are broadcasters profiteering on political campaigns, they are doing so with airwaves they have been granted free of charge, in return for a commitment to serve the public interest. For thirty years, Congress has decreed that one way that broadcasters and cable system operators (and, since 1992, direct satellite providers) must serve the public interest is by reducing the cost of political communication.

Any system of price control tends over time to produce evasions and loopholes. If this amendment becomes law, it is safe to assume that the broadcast industry will look for new ways around it. For that reason, the Alliance believes that a better and more permanent solution to the problem of the high cost of modern political communication is a system of free air time vouchers, distributed to qualifying candidates and parties from a national political broadcast time bank funded by a small spectrum usage fee. That is a fight for another day. For now, the least Congress should do to address this problem is to fill the loopholes in the law it passed 30 years ago.

Finally, let me briefly address three myths about this amendment that National Association of Broadcasters and its state affiliates have been spreading.

Myth 1: The amendment is unconstitutional, both as an infringement of broadcasters’ First Amendment rights and as a “taking” of property without just compensation, in violation of the Fifth Amendment.

Reality: As a memorandum from the Congressional Research Service dated May 24, 2001 makes clear, there is a long line of Supreme Court decisions, stretching back more than half a century, that (a) uphold the government’s interest in assuring that the electromagnetic spectrum is used in ways that promote the public interest; (b) give precedence to the First Amendment principles served when public forums are provided that enhance the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process; and (c) assert that broadcasters do not have a property right when they are granted a license to operate the public airwaves. (I request that the CRS memorandum be made a part of the subcommittee’s hearing record).

Myth 2: Lowering the cost of candidate ads will simply mean that candidates will advertise more; it will not drive down the cost of campaigns.

Reality: Under law, stations are obligated to provide “reasonable access” to federal candidates for their campaign ads, but they are not obligated to provide unlimited access. The Federal Communications Commission takes into account a variety of factors—such as number of political races in a given media market, the number of candidates seeking to advertise, and the needs and demands of a station’s regular product advertisers—to determine what “reasonable access” means on a case-by-case basis. The courts have approved of this approach. If this amendment passes, the FCC would continue to apply these criteria, and in doing so would not allow for a dramatic increase in the volume of candidate advertising if the rule of reason does not support such an increase.

Myth 3: Broadcasters already give ample amounts of “free time” to candidates in the form of coverage of debates, conventions and the campaign itself.

Reality: In the past several decades, both the national broadcast networks and local television stations have sharply cut back their commitment to substantive campaign coverage, “forfeiting the field,” as veteran ABC reporter Sam Donaldson said early last year, to cable. Of 22 televised presidential debates held during the primaries last year, just two were aired on a national broadcast network, neither in prime time. Network coverage of the two national party conventions was down nearly 80 percent in 2000 from what it had been in 1980. Last fall, two of the major national networks for the first time chose not to carry the general election presidential debates; they aired sports and entertainment programs instead. And the industry ignored a modest proposal put forward by a blue ribbon White House advisory panel, co-chaired by CBS President Leslie Moonves, that all stations voluntarily air a minimum of five minutes a night of candidate discourse in the month preceding the election. A nationwide survey by the Annenberg School for Communication at the University of Southern California found that the typical local station aired just 45 seconds a night of candidate discourse in the month before the November 7 election. (I would request that the USC study be made a part of the subcommittee’s hearing record).

In order to make our democracy more robust, our politics less money driven and our campaign finance system more sensible, I urge Congress to support this amendment to close the loopholes in the lowest unit charge law. Thank you.

Mr. UPTON. Thank you.

Mr. Morris, if you wouldn’t mind moving that mike over.

STATEMENT OF DWIGHT L. MORRIS

Mr. MORRIS. Thank you, Mr. Chairman. I would like to begin by saying to you and other members of the committee that it’s an honor to be here this morning. I am here not as an advocate for either side of this debate. I’m here as someone who has studied how money is actually spent in campaigns for the better part of 12 years, first as an investigative reporter and editor for the Los Angeles Times and now as a businessman who services the news industry and studies these issues for them.

We have built a data base that contains roughly 5 million records, going back to 1990 of every dollar spent by every candidate to the House and Senate contests, who ultimately contested the general election. We have not had a chance to put into that data base all of the people that lost in primary. We simply haven’t had the resources to do it. But from the time they declare to the time the election season is over, we track every dollar spent by every candidate for Federal office.

What we have discovered over the last 12 years is that there is a huge myth and much of the discussion here this morning is predicated on the fallacious assumption that every single candidate must raise money in order to buy massive amounts of television time. That is simply not the case and I go through in some detail in my formal testimony why that’s true, but to summarize, many members represent urban districts where buying a 30-second spot reaches not only your constituents, but maybe 15 or 16 other congressional districts. It makes no economic nor political sense to advertise in those areas and they don’t. It’s been zero dollars and zero cents on advertising and they communicate with voters in persuasion mail.

Geographic and other types of gerrymandering. This is not something that you’re unfamiliar with as someone pointed out a few minutes ago. Those lines are currently being drawn now. As those lines are drawn the fight in those State legislatures is over how to create as many safe districts for the Republicans and Democrats as possible and so that in each and every election you have roughly

half of the Members of the House of Representatives who face opponents who spend no money and they spend no money because the parties give them no money. They have no prayer of victory and they can't raise the money, so that in the last election or this past election cycle, half of the incumbents seeking re-election to the House of Representatives faced people who spent zero or less than \$25,000. That did not mean that the people in those districts spent very little money as some of the charts in my testimony reveal.

And finally, campaign funds is a misnomer. These are really political funds. And as some of the members of this committee are well aware, money is spent on all kinds of things, some of which includes television advertising, but not nearly all of it. And that's true of Senate contests as well.

It will shock a lot of people to know that while 11 Senate seats, I'm sorry, 12 Senate seats were decided by 10 percentage points or less, there were 11 Senate seats that were decided by 30 percentage points or more. And in those Senate seats, there was not that great deal of advertising and I list some examples in the testimony, one of which is Senator Ted Kennedy from Massachusetts who faced an opponent who spent \$193,000 and Senator Kennedy spent nearly \$6 million. Out of that \$6 million, \$211,000 went to developing television advertising. There were none aired as far as we can tell. So that \$6 million and zero spent to air ads.

Senator Lott, \$4.3 million, but he gave \$730,000 of his money away and many Members of the House and some of the members on this panel do the same thing and there's nothing wrong with it and it's perfectly legal, not suggesting anything untoward, but the money goes to those candidates who need it and so the money comes into your committees and flows out to other Members of the House and Senate.

And again, I want to stress that none of this is meant in any way derogatory as to how the money is spent. It's simply meant to point out that the notion that all of this money is raised because you must buy more TV time just doesn't hold water.

I've listed in the testimony the dollars spent on broadcasts by the candidates and the percentage of that total and you'll notice that in Senator Kennedy's case it's 3.6 percent and in Senator Lott's case it's about 15 percent. In Senator Akaka's case it's a little less than 3 percent. And in the House, while I have listed a number of examples, 6 or 7 of which are members of this committee, that show that vast sums of money were spent and zero dollars was put into television, that only scratches the surface. I have a book here full of examples from the 1998 and we're just beginning the 2,000 cycle now, but it strikes me that it's improbable that it has changed any in the 2000 cycle. Thank you.

[The prepared statement of Dwight L. Morris follows:]

PREPARED STATEMENT OF DWIGHT L. MORRIS, PRESIDENT, CAMPAIGN STUDY GROUP

I would like to begin by saying that it is an honor to be here this morning. As someone who toiled in the world of daily journalism for more than 18 years—much of it spent as an investigative reporter and editor—this is a moment I could never have imagined. I hope that what I have to say will prove useful to this committee as it tackles a difficult and often misunderstood subject.

I would also like to say that I appear as a journalist, political scientist and businessman, not as an advocate for either side in the campaign finance debate. When my partner and I left daily journalism more than five years ago to form the Cam-

paign Study Group, we did not cease to be journalists. Neither our company nor we as individuals take a position on campaign finance reform. We continue to believe that our role is to collect and analyze information that will help inform the public debate.

That approach has helped add most of the nation's largest news organizations to our client list, either as subscribers to our Web site or as consumers of our custom research. That approach has also attracted national party committees from both sides of the aisle, as well as clients from both sides of the campaign finance reform debate.

While a full explanation of how we track campaign spending is contained in Appendix 1, you should know that we do not pick and choose the races we track in order to make a point. Since 1990, when we both worked at the Washington bureau of the Los Angeles Times, my partner and I have tracked every expenditure made by House and Senate candidates who ultimately contested the general election (we have not had the resources to track all those who lost in the primaries). That process has involved collecting more than 7,000 documents filed with the Federal Election Commission each election cycle, reading each of the roughly 500,000 discrete expenditures reported by the candidates from the day they began their quests for office, and coding each of those expenditures into 1 of 126 categories. That information now resides in a database that contains nearly 5 million records.

What emerges from that database is a picture of campaign spending that runs contrary to conventional wisdom for a host of reasons. Put simply, while the cost associated with television and radio advertising is part of the equation, it is only one among many reasons that campaigns cost what they do.

- Many members represent highly urban districts in which an investment in television and radio advertising makes neither economic nor political sense. For that reason, large numbers of candidates spend nothing on television and radio advertising, preferring to invest in what we refer to as persuasion mail.
- As a result of both the geographic gerrymandering that inevitably accompanies the decennial redistricting process and the power of incumbency, most House contests and a surprising number of Senate races are noncompetitive. That creates a disincentive to large investments in advertising and an incentive to spend money on broader political goals.
- The phrase "campaign funds" is largely a misnomer that is better described by the phrase "political funds," since a majority of members use their treasuries to pay for a host of activities that go far beyond their own immediate reelection.

SPENDING IN SENATE RACES

If one asked any 10 strangers on the street—or any ten journalists, for that matter—why Senate campaigns cost so much the answer would almost invariably be "television advertising." Certainly those who recently watched Sen. Jon Corzine (D-N.J.) spend \$40.1 million on commercials (63% of his campaign's total spending) that helped bring him victory in an open-seat contest could not be blamed for thinking that the cost of television is the main culprit in driving the cost of campaigns higher. Nor could observers of the open seat contest between Sen. Hillary Rodham Clinton (D-N.Y.) and former Rep. Rick Lazio (R-N.Y.)—who together spent roughly \$37.5 million to produce and air their commercials—be faulted for drawing the same conclusion.

However, while the media focuses on these races for obvious reasons and tends to write about them as though they represent the political norm, that could not be farther from the truth. The fact is that while many Senate campaigns are competitive, just as many are not. While twelve Senate contests were decided by 10 percentage points or less, in seventeen contests the margin of victory exceeded 20 percentage points, including eleven in which the margin of victory exceeded 30 percentage points.

Although thirteen incumbent Senators seeking reelection in 2000 spent 50 percent or more of their treasuries on television and radio advertising during the 2000 campaign, nine devoted one-third or less of their total outlays to such advertising. While these nine Senators spent a combined \$5.4 million on advertising, their total campaign spending topped \$32 million.

For example, during the recent Senate debate on campaign finance reform, no one mentioned that while Sen. Ted Kennedy (D-Mass.) spent \$5.9 million on his successful reelection bid, just \$211,928 of that sizeable total (3.5%) was devoted to the creation and airing of television and radio commercials. Overhead costs for the permanent campaign Sen. Kennedy runs 365 days a year, every year, totaled \$2.2 million. His campaign spent more than three times as much on payroll as it spent on advertising. The campaign's telephone bills totaled \$165,884. The campaign spent \$90,468

to lease and maintain an automobile—nearly half as much as his opponent spent on his entire campaign.

Sen. Trent Lott (R-Miss.), who I think it is safe to say is no friend of campaign finance reform, spent \$4.3 million on his 2000 reelection bid, but just 14 percent of that total was invested in television and radio advertising. Sen. Lott was challenged by Democrat Troy Brown, who spent only \$53,931 on the campaign. That left Sen. Lott free to donate \$730,600 of his campaign treasury to Republican Party committees and candidates. Sen. Lott spent more on constituent gifts and entertainment—\$68,340—than Mr. Brown spent on his entire campaign. Sen. Lott's reimbursements to corporations for the use of their private jets to ferry him to and from fund-raising and other political events totaled \$166,398, or more than twice his opponent's total campaign outlays.

Other Senators appear to spend money on television and radio advertising simply because they can, not because they need to. For example, with then-Governor George W. Bush seeking the Presidency, Texas Democrats did not bother to field a competitive challenge to Republican Sen. Kay Bailey Hutchison. Nevertheless, while Gene Kelly spent just \$4,602 trying to unseat her, Sen. Hutchison countered with a \$4.1 million effort, including a \$2.5 million advertising campaign (60% of her total budget).

None of this is meant to single out Sen. Kennedy, Sen. Lott, or Sen. Hutchison. Nor am I suggesting that they did anything wrong in opting to spend money as they did. It is simply important to note that huge sums of campaign dollars are spent on a host of things, including, but not limited to, advertising. It is also important to note that none of this is new, but rather that it has followed roughly the same pattern for the past decade.

In 1998 twenty-nine Senate incumbents poured \$73 million into television and radio advertising. Senate challengers pumped nearly \$51 million into their own broadcast advertising campaigns, and with open seat candidates tossing in another \$15 million, total broadcast advertising outlays by Senate candidates topped \$138 million—a \$46 million increase over 1992.

Yet, as staggering as those numbers are, the typical Senate candidate's budget broke down very much like it did in 1992. The median percentage invested in television and radio commercials was 41 percent—just as it was in 1992. Put another way, while the amount spent by Senate candidates on television and radio advertising has skyrocketed since 1990, the percentage of total spending represented by those ads has remained remarkably constant.

Below are all 2000 Senate candidates with their total spending and their television and radio advertising outlays.

Candidate	Status	Total Spending	Broadcast Advertising	Broadcast Percent
Jon Kyl (R-Ariz.)	Incumbent	\$2,720,966	\$1,227,176	45.10
Dianne Feinstein (D-Calif.)	Incumbent	\$11,604,749	\$5,126,440	44.18
Joseph Lieberman (D-Conn.)	Incumbent	\$4,398,341	\$419,635	9.54
William Roth (R-Del.)	Incumbent	\$4,422,348	\$2,177,819	49.25
Zell Miller (D-Ga.)	Incumbent	\$2,517,702	\$1,910,144	75.87
Daniel K. Akaka (D-Hawaii)	Incumbent	\$628,976	\$15,521	2.47
Richard G. Lugar (R-Ind.)	Incumbent	\$4,889,576	\$2,697,589	55.17
Spencer Abraham (R-Mich.)	Incumbent	\$14,415,920	\$7,961,319	55.23
Edward M. Kennedy (D-Mass.)	Incumbent	\$5,881,765	\$211,928	3.60
Paul S. Sarbanes (D-Md.)	Incumbent	\$1,891,258	\$1,002,696	53.02
Olympia J. Snowe (R-Maine)	Incumbent	\$2,318,741	\$810,149	34.94
Rod Grams (R-Minn.)	Incumbent	\$7,523,708	\$1,998,051	26.56
John Ashcroft (R-Mo.)	Incumbent	\$9,742,579	\$5,568,434	57.16
Trent Lott (R-Miss.)	Incumbent	\$4,260,678	\$631,080	14.81
Conrad Burns (R-Mont.)	Incumbent	\$4,989,872	\$2,438,074	48.86
Kent Conrad (D-N.D.)	Incumbent	\$2,563,713	\$1,399,739	54.60
Jeff Bingaman (D-N.M.)	Incumbent	\$2,929,932	\$979,008	33.41
Mike DeWine (R-Ohio)	Incumbent	\$6,527,687	\$3,247,604	49.75
Richard J. Santorum (R-Pa.)	Incumbent	\$12,826,761	\$6,290,145	49.04
Lincoln Chafee (R-R.I.)	Incumbent	\$2,226,935	\$1,277,364	57.36
Bill Frist (R-Tenn.)	Incumbent	\$6,930,932	\$2,607,737	37.62
Kay Bailey Hutchison (R-Texas)	Incumbent	\$4,091,429	\$2,455,278	60.01
Orrin Hatch (R-Utah)	Incumbent	\$3,462,034	\$517,210	14.94
Charles S. Robb (D-Va.)	Incumbent	\$6,778,099	\$4,539,343	66.97
James M. Jeffords (R-Vt.)	Incumbent	\$2,040,290	\$498,653	24.44
Slade Gorton (R-Wash.)	Incumbent	\$6,945,101	\$3,549,466	51.11

Candidate	Status	Total Spending	Broadcast Advertising	Broadcast Percent
Herb Kohl (D-Wis.)	Incumbent	\$5,535,630	\$3,385,991	61.17
Robert C. Byrd (D-W.Va.)	Incumbent	\$1,239,838	\$629,004	50.73
Craig Thomas (R-Wyo.)	Incumbent	\$973,058	\$191,676	19.70
William Toel (I-Ariz.)	Challenger	\$21,493	\$6,054	28.17
Tom Campbell (R-Calif.)	Challenger	\$4,527,167	\$1,809,135	39.96
Philip Giordano (R-Conn.)	Challenger	\$816,624	\$272,005	33.31
Thomas R. Carper (D-Del.)	Challenger	\$2,565,838	\$1,539,226	59.99
Mack Mattingly (R-Ga.)	Challenger	\$1,019,524	\$662,653	65.00
John S. Carroll (R-Hawaii)	Challenger	\$22,407	\$4,000	17.85
David L. Johnson (D-Ind.)	Challenger	\$1,173,299	\$736,649	62.78
Debbie Stabenow (D-Mich.)	Challenger	\$8,013,758	\$4,478,402	55.88
Jack E. Robinson (R-Mass.)	Challenger	\$193,199	\$—	0.00
Paul Rappaport (R-Md.)	Challenger	\$148,594	\$49,175	33.09
Mark Lawrence (D-Maine)	Challenger	\$743,174	\$309,598	41.66
Mark Dayton (D-Minn.)	Challenger	\$11,957,115	\$7,722,091	64.58
Mel and Jean Carnahan (D-Mo.)	Challenger	\$7,702,160	\$3,527,276	45.80
Troy Brown (D-Miss.)	Challenger	\$54,022	\$6,243	11.56
Brian Schweitzer (D-Mont.)	Challenger	\$2,012,419	\$1,201,360	59.70
Duane Sand (R-N.D.)	Challenger	\$369,654	\$124,068	33.56
Bill Redmond (R-N.M.)	Challenger	\$655,594	\$29,513	4.50
Ted Celeste (D-Ohio)	Challenger	\$515,286	\$31,714	6.15
Ron Klink (D-Pa.)	Challenger	\$3,641,097	\$2,150,091	59.05
Bob Weygand (D-R.I.)	Challenger	\$2,291,469	\$1,210,271	52.82
Jeff Clark (D-Tenn.)	Challenger	\$173,217	\$12,082	6.98
Gene Kelly (D-Texas)	Challenger	\$4,654	\$—	0.00
Scott N. Howell (D-Utah)	Challenger	\$296,842	\$166,745	56.17
George Allen (R-Va.)	Challenger	\$9,894,904	\$5,650,709	57.11
Ed Flanagan (D-Vt.)	Challenger	\$1,094,078	\$426,996	39.03
Maria Cantwell (D-Wash.)	Challenger	\$11,538,133	\$7,007,000	60.73
John Gillespie (R-Wis.)	Challenger	\$603,858	\$83,205	13.78
David T. Gallaher (R-W.Va.)	Challenger	\$—	\$—	0.00
Mel Logan (D-Wyo.)	Challenger	\$4,188	\$3,060	73.07
Bill Nelson (D-Fla.)	Open-Seat	\$6,674,656	\$5,043,704	75.57
Bill McCollum (R-Fla.)	Open-Seat	\$8,798,354	\$4,687,966	53.28
Hillary Rodham Clinton (D-N.Y.)	Open-Seat	\$29,595,761	\$16,530,095	55.85
Rick Lazio (R-N.Y.)	Open-Seat	\$43,038,453	\$20,935,067	48.64
Ben Nelson (D-Neb.)	Open-Seat	\$2,988,285	\$1,607,266	53.79
Don Stenberg (R-Neb.)	Open-Seat	\$1,828,965	\$1,024,468	56.01
Jon Corzine (D-N.J.)	Open-Seat	\$63,202,492	\$39,999,560	63.29
Bob Franks (R-N.J.)	Open-Seat	\$6,595,862	\$2,913,225	44.17
John Ensign (R-Nev.)	Open-Seat	\$4,988,054	\$2,665,726	53.44
Ed Bernstein (D-Nev.)	Open-Seat	\$2,446,048	\$1,570,727	64.21

SPENDING IN HOUSE CONTESTS

In the House, 197 incumbents—roughly half of those seeking reelection—either ran unopposed or faced challengers who spent less than \$25,000 in 2000. Eighty-three incumbents won reelection with 80 percent of the vote or more—one out of every five incumbents seeking reelection—and those 83 incumbents raised more than \$49 million and spent nearly \$38 million of that total. In these races, television advertising was certainly not the issue.

With the availability of large sums of campaign money, most incumbents spend at least some money to entertain or thank constituents. Whether it is providing a meal at the House restaurant for visitors to Washington, purchasing wedding gifts when invitations arrive, mailing thousands of holiday cards, sending flowers to commemorate the death of a constituent, or some other action, the money almost always comes from the campaign treasury.

Others use their campaign funds to lay the groundwork for future bids for other offices. For example, former Rep. Joseph P. Kennedy II (D-Mass.) routinely spent between \$750,000 and \$1 million on his reelection bids even though 80 percent of the voters in his district were registered Democrats and he never received less than 79 percent of the vote in any reelection contest. With the exception of his last House race in 1996, when he was about to declare his candidacy for Governor, Rep. Kennedy never spent a cent on television or radio advertising.

When members find themselves under ethical or legal scrutiny, it is common to pay for the associated legal bills with their campaign treasury. Former Rep. Daniel

Rostenkowski (D-Ill.) spent \$1.3 million of campaign money to pay for legal expenses that he and his staff incurred during the investigation that contributed to his defeat and ultimate criminal conviction.

Most members of Congress give away at least some of their campaign funds, and many donate huge proportions of their treasuries. During the 2000 election cycle, more than \$34 million given by individual donors and Political Action Committees (PACs) to support federal candidates across the country ended up benefiting party committees and other federal candidates for whom the money was never intended. Democratic candidates donated \$16.5 million to other candidates and party committees. Republican candidates gave away \$17.8 million.

- Republican Jose A. Suero spent just \$410 on his way to collecting 9 percent of the vote against Rep. Charles B. Rangel (D-N.Y.). Rep. Rangel spent slightly more than \$2 million during his campaign to secure a 15th term. He simply gave away \$620,000, or 31% of that total, to federal committees and candidates, including \$350,000 to the Democratic Congressional Campaign Committee (DCCC), \$51,500 to the New York state Democratic Party, and \$30,000 to the Congressional Black Caucus. Ninety-six Democratic House and Senate candidates received donations ranging from \$500 to \$4,000 from Rep. Rangel's campaign committee.
- First elected to represent Connecticut's 3rd District in 1990 and never reelected with less than 66 percent of the vote, Democrat Rosa DeLauro spent \$646,322 to defeat Republican June Gold, who managed to spend \$73,864. However \$364,250 of DeLauro's outlays, representing 56 percent of her total spending, was donated to federal committees and candidates. In addition to giving \$151,000 to the DCCC and \$26,000 to the Connecticut Democratic Party, her campaign committee wrote checks to 112 candidates and 7 other party committees.
- Rep. Robert T. Matsui (D-Calif.) has not faced a serious challenge since he was first elected in 1978. Nevertheless he spent \$748,737 on his latest reelection bid. Little was needed for direct appeals to voters, so he donated nearly half of it—\$347,190—to fellow Democratic candidates, party committees and political action committees, including \$304,000 to the DCCC.
- Turning to the Republican side of the aisle, Rep. Chris Cox spent \$1,164,850 during the 2000 campaign, \$782,700 of which was donated to Republican candidates and party committees. In addition to donating \$701,000 to the National Republican Congressional Committee (NRCC), he tapped his campaign treasury to support 52 Republican candidates.
- House Majority Leader Richard K. Armey (R-Texas) had little to worry about. Consistently reelected by huge margins and facing a Democratic opponent who failed to raise or spend as much as \$5,000, he donated slightly more than half of the \$1,125,103 his campaign spent. All but \$3,500 of the \$603,500 Rep. Armey donated through his campaign committee went to the NRCC.
- Rep. Jerry Lewis (R-Calif.) gave away \$329,849, which accounted for 42% of the \$787,333 his reelection committee spent. In addition to the \$240,000 it donated to the NRCC, his campaign committee cut checks ranging from \$1,000 to \$3,000 to 61 Republican House and Senate candidates.

Again, these examples are illustrative of a broad pattern of spending followed by many House members who routinely face little or no opposition.

Harkening back to our first study in 1990, the average House incumbent spent just 20 percent of his or her campaign treasury on television and radio advertising. The typical challenger devoted 27 cents out of every dollar to television and radio commercials, while the average open-seat candidate spent 36 cents out of every dollar on such ads. These figures include not only the cost of airtime but all consulting and production costs associated with the commercials. Both incumbents and challengers spent significantly more on office overhead—rent, staff costs, telephones, leased automobiles, travel, etc.—than they spent on their commercials.

Driven largely by redistricting and a wave of anti-incumbent sentiment generated in part by news reports about members' use of their accounts at the House bank, the typical House incumbent spent 25 cents out of every dollar on television and radio advertising in 1992. The comparable figures for challengers and open-seat contestants were 33 percent and 30 percent, respectively. Incumbent spending on overhead continued to outpace spending on radio and television advertising. Among challengers, advertising outlays outpaced overhead expenses by a total of only about \$6 million.

Although the total dollars invested in campaigns has exploded since 1992, the percentage of that total spending accounted for by television and radio advertising has remained essentially constant. While the media focuses almost exclusively on the 40 to 50 hot races across the country each cycle, the examples below are just a few

of the examples of the incumbents who spent large sums of money during the 1998 election cycle but invested relatively little or nothing in television and radio advertising.

Candidate	Status	Total Spending	Broadcast Advertising	Broadcast Percent
Charles W. "Chip" Pickering (R-Miss.)	Incumbent	\$509,629.00	\$76,421.00	15.00
George Radanovich (R-Calif.)	Incumbent	\$441,457.00	\$—	0.00
Cliff Stearns (R-Fla.)	Incumbent	\$189,424.00	\$—	0.00
Nathan Deal (R-Ga.)	Incumbent	\$223,972.00	\$—	0.00
Christopher Cox (R-Calif.)	Incumbent	\$1,416,514.00	\$—	0.00
J. Greg Ganske (R-Iowa)	Incumbent	\$529,820.00	\$2,000.00	0.37
Henry A. Waxman (D-Calif.)	Incumbent	\$275,209.00	\$—	0.00
Diana Louise Degette (D-Colo.)	Incumbent	\$700,504.00	\$190,252.00	27.16
John D. Dingell (D-Mich.)	Incumbent	\$845,465.00	\$—	0.00
Chris John (D-La.)	Incumbent	\$197,804.00	\$100.00	0.05
W. J. "Billy" Tauzin (R-La.)	Incumbent	\$765,905.00	\$2,887.00	0.37
James E. Rogan (R-Calif.)	Incumbent	\$1,247,527.00	\$—	0.00
Howard L. Berman (D-Calif.)	Incumbent	\$707,302.00	\$100,832.00	14.26
Nancy Pelosi (D-Calif.)	Incumbent	\$514,991.00	\$—	0.00
David J. Weldon (R-Fla.)	Incumbent	\$505,886.00	\$60,407.00	11.94
Henry J. Hyde (R-Ill.)	Incumbent	\$513,992.00	\$17,418.00	03.39
John E. Porter (R-Ill.)	Incumbent	\$488,779.00	\$—	0.00
Nita M. Lowey (D-N.Y.)	Incumbent	\$930,323.00	\$—	0.00
Rod R. Blagojevich (D-Ill.)	Incumbent	\$323,990.00	\$30,343.00	09.37
Pete Stark (D-Calif.)	Incumbent	\$313,214.00	\$—	0.00

APPENDIX I

CAMPAIGN STUDY GROUP CAMPAIGN SPENDING ANALYSIS GUIDELINES

Copies of each campaign's financial reports were obtained from the FEC and entered into a database under 1 of 126 categories.

In calculating expenditure totals, transfers from authorized committees, payments of debts from prior election cycles, contribution refunds, and loan repayments have been excluded in order to avoid double counting expenditures. All debts to vendors reported at the end of each election cycle have been included in that cycle's totals.

The expenditures were subsequently assigned to one of eight major spending categories. Five categories were broken further into specific areas of spending. The following is a description of the categories and the types of items included in each.

Overhead

Office furniture/supplies: Furniture and basic office supplies, telephone answering services, messenger and overnight delivery services, monthly cable television payments, newspaper and magazine subscriptions, clipping services, payments for file storage, small postage and photocopying charges, office moving expenses, and improvements or upkeep of the office (including office cleaning, garbage pickup, repairs, plumbers, and locksmiths).

Rent/utilities: Rent and utility payments for campaign offices. Purchases and leases used as mobile offices, as well as their maintenance costs, are also included.

Salaries and payroll taxes: Salary payments, payroll taxes and employee benefits including health insurance. In addition to payments specifically described as salary and payroll taxes, this category includes regular payments to those people who performed routine office tasks, which were frequently misrepresented in campaign finance reports as "consulting." Whenever a housing allowance was part of a campaign employee's compensation package, it was considered to be salary.

Taxes: Income taxes paid on the campaign's investments.

Bank/investment fees: Interest payments on outstanding loans, annual credit card fees, check charges, investment fees, and investment losses.

Lawyers/accountants: Fees paid for their services as well as any other expenses incurred by the campaign's lawyers and accountants. Five Senate and thirty-one House campaigns paid fines related to violations of federal or state election laws, and those fines have been included as part of legal fees.

Telephone: Purchases of telephone equipment (including cellular telephones and beepers), monthly payments for local and long-distance service, installation fees, repairs, and reimbursements to staff for telephone expenses.

Campaign automobile: All payments for the purchase or lease of a campaign vehicle (except mobile offices), maintenance, insurance, registration, licensing, and gasoline.

Computers/office equipment: All payments related to the purchase, lease, and repair of office equipment, such as computer equipment and software, typewriters, photocopiers, FAX machines, telephone answering machines, televisions, radios, and VCRs.

Travel: All general travel expenses, such as air fare and hotels, rental cars, taxis, daily parking, and entries such as "food for travel." Expenses for the national party conventions, including the costs of receptions and other entertainment, are also included.

Food/meetings: Meeting expenses (for example, steering committees, finance committees, state delegations) and other food costs not specifically related to fund raising, constituent entertainment, or travel.

Fund Raising

Events: All costs related to fund-raising events, including invitations, postage, planning meetings, travel costs, room rental, food and catering costs, liquor, flowers, bartenders, follow-up thank-you cards, in-kind fund-raising expenses, general reimbursements to individuals for fund-raising, tickets to sporting or theater events that served a fund-raising purpose, and fees paid to consultants who planned the events.

Direct mail: All costs related to fund-raising solicitations via the mail, including the purchase of mailing lists, computer charges, postage, printing, caging services, and consultant fees and expenses. Mailings that served a dual purpose, both to raise funds and inform voters, were included in this category.

Telemarketing: All expenses related to a telephone operation designed to raise money, including consultant fees, list purchases, and computer costs.

Polling

All polling costs, including payments to consultants as well as in-kind contributions of polling results to the campaign.

Advertising

Electronic media: All payments to consultants, separate purchases of broadcast time, and production costs associated with the development of radio and television advertising.

Other media: Campaign videos; payments for billboards; advertising in newspapers, journals, magazines, and publications targeted to religious groups, senior citizens, and other special constituencies; as well as program ads purchased from local charitable and booster organizations.

Other Campaign Activity

Persuasion mail/brochures: All costs associated with strictly promotional mailings and other campaign literature, including artwork, printing of brochures or other literature, postage, the purchase of mailing lists, as well as consultant fees and consultant expenses.

Actual campaigning: Filing fees and costs of petition drives, announcement parties, state party conventions, campaign rallies and parades, campaign training schools, opposition research, posters, signs, buttons, bumper stickers, speech writers and coaches, get-out-the-vote efforts, election day poll watchers, and all campaign promotional material (T-shirts, jackets, hats, embossed pencils, pens, nail files, pot holders, etc.). Fees and expenses billed by campaign management firms and general consultants for services unrelated to advertising, fund-raising, and persuasion mail are also included.

Staff/volunteers: All food expenses for staff and volunteers, including phonebank and get-out-the-vote volunteers. These expenses included bottled water, soda machines, monthly coffee service, and food purchases that are specifically for the campaign office. Also included were expenditures for recruitment of volunteers, gifts for staff and volunteers, and staff retreats.

Constituent Gifts/Entertainment

Meals purchased for constituents, the cost of events that were designed purely for constituent entertainment (for example, a local dominos tournament), constituent gifts of all kinds, flowers, holiday greeting cards, awards and plaques, inaugural parties, and costs associated with the annual congressional art contest.

Donations

To candidates (both in-state and out-of-state): Direct contributions to other candidates as well as the purchase price of fund-raiser tickets.

To civic organizations: Contributions to charitable organizations, such as the American Cancer Society, as well as local booster groups, such as the Chamber of Commerce and local high school athletic associations. Includes the cost of tickets to events sponsored by such groups.

To ideological groups: Contributions to ideological organizations, such as the NAACP, the National Organization for Women, and the Sierra Club.

To political parties: Contributions to national, state, and local party organizations, including tickets to party-sponsored fund-raising events.

Unitemized Expenses

Candidates are not required to report expenditures of less than \$200, and many do not list them on their FEC reports. This category also includes expenditures described in FEC reports merely as "petty cash," unitemized credit card purchases, and all reimbursements that were vaguely worded, such as "reimbursement," "political expenses," or "campaign expenses."

APPENDIX II

Campaign Study Group (CSG) is a for-profit consulting firm specializing in campaign finance research and public opinion analysis. Formed in January, 1996 by Dwight L. Morris, former Editor For Special Investigations at the *Los Angeles Times*, and Murielle E. Gamache, former Senior Editorial Researcher at the *Los Angeles Times* Washington Bureau, CSG is dedicated to providing its media clients with pristine data and cutting-edge political analysis.

Since its inception, CSG has helped inform political coverage provided by *The New York Times*, the *Los Angeles Times*, *The Washington Post*, the *Chicago Tribune*, *The Boston Globe*, *USA Today*, the *New York Daily News*, the *Saint Louis Post-Dispatch*, the *Minneapolis Star Tribune*, the *Raleigh News & Observer*, the *Fresno Bee*, the *Sacramento Bee*, the *Modesto Bee*, the *Philadelphia Inquirer*, *The Columbus Dispatch*, the *San Jose Mercury News*, the *Albuquerque Journal*, *The Hartford Courant*, the Associated Press, Reuters America, CBS News, Cable News Network, ABC News, NBC News, KPNX-TV in Phoenix, WCCO-TV in Minneapolis, KOAA-TV in Colorado Springs, WFLA-TV in Tampa, and the Medill News Service.

CSG has also become a major supplier of campaign finance information to political party committees, labor unions, trade organizations, and interest groups. Our campaign finance data is used as a teaching tool in journalism and political science classes at major universities throughout the country, including Northwestern University, Indiana University, the University of North Carolina and Arizona State University.

The firm's major survey research projects include:

- b nationwide study of community involvement and volunteerism conducted for the Pew Partnership for Civic Change
- Two groundbreaking studies examining the political and social attitudes of non-voting Americans. The first of these was conducted in 1996 for the Medill School of Journalism and WTTW-TV in Chicago with funding provided by the John D. and Catherine T. MacArthur Foundation. The second, undertaken for the Medill School of Journalism with funding provided by the Pew Foundation, was conducted following the 2000 presidential election.
- Two surveys dissecting the political attitudes and behavior of 18-to-24 year-old Americans. Funded by the Pew Foundation, these surveys were part of a year-long effort by the Medill School of Journalism to cover the 2000 presidential election in ways that would engage young voters.
- A nationwide survey of Americans 55 years and older for Northwestern University's Newspaper Management Center.
- A survey of senior newspaper editors conducted for the Associated Press Managing Editors Association, the Pew Center for Civic Journalism, and the National Conference of Editorial Writers.

Mr. Morris, CSG's president, began his news career at *The New York Times*, where he served for six years as special projects coordinator and field director of the New York Times/CBS News Poll. In January 1984, he joined Louis Harris & Associates, where he became a vice president responsible for research commissioned by the firm's telecommunications clients.

Mr. Morris also served for two years as vice president of Opinion Research Corporation before returning to the news business as Assistant Managing Editor for Special Projects at the *Atlanta Journal-Constitution*. While in Atlanta, he established the paper's in-house polling operation and coordinated the computer analysis for a ground-breaking study of redlining by Atlanta banks. The series, dubbed "The Color Of Money," won the 1989 Pulitzer Prize for investigative reporting.

Named Editor For Special Investigations at the *Times* Washington bureau in December, 1989, Mr. Morris designed the first-ever study of how money is spent in House and Senate campaigns, which the paper nominated for a Pulitzer Prize in 1991. That project gave rise to the *Handbook of Campaign Spending*, a race-by-race analysis of House and Senate campaigns, which was published by Congressional Quarterly Books following the 1990 and 1992 elections.

Ms. Gamache, CSG's research director, joined the *Los Angeles Times* Washington Bureau's special investigations unit in 1990, where she managed the research team responsible for campaign finance projects. Among other projects she helped design and execute were studies examining the impact of Defense Department downsizing, the Resolution Trust Corporation's efforts to dispose of assets acquired following the collapse of the Savings & Loan industry, Medicare funding issues, and travel abuses by Clinton cabinet officers. The latter project was nominated for a Pulitzer Prize in 1996.

Mr. UPTON. Thank you.

Thank you, Panel. To begin questions, we're going to rotate between the two sides of the aisle, but to start we'll recognize the chairman of the full committee, Mr. Tauzin.

Chairman TAUZIN. Thank you, Mr. Chairman. Let me first, Mr. Morris, concur with you on the points you make that an awful lot of the funds that are raised in campaigns is not spent on broadcast media messages of any type. By the way, I'm looking at your charts and it occurs to me that unfortunately because everyone sees the total amount spent, they lose track of several important parts of the campaign, the first part is the cost of raising that money which is an expenditure listed in the campaign as an expenditure, when it really is money that doesn't come to the campaign. It's actually money that is spent to put on the functions or the events or the travel costs, whatever else may go into a fundraising event. I had one in New Orleans this weekend. It gets pretty expensive when you've got to put on a nice show in New Orleans. I promise you that.

Mr. UPTON. But it is a nice show.

Chairman TAUZIN. It is a nice show. It was that. We had a good time.

Second, a lot of the money that is raised in our campaigns is money donated to the parties and it shows up in expenditures when it really is donated to the parties for other candidates and some of it is directly to candidate's campaigns, so there's a lot of confusion about how much is really spent in an election.

As you point out using Mr. Kennedy as an example, an awful lot of campaigning is really 365 day a year operation. I maintain an office in my District, a political office with paid personnel year round to constantly do campaign functions and campaign work and political function and fundraising, etcetera. Many Members, particularly incumbents, obviously, do this.

The other point I want to make is that your chart doesn't take into account that in some cases there are no opponents. Why would you spend a lot of money on campaigning? In the year, I think, 1998 you show in the chart, that was a year, for example, where I faced no opponents, so the money spent in advertising was to say thank you. It didn't require a lot. And a lot of, a great many differences in the way money is spent in a campaign and unfortunately when you just look at a raw report, you think wow, just a small percent went into advertising. The truth is it's a year-round operation. When you look at the money spent in the campaign, in

the weeks before a campaign, I think maybe that's a better judge of what percent goes into political advertising as opposed to ground operations and whatever else may occur, mailings, what have you, in a particular campaign.

The other point I want to make quickly was one more of philosophy and I'd like any of your comments. There's a neat think about the American political system that may separate us from a lot of countries to our south and countries to the east of us. And that is in our political structure, we generally count on the people in a 2 and 4 and 6-year cycle to recreate their government.

There are many systems that literally provide all kind of government funding for campaigns and free time on media. I was in Brazil and they've got some elaborate system where every candidate has free time on television and media and everyone takes advantage of it and nobody watches it. It's just lost space on the spectrum. And as I looked at it, it was an absolute mess, but it was an attempt by government to provide the means by which government would be recreated in a democratic process. I'd like your thoughts on that. The one thing that separates us from a lot of those countries is that we still depend upon people to decide who they like as candidates and who they're going to give their time to and their dollars to support in terms of the next recreation of our government, whether it's a 2-year cycle in the House or a 4-year cycle in many of the State offices or a 6-year cycle for the Senate, a 4-year cycle for President.

People generally are in the process of picking and choosing with the time they give and the money they give in a campaign and the votes they cast, the people they'd like to see running the government because they like what they stand for or not.

Isn't that something worth preserving and shouldn't we be very careful about amending laws to put the government in the process of deciding who can speak and when they can speak and how much they can speak and who's got to provide them a forum and who can't?

Does anyone want to comment on that? Mr. Taylor?

Mr. TAYLOR. Mr. Chairman, I couldn't agree with you more. In order for the people to recreate their government every 2, 4 or 6 years, they need information upon which to cast an informed vote.

This issue came before the Courts when the reasonable access provision which goes right to what you're talking about was challenged and there was a ruling in 1981, CBS versus FCC, where the Court said that reasonable access promotes first amendment principles by enhancing the ability of candidates to present and citizens to receive the information necessary for the effective operation of the democratic process.

For better or worse, the most important medium of communication in our society is television, has been since its infancy, remains the most important medium today despite the amazing proliferation of other medium. This is the way most citizens get their information. And if you raise the bar for getting on so high that candidates can't get on, you're creating one kind of problem and this Amendment would go toward lowering that bar a little bit, ultimately to getting more information to citizens which is exactly what you're talking about.

Chairman TAUZIN. Except that it does put the government in a position of making some preliminary decisions about how people access a political campaign, how they get a message to voters and in a sense because the government is providing the spectrum to the broadcasters, in a sort of a civil contract, that they're going to broadcast over the air, free television to people, that we're into content.

Mr. TAYLOR. We're into forum. We're saying that this thing that we as a people own, this spectrum, whether it's a physical thing or not, is among the most precious resources we have and 70 days of legislation and regulation and jurisprudence has said we need to operate that in a way that—

Chairman TAUZIN. My only concern is that it is akin to using government assets, public airwaves, public people. It's like taxes or government assets and buildings and public broadcasting is partially a public asset. It's akin to saying when you use public assets to help recreate the next government and I just raise that as a real, I hope, point of concern that—we can tiptoe our way into a situation I see other countries in where the government is more and more involved in the recreation of the next round of the government and the people end up having less and less to do with it as they go down the line.

We made a pretty good break from all that when we declared, our Founding Fathers did, and they went through some rather arduous times to present us with this country, they basically said no, this is going to be a government of, by and for the people, not of, by and for the government. And the government should have less and less, not more and more to do with the next round of elections. I just worry about that consistently. I know my time is up, but if anyone wants to respond to that?

Ms. BEVIER. Could I just say one thing, please? I think your point is absolutely on the money, excuse the pun. But I do think that one of the aspects of the Torricelli Amendment is that is the most troublesome is that it, in fact, represents in effect a closing off of avenues to change for other groups for independent advocacy groups, or anything other than Federal candidates and so not only is the government getting in and going to monitor very carefully what you do as a broadcaster, but also it's going to keep other people out and I think that's extremely troublesome in a free country.

Chairman TAUZIN. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman. Mr. Taylor, the Torricelli proposal goes back in time 365 days in order to determine what the lowest rate would be. The sense is that, as I take it, that the industry ramps up the prices immediately before the election, so you have to get back to some point of time that makes the price more accessible to candidates who clearly don't have the wealth that corporate America would have in those time periods.

Is there some way we can play with the 365-day period? Is there some other way in which you're contemplating that the problem could be solved without using a 1-year timeframe?

Mr. TAYLOR. Well, the Senate, in its wisdom, 69 Members of the Senate voted for an amendment that includes those 365 day look back provision. I would point out an unusually bipartisan group, 22

of the Senate's Republicans voted for this Amendment, so it was their belief that this was the most effective way to assure that the original intent of the lowest unit charge is served.

I have heard people suggest that that rate, that that look back period be reduced somewhat to, for example, 180 days. I don't pretend to be an expert in all the nuances of how advertising is bought and sold. Clearly, there is a seasonal pattern to it and if it was felt that this was a more manageable number, it seems to me as an informed layman, let me call myself, that 180-day look back would also substantially achieve the objectives of this amendment.

Mr. MARKEY. Mr. Sander, you're opposed to the Torricelli Amendment. What do you support? What do you believe the broadcasters have a responsibility to contribute to the political process?

Mr. SANDER. Well, I think that—I am opposed to the Torricelli Amendment because of all the reasons we heard, both at this table and from the committee. I would submit a couple of things. One, I think we can always work toward improving this situation. I think that disclosure element that was talked about earlier today is one that is very relevant and can be looked at and to be sure that it is clear who is spending this money. I think the other thing I would say in this regard also is the fact that we've lumped in use candidates who get LUC with third parties, with interest groups.

Mr. MARKEY. LUC?

Mr. SANDER. LUC, lowest unit charge. We've kind of lumped in all these interest groups which do not get lowest unit charge. We've lumped in ballot issues to some degree which do not get that. Only the candidate which has a use spot which is clearly defined. So I think we've kind of homogenized all of this to a point where—

Mr. MARKEY. What would you support? What I'm saying is that you oppose free time.

Mr. SANDER. Right.

Mr. MARKEY. You oppose lowest unit time.

Mr. SANDER. No sir, I do not.

Mr. MARKEY. You do not.

Mr. SANDER. I do not oppose the current regulations.

Mr. MARKEY. But you oppose extending it in a way which would lower the rates further prior to 60 days or 30 days prior to an election?

Mr. SANDER. I certainly oppose the 365 and the other point I would make is the way the television business is handled and sold is very much like airplanes or hotel rooms. It's a commodity business. There's highs and lows. There's demands and the audience levels vary a great deal as you know. When the Red Sox are fighting for the pennant those ratings are significantly different than when they are not and throughout the times of the year. These rates fluctuate in many cases on a week to week basis.

Mr. MARKEY. Let's look at it another way.

Mr. SANDER. Okay.

Mr. MARKEY. We gave you, retrospectively, ill-advisedly, digital spectrum with a date of 2006 for you to return your analog spectrum. The broadcasters are saying that they are not going to return it by 2006. They can't meet the deadlines. They won't meet the deadlines, whatever, but nonetheless, you have this incredible asset that would make a tremendous difference in the 3-G revolution in

wireless technology, tremendous. So now you've got basically, you've got the beach front property and you've got the home back in the nice community. You've got two homes now which is a nice deal, but no date for you to return the original home, as you promise.

My question to you is this, since you're not going to be returning the digital spectrum for a decade anyway, unless we do something on this committee, well, hopefully we will. We've been waiting a long time for something to happen here, what could you do more for the political process with your digital spectrum?

Mr. SANDER. Interesting question. I'm not sure I can give you a great answer. I'd be very happy to think through that and try to respond back to that. I would—

Mr. MARKEY. Would you commit to the lowest unit rate for 365 days or how many days for the digital spectrum?

Mr. SANDER. I'm not sure I understand what the difference would be.

Mr. MARKEY. Right now, you're putting out a digital signal and an analog signal, but you have intention on returning the analog signal, could you say that you would give the lowest rate for the last 365 days for the digital signal since you're saying you can't make money on it, but at least it gives the candidates some place that they can go. Would you do that? As a gift. Since you're basically keeping from the Federal Government, \$30, \$40, \$50 billion that we could make in the auctioning off of the spectrum, would you give us that back that you could make concessions to the Torricelli Amendment just for the digital spectrum?

Mr. SANDER. Could I check my thoughts with you because I think it's a very complicated issue and I'm not sure I have all the nuances in that. No. 1, my company has spent over \$12 million on digital and we are prepared to go and we are—

Mr. MARKEY. You're speaking for the whole industry right now. Can I say this, Mr. Sander? You're a good player in a bad industry, okay?

Mr. SANDER. Oh wow, gee whiz.

Mr. MARKEY. You're the best in a—

Mr. SANDER. Bad industry.

Mr. MARKEY. I love the broadcasting industry, but they usually pick the best broadcaster who's doing the most to shield all the bad broadcasters who don't want to do anything, okay? And that's why the NAB has paid so much money to be a good lobbying effort here in town.

But what I'm saying to you is you're speaking for the whole industry right now, so I don't want to hear what you're doing because that would be not representative of the broadcasting industry. What I need is a standard for the whole industry. Do you think it makes some sense, given the primitive state of digital television that we could experiment over there. Would that be something that you would be open to doing, Mr. Sander, having an experiment with digital TV in terms of providing a 365-day a year price or 180-day a year price?

Mr. SANDER. I guess, again, I'm having trouble because we're going to try to reach your voter. I have no problem with thinking about how to experiment with digital television and if that includes

some type of political reform, I think it's certainly an open dialog and worth discussion. I candidly don't see the solution as you see it, so I just——

Mr. MARKEY. I'm looking for a give——

Mr. SANDER. I understand that.

Mr. MARKEY. Concession here, based upon—are you going to give back the digital spectrum in 2006?

Mr. SANDER. We are working toward that.

Mr. MARKEY. Will you commit to the committee you will do it? Maybe you'll be a good example there and——

Mr. SANDER. If we have the viewership, if we have met all the requirements.

Mr. MARKEY. The standard is 85 percent.

Mr. SANDER. Right.

Mr. MARKEY. Obviously, you're not going to have that. Will you give it back even though there isn't 85 percent?

Mr. SANDER. Give back so I should go off the air for 20 to 30 percent of the air? Eliminate free television?

Mr. MARKEY. You're not going to do that Mr. SANDER. That's correct.

Mr. MARKEY. What I'm saying to you since you will keep the digital spectrum and you're arguing that it would make no sense for you to go off the air with your analog signal, could you give us something over here on what will still be for you an experimental signal, your digital signal? We need something from the industry, Mr. Sander. We're giving you tens of billions of dollars. You represent that giveaway. Can you give us back something?

Mr. SANDER. I just don't understand what that giveaway back is.

Mr. MARKEY. Yes, you do. You made it very clear what it is.

Mr. UPTON. The gentleman's time has expired. Maybe, Mr. Sander, if you can respond in writing to the question.

Mr. SANDER. Sure.

Mr. MARKEY. He doesn't understand the question, he says.

Mr. UPTON. We'll let you have another opportunity.

Mr. MARKEY. I think he's the only one in the room that doesn't understand the question.

Mr. UPTON. A number of Members, I have supported campaign reform all my days in a bipartisan effort and in all the efforts that I have supported thus far on the floor, whether it's working with Mr. Livingston or Mr. Seiner who is a former member of this committee, Mr. Shays, Mr. Meehan, this issue has not been part, free, over-the-air broadcasting or the Torricelli Amendment has not been included as part of that. I have to agree with the number of those who said here during their opening statements that they see the Torricelli Amendment as, in fact, unintended consequences and particularly Ms. BeVier who indicated that costs to candidates does not necessarily lower the cost of campaigns.

As I have watched a number of campaigns, there is a lot of ads out there, both radio as well as TV, and if somehow the Torricelli provision became law, I see many more ads, not less, and as a viewer, I turn on the TV to watch programs sports, news, movies, not ads and not even at the Super Bowl. And as a consequence though, if you, in fact, saw more ads on the air, I have a sense that, in fact, there would be nothing else but ads and it would, in

fact, close in on the programming element that most viewers turn the TV on and maybe Mr. Wright, Mr. Sanders and Mr. Sapan, you could answer the question as to whether or not you actually have to turn away advertisers, other advertisers in the political season because that time is bought.

Mr. Sander?

Mr. SANDER. Sure, without question. One of the dilemmas—

Mr. UPTON. And folks that are wanting to sell cars or hammers or whatever it might be, do not have the opportunity because the politicians have bought up all of that time during that spectrum.

Mr. SANDER. We have a fixed amount of time we cannot expend. That is an example of prime time. The local television station has approximately 4 minutes of commercial time to sell, nothing more. We can't expand that. We can't make that larger, so we have a fixed amount of time. So we can't just accordion that the way we might like some times.

Second, I've had dozens and dozens of regular 365-day advertisers tell me I'm pulling out of advertising on your station now because of the political overload. It's not an environment I want to advertise in. I can't afford to advertise in there and you've not provided me enough time to buy even if I wanted to. And I'm going to take that and take my advertising because I have to stay in business. I still have Saturday sales. I still have upcoming Thanksgiving Day promotions and so on and so forth. I'm going to move that money out of television on your television station and then maybe come back and talk to you later, but you're going to have to recruit me back into that environment, so without question, we are displacing regular commercial local business advertisers.

Mr. UPTON. Mr. Wright, do you want to comment? I know you're more of the national perspective.

Mr. WRIGHT. Yes, as I said in my testimony—

Mr. UPTON. Do you not have candidates, Presidential candidates?

Mr. WRIGHT. We have not yet, Mr. Chairman, as I said, we have not yet had a request for advertising time, but clearly if we were to, if the demand were to increase we only get a couple of minutes an hour on those channels where we have advertising, where we can sell advertising that's available for sale. So obviously, if the demand were to increase, then we would have to turn away other people who would be seeking that time.

Mr. UPTON. Mr. Sapan?

Mr. SAPAN. That phenomenon occurs to a rather limited degree. It does occasionally, but the amount of inventory that's available on cable television, on a system because many systems are selling upwards of 25 cable channels and avails on them is rather robust, so it tends not to result in that escalation and any of that displacement. As well, on our local news channels which we consider a very important part of our participation in a political dialog in the election process, there is relatively abundant inventory. So that tends not to challenge us.

Mr. UPTON. Now Mr. Taylor, you raise the question and cited some examples of I think it was 99.8 percent in your testimony. Isn't it true that if Candidate Markey is looking for time on the 6 o'clock news, who was your opponent, did you have an opponent last year?

Mr. MARKEY. I'm in the plus perfect form of democracy in my district.

Mr. UPTON. The parole candidate, having lots of cash to compete with Mr. Markey, if Mr. Markey chooses the 6 o'clock evening news time, doesn't under equal opportunity or equal time provisions already there, isn't that candidate also allowed to buy, in essence, the same slot, either that day or the next day at a comparable rate, comparable time?

Mr. TAYLOR. Yes. That's my understanding. But the 99.5 figure had to do with the fact that in almost every instance, Mr. Markey and his opponent and all the other classes of candidates, in order to guarantee they get on on the 6 o'clock news which is obviously a very attractive advertising forum for a candidate, that candidate is going to pay a premium. Now that candidate is choosing to pay that premium, but I think this is a flaw that this Amendment is designed to correct. Candidates are a different kind of advertiser from product advertisers. Nike and McDonald's primary motive is to sort of build brand loyalty over the long haul. They buy in an upfront basis. They're interested in hitting a certain amount of demographics over a certain period of time, a month or a quarter and whether it runs on the 6 o'clock news or tonight or tomorrow night or a little bit later, as long as it's good at the end of a season, they're fine.

Candidate Markey is looking at overnight polls and he's discovering that his opponent is running a very effective attack ads against him on the 6 o'clock news and he wants to be on the 6 o'clock news and that's the way the real world works. So when his media buyer calls up the local station, it's "I got to have it tonight on the 6 o'clock news" and that takes that media buyer to this very high rate. And that's, I think, the conceptual flaw that was not fully addressed 30 years ago and that this Amendment is designed to deal with.

Mr. UPTON. But that opponent is still able to get the same price that comparable time.

Mr. TAYLOR. Absolutely. And if that opponent has the money, he or she is paying that price and everybody's prices are going up.

Mr. UPTON. Okay, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman. I sit in continual awe of Mr. Markey's ability to stretch 5 minutes. It's very impressive.

Mr. Taylor, in his testimony, mentioned the CRS memo citing at least three cases. Ms. Bevier, can you comment on those three cases and your sense of their applicability in the decision before us?

Ms. BEVIER. Certainly. I think the three cases, I would say very briefly are outdated. In other words, it has been quite a long time since the Supreme Court decided CBS versus FCC. The Red Lion case has been discredited. The scarcity rationale simply does not hold water, even the Court has suggested the scarcity rationale should not continue to govern broadcast regulation. They've just never had occasion to encounter a direct challenge to Red Lion.

In the last 10 years, the Supreme Court has been quite rigorous in its scrutiny of any sort of broadcast regulation, increasingly willing to rehabilitate, if you will, the editorial discretion of broadcasters. That simply is a fact, so that I think the most important thing to note about the CRS study is that it relies on precedents

that really are too old and have been called into severe question, both by the commentators and by the Court, most particularly.

Mr. SAWYER. Mr. Taylor, do you want to comment?

Mr. TAYLOR. Well, I wasn't aware that there was a statute of limitations on Supreme Court decisions. None of these rulings have been overruled. They are the settled law of the land.

Mr. SAWYER. Let me make an observation. It seems to me that what we are seeing here is as a product of cost a reduced access to voice. I don't know that this is the solution to it, but in thinking about what Chairman Tauzin had to say I was recalled to the idea that when this democracy was founded it was a democracy of ideas, first and foremost, and those were ideas that were spread as a product of the written word. And with that in mind, it is no accident that the founders put into the Constitution the creation of Postal Service, not for the convenience or the commercial use necessarily of this democracy, although it was certainly that, but for the purpose of spreading ideas. I think that's an important notion.

The sharing of spectrum, as Mr. Markey suggests, is an important notion. I'm not sure this is the best way to go about it. Do you have any thoughts on the best way to make sure that there is adequate voice, not constrained by unreasonable costs that will make it possible to continue this 200-year-old tradition of sharing ideas at the heart of what makes this democracy possible.

Anybody?

Mr. WRIGHT. Well, Mr. Sawyer, one of the things that we are working on in the satellite industry is that we've developed programs that give candidates the opportunity to have free time. For example, Echo Star, one of our member companies, provided free time.

Mr. SAWYER. Anybody else?

Mr. SANDER. Broadcasters provide a lot of free time, without question, so I think we all believe in that concept is that there is a responsibility to your very point about making sure that these voices are heard and different viewpoints are heard.

Mr. SAWYER. One broadcast station in my media market provided one 5 minute slot that I think was broadcast three times in the course of an 8-week campaign. It was fine for me. It was totally inadequate for my opponent who had little financial access to that time. That's the dilemma.

Mr. SAPAN. I'll sound like a booster for the cable industry, but I believe it. If we take a look at the combination of C-SPAN and the three now national news channels, CNN, MSNBC and Fox and the proliferation of local news channels of which today I think there are 30, and if you don't live where one is, you don't see them, but I guess in New England, there's New England News. We operate five in New York and there's New York One and Time-Warner. They are, I think, abundant in their true dedication to providing an editorial voice that is open to a democratic dialog and I think candidates really do become notwithstanding their current position, incumbent or not, exposed. It strikes me that it is a pretty good forum of democratic dialog and information hearing.

Mr. SAWYER. Mr. Taylor?

Mr. TAYLOR. Our organization has long supported free air time. I think there are ways of doing it that are not burdensome. The

television industry took in \$40 billion in advertising revenues last year. We're talking about a very small fraction of that.

As to the notion that the industry gives free time, there was a recommendation from a White House Advisory Panel co-chaired by Leslie Moon that every station in the country voluntarily provide 5 minutes a night of candidate discourse in the month preceding every election. We, working with universities in Pennsylvania and Southern California, monitored stations and we found on average they gave about 45 seconds a night of candidate discourse. So it seems to me they are not stepping up to the plate.

Mr. SAWYER. Thank you, Mr. Chairman.

Mr. UPTON. Mr. Largent.

Mr. LARGENT. Mr. Sanders, I think that in listening to your conversation with Mr. Markey I would be tempted to roll the dice if I were you and say okay, we'll just keep our digital spectrum and we'll cutoff all analog viewers by 2006 and just see what happens when the phones light up in all of our offices and you can just explain to them that we did this because Congress made us and you need to call your Congressman.

Mr. SANDER. That would be painful for all of us.

Mr. LARGENT. It sure would. Mr. Morris, I wanted to ask you, you've done a lot of research on the various campaigns of 435 Members of Congress, the House, and 33 Senators every election cycle. In the election of 2000, how many of those 435 House races were really contested races?

Mr. MORRIS. If you look at the margins of victory and you say all right, if anything is less than 20 percentage points we're going to call that contested, so it's a 60-40 split, you're talking about 60, 65 races. In every election cycle it's about the same number. The parties are not ignorant of the facts and every year they sit down and they figure out what Districts are going to be vulnerable and which ones are competitive because there's a retirement and they target 50 or 60 Districts across the country and that's where the game is played.

Mr. LARGENT. So if you say 60, 65 races out of 435, you're talking about 15 percent of the races in the House.

Mr. MORRIS. Roughly.

Mr. LARGENT. In that 15 percent then, what percent of the total number of dollars do you believe are spent? If we're just talking about spending on actual campaign events, in other words, not me giving money to Heather for her race, but actually me spending money on advertising, on mail, whatever?

Mr. MORRIS. It depends. Do you include the cost of the staff and telephones and travel?

Mr. LARGENT. I noticed in some of the research that you have that that's pretty expensive, particularly in Massachusetts.

Mr. MORRIS. It's very expensive because I'm sure most of the people in this committee maintain offices, political offices in the District which are open every day from the first day they win until the day they walk out the door. There's actually more money spent by Members of the House, every election cycle, on just the office overhead, the rent, the staff, the telephones, the travel, things like that than is spent—and considerable more—than is spent on television or radio advertising and that includes the cost of the production

and anywhere from 5 to 15 percent that they pay to the consultants for placing the ads.

But if you reduce it to the 65 races and you throw away all of the money that members give away and you include the fund raising costs, you're probably talking about 60 percent to 65 percent of the money going to TV in those 65 races.

Mr. LARGENT. So I guess the question I'm asking and it's probably hard to quantify and my guess is and see if you would confirm this is that the overwhelming majority of money that's spent on campaigns, if you say let's exclude the job creation that we do through campaigns and exclude the money that is transferred from one campaign to another and just say money that's really going to what you and I think of as campaign expenses—

Mr. MORRIS. You're just throwing about 40 percent.

Mr. LARGENT. TV, radio, the overwhelming majority of it has to be spent in those 65 races.

Mr. MORRIS. Oh yes, absolutely. There's no question if you take out the basic office overhead and you take out the money that's transferred from committee to committee and you look at where the money is being focused, you give money to your colleagues who are in tight races or you give money to colleagues who aren't because you hope they'll vote for you for some leadership office, but whatever the reason is, if you take all that money out, and you look at the money that's spent trying to best the opposition and gain control of the House or the Senate, it's in a very small handful of races and the majority of the money, 60 percent at least goes to television and radio advertising, including the production costs.

Mr. LARGENT. Mr. Taylor, why didn't you want to look at Mr. Griffin's books when he gave you an opportunity to do so?

Mr. TAYLOR. This is the first I'm hearing about that. The website you referred to we put up last September 15th. It had detailed information on political ad sales in more than 300 stations. We got that information from the Campaign Media Analysis Group which is the leading ad monitoring firm used by candidates for Republicans and Democrats alike. If there is anything wrong with that information, I would love to correct it and would leap at the chance to correct it, but this is the first I'm hearing about it.

Mr. LARGENT. Great, I hope that you'll take them up on their offer and I would think that it would be an enlightening experience.

Mr. TAYLOR. The truth of the matter is we'd love to take a look at stations' books.

Mr. LARGENT. I would think so too. Why should we not look at radio and newspaper and other venues besides just TV, satellite and cable in the Torricelli Amendment?

Mr. TAYLOR. Personally, I feel like leaving radio out, it doesn't make any sense conceptually or from a policy point of view. Candidates use radio. Radio is subject to the same licensing procedures, but to bring print in would be an enormous leap, out of line again with 70 years of law and jurisprudence and regulation that says broadcast is different. It is the public airwaves. There is nothing equivalent on the print side.

Mr. LARGENT. Can I just ask one more question, Mr. Chairman?

Ms. BEVIER. Could I just say one thing about the print media being different from the broadcasting media? Remember that Red Lion, of course, there's no statute of limitations on it, but it was based on the notion of physical scarcity and that notion of scarcity of access, that notion given technological advance, simply no longer is factually true.

So that the factual predicate for regulation, namely scarcity does no longer exist and I think there are very few people who have looked carefully at the first amendment aspect of difference in treatment between broadcasting and print media and have been persuaded that that makes any sense at all. In fact, my question would be why don't you simply require, if you candidates think it's costing you too much to run for office, why don't you require everybody to sell you everything at wholesale? Make everyone contribute to your campaign and subsidize your political career.

Mr. LARGENT. It does seem like a huge conflict of interest for us to be voting on legislation that cuts, reduces the costs—

Ms. BEVIER. Part of my point.

Mr. LARGENT. Well, my last question, Mr. Chairman, thank you for your indulgence here is to address to Mr. Taylor and I just wonder, what is your motive? You want to drive the cost of campaigns down which I mean, believe me, raising money is the dark side of this business that we're in, but it's also a necessary side and I'm for that, but I think taking it out of the hide of broadcasters, I question that, as you heard in my opening testimony, but what is your motive other than just driving the cost of the campaign down?

Mr. TAYLOR. Well, our one-sentence mission statement, if you will, which I have in my testimony is we're a public interest group that promotes political campaigns in which the best information gets to the most number of citizens in the most engaging ways. So our motive is to increase the flow of political communication and to do so it seems to me you have to go to television. That's where the most important political communication happens, on television. To reduce the cost of that communication and ideally, frankly, to increase the breadth of it. And to those who say you're just going to have more political ads and don't we all hate political ads, I would add my voice to that very large chorus.

I'm not sure there would be a dramatic increase in political ads as a result of this. We have a difference of opinion in how it works, but I do think that it would reduce the cost of communicating and that's a good thing for all the reasons that supporters of campaign finance have talked about, how much pressure there is to raise money, how it brings special interest into play. Beyond doing this, I mean I didn't read this part of my testimony, I believe we should look to a system that the government also requires stations to provide a variety of forums of free time, not too dissimilar from the 3-hour rule that we now have requiring stations to do 3 hours of children's educational programming a week. Congress made a determination that's in the public's interest. I think robust discussion around election time is very much in the public's interest. I don't think it's a heavy hand of government doing anything but assuring that the airwaves are open. Our airwaves are open so we can govern ourselves and make informed choices on election day. That's the motive.

Mr. LARGENT. Thank you, Mr. Chairman.

Mr. UPTON. Ms. McCarthy?

Ms. MCCARTHY. Thank you very much, Mr. Chairman and I thank the Panel for their help with this issue today. I'm sorry I missed your testimony, but I wanted to pursue something Mr. Sawyer raised which was back along the lines of a solution. Interestingly enough, Mr. Largent's testimony, it got me thinking about the print media and what's happening in that industry and how difficult it is even for small businesses to now advertise and I find that media markets such as my own, which is in the Greater Kansas City area where there's just one paper owned by a conglomerate, the rates have gone up.

The advertising is like this thick on Sunday and the news and factual material is like this thick and everybody seems to be able to advertise, but the rates are so high that unless you are a big guy or gal, you get stuck in an odd part of the paper and you don't really get the positioning that you need and I'm thinking, Mr. Chairman, this question may be larger than just campaigns and prices, but what's going on out there in the communications world, TV, radio and print with regard to this question of scarcity and whether or not, and rates and charges and reasonable access, because I really think we could find a solution to this dilemma, if we all put our minds to it and I'd appreciate you raising that question. I think there could be a compromise reached which does not violate the first amendment, that the statute reads that you're not obligated to provide unlimited access.

So isn't that sort of the gate keeper anyway for these election issues and I would just welcome some reflection on that from any member of the Panel who would like to respond?

Mr. SANDER. I certainly don't pretend to be a newspaper expert, but I would submit that I think as these newspapers grow in density, they're also offering more zoned product, specifically for geographical areas, much like our colleagues in the cable industry do, newspapers now are finding ways to provide unique sections, geographically driven, so that I think they're trying to address that issue.

Mr. WRIGHT. Ms. McCarthy, to finish the thought that I was about to say to Mr. Sawyer's question, talking about other ways to approach this, we are, as I said in my testimony, a national service, so therefore we tend to be, people who are interested in us tend to be Presidential candidates because we're reaching everyone.

But one of our companies, Echo Star Communications offered 500 hours of free time to the four main Presidential candidates last time and frankly only three of them were willing to even take advantage of it which strikes me as pretty indicative that the problem here isn't just what's out there.

I mean candidates obviously want to control the way the message is presented, who it's directed to. It's not just a question of availability of forums. With cable and with satellite and broadcasting, certainly there's a lot of forums out there and part of the problem is the desire by the candidate to control what is said to whom, at what time and in what way.

Ms. MCCARTHY. How is that different from a department store commercial?

Mr. WRIGHT. It isn't.

Ms. MCCARTHY. Okay, so it's all the same standard.

Mr. WRIGHT. I didn't mean it as a criticism. I'm just saying that we are trying, we in the satellite industry are certainly trying to come up with some creative things that we can do. Obviously, the testimony from cable is equally applicable here. We're looking for ways to get information out, what Mr. Taylor is looking for, we're looking for ways to get more, better information out to more people in as useful a way as possible.

Ms. MCCARTHY. Well, I see a lot of what's happening out there in the communications world has become corporate America looking at quarterly figures and bottom lines and in my community they're letting go with buyout packages of all the most senior, talented members, whether it's in the print media or in the electronic media and actually forcing them out with these buyouts because they just want to save money.

So I have larger questions and concerns than what we have right before us today, but what I would like to see is some attempt by the industry to sit down and try to reach a compromise so that all people are well-served.

Thank you, Mr. Chairman.

Mr. UPTON. Mrs. Wilson?

Ms. WILSON. Thank you, Mr. Chairman. I regret having not having seen the testimony, although I did read much of it in the book and I appreciate that. I had a couple of questions. One was for Mr. Taylor on the study that you did. How did you choose the 10 stations that are highlighted here?

Mr. TAYLOR. We wanted to go to, we wanted a geographic spread. We intended to go to medium or large markets and frankly, we went to markets where we knew there was a lot of political activity. That describes at least 8 of the 10 markets. A couple of the others, there wasn't a great deal of political activity.

Frankly, we needed two sets of information. One was fairly easy for us to get which is—we had volunteers go to each station. They're required by law to keep a political file and we had volunteers go look through those files, but the other set of information we needed to be able to get was the station's published rate cards and that's proprietary and we're able to rely on a network of media buyers and other folks to give them to us, so to a certain extent that dictated a little bit where we wound up, so those were the factors that went in.

Ms. WILSON. So you don't have a random sample?

Mr. TAYLOR. And we don't claim it's a random sample. It is a spread of medium to large size markets where more often than not there was a lot of political activity.

Ms. WILSON. How do you know just taking 10 stations with a nonrandom sample that you have something useful as far as conclusions?

Mr. TAYLOR. Well, to pick up on Dwight Morris' testimony, if you look at the world of political campaigns, it's a very uneven world. If you look at the universe of 435 races, if you were to try to get an average of those races, you're not finding the essence of it. The essence of modern political campaigns is it happens very intensively in certain areas and not very intensively in others and then

2 years later, the pattern is going to be different. So what we tried to take a look at was races where there was a lot of activity where we think the problems of price pressure are obviously at their greatest and where the needs for protection are at their greatest.

Ms. WILSON. Thank you. Mr. Sander, you talk about impact of the Torricelli Amendment, particularly with respect to cutting in revenue during the campaign season. Is that impact disproportionate at smaller regional stations than it is at the big guys or is it just a percentage across the board?

Mr. SANDER. I think it is market by market, but certainly the smaller markets can be impacted. As an example, we have a television station in Spokane, Washington which had heavy, heavy political interest. In addition to probably disenfranchising some regular advertisers during that last 3 to 4 weeks of that campaign, we provided 10 hours of debates which I would also note were not attributed to coverage by Mr. Taylor's report, so that we're actually preempting commercial time, prime time to put these debates on which also is another loss of revenue.

Ms. WILSON. Does that loss of revenue impact the capital available at all for the transition to digital or impact programming that can be purchased and played during election time?

Mr. TAYLOR. Sure. I think that it can because, as I stated earlier, once that inventory is gone, you can't double up the next day or the next week or the next month. It's a fixed amount of inventory and as an example in Seattle which was one of the markets that Mr. Taylor targeted our NBC news leading television station there was selling political candidate time for the 5 o'clock news, roughly about \$1500 at the peak of the campaign. Non-use candidates would be \$7,000 for that same time, so there's no way we can make up that money and therefore you would slow down your capital purchase. You would have to be careful about the programming you bought and your overall cost base.

Ms. WILSON. Thank you. Mr. Chairman, looking down the list of folks on this committee, I don't think—I found your idea of what is competitive to be an interesting list. In my wildest dreams I would have a District where there was a 20 percent spread and I am on one of those that it's not in this list of 60, but probably down there on the list of 10, depending upon which Democrat you talk to and in one of the top 50 television markets in the country. I don't think there's anybody else in this House who has endured more issue advertising that, of course, is not designed to impact our elections at all than me. But I think I agree with Mr. Largent when he says that there's probably a fundamental conflict of interest in candidates and Members of Congress telling businesses that you have to give us something for a particular price or for free and when it comes right down to it, I'll probably stand on the side of principle and not on the side of self-interest.

Thank you, Mr. Chairman.

Mr. UPTON. Thank you. Mr. Engel.

Mr. ENGEL. Thank you, Mr. Chairman. I had another committee meeting and vote, so I apologize for coming late. Obviously, what we're discussing today is balancing a political speech and commercial speech and the way I see it, we presently have the equal opportunity and reasonable access laws and the equal opportunity law

is one that I think we need to be very vigilant in enforcing, but we're really discussing today an issue about altering the reasonable access law and while it would seem to me we don't want to bully anybody, it would also seem to me that we have an obligation to try to strike a balance. I represent a District, my entire District is in the New York City metropolitan area and I have never in all my campaigns and I've been running for office now 7 terms in Congress and 6 terms before that in the State Assembly, I've never been able to afford television because it's just too expensive and not cost effective. Now people are talking about cable and perhaps that would be easier, but to a very large degree it's an impossibility for someone in New York unless they're running State-wide to be able to afford it.

I'd like to ask Professor BeVier, your written testimony is clear that you don't think there's a substantive framework in place governing this issue and what I wanted to ask you is if you were to create such a framework, what would it look like?

Ms. BEVIER. You mean if I were to—a framework to regulate the rates that broadcasters provide?

Mr. ENGEL. Yes.

Ms. BEVIER. Well, I think the framework of freedom of speech and freedom of the press is a pretty good framework to begin with and I would say even that the present favorable treatment that Federal candidates get for advertising time is about as much as I could ever possibly defend in terms of compliance with the first amendment. To be candid with you, frankly, Mr. Engel, I have doubts about the present systems being constitutional. It has never been challenged. Broadcasters have gone along with it and I think that's fine, but my own view is that freedom is the best way to assure political competition and I think that's what the first amendment is about and that's what self-government is about. So that's where I stand.

Mr. ENGEL. I'd like to ask Mr. Taylor, you mentioned a station in Philadelphia as an example of rising TV cost. The Philadelphia market serves a number of, not just a number of State jurisdictions, but also part of Delaware and obviously, New Jersey as well. Do you have any examples of what might be a claim to media market, one that would not have two Governors, two U.S. Senators competing for time? Is Jersey kind of—is Philadelphia kind of muddled because New Jersey relies on the Philadelphia market and the New York market?

Mr. TAYLOR. Well, there are a lot of major media markets that span over a couple of States, but again, we did the in-depth look at 10 stations around the country and Philadelphia came about in the middle of those 10 in terms of its rates being over the lowest published rates. The other cities, we looked at Minneapolis, Columbus, Ohio, San Francisco, Detroit, New York, Salt Lake City, Las Vegas, Los Angeles and Seattle. So that was the spread. As I said to a question earlier, those tended to have a lot of political activity, so the price pressures that drove our candidates were probably greater there than they were at other markets, but this is what happens every 2 years and the price pressures, just talking to media buyers and candidates and issue groups and parties, everybody was saying last fall, my God, we've never seen anything like

this. So I don't make a claim that Philadelphia is representative of a country. It is certainly representative of those 10 cities that I just listed and I don't think the two State thing is that unusual a situation.

Mr. SANDER. Could I add a note to that? The only point I would make is that Mr. Taylor said that it was hard for them to find rate cards. As I talked about earlier, during these times, these rates are changing dramatically for everyone. If you begin in September which is where we could get a rate card and then by the time we're talking about October the 25th, there's been a significant market change there for everyone. In nearly all cases that I've researched, at least at the Belo stations, we have stayed steadfastly with the rate available to politicians much, much tougher and clearer than the rest of the marketplace. So the marketplace has changed during this. There have been 6, 8, 10, 12 rate cards revised during that period of time, so Mr. Taylor obviously has to pick a moment in time which he does, but this is a changing dynamic as I said, in a committed business.

Mr. ENGEL. Thank you very much. I just want to make a final comment. I think most of us are trying to legitimately balance what we think is right. We don't want to impose burdens on anybody, but on the other hand it's certainly in the public interest that people who are running for office get their views out and do it in a way that can help in the political process. I just wanted to comment on what Ms. Wilson said. I don't think that it's at all a conflict of interest for Members of Congress to try to regulate it. There are many, many things, many, many issues that we deal with on this committee and in general in Congress. If you carry it to the nth degree you could say there's a conflict of interest when we vote to raise taxes or cut taxes, technically we're all affected by it. So I think that most Members on both sides of the aisle are really trying to create that balance and I think that was—that is obviously the purpose for these hearings today.

I thank you, Mr. Chairman.

Mr. UPTON. Mr. Ehrlich.

Mr. EHRLICH. Thank you, Mr. Chairman. I apologize. I came here about 10 minutes ago. We had a very important hearing with the Maryland delegation with regard to the Port of Baltimore. And I really regret not listening to your testimony. I will read it. I guarantee you, because I'm sitting here listening to my last two colleagues talk and make points and I'm compelled to agree with both.

Mr. Morris, with respect to your comments, what I would like to do is just make a couple of observations and anybody can comment, if you feel that you need to and I would solicit comments.

The fact is most races here are not competitive, as you know, Congressman Largent talked about. The other fact is with regard to competitive Districts, the amount of TV money you have is very relevant, is the most relevant factor I would submit to you all.

You could—with regard to Ms. Wilson's comments and my friend, both Ms. Wilson and Congressman Largent, you could make the case that the present system is inherently pro-incumbent because to the extent that incumbents can raise money that money generally goes for TV. It's the major cost component of any serious race these days and to the extent that challengers cannot secure

TV money, they're not going to be competitive because we all know we communicate through TV. The fact is lawn signs aren't that important and equally the fact is with respect to the fact we keep offices open all year round and all that, we don't have to do that, many of us, if we just wanted to be reelected. Many of us are looking to future races, State-wide races. That's why we do it. The cost component is TV. Fact. So that being, I guess, a central observation I have and I suspect most of my colleagues will agree. My position letter, I try to make my position letters thoughtful and my position letter with regard to this issue basically is campaign finance reform is a very subjective issue. My favorite thing to do when I talk to a community association at home is to enter the room and say who here supports campaign finance reform and everybody raises their hand and then my next question is okay, define it. And of course, it's like being for Mother and apple pie, small business and peace and prosperity. It means nothing unless you fill in context, unless you define terms. With regard to this campaign finance reform, the McCain bill, it clearly chooses winners and losers. In relative terms it makes big city newspapers more relevant. That's not real good for my party, quite frankly, and it makes parties less relevant and that's probably a loser for all of us, quite frankly. So I get very frustrated with regard to some of the demonization and the demagoguery I see associated with this issue from everybody because the fact is TV runs it. If we're talking about campaign finance reform, we're talking about TV.

Professor, your comments were equally well-taken. As somebody who generally comes from the right on many of these issues and freedom means something to me and to all of us, of course. So I guess my observations are everyone's comments are very well taken, political speech as we know is highly protected speech under the Supreme Court rulings. These are public licenses. There is an obligation. Where we draw that line is what this hearing is all about. But it's a very difficult issue for those of us who really do this for a living and understand that the most important cost element that drives this issue is TV time period.

What to do about it, of course, is why we're making all these hopefully fairly articulate observations. So I'll just make those observations and throw it out to the Panel.

Mr. MORRIS. If I could respond, just briefly. I respectfully have to disagree that TV time is the relevant issue in every race. I think what you need to decide—

Mr. EHRlich. I meant competitive races.

Mr. MORRIS. I think the question you need to decide is do you want to pass a law that really is targeted at 10 to 15 percent of the Districts in this country? I mean North Carolina, when the people run in that District they really need some help because they've changed parties in terms of representation in this body about six times in the last two decades. And that is an incredibly competitive District and they have taken every dime that every candidate can get and stuck it—

Mr. UPTON. Excuse me, whose seat is that in North Carolina?

Mr. MORRIS. Representative Price. Unbelievable District. I wouldn't want to run in that District.

Okay, having said that, in those Districts, the challengers and the incumbents both have all the money they need. You folks from the noncompetitive Districts make sure that that happens. Money just pours into those Districts, both from the parties and from the candidates, both the challenger and the incumbent in every one of those Districts has all the money they need. And so then the question is is it an important issue to pass not only to the benefit of 10 percent of the Districts, but is it important to subsidize them? I can't answer that question. I just raise the issue and I present the facts that I've been able to determine over 12 years of looking at this. You guys are going to be the ones who make that decision and I don't presume to tell you what you need to do. But I mean I think that is the choice.

Mr. EHRLICH. And of course, that is a recent phenomenon of which we're all to blame because as the House remains fairly close, our respective party committees are continually hitting us up and that's very recent, as you know. Congressman Markey, I'm sure can remember the days when that didn't happen, actually, so that's not a very good answer to filling in that gap as to why there's more money in the process and why there's challengers in relative terms and now have relatively more dollars.

Anybody else? Thank you.

Mr. UPTON. I have just one additional question or comment, I think other members may have that and then we'll wrap things up.

You know, as I look at my District, if you're from Michigan, you use your hand, I'm right here on the southwest corner. And I venture to say that every broadcaster that covers my District, whether they be from Grand Rapids, Kalamazoo or Battle Creek or Elkhart, Indiana, South Bend, Indiana, Chicago, they all offer free time. I'm talking about public broadcasting in terms of free time like debates where they invite all of the candidates for a multitude of offices to come in. And the debates sometime is an hour, often they will give, the stations will give free time to get your message off and it will run periodically and the public broadcasters, both TV and radio, do it as well.

For people, individuals, constituents, voters, that want to hear about issues, and that's really how we want them to decide why they vote the way that they do, they have that opportunity, both as a call-in, as well as the people that are usually journalists that are asking questions. So in my view the system works and again, if you look at providing, and I know Mr. Taylor, your view, at least in some of your writings is to go beyond the Torricelli Amendment and look at free advertising because of the spectrum of allocation, and I look at my District and I look at particularly the Chicago area which covers over the air broadcasters, probably 30 or 40 congressional candidates every 2 years, Wisconsin, Indiana, Illinois, Michigan. Usually have 4 or 5 folks that run for my seat, the various parties that are out there and I just don't know when people actually turn on their set to watch a program, if you allow that, it would preempt the World Series. You have to play after November 7th and you know, be snowed out if it's at Wrigley Field because that's when we get snow and in my view, the system works today. The broadcasters like Mr. Sander, by offering free time for your candidates, what did you say 118, I think, this last cycle. The

system works and there are serious constitutional questions that would have to be met. Who knows whether this amendment for those who want campaign finance reform will have an opportunity to vote on an amendment whether one provision in the entire bill is ruled unconstitutional. Do you get anything out of the whole bill, that's a separate debate on a different issue, but I just offer that as a comment. If any of you would like to respond, briefly, we'll move on to Mr. Markey.

Ms. BEVIER. Mr. Upton, may I just say one thing? It has always seemed to me that in order to make any of these proposals work, whether it be free TV or lower rates, what you would have to do, your final move is going to have to be to require people to watch these things and if you can do that, then you can get to your audience, but otherwise, it's so saturated that I think people will probably not.

Mr. UPTON. Mr. Taylor, do you want to comment?

Mr. TAYLOR. Just very briefly. There are a number of broadcasters around the country and Belo is certainly one of them that does do a good job of offering the kind of debates and other forums, but they are unfortunately the exception and not the rule.

Going back to the Presidential campaign last year, two very quick statistics, there were 22 televised Presidential debates during the primaries in January and February and March of last year. Of those, only two were carried on a national broadcast network, neither in prime time. Then fast forwarding to the fall general elections, two of the four major national networks for the first time chose not to cover the general election debates. I think this is part of a pattern of retreat from the kind of providing forums that citizens do need, so I think that while, yes, there are some stations do it, the overall numbers are not very attractive.

Mr. UPTON. But remember, too, that particularly in one of the California debates, the candidates were offered an hour of free time and they chose not to do it. I think it was Mr. McCain chose not to show.

Mr. TAYLOR. This happens and the dynamic there is oftentimes front runners don't want these forums because they don't want their challengers to be on equal footing. This is a problem that seems to me a robust system needs to overcome.

The most difficult problem, I think is the one that Professor described as how do you get people to watch and there, I think if you place yourself in the hands of the broadcast industry, you are at least placing yourself in the best hands in the country, the broadcasters understand how to get people to watch television.

Mr. UPTON. Another comment here is McCain chose not to participate. I think almost in every race that I've had, I had my opponents fail to show up too, including my Democratic opponent this last time, chose not to appear on a free televised debate. It's fine with me. But I've always indicated that I would debate my opponents in every election and I have at one point or another.

The other, I guess, just quick comment, because of the advent of C-SPAN, they often cover other races in parts of the country for the whole country to watch, so I can watch Mr. Markey's empty chair if they chose to show it in Boston, as he has no opponent, but seriously, you can watch the Senate races and the Congressional races,

particularly those, the real close races that Mr. Morris cited, a lot of those, the local broadcasters, in fact, send their feed, taped or sometimes live to C-SPAN, where the whole country can watch.

Mr. TAYLOR. But they have to pay a subscription fee to watch it, so it's not free over-the-air broadcast.

Mr. UPTON. Well, C-SPAN doesn't—

Mr. TAYLOR. You have to have cable to get C-SPAN.

Mr. UPTON. Or satellite. Mr. Markey.

Mr. MARKEY. Thank you, Mr. Chairman. I have testimony here from Louise Slaughter and I would like to make unanimous consent request that it be included.

Mr. UPTON. Without objection.

[The prepared statement of Hon. Louise McIntosh Slaughter follows:]

PREPARED STATEMENT OF HON. LOUISE M. SLAUGHTER, A REPRESENTATIVE IN
CONGRESS FROM THE STATE OF NEW YORK

Mr. Chairman, as a long-time supporter of increasing the communication between candidates and the voters, I urge you to support the "lowest unit charge" amendment to the McCain-Feingold campaign finance reform bill. Special interests now contribute hundreds of millions of dollars to political campaigns, but who gets the money? Television broadcasters, who make the cost of campaigning today truly prohibitive. Make the advertising rates fair, and our elections will be fairer. That's a ratings system all Americans would be proud of.

My involvement in the debate over the cost of political advertising stretches back to the 104th Congress, when I first introduced the Fairness in Political Advertising Act of 1995. This legislation would have required broadcasters to provide free air time for candidates who are seeking office in the period before an election. The air waves are owned by the public; therefore, broadcasters should be willing to provide a few minutes of free advertising for candidates who wish to serve the public good. This bill was never even reported out of committee because the broadcasting lobby spent millions of dollars trying to defeat the bill.

I became interested in the lowest unit charge amendment after it was passed by a bipartisan majority in the Senate on March 21, 2001. This amendment would close the loophole in an existing federal law which directs broadcasters to offer candidates the lowest amount that the station charged for advertising during the 45 days preceding a primary election and the 60 days preceding a general election. Congress enacted the lowest unit charge to assure that candidates are treated the same as the most favored commercial advertisers during the pre-election period.

Although the lowest unit charge is still available to political candidates who wish to run television ads, the broadcast networks have made it an unattractive choice because advertisements that are purchased at the lowest unit charge can be preempted. The only way for a candidate to ensure that his or her political ad will be shown at a specific time and date is to buy nonpreemptible air time. According to a report by the Alliance for Better Campaigns, on average, this can increase the cost of political advertising by up to 65%.

It is my firm belief that the lowest unit charge amendment to the McCain-Feingold bill is an important step toward increasing the communication between candidates and the voters in the period before an election. This amendment would not require broadcasters to offer free air time; rather, as a compromise, it would reduce the costs that federal candidates must pay to get their message out. The lowest unit charge language reinforces an existing federal law that was designed to prevent political candidates from competing with commercial advertisers, and it promotes fairness in the electoral process.

Mr. Chairman, I thank you for the opportunity to express my views, and I urge you to support this provision when the House considers campaign finance reform in July.

Mr. MARKEY. Thank you. So the government actually does set the rate that broadcasters have to pay the satellite industry and the cable industry for carriage of the local broadcast station and we set that rate at free, no charge, to the broadcasters. They get on without paying a nickel. So it's the government getting in, saying

we're going to protect the broadcast industry, you don't have to pay a nickel. And the government sets the compulsory license rates for certain programming as well. We do that. But candidates, the government similarly sets the rates. And so as much as one industry or another, depending upon the circumstances either benefits from or laments the fact that the government is intruding, the industry is depending upon the issue are asking the government to move in to help out. So that's the reality, especially the broadcasters when it comes to must carry.

Now as we move to the digital era, there will be a capacity for the broadcast industry to multiplex, to use this more versatile technology in ways that are touted to increase the capacity for the broadcast industry to serve the community. So the context in which I'm raising the issue of the role that the free over-the-air broadcast industry should play is that there is going to be a must carry issue when it comes to the digital signal and it's going to be a very thorny issue and one of the great contentions, of course, that the broadcast industry is going to make is that they are free and they are over-the-air, but they want now this enhanced benefit from the Federal Government in imposing a mandate upon the cable industry or upon the satellite industry. So my question again is what additional things, Mr. Sander, do you think the broadcast industry can do in conjunction with their request to us that we mandate must carry for the digital signal, the multiplexing, with all of its complexities for the cable industry, set that fee at zero, again, for you. What could you do, in your opinion, as Belo, the best of the broadcasters, what would you recommend that the commitment be that the broadcasters make to ensure that there is more which is done on a mandatory basis, by the way, not you, you're the best, but we hear from Mr. Taylor that on average it came out to 45 seconds. So a lot of people are riding upon your good work and other good stations in the country, but we need something that's more uniform.

So what would you recommend?

Mr. SANDER. Mr. Markey, I think that's a very fair and thoughtful idea. I think as we go forward in the digital world and there are multi-channels and a lot of that is still trying to be hashed out as to what that really access is going to be, I think to have some information/political/governmental responsibilities for one of those channels or one of those multiplex signals is not an unreasonable idea and one that should be pursued.

Mr. MARKEY. So would it be within the realm of reasonableness to have the kind of proposal which Mr. Taylor supports be applicable, at least for some period of time to some part of the digital signal which is being sent out so that the candidates would at least be able to avail themselves in the early years of the digital age since obviously we're putting policies on the books now that will last for a generation?

Mr. SANDER. You may be more knowledgeable in the technical area than I am, but there seems to be so much confusion as to how much spectrum you're going to be able to allot in a multi-channel world, but having said that, to see that as part of the discussion, absolutely.

Mr. MARKEY. You see my experience now in 25 years on this committee is that the one request that we always get from the broadcasters is that it be free, that if we must carry, or it be the digital spectrum itself, free is the key word. So obviously that raises in our minds this question of how we revisit the issue of the public interest responsibility that has to be reciprocated and if no concrete proposal ever comes back, then that's obviously going to affect the way many of us view this relationship that exists between yourself and cable. The cable industry, to its credit, now has C-SPAN 1, C-SPAN 2, C-SPAN 3, admittedly, that's national and it doesn't have political advertising on it, but at the same time that's a pretty substantial commitment. And what I'm saying is that you are going to have an increasing burden and at this point it's clear to me that at least in your testimony today, there is no concrete proposal which has been developed by the NAB.

Mr. SANDER. On the digital side.

Mr. MARKEY. On the digital side. And I find that troubling because I know that there was a long discussion that Belo was part of at the national level.

Mr. SANDER. Right.

Mr. MARKEY. And I'm not asking you to speak again for the whole of the NAB, but just for your own company in terms of what you think it would be reasonable for you to offer as the best player in the industry.

Mr. SANDER. I'd be happy to do that. A couple of points I would add. One, we have been the proponent of the most robust, quality signal possible, so we have been on the aggressive side of the 10 ADI which will take the most amount of that bandwidth. Having said that knowing technology is going to evolve and change in the multi-channel world, Belo would be most happy to come to the table and talk about that.

One of the things I would submit and ask it very much goes to what Chairman Upton talked about, that is, one of the things we talk so much about, I think, in the broadcasting world, because we hear from your constituents, your voters, day in and day out is we don't want all these political ads, so I think what our responsibility would be is to continue to urge for more debates, more open forum, more open access and we do have a dilemma, it's frustrating that we offer this time and that we're not taken up on it. But I would hope that that would encompass all of your goal here for more a voice.

Mr. MARKEY. You believe the NAB should have a national policy which can then be codified, put in regulation or do you think we should just leave it to every company to make up their own mind?

Mr. SANDER. It's a great question. I'm not sure I've got a terrific answer for you. I think that—

Mr. MARKEY. I don't want you to speak disparaging of other members of the NAB, but you're aware of certain participants that have no public interest, obligation whatsoever.

Mr. SANDER. Absolutely.

Mr. MARKEY. And that their shareholders are the only people to whom they have any responsibility at all and you know who those broadcasters are.

Mr. SANDER. I would concur with that, but I would say I think it's the minority and not the majority and I think—

Mr. MARKEY. We don't pass laws for the good players. We don't have a death penalty because anyone is really concerned that my mother is going to murder anybody. That's not why we have it on the books. We have it for that percentage of people that we think are in a category that might tend toward anti-social behavior. So that's why you need to have laws. It's for those people. So within every industry, those people exist and so you need a certain minimal standard of conduct that they all understand that has to be met. And so while I appreciate the fact that there might be an adversity, you might be adverse to having any kind of a regulation, you do understand the need because of the lack of jaw boning capacity within an industry group to get the worst players to behave well.

Mr. SANDER. I certainly understand your position. I'd be happy to give you my list as well.

Mr. MARKEY. It's the same list. You know who they are. They're standouts in their field of inactivity.

One final question, Mr. Taylor, the cable and satellite TV industry, should they be included at this time?

Mr. TAYLOR. Well, my understanding is that under current law they are already included, the 1971 law included cable and I understand the 1992 Cable Act extended these political broadcast requirements to satellite. Now as we've heard testimony, there's not a great deal of advertising, certainly on satellite. There's just a little bit on cable. I don't see any reason at the moment to revisit this. The presumption is that over time this will become a more attractive medium of advertising. I understand the constitutional questions are a little bit different. It seems to me the strongest case is with broadcast because of the 70-year history of public interest obligation, but cable and satellite do have licenses, there is an interference issue with cable and there is at least a peg on which to impose some of these requirements. I don't pretend to be an expert, but I would simply notice that current law is that they are included.

Mr. MARKEY. And I would ask you, Mr. Morris, regardless of the percentage of money that ultimately is dedicated to buying TV everyone of us knows that if you're on television, you exist. If you're not on television, you do not exist. Descartes would have to change his formula.

Mr. MORRIS. I'm not here to suggest in a lot of highly competitive races this is not an important issue. I'm simply here to say that in the majority of congressional districts across the country, it's not an issue and you need to decide, as I mentioned earlier, whether or not and from your perspective it sounds like you made that decision that it is important to pass the law to benefit the few rather than the many and I don't have a problem. That's not my position. I don't have a position.

Mr. MARKEY. I apologize, your indulgence, Mr. Chairman. You may be right that in any given cycle television only plays a role in 15 or 20 percent of the seats, but when that seat is in doubt, that is, when there's an open seat and the new Congressman is going to be selected, albeit with the likelihood that they will stay there

for some considerable period of time, television, more likely than not, will be the determining factor as to who wins that open seat.

Mr. MORRIS. I cannot disagree with that.

Mr. MARKEY. And that then becomes the determining factor for how that vote is cast in Congress, for the rest of the duration of the career of that Congressman. So there is no seat, in other words, in the U.S. Congress that wasn't determined by television.

Mr. MORRIS. Well, actually, there are quite a few at this point because there have been members here long enough when TV wasn't—

Mr. MARKEY. Since I'm not the 18th senior Member of the U.S. House of Representatives, and I ran in 1976 with a television commercial, we're now numbering no more than 17 people, but even amongst them their careers, I think—

Mr. MORRIS. I would agree with you that in many, many Districts, particularly North Carolina, Florida and others that are not highly urbanized, but I would argue that in New York City, the next time any of those seats comes up, you will not see anyone advertising on television. You simply will not. In Chicago, you won't. It just doesn't happen.

Mr. MARKEY. How about in Boston?

Mr. MORRIS. In Boston, you do. There has been, if you look at the Congressional Delegation from Massachusetts in the last couple of election cycles, there has been 1 or 2 of the 10 in Massachusetts in which there has been significant advertising in any given election cycle, but for central city of Boston, and I use the example of Joe Kennedy, there is not a tremendous incentive to advertise in order to win the 8th Congressional District in Boston. I would venture to guess that whoever the Democratic nominee will never run ads in the 8th Congressional District in Boston. I think that's a pretty safe bet.

Mr. MARKEY. That is absolutely untrue. When Joe Kennedy ran the first time in 1986, there was a deification process that was reinforced by the television advertisements that were the central part of his campaign and when his seat was open, believe it or not, in 1998, \$12 million was spent in the primary.

Mr. MORRIS. In the primary, yes.

Mr. MARKEY. Almost all of it on television. So that's what, the fifth largest market in the country?

Mr. MORRIS. Something like that.

Mr. MARKEY. Fifth or sixth. So you might be able to exclude New York. Okay, but there aren't many any longer.

Mr. MORRIS. You can also, to get to a point you were making a moment ago about the question of cable, a lot of Members are moving to cable. One, it's much more cost effective and I don't know, it's certainly not the majority at this point, but if you look at Northern Virginia, and you look at my congressional district, the 8th Congressional District, it's now the 11th Congressional District, was the 8th Congressional District, there was a considerable amount of television advertising by an unopposed incumbent last time. It was all on cable. Every shred of it.

Mr. MARKEY. I'll just make this final point. When I ran in 1976 I was the first person to run a television commercial and I spent \$27,000 on the Boston TV stations and my slogan was because the

Speaker of the House had thrown my desk out in the hall because I had passed this bill banning judges from having law practices on the side, and my final slogan was the bosses can tell me where to sit, nobody tells me where to stand. That's my little slogan, 1976. That's \$27,000, 1976.

For the same buy today, it will be like \$300,000 to \$400,000 with the rate increase, huh? So I could go on and have \$25 fundraisers, \$50 fundraisers in 1976 and as an insurgent candidate actually figure out in a 12-way race how to come out of that field in spending only \$50,000 or \$60,000 totally for \$27,000 on television and create a candidacy.

Today, people can't have \$50 fundraisers or \$100—

Mr. MORRIS. But if you take the percentage of every Member of Congress and what they spent on television, the median expenditure for television advertising by Members of the House of Representatives has not changed one iota since 1992.

Mr. UPTON. I think on that note, we'll adjourn the hearing.

[Whereupon, at 12:41 p.m., the hearing was adjourned.]