HEARING ON THE USE OF "ROBOCALLS" IN FEDERAL CAMPAIGNS"

HEARING

BEFORE THE

SUBCOMMITTEE ON ELECTIONS

COMMITTEE ON HOUSE ADMINISTRATION

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

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THE USE OF ROBO-CALLS IN FEDERAL CAMPAIGNS

THURSDAY, DECEMBER 6, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ELECTIONS,
COMMITTEE ON HOUSE ADMINISTRATION,
Washington, DC.

The subcommittee met, pursuant to call, at 11:25 a.m., in Room 1310, Longworth House Office Building, Hon. Zoe Lofgren [chairwoman of the subcommittee] Presiding.

Present: Representatives Lofgren, Gonzalez, Davis of California, Davis of Alabama, McCarthy, Ehlers, and Lungren.

Staff Present: Liz Birnbaum, Staff Director; Thomas Hicks, Senior Election Counsel; Janelle Hu, Election Counsel; Jennifer Daehn, Election Counsel; Matt Pinkus, Professional Staff/Parliamentarian; Kyle Anderson, Press Director; Kristin McCowan, Chief Legislative Clerk; Daniel Favarulo, Staff Assistant, Elections; Robert Henline, Staff Assistant; Fred Hay, Minority General Counsel; Gineen Beach, Minority Election Counsel; and Bryan T. Dorsey, Minority Professional Staff.

Ms. LOFGREN. I understand that Mr. McCarthy is on his way and Mr. Ehlers, the ranking member of the full committee, is here.

I would like to, as we are getting settled, recognize and welcome the students from two high schools that are visiting this hearing today. The two schools are Carib Christian High School and Colegio Laico San Pablo High School. And I understand the students are as part of a civics education exercise.

And we do welcome all of you here. And hopefully you will have a chance to visit with us after the hearing, and maybe we can answer some of your questions.

I would like to welcome the Elections Subcommittee members, our witnesses and members of the public to the subcommittee's hearing on the use of robo-calls in Federal campaigns.

Political robo-calls, or pre-recorded messages supporting a particular candidate or a particular position, are an increasingly common fixture of the American political landscape. According to a study by the Pew Internet and American Life Project, roughly two-thirds of American voters received robo-calls in the final weeks before last year's election. Approximately 40 percent received between three and nine robo-calls during the campaign. And in the final week before the election, the Republican and Democratic Congressional Committees alone spent $600,000 on robo-calls in nearly 50 congressional districts.

Used responsibly, robo-calls can be an efficient, low-cost means for candidates and advocacy groups to reach out to their supporters or the public at large. Used irresponsibly or maliciously, however, robo-calls can harass, confuse or deceive the public about elections or other matters of pressing importance.

Unfortunately, we saw far too many examples of deceptive and abusive use of robo-calls in the last Federal election. In congressional districts throughout the country, voters were deluged with robo-calls at their homes. Often those calls included misleading information about the opposing candidate. Robo-calls usually did not identify the sponsor of the message until the very end of recording, if at all. Several of the robo-calls were designed to deceive voters about which candidate was responsible for the call.

The mere fact of receiving a robo-call from a candidate, particularly at odd hours of the night or morning, may push an undecided voter to form a negative view of that candidate and vote for his or her opponent or avoid the election altogether. As one voter in Nashville observed, "If I were on the fence, it would push me to the other candidate that wasn't annoying me." This fact was not lost on the campaigns.

Several of these misleading robo-calls were placed to the same number with unrelenting frequency. It was not uncommon for voters in some districts to receive three calls in a 4-hour period. By and large, voters saw these calls as a nuisance. The Missouri Attorney General reported receiving more than 600 complaints about robo-calls in the run-up to the last election. Unfortunately, many voters responded to the deluge of robo-calls by disengaging from the election entirely. With the airwaves already saturated with political advertising, robo-calls drove voters away from meaningful participation in the democratic process. Regardless of political affiliation, this is a trend that should concern us, particularly as our active voter participation still lags that of other democracies.

Apart from their effect on the civility of political discourse and participation in elections, abusive robo-calls represent a threat to the sanctity of the home. As the Supreme Court has recognized time and time again, the Government has a significant interest in protecting residential privacy. In her decision in Frisby v. Schultz, Justice O'Connor noted that a special benefit of the privacy all citizens enjoy within their walls, which the state may legislate to protect, is an ability to avoid intrusions. Frisby is just one of many first amendment cases noting that the state's interest in protecting the well-being, tranquility and privacy of the home is certainly of the highest order in a free and civilized society.

Notwithstanding that interest in protecting residential privacy, many Federal laws do not apply to political robo-calls. Those laws that do apply often go unenforced or, if enforced, impose modest civil penalties that some robo-call firms simply regard as the cost of doing business.

After this last election, State governments sought to fill that void by introducing over 100 bills after the election to address robo-calls. To date, 23 States have enacted laws that deal with political robo-calls, and this varying approach ranges from an outright ban, a ban on robo-calls to numbers listed on the National Do-Not-Call

Registry, to require disclosures of the entity sponsoring and paying for the call.

Municipal governments have also legislated, and indeed these efforts have not actually stopped the deceptive robo-calls. We saw, last month, in the gubernatorial race in Kentucky, one candidate was the victim of robo-calls that falsely purported to be from a gay-rights advocacy group in support of that candidate, and one voter reported, "These calls were the ugliest thing I have heard in an election probably in my lifetime."

With incidents like these, it is clear little has happened since last year's election to address this issue. And this hearing we hope will explore the nature of the problem and potential remedies, and whether the Federal, State and local governments can work together to strike the proper balance of first amendment interests, residential privacy and meaningful participation in the electoral process.

At this point, I would like to recognize the ranking member of the subcommittee for any statement he may wish to make.

[The statement of Ms. Lofgren follows:]

Committee on House Administration
Subcommittee on Elections

Hearing on
"Use of Robo-Calls in Federal Campaigns"
Thursday, December 6, 2007, 11:00 a.m.

Statement of Chairwoman Zoe Lofgren

Good afternoon. I would like to welcome the Elections Subcommittee members, our witnesses, and members of the public to the Subcommittee's hearing on the "Use of Robo-Calls in Federal Campaigns."

Political "robocalls" – or pre-recorded messages supporting a particular candidate or political position – are an increasingly common fixture of the American political landscape.

According to a study by the Pew Internet and American Life Project, roughly two-thirds of American voters received robocalls in the final weeks before last year's election. Approximately 40 percent received between three and nine robocalls during the campaign. In the final week before the election, the Republican and Democratic congressional committees alone spent $600,000 on robocalls in nearly 50 congressional districts.

Used responsibly, robocalls can be an efficient, low-cost means for candidates and advocacy group to reach out to their supporters or the public at large. Used irresponsibly or maliciously, however, robocalls can harass, confuse, or deceive the public about elections or other matters of pressing importance.

Unfortunately, we saw far too many examples of deceptive and abusive use of robocalls in the last federal election.

In congressional districts throughout the country, voters were deluged with robocalls at their homes. Often those calls included misleading information about the opposing candidate.

The robocalls usually did not identify the sponsor of the message until the very end of the recording, if at all. Several of the robocalls were designed to deceive voters about which candidate was responsible for the call.

The mere fact of receiving a robocall from a candidate, particularly at odd hours of the night or morning, may push an undecided voter to form a negative view of that candidate and vote for his or her opponent or avoid the election all together. As one voter in Nashville observed, "If I were on the fence, it would push me to the other candidate that wasn't annoying me."

This fact was not lost on the campaigns. Several of these misleading robocalls were placed to the same number with unrelenting frequency. It was not uncommon for voters in some districts to receive three calls in a four-hour period.

By and large, voters saw these calls as a nuisance. The Missouri Attorney General reported receiving more than 600 complaints about robocalls in the run-up to the last election.

Unfortunately, many voters responded to the deluge of robocalls by disengaging from the election entirely. With the airwaves already saturated with political advertising, robocalls drove voters away from meaningful participation in the democratic process.

Regardless of political affiliation, this trend is a cause for concern, particularly as our active voter participation still lags far behind that of other democracies.

Apart from their effect on the civility of political discourse and participation in elections, abusive robocalls represent a threat to the sanctity of the home.

As the Supreme Court has recognized time and time again, the government has a significant interest in protecting residential privacy. In her decision in *Frisby v. Schultz*, Justice O'Connor noted that "[a] special benefit of the privacy all citizens enjoy within their walls, which the State may legislate to protect, is an ability to avoid intrusions." *Frisby* is just one of many First Amendment cases noting that "the State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." (*Carey v. Brown*)

Notwithstanding that interest in protecting residential privacy, many federal laws do not apply to political robocalls. Those laws that do apply often go unenforced, or if enforced, impose modest civil penalties that some robocall firms simply regard as "the cost of doing business."

After the last election, state governments sought to fill that void by introducing over 100 bills after the election to address robocalls. To date, 23 states have enacted laws that deal with political robocalls. The varying approaches range from an outright ban, a ban on robocalls to numbers listed on the national Do-Not-Call registry, to required disclosures of the entity sponsoring and paying for the call.

Municipal governments have also responded. Just last month, two candidates in a local election in Seattle agreed to pay penalties for violating city campaign rules regarding the use of robocalls. However, for a total of 54,000 calls placed, one candidate paid only $150 in penalties. With *de minimis* sanctions such as these, it is unclear whether laws function as effective deterrents.

Indeed, the use of deceptive robocalls seems to have continued unabated. In last months gubernatorial race in Kentucky, one candidate was the victim of a robocalls that falsely purported to be from a gay-rights advocacy group in support of that candidate. One voter reported that the calls were "the ugliest thing I've heard in an election probably in my lifetime."

With incidents like these, it is clear that little has happened since November 2006 to address the problem with abusive robocalls. It is equally clear that, unless concrete steps are taken, the problem with robocalls will be at least as prevalent in next year's federal elections.

With our panel of witnesses, the Subcommittee hopes to explore the nature of the problem with abusive robocalls, and how states, private actors, and the federal government can work together to strike a proper balance among First Amendment interests, residential privacy, and meaningful participation in the electoral process.

Mr. MCCARTHY. Well, thank you, Madam Chairwoman, and I do want to thank you for holding this oversight hearing.

As one member that has been on the end of negative robo-calls but also seen positives from this position, doing tele-town halls, that I have never gotten so much response back from constituents and felt the freedom to ask a member any question out there, that I see that, as we move forward in an election cycle and as we move forward as a way to communicate with our constituents, especially with new technology, we do need these oversight hearings to know which way we tread and see if there is an ability to protect an individual's right to privacy and the individual's right to actually still communicate.

I think every Member here who will testify today will have a horror story to tell—I have been part of those—and also have maybe a positive story to tell, as well. So this is one that we do need oversight in. And I thank you, Madam Chair, for holding this, that we can get further information and look, as we move forward, especially with technology continuing to change and abilities to reach constituents and constituents actually to reach their elected officials to have their voices heard.

And that is the end of my statement, Madam Chair.

Ms. LOFGREN. Thank you, Mr. McCarthy.

And other members are invited to submit their statements for the record.

And, without objection, we welcome the participation of Mr. Lungren in this hearing.

And we now are very lucky to have three of our colleagues who are here to testify on this subject.

First we have Representative Melissa Bean, who is serving her second term in the U.S. Congress, representing Illinois's 8th Congressional District. She serves as Chairwoman of the Tax, Finance and Export Subcommittee of the House Small Business Committee, as well as serving on the House Financial Services Committee. Prior to her serving in the House, Congresswoman Bean helped build revenues and sales management positions at leading technology companies, before founding her own consulting firm in 1995.

We also are pleased to recognize Congressman Jason Altmire. Congressman Altmire is serving his first term in the United States House of Representatives. He represents Pennsylvania's 4th Congressional District. He serves as Chairman of the Investigations and Oversight Subcommittee of the House Small Business Committee, as well as serving on the Education and Labor Committee and the Transportation and Infrastructure Committee. Prior to serving in the House, Congressman Altmire worked as a congressional staffer, a member of President Clinton's Task Force on National Health Care Reform, and with the Federation of American Hospitals.

And finally, we are pleased to recognize Congresswoman Virginia Foxx, who is serving her second term in the U.S. House of Representatives, representing North Carolina's 5th Congressional District. She sits on the House Committees on Agriculture, Government Reform, and Education and the Workforce. And prior to serving in Congress, Congresswoman Foxx spent 10 years in the North Carolina Senate.

So we welcome all three of you, and we are eager to hear your testimony.

We would ask if we could begin with you, Congresswoman Bean. And there is a light on the microphone. If you can turn it on, that would be terrific.

STATEMENTS OF HON. MELISSA BEAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF ILLINOIS; HON. JASON ALTMIRE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA; HON. VIRGINIA FOXX, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF NORTH CAROLINA

STATEMENT OF MELISSA BEAN

Ms. BEAN. Thank you, Chairwoman Lofgren, Ranking Member McCarthy, my colleagues, members of the subcommittee, for holding today's hearing on the use of robo-calls in Federal elections.

I am Melissa Bean, and I have the honor of representing the 8th Congressional District of Illinois. This is my first time on the other side of the table testifying in a hearing. I was asked to share my experiences from the 2006 campaign, when I was re-elected in a highly targeted and expensive race in the northwest suburbs of Chicago. The topic of today's hearing is one I am personally familiar with.

Although robo-calls, or prerecorded phone messages, can be a useful method in communicating with constituents and voters, unfortunately they can be used to deceive and confuse those voters or, even worse, deliberately suppress voter participation.

In October and November 2006, the NRCC had spent over $60,000 in independent expenditure money to place over a million robo-calls into my district. The calls all followed the same basic format that started off by saying in an upbeat voice, "Hello. I am calling with information about Melissa Bean." And then there was a deliberate pause.

Most voters assumed the call was sponsored by my campaign, because these calls were received multiple times a day, sometimes very late, very early or on their personal cell phones. People were annoyed, frustrated and hung up the phone without listening to the message.

For those who stayed on the line, they would have heard a standard negative attack, as we have all experienced. "as Congresswoman, Melissa Bean opposed legislation X. She is wrong for Illinois." After hearing the negative attack, those who stayed on the line realized that the call that initially appeared to be in support of my campaign was actually in opposition. But it wasn't until the end of the call, and usually in a different, hurried voice, before the voter heard who was really responsible for the call. "this ad was paid for by the NRCC and not authorized by any candidate or candidate's committee," is what it would say at the end.

It is my understanding that, of the people who answer the phone for robo-calls, roughly 25 percent hang up right away, 25 percent hang up halfway through the call—or, I am sorry, halfway through the call, and then 25 hang up between the middle and the end, and only 25 will actually stay through the end of the call. The drop-off

rate increases when voters receive the same call over and over, as they did. By that logic, roughly half of the individuals who received the call believed incorrectly it was on behalf of my campaign, and only 25 percent learned it was an opposition call.

As you can imagine, these calls infuriated voters. After receiving several robo-calls a day, all they would hear was, "Hello. I am calling with information about Melissa Bean." Countless voters who contacted my office or spoke to me out in the district at campaign stops threatened to vote against me if I didn't stop harassing them with these calls. One voter who was interviewed by a local newspaper in my district received 21 of the same robo-calls in one week. They would explain how the calls woke up their babies, interrupted their dinner, kept leaving them messages on their cell phones. They came very late at night. They would jump up to grab the phone and hear, "Hello; I am calling with information about Melissa Bean," for the second, third, fourth time that day. They were deceived into believing I supported this activity.

My campaign and I would explain that the calls were not from my office, were in fact generated by the NRCC, who was using them to attack my record. It was difficult to convince them. For every voter who learned the truth, many more were so furious with my campaign and the process that they were discouraged from voting or persuaded to vote for another candidate.

Unfortunately for voters across the country, this intentional deception was not an isolated case. According to the Associated Press, the NRCC ran similar types of robo-calls in 53 competitive House districts during the 2006 election. Most of the calls were generated by the same communications firm and followed the same format: "hello. I am calling with information about candidate X." The press reported that voters would receive several calls in the middle of the night. People would tell me about 2 o'clock-in-the-morning phone calls and on their cell phones. Even after calling the NRCC and asking to be removed from the list, the calls continued.

In order to respond effectively to these misleading calls, campaigns across the country were forced to shift resources and change strategy. Instead of using the last few weeks of the campaign to discuss positions on issues that voters cared about, volunteers and staff spent hours each day contacting voters, trying to explain what the robo-calls were about and who authorized them. Thousands of flyers with information on the calls, instead of information on candidates' platforms, were distributed. In my own race, instead of using one of the few prerecorded messages my campaign authorized with President Bill Clinton, which would have urged voter turnout, he instead rerecorded it to explain about the misleading calls.

As I mentioned at the opening of my testimony, robo-calls can be helpful for candidates to legitimately contact voters with information regarding their positions. However, during the 2006 cycle, voters in the 8th District and other parts of the country were subject to abusive calls that were intended to deceive and disenfranchise voters.

I understand that several pieces of legislation have been introduced to address abusive and deceptive use of robo-calls, including the Chair's bill, the Quelling of Unwanted, Intrusive and Excessive

Telephone Calls Act. However, first and foremost, the FCC must enforce current laws. The calls my constituents received may have been in violation of current law.

Beyond enforcing current laws, I would recommend legislation that prohibits repeating the same message several times a day, limits the hours within which those calls can be received, prohibits misleading messages that confuse callers about who is making call, and clearly notifies voters at the beginning of the call who sponsored the prerecorded message.

The 2002 Campaign Finance Reform Act forced candidates to stand by their ad. That applies to commercials, mail pieces, print and Internet advertising, and robo-calls. The robo-calls received by voters in my district and other competitive districts did not follow the spirit of that law and may have violated the letter of the law, in some instances. We have a responsibility to make sure all campaign media follows the spirit and the letter of the law.

While the press did ultimately cover the deception of these calls in my district and elsewhere, only a portion of those who were victimized would have seen it. Undoubtedly, there were voters who were discouraged and stayed home on Election Day, while others may have wrongfully punished candidates for calls they didn't make.

This is not a partisan issue. Our democracy should seek an open and transparent process so candidates can stand on the power of their ideas. Our process should disallow deceptive campaign practices that undermine those democratic principles.

I am sorry; I did see I went over. And again, I haven't been on this side of the table. I should have been looking closer.

I will stick around for the testimony of my colleagues and hope to stay for some of the questions. But, as you all know, it is a compressed day. If I do miss any questions, I will be happy to make myself available.

[The statement of Ms. Bean follows:]

Testimony of the Honorable Melissa L. Bean
U.S. Representative (IL-08)

Hearing Entitled: "Use of Robo-Calls in Federal Campaigns"

December 6, 2007

Thank you Chairwoman Lofgren, Ranking Member McCarthy, and Members of the Subcommittee for holding today's hearing on Robo-Calls.

I am Melissa Bean and I have the honor to represent the Eighth Congressional District of Illinois. In 2006, I was reelected in a highly targeted and expensive race in the northwest suburbs of Chicago.

The topic of today's hearing is one I am personally familiar with. Although robo calls or pre-recorded telephone messages can be a useful method in communicating with constituents and voters, unfortunately, they can be used to deceive and confuse those voters, or, even worse, deliberately suppress voter participation.

In October and November 2006, the National Republican Congressional Committee (NRCC) spent over $60,000 in Independent Expenditure money to place over one million robo calls in my district.

The calls all followed the same basic format that started off by saying in an upbeat voice:

"Hello, I'm calling with information about Melissa Bean" and then a deliberate pause.

Most voters assumed the call was sponsored by my campaign. Because these calls were sometimes received very late, very early, or on their cell phones, people were annoyed, frustrated, and hung up the phone before listening to the entire message.

For those who stayed on the line, they would have heard a standard negative attack such as this call:

"...As Congresswoman, Melissa Bean opposed legislation X. Melissa Bean is wrong for Illinois..."

After hearing the negative attack, they realize the robo-call that initially appeared to be in support of my campaign was actually in opposition. However, it was not until the end of the call and usually in a different, hurried voice did the voter hear who was really responsible for the call.

"This call was paid for by the National Republican Congressional Committee and not authorized by any candidate or candidate's committee. www dot nrcc dot org."

It is my understanding, that of the people who answer the phone for robo-calls, roughly 25 percent hang up right away, 25 percent hang up halfway through the call, 25 percent hang up between halfway and the end, and only 25 percent who answer stay on through the end of the call. The drop off rate increases when voters receive the same call over and over.

By that logic, 50 percent of individuals who received the call believe it was on behalf of my campaign, another 25 percent were unsure, and only 25 percent listened to the end to learn it was an opposition call.

As you can imagine, these calls infuriated voters. After receiving several robo-calls a day all they would listen to was "Hello, I'm calling with information about Melissa Bean."

Countless voters who contacted my office or spoke to me directly at campaign stops threatened to vote against me if "I" didn't stop calling them with robo-calls. One voter who was interviewed by a local newspaper in my district received 21 of the same robo-calls in one week. They would explain how the calls woke up their babies, interrupted their dinner, kept leaving them messages on their cell phones, were received late at night, or forced them to run to grab the phone and all they would hear is "Hello, I am calling with information about Melissa Bean" for the second, third, fourth time that day.

These voters were deceived into believing the calls were from my campaign.

My campaign and I would explain that the calls were not generated by my office, but in fact they were generated by the NRCC who was using the calls to attack my record. Since most of the voters who complained didn't listen to the whole message, it was often difficult to convince them. And you have to imagine for every voter who contacted the campaign that we were able to explain what was happening, many more were so furious with my campaign and the process that they were discouraged from voting or possibly persuaded to vote for another candidate.

In order to respond effectively to these misleading calls, my campaign was forced to shift resources and change strategy. Instead of using the last few weeks of the campaign to discuss my position on issues, volunteers and staff spent hours each day contacting voters desperately trying to explain to them that the countless robo-calls they were receiving were not authorized or in support of my campaign. We printed thousands of flyers with information on the calls instead of information on my candidacy. And instead of using one of a few pre-recorded messages my campaign authorized with President Bill Clinton urging Democrats to get to the polls and vote, we had President Clinton rerecord his message explaining the misleading robo-calls voters had been receiving.

Unfortunately for voters across the country, this intentional deception was not an isolated case. According to the Associated Press, the NRCC ran similar types of robo-calls in 53 competitive House districts during the 2006 election. Most of the calls were generated by the same communications firm and followed the same format, "Hello, I am calling with information about blank Democratic candidate."

The press reported that voters would receive several calls in the middle of the night and on their cell phones. Even after calling the NRCC and asking to be removed from the list, the calls continued.

As I mentioned at the opening of my testimony, robo-calls can be helpful for candidates to legitimately contact voters with information regarding their positions. However,

during the 2006 election cycle, voters in the Eighth District of Illinois were subject to abusive robo calls that were intended to deceive and disenfranchise voters.

I understand that several pieces of legislation have been introduced to address abusive and deceptive use of robo-calls including the Chair's bill, *The Quelling of Unwanted Intrusive and Excessive Telephone Calls Act.*

However, first and foremost, current FCC laws must be enforced. The calls my constituents received may have been in violation of current law.

Beyond enforcing current laws, I would recommend legislation that:

1.) Prohibits repeating the same message several times a day
2.) Limits the hours within which robo-calls can be received.
3.) Prohibits misleading messages that confuse callers about who is making the call.
4.) Clearly notifies voters at the beginning of a robo-call who sponsored the pre-recorded message.

The 2002 Campaign Finance Reform Act forced candidates to stand by their ad. That applies to commercials, mail pieces, print and internet advertising, and robo-calls. The robo-calls received by voters in my district and other competitive districts did not follow the spirit of that law and may have violated the letter of the law in some instances. We have a responsibility to make sure all campaign media follows the spirit and the letter of the law.

While the press did cover the deception of these calls in my district and elsewhere, only a portion of those who were victimized would have seen the press. Undoubtedly there were voters who were discouraged and stayed home on Election Day while others who may have wrongfully punished candidates for calls they did not make. Our democracy should seek an open and transparent process so candidates can stand on the power of their ideas. Our process should disallow deceptive campaign practice that undermines those campaign principals.

Once again, thank you for holding today's hearing. I am happy to answer any questions you may have.

\Melissa Bean for Congress Campaign Flyer Responding to Robo-Calls

DECEPTIVE, HARASSING AUTOMATED PHONE CALLS ARE NOT FROM CONGRESSWOMAN MELISSA BEAN

Learn Who's Making Them And How To Stop Them

Residents in Illinois' 8th Congressional District are being harassed with automated phone calls – "robo calls" -- designed to trick voters into thinking they are from Congresswoman Melissa Bean's campaign.

Don't be fooled! The Republican Party – Congresswoman Bean's *opponents* – have spent over $60,000 for millions of calls on behalf of David McSweeney. Dialing over and over again, the calls *deliberately* seem as if they come from Melissa Bean's congressional campaign. This national Republican committee also is using this tactic in Illinois' 6th District and in highly-competitive campaigns throughout the country: from Idaho to Florida, Connecticut to California.

PIONEER PRESS online

"It plays on the fact that people hate these calls and makes them think it's us and not them."

... She got the call again and again and 18 more times, making for a total of about 21 calls since October 24. – 11/2/06

NORTHWEST HERALD

People who hang up immediately are being tricked into thinking that Bean's campaign is behind the calls, Bean spokesman Brian Herman said. "It's not just telemarketing – it's a voter-suppression effort ... They're trying to make people think we're calling them, and calling them so many times that they're just annoyed..." – 11/1/06

AP Associated Press

"I think the real point here is that the Republicans are using a desperate campaign tactic that is misleading, at worst violating the law and at best is a page out of Karl Rove's playbook ...They clearly are attempting to mislead voters." – 11/1/2006

THE WALL STREET JOURNAL

"...Republican operatives send automated middle-of-the-night phone calls naming Democratic candidates to alienate voters..." – 11/3/2006

The National Republican Congressional Committee is paying for these calls! To remove your name from their lists and demand that they halt this deceptive and annoying practice, call the NRCC at (202) 479-7000.

Paid for by Melissa Bean for Congress. Printed In-House.

Press Stories about Robo-calls

BarringtonCourier-Review
BarringtonCourier-Review.com Member of the Sun-Times News Group

'Robocalls' are latest in negative campaigning

(http://www.pioneerlocal.com/barrington/news/120568,ba-chrobocalls68-110206-s1.article)

November 1, 2006

By PATRICK CORCORAN Staff Writer

Rozanne Ronen, a Barrington resident, got the call -- "Hi. I'm calling with information about Melissa Bean ..."

Then she got the call again and again and 18 more times, making for a total of about 21 calls since October 24.

"They are very annoying," Ronen said.

Pat Vockeroth, of Mount Prospect, received the calls too -- "Hi. I'm calling with information about Tammy Duckworth ..."

"If you only listen to the first sentence, you think they are from the Duckworth campaign," she said.

But the calls aren't paid for by Bean, Duckworth or even the Democratic Congressional Campaign Committee, they are paid for by the National Republican Congressional Committee.

Brian Herman, a spokesman for U.S. Rep. Melissa Bean, D-8th, said the calls are a campaign trick meant to kill the Democrat vote on Nov. 7.

"Voters ought to make their decision based on merit and facts, but this about suppressing the vote," he said.

After the introduction, the calls touch on one of several topics, such as immigration or the fact that Bean or Duckworth lives outside the 8th and 6th districts.

Herman said the Bean campaign doesn't use these kinds of tactics.

"We don't use technology to harass voters," he said.
Christine Glunz, a Duckworth spokesman, said the harassment inhibits the campaign's ability to contact voters legitimately.

"Now when we call ... for volunteers or knock on doors, people think we've already made a dozen attempts to contact them. It plays on the fact that people hate these calls and makes them think it's us and not them," she said.

Both campaigns have received dozens of complaints.

Jonathan Collegio, NRCC spokesman, acknowledged that the NRCC has paid for series of robocalls in the 6th and 8th districts, saying phone banking are part of any modern campaign.

"Phone banking is used by campaigns of all stripes and all these calls are made between 9 a.m. and 8 p.m.," he said.
Asked about the repetitive nature of the calls, Collegio said that may be a problem with the contractor.

"Because these calls are done by computers, it could be some kind of a glitch. This is all a matter of voter contact where we are trying to make sure people are aware of the upcoming election and make sure they vote the right way," he said.
Ronen isn't so sure.

"I don't buy that," she said. "The calls seem to be very well planned and I consider it a kind of harassment."

Ronen and Vockeroth, both of whom are supporters of the Democratic Congressional candidates said this type of negative advertising may affect some voters.

"It looks like they are going after a narrow group of voters, trying to sway them before the election," Ronen said.

"I'm savvy because I'm following the campaign, but on other people, this kind of thing might work," Vockeroth said.

According to filings with the Federal Election Commission, the NRCC contracted with Conquest Communications Group, of Richmond, Va., to perform the current batch of robocalls, paying the company a total of $50,000 between Oct. 6 and 30 to call voters in the 8th district.

A Conquest employee said the company is currently providing pre-election phone banking services for candidates, including ones in Illinois, but couldn't confirm it is responsible for the "Hi, I'm calling with information about ..." calls to voters in the 6th and 8th district.

Bean is running for re-election against Wheaton investment banker David McSweeney. Duckworth is running against GOP Congressional candidate and state Sen. Peter Roskam.

Voters can be removed from NRCC call lists by calling (202) 479-7000.

NORTHWEST HERALD
Local News and Video for McHenry County, Illinois

Robo-calls' peeve Dems

By KEVIN P. CRAVER - kcraver@nwherald.com

November 1, 2006

With the election a week away, Barbara Tipton of McHenry comes home to about three or four messages on her answering machine sent by another machine.

The "robo-calls" from the National Republican Congressional Committee oppose incumbent Democrat Melissa Bean, who Tipton plans to vote for. Although Tipton considers the calls a pain, Democrats consider them a ploy to drive voters from the ballot box.

"My delete button on my answering machine is fairly worn out at this point," Tipton said. "I think this a deceptive program to undermine Melissa Bean in a way other than her stand on the issues."

Bean, of Barrington, is running for a second term in the traditionally Republican-leaning district against GOP challenger David McSweeney and Moderate Party challenger Bill Scheurer.

And while the Democratic Party is accusing the GOP of election-eve dirty tricks, Scheurer is accusing Democrats of the same related to a mailer that falsely claims Republicans are funneling hundreds of thousands into his campaign to siphon votes from Bean.

The first sentence of several of the pre-recorded 30-second messages states that the caller is "calling with information about Melissa Bean," and follows with criticism.

But people who hang up immediately are being tricked into thinking that Bean's campaign is behind the calls, Bean spokesman Brian Herman said.

"It's not just telemarketing – it's a voter-suppression effort," Herman said.

"They're trying to make people think we're calling them, and calling them so many times that they're just annoyed," Herman said.

The GOP committee has spent about $6,800 in the past week on calls to the 8th district, according to Federal Election Commission filings. Each call typically costs between 5 and 7 cents.

Republican spokesman Jonathan Collegio said the calls are an important campaign tool, and that they clearly state at the end who is paying for the call.

"Phone banks and automated calling are an integral part of any modern campaign. They're used in virtually all contested House races nationwide," Collegio said. "If there's a glitch in the technology, the calls could be irregular, but that's much more of an exception than a rule."

Herman said his office has received hundreds of phone calls from angry voters thinking that Bean's campaign is behind the calls. Such confusion is happening in other close races, said Democratic Congressional Campaign Committee spokeswoman Jenn Psaki.

Psaki could not speak for other special interest groups, but said that the national committee has only paid for robo-calls in one House district.

"The fact is, they are not coming from the Melissa Bean campaign," Psaki said. "This is going on in at least seven or eight districts that we know of, maybe more."

Scheurer is only concerned with one district, and the third-party candidate is accusing Democrats of lying in a mailer paid for by their campaign committee.

The mailer accuses Republicans of "propp[ing] up a party-switcher like Bill Scheurer with hundreds of thousands of dollars" to beat Bean. Scheurer's one-man Moderate Party candidacy has only collected about $50,000, according to FEC reports, mostly from labor unions and none of it from Republicans. Other donors work for such liberal groups as World Can't Wait and Public Citizen.

Scheurer, who ran against Bean in the 2004 primary, said he found it amusing that he was being portrayed as a Republican ploy.

"It's a lie and it's silly. I wish it was true, because if we had even that amount of money, we could win in a landslide," Scheurer said. Psaki declined comment on the mailer.

How do you like those nasty telephone calls from the campaigns?

Associated Press

November 1 2006

WASHINGTON -- Press one if you think they're dirty tricks. Press two if you think prerecorded telephone messages are devastatingly effective, especially during the final days of a close campaign.

In at least 53 competitive House races, the National Republican Campaign Committee has launched hundreds of thousands of automated telephone calls, known as "robo calls."

Such calls have sparked a handful of complaints to the FCC and underscore the usefulness of the inexpensive - and sometimes overwhelming - political tool.

"As much as people complain about getting automated calls and saying they don't work, every politician is doing them," said Jerry Dorchuck, whose Pennsylvania-based Political Marketing International will make about 200,000 such phone calls each hour for mostly Democratic candidates. "Targeted calls play a key in very close races."

They can single out single women, absentee voters, independents and party faithful with tailored messages, but they also can frustrate voters. Sometimes, the latter is their goal.

Bruce Jacobson, a software engineer from Ardmore, Pa., received three prerecorded messages in four hours. Each began, "Hello, I'm calling with information about Lois Murphy," the Democrat running against two-term incumbent Rep. Jim Gerlach in the Philadelphia-area district.

"Basically, they go on to slam Lois," said Jacobson, who has filed a complaint with the FCC because the source of the call isn't immediately known.

FCC rules say all prerecorded messages must "at the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call." During or after the message, they must give the telephone number of the caller.

"The way they're sent is deceptive. The number of calls is harassing. The way her stances are presented in these stories is deliberately misleading and deceptive," said Karlyn Messinger, another Murphy supporter from Penn Valley, Pa., who filed a complaint with the FCC.

NRCC spokesman Ed Patru denied any illegal intent.

"All of our political calls are in compliance with the law," Patru said.

Not so, said the Democrats.

"They are violating the regulations that were set up," said Jen Psaki, a spokeswoman for the Democratic Congressional Campaign Committee, who said the DCCC employed one robocall this cycle and paid $500 for it.

"I think the real point here is that the Republicans are using a desperate campaign tactic that is misleading, at worst violating the law and at best is a page out of Karl Rove's playbook," Psaki said. "They clearly are attempting to mislead voters."

Democrats argued that that's the strategy.

"Because they are getting so many, they are only listening to the first part of the message," said Amy Bonitatibus, a Murphy spokeswoman. "They're hoping to turn off our base. ... These are pretty much dirty tricks by the Republican Party."

The NRCC, the GOP campaign arm for House candidates, has spent $2.1 million on such automated calls nationwide. In Illinois, at least three versions of a phone message target Tammy Duckworth, the Democrat in a tight Chicago-area race, and her positions on taxes, Social Security and immigrants.

"Illinois families will be footing the bill for illegal immigrants who get government benefits," the voice says in one.

In Connecticut's hotly contested 4th Congressional District, incumbent Republican Rep. Christopher Shays and Democrat Diane Farrell both said they are victims of misleading and annoying robocall campaigns. Shays, a 10-term congressman, said he has survived more than 20 robocall campaigns, including one that tried to link his stance on stem-cell research to that of religious extremists.

"These calls are at best misleading, and often blatantly wrong," Shays wrote in a letter to several newspaper publishers this summer.

Farrell spokeswoman Jan Ellen Spiegel said Tuesday the campaign has been a victim of "constant pummeling," including robocalls that begin with a recorded voice saying, "I'd like to talk with you about Diane Farrell." It's the same tactic employed in Murphy's district and elsewhere.

In North Carolina's 11th Congressional District, Republicans are going after challenger Heath Shuler, whose campaign said the calls are coming as late as 2:30 a.m.

"Calling people up, making people think it's me when it's actually them - it's acts of desperation. ... I think it's part of the corruption in Washington," Shuler said.

That campaign funded two robocalls during the primary but isn't looking to use any more.

"You can't combat a bad robocall message with another robocall message," said Shuler spokesman Andrew Whalen.

It's not just the campaign committees. Outside groups also are joining the fracas. Common Sense, a nonprofit group based in Ohio, has expanded to four other states to help conservative candidates this cycle.

"We can ask the voter or the respondent questions about things that are important to them and then provide information to them based on the things they think are important," said Common Sense's Zeke Swift, who calls the efforts "custom campaigning."

During one call in Maryland, an automated voice asked questions that clearly favor Republican Michael Steele's bid for Senate.

It's not just Republicans. After Rep. Mark Foley resigned his seat amid the House page scandal, the progressive American Family Voices launched robocalls in 50 districts.

"Congressional Republican leaders, including Speaker Dennis Hastert, covered up for a child sexual predator. ... The answer is arrests, resignations and a new congressional leadership," the call told voters.

That Florida district, once a safe Republican seat, is now in play.

THE WALL STREET JOURNAL

November 3, 2007

"The Wall Street Journal's Washington Wire reports that House Democrats say "Republican operatives send automated middle-of-the-night phone calls naming Democratic candidates to alienate voters in Pennsylvania, Connecticut and California. House Republican spokesman Carl Forti dismisses the claim as 'totally baseless,' saying the party places no calls after 8 pm."

Daily Herald
Big Picture . Local Focus

"They have your number: Automated campaign calls just keep coming"

By Stacy St. Clair
Daily Herald Staff Writer
Posted Sunday, November 05, 2006

Joan Sherrill had not decided how to vote in the 8th Congressional race until she received more than a dozen phone calls from Republican David McSweeney.

At that point, the choice was clear.

"I am voting for (Democrat) Melissa Bean," the Palatine woman said. "The calls are just too much. They're annoying."

Sherrill's reaction to the automated phone calls - a popular political practice known as robocalling - is the risk candidates take when they employ the inexpensive and seemingly effective marketing tool.

In at least 53 competitive congressional races, the National Republican Campaign Committee has launched hundreds of thousands of automated telephone calls. The GOP's target areas include the Illinois 6th and 8th districts, where suburban voters will play a critical part in deciding which party controls the House of Representatives.

In the past week, the committee spent $10,000 on robocalls for McSweeney and $9,000 to help state Sen. Peter Roskam, who's in a tough fight against Iraq war veteran Tammy Duckworth.

A GOP spokesman would not comment on how many calls were being made for either candidate. Each call, however, costs about a nickel, meaning roughly 200,000 voters could be reached by phone in the McSweeney-Bean race.

"Every modern campaign uses phone calls as part of their campaign strategy," committee spokesman Jonathan Collegio said.

It's not just campaign committees directing these calls. Outside groups, such as unions and nonprofits, are using robocalls. The Chicago Federation of Labor, for example, left messages Friday encouraging people to vote for their endorsed candidates, including Democrat Todd Stroger for Cook County Board president.

The calls work, in part, because they can reach specific groups. Seniors, single women, absentee voters and the party faithful all can receive messages specifically tailored for them.

"It's cheap and inexpensive to make phone calls," said Bruce Newman, a marketing professor at DePaul University. "The trick is to keep them on the phone."

The Republican campaign committee attempts this by placing calls between 9 a.m. and 8 p.m., when it believes the calls will be less intrusive. That strategy, however, has sparked several complaints to the FCC and to the candidates themselves.

Antioch resident Meghan Marabella grew so tired of being contacted by the Republican Party, she called the campaign committee last week and asked to be taken off their calling list. She explained how the calls were coming to her cellular phone and eating up precious usage minutes, but she received no relief.

The calls continue to come.

"It's so annoying," Marabella said. "Even more annoying is that it's computerized, so there's no one to complain to when you get the call."

At Sherrill's Palatine home, the Republican calls came religiously each day during her infant son's naptime. She called the campaign committee and McSweeney's campaign headquarters to ask them to stop.

When that didn't work, she sent an e-mail to McSweeney to inform him he had lost her previously undecided vote. She copied several friends on the note.

"If you can't take care of a simple problem like this," she wrote, "how am I to assume you can get anything done in Congress?"

Collegio said anyone who asks to be taken off the calling list is removed immediately. He could not say why voters like Sherrill and Marabella continued to receive calls weeks after asking for their name to be deleted from the database.

Some people who have put their numbers on the federal no-call list may think they shouldn't be getting political calls. But such calls are exempt from the list.

Bean's campaign has complained about the GOP calls - which begin "Hello, I'm calling with information about Melissa Bean" - because they contend it misleads voters about which campaign is initiating the contact. Many voters assume its Bean's camp and have vented their anger toward her.

"It's not just telemarketing," Bean spokesman Brian Herman said. "It's a voter suppression effort."

The Republicans defend their efforts, saying robocalls are a common tool in the political arena.

"Phone banks are used in almost every campaign," Collegio said. "To call them a voter-suppression effort is borderline libelous."

Bean's campaign made one round of robocalls since the primary, Herman said. Her automated calls informed recipients of early voting options and encouraged their participation.

However, Bean - a freshman congresswoman who is considered a top Republican target in this election - drew sharp criticism last year when she made government-financed robocalls to her constituents, which is allowed for members of Congress. The calls notified 8th District residents of upcoming town hall meetings and workshops, among other things.

Collegio said those calls were much more offensive than the GOP's current efforts.

"Melissa Bean shamelessly bilked Illinois taxpayers for thousands of dollars of automated phone calls, and now she has the gall to criticize the GOP for privately funded phone banking during the campaign season."

The derision caused by robocalls made Bill Scheurer, a third-party candidate in the 8th District, think twice before launching a telephone campaign last week. In the end, he decided it was the best way to reach people in his district.

His 15-second message - recorded by his wife, Randi - went out twice last week. He'll send out another round Monday, giving him a chance to put his message in front of the voters three times in the week leading up to the election.

It's invaluable exposure, given Scheurer doesn't have the money for television commercials or multiple mailings.

"It's a last resort," he said. "It's a poor man's post card."

Ms. LOFGREN. Thank you very much, Congresswoman.

Congressman Altmire.

STATEMENT OF JASON ALTMIRE

Mr. ALTMIRE. Thank you, Chairwoman Lofgren and Ranking Member McCarthy, for inviting me to testify today.

The 2006 elections saw unscrupulous groups use automated political robo-calls to intentionally harass, deceive and infuriate voters in an attempt to subvert the democratic process. News reports contained stories of calls made in the middle of the night, calls containing deliberately misleading information, and calls that repeatedly dialed if the recipient did not listen to the entire message.

Many of my constituents and thousands of Americans expressed outrage and frustration with the excessive phone calls that marred the weeks prior to last year's election. Dinnertime for many families was often interrupted by prerecorded messages prompting one candidate over another, tarnishing a candidate's character and credibility, or simply annoying those homeowners who do not have caller ID.

Technology has allowed campaigns to quickly and inexpensively use this medium to communicate with voters. Many believe that robo-calls are effective at increasing voter turnout. Unfortunately for many voters, enough is enough, and they are starting to respond to them by choosing instead to stay at home on Election Day due to their frustration with the incessant robo-calls.

Fortunately, we already have a tool at our disposal to curtail those who abuse automated calls to influence voters, the National Do-Not-Call Registry. Since its inception in 2003, the registry has proven extremely popular with Americans who wish to opt out of receiving calls from unwanted telemarketers, with over 107 million phone numbers added through June of 2006.

With this in mind, I introduced the Freedom From Automated Political Calls Act, H.R. 372, which was the first bill I introduced as a Member of the House of Representatives because I feel so strongly about this. That bill addresses the proliferation of automated political calls and would add automated calls from or on behalf of political organizations to the registry and allow our constituents to opt not to receive these political calls.

Importantly, H.R. 372 does not prohibit automated political phone calls, but it gives Americans the right to choose not to receive them, just as they would any other solicitation. Why should political campaigns be specifically carved out from the do-not-call list when businesses across the country are required to abide by it? The do-not-call list is wildly popular—107 million phone numbers have been added to the registry. Why should politicians be exempt from the same regulations that affect everybody else?

Importantly, H.R. 372 would not affect a candidate or his or her campaign's ability to make live, person-to-person phone calls to voters. Some have raised concerns about whether my bill would preclude members from holding tele-town halls or research firms from conducting legitimate surveys and polls. I want to reassure them that this is not the intent of my bill. And I am certainly open to amending the language to make it more clear that the legitimate

use of automated phone calls would not be prohibited, and I would welcome anyone to discuss that with us.

State legislatures from across the country are calling for and acting to reform their State do-not-call lists. I believe it is time for Congress to take action and provide voters with a choice on whether or not they should receive automated political phone calls. I believe that H.R. 372 would be an effective approach to dealing with robo-calls.

And at the same time, it is important to identify and deter the most damaging and abusive tactics, those that Congresswoman Bean talked about, those that involve political robo-calls. I encourage efforts that would effectively deter those practices and punish those who violate the law.

Thank you again, Chairwoman Lofgren and Ranking Member McCarthy, for the opportunity to testify. I appreciate your attention to this issue, as well as your introduction of legislation to penalize those who use robo-calls to make late-night calls, mislead voters, and fail to even disclose who they are.

I hope to be able to work with you as you move forward, Madam Chair, on your efforts to protect the sanctity of one's home from dinnertime interruptions, harassment, deception and the abuse of political robo-calls. And I look forward to working with you.

Thank you.

[The statement of Mr. Altmire follows:]

House Administration Subcommittee on Oversight
Hearing on "Use of 'Robocalls' in Federal Campaigns"
December 6, 2007

Statement of Congressman Jason Altmire

The 2006 election saw unscrupulous groups use automated political "robocalls" to intentionally harass, deceive, and infuriate voters in an attempt to subvert the democratic process. News reports contained stories of calls made in the middle of the night, calls containing deliberately misleading information, and calls that repeatedly redialed if the recipient did not listen to the entire message.

Many of my constituents and thousands of Americans expressed outrage and frustration with the incessant phone calls that marred the weeks prior to Election Day. Dinner time for many families was often interrupted by pre-recorded messages promoting one candidate over another, tarnishing a candidate's character or credibility, or simply annoying those homeowners who do not have caller ID.

Technology has allowed campaigns to quickly and inexpensively use this medium to communicate with voters. Many believe that robocalls are effective in increasing voter turnout. Unfortunately, for many voters, enough is enough and they are starting to respond to them by choosing instead to stay at home on Election Day due to their frustration with the incessant robocalls.

Fortunately, we already have a tool at our disposal to curtail those who abuse automated calls to influence voters: the National Do-Not-Call Registry. Since its inception in 2003, the Registry has proven extremely popular with Americans who wish to opt out of receiving calls from unwanted telemarketers with over 107 million phone numbers added through June 2006.

With this in mind, I introduced the Freedom from Automated Political Calls Act (H.R. 372) to address the proliferation of automated political calls. My legislation would add automated calls from or on behalf of political organizations to the Registry and allow our constituents to opt not to receive political robocalls.

H.R. 372 does not prohibit automated political phone calls, but it does give Americans the right to choose not to receive them, just as they would any other solicitation. Why should political campaigns be specifically carved out from the do-not-call list when businesses across the country are required to abide by it?

Further, H.R. 372 would not affect a candidate or his or her campaign's ability to make live, person-to-person phone calls to voters.

Some concerns have been raised about whether H.R. 372 is intended to preclude members from holding tele-town halls or research firms from conducting surveys and polls. I want to reassure them that this is not the intention of my bill. I am open to amending the language in my bill to protect the legitimate use of automated phone calls, and welcome anyone who wishes to discuss this with me further.

State Legislatures from across the country are calling for and acting to reform their state do-not-call lists. It's time for Congress to take action and provide voters with a choice on whether or not to receive political robocalls.

I believe that H.R. 372 would be an effective approach to dealing with robocalls. At the same time, it is important to identify and deter the most damaging and abusive tactics that involve the use of robocalls. I encourage efforts that would effectively deter those practices and punish those who commit them.

Thank you, Chairwoman Lofgren, for the opportunity to testify here today. I appreciate your attention to this issue, as well as for your introduction of legislation to penalize those who use robocalls to make late night calls, mislead voters, and fail to even disclose who they are. I hope to be able to work with you as you move forward on your efforts to protect the sanctity of one's home from dinner time interruptions, harassment, deception, and the abuse of political robocalls.

Ms. LOFGREN. Thank you very much for that testimony, Congressman.

And finally, we have Congresswoman Virginia Foxx, and we would welcome her testimony.

STATEMENT OF VIRGINIA FOXX

Ms. FOXX. Thank you, Madam Chairwoman. I appreciate very much this opportunity, and I appreciate the committee holding this hearing and inviting me to come. Like my colleagues, this is my first time on this side of the desk, but I am very pleased to be with you.

I will not repeat the things that have been said by my two colleagues. I certainly agree with them on most of what they have said. And they have given, I think, excellent scenarios. I just want to tell you a little bit about my experience with this and why I did this.

I ran for the school board in Watauga County in 1974. I am a very strong person on retail politics, and so I started making telephone calls, individual telephone calls, in 1974 to people that I wanted to vote for me. I have done that every time I have run. I have made thousands of telephone calls for every campaign. And in every campaign, people would say to me, "I am so delighted that you called. I have never had a telephone call from a person. I have never had a chance to talk to a candidate. And I am delighted that you have called me."

Well, when I ran for Congress in 2003–2004, there were a lot of people running in North Carolina. Many, many primaries going on. And there were robo-calls going on all over my district. And as my colleagues have said, there were people in the district getting 20, 24 calls a day. One of my opponents in particular was making calls four, five, six a day, some of them at 1 o'clock in the morning, some of them mentioning my name at the beginning. So, as Congresswoman Bean said, people thought I was calling at 1 o'clock in the morning.

Well, about 3 weeks before the campaign, I and my volunteers had decided we would make personal telephone calls. So, as I said, about 3 weeks before the Election Day, I got on the phone one Saturday morning. I just had a precinct I was going to call. I started calling people at 10 o'clock on Saturday morning. The first seven people I called said, "I am fed up with telephone calls. I know you are calling me personally, but I have gotten so many calls this week, I have injured myself trying to get to the phone, my answering machine has been clogged up"—just all kinds of horror stories. And I made the decision right then that it would be counterproductive for me to even try to make personal telephone calls because people were so upset.

And, again, as my colleagues have said, I think that what is happening, in many cases, is that instead of people being encouraged to get out and vote and engaging with candidates, they are being turned off. That is the last thing in the world I want to have happen in this country. I have always made those personal telephone calls because I believe we have too much cynicism on behalf of the public, and I wanted to try to overcome some of that by personally

contacting people. So I think that these calls have had a negative impact on the democratic process by leaving a bad taste.

I agree with Congressman Altmire; it is a travesty that people can sign up for the do-not-call registry for everything but political calls. The public hates it when the Congress and politicians make different rules for us than we do for business and industry. I am not saying that there should never be robo-calls. I am just saying that people in this country should have a choice, do you want to get them or do you not want to get them?

Now, I believe very much in the tele-town halls, too. And let me tell you, I did a tele-town hall but it took some work, given my opposition to robo-calls. But what we did was we invited people to call us. Now, it was probably a little bit more expensive, but we advertised in newspapers, we advertised on radio, we sent out direct mail, I went on radio stations. I did everything I could to advertise it. And so we had a tele-town hall, but the people who wanted to talk to me called in. And it was a very successful tele-town hall.

So people kept asking me in my first campaign, what is going to be the first bill that you are going to introduce? Well, at that point I kept saying, I don't know. But at that point, 3 weeks before the election, I made up my mind it would be my first bill to set up a do-not-call registry for robo-calls from the political side.

Well, it turned out to be my second bill, but it was very important to me, and I have reintroduced that bill. It is H.R. 248. It is extremely similar to Congressman Altmire's bill. And I am very pleased his bill was introduced after mine and is extremely similar to mine. But I believe—and I, like he, would be more than willing to modify the bill if there are some ways that it needs to be tweaked. But I think that we must not set the Congress and other elected officials apart from the way we treat business and industry, and that it is very important that we pass legislation similar to our bills.

And I again thank you very, very much for giving us this opportunity, because I think this is a winner, and I also think it is not a partisan issue. Thank you very much.

Ms. LOFGREN. Well, thanks so very much to all three of our colleagues for compelling testimony.

Now, we all know how busy we are in these closing days of the Congress, so I don't know whether all three of you have the ability to stay and talk with questions. If you don't, we will not be upset if you have to leave. Now would be the time. If you do have time for some questions, perhaps we can do that now.

And I would like to recognize our ranking member to begin.

Mr. MCCARTHY. I think Mr. Ehlers needs to get to——

Ms. LOFGREN. Is that right? Well, then let us recognize Mr. Ehlers.

Mr. EHLERS. Thank you very much, because I do have a meeting I have to go to.

I would just like to—I don't have questions so much as just a comment. I think the biggest part of the problem comes not from the candidates so much as it does from the political parties first, but even moreso from the independent entities. And those are the ones that really concern me, because there is no accountability. If

an organization calls up and gives their name very rapid-fire, they don't know who it is.

I have recently been subject to a series of robo-calls. I questioned the intelligence of the people making them, since I have a 70 percent district, and I am not quite sure why they are making robo-calls about me, but it is from some group named American Voices I am not familiar with. But the net effect is that my office has been very busy handling calls from citizens who are extremely upset, not at me, but that anyone questions my integrity. So I think they backfired as well.

But my point is simply, whether it is MoveOn.org or American Voices or similar Republican groups, they are essentially out of control. And that is a huge concern to me. I am less concerned about the campaign committees we have or the national committees we have, because there is some accountability built in, provided they are honest in it. But perhaps, you know, perhaps they all have to be added on the do-not-call list.

One thing I am very strong on, and that is to—first of all, whatever we do has to be in accord with the Constitution. The whole issues of freedom of speech and political discussion, that is going to be very, very difficult to take into account here.

And finally, I find the telephone town hall meetings are very invaluable. My constituents love them. So whatever we do in this, I think it is very important we not ban robo-calls relating to telephone town halls, because that really is a public service. We are doing it personally. If they don't like them, they can let us know, but I think that is a very important governmental function that we have to maintain.

And I thank you very much for letting me make those three comments.

Ms. LOFGREN. Of course. Thank you, Mr. Ehlers.

Mr. Gonzalez, do you have questions for our colleagues?

Ms. Davis.

Mrs. DAVIS of California. Thank you very much, Madam Chair.

And I certainly know from the experience of candidates in my district, as well as myself, how incredibly annoying those calls are, and especially in the middle of the night. And so I think it is very wise that you are here and bringing this forward, and the committee is listening to all of these concerns as well.

I am just wondering, you know, the first amendment, free speech challenges, I know we are all very aware of that. I am wondering whether you are aware of any legal precedents that would either move in the direction of Congressman Altmire's legislation or address it in a specific way.

Is there anything that you are aware of, Congressman?

Ms. FOXX. Could I answer that very quickly?

Mrs. DAVIS of California. Yes.

Ms. FOXX. And they, too, but we worked really hard, the first year, on our bill to make sure that would not happen. And we believe that this would stand up, as the do-not-call registry has stood up in terms of the private sector. So we were very sensitive to that, in terms of trying never to violate anybody's free speech.

And certainly I don't want to stop the industry either. I think the industry has a purpose, and there are people who want to partici-

pate. So we worked very hard at that. And I think leg counsel gave us the assurance that this should withstand scrutiny.

Mr. ALTMIRE. And again, Congresswoman, I would add only that this is optional. This is for the person at home with the phone number to choose to add their phone number to the do-not-call registry list. It doesn't prohibit the calls. It doesn't say you can't do them or you can't receive them. It just simply says, as a consumer, you do not have to have your number listed as being willing to receive these calls.

Mrs. DAVIS of California. And, you know, because this started in California, a lot of us are from California, and I remember at the time that that legislation was introduced, and we really weren't sure that it was going to go forward and that it was going to be effective. And yet I think that it has been. I mean, I think that we have had fewer calls at home. And certainly nonprofits are continuing to call. But the follow-up with that in enforcement is also hopefully effective. So I am interested, as we move forward, to take a look at that.

And I think that also, Congresswoman Bean, I am interested in the limiting of those calls so that the companies—because we know there are companies, and I am sure we are going to be hearing from some of them—have some responsibility as well. And there may be a way that those can be limited so that they are not multiple calls and also at times that people certainly would have their sleep interrupted and other issues.

Ms. BEAN. Congresswoman, if I can respond for a second, I am not necessarily advocating against the calls. I think you just have to put parameters on. You shouldn't be able to harass people over and over. You shouldn't be able to do it at obscene hours in the evening. And you should say right from the beginning, slowly and clearly, who it is that is paying for the ad and sponsoring it.

Because I actually think there is a purpose for them. If someone is doing a TV attack against someone late in an election that is unanticipated and a candidate wants to respond, it is very difficult to get back on TV and do that late. You can't put an ad together in the final days of the campaign, and phones give you a way to at least clarify your record and respond. We know how big our districts are and how many people there are to reach.

So there are ways to do it, and I just think that we need to tighten up those parameters.

Mrs. DAVIS of California. Thank you.

Ms. LOFGREN. Mr. McCarthy.

Mr. MCCARTHY. Thank you, Madam Chair. I appreciate it.

I appreciate the panel all coming.

Right before I begin, Madam Chair, I would ask for a few items to be recorded in today's proceeding: first, the written testimony by James Bopp, who wasn't able to be here; a letter from CMOR to Ranking Republican Member Ehlers; and a dear-colleague letter from Representative Conaway.

Ms. LOFGREN. Without objection, that will be made part of the record.

[The information follows:]

"Use of 'Robocalls' in Federal Campaigns"

Testimony of James Bopp, Jr.
Before the Committee on House Administration Subcommittee on Elections
December 6, 2007[1]

INTRODUCTION

I am James Bopp, Jr., attorney at law, and I thank you for the opportunity to testify before this Committee. A substantial part of my law practice involves defending clients from governmental incursions against their constitutionally-protected freedom of speech and expression. I have defended the rights of citizens to participate in the electoral process in administrative investigations and through litigation, *amicus curiae* briefs, scholarly publications, and testimony before legislative and administrative bodies.

I have represented numerous plaintiffs in successful law suits challenging federal and state election statutes and regulations in order to vindicate constitutional rights that are integral to the successful continuation of our representative democracy.[2] The appended summary of my

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[1]The witness states, in compliance with the House rule requiring disclosure of grants or contracts relevant to a witness' testimony received in the current or two preceding fiscal years by the witness or any entity represented by the witness, that no such grants or contracts exist.

[2]In addition to dozens of successful federal district court decisions, I have been privileged to represent numerous plaintiffs in their successful efforts to vindicate their constitutional rights to free speech in the election context, which resulted in reported appellate decisions by the United States Courts of Appeals for the 1st, 2nd, 4th, 7th, 8th, 9th, 10th and 11th circuits. *See Florida Right to Life Comm. v. Lamar*, 238 F.3d 1288 (11th Cir. 2001); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Perry v. Bartlett*, 231 F.3d 155 (4th Cir. 2000); *Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000); *Iowa Right to Life Comm. v. Williams*, 187 F.3d 963 (8th Cir. 1999); *North Carolina Right to Life v. Bartlett*, 168 F.3d 705 (4th Cir. 1999); *California Pro-Life Council v. Scully*, 164 F.3d 1184 (9th Cir. 1999); *Brownsburg Area Patrons Against Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1997); *Clifton v. FEC*, 114 F.3D 1309 (1st Cir. 1997); *Minnesota Concerned Citizens for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997); *Maine Right to Life Comm. v. FEC*, 914 F.Supp 8 (D.Me. 1995, *aff'd per curiam*, 98 F.3d 1 (1st Cir. 1996); *New Hampshire Right to Life v. Gardner*, 99 F.3d 8 (1st Cir. 1996); *Day v. Holahan*, 34 F.3d 1356 (8th Cir. 1994); *Faucher v. FEC*, 928 F.2D 468,

professional resume summarizes my work in this area. I testify today as a practitioner of federal First Amendment law and not as a representative of any client.

In this testimony, I will first give a brief background of the typical regulations of automatic dialing technology and how it has advanced. Second, I will give a brief background of the First Amendment and its importance to our representative democracy because I believe that unless Members of Congress start with a proper understanding of our First Amendment and its designs, they cannot adequately uphold their oath to uphold the Constitution. Third, I will discuss the First Amendment problems with banning or severely regulating automatic dialing technology.

I. Brief History of Automatic Dialing Machine Statutes and Advances in Automatic Dialing Technology.

Telephones are important instruments in political and public issue campaigns. This is true regardless of whether the calls are placed by a live operator or by an automatic dialing machine.

In 1991, Congress adopted the TCPA which amended the Communications Act of 1934

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472 (1st Cir. 1991). I have also been privileged to successfully argue the landmark United States Supreme Court cases of *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), which struck down restrictions on the speech of candidates for elected judicial office on First Amendment grounds, *Wisconsin Right to Life v. Federal Election Comm'n*, 126 S. Ct. 1016 (2006), which held that McCain-Feingold's "electioneering communication" corporate prohibition could be subject to as-applied challenges for genuine issue ads, *Randall v. Sorrell*, 126 S. Ct. 2479 (2005) which struck down Vermont's mandatory expenditure limits and contribution limits and *Federal Election Comm'n v. Wisconsin Right to Life*, 127 S. Ct. 2652 (2007), which held that McCain-Feingold's "electioneering communication" prohibition is unconstitutional as applied to grass roots lobbying ads.

to regulate telemarketing calls, including those made using automatic dialing technology. In enacting the TCPA, Congress adopted Section 2(13), which in recognition of the heightened protection afforded political and other forms of nonpolitical speech by the Supreme Court, found that the FCC "should have flexibility to design different rules for . . . noncommercial calls, consistent with the free speech provisions embodied in the First Amendment of the Constitution." The FCC in turn, decided to exempt all non-commercial speech from the prohibition that would otherwise apply to prerecorded calls in recognition of the First Amendment interests at issue and because no evidence was presented in the rulemaking record "to show that non-commercial calls represent as serious a concern for telephone subscribers as unsolicited commercial calls."[3]

Currently this body is considering more restrictive legislation such as H.R. 1383 "The Quelling of Unwanted or Intrusive and Excessive Telephone Calls Act of 2007" ("QUIET Act") introduced by Ms. Zoe Lofgren of California. The Quiet Act not only regulates the time and manner of how such calls may be placed but also imposes criminal penalties on those who deceive the public regarding:

(A) the time, place, or manner of an election for Federal office; (B) the qualifications

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[3]Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 7 FCC Rcd 8752 (1992) ("1992 Report and Order"). In creating this exemption, the FCC stated, "[w]e find that the exemption for non-commercial calls from the prohibition on prerecorded messages to residences includes calls conducting research, market surveys, political polling or similar activities which do not involve solicitation as defined by our rules." *1992 Report and Order* ¶ 41. In a further rulemaking decision issued in July 2003, the FCC expressly reaffirmed the exemption for prerecorded, non-commercial calls. Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Report and Order, 18 FCC Rcd 14014 (2003) ("2003 Report and Order").

> for or restriction on voter eligibility for an election for Federal office; (C) the political party or affiliation of any candidate running in an election for Federal office; or (D) the sponsor, endorser, or originator of a telephone call initiated using an automatic telephone dialing system or using an artificial or prerecorded voice.[4]

Several states have adopted laws that subject prerecorded interstate telephone calls to more stringent requirements than the federal standards, even those currently being considered. For example, both Minnesota and Indiana have statutes prohibiting prerecorded calls that apply to both noncommercial and commercial calls and have been enforced against prerecorded political issue calls.[5] While generally banning all calls placed by automatic dialing machines, many of these laws allow such calls if a live operator asks the recipient whether he or she is willing to listen to the message or participate in the survey before it is played. The purpose of the live operator requirement is to get the consent of the recipient to receive the call.

When the federal government first got involved in legislation regarding automatic dialing devices, those machines were primitive – a call was placed and a taped message was played, often the call would tie up the phone line regardless of whether the person receiving the call hung

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[4]While the ban on calls between the hours of 9:00 p.m. and 9:00 a.m. may be a valid time restriction because most people sleep during these hours and the required disclosure of the sponsor of the call may be valid pursuant to First Amendment jurisprudence, the remaining bans on deception are covered by other laws regarding deception and/or fraud rendering it unnecessary to single out automated calls for a separate criminal penalty.

[5]Minn. Stat. § 325E.27. In *Van Bergen v. State of Minnesota*, 59 F.3d 1541 (8th Cir. 1995), the Eighth Circuit upheld this statute against a preemption challenge by a candidate for governor who sought to make intrastate political polling calls in support of his candidacy. Ind. Code § 24-5-14 *et seq*. In *FreeEats.Com, Inc. v. State of Indiana*, 502 F.3d 590 (7th Cir. 2007), the Seventh Circuit dismissed a federal challenge to the validity of Indiana's auto-dial statute because the Court held that the claims could be litigated in the state court where the State had filed an enforcement action against FreeEats and other organizations for making political issues calls.

up on it. However, with advances in technology calls using automated dialing devices are sometimes indistinguishable from calls placed by live operators. Therefore, although such calls have previously been deemed "robo" calls, I believe a better term would be artificial intelligence calls or "AIC" for short.

An AIC is the functional equivalent of a live operator call. It can be programmed such that the first question asked is whether the recipient would like to participate in the survey or hear the message and, just like a live operator, go on if the response is "yes" or hang up if the response is "no." It can even offer the recipient the option of adding his name to a speaker specific do-not-call list. AICs use interactive-voice-response and speech-recognition technology to interact with the recipient almost as if it the call were placed by a live person. AICs can be set up to record not only "yes" or "no" answers but also to record the recipient's free form responses. The calls can even be placed using the voice of the person who commissioned the calls. Thus, today's AICs are very different from the robo calls placed in the late eighty's or early ninety's when most of the laws regulating them were passed. The law, unfortunately, has not been able to keep up with the technological advances in this area. Bans or severe regulations on AIC technology serve to deprive the citizens of an easy, effective, and unobtrusive means of communication and deny the willing recipient of an opportunity to learn more about an issue in the case of a simple message delivery or an opportunity to make his voice heard in the case of a poll or survey.[6]

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[6]This testimony is limited to those who want to receive the caller's message. Unlike do-not-call laws, most automatic dialing machine regulations are blanket bans and foreclose calls to everyone regardless of whether the recipient of the call wants to hear the message.

II. The First Amendment and Its Purposes.

The First Amendment is a very special kind of law because its aim is to restrict government, not citizens. It is a mandate that "Congress shall make no law" and, through this mandate, our Founding Fathers sought to guarantee the "indispensable democratic freedom[s]"[7] necessary for the People to exercise their right of self-government by placing *limitations* on the powers of the government to restrict those freedoms.

At first blush, it seems as if the First Amendment prohibits all laws and regulations that restrict speech. After all, the text of that Amendment says: "Congress shall make no law . . . abridging the freedom of speech."[8] The Supreme Court, however, has held that the First Amendment does not proscribe government restrictions on speech that are justified by a compelling governmental interest. It is the conflict between the First Amendment's protection of fundamental rights with claimed governmental interests that gives rise to so many constitutional issues.

The purpose of the First Amendment is to further our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[9] Thus, "there is practically universal agreement that a major purpose of [the First] Amendment was to

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[7] *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

[8] U.S. Const. amend. I.

[9] *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

protect the free discussion of governmental affairs."[10] Political speech is protected because the Framers understood that it is "integral to the operation of the system of government established by our constitution."[11] As a result,

> in a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation.[12]

Indeed, "public discussion" was viewed by the Framers as not only a political right, but as "a political duty."[13] This stems from the fact that the "opportunity for free political discussion" is vital to assuring that "government may be responsive to the will of the people and that changes may be obtained by lawful means."[14]

Therefore, freedom of speech is a condition essential to our political liberty. "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we 'govern.'"[15] Our commitment to freedom of expression is anchored in promoting a framework of discourse in which unrestricted deliberation on matters of public concern is secure from the intrusion of government power. The outcome in this secured

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[10]*Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (*quoting Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

[11]*Id.*

[12]*Id.* at 14-15.

[13]*Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

[14]*Stromberg v. California*, 283 U.S. 359, 369 (1931).

[15]Alexander Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245, 255.

"marketplace of ideas" will be determined by the persuasiveness of the speakers' reasons used in support of their values and beliefs, *not* by the dictates of government.

As Justice Brandeis eloquently stated, democratic society must value free speech "both as an end and as a means."[16] Free Speech is a valuable "end" because it is a manifestation of the ultimate purpose of government: to free its citizens so that they may pursue self-fulfillment.[17] As a "means," free speech is an indispensable path to political truth.[18]

As embodied in our Constitution, the people have chosen to submit to a system of government in which they remain the ultimate basis of authority. Therefore, government cannot deny the people their right to express and hear political ideas, attitudes, or beliefs, because to do so would interfere with their responsibility as citizens to govern themselves. The people's assumption of this ultimate authority necessarily requires that they be able to express in a manner *unrestricted* by government, whatever ideas, viewpoints, or information may prove necessary for self-governance. Public opinion mediates between the particular wills of individual citizens and the general will of the government by allowing all citizens to participate in an ongoing debate. If government restricts the speech of a citizen within public discourse, government prevents that citizen from participating in collective self-governance.

Under Article One, section six, the Constitution affords "absolute protection" to the speech of Members of Congress, our political representatives. As you, our representatives,

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[16] *Whitney*, 274 U.S. at 375.

[17] *Id.* at 375-76.

[18] *Id.*

derive your governing power from citizens, the latter must enjoy *at least* as much protection as you, their elected servants.[19] For how is the citizenry to self-govern, and serve as a check on their elected servants, if the people are not also absolutely protected in their praise and criticism of the actions of these elected servants?

Therefore, to the extent that this country has a government "of the people, by the people, and for the people," the public is the government. But what protections are offered by regulations that limit the participation of citizens in this process? For government to abide by the spirit of the First Amendment, it must *value* speech and *protect* free speech as a right, rather than as a privilege.

As a practical matter, unless citizens may exercise their right to speak freely on political matters – including discussions of candidates and their qualifications – self-government is impossible. In order to make good decisions regarding who will represent us and to hold our representatives accountable for their actions, citizens must have access to ideas and information concerning the positions candidates take on issues and their fitness to hold office. In order for those ideas and that information to be available to the electorate, there must be free commerce in the marketplace of ideas. If the marketplace of ideas is compromised by governmental restrictions on speech, then self-governance will suffer and so too will all of the other freedoms guaranteed by the Constitution.

The effect of placing governmental restrictions on political speech cannot be easily

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[19]*See* Alexander Meiklejohn, *Political Freedom*, at 36 (1960) ("The freedom which we grant to our representatives is merely a derivative of the prior freedom which belongs to us as voters.").

compartmentalized. The aim of the First Amendment is not only the protection of discourse from the intrusion of governmental authority to secure self-governance, but also the independence of citizens as rulers of themselves.[20] That is, it leaves to individuals the independence to deliberately define for themselves their beliefs, morals, and ideas.[21] As Justice Brandeis stated in his famous concurrence in *Whitney v. California*:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary . . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law – the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.[22]

Free speech on political matters, then, is the key to the preservation of self-government and concomitant personal liberties. Therefore, political free speech is strictly guarded by the Constitution for at least three inextricably interwoven reasons: (1) because it was the Framer's

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[20]These two dimensions of freedom of expression are not mutually exclusive. It would be impossible to adequately protect one dimension of speech without also extending considerable protection to the other. Strict constraints on the public consideration of different moral points of view is not likely to lead to wide open political debate. Similarly, prohibiting the advocacy of certain political points of view is likely to have repercussions on moral discussion. Hence the *Buckley* Court's observation that "the distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application." *Buckley*, 424 U.S. at 42.

[21]*See* Paul G. Stern, Note, *A Pluralistic Reading of the First Amendment and Its Relation to Public Discourse*, 99 Yale L.J. 925, 934 (1990).

[22]275 U.S. at 375-76 (citations omitted).

intention to preserve free speech (which is obvious on the face of the First Amendment); (2) because political speech is an indispensable role in the preservation of self-government; and (3) because, given its role in preserving self-government, free political speech undergirds all other civil liberties protected by the Constitution. Thus, the Court reiterated almost sixty years later that "[t]hose who won our independence believed that the final end of the State was to make men free to develop their faculties . . . . They valued liberty both as an end and as a means."[23]

The Supreme Court has always been concerned with protecting the transmission of information from speaker to listener, and rightly so. Without this protection, the participation of citizens is chilled and their self-governing rights are diminished.

III. Restrictions On AIC Calls, Particularly Those Advocating For or Against Political Issues, Strike at the Heart of the First Amendment.

The First Amendment protects the right of self-government by protecting the four "indispensable democratic freedom[s]" of speech, press, assembly, and petition. Thus, these constitutional guarantees have their "fullest and most urgent application precisely to the conduct of campaigns for political office."[24] Advocacy of public issues or "political beliefs and ideas" is also core political speech entitled to the same protections.[25]

In *City of Ladue v. Gilleo* the Supreme Court considered the constitutionality of a city ordinance against displays of signs on residential property as applied to prohibit a homeowner

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[23] *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 n.10 (1986) (*quoting Whitney*, 274 U.S. at 375 (Brandeis, J., concurring)).

[24] *Buckley*, 424 U.S. at 14-15.

[25] *See Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981).

from displaying a sign protesting the first gulf war.[26] The Court found that the ordinance "almost completely foreclosed" a form of political communication that was "unusually cheap and convenient."[27] Relying on a line of "prior decisions [that] had voiced particular concerns with laws that foreclose an entire medium of expression," the Court held that the ordinance violated the First Amendment.[28]

> Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent – by eliminating a common means of speaking, such measures can suppress too much speech.[29]

The principal case on which the Supreme Court relied in *Ladue* was *Martin v. City of Struthers*.[30] In *Martin* the Court held that a local ordinance prohibiting a person from knocking on the door of residences to distribute literature was unconstitutional as applied to a person distributing religious literature door-to-door. The municipality attempted to defend its law as protecting homeowners from nuisances and potential criminal activity. The Supreme Court nevertheless held that the ordinance was unconstitutional because it:

> substitut[es] the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is

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[26] 512 U.S. 43 (1994).

[27] *Id.* at 48, 54.

[28] *Id.* at 55.

[29] *Id.*

[30] 319 U.S. 141 (1943).

in fact glad to receive it.[31]

Similarly, in *Meyer v. Grant*, the Supreme Court held that a Colorado law which prohibited the use of paid employees to circulate initiative petitions violated the First Amendment.[32] The Court found that the prohibition against the use of paid circulators "limits the number of voices who will convey [their] message and the hours they can speak and, therefore, limits the size of the audience they can reach."[33] It also found that the prohibition on this communication mechanism "has the inevitable effect of reducing the total quantum of speech on a public issue."[34] The Court concluded that the statute restricted "access to the most effective, and perhaps economical avenue of political discourse" and held it unconstitutional under the First Amendment.[35] Further,

> That it leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression. . . . The First Amendment protects appellees' right not only to advocate their cause but also to select what they believe to be the most effective means for so doing.[36]

In 1995, the Eighth Circuit held that a ban on automatic dial announce devices did not violate the First Amendment.[37] However, *Van Bergen* was wrongly decided because it failed to

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[31] *Id.* at 143-44.

[32] 486 U.S. 414 (1988).

[33] *Id.* at 422-23.

[34] *Id.* at 423.

[35] *Id.* at 424.

[36] *Id.*

[37] *Van Bergen v. Minnesota*, 59 F.3d 1541 (8th Cir. 1995).

follow the *Ladue-Struthers* line of cases for reviewing statutes that prohibit an entire medium for communicating political speech, based on the false assumption that no residents wish to receive such speech. The Ninth Circuit relied on *Van Bergen* when it issued a similar decision in 1996.[38] Both cases were decided before the advances in technology made it possible to disconnect the phone quickly and to offer the recipient of the call the option to add him or herself to a speaker-specific do-not-call list.[39]

While AIC technology is used by commercial telemarketers, it is also a common form of communication by candidates, office holders and other individuals or groups who want to educate the public on issues they deem to be of great importance. AIC technology can be, and has been, used by members of this body as a part of their franking privilege. Regardless of whether it is an office holder, a candidate or an organization, such calls are core speech under the First Amendment. Laws banning or severely restricting the use of AIC technology prohibit one of the most effective, fundamental and economical forms of political communication, which permits a person who seeks to educate the citizenry on his point of view to communicate directly, quickly and in a cost-effective manner, with a large number of people. Bans or severe restrictions on AIC technology directly reduce the number of calls that can be made that contain, and the size of the audience that will receive, political messages. The effect of this restriction on the use of telephone calls to reach potential voters is to increase the cost and therefore reduce the amount of speech that proponents of political issues can communicate to the public.

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[38] *Bland v. Fessler*, 88 F.3d 729 (9th Cir. 1996).

[39] *Van Bergen*, 59 F.3d at 1555; *Bland*, 88 F.3d at 731.

AIC technology is an important part of political campaigns because it offers the salient advantages of permitting targeted communication with a large number of residences within a short period of time and in a cost-effective manner. A prohibition on AIC technology takes away "access to the most effective, fundamental and perhaps economical avenue of political discourse."[40] Other media, such as newspapers and broadcast or live operator calls, cannot adequately substitute for these features, especially if their relative costs are taken into account.

For example, in *FreeEats.com v. Indiana*, FreeEeats represented to the Seventh Circuit that it can place calls to 1,700,000 homes in approximately 7 hours.[41] This is the equivalent of placing approximately 243,000 calls per hour. In contrast, a live operator can place only approximately 20 calls per hour.[42] FreeEats estimated that, using 200 live operators, it would take 35 full-time days to complete the same number of calls.[43] It also estimated that the cost of placing these calls would exceed $2 million while calls placed using AIC technology would cost roughly $255,000.[44] In short, the cost would escalate from $.15 to roughly $2.25 per call.[45] Thus, using a live operator to place such calls prohibitively increases the cost and makes it difficult, if

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[40]*Meyer*, 486 U.S. at 424.

[41]*FreeEats.com v. Indiana*, No. 06-3900 (7th Cir.), Brief of Appellant, 2006 WL 3319693 (Nov. 1, 2006).

[42]*Id.*

[43]*Id.*

[44]*Id.*

[45]*Id.*

not impossible, to complete the calling project in the time necessary for effective political communication.

The requirement to introduce an AIC with a live operator, effectively bans an entire medium of communication with the citizenry by raising costs exponentially and preventing calls from being completed in a timely manner. The conflicting state interest is in protecting residential privacy. This justification has been deemed sufficient to uphold do-not-call statutes that provide exceptions for political calls.[46] The idea of having a live operator introduce a call is to get the recipient's consent to listen to the message. If the recipient says "yes," then the taped message is played. If the recipient says "no," the call is terminated. With today's AIC technology, the same thing can be done by the computer using its voice recognition capabilities. Thus, calls placed utilizing current AIC technology are no more intrusive than calls placed by live operators. Persons receiving such calls are free to either not answer (especially if they have caller-id) or hang up, just as those desiring not to talk to door-to-door solicitors are free to either not answer or shut the door.

CONCLUSION

AIC is a modern form of door-to-door campaigning. It is a direct, cost-effective means of communication that is essential to less well-funded speakers such as non-profit advocacy groups and non-incumbent candidates. AIC technology offers the salient advantages of permitting

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[46]*See National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783, 791-92 (7th Cir. 2006) (upholding Indiana's do-not-call list because it applied to a "telephone sales call" while "excluding speech that historically enjoys greater First Amendment protection" such as political speech).

targeted communication with a large number of residences within a short period of time and in a cost-effective manner. When the use of AIC technology by non-commercial speakers is banned or severely restricted, the First Amendment is no longer able to guarantee the "indispensable democratic freedom[s]"[47] necessary for the People to exercise their right of self-government.

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[47] *Thomas v. Collins*, 323 U.S. 516, 529-30 (1945).

CMOR

Promoting and Advocating Survey and Opinion Research

December 4, 2007

Ranking Member Vernon Ehlers
House Administration Committee
1313 Longworth Building
Washington, DC 20515
202-225-9957 (fax)

Dear Mr. Ranking Member,

As you prepare for Thursday's Committee hearing on the use of "robocalls" in Federal campaigns, I wanted to share some information with you and your staff, and some concerns of the survey and opinion research profession with legislation you will discuss.

My name is Howard Fienberg, and I am the Director of Government Affairs for **CMOR**, a national non-profit association representing survey, polling and opinion researchers, like Gallup, the Roper Center and Greenburg Quinlan Rosner Research. As an advocate for individual privacy, CMOR seeks to protect consumers from telephone harassment and unwanted telemarketing calls. However, CMOR remains concerned that some legislation intended to protect consumers from unwanted automated calls, such as H.R. 372, H.R. 248, and H.R. 1383, may inadvertently circumscribe legitimate survey and opinion research calls.

Some survey and opinion researchers conduct political research using automated dialing systems, technology which makes the research process feasible and affordable and prevents telephone interviewers from accidentally dialing unintended respondents. In addition, some members of the profession (such as Rasmussen and Survey USA) make use of interactive voice response (IVR) systems to conduct polls, sometimes referred to as "robopolls". Still other researchers use automated dialing and announcing devices (ADAD) to send messages to recruit respondents for political research. Such legitimate research activities do not attempt to sway the opinion of a respondent, induce or suppress activity, sell any products, goods or services, or fundraise.

CMOR has met with the staff responsible for H.R. 372, H.R. 248 and H.R. 1383, and each has clarified that the bills were not intended to impact or include survey and opinion research activities. They have also expressed interest in making minor amendments to their bills in order to protect the integrity of the research process.

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Website: www.cmor.org • Email: info@cmor.org

CMOR's membership consists of more than 150 organizations, including research trade associations, research providers, pollsters, data collectors, end users / client companies, academic institutions and even government agencies like the Census Bureau. Collectively, we work to protect the integrity of the survey and opinion research process by expanding respondent cooperation, improving the research process, and positively impacting privacy law and other legislation related to survey research.

CMOR pursues investigations into abuses of the survey research process and actively participates in consumer awareness campaigns. We seek to protect researchers' access to information, while balancing the need for information with the privacy rights of the public.

Should you have any questions about this letter, the legislation mentioned, or about the survey and opinion research profession in general, please fell free to contact me.

Thank you for your time.

Sincerely,

Howard Fienberg
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Attachment: CMOR 1-pager

CMOR

Promoting and Advocating Survey and Opinion Research

CMOR: Promoting Survey and Opinion Research & Protecting Consumer Privacy

What is CMOR?
CMOR is a national non-profit organization working on behalf of the survey and opinion research profession.

CMOR membership consists of more than 150 organizations, including research trade associations, research providers, End Users or client companies, academic institutions and others. Collectively, these organizations work to protect the integrity of the survey and opinion research process by expanding respondent cooperation, improving the research process, and positively impacting privacy law and other legislation related to survey research.

CMOR pursues investigations into abuses of the survey research process and actively participates in consumer awareness campaigns. We seek to protect researchers' access to information while, balancing the need for information with the privacy rights of the public.

What is Survey and Opinion Research?
Survey and opinion research is the process of acquiring opinions from the public. Researchers seek to determine the public's opinion regarding products, issues, candidates and other topics. Such information is used to develop new products, improve services, influence policy, and is also used by health care providers, airlines, private businesses and others. In fact, government is the largest consumer of survey and opinion research in the United States!

How is Research Different from Sales-Related Activities?
Researchers measure public opinions of services or products or social and political issues. Conversely, telemarketers and other sales-related activities attempt to sell goods or services to the public. Researchers *never* ask for money or attempt to sell products or services. Moreover, sales or solicitation is not acceptable or permitted in legitimate and professionally-conducted survey and opinion research and, if conducted via telephone, would be in violation of the federal *Telemarketing Sales Rule* (15 U.S.C. 6101).

How Do Researchers Manage Personally Identifiable Information?
As part of the research process, researchers gather information about respondents' attitudes and opinions. Interviewers often ask for "demographic" information to help define the interest that the sample is likely to have in the product or service being studied. This information is *never* looked at by individual answers. Instead, each person's answers are combined with those of many others reported as a group to the client who requested the survey. Most research companies destroy individual questionnaires at the end of the study, and names and addresses of participants are separated from the answers if additional tabulation of the results is done. Again, *all of the personal records are usually destroyed after the study is completed or the validation check has been made*, and all of a respondent's personally identifiable information is kept strictly confidential.

How Does The Research Profession Regulate Itself?
The research profession aggressively self-regulates. Our codes & standards address issues of confidentiality and privacy. Our self-regulation also includes academic discipline that requires us to be statistically accurate in our data and in the recommendations we provide to our clients.

Contacting CMOR?
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K. MICHAEL CONAWAY, CPA
11TH DISTRICT, TEXAS
ASSISTANT REPUBLICAN WHIP

COMMITTEE ON AGRICULTURE
COMMITTEE ON ARMED SERVICES
COMMITTEE ON THE BUDGET
REPUBLICAN POLICY COMMITTEE

Congress of the United States
House of Representatives
Washington, DC 20515

May 3, 2007

Want to Know What Your Constituents Think? Ask them!

Dear Colleague:

I wanted to take some time to send you this letter about a novel and unique process I recently used to communicate with every home in my district, TX-11. The results of this effort have given me new and detailed insight into the concerns of my constituents at a very reasonable cost. I can honestly tell you that this was the most effective constituent communications tool I have ever used.

During the week of April 23, 2007, **I targeted 203,078-homes in my District with an automated survey recorded in my voice** that asked constituents their opinion on certain federal issues. The constituents then responded via a voice activated system. Important issues and results I want to point out to you include:

1. I was able to use a current and up to date database that went beyond voter files.
2. I reached over 63% of all homes either live (over 47%) or with an answering device message (over 15%).
3. I had an amazing response rate with 37,000 constituents responding to one or more questions and 22,000 responding to all 15 questions I asked.
4. The script included an "Opt-In" question that under Franking rules will allow me extra opportunities to use my MRA budget to communicate with over 15,000-homes (representing over 30,000 constituents) several times again.
5. This process afforded me and my staff "Real-time, Online access" to the survey results as they were compiled.
6. My office was provided a final report that included many details about constituent homes including the name, address, phone number, as well as how the respondent answered the questions asked in the targeted survey.
7. My office now owns this data with unlimited use. We intend to utilize it to make my mailings, Tele-Town Halls and all other constituent communications efforts much more effective and efficient.

For your review, I have included a few questions I asked and the responses I received:

Questions Asked	Yes	Responding Percent "Yes"	No	Responding Percent "No"
Are you registered to vote in Texas?	38,779	85.17%	5,361	14.83%
Do you support the US Efforts in Iraq?	22,892	73.91%	8,088	26.09%
Do you believe the United States should put in place a fixed timetable for withdrawal of troops from Iraq?	11,799	41.75%	16,462	58.25%
Do you want me to support sending more Border Patrol Agents to the border?	19,783	84.45%	3,644	15.55%
Are you in favor of a non-amnesty temporary worker program with no path to citizenship?	11,744	52.67%	10,552	47.33%
Do you believe, as your Congressman, I should be able to advocate the funding for local projects with federal money, often called earmarks?	14,966	67.14%	7,324	32.86%
Would you support the elimination of the I.R.S. and the way we currently pay taxes and replace it with a National Sales Tax?	14,081	70.76%	5,786	29.24%
Do you believe the government should promote more choices in healthcare coverage by providing tax incentives to employees and businesses?	18,052	84.78%	3,242	15.22%

I encourage all Members to seriously consider this service as one of the staples you can use to communicate with your constituents. Thank you for allowing me to discuss this process with you. If you have any questions or comments, please contact Austin Weatherford in my office at 5-3605 or Austin.Weatherford@mail.house.gov.

Sincerely,

K. Michael Conaway
Member of Congress

Mr. MCCARTHY. Thank you.

Congresswoman Bean, you brought up a very good point. I mean, I think everybody in this institution has been receptive of these robo-calls and could be in a negative manner. My idea, though, is, how do we solve a problem here, while at the same time—I have got some of my best responses from my tele-town halls.

I mean, my wife and I were in a parade recently, and people were literally yelling from the side, "Thank you for calling." One person said, "Call at 7:00. I am eating dinner at 6:00." And I told him, "Okay, I will do it at 7 o'clock next time." And I did it at 7:00, and I had fewer people participating.

But then I also sit there and think about the campaign finance law. We have had these hearings, and we went through and we changed campaign finance law, thought we were going to solve a lot of these bad things in politics. And now we find it just goes to independent expenditures.

And I am wondering when we sit back and we look, could we write a bill that says you can't be deceptive? But I wonder how do you—how can you clarify that? Because someone may say in a robo-call against me I voted a certain way. That is probably true, but I think it is deceptive from that perception.

And then if I just said that I wanted to solve a problem and I just said you had to say the name at the very beginning, what would happen is it is like water flowing through a dike; it will move someplace else. We would then find, like these independent expenditures, it would be a lot of these groups created with a very positive, flowery name, that money will just go there to just focus on robo-calls. I am afraid that wouldn't just solve the problem.

So I am wondering if you thought about this, are there other ways, because I am fearful that if you just do the name at the very front that that doesn't solve it. We are just flowing the money someplace else.

And I also have the opinion that a lot of people do these robo-calls late at night, it works against them. If an opponent does it, it does work against you in the end.

Ms. BEAN. If I could respond for a second. It is if you knew it was them that called.

Mr. MCCARTHY. Yes.

Ms. BEAN. That is the challenge. That is why if you don't identify in the front end they are angry at the wrong direction.

Mr. MCCARTHY. But if we do on television, you have a choice. You can do it at the beginning or the end. And I am trying to think—I mean, I am just brainstorming here, because—do you think if we just did it at the beginning it would solve all the problems on robo-calls? Or do you believe the money would flow someplace else to a flowery name?

Ms. FOXX. Well, I think you are right about the names of the groups. I think that a lot of groups have great-sounding names now when they make those calls, so people can't tell that it is a group that is campaigning against the person.

And it is like Congresswoman Bean said. I was the victim of calls being made saying, "I am calling about Virginia Foxx." And they were coming in at 1 o'clock in the morning, and people thought I

was making the telephone calls, and they were mad at me. So it is a real problem.

I think the FEC has tightened up on ads on TV and ads on the radio. And there may be ways that it can be done, and I think it certainly should be done. But I don't think you will probably ever solve that problem of the name of the group. That is probably not something we can figure out.

But if we could have a disclaimer at the beginning that says this is a call for or against the person, if you could require them to say something like that, that is more important, it seems to me, than knowing the group. And then perhaps having them say the group at the end.

I have worked less on that aspect of it, Congressman McCarthy, than I have on simply making the choice available to people. But I do think that—you know, we all know this, having been in this business—whatever rules we write, whatever laws we pass, somebody is going to figure out a way to get around them.

Mr. MCCARTHY. Because I do, on my tele-town hall, at the very beginning if you want to opt out you hit—I forget—number 2 or something, and then I opt you out from ever calling or receiving those again.

But I am just wondering in our television ads, we have to sit out there and say, "I approve this ad," whether it is a positive or negative ad. And what happens is it forces you, if you are going to go negative, you better be true on what you say, and your face is there, and you are saying it.

Now, if we did something similar to that in the robo-calls, what we find also on television is these independent expenditures go do all these negative ads, have no accountability. And I am just trying to think out loud how do we solve this problem without creating a bigger problem after the bill goes through with a whole new industry? I don't know if anybody has any wisdom toward that.

Ms. BEAN. No silver bullet.

Mr. ALTMIRE. I would just say, Congressman, that you give people the choice to opt out, as Congresswoman Foxx and I have advocated.

Mr. MCCARTHY. Well, I thank you, Madam Chair. And maybe even further, if we have more hearings, we should do a panel of members that weren't successful, because I imagine they would have a lot to say.

But I congratulate all of you surviving.

Ms. LOFGREN. I would like to recognize Mr. Gonzalez for his questions at this point.

Mr. GONZALEZ. Thank you very much, Madam Chairwoman.

And the whole issue is just, why do we have a different standard for officeholders and campaigns and such on the do-not-call? And, you know, that is legitimate.

But I would also like to place out there for consideration that maybe the nature of our work is different than most telemarketers, and how important a tool it may be, a robo-call, in communicating, contacting, advising and so on our constituents, because it is not the easiest thing in the world.

None of us are going to engage in any activity that alienates the voter. So are we going to have different standards—and let me—

can we tweak it? And I am just, you know, we are all thinking, giving some ideas today, and there will be an exchange, and the next panel may say just how crazy some of this sounds. But rather than simply having it apply to officeholders and those that seek office, could we simply have certain conditions that may guard against some of the abuses?

And my colleague from California pointed out what we have to do when we have ads. What if that robo-call has to be in the voice of the candidate him- or herself? The entire message has to be. So if you are going to really aggravate somebody, you know that you are doing it, it is your voice. I mean, seriously, I am quite serious about this.

Caller ID, that we make sure the caller ID identifies the candidate and on whose behalf the call is being made. I mean, all of these things.

The other thing, timelines. I mean, what we do during an election year or election period may be totally different and affect the legitimacy of robo-calls that may be for a totally different reason when it is not during the election year. There has to be a way of doing this.

The next consideration is we need to start thinking of the different technologies and how this will apply to the Internet when you hire services that have Internet addresses and they just send them out. We are having problems with a do-not-email-me list already. So we need to start thinking of those implications.

And there is no reason why we shouldn't be thinking of them in this particular context if we are going to be addressing one medium. Or maybe that is too ambitious.

But what are your thoughts about tweaking it to make sure that the candidate would be more responsible and not necessarily throwing the baby out with the bath water?

Ms. FOXX. Well, I think Congressman Ehlers brought up an important point that we need to think about, and that is that probably more of the abuse is coming from the independent expenditures than it probably is coming from the candidates. I mean, we don't know that for sure, but it definitely seems to me that some control ought to be placed on these independent expenditures.

But as I understand it, there is no way for us to be in touch with those people. So they can't be in touch with us to get an ad if they are going to run something either for or against us. So it would seem to me that one of the ways to start looking at this would be to look at the independent expenditures.

And I appreciate what you said, Congressman Gonzalez. For the most part, we don't want to alienate anybody who might vote for us, so we are more sensitive to that, but some of these independent groups may not be quite as sensitive. So I would suggest, if you look at it, begin there.

Ms. BEAN. I would echo Congresswoman Foxx's comments that, at least in my experience and most that I heard about, it wasn't from opponents, it was from parties. And in that case, the wall is up and you can't communicate. So it would be difficult to do some sort of—have your voice on someone else's ad. So I think, to her point, you would have to look at those independents.

Mr. ALTMIRE. Congressman Gonzalez, at the beginning of your remarks, you said something that others have said in reviewing this legislation, is that, well, isn't the nature of a political candidate's call different than that of a phone solicitor? And that may be the case, so a possible solution to that is to have a separate do-not-call registry to where, if you are on the do-not-call list for consumer products, that is one thing, and then you have a separate do-not-call list for political robo-calls.

Logistically, that is a lot more difficult to do. I don't support that. I think it should be within the overall do-not-call list. But that would be a way to resolve the concern that you have mentioned.

Mr. GONZALEZ. And I guess what I am hinting at here, of course, is still some sort of exemption or carve-out for, obviously, the incumbents and candidates for office, because I do see the value of this particular tool. And the abuses, we can take care of that.

I definitely would agree with Congresswoman Foxx that I think most of the abuses are going to be the independent expenditure, the organizations and some parties, and not the individuals. I just would hate to impact the individuals. So if there is some way to protect the legitimate utilization of such an important tool.

And I will just end it with this. I will tell you robo-calls, for me, it is about the only way I really get people out there for events, not necessarily to convince them to vote for me, but when I am having an event back in San Antonio, I tell you, it is the robo-call that gets people there. And I haven't had any complaints. Actually, they thank me, "Thank you for notifying me about today's meeting."

So, again, thank you very much. I yield back.

Ms. LOFGREN. Thank you, Mr. Gonzalez.

Mr. Lungren, would you care to ask some questions?

Mr. LUNGREN. Thank you very much, Madam Chairwoman.

Probably the largest reason why I decided to come to this hearing today is to make sure that nothing we do would discourage telephone town halls, either for Members of Congress or political office or those running.

Last week I had a telephone town hall in my district. I was home in the district. I had a live town hall, where I had about—standing room only, about 150 to 200 people. But I did a telephone town hall. We dialed 175,000 people or homes, because I wanted to do the whole district to see if we could do that. We had 102,000 households contacted: 55,000 were live households answering the phone; 49,000 calls went to voicemail. After answering the phone, 25,000 households hung up. But I had 28,169 people who accepted the call and listened—28,000. Now, some listened for 10 seconds; some listened for 2½ hours. That is the most effective means to communicate with my district: 28,000 versus 200 people at the live one.

I call at dinnertime, believe it or not, because I have called at different times and I found most people like it at dinnertime. They put it on the speaker phone. I had one lady tell me 2 months ago that it was great. When I called, she was feeding her baby. She fed her baby, she bathed her baby, she put her baby to bed, and now she had a chance to ask me a question.

Now, the fact of the matter is, if you have a State—or we have a law that says you can't use a recorded message, you can't do it

that way. Because I can't make 175,000 dials in an hour and a half. So I think we ought to be very, very careful about anything we do here that would restrict that.

Secondly, the great inconvenient truth today is not global warming, as my friend Al Gore suggests, but it is the first amendment of the Constitution. It is inconvenient. It interferes with things. I don't want to listen to someone yelling at me some political message as I walk through or happens to be outside my house on the sidewalk, but, you know, they are able to do that.

There is a distinction, first amendment distinction, between commercial speech and political speech. Whether we like it or not, there is a distinction. We don't have to be defensive about the fact we make a distinction between Members of Congress or politicians and commercial speech, because it is embedded in the Constitution. The Supreme Court has suggested to us that you have to have what they call a compelling governmental interest to interfere in any way. And then, if we do, it has to be in the least intrusive way. And that is what we have to look at here.

I am informed, although I don't have it on my phone, that you can have caller ID on your phone, in which if your phone does not recognize the number that is calling they don't accept the call. Presumably, that would stop a lot of robo-calls. That is a far less intrusive way of doing it than either banning it or putting political speech within the no-call list that we have.

So, I don't like people calling me. I got so many—I was excited the first time the Governor of California called me. It was very evident from his accent who it was. But about the sixth time he called, among the 20 that were calling that day prior to the election, I don't like it. I just turned that off. It makes me less likely to vote for whoever it is. And if I am really concerned about having repetitive calls, I listen to hear who actually has the tagline for who they are, and then I either don't vote for them or I let them know I don't appreciate that sort of thing.

So I understand the problem, but I just hope we don't overreact to the problem. Politics is supposed to be robust. It is supposed to be kind of tough. I mean, we are supposed to get bruises from it. That is the price we pay for the first amendment. We allow all kinds of terrible speech out there. We protected Nazis marching in Illinois, I recall, 20 years ago, even though that is terribly offensive, far more offensive than a call talking about what a bad guy I am. So I am very leery of us doing that.

But the main reason I am here is to make sure nothing we do would interfere with the potential for telephone town halls, which I happen to think is the most effective means that allows us to communicate with our constituents or an aspiring elected official to communicate with their prospective constituents. And we are so divided now, where most of us vote by absentee rather than actually going to the polls, it is almost like we are afraid to be a community again politically. And I hate to be the negative person here, but I am very, very concerned about us overreacting.

And I thank you, Madam Chair.

Mr. ALTMIRE. Madam Chair, if I might respond? I know we are over the time.

Ms. LOFGREN. Certainly.

Mr. ALTMIRE. I am glad the gentleman brought it back to the tele-town halls, because I agree with everything he said in his remarks. My legislation does not ban tele-town halls. It is certainly not my intent nor Congresswoman Foxx's intent to in any way have tele-town halls or the ability for candidates or elected office officials to hold tele-town halls under the scope of this legislation.

Ms. FOXX. And what I might add to that, Dan, is that the 25,000 people who hung up right after you called might be those people who would say, I don't want to get the call to begin with. So you are not really turning anybody off or denying anybody that opportunity. They simply opted out of those 173,000.

I don't want to cut people off—I don't want to cut out free speech in any way. But I believe allowing people to get on a do-not-call registry and have it apply to everybody—I mean, whether they are independent callers or they are us or they are aspiring people, if it applies to everybody, then we are all treated alike. And then those people don't have to be called to begin with. And the people who do want to be on your tele-town hall will be on your tele-town hall. So you are not denying anybody anything.

Ms. BEAN. I also want to echo I think Congressman Lungren makes a very valid point. We have all used the town halls. And particularly with the time we are spending in Washington lately, which has been an even greater degree, it makes it so much harder to stay connected to our constituents and understand their concerns. So I think it is a very valid form of communication.

And there is a difference between political speech and government outreach, too. But I would say, relative to the freedom of speech provision that you mentioned and the Nazis, you know, in Illinois, in Skokie particularly, of course we support freedom of speech, but the Nazis weren't pretending to be someone else. So I do think there is a way to allow those people to speak, but there is a difference between speaking and being fraudulent in who is speaking.

Ms. LOFGREN. Let us turn now to Mr. Davis.

Mr. DAVIS of Alabama. Thank you, Madam Chairwoman.

Mr. Lungren and I serve on two committees together, and I find that 75 percent of the time I disagree with him. The other 25 percent of the time, I am envious that he got to make the point first, because he makes it very well. And this is a 25 percent moment, frankly.

I am certainly glad to see the effort that my colleagues have put into this legislation. I fully understand the purpose and the underlying spirit behind it. But I think the core of what Mr. Lungren said is exactly right for two reasons.

First of all, we do have a well-developed constitutional doctrine in this country, developed by the Supreme Court, that says that commercial speech does not have the same weight as political, ideological speech. And that manifests itself in a variety of ways. You can put time, place and manner restrictions on commercial speech. You can say that a billboard can only be so large and can't be in certain areas. For example, you can say you can't advertise liquor in a school zone or next to a school. I don't think anyone would ever argue you could make those kinds of exceptions for political speech.

There are content-based restrictions you can put on commercial speech related to truth in advertising. As much as we probably would like to find a way to do it, as much as we would like to find a way to adopt a standard requiring truth in advertising in campaigns, a lot of how you interpret a voting record, a lot of how you interpret a position is enormously subjective. And our truth may not hold up to some objective light of day. It is just the nature of this business.

So there has been a well-established difference in how we treat commercial and political speech, and I am a little bit uncomfortable with redrawing the lines. And, you know, certainly you can say, well, the robo-calls for town hall meetings are good, robo-calls to encourage that you turn out to vote are good, robo-calls to say "support me" aren't good. The problem is, electronically, those are all the same thing. They are all advocating that you do something. They are trying to compel you to a particular set of action. They are advocacy. And that is the root. It is not so much that it is advocacy that we like versus advocacy that may make us uncomfortable. The root of everything I have just described is that it is advocacy, it is encouraging you to do something. And we are very loathe to restrict political advocacy, as opposed to commercial advocacy.

The second point that I would make, I do think that we struggle with the question of people spreading lies by telephone. Virtually every one of us who has been elected to office at any level has had some opponent spread, through literature or through phone, something that is palpably false.

Now, there is a difference between the palpably false and something that is simply an argument over a vote or what the ripple effect of something may be. If you say someone has been arrested three times, has a criminal record, that is either true or false. If you say that voting for the Protect America Act means that you are indifferent to civil liberties, that is obviously subjective. So what I wonder is whether we can ever find the way and the means to really hone in on factually demonstrably false information.

Now, having said that, we know how robo-calls do it. They don't say that John Jones is a three-time sex offender. They say, "Would it trouble you if you learned that one of the leading candidates in this race who is not Pete Smith is a three-time sex offender?" and they would come back and say, "Well, I didn't say it. I just asked if it would bother you."

So I wonder if we could find a way to maybe rout out the demonstrably factually false, someone asserting a vote that did not happen, someone asserting a criminal record when you don't have it, someone asserting an arrest when you don't have it. And I wonder if we could find some way to strengthen our laws.

And our libel laws are interesting in this area. There is this myth that floats around that basically politicians are immune from libel laws. That is not quite true. If you know that something is false, you don't have a right to disseminate it against a politician more than you do anybody else. The question is what constitutes knowledge and what constitutes certainty.

But I think it is a very interesting discussion, it is a very interesting debate. I don't think we resolve it, though, by trying to carve out lines based on different kinds of advocacy. Political speech is

political speech. And whether it encourages someone to come out to a town hall meeting or vote for Virginia Foxx or Jason Altmire, it is still advocacy at its core. And I think if we are going to parse out those distinctions, we are going to eventually find a Supreme Court that gives us some outcomes we don't like.

Ms. LOFGREN. The gentleman yields back.

I appreciate the fact that our colleagues have stayed with us for so long. I know Congresswoman Bean had to leave.

I will just say how much I appreciate the leadership the three Members have given on this important subject. It is complicated. The three of us serve on the House Judiciary Committee. And thinking about this, I mean, there are severe First Amendment issues here; there is no doubt about it.

The last thing any of us would want to do would be to constrain the ability to have these tele-town halls. I just think they are a fabulous opportunity to connect and for citizens to participate. And, you know, if a Member has not done it, they should try it. The citizens love it.

On the other hand, that is very different than, you know, 25 phone calls being placed to the same number at 2:00 a.m., which is harassment. And so, as we look at this, we are going to be very mindful of the constraints of the First Amendment.

But, you know, we also did pass out of the Judiciary Committee, with broad bipartisan support, an anti-election harassment bill, too, where it is now contrary to law to tell people the election date has changed. And so I think we can explore some of what is possible on the harassment area. And I think this hearing and certainly the leadership of the three Members is a very important first step on that road.

So we thank you very much.

And we will now ask our next panel to come forward. And we will be having two votes soon, but perhaps we can at least begin on the next panel.

And I would like to introduce the witnesses.

We have Steve Carter. Mr. Carter has served as Indiana's Attorney General since the year 2000. As Attorney General, Mr. Carter has been active in enforcing and implementing the Nation's strongest do-not-call law. And in the last 3 years, his office has either filed suit or entered court-ordered agreements with roughly 20 companies for violating either State or Federal statutes regulating automated calls. Prior to serving as the Attorney General, Mr. Carter worked as chief city-county attorney for the City of Indianapolis and as legislative counsel for the Indiana State Senate and the agricultural assistant and chief of staff to the Indiana Lieutenant Governor.

We also have with us John Cooney, who is a partner at the law firm Venable, LLP. He has 30 years of experience in regulatory policymaking and regulatory litigation. Prior to his work with Venable, Mr. Cooney served as assistant to the solicitor general in the Department of Justice, as well as deputy general counsel for litigation and regulatory affairs in the office of OMB.

We also have with us William Raney, who is a partner in the law firm of Copilevitz and Canter. His practice there focuses on first amendment issues and compliance with State and Federal tele-

marketing laws. His clients include nonprofit organizations, publicly traded companies, as well as telemarketing service bureaus both in the United States and overseas.

We also have Rodney Smith, who is a political consultant and fund-raiser. He is also a founder of the Tele-Town Hall political firm based in Washington, DC. And we have been singing the praises of tele-town halls. In the past he has worked as the national finance director for the Republican National Committee and the National Republican Congressional Committee and served as treasurer and finance director of the National Republican Senatorial Committee.

And finally, we have Karyn Hollis, who is a registered voter in the 6th Congressional District. She has been a registered voter for 17 years and is a tenured faculty member in the department of English at Villanova University, where she has worked for the past 17 years. Before working at Villanova, Dr. Hollis taught at Dickinson College in Carlisle, Pennsylvania. She is married to Paul Gottlieb, and they have been married for 22 years. And they have one son, Martin Gottlieb-Hollis, who is 19. We thank Dr. Hollis for coming today, and we look forward to her testimony.

But we are going to get the testimony of this panel after we come back from casting two votes on the floor. So we will be back here. We will come immediately after we vote. It will be, I would say, about 12:45 by the time that is done, at the earliest, maybe 12:50.

Thank you. This hearing is recessed.

[Recess.]

Ms. LOFGREN. My apologies for our delay due to votes on the floor. We are reconvening our subcommittee now to hear the testimony from our second panel, who have already been introduced.

By unanimous consent, your entire statements will be made part of the official record of this hearing. We would ask that your oral testimony be limited to about 5 minutes. When you have used up 4 minutes, that little machine on the middle of the table will show a yellow light. And when your 5 minutes are up, it will show a red light. And at that time, we would ask you just to summarize and finish your sentence.

And I am going to actually ask that we do that this time, because we will have another set of votes in an hour. And we would like to finish this and not have to come back still again. And we do appreciate your patience and your willingness to stick with us on this.

So, Mr. Carter, we would like to begin with you, if we could.

STATEMENTS OF HON. STEVE CARTER, ATTORNEY GENERAL OF INDIANA; MR. JOHN F. COONEY, PARTNER, VENABLE, LLP; MR. WILLIAM RANEY, PARTNER, COPILEVITZ AND CANTER, LLC; MR. RODNEY SMITH, FOUNDER, TELE-TOWN HALL, LLC; MS. KARYN HOLLIS, ASSOCIATE PROFESSOR, VILLANOVA UNIVERSITY

STATEMENT OF STEVE CARTER

Mr. CARTER. Thank you, Madam Chairman, members of the committee. Thank you for the opportunity to be here. Also a special hello to my Attorney General colleague, Congressman Lungren.

Thank you for the opportunity to speak as Indiana's Attorney General.

In that capacity, I am provided the authority to enforce consumer protection laws, including the do-not-call law limiting telemarketers, as well as statutes regulating prerecorded or automated dialed calls known as robo-calls. Both of these laws are extremely popular with Indiana citizens. I am reminded every day through comments, correspondence and by complaints received against violators of the positive impact of each of these laws on our individuals throughout our State.

Indiana has the strongest do-not-call law in the country, a law with the fewest exemptions, that significantly reduces the number of telemarketing calls citizens receive. More than half of Indiana's population benefits from the Indiana do-not-call law. The results of a survey that we conducted show that about 98 percent of registrants report that the laws works for them, increasing their personal privacy and reducing the unwanted, unsolicited telemarketing calls.

I mention this because it is related to the automated or prerecorded calling issue. People's expectations of privacy have increased in this area. They have come to expect that telemarketers should only be calling them if they have explicitly asked them to, or at least not when a citizen has placed himself or herself on a State or Federal do-not-call list.

Automated calls have become a major issue over the past few years because they are different than the regular telemarketing calls that people have received. And as their volume increased, we have started to hear more about it. In the last 3 years, my office has either filed suit or entered into court-ordered agreements with about 20 companies for violating either State or Federal statutes related to automated calls. These actions included filing suit against two entities that were making political-related calls using a prerecorded message, in violation of our State law prohibiting so-called robo-calls.

In addition, I have been the target of lawsuits by telemarketers for having pursued these enforcement actions. When I sued American Family Voices and the Economic Freedom Fund for calling citizens in Indiana's 9th Congressional District for noncompliance with the law, I was in turn sued by FreeEats.com, a company that sends, and can literally send millions of automated calls within a few hours.

As a matter of fact, this company has admitted in an Indiana court that it maintains a database of nearly 2 million Indiana phone numbers and that its calling system can automatically dial these each three times. One call is annoying. Two is frustrating. Number three is often considered harassment, at least in Indiana. This group has been seeking ways to keep me from enforcing Indiana's law and providing residential peace and quiet to our citizens. We have prevailed, though, and in September the Seventh Circuit Court of Appeals gave me the green light to proceed with my State enforcement actions against FreeEats and other groups involved.

Indiana has implemented and enforced a strict standard of telephone privacy for its citizens. When the standard is breached, the Attorney General's Office has regularly stated and stood by a policy

of strong enforcement. I believe we have had overwhelming success in achieving compliance from most telemarketers.

I continue to believe that a marketer's message can be relayed in many different ways, outside of an intrusive, invasive use and violation of one's personal telephone line. The annoyance and frustration caused by these unwanted calls pushes an intended audience away, leading people to file grievances and be more inclined to disregard or even disagree with the message being conveyed.

With television and radio advertising, use of prerecorded messages in a lawful way, also where direct mail and volunteers are able to make message calls, there are many ways that telemarketers can reach an audience legally. Technological advances that have created these mass-market calling programs have made it easier on the telemarketer, but at what cost to the consumer? Greater convenience for the telemarketer comes only at the expense of the loss of privacy for our consumers.

The public sentiment for telephone privacy is very high. This country saw a wave of do-not-call registries form within short order. Legislators know that this issue hits a chord with their constituency. Congress has recognized the tidal wave and implemented a national registry, watching firsthand as millions registered, seeking relief and wresting control of their telephone back from those unwanted telemarketing calls. Calls can be made, but they must be made in accordance with the laws that have been established for the benefit of those we serve.

Laws also don't assist the public if they are not enforced. This is why I have taken a position to ensure that these laws are being utilized and enforced and companies are taken to task for not recognizing the language of the law but also not for recognizing the will of the people.

Thank you.

[The statement of Mr. Carter follows:]

TESTIMONY BY INDIANA ATTORNEY GENERAL STEVE CARTER
Committee on House Administration Hearing
Subcommittee on Elections: Hearing on Robo-Calls

Thursday, December 6, 2007

THANK YOU FOR THE INVITATION TO BE HERE TODAY.

AS INDIANA'S ATTORNEY GENERAL, I AM PROVIDED THE AUTHORITY TO ENFORCE CONSUMER PROTECTION LAWS – INCLUDING THE DO NOT CALL LAW LIMITING TELEMARKETERS, AS WELL AS STATUTES REGULATING PRE-RECORDED OR AUTOMATED DIALING – INCLUDING ROBO CALLS.

BOTH OF THESE LAWS ARE EXTREMELY POPULAR TO CITIZENS. I AM REMINDED EVERYDAY THROUGH COMMENTS, CORRESPONDENCE, AND BY COMPLAINTS RECEIVED AGAINST VIOLATORS, OF THE POSITIVE IMPACT EACH OF THESE LAWS HAS ON INDIVIDUALS THROUGHOUT OUR STATE. INDIANA HAS THE STRONGEST DO NOT CALL LAW IN THE COUNTRY – A LAW WITH THE FEWEST EXEMPTIONS THAT SIGNIFICANTLY REDUCING THE NUMBER OF TELEMARKETING CALLS CITIZENS RECEIVE.

MORE THAN HALF OF THE INDIANA'S POPULATION BENEFITS FROM THE INDIANA DO NOT CALL LAW – THE RESULTS OF A SURVEY THAT WE CONDUCTED SHOW THAT ABOUT 98 PERCENT OF REGISTRANTS REPORTED THE LAW WORKS FOR THEM – INCREASING THEIR PERSONAL PRIVACY USE OF THE TELEPHONE AND REDUCING UNWANTED, UNSOLICITED TELEMARKETING CALLS.

I MENTION THIS BECAUSE IT IS RELATED TO THE AUTOMATED – OR PRE-RECORDED CALLING ISSUE. PEOPLE'S EXPECTATIONS HAVE INCREASED IN THE AREA OF TELEPHONE PRIVACY....THEY HAVE COME TO EXPECT THAT TELEMARKETERS SHOULD ONLY BE CALLING THEM IF THEY HAVE EXPLICITLY ASKED THEM TO. OR AT LEAST NOT WHEN THE CITIZEN HAS PLACED HIMSELF ON A STATE OR FEDERAL DO NOT CALL LIST.
AUTOMATED CALLS BEGAN STANDING OUT A FEW YEARS AGO BECAUSE THEY WEREN'T PART OF THE REGULAR TELEMARKETING CLUTTER PEOPLE HAD BEEN GETTING BEFORE – WE STARTED HEARING ABOUT IT.

IN THE LAST THREE YEARS, MY OFFICE HAS EITHER FILED SUIT OR ENTERED COURT ORDERED AGREEMENTS WITH ABOUT 20 COMPANIES FOR VIOLATING EITHER STATE OR FEDERAL STATUTES REGULATING AUTOMATED CALLS.

THESE ACTIONS INCLUDE FILING SUIT AGAINST TWO ENTITIES THAT WERE MAKING POLITICAL-RELATED CALLS USING A PRE-RECORDED MESSAGE IN VIOLATION OF OUR STATE LAW PROHIBITING SO-CALLED ROBO CALLS.

IN ADDITION, I HAVE BEEN THE TARGET OF LAWSUITS BY TELEMARKETERS FOR HAVING PURSUED THESE ENFORCEMENT ACTIONS.

WHEN I SUED AMERICAN FAMILY VOICES AND THE ECONOMIC FREEDOM FUND FOR CALLING CITIZENS IN INDIANA'S 9TH CONGRESSIONAL DISTRICT IN NON COMPLIANCE THE LAW, I WAS

IN TURN SUED BY FREEEATS.COM – A COMPANY THAT SENDS, AND CAN SEND LITERALLY MILLIONS OF AUTOMATED CALLS WITHIN A MATTER OF DAYS.

AS A MATTER OF FACT, THIS COMPANY HAS ADMITTED IN COURT THAT IT MAINTAINS A DATABASE OF 1.7 MILLION INDIANA PHONE NUMBERS AND THAT ITS CALLING SYSTEM MAY DIAL EACH NUMBER AS MANY AS THREE TIMES.

ONE CALL IS ANNOYING, TWO IS FRUSTRATING, NUMBER THREE IS OFTEN CONSIDERED HARRASSMENT – AT LEAST IN MY STATE.

THIS GROUP HAS BEEN SEEKING WAYS TO STOP ME FROM ENFORCING INDIANA'S LAW AND PROVIDING RESIDENTIAL PEACE & QUIET TO OUR CITIZENS. WE HAVE PREVAILED AND IN SEPTEMBER, THE 7TH CIRCUIT COURT OF APPEALS GAVE ME THE GREENLIGHT TO PROCEED WITH MY STATE ENFORCEMENT ACTIONS AGAINST FREEEATS AND THE OTHER GROUPS INVOLVED.

INDIANA HAS IMPLEMENTED AND ENFORCED A STRICT STANDARD OF TELEPHONE PRIVACY FOR ITS CITZENS. WHEN THIS STANDARD IS BREACHED, THE ATTORNEY GENERAL'S OFFICE HAS REGULARLY STATED, AND STOOD BY A POLICY TO ENFORCE. I BELIEVE WE HAVE HAD AN OVERWHELMING SUCCESS IN ACHIEVING COMPLIANCE FROM TELEMARKETERS.

I CONTINUE TO BELIEVE THAT A MARKETER'S MESSAGE CAN BE RELAYED IN A NUMBER OF WAYS OUTSIDE OF THE INTRUSIVE USE, AND VIOLATION, OF A PERSONAL TELEPHONE LINE.

THE ANNOYANCE AND FRUSTRATION CAUSED BY THESE UNWANTED CALLS PUSHES YOUR INTENDED AUDIENCE AWAY – LEADING PEOPLE TO FILE GRIEVANCES AND BE MORE INCLINED TO DISREGARD, OR EVEN DISAGREE WITH THE MESSAGE BEING CONVEYED.

TELEVISION AND RADIO ADVERTISING, USING PRE-RECORDED MESSAGES THE RIGHT WAY, WHERE A PERSON HAS A CHANCE TO SAY YES OR NO – DIRECT MAIL AND USING VOLUNTEERS TO MAKE MESSAGE CALLS PROVIDE TELEMARKETERS WITH OTHER MEANS TO REACH THEIR AUDIENCE.

TECHNOLOGICAL ADVANCES THAT HAVE CREATED THESE MASS-CALLING PROGRAMS HAVE MADE IT EASIER ON THE TELEMARKETER, BUT AT WHAT COST TO A CONSUMER? GREATER CONVENIENCE FOR THE TELEMARKETER COMES ONLY AT THE EXPENSE OF THE LOSS OF PRIVACY TO OUR CONSUMERS.

THE PUBLIC SENTIMENT FOR TELEPHONE PRIVACY IS HIGH. THIS COUNTRY SAW A WAVE OF DO NOT CALL REGISTRIES FORM WITHIN SHORT ORDER.

LEGISLATORS KNOW THAT THIS ISSUE HITS A CORD WITH THEIR CONSTITUENTCY. CONGRESS RECOGNIZED THE TIDAL WAVE AND IMPLEMENTED A NATIONAL REGISTRY – WATCHING FIRST-HAND AS MILLIONS REGISTERED – SEEKING RELIEF AND WRESTING CONTROL OF THEIR TELEPHONE BACK FROM THOSE UNWANTED TELEMARKETING CALLS.

CALLS CAN BE MADE, BUT THEY MUST BE MADE IN ACCORDANCE WITH THE LAWS THAT HAVE BEEN ESTABLISHED FOR THE BENEFIT OF THOSE WE SERVE.

LAWS ALSO DON'T ASSIST THE PUBLIC WHEN THEY ARE NOT ENFORCED.

THIS IS WHY I'VE TAKEN A POSITION TO ENSURE THAT THESE LAWS ARE BEING UTILIZED, AND COMPANIES ARE TAKEN TO TASK FOR NOT RECOGNIZING THE LANGUAGE OF THE LAW, BUT ALSO FOR NOT RECOGNIZING THE WILL OF THE PEOPLE.

Thank you

Ms. LOFGREN. Thank you very much, Mr. Attorney General.
Mr. Cooney.

STATEMENT OF JOHN COONEY

Mr. COONEY. Chairman Lofgren and members of the committee, thank you for the opportunity to testify today.

In my testimony I will try to focus on the constitutional issues related to Government regulation of prerecorded telephone calls that are made for political purposes. And my principal point will be that the First Amendment, as interpreted in many Supreme Court decisions, substantially limits the Government's ability to regulate prerecorded calls as long as they are made for political purposes.

Political speech is entitled to the greatest degree of protection under the First Amendment. And the answer to the question that was presented by Representatives Altmire and Foxx was the answer given by Congressman Lungren and Congressman Davis, namely that commercial enterprises are different. Under Supreme Court precedent, they are entitled to a lesser degree of protection, and the standard of review used in considering Government restrictions is also lesser. And so there is a fundamental difference between the free-speech rights of political speakers and those of commercial speakers.

Now, existing Federal Communications Commission rules adopted under the Telephone Consumer Protection Act of 1991 already regulate the procedures under which prerecorded political calls can be made. The TCPA was passed by Congress after a thorough debate on the constitutional limitations on its power to regulate noncommercial calls. And it recognized that its authority was lesser, and so it sent the issue to the Federal Communications Commission for a nuanced, tailored approach to make certain that consumer protection was furthered but consistent with the overall rule that political speech has a paramount role to play in American life.

After the TCPA and its implementation, there is probably a small space within which additional procedural restrictions could be adopted on prerecorded political calls. But it would be very easy for Congress to step over the line and adopt a restriction that was unconstitutional. So my bottom-line judgment is that Congress should proceed very cautiously in this area, both because of the value of prerecorded political calls to the public debate and also because the risk of constitutional error is so high.

Now, as I mentioned, the political speech protection is at its zenith under the First Amendment. The Government must show that the restriction serves a compelling governmental interest and is the least restrictive alternative available. And as Congressman Lungren pointed out, it is very difficult for the Government to satisfy a least-restrictive-alternative test. There have been repeated Supreme Court decisions over the last 10 years that have struck down good-faith efforts by Congress to find ways to regulate speech. In the indecency on cable television, obscenity on the Internet, and in the campaign finance area, in particular, Congress has had great difficulty in understanding where the line is, in response to issues that are presented there. But the universal statement in all these

cases is that political speech is entitled to the greatest degree of protection.

The Supreme Court has also specifically held that you cannot have a regulation that entirely blocks one mode of communication. That was Justice Rehnquist's decision in 1994 in City of Ladue cited five other Supreme Court cases, going back to the Jehovah's Witnesses cases that we all studied in law school, that have made this point consistently since the 1940s.

The Supreme Court also established that the Government can't block a form of political communication based upon assertions that some members of the public may not wish to receive it. In the *Struthers* case, the Supreme Court held that where technology exists for prerecorded political calls to differentiate between the people who want to receive the call and those who do not want to receive the call, then a blanket ban is impermissible.

As members of the committee have said today, I think Representative Bean pointed out that 25 percent of the people who received prerecorded calls listened to them to the end. And the record in the Indiana litigation to which the Attorney General referred, the undisputed facts in the record showed that 20 percent of the population stayed on until the end of the call, the interactive call that my client, FreeEats, made. And FreeEats uses a new generation of technology which we call artificial-intelligence calls, because it asks the recipient a series of questions that can be answered "yes" or "no", and depending upon the "yes" or "no" answer, the recipient can hear that he is going down a logic path and that the machine is responding to his questions. And people are interested in participating.

And in particular, this technology is used in franking calls by Members of Congress, where it has proved to be a popular and effective way in which questions can be asked directly to large numbers of people in the Member's district. And the Member doesn't get a poll; he gets more than a representative sample. He gets answers from a large number of his constituents about how they feel about pressing policy issues.

So, for these reasons, because of the value of these kinds of prerecorded political calls in the public debate, my bottom-line conclusion is that the committee should proceed very cautiously and with full view of the Constitution to make certain that we don't violate the Constitution and we don't inhibit the public debate.

[The statement of Mr. Cooney follows:]

Committee on House Administration
Subcommittee on Elections

Oversight Hearing on the Use of "Robocalls" in Federal Campaigns

Testimony of John F. Cooney
Partner, Venable LLP

December 6, 2007

Chairman Lofgren and members of the Subcommittee, thank you for the invitation to testify concerning the use of prerecorded telephone calls in federal election campaigns. My name is John F. Cooney, and I am a partner in the law firm of Venable LLP in Washington, D.C.

In my testimony, I will focus on the First Amendment issues related to use of prerecorded calls as a form of political communication in election campaigns. Bills have been filed and are being considered by the House of Representatives that would establish additional regulatory requirements on prerecorded political calls beyond those already imposed on such calls by the governing rule of the Federal Communications Commission, pursuant to a grant of authority by Congress in the Telephone Consumer Protection Act of 1991.

Prerecorded telephone calls in political campaigns are a form of political speech that are entitled to the greatest degree of protection available under the First Amendment. Supreme Court decisions applying the First Amendment to political communications establish an exacting standard of review. A law can survive constitutional scrutiny only if it serves a compelling governmental interest and is the least restrictive alternative necessary to serve that interest. *See Buckley v. Valeo*, 425 U.S. 1, 45 (1976). In considering legislation that would restrict prerecorded political communications, the

Members of the Subcommittee should proceed carefully to avoid infringing the First Amendment rights of both speakers and recipients.

I. Prerecorded Political Calls.

Prerecorded telephone calls have long been used in federal elections to help survey potential voters about their attitudes and to persuade voters to go to the polls on election day. The term "robo-calls" might have been an accurate description in the infancy of prerecorded calls in the late 1980s and early 1990s, when the technology allowed the political speaker to do little more than attach a tape player to a telephone and play a recorded message from beginning to end. The term bears no resemblance to the current generation of technology, which employs interactive voice response, speech recognition software. This technology can be programmed in many ways to ask a recipient any question that a human might present and can respond to "Yes or No" answers from the recipient, by choosing among various alternative questions that could be asked next. The technology also can be programmed to disconnect the call at the request of the recipient.

Today's interactive voice response, speech recognition technology would more accurately be described as "Artificial Intelligence calls." The calls can be made to sound like a live person, rather than a machine; the systems can change from English to Spanish when a response is received in Spanish. Data generated from the responses can be accumulated more quickly, without any time lag bias. All questions are asked in the same voice, which eliminates the risk of "surveyor bias" or adjustments that need to be made for accents.

The technology for making automated calls has progressed to the point that the interactive voice response, speech recognition technology systems of our client ccAdvertising are an approved part of the Franking process of the U.S. House of Representatives. Those systems are used to by various Members to conduct franking surveys of their constituents.

II. First Amendment Principles Applicable to Prerecorded Political Calls.

A. Background Principles. The Supreme Court has long recognized the critical importance of free political communication in election contests. For example, in *Eu v. San Francisco Cty. Democratic Cent. Com*, 489 U.S. 214 (1989), the Court held that "[t]he First Amendment 'has its fullest and most urgent application to speech uttered during a campaign for political office.'" 489 U.S. at 23, quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971). Similarly in *Meyer v. Grant*, 486 U.S. 414 (1988), the Court found that political speech is "at the core of our electoral process and of the First Amendment freedoms . . . an area of public policy where protection of robust discussion is at its zenith." 486 U.S. at 425 (internal citations omitted).

Further, the First Amendment "protects [the speaker's] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Meyer*, 486 U.S. at 424. In that case, the Supreme Court found that a Colorado law prohibiting the use of paid petition circulators "restricts access to the most effective, fundamental, and perhaps economical avenue of political discourse" and therefore constituted an impermissible burden on speech, especially given the presence of less restrictive alternatives that could address the State's concerns. *Id.* The Court explicitly relied on these cost and efficiency considerations in determining that the statute imposed

an unconstitutional burden on political speech. In so holding, the Court reaffirmed its prior decision in *Martin v. City of Struthers*, 319 U.S. 141 (1943). There, the Court invalidated an ordinance prohibiting door-to-door solicitation even for religious purposes, based in part on the fact that such speech "is essential to the poorly financed causes of little people." 319 U.S. at 146.

The Supreme Court has held repeatedly that laws which ban an entire category of protected expression are unconstitutional. In *City of Ladue v. Gilleo*, 512 U.S. 43 (1994), the Court followed five prior decision in which it had held that laws which "foreclose an entire medium of expression" violate the First Amendment. 512 U.S. at 47.

> Although prohibitions foreclosing entire media may be *completely free of content or viewpoint discrimination,* the danger they pose to the freedom of speech is readily apparent -- by eliminating a common means of speaking, such measures can suppress too much speech.

Id. (emphasis added).

Similarly, the Supreme Court has held that the government may not categorically prohibit an entire category of protected speech based on a false and undocumented assumption that all residents object to that particular form of speech and are unwilling to receive it. In *Struthers*, the Court struck down a local law imposing a total ban on door-to-door communication of highly protected speech on the ground that:

> The ordinance . . . substitutes the judgment of the community for the judgment of the individual householder. It submits the distributer to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it.

319 U.S. at 143-44.

Congress followed these core First Amendment principles in enacting the Telephone Consumer Protection Act of 1991. The statute established a comprehensive regime for regulating, and in many respects prohibiting, prerecorded calls made for commercial purposes. Congress, however, recognized that speech made for non-commercial purposes was entitled to a greater degree of protection under the Constitution than commercial speech and therefore did not prohibit prerecorded calls for these purposes. Rather, Congress delegated authority to the Federal Communications Commission to determine, through rulemaking, whether prerecorded speech for non-commercial purposes should be exempted from the general prohibition on prerecorded calls and, if so, under what conditions. 47 U.S.C. § 227(b)(2)(B). In 1992, in recognition of the heightened constitutional protection to which political speech is entitled, the FCC determined that prerecorded political communications were permissible. 7 FCC Rcd 8752 (1992).

In 2003, the FCC expressly stated that "any state regulation of interstate telemarketing calls that differs from our rules *almost* certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted." 18 FCC Rcd 14014 ¶84 (2003) (emphasis added). There is ongoing litigation in the State courts of Indiana concerning the constitutionality of its law that prohibits virtually all prerecorded calls, even if made for political speech purposes and even if interstate in nature.

B. Application of These Principles to Restrictions on Prerecorded Political Calls.

Under the Supreme Court's decisions, prerecorded political calls – that is, communications intended to determine the recipient's political views and to persuade that

person to vote – constitute core political speech and are entitled to the greatest degree of protection afforded by the First Amendment. Under the so-called strict scrutiny test, a government seeking to restrict core political speech must demonstrate that its law serves a compelling interest and is the least restrictive alternative available to serve that interest. The courts have recognized that protecting residential privacy is a compelling state interest. But under repeated Supreme Court decisions, a law prohibiting prerecorded political calls, either explicitly or in a de facto manner based on its effects, violates the First Amendment.

First, the Supreme Court has explicitly held that a law prohibiting an entire medium of communication of protected speech violates the First Amendment. *See City of Ladue*, 512 U.S. at 47, citing five prior cases on which it relied. The Court's decisions also establish that a government cannot prohibit all political speech to potential voters based on an unfounded assumption that since some recipients may object to a particular form of political speech, all potential recipients are unwilling to received it. *City of Struthers*, 319 U.S. at 143-44.

In prior litigation over the constitutionality of the Indiana law prohibiting prerecorded political calls filed against the State by FreeEats.com, the undisputed facts in the record of the U.S. District Court for the Southern District of Indiana demonstrated that 40% of the homes that actually answered the telephone in response to a call made by its interactive voice response, speech recognition technology responded to at least some of the interactive political survey questions they were asked; 20% of the live recipients completed the entire survey. In the face of this evidence, it would be unconstitutional for a government to ban an entire category of speech based on complaints by some residents

that they do not wish to receive prerecorded political calls. Under the Supreme Court's decisions, the controlling factor is that a substantial proportion of the population wishes to receive prerecorded political calls, as demonstrated not by an abstract response to a pollster's question but by their actual behavior when they received such calls.

Second, under the least restrictive alternative test, a law banning prerecorded political speech with potential voters is unconstitutional where other approaches or technologies are available that permit fine tuning distinctions between the potential recipients who do or do not wish to receive a particular call. In this regard, it is important that the technology by which prerecorded calls are made has evolved substantially since the first generation of laws were passed concerning such calls twenty years ago. Today, prerecorded calls can be made with technology that responds to voice commands given in a "Yes or No" format and that tailors its subsequent actions to the expressed preferences of the recipient. For example, the technology could be programmed to begin a prerecorded political call with an introductory section that seeks, through a simple "Yes or No" response, the recipient's permission before playing the substantive political polling survey or message. In the event that the recipient gives a "No" response, the software could be programmed to disconnect the call. The interactive technology also could utilize a subsequent "Yes or No" response to offer the recipient the option to have his name added to a speaker-specific do-not-call list.

In applying the least restrictive analysis standard, it is important to note that several jurisdictions, including Indiana, prohibit all prerecorded calls, whether for commercial or political purposes, but contain an exception that permits such calls if they arc introduced by a live operator who solicits the recipient's consent for the prerecorded

portion of the call. However, modern interactive voice response, speech recognition technology can be programmed to ask at the outset of the call for the recipient's consent to play the prerecorded substantive portion of the call, in exactly the same words that an operator reading from a script would use, and to disconnect the call if the recipient answered "No."

The effect on residential privacy in having these questions asked by a prerecorded, interactive call is no different from the effect of having these calls asked by a live operator, and the answers taken in response to the recipient's answer would be the same. A statute that required the speaker to include such interactive features at the beginning of a prerecorded political call would thus permit precise differentiation of which recipients wish to receive that political message, without the suppression of political speech that would be imposed by the costs of a requirement that a live operator deliver the same message.

The undisputed facts in the record of the Indiana District Court proceeding also show that the requirement of a live operator to deliver the introductory message seeking consent to play the prerecorded portion of the call would increase by 1500% the cost of calling the same population and delivering the same message through a prerecorded introduction. This vast cost increase would function as a *de facto* prohibition or severe curtailment of political speech through prerecorded calls. Moreover, the evidence in that proceeding showed that the delays in communication caused by the live operator requirement would make it physically impossible for a political speaker to reach many voters in the days immediately before an election.

Meyer v. Grant establishes that these cost and delay considerations are of critical significance in determining the constitutional validity of a government restriction on political speech. They formed the basis for the Supreme Court's conclusion that the statute there at issue constituted an impermissible burden on political speech because it restricted "access to the most effective, fundamental, and perhaps economical avenue of political discourse." 486 U.S. at 424. The Court also has found that a law prohibiting protected speech may be unconstitutional even it is not framed as an explicit ban, but nonetheless accomplishes the same result through the size of the imposition that is imposed on that speech. "It is of no moment that the statute does not impose a complete prohibition. The distinction between laws burdening and laws banning speech is but a matter of degree." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000).

Accordingly, based on currently available technology, a statute that imposed a categorical ban on prerecorded political speech would be unconstitutional. There is an effective and less restrictive alternative available to a prohibition, which is to permit such calls to be made with interactive voice response, speech recognition technology that permits an individualized determination for that specific call of whether a particular recipient does or does not wish to receive the prerecorded message. The existence of such an alternative means that a blanket prohibition would fail the strict scrutiny test, because it is not the "least restrictive" approach available.

Some of the bills that have been filed and are being considered by the House of Representatives would authorize creation of a national Political "Do-Not-Call" list that would permit voters to register to block receipt of any future prerecorded political calls,

regardless of the identify of the speaker or the political cause he or she represents. I am unaware of any jurisdiction that has created such a Political "Do Not Call" list. There certainly has been no litigation directly considering the constitutionality of such an approach; all cases decided to date involving Do-Not-Call lists involve their use to prevent transmission of prerecorded commercial messages. This type of speech is entitled to a lesser degree of protection under the First Amendment than the political communications that the current bills address.

Based on the Supreme Court decisions set forth above, there are substantial reasons to believe that a statute seeking to establish a Political "Do Not Call" list would be held to violate the First Amendment. Such a list would irrevocably inhibit the ability of political speakers to communicate with a portion of the electorate through an effective form of communication and would deprive the political speaker of the fundamental right to ask whether a voter wished to receive a message. As discussed above, the intrusion on residential privacy by asking such a question, at the outset of a prerecorded cal, through the capabilities of interactive voice response, speech recognition technology is no different from the degree of intrusion that would occur when a live operator places such a call and makes such a request.

The importance of the difference between commercial and non-commercial speech in the context of telephone calls is demonstrated by the Seventh Circuit's recent decision in *National Coalition of Prayer v. Carter*, 455 F.3d 783 (7th Cir. 2006), in which one of today's witnesses, Indiana Attorney General Steve Carter, was the defendant. There, the court upheld, against a First Amendment challenge, the constitutionality of a provision of the Indiana Telephone Privacy Act which precluded

charities from making fundraising calls through professional marketers and required that such sales calls could be made only by volunteers or employees of the charity. 455 F.3d at 784. In upholding the restriction as applied to this form of commercial speech, the court stated on three occasions that "an act that severely impinged on core First Amendment values might not survive constitutional scrutiny." *Id.* at 790 n.3. The court based its decision on the fact that the Attorney General had by his own interpretation carved out an exception to the statute so that this restriction did not apply to political speech. The court stated:

> [W]e are mindful that if an ordinance is to regulate any speech, it must be able to withstand a First Amendment challenge. To that end, it is not surprising that the Indiana Attorney General has fashioned an "implicit exception" for political speech, even if that speech comes from professional telemarketers. Political speech has long been considered the touchstone of First Amendment protection in Supreme Court jurisprudence, and courts are prone to strike down legislation that attempts to regulate it.

Id. at 791.

For these reasons, the Subcommittee should act with great care in considering any proposal, such as a Political "Do Not Call" list, that would ignore the differences between the application of the First Amendment in the political and commercial contexts and that would purport to prevent political speakers from contacting voters in connection with an election.

C. Regulation of Political Calls through Time, Place or Manner Restrictions.

A State law may impose reasonable restrictions on speech based on its time, place or manner, provided that the restrictions are justified without reference to the content of the speech, they are narrowly tailored to serve a significant government interest, and they

leave open ample alternative channels for communication of the information. *See Ward v. Rock against Racism*, 491 U.S. 781, 791 (1989).

Under this "intermediate scrutiny" test, some restrictions on the ability of speakers to make prerecorded political calls might be permissible. The FCC rules regulating political speech already contain a substantial number of such restrictions, such as the hours of the day when prerecorded non-commercial calls may be made. These conditions were carefully designed to respect the heightened First Amendment protection to which political speech is entitled. There likely would be no constitutional objection if Congress were to codify the "time, place or manner" restrictions that the FCC has adopted. However, to the extent that pending bills propose restrictions under the "time, place or manner" rationale that go beyond the scope of the FCC rules, the Subcommittee should review those proposals carefully to make certain that the additional restrictions do in reality simply shift the time, place or manner of delivery of a political message, and do not constitute a disguised attempt to restrict of the ability of political speakers to communicate with residents or the volume of those communications.

The Subcommittee should be aware that under the First Amendment, any additional restriction imposed on political speech pursuant to the "time, place or manner" rationale would have to apply to other forms of non-commercial speech to at least the same extent. As noted, political speech is entitled to the highest degree of protection available under the First Amendment. Therefore, it would be unconstitutional for Congress to adopt a "time, place or manner" restriction on prerecorded political communications, while purporting to exempt prerecorded similar speech by the Red Cross or a charitable organization from such a restriction. The Subcommittee should bear

this practical consequence in mind if it considers any new restrictions under this rationale.

Finally, the Subcommittee should be aware that Supreme Court decisions which have sustained a restriction on protected political speech under the intermediate scrutiny test have done so only in contexts where the regulations "do not foreclose an entire medium of expression, but merely shift the time, place or manner of its use, must leave open ample alternative channels for communication." *City of Ladue*, 512 U.S. at 56, quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Current events demonstrate that foreclosing political speech through prerecorded calls may not leave political speakers with effective alternative means of communicating with voters.

Prerecorded political calls are being used extensively in connection with the forthcoming Iowa Caucuses. The reason for this is that the Caucuses are being held immediately after the critical Christmas/New Year shopping period. The major commercial advertisers, such as Wal-Mart and the automobile manufacturers, have long since purchased all available advertising spots on Iowa television and radio stations to promote their sales. Political candidates cannot obtain buy air time even though they have the necessary funding. Accordingly, they have relied to a substantial degree on prerecorded political calls, which have a demonstrated ability to reach identifiable potential voters in the days immediately before the contest and contribute to voter turnout. The candidates literally would have no effective alternative means of communication in this situation, if the governing law substantially restricted the ability of political speakers to reach potential voters through prerecorded political calls.

III. Preemption of Inconsistent State Laws.

Any new legislation that moves forward should include a provision clarifying the scope of the existing preemptive effect of the Telephone Consumer Protection Act with respect to State laws that are inconsistent with federal law or the FCC implementing rules with respect to interstate phone calls. The saving clause of that statute, 47 U.S.C. §227(e)(1), was intended to preserve the ability of the States that already had laws governing prerecorded calls to maintain in place, with respect to intrastate telephone calls, any restrictions that were more stringent than the new federal law and FCC rules that were to govern interstate calls.

Due to inartful drafting, the saving clause has no ascertainable plain meaning. All proposed readings have grammatical defects. This drafting error has made it difficult for reviewing courts to apply the provision. The law should be clarified to reflect the original intent of Congress. As the FCC correctly found in 2003, all State restrictions on interstate calls that differ from the federal rules should be preempted.

Thank you again for the opportunity to testify today. I would be please to respond to any questions that the Subcommittee may have.

Ms. LOFGREN. Thank you very much for that very helpful testimony.

Mr. Raney.

STATEMENT OF WILLIAM RANEY

Mr. RANEY. Thank you, Chairwoman. Thank you, Ranking Member McCarthy, members of the committee. I am here on behalf the American Association of Political Consultants, which is a bipartisan professional trade group representing candidates at all levels of elections, that is here to urge responsible tactics both for its members, as well as show a need for legislation by this committee and by Congress.

I don't think anybody thinks that fraud or abuse is protected speech. Everyone knows that that is not. So setting reasonable standards preventing harassment, frequency of calls, deception, curfews—we urge adoption of those types of restrictions. And that will not create a constitutional problem because abuse and fraud are not protected speech.

Mr. Lungren raised an excellent point, however, that you can't differentiate between types of political speech. It is all protected at the core. And you raise an even bigger constitutional problem if you treat some forms of core speech less favorably or if you treat some forms of commercial speech more. San Diego v. Metromedia is the Supreme Court case on that. And you would quickly run afoul of the Constitution if you differentiate between levels of speech.

There are several unique benefits for this type of media. It is fast. You could place a political prerecorded call if a polling place was called to let constituents know that the polling place would be kept open for longer hours. That can't be done through any other media. And that is prevented by some States.

It is targeted. The town hall topic has been mentioned many, many times. You have direct, participatory political involvement with your constituents. I don't think there is any other medium that can do that so effectively. And that is banned by some States.

It is effective. You can directly get voters patched to your office. Their concerns can be directly expressed to you through this medium, and I don't think they can be done through any other medium.

There is a need for legislation on the Federal level to prevent the abuses that Congresswoman Bean talked about, but also to satisfy the uniformity that is needed in this field, especially with Federal elections. There is a long tradition, and it has been upheld, of Federal regulation of interstate telephony. We have many, many States, set forth in my testimony, that ban these calls, that apply the State or Federal do-not-call list to these calls, and that is not appropriate when we are talking about a uniform medium like interstate telephony.

So in conclusion, the AAPC would urge adoption of a caller ID provision, prohibition against any form of deception regarding the identity of the sponsor of the call, a curfew to reasonable hours—8:00 a.m. to 9:00 p.m. is the same curfew that has been adopted in many other States—and preempting contradictory State law. This is the main need of this committee.

Thank you.
[The statement of Mr. Raney follows:]

CONGRESS OF THE UNITED STATES

House of Representatives
Committee on House Administration
1309 Longworth House Office Building
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SUBCOMMITTEE ON ELECTIONS HEARING

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Thursday, December 4, 2007, 11:00 a.m.

OVERSIGHT HEARING ON USE OF "ROBOCALLS" IN FEDERAL CAMPAIGNS

TESTIMONY OF WILLIAM E. RANEY

COUNSEL TO AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS

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As federal elections approach, a combination of technology and money will fuel an unprecedented number of telephone calls to be placed in the coming year for individual candidates and issues.

This Subcommittee has invited me to testify regarding the use of "robocalls" in political campaigns. These are prerecorded messages sent to voters by or on behalf of candidates concerning ballot issues.

I am a partner at the law firm of Copilevitz & Canter, LLC in Kansas City, Missouri. I have more than a decade of experience in this field. My practice includes commercial

telemarketing, charitable fundraising, and all applications of prerecorded telephone calls. Today I appear as counsel for the American Association of Political Consultants (AAPC), an organization with members providing services to both Democrats and Republicans. I urge this Committee to take action so that legitimate uses of this technology, with regard to elections, are protected. While the AAPC encourages self-regulatory standards for its members, Congress can set a uniform standard to ensure that all political calls meet a similar level of professionalism and ethical responsibility.

I. HISTORICAL USE

Historically, an "autodialer" could place a telephone call to a sequential or random list of telephone numbers and deliver a low fidelity message if a consumer answered the phone. This mechanical technology has been available for decades, but in the past often malfunctioned, delivering cut off messages to answering machines, "seizing" telephone lines, and failing to communicate effectively with consumers. The first federal legislative response to these calls was the Telephone Consumer Protection Act of 1991 ("TCPA") which bans prerecorded calls - absent express consent - to cell phones, emergency and public safety numbers, and requires some minimal disclosure as to the caller's identity and telephone number. Several states responded to this crude technology as well with bans on prerecorded calls or other restrictions.

These laws nearly uniformly addressed commercial uses of prerecorded calls. If applicable to political calls, these laws would group political calls in the same category as "telemarketing"- not a good fit.

The technology has changed in massive and important ways in the past decade, and Congress now faces new challenges, not met by existing laws.

First, these calls are no longer sent by a mechanical dialer and tape player, but sophisticated hardware and software, which allow a specific database of phone numbers to be

contacted, quickly and cheaply. These dialers no longer call cell phones or public safety lines (absent express consent).

Second, the software now allows different messages to be played (some interactive) based on whether a live consumer or an answering machine picks up the call.

Third, Caller ID allows the identity of the caller to be quickly and accurately disclosed. The AAPC believes there is no room for deceptive or abusive practices – ("dirty tricks") with regard to these calls and urges a legislative response to require disclosure and prevent deception.

II. EFFECTS OF TECHNOLOGY ON VOTERS

The professionals at AAPC think this technology is a valuable tool, among several, to get their candidates' message to voters. The candidates and officials the AAPC represents overwhelmingly recognize the potential value of this tool. Many elected officials use some aspects of this technology for franked communications, as well, including telephone "town halls". I think this medium is worth protecting both from misuse and an inappropriate legislative response. The First Amendment mandates that more speech, not less, is better for society.

Politicians can use these messages in many ways beyond simple "get out the vote" calls. Tests regarding prerecorded political calls are inconclusive regarding their effect on voter turnout. The only public test on prerecorded call effectiveness is from Gerber and Green at Yale[1]. Their work is not encouraging solely on the overall effectiveness of "get out the vote" calls but it does not consider the collective positive set of uses- voter education, issue calls, get out the vote, voter registration, fundraising, volunteer mobilization, etc. Candidates embrace this medium because they think it works and it is a core aspect of free speech that speakers know best what they want to say and how they want to say it.

Polling of voters has shown telephone calls have some effect on voters' impressions of candidates. In the Jim Webb for Senate campaign 3% of voters said phone calls were the "most"

[1] http://poq.oxfordjournals.org/cgi/content/citation/65/1/75

important form of information they received; 6% said radio ads were the most important form of information; 8% attributed campaign mail with being the most important form of information, and 37% said television was the most important form of information received. http://www.campaignsandelections.com/webedition/page.cfm?pageid=288&navid=52

It is a well-settled maxim of constitutional law that speakers know best what they want to say and how they want to say it. The AAPC expresses this view here: Prerecorded calls are an inexpensive and effective way - sometimes the only way - for a voter to hear the words of a candidate, in the voice of that candidate or an interested citizen, without expensive technology or time investment (e.g. watching a full debate). On issue votes, prerecorded calls are a great tool for voter education. They could, for example, provide a web link to a consumer for further research.

III. PAST PROBLEMS WITH CALLS

Because prerecorded calls are inexpensive and result in nearly instantaneous delivery of messages to consumers' telephone lines, there is potential for abuse, such as deception, misinformation, and other "dirty tricks".

Just last November, a New Hampshire Congressional race was marred by negative prerecorded calls that did not disclose promptly the identity of the caller, thus resulting in massive negative feedback to a candidate. ["Repeat calls not from Hodes ..." Concord Monitor, November 5, 2006.]

http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20061105/REPOSITORY/611050397.

Deceptive calls can be used to easily misinform voters with little likelihood of monetary TCPA enforcement.

At other times, prerecorded political calls have been sent, sometimes by mistake, at odd hours. Three thousand calls were sent to voters, including the candidate, at 2 a.m. instead of 2

p.m. during a recent campaign in Peekskill, New York. "Rude Awakenings", Kansas City Star, Nov. 3, 2007, p. A3.

IV. LEGISLATIVE RESPONSE

The TCPA requires that all prerecorded calls put at the beginning of the message and state clearly "the identity of the business, individual, or other entity that is responsible for initiating the call" and "during or after the message, state clearly the telephone number of . . . such business. . .". 47 C.F.R. § 64.1200(b). A person or entity who receives a call that does not make this disclosure may bring an action in state court for actual monetary loss or $500 (whichever is greater). This amount can be trebled for knowing or willful violations. 47 U.S.C. § 227(b)(3). Even with Congress' action enacting the TCPA, some doubt that it applies to political prerecorded calls.

Given the size of prerecorded telemarketing campaigns (which very quickly can call thousands of numbers), the potential monetary damage of calls which do not make this disclosure is catastrophic.

The TCPA has also been approved for use in class action cases, potentially exposing senders' messages that do not contain this disclosure to catastrophic liability.

Attached as Exhibit A is a memorandum summarizing existing federal and state law which regulates prerecorded political calls. Some states ban these calls entirely, but most states allow them. Of the states which ban prerecorded calls, several would allow calls if there is a relationship between the caller and the consumer (e.g. prior donation, etc.).

In the immediate past legislative session, many states considered bills specifically regulating prerecorded political calls. With the exception of Oregon, these laws were not adopted. The bills fell into two categories:

1. Banning prerecorded political calls, and

2. Banning prerecorded political calls to persons whose names were included on the state or federal "do-not-call" list.

Each of these legislative responses bans legitimate speech without regard for the negative effect of banning a particular call. In the First Amendment setting, the AAPC and I personally believe a narrow legislative response, banning misrepresentations, better serves consumers' needs than an outright ban.

Additionally, the second option above confuses "do-not-call" lists, which were intended for commercial telemarketing calls, with advocacy and "fully protected" election speech activities, and forces a consumer to make a choice between receiving no calls (commercial or political) and every call (telemarketing calls included).

There is a need for Congress to provide a uniform solution to the problem of deceptive or abusive prerecorded messages by expressly preempting conflicting state law.

The Supreme Court has held that:

> the Federal Government holds a decided advantage in this delicate balance [between the states and federal government]: the Supremacy Clause and as long as it (Congress) is acting within the powers granted it under the Constitution, Congress may impose its will on the States.

Gregory v. Ashcroft, 501 U.S. 452, 460 (1991).

> [W]hen Congress has 'unmistakably... ordained,' . . . that its enactments alone are to regulate a part of commerce, state laws regulating that aspect of commerce must fall. This result is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. . .

[Citations omitted]. Id.

Further, there is a longstanding tradition of exclusive federal law jurisdiction over interstate telephony. According to AAPC membership, the vast majority of these telephone calls are interstate.

Based on this authority and need, Congress should pass legislation in the best interests of consumers, regulators, and speech in general, imposing uniform rules that are enforceable by federal, state, and private persons, for political prerecorded telephone calls.

V. CONCLUSION

The Subcommittee has a unique opportunity to both reduce consumer confusion and improve voter participation by crafting an appropriate legislative response that recognizes the importance of this medium and protects legitimate speakers and candidates.

The AAPC believes that this response should include the following:

1. A rule requiring responsible prerecorded disclosures identifying the sender of calls and a telephone number of that sender for all political calls before the end of the call;
2. Preempting contradictory state law;
3. Allowing call recipients to opt out of future calls from that campaign, candidate or organization;
4. Requiring caller ID to be projected for every call;
5. Restricting calls to normal times of day (i.e. 8:00 a.m. to 9:00 p.m.);
6. Prohibiting misrepresentations or deception of any sort with regard to political issues.

Thank you for your consideration.

William E. Raney

APPENDIX I

Exhibit A

Memo re: Existing Prerecorded Call Laws Affecting Political Calls

Exhibit B

Citations - TCPA & Regulations

47 U.S.C. § 227

47 C.F.R. § 64.1200

Exhibit C

Contact Information:

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MEMORANDUM

To: **Anthony Bellotti - The AAPC**

From: **William E. Raney**

Date: **December 4, 2007**

Re: **Phase I Report - Existing Prerecorded Call Laws Affecting Political Calls**

This memorandum will set forth the current state of laws regulating prerecorded political telephone calls at the state and federal levels. For the purposes of this memorandum, it will be assumed that the calls solely advocate a given issue or candidate and do not contain a request for a donation.

I. Federal

A. TCPA

The Telephone Consumer Protection Act of 1991 ("TCPA" 47 U.S.C. § 227) and its accompanying regulation apply some basic restrictions to all prerecorded calls.

Specifically, the TCPA provides for restrictions on the use of telephone messages using an artificial prerecorded voice, prohibiting such calls to any emergency telephone line, to the telephone line of any guest or patient room of a hospital or healthcare facility, elderly home, or similar establishment, or any telephone number assigned to a paging service, cellular telephone service, or other service for which the called party is charged for the call without the express consent of the called party.

The FCC has defined "express consent" for this purpose to include any situation where the consumer has provided the telephone number to the caller and not made instructions to the contrary. 7 FCC Record § 8752 ¶ 31.

The regulations implementing the TCPA require that:

> All artificial or prerecorded telephone messages shall:
>
> (1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

> (2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign.

47 C.F.R. § 64.1200(b).

B. Telemarketing Sales Rule

The FTC has specifically stated that the Telemarketing Sales Rule's restrictions on prerecorded messages do not apply to political calls. Federal Register, Wednesday, January 29, 2003, p. 4589.

C. Proposed Legislation

1. H.R. 1383

The "Quelling of Unwanted Intrusive and Excessive Telephone Calls Act of 2007" ("H.R. 1383") requires disclosure of the identity of the caller and imposes a 9:00 a.m. to 9:00 p.m. curfew for these calls. Certain deceptions regarding the call content are subject to criminal penalty. *Id.* at (a)(2).

II. States

A. Summary

States banning political recorded calls (3): Arkansas, Montana, Wyoming.

States allowing political recorded calls (19): Alaska, Arizona, Colorado, Connecticut, D.C., Florida, Illinois, Massachusetts, Michigan, Nebraska, Nevada, New Mexico, North Carolina, Oklahoma, Rhode Island, Utah, Virginia, Washington, Wisconsin.

States allowing political recorded calls ONLY if there is an established business relationship or express consent (7): California, Indiana, Minnesota, Mississippi, New Jersey, North Dakota, South Carolina.

States allowing political calls, but NOT calls conducting polls (5): Georgia, Kentucky, Louisiana, Maryland, Tennessee.

States allowing political calls but imposing certain behavioral restrictions (8): Idaho, Iowa, Maine, Missouri, New York, Pennsylvania, South Dakota, Texas.

States allowing political calls because they do not regulate recorded calls (7): Alabama, Delaware, Hawaii, Kansas, Ohio, Vermont, West Virginia.

States allowing political calls but requiring "scrubbing" against "do-not-call" lists (2): New Hampshire, Oregon.

B. States

Several of these statutes have not been enforced to my knowledge against commercial or prerecorded political calls. You should seek counsel regarding specific campaigns.

1. Alabama

Political recorded calls are not regulated.

2. Alaska

Political recorded calls are allowed.

3. Arizona

Political recorded calls are allowed.

4. Arkansas

Arkansas' automated telephone solicitation law prohibits the use of any automated system for the selection and dialing of telephone numbers and the playing of a recorded message for any purpose in connection with a political campaign. ACA § 5-63-204(a)(1). Violations are a Class B misdemeanor. *Id.* at (b).

5. California

California Public Utilities Code §§ 2872 and 2873 prohibit the use of automatic dialing announcing devices unless announced by a live person or by the express consent of the recipient of the call or to persons with whom the caller has an established business relationship.

There is no exemption for political calls without an established business relationship.

"Automatic dialing announcing device" is defined as:

> Any automated equipment which incorporates a storage capability of telephone numbers to be called or a random sequential number generator capable of producing numbers to be called and the capability, working alone or in

> conjunction with other equipment, to disseminate a prerecorded message to the telephone number called.

Id. at § 2871.

6. Colorado

Political calls are allowed.

7. Connecticut

Political calls are allowed.

8. Delaware

Political recorded calls are not regulated.

9. District of Columbia

Political recorded calls are allowed.

10. Florida

Political recorded calls are allowed.

11. Georgia

Georgia law states that:

> it shall be unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment for the purpose of advertising or offering for sale, lease, rental, or as a gift any goods, services, or property, either real or personal, primarily for personal, family, or household use or for the purpose of conducting polls or soliciting information.

Ga. Code § 46-5-23(a)(2).

Because only calls for the sale of goods or services are banned, political prerecorded calls are therefore allowed as long as a poll is not conducted.

12. Hawaii

Political recorded calls are not regulated.

13. Idaho

Political calls are allowed but state behavioral restrictions apply.

14. Illinois

Political recorded calls are allowed

15. Indiana

Indiana law states that "a caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message." Ind. Code § 24-5-14-5(b)(1).

Political calls are allowed only with the consent of person called.

16. Iowa

Political calls are allowed but state behavioral restrictions apply.

17. Kansas

Political recorded calls are not regulated.

18. Kentucky

Kentucky law states that "no person shall use automated calling equipment, or cause it to be used, for conducting polls, for soliciting information, or for advertising goods, services, or property." Ky. Stat. § 367.461(2).

Political prerecorded calls are allowed as long as a poll is not conducted.

19. Louisiana

Louisiana states that:

> it shall be unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment or to use a live operator to make calls for the purpose of advertising or offering for sale, lease, rental, or as a gift any goods, services, or property, either real or personal, primarily for personal, family, or household use or for the purpose of conducting polls or soliciting information ....

La. Code § 45:811.

Political prerecorded calls are therefore allowed as long as a poll is not conducted.

20. Maine

Political calls are allowed but state behavioral restrictions apply.

21. Maryland

Maryland law prohibits the use of an automated dialing, push-button, or tone-activated address signaling system with a prerecorded message to:

(1) solicit persons to purchase, lease, or rent goods or services;

(2) offer a gift or prize;

(3) conduct a poll; or

(4) request survey information if the results will be used directly to solicit persons to purchase, lease, or rent goods or services.

Md. Pub. Util. Code § 8-204.

Political prerecorded calls are therefore allowed as long as a poll is not conducted.

22. Massachusetts

Political recorded calls are allowed.

23. Michigan

Political recorded calls are allowed.

24. Minnesota

Minnesota law states that "a caller shall not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly or voluntarily requested, consented to, permitted, or authorized receipt of the message." Minn. Stat. § 325E.27.

Political recorded calls are allowed only with the consent of the person called.

25. Mississippi

Mississippi law states that:

> automatic dialing-announcing devices may be used to place calls over telephone lines only pursuant to a prior agreement between the persons involved, by which

> the person called has agreed that he or she consents to receive such calls from the person calling.

Miss. Code § 77-3-455(1).

Under this statute, political recorded calls are allowed only with the consent of the person called.

Another Mississippi law states that:

> a person or entity who makes a telephone solicitation to a consumer in this state may not use an automated dialing system or any like system that uses a recorded voice message to communicate with the consumer unless the person or entity has an established business relationship with the consumer and uses the recorded voice message to inform the consumer about a new product or service.

Miss. Code § 77-3-723.

"Telephone solicitation" is defined as:

> any voice communication over the telephone line of a consumer for the purpose of: (i) encouraging the purchase or rental of, or investment in, property; or (ii) soliciting a sale of any consumer goods or services, or an extension of credit for consumer goods or services.

Id. at § 77-3-705(d).

Under this statute, political recorded calls are allowed.

26. Missouri

Political calls are allowed but state behavioral restrictions apply.

27. Montana

Montana law states that a person:

> may not use an automated telephone system, device, or facsimile machine for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number for the purpose of . . . (e) <u>promoting a political campaign or any use related to a political campaign.</u>

Mont. Code § 45-8-216.

Political recorded calls are not allowed.

28. Nebraska

Political recorded calls are allowed.

29. Nevada

Political recorded calls are allowed.

30. New Hampshire

New Hampshire Revised Code § 664:14-a prohibits knowingly delivering a prerecorded political message to any telephone number on the federal "do-not-call" list. *Id.* at III.

The law also requires that the message contain the name of the candidate or organization the call is on behalf of, and the name of the entity paying for delivery of the message. *Id.* at II.

"Prerecorded Political Message" is defined as:

> a prerecorded audio message delivered by telephone by a candidate or political committee or any person when the content of a message expressly or implicitly advocates the success or defeat of any party, measure, or person at any election, or contains information about any candidate or party. . .

Id. at I.

Violations of this section shall result in a civil penalty of $5,000 per violation and are subject to private actions, liquidated damages of $1,000 per violation which can be trebled for knowing and willful violations. *Id.* at IV.

This statute became effective January 1, 2004.

31. New Jersey

New Jersey prohibits the use of:

> a telephone or telephone line to contact a subscriber within the State to deliver a recorded message other than for emergency purposes, unless the recorded message is introduced by an operator who shall obtain the subscriber's consent before playing the recorded message, or unless a prior or current relationship exists between the caller and the subscriber.

N.J. Stat. § 48:17-28.

Political recorded calls are allowed only when there is a prior or current relationship or a live operator obtains the consent of the person called but the statute is specifically limited to callers in the state of New Jersey. *Id.*

32. New Mexico

Political recorded calls are allowed.

33. New York

Political calls are allowed but state behavioral restrictions apply.

34. North Carolina

Political recorded calls are allowed.

35. North Dakota

North Dakota law states that:

> a caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered.

N.D. Stat. § 51-28-02.

Political recorded calls are allowed only with the consent of the person called.

36. Ohio

Political recorded calls are not regulated.

37. Oklahoma

Political recorded calls are allowed.

38. Oregon

Oregon recently amended its automatic dialing and announcing device rules to apply restrictions to all prerecorded calls. 2007 Oregon Senate Bill 863 (July 17, 2007). Calls are prohibited to persons on the state "do-not-call" list. *Id.* at § 2(2)(c).

Calls to established customers are exempt from this restriction.

Calls are prohibited outside the hours of 9:00 a.m. to 9:00 p.m.

39. Pennsylvania

Pennsylvania allows prerecorded calls but state restrictions apply. 52 Pa. Code § 63.60. The statute requires the recorded message begin with a statement announcing the name, address, and call back telephone number of the calling party, the nature and purpose of the ensuing message, and the fact that the message is recorded. Calls are prohibited on Sunday before 1:30 p.m. or after 9:00 p.m., and before 9:00 a.m. or after 9:00 p.m. for the remainder of the week. *Id.* at (b)(2).

40. Rhode Island

Political recorded calls are allowed.

41. South Carolina

South Carolina law states that "ADAD calls are prohibited." S.C. Stat. § 16-17-445.

ADAD calls include automatically announced calls of a political nature including, but not limited to, calls relating to political campaigns. *Id.*

Calls to persons with whom the caller has an established business relationship are exempt. *Id.* at § B(3).

42. South Dakota

Political recorded calls are allowed.

43. Tennessee

Tennessee law states that:

> it is unlawful for any person to use, to employ or direct another person to use, or to contract for the use of ADAD equipment for the purpose of advertising or offering for sale, lease, rental or as a gift any goods, services or property, either real or personal, primarily for personal, family or household use or for the purpose of conducting polls or soliciting information.

Tenn. Code § 47-18-1502.

Political prerecorded calls are allowed as long as a poll is not conducted.

44. Texas

Political calls are allowed but state behavioral restrictions apply.

45. Utah

Political recorded calls are allowed.

46. Vermont

Political recorded calls are not regulated.

47. Virginia

Political recorded calls are allowed.

48. Washington

Political recorded calls are allowed.

49. West Virginia

Political recorded calls are allowed.

50. Wisconsin

Political recorded calls are allowed.

51. Wyoming

Wyoming law states that:

> no telephone solicitor or merchant shall make or knowingly allow a telephonic sales call to be made if the call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.

Wyo. Stat. 40-12-303.

"Telephonic sales call" is defined as:

> a call made by a telephone solicitor to a consumer, for the purpose of soliciting a sale of any consumer goods or services, for the purpose of soliciting an extension of credit for consumer goods or services, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

Id. at § 40-12-301(ix).

Because only calls for the sale of goods or services are banned, political prerecorded calls are allowed under this statute.

However, under another Wyoming statute:

> no person shall use an automated telephone system or device for the selection and dialing of telephone numbers and playing of recorded messages if a message is completed to the dialed number for purposes of … promoting or any other use related to a political campaign.

Wyo. Stat. § 6-6-104.

Political recorded calls are not allowed.

WER:ag

Ms. LOFGREN. Thank you very much.

Mr. Smith.

STATEMENT OF RODNEY SMITH

Mr. SMITH. Madam Chairman, Ranking Member McCarthy, distinguished members of the subcommittee, my name is Rodney Smith. I am the founder and president of Tele-Town Hall.

Thank you for letting me testify today on the need to protect telephone town halls, which are not robo-calls, but still they are banned right now in some states. That is why federal legislation is needed to ensure that telephone town halls are available to all elected officials and candidates as a unique new form of live, two-way communications with their constituents.

A telephone town hall is essentially an ordinary phone call that allows elected officials and candidates to have a real-time, personal conversation on a mass scale with a targeted audience. There is no other medium currently providing comparable means of communications.

Well over 150 members of the House and a growing number of members of the Senate use telephone town halls to contact their constituents directly from their D.C. or state offices. The magic of a telephone town hall is that it allows members of Congress to develop a personal relationship with a large number of constituents.

In the Congressional Institute's research study on the transformative effects of telephone town halls on constituents' perceptions of members of Congress, it was found that among both Republicans and Democrats participating in just one telephone town hall meeting that the favorable view of their Congressman increased by at least 60 percent. That is why it would be tragic to allow new telephone town hall technology to be outlawed by states.

Yet this is exactly what is happening, albeit unintentionally. An automated dialing system and a prerecorded introduction are essential ingredients in setting up a telephone town hall meeting. Unfortunately, states' statutory language prohibiting robo-calls typically focuses on automated dialing systems and prerecorded messages as the trigger for application of the law. As a consequence, telephone town hall technology inadvertently becomes caught up in the definitions of existing bans on robo-calls, as well as in the definitions of much of the pending legislation being proposed to prohibit robo-calls.

I have included in my written testimony suggested language that addresses this issue, and I would urge the Subcommittee, in its deliberation, to consider this language relating to communications between a member of Congress and his/her constituents. To see exactly how a telephone town hall works, you are welcome to visit my web site, www.teletownhall.com, and simply click on "See It Perform."

Thank you.

[The statement of Mr. Smith follows:]

SUBCOMMITTEE ON ELECTIONS OF THE COMMITTEE ON HOUSE ADMINISTRATION
TESTIMONY BY: RODNEY A. SMITH
DECEMBER 6, 2007

Madame Chairwoman and Ranking Member McCarthy, distinguished members of the Subcommittee, good morning and thank you for allowing me to testify today on the need to protect telephone town halls, a unique new form of live, two-way communication between Members of Congress and their constituents. My name is Rodney Smith. I am the Founder and President of Tele-Town Hall, LLC.

A telephone town hall is essentially an ordinary phone call that allows an elected official, legally recognized candidate or other VIP to have a real-time personal conversation on a mass scale with a targeted audience. There is no other medium currently providing a comparable means of communication. Telephone town halls are the next step in "live" one-to-one personal communication.

Well over 150 Members of the House and a growing number of Senators have used telephone town halls to contact their constituents directly from their D.C. or state offices. During a telephone town hall, when a constituent answers the phone, he or she hears the Member's prerecorded invitation to be connected to a live town hall meeting. During the meeting, constituents can press "0" on their phone keypads to ask the Member questions about public policy issues or, if they prefer, simply listen to the verbal interaction live with other constituents. They can also choose not to participate and may select an option that adds their phone number to our Do-Not-Call list.

The magic of a tele-town hall is that it allows individuals who have had little or no contact with their elected representative to communicate with that representative in real-time. Having a two-way personal conversation is what humanizes a phone conversation and enables the people involved to have meaningful emotional contact. Emotional contact is a prerequisite for developing a personal relationship. Personal relationships are important because they build friendship, loyalty and trust.

Building such trust between elected representatives and their constituents has never been more important than it is today, when too many of our citizens feel disconnected from government and the political process. Over the past two years, nationwide surveys by Rasmussen Reports have consistently found that 26% or fewer Americans have had a favorable view of Congress. Meanwhile, in October 2007, the Congressional Institute funded an extensive research study on the transformative effects of telephone town halls on constituent perceptions of Members of Congress. The study found that among both Republicans and Democrats participating in just one telephone town hall, their favorable view of their Congressman increased by at least 60%. Given these remarkable statistics, it would be tragic to allow this new telephone town hall technology to be outlawed by states.

Yet that is exactly what is happening, albeit unintentionally. In response to legitimate frustration expressed by consumers about the growing number of automated, prerecorded calls from telemarketers and political campaigns (known as "robo calls"), many states are enacting legislation to prohibit robo calls. While it is not the intent of these new laws to restrict telephone town halls, in many cases the laws' practical impact has been to prohibit tele-town halls because of the technology employed to establish contact with constituents.

To reach a sufficient number of people in a timely manner, a telephone town hall call must use an automated dialing system to initiate calls and a prerecorded introduction from the Member, candidate or other VIP to explain the purpose of the call and invite participants to join in on the live, real-time discussion. These two essential ingredients (an automated dialing system and a prerecorded

introduction) are what mistakenly link telephone town halls with robo calls. While robo calls also use automated dialing systems and a prerecorded message, they are not ordinary phone calls. Instead, the purpose of a robo call is to play a pre-recorded message to whoever answers the phone. By contrast, the purpose of a telephone town hall is to foster live, two-way communication between the parties involved in the call.

Existing robo call bans and pending legislation in many states would prohibit tele-town halls because state statutory language typically focuses on automated dialing and/or prerecorded messages as the trigger for application of the law. For example, in a ruling by U.S. District Judge Larry McKinney in Indiana, the court found that the state statute does not ban calling Indiana residents, it simply bans automated calls. In North Dakota, the Courts have upheld a ban on making prerecorded interstate calls to that state's residents. While such laws were not written to prohibit Telephone town halls, the practical impact is that they do.

Federal legislation is needed to ensure that telephone town halls are available for all elected officials and candidates as a means of efficiently and cost effectively conversing directly with constituents. I have included in my written testimony suggested legislative language that addresses this issue. I would urge the Subcommittee to consider this language in its deliberations relating to communications between Members of Congress and their constituents. To see exactly how a telephone town hall works you can visit our website at www.teletownhall.com and click on "See it perform." Thank you.

Section 227 of title 47, United States Code, is amended to read as follows:

(b) Restrictions on use of automated telephone equipment

(1) Prohibitions

* * *

(2) Political Communications

Notwithstanding any other provision of law, it shall be lawful to make any interstate call to facilitate two-way, real-time communication between the holder of an elective public office (or a legally recognized candidate for such office) and any constituent (or potential constituent).

[renumber existing subparagraphs (b)(2) and (b)(3)]

* * *

(e) Effect on State law

(1) State law not preempted

Except for subparagraph (b)(2), the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits -- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations.

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The Transformative Effects of Tele-Town Halls on Constituent Perceptions of Members of Congress— and Best Practices to Further Accentuate the Positives

Research Report
October 2007

Key Findings

Tele-Town Halls (TTHs) are an increasingly popular technique for office-holders to conduct very large-scale telephone conference calls with constituents at low cost. These calls are used to update constituents on Members' recent and upcoming activities, as well as to take calls from constituents and conduct "insta-polls" using telephone keypads.

Building upon anecdotal evidence of these TTHs' effectiveness, we set out to conduct the first-ever survey of TTH participants, as well as focus group discussions to better understand the TTH phenomenon.

These are the key findings:

1) Higher frequency of Member contact (of any type) correlates with multiple measures of higher job approval

2) If constituents hear from their Member often, they likelier to view the Member as a friend or acquaintance. If they don't hear from their Member, he remains a stranger

3) For a majority of constituents, Members are not contacting them regularly enough to satisfy them

4) Across different forms of outreach, frequency of non-campaign "touch" correlates to higher levels of satisfaction with Member's job performance

5) Printed newsletters viewed as the *best* use of taxpayer money to keep the largest number of people in one's district well-informed

6) Ironically, printed newsletters are also viewed as the *worst* use of taxpayer money to keep the largest number of people in one's district well-informed

7) In the abstract, it takes time to get constituents to warm up to the idea of a conference call with their Congressman. But once they join a call and begin to understand it, it strongly (and positively) transforms their view of their Congressman. The more TTHs a constituent attends, the higher the Member's favorability.

8) The TTH experience transforms constituents for a variety of reasons—not just one

9) The more TTHs constituents do, the more often they want to do them

10) Participation in TTHs correlates to improving levels of satisfaction with Member's job performance over the past four years

11) TTH participants prefer the telephone town hall to a traditional town hall by a nearly two-to-one margin; Non-TTH participants prefer the traditional town hall by a nearly three-to-one margin

12) The TTH "bounce" is dramatic among GOP constituents of GOP Members—but Democratic constituents on balance also respond favorably to TTH outreach by GOP Members

Best Practices

Following these findings, this report includes a list of 25 recommended "TTH Best Practices" to improve the execution of TTHs for practitioners and novices. These Best Practices are derived mainly from the focus groups along with some data from the survey.

Overview of Research

Presentation Testing conducted a two part research project in October 2007 to study the emerging communications process being adopted by Members of Congress known as Tele Town Halls (TTHs). We set out to answer two questions:

1) Are TTHs as effective as anecdotal feedback from Members suggests?
2) Assuming TTHs are effective, what practical steps can Members take before, during and after each TTH call to make them even more so?

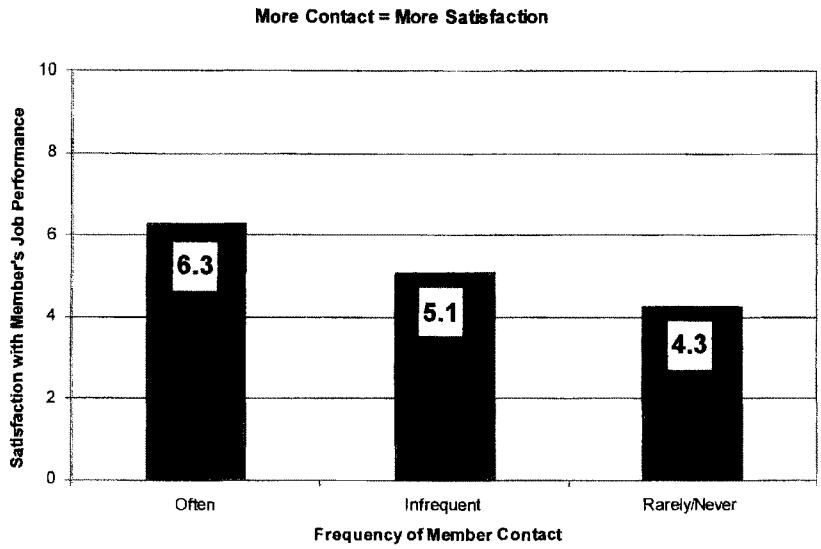
The research consisted of a survey of 867 registered voters across six Congressional districts. We surveyed TTH participants in particular portions of three Congressional districts where Members have been actively hosting TTH calls. These three districts are the 6th District of Pennsylvania, the 2nd District of Kentucky, and the 3rd District of California. As control groups we also surveyed constituents in these same districts who never participated in TTHs, as well as constituents in three other districts in the same states where TTHs are not currently done: the 16th District of Pennsylvania, the 1st District of Kentucky, and the 40th District of California.

Following the survey, we conducted two focus groups in each of the three TTH-active districts. In Reading, PA, Bowling Green, KY, and Rancho Cordova, CA, one focus group

consisted of registered voters who had never participated in a TTH, and another that had participated. These groups were convened during the last two weeks of October, 2007, and each lasted between 90 minutes and two hours.

Key Findings

1) **Higher frequency of Member contact (of any kind) correlates with multiple measures of higher job approval**



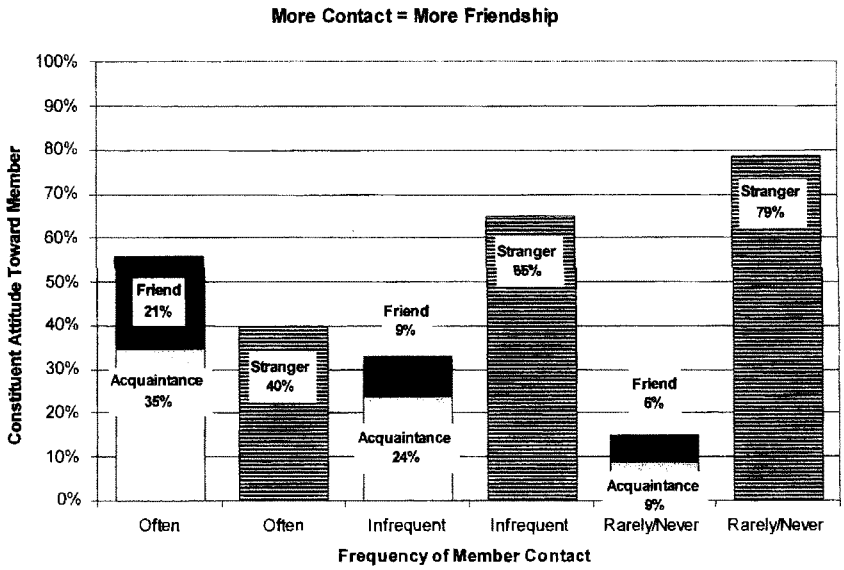
Voters who said they heard from their Congressman at least quarterly scored their Congressman's job performance at an average of 6.3 on a one-to-10 scale. Those who heard from him once every six months to a year rated job performance at an average of 5.1. And those who heard from their Congressman rarely or never scored it at 4.3.

23% of voters who hear from their Congressman at least quarterly say their *satisfaction with their Congressman's job performance* is higher now than four years ago. Only 12% of those who hear from their Congressman once or twice a year say their satisfaction with their Congressman's job performance is higher now. Only 7% of those who hear from their Congressman rarely or never say their satisfaction with their Congressman's job performance is higher now. 35% of those rarely contacted say it is lower now than four years ago.

30% of voters who hear from their Congressman at least quarterly say their Congressman's *willingness to listen to their concerns* is higher now than four years ago. Only 15% of those who hear from their Congressman once or twice a year say their Congressman's willingness to listen to their concerns is higher now. Only 5% of those who hear from their Congressman rarely or never say their Congressman's willingness to listen to their concerns is higher now. 28% of those rarely contacted say it is lower now than four years ago.

28% of voters who hear from their Congressman at least quarterly say their Congressman's *knowledge of issues that matter to voters* is higher now than four years ago. Only 16% of those who hear from their Congressman once or twice a year say their Congressman's knowledge of issues that matter to voters is higher now. Only 10% of those who hear from their Congressman rarely or never say their Congressman's knowledge of issues that matter to voters is higher now. 31% of those rarely contacted say it is lower now than four years ago.

2) If constituents hear from their Member often, they begin to view the Member as a friend or acquaintance. If they don't hear from their Member, he remains a stranger



[+/-3.3%]

56% of people who hear from their Congressman at least quarterly view him as either a friend (21%) or an acquaintance (35%). 40% in this category continue to view their Congressman as a stranger.

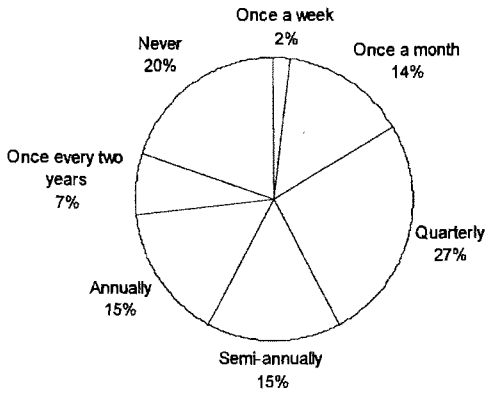
33% of people who hear from their Congressman once or twice a year view him as either a friend (9%) or an acquaintance (24%). 65% in this category continue to view their Congressman as a stranger.

15% of people who hear from their Congressman rarely or never view him as either a friend (6%) or an acquaintance (9%). 79% in this category continue to view their Congressman as a stranger.

Interestingly, we heard in the focus groups that constituents ideally want their Member to be not a friend or acquaintance per se, but more of an "ally," someone who is "approachable," "visible," and a "watchdog" for their concerns.

3) For a majority of constituents, Members are not contacting them regularly enough to satisfy them

Constituents' Claimed Frequency of Contact by Member

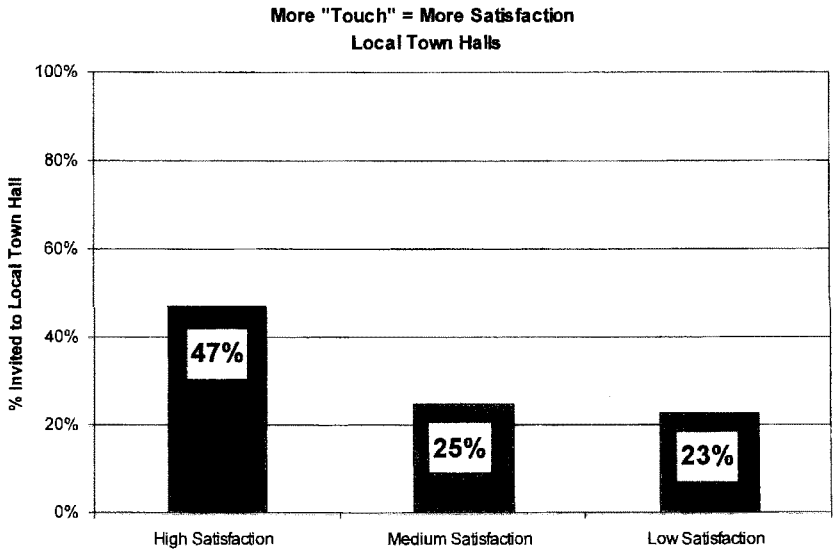


[+/-3.3%]

Our focus groups showed that most voters prefer to hear from their Member of Congress between once a month and once a quarter.

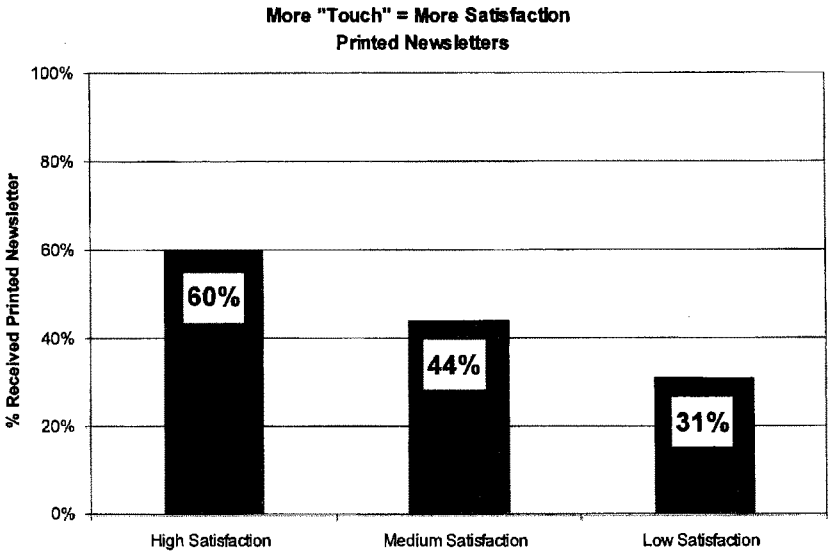
(See Finding 9, below: The more TTHs constituents do, the more often they want to do them.)

4) Across different forms of outreach, frequency of non-campaign "touch" correlates to higher levels of satisfaction with Member's job performance



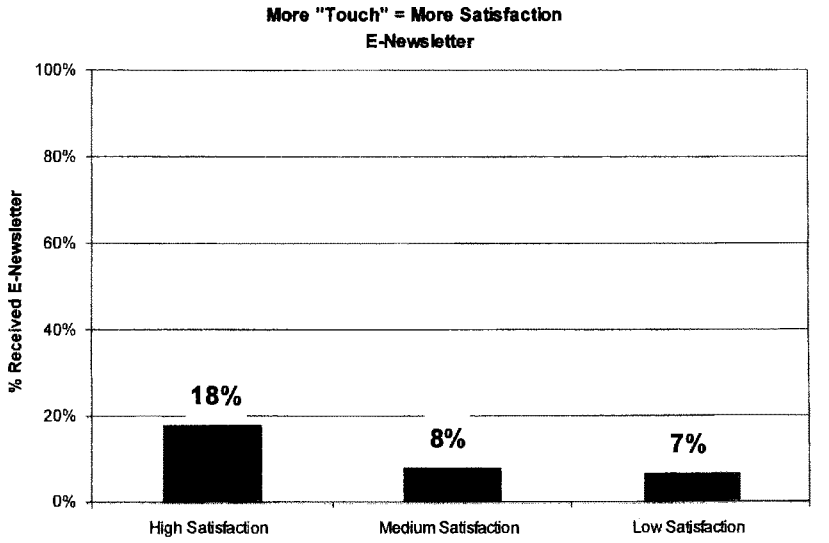
[+/-3.3%]

Among those who say they have a high level of satisfaction with their Congressman's job performance, 47% have been invited to a local town hall meeting with their Congressman in the past three months. Among those who say they have a medium level of job satisfaction with their Congressman, 25% have been invited to a local town hall meeting. Among those who say they have a low level of job satisfaction, 23% say they have been invited to a local town hall meeting in the past three months.



[+/-3.3%]

Among those who say they have a high level of satisfaction with their Congressman's job performance, 60% have received a printed newsletter from their Congressman in the past three months. Among those who say they have a medium level of job satisfaction with their Congressman, 44% have received a printed newsletter from their Congressman. Among those who say they have a low level of job satisfaction, 31% say they have received a printed newsletter from their Congressman in the past three months.

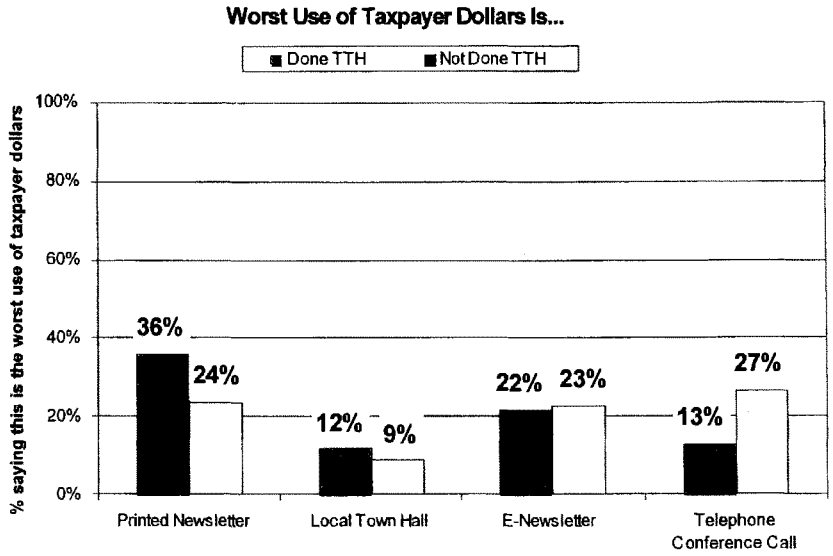


[+/-3.3%]

Most constituents do not receive an email newsletter from you. Indeed, in our study, 84% said they never received an email newsletter.

Yet, among those who say they have a high level of satisfaction with their Congressman's job performance, 18% have received a newsletter from their Congressman in the past three months. Among those who say they have a medium level of job satisfaction with their Congressman, 8% have received an e-newsletter from their Congressman. Among those who say they have a low level of job satisfaction, 7% say they have received an e-newsletter from their Congressman in the past three months.

6) Ironically, printed newsletters are also viewed as the *worst* use of taxpayer money to keep the largest number of people in one's district well-informed

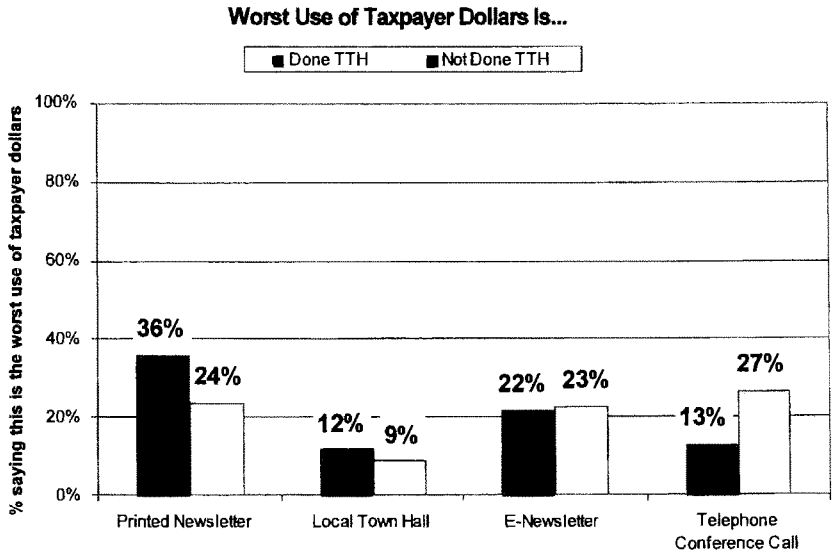


[+/-3.3%]

As much as there was an active contingent saying that printed newsletters were the best use of taxpayer dollars, there was an equally opinionated group who thought they were the worst. In large part, we heard many comments about the newsletters looking like junk mail, or containing very dated information, or failing to highlight issues that were coming up in Congress. Several people thought the newsletters were too glossy and thus too expensive to produce, causing them to wonder, "How much did *THIS* cost?!?"

We heard several recommendations to make the newsletter look more like a traditional black and white letter in an envelope so that people would open it and take it seriously.

6) Ironically, printed newsletters are also viewed as the *worst* use of taxpayer money to keep the largest number of people in one's district well-informed



[+/-3.3%]

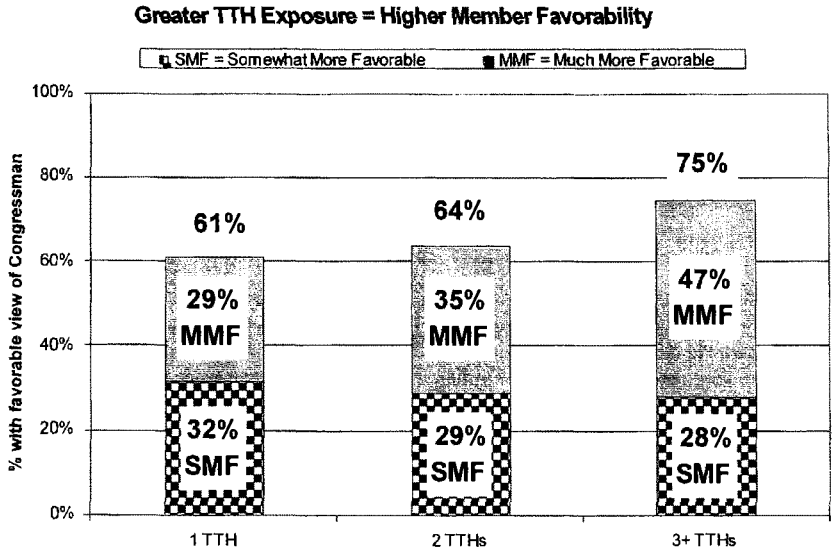
As much as there was an active contingent saying that printed newsletters were the best use of taxpayer dollars, there was an equally opinionated group who thought they were the worst. In large part, we heard many comments about the newsletters looking like junk mail, or containing very dated information, or failing to highlight issues that were coming up in Congress. Several people thought the newsletters were too glossy and thus too expensive to produce, causing them to wonder, "How much did *THIS* cost?!?"

We heard several recommendations to make the newsletter look more like a traditional black and white letter in an envelope so that people would open it and take it seriously.

7) **In the abstract, it takes time to warm up constituents to the idea of a conference call with their Congressman. But once they join a call and begin to understand it, it strongly (and positively) transforms their view of their Congressman. The more TTHs a constituent attends, the higher the Member's favorability.**

Among those who have never participated in a conference call with their Congressman, 63% say they would *not* be interested in participating. We saw initial resistance to TTHs among groups of non-participants, some of whom didn't fully grasp the concept of their Congressman actually calling them directly and inviting them to stay on a call. We heard other initial concerns driven by the *perceived* inability to ask a question, or by a lack of desire to stay on a call for a long period of time, or the expectation that the Congressman would take questions that are of no interest to the typical listener.

What was so interesting was that during our focus groups, as the calls were described to those who'd never participated in one, focus group attendees became more and more interested and curious.



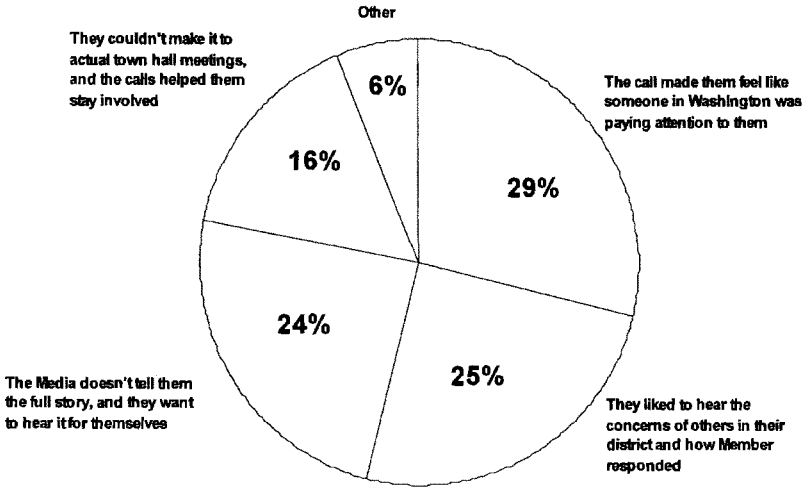
[+/-6.4%]

We also found in the survey that the more people participate in the TTHs, the more they gained a positive view of their Congressman.

Among those who said they'd done one TTH, 29% said they had a much more favorable view, and 32% said they had a somewhat more favorable view. Among those who said they'd done two TTHs, 35% said they had a much more favorable view, and 29% said they had a somewhat more favorable view. And among those who said they'd done three or more TTHs, 47% said they had a much more favorable view, and 28% said they had a somewhat more favorable view.

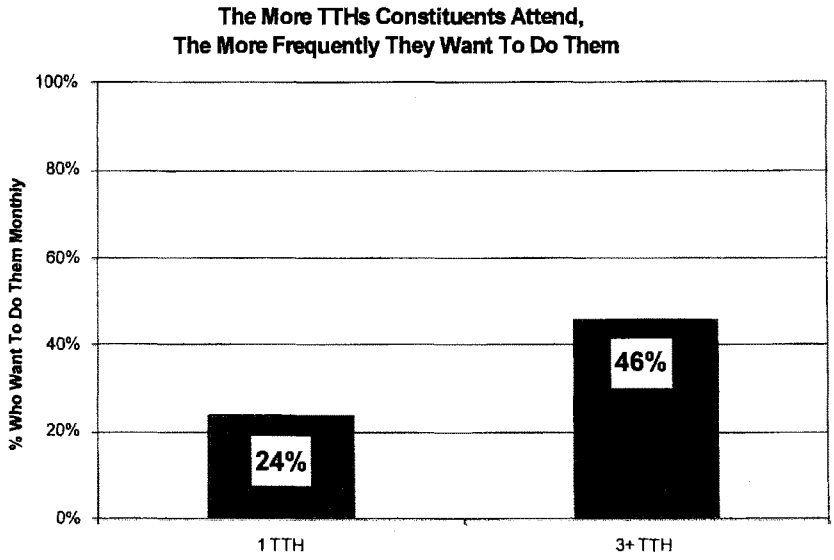
8) The TTH experience transforms constituents for a variety of reasons—not just one

Why TTHs Made Constituents More Favorable Toward Member



[+/-6.4%]

9) The more TTHs constituents do, the more often they want to do them

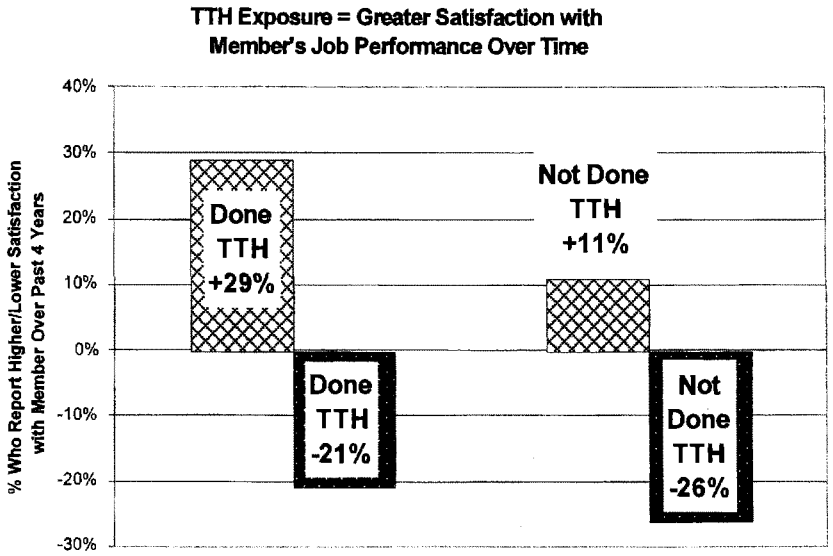


[+/-6.4%]

Among those who have done just one TTH, 24% would like to do them once a month. Among those who have done three or more TTHs, 46% would like to do them once a month.

What's important is that no matter how many TTHs one has participated in, a large majority feel that the ideal frequency of participation is between once a month (37%) and once a quarter (36%).

10) Participation in TTHs correlates to improving levels of satisfaction with Member's job performance over the past four years

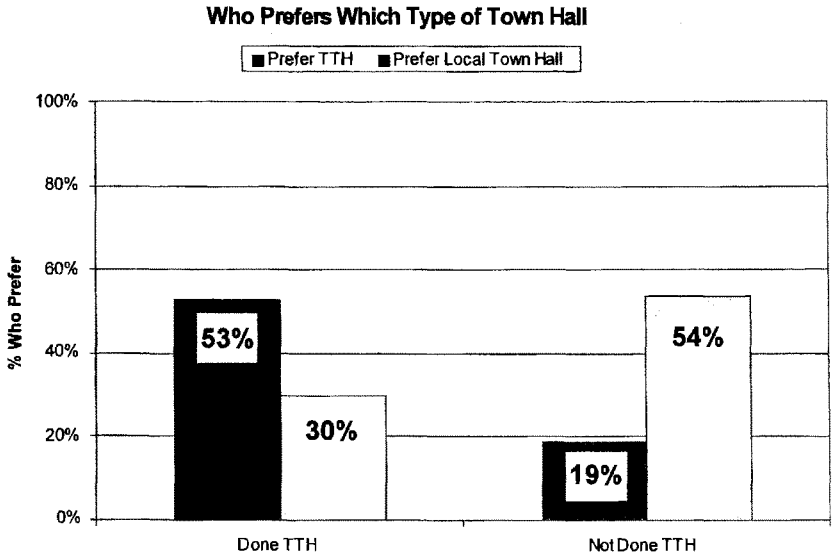


[+/-3.3%]

Among those who have participated in TTHs, 29% say their satisfaction with the Member's overall job performance has risen in the past four years; 21% say it has fallen; 48% say it has remained the same.

Among those who have not participated in TTHs, 11% say their satisfaction with the Member's overall job performance has risen in the past four years; 26% say it has fallen; 58% say it has remained the same.

11) TTH participants prefer the phone town hall to a traditional town hall by a nearly two-to-one margin; Non-TTH participants prefer the traditional town hall by a nearly three-to-one margin

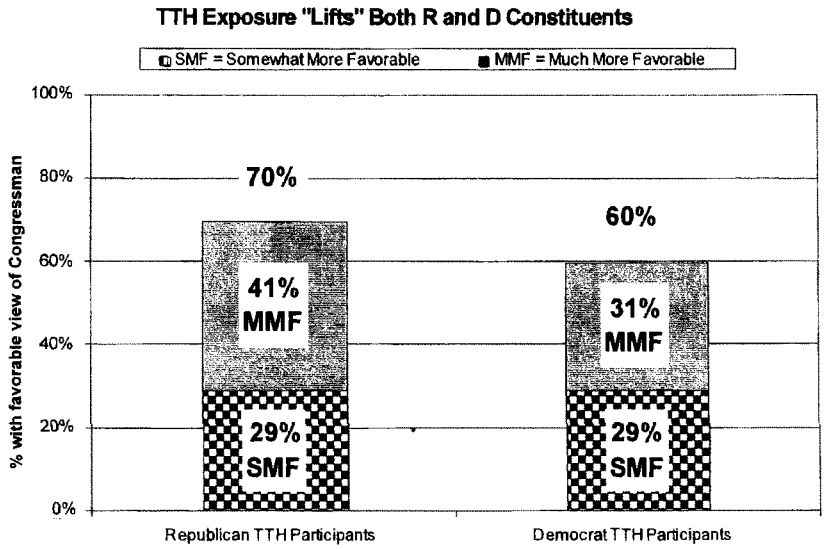


[+/-3.3%]

53% of people who have participated in a TTH prefer a conference call with their Congressman to a traditional town hall. 30% of people in this category would prefer the opposite: the traditional town hall over the conference call.

54% of people who have never participated in a TTH prefer a traditional town hall to a conference call with their Congressman. 19% of people in this category would prefer the opposite: the TTH over the traditional town hall.

12) **The TTH "bounce" is dramatic among GOP constituents of GOP Members—but Democratic constituents on balance also respond favorably to TTH outreach by GOP Members**



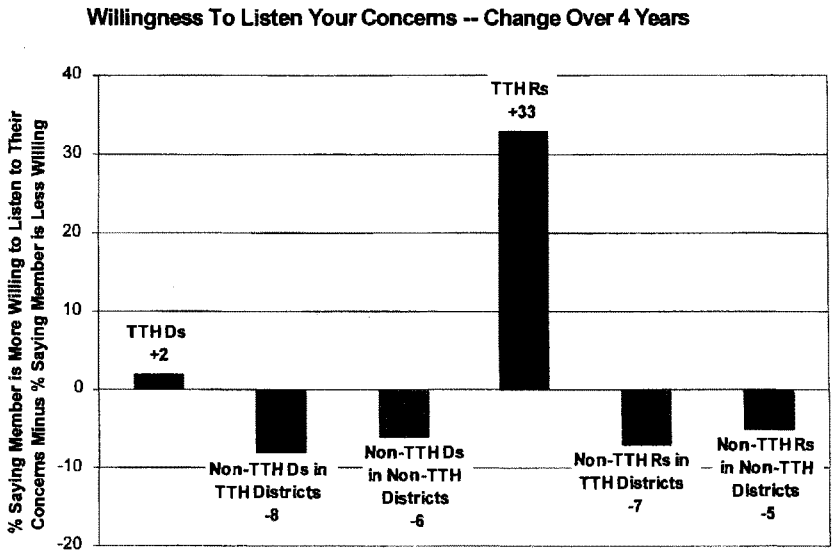
[+/-6.4%]

Importantly, participating in at least one TTH caused both Democrats and Republicans to have a much more favorable view of their GOP Congressman. Seventy percent of Republicans said they had either a much more favorable (41%) or somewhat more favorable (29%) view of their Congressman after participating in a TTH. Sixty percent of Democrats said they had either a much more favorable (31%) or somewhat more favorable (29%) view of their Congressman after participating in a TTH. Only 11% of participants came away with a less favorable view of their Congressman after the TTH.

Among Republicans who had participated in a TTH, their mean satisfaction score for the Member of Congress was 7.1 (on a zero to 10 scale). This compares to 5.3 for Republicans in the same districts who had never done a TTH, and 5.5 for Republicans in districts where TTHs have not been conducted at all.

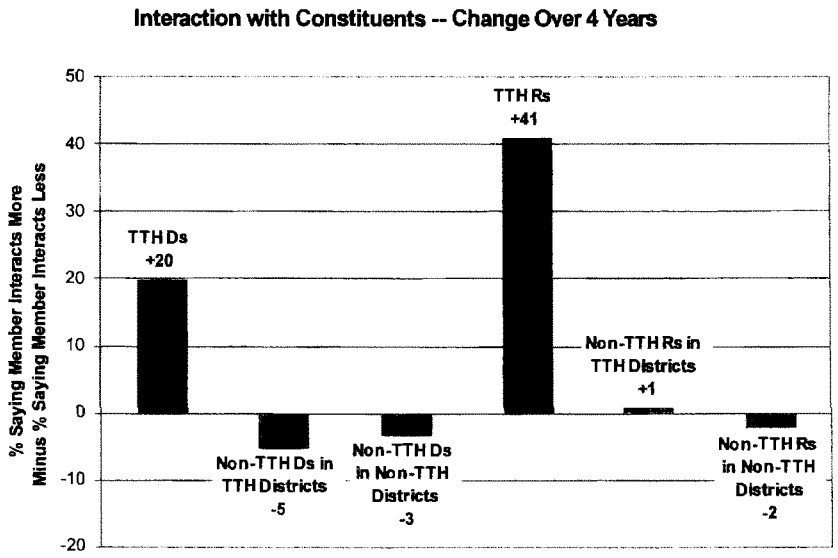
Among Democrats who had participated in a TTH, their mean satisfaction score for the Member of Congress was 5.0 (on a zero to 10 scale). This compares to 4.7 for Democrats in the same districts who had never done a TTH, and 4.7 also for Democrats in districts where TTHs have not been conducted at all.

Willingness to listen to your concerns



[+/-3.3%]

Interaction with constituents



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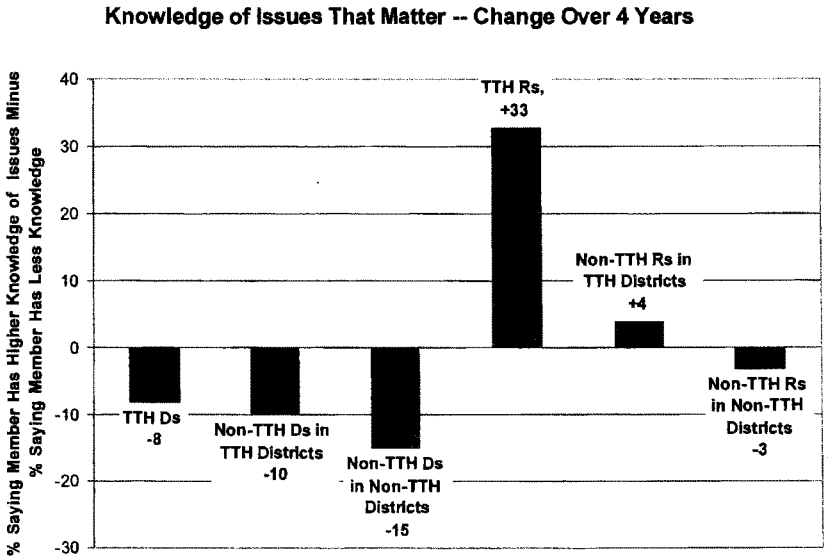
Knowledge of issues that matter to you



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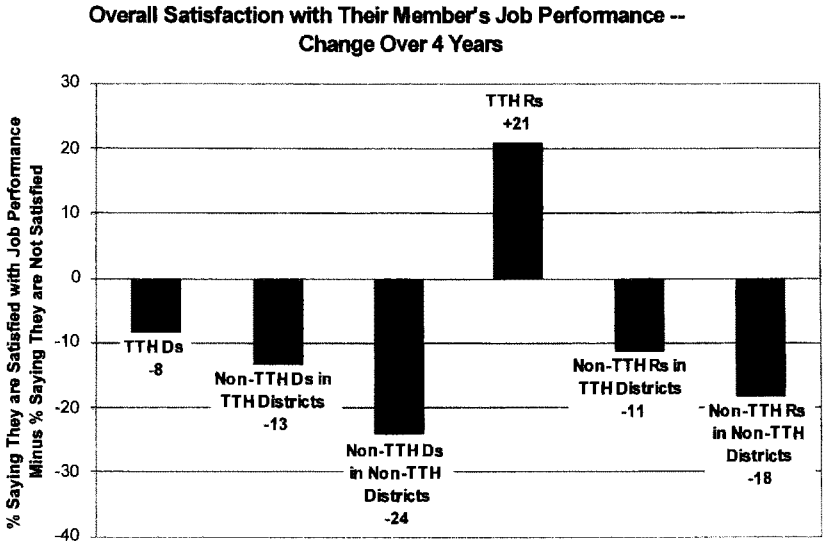
Overall satisfaction with their Member's job performance



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Best Practices for Conducting Congressional Tele-Town Halls (TTHs)

Prior to the call

1) Limit the geography of outbound calls to particular cities or towns near one another, as opposed to taking a smattering from all over the district. When you spread the outbound calls far and wide, and then on the TTH announce where each caller is from, you undermine the intimacy that a TTH call offers. Geographic diversity within the district leads listeners to think there's a huge number of people on the call—an impression you don't want to leave if you don't have to. You want people to think you are calling only people who live near them, and that you're focused on that localized community's concerns.

2) Expand your selection criteria for phone numbers to call. Most of the people in our focus groups who had not participated in a tele-town hall would very much like to attend one.

3) Give constituents advance notice that the calls are taking place. The ideal amount of lead time is one week. You can leave a brief, automated voice message with the approximate time they can expect to receive a call on a given evening.

4) Limit calls to weekday evenings. Sixty-four percent of respondents in our survey who had participated in TTHs said that weekday evenings were preferable either to weekends or daytime during the week. The best time on a weekday night varies from person to person, but with older people you generally want to start a bit earlier (7:00 p.m. or so), and for parents with children you want to start later (8:30 or so, after young kids go to bed). Do not *start* a call any later than 8:30 p.m.

5) For those districts with pockets of "challenging constituents," be sure to conduct TTHs with those constituents, too. There is considerable goodwill built up by merely doing TTHs and showing that you're listening, even among those who oppose your point of view.

At the beginning of the call

6) During the automated message inviting people onto the call, indicate at what time the call will end. This will give people a sense of whether they want to make the time commitment, and know they're not signing on for hours of conversation.

7) Announce you plan to limit the scope of issues in the first half hour to three or four hot-button issues that you specify. This gives you more control over the agenda and ensures that issues that are on most constituents' minds are addressed in full. It also signals to listeners that people with narrow agendas won't dominate the call. But also be sure to announce that at an appointed time during the call (at 20 minutes past the hour, for example) you will welcome calls on any subject.

8) Take a few minutes at the beginning of the call, before taking questions, to talk about what you've been doing recently in Washington and what you're going to be working on in the next month.

During the call

9) Get callers with personal concerns off the call immediately by referring them to staff. Show all appropriate sensitivity, but tell the caller that they should call a specific person at the office the next day, and give that staffer's first name and phone number. Listeners get very impatient will calls that have no perceived bearing on their lives, or that go on too long.

10) Remind participants the call is live and not recorded. The easiest way to do this is to periodically say what time it is, or announce how much time is left for people to call in.

11) Conduct an instant survey with call participants (by instructing them to push the keypad on their phones) to get immediate feedback on pending issues before Congress. The more interactive you can make the call, the longer people are willing to listen. Remember: The top reason people say the TTHs enhance their view of their Congressman is that they show that someone in Washington is paying attention to their concerns. Building upon that sentiment is crucial to strengthening your TTH outreach.

12) Indicate that the calls are not screened. About half the people in our focus groups thought that the calls *were* screened. You build considerable goodwill by signaling that you do not screen your calls and you welcome all comers. Our most skeptical people said that merely saying you don't screen the calls is still not enough. The best way to get this point across: Use a bit of humor. Wait until a hostile caller gets on the phone, and when he or she is done with the question, say something like this: "Well, as you can probably tell, we obviously don't screen our calls..."

13) If you know a caller personally, don't make it sound like you're old buddies when he/she gets on the line. When that happens more than once on a call, it leads some listeners to conclude that the call is staged and not spontaneous. Keep in mind: Most of the folks on the call don't know you personally, and it sounds surprising to them that you might know multiple people who are randomly calling in. You might say something warm but innocuous to a familiar caller, such as: "I'm delighted to have you on the conference call tonight."

14) Use the TTH as an opportunity to drive people to your website. Most have not visited it, but they intuit there's useful information there. Also encourage them to sign up for your e-newsletter while on the home page. What you should *absolutely not do* is use the website as a crutch during the TTH; in other words, do *not* tell a caller that the answer to a question can be found on the website. Answer the question in full on the call, and then say that if they want even more detailed information, they can find it at your site. And be sure to give out the URL (website address).

15) Remind participants that they can put you on their speaker phone if they have one. We heard some people say it was annoying to have to hold a phone to their ear for an hour, so you can do them a favor if you gently remind people that they may have that speaker option on their phone. You can also turn it into a family event, where you can encourage parents to bring their kids in to listen in the same room.

16) Mention the fact that you're one of the first people in Congress to use this new technology, and that you've been leading others in Congress to adopt it as well. Constituents like to hear evidence that you're able to persuade other Member of Congress to do something; it shows you have some clout to get things done, even if not issue-specific.

17) Cite how previous TTHs have influenced your thinking on specific issues—even if they didn't necessarily change your overall position. We heard from some TTH participants that being on the call sounded "more like the Congressman was giving out information as opposed to answering questions." You want to convey that you are truly listening, and that you are empowering them merely by asking questions of you on a call.

At the end of the call

18) Remind callers they can push a particular key on their phone and leave a message at the end of the TTH, and a staff member will call back soon with an answer (and actually follow up). When offering this, it would be very useful to have your TTH provider dial an automated, *immediate* reply call to each person leaving a message, indicating that the constituent's message was indeed received, that you look forward to reviewing it, and that a live person from your office will be calling back within 48 or 72 hours. We heard concerns that people had left messages and were uncertain for days whether they were received. ALSO: In a couple of instances people left messages and never received a follow-up from staff. This left a very bad impression in the minds of constituents.

19) Announce that you will be uploading the audio of the tele-town hall onto your website, so those who missed part of it can download it. (You can easily convert it into a podcast that's downloadable.)

Other recommendations:

20) Aim to reach each household once per quarter. More often is too often; less often is not enough. At the end of each call, announce in what month you will be calling them again.

21) Limit each TTH to one hour, maximum.

22) When you dial phone numbers where no one is home, and leave a message indicating you were inviting them to a TTH, give them a way to learn about what you're doing in Congress. The best way is to send them to your website and let them download the audio of the TTH or possibly a transcript. Merely leaving a message saying that the constituent missed the TTH is not viewed as having any intrinsic value.

23) Do *not* invite guest experts to join you on the call. Constituents want to hear you and you only.

24) Do not indicate how many people are on the call. They assume there are far fewer than there actually, and you don't want to dilute the intensity of "touch" that comes with TTHs.

25) Take these calls seriously, and study how to get them right. At least half the people we spoke with who have participated in TTHs said the main way they determine whether they're satisfied with your job performance is based upon the TTHs.

Ms. LOFGREN. Thank you very much Mr. Smith.

And we will close with Dr. Hollis.

STATEMENT OF KARYN HOLLIS

Ms. HOLLIS. Thank you, Chairwoman Lofgren, thank you, everyone, for inviting me to speak here today. I am happy to be able to speak on this issue because I have received a number of the robocalls.

I am just going to read this, because I think it will be quicker.

During the days preceding the election of November 7, 2006, my family received an unwarranted barrage of automated recording calls to our home phone number in Winwood, Pennsylvania. I would estimate that we received up to about four robo-calls a day during that weekend before the election. The calls had numerous scripts, but all were critical of Lois Murphy, the Democratic candidate for Congress in our 6th District. These calls were frequent, irritating and misleading.

The script typically began with the upbeat announcement, "Hi, I am calling with information about Lois Murphy," leading the listener to believe that the call was coming from the Murphy campaign. Furthermore, the tone was cheery, giving the listener the impression the information was going to be positive. Both of these assumptions were incorrect. As the recording continued, the script turned negative regarding Murphy. Although I can't remember exactly what the calls said, I do remember that they were critical of Murphy. And at the time, I recall feeling angry because the information presented was false. I knew what Murphy's positions were on the issues, and they weren't being truthfully represented in these calls. Voters were indeed being misled by them.

I went so far as to file a complaint with the Federal Communications Commission, because I believed that these calls had broken some campaigning laws. The fact that they were made and paid for by the Republican Party was not indicated at the beginning of the call, as is legally mandated.

All during the first few days before the November 7th election, I heard family, friends and neighbors in our district complaining about the content and frequency of these calls. Some said they were so fed up with the calls that they didn't even feel like voting anymore. Since the speakers in the robo-calls were not clearly identified, some voters were under the impression that the calls were coming from the Murphy campaign. I found this misconception particularly disturbing, and I believe that it could have cost Murphy some votes.

I believe these types of harassing calls should be stopped. Because of them, some voters were likely discouraged from going to the polls due to their anger at candidates like Murphy, whom they erroneously believed instigated the calls, or because of the misinformation and falsehoods spread by the calls about candidates that they had previously decided to vote for.

I thought those two bills, or the one bill proposed by Congressman Altmire and the other one by Virginia Foxx, sounded great, and I would encourage you to support those bills. And I hope you will take action against this chilling electoral activity.

And thank you for listening to my experiences.

[The statement of Ms. Hollis follows:]

Karyn L. Hollis -- Testimony for the Subcommittee on Elections of the Committee on House Administration and Hearing on Robo-Calls, December 6, 2007

During the days preceding the election of November 7, 2006, my family received an unwanted barrage of automated, recorded calls to our home phone number in Wynnewood, PA. I would estimate that we received up to 4 robo-calls a day during that weekend before the election.

The calls had numerous scripts, but all were critical of Lois Murphy, the Democratic candidate for congress in our 6th district. These calls were frequent, irritating and misleading. The script typically began with the upbeat announcement, "Hi. I'm calling with information about Lois Murphy," leading the listener to believe that the call was coming from the Murphy campaign. Furthermore, the tone was cheery, giving the listener the impression that the information was going to be positive. Both of these assumptions were incorrect. As the recording continued, the script turned negative regarding Murphy.

Although I can't remember exactly what was said in the calls, I do remember that they were critical of Lois Murphy, and at the time I recall feeling angry because the information presented was false. I knew what Murphy's positions were on the issues, and they weren't being truthfully represented in these calls. Voters were indeed being misled by them.

I went so far as to file a complaint with the Federal Communications Commission because I believed that these calls had broken some campaigning laws. The fact that these calls were made and paid for by the Republican Party was not indicated at the beginning of the call as is legally mandated.

All during the last few days before November 7 election, I heard family, friends and neighbors in our district complaining about the content and frequency of these calls. Some said they were so fed up with the calls that they didn't even feel like voting anymore. Since the speakers in the Robo-Calls were not clearly identified, some voters were under the impression that the calls were coming from the Murphy campaign. I found this misconception particularly disturbing, and I believe it could have cost Murphy some votes.

I believe that these types of harassing calls should be stopped. Because of them some voters were likely discouraged from going to the polls due to their anger at candidates like Murphy whom they erroneously believed instigated the calls, or because of the misinformation and falsehoods spread by the calls about candidates that previously had decided to vote for.

I hope you will take action against this electorally chilling activity.

Thank you for listening to my views and experiences.

Ms. LOFGREN. Thank you very much, Dr. Hollis. And thank you to all of the witnesses. We will now go to the time of our hearing where members will have an opportunity to question the witnesses. And I would like to invite the Ranking Member to begin.

Mr. MCCARTHY. Why thank you, Madam Chair. This has been very interesting from all sides. And I appreciate both panels for coming. And I found it quite intriguing. I mean I feel very fortunate serving on this committee, because we have a lot of legal minds actually on this committee, a former attorney general, former judge. And part of their discussion last time, and then listening what we have here, my first question is to the Attorney General. I know you have a strict law inside Indiana. Do congressional Members there, does this law not allow them then to do tele-town halls because they use robo-technology?

Mr. CARTER. They would have to have consent by the person that they are calling.

Mr. MCCARTHY. So you would have to send a letter to every constituent to ask them prior to making that call?

Mr. CARTER. If you want to make the calls, not violating the law, you would have to have their consent. You could gather that different ways, but of course that would be one way.

Mr. MCCARTHY. Okay.

If I may ask, Mr. Cooney, your conversation was bordering on—that is what I found interesting from both sides, Mr. Davis and Mr. Lungren, about political speech and the First Amendment. Do you think that would uphold—that law would uphold the Supreme Court test for disallowing congressional members?

Mr. COONEY. I probably shouldn't venture an opinion on something I haven't seen before.

Mr. MCCARTHY. Okay.

Mr. COONEY. I have not seen telephone town halls before today. But something that is classic core political speech, with a Member of Congress trying to reach out to constituents and involve them in the operations of the office and finding out what is good for people in the district, probably would be covered. And I am not certain if that is the context in which telephone town halls come up or not, but that would be the core principle from which one would start the analysis.

Mr. MCCARTHY. You have a follow-up. Go ahead.

Mr. CARTER. I would mention that in the 2006 campaign there were two efforts to make robo-calls that were in violation, in my opinion, of our statute. Those did relate to political speech. They did relate to congressional campaigns. We are enforcing that law, that State law. Those have been challenged in Federal court, and thus far we have succeeded both at the district court level and at the court of appeals that it is not an unconstitutional restraint.

Mr. MCCARTHY. Okay. I just—and the one thing with robo-calls, too, from a congressional—we have blackout periods where you cannot do it prior to an election. I know you mentioned, Mr. Smith, from the tele-town hall, I find these tele-town halls holding me accountable, because I do them for one hour at a time, and they can ask me any question. And I don't pick the order. Whoever hit the pound sign first gets to ask the next question. And I find with us being back in Washington during the week it is a great ability, es-

pecially when I am from California, the time difference within there.

I just think coming from Mr. Raney's—you raised a couple good points at the very end, because I do agree with Ms. Hollis that I get a lot of these phone calls that I don't care about, and some people are misleading, and this has happened to me as well. But I do believe also from the standpoint of free speech that you seem to have a couple ideas that maybe we could solve both problems all the way along so people could get the message, but also in a manner that is respectful. What were some of your points again about timeline?

Mr. RANEY. I think a prohibition on deception regarding the identity of the caller. I mean I think every single one of you—well, most of you had a story about somebody sending a call that was deceptive as to the identity of the call. And there is no room for that. Nor is there any argument that that would be protected speech. So I think that is an easy victory.

I think Mr. Carter also raised a great point regarding enforcement. There is a Telephone Consumer Protection Act out there right now which requires certain disclosures. And it just hasn't been enforced. So if this committee can adopt standards requiring disclosures. Caller ID is another example regarding the identity of the caller. Then a lot of the complaints that we have are gone. I mean, making somebody stand up for the words, the attacks that they make is constitutional. And I don't think that there would be a big first amendment concern with that type of legislation. However, I definitely think there is a need. And my client thinks that these are valuable calls. And there are many, many valuable applications. And to have the citizens of Indiana not be able to take advantage of those is not right. And that is why I think that there is a Federal need for uniformity.

Mr. MCCARTHY. Yeah, because I almost think if I am a candidate and I haven't been in political office before, and I am pure grassroots, and I don't have the money to go on television, and I am running against some incumbent and they have a lot of money and they are on television all the time, the technology to be able to reach a lot of people inexpensively is telephones.

Mr. RANEY. It is fast.

Mr. MCCARTHY. It is fast and it is able to deliver, even if they put something up in the last 2 weeks that is not honest. So I do think there is a place that we could get that could solve these problems in a lot of ways and still allow the free speech.

And I thank you, Madam Chair. I yield back.

Ms. LOFGREN. The gentleman yields back. Mr. Gonzalez.

Mr. GONZALEZ. Thank you very much, Madam Chairwoman.

And the question is to General Carter. You have heard my colleagues, Mr. Lungren and Mr. Davis, express some strong concerns regarding the constitutionality. But in our conversation you had earlier you told me your law has been on the books for 20 years, I believe, correct?

Mr. CARTER. Correct.

Mr. GONZALEZ. It has been challenged in Federal court, you just indicated. And I am just trying to figure out as lawyers and such why it has withstood that kind of scrutiny. And it probably is, sure,

you can respect political speech, free speech and such, but the person that is exposed to it can remove themselves from that particular person that may be utilizing or exercising the constitutional right. And you do that by simply being on a do-not-call list or by having to opt in or opt out. You have an opt-in. I mean that must be it.

I don't understand, because it would seem pretty clear, after listening to Mr. Cooney, that the Indiana law by this point should have been successfully challenged. So I guess it is not that simple in the equation. But again, I am thinking what Mr. McCarthy is saying, is there some sort of middle ground that we can reach here?

I will ask Mr. Carter, though. General Carter, do you think there has been some cost to citizens of Indiana in the way of communicating with their elected officials?

Mr. CARTER. You know, I haven't had any citizens tell me that they didn't have plenty of information about recent campaigns in Indiana. In fact, they have been barraged with multiple sources of information about the campaigns. I don't think that the fact that this one method was restricted in Indiana led to any breakdown in their ability to analyze the candidates. We did have the elections, successfully chose people for those offices. I don't think the robocall restriction affected that.

The other thing I would mention is that the key question here is are you going to give that choice to the consumer or are you going to leave it with the telemarketer. The consumer, by their expression through their elected representatives that we do not want certain types of automated calls because of the volume, primarily, that we could be hit with, we don't want that type of harassment, which they consider to be harassment when the volume reaches a certain level, and the new technology permits that, or are we going to leave it as we have been since the invention of the telephone? Are we going to leave it to the telemarketers to determine when and how they can interrupt people in the privacy of their homes? That is a key you have got to determine, which is going to control that decision.

Mr. GONZALEZ. Okay. And so the question that goes to Mr. Raney and Mr. Smith, how do you respond to that? Because I mean he has a very popular and resonating argument there when you are out there talking to the public. Do you want the right to be able to restrict who is calling you at all hours, even reasonable hours, regardless of content, regardless of commercial or noncommercial, political or nonpolitical, regardless of identification, full disclosure, or even the nature of the message being that it be truthful and not deceptive? Forget all that. How do you respond to that basic premise that Mr. Carter has that is a very attractive one?

Mr. RANEY. I have two responses. First, he mentioned that the law has been on the books for more than 20 years. This is an example of a law that was originally intended to apply to technology and commercial calling that is totally different than the current application, and I don't think would have been anticipated had it been applied in this way. That is my first point. This is a misfit of applying commercial telemarketing rules to something that is entirely different, both constitutionality and purpose-wise.

Second, the AAPC would urge adoption of an opt-out, that any person who receives the call, by pressing a number on a keypad, can opt out of future calls from that candidate or campaign or entity, and in that way honor those requests.

However, the Constitution mandates that more speech, not less speech is better. And the first amendment can sometimes be messy. So am I willing to pay the price of one call and then I opt out? Absolutely. Because there are new candidates and new issues all the time. Rather than a broad solution, let us make it campaign- and candidate-specific.

Mr. SMITH. Let me add something to that if I could. The way the Indiana law has been challenged, has been on the basis that it violates freedom of speech, the First Amendment, and the interstate commerce clause. It has not been challenged under the speech or debate clause of Article I. And it would seem to me that a member of Congress has a right, under the speech or debate clause of Article I of the Constitution—as a matter of fact, a responsibility—to communicate in any way he or she deems appropriate in concert with other members of Congress—to his constituents. And that has yet to be argued in court. And when it is, I think it will prevail.

Mr. GONZALEZ. Thank you very much.

Ms. LOFGREN. Mr. Lungren is recognized for 5 minutes.

Mr. LUNGREN. Thank you very much. I just find it interesting we so glibly say certain things. I mean I don't like it when you can't identify who is behind a particular ad and so forth on television. They can use fancy names, and the more we go to it.

But I wonder, would the Federalist Papers have been outlawed? They were not, as I recall, published under the names of the individuals. They were anonymous names. You kind of wonder, when you go back in our history and look at those.

Here is the other thing. And I would ask you this, my friend the Attorney General of Indiana. You said there are other modes of communication. So because you restrict one it shouldn't have an impact on the first amendment.

I can tell you absolutely if I were to use it in a campaign, a tele-town hall would probably cost me about one-tenth what it would cost me to buy—at least one-tenth, maybe one-twentieth of what it would cost me to buy a television ad or sufficient radio ads to respond to an attack on me.

So are you saying that doesn't have any impact on the analysis by a court with respect to the first amendment when you are limiting in a very serious way the most effective, efficient way I have to respond to an attack on me using the other media?

And by the way, think of this. If I get attacked in the last weekend on television, I cannot buy ads on television because it is locked up by that time. In fact, in the last week I can't, but I can go and get robo-calls to be able to respond to that or have a tele-town hall. Doesn't that implicate first amendment?

Mr. CARTER. Congressman, those arguments have been made very effectively in the court cases that we have been involved with, and thus far the Federal judiciary has not agreed with that.

Mr. LUNGREN. I should have been involved in those cases, I guess. No, no, I mean but there is—for years I have been frustrated by the fact that the way the political machine has gone is to more

and more expensive things. The way the culture has developed is that political consultants get paid as a percentage of the amount that you spend. So the more you spend, the more they get. The incentive is to spend more. And you do it in television, you do it in radio, and you do it in mail. Tele-town halls and robo-calls, frankly, are the cheapest way to get your message across. It is an effective way of a poorer candidate being able to go against an incumbent or against a richer candidate.

Isn't the inconvenience that we would suffer as individuals—and I don't like these calls any more than anybody else—isn't that something to be balanced off against the first amendment presumption that we want to expand political speech rather than restrict political speech?

Mr. CARTER. And I think from the invention of the telephone, up into the 1990s, that balancing was always in favor of the telemarketers. Because it was more efficient for whomever wanted to broadcast that message, we were going to permit them to intrude upon the privacy of the consumers.

Mr. LUNGREN. Let us just restrict it to the political use of it, not all telemarketers. Not commercial speech, political speech.

Mr. CARTER. And I think that since then, because of the volume of calls, because of the very advances of technology that have made it more efficient for the telemarketing message, the volume has gotten to the point where the public says we don't want that. We don't want to bear the cost of that. And one or two calls a night might be okay, but would 10 calls be okay? Or 15?

Mr. LUNGREN. When you start doing that, then people start turning off and they are not effective anymore. And you move onto something else. The market in a sense takes care of that, because we turn off. And then you come to me as someone running for office and you say we will do robo-calls, and I know they don't work anymore because people are sick and tired of them.

The other thing is the Constitution suggests, at least Supreme Court suggests by constitutional analysis, that it is the least restrictive or intrusive way of invading the first amendment if you do have a real government interest here. What about the technology that I as a consumer can have caller ID? And if I don't recognize that, I can—they don't get in?

Mr. CARTER. Well, you may not pick up the phone, but that doesn't mean the phone didn't ring. That doesn't mean it didn't wake up your child that has gone to bed. It doesn't mean that it hasn't interrupted that senior citizen that falls getting to the phone to see who is on the caller ID.

Mr. LUNGREN. So we should tell these countries that are attempting to try to involve themselves in democracy that democracy is important to us, but not if it interrupts our sleep.

Mr. CARTER. I don't think these robo-calls are going to be the key to our message with them.

Mr. COONEY. May I follow up quickly on three points that were raised in that colloquy?

Mr. LUNGREN. Sure.

Mr. COONEY. First the question about the cost. The record in the Indiana litigation to which the attorney general referred showed that the cost of a prerecorded call was one-fifteenth the cost of the

same call, asking the same question, introduced by a live operator. One-fifteenth.

Second, restrictions on alternatives to speech, you are finding this now in the Iowa caucuses because the caucuses are so close to the Christmas-New Year's holiday season, the Wal-Marts and the auto companies of the world have tied up all the TV time. The candidates can't get on, even though they have the money. So they are relying on prerecorded calls more extensively.

And finally, the answer to the question about why there hasn't been litigation and why there haven't been decisions in this area I think is that many States recognize that these laws were vulnerable under the First Amendment because they were drafted to respond to the old technology of the late eighties, where all you could do is hook up a tape and play it from beginning to end, that the industry has moved on, and that trying to restrict something that actually asks questions of people and gets responses would be treated differently.

And I must disagree with the attorney general on one point. There is no decision upholding the Indiana statute. We raised all these arguments. What the Seventh Circuit Court decided is that the issue should be resolved in State court rather than in Federal court. It was an abstention decision. So the merits of the Indiana statute have not yet been resolved.

Ms. LOFGREN. The gentleman's time has expired. I turn now to Congresswoman Davis for her questions.

Mrs. DAVIS of California. Thank you, Madam Chair. And I am sorry that I wasn't able to be here for your testimony. We were here for the members expressing their frustration. I want to just clarify for a second, Mr. Attorney General, the law in Indiana, did it carve out political speech?

Mr. CARTER. No. In 1988, I believe in response to the public's discontent with recorded messages that they were receiving, the elected members, elected legislature, chose to prohibit the so-called robo-calls, prerecorded messages, if they were not introduced with a live voice. If people want to receive those calls they can consent, they can then receive those calls. That is the exemption.

Mrs. DAVIS of California. But it wasn't specific for political speech?

Mr. CARTER. No, it covers the technology, because frankly I think the legislature's view was people aren't—to some extent, if they have to hear the message, they are concerned with the content of it. But a lot of people are just upset with their phone, that they have bought and paid for, being utilized by somebody else without their permission and without them having some ability to control the volume of those intrusions that they have in the privacy of their home.

Mrs. DAVIS of California. You have heard the concerns about the tele-forums that we do. And I am just wondering maybe for all of you, do you see that? And you may have addressed this already. But do you see that as a problem as we move forward and trying to see is there a role for Congress to play here?

Obviously, none of us want to step in at a point that diminishes free speech in any way, and yet there are concerns that have been expressed. Do you—I think I maybe heard at the tail end of this—

do you see a problem with the forums that we are talking about, that this would in some way restrict it?

Mr. RANEY. I would personally object to inclusion of political calls on the Federal do-not-call list. I think the expectation of consumers when they signed onto the list was it was a commercial calling. And so I did not agree with the bills proposed by two of the previous witnesses. Congresswoman Bean, however, suggested that there may be some regulatory things that could be adopted to prohibit deception and abuse. And I am perfectly in favor of those. And like I said, there is no constitutional protection for fraud. So punish fraud and punish it harshly, and let legitimate speakers speak and let listeners listen.

Mrs. DAVIS of California. Yeah, the policing of the industry in this, do you see a marked difference between the way some firms handle this issue? Are there some firms that refuse to have robocalls going in the middle of the night? Are there some firms——

Mr. RANEY. Oh, absolutely. I don't think any legitimate consultant would send calls in the middle of the night.

Mrs. DAVIS of California. But yet we know that that is——

Mr. RANEY. No client of mine. I would think that that would violate the TCPA, personally, and subject that caller to potentially catastrophic monetary damages. But the AAPC would urge adoption of restrictions that make it clear that there are legitimate ways to use this and nonlegitimate ways.

Mrs. DAVIS of California. Could anybody else respond, though? I mean how do you explain the fact that this dominates in some campaigns now? So the fact that we have industries that are saying no, I am not going to do that, yet there must be plenty that do. And how, in fact, are you trying to police that among the organizations? Dr. Hollis.

Ms. HOLLIS. Well, I would just like to say that I think it is a strategy, and I think that certain consultants and certain people organizing these robo-calls know very good and well what they are doing. You know, in our case we are registered Democrats. We are the base. We are probably not going to be persuaded not to vote for Lois Murphy. I think they know that very well. But they are hoping that by almost impersonating her, they are going to get people irritated and aggravated and they will just say oy, they are just overwhelming me here, and I am just going to forget this whole thing. So I think it is a definite strategy. I think they know full well what they are doing.

And you know, again, I am not a lawmaker, but maybe there would be some ways to fine-tune wording that would, you know, be able to prevent this. Maybe you could limit the number of calls that people are—to a certain number from a certain organization. Or, like Mr. Davis was saying, make the blatant, false claims that some of them, you know, put forward illegal. Again, I don't know how; there is a time element probably, but maybe you could have certain scripts reviewed by, I don't know, somebody to verify that they are true at least.

Mrs. DAVIS of California. It would be great if this sort of thing just fizzled because the public was saying forget it. But unfortunately, I think we see it probably increasing more than that. My time is up, but it looked like you wanted to comment.

Mr. SMITH. One quick statement. A campaign is a battle of ballots, not a battle of bullets, but each battle is just as intense. And some people carry it too far. And I think in terms of robo-calls that there can be some reasonable rules put in place that would account for most of what is being said here. And the people that go to an extreme ought to be punished and ought to be punished severely. And in terms of identification, as opposed to allowing people to portray themselves as part of some mystical organization, individuals should take responsibility for advertisements. For example, Rodney Smith paid for this ad, or somebody else, so that you have an individual that can be held specifically responsible for what is said.

Mrs. DAVIS of California. Thank you, Madam Chair.

Ms. LOFGREN. Mr. Davis is recognized.

Mr. DAVIS of Alabama. Thank you, Madam Chairwoman.

Two sets of points. The first one, the broad question is the degree to which this institution can regulate robo-calls. I wouldn't say that it is just a 100 percent decided question, but it would seem to me that the predominance of what the Supreme Court has said on these issues is that all political advocacy is given a very high level of protection that virtually can't be trampled. And the Court has specifically said we can't restrict or regulate political speech or political advocacy because we don't like its content.

So I think there are just pressing constitutional questions around taking the do-not-call list and adding political speech to it. I would be stunned, frankly, if a Federal appeals court were to uphold that.

But moving to a closer question, Mr. Raney, you talked a lot about, particularly in your written statement, about—prohibiting deception of any sort with regard to political issues is the phrase you used. It is probably broader than what you meant to say, but you do draw a distinction between advocacy and something that is clearly fraudulent. So I want to try to flesh that out for a moment.

Let us take the example most of us are familiar with, South Carolina campaign in 2000. Regardless of who paid for the ads and all that, there were ads, robo-calls rather, that went into homes disseminating personal information about John McCain that was known to be false by the people who did it. I don't think there is a huge factual dispute about that.

Does anyone on the panel believe that kind of deliberate dissemination of false information is protected under current law? Okay. No one affirmatively believes that is protected.

Mr. COONEY. Certainly not.

Mr. DAVIS of Alabama. And so can one of you talk a little bit about what remedies are available for a candidate who is wronged in that way? I suppose one remedy is, obviously, holding a press conference and denouncing it. But of course that is a way of publicizing the allegation. Are there legal remedies that are available, perhaps after the election, other than just the usual more speech denouncing it? Or are we talking about tort remedies that are available, defamation law, or as—there seems to be some concession that, well, you can't do that under the current law, but very rarely do candidates take advantage of that recourse.

Mr. SMITH. Sir, one of the things the Supreme Court says you can do in a campaign is advocate full disclosure. And when somebody does that they need to be forthright—in other words, they

can't do it under some ruse. It would seem to me that that would be a step in the right direction to force them to admit who they are and identify themselves.

Mr. DAVIS of Alabama. Mr. Raney, do you think that libel laws, as they are currently defined in most States, would allow someone to go to court to sue someone for the kind of ads that happened to McCain in 2000?

Mr. RANEY. Yes, they would allow the suit. It would be a very high standard to meet. I mean we know that public figures are—it is a very, very high standard. I think the concern that my clients have is more the immediacy of the campaign. That the need for regulation here has to do with that immediate damage that is done to a candidate by these messages or the immediate help that these messages can give a candidate. And that is the role——

Mr. DAVIS of Alabama. Let me stop you for one second and ask you this question. Let us say that we are 4 days out from a campaign. On day one a phone bank goes up that disseminates something that is false. Does anyone on the panel think that someone could go to court to get an injunction against that phone bank going forward?

Mr. COONEY. Well, you could certainly try, but you are going to meet the First Amendment objections there. The courts will bend over backwards to make certain they are not suppressing——

Mr. DAVIS of Alabama. Give me an argument that would trump the prior restraint argument.

Mr. COONEY. The argument would be this is a deliberate falsehood and can be proven in a short period of time to be a falsehood. It is not a theoretical objection to the lawsuit, it is just a practical problem. A judge in the days just before an election would be reluctant to jump in unless the case is overwhelming. But with an appropriate case, the courts could.

Mr. RANEY. You would also have irreparable injury in that situation. I mean, 4 days from an election the falsehood can't be corrected, and stopping it is the only remedy to prevent the irreparable injury. But it is a very, very high standard; I mean, practically impossible.

Mr. DAVIS of Alabama. General Carter, do you have anything you want to add to that?

Mr. CARTER. No.

Mr. DAVIS of Alabama. Let me leave you with just one hypothetical. In your capacity as attorney general, what would be the circumstance in which you would consider prosecuting someone on grounds of fraud based upon a political communication? What would be your standard as an attorney general that would allow you to say this is clearly fraud that was communicated, I am going to prosecute someone for it?

Mr. CARTER. I wouldn't be prosecuting, because in our State the attorney general does not have that jurisdiction. That is with local prosecutors. We do represent the State Election Commission. If there was a complaint filed with them, we could pursue an investigation and a civil action. But again, it would not be one that would provide very prompt relief.

Ms. LOFGREN. Thank you very much. The gentleman yields back.

I think this has been an enormously helpful hearing. I have learned some things. I feel badly that our colleagues—we have a bipartisan delegation from Indiana—that none of them get to do tele-town halls. And I feel badly for their constituency. But I am interested, Dr. Hollis, one of the things that Mr. Raney suggested that intrigued me was the ability of a voter to press a button and not get any more calls from a particular source. So that doesn't preclude the ability to initiate political speech, which has the highest protection level in the Constitution.

But would that have worked in the election you talked about, where you could say I don't want—you know, get rid of this, get it out of my answering machine, where you just turn it off?

Ms. HOLLIS. It would have been identified as coming from the Republican Party. It would have been very general, I guess. And maybe there are some times you might want to hear what they had to say so——

Ms. LOFGREN. Once maybe, but not 15 times. I know when I do my telephone town halls—and Mr. McCarthy whispered he does the same thing—the first question we ask is, we are having the telephone town hall, you can join right now if you want. If you never want a call like this again, you can press number 2, and then we take them off the list.

Ms. HOLLIS. Yeah, something like that sort of makes it real more specific what the purpose and who is calling and—yeah, definitely.

Ms. LOFGREN. I wonder, Mr. Cooney, one of the things that I think there are problems, when you get into judging, as Mr. Davis said earlier, I mean, there is stuff that is fact, but so much of political speech is opinion, and the coordinates always felt, and the first amendment really provides, that the remedy for speech that you don't like is more speech.

And I agree with that, but that is different, I think, than calling 25 times at 2:00 a.m., which is not about speech. That is about harassment.

Do you think that regulation that is neutral in terms of the content, but deals with frequency of calls or the time of calls would meet the constitutional concerns that you have outlined in your testimony?

Mr. COONEY. The question is simpler to answer for the timing of calls. The Federal Communications Commission already has rules that regulate when calls can be made, and States also restrict them—typically to some period between 8 a.m. and 9 p.m., although States vary either way on that.

Something that affected the timing in which a call can be received is a classic time, place or manner restriction, which is judged under a lesser standard and is easier for a State to sustain.

It is difficult when you start to talk about the number of calls, because that gets into the volume of speech. Generally speaking, the courts bend over backwards not to try to establish what the total volume of speech should be.

But there is another part of the FCC rules that may help answer that problem, which is that the FCC requires, at the end of the prerecorded message, that a number be included that the recipient can call and can be taken off the list for any further calls from that particular speaker.

That is one of the conditions that the FCC put in the TCPA implementing regulations. It is a step in the direction of trying to protect consumers, but by having consumer choice govern and not the dictate of the government.

Ms. LOFGREN. Let me ask you, Mr. Raney, you mentioned that none of the political consultants that you represent would engage in this kind of harassing behavior. I take you at your word, but clearly somebody is doing it because voters—we had testimony from three of our colleagues this morning about problems that have occurred, and we have a voter here today talking about problems.

The enforcement appears to be deficient. One of the things that we have kicked around is whether there needs to be—you know, just outlaw this and make someone who is going to do this realize they would be violating a criminal statute as a deterrent if it is at 2:00 in the morning, for example. I mean, nobody who is actually selling a product would call a customer at 2:00 in the morning. That is not the way to make friends and consumers. What is your thought on that?

Mr. RANEY. My thought is so long as there is a protection to prevent prosecution in the instance of a mistake.

Ms. LOFGREN. An error.

Mr. RANEY. It can't be knowing and with intent. But if there is knowing, an intent standard, a criminal sanction is perfectly appropriate. I mean, we talked about people just doing this as a cost of doing business and paying some small fine. Obviously a small fine doesn't work. To make it serious, that is appropriate. As long as there is protection from mistakes——

Ms. LOFGREN. Okay. I would like to yield to Mrs. Davis for another question.

Mrs. DAVIS of California. Dr. Hollis, I am just curious about the response of the FEC to your complaint.

Ms. HOLLIS. E-mail receipt, they got the complaint, that was it.

Ms. LOFGREN. So nothing really happened.

Ms. HOLLIS. Yes.

Mrs. DAVIS of California. Certainly people wouldn't be encouraged to do what you did, to take the extra step to file that kind of a complaint, if, in fact, it went into thin air. So that might be something we would be looking at.

Ms. LOFGREN. Mr. Lungren, I would yield to you.

Mr. LUNGREN. I would like to ask something of the panel, and that is this: We have talked about how you respond to deceptive advertising in the political contest. What if you have a late smear against you. It is by way of mail, direct mail. It arrives on Saturday or arrives Monday. You can't get television, you can't mail it out. The only thing you can do is use the telephone.

In the course of making those calls, for the time that it takes, by the time you get out, you actually go beyond the 9 o'clock period. You go on to 10:00 or 11:00 or something.

In view of the principles of the first amendment, and in view of the principles of being able to respond to an attack, in view of the media that is available to you, is that something that we should prohibit?

Mr. Attorney General.

Mr. CARTER. Prohibit the last-minute mailings?

Mr. LUNGREN. No. The only means by which I can respond would be by, we will call, even robo-calls, in which I state what my position is, in which I say I have been attacked unfairly, I don't have time to respond, television is not available, I want you to hear my story. Would that be something that you think ought to be prohibited?

Mr. CARTER. In Indiana it should be, because in Indiana people want their privacy more than they want those last-minute communications from politicians or anyone else.

Mr. LUNGREN. Even if we posit that it is the truth, that you are actually making a truthful statement to respond to——

Mr. CARTER. Yes. It is the interruption that people are upset about. It is not probably the content of the message. They don't like the interruption of their phone being used for any purpose like that.

I am just going to ask the committee as you consider this, as you go forward, this is a law that the Indiana citizens do not have a problem with. It is not a problem with our legislature. It has been on the books for 19 years. It is not a problem with our congressional delegation. The only communications I had during the last campaign from Congressmen, and they included Congressman Souder, Congressman Sodrel, newly elected Congressman Hill, and former Congressman Hostetler, were to enforce the Indiana robocall law. You don't have any Indiana Congressman here asking for exceptions to that law.

Ms. LOFGREN. Reclaiming my time, I am glad you mentioned that, because I did mention to my colleagues, I think it is a shame. I do want to clarify none have complained to us.

Mr. CARTER. I would ask that you communicate with them before you would take any action that would preempt the Indiana law.

Ms. LOFGREN. If I may, there is lots of further discussion we are going to need on this subject, obviously. But if I were your political consultant, Dan, I would tell you don't call them after 9:00 because you are just going to tick them off. Certainly you wouldn't want to call them at 2:00 a.m.

So there is a discussion about where we should draw a line and what really is something that no one would do except a dirty trick.

Mr. LUNGREN. We can always call voice mail.

Ms. LOFGREN. With that, I am going to thank the witnesses for being here. It has been very, very helpful.

We will keep the record open for 5 legislative days. If there are additional questions that Members have, we will forward them to you. We will ask that you respond promptly.

Ms. LOFGREN. A lot of people don't realize that witnesses come here as volunteers to help our country find out information and to get to the right answers in a responsible way. We are very grateful to you for taking the time to participate in this process.

This hearing is now adjourned.

[Whereupon, at 2:07 p.m., the subcommittee was adjourned.]

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