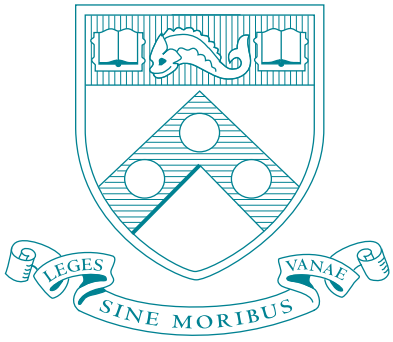
NO. 19

"STAND BY YOUR AD": A CONFERENCE ON ISSUE ADVOCACY ADVERTISING

A Report of the Conference held by The Annenberg Public Policy Center of the University of Pennsylvania and The Free TV for Straight Talk Coalition at the National Press Club, Washington, DC and funded by The Pew Charitable Trusts

16 September 1997



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FOREWORD

The Annenberg Public Policy Center was established by publisher and philanthropist Walter Annenberg in 1994 to create a community of scholars within the University of Pennsylvania which would address public policy issues at the local, state and federal levels. Consistent with the mission of the Annenberg School for Communication, the Center has four ongoing foci: Information and Society; Media and the Developing Mind; Media and the Dialogue of Democracy; and Health Communication. Each year, as well, a special area of scholarly and social interest is addressed. The Center supports research and sponsors lectures and conferences in these areas. This series of publications disseminates the work of the Center.

Kathleen Hall Jamieson
Director

INTRODUCTION

The "Stand By Your Ad"* conference, held on September 16, 1997 in Washington DC, explored issues of accountability and disclosure in political advertising on television.

A first panel examined whether requirements that candidates appear in their own ads have a positive impact on political discourse. It also discussed whether such requirements are best imposed by law or by voluntary compact.

A second panel examined the new and fast-growing phenomenon of "issue advocacy" advertising during political campaigns. An Annenberg Public Policy Center report released at the conference catalogued some $135 to $150 million of this sort of advertising during the 1995-96 campaign, by political parties, labor unions, trade associations and business, ideological and single-issue groups. Most of these ads look and sound like traditional candidate spots, but their sponsors do not face the same disclosure requirements that candidates face. Should they?

In the afternoon, the conference heard from Sen. Arlen Specter (R-Penna.), who discussed campaign finance reform, and Sen. John Kerry (D-Mass.), who discussed the multiple debates and the voluntary spending limits in his 1996 Senate re-election campaign against then Massachusetts Gov. William Weld.

The conference was co-sponsored by the Annenberg Public Policy Center of the University of Pennsylvania and The Free TV for Straight Talk Coalition. It attracted more than 100 scholars, elected officials, political practitioners, campaign reform advocates and journalists.

The following is a distillation of the conference proceedings.

* "Stand By Your Ad" is the title of bills introduced in both the North Carolina legislature and the U.S. Congress in 1997 requiring candidates to personally deliver their own disclaimer statements in television and radio ads. It was one of several legislative proposals discussed at the conference.

PANEL I: DOING WELL BY DOING GOOD?

Moderator: Douglas Bailey

Douglas Bailey is the founder and chairman of the *American Political Network*, a division of the *National Journal*. He is the publisher of *The Hotline*, the *American Health Line*, *GREENWIRE*, and *The Abortion Report*, which are, respectively, daily briefings on American politics, the national health care debate, the environment, and on the politics of abortion.

Joseph N. Cappella

Joseph N. Cappella is Professor of Communications at the Annenberg School for Communication at the University of Pennsylvania and a fellow of the International Communication Association. He is the author of Multivariate Techniques in Human Communication Research; Sequence and Pattern Communication Behavior; and, with Kathleen Hall Jamieson, Spiral of Cynicism: The Press and the Public Good.

Ron Faucheux

Ron Faucheux is Editor and Publisher of *Campaigns and Elections*, a trade publication for the political industry, and *Campaign Insider*, a weekly newsletter about the business of politics. He is a former member of the Louisiana House of Representatives.

Tom Hamburger

Tom Hamburger is the Washington Bureau Chief of the *Minneapolis Star Tribune*. He has written for a variety of other publications, including *The Washington Monthly* and *The New Republic*.

Representative Stephen Horn

Stephen Horn, a former college professor, has represented the 38th district of California since 1992.

Kathleen Hall Jamieson

Kathleen Hall Jamieson is Professor of Communications and Dean of the Annenberg School for Communication at the University of Pennsylvania. She is the author of Dirty Politics: Deception, Distraction and Democracy; Packaging the Presidency, which received the Speech Communication Association's Golden Anniversary Book Award; Eloquence in an Electronic Age, which received the Winans-Wichelns Book Award. Her most recent book with Joseph Cappella is Spiral of Cynicism: The Press and the Public Good.

Representative David Price

David Price, a former college professor, has represented the fourth district of North Carolina since 1986.

Representative Louise Slaughter

Louise Slaughter is in her sixth term in the U.S. House of Representatives, representing the 28th Congressional District of New York State.

JAMIESON: If we are going to ask how to improve the quality of campaign discourse, we need to determine what constitutes quality campaign discourse. And so I'd like to begin by saying, I think we ought to abolish the word "negative" from our discussions. I don't think the word "negative" is helpful in describing political campaign ads, or for that matter, political campaign discourse. The reason is this, if a campaign doesn't have attack — a reason why I should vote against someone, as well as advocacy — an argument why I should vote for someone — I may not be able to differentiate the two candidates. So if the press and the pundits label everything which is attack as "negative" and hence should be dispatched from the body politic, they may inadvertently penalize the basis for legitimate differentiation and for legitimate voting.

So we begin by saying that campaign ads can be divided into those which simply attack and do nothing else; those that simply advocate, make the case for this candidate; and those that combined advocacy and attack, which we call comparison or contrast ads. There is no judgment in that labeling about the legitimacy of the attack, the advocacy, or the comparison and contrast. In fact, it is historically true that the ads that contain advocacy are more likely to be deceptive than the ads that contain pure attack, in part because reporters tend to focus on attack not advocacy and hence consultants realize that they can get by with shading the truth more in the advocacy ads. Also, incidentally, most ads, most of the time, are telling the truth.

And so we ask whether an ad attacks, advocates or does both, then look at whether the attack, the advocacy and the comparison or contrast are or are not legitimate — by which we mean are they accurate, do they mislead? If you knew the whole of the campaign in Iowa, would you draw the same inference that you would draw if you were simply presented with the information in the ad? The reason I think that this is important to distinguish is because in the 1996 campaign the majority of the ads were comparison/contrast ads, largely because that was the basic ad form used by the Clinton campaign. So if you simply said, "Was the percent of attack advertising up in '96 judged by that standard?" The answer is "no." However, the level of misleading claims per ad was up in 1996 to the highest point in the history of the Presidency. So what we should be saying is inaccurate, misleading claims are problematic. Attack in its own right is not! By the way, the number of ads containing a misleading claim in the Presidential campaigns of Clinton and Dole exceeded 1 out of 2, having been only 14% in 1992.

There is another important thing to say, however, if a campaign only attacks or primarily attacks, it hasn't provided a grounds, even if the attack is legitimate, for telling why we should vote for someone. So we recommend that campaigns combine advocacy and attack — both being legitimate. Also, that they compare and contrast so that the electorate is better able to make issue distinctions — character, temperamental, and biographical distinctions.

I'd like to ask a second question which is, "How would we know if the electorate was unhappy with the level of attack or with the illegitimacy of the discourse in the campaign?" The answer is that it's extraordinarily difficult for the electorate to tell us because the electorate can't speak with a single voice. I recommend that we look to three indicators of whether or not the electorate is trying to send a signal. The first indicator asks whether they are saying they are voting against those who engage in what they consider to be inappropriate discourse. This locates the determination of what's inappropriate with the electorate, but it also gives us the ability, if we know who they voted for and that they are saying they are casting a vote against this kind of campaigning, to correlate those votes with the actual discourse to see whether it's a discriminating judgment. The second standard asks whether or not the percent of people who vote for some office is different from those who vote for another office in the same race. In other words, if people went into the ballot box and elected not to cast a vote at one level, they may be trying to tell us that that was not a race that was helpful to them. Then finally, are we seeing people who say they are not voting at all?

And those people who say they are not going to vote at all, who are registered, are also saying that the campaign is more negative — and unfortunately the pollsters continue using the word "negative" — than they would consider appropriate. I think by those three measures, we have the ability to start to define whether or not there is a public voice speaking out against illegitimate discourse. If you take the exit poll in the primaries, you see one third of the voters consistently across the primaries — in each of the Republican primaries of 1996 — agreeing with the statement, "I am trying to cast a vote against negative campaign practices." Those voters are more likely to be casting their votes for the candidates who are engaging in a lower level of illegitimate discourse. I think that's a signal.

Secondly, if you look at the New Jersey race, the Massachusetts race, and the Minnesota race in 1996 you'll find the fall off between the Presidential vote and the Senatorial vote in New Jersey. This is Torricelli-Zimmer, characterized by the press as the most "negative" race of the year. The fall off is 270,000 votes. In Minnesota where one campaign put forward ads, the majority of which were simple advocacy ads, and the other campaign had the Republican Senatorial Campaign Committee coming in with ads which were 100% attack ads — the fall off is 110,000 votes between the Presidential and the Senatorial race. In Massachusetts where there was a high level of legitimate attack and a very small, good, I would argue, and clean campaign — the fall off is only 40,000 votes. I think there is a crude correlation there between the amount of illegitimate discourse and the amount of discourse the electorate felt uncomfortable with and the fall off.

The final indicator, whether people vote at all, I think is the most problematic, because some political scientist have raised the possibility that faced with a campaign the public conceives as "negative" they may, in fact, not vote for anyone in that election, thereby penalizing those running for other offices on the ballot that year. Here we have an interesting piece of suggestive evidence from the Eagleton Poll the end of October done by Rutgers University, which found that those who thought that the Senatorial race was "negative" were more likely to say they weren't going to vote. Those who said the race was "positive" were more likely to say they were going to vote. All these indicators suffer from some methodological problems, but I think they become a crude and initial way to ask the question, "What is the electorate trying to tell us?" For a detailed answer to that question I'd like to introduce my colleague Joe Cappella.

CAPPELLA During the past year I have had the opportunity to study the Minnesota Compact and the races in the state of Minnesota. The Minnesota Compact is an idea of Tom Hamburger, who sits here at the end of the table, that deals with improving the quality of public discourse during the campaigns in the state of Minnesota. It focuses on citizens and journalists and politicians asking them to do some fairly specific things to improve the quality of their own behavior and to take responsibility. The reality of the election in the state of Minnesota was that in the Senate race the number of specific and different ads that occurred during that race between Paul Wellstone and Rudy Boschwitz numbered nearly 40 — 13 of them from May through election day from the Republican Senatorial Committee, 11 from the Boschwitz campaign itself, and 13 from Wellstone. To talk about the nature of these ads would be a mistake for me with Kathleen Jamieson in the room, so we are going to turn to Kathleen to talk a little bit about the character of the ads that appeared in the state.

JAMIESON: Let me read an ad-watch done by Brooks Jackson of CNN. Jackson says: "This ad started running in Minnesota last week saying Wellstone is too liberal on crime." The piece then shows the ad saying, "Wellstone even voted twice to let violent criminals out of jail before they serve 85% of their sentences." Jackson says, "Well, but just hold on a second. Siding with liberals? Sure, but look who else he's siding with. On all three votes cited by the Republican ad, Minnesota's Republican Senator at the time, David Durenburger, voted the same way. The awful pictures make Wellstone look pro crime. The announcer in the ad then says. 'But ultra liberal Paul Wellstone voted to let violent criminals out of jail before they served their full sentence.'" Jackson says, "'Ultra liberal?' On one of those votes he sided with Al D'Amato himself, and more than half the Republicans in the Senate voted the same way." D'Amato is the head of the Republican Senatorial Campaign Committee which is sponsoring this ad. "The bill would have cost many states money, and so the D'Amato gang's ad." Then they cut to the announcer in the ad saying, "Tell Paul Wellstone to stop siding with the liberals." Jackson says it's "way off the mark — it's misleading. A spokesman for D'Amato's NRSC defended the ad saying, 'Wellstone has a long record of being soft on crime. It is impossible to fit his entire soft on crime record into a 30 second ad.'" Jackson, "D'Amato wants Minnesota voters to believe Wellstone is ultra liberal because he voted the same way as D'Amato. Ads like that could backfire and make your Republican candidate Rudy Boschwitz, a victim."

CAPPELLA: What was the effect of these ads and ads like them? Well, first of all one has to realize that the attack on Wellstone's liberal character was not misplaced in Minnesota. Statements in polls in early September that Wellstone was too liberal for Minnesota were accepted by almost 50% of the people polled. The ads generated by Boschwitz against Wellstone clearly broke through to the electorate with 2 in 5 saying they didn't remember the Wellstone ads and only 1 in 5 saying they didn't remember the Boschwitz ads. So they were a better remembered set of ads. People also thought that the ads directed at Wellstone attacked him versus explaining his position — 60% versus 15% — so the electorate clearly got the impression that these were attack ads. Did this make a difference in terms of how they responded to Wellstone versus Boschwitz? Indeed it did. People said that the ads were more likely to make them vote for Wellstone — 44% versus 29% — and then, at exit polls, those who voted for Wellstone (46%) said that the ads helped them in making their decision to vote for Wellstone versus only 20% for Boschwitz. Of those who thought that Boschwitz ads attacked Wellstone, 70% of those people voted for Wellstone. What could have happened that didn't happen, that I think is very important, is that the electorate did not say, as the result of the ad environment in the Senate race in the state of Minnesota "a pox on both of their Houses." They did not say that, but actually turned out to vote in numbers that were along the lines that Kathleen described earlier.

So that cynicism did not arise across the board, but was directed primarily at Boschwitz. Why did this happen? We can't be sure. There are a lot of reasons that results like this can come about. But one of the reasonable expectations for this effect is what has been called "priming." Priming is the idea that what the media covers doesn't change attitudes, but instead what the media covers changes what people weigh in their decision-making. A classic example of this is that Presidential popularity depends more on how the President performs on the economy when the media is covering the economy rather than foreign affairs. So that is an important affect. Was there extensive media coverage in the Senate race in Minnesota regarding the ad environment? The answer to this is, "you bet."

As for the ad-watches: in the *Star Tribune* there were about a dozen of them from May to election day; in the *Pioneer Press*, about nine of them; in the *Rochester Post Bulletin*, about a dozen of them even though they mostly focused on the Congressional race between Gutknecht and Mary Rider rather than the Senate race. So, in several of the major newspapers in Minnesota, there was extensive coverage of the ad environment — articles specifically

dealing with the ads and their character. There were editorials in both the *Pioneer Press* and the *Star Tribune* about the quality of the ad environment. Probably most important is that the media differentiated between the Boschwitz and Wellstone ads in their critique. There was no attempt to introduce a kind of false balance where every critique of an ad generated by the Republican Senate Committee or Boschwitz was accompanied by a critique of a Wellstone ad. There was clear differentiation on the part of the media. The bottom line, I think, is this, although we can't be certain: the media coverage of the ad environment in Minnesota may have primed citizens to use the quality of the ads in their voting decision. They did so by careful attention to the ads' quality and by making hard decisions to critique those they thought most deserved it.

BAILEY: Let's start with Tom Hamburger. Is that your perception of the impact of those ads in Minnesota, and what is the status today of what you call the Minnesota Compact?

HAMBURGER: Well, it's not surprising that the state known as "the land of 10,000 civic organizations" produced a proposed Compact like this. There were actually competing ad codes and compacts in the 1994 and 1995 and 1996 races. The impact is difficult to gauge, as was just suggested. It is hard to know. On the one hand you had all these compacts in the state and ad codes, and yet as Dean Jamieson just said, Minnesota probably had the most vicious series of attack advertising it had ever seen. Candidates complained as never before. At first one might say, "This is a failure. What did the Compacts do? What did the ad codes do?" But I conclude rather, as was just suggested, that there was probably a way in which consciousness was raised.

There was an awareness on the part of the public and a willingness to look critically at the advertising that was offered in a way that we didn't see before. And it was a combination of both public awareness and paying attention to the advertising that was running. Also news organizations were doing unprecedented ad watches and not just the sort of inside the paper ad watches. It was front page news and, as a result of these ad codes, it became an issue in the campaign. And so, the question of candidate performance and the candidate advertising became a central subject of discussion. After the race we looked at our own polling numbers, as well as the tracking polls that we were able to get from both parties. Wellstone, as you might imagine, was the most forthcoming. What they showed was that the candidate's willingness to sign on to the ad code and Wellstone's sort of insistence on not going for the attack ad approach rebounded to his benefit and did so consistently.

Just a couple of numbers we found interesting. Between September 15th and October 15th, when Boschwitz and the NRSC were running the most aggressive of the Finckelstein ads — some of which you saw on the tape just a few minutes ago — Boschwitz's negatives soared. His unfavorable rating went up 12 points. The Wellstone tracking poll showed that consistently the more negative Boschwitz became, the better Wellstone did. One of the things that

Wellstone said was that public attention to the compact, and to advertising codes provided a kind of inoculating effect which rebounded to his benefit.

This panel was titled "Can You Do Well by Doing Good?" In the Minnesota case, if doing good is agreeing at the outset of a campaign to a higher level of discourse or to a Compact or a code, whether the code works effectively or not, then a candidate who abides by such a code, at least in this Senate race, could do well.

BAILEY: The "Stand By Your Ad" legislation is cosponsored by Congressmen Horn and Price, and we'd like to know their reasoning — sum up the bill and your reasoning behind it.

PRICE: I am from North Carolina, which is known, I suppose, as the hotbed of attack ads. Ads featuring personal attacks and distortions of records became a hallmark of some campaigns in our state in the 70's. The high point, or low point, was reached in 1984 with the Hunt-Helms Senate race with very, very harsh advertising on both sides. We have always had to deal with a pretty rough campaign environment and figure out ways of dealing with attack ads of various sorts, and had to ask some hard questions about how we were going to present our own case.

I would sum up the ways of dealing with attack ads in four short maxims, without claiming any originality, and certainly without claiming that they always work. I do think it's important to always have a positive message laid down initially and to never let yourself get totally diverted from that. A positive message either about your own character, your own approach to politics, or your own positions. I think it often is possible to make campaigning itself an issue. Call people's attention to the kind of tactics that the opposition is using. I had the experience you described in Minnesota in my second campaign, when I was being attacked in what I thought was a distorted and unfair way. In countering that ad, instead of answering it directly — although I was sorely tempted — I simply pointed out the past history of the opponent who was running the ad. He was a very young man and in his whole political life he had been affiliated with one aspect or another of the Jesse Helms organization. I pointed out that record, and as the ad continued to run through October, we tracked it very carefully and found, as he was running these ads, my negatives were going up, but his were going up even faster. So it is possible sometimes to make campaigning itself an issue. It is possible to frame the opponents ads so that viewers think about him when they see his ads about you. That's not always possible, but it certainly is an important way of countering attacks, if you can figure out how to do so. And then I would say the bottom line is in whatever you run to be truthful. In drawing comparisons and contrasts don't engage in personal attacks and distortion. Simply refuse to descend to that level. Have a sense of humor if you can manage it, and don't hesitate to draw contrasts and comparisons, but do that in a way that maintains your own integrity and truthfulness. I'm not saying that it always works. When the climate is negative out there often these tactics don't work. You really find the negatives increasing no matter what you do. But I do think those are pretty good rules of thumb in most situations.

Now there is no question that attack ads work, but people do say they don't like them; and often they mean it. So that lays down the predicate for a counter strategy, as I have said, making campaigning itself an issue. It also lays down a predicate for a reforming initiative, such as the one we are discussing today.

Campaign reform, I think in most people's minds, is not just about money. It certainly is about money, but when you ask people on the street what they don't like about campaigns and what they think ought to be changed, it won't be very long until you get around to the business of the nastiness and the distortion of advertising.

So the "Stand By Your Ad" concept draws on this. Its origins are in the rough world of North Carolina politics. Now Mac McCorkle is here today, and Mac did a lot of the early work on this. Our Lt. Governor, Dennis Wicker, introduced this bill in the North Carolina Senate. It passed the Senate, but did not do well in the Republican House, although it may yet be taken up there. It has made some headway at the state level.

The basic idea is quite simple. The candidate is to appear full screen in the TV ad and say, "I am 'X,' I'm a candidate for 'Y,' and I sponsored this advertisement." There is a comparable requirement for organization-sponsored ads and for print ads, strengthening the disclaimer requirement. The intent is not to regulate the content of ads beyond this disclaimer. The intent is to strengthen the existing disclaimer requirement. So it's to make the sponsorship of the ad clear and to require an assumption of personal responsibility on the part of the candidate or the leader of the sponsoring organization, in a way that, we believe, is likely to discourage the most irresponsible and distorted kinds of attacks. Politicians love to preach personal responsibility. The basic concept here is that politicians need to assume responsibility for themselves, for what is going on the air in their name, and the content of their campaign communications.

This isn't the first time this has been thought of. There have been earlier proposals to impose disclaimers and to strengthen them in one way or another. I think that we would have to agree that the present postage stamp style picture down in the corner of the screen really doesn't measure up. But at present ours is the only proposal of its kind that's on the docket. Steve Horn and I have brought this forward as a bipartisan initiative, and we are going to work to make it part of whatever comes forward in the House in the campaign reform area. We are going to argue — I hope convincingly — that this really is a complement to almost every reform approach that's out there. We address the quality of campaigning, the tone of campaigning, its element of personal responsibility, in a way that the finance proposals do not. But it is compatible with the full range of reform approaches, everything from Shays/Meehan to disclosure-only kinds of bills. I think the "Stand By Your Ad" concept is compatible with any and all of those approaches. We would hope that we could make a strong case for this and try to append it to whatever comes forward in the House.

BAILEY: Steve, does it raise any of the freedom of expression issues and concerns for the Congress to say to candidates, "You must do it this way." Is the Republican majority in the House likely to go with you on this? Why are you on board? And if you tried to start this in California would it sweep across the country as another California reform?

HORN: Thank you Doug, that answer is "yes or no."

I want to thank the people sponsoring this conference — the Annenberg group and the Free TV for Straight Talk Coalition — but since I am a politician, I want to particularly thank The Pew Charitable Trusts for putting me on the line so we can all get together. It is a very public spirited foundation.

Anyhow, I am glad to be here because one of the unanswered questions we deal with in this Congress is "How do we restore common sense to our political campaigns?" The program suggests two simple ways to begin answering that question. One is to hold the candidates accountable for what they say in their TV, radio, and print ads. David has described very well the North Carolina experiment, which we would like to have as a national experiment. The other, covered in your second panel, is to unmask the secret persuaders by requiring full disclosure of every dollar spent to influence an election. Since I won't be here for that panel, I want to get in a few licks for my money.

They view all of this as legalistic mumbo jumbo to justify the activities that could never pass muster in a wild west saloon. It's no wonder that many Americans look at politics as a sleazy, underhanded game that is rigged in favor of the big money interests. It's also no wonder that people accept the idea that everyone does it. The President seems to be pushing that idea. I think that is utter nonsense. Everyone does not do it. I know for a fact that most of my colleagues, on both sides of the aisle, work very hard to assure that their fundraising efforts are not only legal, but above reproach. They do so because they are decent and honorable people who generally seek to do the right thing.

To me, it makes it all the more urgent that we address the profound problems in our election laws and particularly our campaign finance system. Failing to do so will allow only further erosion of what little public trust remains, and will undermine the few incentives that still draw serious and thoughtful people into the public service. Good people trapped too long in a system eventually are overwhelmed and made irrelevant. It is said in business "good money drives out bad." Something similar can happen in politics if we allow it — we the legislators, we the American people. That's why I joined with Dave Price in co-sponsoring the "Stand By Your Ad" legislation. It doesn't do anything fancy or complicated — it simply requires candidates to take the credit or the blame for their TV, radio, and print advertisements. That's no violation of the First Amendment, and any court that rules it is, maybe we ought to then have a sort of new Senate confirmation, if it's in the Federal Court, and amend the Constitution.

A candidate can still say anything he wants or she wants under Dave's proposal that I've joined him in. They cannot hide behind their media consultant and their pollsters — two of the evils of modern campaign behavior. They have to stand up in front of the voters, look them in the eye, and make the case in broad daylight.

It is also why I offered my own bill, the Campaigns and Sunshine Act, to require disclosure of independent expenditures. That's where the evil comes in American politics, the independent expenditures. Most of them are not independent. Most of them are absolutely fraudulent. They consult with the campaigns, and frankly, if they even come in on your side they are usually doing something so stupid that it jeopardizes your campaign. I had that experience once in my first year where somebody wanted to even the score with my opponent — and he certainly had a legitimate gripe — and a lot of money was poured in, not to help me, but to even an earlier score. And yet that can slop over into one's own campaign.

What the bill does is it doesn't stop anybody from engaging in political campaigning or saying what they want to. What it does do is say, "Okay, you have the same rules apply to you, whether it be soft money, whether it be independent expenditures." And I think we need to include this so-called educational advocacy nonsense. Once they name a candidate, it becomes election candidate advocacy, and you need to tell us where the money came from, and you need to do it in the same time period we as candidates have to do it. As you know, in the last few weeks of the election, if we get a thousand dollars from somebody, you've got to file that real fast or you're in violation of the FEC election laws. The goal will be to reestablish some accountability in our campaign system by making candidates rise or fall on their own words and by making every group come out into the sunshine to make its case. Thank you very much.

BAILEY: Thank you Congressman.

Representative Slaughter has a separate bill with a different approach to this subject. Would you describe it for us?

SLAUGHTER: I'd be happy to. I have to raise and spend about $800,000 every two years, because I am a perennial target. It's about enough to run a small village and it makes me sick and I feel really awful about it. So one of the reasons behind the legislation that I've written is that I know, no matter what we do, whatever we talk about, about cleaning up soft money and independent expenditures, of capping the amount of money that we spend, none of it is really going to make any sense unless we deal with the basic cost of campaigning, and that is the cost of television advertising. I was a great believer in the Fairness Doctrine — and am to this very day — and I have never forgotten that the airways belong to the people of the United States. And that they are basically supposed to be used for our good. And I think that nothing can be more compellingly in the public interest than to have some free television time for candidates to allow them to get the message out and to say what they are all about when they are getting elected.

Now there are a number of reasons for this. Obviously, there are a lot of people running for the Congress of the United States who live in areas where the media market is so grossly expensive that they couldn't go on television for anything. This will give them the chance to do it. There are candidates, challengers who never have an opportunity to raise the money to go on television, and are at a disadvantage from the word "go." If you know that you are running against somebody who isn't going to go on television, you know you're home free, and my bill takes away that advantage.

Now the best, most important part, I think, of this bill that I have, requires the candidate, himself or herself, to do the ad. Now the first thought that everybody has is, "Is it constitutional?" Yes it is. First it's voluntary, and I've got the papers here somewhere — I'm certified on this bill. It is voluntary, and we do not restrict what the candidate says on the television. Nor do we restrict the candidates' ability to buy other television should they want to and should they be able to. I think that it's terribly important that the candidates do this ad themselves, because I am still a believer in a place called "hope" — that people will look into that television screen to the people that they are hoping to impress, one way or another, and tell the truth. And I don't think they are going to want to use as valuable a resource as that in foolish and stupid attacks. At least that is my hope. As I pointed out, we can't prevent them from doing it.

I think that really it has gotten to the point where it's utterly absurd and the candidates cannot stand the expense anymore. I am concerned, of course, about my district because, as I pointed out, every two years I have to go back to the people who support me. After six election years and six terms I know they are about to say, "Well, good Lord, if Slaughter can't make it on her own by now, I don't know what we're going to do?" And we have to go out again and raise just short of $1 million to run. One of the things that scares me too is that I honestly believe that in this political environment — and I'm not exaggerating — I really do believe that given enough money, a person can be elected to the Congress of the United States without anybody ever laying eyes on them. As a matter of fact you may even be able in some places to elect a fictional member of Congress, because it has simply gotten down to the point

now where it is "he said, she said." And I got into that in my own campaign in the last election, and I want to show you an ad about that in just a minute.

But I think something we want to say to broadcasters is that two hours of free time should be given to each candidate. It has to be broken down in segments of not less than sixty seconds or not more than five minutes because we don't want to bore anybody out there talking about where the United State is going to go. And we want to make sure that they don't find themselves being seen at 3:00 a.m. on a Sunday morning as well, so it has to be an important time. Now does this give the advantage to the incumbent who is used to talking to the television camera? This comes up to me so many times. People said that you're just trying to keep incumbents in office. I've served in three legislatures —the county legislature, the New York State Assembly and now Congress — and I beat an incumbent to get to all three of them. I say that because they certainly ought to put that to rest, that you cannot beat an incumbent. So, I think it's important to point out that we are giving equal rights to the challenger and to the candidate.

Now I am not trying to make these things less creative. You can do whatever you want to with your free time as long as you're sitting there doing it yourself. If you want to attack your opponent, you can go ahead and do it. But a lot of research also indicates that most viewers today are confused by the ads that they see. They don't know whether the opponent is running the ad. They don't know whether the incumbent is running the ad. And so they can't possibly judge the ad in any context at all. I think that campaign consultants take advantage of that, and they make those ads seem like they are unbiased news bulletins sometimes. "Look what she's done now!" A technique that my opponent used in the last election. Or sometimes they use the man or woman in the street reaction and distort their charges to reinforce the voters own reactions to the charges. And that was another tactic used against me the last time. Now my last campaign was like everybody else's. We had distorted pictures and ominous music and awful gray looking things, and I got more and more distressed by it because I could feel that people on the street were disappointed in me. They'd expected something better from me than what they were seeing. We changed consultants for one thing — which was good. But the second thing was I decided I would stand by my bill, and I determined that I was going to make an ad myself. This followed an ad that had four or five women looking just like me, same age, all the same people from all walks of life, standing there saying, "Well, I used to vote for Louise, and I thought she was good but she's changed, and I'm not going to vote for her anymore. I just don't understand it because she has changed." So I decided that I needed to do something about it, so if you would indulge me, I would like to play the ad that I did. Now this was done — I was very conscience of the fact that I had thirty seconds, and I talked too fast because I didn't want to waste any second of that because I'm a Scot, and I wanted to make sure I got the message in, but at least I want you to see that I wanted to reconnect myself with the voters in my district.

> Ad — "I'm Louise Slaughter and I want to tell you how much I appreciate representing you. Together we won a battle to develop our waterfront, building high tech innovative new jobs and our veterans now have (unclear) in Rochester. We're campaigning and we're hearing the same old attacks, but let me tell you I'm the same Louise I was when you first sent me out to work for you. If I could change, the one thing I'd be is thinner! You're the best district and the very best people and am asking for your vote so we can continue to work together."

I could see the difference on the street in a day or two, because people had seen me in that ad. I think it's part of the conventional wisdom, if you're going to attack somebody you don't want to be anywhere around it yourself. And so the idea is that these were coming from out of the ether somewhere, but I felt so good myself because I was able to really sit in an ad. I should also point out that it has been difficult in my district to do that because I don't sound like a typical New Yorker. And even though every constituent that I have, and people have voted for me about twenty

years, know that I am not, they understand already that I was born in Kentucky, every consultant I've ever had has had the fear of "Oh Lord, let's not let them know this," and "We will keep this woman away from the television cameras."

Thank you.

BAILEY: Ron, if you were in the Congress, or, as you once were, in the legislature in Louisiana, would you support either or both of these bills, or is there a better way?

FAUCHEUX: If I were in Congress or the legislature today, I would support all of it because all of it would make it more difficult to defeat me because all of it helps incumbents as all the regulations of campaigns have done. I think there is no question about it that there are too many political campaign ads that stretch the truth, that misrepresent the facts, and that demagogue issues. There are too many political speeches that misrepresent the truth, demagogue issues, and misrepresent the facts too. So TV ads are not the only medium that's doing it. The problem with the whole idea of determining through legislation the content and format of political TV spots, may not be the specific words and positions you take. But a political campaign message that must be a candidate head-on spot format helps good TV candidates. Some people are better speaking head-on on television than other people are, and that's a big factor not just in incumbent races, but in open races. You are also helping incumbents because you're making challengers — who have a double burden of proof to show not only that they should be in the office, but that the incumbent shouldn't be in the office — less effective in pointing out the facts that distinguish themselves from the candidates in the race.

Now I think we shouldn't just slough off the idea of constitutionality. I don't see how any of this could ever pass constitutional muster unless it was voluntary, and if it's voluntary it's going to work about as effectively as everything else that has been voluntary in campaign finance: it has been hypocritical window dressing and hasn't accomplished anything.

We also hear a lot of talk about responsibility and accountability for campaign ads, and I think doing something like this would do just the opposite. It is going to further re-channel money away from candidates and around special interest groups, towards and around independent expenditures, soft money, party expenditures, advocacy expenses, because if you have to say something about a candidate you might not be able to say it under the format of this legislation. Then interest groups supporting or opposing candidates will figure out a way to do it, and since they are not candidates, and since they are protected by the First Amendment — whether you like it or not — they can go on and run any kind of ad they want to run. And that's been the whole story of regulating campaigns in this country. It's taking money away from candidates who are responsible and accountable to the electorate, and it's giving more money and more power to interest groups so that candidates can say, "Oh, I didn't attack my opponent. I'm running a clean campaign. That vicious National Education Association or that vicious labor union or that vicious gun control group or gun owners group did it. I didn't do it." And I think that's a little bit of hypocrisy.

I agree that a lot of unfair political attacks are run, particularly if the opposition doesn't have the time or money to respond to those attacks. We might want to look at doing some things that would have a practical result without

regulating the format of spots. For example, having "discovery" of campaign advertising similar to what you would have in a court case, so that any time someone was going to unveil a new spot, say in the last two or three weeks in an election, it would have to be publicly open for inspection maybe twenty-four hours or forty-eight hours before it's run, which gives the news media and the political opposition an opportunity to research the information in it, to look at it, to develop a response — whether that response is done through the press or whether its done through advertising. And it does it without regulating the format, without attempting to regulate the time or the place or the manner of doing this type of campaigning.

Clarifying disclaimers may be a good idea too. Those of you who have discussed that are on to something. I don't think that anybody wants to encourage the current system where you have "paid for by an independent committee to support better government, and higher wages for working people, and higher profits for business people" — whatever that may be. Then nobody knows what that is. Is that labor? Is that business? Is that a gun group? Is that an environmental group, or whatever? And I think maybe there is some way to do that.

Anything we do, in terms of regulating the format of political advertising, and in regulating the money that goes into the political system, is going to produce the same unintended consequences that we've seen in the last twenty years: it increases the rate of incumbent re-election, it increases the power of interest groups, it professionalizes money, it institutionalizes money. People say, "Of course you say that. You represent a lot of political campaign consultants." In response, all I have to say is that in 1971, before you had campaign regulation, there were about 200 professional political consulting firms in this country. Now, with regulation, there are over 3000. The more legislation you pass, the more business for consultants you are going to have.

BAILEY: Thanks to all the panel. Kathleen, let me ask you this question. Would a full screen credit line admission, disclosure, if you will, as to "This ad comes from me. I'm the candidate. This ad comes from me. I have authorized it," would that change the nature of advertising?

JAMIESON: What we have found historically, is that when a candidate appears in her own ad, it happens in free time as well, that spot is more likely to contain advocacy and comparison. It is less likely to contain attack. It is more likely to be accurate. It is more likely to be nuanced, so it is more likely, for example, to indicate who else deserves credit for accomplishing something, and it's more likely to contain evidence as well as a claim rather than simple assertion. In other words, there does appear to be an affect that is tied to the candidate appearing in ads in the general direction of those things that most academics would consider to be a better discourse. The question is does that discourse drive voters away? When we looked at the free time experiment in 1996, we found no drop in the network rating after airing free time segments.

BAILEY: Sir.

Audience Participant: Russ Neumann, Professor of Communication, Annenberg School for Communication. I have a question for anybody. There is an old cliché that generals are always strategizing for the last war, not the next one. My question is, as we may be standing at the twilight of traditional television, why aren't we anticipating the new technologies and trying to set up a system that will work for the improvement of public discourse in a 500 or 500,000 channel world, and perhaps in a video world? Where are the opportunities and new technologies for public discourse?

BAILEY: Anybody want to volunteer on that? If not, I will.

If you fast forward ten years, the television and the internet are going to be one communications device in our home. That changes the whole nature of political advertising, and we need to think about that a lot because today, political advertising is directed at the couch potato — at the captive audience. That is how campaigns reach that audience that won't turn on politics, won't turn on a debate, may not turn on the news, but turns on entertainment programming and gets the 30 second ad that is caught there in the middle. They are a captive audience.

When, however, the television and the computer become one, then advertising takes on a different nature all together. First it is on demand. You as a voter will be able to get any information you want, and in virtually any format that you want, and when you want it. But it also means that to get an ad you probably have to click on it. Will voters click on negative ads? That frankly is a really interesting question, because lots of polls show that the confrontation ads are not very popular, but I must tell you that they tend to be more entertaining then the positive ads; and so it is going to be an interesting test. I think that the premise of the question is exactly correct. The communication world is changing dramatically, and do we have the foresight to prepare for that world so that we are ready for it when it comes?

PANEL II: ISSUE ADVOCACY ADS: HOW MUCH DISCLOSURE?

Moderator: Roy Schotland

Roy Schotland is a professor at Georgetown School of Law, where he teaches administrative law, constitutional law, election and campaign finance regulation, and has taught pension regulation. He served as a law clerk to Justice William J. Brennan, has been a professor at University of Virginia Law School and a visiting professor at the University of Pennsylvania Law School, associate dean at Georgetown, and chief counsel for the Securities and Exchange Commission Institutional Investor Study.

Craig Engle

Craig Engle is General Counsel and Assistant Treasurer to the National Republican Senatorial Committee. He has primary responsibility for advising Republican Senators and all Republican candidates for the U.S. Senate on matters of election law, campaign finance law, gift law, public financial disclosure, and ethics.

George Gould

George Gould serves as assistant to the president for legislative and political affairs for the National Association of Letter Carriers. A 15-year veteran of Capitol Hill, Gould served as the staff director of the House Subcommittee on Postal Operations and Services from 1976 to 1979.

Douglas Johnson

Douglas Johnson has served as Federal Legislative Director for the National Right to Life Committee since 1981. Johnson has written extensively on the implications of the McCain-Feingold bill and other campaign reform proposals on the communications of issue-advocacy groups such as NRLC.

Laura Murphy

Laura Murphy is director of the Washington office of the American Civil Liberties Union where she serves as chief lobbyist, administrator, and a national spokesperson on federal legislative issues. She is directly involved in legislative and administrative branch deliberations on criminal justice issues, privacy, free speech, and campaign finance reform, among other issues.

Norman Ornstein

Norman Ornstein is a resident scholar at the American Enterprise Institute for Public Policy Research and election analyst for CBS News. In addition, Ornstein writes a weekly column for *USA Today*, a column for *Roll Call*, has worked with Al Fraken as a commentator and pollster for the Comedy Central TV Network's political coverage, and is a senior advisor to the Pew Research Center for the People and the Press.

Andrew Schwartzman

Andrew Schwartzman is the president of the Media Access Project, an organization he has directed since 1978. Mr. Schwartzman has appeared on behalf of MAP before the Congress, the FCC and the courts on issues such as cable TV regulation, minority and female ownership and employment in the mass media, and "equal time" laws.

Leslie Wayne

Leslie Wayne joined *The New York Times* in 1981 as a business reporter, covering the savings and loan crisis, the Orange County bankruptcy, financial scams, and the banking industry. In the fall of 1996, she came to Washington to cover campaign finance.

SCHOTLAND: I am going to note the cases that are landmarks in the law on express advocacy.

Let me start out with the ground rules — the current law determining whether an ad is subject to Federal Election Act regulation. "Regulation" meaning at least some disclosure requirement, and it may mean limitations on the sources or amounts of the money to pay for the ads. Now the ground rules come from 1976's *Buckley v. Valeo*, which Senator McConnell keeps saying nobody has read. "Candidates," said the court, "especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions. Not only do candidates campaign on the basis of positions on issues, but campaigns themselves generate issues of public interest." They then quoted a precedent from thirty years earlier: "The distinction [that is here for example between express and issue advocacy] offers no security for free discussion. In these conditions it blankets with uncertainty. Whatever may be said, it compels speakers to hedge and trim," and therefore, in order to protect whatever may be said, they came up with a limitation that the provisions apply only to expenditures for communications that in express terms advocate election or defeat of clearly identified candidates. And they then provide a footnote saying that the express words would be phrases such as "vote for" or "elect" or "defeat" and so forth. And if it isn't within that express advocacy, *Buckley* is saying, then the First Amendment proscribes regulating the conduct.

Some people believe that choosing the line between express and issue advocacy is like choosing from this dictionary or that dictionary or modifying the dictionary definition or redesigning a tool. That is to say, a view that a reasonable change after the experience of at least a generation can be made. Other people believe that the line *Buckley* drew is, as that court said, "compelled by the First Amendment" — that is, by the need to protect against some emasculation of free speech, leaving no room for many of the kinds of changes now being proposed.

The following seven events show very briefly the difficulties in applying the express/issue line:

- 1987, 9th Circuit, a case called *Furgatch*: "Don't let him do it!" said two *New York Times* ads run by an individual attacking Jimmy Carter just before election day. The Election Commission sued saying *Furgatch* had made an "independent expenditure" and so he had to identify any person who had contributed $200 or more. The Court of Appeals agreed saying, "considering what he had said and how he said it and when he said it, he was within the Act's regulatory scheme."
- Two years later, DC Circuit, *National Organization For Women*: the Federal Election Commission claimed that N.O.W. engaged illegally in express advocacy by using their treasury funds, one per cent of which came from corporations and unions, in order to send out three mailings shortly before the 1984 election. The mailings criticized Reagan, Jesse Helms, and other Republicans. N.O.W. said the mailings merely

presented the organization's views to get new members, and the court agreed, saying the mailings hadn't urged votes against those Republicans.

- Two years later, First Circuit, a case called *Forcher*: The Maine Right to Life Committee and an individual sought to enjoin the Election Commission, which was taking the position that the group's 1988 election issue of its newsletter — which was like a voter guide, you know, "here's how people voted" — was express advocacy, and thus under limitations on the source of funds. The court disagreed, said there were no magic words, no express advocacy, no vote for/vote against, and that any more subtle line drawing between express and issue advocacy was exactly what *Buckley* stood to avoid.
- 1996, Fourth Circuit, Christian Coalition: A nonprofit group used its general treasury funds to run ads criticizing Clinton and Gore for their views about homosexuals, ending with "Is this your vision for a better America? For more information on traditional family values, contact the Christian Coalition Network." The Fourth Circuit not only found no express call to vote for or against, but said the Election Commission was so reckless in its reading of the relevant precedents that the Commission had to pay the Coalition's legal fees, which doesn't happen every day.
- 1996, AFL-CIO and a few others as you well know, not a case but certainly an event.
- 1996-97, Wisconsin's Americans for Limited Terms (ALT) and nonprofit groups spent over a million dollars running ads in 14 states. For example one against a Wisconsin State Assemblyman: "The people want term limits, but part of the problem is Dave Travis. He refuses to support term limits, so call Travis today, tell him to change his mind." On a Friday before election day Travis, claiming that the ALT was a money laundering operation — his phrase — for the Republicans, sued to enjoin the ads because they did not comply with the Wisconsin law. Wisconsin law requires groups to register and to disclose donor lists not only if engaged in express advocacy, but also if they act for the purpose of influencing the election. Travis won an injunction from the state judge, so the ads were yanked over the weekend and a few days before the election. Then after the election the State Commission sued ALT for failing to comply with the law, and ALT is suing the Commission in Federal Court for violating its First Amendment rights.
- The last of these events: 1997, First Circuit, the *Clifton* case. The Maine Right to Life Committee (again) and an individual (again) challenged new Federal Election Commission regulations governing voter guides and voter records. The regs, to be very brief, required that each candidate be given equal space and prominence, barred electioneering messages in the Voter Guide (Record), and also aimed at preventing any coordination with candidates in preparing the Voter Guide or Record. Any contact between the sponsor of the ad or the publication and the candidates had to be in writing. The regs were invalidated on several grounds.

We are starting with Andy Schwartzman.

SCHWARTZMAN: I guess I should start by saying Professor Schotland was my very first professor on the very first day of my first class of law school a long time ago. I guess he's ultimately responsible for whatever happens here.

I am going to start with a couple of very, very sweeping statements which I do not intend to try to prove or document. Within that framework, I am then going to ratchet it down to a much more narrow set of points that may help promote the discussion today.

The first point underlies everything that's been said so far. It is likely to be repeated later, but I think it's important to remind ourselves of this. Let's not forget that our premise is that identification of the source of a message promotes informed voting and improves democracy. If that's not so, then we should not be here. We're operating on that assumption. Professor Jamieson's research tends to support it and it's intuitive.

Second point: The Federal Communications Commission and the Communication Act offer considerable jurisdiction and considerable opportunity to address some of the difficulties that arise under the FECA and the constitutional dimensions of that. I would observe that Doug Bailey is right on target in pointing out that we may be fixing something at most for one or two election cycles. We are, I think, on the eve of a technology revolution and the integration of the internet and some multi-channel technologies into the discourse that will change the nature of things. I am going to say that I think that the FCC in using the Communications Act could do a great deal under existing authority to enhance disclosure of the sources of money for political advertising. This is true for candidate ads, as well as non-candidate ads, but we'll focus here on the latter. In fact I intend to use a case study that doesn't even involve a candidate election, but rather a ballot issue.

Last year we brought a successful complaint against a number of stations in Oregon which were carrying advertising opposing a tobacco tax that was on a state-wide ballot in Oregon. The unsuccessful campaign against the Tobacco Tax was waged by Fairness Matters to Oregonians. Because of what I can characterize as inept lawyering which left them unnecessarily vulnerable, the fact that Fairness Matters to Oregonians had receipts of $2,660,620 of which $20 was a miscellaneous cash contribution and $2,660,600 was from the Tobacco Institute, the Federal Communications Commission ruled that the commercials had to be identified as being paid for by the Tobacco Institute and not paid for by Fairness Matters to Oregonians. The tax passed. Many people believe that the identification of the Tobacco Institute as the sponsor blunted the effect of this largely unrebutted advertising campaign and may have affected the outcome.

What was unusual about this case was that with minimal care it is possible to engage in the kind of exercise I just described and successfully identify the commercials as being paid for by Fairness Matters to Oregonians or some equivalent. I would like to see the Federal Communications Commission change its interpretation of the sponsorship identification requirements of the Communications Act in order to produce more results of the kind I just described, and we intend to work for that.

A few observations: First, this was done under an existing statute, Section 317 of the Communications Act. Section 317 involves enforcement against broadcasters. Broadcasters are required to fully and fairly disclose the sources of money used to sponsor air time. The Supreme Court has held in *CBS vs. Democratic National Committee* that there is no constitutional right to buy air time. It raises fewer constitutional questions that way. You are dealing here with two sets of practices. One is laundering of money where an existing group receives money and passes it through and identifies itself as the sponsor. That's a misleading practice, because they are not the true sponsor. You're dealing with a second kind of practice when you have, as in the Oregon case, a misleading name. I think that they may have to be dealt with differently. I think that when you get the reverse of the McIntyre case, where you have an individual using a name, as right now with Steve Forbes buying ads which are identified as being paid for by Americans For Hope, Growth and Opportunity, you've got yet a different and more interesting constitutional question that will rarely arise.

That's my point. That's my premise. I think it brings it down to some discussible levels. This is difficult stuff, but it's worth exploring.

SCHOTLAND: Thank you. Douglas Johnson.

JOHNSON: I think that we can't have a proper debate about the current demands for regulations of commentary on politicians by citizen advocacy groups, whether so-called "disclosure" requirements or other restrictions, without stepping back to examine some of the premises on which the demands are based, and some of the benefits that some of those pushing for such regulations would accrue if they were enacted. I appreciate the opportunity to speak here today from a group called the Free TV for Straight Talk Coalition. I am not sure about the "free TV" part, but I certainly endorse the goal of "straight talk," and I think that goal would be greatly advanced if many of those who were pushing for restrictions on political speech, such as those contained in the McCain/Feingold Bill or the package being promoted by the League of Women Voters, were more candid in acknowledging how very substantially they wish to narrow the free speech rights traditionally enjoyed by all groups of American citizens — supposedly all for the public's own good, of course.

Frankly, from where we sit at the National Right to Life Committee, it appears that much of the current talk about requiring greater "disclosure" is really a smoke screen for advancing schemes to severely restrict the amount of speech commenting on the positions and voting records of politicians; and/or to control the content and tone of whatever such communications would continue to be permitted by the government. Regulatory devices such as mandatory reporting of donors are mainly means to that end.

The latest incarnation of the McCain/Feingold bill bans any incorporated entity, including issue advocacy groups or any union, from issuing any communication to the public that so much as mentions a name of a member of Congress within 60 days of a general election or a primary. Mr. Ornstein has written advocating a 90 day restriction of this type prior to both primary and general elections. So under that restriction alone, and there are many others, such communications could only be issued by a political action committee and by the corporations that operate news media outlets.

Limiting commentary on politicians to political action committees would, even if there were no further restrictions, silence thousands of smaller issue advocacy groups, particularly at the state and local level, from speaking about politicians, because they lack the resources to comply with the already complex regulatory and accounting legal requirements that govern the establishment and the operations of PACs. And even PACs, which are already severely limited by many restrictions on their fundraising and their expenditures, would be subjected to a host of new restrictions and rationing devices under the pending proposals.

We believe that this is a far cry from the words of the First Amendment that "Congress shall make no law abridging the freedom of speech or of the press." And it was speech about the government — about politicians — that these prohibitions were mainly intended to protect. We think these proposals are a far cry from the words of the U.S. Supreme Court in *Buckley v. Valeo*, and I quote: "In the free society ordained by our Constitution, it is not the government, but the people, individually as citizens and candidates and collectively as associates and political committees, who must retain control over the quantity and the range of debate over public issues in a political campaign." Note what they said: "in a political campaign."

A long line of Supreme Court cases, both decades before and since *Buckley v. Valeo*, established that in the United States of America the general rule is that every group is free to say what they want to say about those who hold or seek public office, and to speak freely about their positions and judgments on those positions and official actions. We believe that our nation should not abandon this cornerstone of liberty in favor of a system in which politicians and appointees would decide who is allowed to speak about politicians, how much, at what time, or with what tone. We respect our elected officials, but they lack the authority to tell us if or in what manner we may disseminate their voting records or comment thereon, anymore than they could impose such a requirement on the institutional news media. Nor do they possess the authority to demand the names of those who support such commentary with their donations, any more than they have the right to demand that each individual citizen make a public declaration of which candidate he has voted for, or to demand the list of subscribers of a given newspaper.

As the U.S. Court of Appeals for the Second Circuit said in 1980, "the right to speak out at election time is one of the most zealously protected under our Constitution." The right to utilize issue advocacy to attempt to persuade one's fellow citizens of the issues that they should weigh when they cast their ballot is really as fundamental as the right to vote itself. And that is why the Supreme Court said in *Buckley v. Valeo*, and I quote: "As long as persons in groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views."

So the legal distinction really is not, as we so often read, and as I read in the introduction to the study that was released here today, that "issue advocacy" is for the primary purpose of promoting ideas and policies, while "express advocacy" deals with "a candidate." That is the doctrinal distinction which the Supreme Court and the lower federal courts have emphatically rejected in case after case after case.

To seek to distinguish by law between speech that discusses the issues and speech that discusses politicians' positions on issues is, as Jonathan Rauch recently put it in the *New Republic*, "like saying that the law should be tightened to distinguish clearly between sex for love and sex for pleasure."

To conclude, in our view many of the lawmakers and groups who are backing regulations on political speech are consciously or unconsciously attempting to enhance the value of the political currency in which they are particularly endowed, but at the expense of the free rights of other groups of citizens. I would speak for example of the League of Women Voters and of Common Cause, even of Walter Cronkite. If time allows I would be happy to cite chapter and verse regarding these attempts to skew the playing field.

One final thought: just what does it mean to "influence elections," anyway? None of the communications that are being discussed here today, whether voter guides, TV ads or whatever, can influence elections in the slightest, except to the extent they are given weight by registered voters — American citizens, grown-ups. Doesn't our Constitution rest on the premise that these people should be allowed to sort out conflicting political messages, including those presented by the news media, without government imposed counter-speech or filters or restrictions? I think that many of these restrictions on political speech are really animated by an often-unspoken premise — what I call the "protect the dimwit's" mind-set. It's the notion by certain media and political elites, that these poor people need to be protected by force of law from communications that would manipulate them or in some way fool them into voting for candidates who are against their interests. I have explored this notion further in an essay, "Do American Voters Need Speech Nannies?" (www.nrlc.org/dimwit.html).

Thank you.

SCHOTLAND: Thank you. Norm Ornstein.

ORNSTEIN: Thank you Roy I was kind of amused to hear Mr. Johnson talk about "mandatory reporting of donors" instead of the more familiar term "disclosure." Frank Luntz has done his work well.

Let me just raise a few questions here that I think we are dealing with. The first and the obvious one that the court grappled with is, is there a distinction between political speech and issue speech? Obviously, there needs to be. And the court suggested that you could have some rules out there that apply to political speech, rules relating to contribution limits and to disclosure. And you would have a different framework for issue speech. That's certainly something that all of us would agree is fundamental.

The second and more interesting question then is the bright line distinction that the court drew in the *Buckley* decision, saying that political speech was express advocacy that required using words like "elect," "defeat," "vote for," "vote against." But that is not the only such distinction one could possibly make in this process or reasonably make given the Constitution. What if the court, for example, had said in *Buckley* that we'll make another bright line distinction about ads designed to influence an election close to an election. Would that have been at the time viewed as shocking and impermissible, outside the bounds of the Constitution? Or would another line drawn now, twenty years later in light of our experience under these circumstances, be out of bounds, out of the question, or unreasonable? It is on that basis, I think, that we have some very substantial disagreement here. I agree with one of the comments made in the previous panel by Steve Horn, that what we need to do is to have Congress have a debate in which they provide an extensive legislative history and language and documentation providing reasoning that would make a compelling case within the structure and the spirit of the First Amendment, that a change in the definition is necessary. I happen to believe, as some of my colleagues do, that the most appropriate change is to draw another bright line distinction.

We had originally put in 90 days before an election, because that happened to be the limit that Congress put on itself, on its own speech with regard to the "frank," saying that they would limit their own speech. They made it within 90 days of an election. The bill moving forward, McCain/Feingold/Shays/Meehan, draws a 60 day distinction. I think that you can find a compromise there. Something that is close to an election where clearly you have a difference in the speech, and we suggest that the easiest, simplest, sharpest distinction is generally broadcast communications that mention the name or use the likeness of the candidate.

Now let me make something very clear here right now, which has not been made clear up until now. This is not preventing speech. We can see, because we have independent expenditure speech to the tune of tens of millions of dollars run by outside groups in the last campaign, they weren't prevented from speaking at all. The court said that they could put in as much as they wanted, but they had to abide by, as political speech, the same rules that apply to the candidates and others. That means some limits on contributions and some disclosure. Within that context, they can run any ads that they want, and there are even some exceptions to that for small groups that don't have corporate donations. It simply means you can't use union dues. Unions can run such ads. They run those ads all the time.

They don't use dues for them. You can't use corporate funds directly out of corporate coffers. You can't use foreign money. And there are limits in what individuals can contribute unless they do it on their own, independently.

Now why change the definition? First I believe it is absolutely demonstrably clear that both the climate and the political landscape have changed dramatically since 1976, and changed remarkably in 1996, as we saw. Anybody knows who was out there watching any ads on the television during the course of the election campaign or who saw some of these ads or who reads the documentation. We don't know how much money was spent. We only have estimates. This is the best estimate that we have — $135-$150 million. It is clear that the ads that are being run now are no longer primarily, even secondarily, designed as issue advocacy. That, in fact, the findings in this report, I believe, are absolutely stunning. These issue advocacy ads had more pure attack than any other type of political ad; less comparison of issue positions. Over 90% directly referred to candidates and most stunning of all, for ads that are supposed to be advocating on issues, less than one in five directly advocated the sponsor's own position. What we see here is a clear and blatant attempt by many such groups to manipulate the rules. And I can understand it. If I could operate in a system, if for example I could be out there in the stock market and invest in companies where I didn't have to abide by insider trading rules, where I didn't have to have any disclosure requirements; if I could play football where I didn't have to worry about any penalties, and everybody else had to abide by those particular rules, of course I would argue that that rule ought to be kept in place.

Peter Flaherty, the head of Americans for Reform, one of those groups where it is clearly and instantaneously obvious what they stand for — that's a joke, of course — has been well known because of the campaign run in Montana where the issue ad was about the Democratic candidate for Congress. It read, "Who is Bill Yellowtail? He preaches family values, but he took a swing at his wife. And Yellowtail's explanation was, 'He only slapped her,' but her nose was broken." He said afterwards, when *The Los Angeles Times* reporters asked whether he would run such ads about domestic violence in other districts including some involving Republicans, "It is not up to us to do the job of people who have a liberal ideology." And he said, "As long as I don't use the magic words, we can do anything we want." These are clearly political ads, and there is no question about what we saw in 1996. What we saw in 1996 will be expanded and dramatically changed to a brave new world of political communication by the year 2000, if we don't create a system where ads that are clearly political have to run by the rules that candidates and everybody else have to apply.

SCHOTLAND: Thank you. Laura Murphy.

MURPHY: You know it concerns me that we don't have common agreement about what has primacy when we talk about regulating issue advocacy. What in my view should have primacy is the right to speak, and the First Amendment, not the rules of the FEC or the laws of the 1974 Federal Election Campaign Amendments. No one argues that we are talking about the regulation of speech when we are talking about the regulation of issue ads, but then it seems to break down after that. It seems as though we can regulate broadcast advertising, and we can regulate print advertising, and people then begin to believe that because we are trying to make sure that there is a level playing field, this is somehow more acceptable. I'll just give you a personal example.

I am frequently asked to speak at ACLU affiliates across the country for their annual meetings and their annual dinners, or I speak at national rallies. I've given a speech at the Washington Monument. I've given speeches at conferences. Let's say that within 30 days before an election I give a speech blasting McCain and Feingold for their willingness to violate First Amendment rights. And I happen to give this speech in Wisconsin or Arizona. And I happen to give this speech before a large audience of people who are about to make a determination about how they are going to vote. Should that speech be regulated? Should I be barred from making a comment that talks about their personal role in this debate? Well, if my speech should not be regulated — most of you I think would agree that I should be allowed to say that — then why, if that is distilled in an ad, should it be disclosed and regulated in a way that my speech is not? We are talking about forms of speech here, and I think that we need to do a little more homework about the *Buckley* decision.

In the early stages of the challenge to the Federal Election Campaign Amendments of 1974 — the ACLU as you know was involved in that litigation — we challenged Section 437A. This was an amendment that specifically named Common Cause, the ACLU, and a lot of other organizations that put out "dirty dozen" lists about candidates' records on issues. The Court of Appeals of the DC Circuit invalidated that section of the law, and that was merely a disclosure section. It did not ban these attacks, nor did it ban our voting records. It merely asked us to disclose. But the act of disclosure, we asserted, would have a chilling effect on speakers, especially on popular speakers, and that section of the law was struck down in the DC Circuit. It was never appealed by the FEC as the case went through the system to the Supreme Court. Yet the FEC has relentlessly tried to get that same disclosure requirement by regulation. I think it's inappropriate, and I want to ask, "Why are we doing this?"

It seems as though problems with our campaign laws have seasons. Ten years ago everybody was up in arms about political action committees. Now everybody is up in arms about issue advocacy. Why is it? Is it because issue ads have too much power as compared to other ads that are more regulated? Or is it because we don't like them because they are perhaps too powerful, or because the sources of the ads aren't identified clearly enough? Or do we believe that these ads subvert the law? I think we should have more hearings about the last point on Capitol Hill. Are there people using false assertion?

We have to go back to the *Buckley* case and look at the relationship between those parts of the law that the Supreme Court allowed to stand, and their view about the relationship to those provisions of the law, and on the corruption of elected officials. Are these ads corrupting anyone? We don't like them, but do we not like them for a legitimate reason, or because we just don't like the way they are done? Do they go to the heart of the reason why the court has allowed certain campaign finance laws, and struck down others? I don't think that our rationale is close enough to the rationale used by the *Buckley* court to let some of these laws stand. And then, how do we prevent the government from being arbitrary and capricious in its selection of so-called violators of issue ad regulations?

We have a long history with the FEC, and I am not comfortable that they are going to "know it when they see it." Frankly, I thought that the ads we saw this morning were issue ads. They were far more substantive and informative than many of the candidate ads that I see showing a candidate holding a baby and saying he is a nice person and giving me information about his or her resume. I want to have that information and, as Director of the ACLU Washington office, I want to make sure that the ACLU and every organization in this room has the ability to put out information about candidates' records. Unfortunately, the Congress waits until the last minute, often times, to decide the major decisions. In the last thirty days before they adjourned for the November elections, I can guarantee some major issues are passed. If we have to disclose and change the very nature of our institution, we will not be able

to tell our own constituencies and members of the public, how candidates voted on issues. I think anything that has a chilling effect on our ability to communicate about public policy issues is wrong.

Then there is the whole question of anonymity. The court has repeatedly recognized that disclosure can have a chilling effect on the speaker's willingness or ability to speak freely. We need to look at some of these lawsuits. *NAACP v. Alabama*, for example. Look at what the state of Alabama did by trying to force the NAACP to disclose its membership list. Or the example I gave at the Brookings Institution where a group of gay officers in the military may know that they are one vote short in the Senate from ending "Don't Ask, Don't Tell." They decide that they want to put out issue ads. If they had to disclose that they paid for these ads, it's a death knell to their careers in the military. I think there are many reasons why we ought to allow anonymity to continue. Just because you do not want to disclose your ads doesn't mean that you don't have to disclose the source of funding for your ads, doesn't mean that you don't have the right to speak in a free society.

Thank you.

SCHOTLAND: Thank you Laura. George Gould.

GOULD: Ron Faucheux said that I represent the letter carriers. He then mentioned the AFL-CIO ads and suggested some of the ads in general, not necessarily the AFL-CIO ads, were vicious. I want to say that letter carriers are sometimes attacked by vicious dogs, but we are never vicious.

I find it hard to believe that we are going to have real finance campaign reform passed in this atmosphere. I think one of the reasons is that some of the reformers have spent a great deal of time in the last ten years confusing the public by attacking the wrong targets. Laura mentioned the PACs. I think that's a good example. If we were dealing only with so-called hard money, or PAC money, right now, we wouldn't be talking about a scandal. So for ten years self-styled "reformers" attacked the process, or an effort, or a tool that I think is probably one the most honestly-based tools we have for dealing with campaign contributions — PACs.

But now "reformers" are shifting ground and looking at other targets. They are having a heck of a time getting rid of the positions they took on PACs. It reminds me of the Australian who was given a new boomerang for his birthday, and then spent the rest of his life trying to throw the old one away. And I think that's what they are trying to do. So now we have new targets. We're going to eliminate money, or we're going to define or restrict ads.

Well, number one, if we do eliminate so-called soft money, what do you do with political parties? If you abolish soft money, which will seriously weaken political parties, who controls the campaign funds, where are they channeled, will they be channeled into less reportable and less constructive channels? I think there'll be problems. If fundraising is removed, will we necessarily have to reinvent some kind of structure to replace political parties? If you tell politicians who are running for office what they can't do when they need to do it, they'll find a way to do it. It's the nature of political campaigns.

Secondly, they suggest that elected officials or candidates should volunteer to suspend their legal campaign fundraising activities that appear to some to be unseemly. I've seen the President criticized and the Vice President

recently criticized for continuing to practice within the present political fundraising system when some people have judged it to be unethical or maybe some of the practices illegal. Well, I can't help but wonder if some of our newspapers — maybe the *Washington Post* — would be willing to suspend ads so they could run more news in hopes that their competitors would do the same thing, or the public would pay a higher price when they buy a newspaper.

Thirdly, there are some who suggest defining or restricting ads. Well, I am not necessarily opposed to that, but I am reminded of the tobacco industry, which has constantly changed the manner in which they have advertised their product. Now, if they can be as clever as they have been over the years, both in this country and in foreign countries, to continue to advertise a product that everybody — including them — now agrees can hurt people, I think I am hard pressed to figure out how we are going to define political ads so that the politicians and the candidates won't be able to get their message across. I'd love to have someone show me how to accomplish that. If the public does decide to choose a candidate who has been sleazy, who might be defined as ethically challenged, well, actually, it's democracy. They have chosen someone knowing what type of campaign they have run. They have either bought the ads or excused the ads and the people have elected them. I am not sure that that is necessarily a problem.

There is a Congressperson who feels that in some districts these ads could elect a fictitious congressional candidate. Well, after thirty-five years dealing with Congress, I am not so sure that in some places that's a bad idea.

There will always be a lot of private money involved. The government is about money, and I think the problem we have here is that, in this climate, we can never get real, full campaign finance reform. Public opinion polls consistently show unhappiness with the current finance system, but the voters don't want to contribute to a campaign or trust Congress to improve the system. By a 2-1 margin, people believe that reform would have no effect on the political system.

So disclosure is probably the only thing we can go for. My concern, as someone who represents working people, is that we do not get caught in a process in which, in attempting to reach a laudable goal — like Norm has talked about — the system is changed so that it penalizes my people. The final legal product could penalize groups of people based on the decisions made by other people protecting their own interests.

SCHOTLAND: Thank you. Leslie Wayne.

WAYNE: As a reporter for *The New York Times*, I am not here offering an opinion about the issue at hand. But as someone who has covered campaign finance since last August, I can give you some insights on some of the reporting that I have done on the subject about issue ads. As we look at the issue of disclosure, the stories that I've been working on have been primarily "follow the trail of the dollars" kinds of stories. As you look at those kinds of stories and issue ads, you will see that some of the issues that we are dealing with are not only the idea of disclosure, but also groups that very aggressively try to disguise the source of their money and the source of the philosophical orientation behind the ads they are producing.

I am going to talk to you about two particular ad campaigns. They are both ad campaigns that were run by people on the Right. There have been similar campaigns by people on the Left. It just so happens that these are ones that I have written about. Both of these exemplify what I am talking about.

The first campaign is one by a group called Triad. Triad is a for-profit consulting group based in Northern Virginia. It is run by a woman, Carolyn Malenick who is a former Ollie North fund-raiser. What this group does is it locates conservative donors. It advises them on which candidates and on which PACs to give their money to. It also advises them on which nonprofits to give their money to, and those nonprofits will then run negative ads in districts where conservatives are running, against liberal Democrats. I should also note that Triad works outside the confines of the Republican Party. Carolyn Malenick and the people who are the conservative supporters she deals with find that the Republican Party is far too moderate for their point of view.

In the last election Triad put $5 million in a last minute ad blitz in ten different states. The money was raised from the donors and Carolyn Malenick gave it to two nonprofit groups. One was called Citizens for Reform, headed by Peter Flaherty, and the other one was Citizens for the Republic Education Fund, which is headed by Lyn Nofziger. Essentially, though, these non-profit groups were mere fronts. Triad found the source of the money, Triad designed the ads, Triad made the ad buys, and Triad did everything regarding these ads. The ads were unrelentingly negative, and among them were the Yellowtail ad in Montana where the candidate was accused of being a wife beater. In the race for Bob Dole's senate seat in Kansas, it was Brownbeck against Jill Docking. Brownbeck being Republican and Jill Docking being the Democrat. Jill Docking was accused of being a liberal from Massachusetts because she had moved to Kansas from Massachusetts twenty years ago. The idea of liberal Democratic candidates supporting gay rights was thrown out in a lot of these ads. There were a lot of red flag issues, but when the ads were aired, at the bottom of the ads it only said "Citizens for Reform" or "Citizens for the Republic Education Fund." So there was no way for anyone on the receiving end of these ads or who had seen these ads to be able to find out the source of the money behind them or the philosophical orientation of the people behind them.

The second example is Americans for Tax Reform. Americans for Tax Reform is an anti-tax group that is headed by Grover Norquist who is a very well known conservative activist. He is close to Haley Barbour, former Chairman of the RNC, and he is close to Newt Gingrich.

In the last election, as you have seen in the ads, the Republicans were losing on the Medicare issue, and there was a lot of concern —especially on the part of elderly voters — that the Republicans were going to take away their Medicare benefits. What Grover Norquist did was to get $4.6 million from the Republican Party. The $4.6 million was then used to run an issue ad campaign under the name of Americans for Tax Reform, which basically said that the Republicans were okay on the Medicare issue, and that there was nothing to fear from this.

There was no disclosure on any of these ads that the money was really coming from the Republican Party, and instead the tag line on the ads was the Americans for Tax Reform. Grover Norquist said that he did not in any way coordinate with the Republican Party on this, but obviously when the Party gave the money, they knew who they were giving the money to. In that particular Americans for Tax Reform situation, polls afterwards showed that those ads were highly effective in swinging voters in that, whereas before the ads it looked as though the Republicans were losing on the Medicare issue, in the 150 districts where the ads and the direct mail campaign took place, the Republicans began to win on the Medicare issue.

So these are just a few examples from my reporting. Again the point that I want to make, the larger point, is there is one thing about disclosure and there is another thing about disguise. I think as you begin to look at the issue of disclosure you also have to take up the issue of disguise.

Thank you.

SCHOTLAND: Thank you Leslie. Craig Engle.

ENGLE: Thank you Roy.

I also note that Roy Schotland was my campaign law professor and is solely responsible for anything I say today.

I want to go back to the title of this conference, "Stand By Your Ad," and also take a shot at the Democratic Party, and see if I can combine the two and amplify some of what Leslie was just saying as to whether or not the Democratic Party stands by its ads or whether we have a more difficult problem of people being misled as to where the source of the money is from, and who's name is on the ad. We can get to whether it is issue advocacy or express advocacy and issues of timing or content, but I want to focus on a particular problem that is of a concern — that people are being misled as to who is paying for advertisements.

Let me show you something that happened in the state of Kentucky last year. In the run up to the general election, you would see on the reports filed by the Kentucky Democratic Party and the Democratic National Committee the following scenario: On July 1st and July 5th the DNC would transfer to the Kentucky Democratic Party $62,223. That very same day the Kentucky Democratic Party would transfer to something called the November 5 Group $62,223. July 8th and 10th, $50,000; the 22nd, $12,000. The same day, same amount over and over and over again. Money would go from the DNC to the Kentucky Democratic Party, and then minutes later the money would return to Washington, DC. Why was that going on? Well there is a campaign finance reason for why that's going on. But first let me tell you what the result of all of these transfers was.

These transfers resulted in things called "issue ads" against Senator McConnell, who was running for re-election in 1996, and is currently the Chairman of the National Republican Senatorial Committee. These issue ads talk a little bit about the fact that he has voted to cut Medicare. They talk about the fact that he is in lock step with Newt Gingrich, and they instructed viewers to call the Capitol switchboard to alert Senator McConnell that they did not agree with these particular views.

But at the very same time that an ad like this was being run, there were also some coordinated party expenditure ads being run that looked just like this — also with Speaker Gingrich and Senator McConnell. They end with the words, "It's time for a change." That is what makes that a campaign express advocacy ad rather than an issue ad. Here is the problem. This particular issue ad says that it was paid for by the Kentucky Democratic Party. Now the Kentucky Democratic Party did not pay for that ad. Sure they wrote a check, but if you look at the money we were talking about, the Kentucky Democratic Party merely passed through on a daily basis money that was transferred to it from the Democratic National Committee. The Democratic National Committee paid for that ad.

You also have the fact that when the DNC transfers money to state parties, they are saving hard dollars, and it's a complicated formula at the Federal Election Commission. The DNC transferred $342,000 to the Kentucky Democratic Party. If the DNC had paid for those issue ads themselves, they would have had to use $222,000 federal and $119,000 nonfederal, but because the Kentucky Democratic Party has a different formula they were able to pay for those ads at a different rate. Meaning, in the state of Kentucky alone, the Democratic Party saved $75,000 on

their issue ad campaign by running the money on a daily basis through the state party. Multiply that by the twelve other states where this activity occurred and you will understand the financial aspect to this particular program.

The legal problem with this goes back to what we were talking about — about misleading the viewer. Because this money came from the Democratic Party — according to what Mr. Schwartzman said from the Oregon case — the Kentucky Democratic Party was not the true sponsor of that ad. They did not have the money, and they did not exercise any editorial control over the content of those ads. Those ads were hatched in Washington, DC, bought in Washington, DC, and organized and sent out to the television stations from Washington, DC. So you are missing the two critical elements of a disclaimer — who was the source of the funds, and who had editorial control?

But there is also a third disclaimer problem: the same groups who were running those issue ads were also the groups that were consulting on the campaign for Senator McConnell's opponent. So not only does the disclaimer say incorrectly that it was "Paid for by the Democratic Party," what it should have said was "Paid for by the Democratic National Committee, and authorized by Beshear for U.S. Senate [Senator McConnell's opponent]." The ads were coordinated with Beshear's committee, and they were paid for with Democratic National Committee funds. This difference is not "Standing By Your Ads."

SPECIAL PRESENTATIONS

Senator Arlen Specter (R-PA)

Senator Arlen Specter, Pennsylvania's senior U.S. Senator, chairs the Senate Veterans' Affairs Committee and the Appropriations Subcommittee on Labor, Health and Human Services, and Education. He is also a member of the Judiciary and Governmental Affairs Committees.

SENATOR SPECTER: I compliment you on what you are doing here today, on trying to liven up the debate on campaign finance reform. It is something which I think we urgently need, and we will, in my opinion, not have until there is a public demand for it. And at the moment I do not see that public demand, although I think it is gaining just a little momentum. I am heartened by the statistics which show that in the early days of Watergate not much was happening on the polls and later that picked up considerably. And I would like to see the hearings on our Governmental Affairs Committee, and what's going on in the House counterpart, stimulate public interest. So far there is a little, and perhaps we will get more when we get into the soft money.

I crossed party lines in voting for closure on the McCain/Feingold Bill. I have not co-sponsored that bill because I do not agree with a fundamental provision in it about requiring free television time. I know that there are differences of opinion on that. There is a legal argument to be made. The air waves are in public ownership and my own sense is that it would be taking property without compensation of law. I do think it is really important to limit the amounts of monies which were spent, and *Buckley* is a big, big problem. Senator Hollings and I tried for almost a decade to bring out a constitutional amendment against it without any success, because when you tie the First Amendment in, it is just very, very hard to get any political traction on that point.

I have been working on legislation for a long time, consulted with Paul Taylor about a year ago, and consulted with others, Norman Ornstein, and many others, and have decided not to introduce it until we finish the first round of our Governmental Affairs hearings. I have circulated a draft bill which has six points. One, I would end soft money. Secondly, I would define express advocacy to mean commercials which extol the virtues of a candidate or denigrate another candidate. That is an issue which escapes me as to how these commercials are called issue advocacy when they tell all about the virtues of Senator Dole and all about the problems and faults of President Clinton or vice versa, and they are held to be issue advocacy as opposed to express advocacy.

A third provision on the statute bill that I am going to introduce would require affidavits on independent expenditures and to try to make them truly independent. My idea is that if an independent expenditure is to be made, the individual who's making the independent expenditure — the officers of the committee — ought to have to sign an affidavit with a form to be prepared with all the black letter warnings for perjury and the notarization, etcetera, etcetera, and then to file that promptly with the FEC. The FEC then having an obligation to furnish that affidavit to the candidate, the candidate's committee, and require an affidavit from the candidate and the candidate's committee. My own sense is that many if not most of the so-called independent expenditures are not independent at all, and that requiring this series of affidavits will put some teeth into the issue.

The fourth provision of my bill would eliminate foreign transactions which funnel money into the United States campaigns. In our hearings on the so-called Young Brothers transaction with Chairman Haley Barbour we saw an illustration as to how foreign contributions did come into the political committee. My bill would tighten up the federal law to eliminate that.

The best answer that I have seen to stopping a multimillionaire from spending as much of his/her money as he/she chooses would be the statute enacted in Maine which provides for standby public financing, which would say in effect that if there are two candidates we set a limit — my bill does set a limit — and if "A" spends $10 million more, illustratively, then the state or the federal government would match that expenditure. I am not in favor of public financing generally, but I do think that that much public financing would be a good idea. And my instinct is that there would not be much of it required; that there would be more of a deterrent with "A" figuring why spend $10 million because "B" will get it from the federal government.

The sixth provision in the bill that I am going to introduce would impose limitations and require reporting of contributions to legal defense funds for federal office holders and candidates. We have seen in the hearings on Governmental Affairs the Charlie Trie episode of bringing in enormous sums of money for the legal defense fund. There is no reporting requirement. The defense fund held them for a long period of time, so that it never became public until after the campaign was over, and my sense is that contributions to a legal defense fund are first cousins of campaign contributions and ought to be regulated in the same manner — reporting and limitations.

I am up to nine minutes, and that's about as long as any speech ought to be. This is the point where I customarily take off my watch and give my audience a false sense of security that I am paying attention to the time.

I'd be very glad to respond to questions. I'd be equally glad not to respond to questions.

SCHWARTZMAN: You said today, and you said in your floor statement a week or so ago, that you think that its a "taking" to require broadcasters to provide free time. I am wondering if you and your staff considered section 304 of the Communications Act which expressly provides that the broadcasters have an executed written waiver of any property interests and spectrums that are conditions for their license, and how do you think that that provision would not lead to a different result?

SPECTER: Well, I do not think that that provision is dispositive of the issue — sort of a contract of adhesion, this is how you get it, take all the terms and conditions. My opinion is that as broadcast television, broadcast radio, has evolved over the years, there have been enormous investments and a property interest accumulated, and it is really unfair and unconstitutional to go in and say you have to give that in a free way. By that token, you could go in and say that "None of it is yours. We're going to let it go to another licensee if we choose so." Licenses are lost if there is a flagrant violation of a number of the FCC standards for cause, but I think a property interest has attached to what the broadcasters have.

ORNSTEIN: Senator, the logic that property interest is accumulated, let's apply it to digital television where nothing is accumulated and where soon we are going to be seeing a very different and extremely valuable area of the spectrum moving forward. Would your feeling about "takings" be the same with regard to digital television as it is to the existing elements?

SPECTER: Norman, it is not. And an earlier idea I had was to make a trade with the television industry of the new spectrum for a commitment to do advertising. I think that kind of a trade would be appropriate. That's a very valuable new item, and I think it would be fair to say you have to give free time in exchange for this multi-billion dollar commodity. That's a very mixed bag as to what's happened, how much they are going to pay for it, whether they're going to have digital, what is going to be worked out. I see that Commerce is having hearings on that subject.

Senator John Kerry (D-MA)

Senator John Kerry, is in his third term as U.S. Senator from Massachusetts. He is a Vietnam veteran and a former prosecutor.

KERRY: First of all let me talk proudly about the 1996 Senate race in Massachusetts. I take it we have enough time to do some "Q and A" and so forth, and I'd love to do that and perhaps you won't have me as a second dessert in the course of that. But I offer myself up anyway.

This is a subject that has confounded me and been at the center of my efforts since I first came to Washington. I stand before you as the only United States Senator who has been elected three times without taking a dime of PAC money. I began that practice when I first ran in 1984, and I have replicated it. In fact we had the only PAC-free race in the United States of America.

In 1984, because of the pledge that I took, I made PACs a focus of the campaign and forced every other candidate to similarly abandon PAC money. I don't happen to believe, incidentally, that PAC money is inherently evil. I did it as a statement to try to say we need to change the way we fund campaigns, and there is too much money in American politics, and it's too focused on too few groups contributing, and it's the appearance that we have to deal with, not necessarily the reality. In fact, if PAC money was to be some component of the legitimate reform effort, I'd happily join up with that and take it, and in fact even more happily today, because the amount of time it takes and the amount of energy you expend, and the additional cost in not taking PAC money is significant.

In fact, in my race against Bill Weld, I raised more money than any other Senate candidate in the United States of America — $10 million — that is to say incumbent senator. But I ran against a governor who, while I was locked into voting here — and we all know what happens if you miss a vote for a fund-raiser — he was free to carve his own schedule as a governor and go anywhere in the country and raise money. His capacity, therefore, to raise money was actually significantly greater than mine. Which is why my campaign wound up $2 million in debt at the end, notwithstanding the agreement that we reached. We had a significant number of forces driving our ability to be able to reach an agreement, and it's unique. I suppose in many ways it was special even to the nature of our candidacies, of who he was and who I am, where we came from, and how we approached politics. But it was also, candidly, an assessment of our respective political strengths and the ground from which we thought we were going to fight the fight. I mean, anybody who tells you otherwise is kidding.

He perceived the capacity of my wife and our joint holdings to be able to intimidate him with a notion that I had unlimited resources to put in the campaign, and, therefore, anything he could do to try to stop me from doing that was fair game. And I, on my part, had a fundamental aversion from the years when I first ran to spending that kind

of money, number one. And number two I had a fundamental aversion to suddenly acquiring money by virtue of marriage and spending it in my race, and I thought that the unseemliness of it was enough to warrant trying to do this in a different way. So we both had forces driving us toward some kind of an agreement. I also had a third thought which was that if we could get an agreement that encompassed a broader range of reform, then we had a better chance of trying to make a statement with the campaign that was more worthwhile — my giving up whatever advantage I might have for spending more money. And I believed in my candidacy. I really believed that given equal money, given whatever number of platforms, that I was going to reach the people of our state — which I think maybe it's naive and maybe its somewhat idealistic, but I'd be happier being naive and idealistic than being what we have in Washington today, which is cynical and pretty crass about how people go about getting elected. And it seems to me, without any pollyannaish, holier than thou attitudes about it, that I believed the record that I had achieved. And I believed what I was fighting for was more in the mainstream of the citizens of my state than what my opponent was offering, and I was willing to roll the dice on that basis. Obviously we have a lot of candidates in the country who aren't. That's the fundamental problem. It is a question of felt needs.

I remember, when I was an undergraduate at Yale, John Morton Blum. One of his phrases worth remembering was that "All politics is a reaction to felt need." And indeed the more I am a practitioner of the art of politics, the more I recognize the wisdom of what he was saying. One of the reasons the country is so quiet today is obviously the strength of the economy, and the lack of a number of perceived felt needs, even among the people at the lower end of the income scale where traditionally you would have had more coalescence and pushing than you have today.

The same is true, I might add, about campaign finance reform. I think there would be a far greater impetus for political organizing if there were other things happening in people's lives that made them feel that fighting the system was worthwhile because it would somehow affect other things that mattered to them, and then they would care more about the sort of process pieces that are tied to their ability to be able to create that kind of change. They'd care about who's a senator. They would care more about who's a congressman. But right now they don't care particularly, because there isn't enough that they feel those people can do to affect those people who really matter to them right now. And that's, in my judgment, the bottom line that we are trying to deal with in the context of reform today.

So Bill Weld came to our campaign with particular felt needs. And I thought there was a terrific advantage — and I still believe there was — in minimizing the din around us, and maximizing our ability to communicate to the citizens of the state. Therefore, as part of our agreement, we precluded any independent expenditures on our behalf by basically appealing to the media, both of us, in a jointly signed letter saying, "We're asking you to exercise the discretion given to you, which says you don't have to run these ads, and not run them."

And secondly, by each of us agreeing that if it was an independent expenditure that could be clearly defined as favoring one candidate or the other, that the opposite camp had an obligation to go to that independent source and get them to cease and desist. If they didn't cease and desist upon request of the candidate, then it would be credited against the cap of the total amount of money that we could spend. So there was a great incentive for each of us to keep other people out in order to meet our cap. Now we agreed on a cap. I guess we agreed in July of election year, to a cap, believe it or not, of $5 million on media and $1.9 million on the general campaign expenditures for ground operations, get out the vote, or whatever else you're doing — joint campaign, coordinating campaign, etcetera, with no additional moneys from your DNC, RNC, FEC, etcetera, coming in and no independent expenditures.

Some people wrote in the final days that somehow the agreement didn't hold and it fell apart. The truth is it did hold. And it only sort of fell apart marginally in the final day because they attempted some creative accounting which we didn't quite button down tight enough as to whether it was gross purchase or net purchase. We were operating on the basis of gross and by virtue of making it net, they were in effect, able to buy about $400,000 or $500,000 more than we were going to be able to buy. So we simply neutralized that by keeping independent expenditures out. We both kept both of our national parties out. We kept any express advocacy or any kind of issue advocacy out. It was Bill Weld and John Kerry for three months, talking to the state in an unprecedented number of one hour televised debates. And if you talk to anybody in our state, they will tell you that they appreciated it as a wonderful opportunity to really have a couple of people stand up there and talk about the differences that exist in American politics.

Now if I'd had my way, we would have agreed to spend about $2 million and not $5 million. We could have saved each other maybe $4.5 - $5 million in this race. I've almost come to the conclusion that if you're spending equally, or spending nearly equally, I think these ads just cancel themselves out. I think they're sort of stupid. I think that what's happened in America is that people are dependent upon them. The consultants come in. You obviously can't win without them if somebody is negativing you to death. If there are equal negatives out there, it pretty much becomes more people's perceptions, it becomes much more visceral, it becomes much more character judgments, much more based on the free press and people's assessments in the press, on your response to people's felt needs, your definition of those felt needs, and how you have addressed them or will address them.

And finally, the TV debates were far more telling and penetrating than any of those advertisements, and the public is wising up to them, if you will, notwithstanding the wisdom of the American public which I believe is very real and very significant in terms of where I would go in any strategy running for office in the future.

You obviously have to answer to a certain degree, and the Armageddon of fundraising is around the corner, folks. We have seen it escalate every single year I've been here. There is nothing to indicate, in fact all the indicators are to the contrary, that we aren't going to have increased spending this time, increased levels, increased energy in raising soft money, increased involvement by so called independent groups and issue advocacy groups in an effort to sway the elections. I am very simplistic in my approach to all of this. It's not to say that it's successful as an approach, but, I think, an honest approach, and an honest appraisal of where we are in the country.

Forty-nine per cent of the people in our nation believe that special interest groups run Washington. Ninety-two per cent of the people in this country believe that politicians' votes are guided by, affected by, controlled by special interest groups. Eighty-eight per cent of the people in this country believe that people who give money get something back in terms of special favors and special treatment, and the participation of Americans, as you all know better than anybody, is diminishing as those figures go up. So, we spend an awful lot of time and energy and money in an effort to get democracy in Russia or in the Philippines or China, Hong Kong, or wherever it is, and we are literally watching our own democracy just sucked away underneath us by this money, and only honest people are, I think, in the end going to lay out the truth of that. I did in Boston a few days ago and wound up being called "hypocritical" in the newspapers because I still raise money. Of course I still raise money. I owe the bank $23,000 a month because of my efforts not to take PAC money, and I have no choice but to raise money because someone else is going to raise it.

That doesn't mean that you can't legitimately champion reform, and in my judgment real reform is not McCain/Feingold, although I am a co-sponsor, supporter, and will vote for McCain/Feingold. But McCain/Feingold will leave every politician going to people and asking for fairly significant sums of money, and as long as you are left asking people for fairly significant sums of money in American politics, you will always invite the question, "Who gave you what for what?" It's a simple result of the process. Unless you diminish the level of giving to such a diminutive state that it simply sort of crosses a threshold line where there couldn't be any perception of potential interference.

Now, do I think my colleagues are for sale for $2,000? Absolutely not. No, I don't. I think it is ridiculous to assume that somebody is really going to do that. Did someone get their phone answered faster? Yes. But the real amounts of money that affect you are the conglomerate groupings of particular industries that through the various syndicated connections of a particular PAC's giving are not giving $1,000 and $2,000 dollars, but are giving $15,000 or $20,000 and plus soft money. And when you add them all up, if you look at particularly congressman more than senators, they become a very large, what I'll call, "critical mass" of the total of those particular individuals' contributions. So you can have whole segments of industries that are 50 and 60 per cent of the total money going to somebody.

PAUL TAYLOR (Free TV for Straight Talk Coalition): The part of your agreement with Governor Weld to keep outside groups, issue advocacy groups and independent expenditure groups, out...did any of them challenge that? Did any of them go to the television stations with ads, which the stations then rejected?

KERRY: One group challenged it. They briefly ran a few ads. It was a union group, as a matter of fact, and it would have cost me, and been tabulated against me. And I met with them, and we had a very intense, tough meeting. And I told them point blank they weren't helping me. That it was going to hurt me. That I wanted to control my own ads, and so forth. And they finally pulled it, and they stopped, and we basically didn't spend that amount of money. I think it was...I forget...it was a hundred and some thousand dollars at that point.

TAYLOR: But your efforts to enlist the broadcasters?

KERRY: I think most people were duly put on notice by virtue of our agreement. There's another ingredient I neglected to tell you. We had a consortia of the media who came together. We did not dream up the idea of seven to nine debates. They proposed it. And when *The Boston Herald* and *The Boston Globe* and the three TV stations came and said "We're going to have seven debates," it became almost a no-choice situation. Because, clearly, if one candidate or the other refused it you're going to lose your news slot. And they had any number of ways to force the issue and turn the events — from front page stories to editorials to combined efforts. So, if we were going to have a dialogue it was pretty clear both candidates were going to accept that. That significantly altered other people's perceptions about how they might be able to break through.

Once you had that kind of media concentrated policy, I think it was a threat of significant investigative outcome. For instance, if some group came up out of nowhere, I assure you that all three of those stations and the papers would have been all over them. "Where do you come from? Where's your money from? Who are you?." And it would have been conceivably very hurtful because of the level of accountability. So accountability is a critical component of this, which is why in many ways, some of the laws we have today aren't so bad, but we have no accountability to go with it. You've got an FEC that makes a decision a year and a half, two years later, and comes to

somebody and says "Well, you're in violation." And they pay a forty thousand dollar fine for five million dollars of expenditure. Who cares?

Unless you have a capacity by some entity to pipe up during a campaign and say "You're in breach of the standards of fair campaigning," or whatever it is, you behave differently. I guarantee you that Bill Weld's campaign and my campaign were acutely sensitive to the potential of either *The Globe* or *The Herald* or the stations to pillory one of us or the other for somehow being perceived as breaking this or moving in the wrong direction. So the public accountability is a critical component of regulating candidate behavior.

RUSH KIDDER (Institute for Global Ethics): Could you focus on the relationship between finance reform and the negative ads that you mentioned? Because it seems to me that it would at least be theoretically possible to strip all the money out of campaigns, force people to go back to what they used to do, which is precinct ward organization, go door to door with hand-made pamphlets, and still have some of the most nasty and negative campaigns around. And in that way, continue to increase voter cynicism, and drop...lower turnout, and so forth. Is that right, or am I missing something?

KERRY: That is right. No you're not missing anything. Long before the age of television, we had extraordinarily nasty campaigns in America. I mean, go back and read what some of those folks were saying about each other in the 1800's. Actually, what we say today is tame compared to what they were calling each other and saying then. The difference today, in my judgment, is that we have much greater capacity because of the level of scrutiny and the electronic media that are available to us to set the record straight and there's much greater sophistication today. People don't move in the same kind of monolithic blocks, they're exposed to much more. They're not controlled by a Tammany Hall boss, and the union representation isn't as great. There's much greater sophistication about all this. So I don't worry about that.

I think there's a certain self-policing effort that can come through if you've got that equal access and capacity to compete, and if the media are playing a responsible role to really look at the issues, and not at all this sub-strata stuff they get so preoccupied with. I mean, the media is a critical component of this reform effort. They are exceedingly necessary, as they were in Massachusetts, to be able to make this happen. If you have pure muckraking, pure competition, and no willingness to try to share the structure, the media can be totally destructive in your ability to have any kind of control over this. But if, as you had — and I think they deserve more credit than they've gotten — if you had this sort of "Well, we don't care about sponsoring that debate all by ourselves. We're happy to join with our competitor." Now, in this case, they knew with two highly visible individuals, there wasn't going to be any paucity of attention anyway, so they weren't risking that much. In some states, there's not that kind of fierce competition, nor even lust for politics, the way we have it in Massachusetts, where it's a blood sport, not just a participatory process. And so I think it was a safe bet for them, and that made a hell of a difference.

And I would suggest that if you had your principal papers in Nebraska, or in Colorado, and various places joining with the TV stations, saying "We're going to do five debates, and if you're not there, there's going to be an empty chair for every single one of the...," you're going to have five debates. And if they're going to say, you know, "Here's our standard for the kind of ads we think we're willing to accept, or we ought to have, and if you're going to go negative, we're going to give the other guy time to do it." I mean, there are all kinds of ways to police this, folks, without the United States Congress, if we get a little creative energy out there in the media itself. And nothing — and I say this again —nothing will move my colleagues faster than the perception that they're not going to be getting

a free ride that way. Now let's face it — and maybe I'm being more candid than Washington allows for — but the truth is that we all know, some media in this country are very content to have the Senator they have, or the Congressman they have, and they have no intention of creating a fair playing field, because they view it as against their interests, ideologically or otherwise. So you're not going to get any unanimity in that kind of approach either. But it is one avenue that certainly in some places can have an impact.

In our race with Bill Weld, I proposed that we have no negative advertising. And I said "Let's each agree to submit the text of our ads to the stations, and to the other side, a day ahead of time." And if it's viewed as negative, I'm willing to submit to some kind of arbitration on that. And they wouldn't do it. They wanted to go negative. I mean, they purely, clearly wanted to go negative. And they did. They started going negative, early. But again, my campaign proved that you can overcome that. And in the end they got fairly intensely negative, and I would submit to you, that because of the standard that we had achieved in setting up until then — by going fairly negative in the end, I think he hurt himself. And I think it dragged him down a little bit and left our campaign at a higher altitude. And then I think he came back in the end. So there's a virtue to doing this, folks. There's a political plus in doing this.

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