

## OUR DEMOCRACY, OUR AIRWAVES

In July 2003, Senator McCain introduced S. 1497, the Our Democracy, Our Airwaves Act of 2003, co-sponsored by Senators Feingold, Durbin and later, Senator Corzine. This bill amends the Communications Act of 1934 and applies to *commercial, broadcast* television and radio stations. The Act ensures that candidates receive the same low advertising rates that stations give their high-volume, year-round advertisers; establishes the minimum requirements for stations to air candidate-centered and issue-centered programming before primary and general elections; and establishes a voucher system for the purchase of *commercial, broadcast* air-time for political advertisements.

The *Our Democracy, Our Airwaves Coalition*, led by the Alliance for Better Campaigns, supports proposals that require broadcasters to provide increased candidate issue discussion in the weeks before elections. More than 60 national organizations, including the League of Women Voters, are part of this coalition. The following is a summary of **The Case for Free Air Time**, a monograph written in March 2002 by Paul Taylor, President of the Alliance for Better Campaigns. It has been modified to reflect the pending legislation. As counterpoint, the response of the National Association of Broadcasters to the Our Democracy, Our Airwaves Act of 2003 concludes the discussion.

### THE CASE FOR FREE AIR TIME

In our democracy, speech is free but communication is expensive. As the cost of political communication keeps rising, the competitive playing field of campaigns keeps tilting toward candidates who are wealthy or well-financed. In the 435 races for U.S. Congress in 2000, for example, the typical winner outspent the typical loser by nearly three to one during the campaign, and on election day, piled up a victory margin of 70% to 30%-- a landslide. A staggering 98.5% of all incumbents seeking reelection were successful.

Election campaigns are democracy's crown jewel. They build mandates and provide for accountability. At their best, they transform a population into a citizenry. But when money become the arbiter of who gets heard and who gets elected, campaigns serve these functions less effectively than they should. To reconcile this, a system of free air time on broadcast television can be created.

Virtually all of the world's democracies require broadcasters to provide free political air time during the campaign season. In countries that have parliamentary democracies, the free air time typically goes to parties rather than to candidates. Britain and France prohibit paid broadcast advertising on top of the free air time; Canada and Venezuela allow for both. In Britain's 2001 campaign, the Labor and Conservative Parties were each allotted five five-minute segments for the five-week campaign, and the smaller Liberal Party was allotted four segments. The segments aired on BBC as well as commercial networks. In addition, the party leaders held a televised press conference each morning, and they routinely submitted to in-depth interviews on television and radio. The price tag of the entire 2001 election campaign for Britain's 651 member House of Commons (which, in turn, elects the prime minister) was \$60 million. That's 1.5% of what we spent on our 2000 national election.

Free air time would increase the flow and reduce the cost of political communication on the most important medium for politics and democracy-- the broadcast airwaves. To achieve

these goals, a free air time system should require television and radio stations to devote a reasonable amount of air time during the campaign season to issue-based candidate forums such as debates, interviews, town hall meetings, etc. And it should require stations to provide qualifying candidates and parties with vouchers to run a reasonable number of free ads in the period before an election.

By providing a floor of communication opportunities to candidates regardless of their financial circumstances, [free air time] would open up the political process to those currently priced out of the market. And by creating [additional] forums that allow for a free exchange of ideas among competing candidates, it would reduce the relative importance of moneyed special interests. These steps would provide citizens with more choice, more information, more power.

Our government gives broadcasters free licenses to operate on the public airwaves on condition that they serve the public interest. During the campaign season, broadcasters sell access to these airwaves to candidates at [above minimum] prices. Candidates [must] raise special interest money to purchase access to the airwaves. As Congress grapples with the problem of money and politics, the focus of legislative reforms in recent years has been on proposals to reduce the supply of political money-- chiefly by banning "soft money," the large donations that go to political parties. Because these unlimited checks have the greatest potential to create the appearance or reality of corruption, banning them is a necessary first step. But it is only a first step. If Congress is to look for a more comprehensive solution, it must address the need to reduce the demand for political money as well. Free air time is the most promising practical and equitable way to achieve that goal.

### **Television, Money and Politics**

The local television station is where the biggest chunk of money in modern campaigns winds up. In 2000, television stations took in an estimated \$1 billion of the estimated \$4 billion in overall campaign spending by candidates, parties and issue groups at all levels of politics-- federal state and local.

Between 1980 and 2000, the amount of money spent on political ads more than quadrupled, even after adjusting for inflation. A generation ago, political advertising was pretty much the exclusive province of candidates. Since then, campaign finance loopholes permit parties and interest groups to pay for campaign ads with funds that are not subject to the regime of contribution limits that applies to candidates. By 2000, more than 40% of the 880,172 campaign ads that aired in federal races in the nation's top 75 media markets were sponsored not by candidates but by interest groups and parties. The Center for the Study of Elections and Democracy at Brigham Young University looked at 17 media markets across the country in 2000 where there were competitive congressional races and found that the average cost of a 30-second political spot tripled [from approximately \$400 to \$1200] from the end of August through the end of October 2000. In non-election years, ad prices during that same time period increase by roughly 20%.

This occurred despite a law Congress passed in 1971 that was designed to insulate candidates from these classic supply-and-demand pressures. Known as the "lowest unit charge" law, it requires that television stations, as a condition of receiving free licenses to use the public airwaves, must offer candidates the same low rates they give their high volume, year-round commercial advertisers. But the law never provided candidates with the safeguards that its

name promises. Candidates need assurances that their ads will run exactly where and when they place them. Stations charge high premiums for such “non-preemptible” time, and nothing in the lowest unit charge law prevents them from doing so.

After the 2000 campaign, the U.S. Senate approved an amendment to the McCain-Feingold campaign finance bill that would allow candidates to purchase “non-preemptible” time at the lower “preemptible” rates most product advertisers use. The lopsided vote (69 to 31) [was] in favor of this amendment. However, the broadcast industry successfully lobbied to remove that provision when the companion Shays-Meehan campaign finance bill was taken up in February, 2002, by the House of Representatives.

The trouble at the intersection of television, money and politics isn’t limited to the rising cost of ads. The other problem is the declining amount of time that broadcast television devotes to substantive coverage of issues, debates, conventions, candidate speeches and the like. The less exposure candidates receive from “free media” coverage, the more they must rely on paid ads to reach the broad audience that only television delivers.

The broadcast industry’s retreat from substantive campaign coverage stretches from coast to coast; it has affected the national networks as well as local stations. A summary of findings from the 2000 campaigns:

- The three national network nightly newscasts devoted 28% less time to coverage of the 2000 [presidential] campaign than they did to the 1988 campaign.
- The time devoted by the networks to coverage of the two national party conventions in 2000 was down by two-thirds from 1988.
- Just 12%, a record low, of all presidential campaign coverage on the nightly network newscasts was devoted to the candidates’ own words. Reporters received 74% of election news air time and the remaining 14% was divided among voters, pundits, pollsters, campaign staffers and others.
- The length of the typical presidential candidate sound-bite on the nightly newscasts also set a record for brevity-- 7.8 seconds. In 1968, it was 43 seconds.
- Of the campaign stories that the national network nightly newscasts did air in 2000, 71% focused on the horse-race rather than on the issues.
- A total of 22 television debates were held by presidential candidates during the 2000 primary campaign, but of these just two aired on a national broadcast network, neither in prime time. The other 20 were shown only on cable, public television or a local broadcast station in the city where the debate was held.
- For the first time ever, two of the four national networks (Fox and NBC) declined to carry all of the general election presidential debates-- opting instead to counter-program with sports and entertainment.
- The typical local television station in a large or medium sized city aired just 45 seconds a night of candidate discourse in the month before the 2000 election, and the national networks aired just 64 seconds a night-- both far below a five-minute a night voluntary standard recommended by a White House advisory panel charged with updating the public interest obligations of broadcasters.

Broadcasters have lost substantial slices of their audience. Fewer people than ever followed the campaign on broadcast television, while more people than ever followed it on cable and

the Internet. [However,] ABC, CBS, and NBC nightly network newscasts still draw a combined audience of 30 million. CNN averages just over 1 million and FNC just under 1 million. Network television may not be the colossus it once was, but it's still the place that sets the tone for our ongoing conversation of democracy.

### **Broadcasters and the Public Interest**

Broadcasters have always been public trustees as well as private businesses. Uniquely, they have been granted the privilege of using a scarce public asset--the airwaves-- to transmit their signals. In return for this free grant of airwaves, broadcasters have agreed to serve "the public interests, convenience and necessity"-- and the courts have consistently determined that this compact places limits around their First Amendment freedoms.

When the federal government established this public trustee compact in the Radio Act of 1927 and refined it in the Communications Act of 1934, its motives were not to shackle the industry but to enable it to flourish. [There] are not enough frequencies available for all who wish to use them [and] no way to prevent one station from poaching on the frequencies used by a rival station. A gatekeeper was needed. So the federal government established a licensing system that granted a broadcaster the exclusive rights to an assigned frequency within a defined geographic area, but also made all broadcasters public trustees. If the airwaves used by the broadcasters were sold at auction-- the way the federal government has been auctioning off other portions of the spectrum in the last decade to cellular phone companies and other wireless communications technologies-- they would bring in a staggering \$367 billion to the public treasury.

In the area of political discourse, there are three laws on the books. A *reasonable access* provision requires that stations sell commercial air time to candidates who can afford to pay for it; an *equal opportunities* provision requires that stations which have sold spots to one candidate must provide his or her opponent with the chance to purchase comparable air time at a comparable price; and the *lowest unit charge* provision is supposed to assure that candidates will receive the same low rates as stations' best year-round product advertisers.

There have been many proposals over the years to broaden these political discourse requirements to include mandatory free air time. But key congressional leaders who are averse to the idea of free air time threatened to cut off appropriations to the FCC if it proceeded with a free air time rule-making. Some congressional leaders supported the concept but felt strongly that it should come about through legislation rather than regulation. The FCC backed off. A White House advisory panel recommended that television stations voluntarily air a minimum of five minutes a night of "candidates-centered discourse" in the month preceding all elections. With just a handful of exceptions, however, the nation's 1,300 local television stations ignored this call for voluntary action. The typical local station aired just 45 seconds a night.

### **A Free Air Time Proposal**

Any free air time system should have two related-- but distinct-- objectives. It should reduce the cost of candidate communication and it should increase the flow of political information on the broadcast media. [Editor's Note: To make this study more relevant, we have replaced certain elements proposed in the original monograph, **The Case for Free Air Time**, with the actual legislation proposed in S. 1497, the Our Democracy, Our Airwaves Act of 2003, currently under consideration in Congress. These elements are noted by {brackets} ].

### ***I. A Voucher System for Free Political Ads***

The free air time system would provide vouchers for a reasonable amount of free advertising time to candidates and to political parties. The candidates who would receive direct grants of vouchers would be those running for U.S. House and Senate seats in a general election who had first raised a threshold amount of contributions in small donations. {Also eligible for vouchers are candidates for nomination for election, or election, to the Office of President}. In addition, each of the two major political parties would receive large block grants of broadcast vouchers in each election cycle-- which the parties could use to air their own ads, or pass along for use by any general election candidate the party supported for any local, state, or federal office. Minor parties that met qualifying thresholds would receive smaller blocks of free air time vouchers. The voucher system would be financed by a spectrum usage fee {ranging from 1/2 of 1% to 1% of } the gross annual revenues of the nation's 1,300 local television station licensees and 13,000 local radio station licensees.

### ***II. A Voters' Time Requirement***

All television and radio licensees would be required to air a minimum of two hours a week of {candidate-centered programming or issue-centered programming} in the month preceding every election. At least half of these segments would have to be aired in {evening} prime or drive time. {None aired between midnight and 6:00 a.m. would be counted toward the minimum}. The formats would consist of debates, interviews, candidate statements, {issue statements, and other program formats that provide for a discussion of issues by the candidate, or of any ballot measure in the forthcoming election. Paid political advertisements are excluded.} Within these broad guidelines, all decisions about when the segments should air, how long they should be, what races they should focus on and what formats should be used would rest with local stations.

A free air time system would not place limits on how much additional broadcast advertising a candidate could purchase. Some would argue that the absence of such a limit fatally detracts from the ability of the proposal to reduce the role of money in politics. But others would argue that by at least providing a floor of communication resources to all candidates, this approach would help level the playing field. Research on campaign spending shows that the most important variable in determining whether a race will be competitive is not how much money the better financed candidate spends, but how much money the less well-financed candidate spends. Moreover, the "voters' time" provision of this free air time system would also provide opportunities for all candidates, regardless of the size of their campaign war chests, to get their message out over the airwaves in debates, issue forums, etc.

### **How would the voucher system work?**

Candidates could use their vouchers on whatever television or radio station was most advantageous to them, but they would "pay" prevailing market rates. So, for example, it might cost a candidate in New Mexico \$300 worth of vouchers to air a 30-second spot on the local 6:00 news, while a candidate in New York city might have to spend 10 times that many vouchers for a similar spot on the local news there. This creates real-world pricing incentives that will result in the most politically efficient and market-friendly use of the vouchers. Moreover, because the vouchers would be financed by a gross revenue tax on broadcasters, all local stations would share an equal financial burden, regardless of how many candidates redeemed vouchers at their stations.

### **How would candidates qualify for vouchers, and how many could they receive?**

To qualify, a congressional candidate would have to raise at least {\$25,000} in donations of not more than {\$250} apiece. Once the candidate met that qualifying threshold, all donations of {up to \$250 per individual} would be matched in broadcast vouchers on a {three}-for-one basis, up to a limit of {\$375,000} per House candidate. So if a House candidate raised \$125,000 in small donations, he or she would receive the maximum {\$375,000} in broadcast vouchers. The limit for Senate candidates would {be \$375,000 multiplied by the number of Representatives from the State from which the individual seeks election.} {Presidential candidates would qualify to receive broadcast vouchers in the same way they qualify to receive partial public financing for their primary election campaigns and full public financing for their general election campaigns. Candidates for their party's presidential nomination receive \$1 in broadcast vouchers for every \$1 they receive in federal matching funds under the presidential public financing system. Candidates for presidency in the general election receive 50 cents in vouchers for every \$1 they receive in federal funds. The use of these vouchers does not count against the expenditure limits in the presidential public financing system. The presidential voucher system does not go into effect until the 2008 campaign.}

### **Why distribute additional large blocks of vouchers to the political parties?**

First, it is a way to get vouchers to thousands of state and local candidates without having the federal government trying to micro-manage which races in which states in which years should get what quantity of vouchers. Let the parties make those allocation decisions; it's their business. Second, it is a way to create a "secondary market" in vouchers-- in effect, turning them into a fungible communications asset. Suppose a U.S. House candidate is running in an urban district where it doesn't make sense to use broadcast advertising because the cost is prohibitive. That candidate trades her vouchers into her party, in return for an asset that the candidate would find more cost-effective, such as direct mail. The party, in turn, makes her unused vouchers available to a candidate in another district who can make more efficient use of them. Finally, a political party is the one permanent political institution that has an ongoing interest in electing challengers. If parties distribute their vouchers wisely, more campaigns will become more competitive. One way to think of these large block grants of party vouchers is as a clean replacement for soft money. What is objectionable about soft money is how it is raised (in large donations from contributors with special interests.)

### **Aren't these vouchers public financing of campaigns by another name?**

Yes. The difference is that public financing systems are paid for by the taxpayers, whereas vouchers represent a return to the taxpayers on a public asset they already own, the broadcast spectrum. Given the opposition of many members of Congress to taxpayer-supported public financing systems, vouchers may be a more politically achievable way to put public resources into the hands of candidates. But there is no reason that free air time and public financing cannot co-exist, or be blended into one system.

### **Won't the free vouchers mean more political ads, on top of the glut we already have?**

Probably. For better or worse, political ads are what most candidates want to spend their money on-- the brevity, the repetition and the emotional punch make them the campaign weapon of choice in our noisy, short-attention span culture. But it would not be a one-for-one increase. For one thing, if broadcasters are required to distribute {\$750} million in free ad time inventory during the campaign season, it will drive up the price of paid political ads, making them less cost-efficient. Also, the law of diminishing returns operates with political

advertising, as it does with most things. [Editor's Note: S. 1497 proposes that in 2004, the amount of vouchers disbursed shall not exceed \$750 million, of which not more than \$650 million in vouchers will be available for the candidates, and not more than \$100 million in vouchers will be available for the political parties.]

**Would the vouchers be available for use in primaries as well as the general election?**

[Not for candidates for the House or Senate.] Even though the great value of the vouchers is that they remove barriers to entry into the political process, any voucher system must have a reasonable qualifying threshold so that it does not become a magnet for candidates who have no viable base of support but who want free access to television and radio. Having to win a party primary is one such reasonable qualifying threshold. In addition, the block grant of vouchers to parties would be problematic in the context of a primary. Parties tend to support incumbents over challengers in intra-party fights; they would have an inherent bias problem if they were in a position to distribute vouchers to primary candidates. These conflicts do not arise in a general election, when the party's sole interest is in maximizing the number of candidates it elects. {Candidates in a primary election for the Office of President would be eligible for vouchers.}

**Should there be format restrictions on ads paid for with vouchers?**

Very few. Such restrictions would rub against the culture of unfettered political speech that has always been at the heart of our campaigns as well as our First Amendment.

**What about third party candidates-- should they be included in the voters' time segments, and should they get vouchers for free ads?**

Any third party congressional candidate on the general election ballot would qualify for vouchers in the same way the major party candidates would qualify-- by meeting the threshold and raising money in small donations. [Vouchers will be disbursed to minor party committees if that party has candidates who are eligible for election in at least 22 House districts or to the Senate in at least 5 States.]

**Would a free air time bill be constitutional?**

More than 70 years of legislation, regulation and court rulings argue strongly that it would be constitutional. In 1969, the Supreme Court held that "it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas...rather than to countenance the monopolization of the market," and thus, it is "the right of the viewers and listeners, not the right of the broadcasters, which is paramount." (*Red Lion*, 1969). In the *FCC v. League of Women Voters of California* (1984), the court held that the government has a compelling interest in ensuring that "the public receives through the [broadcast] medium, a balanced presentation of information on issues of public importance that otherwise might not be addressed if control of the medium were left entirely in the hands of those who own and operate broadcasting stations." In *Buckley v. Valeo* (1976), the court observed that "efforts to 'enhance the volume and quality of coverage' of public issues through regulation of broadcasting may be permissible where similar efforts to regulate print media would not be." And in upholding the "reasonable access" provision of existing law against the broadcasters' First Amendment challenge, the court noted that the provision makes "a significant contribution to freedom of expression by enhancing the ability of candidates to present, and the public to receive, information necessary for the effective operation of the democratic process." (*CBS v. FCC*, 1981). Over the years, the broadcast industry has mounted multiple challenges to the "scarcity rationale" for regulation, arguing that in an era of proliferating

information technologies, what broadcasters provide is neither scarce nor unique. But the court has taken the view that scarcity persists because there are still many more people who want to broadcast over the airwaves than there are available frequencies. As for the Fifth Amendment “takings” argument, the courts have long held that broadcasters have no “property interest” as a result of their licenses to use the airwaves, and thus there could be no takings.

**Should the free air time requirements be applicable to cable systems as well as to broadcasters?**

Because cable television is not constrained by the scarcity of the electromagnetic spectrum, a free air time mandate imposed on cable (or satellite) operators would most likely be subject to a more exacting judicial review than would a mandate imposed on broadcasters. The government would have to show that it has a compelling interest in the regulation and that the regulation is narrowly tailored to achieve the government’s purposes.

**Response of the National Association of Broadcasters**

*Alliance for Better Campaigns Says: Advertising is the driving force behind rising campaign costs. This forces politicians to spend time raising money.*

**Broadcaster response:**

1. *Free timers lump issue ads and candidate ads together. This distorts the numbers and inflates the effect advertising has on campaign budgets.* Free air-time advocates would like you to believe that political candidates are forced to raise money in order to pay for billowing advertising costs. To evidence this, they cite a rising amount of dollars spent on political ads over the last thirty years. These figures actually include the costs of third party issue ads – entities that would not be eligible for free time.

2. *In reality, while the cost of campaign advertising has indeed risen over the past thirty years, so too have all other campaign costs. The percentage that advertising comprises of campaign’s budgets has remained constant over the past ten years .*

- In 1998, the median percentage invested by Senate candidates on television and radio commercials was 41 percent—just as it was in 1992. Put another way, while the amount spent by Senate candidates on television and radio advertising has increased since 1990, the percentage of total spending represented by those ads has remained remarkably constant.
- In 1990, the average House incumbent spent just 20 percent of his or her campaign treasury on television and radio advertising. The typical challenger devoted 27 cents out of every dollar to television and radio commercials, while the average open-seat candidate spent 36 cents out of every dollar on such ads. These numbers have also remained constant over the last decade.

- These figures include not only the cost of air-time but all consulting and production costs associated with the commercials.
- Both incumbents and challengers spent significantly more on office overhead—rent, staff costs, telephones, leased automobiles, travel, etc.—than they spent on their commercials.

3. *Broadcasters already provide candidates with significant discounts on advertising time.* In 1971, Congress passed the Lowest Unit Charge Law which entitles federal candidates to receive the “lowest rate of the station for the same class and amount of time for the same period.” On average, this discount provides candidates with a discount of almost 30%. Mandating free time on top of this discount simply goes too far.

4. *Candidates will continue to spend the same, if not more money on campaigns. Any dollars candidates save through free time will be spent in one place -- on more advertising.*

***Alliance Says: A 1% tax on broadcasters’ spectrum would carry negligible costs.***

**Broadcaster response:**

1. *A one percent tax would result in a \$119 million dollar tax on radio stations alone.* BIA Financial Network, Inc. (BIAfn) estimated 2001 annual radio revenues at \$11.9 billion, meaning the proposed tax could be as much as \$119 million.

2. *Using a similar projection for television stations finds that the provision would amount to a \$190 million dollar tax.* BIAfn estimated 2001 annual television station revenues at \$19 billion, meaning the provision would result in a \$190 million tax on television broadcasters.

3. *This means that, taken together, the provision would amount to a tax of over \$300 million.*

4. *Worse yet, consumers will endure much of these costs.* As broadcasters attempt to recoup lost revenue, ad rates for commercial advertisers will likely increase. Commercial advertisers, such as small businesses, will then pass these costs on to their customers in the form of higher prices. At best, the final result will be higher prices for consumers; at worst a slackening of demand and a pinch on small business.

5. *Finally, the above numbers are conservative and only account for the spectrum tax.* The other free time provision, mandating two hours per week of coverage, will further squeeze broadcasters’ limited advertising revenue. It is impossible to estimate the financial impact of that onerous provision.

***Alliance Says: Broadcasters are diminishing their coverage of elections.***

**Broadcaster Response:**

1. *Broadcasters already provide hundreds of hours of voluntary free time through news coverage, interviews, the airing of debates, voter registration drives, and other activities.* Local stations sacrifice advertising revenues in order to fulfill these activities.

2. *Voters are satisfied with broadcasters’ coverage of elections.* According to a study

conducted in late October 2002 by the research firm *Wirthlin Worldwide*, more than eighty percent of registered voters believe local broadcasters provide “the right amount” or “too much” coverage of elections.

3. *Candidates routinely turn down the voluntary free air-time that stations make available.* Before mandating that candidates receive free subjective advertising, where the candidate makes untested and unchallenged assertions about their own records, candidates should first begin availing themselves of the opportunities for objective political discourse that is already available.

***Alliance Says: Broadcasters’ digital television spectrum and the public interest obligation justify a free air-time mandate.***

**Broadcaster response:**

1. *Local broadcasters take their obligation to serve the public very seriously.*

2. *A recent study by NAB found that local stations contributed \$9.9 billion dollars worth of service to their communities in 2001 alone.* This number included the value of money and goods raised for charities and disaster relief as well as time contributed for the airing of Public Service Announcements.

3. *The federal government loaned local television stations a swath of spectrum in order to make the digital television transition possible.* This was so stations could, during the digital television transition, broadcast simultaneously in both analog and digital in order to avoid cutting off service to their viewers. Once the transition is complete and stations are sending out only a digital signal, broadcasters will turn off their analog transmissions and *return their analog spectrum to the government.*

Edited by LWVFA Program Directors Rona Ackerman and Rita Koman, July 2004

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