Before the Committee on Rules and Administration

United States Senate

Hearing on S. 1285, The "Fair Elections Now Act"

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Prepared Statement of Scott E. Thomas

Chairman Feinstein and Members of the Committee. Thank you for the opportunity to testify at this hearing. I appear here today in my individual capacity. I currently lead the Political Law Practice at the law firm Dickstein Shapiro LLP. Before that, I served 19 years as a commissioner of the Federal Election Commission (FEC), including four terms as Chairman. Prior to my appointment as a commissioner, I served in various legal capacities at the agency. Perhaps of most relevance to the Committee today, I witnessed first hand the FEC's implementation of the presidential public funding system. Based on my experience, I hope to provide some helpful analysis of S. 1285, the Fair Elections Now Act.

My comments will be confined to the following areas: (1) practical considerations regarding implementation of the legislation; (2) areas of the bill that warrant further review to assess possible unintended consequences; and (3) possible economic and legal concerns if broadcasters are required to provide non-preemptible lowest unit charge time to candidates and parties at preemptible rates.

The Bill makes public funds available in primarily two ways to fund the primary and general campaigns of Senate candidates who raise qualifying contributions pursuant to a fundraising threshold. A base payment plus so-called "fair fight" funds to counter opposition resources above certain levels are made available to cover the bulk of campaign costs. In addition, vouchers to cover broadcasting costs up to a certain level are made available for the general election. Finally, the Bill includes several Communication Act changes that require broadcasters to provide airtime at reduced rates.

Practical considerations

1. Paying for administration of the program

The FEC will shoulder the burden of reviewing initial applications of candidates, making certifications, reviewing additional reports that will be required of non-participating candidates, and conducting audits of 30% of the participating candidates. Having seen the hardworking staff of the FEC try to do more with insufficient resources, I would urge the Committee to conduct a careful analysis of the additional resources the FEC will require to carry out these functions.

My rough estimate is that an additional 10 auditors would be needed just to carry out the audit function. I would guess that the 33 or so Senate races each cycle will generate about 60 participating candidates who go all the way to the general election, plus another 70 that will participate in the various primary elections. Of this total of 130 participating candidates, 30%, or about 40 campaigns, would have to be audited by the FEC under Sec. 106 of the Bill. The FEC currently has about 30 line auditors who carry out the audits relating to the presidential public funding program *plus* the other audits generated "for cause" pursuant to 2 U.S.C. § 438(b).[1] The FEC's budget documents indicate the agency performs about 40-45 "for cause" audits per election cycle.[2] Assuming only about 10 Full Time Equivalents (FTE) are utilized to carry out the "for cause" audits, this suggests that 10 auditor FTE would be needed for the audit function under S. 1285. At a cost of approximately $100,000 in total annual personnel costs per auditor, and an additional cost of, say, $50,000 per year for overhead costs for each new hire, a coarse estimate of $1,500,000 per year for the auditing program emerges.

My point here is simply that the Committee should be sure to get assessments of the agency needs at the FEC (and the FCC) so that the various new functions assigned can in fact be carried out if S. 1285 passes.[3] The rough estimate just outlined may be short of the projected costs, and Members should have an accurate assessment of the administrative costs when debating the merits of the Bill.

2. Effective date

Sec. 403 of the Bill makes most of the provisions effective January 1, 2008. If the intent is to have the legislation apply to candidates seeking the Senate in the 2008 elections, there will be significant difficulty in getting the program in place in time to be of real use. The FEC and the FCC will have to adopt regulations, forms, and internal procedures to carry out numerous new functions. Under S. 1285, a candidate's qualifying period can begin 180 days before a primary.[4] Meanwhile, several states will hold Senate primaries in the first half of 2008.[5] Even if the Bill passes by the end of this month, it will be asking a lot to have the FEC and the FCC ready to administer the law when candidates are ready to start using the law.

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[1] Under this provision, committee reports are reviewed for various types of apparent violations. According to internal thresholds established by the Commission, if a committee's apparent problems suggest there may not be substantial compliance with the law, an audit can be approved if there are at least four votes.

[2] FEC FY 2008 Performance Budget (Feb. 5, 2007), p. 14, *available at* http://www.fec.gov/pages/budget/fy2008/fy2008cbj_final.doc.

[3] Section 202 of the Bill creates a new § 315A of Title 47, United States Code. Under paragraph (f)(2)(B)(i) the administrative costs of the FCC and the FEC for the voucher program can be paid from sums generated by a "spectrum use fee" in the amount of 2% of each broadcasting station's gross advertising revenues per year. This does not address the administrative costs of the FEC for the public fund grant functions.

[4] *See* secs. 501(2), (3) and 503(a), created in Sec. 102 of S. 1285 (defining Fair Elections Qualifying Period and Fair Elections Start Date and specifying eligibility for allocation from the Senate Fair Elections Fund) .

[5] In the 2006 cycle, Texas and Illinois had March primaries for congressional offices.

3. Funding the Senate Fair Elections Fund

The Senate Fair Elections Fund would be funded primarily from (1) 10% of the proceeds generated by the sale of airwave spectrum and (2) proceeds generated by a 2% annual spectrum use fee assessed on each broadcast station's gross advertising revenue not needed for the broadcast voucher subsidy.[6]

The Congressional Budget Office estimates that spectrum auction proceeds for fiscal years 2007-2011 will aggregate at around $28 billion.[7] Ten percent of that amount at an annualized level would be about $700 million ($2.8 billion divided evenly over four years).

As for the proceeds from a 2% spectrum use fee from broadcast stations, one recent study indicated broadcasters take in about $65 billion per year.[8] Using that figure, the 2% fee would generate about $1.3 billion per year. My projection is that relatively little of the $1.3 billion would be needed for the voucher program and, thus, most would be available for the Senate Fair Elections Fund.[9] With a formula driven by the number of congressional districts in a state, the voucher program could consume approximately $29 million every two years (435 districts times $100,000, multiplied by 2 candidates for each race, multiplied by 1/3 to represent the number of actual Senate races each cycle). I would estimate, though, that about 1/10 of the Senate campaigns will not use the public funding approach, so my rough calculation is that the voucher program will drain only about $13 million per year from the $1.3 billion in projected annual proceeds generated by the spectrum use fee.

An annualized total of $2 billion—$700 million from the spectrum sale (at least for the next four years) plus $1.3 billion per year from the spectrum use fee—should be enough to easily pay for the base funds that S. 1285 contemplates. All told, Senate candidates in the last several election cycles have not raised or spent anywhere near that rate.[10] Nonetheless, when one takes into account the "fair fight" funding available under new sec. 509(a)(1)(B) to counter opposition funding, the potential exists for rather dramatic payouts well in excess of what candidate

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[6] New sec. 502(b) created by sec. 102 of S. 1285; new sec. 315A(f)(2)(B)(ii) created by sec. 202 of S. 1285.

[7] *The Budget and Economic Outlook: Fiscal Years 2008-2017* (Congressional Budget Office, Jan. 2007), p. 64, *available at* http://www.cbo.gov/ftpdocs/77xx/doc7731/01-24-BudgetOutlook.pdf.

[8] "Funding Clean Elections" (U.S. PIRG, March 2007), p. 12, *available at* http://www.uspirg.org/uploads/0x/GP/0xGPaTDMJTpKdsxgW7vlHw/Funding-Clean-Elections.pdf. (citing Jack Loechner, "2006 May See $292 Billion in Advertising Expenditures" (Center for Media Research, Jan. 3, 2006)).

[9] Under new 47 U.S.C. § 315A created by sec. 202 of S. 1285, each participating candidate could receive vouchers worth $100,000 multiplied by the number of congressional districts in the State. In California, each participating Senate candidate would be entitled to $5,300,000 in vouchers.

[10] The FEC reported on November 2, 2006 that through October 18, Senate candidates participating in the general election had raised about $457.4 million. "Congressional Campaigns Spend $966 Million Through Mid October," (FEC Press Release, Nov. 2, 2006). The FEC Press Office recently indicated via telephone that the final Senate receipts figure for the cycle was $564.5 million.

campaigns would be receiving for base funds.[11] The example regarding California is telling. While the public funding for a California candidate's primary and general election base amounts would total about $14.2 million, the total when potential "fair fight" funds are added goes up to about $42.5 million. If both major party candidates in a hotly contested race draw the maximum available for base and "fair fight" funds, the total is $85 million—just for the California Senate race. When the costs for all other Senate races in a given cycle are added in, the numbers start inching toward payouts in the $1 billion range every two years. If the revenues from the spectrum sales and spectrum use fees truly can sustain a $2 billion per year pattern, there should be no funding problem.[12]

But before considering the money 'in the bank,' Members must anticipate that there will be stiff resistance to using 10% of the spectrum auction proceeds and assessing a 2% tax on broadcaster advertising revenues. There are many competing potential uses for spectrum proceeds, and a 2% assessment for broadcasters will seem like a hefty burden on the 'bottom line.' Members contemplating approval of a Senate campaign funding program might want to consider other funding alternatives, like a straight appropriation based on program needs calculated on a biennial basis.

Potential unintended consequences

1. The 'fringe' candidate factor

The Bill sets the threshold for qualifying for the program benefits as follows: A major party candidate must obtain qualifying $5 contributions numbering 2,000, plus 500 for each congressional district (beyond one) in the State.[13] In California, this would amount to 28,000 contributions of $5 each (2,000 plus 52 X 500). In Utah, this would amount to 3,000 contributions of $5 each (2,000 plus 2 X 500). This may prove to be a relatively easy threshold to meet. The benefits of a qualifying candidate include primary election base funds of $5,728,500 in California ($750,000 plus 52 X $150,000 times 67%) and $703,500 in Utah ($750,000 plus 2 X $150,000 times 67%).[14] The general election base funds for a qualifying candidate are $8,550,000 in California and $1,050,000 in Utah.[15] These are rather attractive incentives for candidates who might be considered 'fringe.' It would be prudent to carefully research how easily candidates could reach the qualifying threshold to assure that it is not going to generate more qualifying 'fringe' candidates than intended.

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[11] Under new sec. 511, created by sec. 102 of S. 1285, the "fair fight" funds would be available to counter the advantage an opponent has in opposition funds, which includes independent expenditures and electioneering communications helping such opponent. The total amount of "fair fight" funds could not exceed 200% of the base level allocation already received from the Senate Fair Elections Fund.

[12] Indeed, a logical criticism may develop at some point if the funds being collected for the Senate Fair Elections Fund (and for the Political Advertising Voucher Account) are far in excess of what is needed for the various payments and vouchers issued under the legislation.

[13] Sec. 505(a), created by sec. 102 of S. 1285.

[14] Sec. 510(c)(1), (d), created by sec. 102 of S. 1285.

[15] Sec. 510(c)(3), (d), created by sec. 102 of S. 1285.

2. Opposition spending may move into gray legal areas

The bill offers "fair fight" funds to candidates who face a disadvantage when facing an avalanche of so-called opposition funds.[16] The opposition funds would be calculated by including "independent expenditures" and "electioneering communications" helping an opponent. Because the definition of "independent expenditure" under existing law requires the presence of content "expressly advocating" the election or defeat of a clearly identified candidate,[17] and because "electioneering communications" require reference to a clearly identified candidate,[18] it is likely that opposing groups wanting to avoid triggering "fair fight" funds will move toward more ambiguous advertising that would qualify as neither "independent expenditure" nor "electioneering communication" messaging.

The FEC currently seems to be using its regulatory definition of "expressly advocating," which includes a communication that "taken as a whole . . . could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because . . . the electoral portion of the communication is . . . suggestive of only one meaning . . . and . . . [r]easonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action."[19] While this definition reaches more political communication than the much discredited 'magic words' construction that some courts and some commissioners followed for several years, it still leaves room for clever campaign strategists to craft messages that escape the "independent expenditure" confines.

One example of this evasive tactic would be messages that avoid reference to a clearly identified candidate. The FEC regulations define "clearly identified" in this context to mean:

> the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "the President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic presidential nominee" or "the Republican candidate for Senate in the State of Georgia."[20]

A message simply saying, "Anyone against our President is bad for America" or "We can't stand another supporter of the Iraq war," probably would escape treatment as an ad making reference to a clearly identified candidate. Note that such an ad also would escape treatment as an "electioneering communication" for the same reason.

In a particular race where the defining issue is support for the President or the Iraq war and the candidates' positions are well known, words like those quoted above, coupled with strong

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[16] New sec. 511, created by sec. 102 of S. 1285, lays out the method for determining "fair fight" fund eligibility.

[17] 2 U.S.C. § 431(17).

[18] 2 U.S.C. § 434(f)(3)(A)(i)(I).

[19] 11 C.F.R. § 100.22(b).

[20] 11 C.F.R. §100.17; *see also* 2 U.S.C. § 431(18).

rhetoric about the issue, could have a dramatic impact. In the context of S. 1285 and the "fair fight" funds provision, opponents of a participating candidate could rack up *unlimited* spending for such ads without triggering any "fair fight" payments to the candidate detrimentally affected.

I raise the issue for the Members today so that some thought can be put into whether there are better ways to define some of the terms in the federal campaign finance statutes.[21] There truly ought to be ways to distinguish election-related communications that cannot fairly be deemed pure legislative advocacy or pure educational messaging. Perhaps this legislative vehicle can serve to move in that direction. At a minimum, because there is a potential for evasion of the intended effect of the "fair fight" funds, there should be careful thought about whether the current provisions are adequate.

Practical and legal considerations regarding requirements imposed on broadcasters

1. The economic pressures on broadcast (and cable and direct broadcast satellite) businesses

The Bill would require that broadcasters providing airtime to participating Senate candidates do so for 80% of the lowest unit charge (LUC) for preemptible time.[22] It would require that LUC for premptible time also be made available to a national committee of a party for use "on behalf of" a candidate.[23] The Bill also would mandate that the time made available to legally qualified Senate candidates in fact be non-preemptible.[24] In addition, as noted earlier, S. 1285 sets up a spectrum user fee that requires payments from broadcasters of 2% of their gross advertising revenue each year.

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[21] The current state of the law is rather convoluted. Depending on the legal circumstances, the FEC must apply various tests, including: whether the activity was "in connection with" an election (*see* 2 U.S.C. § 441b); whether a transaction was "for the purpose of influencing" a federal election (*see* 2 U.S.C. § 431(8)(A)(i)); whether a communication is "expressly advocating the election or defeat" of a candidate (*see* 2 U.S.C. §§ 431(17), 441d(a)); and whether a communication "promotes or supports . . . or attacks or opposes" a candidate (*see* 2 U.S.C. § 431(20)(A)(iii)).

[22] Sec. 201(b)(2) of S. 1285, amending 47 U.S.C. § 315(b). The LUC concept has been in the law for years. Essentially, it embodies the station's best rates for its most favored commercial advertisers for airtime in a particular class, at a particular time, and in a particular amount. 47 C.F.R. § 73.1942(a)(1). Logically, the LUC for the class of time that can be preempted by another customer willing to pay more is lower than the LUC for the class of time that cannot be preempted. For years there has been tension due to the practice of broadcasters offering non-preemptible time at a rate substantially above the rate for preemptible time, and the desire of candidates to have the security of non-preemptible time slots just before an election. *See* "Gouging Democracy—How the Television Industry Profiteered on Campaign 2000" (Alliance for Better Campaigns), *available at* http://www.campaignlegalcenter.org/attachments/1712.pdf. . Broadcasters believe it is fair in the marketplace to let candidates decide if they want to pay more for non-preemptible time, and candidates believe that broadcasters should be willing to provide preemptible time rates for non-preemptible time.

[23] Sec. 201(a) of S. 1285, amending 47 U.S.C. § 315(b).

[24] Sec. 201(c)(3) of S. 1285, amending 47 U.S.C. § 315.

At some point, the broadcasting industry is going to squeal. This Committee should work with the industry to generate accurate assessments of the how broadcasters and others are charging for airtime these days and what the impact of these types of changes would be.[25] With close and careful analysis, it is possible that the proper balance can be achieved.

Absent cooperation and successful negotiation, the legislation will generate contention and litigation, in my view. Mandating that broadcast stations providing time do so at preemptible LUC rates, will affect the bottom line for stations that cannot afford to forego political advertising revenue. Requiring such stations to further 'eat' 20% of the already low rate when dealing with participating Senate candidates, and requiring stations to extend the LUC rate for preemptible time to national party committees advertising on behalf of candidates will further erode the stations' revenue. Adding the over-arching 2% spectrum use fee—an annual assessment that will occur for all broadcasters (radio and TV) whether or not they minimize losses from political advertising—may be the final step that brings out the litigators.

2. Congressional power to impose conditions on broadcasters

Congress thus far has been successful when imposing certain conditions in the public interest on those who are licensed to use the airwaves. The Communications Act of 1934, as amended, allows the FCC in granting licenses and renewals to determine whether "the public interest, convenience, and necessity will be served."[26] In the well-known *Red Lion Broadcasting Co. v. FCC* case,[27] the Supreme Court upheld the FCC's "fairness doctrine" which required stations to provide air time for opposing viewpoints on issues of public importance. Relying on earlier analysis, the Court found significant the 'scarcity' of the available airwaves. Later, in *Columbia Broadcasting System v. FCC*,[28] on similar grounds, the Court held that the statutory provision requiring broadcasters to provide reasonable access to legally qualified Federal candidates[29] was

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[25] The FCC's 2002 report, "Broadcast Television: Survivor in a Sea of Competition," indicates broadcast stations in the top ten markets had average profits of 46.2%, and those in the 176-210 market range had average profits of 17.5%. *Available at* http://www.fcc.gov/ownership/materials/already-released/survivor090002.pdf. The overall amount of ad revenue for the TV broadcast industry for political advertising was in the $2 billion range in 2006, according to research by the Project for Excellence in Journalism, *available at* http://www.stateofthemedia.org/2007/narrative_localtv_economics.asp?cat=3&media=7. The same report indicated political ad revenue constituted about 7% of overall 2006 broadcasting ad revenue. The Alliance for Better Campaigns report, "Gouging Democracy—How the Television Industry Profiteered on Campaign 2000" (*supra*, n. 22), at p. 5, provided the example of ten different stations that sold ad time, on average, at a rate 65 percent above the lowest published candidate rate. Meanwhile, according to the Campaign Study Group, Senate candidates in the 2000 cycle spent in the range of 52% of their budgets on broadcast advertising. (Sources not cited specifically are available on request.) While all these statistics sound alarming at first blush, caution is in order. The numbers need to be verified, and the following question always needs to be asked: "Is the solution proposed the right one?"

[26] 47 U.S.C. §§ 307(a), 309(a).

[27] 395 U.S. 367 (1969).

[28] 453 U.S. 367 (1981).

[29] 47 U.S.C. § 312(a)(7).

not a violation of broadcasters' First Amendment rights. In 1994, in *Turner Broadcasting System, Inc. v. FCC*, the Court declined to back away from its holdings allowing imposition of "limited content restraints" and "affirmative obligations" on broadcasters.[30]

3. Potential First Amendment challenge to reduced airtime charge obligations

There is considerable debate these days—because of the ever-widening variety of information sources—about the continued veracity of the 'scarcity' rationale in the broadcasting context. The tortuous battle at the FCC to do away with the "fairness doctrine," for example, is littered with arguments regarding the dramatic changes in the communications and media worlds and the increase in news and information sources beyond those of broadcast TV.[31] It would not surprise me if the provisions in S. 1285 generate new assertions along these lines and new threats of litigation claiming the obligations to offer reduced rates to candidates and party committees improperly burden the editorial functions of broadcasters in violation of their First Amendment rights. The accompanying rationale would be that the broadcasting industry is now a much less essential medium for dissemination of campaign advertising spots (cable, direct broadcast satellite, Internet, and cell-phone technology being the other outlets). Broadcasters thus would challenge the claim of a compelling governmental interest in assuring use of a 'scarce' medium to provide the public with candidate messaging.

4. Potential 'takings' challenge regarding reduced rate obligations

As an alternative legal theory, the broadcasting industry might attempt to construct a 'takings' argument regarding the requirement to provide airtime at preemptible rates and the requirement to provide an additional 20% discount to participating Senate candidates.[32] The Government surely would counter that the statute requires licensees to waive "any claim to the use of . . . the electromagnetic spectrum as against the regulatory power of the United States because of previous use of the same . . . ."[33] The Government also would cite a Supreme Court opinion for the proposition that under the Communication Act, "no person is to have anything in the nature of a property right as a result of the granting of a license."[34] Nonetheless, a legal challenge

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[30] 512 U.S. 612, 636 (1994). The Court did not apply the 'scarcity' of airwaves argument to its analysis of the 'must carry' rules imposed on cable operators, but it did note the "special characteristics" of the cable medium, including the "bottleneck monopoly power exercised by cable operators." 512 U.S. at 661. After remanding the case to a district court for fact-finding, the Court ultimately upheld the 'must carry' rules imposed on cable operators. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180 (1997).

[31] *See* "Joint Statement of Commissioners Powell and Furchtgott-Roth" (June 22, 1998), FCC Gen Docket No. 83-484, *available at* http://www.fcc.gov/Speeches/Furchtgott_Roth/Statements/sthfr834.html (explaining a split vote on repeal of the 'personal attack' and 'political editorial' response rules and noting increased cable subscribership, widespread direct broadcast satellite service, as well as proliferation of information through the Internet and other digital technologies).

[32] Under the Fifth Amendment of the Constitution, "private property [shall not] be taken for public use without just compensation."

[33] 47 U.S.C. §304.

[34] *FCC v. Sanders Bros. Radio Station*, 309 U.S. 642, 697 (1940).

might be brought on the ground that it is the particular lost revenues that are at stake (not the use of the spectrum or the value of the existing license). If the broadcasters believe they can marshal evidence showing a dramatic economic impact from the provisions of S. 1285, this type of 'takings' argument might find its way to a court house.

Conclusion

I hope the foregoing thoughts are helpful. The bill currently before you is the product of a lot of hard work and good intentions. My experience in trying to implement such a law leads me to offer constructive criticism in the hope that the Members of this Committee and others will be open to improvements and new ideas along the way.