SENATE COMMITTEE ON RULES AND ADMINISTRATION

Hearing on Repealing Limits on Party Expenses
April 18, 2007

Testimony of
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Madam Chairman, members of the Committee, thank you for the invitation and the opportunity to submit testimony and to appear before the Committee to discuss the potential repeal of the limits on coordinated party expenditures. This is an important issue facing candidates, parties and the entire regulated community.

For the last fourteen years I have represented officeholders, candidates, party committees, PACs and individuals in matters involving federal campaign finance law. During that time I have counseled hundreds of clients and answered thousands of questions on the rules governing party spending, including:

- Limitations placed on express advocacy versus issue advocacy;
- Limitations on communications distributed by paid vendors versus those distributed by volunteers;
- Limitations on the contents of slate cards;
- Limitations on direct contributions by parties versus coordinated expenditures by parties; and
- Limitations on independent expenditures versus coordinated expenditures.

The purpose of this hearing is to receive testimony and information regarding the complete removal of one provision that regulates political parties – the coordinated party spending provision contained in section 441a(d) of the Federal Election Campaign Act. As the only practitioner submitting testimony today, I want to offer the Committee a practical perspective, rather than an ideological one. A perspective that is based on the experience of counseling clients, rather than on a hypothesized view of what the law ought to be.

I have two concerns with removing the restrictions of section 441a(d) in the manner being proposed. First, proponents of a complete repeal of the limits overstate the problems associated with the current independent expenditure programs run by the national parties.

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Second, proponents of the current repeal efforts underestimate the effects that it will have on the fabric of the campaign finance laws. I will address each of these in turn.

I. A TWENTY-YEAR CAMPAIGN TO REPEAL SECTION 441A(D) LIMITS – FROM COLORADO TO TENNESSEE

Efforts to repeal 441a(d) limits did not begin with the passage of The Bi-partisan Campaign Reform Act (BCRA) or with the current concern over national party independent expenditures. Rather, repealing the 441a(d) limits has been a priority of the Republican Party for at least the last twenty years. During that time the argument for repeal has moved from being a constitutional objection to the current concern over accountability in party advertising. What has remained constant is their resolute belief that the limits must go.

A. The Early Efforts in the Courts

The genesis of the effort to repeal the 441a(d) limits was the 1986 Senate race in Colorado. In January 1986, then-Congressman Tim Wirth announced that he would run for Senate. Despite having assigned its ability to spend under section 441a(d) to the National Republican Senatorial Committee, the Colorado Republican Party aired paid radio advertisements attacking Wirth. One can surmise that this violation of the law was designed to trigger a frontal challenge to the constitutionality of the 441a(d) limits.

If that was in fact the Party's intention, it worked. Over the next decade and a half, the Colorado Republican Federal Campaign Committee pressed its cause to the Supreme Court twice. In each instance, the Republican Party argued that limits on the amount parties could spend on behalf of their candidates could not constitutionally be limited. In the first of those cases, *Colorado Republican I* (518 U.S. 604 (1996)), the Supreme Court avoided addressing the issue of *coordinated* spending by finding that there was no actual coordination with respect to the anti-Worth advertisements. Significantly, the Court held that there could be no limits on the party's ability to spend money if the money was spent "totally independently" of the benefiting campaign. The Court held that parties, like PACs or wealthy individuals, enjoy an absolute constitutional right to spend an unlimited sum advocating the election or defeat of a candidate if the spending was done without coordinating with a candidate.

Undeterred by its apparent victory, the Colorado Republican Party brought another lawsuit. This time the Republican Party launched a facial challenge to section 441a(d), arguing that all limits on party spending – even coordinated spending – are unconstitutional. In *Colorado Republican II* (533 U.S. 431 (2001)), the Court rejected this argument and upheld the constitutionality of the coordinated spending limits contained in section 441a(d). In rejecting the constitutional argument, the Court left opponents of section 441a(d) with no further constitutional objections. Instead, future objections would have to be based on other grounds.

B. The Current Argument

After the Court's 2000 decision in *Colorado Republican II*, opponents of the coordinated party spending limits turned their attention elsewhere. Indeed, they had larger issues on the horizon. Specifically, Congress was in the run up to passage of BCRA, a major overhaul of the campaign finance system. Far from repealing the limits contained in 441a(d), BCRA attempted

to present parties with a choice – either make expenditures under the section 441a(d) limits or make unlimited independent expenditures. Under BCRA as enacted, a party could not do both. In *McConnell v. FEC* the Supreme Court struck down this required choice provision as unconstitutional. The result is that the parties continue to be free to make both independent expenditures and coordinated expenditures in the same elections.

As evidenced by this hearing, the foes of section 441a(d) limits have reemerged in the post-BCRA era. Even before the 2006 elections, opponents of section 441a(d) limits were arguing that the limits ought to be removed as a matter of good public policy. Their argument is that section 441a(d) requires parties to operate independently of their candidates for some activities (namely airing independent expenditure advertisements) and this is an unnatural posture in which to place a party. This argument achieved its strongest form when the Republican National Committee claimed that it could not legally stop its own independent expenditure team from sponsoring an advertisement in the U.S. Senate race in Tennessee that many criticized as racist. I will leave to others to discuss whether the advertisement sponsored by the RNC was appropriate or not. I do want to make two observations:

First, all advertisements sponsored by political party committees are the responsibility of that committee, period. My understanding is that one proposed piece of legislation that would repeal the section 441a(d) limits is entitled the "Campaign Accountability Act." Whatever the merits of repealing the section 441a(d) limits, I do not believe that "accountability" is one of them. The RNC was legally accountable for the ad it sponsored in Tennessee. Some in the media incorrectly suggested that the RNC ad in Tennessee was not the product of the RNC. It was. That ad contained a disclaimer that made clear that the RNC had paid for and sponsored the advertisement. Indeed, the advertisement had a clear statement that the RNC was responsible for the content of the advertisement. While the personnel who oversaw that advertisement might have operated independently of the Corker campaign, they were nevertheless employees and/or agents of the RNC. Efforts to suggest otherwise are simply mistaken.

Second, it is important for the Committee to understand that nothing in the law prohibited Mr. Corker and his campaign from expressing disapproval of the advertisement nor did the law prevent them from publicly calling on the RNC to stop airing it. Similarly, if the RNC Chair or others at the RNC disapproved of the advertisement, nothing prohibited them from asking publicly that the ad be pulled from the airwaves. During the ten years that parties have made independent expenditures there have been many such requests that have led to an advertisement being taken off the air.

II. A SHOTGUN BLAST, NOT A RIFLE SHOT -- REMOVING 441A(D) LIMITS WOULD EFFECTIVELY BE A MAJOR REWRITING OF THE CAMPAIGN FINANCE LAWS

After *Colorado II*, all sides in this debate acknowledge that Congress has the constitutional authority to impose or remove limits on coordinated party spending. The issue before this Committee is therefore simply whether removing those limits is good public policy. Setting aside the motives of those seeking the repeal, there remains a legitimate question of whether the current campaign finance system would be better served without those limits. As someone who has vigorously argued in favor of a simpler, more intuitive set of rules, the repeal

of party limits has some appeal. However, I think it would be a mistake for this Committee to proceed with a removal of those limits without a full understanding of the consequences on the entire system of campaign finance.

The limits contained in Section 441a(d) do not exist in isolation. Instead, they operate as part of a system of intertwined laws. For example, a repeal of section 441a(d) limits would:

- Undo advantages current law gives to State party committees (versus national parties) to conduct certain "exempt" activities, such as the volunteer distribution of campaign materials, the distribution of slate cards, and some voter registration and get-out-the-vote activities.

- Make section 441a(h) -- which gives the national Senatorial Committees unique powers to make larger contributions to Senate campaigns – virtually obsolete.

- Undermine one of the central provisions of the Millionaire's Amendment. Currently, the ability of a party to make unlimited coordinated expenditures is a consequence of (and thus a deterrent to) a millionaire using personal money to fund his or her campaign.

- Mean less timely reporting of some expenditures by party committees – since they would no longer have to file "independent expenditure" reports within 24 or 48 hours of an advertisement being aired.

These are only a handful of the legal consequences that would occur if section 441a(d) were repealed. Some of these may be desired, others may be unintended. There will presumably be even more profound changes in the manner in which parties and candidates respond to this change. One can assume that a repeal of the limits would push parties towards spending more on advertisements and less on other programs and activities. It will also likely mean that the role of state parties will further diminish as national parties become more important. A repeal of the limits will likely alter the manner in which fundraising for parties is conducted. There would almost certainly be a greater connection – even if short of earmarking – between the money a candidate raises and the amount of spending the party does on his or her behalf.

Some of these results might be desirable, others less so. However, it is a mistake to believe that section 441a(d)'s limits can be surgically removed without there being a large impact on the rest of the campaign finance system. I strongly urge this Committee to consider carefully the effects that a repeal of the section 441a(d) limits would have on the way in which parties and campaigns operate and how its removal would affect other political actors.

I would similarly urge this Committee to review all of its options to address the concerns that the current proponents of repeal put forth. For example, if the primary concern is accountability for paid advertisements, then Congress could require political parties to provide an audio and/or video "stand by your ad" in the same fashion that candidates now must. Alternatively, Congress could simply lower the standard for what is necessary for an advertisement to be considered "independent." Indeed, the current heightened standard is the result of Congress' instructions to the Federal Election Commission contained in BCRA. In lieu

of a complete repeal, Congress could re-instruct the FEC to enact new rules allowing for greater coordination for party ads than for other third party ads, without triggering the definition of "contribution" or "expenditure." Finally, Congress could exempt certain types of advertisements from section 441a(d) limits without abolishing those limits altogether.

III. CONCLUSION

Four years after the last major rewrite of the campaign finance laws, the regulated community is finally starting to fully understand the rules of the new regime. This Committee should keep in mind that every significant change in the law serves to create a period of uncertainty and confusion. Changing the law is therefore not a costless decision. That does not mean that Congress cannot or should not make changes where it deems it appropriate. However, it should do so only after a complete review of the intended and likely unintended consequences of its actions and after a thorough discussion of the alternatives. The Committee might also consider what other changes to the law are appropriate and consider a more comprehensive campaign finance reform measure to address a number of issues at once.

I am pleased to be invited to be a part of that process, and again, want to thank the Chair and the Committee for allowing me the opportunity to submit testimony on this important topic and I will be happy to answer any questions.