Testimony of

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to the
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An Evaluation of the Campaign Accountability Act of 2007

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Chairman Feinstein, Ranking Member Bennett, and Members of the Committee:

It is a pleasure to speak with you today. I am director of Center for Representative Government at the Cato Institute, a non-profit research institute dedicated to preserving the traditional American principles of limited government, individual liberty, free markets, and peace. I have studied and written widely about campaign finance regulation including my recent book, *The Fallacy of Campaign Finance Reform* (University of Chicago Press, 2006).

I would like to offer an assessment of the "Campaign Accountability Act of 2007" (S. 1091). This bill seeks to remove party coordinated expenditure limits now enforced under United States Code, sec. 441a(d). My evaluation of this bill begins with the history of that limit and its justifications.

The Federal Election Campaign Act of 1971 (FECA) imposed limits on direct and indirect contributions by persons and multicandidate political committees. These latter limits on their face would have constrained party coordinated expenditures were it not for the fact that FECA also exempted political parties from these constraints through what Justice Breyer would later call the "Party Expenditure Provision." That part of FECA imposed a limitation on party expenditures that takes account of both state populations and inflation.[1] S. 1091 concerns this restriction on party coordinated spending.

FECA imposed among other things limitations on contributions and expenditures by individuals and institutions. In *Buckley v. Valeo*, the Supreme Court validated the contribution limits and struck down some of the expenditures constraints. The contribution limits were justified as means to the compelling state interests in preventing corruption and the appearance of corruption. The spending limits were struck down as direct restrictions on free speech and thus invalid under the strictures of the First Amendment. Finally, the *Buckley* Court also decided that truly independent electoral spending – outlays made without the cooperation or consent of a candidate or at their request or suggestion – could not be limited. Such spending did not implicate the candidates and thus did share the corruption rationale underlying contribution limits.

Buckley did not leave federal election law a coherent whole. The "Party Expenditures Provision" appeared to be a limitation on expenditures. As Justice Breyer later noted, FECA itself mentioned "expenditures" in regard to the provision.[2] Justices Kennedy and Thomas would press the point harder. It would hardly have been surprising if FECA contained a spending limit on the parties; the law generally favored spending limits as a policy tool. To be sure, as Justice Kennedy would later note, the Court "had no occasion in *Buckley* to consider possible First Amendment objections to limitations on spending by parties."[3] The restrictions on coordinated expenditures thus survived *Buckley* at a price to doctrinal coherence.

The most important developments after *Buckley* in this argument came in the Supreme Court's decisions in Colorado I and Colorado II. In Colorado I, the Court decided that party coordination spending limits should not be applied to spending of party resources that was nonetheless independent of the party. [4] In Colorado II, a bare majority of the Court upheld the limits on coordinated party spending.[5] Justice Souter saw coordinated party spending as a contribution not from the party but from interested donors who used the party form to circumvent existing restrictions on individual or donor contributions in order (in Justice Souter's words) "to produce obligated officeholders." The Court thus presumed to reconcile the Party Expenditures Provision with the traditional "corruption and appearance of corruption" rationale for restrictions on campaign finance. The idea of circumvention built a bridge between Buckley and Colorado II. Party spending was just a way chosen by relentless and corrupting "interested" donors to run around existing election law. In dissent, Justice Thomas noted the lack of evidence for the majority's assertion that donors would use parties to circumvent the law if the Court invalidated limits on coordinated party spending.

Prior to 2002, the parties engaged direct spending for a candidate and in two kinds of coordinated spending on behalf of candidates. They expressly advocated the election of their candidates up to the party coordination limits. Beyond that, the parties supported issue ads that did not expressly advocate the election of a candidate. These latter communications were not constrained by party coordination limits. After Congress passed the Bipartisan Campaign Reform Act in 2002, the Federal Election Commission made it clear that the coordination limits "would apply to party committee spending for advertising that does not contain express advocacy."[6] Parties responded to this rulemaking by creating entities that could spend independently on behalf of their candidates.

Not surprisingly, given that the party coordination limits are far less than what is needed to win an election, the parties began spending independently of their candidates. In 2000, the two major parties spent $3.8 million in independent expenditures; in 2004, they laid out $264.5 million. In the mid-term election of 2002, the parties spent $3.8 million. In 2006, they spent $223.7 million.[7] These sums were four to six times the sums spent by the parties in coordination with their candidates.

Like much of campaign finance law, the limitation on party coordinated spending seems to be a narrow and rather technical aspect of the law. But it engages larger themes in our political life, themes that bear explication and analysis: political parties in democracy, accountability and elections, and the value of political speech and spending. I would like to examine S. 1091 in light of these larger themes.

Campaign finance regulation reflects the political theory of Progressivism. This philosophy posits that the public interest exists apart from political struggle; for Progressives the public interest must often be imposed on politics which tends toward self-interest and corruption. Progressives distrust political parties because they reflect narrow interests rather than the public interest or common good.[8] Limiting the activities of the political parties thus constrains agents of private interests and corruption. But Progressives did not object only to contributions by the parties. They objected to the "private interest" activities of the parties in general, not least their spending on behalf of candidates. The FECA limits on coordinated expenditures reflect this Progressive distaste for political parties. To limit parties in general and their use of money in particular was to constrain an agent of corruption. FECA fits well into the intellectual background of campaign finance regulation. Once the Court invalidated expenditures limits, the Progressive vision did not cohere with the reality of regulation. Colorado II resolved that by making the parties willing accomplices of the "true" agents of corruption, donors who wished to give more than the government allowed. From the age of the urban machine to Colorado II, Progressives have seen political parties as enemies of the public interest and agents of corruption.

In light of traditional categories of analysis, the corruption complaint against the parties is not persuasive. Contribution limits are the main instrument to prevent corruption, and they apply to individuals, candidates, and organizations. Coordinated spending between a party and a candidate must begin as hard money. If the contribution limits are actually limits on the corrupting influence of money in politics, the hard money contributions to the parties cannot be corrupt. Colorado II implicitly sought a way around this problem by assuming an objectionable motive on the part of a significant number of donors. These donors intend to violate the limits on contributions to candidates by giving legal donations to the parties. The Colorado II majority provided no evidence of this intent on the part of donors. FECA had already proscribed directing contributions to candidates by way of a party contribution.[9] Indeed, if intent is the standard of corruption, it is difficult to discern why we have objective limits on donations.

We should not accept the assumption that political parties corrupt representative democracy. Our Constitution and political tradition do not assume that private interests necessarily corrupt politics or that the job of the government should be to suppress private interests in pursuit of a common good known prior to political struggle. In general, the Constitution seeks to harness private interests to engage in a struggle that precludes tyranny of a majority. Yet, American government also has legitimate though limited powers and control over that power implies representation and elections. Political parties mediate between individuals (or individuals joined together in groups) and government. They encompass a coalition of interests that from electoral necessity support a larger agenda for governing.

Building coalitions and fighting elections create ideological and policy reputations for the political parties. These reputations provide cues for voting by citizens. Such cues are essential; voters have few incentives to acquire detailed knowledge about politics and policies. The reputations of parties connect the voter in some measure to the actions of government. Parties and their activities including spending thus transcend the rational self-interest and ignorance of voters and foster a workable, if imperfect representative democracy.

The limits on coordinated party spending complicate this function of parties in our representative democracy. The speech supported by independent spending will not be controlled by candidates. In some cases, national party leaders will not be able to control this spending since these officials must remain aloof from the entities doing the spending to preserve their legal independence. The information about a candidate contained in the party label becomes more obscure for the voter thereby complicating the link between voter, party, and governance.

We should take care to untangle the case against party independent spending from arguments directed against the content of some speech funded by these independent entities. Some see this independent speech as "unduly negative." For some time, critics of our politics and campaign finance system have decried "negative advertising" during election campaigns. They argue such speech leads to declining trust in government, among other ills of the body politic. Under the First Amendment, however, the content of speech should not be a reason to regulate it or the funding necessary to support the speech. In fact, negative advertising and speech – that is, speech critical of an opponent in an election – offers many advantages to our republic. Such speech informs and mobilizes voters while fomenting few of the harms long asserted by critics.[10] Of course, speech criticizing an opponent can turn wild and vicious. That tactic runs its own risks if voters do not favor such speech, and they can link a campaign to what they do not like. In that case, wild attacks on an opponent produce fewer rather than more votes for the speaker. However, if the wild attacks are independent of a candidate (and perhaps a party), voters cannot be sure of the source of their unhappiness and cannot punish the guilty. Of course, the voter might assume the candidate is responsible for the disfavored speech even though it was undertaken independent of his campaign. Insofar as the voter acts on that mistaken account of responsibility, the candidate suffers an injustice and elections are distorted.

The restrictions on party coordinated spending reflect a longstanding animus in parts of our political culture toward electoral spending. That animus informed FECA which imposed spending restraints on many kinds of political activities. *Buckley* did well by noticing that restricting spending would necessarily restrict speech. That remains true today. Given the fundamental commitments of the First Amendment, the animus toward spending must count as an animus toward our liberal Constitution. Of course, if political parties are assumed to be agents of corruption, then more spending by parties (rather than less under limits) would foster more corruption.

These commonplace prejudices have little support in the scholarly literature on elections and campaign finance. For example, John Coleman, a political scientist at the University of Wisconsin – Madison, has found that increases in spending in congressional elections leads to better informed voters.[11] More spending also helps those who are "information poor" more than those who are already well-informed about an election campaign.[12] Coleman also found that the usual complaints about increases in electoral spending (for example, a purported decline in trust in government) were not accurate. If removing limits on party coordinated spending leads to more spending on elections, voters will be better-informed than they are now. Because information fosters competition, limits on expenditures should restrict electoral competition for incumbents. The political scientist Gary Jacobson has confirmed this conjecture.[13] Finally, it is always important to keep our relative spending on elections in mind. Once liberalized, the parties will no doubt spend hundreds of *millions* of dollars to win the power to guide a government that spends hundreds of *billions* of dollars in its discretionary budget.

Changes in campaign finance regulations can always restrict political freedom; indeed, such regulations are often used to alter the political battlefield to favor a political party or incumbent members of Congress. Here we should be concerned that the two major political parties might eliminate the party coordination limits as way to hobble other parties, individuals or groups. This change, however, does not complicate or prohibit independent spending by anyone other than the political parties. This bill will no doubt reduce the sums spent by the parties independently of their candidates. That spending, however, resulted from the limits on party coordinate spending rather than a genuine desire to spend money independently on behalf of a candidate. The bill could increase the already large differences in spending between the major parties and minor parties. It is far from certain that the parties will spend a great deal more money all things being equal if the party coordination limits are removed: it is possible that greater control over spending will lead to more efficient outlays and thus about the same or even less party spending.[14] Even if the parties spend more, the harm done to minor parties will likely be small and should be balanced against the considerable gains for accountability and voter competence likely to follow the liberalization of party coordinated spending.

Federal limits on party coordinated spending have not had a happy history. They were intended to restrict party spending, an unconstitutional goal. The limits were then brought under the anti-corruption rationale by a bare majority of the U.S. Supreme Court in a singularly unpersuasive argument. Parties now spend most of their campaign money apart from, and sometimes in opposition to, their candidates, a result that serves neither the theory nor the practice of representative democracy.

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[1] Justice Breyer offers a good review of this history in his opinion in Colorado Republican Federal Campaign Committee v. Federal Election Committee 518 U.S. 604 (1996).

[2] Ibid.

[3] Colorado I.

[4] Ibid.

[5] *Federal Election Comm'n* v. *Colorado Republican Federal Campaign Comm.*, 533 U. S. 431, 441 (2001).

[6] Stephen Hoersting and Paul Sherman, "A Constitutional Solution to the Problems of Control and Accountability in Party Independent Expenditures," Center for Competitive Politics, n.d., p. 3.

[7] R. Sam Garrett and L. Paige Whitaker, "Coordinated Party Expenditures in Federal Elections: An Overview," Congressional Research Service Report to Congress, April 13, 2007, p. 5.

[8] John Samples, *The Fallacy of Campaign Finance Reform* (Chicago: University of Chicago Press, 2006), p. 46.

[9] Garrett and Whitaker, p. 6.

[10] Richard Lau, Lee Sigelman, Caroline Heldman and Paul Babbit, "The Effects of Negative Political Advertisements: A Meta-Analytic Assessment," *American Political Science Review*, 93(December 1999):856-8.

[11] John J. Coleman and Paul F. Manna, "Congressional Campaign Spending and the Quality of Democracy." *Journal of Politics* 62, 3(2000): 757-89.

[12] John J. Coleman, "The Distribution of Campaign Spending Benefits Across Groups." *Journal of Politics* 63, 3 (2001): 916-34.

[13] Gary C. Jacobson, "Enough is Too Much: Money and Competition in House Elections," in *Elections in America*, ed. Kay Lehman Schlozman (Boston: Allen & Unwin, 1987), p. 76.

[14] The parties will spend more money will spend more money independently and in coordination with candidates with the passage of time. The question should be whether elimination of coordination limits would lead to more spending than that baseline.