Testimony of Fred Wertheimer
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Before the
Committee on Rules and Administration
United States Senate

April 18, 2007

Chairman Feinstein and members of the Rules Committee:

I appreciate the opportunity to testify today on behalf of Democracy 21.

Democracy 21 opposes repeal of the party coordinated spending limits contained in section 441a (d) of the Federal Election Campaign Act (FECA).

We believe these limits serve an important purpose and we supported their constitutionality in a brief we filed in the Supreme Court in *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001) (*Colorado II*).

The Supreme Court ruled in that case that the party coordinated spending limits were constitutional.

We oppose repealing the coordinated party spending limits because doing so would open the door to the possibility of widespread use of the party committees as a means for evading the limits on what an individual or PAC can contribute to a federal candidate.

The section 441a(d) limits on party spending coordinated with candidates also limit the extent to which donors can make contributions to a party for use by a candidate that are over and above the amount the donor could give directly to the candidate.

Under current law, individuals can contribute $28,500 to a national party committee per year and PACs can contribute $15,000 per year to a party. These limits on contributions to parties are much higher than the corresponding limits on the contributions that can be made directly to candidates by individuals ($2,300 per election) and by PACs ($5,000 per election).

Although parties are free under the Supreme Court decision in the *Colorado I* case to spend an unlimited amount above the section 441a(d) limits in support of their candidates if such expenditures are made independently of the candidates, the section 441a(d) limits restrain the extent to which candidates can control the expenditure of party funds to support their own candidacies.

In this sense, the party spending scheme places parties in the same position as individuals and PACs: they are free to spend an unlimited amount independently of candidates, but any amount spent by an individual or PAC or party in coordination with a candidate is treated as a contribution to the candidate and subject to a cap.

Congress enacted Section 441a(d) in 1974 as part of a statutory scheme to further the government's legitimate interest in combating actual and apparent corruption through the use of private contributions in federal elections. Both Congress and the Supreme Court have long recognized the compelling interest in deterring corruption and the appearance of corruption.

In *Buckley v. Valeo*, 424 U.S. 1, 25-26 (1976), the Supreme Court held that Congress has a constitutional interest in regulating campaign contributions and coordinated expenditures. The Court recognized the danger that private interests can secure political quid pro quos from candidates through large campaign contributions. *See Buckley*, 424 U.S. at 25-26. And "[o]f almost equal concern … [was] the impact of the appearance of corruption stemming from the public awareness of the opportunities for abuse inherent in a regime" influenced by private interests. *See Buckley*, 424 U.S. at 27 ("Congress could legitimately conclude that the avoidance of the appearance of improper influence is also critical ...."). The Court found these dangers to be both grave and "inherent in a system permitting unlimited financial contributions." *Id.* at 28.

The Court reiterated these conclusions in the 2000 case of *Nixon v. Shrink Missouri PAC,* 528 U.S. 377 (2000): "Leave the perception of impropriety unanswered, and the cynical assumption that donors call the tune could jeopardize the willingness of voters to take part in democratic governance." *Shrink Missouri,* 528 U.S. at 390.

The Court concluded that "there is little reason to doubt that sometimes large contributions will work actual corruption of our political system and no reason to question the existence of a corresponding suspicion among voters." *Id.* at 395.

Section 441a(d) was an important part of Congress's integrated statutory approach to limiting corruption and the appearance of corruption, because it serves as a prophylactic to deter evasion of the limits on the amounts that individual donors and PACs can contribute directly to candidates - the $2,300 limit per election on individual contributions to candidates, and the $5,000 limitation per election on PAC donations to candidates.

If there were no limit on the amount parties could spend in coordination with their candidates, a candidate would be free to solicit from an unlimited number of contributors who had already given the statutory maximum directly to the candidate's campaign an additional $57,000 from an individual for the candidate's party over the course of two years for a House candidate, or $171,000 from an individual over six years for a Senate candidate.

The candidate could then fully control the spending of that money by the party committee to support the candidate's campaign. The same is obviously not true of contributions given by an individual to a party that is spent by the party in the form of independent expenditures.

In other words, if the coordinated spending limits were repealed, for all practical purposes an unlimited number of individuals would be able to contribute to a candidate a far greater amount then the limits Congress established on what an individual can give to a candidate in order to protect against corruption and the appearance of corruption.

In a *de facto* sense, the $2,300 limit on individual contributions to candidates would be increased by $57,000 for House candidates and by $171,000 for Senate candidates, by allowing an individual's annual $28,500 contribution to a party to be effectively passed through to a candidate in the form of coordinated spending controlled by the candidate.

PAC contribution limits for candidates would be similarly increased by $15,000 per year, in addition to the $5,000 per election limit on PAC contributions to candidates.

Congress recognized that parties have different needs and are in a different position than candidates by providing higher limits on contributions from individuals and PACs to parties than to candidates. But Congress also correctly limited the ability of the higher limits on contributions to parties to serve as a vehicle for evading the limits on contributions to candidates by enacting the 441a (d) coordinated spending limits to ameliorate and restrain the evasion problem. By limiting the amount that parties can spend in coordination with their candidates, Congress thereby limited the amount of contributions to parties that could be passed through as *de facto* contributions to candidates.

The Supreme Court in the *Colorado II* case described this very mechanism of evasion, should section 441a(d) be removed:

> Despite years of enforcement of the challenged limits, substantial evidence demonstrates how candidates, donors, and parties test the limits of current law, and it shows beyond serious doubt how contribution limits would be eroded if inducement to circumvent them were enhanced by declaring parties' coordinated spending wide open.
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> ....What a realist would expect to occur has occurred. Donors give to the party with the tacit understanding that the favored candidate will benefit. ... Although the understanding between donor and party may involve no definite commitment and may be tacit on the donor's part, the frequency of the practice and the volume of money involved has required some manner of informal bookkeeping by the recipient. In the Democratic Party, at least, the method is known as "tallying," a system that helps connect donors to candidates through the accommodation of a party....
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> Such is the state of affairs under the current law, which requires most party spending on a candidate's behalf to be done independently, and thus less desirably from the point of view of a donor and his favored candidate. If suddenly every dollar of

> spending could be coordinated with the candidate, the inducement to circumvent would almost certainly intensify. Indeed, if a candidate could be assured that donations through a party could result in funds passed through to him for spending on virtually identical items as his own campaign funds, a candidate enjoying the patronage of affluent contributors would have strong incentive not merely to direct donors to his party, but to promote circumvention as a step toward reducing the number of donors requiring time-consuming cultivation. If a candidate could arrange for a party committee to foot his bills, to be paid with $20,000 contributions to the party by his supporters, the number of donors necessary to raise $1,000,000 could be reduced from 500 (at $2,000 per cycle) to 46 (at $2,000 to the candidate and $20,000 to the party, without regard to donations outside the election year.

533 U.S. at 459-60 (emphasis added).

In short, the Supreme Court recognized that "[c]oordinated expenditures of money donated to a party are tailor-made to undermine contribution limits." *Id.* at 464.

Section 441a(d) helps to uncouple the candidates of a party from the large contributions that party committees receive from private donors - contributions that Congress has determined if given to candidates carry the risk of actual and apparent corruption.

Indeed, the relatively high limit that Congress has placed on individual contributions to party committees must be viewed in light of the corresponding congressional judgment that these limits are acceptable in the context of the Section 441a(d) limits on the ability of party committees to act as contributors' agents in passing money through to candidates on behalf of the contributors.

It is important to note that Section 441a(d)'s limit on coordinated spending does not impose a burden on the ability of the parties to communicate with the public. To the contrary, political parties can make unlimited independent expenditures for or against candidates on top of the coordinated expenditures they can make, under the Supreme Court decision in *Colorado I.*

As the Supreme Court noted in the *Colorado II* case, quoting political scientists, "there is little evidence to suggest that coordinated party spending limits adopted by Congress have frustrated the ability of political parties to exercise their First Amendment rights to support their candidates." 533 U.S. at 450-51.

One of the arguments being made in support of repealing the Section 441a(d) limits is that the repeal is necessary to deal with the situation where an ad is run by the independent expenditure unit of a party on behalf of one of the parties' candidates and neither the candidate involved nor the party can contact the independent party unit to ask them to take the ad off the air, without illegally coordinating with the unit.

While we disagree with this interpretation of the existing coordination rules, this issue clearly can be addressed without repealing the coordinated spending limits. This could be accomplished legislatively by providing that a communication by a candidate or party with the party's independent expenditure unit requesting the unit not to run an ad, or to withdraw an ad that is being run, does not constitute coordination under the campaign finance laws.

The reality is that a request to someone not to run an ad is a request not to make an expenditure and if the request is successful there is no expenditure with which to coordinate.

Furthermore, we believe that, unlike proposals to establish electronic reporting for Senate candidates or to require 527 groups to comply with campaign finance laws, coordinated party spending limits are part of an integrated statutory scheme dealing with the financing of candidate elections. Any changes in these limits should not be undertaken in a vacuum or considered on their own in isolation from other related issues regarding candidate campaign finances.

We also believe that there are far more important campaign finance problems that need to be addressed by the Senate than the issue of coordinated spending limits.

These include repairing the presidential public financing system that has served the country well for most of its existence but is now broken and needs to be fixed, establishing a system of public financing for congressional races, requiring 527 groups that spend money to influence federal campaigns to comply with federal campaign finance laws, providing free TV or low cost TV to federal candidates, and addressing the problems with leadership PACs, among others.

We see no reason why the issue of repealing the 441a(d) coordinated spending limits should be picked out for Senate consideration ahead of these more important campaign finance issues.

In conclusion, we oppose the legislation to repeal the section 441a(d) limits because it opens up new avenues for evading the limits on contributions to candidates, we believe the accountability issue raised in conjunction with the section 441a(d) limits can easily be addressed, if necessary, by amending the definition of "coordination," and we urge the Committee to address the important campaign finance issues facing the country and Congress that are noted in our testimony.

Thank you again for the opportunity to testify and I would be happy to answer any questions Committee members may have.