LEGAL BARRIERS TO THIRD PARTIES

REMARKS OF CHRIS HOCKER

The 1980 presidential campaign marked the first time that the legal barriers facing third parties and independent candidates have been seriously discussed outside of a narrow circle of political trivia buffs. The experiences of John Anderson and Libertarian Ed Clark, and to a lesser extent, other third party candidates, focused public attention on the problems created by these barriers. This, in turn, raised the question of whether or not the traditional two party system is serving a useful purpose. The third party independent candidate phenomenon has raised the level of awareness that the two party system appears to have a vested interest in its own self-protection and therefore will act to block or stifle political challenges from the outside.

The problems of third parties differ somewhat from those faced by independents. Third parties are in the business not only of running candidates for president and vice-president every four years, but also of maintaining and, hopefully, building a party organization in the intervening years. Like the Republicans and Democrats, third parties try to field slates of candidates for state, local, and federal offices in nonpresidential election years. In contrast, independent candidates rarely maintain an organization of their own particular campaign beyond election day; there is no independent "party." Thus, dealing with and overcoming legal barriers pose ongoing problems to a greater extent for third parties than for independents. I would go so far as to say that no third party may reasonably expect to become a major or otherwise significant part of the political scene unless its leaders concentrate an enormous amount of attention on these legal barriers.

There are three major areas in which third parties and independent candidates face legal obstacles. The first major problem is ballot access. Each state sets its own ballot access requirements, so that detailed discussion of individual sets of regulations is impossible here. A brief survey of the nation as a whole indicates that there are two principle rationales for ballot access requirements. The most common rationale is that access requirements are necessary to provide a means of keeping ballots orderly. States must be able to exclude frivolous candidacies and parties while allowing minority political movements to have a voice if they can demonstrate a modicum of public support. From a libertarian point of view, this process is relatively harmless, although it can be argued that one person's "lunatic fringe" candidate can be another's legitimate channel of political expression. In a majority of states, however, ballot access requirements are not terribly burdensome. The number of state ballot lines attained by Eugene McCarthy and Libertarian Roger MacBride in 1976, and by Barry Commoner, the

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Citizens Party candidate in 1980, indicates that a reasonably diligent independent or new party candidate can get on the ballot in about thirty states. Only an unusually well planned, coordinated, and financed campaign like those of Anderson and Clark in 1980, can raise even the hope of total nationwide ballot status for non-major party candidates.

The second ballot access rationale is far more oppressive. In many states, ballot access laws were written or revised shortly after new political parties began to show signs of a significant following. Such responses appeared after the success of the Socialist Party in the early 1900's, the appearance of the Communist Party in the 1920's, and the success of George Wallace and the American Independent Party in the late 1960's. One of the clearest examples of this type of reaction can be seen in a West Virginia law which effectively prevented all but Republicans and Democrats from participating in elections from 1916 until portions of it were struck down by the state supreme court in 1980.[1] Originally directed at the Socialist Party of Eugene Victor Debs, the law required ballot access petitioners, even statewide office seekers, to obtain prior approval from county clerks. The petitioners were then allowed to circulate petitions only within the magisterial district of which they were residents. Petition signers were barred from voting in party primaries. More recently, Maryland reacted to George Wallace's limited success in the late 1960's by making its ballot access requirements more stringent. The particularly difficult Maryland requirement of an early signature filing deadline has since been struck down,[2] but the remaining provisions remain among the most restrictive in the country. To be sure, unduly restrictive ballot access requirements can be and have been challenged successfully in the courts, but such challenges usually take place several years—in the case of West Virginia, sixty-four years—after the state legislature has consciously decided to deny access to third parties.

One difficulty with ballot access faced by third parties but not by most independents is that of keeping ballot status after it has initially been won. All states but South Carolina, Alabama, and Kansas, require a new party to maintain a minimum level of support, measured by a percentage of the vote for some elective office, if the party is to stay on the ballot after having gained ballot status. The percentage in most states is in between two and five percent (although Georgia requires twenty percent), but the real difficulty often lies with the particular office for which the party must win its minimum percentage. For example, Indiana requires only one-half of one percent for a third party to stay on the ballot—but that percentage applies to the office of Secretary of State, for which the elections are held only in

1. West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634 (W. Va. 1980).
2. Mathers v. Morris, 649 F.2d 280 (4th Cir. 1981), *aff'd mem.*, 50 U.S.L.W. 3300 (U.S. Oct. 19, 1981); Bradley v. Mandel, 449 F. Supp. 983 (D. Md. 1978).

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nonpresidential years. In such states as Indiana, New York, Massachusetts, and Texas, Libertarian Ed Clark could theoretically have won the states' electoral votes without winning ballot status for the Libertarian Party.

Another ballot access question faced by third parties but not by independents relates to party registration procedures in the various states. While some states have no party registration, and a few permit voters to register under any party label they choose, many states will not permit registration in parties that are not ballot-qualified. The problem this poses is illustrated by the situation in Oklahoma in 1980. It was impossible to register as a Libertarian in Oklahoma until June of 1980, when the party qualified for the ballot. State law required, however, that candidates for nonfederal partisan office in Oklahoma be registered with their party for six months prior to their nomination. It was thus technically impossible for a Libertarian to run for a partisan state office, despite the party's ballot status. Furthermore, when no Libertarian candidate for federal office drew ten percent of the vote—the percentage required to maintain ballot status—the party officially ceased to exist. Several hundred voters who had legally registered as Libertarians between June and November were effectively told by the state that they could no longer affiliate with this "party," since it was no longer a party. The Oklahoma situation raises some potentially serious freedom of association problems which, to my knowledge, no court has addressed.

The second major barrier to third parties is the entire Federal Election Campaign Act[3] as administered by the Federal Election Commission. My own position is that the only real solution to the problems created by the FECA is complete repeal of the FECA and abolition of the FEC. Others who share this basic "abolitionist" view have suggested that the portion of the FECA requiring public disclosure of contributors and the amount of their contributions may be retained without serious harm to third parties. I would argue, however, that even disclosure has some chilling effect on potential support for a third party. Because third parties often have a reputation (sometimes deserved) for being irresponsible, zany, or radical, it is by no means unusual for potential supporters to express concern that their names not be published in connection with a third party effort, even if they themselves are pleased to give their support. When, as sometimes happens, a potential contributor requires anonymity as a condition of support, the party has no choice but to refuse the contribution.

Simply attempting to comply with the FECA imposes a hardship on third parties which is not proportionately borne by major parties. Keeping the necessary records and completing and filing the necessary forms in a timely way are much more difficult for a small organization with a small staff, many of whom may be volunteers, than for the Republican or Demo-

3. 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980).

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cratic National Committees, which have large, well-paid staffs, complete with attorneys familiar with this aspect of the law. Notwithstanding this disproportionate burden, the compliance requirements are the same for major parties and third parties alike.

Of all the myriad FECA requirements, the one having the most adverse effect on third parties and independents is the one thousand dollar contribution limitation in a federal campaign.[4] The limitation, of course, applies equally to all federal candidates regardless of party, but with the availability of federal matching funds to major party candidates in the primaries, and with virtually total federal funding of major party presidential nominees, the inequity is obvious. Third parties rely very heavily upon their presidential campaigns to build name recognition and awareness, but their presidential candidates can raise money only from individuals in amounts of one thousand dollars or less. Despite inflation, this figure has remained the same since the requirement was written. (The subsidy for each major party candidate, originally twenty million dollars, includes an automatic adjustment based on the Consumer Price Index.) While a third party may qualify retroactively for federal funds if its presidential candidate wins five percent or more of the vote, the experience of John Anderson, who barely reached this threshold in spite of massive free publicity from the news media, demonstrates that the initial inequity is virtually insurmountable for a third party candidate.

A basic principle of electoral politics is that "early" money, which is given at the outset to get the campaign started, to set up an organization, or to raise other money, is the most important. Under the contribution limitation provision, no individual can possibly provide this necessary "seed money," even as a loan. Under the FECA, a loan is considered a contribution until it is repaid and is thus limited to one thousand dollars.[5] A result of this situation is that third parties must give serious consideration to a candidate's personal wealth when deciding whom to nominate as a presidential or vice-presidential candidate. Because the Supreme Court determined in *Buckley v. Valeo*[6] that a federal candidate may make unlimited expenditures for his or her own campaign, the present structure of the FECA actually encourages a third party to nominate extremely wealthy candidates, if it can find them. While I have no objection to wealthy individuals running for office, I do object to a system which inexorably propels a political party to consider personal wealth as a prime criterion in its nominating process.

The third major barrier to third party candidates, the so-called "equal time" provision of the Federal Communications Act,[7] can be described very briefly. Under this provision, once a broadcast facility has given non-news

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4. *Id.* § 441a(a)(1)(A).
5. *Id.* §§ 431(e), 441a(a)(1)(A).
6. 424 U.S. 1 (1976).
7. 47 U.S.C. § 315 (1976).

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broadcast time to one candidate for an office, it is required to give equal time to all other candidates for the same office if requested. In theory, this may appear to benefit third party candidates, but in practice it damages their chances of appearing on the air at all. Television and radio stations will often deny non-news time to one candidate to avoid having to extend time to everyone else; thus, no candidate is given access to the air. As applied to presidential candidates, the rule does attempt to separate "serious" candidates from those who might be considered completely frivolous. This is because equal time applies only to those presidential candidates who either are qualified for the ballot in the state where the broadcast facility is located, or to those who are ballot-qualified in at least ten other states. Many small, local stations are unaware of this limitation, however. They remain convinced that hosting, for example, the Libertarian presidential candidate on a public affairs program would require them to host every other presidential candidate who has filed a statement of candidacy with the FEC. Typically, there are several hundred of these statements in every presidential election, although no more than eight or ten will become ballot-qualified in even one state, let alone ten or more. Ignorance and misinterpretation of the equal time requirement is at least as great a liability to a third party candidate as the provision itself.

Even when a station interprets the provision correctly, however, serious problems remain, not the least of which is the impact on the freedom of the station itself to make its own independent decisions about its programming. Of the eight or ten presidential candidates who may meet the ballot qualification test in ten or more states, perhaps three or four may have some likelihood of affecting the election or may otherwise be of particular interest to listeners and viewers. Under the equal time provision, however, a public affairs programmer may not make the judgment that an Ed Clark or a Barry Commoner, rather than a Gus Hall or a Dierdre Griswold, would be an asset to the program without running the risk of being required to invite Hall and Griswold. In short, the equal time provision is an affront to both candidates and broadcast facilities alike, and should be abolished.

All three major barriers to third parties and independents—ballot access requirements, the FECA itself, and equal time—unite in their effect upon the American political system by guaranteeing a permanent two-party monopoly over political participation in the absence of a sudden, almost revolutionary insurgence on the part of the electorate. These problems are felt much more sharply and continuously by third parties than by independent candidates, although the problems are equally real for both. Speaking only for the organization which I represent, the Libertarian Party, we view the political growth of our party as a long-term, evolutionary process to be continued over several decades. We thus must confront these barriers every day—not only during presidential elections, but in every election in which we even consider participating. Independents need only deal with these barriers once. Republicans and Democrats need not deal with them at all.

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The ability of such candidates as John Anderson and Ed Clark to overcome these obstacles in 1980 had, to some degree, the healthy effect of focusing public attention on the problems they faced. Many observers of the legal process pertaining to election law acknowledge that the system, insofar as it discriminates against third parties and independents, needs changes, major reforms, or even a complete overhaul. Unfortunately, however, many of their proposed reforms would only extend and perpetuate the basic inequity. A typical proposal is to alleviate the effects of the one thousand dollar contribution limit by providing federal funds to a wider variety of candidates. Such a transfusion of taxpayer money may or may not be welcomed by the new beneficiaries, but this proposal certainly would not address the fundamental problem, which is the capacity of new political parties, movements, or coalitions to organize freely and compete equitably for a place in the political system. Expanded federal funding of candidates and campaigns would only change the number of players that government will permit to participate in the political game. My most basic argument is that government in a free society should not be in the business of determining the legitimacy of political ideas or their means of expression. For far too long, the sole response to these problems by those who regulate the American political system has been to establish arbitrary "standards of viability" for political parties and candidates. "Viability" in a political system, however, should be a decision for the voters, not the regulators, and I would suggest that any proposed solution to the existing problems which involves a mere tinkering with the present standards is, in reality, no solution at all.

The recent presidential campaign helped to draw clear lines between those who believe that the traditional two-party system should be protected and insulated by force of law, and those who believe that such legal insulation and protection is actually dangerous to our political health. A case can certainly be made that the two-party system has served us well and should be kept. This argument is weakened dramatically, however, by the imposition of legal barriers which prevent new parties, new movements, and new ideas from competing freely in the political system.

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