RESOLVING CONSTITUTIONAL ISSUES UNDER THE FEDERAL ELECTION CAMPAIGN ACT: A PROCEDURAL LABYRINTH

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I

INTRODUCTION

When Congress enacted the Federal Election Campaign Act of 1971[1] (FECA) and the Amendments of 1974[2] and 1976,[3] it anticipated intense constitutional scrutiny of that legislation.[4] It therefore attempted to provide a procedural mechanism within the framework of the FECA to simplify and expedite the resolution of constitutional challenges.[5] Congress' prediction that the various pieces of federal election legislation would be plagued with challenges based on constitutional grounds was correct.[6] Congress was mistaken, however, in believing its legislation would provide simple, expeditious, and manageable procedures. On the contrary, the labyrinth of procedural requirements established by Congress[7] and the Federal Election Commission (FEC) has frustrated constitutional challenges. The repercussions of that fact are particularly significant. Some of the restrictions of the FECA infringe upon the first amendment rights of free speech and association, and procedural inadequacies in the FECA and related legislation may hinder review and vindication of those rights. In addition, the practical impact of this procedural maze is to require greater skill and care on the part of lawyers. Lawyers must do more than merely insure that the substantive requirements of the federal election laws have been satisfied. Lawyers are now forced to assume a strategic role; where constitutional issues are raised, the procedural obstacles must be anticipated and dealt with.

This Article will examine the various procedural mechanisms presently established. The inherent problems of these procedural devices will be discussed in the context of three challenges brought by the campaigns in the

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1. Pub. L. No. 92-225, 86 Stat. 3 (1972) (amended 1974, 1976, 1980) (current version at 2 U.S.C. §§ 431-455 (1976 & Supp. IV 1980)).

2. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (further amendments 1976, 1980) (codified as amended in scattered sections of 2, 5, 18, 26, 47 U.S.C. (1976 & Supp. IV 1980)).

3. Pub. L. No. 94-283, 90 Stat. 475 (1976) (further amendments 1980) (codified as amended in scattered sections of 2, 26 U.S.C. (1976 & Supp. IV 1980)).

4. *See, e.g.*, S. REP. No. 93-689, 93d Cong., 2d Sess. 18-19 (1974); 120 CONG. REC. 6845 (1974); 120 CONG. REC. 10,560 (1974); 120 CONG. REC. 27,304 (1974).

5. *See* 2 U.S.C. § 437h (1976 & Supp. IV 1980); 26 U.S.C. §§ 9011, 9041 (1976).

6. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1 (1976); Common Cause v. Schmitt, 512 F. Supp. 489 (D.D.C. 1980), *aff'd mem.*, 50 U.S.L.W. 4168 (U.S. Jan. 19, 1982) (equally divided Court, O'Connor, J., not participating); Reader's Digest Ass'n v. Federal Election Comm'n, 509 F. Supp. 1210 (S.D.N.Y. 1981).

7. *See infra* Section II.

1980 presidential election. Finally, the Article offers several recommendations for legislative and judicial action to prevent procedural defects from thwarting the vindication of constitutionally protected rights.

II

PROCEDURES FOR CONSTITUTIONAL AND STATUTORY CHALLENGES

An individual or organization seeking to assert constitutional or statutory rights under the FECA must first decide whether any of five different procedures is available. First, if the legality of a specific prospective election-related activity is in doubt, one may request an advisory opinion from the FEC.[8] Second, if one believes that the FECA may have been violated, an administrative complaint may be filed with the FEC.[9] Third, if the FEC fails to investigate the administrative complaint, or fails to enforce the FECA with respect to the particular challenge, any aggrieved party may appeal to the United States District Court for the District of Columbia.[10]

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8. 2 U.S.C. § 437f (Supp. IV 1980) in relevant part provides:

> (a)(1) Not later than 60 days after the Commission receives from a person a complete written request concerning the application of this Act, chapter 95 or chapter 96 of Title 26, or a rule or regulation prescribed by the Commission, with respect to a specific transaction or activity by the person, the Commission shall render a written advisory opinion relating to such transaction or activity to the person.
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> (2) If an advisory opinion is requested by a candidate, or any authorized committee of such candidate, during the 60-day period before any election for Federal office involving the requesting party, the Commission shall render a written advisory opinion relating to such request no later than 20 days after the Commission receives a complete written request.

The 60- and 20-day deadlines were created by amendment in 1980. FECA Amendments of 1979, Pub. L. No. 96-187, § 107, 93 Stat. 1339, 1357 (1980). The earlier version of section 437f provided that opinions were to be rendered "within a reasonable period of time." 2 U.S.C. § 437f(a) (1976).

9. 2 U.S.C. § 437g (Supp. IV 1980) in relevant part provides:

> (a)(1) Any person who believes a violation of this Act or of chapter 95 or chapter 96 of Title 26 has occurred, may file a complaint with the Commission. Such complaint shall be in writing, signed and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury and subject to the provisions of section 1001 of Title 18. Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person on the basis of the complaint. The Commission may not conduct any investigation or take any other action under this section solely on the basis of a complaint of a person whose identity is not disclosed to the Commission.

10. 2 U.S.C. § 437g(a)(8)(A) (Supp. IV 1980) provides:

> Any party aggrieved by an order of the Commission dismissing a complaint filed by such party under paragraph (1), or by a failure of the Commission to act on

The two remaining procedural provisions mandate expeditious judicial review of constitutional challenges and broaden standing for plaintiffs. The first of these, included as part of the Presidential Election Campaign Fund Act[11] (the Fund Act), provides that constitutional challenges arising under it will be heard by a three-judge court, with direct appeal to the Supreme Court.[12] For decisions concerning a candidate's entitlement to federal funds, the same section provides that an appeal from the FEC's decision may be made directly to the United States Court of Appeals for the D.C. Circuit.[13] The second of these provisions permits the FEC, the national committee of any political party, and any person eligible to vote for President of the United States to challenge FECA provisions not in the Presidential Election Campaign Fund Act.[14] Once a plaintiff has filed suit under the FECA in federal district court, the district court may certify questions of constitutional law only to the court of appeals in the appropriate circuit which must hear the matter sitting en banc.[15] Appeal from the court of appeals decision may then be taken directly to the Supreme Court.[16]

Senator James Buckley introduced the extraordinary judicial review provisions, including the broadened standing provision, because of his concern that the FECA and its amendments posed serious constitutional issues. Senator Buckley intended his amendment to expedite resolution of these issues before the 1976 presidential election,[17] particularly in light of Congress' refusal to remove expenditure limits.[18] Each of the courts, including the Supreme Court, is directed to expedite claims brought under the FECA and its amendments and the Fund Act.[19]

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such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia.

The standard of review under this provision is limited to whether the FEC acted contrary to law, a standard consistent with the primary jurisdiction vested in the FEC.

11. Pub. L. No. 92-178, § 801, 85 Stat. 497 (1971) (current version at 26 U.S.C. §§ 9001-9013 (1976 & Supp. IV 1980)).

12. 26 U.S.C. § 9011(b)(2) (1976) provides in relevant part:

> Such proceedings shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28, United States Code, and any appeal shall lie to the Supreme Court. It shall be the duty of the judges designated to hear the case to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

13. 26 U.S.C. § 9011(a) (1976).

14. 2 U.S.C. § 437h(a) (Supp. IV 1980).

15. *Id.*

16. 2 U.S.C. § 437h(b) (Supp. IV 1980).

17. *See* 120 CONG. REC. 10,562 (1974) (remarks of Sen. Buckley).

18. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974) (amending Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972)).

19. *Compare* 2 U.S.C. § 437h(c) (1976) *with* I.R.C. § 9011(b). I.R.C. § 9011(b) provides that the courts shall hear the case regardless of whether administrative remedies have been exhausted. No corresponding provision was included in 2 U.S.C. § 437h.

A substantial number of questions about these procedures are still unresolved and have arisen in cases brought thereunder. For example, the scope of standing under the provisions has led to a split between the Seventh and D.C. Circuits.[20] There is also uncertainty as to the circumstances in which administrative remedies must be exhausted.[21] The duty of the FEC to investigate allegations of certain categories of improprieties remains unclear,[22] and there is confusion as to the scope of the ripeness doctrine.[23]

III

THE PRESIDENTIAL ELECTION OF 1980

The multiple procedures pertaining to constitutional challenges of the federal election law, discussed in Section I, present the potential for considerable confusion. Three specific examples based on the experiences of participants in the 1980 presidential election illustrate the need for procedural reform: the suit by the Republican National Committee (RNC) against the FEC,[24] the successive Carter-Mondale Reelection Committee actions against the Kennedy campaign and the Reagan campaign,[25] and the suits brought by John Anderson against the FEC.[26]

In the spring of 1979, the Republican National Committee decided to address an ostensibly unresolved issue under the FECA and the Fund Act. In *Buckley v. Valeo,*[27] the Supreme Court had declared expenditure limits to be unconstitutional but indicated in a footnote that imposition of such limits could be made a condition of the receipt of public funds.[28] In *Republican*

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20. *Compare* Martin Tractor Co. v. Federal Election Comm'n, 460 F. Supp. 1017 (D.D.C. 1978), *aff'd on other grounds,* 627 F.2d 375 (D.C. Cir.), *cert. denied,* 449 U.S. 954 (1980) *with* Bread Political Action Comm. v. Federal Election Comm'n, 591 F.2d 29 (7th Cir. 1979).

21. *See In re* Carter-Mondale Reelection Comm., Inc., 642 F.2d 538 (D.C. Cir. 1980).

22. *See id.* at 544.

23. *See, e.g.,* Martin Tractor Co., 460 F. Supp. 1017; Mott v. Federal Election Comm'n, 494 F. Supp. 131 (D.D.C. 1980); *In re* Carter-Mondale Reelection Comm., Inc. 642 F.2d 538 (D.C. Cir. 1980); Anderson v. Federal Election Comm'n, No. 80-1911 (D.D.C. Sept. 9, 1980).

24. Republican Nat'l Comm. v. Federal Election Comm'n, 487 F. Supp. 280 (S.D.N.Y.), *aff'd,* 445 U.S. 955 (1980).

25. *In re* Carter-Mondale Reelection Comm., Inc., 642 F.2d 538 (D.C. Cir. 1980); Carter-Mondale Presidential Comm., Inc. v. Florida for Kennedy Comm., Complaint before the Fed. Election Comm'n (filed Oct. 3, 1979).

26. Anderson v. Federal Election Comm'n, No. 80-1911 (D.D.C. Sept. 9, 1980) (dismissing case for mootness); Anderson v. Federal Election Comm'n, No. 80-3272 (D. Me. Oct. 14, 1980), *aff'd and remanded,* 634 F.2d 3 (1st Cir. 1980).

27. 424 U.S. 1 (1976).

28. *Id.* at 57 n.65. The Court stated:

> Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forego private fundraising and accept public funding.

National Committee v. Federal Election Commission,[29] the RNC asserted that the *Buckley* footnote was mere dictum since the matter had not been fully addressed by or briefed before the Court.[30] The RNC argued that if the direct imposition of such limits by Congress was unconstitutional, the same limits could not be indirectly imposed by means of conditional grants.[31] The RNC alleged that the expenditure limits would discourage grassroots activities in the presidential election and would favor both incumbents and candidates with strong support from unions.[32] Prior to the decision on the merits, however, the RNC encountered the same procedural problems[33] faced by the *Buckley* plaintiffs. As in *Buckley,* the plaintiffs in *Republican National Committee v. Federal Election Commission* challenged provisions of both the FECA and the Presidential Election Campaign Fund Act.[34] Therefore, the suit began under the FECA before a federal district judge who was then asked to convene a three-judge court to consider the Fund Act challenge.[35] The original judge was designated a member of the three-judge panel.[36] Both courts spent a considerable amount of time hearing overlapping motions to dismiss, making joint findings of fact, and certifying constitutional questions. The differing procedures provided by the two acts thus produced massive duplication of judicial effort. The procedural lesson of *Republican National Committee* is that the provisions for expedited review in the Fund Act and the FECA do not guarantee that constitutional challenges will be heard as quickly and fully as possible. Rather, the procedural provisions of the two laws may frustrate each other.

A different procedure was followed in two actions brought by the Carter-Mondale Reelection Committee not long after *Republican National Committee.* The first action was brought against the various committees which had been organized throughout the country to draft Senator Kennedy for the presidency.[37] The campaign believed that these committees were not spontaneous grassroots organizations but were affiliated among themselves and with Senator Kennedy or his agents.[38] Under the FECA, affiliated committees share a single contribution limit.[39] After studying the various

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29. 487 F. Supp. 280 (S.D.N.Y.), *aff'd,* 445 U.S. 955 (1980).

30. *Id.* at 284 n.6.

31. *See id.* at 284-85. *See also* Plaintiff's Complaint for Declaratory and Injunctive Relief at 1-2, Republican Nat'l Comm., 487 F. Supp. 280.

32. Republican Nat'l Comm., 487 F. Supp. at 286.

33. *Id.* at 282-83.

34. *Id.*

35. Republican Nat'l Comm. v. Federal Election Comm'n, 461 F. Supp. 570 (S.D.N.Y. 1978).

36. *Id.* at 576.

37. Carter-Mondale Presidential Comm., Inc. v. Florida for Kennedy Comm., Complaint before the Fed. Election Comm'n (filed Oct. 3, 1979).

38. *Id.*

39. 2 U.S.C. §§ 433(b)(2), 441a(a)(1)(C), 441a(a)(5) (1976 & Supp. IV 1980).

provisions of the FECA to determine the proper procedural mechanism, the Carter campaign concluded that the appropriate vehicle would be an administrative complaint filed with the FEC.[40] In their complaint, the plaintiffs alleged that the persons and committees involved in the "draft Kennedy" movement were violating the statutory provisions of the law.[41] Once the complaint had been filed the respondents were barred from responding publicly to the charges because an enforcement action filed with the FEC is required by law to be carried out in strict confidence.[42] The result of this strict confidentiality requirement was that from the outset of the campaign neither side was able to comment in any way on the charges.

Once the FEC determines that there is reason to believe that the law has been violated, the alleged violators are subjected to further FEC investigation.[43] The result in this case was that during a critical organizational and fundraising period for their campaign, the "draft Kennedy" organizers found themselves under investigation by the FEC. Since the matter was under the primary jurisdiction of the FEC,[44] however, the "draft Kennedy" respondents had no choice but to proceed with their efforts under this legal sword of Damocles. As the matter dragged on through the primaries, resentment between the Carter and Kennedy people over the enforcement action increased. The "draft Kennedy" people felt that their rights to organize and to raise money had been unfairly and unconstitutionally infringed. The Carter people felt just as strongly that the "draft Kennedy" people had successfully evaded the law and that the FEC was taking no expeditious action to stop them. Ironically, the investigation did not really begin in earnest until the primaries were over, when the two campaigns were trying to effect a reconciliation. Thus, at the very moment the Carter people were attempting to reach out to the Kennedy campaign and put their differences aside, the Kennedy people found themselves responding to discovery by the FEC pursuant to the Carter-Mondale complaint.[45]

In the late summer, the Carter campaign brought its second action and again sought to counter the massive spending by independent committees supporting the candidacy of an opponent, this time Ronald Reagan.[46] After its experience with the FEC on the "draft Kennedy" committee issues, the

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40. 2 U.S.C. § 437g (Supp. IV 1980). *See supra* text accompanying note 9.

41. Carter-Mondale Presidential Comm., Inc. v. Florida for Kennedy Comm., Complaint before the Fed. Election Comm'n (filed Oct. 3, 1979).

42. 2 U.S.C. § 437g(a)(4)(B)(i) (Supp. IV 1980).

43. 2 U.S.C. § 437g(a)(2) (Supp. IV 1980).

44. *Id.*

45. The case is still pending before the FEC. The Commission found reason to believe that certain provisions of the Act had been violated and it authorized the issuance of an administrative subpoena. The Florida for Kennedy Committee challenged the subpoena, without success. Federal Election Comm'n v. Florida for Kennedy Comm., 492 F. Supp. 587 (S.D. Fla. 1980), *appeal docketed,* No. 80-6013 (5th Cir. Dec. 18, 1980) (transferred to 11th Cir. Oct. 1, 1981).

46. *In re* Carter-Mondale Reelection Comm., Inc., 642 F.2d 538 (D.C. Cir. 1980).

Carter campaign was apparently reluctant to pursue only the administrative route. Instead the Carter campaign launched a two-pronged attack. First, the Carter campaign sought to make use of the Fund Act provision which permits challenges of FEC decisions to be brought directly in the United States Court of Appeals for the D.C. Circuit.[47] In that court, the Carter campaign challenged the FEC's decision to certify the Republican nominee for a $29,400,000 major party subsidy.[48] Second, an administrative complaint was filed with the FEC[49] alleging illegal coordination between the independent committees and the Reagan campaign.[50] The court of appeals held, not unexpectedly, that primary enforcement jurisdiction rests with the FEC and thus denied the first prong of the Carter assault.[51] The second prong, the Carter administrative complaint, is still pending before the FEC. Assuming arguendo that there were substantial violations of the law committed by the Reagan campaign or the independent committees, it would be difficult to imagine what satisfactory remedy the FEC could now offer. Had the FEC moved more quickly to resolve the enforcement action, however, it undoubtedly would have been criticized for forcing the diversion of scarce campaign resources to a collateral matter.

The third and final example of the significant procedural obstacles to constitutional challenges under the FECA arose in two suits brought under the FECA by the National Unity Campaign for John Anderson.[52] Although not by choice, Congressman Anderson conducted the most litigious 1980 presidential campaign. Having spent the period following his loss in the Republican primary fighting a series of successful ballot access cases, Anderson ended the summer with a deficit and little cash to begin his fall general election campaign. Pursuant to the Fund Act, both major party nominees received $29,400,000 once they had agreed to forego all private fundraising.[53] In contrast, Anderson was obliged to abide by the FECA's contribution limits while being deprived of the corresponding federal grant.[54]

In *Anderson I,* Congressman Anderson filed suit against the FEC in the United States District Court for the District of Columbia. In his complaint, Anderson alleged that the FEC discriminated between his independent cam-

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47. 26 U.S.C. § 9011(a) (1976). *See supra* text accompanying note 13.

48. *In re* Carter-Mondale Reelection Comm., Inc., 642 F.2d 538.

49. Pursuant to 2 U.S.C. § 437g(a)(1) (Supp. IV 1980).

50. Carter-Mondale Reelection Comm. v. Americans for Change, Complaint before the Fed. Election Comm'n (filed July 2, 1980).

51. *In re* Carter-Mondale Reelection Comm., Inc., 642 F.2d 538.

52. Anderson v. Federal Election Comm'n, No. 80-1911 (D.D.C. Sept. 9, 1980) (dismissing case for mootness) [hereinafter cited as *Anderson I*]; Anderson v. Federal Election Comm'n, No. 80-3272 (D. Me. Oct. 14, 1980), *aff'd and remanded,* 634 F.2d 3 (1st Cir. 1980) [hereinafter cited as *Anderson II*].

53. *Cf.* 26 U.S.C. § 9003(b) (1976); 2 U.S.C. § 441a(b)(1) (1976).

54. *Cf.* 26 U.S.C. § 9003(c) (1976).

paign and those of partisan candidates.[55] By refusing to interpret the Fund Act to include his independent campaign under the Act's definition of a "new party," the FEC made post-election funds absolutely unavailable to independent candidates, while they were available for partisan candidates based on actual performance.[56] With his complaint, Anderson submitted the affidavits of two bankers who agreed to loan money to the Anderson campaign if the FEC assured the campaign that it would not be ineligible for post-election federal funding by virtue of its status as an "independent" campaign.[57] Following a suggestion by one of the judges in chambers, the Anderson campaign submitted an advisory opinion request between the time of the status conference and that of the oral argument. After briefs were filed and oral arguments presented, but before the court rendered a decision, the FEC responded to the request for an advisory opinion, and granted the Anderson campaign the relief it was seeking by making it eligible for receipt of post-election compensation.[58] The court held that the opinion by the FEC rendered the case moot.[59]

Soon thereafter, the Anderson campaign filed another suit against the FEC, *Anderson II*,[60] in which it requested preliminary injunctive relief directing the FEC to allow the Anderson campaign to raise and spend the same amounts of funding permitted national political parties. The gravamen of the complaint was that the national parties were each permitted to receive contributions of twenty thousand dollars from individuals and fifteen thousand dollars from multi-candidate political action committees (PACs) per calendar year, while Anderson's National Unity Campaign was restricted to one thousand dollars from individuals and five thousand dollars from PACs per election.[61] The district court denied the motion for a preliminary injunction, and was affirmed on appeal.[62]

The fundamental difficulty in both *Anderson I* and *Anderson II* was that neither was ripe for review. In order for a federal court to exercise jurisdiction, a real case or controversy must be presented.[63] Since the FEC had not stated a position on the merits, the court was not presented with a real case or controversy in *Anderson I* or *Anderson II*. This problem would not have existed if the campaign had requested an advisory opinion from the FEC immediately after Anderson launched his independent campaign on

55. Complaint for Declaratory and Injunctive Relief at 5-7, *Anderson I*.
56. *Id.*
57. Plaintiff's Affidavit, *Anderson I*.
58. FEC Advisory Op. 1980-96, 1 FED. ELECTION CAMP. FIN. GUIDE (CCH) ¶ 5535 (Sept. 4, 1980).
59. *Anderson I*.
60. *Anderson II*. No. 80-3272 (D. Me. Oct. 14, 1980), *aff'd and remanded*, 634 F.2d 3 (1st Cir. 1980).
61. *Anderson II*, 634 F.2d 3, 4 (1st Cir. 1980); *see* 2 U.S.C. §§ 431, 441a(a)(1)(B), 441a(a)(1)(C), 441a(d)(1), 441a(d)(2) (1976).
62. *Anderson II*, 634 F.2d at 4-5.
63. U.S. CONST. art. III, § 2; Baker v. Carr, 369 U.S. 186, 198 (1961).

April 24, 1980. Under the FECA and its amendments, the FEC must issue an advisory opinion within sixty days from the day it is requested, and within twenty days if it is requested by a candidate within sixty days prior to the election.[64] In practice, the FEC has acted even more quickly than required under the statute, often responding to advisory opinion requests within two weeks. By avoiding the FEC and going directly to a three-judge court, the National Unity Campaign in both *Anderson I* and *Anderson II* enabled counsel for the FEC to defend the litigation on ripeness grounds rather than on the merits of the case. In *Anderson I,* the court held that the issue was rendered moot when the FEC issued its advisory opinion granting the relief requested by the Anderson plaintiffs.[65] *Anderson II* was not heard on the merits until exactly two weeks before Election Day,[66] and long after the statutory period within which the FEC would have been required to issue a response to an advisory opinion request,[67] had the Anderson campaign used that route.

If Anderson had been able to claim that an adjudication on the merits was the only method by which he and his supporters could vindicate their first amendment rights, and if he had secured expedited adjudication on this claim, then future campaigns would rarely bother requesting an advisory opinion where the result might be in doubt. Apart from the tactical disadvantage to the Anderson campaign of going directly to court and bypassing the FEC, the effect of that procedure would have been to turn the FEC's advisory opinion mechanism over to the federal courts. Regardless of whether it is constitutional for a federal court to render advisory opinions, Congress certainly did not envision such a role for the courts. Furthermore, the giving of advisory opinions is not an effective use of judicial resources.

IV

RECOMMENDATIONS FOR CHANGE

The results of these three instances in which presidential campaigns attempted to litigate their constitutional rights under the FECA make clear that the existing procedural mechanism for such claims is largely inadequate. The federal election laws operate within the core of the first amendment.[68] When Congress created the FEC as part of the Federal Election Campaign Act Amendments of 1974[69] and provided for expedited judicial review,[70] its express intention was to permit prompt resolution of disputes in

64. 2 U.S.C. § 437f(a) (Supp. IV 1980).
65. *Anderson I.*
66. *Anderson II,* 634 F.2d at 3.
67. *See* 2 U.S.C. § 437f(a) (Supp. IV 1980).
68. Buckley v. Valeo, 424 U.S. at 14.
69. FECA Amendments of 1974, § 208, 2 U.S.C. § 437c (1976).
70. 2 U.S.C. §§ 437g(a)(10), 437h (1976 & Supp. IV 1980).

order to minimize any potentially chilling effect on the fundamental rights of speech and association.[71] These goals are not being achieved.

A complete reexamination and, perhaps, an overhaul of these procedures is in order. First, the judicial review provisions under the FECA and the Fund Act should be consolidated into a single section. This section could resemble the present provision of the Fund Act that provides for initial expedited review of all constitutional claims by a three-judge court, followed by direct appeal as of right to the Supreme Court. Second, although Congress gave considerable attention to balancing the competing policy considerations concerning enforcement actions in the 1979 amendments,[72] there must be further study of this troublesome issue. On the one hand, expeditious prosecution would result in an even greater drain on already severely limited campaign resources, and could encourage the filing of enforcement actions for the purpose of harassment. Moreover, the mere fact of an investigation during a campaign, particularly Congressional races, can become a campaign issue. On the other hand, when consideration of an enforcement action is delayed until the completion of the election, its continued processing is irrelevant and wasteful. The current procedures are tilted too far toward the latter extreme. In reviewing these procedures for future refinement, consideration should be given to provisions for expedited treatment of certain categories of complaints. One possibility is to require the complainant to post bond in order to restore the balance toward more prompt resolution.

Finally, the courts should vigorously enforce the ripeness doctrine to insure that whenever possible the FEC, as the appropriate administrative body, has a full opportunity to consider the matter initially.

While the entire concept of campaign finance regulation remains controversial, it is important not to lose sight of the fact that enactment of a regulatory system must be accompanied by fair and expeditious enforcement procedures and practices if injustice is to be avoided. Falling too far short of this goal may irreparably compound the already formidable difficulties facing the FECA.

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71. *See supra* note 4.

72. FECA Amendments of 1979, Pub. L. No. 96-187, 93 Stat. 1339 (1980) (codified in scattered sections of 2, 5, 18 U.S.C. (Supp. IV 1980)).