CHALLENGING RESTRICTIVE BALLOT ACCESS LAWS ON BEHALF OF THE INDEPENDENT CANDIDATE

REMARKS OF GEORGE FRAMPTON, JR.

As of April 24th, the date that John Anderson decided that he was an independent candidate, there were three kinds of barriers to getting onto the primary ballots. The most pressing problem was that there were five states in which the deadlines for filing petition signatures for independent candidates had expired. The most immediate order of business, therefore, was to institute lawsuits in those five states and to have their filing deadlines declared unconstitutional.

The second set of problems involved the possibility that a host of laws in different states might be asserted against Anderson to keep him off the ballot. These laws, known as "disaffiliation laws," required that an independent candidate have taken some affirmative action either to declare himself independent or to resign or disaffiliate himself from any political party some length of time before entering an electoral race. "Sore loser" laws, which were in effect in many states, prohibited a candidate who had run in a primary and lost from then switching tracks and trying to get on the ballot as a third party or as an independent candidate.

The third type of problem faced by Anderson involved state laws which had elaborate requirements regarding petition signatures, geographical distribution, the form of petitions, and so forth. The most outrageous example was a West Virginia requirement that people who sign petitions indicate the magisterial district in which they reside. The problem was that there was absolutely no way to tell from state law, practice, court records, or anything else what the boundaries of West Virginia's magisterial districts were. These districts had basically gone out of existence. We were lucky enough to join the Libertarian Party in a suit challenging this requirement in the state supreme court. The court overturned the requirement,[1] and we got on the ballot there.

We discovered that the Supreme Court had held quite resoundingly in *Williams v. Rhodes* [2] that burdensome ballot-access restrictions constituted an unconstitutional limitation on the rights of supporters of independent candidates to vote and to associate. Since *Williams,* the Court has consistently applied the strict scrutiny review which is appropriate when first amendment rights are implicated, requiring that a compelling state interest justify these restrictions. Since that decision, however, the Supreme Court

1. West Virginia Libertarian Party v. Manchin, 270 S.E.2d 634 (W.Va. 1980).
2. 393 U.S. 23 (1968).

has not been very hospitable to challenges to state ballot access restrictions. In fact, in *Storer v. Brown*,[3] the majority opinion by Justice White held that political stability and the desire of a state to channel dissent and discussion within the two-party system constituted a compelling state interest. Moreover, a law requiring disaffiliation one year before the primary was upheld as constitutional. The Court also noted that a California law requiring a state-wide candidate to get several hundred thousand petition signatures might be constitutional if a reasonably diligent candidate could gather that number of signatures in a short period of time.

Despite the *Storer* decision and other similar Supreme Court cases, it appeared to us that several cases from the late 1970's involving Eugene McCarthy's candidacy and those of other independent candidates showed that the federal district courts often acted as though the Supreme Court decisions did not exist. The district court judges seemed to have been very reluctant to prevent a candidate from entering an election if the candidate had enough money and interest to go into court to challenge state laws which kept him off the ballot. The law being made at the trial court level looked very different from the doctrine being espoused by the Supreme Court. Our strategy, therefore, was to try to win our litigation at the trial level. We tried to avoid constitutional doctrine as much as possible, and to demonstrate instead that early filing deadlines and other state law restrictions simply had no rational purpose in the state election law scheme. The laws were not designed to accomplish any legitimate purpose; they only made it difficult for independents to compete with the major party candidates.

Some people wanted us to frame the question of whether John Anderson could run in every state of the Union as a major constitutional issue, and attempt to get judicial review by the Supreme Court. Instead, we chose exactly the opposite strategy. Our idea was to try to limit each case to its own facts, and convince the judge that it would really be unfair to Anderson's supporters to keep him off the ballot in that state. We hoped we could win enough cases at the trial level while avoiding the Supreme Court, and succeeded. Anderson did get on the ballot in all fifty-one jurisdictions, though we had to litigate that issue in ten states. We won all of those cases in the district court, and then sought to fend off appeals by state officials.

We won five filing-deadline cases on a somewhat novel theory. In previous ballot access cases, courts had struck down early filing deadlines as burdensome, because candidates could not evoke enough interest in the campaign nine or ten months before the election. The candidates would thus have a hard time getting the requisite number of signatures. Anderson, however, did not have this problem. In most cases, he was able to get the required number of signatures within a few days or weeks. He was forced to

3. 415 U.S. 724 (1974).

argue, therefore, that it violated the equal protection clause to make an independent candidate decide in April or May that he was going to run in order to satisfy all of the state's requirements while the major parties were given until July or August to select their candidates. This theory was accepted by the district courts and two courts of appeals.

We also eventually had three cases challenging disaffiliation or "sore loser" statutes. We won all of those cases by again avoiding the constitutional issues and concentrating instead on the pragmatic question of how Anderson could get on the ballot without doing too much damage to the state's scheme. The most interesting case, I think, was in Georgia where we succeeded in getting Anderson on the ballot even though we did not have enough signatures. The state of Georgia could not validate enough of Anderson's signatories as registered voters to bring him up to the minimum required. It was unclear how many signatures were valid, and we convinced the federal district court and the court of appeals that if it cannot be determined whether a candidate has the required number of signatures, the benefit of the doubt should go to the candidate.

You may remember reading about the Democratic National Committee's (DNC) purported decision to spend a lot of money to ensure the strict enforcement of state access laws in an attempt to keep Anderson off the ballot. In spite of this publicity, or perhaps because of it, we did not, with one or two exceptions, see any overt attempts by the DNC or the Republicans to mount challenges against Anderson in any of the states. We were lucky on that score. We were terribly frightened that a well-financed and aggressive effort which would force us to challenge a number of state laws would totally tie up the campaign. Although that did not happen, there are many arguments which could be used by a candidate to try to impede the ballot access efforts of another candidate. The results of the litigation that we brought, together with cases that were litigated on behalf of Senator [Eugene] McCarthy in 1976, should make ballot access for future independent presidential candidates much easier than it has ever been.

It should be noted that even in 1980, the main barriers that an independent candidate must face are not legal barriers to ballot access, but other institutional factors. One of these is the seemingly inevitable trap of spending a great deal of time and money on ballot access itself. I could not agree more with Stewart Mott's observation that the Anderson campaign's preoccupation with its ballot access efforts turned out to be terribly pernicious to the overall presidential campaign. Historically, this has been true for every third-force candidate in the last one hundred years. In connection with our federal district court litigation, we had political scientists and historians work with us to prepare a paper on third-party and independent presidential candidates in American history, beginning with the candidacy in 1832 of a Mason named William Wirt, who ran for President on the Antimasonic Party ticket. His party brought into American history the first party convention, a tradition that has become somewhat of a beast since then. Our

analysis showed that almost every candidate who had run as a third-party or independent candidate for the Presidency had basically gotten submerged in the problems of getting onto the ballot, and exhausted his or her resources by September or October, with nothing left to run a real campaign. The same thing happened to John Anderson. He should have assigned the ballot access problem to a few campaign people and his lawyers, and gotten on with the business of running a real campaign. He failed to do this.

A second institutional type of barrier is the money problem. I was interested in hearing Charles Steele speak about the extent to which he thinks that a conventional first amendment analysis really does not help one deal with the competing rights and interests involved in campaign finance law. This conclusion is also true with respect to communications media. If one is in the position of an Ed Clark or a John Anderson, gaining access to radio and television during a campaign is very difficult, because one must depend on an overwhelming number of regulations in order to assert one's first amendment rights in the first place.

The problems of money and the current problems pertaining to regulation of the debates are harmful to the third-force candidacy. Those problems, together with the electorate's institutional habit of supporting the major party candidate in the long run and avoiding the potential "spoiler," are the real barriers today. These problems, and not ballot access, will continue to be the real barriers to any effective third-party or independent candidacy in the future.