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An Analysis of the 2004 Nader Ballot Access Federal Court Cases

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Richard Winger[*]

"In America, it is vital that every vote count and that every vote be counted." John Kerry, concession speech of November 3, 2004.[1]

"Be it further resolved that: The Democratic Party of the United States recognizes the right to vote as the most fundamental of all rights in our democracy. And no duty of the Party is more important than protecting the sanctity of this right." Resolution passed by the 1984 Democratic National Convention.

"It is to be expected that a voter hopes to find on the ballot a candidate who comes near to reflecting his policy preferences on contemporary issues."[2]

INTRODUCTION

Beginning in 1968, federal courts have generally protected the ability of voters to cast votes for minor party and presidential candidates if those candidates were significant enough to obtain regular coverage by major daily newspapers and national television networks. George Wallace, Eugene McCarthy, John B. Anderson, Ross Perot, and Ralph Nader (in 2000) were all placed on the ballot of various states by federal court injunctions, as this article will show.[3] However, in 2004, Ralph Nader failed to get injunctive relief from any federal court in his eight federal ballot access or vote-counting cases, which were filed against certain

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1. Richard Stevenson, *After a Tense Night, Bush Spends the Day Basking in Victory*, N.Y. TIMES, Nov. 4, 2004, at P3.

2. Lubin v. Panish, 415 U.S. 709, 716 (1974).

3. George Wallace won his ballot access lawsuit against Ohio on October 15, 1968. Williams v. Rhodes, 393 U.S. 23, 34 (1968). There was no precedent holding that the Constitution protects ballot access for minor parties or independent candidates. *See id.* at 32 (relying on other types of Equal Protection cases to determine if the State can keep minority parties off the ballot).

election officials in Arizona, Hawaii, Illinois, North Carolina (two cases), Ohio (two cases), and Texas. This article discusses each of Nader's 2004 federal ballot access cases.[4] These cases are grouped by issue: a) whether a state petition deadline is unconstitutionally early; b) whether a state requirement concerning the number of signatures is discriminatory; c) whether a state restriction on who can circulate a petition is unconstitutionally restrictive; and d) miscellaneous other issues. This Article concludes that Nader's 2004 federal ballot access cases had merit, and that the federal courts which heard these cases defied precedent, and made errors of both fact and law when they denied relief to voters who wished to vote for Nader. This Article's conclusion also shows that denial of injunctive relief completely disenfranchised tens of thousands of voters in the presidential election.

I. NADER'S INABILITY TO WIN INJUNCTIVE RELIEF FROM FEDERAL COURTS

Ever since 1968, when the Supreme Court ordered Ohio to place George Wallace's name on its presidential ballot,[5] the federal courts have protected ballot access for whichever minor party or independent presidential candidate was running third, if the candidate was prominently mentioned in the news media and needed help from courts to get on ballots.[6] In 1976, federal courts, including the Supreme Court itself, issued injunctions requiring ten states (Delaware,[7] Florida,[8] Illinois,[9] Kansas,[10] Louisiana,[11] Michigan,[12] Missouri,[13] Nebraska,[14] Texas,[15] and Vermont)[16] to list

4. This Article does not discuss Nader's federal ballot access cases in Michigan and New Mexico, since they were rendered mooted by decisions of state courts placing Nader on the ballot in those two states. Those two cases were *Gladstone v. Vigil-Giron*, CV-04-1078 (D.N.M. Sept. 28, 2004), and *Nader v. Land*, No. 04-CV-72830 (E.D. Mich. July 27, 2004). Any blanket statements about "all" of Nader's federal ballot access cases in this article do not include these two cases.

5. *See Williams*, 393 U.S. at 34.

6. There were no independent or minor party presidential candidates who were covered by the major newspapers or television networks in the presidential elections of 1972, 1984, and 1988.

7. McCarthy v. Tribbitt, 421 F. Supp. 1193, 1199 (D. Del. 1976).

8. McCarthy v. Askew, 540 F.2d 1254, 1255 (5th Cir. 1976).

9. McCarthy v. Lunding, No. 76-C-2733 (N.D. Ill. September 7, 1976) (on file with author).

10. McCarthy v. Shanahan, No. 76-237-C6 (D. Kan. June 17, 1976) (on file with author).

11. McCarthy v. Hardy, 420 F. Supp. 410, 413 (E.D. La. 1976).

12. McCarthy v. Austin, 423 F. Supp. 990, 1000 (W.D. Mi. 1976).

13. McCarthy v. Kirkpatrick, 420 F. Supp. 366, 375 (W.D. Mo. 1976).

14. McCarthy v. Exon, 424 F. Supp. 1143, 1145 (D. Neb. 1976).

Eugene McCarthy on November ballots. In 1980, federal courts issued injunctions requiring eight states (Florida,[17] Georgia,[18] Kentucky,[19] Maine,[20] Maryland,[21] New Mexico,[22] North Carolina,[23] and Ohio[24]) to list John B. Anderson and his running mate on their ballots. In 1992, independent candidate Ross Perot attained ballot status in all fifty states without needing to sue any state elections officials. In 1996, federal courts ruled in favor of ballot access (in time for the election) for Ross Perot's Reform Party and its national ticket in Arkansas,[25] Florida,[26] and Maine.[27] In 2000, Nader won injunctions in federal court putting him on the ballot in Illinois[28] and West Virginia.[29] Also in 2000, he won declaratory, but not injunctive relief, in South Dakota.[30]

In stark contrast, in 2004 Nader sought but failed to get injunctive relief from lower federal courts in six states: Arizona,[31] Hawaii,[32] Illinois,[33] North Carolina,[34] Ohio,[35] and Texas.[36] He also failed to obtain injunctive

15. McCarthy v. Briscoe, 429 U.S. 1317, 1323-24 (1976).

16. McCarthy v. Salmon, No. 76-213 (D. Vt. Oct. 7, 1976) (on file with author).

17. Anderson v. Firestone, 499 F. Supp. 1027, 1030-31 (N.D. Fla. 1980).

18. Anderson v. Poythress, No. C80-1671A (N.D. Ga 1980) (on file with author).

19. Greaves v. Mills, 497 F. Supp. 283, 289 (E.D. Ky. 1980).

20. Anderson v. Quinn, 495 F. Supp. 730, 734 (D. Me. 1980).

21. Anderson v. Morris, 636 F.2d 55, 58-59 (4th Cir. 1980).

22. Anderson v. Hooper, 498 F. Supp. 898, 905 (D.N.M. 1980).

23. Anderson v. Babb, 632 F.2d 300, 309 (4th Cir. 1980).

24. Anderson v. Celebrezze, 499 F. Supp. 121, 124 (S.D. Ohio 1980). Ohio asked the U.S. Supreme Court to overturn this decision and to bypass the Sixth Circuit, but the Supreme Court refused on August 15, 1980 in *Celebrezze v. Anderson*, 448 U.S. 914 (1980).

25. Citizens to Establish a Reform Party in Ark. v. Priest, 970 F. Supp. 690, 700-01 (E.D. Ark. 1996).

26. Libertarian Party of Fla. v. Mortham, No. 4:96-CV258-RH (N.D. Fla. Sept. 9, 1996).

27. Citizens to Establish a Me. Reform Party v. Diamond, No. 96-CV-24 (D. Me. 1996). In this case, the state capitulated before the court could rule on the matter.

28. Nader 2000 Primary Comm. v. Ill. State Bd. of Elections, No. 00-C-4401 (N.D. Ill. 2000) (on file with author).

29. Nader 2000 Primary Comm. v. Hechler, 112 F. Supp. 2d 575, 580 (S.D. W. Va. 2000).

30. Nader 2000 Primary Comm. v. Hazeltine, 110 F. Supp. 2d 1201, 1209 (D.S.D. 2000).

31. Nader v. Brewer, No. 04-1699 (D. Az. Sept. 10, 2004) (on file with author); *aff'd*, 386 F.3d 1168, 1169 (9th Cir. 2004).

32. Nader v. Yoshina, No. 04-611 (D. Hi. Oct. 13, 2004) (on file with author).

33. Nader v. Keith, No. 04 C 4913, 2004 U.S. Dist. LEXIS 16660 (N.D. Ill. Aug. 23, 2004); *aff'd*, 385 F.3d 729 (7th Cir. 2004).

34. Nader v. Bartlett, No. 5:04-cv-675-BR (E.D.N.C. Sept. 24, 2004) (on file with author).

35. Blankenship v. Blackwell, 341 F. Supp. 2d 911, 924 (S.D. Ohio 2004).

36. Nader v. Connor, 332 F. Supp. 2d 982, 992 (W.D. Tex. 2004); *aff'd*, 388 F.3d 137

relief from the Supreme Court in Ohio,[37] Oregon,[38] and Pennsylvania,[39] in appeals from adverse decisions of federal and state courts. Justice Stephen Breyer was the only federal judge who gave Nader's ballot access any support whatsoever, and cast the sole vote on that court to grant injunctive relief to Nader in Oregon.[40] Nader's ballot access cases were in front of the entire Seventh Circuit,[41] three judges in the Ninth Circuit,[42] three judges in the Sixth Circuit,[43] three judges in the Fifth Circuit,[44] and eight district court judges.[45]

At this point, the reader may wonder if perhaps the Nader ballot access cases of 2004 lacked merit. Despite suggestions to the contrary, Nader's 2004 federal ballot access cases enjoyed considerable merit. This Article will attempt to show that the decisions of federal courts in 2004 to deny Nader injunctive relief violated precedents, committed serious factual errors, and were of poor quality. In sharp contrast to the behavior of federal courts in the 2004 Nader cases, state courts ruled in favor of ballot access for Nader in eleven states: Arkansas, Colorado, Florida, Maine, Maryland, Michigan, Nevada, New Mexico, Washington, West Virginia, and Wisconsin.[46] Nader failed to obtain injunctive relief in state court in only five states: Hawaii,[47] Illinois,[48] Ohio,[49] Oregon,[50] and Pennsylvania.[51]

(5th Cir. 2004).

37. The Supreme Court denied injunctive relief on October 24, 2004 in *Blankenship v. Blackwell*, 125 S. Ct. 375 (2004).

38. The Supreme Court denied injunctive relief on September 28, 2004 in Kucera v. Bradbury, 125 S. Ct. 27 (2004).

39. The Supreme Court denied injunctive relief on October 23, 2004 in *Nader v. Serody*, 125 S. Ct. 375 (2004).

40. Richard Winger, *16 Wins, 9 Losses in Ballot Access Cases*, BALLOT ACCESS NEWS, Oct. 3, 2004, *at* http://www.ballot-access.org/2004/1003.html. Breyer's vote was cast on September 28, 2004. *See Kucera*, 125 S. Ct. at 27.

41. Nader v. Keith, 385 F.3d 729, 737 (7th Cir. 2004). Nader asked for an *en banc* rehearing in the Seventh Circuit, which was denied on October 15, 2004. Nader v. Keith, 2004 U.S. App. LEXIS 22473 (7th Cir. Oct. 15, 2004).

42. Nader v. Brewer, 386 F.3d 1168, 1169 (9th Cir. 2004) (denying Nader the injunctive relief he requested).

43. Blankenship v. Blackwell, No. 04-4259 (6th Cir. Oct. 18, 2004) (denying Nader the injunctive relief he requested) (on file with author).

44. Nader v. Connor, 388 F.3d 137 (5th Cir. 2004) (denying Nader the injunctive relief he requested).

45. The eight district judges were Frederick J. Martone of Arizona, David Alan Ezra of Hawaii, Matthew F. Kennelly of Illinois, Frank W. Bullock, Jr. and W. Earl Britt of North Carolina, Edmund A. Sargus, Jr. and George C. Smith of Ohio, and Lee Yeakel of Texas. Five of the judges were appointees of Republican presidents, and three were Democratic appointees.

46. For a discussion of cases decided in favor of granting Nader ballot access in these states, see Winger, *supra* note 40.

47. Nader v. Yoshina, No. 04-00611 (D. Hi. Oct. 13, 2004) (on file with author).

II. NADER'S CASES AGAINST TOO-EARLY PETITION DEADLINES

In 1983, the Supreme Court ruled in *Anderson v. Celebrezze*[52] that early petition deadlines for non-major party presidential candidates are unconstitutional. Part II of that decision discusses the injury to voting rights imposed by such deadlines; Part III discusses the state interests in an early deadline. Applying a balancing test, the decision concludes that the harm done to voting rights by early petition deadlines is substantial, whereas the harm done to state interests by a later deadline is not substantial.[53]

The Court depended on American history for its conclusion that voting rights are substantially infringed by early deadlines, and quoted extensively from historian Alexander Bickel.[54] Throughout America's history, voters dissatisfied with the major party national nominees and platforms have transferred their interest and support to new parties and independent candidates. The Republican Party was formed on July 6, 1854,[55] in response to the Kansas-Nebraska Act having been signed into law in May 1854.[56] The Progressive Party of 1912 was not organized until August,[57] after Theodore Roosevelt had been denied the Republican Party nomination in June.[58] Independent Progressive candidate Robert La Follette did not decide to run for president until July 4, 1924, after it became apparent that the Democratic Party national convention was not going to nominate William G. McAdoo, the favorite candidate of the progressive movement that year.[59] Strom Thurmond did not decide to run for president until mid-July 1948, after the Democratic national convention passed a Civil Rights plank.[60]

Starting in 1972, most states provided the Democratic and Republican

48. Nader v. Ill. State Bd. of Elections, 819 N.E.2d 1148 (Ill. App. Ct. 2004).
49. Blankenship v. Blackwell, 817 N.E.2d 382 (Ohio 2004).
50. Kucera v. Bradbury, 97 P.3d 1191 (Or. 2004) (on file with author).
51. *In re* Nader, No. J-211-2004 (Pa. Oct. 19, 2004) (on file with author).
52. 460 U.S. 780 (1983).
53. *Id.* at 806.
54. *See, e.g.*, *id.* at 805.
55. ENCYCLOPEDIA BRITANNICA 202 (1958) ("Republican Party").
56. MICHAEL F. HOLT, RISE AND FALL OF THE AMERICAN WHIG PARTY 822 (1999).
57. *Roosevelt Named Shows Emotion*, N.Y. TIMES, Aug. 8, 1912, at 1.
58. *Taft Renomiated By The Republican Convention*, N.Y. TIMES, June 23, 1912, at 1.
59. *Follette Agrees To Lead The Fight For Progressives*, N.Y. TIMES, July 5, 1924, at 1.
60. W.H. Lawrence, *Truman, Barkley Named By Democrats; South Loses on Civil Rights; President Will Recall Congress July 26*, N.Y. TIMES, July 18, 1948, at 1; John N. Popham, *Southerners Name Thurmond To Lead Anti-Truman Fight*, N.Y. TIMES, July 15, 1948, at 1.

Parties with their own presidential primaries, and it became common for the identity of major party presidential nominees to be predictable by April (as of 1980),[61] and even by March (by 1988).[62] It continued to be true, however, that major party vice-presidential nominees, and party platforms, were often not known until the July and August, national party conventions. Even in 2004, the Democratic vice-presidential candidate was not known until July 6, when John Kerry announced that his choice would be John Edwards.[63] Also, the Democratic Party's position on the Iraq war was unclear until its national convention, held July 26-29. Therefore, the logic employed in *Anderson v. Celebrezze* continued to be valid, even into 2004.

By 1988, all states except Texas had moved their petition deadlines for non-major party presidential candidates to the months of July, August or September.[64] Texas's petition deadlines for new parties and independents had been in July, or even later, since that state had first created government-printed ballots in 1903.[65] In 1986, however, the state had moved its first primary from May to March.[66] This had the indirect effect of moving the new party petition deadline to late May, and the independent petition to early May. This is because the Texas deadline law was worded in terms of a specified number of days after the primary. By contrast, most states wrote their laws in terms of a specified number of days prior to the November election. With all other states having their deadlines in July, August, or September, it seemed obvious that Texas's newly created May deadline was not only sharply deviant from the remainder of the nation, but

61. Robert Dallek, RONALD REAGAN: THE POLITICS OF SYMBOLISM 56 (1984). Ronald Reagan, having won the Illinois Republican presidential primary on March 18 and the Wisconsin and Kansas primaries on April 1, seemed unstoppable.

62. There was consensus that Michael Dukakis had captured the Democratic nomination on the basis of his strong showings on "Super Tuesday," March 8, 1988. Buoyed by this consensus, Michael Dukakis did not lose any primaries after March 15, except for the District of Columbia primary on May 3 won by Jesse Jackson. For the chronological list of presidential primary results, see RICHARD M. SCAMMON & ALICE V. MCGILLIVRAY, AMERICA VOTES 20: A HANDBOOK OF CONTEMPORARY AMERICAN ELECTION STATISTICS 61 (1992). Similarly, George H. W. Bush was considered the certain nominee after Super Tuesday, and his momentum from Super Tuesday brought him victory in all the following primaries that year.

63. *Kerry's Choice*, N.Y. TIMES, July 7, 2004, at A1.

64. For a list of these deadlines, see BALLOT ACCESS NEWS, Apr. 19, 1988, at 2.

65. The original 1903 law, required new parties to nominate by convention during August, and certify their nominees before the end of August. 1903 Tex. Sess. Law Serv. 101 (Vernon). A 1905 amendment, ch. 11, sec. 94, p. 541, set up petition procedures for independent candidates, due thirty days after the run-off primary. 1905 Tex. Sess. Law Serv. 11 (Vernon).

66. 1986 Tex. Sess. Law Serv. 14 (Vernon).

probably unconstitutional as well. If Texas had had such an early deadline in 1948, for example, Strom Thurmond could not have gained a place on the ballot, and the 9.1% of Texas voters who voted for him[67] would have had to resort to casting a write-in vote.

In the period 1988-2000, however, no independent presidential candidate sued Texas over its May petition deadline. No independent presidential candidate attempted to qualify in Texas in 1988. Ross Perot qualified as an independent in Texas in 1992 and 1996, and Pat Buchanan qualified in 2000. Ross Perot had launched his first presidential bid on February 20, 1992,[68] and had such huge popularity that spring that he was able to comply with the May deadline. Pat Buchanan had launched his Reform/independent bid on October, 25, 1999,[69] and since he received $4,022,171 in primary season matching funds during the period January through August 2000,[70] he was able to hire paid circulators to complete his Texas petition by the early May deadline.

In 1993, Arizona moved its independent petition deadline from September to June.[71] The Arizona primary continued to be in mid-September,[72] so it was obvious that the June deadline was not needed for election administration-related reasons. In 1999, Illinois moved its deadline from August to late June.[73]

In 2004, Nader tried to meet the Arizona and Illinois June deadlines, but he came up 550 signatures short in Arizona,[74] and 4818 signatures short in Illinois.[75] His supporters obtained additional signatures in each state and submitted them, but these supplemental signatures were rejected because they were beyond the June deadlines. Nader sued both states, believing that June petition deadlines were unconstitutional under *Anderson v.*

67. SVEND PETERSEN, A STATISTICAL HISTORY OF THE AMERICAN PRESIDENTIAL ELECTIONS 104 (1963).

68. BALLOT ACCESS NEWS, Mar. 30, 1992, at 4. The announcement, made on Larry King's interview program, was coy and indirect; Perot said he would run if his supporters successfully placed him on the ballot in all fifty states. By mid-March, that petition effort was well underway.

69. *See* BALLOT ACCESS NEWS, Nov. 1, 1999, *at* http://www.ballot-access.org/1999/1101.html.

70. *See* BALLOT ACCESS NEWS, Sept. 1, 2000, *at* http://www.ballot-access.org/2000/0901.html. Buchanan also received approximately $12,000,000 in general election campaign funds in September 2000.

71. 1993 Ariz. Sess. Laws 98.

72. In 2004, the Arizona primary was on September 7. Arizona Revised Statutes section 16-201 sets the primary date on the eighth Tuesday before the general election.

73. 1999 Ill. Laws 91-317.

74. Nader v. Brewer, No. 04-1699 (D. Ariz. Sept. 10, 2004).

75. Nader v. Keith, 385 F.3d 729, 731 (7th Cir. 2004).

Celebrezze. He had precedent on his side. All independent presidential petition deadlines that had been tested in court since *Anderson v. Celebrezze,* that were earlier than July 15, had been invalidated,[76] with one peculiar exception.[77]

Nader had further reason to believe that the Illinois June deadline was unconstitutional, because Nader's own 2000 ballot access lawsuit against Illinois's deadline had won injunctive relief. Nader had sued Illinois in 2000 over the early deadline. He had come up short by 2000 signatures, continued to collect more after the deadline, and won a federal court injunction, requiring the State Board of Elections to accept the late signatures.[78] After he got on the Illinois ballot in 2000, however, his attorneys never returned to court to secure declaratory relief.

Nader also had reason to believe the Texas deadline was unconstitutional. Due to an anomaly in the Texas law, the independent presidential petition in 2004 was due on May 10,[79] whereas the petition to qualify a new political party was not due until May 24. Even setting aside the general point that May 10 seemed too early to pass muster under *Anderson v. Celebrezze,*[80] there was the additional point that requiring an independent presidential candidate to submit signatures two weeks before minor parties must do so, is irrational and discriminatory. Additionally, in

76. These cases were from Indiana (Warrick v. Condre, No. IP-83-810-C, (S.D. Ind. 1983)), Kansas (Merritt v. Graves, No. 87-4264-R (D. Kan. Sept. 21, 1988)), Massachusetts (Serrette v. Connolly, No. 68172 (Suffolk Sup. Ct. June 27, 1985) (on file with author)), Nevada (Fulani v. Lau, No. CV-N-92-535 (D. Nev. 1992) (on file with author)), New Jersey (LaRouche v. Burgio, 594 F. Supp. 614 (D.N.J. 1984)), Pennsylvania (Libertarian Party of Pa. v. Davis, No. 84-0262 (M.D. Pa. June 1, 1984) (on file with author)), and Utah (LaRouche v. Monson, 599 F. Supp. 621 (D. Utah 1984)).

77. In 2002, the Arizona Supreme Court had reversed the State Court of Appeals, and upheld Arizona's June deadline, on the grounds that the plaintiff, Libertarian nominee Harry Browne, had not filed his signatures until August 22. Browne v. Bayless, 46 P.3d 416, 417 (Ariz. 2002). The court seemed influenced by the fact that the Arizona Libertarian Party was a qualified party in Arizona, yet the state party officers had refused to certify Browne as the Libertarian nominee because of an intra-party squabble. *See id.* This necessitated that Browne complete an independent petition, even though he was not a true independent candidate. *See id.*

78. Nader 2000 Primary Comm. v. Ill. State Bd. of Elections, No. 00-C-4401 (N.D. Ill. Aug. 25, 2000) (on file with author).

79. Texas Election Code Annoted section 192.032(c) (2004) sets the independent presidential petition deadline as the second Monday of May. Section 181.005(a) sets the new party petition deadline at seventy-five days after the precinct conventions. Section 174.022(a) sets precinct conventions on primary day, and section 41.007(a) sets primary election day on the first Tuesday of March. Seventy-five days beyond the first Tuesday is always a Sunday, so the actual deadline defaults to the following Monday.

80. 460 U.S. 780 (1983).

2004 new parties needed 45,540 signatures,[81] and independent candidates for other statewide office needed 45,540[82] as well, yet presidential independents needed 64,076.[83] Nader submitted 80,044 signatures[84] in Texas on May 24, the deadline for minor parties. Although he had missed the independent deadline, he felt confident that he could prevail in court against the May 10 deadline. All relevant legal precedent confirmed that states could not require earlier petition deadlines for independent candidates than for new parties.[85]

Notwithstanding the legal precedent, Nader failed to win injunctive relief against the deadline in all three of his cases. In Texas, the district court judge ruled that, relative to new parties (which had a petition deadline of May 24, which Nader met), the May 10 deadline is not discriminatory because the presidential nominees of minor parties must file a declaration of candidacy on January 2.[86] The district court was factually mistaken. The Texas law requiring minor party nominees to file a declaration of candidacy in January does not apply to presidential candidates.[87]

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81. Nader v. Connor, 332 F. Supp. 2d 982, 984 (W.D. Tex. 2004). Texas Election Code Annoted section 181.006(b)(2) requires new parties to submit a number of signatures equal to one percent of the previous gubernatorial vote.

82. Texas Election Code Annoted section 142.007(1) requires statewide independent candidates who are running for office other than president to submit a number of signatures equal to one percent of the previous gubernatorial vote.

83. *Nader*, 332 F. Supp. 2d at 984. Texas Election Code Annoted section 192.032(d) requires presidential independent candidates to submit a number of signatures equal to one percent of the previous presidential vote received in that state. Since Texas elects its governors in mid-term congressional election years, and since the turnout is invariably far lower in mid-term years than in presidential years, independent presidential candidates invariably need far more signatures than new parties and non-presidential independent candidates need. In 2004, the presidential independent petition required forty-one percent more signatures than the other two types of petitions.

84. *Nader*, 332 F. Supp. 2d at 985. The Texas Secretary of State, using random sampling, determined that between 56,215 and 63,374 signatures were valid. *Id.* at 985 n.10. Because this was slightly less than the independent presidential requirement, Nader sued to overturn the number of signatures for independents, as well as the independent candidate deadline. See *id.* at 985 for these numbers.

85. *See* Cromer v. South Carolina, 917 F.2d 819, 824 (4th Cir. 1990); Greaves v. N.C. Bd. of Elections, 508 F. Supp. 78, 83 (E.D.N.C. 1980); McCarthy v. Kirkpatrick, 420 F. Supp. 366, 375 (W.D. Miss. 1976). No precedent contradicts these cases.

86. *Nader*, 332 F. Supp. 2d at 989.

87. Texas Election Code Annoted section 181.031, applies to "a convention held under this chapter," and the relevant chapter does not include presidential conventions. The author discussed this with Melinda Nickless, Assistant Director of Elections of Texas, on September 2, 2004 and she agreed that presidential candidates of minor or new parties never need file a declaration of candidacy with Texas. The national convention officers do certify the names of the presidential and vice-presidential candidates after those national conventions are held, and they may be held as late as September 2. Michael Badnarik, Libertarian presidential nominee in 2004, told the author that he did not file any declaration

The district court also said that May 10 is not too early, because presidential nominees of the major parties are now known as early as March.[88] Even when *Anderson v. Celebrezze* was decided in 1983, however, the major party nominees were known as early as April. On April 23, 1980, supporters of John Anderson filed petitions in New Jersey allowing him to run as an independent candidate in that state,[89] because it was already settled at that point that Ronald Reagan would be the Republican nominee.

Nader appealed the Texas decision to the Fifth Circuit. At oral argument, counsel for Nader clearly established that no declaration of candidacy is required for minor party presidential nominees, and counsel for the state of Texas acknowledged this point. Nevertheless, two days after the hearing, the Fifth Circuit summarily affirmed the district court decision, without writing its own decision or acknowledging the factual error in the district court's opinion.[90]

In Illinois, Nader also failed to win injunctive relief, even though, as noted above, he had won injunctive relief against that same deadline in 2000. The 2004 district court decision stated that the Supreme Court had upheld an early July petition deadline in *American Party of Texas v. White*, and the Illinois deadline is only fourteen days earlier than the Texas deadline upheld in *American Party of Texas*.[91] It is true that the Supreme Court upheld the whole Texas statutory scheme as it had existed in 1972,[92] but the plaintiff American Party had not failed to get on the 1972 Texas ballot because of the deadline, nor did it allege that the deadline was the cause of its failure to qualify.[93] Furthermore, the other two political party-plaintiffs in that case, La Raza Unida Party and the Socialist Workers Party, had actually qualified for the 1972 Texas ballot (they had sued before they realized they would succeed).[94] Therefore, the Supreme Court had not specifically addressed the Texas petition deadline in its 1974 decision, and this holding should not control the Illinois Nader decision.

of candidacy with Texas.

88. *Nader*, 332 F. Supp. 2d at 991.

89. *New Jersey Petitions List Anderson as Independent*, N.Y. TIMES, Apr. 24, 1980, at A22.

90. Nader v. Connor, 388 F.3d 137 (5th Cir. 2004).

91. Nader v. Keith, No. 04 C 4913, 2004 U.S. Dist. LEXIS 16660, at *19-20 (N.D. Ill. Aug. 23, 2004) (citing Am. Party of Tex. v. White, 415 U.S. 767, 787 (1974)).

92. *Am. Party of Tex.*, 415 U.S. at 793-94.

93. The American Party's Jurisdictional Statement to the U.S. Supreme Court, at 3 (on file with author), complains about the number of signatures, the notarization requirement, the short time for collecting signatures, the prohibition on primary voters signing the petition, but does not complain that the deadline is too early.

94. *Am. Party of Tex.*, 415 U.S. at 770 n.2.

Furthermore, *Anderson v. Celebrezze* is nine years more recent than *American Party of Texas.* Finally, in *Mandel v. Bradley*,[95] Justice John Paul Stevens had specifically warned lower courts not to make the mistake of assuming that the Supreme Court's ballot access rulings earlier than 1977 should be read to settle the deadline issue.

The district court's order in Illinois in 2004 did not even acknowledge that another district court in Illinois had issued an injunction against the same deadline in 2000.

Nader appealed his 2004 loss to the Seventh Circuit.[96] The Seventh Circuit seemed to think Nader's complaint had some validity. It noted,

> One hundred thirty-four days—almost four and a half months—seems awfully long. Too long, seems to be the judgment of 47 of the other 49 states. A 120-day deadline was upheld in *American Party of Texas v. White*, but it had not been separately challenged and it was not separately discussed.[97]

It also stated,

> But is it reasonable to require that the required number of nominating petitions all be collected by June 21 when the election is not until November 2? June 21 preceded both major parties' conventions, and depending on what occurred there a third-party candidacy might generate a degree of support that it could not have attracted earlier. The problem is that time has to be allowed between the deadline for petitions and the election to enable challenges to the validity of the petitions to be made and adjudicated.[98]

The Seventh Circuit seemed to be wavering, but finally denied injunctive relief for Nader on the grounds that he had filed his lawsuit too late.[99] This seems, however, unfair. Nader had filed his lawsuit on June 27, 2004,[100] soon after his petition had been rejected. By contrast, George Wallace had not filed his lawsuit against the Ohio ballot access laws until July 29, 1968,[101] and yet the Supreme Court put him on the ballot.[102] Also, Eugene McCarthy had not filed his lawsuit against the Texas ballot access laws until July 30, 1976,[103] and the Supreme Court put him on the ballot.

95. 432 U.S. 177, 180 (1977) (Stevens, J., dissenting).
96. Nader v. Keith, 385 F.3d 729 (7th Cir. 2004).
97. *Id.* at 734.
98. *Id.*
99. *Id.* at 736.
100. *Id.*
101. *See* Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 985 (S.D. Ohio 1968).
102. Williams v. Rhodes, 393 U.S. 23, 35 (1968).
103. *See* McCarthy v. Briscoe, 539 F.2d 1353, 1354 (5th Cir. 1976).

The Seventh Circuit cited no precedent for its conclusion that Nader filed the case too late.

Nader failed to gain injunctive relief against the Arizona deadline because he filed the lawsuit too late. He had filed it August 16,[104] and it was not decided until September 10, when relief was denied orally from the bench.[105] Although this conclusion seems reasonable on its face, it fails to acknowledge that Arizona didn't hold its primary (for office other than president) until September 7.[106] On September 10, the day of Nader's hearing, the official canvass for the primary had not yet been completed, so it was obvious that the November ballots were not yet being printed. Also, note that Nader won nine of his ballot access lawsuits in state courts during the period September 15 through October 8 (see footnotes 45 through 55). If Arkansas, Colorado, Florida, Maine, Maryland, Nevada, New Mexico, Washington, and West Virginia were able to cope with pro-Nader court decisions in the second half of September and even the first eight days in October, it was not' too late for judicial relief in Arizona.

III. NADER'S LAWSUITS AGAINST A DISCRIMINATORY NUMBER OF SIGNATURES

Nader filed lawsuits against Hawaii and Texas for laws that required substantially more signatures for independent presidential candidates, than for new parties.[107] Each case also contained a second distinct claim, that it is unconstitutional for a state to require more signatures for an independent presidential candidate than for independent candidates for other statewide office. Under all prior rulings, these cases should have been successful, but they did not.[108] Nader failed to get injunctive relief in Hawaii,[109] and in Texas, he lost both injunctive and declaratory relief.[110]

In Hawaii, an independent candidate for president in 2004 needed 3711

104. Complaint, *Nader v. Brewer*, No. 04-1699 (D. Ariz. Sept. 10, 2004) (on file with author).

105. Nader v. Brewer, No. 04-1699 (D. Ariz. Sept. 10, 2004).

106. *See* ARIZ. REV. STAT. ANN. § 16-201 (West 2004) (setting the primary on the eighth Tuesday before the general election).

107. See the discussion of Nader v. Connor, 388 F. Supp. 2d 982 (W.D. Tex. 2004), *supra* Part II. The Hawaii case is *Nader v. Yoshina*, CV04-611 (D. Hi. Oct. 13, 2004).

108. Greaves v. State Bd. of Elections, 508 F. Supp. 78 (E.D.N.C. 1980); DeLaney v. Bartlett, No. 1:02CV00741 (M.D.N.C. July 26, 2004) (on file with author); Cromer v. South Carolina, 917 F.2d 819 (4th Cir. 1990); Danciu v. Glisson, 302 So. 2d 131 (Fla. 1974); Patton v. Camp, No. 92V-885-N (M.D. Al. Aug. 31, 1992) (on file with author).

109. Nader v. Yoshina, No. CV-04-00611 (D. Hi. Oct. 13, 2004).

110. Nader v. Connor, 332 F. Supp. 2d 982 (W.D. Tx. 2004), *aff'd*, 388 F.3d 137 (5th Cir. 2004).

signatures.[111] A new party (entitled to its own primary, and the ability to nominate someone for every partisan office in the state) only needed 677 signatures.[112] An independent candidate for statewide office other than president only needed 25 signatures.[113] Nader believed he submitted more than 3711 valid signatures, but the state Elections Office ruled against him. Even though Nader's campaign believed it proved that the state was wrong, it failed to gain any relief in state administrative proceedings on that claim. So, it filed a federal lawsuit alleging that it is unconstitutional to require so many more signatures for Nader than for an independent candidate for other statewide office, or an entire new party. Every precedent was on Nader's side.[114]

But the district court in Hawaii denied injunctive relief on the grounds that, as the Court read it, *American Party of Texas v. White*, compelled a different result. Texas, in 1972, had required a petition signed by one percent of the last gubernatorial vote to place a new party on the statewide ballot.[115] Alternatively, a new party could qualify in just a single county (if it could not' qualify statewide, or did not' wish to) with a petition signed by three percent of the last gubernatorial vote within that county. A new party could not qualify in a single congressional or legislative district.

Also in Texas in 1972, an independent candidate for statewide office, even president, needed a petition of one percent of the last gubernatorial vote. Independent candidates for district office needed a petition signed by three percent of the last gubernatorial vote, if the district encompassed more than a single county. Independent candidates for district office within a single county needed a petition of five percent of the last gubernatorial vote in that district. No independent candidate for any district or county office, however, ever needed more than 500 signatures.

The district court in Hawaii misread *American Party of Texas v. White.* The Hawaii court wrote, "In *American Party of Texas*, the Supreme Court determined that the requirement of the notarized signatures of one percent of the total gubernatorial votes at the last preceding general election for minority parties and three percent or five percent for independent candidates were not impermissible burdens on the First and Fourteenth

111. HAW. REV. STAT. § 11-113(c)(2)(B) (2004) (providing that independent presidential candidates need a petition signed by one percent of the last presidential vote cast).

112. HAW. REV. STAT. § 11-62 (explaining that a new party needs signatures of one-tenth of one percent of the number of registered voters).

113. HAW. REV. STAT. § 12-3.

114. ARIZ. REV. STAT. ANN. § 16-201 (West 2004).

115. 415 U.S. 767, 774-76 nn.6-7 (1974) (describing the Texas ballot access laws for minor parties and independent candidates).

Amendment." The Hawaii court seemed to believe that a new party in Texas needed a one percent petition for statewide office, whereas an independent candidate for statewide office needed a three percent or five percent petition. This is factually wrong. Statewide independent candidates, and new parties, needed an identical number of signatures.[116] The fact that district independents needed three percent or five percent, but never more than 500, does not show that Texas was discriminating against independent candidates, because minor parties could not' even qualify in just a single congressional or legislative district. If any group was discriminated against in Texas in 1972, it was minor parties, not independent candidates.

The Hawaii court failed to acknowledge the most important precedent of all, *Illinois State Board of Elections v. Socialist Workers Party*.[117] A unanimous Supreme Court held that lower courts are supposed to use common sense when they evaluate the number of signatures required for ballot access.[118] Illinois required statewide minor party and independent candidates to submit 25,000 signatures, but required minor party and independent candidates for mayor of Chicago to submit approximately 42,000 (the formula for district office was five percent of the last vote cast, and in Chicago, five percent of the last mayoral vote cast was a number substantially higher than 25,000).[119] The Supreme Court ruled that Illinois could not require minor party and independent candidates to collect more signatures for an office in just part of the state, than they needed for statewide office.[120]

Similar common sense should have compelled the decision that Hawaii has no rational need to require 3711 signatures for a single independent presidential candidate, if the state feels that only 677 signatures are needed

116. When *American Party of Texas* was filed in 1972, Texas required the same deadline and number of signatures for minor parties, independent presidential candidates, and independent candidates for other statewide office. *See id.* (citing Tex. Elec. Code §§ 13.45 (for new parties), 13.50 (for all independent candidates)). In 1975, Texas repealed all procedures for independent presidential candidates to get on the ballot, an action criticized by the Supreme Court in *McCarthy v. Briscoe*, 429 U.S. 1317 (1976). When Texas restored such procedures in 1977, the restored procedures for independent presidential candidates were, for the first time, more restrictive than the procedures for new party and non-presidential independent statewide independent.

117. 440 U.S. 173 (1979).

118. *See id.* at 186. The Court reached this conclusion without extended discussion, and in just two sentences: "The Illinois legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000-signature requirement. Yet appellant has advanced no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Id.*

119. *Id.* at 176.

120. *Id.* at 187.

for an entire new party. The purpose of ballot access restrictions is to keep the ballot from being too crowded. So if 677 signatures are sufficient to keep the ballot uncrowded in the case of new or minor parties, there can not' be any sensible reason to require more than five times as many signatures for an independent presidential candidate. A new party has the ability to clutter up the general election ballot far more than a single independent presidential candidate.

Similarly, if Hawaii can get along with only twenty-five signatures for statewide independent candidates (for office other than president), how obvious can it be that there is no need to require 145 times as many signatures for independent presidential candidates?

In *Nader v. Connor*, Nader tried to show that Texas could have no rational interest in requiring 64,077 signatures for an independent presidential candidate, when the state only required 45,540 for a statewide independent candidate for other office, or for a new party.[121] But the district court and the Fifth Circuit upheld the disparity.[122] The Court said that independent presidential candidates need not hold a convention, whereas new and minor parties must hold precinct, county, and state conventions.[123] The Court implied that the burden of holding conventions cancelled out the disparity in the number of signatures.[124] Texas law, however, permits a new or minor party to hold a single precinct convention, a single county convention, and then a state convention.[125] The burden of holding three meetings (of no specified minimum number of attendees) is obviously far, far lighter than obtaining another 20,000 valid signatures.

As to Nader's point, wondering why he should be required to collect forty-one percent more signatures than an independent candidate for U.S. Senate or other non-presidential statewide office must obtain, the district court, and the Fifth Circuit, said not a word. If anything, independent presidential candidates should be required to collect fewer signatures than independent candidates for other statewide office. In *Anderson v. Celebrezze*, the Court said that states have a diminished interest in keeping independent presidential candidates off their ballots than candidates for other office.[126]

121. *See* Nader v. Connor, 332 F. Supp. 2d 982, 985 (W.D. Tex. 2004).
122. *Id.* at 992.
123. *Id.* at 989.
124. *Id.*
125. *Id.* (citing TEX. ELEC. CODE ANN. § 181.004 (Vernon 2003)).
126. 460 U.S. 780, 795 (1983).

IV. NADER'S LAWSUITS ON WHETHER OUT-OF-STATE CIRCULATORS MAY WORK

Nader filed lawsuits against Arizona and Ohio, alleging that it is unconstitutional for states to prohibit out-of-state circulators. This Article has already discussed the Arizona decision.[127] As noted, the sole reason for a failure to gain injunctive relief was that Nader filed the case too late on August 16.[128] This was true for both issues in the case, out-of-state circulators and the deadline.

Nader's lawsuit[129] against Ohio's ban on out-of-state circulators failed to gain injunctive relief. The district court ruled that Ohio law, requiring circulators to be registered voters in Ohio, is likely unconstitutional.[130] This was no surprise, because the Supreme Court had invalidated a Colorado law in 1999 that required initiative circulators to be registered voters.[131] Ohio requires initiative circulators to be registered voters.[132] As Ohio forbids anyone from registering to vote until they have lived in the state for at least thirty days, the registration requirement also serves as a duration of residency requirement.[133]

Why, then, did the district court fail to put Nader on the ballot? After all, he had submitted 14,473 signatures, when only 5000 were required.[134] The only basis for keeping him off the ballot was by eliminating all of the signatures collected by circulators who supposedly were not *bona fide* Ohio registrants. Because the circulators had claimed to be residents of Ohio, the district court[135] and the Sixth Circuit[136] said that some of them had committed fraud; therefore, the constitutional issue did not need to be reached. Footnote fourteen of the district court decision states, "In the Court's view, this case is wholly different from one in which out-of-state circulators, untainted by fraud, challenge a residency statute on First Amendment grounds. In such a case, the Court would consider the First

127. *See supra* notes 74, 106, 114 and accompanying text.

128. *Id.*

129. Blankenship v. Blackwell, 341 F. Supp. 2d 911 (S.D. Ohio 2004).

130. "The Court concludes that the Ohio law at issue should be reviewed under a strict scrutiny analysis." *Id.* at 922. "It appears clear that the requirement of Ohio law that circulators be registered voters is unconstitutional." *Id.* at 921-22.

131. Buckley v. Am. Constitutional Law Found., 525 U.S. 182 (1999).

132. OHIO REV. CODE ANN. § 3503.06 (2005).

133. Section 3503.06 explicitly incorporates the thirty-day residency requirement into the restriction on circulating a petition.

134. *Blankenship*, 341 F. Supp. 2d at 914.

135. *Id.* at 923.

136. *Blankenship v. Blackwell*, No. 04-4259, slip. op. at 2 (6th Cir. Oct. 18, 2004) (on file with author).

Amendment issue."[137]

Nader argued in vain that no administrative body, or had ever established that four particular circulators were not Ohio residents, and those four alone collected more than the needed 5000 valid signatures.[138] Nader asked the Supreme Court for an injunction pending appeal of his federal Ohio case, but the Court denied the injunction.[139] Undoubtedly the Supreme Court denied relief because of the extreme delay of the appeal to that Court.

V. NADER'S OTHER FEDERAL BALLOT ACCESS LAWSUITS

A. North Carolina

Nader sued North Carolina, asking for an injunction to place him on the ballot, on the grounds that the state's existing independent candidate petition requirements had been declared unconstitutional on July 26, 2004.[140] Under the Supreme Court case *McCarthy v. Briscoe*,[141] when a state's ballot access law for an independent presidential candidate has been deemed unconstitutional, a lower court should place an independent presidential candidate on the ballot if the evidence shows that the candidate has a modicum of support. "Modicum," in this context, means "a small amount." Clearly, Nader enjoyed a modicum of support throughout 2004. He filed his North Carolina lawsuit in the Middle District on September 2,[142] even though the State Board of Elections had set September 3 as the date on which they would convene to consider Nader's request for ballot placement. The State Board did not make a decision on September 3, so the Middle District court denied relief on September 3 on the grounds that Nader hadn't exhausted his administrative remedies. At another hearing on September 14, the Middle District ruled that the lawsuit should have been filed in the Eastern District,[143] which contains Raleigh, the state capitol,

137. *Blankenship*, 341 F. Supp. 2d at 923 n.14.

138. See Nader's Application for Stay of the Sixth Circuit decision, directed to the Supreme Court on Oct. 22, 2004, at 13-15.

139. Blankenship v. Blackwell, 125 S. Ct. 375 (2004).

140. DeLaney v. Bartlett, NO. 1:02CV00741, 2004 U.S. Dist. LEXIS 14696 (M.D.N.C. July 26, 2004).

141. 429 U.S. 1317 (1976).

142. *Nader v. Bartlett I*, 1:04-cv-793 (M.D.N.C. 2004) (on file with author). The chronology of Nader's lawsuits and administrative hearings in North Carolina is contained in the September 24, 2004 order of the district court in *Nader v. Bartlett II*, 5:04-cv-675-BR (E.D.N.C. 2004) (on file with author).

143. One of the plaintiffs, a voter who wished to vote for Nader, lived in the Middle District, so Nader had a plausible argument that the Middle District was proper venue.

where the State Board of Elections "resides." Nader filed a new lawsuit in the Eastern District that very day, but on September 24, the Eastern District ruled that the case had been filed too late.

Again, this conclusion sounds somewhat reasonable, until one remembers that Nader won ballot access lawsuits in four state courts on dates later than September 24.[144]

B. Ohio Write-In Lawsuit

Nader sued Ohio (after he lost his ballot access cases in that state) in federal court, asking that write-ins for him be counted. But, even that injunctive relief was denied.[145] Ohio permits write-ins, but will only tally write-ins for candidates who filed a declaration of write-in candidacy forty days before the election.[146] In 2004, that deadline fell on September 23. At that time, Nader was on the Ohio ballot, because on September 3, the state had determined that he had enough signatures (he was removed on September 28 when an administrative hearing reversed that decision).[147] Since Nader was on the ballot on the day the write-in declaration was due, he believed he could not legally file as a declared write-in candidate. The district court denied injunctive relief on the grounds that the lawsuit had been filed too late,[148] even though the lawsuit, if successful, would not have required any changes to the ballot. Instead, it would only have required the Secretary of State to inform the counties that Nader write-ins should be canvassed. The order also stated, "The Court finds that because no constitutional violation has occurred, plaintiffs will not suffer irreparable harm," even though five of the plaintiffs were Ohio voters who wished to write-in Nader and desired that their vote be counted.[149]

Nader, however, did not contest the venue ruling.

144. These ballot access lawsuits were won in Arkansas (Populist Party of Ark. v. Chesterfield, No. 04-994, 2004 WL 2113065 (Ark. Sept. 23, 2004)), Maine (Melanson v. Sec'y of State, 861 A.D.2d 641 (Me. 2004)), New Mexico (Nader v. Griego, No. 28,900 (N.M. Sept. 28, 2004)) and Wisconsin (Nader v. Circuit Court, 04-2559-W (Wisc. Sep. 30, 2004)).

145. Nader v. Blackwell, No. 04-1052 (S.D. Ohio Nov. 2, 2004) (on file with author).

146. OHIO REV. CODE ANN. § 3513.041 (Anderson 2005). Thirty-four states will not canvass write-ins for candidates who fail to file a declaration of write-in candidacy sometime before the election. Ohio is one of those thirty-four states. Generally the deadline to file such a declaration of write-in candidacy is a week or two before the election, if the candidate is running in the November election, but Ohio's deadline falls in late September.

147. The Ohio Supreme Court ballot access decision, *Blankenship v. Blackwell*, 817 N.E.2d 382, 383 (Ohio 2004), contains this chronology.

148. Nader v. Blackwell, No. 04-1052 (S.D. Ohio Nov. 2, 2004).

149. *Id.* at 4.

CONCLUSION

The federal courts that considered whether to grant Nader injunctive relief did a poor job. One district court judge took forty-one days from the date of the hearing, to issue his ruling.[150] The district courts in Hawaii and Illiniois may have misread *American Party of Texas v. White*.[151] One district court judge misunderstood Texas election law. One district court judge acknowledged that the law is unconstitutional but still refused relief because of an unestablished allegation that some circulators had committed fraud. Three district court judges, and the Seventh Circuit, said that Nader had filed his lawsuits too late, even though he had filed them earlier in the year than past presidential candidates who were placed on ballots by the Supreme Court, and even though nine state courts ruled in favor of Nader on dates even closer to the general election than the dates of these federal decisions.

The federal courts, by denying injunctive relief, harmed voters who desired to vote for Nader. In states in which Nader was on the ballot, 0.67% of the voters voted for Nader. In the two states in which federal courts denied injunctive relief to Nader, and in which voters couldn't even cast a write-in vote for Nader and have that write-in be tallied, 6,056,916 votes for president were cast in the 2004 general election.[152] Assuming that Nader had the same level of support in the two states in which voters could not vote for him, as he did in states where he was on the ballot, then 40,581 voters were disenfranchised by the lack of injunctive relief in those two states (6,056,916 multiplied by 0.67% equals 40,581).

In the four states in which federal courts denied injunctive relief, but in which Nader write-ins could be counted, Nader was credited with 17,302 votes. Those voters were also not treated equal to voters who desired to vote for President Bush and Senator Kerry, since it is more difficult to cast a write-in vote than to vote for a candidate listed on the ballot. And Nader himself was disadvantaged, since if he had received the same 0.67% of the vote in those four states that he received in states in which he was on the ballot, he would have received 121,931 more votes.

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150. The District court in Texas that handled Nader's case, *Nader v. Connor*, 332 F. Supp. 2d 982 (W.D. Tex. 2004), held the hearing on July 22 but did not release its opinion until September 1, even though the Judge had promised at the hearing to issue it the first week in August "at the absolute latest." *See* Nader's cert. petition, no. 04-918, on page 5.

151. *See Nader v. Yoshina*, No. 04-00611 (D. Hi. Oct. 13, 2004) (on file with author); *Nader v. Keith*, No. 04-C-4913 (N.D. Ill. Aug. 23, 2004), *aff'd* 7th Cir., No. 04-3183.

152. For the Federal Election Commission's official presidential returns, see *2004 Official Presidential General Election Results*, *available at* http://www.fec.gov/pubrec/fe2004/2004presgenresults.pdf.

The Organization for Security and Co-operation in Europe Election Observation Mission issued a preliminary report on the U.S. election on November 4, 2004. The Organization for Security and Co-operation is the formal name of the group that enforces the Helsinki Accords. The November 4, 2004, report says, "The OSCE will issue a comprehensive final report which will address certain issues not included in this statement, including candidate ballot access, open voting by fax and the restricted representation in Congress of residents of the District of Columbia."[153] It is likely that the final OSCE report will be critical of U.S. ballot access laws and some of the decisions discussed in this Article.

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."[154] At a time when the United States claims that it is fighting a war in Iraq[155] to instill representative government in that nation, it is unfortunate that it seems unwilling to practice what it preaches.

153. The Organization for Security and Co-operation in Europe, *Election Observation Mission: United States of America 2 Nov. 2004 Elections* (Nov. 4, 2004), *available at* http://www.osce.org/documents/odihr/2004/11/3779_en.pdf.

154. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

155. Ballot sheets for the National Assembly election provided Iraqi voters with choices from 111 political parties. James Glanz, *From Ballot To Tally Sheet To Laptop, the Election Results Start Coming Together*, N.Y. TIMES, Feb. 3, 2005, at A10.