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COMMENT

Validation Procedures and the Burden of Ballot Access Regulations

One of the most intriguing subplots of the 2004 presidential campaign involved the efforts of some John Kerry supporters to keep Ralph Nader off the ballot. In more than twenty states, Democratic activists vigorously contested the validity of Nader's nomination petitions.[1] The Nader campaign countered on two fronts. First, it defended itself against the onslaught of challenges in state administrative and judicial proceedings. Second, it filed federal lawsuits claiming that certain state ballot access laws violated the constitutional rights of Nader and his supporters.[2]

Like most plaintiffs in federal ballot access cases, Nader focused on the core statutory requirements that states impose on minor-party and independent candidates. Such requirements are constitutionally suspect if they "unfairly or unnecessarily burden[] the 'availability of political opportunity.'"[3] The Supreme Court, for example, has invalidated state laws that require candidates to collect an inordinately large number of signatures or to submit their nomination petitions early in the election season.[4]

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1. *See* Jonathan Finer & Brian Faler, *Nader Still Unsure of Ballot Spot in Many States*, WASH. POST, Aug. 24, 2004, at A9 (estimating that lawyers had contributed some $2 million of pro bono labor in the fight against Nader); Katharine Q. Seelye, *Democrats' Legal Challenges Impede Nader*, N.Y. TIMES, Aug. 19, 2004, at A24.

2. *See, e.g.*, Memorandum of Law in Support of Plaintiffs' Motion for a Preliminary Injunction, Nader v. Keith, No. 04 C 4913, 2004 WL 1880011 (N.D. Ill. Aug. 23, 2004). The Constitution gives the states primary responsibility for administering federal elections, U.S. CONST. art. I, § 4, cl. 1; *id.* art. II, § 1, cl. 2, and ballot access requirements differ markedly from state to state.

3. Clements v. Fashing, 457 U.S. 957, 964 (1982) (plurality opinion) (quoting Lubin v. Panish, 415 U.S. 709, 716 (1974)).

4. The Ohio laws struck down in *Williams v. Rhodes*, 393 U.S. 23 (1968), required third-party candidates, nine months before the election, to submit "petitions signed by qualified electors

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Nader's experience in 2004, however, reveals that signature requirements, filing deadlines, and similar statutory hurdles are not the only burdens that state ballot access regimes impose. In many states, Nader purported to satisfy the initial conditions for ballot access only to confront a second obstacle in the form of challenges to the veracity of his nomination materials. His chances of securing a spot on the ballot hinged on the procedures states used to authenticate his filings. All else being equal, the easier it is to challenge and invalidate a candidate's nomination materials, the more difficult it is for that candidate to qualify for the ballot.

Despite the prominent role they play in election contests, validation mechanisms have largely escaped judicial and scholarly scrutiny. This Comment urges courts to assess the constitutionality of a state's ballot access scheme in light of how the state evaluates and certifies a candidate's nomination materials. As Part I explains, *Nader v. Keith*,[5] a Seventh Circuit decision authored by Judge Posner, takes some tentative steps in the right direction. Part II builds on Judge Posner's analysis to suggest that ballot access doctrine obliges courts to be sensitive to the difficulties validation mechanisms can create. Part III then explains why giving partisan actors a central role in challenging an opponent's nomination filings may present special constitutional problems because private challenges can be a potent way to limit the political participation of disfavored candidates.

I. *NADER V. KEITH*: INTRODUCING VALIDATION PROCEDURES INTO BALLOT ACCESS ANALYSIS

In 2004, the Nader campaign brought federal lawsuits challenging the constitutionality of numerous state ballot access laws.[6] *Nader v. Keith*, which involved Illinois's ballot access regime, presented the Seventh Circuit Court of Appeals with a set of factual and legal claims typical of these suits. Under Illinois law, Nader was required to submit, at least 134 days prior to the election, nominating petitions bearing the signatures of 25,000 qualified voters as well as the addresses at which those voters were registered.[7] The campaign purported to satisfy this requirement, turning in 32,437 signatures on the date of the deadline.

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totaling 15% of the number of ballots cast in the last preceding gubernatorial election" (roughly 433,000 signatures) in order to appear on the ballot. *Id.* at 24-25, 26.

5. 385 F.3d 729 (7th Cir. 2004).

6. For a survey of Nader's ballot access suits, see Richard Winger, *An Analysis of the 2004 Nader Ballot Access Federal Court Cases*, 32 FORDHAM URB. L.J. 567 (2005).

7. *See* 10 ILL. COMP. STAT. ANN. 5/3-1.2, 5/10-2, -3, -6 (West 2003); *Keith*, 385 F.3d at 731.

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Illinois officials perform no independent assessment of a candidate's nomination materials; instead, their role is to evaluate objections raised by outsiders.[8] In Nader's case, John Tully, a man Nader described as "a 'minion' of the Illinois Democratic Party" promptly contested the veracity of more than 19,000 of Nader's signatures, mostly on the ground that the signer was not registered to vote at the address listed.[9] A state administrative panel heard Tully's claims and ultimately invalidated 12,327 signatures.[10] That dropped Nader below the 25,000-signature threshold needed to qualify for the ballot.

As the state administrative proceedings unfolded, Nader sought relief in federal court. He claimed that three provisions of the Illinois Election Code—the 25,000-signature requirement, the address requirement, and the submission deadline—combined to "impose an unreasonable burden on third-party and independent (nonparty) candidacy" in violation of the First and Fourteenth Amendments.[11] Nader's argument tracked the Supreme Court's insight that ballot access laws should not be viewed in isolation. Instead, sometimes "a number of facially valid provisions of election laws may operate in tandem to produce impermissible barriers to constitutional rights."[12]

In *Keith*, Judge Posner recognized that the impact of a ballot access law on prospective candidates depends not only on surrounding laws but also on the validation procedures the state uses to ensure compliance: "The fewer the petitions required to put a candidate on the ballot and the harder it is to challenge a petition . . . the shorter the deadline for submitting petitions can be made without unduly burdening aspiring candidates."[13] According to Judge Posner, the fact that Illinois "makes challenges easy rather than hard" rendered the state's core ballot access requirements more difficult to satisfy and thus more constitutionally suspect.[14]

Judge Posner also attempted to quantify the true burden of Illinois's ballot access scheme. He explained that the total number of signatures a candidate must collect in order to be confident of securing a spot on the ballot generally

8. *See* 10 ILL. COMP. STAT. ANN. 5/7-13 (West 2003); *see also* Delay v. Bd. of Election Comm'rs, 726 N.E.2d 755 (Ill. App. Ct. 2000) (holding that state law does not authorize election officials to challenge nomination papers sua sponte).

9. *Keith*, 385 F.3d at 731.

10. *Id.*

11. *Id.* at 732.

12. Storer v. Brown, 415 U.S. 724, 737 (1974).

13. *Keith*, 385 F.3d at 735.

14. *See id.*

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exceeds the statutory minimum.[15] If a state requires 25,000 signatures but does not permit challenges to their veracity, then a candidate who submits 25,000 signatures should receive a spot on the ballot. But if a state does allow challenges, then a rational candidate must submit additional signatures to hedge against the risk that some will be invalidated. As a state's ballot access rules become more cumbersome and challenges become easier to make, a candidate needs an increasingly large cushion. Given that approximately one-third of Nader's signatures were invalidated, Judge Posner estimated that Nader would have had to collect some 40,000 signatures to be confident that 25,000 would withstand scrutiny.[16] A 40,000-signature requirement, however, remained well within the limits of Supreme Court precedent.[17] Consequently, the Seventh Circuit denied Nader's request for a preliminary injunction.[18]

II. THE BURDENS AND BENEFITS OF VALIDATION PROCEDURES

In its ballot access cases, the Supreme Court has attempted to strike a balance between the rights of candidates and voters to "associate for the advancement of political beliefs"[19] and the interests of the state in "protecting the integrity of the electoral system."[20] However, neither the Supreme Court nor the Seventh Circuit has fully integrated validation-related considerations into its constitutional analysis of state ballot access laws. Taking Judge Posner's opinion in *Keith* as a starting point, this Part shows that how a state evaluates and certifies nomination materials affects both sides of the Court's equation. As a result, it may well be appropriate for courts in future cases to find ballot access laws unconstitutional in light of a state's validation procedures or to find that a state's validation scheme is itself impermissible.[21]

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15. *Id.* at 734. A handful of other federal courts have made a similar observation. *See, e.g.*, Schulz v. Williams, 44 F.3d 48, 57 (2d Cir. 1994); Libertarian Party of Fla. v. Florida, 710 F.2d 790, 794 (11th Cir. 1983); Molinari v. Powers, 82 F. Supp. 2d 57, 75 (E.D.N.Y. 2000).

16. *Keith*, 385 F.3d at 734.

17. The 40,000-signature figure represented "only slightly more than one-half of one percent of the number of registered voters in Illinois." *Keith*, 385 F.3d at 734. In *Jenness v. Fortson*, 403 U.S. 431 (1971), the Supreme Court upheld a Georgia law requiring candidates to submit signatures representing at least five percent of eligible voters.

18. The district court also ruled against Nader. Nader v. Keith, No. 04 C 4913, 2004 WL 1880011 (N.D. Ill. Aug. 23, 2004), *aff'd* 385 F.3d 729 (7th Cir. 2004).

19. Am. Party of Tex. v. White, 415 U.S. 767, 771 (1974).

20. Lubin v. Panish, 415 U.S. 709, 714 (1974).

21. Nader did not directly question the constitutionality of Illinois's validation procedures, so that issue was not before the Seventh Circuit in *Keith*.

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Ballot access requirements coupled with validation procedures can burden individual rights in ways *Keith* does not fully capture. For one thing, Judge Posner did not consider the amount of effort a candidate who collects 40,000 signatures must exert in order to ensure that at least 25,000 signatures withstand challenge. In practice, defending the validity of signatures may be as onerous as collecting them. Moreover, a state with a drawn-out validation process may find it necessary to impose early deadlines for submitting nomination materials. Under Judge Posner's reasoning, Illinois's early filing deadline was permissible because the state needed sufficient time to review challenges and rebuttals.[22] But this leaves candidates to bear the double burden of having to defend against challenges (which are easy to make under Illinois law) and having to solicit a large number of signatures early in the election season. Late entrants to a race or candidates who build momentum slowly may be particularly disadvantaged by such a system.[23]

In addition, while Judge Posner knew how many of Nader's signatures were rejected and then estimated that Nader should have gathered 40,000, candidates do not enjoy the benefit of hindsight. Instead, candidates face an intractable dilemma: First, they can devote their full attention to signature gathering. This maximizes their chances of gaining access to the ballot but necessarily means they will have fewer resources available for other campaign activities. Second, they can collect only enough signatures to provide a small cushion. This will allow them to devote more resources to political expression but may cause them to be left off of the ballot entirely.

The uncertainty candidates confront becomes more serious as ballot access regulations grow more technical and validation mechanisms become less forgiving. New York, for example, is infamous for stringently enforcing arcane petition requirements. Until recently, signatures could be invalidated if they were not accompanied by the signer's election district, assembly district, or ward number.[24] Signers were also required to provide their "town" or "city" of residence, which, unbeknownst to them, often differed from the village they used as their mailing address.[25] One court estimated that candidates might

22. *Keith*, 385 F.3d at 734-35.

23. *Cf.* Anderson v. Celebrezze, 460 U.S. 780 (1983) (invalidating an Ohio law that required nomination petitions to be submitted seven months before the general election). Under Illinois law, Nader was required to file his nomination materials by June 21, more than a month before either of the major parties' nominating conventions. *Keith*, 385 F.3d at 734.

24. *See* Schulz v. Williams, 44 F.3d 48, 57 (2d Cir. 1994); Molinari v. Powers, 82 F. Supp. 2d 57, 72 (E.D.N.Y. 2000).

25. *Molinari*, 82 F. Supp. 2d at 71-72. *Molinari* held that the town or city requirement was unconstitutional because of the burden it placed on the rights of candidates and voters. *Id.*

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need to collect six times the nominal statutory signature requirement in order to be confident of securing a spot on the ballot.[26]

On the other side of the equation, states assert that ballot access requirements and validation mechanisms operate in tandem to serve their interest in preventing election fraud.[27] Guarding against fraud, in turn, helps to assure that the ballot is reserved for those candidates who can demonstrate "a significant modicum of support."[28] The problem with this account is that overly stringent validation procedures can interfere with the state's ability to ascertain candidates' relative levels of support. As Judge Posner acknowledged, strict enforcement of Illinois's address requirement is likely to invalidate legitimate signatures as well as fraudulent ones, "since a discrepancy . . . is likely to be pretty common even without fraud."[29] One potential response is that even if the law is overinclusive, it affects all prospective candidates equally. As Part III explains, however, that assumption is often incorrect. Furthermore, given that rigorous enforcement of technical requirements increases the risk that candidates will miscalculate how much of a signature cushion they need, some might be disqualified for reasons that have little to do with their level of popular support.[30] In sum, unforgiving validation procedures may significantly impair the ability of candidates to participate in the political process without advancing the state's interest in administering fair elections.

III. THE TROUBLE WITH PRIVATE CHALLENGES

The availability of private challenges can create particular difficulties for prospective candidates seeking access to the ballot. The activists who

26. *Id.* at 75. Florida's verification procedures offer an instructive contrast. State officials are directed to validate signatures even if the signer's name "is not in substantially the same form as a name on the voter registration books" and even if the signer "lists an address other than the legal residence where the voter is registered," as long as a comparison of the signature and registration books reveals "that the person signing the petition and the person who registered to vote are one and the same." FLA. STAT. § 99.097(3) (1996 & Supp. 2000).

27. *See, e.g.*, *Keith*, 385 F.3d at 733-34.

28. Jenness v. Fortson, 403 U.S. 431 (1971); *see also Schulz*, 44 F.3d at 57.

29. *Keith*, 385 F.3d at 735.

30. There is also the possibility that cumbersome statutory requirements and rigorous enforcement might encourage the very fraud they seek to suppress. First, the more difficult it is to collect the necessary information, the more tempted a candidate might be to resort to fraud in order to reach the statutory minimum. Second, unscrupulous opponents may provide false information knowing that their signatures are likely to be invalidated. This practice has a long lineage in New York politics. *See* Note, *Limitations on Access to the General Election Ballot*, 37 COLUM. L. REV. 86, 99 n.89 (1937).

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challenged Nader's nomination materials made few pretensions about the purpose of their activity. In the words of one activist, "'We wanted to neutralize his campaign by forcing him to spend money and resources defending these things.'"[31] How should such political realities factor into a constitutional analysis of ballot access laws?

Although the Supreme Court's ballot access doctrine focuses on individual rights and state interests, the Court has occasionally noted the underlying political dynamics.[32] However, several commentators, including Judge Posner, have argued that the Court is not sufficiently attentive to the danger that major parties will conspire to protect their dominant position at the expense of minor-party and independent candidates.[33] In their view, the threat of collusion and "partisan lockups" suggests that courts must be wary of ballot access laws that "systemic[ally] distort[] . . . the political market."[34] At the very least, the tendency of established players to insulate themselves from competition counsels skepticism toward the interests that states assert to justify their ballot access restrictions.

Partisan involvement in ballot access challenges creates an especially significant threat of anticompetitive conduct. Entrenched political actors might tend to adopt overly burdensome preconditions for ballot access, but at least those requirements will apply equally to all prospective minor-party and independent candidates. By contrast, private challenges enable partisan players to impose costs on particular adversaries ex post as well as ex ante.[35]

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31. *See* Finer & Faler, *supra* note 1 (quoting Toby Moffett, Co-Founder, Ballot Project Inc.).

32. *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 793 n.16 (1983) ("[B]ecause the interests of minor parties and independent candidates are not well represented in state legislatures, the risk that the First Amendment rights of those groups will be ignored in legislative decisionmaking may warrant more careful judicial scrutiny.").

33. In *Keith*, Judge Posner explained that "the barriers to the entry of third parties must not be set too high; yet the two major parties, who between them exert virtually complete control over American government, are apt to collude to do just that." 385 F.3d at 735. In his academic writing, Judge Posner has argued that "the quality and responsiveness" of representation suffers "if there is no meaningful threat of entry by a third party that can offer better policies and candidates." RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 237 (2003); *see also* Dmitri Evseev, *A Second Look at Third Parties: Correcting the Supreme Court's Understanding of Elections*, 85 B.U. L. REV. 1277 (2005); Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States To Protect Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331.

34. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 710 (1998).

35. *Cf.* Nathaniel Persily, *Candidates v. Parties: The Constitutional Constraints on Primary Ballot Access Laws*, 89 GEO. L.J. 2181, 2212 (2001) (criticizing New York's practice of allowing party leaders to "erect ad hoc primary ballot access rules at any point during the campaign").

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From a competition perspective, if a major party is able to disqualify an upstart rival (or to tie up most of a rival's resources in ballot access disputes), then the major party has less reason to be responsive to the concerns of the rival and her supporters.[36] From an individual rights perspective, private challenges can impose severe and discriminatory burdens on disfavored candidates and their supporters without appreciably advancing the state's legitimate interests in regulating access to the ballot. Calculating an appropriate cushion is never an exact science, but it is especially difficult when candidates do not know how much opposition, if any, they are likely to confront. By contrast, when a state fully controls the validation process, nomination materials will tend to receive a more consistent, and thus more predictable, level of scrutiny.[37]

By enabling uneven enforcement of ballot access requirements, states that rely on private challenges also improperly discriminate among prospective candidates. The Supreme Court has explained that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."[38] Like filing fees or early nomination deadlines, a private challenge system can affect candidates in different ways. Minor-party and independent candidates who draw most of their support from only one of the two major parties are especially apt to be targeted.[39]

Although a state might argue that private challenges are fiscally sensible and ensure vigorous enforcement of ballot access laws, the legitimacy of a ballot access scheme ultimately rests on its ability to separate "serious" candidates from "spurious" ones.[40] Partisan challenges do not serve that interest if the challengers principally target only their most formidable

36. *See* Issacharoff & Pildes, *supra* note 34, at 649; *see also* Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 807 (2000) (arguing that the general election ballot should include candidates who "have the capacity to cause one of the incumbent parties to lose an election").

37. *See, e.g.*, CAL. ELEC. CODE § 8401 (West 2002); CAL. CODE REGS. tit. 2, § 20530 (2002) (establishing procedures, including random sampling, to verify all nomination petitions).

38. Anderson v. Celebrezze, 460 U.S. 780, 793 (1983).

39. Supporters of private challenges might counter that vigorous enforcement is needed in these cases because a candidate who threatens one major party may receive surreptitious support from the other major party. There is evidence that this occurred in 2004. *See, e.g.*, Michael Janofsky, *Virginia Is 6th State To Keep Nader off Ballot*, N.Y. TIMES, Sept. 8, 2004, at A19. However, it seems improbable that a candidate would receive assistance from an ideological adversary sufficient to offset the costs imposed by determined private challengers.

40. Lubin v. Panish, 415 U.S. 709, 716 (1974); *see also* Bullock v. Carter, 405 U.S. 134, 145 (1972).

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adversaries. In *Keith*, Judge Posner implied that Nader's constitutional claim was weakened by the fact that "the Libertarian Party's candidate was able to qualify" for the Illinois ballot.[41] If anything, this result suggests that something might be amiss with Illinois's ballot access system. In 2000, Nader received nearly ten times as many votes in Illinois as his Libertarian counterpart, and, despite a precipitous decline in support, Nader still outpolled the Libertarian candidate nationwide in 2004.[42] It appears that his nomination materials were singled out precisely because he posed a "serious" threat to a major party.

These criticisms suggest that private challenge systems should not be entitled to a presumption of legitimacy. Under current doctrine, "the state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[43] Because private challenges countenance unequal application of ballot access laws, they should be subject to heightened scrutiny. If a private challenge regime imposes severe burdens on candidates, it should be upheld only if the state can demonstrate that the scheme has been "narrowly drawn to advance a state interest of compelling importance."[44]

CONCLUSION

This Comment does not seek to laud Nader's candidacy or to condemn those who challenged his nomination filings. Instead, it argues that individual rights and democratic values must not be trumped by political expediency. Courts should ensure that states do not unduly burden minor-party and independent candidates by coupling seemingly reasonable ballot access laws with a strict validation process. When candidates litigate the constitutionality of ballot access laws, they should consider directly assailing the legality of validation procedures. Systems that encourage private challenges to candidate filings are particularly problematic because they allow partisan actors to target disfavored adversaries without appreciably advancing the state's legitimate interest in regulating the electoral process.

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41. Nader v. Keith, 385 F.3d 729, 734 (7th Cir. 2004).

42. *See* 2004 Presidential Election Results, http://uselectionatlas.org/USPRESIDENT/national.php?year=2004 (last visited Mar. 7, 2006); 2000 Presidential Election Results, http://uselectionatlas.org/USPRESIDENT/national.php?year=2000 (last visited Mar. 7, 2006).

43. *Anderson*, 460 U.S. at 788; *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

44. Norman v. Reed, 502 U.S. 279, 289 (1992).

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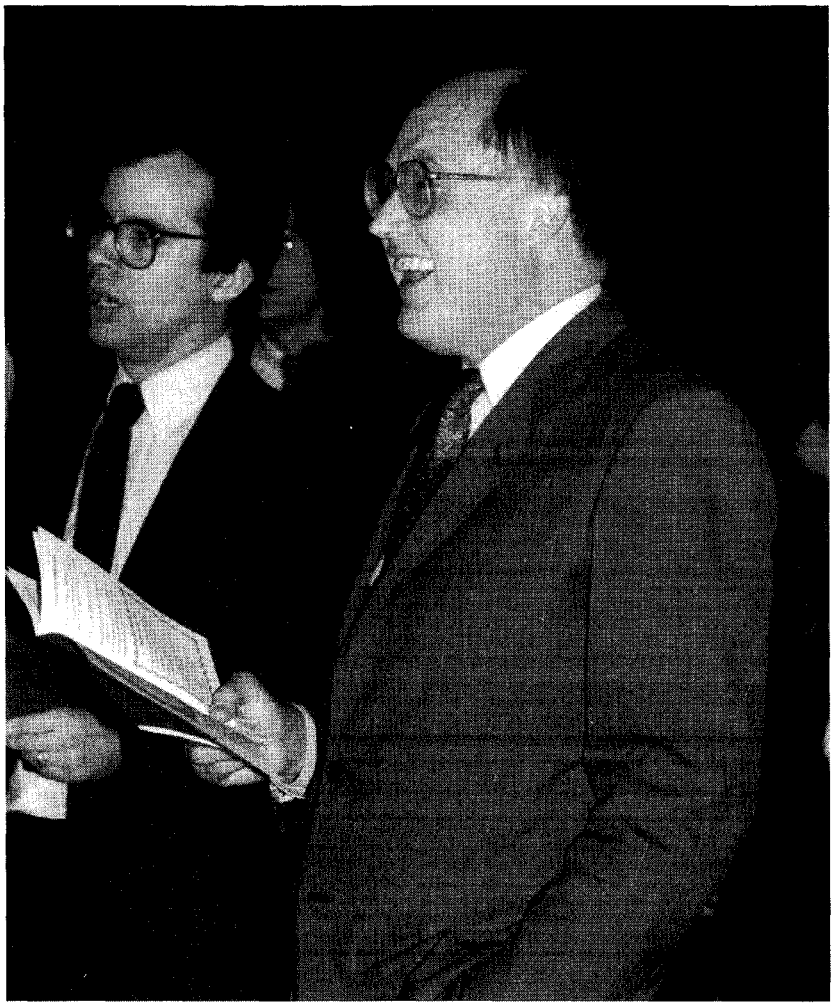

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