



FEDERAL ELECTION COMMISSION

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS) MUR No. 1287
EDUCATIONAL FUND)

RESPONSE OF RUTH J. HINERFELD
AND THE
LEAGUE OF WOMEN VOTERS EDUCATION FUND^{1/}

INTRODUCTION

Barry Commoner, The Citizens Party candidate for President, has filed a complaint alleging that the Presidential and Vice-Presidential candidate debates that the League of Women Voters Education Fund (LWVEF) intends to sponsor in September and October of 1980 violate the Federal Election Campaign Act and the regulations of the Federal Election Commission. More specifically, he claims that the criteria established by the LWVEF for selecting debate participants are partisan in structure and effect and that the LWVEF will invite candidates to participate based on partisan considerations.^{2/}

The allegations have no merit. The determination to limit participation in the LWVEF-sponsored debates to significant candidates and the criteria the LWVEF has adopted are nonpartisan. Moreover, the adoption of the criteria and any decision to invite or not to invite candidates to participate have been, and will continue to be, the LWVEF's independent actions made solely in light of its overriding purpose of educating the electorate about the issues in the campaign and the candidates' positions on those issues.

1/ This response is submitted pursuant to the provisions of the Federal Election Campaign Act, 2 U.S.C. § 437g(a)(1), and of the regulations of the Federal Election Commission, 11 C.F.R. § 111.6.

2/ Although Mr. Commoner names Ruth J. Hinerfeld as a respondent in his complaint, he does not allege that Ms. Hinerfeld has in any way violated the Act or regulations. Moreover, as Ms. Hinerfeld's affidavit shows, the LWVEF is the sole sponsor of the 1980 debates. Affidavit of Ruth J. Hinerfeld, ¶ 1. Accordingly, we will address only the question whether the LWVEF has acted improperly in staging the debates.

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There is, therefore, no reason to believe that any violation of the Act or the Commission's regulations has occurred, or is about to occur, in connection with the LWVEF's sponsorship of the 1980 debates. Accordingly, Mr. Commoner's complaint should be dismissed.

STATEMENT OF FACTS

This matter arises out of the LWVEF's planned sponsorship of three Presidential candidate debates and one Vice-Presidential candidate debate scheduled to take place this year in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). The debates will be staged pursuant to § 110.13 of the Commission's regulations, a provision with which the LWVEF has considerable familiarity. Since its sponsorship of the 1976 Presidential and Vice-Presidential candidate debates, the LWVEF worked for the promulgation by the Commission of a rule that, like § 110.13, would permit its sponsorship of public debates among candidates for federal office with funds solicited by it for that purpose. It submitted pages of testimony and comments to the Commission in connection with rule-making proceedings that spanned a three-year period.^{1/} Affidavit of Ruth J. Hinerfeld, ¶¶ 7, 20.^{2/}

Section 110.13(a) of the regulations permits the sponsorship of nonpartisan candidate debates by an organization, such as the LWVEF, which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code and which does not

^{1/} Indeed, it would not be hyperbole to state that § 110.13 of the regulations was drafted with organizations like the LWVEF in mind.

^{2/} This affidavit is attached hereto as Appendix A.

support or oppose political candidates or political parties. Under § 110.13(b), the structure of the debates is left "to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another."

The LWVEF has, of course, a long tradition of nonpartisanship which it values, and which governs all of its activities. Moreover, because the LWVEF is a nonpartisan, educational trust, Article II of its Trust Agreement and its status as a § 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of the LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process. Since its establishment in 1957, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

Thus, when the regulations became effective on April 1, 1980, the LWVEF undertook the task of structuring the 1980 debates in light of: (1) its nonpartisan tradition, its Trust Agreement, § 501(c)(3) of the Internal Revenue Code, and the nonpartisan requirement of the FEC's regulations; and (2) its exclusive educational purpose of providing information about Presidential and Vice-Presidential candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the

LWVEF did not believe that participation in the debates necessarily should be limited to only major party candidates, as is clearly permitted under the regulations, the LWVEF determined that its purpose of educating the electorate in a nonpartisan manner would best be accomplished by developing criteria that would permit participation in the debates by both major party and non-major party significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 8.

Before establishing these criteria, the LWVEF received input from the Advisory Committee that it had established. The Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations,^{1/} was set up for the purpose of providing advice and ideas with respect to the debates. It was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone, and no one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted. Affidavit of Ruth J. Hinerfeld, ¶ 9.

On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates".^{2/} The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone; this decision was not in any way affected by the positions or views of any of the Presidential candidates, their running mates, or their

1/ The members of the Advisory Committee are named in Attachment A to the Affidavit of Ruth J. Hinerfeld.

2/ A copy of this document is attached to the Affidavit of Ruth J. Hinerfeld as Attachment B.

representatives. In addition, the LWVEF has had, and will have, exclusive responsibility for applying the criteria and in selecting participants. Affidavit of Ruth J. Hinerfeld, ¶ 10.

Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support. Affidavit of Ruth J. Hinerfeld, ¶ 11.

The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. Debates that are too lengthy or that include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 12.

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In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support are: (1) nomination of a candidate by a major party; and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower. The 15 percent figure is exclusive of undecided respondents.^{1/} Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate with such a standing also should be considered significant and of sufficient interest to the electorate that his or her participation in a debate would be warranted. Affidavit of Ruth J. Hinerfeld, ¶ 13.

The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. The LWVEF did so in order to permit participation in the second or third Presidential debate by candidates who did not satisfy the criteria in early September and to permit exclusion of a previously invited candidate whose participation no longer would advance the purposes of the debates. Affidavit of Ruth J. Hinerfeld, ¶ 14.

^{1/} This means, for example, that in a poll where 10 percent of those polled were undecided, an actual showing of only 13.5 percent would be sufficient.

The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates. Affidavit of Ruth J. Hinerfeld, ¶ 15.

The LWVEF also concluded that the best test of voter interest in a candidate is the traditional trial-heat type question that asks simply and directly for whom the public would actually vote if the election were held today. Other possible questions that conceivably might have been asked involve a series of difficult and controversial hypothetical questions and were less likely to yield reliable

information about the question in which the LWVEF is interested, namely, the degree of support of, and interest in, particular candidates by the electorate as a whole. Affidavit of Ruth J. Hinerfeld, ¶ 16.

In deciding to adopt a 15 percent figure as the required level of support in the public opinion polls, the LWVEF recognized that there is no single magic number that separates significant from insignificant candidates. However, the 15 percent threshold figure, which was the lowest level of support suggested by any member of its Advisory Committee, was intended to take into account the fact that the results of polls are subject to a statistical margin of error and to other imperfections. Thus, the LWVEF recognized that the higher the threshold figure adopted, the more likely that the statistical margin of error would result in the exclusion of a candidate who is, in fact, significant. On the other hand, for the same reasons, it also took into account that a lower threshold would have increased the likelihood that candidates who are not significant would be included. Affidavit of Ruth J. Hinerfeld, ¶ 17.

The LWVEF therefore concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, provides a reasonable degree of confidence that statistical margins of error will not result in exclusion of candidates whose participation would advance the purposes of the debates. Conversely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate was not of sufficient interest to the

electorate to warrant participation in a debate with major party and other significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 18.

At the time the criteria were adopted, the members of the Board of Trustees knew, as did all informed citizens, that President Carter at one time had expressed his reluctance to participate in a debate with non-major party candidates. The LWVEF also was aware that several non-major party candidates wanted to participate in the debate series, and it anticipated that these candidates would object to whatever criteria the LWVEF established if their application resulted in non-participation. Affidavit of Ruth J. Hinerfeld, ¶ 21.

The LWVEF was, however, firmly committed to the belief that the debates should be structured so as to best serve the interests of the American electorate rather than what any particular candidate perceived as being in his own best interest. It remains committed to that belief, and it also believes that its candidate selection criteria fulfill that commitment. Affidavit of Ruth J. Hinerfeld, ¶ 22.

In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to all 6 non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The August 19 letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all prospective participants. Affidavit of Ruth J. Hinerfeld, ¶ 19.

Previously, on August 18, the LWVEF received a letter from counsel for the complainant in this proceeding objecting to the 15 percent standard and requesting the inclusion in the debates of Mr. Commoner and his running mate, LaDonna Harris.^{1/} This letter apparently was in response to the LWVEF's public announcement on August 10, of the candidate eligibility criteria. In a letter dated August 22, the LWVEF denied the request, explaining why it had selected the 15 percent standard and reaffirming its commitment to invite to debate any of the six non-major party candidates who satisfied its criteria.^{2/} On August 28, Mr. Commoner filed his complaint with the Commission.

By September 9, the LWVEF received the results of the several nationwide polls conducted during the periods August 27 and September 6 -- the most recent polls prior to that date. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14 to August 23.^{3/} The Committee also received the advice of Dr. Herbert Abelson, Mervin Field, and Lester Frankel, independent experts on polling.^{4/} Albert H. Cantril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Field to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel. Affidavit of Ruth J. Hinerfeld, ¶ 23.

1/ A copy of this letter is attached to the complaint.

2/ A copy of this letter is attached hereto as Appendix B.

3/ The results of these polls are set forth in a chart appended to Affidavit of Ruth J. Hinerfeld as Attachment C.

4/ The qualifications of these experts are set forth in Affidavit of Ruth J. Hinerfeld, ¶ 23.

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These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher."^{1/} Affidavit of Ruth J. Hinerfeld, ¶ 24.

After careful consideration, the LWVEF Board of Trustees concluded that of the six non-major party candidates to whom letters were sent on August 19, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in excess of 15 percent in the polls.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support. Affidavit of Ruth J. Hinerfeld, ¶ 25.

Accordingly, on September 9, 1980, the LWVEF invited Mr. Anderson to participate in the 1980 debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF's invitations. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore. The LWVEF expects to proceed with the Baltimore debate whether or not President Carter ultimately agrees to participate. Affidavit of Ruth J. Hinerfeld, ¶¶ 26, 27.

1/ The statement issued by these experts is appended to Affidavit of Ruth J. Hinerfeld as Attachment D.

2/ This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

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The insignificant levels of voter support for non-major party candidates other than John Anderson are also shown consistently in the results reported not only in seven of the eight polls used in the LWVEF's determination which reported results for non-major party candidates, but also in three earlier polls. In nine polls taken between August 5 and September 6, 1980, the reported results for no non-major party candidate other than Mr. Anderson ever exceeded one percent and the reported result in the tenth poll for all such candidates other than Mr. Anderson did not exceed three percent.^{1/}

ARGUMENT

Mr. Commoner claims: (1) that the LWVEF's candidate selection criteria are partisan because major party candidates are treated differently from non-major party candidates; and (2) that the fifteen percent standard for the demonstration of voter support and interest by non-major party candidates is improper. These claims are unfounded.

Mr. Commoner's claims rest upon both an erroneous understanding of the Commission's regulations and an incorrect understanding of the facts. In essence, Mr. Commoner asks the Commission to misapply its own regulations, and to ignore the Explanation and Justification accompanying § 110.13, which the Commission provided for the very purpose of explaining the meaning of that section. In support of this request, Mr. Commoner serves up inaccurate and incomplete information and pure speculation.

As we demonstrate below, the LWVEF's candidate selection criteria are nonpartisan and in full compliance with the letter and the spirit of the Commission's regulations.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment E.

First, under Commission regulations, debate sponsors may treat major party candidates differently from non-major party candidates and limit participation in debates to significant candidates. Second, the decision of the LWVEF that its voter support and interest criterion can be satisfied either by nomination by a major party, as defined in the Federal Election Campaign Act, or by a showing of fifteen percent in public opinion polls in the case of non-major party candidates is a reasonable method of separating significant from non-significant candidates. Third, in any case, it is abundantly clear that Mr. Commoner does not meet any reasonable test of significance. With a one percent showing in numerous public opinion polls, his candidacy properly may be regarded as "hopeless." Buckley v. Valeo, 424 U.S. 1, 96 (1976). In addition, it is clear that the LWVEF has applied its criteria in a nonpartisan fashion and in light of its overriding purpose of educating the American electorate.

Finally, Mr. Commoner mistakenly brings to the attention of the Commission Constitutional questions, and erroneously claims that the LWVEF has violated his Constitutional rights. Although such questions are beyond the jurisdiction of the Commission, we will address them briefly here. Under applicable law, it is clear that: (1) the LWVEF sponsorship of candidate debates is a purely private matter, and (2) even if the LWVEF could be held to the exacting standards of the Constitution, its candidate selection criteria would pass muster. Moreover, any Government action that would reduce the discretion of the LWVEF beyond that required by its nonpartisan obligation would present far more serious Constitutional questions than those raised by Mr. Commoner's complaint.

I. THERE IS NO REASON TO BELIEVE THAT THE
LWVEF HAS VIOLATED, OR IS ABOUT TO VIOLATE,
THE ACT OR THE COMMISSION'S REGULATIONS

Section 110.13 of the Commission's debate regulations is the provision that sets forth who may sponsor a debate supported by corporate and union contributions, and the structure of such a debate. It provides, inter alia, that "[a] non-profit organization which is exempt from federal taxation under 26 U.S.C. § 501(c)(3) . . . and which does not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with 11 CFR 110.13(b) and 114.4(e)." 11 C.F.R. § 110.13(a). The LWVEF, which has a 23 year history of non-partisanship, is exempt from taxation under § 501(c)(3) of the Internal Revenue Code. Accordingly, it may use its funds and those donated by corporations and labor unions to sponsor nonpartisan candidate debates.^{1/} 11 C.F.R. § 114.4(e).

The "structure" of such debates is expressly "left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." 11 C.F.R. § 110.13(b). For the reasons that follow, the LWVEF has complied with the only requirement at issue here -- the requirement of nonpartisanship.

1/ Mr. Commoner's assertion that the 1980 debates violate the regulations of the Internal Revenue Service and the Trust Agreement of the LWVEF is unsupported and conclusory. Just as the 1980 debates satisfy the nonpartisan requirements of the Commission's regulations, so do they comply fully with the LWVEF's Trust Agreement and the rules and regulations of the Internal Revenue Service. Indeed, during the 23 years of its existence, the LWVEF has been keenly aware that it must maintain and strictly adhere to a policy of nonpartisanship to comply with Article II of its Trust Agreement as well as the requirements of the Internal Revenue Code. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

A. The LWVEF Debates Comply Fully With the Nonpartisan Requirements of the Debate Regulations.

1. The LWVEF May Limit Participation in the Debate to Significant Candidates.

In promulgating the debate regulations, the Commission expressly recognized that "[a] nonpartisan candidate debate . . . provides a forum for significant candidates to communicate their views to the public." Explanation and Justification, 44 Fed. Reg. 76734 (Dec. 27, 1979) (emphasis added). In providing such a forum, debate sponsors may, in accordance with the express provisions of 11 C.F.R. § 110.13(b)(2), exercise "discretion" so long as debates "are nonpartisan in that they do not promote or advance one candidate over another." According to the Commission, "[t]he primary question in determining nonpartisanship is the selection of candidates to participate in the debates." Explanation and Justification, 44 Fed. Reg. 76735.

The LWVEF criteria for inviting candidates to participate in the debates it plans to sponsor comply with the letter and the spirit of the Commission's regulations. In formulating and adopting them, the LWVEF exercised its "discretion" and attempted, in good faith, to identify "significant candidates" in order to educate the electorate and stimulate interest in the general election. They "are nonpartisan in that they do not promote or advance one candidate over another."

Mr. Commoner urges, however, that the LWVEF has improperly exercised its discretion in determining who is a significant candidate. Among other things, citing Nashua Telegraph, MURs 1167, 1168, 1170, First General Counsel's Report (Feb. 20, 1980), he asserts: "A debate involving only the two major party candidates is not nonpartisan but bi-partisan." Complaint, p. 7. Mr. Commoner is wrong.

In promulgating the debate regulations, the Commission stated that "[a]n organization staging a debate may invite candidates to participate . . . on the basis of party affiliation," and "that such an organization could stage a general election debate to which only major party candidates are invited." Explanation and Justification, 44 Fed. Reg. 76735. In testimony before Congress, moreover, both the former and present Chairmen of the Commission reaffirmed that debates could be so limited. Repeal of "Equal Time" Requirements: Hearings on H.R. 6103 before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2nd Sess. 14 (1980). If the LWVEF properly may invite to participate in a debate only the two major party nominees, then it also may invite to participate only these two candidates and any other candidate that it, in good faith, concludes is significant.

That debate sponsors may exercise considerable latitude in selecting debate participants is supported by Congressional reaction to the Nashua Telegraph case upon which Mr. Commoner relies. As the Chairman of the House Committee on Administration stated in a letter of March 10, 1980, to the Commission:

The Commission should be reluctant in enforcing these regulations to substitute its judgment of the propriety of a particular debate for the on-the-spot judgment of the sponsor. Before the Commission should choose to take any action, it should be clear on the face of a complaint that the sponsoring of a debate involves something other than the good faith editorial judgment of the sponsor. The mere fact that a debate does not include the full field of eligible candidates should not in itself be reason to believe that the debate falls outside these regulations.

126 Cong. Rec. H. 1822 (March 12, 1980) (remarks of Rep. Van Deerlin) (emphasis added). The Chairman of the Senate Committee

on Rules and Administration expressed similar views:

I will follow closely the Commission's interpretation of these regulations, and urge the FEC to apply a rule of reason to the end that the FEC in no case substitute its discretion and judgment for that of the sponsor.

126 Cong. Rec. S. 2813 (March 21, 1980) (remarks of Sen. Pell).

Moreover, even if there had been no adverse Congressional reaction to Nashua Telegraph, its precedential significance would be questionable. First, Nashua Telegraph involved a candidate debate at the primary level where different considerations may be present. Second, in that case, the selection of two of the seven candidates running in the New Hampshire Republican Presidential primary was made without the aid of objective criteria.

Thus, Mr. Commoner's assertion that a debate sponsor may not, in good faith, invite only the two major party candidates -- or presumably any two candidates it views as significant -- is directly at odds not only with Congress' understanding of what the law is, but also with the clear and plainly worded explanation of the Commission that promulgated the rule in question.^{1/} Indeed, Mr. Commoner's attempt to dismiss the Commission's Explanation and Justification of § 110.13 as "merely conclusory" ignores the very purpose of that document.

Mr. Commoner's assertion ignores as well the significant regulatory history of § 110.13. This regulation was promulgated in response to Senate disapproval of a more detailed and restrictive regulation governing the sponsorship and funding of candidate debates, S. Res. 236, 96th Cong. 1st Sess.,

^{1/} In addition, Mr. Commoner overlooks the fact that debate participants will not necessarily benefit by public exposure. It is impossible to predict until after the debate who, if anyone, may have been helped by participating in it, and who, if anyone, may have been harmed by not participating. Whether or not participants and non-participants benefit depends on many factors, including the electorate's perception of the performance of participants.

125 Cong. Rec. S. 12822 (Sept. 18, 1979). It is the product of two rulemakings, 44 Fed. Reg. 76734 (Dec. 27, 1979); 44 Fed. Reg. 39348 (July 5, 1979); two proposed rulemakings, 44 Fed. Reg. 59162 (Oct. 12, 1979); 42 Fed. Reg. 35856 (July 12, 1977); and hearings before the Commission on September 12, 1977, and October 23 and 24, 1979, at which numerous parties, including the LWVEF, testified and submitted comments. To argue, as Mr. Commoner appears to, that the Explanation and Justification, which accompanied § 110.13 to the Senate floor the second time, is not a carefully considered explanation by the Commission of the meaning of that regulation, and that the Commission did not mean what it said, is to miscomprehend the administrative process.

Moreover, even under the Commission's more detailed and restrictive predecessor to the present § 110.13, the LWVEF's criteria would have been proper. Former § 110.13(b)(1)(i) provided that if a sponsor invites one general election candidate who has been nominated by a major party to participate in a debate, then the sponsor must invite all candidates nominated for the same office by any major party to participate in the same debate. 44 Fed. Reg. 39348, 39350 (July 5, 1979). However, the sponsor also had "discretion to include any minor party, new party, independent or write-in candidate in any debate held under 11 CFR 110.13(b)(1)." Id.^{1/} As the Commission made clear in the Explanation and Justification accompanying that section, "[t]his structure is designed to permit

1/ Former § 110.13(b)(1)(v). The requirement contained in former § 110.13(b)(1)(iv) that all minor party candidates should be invited to participate in the event that only one major party candidate agrees to debate, would not have applied because in this general election, there are no minor party candidates as defined in the Federal Election Campaign Act. See former § 110.13(b)(5)(ii), 44 Fed. Reg. 39351.

participation in a debate by significant serious candidates for the same public office." Id. at 39348 (emphasis added).

Former § 110.13 was disapproved by the Senate, however, on September 18, 1979. One of the Senator's major concerns was the restrictiveness of the debate structure mandated by the Commission. As stated by Senator Hatfield, a co-sponsor of the resolution of disapproval, "I question whether Congress ever intended to involve the Federal Election Commission in determining the format for candidate debates . . ." 125 Cong. Rec. S. 12821-22 (Sept. 18, 1979). In response to that resolution, the Commission promulgated the present regulation, which retains the requirement of nonpartisanship but leaves the structure of the debates to the discretion of the sponsor. Thus, it is nonsensical to argue that the LWVEF's decision not to invite non-significant candidates to participate in the debates violates current § 110.13(b)(2), when this decision would have been proper even under the more restrictive debate scheme previously adopted by the Commission. Present § 110.13 clearly grants more leeway to the LWVEF in sponsoring debates.

In light of the regulatory history of § 110.13 and the Commission's own explanation of the purpose and effect of this regulation, it is clear that the LWVEF may invite to participate in its debates only major party candidates for President and Vice-President. Since that is so, it is also clear that the LWVEF may, in good faith, exercise its discretion to invite candidates in addition to major party candidates based on its determination whether candidates are significant.

2. The LWVEF's Criterion For Determining
The Significance Of A Candidate Is
Nonpartisan and Reasonable.

Although the LWVEF could have complied with its non-partisan obligation by inviting to participate in the debates

the major party candidates or candidates who it, in good faith, believed to be significant, instead, the LWVEF, to ensure an entirely nonpartisan approach to determining significance, developed and adopted the voter support and interest criterion. The two elements of this criterion are reasonably capable of objective application and, in the LWVEF's judgment, constitute reasonable indicators of significant voter interest and support. They are: (1) nomination of a candidate by a major party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower.^{1/} The 15 percent figure is exclusive of undecided respondents. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

1/ Of course, nomination by a major party and voter support in public opinion polls are not the only possible indicators of voter support and interest. The LWVEF could have established a standard that included, for example, the number of contributors to, or the amount of financial support received by, a candidate, or media interest in a candidate. Alternatively, it could have established a petition requirement. It is apparent, however, that such other possible indicators of voter support and interest may be more subjective and unreliable than the standards adopted and that they measure less directly than the standards adopted the question in which the LWVEF is interested. Moreover, any meaningful petition requirement would be quite onerous. In view of the problems of alternative standards, the LWVEF cannot be faulted for adopting two indicators of candidate significance that are reasonably capable of good faith, objective application.

Although Mr. Commoner is apparently of the view that his candidacy would be served by his participation in such a debate,^{1/} it is clear that the LWVEF reasonably could conclude that the electorate would not be served by being compelled, in effect, to listen to those candidates in which it has no significant interest and by being deprived of any meaningful exchange among those candidates in whom it has a serious and substantial voter interest. Moreover, the LWVEF, in light of the present dominance of the two major parties, acted reasonably by requiring as a condition of participation by non-major party candidates a showing of substantial voter support, such as 15 percent.^{2/}

In attempting to maximize the amount of useful information presented to the electorate in a debate in which the addition of each non-major party candidate necessarily reduces the time available to the electorate to learn about positions of the clearly significant candidates, it is reasonable to demand that such non-major party candidates have a level of voter support that distinguishes them from the numerous and quite insignificant candidates that abound in an election year. The 15 percent voter support standard does precisely that, and given the support of the two major parties in the last Presidential election, cannot be deemed too harsh.

1/ Mr. Commoner does not claim that he meets the LWVEF criteria but merely that he might meet the criteria after participation in a debate. Quite obviously, candidates hopeful of being "significant" could make similar arguments in seeking access to the ballot, but it is clear that not even the Constitution requires states to permit access to the ballot by insignificant candidates who are hopeful that such access will convert their insignificant candidacies into significant ones.

2/ If, as in other political systems, there were several political parties or candidates of roughly comparable strength or varying degrees of clearly substantial strength, a lesser threshold might well have been selected. In any event, to satisfy its nonpartisan obligation, the LWVEF does not have to demonstrate that all other possible standards would not be reasonable. The obligation of nonpartisanship does not preclude the exercise of discretion.

Mr. Commoner asserts, however, that the LWVEF's third criterion "is partisan in structure and effect" because, inter alia: (1) "[m]ajor party candidates are exempt from the polling requirements, while non-major parties are subject to the vagaries of an inappropriate and inaccurate measurement;" (2) George Wallace would not have met the LWVEF's standard and that it appears that no non-major party candidate will do so this year; and (3) the standard subjects him to "a classical Catch 22 dilemma." Complaint, pp. 6-7. These assertions are unfounded, irrelevant, or both.

While it is true that certain candidates are exempt from the polling standard measure of voter support and interest, they already have demonstrated significant voter interest and support by winning the nomination of a major party. Distinguishing between major and non-major party candidates on this basis is neither improper nor novel.^{1/} As the Commission stated in the Explanation and Justification accompanying former § 110.13:

Structuring debates on the basis of party affiliation is similar to the standard used in the Act for public funding entitlement. Under the Act, only those presidential primary candidates who are seeking nomination by a political party are entitled to receive matching funds (26 U.S.C. § 9033(b)(2)). Moreover, the amount of funding to which a general election candidate is entitled is based on whether the candidate is a major, minor or new party candidate.

44 Fed. Reg. 39348. Moreover, the very reason that the LWVEF adopted the separate standard for non-major party candidates was to afford them the opportunity to be invited to debate. Without the separate standard complained of by Mr. Commoner, the

^{1/} See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (public financing); American Party of Texas v. White, 415 U.S. 767 (1974) (ballot access); Jenness v. Fortson, 403 U.S. 431 (1971) (ballot access).

debates would not have included any non-major party candidates.

Nor did the LWVEF act improperly in setting the standard applicable to non-major party candidates. In urging that the 15 percent standard is improper, Mr. Commoner quotes from a Washington Star article that reported a statement issued by the National Council on Polls and cites an article by Peter D. Hart that was published in the Washington Post. Complaint, p. 6, Appendix pp. 23, 25. His reliance on these sources is misplaced.

The National Council on Polls did issue a statement warning that "different techniques used by polling organizations . . . can result in varying assessments of candidate strength" and that "public opinion polls are subject to certain levels of sampling tolerance."^{1/} In light of those potential problems, the Council recommended that the LWVEF "consult several disinterested but qualified professionals in the field of survey research regarding measurement issues that bear on the reported poll results."

At the time the LWVEF adopted the voter support and interest standard, it recognized that polls may not perfectly measure public opinion because there are methodological differences among polling experts as to the best ways to try to measure public opinion and because their results are subject to a statistical margin of error. In the absence of superior alternatives, however, the LWVEF decided that it would attempt to deal with possible polling imperfections by examining the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining

^{1/} A copy of the statement issued is attached hereto as Appendix C.

the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

In addition, the LWVEF, after consulting with Albert H. Cantril, the President of the National Council on Public Polls, appointed three experts to assist it in interpreting the results of the polls on which it would rely. After examining the results of these polls, these experts advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes."^{1/} Thus, the concerns expressed by Mr. Commoner did not materialize, and, in any event, as the reported results show, would not have affected his ability to participate in the debates.

The Hart article on which Mr. Commoner relies made several charges: (1) that the decision of the LWVEF was "both bad and wrong" because "polls do not predict the future"; (2) that the LWVEF had wrongly decided to rely on polls taken within a single period of time immediately following the Democratic National Convention; (3) that the use of a nationwide survey "ignores the fact that an independent candidate can significantly affect the Electoral College results because he may garner a great deal of support from one region or state"; (4) "that a single question determining the standing hardly provides a true understanding of election dynamics"; and (5) that George Wallace would not have qualified to participate in the LWVEF debate had the voter support and interest standard applicable to non-major parties been in effect in 1968. Complaint, Appendix, p. 25.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment D.

These charges are unfounded. First, the purpose of the LWVEF's polling standard is not to measure who ultimately might win the election or who ultimately might be significant candidates in November. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken, and it is because they do reflect contemporaneous electorate attitudes that polls were selected. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers a non-major party candidate to be significant.^{1/} Second, the LWVEF did not rely solely on polls taken immediately after the Democratic National Convention but also on polls taken in late August and early September. Third, in light of the LWVEF's educational purposes, it quite properly relied on nationwide polls. Indeed, if Mr. Hart's observation were taken to its logical extreme, presumably a candidate who is on the ballot in a single state where the election is likely to be close would have to be considered significant because he could tip the balance in the Electoral College even if he received only 100 votes in the state election. Fourth, the use of the trial-heat question was appropriate to measure what the LWVEF was interested in ascertaining -- whether a non-major party candidate has a significant level of voter support to warrant participation in a debate series intended to educate

^{1/} Despite their imperfections, there is no legal flaw in using public opinion polls to measure contemporaneous voter support and interest. As the Supreme Court observed in *American Party of Texas v. White*, 415 U.S. 767, 786-87 (1974), "[a] petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required the States to do the impossible." Respected public opinion polls are a reasonable tool for measuring nationwide voter support for a candidate at any particular time, even though no particular poll may be mathematically precise.

the electorate as a whole. Finally, had the LWVEF standard been in effect in 1968, Mr. Wallace would have been invited to participate because he met the fifteen percent threshold.

Mr. Commoner also argues that the 15 percent threshold is "partisan in structure and effect" because

[h]istorically, only 2 minor party candidates, Theodore Roosevelt and Robert La Follette, received more than 15% of the vote. Eugene McCarthy and George Wallace did not, nor does it appear any other minor party candidates in 1980 will meet this arbitrary and capricious threshold.

Complaint, pp. 6-7. Mr. Commoner is mistaken.

Among other matters, John Anderson clearly has met the 15 percent threshold, and, as already noted, George Wallace had 15 percent or greater support in the pre-election polls.^{1/} Moreover, no non-major party Presidential candidate who did not exceed 15 percent either in the general elections or in the public polls preceding the elections, received a vote of more than 3 percent in the general elections in the twentieth century. And, in fact, no non-major party candidate other than Mr. Anderson has received more than a one percent level of voter support in 1980.

Mr. Commoner complains, in addition, that the 15 percent requirement subjects him "to a classical Catch 22 dilemma that with it he is excluded from the debates and without it, he would have an opportunity to inform voters of his campaign positions and may very well achieve a 15% rating." Complaint, p. 6.

This complaint rings hollow. First, given Mr. Commoner's consistently poor showing in all of the nationwide polls, any reasonable method of measuring whether a candidate

^{1/} This fact was pointed out to counsel for complainant in the letter of August 22. See Appendix B.

has significant voter support and interest would have subjected him to the same dilemma. More importantly, however, the purpose of these debates is not to help candidates like Mr. Commoner make a better showing in the general election; it is to provide the electorate with information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole.

In short, while the 15 percent figure itself is not a magic number, the LWVEF, in determining who to invite to debate, exercised precisely the discretion and judgment which § 110.13 contemplates. It did so in a carefully considered and nonpartisan manner, concluding that a consistent showing below 15 percent in the nationwide polls would permit it to make a reasonable judgment that a particular candidate is not considered significant by the electorate, taken as a whole. Moreover, the LWVEF reasonably concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, would not result in exclusion of candidates who ought to be invited to debate. Indeed, as the results of the nationwide polls show, none of the non-major party candidates but Mr. Anderson would have satisfied even a one percent threshold.

3. The LWVEF Has Applied, And Will Apply, The Candidate Eligibility Criteria In An Independent, Objective, and Nonpartisan Manner.

Not only did the LWVEF develop and adopt nonpartisan, objective criteria for determining eligibility to participate in the 1980 debates: it also has objectively and fairly applied them. As noted above, on August 19, the LWVEF determined that President Carter and Governor Reagan satisfied the three criteria that it had adopted, and invited both candidates to

participate in the debates. On September 9, after examining the reported results of eight nationwide polls, and after consulting with the three independent polling experts, the LWVEF determined that Mr. Anderson was the only non-major party candidate whose standing exceeded 15 percent. None of the other non-major party candidates came within 14 points of that figure.^{1/} Accordingly, pursuant to its criteria, the LWVEF invited Mr. Anderson to participate in the 1980 debates.

Mr. Commoner, however, claims that the LWVEF's application of its criteria to the non-major party candidates is tainted by the fact that President Carter allegedly has brought pressure to bear on the LWVEF to exclude all non-major party candidates from the debates. The short answer to this is that contrary to Mr. Commoner's prediction, Mr. Anderson has demonstrated his significance as a candidate pursuant to the LWVEF's criteria, and he was invited to participate in the debates. Moreover, as stated above, the LWVEF plans to go ahead with the Baltimore debate as scheduled, whether or not President Carter ultimately agrees to participate.^{2/}

^{1/} See Affidavit of Ruth J. Hinerfeld, Attachment E.

^{2/} Affidavit of Ruth J. Hinerfeld, ¶ 27. In addition, it should be noted that Ruth Hinerfeld denies Mr. Commoner's claim that she stated that "the league could change its debate rules so that Anderson, should he qualify would take part in the first debate, but not in a second." See Complaint, p. 9; Appendix, p. 26. In fact, what she stated, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate. She also stated that she would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. She did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues. See Affidavit of Ruth J. Hinerfeld, ¶ 28.

Just as the LWVEF has no control over the public pronouncements of Mr. Carter, Mr. Commoner, or any of the other candidates, so the LWVEF has no control over a candidate's decision whether to accept the invitation to debate. Although the LWVEF would like to present a debate among all the significant Presidential candidates to the electorate, the LWVEF can do no more than create a mechanism which, in as nonpartisan, objective, and reasonable a manner as possible, will provide the opportunity for truly significant candidates to participate. This the LWVEF has done, and as shown above there is no reason to believe that it has failed, or will fail, to comply with § 110.13 of the Commission's regulations. Accordingly, Mr. Commoner' complaint should be dismissed.

B. The LWVEF Has Not Violated, And Is Not About To Violate, 2 U.S.C. § 433(a) and § 434.

Mr. Commoner alleges that the LWVEF is a "political committee" within the meaning of the Act because it has made "expenditures" in excess of \$1000 in order to stage the 1980 debates, and, as such, has violated the Act by not registering and reporting pursuant to § 433(a) and § 434. As Mr. Commoner notes, however, § 100.7(b)(21) and § 100.8(b)(23) of the Commission's regulations provide that the terms "contribution" and "expenditure" do not include funds used to defray the costs of staging nonpartisan candidate debates in accordance with § 110.13 and § 114.4(e). As shown above, the LWVEF has complied fully with the provisions of § 110.13 and § 114.4(e), and thus, under the Act, is not deemed to have made a "contribution" or "expenditure" in connection with the debates. Accordingly, the LWVEF is not a "political committee" within the meaning of 2 U.S.C. § 431(4), and need not register or report pursuant to the Act.

II. MR. COMMONER'S OTHER CONTENTIONS NOT ONLY RAISE ISSUES BEYOND THE JURISDICTION OF THE COMMISSION, BUT ALSO ARE MERITLESS

The jurisdiction of the Federal Election Commission is limited, with respect to civil enforcement proceedings, to the provisions of the Act, and chapter 95 and chapter 96 of title 26. 2 U.S.C. § 437c(b)(1), § 437d(6), and § 437g. Consequently, Mr. Commoner's charge that the LWVEF's exercise of its First Amendment rights in staging the 1980 debates somehow constitutes illegal government action and violates his First Amendment rights raises issues that are beyond the jurisdiction of the Commission.^{1/} Nevertheless, we will briefly discuss these issues.

A. The LWVEF's Sponsorship of Candidate Debates Does Not Constitute State Action.

Mr. Commoner asserts that "[t]he degree of interaction of the LWVEF must have with broadcasters to televise this event, the privilege of tax exemption bestowed by Congress to the LWVEF and the privilege of debate sponsorship bestowed by the Commission to the LWVEF, elevate private action to government action." Complaint, p. 7. He cites no authority whatsoever in support of this contention. It is plainly wrong.

First, of course, the privilege of debate sponsorship is not bestowed on the LWVEF by the Commission but is a privilege -- indeed, a right -- bestowed by the First Amendment. Moreover, even if Mr. Commoner were correct in identifying the source of the LWVEF's privilege, the privilege, even when conjoined with a charitable tax exemption and interaction with the

^{1/} Mr. Commoner also suggests that the LWVEF's debate series somehow will violate the Federal Communications Act. This suggestion is incorrect, but if Mr. Commoner wishes to pursue it, the agency with jurisdiction is the Federal Communications Commission.

broadcast media, does not convert the actions of the LWVEF into the actions of the state.

For a private entity's action to be regarded as that of the state, far more interaction between the two is required. Thus, even when the government grants a private entity a long-term and lucrative utility monopoly and engages in detailed regulation of its activities, a unilateral action by that entity is not regarded as state action even when the state knows in advance of that entity's policy. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Similarly, the provision of a scarce and lucrative resource, such as a liquor license, to a private entity does not convert that entity's action into that of the government. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Finally, even the heavily regulated broadcast licensees, which are granted an exclusive right to scarce resources and benefit financially therefrom, are not state actors. See Greenberg v. Bolger, 80 Civ. 0340, Slip Op. p. 43 (E.D.N.Y. June 20, 1980).

In light of these and other cases, any conclusion that the LWVEF is a state actor, or that its debates constitute state action, would be erroneous.

B. Assuming Arguendo That The LWVEF Is A State Actor, Its Criteria For Candidate Participation Are Lawful And Its Exclusion Of Mr. Commoner From Its Debates Is Proper.

Assuming arguendo that the LWVEF is a state actor, its criteria for candidate participation are lawful and its exclusion of Mr. Commoner from the debates is proper. There are "vital state objectives" that justify the criteria and the exclusion of Mr. Commoner, a "hopeless" candidate, from the debates. American Party of Texas v. White, 415 U.S. 767, 781 (1974); Buckley v. Valeo, 424 U.S. 1, 96 (1976).

In establishing standards to govern access to a debate, the Constitution would permit the LWVEF, as a state actor, to: (1) determine whether there is voter support for a candidate; (2) apply different standards for measuring such support in the case of major party candidates, on the one hand, and non-major party candidates, on the other; and (3) exclude from participation a candidate for whom there is insignificant support. See, e.g., American Party of Texas v. White, supra; Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). In particular, the LWVEF would be permitted to exclude from a debate a candidate who, like Mr. Commoner, has minimal voter support. Mr. Commoner received one percent or less of the vote in nine nationwide public opinion polls during the period August 5 to September 6, 1980. He properly may be treated, therefore, under Buckley v. Valeo, supra, 424 U.S. at 96, as a "hopeless" candidate.

In support of his argument that the LWVEF candidate selection criteria are unlawful, Mr. Commoner cites only Buckley v. Valeo, supra, and Greenberg v. Bolger, supra. Neither case supports his claim that he is entitled to participate in the LWVEF-sponsored debates.

In Buckley v. Valeo, of course, the Supreme Court upheld the public financing provisions of the Federal Election Campaign Act despite the fact that entitlement to public financing was dependent on a showing of voter support, that the Act distinguished between major party candidates and non-major party candidates, and that financing was not available to insignificant candidates. Moreover, although the court in Greenberg struck down a mail subsidy that was granted only to major parties, that case is distinguishable.

In Greenberg, the court recognized that "[e]ach medium of expression . . . must be assessed for first amendment purposes by standards suited to it, for each may present its own problems . . ." Mem. Op., p. 47, quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975). In addition, the court recognized that the government has legitimate interests that must be balanced against the effect of government action on non-major parties. These interests include facilitation of public expression, ensuring the manageability and integrity of the resource to which access is sought, protecting scarce resources, and guarding against factionalism.

In Greenberg, the interests purportedly protected by the mail subsidy statute did not "survive impartial scrutiny and weighing." Mem. Op., p. 59. Manifestly, however, candidate access to a debate is different from political party access to a mail subsidy, and the considerations that the Greenberg court regarded as being a proper basis for government action support the exclusion of Mr. Commoner and others like him from the 1980 candidate debates.

As the Supreme Court has observed in the analogous context of ballot access:

The fact is that there are obvious differences in kind between the needs and potentials of a political party which historically established broad support, on the one hand, and a new or small political organization on the other. [A state is not] guilty of invidious discrimination in recognizing these differences Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike

American Party of Texas v. White, supra, 415 U.S. at 782 n. 13, quoting Jenness v. Fortson, supra, 403 U.S. at 441-42.

Just as there are obvious differences between political parties, there are obvious differences between their nominees for

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President. In the context of a debate among candidates for President, it would be the grossest discrimination to treat Mr. Commoner, showing one percent of voter support in nationwide polls, exactly like non-major party candidates having fifteen times his support. The Constitution would not require such an unsound result.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

Respectfully submitted,

/s/
Ernest W. Jennes

/s/
Donna M. Murasky

/s/
Scott D. Gilbert

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September 15, 1980

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS) MUR NO. 1287
EDUCATIONAL FUND)

AFFIDAVIT OF RUTH J. HINERFELD

Ruth J. Hinerfeld, being duly sworn, deposes and says:

1. I serve as Chair of the Board of Trustees of the League of Women Voters Education Fund (LWVEF), and I am also the President of the League of Women Voters of the United States (LWVUS). I have served in these capacities since 1978. During the period 1972 to 1978, I held the positions of First Vice Chair, Vice Chair, and Trustee of the LWVEF, and served as First Vice President, Vice President, and Director of the LWVUS. I have been a member of the LWVUS since 1953. As Chair of the Board of Trustees of the LWVEF, I have been involved substantially in the initiation, structuring and scheduling of the 1980 Presidential and Vice Presidential candidate debates that are the subject of this proceeding; the LWVEF is the sole sponsor of such debates.

2. The LWVUS is a nationwide organization with 50 state leagues, 1,300 local leagues, and approximately 120,000 individual members. It has been sponsoring nonpartisan debates, forums and candidate events for 60 years. Under its by-laws, the LWVUS's purposes are to promote political responsibility through informed and active citizen participation in government and to act on selected governmental issues. In furtherance of these purposes, state and local leagues sponsor a variety of nonpartisan activities and citizen education programs.

These include publication of information about candidates for elective office and their positions on the issues, candidate forums and debates, get-out-the-vote drives, and demonstrations of voting machines. The LWVUS and the various state and local leagues are prohibited by their by-laws from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity.

3. The LWVEF was established by the LWVUS in 1957. It is a nonpartisan, educational trust exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code. Article II of its Trust Agreement and its status as a Section 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process.

4. Since its establishment, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship which it values highly.

5. In keeping with this tradition and its educational, nonpartisan purpose, the LWVEF sponsored three Presidential candidate debates and one Vice Presidential candidate debate between the Democratic and Republican nominees during the 1976 campaign.

6. The LWVEF takes great pride in its sponsorship of the 1976 Presidential candidate debates and believes that the debates helped American voters to make an informed decision in the election and generated increased public interest in the 1976 Presidential campaign. Independent studies support this belief. On the basis of their empirical studies, Steven H. Chaffee and Jack Dennis, in "Presidential Debates: An Empirical Assessment" (published in The Past and Future Presidential Debates, ed. A. Ranney, American Enterprise Institute 1979), conclude at page 98, "that the debates make substantial contributions to the process of democracy and perhaps even to the long-term viability of the system." And the March 1979 Report of the Twentieth Century Fund Task Force on Televised Presidential Debates concludes that Presidential debates should become a regular and customary feature of Presidential election campaigns. Since 1976, the LWVEF has worked to make this a reality.

7. After the 1976 election, the LWVEF worked over the next three years to secure the promulgation of regulations by the Federal Election Commission that would permit the sponsorship and funding of public debates among candidates for federal office. On September 12, 1977, Ruth Clusen, then Chair of the LWVEF testified before the Commission in connection with the first proposed rulemaking. I submitted comments on behalf of the LWVEF to the Commission on May 22, 1979, with respect to that proposed rulemaking, and testified before the Commission on October 23 and submitted written comments on November 13, 1979, with respect to a second proposed rulemaking, urging adoption of regulations that would enable the LWVEF to begin immediate fundraising for, and planning of, Presidential and Vice Presidential debates in 1980.

8. In keeping with its long tradition of nonpartisanship, the LWVEF undertook the task of structuring the 1980 debates so that they would comply fully with the nonpartisan requirements of the regulations of the Federal Election Commission and at the same time provide information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the LWVEF did not believe that participation in the debates should necessarily be limited to major party candidates, the LWVEF determined to develop criteria that would permit participation in the debate series by all significant candidates.

9. Before establishing criteria, the LWVEF received input from its Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations who are listed in Attachment A to this Affidavit. The Advisory Committee was set up for the purpose of providing advice and ideas with respect to the debates. The Committee was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone. No one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted.

10. On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection Of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates", a copy of which is attached hereto as Attachment B.

The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone. This decision was not in any way affected by the positions or views of any of the Presidential candidates, or their running mates, or their representatives. Nor has anyone but the LWVEF applied the criteria or selected participants.

11. On the following day, August 10, the LWVEF released the eligibility criteria that had been adopted by the Board, and announced the sites chosen for the 1980 debates. As described in the attached criteria paper, the LWVEF plans to sponsor three Presidential candidate debates and one Vice Presidential candidate debate to which the running mates of eligible Presidential candidates will be invited. Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support.

12. The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity

for effective interchange between or among the participants, on the other. Debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its educational purposes in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates.

13. In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support were: (1) nomination of a candidate by a major national political party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls^{1/} or a standing equal to that of a major party candidate, whichever is lower. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

^{1/} The 15 percent figure is exclusive of undecided respondents. This means, for example, that in a poll where 10 percent of those polled were undecided, a showing of only 13.5 percent of all respondents would be sufficient.

14. The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. It did so in order to permit participation in the second and third Presidential debates by candidates who did not satisfy the criteria in early September, and to permit it to reassess whether future participation by a previously invited candidate would continue to advance the purposes of the debates.

15. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

16. The LWVEF also concluded that the best test of voter interest in a candidate is the traditional trial-heat type question that asks simply and directly for whom the public would actually vote if the election were held today. Other possible questions that conceivably might have been asked involve a series of difficult and controversial hypothetical questions and were less likely to yield reliable information about the question in which the LWVEF is interested, namely, the degree of support of, and interest in, particular candidates by the electorate as a whole.

17. In deciding to adopt a 15 percent figure as the required level of support in the public opinion polls, the LWVEF recognized that there is no single magic number that separates significant candidates from candidates who are not significant. However, the 15 percent threshold figure, which was the lowest level of support suggested by any member of its Advisory Committee, was intended to take into account the fact that the results of polls are subject to a statistical margin of error and to other imperfections. Thus, the LWVEF recognized that the higher the threshold figure adopted, the more likely that the statistical margin of error would result in exclusion of a candidate who is, in fact, significant. On the other hand, for the same reasons, it also took into account that a lower threshold would have increased the likelihood that candidates who are not significant would be included.

18. The LWVEF therefore concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, would provide a reasonable degree of confidence that statistical margins of error would not result in exclusion of candidates who ought to be invited to participate in the debates. Con-

versely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate had not met the statistical threshold.

19. In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to the six non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all possible participants. To date, the LWVEF has received responses from all such non-major party Presidential candidates except Ms. Ellen McCormack and Mr. Gus Hall.

20. The LWVEF intends to stage the debates now planned in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). These sites were chosen on the basis of geographical diversity and availability of physically suitable facilities. In all four cities, the physical facilities necessary to stage the debates are being provided to the LWVEF free of charge.

21. At the time that the criteria were adopted, the members of the LWVEF Board of Trustees were aware, as were all informed citizens, that President Carter at one time had expressed reluctance to participate in a debate that included non-major party candidates. They were also aware that several non-major party candidates had indicated that they wanted to participate in the debate series, and they anticipated that these candidates might object to whatever criteria the LWVEF established if application of those criteria resulted in their exclusion.

22. Despite this information, the LWVEF was firmly committed to the belief that the debates should be structured so as best to serve the interest of the American electorate rather than what any particular candidate perceived as being in his self-interest. It remains committed to that belief, and it also believes its candidate selection criteria fulfills that commitment.

23. By September 9, 1980, the LWVEF had received the results of several nationwide polls conducted during the period August 27-September 6. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14-August 23. The results of these polls are set forth in a chart attached hereto as Attachment C. The Committee also received the advice of several respected independent experts on polling.

These experts were:

- (1) Dr. Herbert Abelson, co-founder of Response Analysis, Princeton, New Jersey. Dr. Abelson is a specialist in survey research methodology, especially as applied to social research and voter preference. He is a past president of the American Association for Public Opinion Research and currently vice-chairman of the Council of American Survey Research Organizations.
- (2) Mervin Field, Chairman of the Board of Field Research Corporation and Director of the California Poll, San Francisco. Mr. Field is a recognized authority on consumer behavior and public opinion. He has held offices in the American Marketing Association, and the American Association for Public Research. He is a trustee of the National Council on Public Opinion Polls.
- (3) Lester Frankel, executive vice-president of Audits and Survey, Inc. Mr. Frankel has been involved in a number of large scale sample surveys in government and in studies of consumer behavior and attitudes. Mr. Frankel is past president of the American Marketing Association and a regular member of the International Statistical Institute.

Albert H. Cantril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Field to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel.

24. These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher." See Attachment D.

25. The members of the Board of Trustees, some of whom were consulted by telephone, also concluded that of the six non-major party candidates under consideration, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in the polls of voter support in excess of fifteen percent.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support.

26. After concluding that Mr. Anderson had satisfied the LWVEF criteria, the LWVEF invited him to participate in its debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF invitations for the Baltimore debate. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore.

27. The LWVEF expects to proceed with the Baltimore debate whether or not the President ultimately decides to participate. It is nevertheless hopeful that the President will agree to participate because the LWVEF believes that his participation is important to informing the electorate and

^{2/} This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

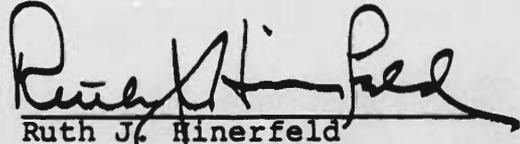
- 13 -

making that debate of greatest use to the electorate.

28. On August 26, I did not state, as the complaint alleges, that "the league could change its debate rules so that Anderson, should he qualify, would take part in the first debate, but not in a second." What I did say, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate (see ¶ 14 of this Affidavit). I also stated that I would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. I did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues.

29. The LWVEF continues to believe that the electorate would not best be served by the inclusion of clearly non-significant candidates, such as Mr. Commoner, in its debate series, and that the educational purposes of the debate series would be frustrated by the inclusion of any or all such candidates. Attached as Attachment E is a summary of the standing of non-major party candidates as shown in nationwide polls taken between August 5, 1980, and September 7, 1980; it demonstrates that neither Mr. Commoner nor any other non-major party candidate, other than Mr. Anderson, has

achieved more than a minimal level of voter support.


Ruth J. Hinerfeld

District of Columbia, ss:

Sworn to and subscribed before me this 12th day
of September 1980.


Notary Public

My Commission Expires July 31, 1982

ADVISORY COMMITTEE

ROBERT ANDERSON -- Chairman of the Board of Atlantic Richfield Co.

GOVERNOR JERRY APODACA -- President, National Issues Council; Governor of New Mexico (1975-1978); Chairman of the President's Council on Physical Fitness.

JAMES DAVID BARBER -- James B. Duke Professor of Political Science, Duke University.

CHARLES BENTON -- Chairman, Films, Inc.; Chairman, National Committee of Library and Information Science.

SHIRLEY TEMPLE BLACK -- Former U.S. Ambassador to the Republic of Ghana; Former U.S. Chief of Protocol.

*HONORABLE WILLIAM BROCK -- Chairman, Republican National Committee; Former United States Senator from Tennessee.

DOUGLASS CATER -- Trustee and Senior Fellow, Aspen Institute for Humanistic Studies; Special Assistant on Education and Health Policy during the Johnson Administration.

SOL CHAIKIN -- President, International Ladies Garment Workers Union.

ARCHIBALD COX -- Chairman, Common Cause; Professor of Law, Harvard University School of Law; Solicitor General of the United States (1961-1964); Watergate Special Prosecutor.

LEE HANNA -- Director, 1980 Presidential Debates; former Vice-President and Director of NBC News.

DOROTHY HEIGHT -- President, National Council of Negro Women.

HARRIET HENTGES -- Executive Director, League of Women Voters Education Fund; Economist.

CARLA HILLS -- Attorney; Partner, Latham, Watkins & Hills, Washington, D.C.; Secretary of Housing and Urban Development during the Ford Administration.

RUTH J. HINERFELD -- Chair, League of Women Voters Education Fund.

BENJAMIN HOOKS -- Executive Director, NAACP; Attorney; Ordained Baptist Minister.

PAT HUTAR -- Director of the Office of International Medicine, American Medical Association; Immediate Past President, National Federation of Republican Women; former U.S. Representative to the U.N. Committee on the Status of Women.

JIM KARAYN -- President and General Manager, WHYI Inc., (Radio and TV); Director of the Presidential Debates in 1976.

JEWEL LAFONTANT -- Attorney, LaFontant, Wilkenson & Butler, Chicago; Former U.S. Delegate to the U.N.; Former Deputy Solicitor General of the U.S.

NEWTON MINOW -- Attorney, Sidley & Austin, Chicago; Chairman of the Federal Communications Commission (1961-1964); Co-Chair 1976 Presidential Debates Advisory Committee.

LEE MITCHELL -- Attorney, Sidley & Austin, Washington, D.C.; practices communications law.

AUSTIN RANNEY -- Resident Scholar and Co-Director of the Center for Political and Social Processes at the American Enterprise Institute for Public Policy Research; Edited The Past and Future of Presidential Debates.

SHARON PERCY ROCKEFELLER -- First Lady of West Virginia; Director, Corporation for Public Broadcasting.

CARMEN VOTAW -- President, Inter-American Commission of Women.

PAUL WAGNER -- President, Wagner & Baroody, Public Relations Counselors, Washington, D.C.

CHARLS WALKER -- Chairman of Charls Walker, Washington consultants.

CASPER WEINBERGER -- Vice-President and General Counsel of Bechtel Power Corporation.

*HONORABLE JOHN WHITE -- Chairman, Democratic National Committee; Former Deputy Secretary of Agriculture.

*Ex Officio

August 10, 1980

LEAGUE OF WOMEN VOTERS EDUCATION FUND
CRITERIA FOR SELECTION OF CANDIDATES TO
PARTICIPATE IN THE 1980 PRESIDENTIAL
AND VICE-PRESIDENTIAL DEBATES

It is the intention of the League of Women Voters Education Fund to sponsor a series of nonpartisan debates among candidates for the offices of President and Vice President of the United States. There will be three Presidential Debates and one Vice-Presidential Debate. The LWVEF's purpose in sponsoring the debates is to educate the public about the issues in the campaign and the candidates' positions on those issues. At the same time, the Debates are intended to stimulate and to increase voter interest and participation in the general election. These purposes are best served by inviting to participate in the debates only those presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest.

The criteria for selecting candidates to participate in the debates have been drawn in light of the requirements of the Federal Election Commission and the purposes of the debates. Federal Election Commission regulations permit the LWVEF to sponsor nonpartisan candidate debates. The structure of such debates is left by the FEC "to the discretion" of the LWVEF "provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate

Attachment B

over another."

The LWVEF has adopted criteria for selection which it believes are:

- nonpartisan
- capable of objective application so that they will be as free as possible from varying interpretation, and
- understandable by the public.

The criteria set forth have been adopted after careful consideration by the Board of Trustees. In its deliberations, the Board was fortunate to have available to it the views of its Advisory Committee, a group of 24 prominent citizens having diverse backgrounds and interests.

All participants must meet the League's criteria to ensure that the Debates further the LWVEF's purposes. Accordingly, the LWVEF will invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will be invited to participate in the Vice-Presidential Debate. The participation of non-major party candidates will be determined on a case-by-case basis.

There are three basic criteria for inviting Presidential candidates to debate: (1) constitutional eligibility; (2) ballot accessibility; and (3) demonstrated significant voter support and interest.

Based on these criteria, the LWVEF will determine in late August whom to invite to the debate series. The running mates of presidential candidates invited to participate in the debates automatically will be eligible to participate in the debate for vice-presidential candidates. In addition, throughout the debate series, the LWVEF will retain the option to reassess the participa-

tion of non-major party candidates in the event of significantly changed circumstances. The LWVEF will do so in order to determine whether any additional candidates, who did not satisfy the criteria in late August, will be invited to participate in the second and third Presidential Debate or whether future participation by a candidate would no longer advance the purposes of the debates.

CRITERIA FOR SELECTION OF
PRESIDENTIAL CANDIDATES
INVITED TO DEBATE

I. Constitutional Eligibility Criterion.

Only those candidates who meet the eligibility requirements of Article II, Section 1, of the Constitution will be invited to participate in the Debates since the purposes of the LWVEF would not be served by permitting participation of candidates who are ineligible to become President or Vice President.

II. Ballot Access Criterion.

1. A presidential candidate must be on the ballot in a sufficient number of states to have a mathematical possibility of winning a majority of votes (270) in the Electoral College.

Explanation: The LWVEF's purpose in sponsoring the debates is to educate the public about candidates who may become President in the general election. A candidate must win a majority of electoral votes to be elected. Adoption of a standard that allows participation in the debates by candidates who are not on enough ballots to win in the Electoral College would not further that purpose. Thus, although a candidate with less than a majority in the Electoral College could win in an election decided by the House of Representatives, the purpose of the Debates is to educate the electorate about the choice it must make in November, not the members of the House of Representatives who would elect the

President in the unlikely event that no candidate wins a majority in the Electoral College. On the other hand, a standard that requires a candidate to be on the ballot in more states than are necessary to secure 270 electoral votes exceeds the constitutional minimum and appears, therefore, to be unduly harsh. Most members of the Advisory Committee also suggested this standard.

2. When the LWVEF decides whom to invite to debate, it is possible that in a number of states there will be no clear indication of candidate ballot status. In some states, a candidate may have filed the requisite number of signatures but not be officially certified on the ballot. In others, there may be legal challenges to (1) early filing deadlines and (2) independent and third party candidate petitions. In addition, candidates still may be in the process of qualifying to be on ballots when the LWVEF is making its decisions on participants.

- a. The LWVEF will request selected non-major party candidates ^{1/} interested in participating in the Debates to provide it with reasonable assurances that they will meet the ballot

^{1/}The non-major party candidates to be invited to demonstrate that they meet the ballot access criterion are those candidates who are required to file quarterly financial reports with the Federal Election Commission, who have indicated that they meet the financial threshold established by the FECA, and who have not formally terminated their candidacies.

The Federal Election Campaign Act defines a major party as a political party whose nominee for the Presidency received twenty-five percent or more of the popular vote in the preceding Presidential election. 26 U.S.C. § 9002 (6).

-5-

access criterion by the date of the election. The LWVEF will then assess whether the candidate is likely to qualify, taking into account, for example, the number of signatures already collected, the extent of the candidate's past efforts to qualify, and the likelihood that the candidate's planned efforts will be successful. To the extent indicated, the LWVEF will confirm with appropriate state officials the facts presented to it.

- b. In states where early filing deadlines have barred candidates from the ballot, state law will be respected unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.
- c. In states where a candidate appears to have qualified for the ballot, but the candidate's right to remain on the ballot is being challenged, certification by the appropriate state official will be conclusive unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.

Explanation: The LWVEF will not require candidates to be qualified on the requisite number of ballots at the times it needs to issue invitations to debate. This is because the law in some states permits candidates to qualify to be on the ballot after the times that the LWVEF will need to make its decisions. The LWVEF will not require candidates to meet a more onerous ballot access criterion than that required by the states themselves -- what the LWVEF seeks to ascertain by this criterion is whether a presidential candidate has a possibility of winning a general election in November, not in August or September.

III. Demonstrated Significant Voter Support and Interest Criterion.

In 1976, seven candidates eligible to become President were on the ballots in enough states to have a theoretical possibility of winning. Not all of them, however, were significant candidates. Meeting the above standards does not, therefore, necessarily mean that a candidate will be invited to participate in the 1980 debates. The LWVEF also will require that Presidential candidates have significant voter support and interest. "Significant" does not mean that a candidate is raising issues different from those raised by other candidates or that the candidate's views on already-defined issues may differ from those of other candidates. The definition of "significant" is based on magnitude of voter support for and voter interest in a person's candidacy.

1. Candidates invited to debate must either be a nominee of a major political party as defined in the Federal Election Campaign Act or meet LWVEF standards for demonstrated voter support and interest.

Explanation: There is ample precedent for treating the candidates of major parties differently from non-major party candidates. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court found that the Constitution did not require the government to treat all presidential candidates the same for public financing purposes. Major party nominees already have demonstrated significant voter support and interest by virtue of their nomination. Non-major party candidates, however, have not met any similar test. It is necessary, therefore, for the LWVEF to ascertain whether non-major party presidential candidates have the support of a significant portion of the electorate in addition to their being eligible for office and theoretically capable of winning the general election.

2. The LWVEF will rely on nationwide public opinion polls to determine voter support and interest.

Explanation: Although public opinion polls are not necessarily accurate predictors of future voting behavior, they present the best indicator of existing voter support for and voter interest in non-major party candidates at any given time during the elective process. There are other indicators, such as number of contributors, amounts of funds raised, and media attention, which also may indicate voter support and interest. These other indicators are more difficult to interpret and apply, and they measure less directly than national opinion polls voter support and interest. Other possible indicators of voter support and interest, such as petition requirements, place an unnecessary burden on non-major party presidential candidates.

3. An assessment of voter support and interest will be based on data derived from nationwide polling samples provided by several well-respected public polling organizations.

4. The LWVEF will make its decisions based on the outcome of the most recent polls taken by each of the polling organizations selected by the LWVEF.

Explanation: Polls may vary, not only due to polling methods but also as a result of the dates on which they were taken. This is especially true when the measure of public opinion is taken in election campaigns. The best the LWVEF can hope to do is to ascertain current voter support and interest as close as is feasible to the dates on which it makes its decisions.

5. The LWVEF will rely on questions which are as close as possible to the classic "trial-heat" approach -- "If the election were held today, would you vote for A, B, C, D, etc.?"

Explanation: The principal purpose of the Debates that the LWVEF

proposes to sponsor is a more informed electorate. To achieve that purpose, the LWVEF must attempt to ascertain which candidates the electorate regards as serious candidates for its vote. Identification of such candidates is most readily ascertained by the "trial-heat" type question proposed.

6. In order to participate in the Debates, a non-major party candidate must receive a level of voter support of fifteen percent or the level of voter support received by a major party candidate, whichever is lower.

Explanation: Advisory Committee members suggested voter support threshold levels ranging between fifteen and twenty-five percent, and the Board concluded that any figure within this range would be reasonable. After consideration of a number of factors, including the records of public opinion polls in previous presidential elections and their relationship to actual election results, the substantial obstacles faced by non-major party candidates and variations among public opinion polling techniques and the precision of their results, the Board decided to adopt the fifteen percent level of support or the level of support that a major candidate receives for the following reasons. First, non-major party candidates who reach even a fifteen percent level of support, despite the substantial odds facing them, should be regarded as significant forces in the election. In addition, we also found it appropriate to include non-major party candidates whose showing in the polls is equal to that of a major party candidate. The ability to garner such a level of support suggests the candidate's presence in the Debates would further the LWVEF's purposes/ for the debates. On the other hand, to lower the fifteen percent threshold in the absence of a comparable lower level of voter support for a major party candidate could result in participation by candidates who would not further the LWVEF's purposes. Their parti-

icipation would, moreover, decrease the time available to clearly significant candidates to set forth their views and differences in the Debates. The LWVEF recognizes that each additional candidate invited to the debates will diminish the other candidates' ability to make their views known.

7. The procedure adopted for testing whether a candidate meets the voter support requirement gives all the active, selected^{2/} non-major party candidates an opportunity to satisfy the requirement. The LWVEF will look at the nationwide results of the most recent polls taken by each of the major polling organizations selected by the League. All non-major party candidates who receive the requisite level of voter support of fifteen percent or the level of support received by major party candidates, whichever is lower, will be invited.

VICE-PRESIDENTIAL CANDIDATES

Other than being required to possess the personal qualifications to become President, the running mates designated by the participants in the Presidential Debates will be included in the Vice-presidential Debate.

^{2/} See page 5, fn. 1

SUMMARY OF AVAILABLE
 NATIONAL POLL DATA - 1980 PRESIDENTIAL
 LEAGUE OF WOMEN VOTERS EDUCATION FUND

| <u>POLL:</u> | <u>TIME</u> | <u>Reper</u> | <u>L.A. Times</u> | <u>Harris</u> |
|--------------|----------------|----------------|-------------------|----------------|
| <u>Dates</u> | <u>8/26-23</u> | <u>9/4-6</u> | <u>9/2-7</u> | <u>9/3-7</u> |
| Reagan | 39% | 40% | 37% | 41% |
| Carter | 39 | 34 | 36 | 37 |
| Anderson | 15 | 13 | 18 | 17 |
| | Unsure - 7 | Clark - 1 | Other - 3 | Clark - 1 |
| | | Commoner - 1 | Not sure - 6 | Commoner - * |
| | | Undecided - 12 | | Pulley - * |
| | | | | McCormack - * |
| | | | | Don't know - 4 |

| <u>POLL:</u> | <u>Gallup</u> | <u>Harris</u> | <u>AP/HBC</u> | <u>Reper</u> |
|--------------|---------------------------|----------------|----------------|----------------|
| <u>Dates</u> | <u>8/26-23</u> | <u>8/14-20</u> | <u>8/15-17</u> | <u>8/16-23</u> |
| Reagan | 37% | 42% | 39% | 37% |
| Carter | 35 | 36 | 32 | 36 |
| Anderson | 14 | 17 | 13 | 14 |
| | Commoner - 1 | Clark - 1 | Commoner - 1 | Pulley - 1 |
| | McCormack - 1 | Commoner - * | Clark - 0 | Commoner - * |
| | Clark - * | McCormack - * | Other - 2 | Clark - * |
| | Pulley - * | Pulley - * | Not sure - 13 | McCormack - * |
| | Hall - 0 | Not sure - 4 | | Hall - * |
| | Others/ Undecided - 12 | | | Other - 1 |
| | | | | Not sure - 10 |

* less than 0.5%

Attachment C

1980 PRESIDENTIAL DEBATES

 League of Women Voters Education Fund
1730 M Street, NW, Washington DC 20036
NEWS RELEASE

Contact
Vera Hirschberg
Public Relations
296-1770, ext. 263

FOR IMMEDIATE RELEASE
September, 9, 1980

STATEMENT OF DR. HERBERT ABELSON, MERVIN FIELD AND LESTER FRANKEL

Eight separate polling reports, which were based on national cross sections of potential voters were reviewed. These were all the available national published polls reported since mid-August. Four of these polls were taken in late August and four in early September.

The four August polls showed Anderson's support to range from 13% to 17%. The four September polls showed Anderson's support ranging from 13 to 18% with three of the four polls at 15% or higher.

We were struck with the consistency of the data produced by these eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes.

In our individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher.

As research professionals we recognize the fragile nature of any statistic derived from a public opinion sample. We anticipated that League officials might be in receipt of a variety of disparate and ambiguous poll results. We volunteered our efforts to assist the League in the interpretation of the data. As things turned out, the data were quite clear and unambiguous and it was not necessary to use any involved analytical procedures to reach our conclusions.

Attachment D

1. AP/NBC Poll, 8/5-8/7/80

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

2. Harris Poll, 8/5-8/6/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

3. Harris Poll, 8/14-18/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

4. AP/NBC Poll, 8/15-8/16/80^{*/}

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

5. Gallup Poll, 8/15-8/17/80

| | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |

^{*/} Attachment C incorrectly states that this poll was taken on August 15-17, 1980.

6. Roper Poll, 8/16-8/23/80
- | | |
|------------|----------------|
| Commoner | less than 0.5% |
| Clark | less than 0.5% |
| Hall | less than 0.1% |
| McCormack | less than 0.5% |
| Pulley | 1% |
| Others | 1% |
| Don't know | 10% |
7. Gallup Poll, 8/26-8/28/80
- | | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |
8. L.A. Times Poll, 9/2-9/7/80
- | | |
|----------|------------------|
| Other | 3% ^{*/} |
| Not sure | 6% |
9. Harris Poll, 9/3-9/7/80
- | | |
|------------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| Pulley | less than 0.5% |
| McCormack | less than 0.5% |
| Don't know | 4% |
10. Roper Poll, 9/4-9/6/80
- | | |
|-----------|-----|
| Clark | 1% |
| Commoner | 1% |
| Undecided | 12% |

*/ Other than Reagan, Carter, and Anderson.

POLLING DATA

1. AP/NBC Poll, 8/5-8/7/80

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

2. Harris Poll, 8/5-8/6/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

3. Harris Poll, 8/14-18/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

4. AP/NBC Poll, 8/15-8/16/80^{*/}

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

5. Gallup Poll, 8/15-8/17/80

| | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |

^{*/} Attachment C incorrectly states that this poll was taken on August 15-17, 1980.

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August 22, 1980

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ERNEST W. JENNES
STANLEY L. TEMKO
DON V. HARRIS, JR.
WILLIAM STANLEY, JR.
WEAVER W. DUNNAN
EDWIN M. ZIMMERMAN
JEROME ACKERMAN
EDGAR F. CZARRA, JR.
WILLIAM H. ALLEN
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WILLIAM D. IVERSON
S. WILLIAM LIVINGSTON, JR.
JOHN M. VINE
STUART C. STOCK

H. Richard Mayberry, Jr., Esq.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Mayberry:

This letter is written on behalf of the League of Women Voters Education Fund in response to your August 18 letter to the LWVEF regarding the 1980 Presidential and Vice-Presidential debates which it is sponsoring.

Your letter (1) requests that your clients, Barry Commoner and LaDonna Harris, Presidential and Vice-Presidential candidates of The Citizens Party, be included in the debates and (2) objects to LWVEF's 15 percent standard for determining whether non-major party candidates have achieved a significant measure of nationwide voter support and interest.^{1/}

We have advised the LWVEF that the criteria it has established meet any applicable legal requirements. Of particular importance are the regulations of the Federal Election Commission. Under those regulations, the LWVEF, as a nonprofit organization exempt from federal taxation under 26 U.S.C. § 501(c)(3) "may stage nonpartisan candidate debates in accordance with 11 C.F.R. 110.13(b)" 11 C.F.R. § 110.13(a)(1). Section 110.13(b), in turn, states that "[t]he structure of debates . . . is left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." In promulgating these rules, the Federal Election Commission made clear that the LWVEF may "stage a general election debate to which only major party candidates are invited."
44 Fed.Reg. 76735 (1980).

^{1/} The precise standard is whether the candidate receives a level of voter support in the polls of 15 percent or the level received by a major party candidate, whichever is lower. Since undecided responses will be excluded, the actual standard is something less than 15 percent.

H. Richard Mayberry, Jr., Esq.
August 22, 1980
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The LWVEF would comply with the FEC's nonpartisan requirement (or the requirements of any other government agency) if it included in the debates only the Democratic and Republican nominees. The fact that the LWVEF is providing an opportunity for non-major party candidates who meet its significant candidate criterion to participate does not render the proposed debates partisan or otherwise legally questionable.

That the LWVEF has discretion to distinguish between major party candidates and non-major party candidates in adopting standards to implement its voter support and interest criterion also is supported by Buckley v. Valeo, 424 U.S. 1 (1976). Buckley does not, as you suggest, bar the government (much less a private organization such as LWVEF) from treating major party candidates differently from non-major party candidates. Rather, in that case the Supreme Court upheld the public financing scheme of the Federal Election Campaign Act even though it differentiates among major party, minor party and new party candidates based on specific levels of past voter support.^{1/}

You appear to be arguing that the selection standards are discriminatory and that the debates will be partisan because some non-major party candidates will not participate. The logic of this argument, of course, is that all non-major party candidates must participate in the debates to avoid discrimination and for the debates to be non-partisan. Any such approach, however, would result in debates which would be less informative and enlightening to the electorate than the LWVEF debates. Moreover, unless all candidates are invited, any choice has the effect of excluding some candidates, and may have the effect of benefiting or injuring some of those who do and do not participate, depending upon what occurs in the debates. But the test of nonpartisanship is not whether the debates benefit or injure participants or non-participants. The test is whether they have been structured in a particular way for the purpose of benefiting a particular candidate. Here it is clear that LWVEF's purpose is truly nonpartisan.

The purpose of the debates is neither to benefit nor to disadvantage major parties or third parties. The purpose is to help

^{1/} The Supreme Court rejected the argument that such a scheme invidiously discriminates against non-major party candidates, i.e., nominees of parties whose candidates in the preceding general election received less than twenty-five percent of the popular vote. 424 U.S. at 93-108. The LWVEF, of course, has adopted a much less rigorous standard for determining whether non-major party candidates should be invited to share a forum with major party candidates.

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H. Richard Mayberry, Jr., Esq.
August 22, 1980
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inform the electorate of the views of the significant candidates on the issues in the campaign. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. So, too, debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF must limit its forum to candidates whose participation would most likely be critical to the electorate as a whole -- that is, the candidates whom the public itself regards as truly significant candidates.

The LWVEF's purpose would not be served best by inviting non-major party candidates to participate merely because they may raise issues different from those raised by the 1980 major party Presidential and Vice-Presidential candidates or because their views on already-defined issues may differ from those of the major party candidates. This is not to say that the LWVEF questions the importance of such candidates to the electoral process. Its debates must be limited because its purpose in sponsoring them is limited. The debates are not intended to be town meetings. To achieve the necessarily limited purpose of the debates, the LWVEF criterion excludes only those non-major party candidates whom more than 85 percent of the electorate do not support.

Your suggestion that the voter support and interest standard is improper appears to be based on the premise that it necessarily excludes participation by new parties. Thus, you state that the standard "does not bear a reasonable relationship to the purpose of the debates . . . for it effectively excludes new party participation." And in support of your legal argument, you state that "the percentile classification used by the League is so high as to exclude any new parties."

However, your premise is erroneous, as shown by the very data you cite in support of it, even though these are election results rather than poll results. Your letter specifies six non-major party candidates in previous Presidential elections who received more than three percent of the vote in the general election. All of these candidates who would have met the ballot access requirement, about which you do not complain, exceeded the LWVEF's 15 percent voter support standard. Theodore Roosevelt received 27 percent of the vote in 1912, Robert LaFollette received 16 percent in 1924, and George Wallace, who received 13 percent on election day, had 15 percent or greater support in the pre-election polls. Moreover, your letter points out that a non-major party candidate, John Anderson, "may well qualify for the general election debates" this year.

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H. Richard Mayberry, Jr., Esq.
August 22, 1980
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The LWVEF has no intention, therefore, of eliminating as a condition for non-major party candidate participation in the debates the voter support and interest standard that it has adopted. Moreover, any attempt by any Government agency to reduce the LWVEF's discretion under the FEC regulations would present serious constitutional problems. The Government may not interfere with the First Amendment rights of the LWVEF in its sponsorship of the 1980 debates.

All six non-major party Presidential candidates including your client have received a letter from the LWVEF requesting information concerning the ballot access criterion and informing them that invitations to debate will be issued by September 10, 1980 --after the LWVEF has had an opportunity to examine the results of various nationwide polls. As in the past and up until the time that such polls are taken, your clients, like other Presidential and Vice-Presidential candidates, have had and will have the opportunity to demonstrate significant voter support and interest.

Very truly yours,



Ernest W. Jenness

cc: General Counsel
Federal Election Commission
Washington, D.C. 20463

Chief
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Howard Schoenfeld
Special Assistant for Exempt Organizations
Internal Revenue Service
Washington, D.C.

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NCPP

NATIONAL COUNCIL ON PUBLIC POLLS

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Glenn H. Roberts
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and Tribune

Burns W. Roper
The Roper Organization

Richard M. Scammon
Electons Research Center

Contact: Albert H. Cantril
(202) 393-5100

EMBARGOED FOR RELEASE
6 p.m., Friday, August 22, 1980

POLLING ASSOCIATION CAUTIONS LEAGUE OF WOMEN VOTERS

ON USE OF POLLS FOR DEBATES DECISION

Washington, D. C.—The National Council on Public Polls

expressed its concern today over the difficulty of specifying when a candidate has achieved a 15 percent level of support in order to satisfy the League of Women Voters' requirement for participation in the 1980 Presidential Debates.

While the National Council acknowledged the right of the League to set a threshold in its attempt to find a criterion "capable of objective application," many members of the association of polling organizations regard a specific percentage as arbitrary. "What

really troubles our members, however," National Council President Albert H. Cantril explained, "are the many practical problems in applying the 15 percent criterion."

The National Council called attention to the different techniques used by polling organizations that can result in varying assessments of candidate strength. For example, some polling firms base their estimates on registered voters, others on "likely" voters, and others

Appendix C

(MORE)

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on a "probable electorate." In addition all public opinion polls are subject to certain levels of sampling tolerance. Taking into account these factors and other differences in procedure, the National Council cautioned the League of Women Voters that in a close decision there is no incontestable way to confirm or refute the absolute validity of a candidate's standing relative to the 15 percent.

The National Council recognizes that the decision of which candidates to invite to debate can be made only by the League. If the League proceeds to rely on polling data, however, the National Council feels that at a minimum two steps should be taken: (a) those polls on which the League will base its invitation decision should be accompanied by full disclosure of the methods employed; and (b) the League should consult several disinterested, but qualified, professionals in the field of survey research regarding measurement issues that bear on the reported poll results.

Members of the National Council on Public Polls include: the Bureau of Social Science Research; Cantril Research; CBS News; The Des Moines Register and Tribune; the Elections Research Center; the Field Institute; the Gallup Poll; GMA Research Corporation; Louis Harris & Associates; Peter D. Hart Research; the National Opinion Research Center; the Opinion Research Corporation; Polls, Inc.; Response Analysis Corporation; The Roper Organization; and Yankelovich, Skelly and White.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS) MUR No. 1287
EDUCATIONAL FUND)

30 SEP 15 AM 1:13

RECEIVED
OFFICE OF THE
GENERAL COUNSEL

RESPONSE OF RUTH J. HINERFELD
AND THE
LEAGUE OF WOMEN VOTERS EDUCATION FUND^{1/}

INTRODUCTION

Barry Commoner, The Citizens Party candidate for President, has filed a complaint alleging that the Presidential and Vice-Presidential candidate debates that the League of Women Voters Education Fund (LWVEF) intends to sponsor in September and October of 1980 violate the Federal Election Campaign Act and the regulations of the Federal Election Commission. More specifically, he claims that the criteria established by the LWVEF for selecting debate participants are partisan in structure and effect and that the LWVEF will invite candidates to participate based on partisan considerations.^{2/}

The allegations have no merit. The determination to limit participation in the LWVEF-sponsored debates to significant candidates and the criteria the LWVEF has adopted are nonpartisan. Moreover, the adoption of the criteria and any decision to invite or not to invite candidates to participate have been, and will continue to be, the LWVEF's independent actions made solely in light of its overriding purpose of educating the electorate about the issues in the campaign and the candidates' positions on those issues.

^{1/} This response is submitted pursuant to the provisions of the Federal Election Campaign Act, 2 U.S.C. § 437g(a)(1), and of the regulations of the Federal Election Commission, 11 C.F.R. § 111.6.

^{2/} Although Mr. Commoner names Ruth J. Hinerfeld as a respondent in his complaint, he does not allege that Ms. Hinerfeld has in any way violated the Act or regulations. Moreover, as Ms. Hinerfeld's affidavit shows, the LWVEF is the sole sponsor of the 1980 debates. Affidavit of Ruth J. Hinerfeld, ¶ 1. Accordingly, we will address only the question whether the LWVEF has acted improperly in staging the debates.

There is, therefore, no reason to believe that any violation of the Act or the Commission's regulations has occurred, or is about to occur, in connection with the LWVEF's sponsorship of the 1980 debates. Accordingly, Mr. Commoner's complaint should be dismissed.

STATEMENT OF FACTS

This matter arises out of the LWVEF's planned sponsorship of three Presidential candidate debates and one Vice-Presidential candidate debate scheduled to take place this year in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). The debates will be staged pursuant to § 110.13 of the Commission's regulations, a provision with which the LWVEF has considerable familiarity. Since its sponsorship of the 1976 Presidential and Vice-Presidential candidate debates, the LWVEF worked for the promulgation by the Commission of a rule that, like § 110.13, would permit its sponsorship of public debates among candidates for federal office with funds solicited by it for that purpose. It submitted pages of testimony and comments to the Commission in connection with rule-making proceedings that spanned a three-year period.^{1/} Affidavit of Ruth J. Hinerfeld, ¶¶ 7, 20.^{2/}

Section 110.13(a) of the regulations permits the sponsorship of nonpartisan candidate debates by an organization, such as the LWVEF, which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code and which does not

^{1/} Indeed, it would not be hyperbole to state that § 110.13 of the regulations was drafted with organizations like the LWVEF in mind.

^{2/} This affidavit is attached hereto as Appendix A.

support or oppose political candidates or political parties. Under § 110.13(b), the structure of the debates is left "to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another."

The LWVEF has, of course, a long tradition of nonpartisanship which it values, and which governs all of its activities. Moreover, because the LWVEF is a nonpartisan, educational trust, Article II of its Trust Agreement and its status as a § 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of the LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process. Since its establishment in 1957, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

Thus, when the regulations became effective on April 1, 1980, the LWVEF undertook the task of structuring the 1980 debates in light of: (1) its nonpartisan tradition, its Trust Agreement, § 501(c)(3) of the Internal Revenue Code, and the nonpartisan requirement of the FEC's regulations; and (2) its exclusive educational purpose of providing information about Presidential and Vice-Presidential candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the

LWVEF did not believe that participation in the debates necessarily should be limited to only major party candidates, as is clearly permitted under the regulations, the LWVEF determined that its purpose of educating the electorate in a nonpartisan manner would best be accomplished by developing criteria that would permit participation in the debates by both major party and non-major party significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 8.

Before establishing these criteria, the LWVEF received input from the Advisory Committee that it had established. The Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations,^{1/} was set up for the purpose of providing advice and ideas with respect to the debates. It was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone, and no one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted. Affidavit of Ruth J. Hinerfeld, ¶ 9.

On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates".^{2/} The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone; this decision was not in any way affected by the positions or views of any of the Presidential candidates, their running mates, or their

^{1/} The members of the Advisory Committee are named in Attachment A to the Affidavit of Ruth J. Hinerfeld.

^{2/} A copy of this document is attached to the Affidavit of Ruth J. Hinerfeld as Attachment B.

representatives. In addition, the LWVEF has had, and will have, exclusive responsibility for applying the criteria and in selecting participants. Affidavit of Ruth J. Hinerfeld, ¶ 10.

Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support. Affidavit of Ruth J. Hinerfeld, ¶ 11.

The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. Debates that are too lengthy or that include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 12.

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In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support are: (1) nomination of a candidate by a major party; and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower. The 15 percent figure is exclusive of undecided respondents.^{1/} Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate with such a standing also should be considered significant and of sufficient interest to the electorate that his or her participation in a debate would be warranted. Affidavit of Ruth J. Hinerfeld, ¶ 13.

The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. The LWVEF did so in order to permit participation in the second or third Presidential debate by candidates who did not satisfy the criteria in early September and to permit exclusion of a previously invited candidate whose participation no longer would advance the purposes of the debates. Affidavit of Ruth J. Hinerfeld, ¶ 14.

^{1/} This means, for example, that in a poll where 10 percent of those polled were undecided, an actual showing of only 13.5 percent would be sufficient.

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The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates. Affidavit of Ruth J. Hinerfeld, ¶ 15.

The LWVEF also concluded that the best test of voter interest in a candidate is the traditional trial-heat type question that asks simply and directly for whom the public would actually vote if the election were held today. Other possible questions that conceivably might have been asked involve a series of difficult and controversial hypothetical questions and were less likely to yield reliable

information about the question in which the LWVEF is interested, namely, the degree of support of, and interest in, particular candidates by the electorate as a whole. Affidavit of Ruth J. Hinerfeld, ¶ 16.

In deciding to adopt a 15 percent figure as the required level of support in the public opinion polls, the LWVEF recognized that there is no single magic number that separates significant from insignificant candidates. However, the 15 percent threshold figure, which was the lowest level of support suggested by any member of its Advisory Committee, was intended to take into account the fact that the results of polls are subject to a statistical margin of error and to other imperfections. Thus, the LWVEF recognized that the higher the threshold figure adopted, the more likely that the statistical margin of error would result in the exclusion of a candidate who is, in fact, significant. On the other hand, for the same reasons, it also took into account that a lower threshold would have increased the likelihood that candidates who are not significant would be included. Affidavit of Ruth J. Hinerfeld, ¶ 17.

The LWVEF therefore concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, provides a reasonable degree of confidence that statistical margins of error will not result in exclusion of candidates whose participation would advance the purposes of the debates. Conversely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate was not of sufficient interest to the

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electorate to warrant participation in a debate with major party and other significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 18.

At the time the criteria were adopted, the members of the Board of Trustees knew, as did all informed citizens, that President Carter at one time had expressed his reluctance to participate in a debate with non-major party candidates. The LWVEF also was aware that several non-major party candidates wanted to participate in the debate series, and it anticipated that these candidates would object to whatever criteria the LWVEF established if their application resulted in non-participation. Affidavit of Ruth J. Hinerfeld, ¶ 21.

The LWVEF was, however, firmly committed to the belief that the debates should be structured so as to best serve the interests of the American electorate rather than what any particular candidate perceived as being in his own best interest. It remains committed to that belief, and it also believes that its candidate selection criteria fulfill that commitment. Affidavit of Ruth J. Hinerfeld, ¶ 22.

In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to all 6 non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The August 19 letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all prospective participants. Affidavit of Ruth J. Hinerfeld, ¶ 19.

Previously, on August 18, the LWVEF received a letter from counsel for the complainant in this proceeding objecting to the 15 percent standard and requesting the inclusion in the debates of Mr. Commoner and his running mate, LaDonna Harris.^{1/} This letter apparently was in response to the LWVEF's public announcement on August 10, of the candidate eligibility criteria. In a letter dated August 22, the LWVEF denied the request, explaining why it had selected the 15 percent standard and reaffirming its commitment to invite to debate any of the six non-major party candidates who satisfied its criteria.^{2/} On August 28, Mr. Commoner filed his complaint with the Commission.

By September 9, the LWVEF received the results of the several nationwide polls conducted during the periods August 27 and September 6 -- the most recent polls prior to that date. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14 to August 23.^{3/} The Committee also received the advice of Dr. Herbert Abelson, Mervin Field, and Lester Frankel, independent experts on polling.^{4/} Albert H. Cantril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Field to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel. Affidavit of Ruth J. Hinerfeld, ¶ 23.

1/ A copy of this letter is attached to the complaint.

2/ A copy of this letter is attached hereto as Appendix B.

3/ The results of these polls are set forth in a chart appended to Affidavit of Ruth J. Hinerfeld as Attachment C.

4/ The qualifications of these experts are set forth in Affidavit of Ruth J. Hinerfeld, ¶ 23.

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These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher."^{1/} Affidavit of Ruth J. Hinerfeld, ¶ 24.

After careful consideration, the LWVEF Board of Trustees concluded that of the six non-major party candidates to whom letters were sent on August 19, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in excess of 15 percent in the polls.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support. Affidavit of Ruth J. Hinerfeld, ¶ 25.

Accordingly, on September 9, 1980, the LWVEF invited Mr. Anderson to participate in the 1980 debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF's invitations. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore. The LWVEF expects to proceed with the Baltimore debate whether or not President Carter ultimately agrees to participate. Affidavit of Ruth J. Hinerfeld, ¶¶ 26, 27.

^{1/} The statement issued by these experts is appended to Affidavit of Ruth J. Hinerfeld as Attachment D.

^{2/} This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

The insignificant levels of voter support for non-major party candidates other than John Anderson are also shown consistently in the results reported not only in seven of the eight polls used in the LWVEF's determination which reported results for non-major party candidates, but also in three earlier polls. In nine polls taken between August 5 and September 6, 1980, the reported results for no non-major party candidate other than Mr. Anderson ever exceeded one percent and the reported result in the tenth poll for all such candidates other than Mr. Anderson did not exceed three percent.^{1/}

ARGUMENT

Mr. Commoner claims: (1) that the LWVEF's candidate selection criteria are partisan because major party candidates are treated differently from non-major party candidates; and (2) that the fifteen percent standard for the demonstration of voter support and interest by non-major party candidates is improper. These claims are unfounded.

Mr. Commoner's claims rest upon both an erroneous understanding of the Commission's regulations and an incorrect understanding of the facts. In essence, Mr. Commoner asks the Commission to misapply its own regulations, and to ignore the Explanation and Justification accompanying § 110.13, which the Commission provided for the very purpose of explaining the meaning of that section. In support of this request, Mr. Commoner serves up inaccurate and incomplete information and pure speculation.

As we demonstrate below, the LWVEF's candidate selection criteria are nonpartisan and in full compliance with the letter and the spirit of the Commission's regulations.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment E.

First, under Commission regulations, debate sponsors may treat major party candidates differently from non-major party candidates and limit participation in debates to significant candidates. Second, the decision of the LWVEF that its voter support and interest criterion can be satisfied either by nomination by a major party, as defined in the Federal Election Campaign Act, or by a showing of fifteen percent in public opinion polls in the case of non-major party candidates is a reasonable method of separating significant from non-significant candidates. Third, in any case, it is abundantly clear that Mr. Commoner does not meet any reasonable test of significance. With a one percent showing in numerous public opinion polls, his candidacy properly may be regarded as "hopeless." Buckley v. Valeo, 424 U.S. 1, 96 (1976). In addition, it is clear that the LWVEF has applied its criteria in a nonpartisan fashion and in light of its overriding purpose of educating the American electorate.

Finally, Mr. Commoner mistakenly brings to the attention of the Commission Constitutional questions, and erroneously claims that the LWVEF has violated his Constitutional rights. Although such questions are beyond the jurisdiction of the Commission, we will address them briefly here. Under applicable law, it is clear that: (1) the LWVEF sponsorship of candidate debates is a purely private matter, and (2) even if the LWVEF could be held to the exacting standards of the Constitution, its candidate selection criteria would pass muster. Moreover, any Government action that would reduce the discretion of the LWVEF beyond that required by its nonpartisan obligation would present far more serious Constitutional questions than those raised by Mr. Commoner's complaint.

I. THERE IS NO REASON TO BELIEVE THAT THE LWVEF HAS VIOLATED, OR IS ABOUT TO VIOLATE, THE ACT OR THE COMMISSION'S REGULATIONS

Section 110.13 of the Commission's debate regulations is the provision that sets forth who may sponsor a debate supported by corporate and union contributions, and the structure of such a debate. It provides, inter alia, that "[a] non-profit organization which is exempt from federal taxation under 26 U.S.C. § 501(c)(3) . . . and which does not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with 11 CFR 110.13(b) and 114.4(e)." 11 C.F.R. § 110.13(a). The LWVEF, which has a 23 year history of non-partisanship, is exempt from taxation under § 501(c)(3) of the Internal Revenue Code. Accordingly, it may use its funds and those donated by corporations and labor unions to sponsor nonpartisan candidate debates.^{1/} 11 C.F.R. § 114.4(e).

The "structure" of such debates is expressly "left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." 11 C.F.R. § 110.13(b). For the reasons that follow, the LWVEF has complied with the only requirement at issue here -- the requirement of nonpartisanship.

^{1/} Mr. Commoner's assertion that the 1980 debates violate the regulations of the Internal Revenue Service and the Trust Agreement of the LWVEF is unsupportable and conclusory. Just as the 1980 debates satisfy the nonpartisan requirements of the Commission's regulations, so do they comply fully with the LWVEF's Trust Agreement and the rules and regulations of the Internal Revenue Service. Indeed, during the 23 years of its existence, the LWVEF has been keenly aware that it must maintain and strictly adhere to a policy of nonpartisanship to comply with Article II of its Trust Agreement as well as the requirements of the Internal Revenue Code. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

A. The LWVEF Debates Comply Fully With the Nonpartisan Requirements of the Debate Regulations.

1. The LWVEF May Limit Participation in the Debate to Significant Candidates.

In promulgating the debate regulations, the Commission expressly recognized that "[a] nonpartisan candidate debate . . . provides a forum for significant candidates to communicate their views to the public." Explanation and Justification, 44 Fed. Reg. 76734 (Dec. 27, 1979) (emphasis added). In providing such a forum, debate sponsors may, in accordance with the express provisions of 11 C.F.R. § 110.13(b)(2), exercise "discretion" so long as debates "are nonpartisan in that they do not promote or advance one candidate over another." According to the Commission, "[t]he primary question in determining nonpartisanship is the selection of candidates to participate in the debates." Explanation and Justification, 44 Fed. Reg. 76735.

The LWVEF criteria for inviting candidates to participate in the debates it plans to sponsor comply with the letter and the spirit of the Commission's regulations. In formulating and adopting them, the LWVEF exercised its "discretion" and attempted, in good faith, to identify "significant candidates" in order to educate the electorate and stimulate interest in the general election. They "are nonpartisan in that they do not promote or advance one candidate over another."

Mr. Commoner urges, however, that the LWVEF has improperly exercised its discretion in determining who is a significant candidate. Among other things, citing Nashua Telegraph, MURs 1167, 1168, 1170, First General Counsel's Report (Feb. 20, 1980), he asserts: "A debate involving only the two major party candidates is not nonpartisan but bi-partisan." Complaint, p. 7. Mr. Commoner is wrong.

In promulgating the debate regulations, the Commission stated that "[a]n organization staging a debate may invite candidates to participate . . . on the basis of party affiliation," and "that such an organization could stage a general election debate to which only major party candidates are invited." Explanation and Justification, 44 Fed. Reg. 76735. In testimony before Congress, moreover, both the former and present Chairmen of the Commission reaffirmed that debates could be so limited. Repeal of "Equal Time" Requirements: Hearings on H.R. 6103 before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2nd Sess. 14 (1980). If the LWVEF properly may invite to participate in a debate only the two major party nominees, then it also may invite to participate only these two candidates and any other candidate that it, in good faith, concludes is significant.

That debate sponsors may exercise considerable latitude in selecting debate participants is supported by Congressional reaction to the Nashua Telegraph case upon which Mr. Commoner relies. As the Chairman of the House Committee on Administration stated in a letter of March 10, 1980, to the Commission:

The Commission should be reluctant in enforcing these regulations to substitute its judgment of the propriety of a particular debate for the on-the-spot judgment of the sponsor. Before the Commission should choose to take any action, it should be clear on the face of a complaint that the sponsoring of a debate involves something other than the good faith editorial judgment of the sponsor. The mere fact that a debate does not include the full field of eligible candidates should not in itself be reason to believe that the debate falls outside these regulations.

126 Cong. Rec. H. 1822 (March 12, 1980) (remarks of Rep. Van Deerlin) (emphasis added). The Chairman of the Senate Committee

on Rules and Administration expressed similar views:

I will follow closely the Commission's interpretation of these regulations, and urge the FEC to apply a rule of reason to the end that the FEC in no case substitute its discretion and judgment for that of the sponsor.

126 Cong. Rec. S. 2813 (March 21, 1980) (remarks of Sen. Pell).

Moreover, even if there had been no adverse Congressional reaction to Nashua Telegraph, its precedential significance would be questionable. First, Nashua Telegraph involved a candidate debate at the primary level where different considerations may be present. Second, in that case, the selection of two of the seven candidates running in the New Hampshire Republican Presidential primary was made without the aid of objective criteria.

Thus, Mr. Commoner's assertion that a debate sponsor may not, in good faith, invite only the two major party candidates -- or presumably any two candidates it views as significant -- is directly at odds not only with Congress' understanding of what the law is, but also with the clear and plainly worded explanation of the Commission that promulgated the rule in question.^{1/} Indeed, Mr. Commoner's attempt to dismiss the Commission's Explanation and Justification of § 110.13 as "merely conclusory" ignores the very purpose of that document.

Mr. Commoner's assertion ignores as well the significant regulatory history of § 110.13. This regulation was promulgated in response to Senate disapproval of a more detailed and restrictive regulation governing the sponsorship and funding of candidate debates, S. Res. 236, 96th Cong. 1st Sess.,

^{1/} In addition, Mr. Commoner overlooks the fact that debate participants will not necessarily benefit by public exposure. It is impossible to predict until after the debate who, if anyone, may have been helped by participating in it, and who, if anyone, may have been harmed by not participating. Whether or not participants and non-participants benefit depends on many factors, including the electorate's perception of the performance of participants.

125 Cong. Rec. S. 12822 (Sept. 18, 1979). It is the product of two rulemakings, 44 Fed. Reg. 76734 (Dec. 27, 1979); 44 Fed. Reg. 39348 (July 5, 1979); two proposed rulemakings, 44 Fed. Reg. 59162 (Oct. 12, 1979); 42 Fed. Reg. 35856 (July 12, 1977); and hearings before the Commission on September 12, 1977, and October 23 and 24, 1979, at which numerous parties, including the LWVEF, testified and submitted comments. To argue, as Mr. Commoner appears to, that the Explanation and Justification, which accompanied § 110.13 to the Senate floor the second time, is not a carefully considered explanation by the Commission of the meaning of that regulation, and that the Commission did not mean what it said, is to miscomprehend the administrative process.

Moreover, even under the Commission's more detailed and restrictive predecessor to the present § 110.13, the LWVEF's criteria would have been proper. Former § 110.13(b)(1)(i) provided that if a sponsor invites one general election candidate who has been nominated by a major party to participate in a debate, then the sponsor must invite all candidates nominated for the same office by any major party to participate in the same debate. 44 Fed. Reg. 39348, 39350 (July 5, 1979). However, the sponsor also had "discretion to include any minor party, new party, independent or write-in candidate in any debate held under 11 CFR 110.13(b)(1)." Id.^{1/} As the Commission made clear in the Explanation and Justification accompanying that section, "[t]his structure is designed to permit

1/ Former § 110.13(b)(1)(v). The requirement contained in former § 110.13(b)(1)(iv) that all minor party candidates should be invited to participate in the event that only one major party candidate agrees to debate, would not have applied because in this general election, there are no minor party candidates as defined in the Federal Election Campaign Act. See former § 110.13(b)(5)(ii), 44 Fed. Reg. 39351.

participation in a debate by significant serious candidates for the same public office." Id. at 39348 (emphasis added).

Former § 110.13 was disapproved by the Senate, however, on September 18, 1979. One of the Senator's major concerns was the restrictiveness of the debate structure mandated by the Commission. As stated by Senator Hatfield, a co-sponsor of the resolution of disapproval, "I question whether Congress ever intended to involve the Federal Election Commission in determining the format for candidate debates" 125 Cong. Rec. S. 12821-22 (Sept. 18, 1979). In response to that resolution, the Commission promulgated the present regulation, which retains the requirement of nonpartisanship but leaves the structure of the debates to the discretion of the sponsor. Thus, it is nonsensical to argue that the LWVEF's decision not to invite non-significant candidates to participate in the debates violates current § 110.13(b)(2), when this decision would have been proper even under the more restrictive debate scheme previously adopted by the Commission. Present § 110.13 clearly grants more leeway to the LWVEF in sponsoring debates.

In light of the regulatory history of § 110.13 and the Commission's own explanation of the purpose and effect of this regulation, it is clear that the LWVEF may invite to participate in its debates only major party candidates for President and Vice-President. Since that is so, it is also clear that the LWVEF may, in good faith, exercise its discretion to invite candidates in addition to major party candidates based on its determination whether candidates are significant.

2. The LWVEF's Criterion For Determining
The Significance Of A Candidate Is
Nonpartisan and Reasonable.

Although the LWVEF could have complied with its non-partisan obligation by inviting to participate in the debates

the major party candidates or candidates who it, in good faith, believed to be significant, instead, the LWVEF, to ensure an entirely nonpartisan approach to determining significance, developed and adopted the voter support and interest criterion. The two elements of this criterion are reasonably capable of objective application and, in the LWVEF's judgment, constitute reasonable indicators of significant voter interest and support. They are: (1) nomination of a candidate by a major party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower.^{1/} The 15 percent figure is exclusive of undecided respondents. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

1/ Of course, nomination by a major party and voter support in public opinion polls are not the only possible indicators of voter support and interest. The LWVEF could have established a standard that included, for example, the number of contributors to, or the amount of financial support received by, a candidate, or media interest in a candidate. Alternatively, it could have established a petition requirement. It is apparent, however, that such other possible indicators of voter support and interest may be more subjective and unreliable than the standards adopted and that they measure less directly than the standards adopted the question in which the LWVEF is interested. Moreover, any meaningful petition requirement would be quite onerous. In view of the problems of alternative standards, the LWVEF cannot be faulted for adopting two indicators of candidate significance that are reasonably capable of good faith, objective application.

Although Mr. Commoner is apparently of the view that his candidacy would be served by his participation in such a debate,^{1/} it is clear that the LWVEF reasonably could conclude that the electorate would not be served by being compelled, in effect, to listen to those candidates in which it has no significant interest and by being deprived of any meaningful exchange among those candidates in whom it has a serious and substantial voter interest. Moreover, the LWVEF, in light of the present dominance of the two major parties, acted reasonably by requiring as a condition of participation by non-major party candidates a showing of substantial voter support, such as 15 percent.^{2/}

In attempting to maximize the amount of useful information presented to the electorate in a debate in which the addition of each non-major party candidate necessarily reduces the time available to the electorate to learn about positions of the clearly significant candidates, it is reasonable to demand that such non-major party candidates have a level of voter support that distinguishes them from the numerous and quite insignificant candidates that abound in an election year. The 15 percent voter support standard does precisely that, and given the support of the two major parties in the last Presidential election, cannot be deemed too harsh.

1/ Mr. Commoner does not claim that he meets the LWVEF criteria but merely that he might meet the criteria after participation in a debate. Quite obviously, candidates hopeful of being "significant" could make similar arguments in seeking access to the ballot, but it is clear that not even the Constitution requires states to permit access to the ballot by insignificant candidates who are hopeful that such access will convert their insignificant candidacies into significant ones.

2/ If, as in other political systems, there were several political parties or candidates of roughly comparable strength or varying degrees of clearly substantial strength, a lesser threshold might well have been selected. In any event, to satisfy its nonpartisan obligation, the LWVEF does not have to demonstrate that all other possible standards would not be reasonable. The obligation of nonpartisanship does not preclude the exercise of discretion.

Mr. Commoner asserts, however, that the LWVEF's third criterion "is partisan in structure and effect" because, inter alia: (1) "[m]ajor party candidates are exempt from the polling requirements, while non-major parties are subject to the vagaries of an inappropriate and inaccurate measurement;" (2) George Wallace would not have met the LWVEF's standard and that it appears that no non-major party candidate will do so this year; and (3) the standard subjects him to "a classical Catch 22 dilemma." Complaint, pp. 6-7. These assertions are unfounded, irrelevant, or both.

While it is true that certain candidates are exempt from the polling standard measure of voter support and interest, they already have demonstrated significant voter interest and support by winning the nomination of a major party. Distinguishing between major and non-major party candidates on this basis is neither improper nor novel.^{1/} As the Commission stated in the Explanation and Justification accompanying former § 110.13:

Structuring debates on the basis of party affiliation is similar to the standard used in the Act for public funding entitlement. Under the Act, only those presidential primary candidates who are seeking nomination by a political party are entitled to receive matching funds (26 U.S.C. § 9033(b)(2)). Moreover, the amount of funding to which a general election candidate is entitled is based on whether the candidate is a major, minor or new party candidate.

44 Fed. Reg. 39348. Moreover, the very reason that the LWVEF adopted the separate standard for non-major party candidates was to afford them the opportunity to be invited to debate. Without the separate standard complained of by Mr. Commoner, the

^{1/} See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (public financing); American Party of Texas v. White, 415 U.S. 767 (1974) (ballot access); Jenness v. Fortson, 403 U.S. 431 (1971) (ballot access).

debates would not have included any non-major party candidates.

Nor did the LWVEF act improperly in setting the standard applicable to non-major party candidates. In urging that the 15 percent standard is improper, Mr. Commoner quotes from a Washington Star article that reported a statement issued by the National Council on Polls and cites an article by Peter D. Hart that was published in the Washington Post. Complaint, p. 6, Appendix pp. 23, 25. His reliance on these sources is misplaced.

The National Council on Polls did issue a statement warning that "different techniques used by polling organizations . . . can result in varying assessments of candidate strength" and that "public opinion polls are subject to certain levels of sampling tolerance."^{1/} In light of those potential problems, the Council recommended that the LWVEF "consult several disinterested but qualified professionals in the field of survey research regarding measurement issues that bear on the reported poll results."

At the time the LWVEF adopted the voter support and interest standard, it recognized that polls may not perfectly measure public opinion because there are methodological differences among polling experts as to the best ways to try to measure public opinion and because their results are subject to a statistical margin of error. In the absence of superior alternatives, however, the LWVEF decided that it would attempt to deal with possible polling imperfections by examining the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining

^{1/} A copy of the statement issued is attached hereto as Appendix C.

the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

In addition, the LWVEF, after consulting with Albert H. Cantril, the President of the National Council on Public Polls, appointed three experts to assist it in interpreting the results of the polls on which it would rely. After examining the results of these polls, these experts advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes."^{1/} Thus, the concerns expressed by Mr. Commoner did not materialize, and, in any event, as the reported results show, would not have affected his ability to participate in the debates.

The Hart article on which Mr. Commoner relies made several charges: (1) that the decision of the LWVEF was "both bad and wrong" because "polls do not predict the future"; (2) that the LWVEF had wrongly decided to rely on polls taken within a single period of time immediately following the Democratic National Convention; (3) that the use of a nationwide survey "ignores the fact that an independent candidate can significantly affect the Electoral College results because he may garner a great deal of support from one region or state"; (4) "that a single question determining the standing hardly provides a true understanding of election dynamics"; and (5) that George Wallace would not have qualified to participate in the LWVEF debate had the voter support and interest standard applicable to non-major parties been in effect in 1968. Complaint, Appendix, p. 25.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment D.

These charges are unfounded. First, the purpose of the LWVEF's polling standard is not to measure who ultimately might win the election or who ultimately might be significant candidates in November. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken, and it is because they do reflect contemporaneous electorate attitudes that polls were selected. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers a non-major party candidate to be significant.^{1/} Second, the LWVEF did not rely solely on polls taken immediately after the Democratic National Convention but also on polls taken in late August and early September. Third, in light of the LWVEF's educational purposes, it quite properly relied on nationwide polls. Indeed, if Mr. Hart's observation were taken to its logical extreme, presumably a candidate who is on the ballot in a single state where the election is likely to be close would have to be considered significant because he could tip the balance in the Electoral College even if he received only 100 votes in the state election. Fourth, the use of the trial-heat question was appropriate to measure what the LWVEF was interested in ascertaining -- whether a non-major party candidate has a significant level of voter support to warrant participation in a debate series intended to educate

^{1/} Despite their imperfections, there is no legal flaw in using public opinion polls to measure contemporaneous voter support and interest. As the Supreme Court observed in *American Party of Texas v. White*, 415 U.S. 767, 786-87 (1974), "[a] petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required the States to do the impossible." Respected public opinion polls are a reasonable tool for measuring nationwide voter support for a candidate at any particular time, even though no particular poll may be mathematically precise.

the electorate as a whole. Finally, had the LWVEF standard been in effect in 1968, Mr. Wallace would have been invited to participate because he met the fifteen percent threshold.

Mr. Commoner also argues that the 15 percent threshold is "partisan in structure and effect" because

[h]istorically, only 2 minor party candidates, Theodore Roosevelt and Robert La Follette, received more than 15% of the vote. Eugene McCarthy and George Wallace did not, nor does it appear any other minor party candidates in 1980 will meet this arbitrary and capricious threshold.

Complaint, pp. 6-7. Mr. Commoner is mistaken.

Among other matters, John Anderson clearly has met the 15 percent threshold, and, as already noted, George Wallace had 15 percent or greater support in the pre-election polls.^{1/} Moreover, no non-major party Presidential candidate who did not exceed 15 percent either in the general elections or in the public polls preceding the elections, received a vote of more than 3 percent in the general elections in the twentieth century. And, in fact, no non-major party candidate other than Mr. Anderson has received more than a one percent level of voter support in 1980.

Mr. Commoner complains, in addition, that the 15 percent requirement subjects him "to a classical Catch 22 dilemma that with it he is excluded from the debates and without it, he would have an opportunity to inform voters of his campaign positions and may very well achieve a 15% rating." Complaint, p. 6.

This complaint rings hollow. First, given Mr. Commoner's consistently poor showing in all of the nationwide polls, any reasonable method of measuring whether a candidate

^{1/} This fact was pointed out to counsel for complainant in the letter of August 22. See Appendix B.

has significant voter support and interest would have subjected him to the same dilemma. More importantly, however, the purpose of these debates is not to help candidates like Mr. Commoner make a better showing in the general election; it is to provide the electorate with information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole.

In short, while the 15 percent figure itself is not a magic number, the LWVEF, in determining who to invite to debate, exercised precisely the discretion and judgment which § 110.13 contemplates. It did so in a carefully considered and nonpartisan manner, concluding that a consistent showing below 15 percent in the nationwide polls would permit it to make a reasonable judgment that a particular candidate is not considered significant by the electorate, taken as a whole. Moreover, the LWVEF reasonably concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, would not result in exclusion of candidates who ought to be invited to debate. Indeed, as the results of the nationwide polls show, none of the non-major party candidates but Mr. Anderson would have satisfied even a one percent threshold.

3. The LWVEF Has Applied, And Will Apply, The Candidate Eligibility Criteria In An Independent, Objective, and Nonpartisan Manner.

Not only did the LWVEF develop and adopt nonpartisan, objective criteria for determining eligibility to participate in the 1980 debates: it also has objectively and fairly applied them. As noted above, on August 19, the LWVEF determined that President Carter and Governor Reagan satisfied the three criteria that it had adopted, and invited both candidates to

participate in the debates. On September 9, after examining the reported results of eight nationwide polls, and after consulting with the three independent polling experts, the LWVEF determined that Mr. Anderson was the only non-major party candidate whose standing exceeded 15 percent. None of the other non-major party candidates came within 14 points of that figure.^{1/} Accordingly, pursuant to its criteria, the LWVEF invited Mr. Anderson to participate in the 1980 debates.

Mr. Commoner, however, claims that the LWVEF's application of its criteria to the non-major party candidates is tainted by the fact that President Carter allegedly has brought pressure to bear on the LWVEF to exclude all non-major party candidates from the debates. The short answer to this is that contrary to Mr. Commoner's prediction, Mr. Anderson has demonstrated his significance as a candidate pursuant to the LWVEF's criteria, and he was invited to participate in the debates. Moreover, as stated above, the LWVEF plans to go ahead with the Baltimore debate as scheduled, whether or not President Carter ultimately agrees to participate.^{2/}

1/ See Affidavit of Ruth J. Hinerfeld, Attachment E.

2/ Affidavit of Ruth J. Hinerfeld, ¶ 27. In addition, it should be noted that Ruth Hinerfeld denies Mr. Commoner's claim that she stated that "the league could change its debate rules so that Anderson, should he qualify would take part in the first debate, but not in a second." See Complaint, p. 9; Appendix, p. 26. In fact, what she stated, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate. She also stated that she would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. She did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues. See Affidavit of Ruth J. Hinerfeld, ¶ 28.

Just as the LWVEF has no control over the public pronouncements of Mr. Carter, Mr. Commoner, or any of the other candidates, so the LWVEF has no control over a candidate's decision whether to accept the invitation to debate. Although the LWVEF would like to present a debate among all the significant Presidential candidates to the electorate, the LWVEF can do no more than create a mechanism which, in as nonpartisan, objective, and reasonable a manner as possible, will provide the opportunity for truly significant candidates to participate. This the LWVEF has done, and as shown above there is no reason to believe that it has failed, or will fail, to comply with § 110.13 of the Commission's regulations. Accordingly, Mr. Commoner' complaint should be dismissed.

B. The LWVEF Has Not Violated, And Is Not About To Violate, 2 U.S.C. § 433(a) and § 434.

Mr. Commoner alleges that the LWVEF is a "political committee" within the meaning of the Act because it has made "expenditures" in excess of \$1000 in order to stage the 1980 debates, and, as such, has violated the Act by not registering and reporting pursuant to § 433(a) and § 434. As Mr. Commoner notes, however, § 100.7(b)(21) and § 100.8(b)(23) of the Commission's regulations provide that the terms "contribution" and "expenditure" do not include funds used to defray the costs of staging nonpartisan candidate debates in accordance with § 110.13 and § 114.4(e). As shown above, the LWVEF has complied fully with the provisions of § 110.13 and § 114.4(e), and thus, under the Act, is not deemed to have made a "contribution" or "expenditure" in connection with the debates. Accordingly, the LWVEF is not a "political committee" within the meaning of 2 U.S.C. § 431(4), and need not register or report pursuant to the Act.

II. MR. COMMONER'S OTHER CONTENTIONS NOT ONLY RAISE ISSUES BEYOND THE JURISDICTION OF THE COMMISSION, BUT ALSO ARE MERITLESS

The jurisdiction of the Federal Election Commission is limited, with respect to civil enforcement proceedings, to the provisions of the Act, and chapter 95 and chapter 96 of title 26. 2 U.S.C. § 437c(b)(1), § 437d(6), and § 437g. Consequently, Mr. Commoner's charge that the LWVEF's exercise of its First Amendment rights in staging the 1980 debates somehow constitutes illegal government action and violates his First Amendment rights raises issues that are beyond the jurisdiction of the Commission.^{1/} Nevertheless, we will briefly discuss these issues.

A. The LWVEF's Sponsorship of Candidate Debates Does Not Constitute State Action.

Mr. Commoner asserts that "[t]he degree of interaction of the LWVEF must have with broadcasters to televise this event, the privilege of tax exemption bestowed by Congress to the LWVEF and the privilege of debate sponsorship bestowed by the Commission to the LWVEF, elevate private action to government action." Complaint, p. 7. He cites no authority whatsoever in support of this contention. It is plainly wrong.

First, of course, the privilege of debate sponsorship is not bestowed on the LWVEF by the Commission but is a privilege -- indeed, a right -- bestowed by the First Amendment. Moreover, even if Mr. Commoner were correct in identifying the source of the LWVEF's privilege, the privilege, even when conjoined with a charitable tax exemption and interaction with the

^{1/} Mr. Commoner also suggests that the LWVEF's debate series somehow will violate the Federal Communications Act. This suggestion is incorrect, but if Mr. Commoner wishes to pursue it, the agency with jurisdiction is the Federal Communications Commission.

broadcast media, does not convert the actions of the LWVEF into the actions of the state.

For a private entity's action to be regarded as that of the state, far more interaction between the two is required. Thus, even when the government grants a private entity a long-term and lucrative utility monopoly and engages in detailed regulation of its activities, a unilateral action by that entity is not regarded as state action even when the state knows in advance of that entity's policy. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Similarly, the provision of a scarce and lucrative resource, such as a liquor license, to a private entity does not convert that entity's action into that of the government. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Finally, even the heavily regulated broadcast licensees, which are granted an exclusive right to scarce resources and benefit financially therefrom, are not state actors. See Greenberg v. Bolger, 80 Civ. 0340, Slip Op. p. 43 (E.D.N.Y. June 20, 1980).

In light of these and other cases, any conclusion that the LWVEF is a state actor, or that its debates constitute state action, would be erroneous.

B. Assuming Arguendo That The LWVEF Is A State Actor, Its Criteria For Candidate Participation Are Lawful And Its Exclusion Of Mr. Commoner From Its Debates Is Proper.

Assuming arguendo that the LWVEF is a state actor, its criteria for candidate participation are lawful and its exclusion of Mr. Commoner from the debates is proper. There are "vital state objectives" that justify the criteria and the exclusion of Mr. Commoner, a "hopeless" candidate, from the debates. American Party of Texas v. White, 415 U.S. 767, 781 (1974); Buckley v. Valeo, 424 U.S. 1, 96 (1976).

In establishing standards to govern access to a debate, the Constitution would permit the LWVEF, as a state actor, to: (1) determine whether there is voter support for a candidate; (2) apply different standards for measuring such support in the case of major party candidates, on the one hand, and non-major party candidates, on the other; and (3) exclude from participation a candidate for whom there is insignificant support. See, e.g., American Party of Texas v. White, supra; Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). In particular, the LWVEF would be permitted to exclude from a debate a candidate who, like Mr. Commoner, has minimal voter support. Mr. Commoner received one percent or less of the vote in nine nationwide public opinion polls during the period August 5 to September 6, 1980. He properly may be treated, therefore, under Buckley v. Valeo, supra, 424 U.S. at 96, as a "hopeless" candidate.

In support of his argument that the LWVEF candidate selection criteria are unlawful, Mr. Commoner cites only Buckley v. Valeo, supra, and Greenberg v. Bolger, supra. Neither case supports his claim that he is entitled to participate in the LWVEF-sponsored debates.

In Buckley v. Valeo, of course, the Supreme Court upheld the public financing provisions of the Federal Election Campaign Act despite the fact that entitlement to public financing was dependent on a showing of voter support, that the Act distinguished between major party candidates and non-major party candidates, and that financing was not available to insignificant candidates. Moreover, although the court in Greenberg struck down a mail subsidy that was granted only to major parties, that case is distinguishable.

In Greenberg, the court recognized that "[e]ach medium of expression . . . must be assessed for first amendment purposes by standards suited to it, for each may present its own problems . . ." Mem. Op., p. 47, quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975). In addition, the court recognized that the government has legitimate interests that must be balanced against the effect of government action on non-major parties. These interests include facilitation of public expression, ensuring the manageability and integrity of the resource to which access is sought, protecting scarce resources, and guarding against factionalism.

In Greenberg, the interests purportedly protected by the mail subsidy statute did not "survive impartial scrutiny and weighing." Mem. Op., p. 59. Manifestly, however, candidate access to a debate is different from political party access to a mail subsidy, and the considerations that the Greenberg court regarded as being a proper basis for government action support the exclusion of Mr. Commoner and others like him from the 1980 candidate debates.

As the Supreme Court has observed in the analogous context of ballot access:

The fact is that there are obvious differences in kind between the needs and potentials of a political party which historically established broad support, on the one hand, and a new or small political organization on the other. [A state is not] guilty of invidious discrimination in recognizing these differences Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike

American Party of Texas v. White, supra, 415 U.S. at 782 n. 13, quoting Jenness v. Fortson, supra, 403 U.S. at 441-42.

Just as there are obvious differences between political parties, there are obvious differences between their nominees for

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President. In the context of a debate among candidates for President, it would be the grossest discrimination to treat Mr. Commoner, showing one percent of voter support in nationwide polls, exactly like non-major party candidates having fifteen times his support. The Constitution would not require such an unsound result.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

Respectfully submitted,

/s/
Ernest W. Jennes

/s/
Donna M. Murasky

/s/
Scott D. Gilbert

COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 452-6000

September 15, 1980

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS) MUR NO. 1287
EDUCATIONAL FUND)

AFFIDAVIT OF RUTH J. HINERFELD

Ruth J. Hinerfeld, being duly sworn, deposes and says:

1. I serve as Chair of the Board of Trustees of the League of Women Voters Education Fund (LWVEF), and I am also the President of the League of Women Voters of the United States (LWVUS). I have served in these capacities since 1978. During the period 1972 to 1978, I held the positions of First Vice Chair, Vice Chair, and Trustee of the LWVEF, and served as First Vice President, Vice President, and Director of the LWVUS. I have been a member of the LWVUS since 1953. As Chair of the Board of Trustees of the LWVEF, I have been involved substantially in the initiation, structuring and scheduling of the 1980 Presidential and Vice Presidential candidate debates that are the subject of this proceeding; the LWVEF is the sole sponsor of such debates.

2. The LWVUS is a nationwide organization with 50 state leagues, 1,300 local leagues, and approximately 120,000 individual members. It has been sponsoring nonpartisan debates, forums and candidate events for 60 years. Under its by-laws, the LWVUS's purposes are to promote political responsibility through informed and active citizen participation in government and to act on selected governmental issues. In furtherance of these purposes, state and local leagues sponsor a variety of nonpartisan activities and citizen education programs.

These include publication of information about candidates for elective office and their positions on the issues, candidate forums and debates, get-out-the-vote drives, and demonstrations of voting machines. The LWVUS and the various state and local leagues are prohibited by their by-laws from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity.

3. The LWVEF was established by the LWVUS in 1957. It is a nonpartisan, educational trust exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code. Article II of its Trust Agreement and its status as a Section 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process.

4. Since its establishment, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship which it values highly.

5. In keeping with this tradition and its educational, nonpartisan purpose, the LWVEF sponsored three Presidential candidate debates and one Vice Presidential candidate debate between the Democratic and Republican nominees during the 1976 campaign.

6. The LWVEF takes great pride in its sponsorship of the 1976 Presidential candidate debates and believes that the debates helped American voters to make an informed decision in the election and generated increased public interest in the 1976 Presidential campaign. Independent studies support this belief. On the basis of their empirical studies, Steven H. Chaffee and Jack Dennis, in "Presidential Debates: An Empirical Assessment" (published in The Past and Future Presidential Debates, ed. A. Ranney, American Enterprise Institute 1979), conclude at page 98, "that the debates make substantial contributions to the process of democracy and perhaps even to the long-term viability of the system." And the March 1979 Report of the Twentieth Century Fund Task Force on Televised Presidential Debates concludes that Presidential debates should become a regular and customary feature of Presidential election campaigns. Since 1976, the LWVEF has worked to make this a reality.

7. After the 1976 election, the LWVEF worked over the next three years to secure the promulgation of regulations by the Federal Election Commission that would permit the sponsorship and funding of public debates among candidates for federal office. On September 12, 1977, Ruth Clusen, then Chair of the LWVEF testified before the Commission in connection with the first proposed rulemaking. I submitted comments on behalf of the LWVEF to the Commission on May 22, 1979, with respect to that proposed rulemaking, and testified before the Commission on October 23 and submitted written comments on November 13, 1979, with respect to a second proposed rulemaking, urging adoption of regulations that would enable the LWVEF to begin immediate fundraising for, and planning of, Presidential and Vice Presidential debates in 1980.

8. In keeping with its long tradition of nonpartisanship, the LWVEF undertook the task of structuring the 1980 debates so that they would comply fully with the nonpartisan requirements of the regulations of the Federal Election Commission and at the same time provide information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the LWVEF did not believe that participation in the debates should necessarily be limited to major party candidates, the LWVEF determined to develop criteria that would permit participation in the debate series by all significant candidates.

9. Before establishing criteria, the LWVEF received input from its Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations who are listed in Attachment A to this Affidavit. The Advisory Committee was set up for the purpose of providing advice and ideas with respect to the debates. The Committee was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone. No one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted.

10. On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection Of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates", a copy of which is attached hereto as Attachment B.

The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone. This decision was not in any way affected by the positions or views of any of the Presidential candidates, or their running mates, or their representatives. Nor has anyone but the LWVEF applied the criteria or selected participants.

11. On the following day, August 10, the LWVEF released the eligibility criteria that had been adopted by the Board, and announced the sites chosen for the 1980 debates. As described in the attached criteria paper, the LWVEF plans to sponsor three Presidential candidate debates and one Vice Presidential candidate debate to which the running mates of eligible Presidential candidates will be invited. Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support.

12. The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity

for effective interchange between or among the participants, on the other. Debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its educational purposes in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates.

13. In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support were: (1) nomination of a candidate by a major national political party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls^{1/} or a standing equal to that of a major party candidate, whichever is lower. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

^{1/} The 15 percent figure is exclusive of undecided respondents. This means, for example, that in a poll where 10 percent of those polled were undecided, a showing of only 13.5 percent of all respondents would be sufficient.

14. The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. It did so in order to permit participation in the second and third Presidential debates by candidates who did not satisfy the criteria in early September, and to permit it to reassess whether future participation by a previously invited candidate would continue to advance the purposes of the debates.

15. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

16. The LWVEF also concluded that the best test of voter interest in a candidate is the traditional trial-heat type question that asks simply and directly for whom the public would actually vote if the election were held today. Other possible questions that conceivably might have been asked involve a series of difficult and controversial hypothetical questions and were less likely to yield reliable information about the question in which the LWVEF is interested, namely, the degree of support of, and interest in, particular candidates by the electorate as a whole.

17. In deciding to adopt a 15 percent figure as the required level of support in the public opinion polls, the LWVEF recognized that there is no single magic number that separates significant candidates from candidates who are not significant. However, the 15 percent threshold figure, which was the lowest level of support suggested by any member of its Advisory Committee, was intended to take into account the fact that the results of polls are subject to a statistical margin of error and to other imperfections. Thus, the LWVEF recognized that the higher the threshold figure adopted, the more likely that the statistical margin of error would result in exclusion of a candidate who is, in fact, significant. On the other hand, for the same reasons, it also took into account that a lower threshold would have increased the likelihood that candidates who are not significant would be included.

18. The LWVEF therefore concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, would provide a reasonable degree of confidence that statistical margins of error would not result in exclusion of candidates who ought to be invited to participate in the debates. Con-

versely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate had not met the statistical threshold.

19. In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to the six non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all possible participants. To date, the LWVEF has received responses from all such non-major party Presidential candidates except Ms. Ellen McCormack and Mr. Gus Hall.

20. The LWVEF intends to stage the debates now planned in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). These sites were chosen on the basis of geographical diversity and availability of physically suitable facilities. In all four cities, the physical facilities necessary to stage the debates are being provided to the LWVEF free of charge.

21. At the time that the criteria were adopted, the members of the LWVEF Board of Trustees were aware, as were all informed citizens, that President Carter at one time had expressed reluctance to participate in a debate that included non-major party candidates. They were also aware that several non-major party candidates had indicated that they wanted to participate in the debate series, and they anticipated that these candidates might object to whatever criteria the LWVEF established if application of those criteria resulted in their exclusion.

22. Despite this information, the LWVEF was firmly committed to the belief that the debates should be structured so as best to serve the interest of the American electorate rather than what any particular candidate perceived as being in his self-interest. It remains committed to that belief, and it also believes its candidate selection criteria fulfills that commitment.

23. By September 9, 1980, the LWVEF had received the results of several nationwide polls conducted during the period August 27-September 6. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14-August 23. The results of these polls are set forth in a chart attached hereto as Attachment C. The Committee also received the advice of several respected independent experts on polling.

These experts were:

- (1) Dr. Herbert Abelson, co-founder of Response Analysis, Princeton, New Jersey. Dr. Abelson is a specialist in survey research methodology, especially as applied to social research and voter preference. He is a past president of the American Association for Public Opinion Research and currently vice-chairman of the Council of American Survey Research Organizations.
- (2) Mervin Field, Chairman of the Board of Field Research Corporation and Director of the California Poll, San Francisco. Mr. Field is a recognized authority on consumer behavior and public opinion. He has held offices in the American Marketing Association, and the American Association for Public Research. He is a trustee of the National Council on Public Opinion Polls.
- (3) Lester Frankel, executive vice-president of Audits and Survey, Inc. Mr. Frankel has been involved in a number of large scale sample surveys in government and in studies of consumer behavior and attitudes. Mr. Frankel is past president of the American Marketing Association and a regular member of the International Statistical Institute.

Albert H. Cantril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Field to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel.

24. These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher." See Attachment D.

25. The members of the Board of Trustees, some of whom were consulted by telephone, also concluded that of the six non-major party candidates under consideration, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in the polls of voter support in excess of fifteen percent.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support.

26. After concluding that Mr. Anderson had satisfied the LWVEF criteria, the LWVEF invited him to participate in its debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF invitations for the Baltimore debate. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore.

27. The LWVEF expects to proceed with the Baltimore debate whether or not the President ultimately decides to participate. It is nevertheless hopeful that the President will agree to participate because the LWVEF believes that his participation is important to informing the electorate and

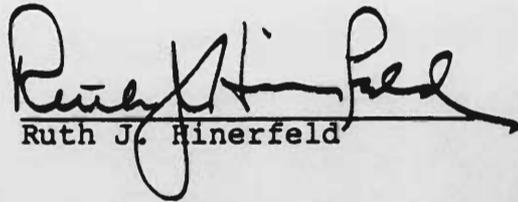
^{2/} This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

making that debate of greatest use to the electorate.

28. On August 26, I did not state, as the complaint alleges, that "the league could change its debate rules so that Anderson, should he qualify, would take part in the first debate, but not in a second." What I did say, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate (see ¶ 14 of this Affidavit). I also stated that I would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. I did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues.

29. The LWVEF continues to believe that the electorate would not best be served by the inclusion of clearly non-significant candidates, such as Mr. Commoner, in its debate series, and that the educational purposes of the debate series would be frustrated by the inclusion of any or all such candidates. Attached as Attachment E is a summary of the standing of non-major party candidates as shown in nationwide polls taken between August 5, 1980, and September 7, 1980; it demonstrates that neither Mr. Commoner nor any other non-major party candidate, other than Mr. Anderson, has

achieved more than a minimal level of voter support.


Ruth J. Hinerfeld

District of Columbia, ss:

Sworn to and subscribed before me this 12th day
of September, 1980.


Notary Public

My Commission Expires July 31, 1982

ADVISORY COMMITTEE

ROBERT ANDERSON -- Chairman of the Board of Atlantic Richfield Co.

GOVERNOR JERRY APODACA -- President, National Issues Council; Governor of New Mexico (1975-1978); Chairman of the President's Council on Physical Fitness.

JAMES DAVID BARBER -- James B. Duke Professor of Political Science, Duke University.

CHARLES BENTON -- Chairman, Films, Inc.; Chairman, National Committee of Library and Information Science.

SHIRLEY TEMPLE BLACK -- Former U.S. Ambassador to the Republic of Ghana; Former U.S. Chief of Protocol.

*HONORABLE WILLIAM BROCK -- Chairman, Republican National Committee; Former United States Senator from Tennessee.

DOUGLASS CATER -- Trustee and Senior Fellow, Aspen Institute for Humanistic Studies; Special Assistant on Education and Health Policy during the Johnson Administration.

SOL CHAIKIN -- President, International Ladies Garment Workers Union.

ARCHIBALD COX -- Chairman, Common Cause; Professor of Law, Harvard University School of Law; Solicitor General of the United States (1961-1964); Watergate Special Prosecutor.

LEE HANNA -- Director, 1980 Presidential Debates; former Vice-President and Director of NBC News.

DOROTHY HEIGHT -- President, National Council of Negro Women.

HARRIET HENTGES -- Executive Director, League of Women Voters Education Fund; Economist.

CARLA HILLS -- Attorney; Partner, Latham, Watkins & Hills, Washington, D.C.; Secretary of Housing and Urban Development during the Ford Administration.

RUTH J. HINERFELD -- Chair, League of Women Voters Education Fund.

BENJAMIN HOOKS -- Executive Director, NAACP; Attorney; Ordained Baptist Minister.

PAT HUTAR -- Director of the Office of International Medicine, American Medical Association; Immediate Past President, National Federation of Republican Women; former U.S. Representative to the U.N. Committee on the Status of Women.

JIM KARAYN -- President and General Manager, WHY Inc., (Radio and TV); Director of the Presidential Debates in 1976.

JEWEL LAFONTANT -- Attorney, LaFontant, Wilkenson & Butler, Chicago; Former U.S. Delegate to the U.N.; Former Deputy Solicitor General of the U.S.

NEWTON MINOW -- Attorney, Sidley & Austin, Chicago; Chairman of the Federal Communications Commission (1961-1964); Co-Chair 1976 Presidential Debates Advisory Committee.

LEE MITCHELL -- Attorney, Sidley & Austin, Washington, D.C.; practices communications law.

AUSTIN RANNEY -- Resident Scholar and Co-Director of the Center for Political and Social Processes at the American Enterprise Institute for Public Policy Research; Edited The Past and Future of Presidential Debates.

SHARON PERCY ROCKEFELLER -- First Lady of West Virginia; Director, Corporation for Public Broadcasting.

CARMEN VOTAW -- President, Inter-American Commission of Women.

PAUL WAGNER -- President, Wagner & Baroody, Public Relations Counselors, Washington, D.C.

CHARLS WALKER -- Chairman of Charls Walker, Washington consultants.

CASPER WEINBERGER -- Vice-President and General Counsel of Bechtel Power Corporation.

*HONORABLE JOHN WHITE -- Chairman, Democratic National Committee; Former Deputy Secretary of Agriculture.

*Ex Officio

August 10, 1980

LEAGUE OF WOMEN VOTERS EDUCATION FUND
CRITERIA FOR SELECTION OF CANDIDATES TO
PARTICIPATE IN THE 1980 PRESIDENTIAL
AND VICE-PRESIDENTIAL DEBATES

It is the intention of the League of Women Voters Education Fund to sponsor a series of nonpartisan debates among candidates for the offices of President and Vice President of the United States. There will be three Presidential Debates and one Vice-Presidential Debate. The LWVEF's purpose in sponsoring the debates is to educate the public about the issues in the campaign and the candidates' positions on those issues. At the same time, the Debates are intended to stimulate and to increase voter interest and participation in the general election. These purposes are best served by inviting to participate in the debates only those presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest.

The criteria for selecting candidates to participate in the debates have been drawn in light of the requirements of the Federal Election Commission and the purposes of the debates. Federal Election Commission regulations permit the LWVEF to sponsor nonpartisan candidate debates. The structure of such debates is left by the FEC "to the discretion" of the LWVEF "provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate

Attachment B

over another."

The LWVEF has adopted criteria for selection which it believes are:

- nonpartisan
- capable of objective application so that they will be as free as possible from varying interpretation, and
- understandable by the public.

The criteria set forth have been adopted after careful consideration by the Board of Trustees. In its deliberations, the Board was fortunate to have available to it the views of its Advisory Committee, a group of 24 prominent citizens having diverse backgrounds and interests.

All participants must meet the League's criteria to ensure that the Debates further the LWVEF's purposes. Accordingly, the LWVEF will invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will be invited to participate in the Vice-Presidential Debate. The participation of non-major party candidates will be determined on a case-by-case basis.

There are three basic criteria for inviting Presidential candidates to debate: (1) constitutional eligibility; (2) ballot accessibility; and (3) demonstrated significant voter support and interest.

Based on these criteria, the LWVEF will determine in late August whom to invite to the debate series. The running mates of presidential candidates invited to participate in the debates automatically will be eligible to participate in the debate for vice-presidential candidates. In addition, throughout the debate series, the LWVEF will retain the option to reassess the participa-

tion of non-major party candidates in the event of significantly changed circumstances. The LWVEF will do so in order to determine whether any additional candidates, who did not satisfy the criteria in late August, will be invited to participate in the second and third Presidential Debate or whether future participation by a candidate would no longer advance the purposes of the debates.

CRITERIA FOR SELECTION OF
PRESIDENTIAL CANDIDATES
INVITED TO DEBATE

I. Constitutional Eligibility Criterion.

Only those candidates who meet the eligibility requirements of Article II, Section 1, of the Constitution will be invited to participate in the Debates since the purposes of the LWVEF would not be served by permitting participation of candidates who are ineligible to become President or Vice President.

II. Ballot Access Criterion.

1. A presidential candidate must be on the ballot in a sufficient number of states to have a mathematical possibility of winning a majority of votes (270) in the Electoral College.

Explanation: The LWVEF's purpose in sponsoring the debates is to educate the public about candidates who may become President in the general election. A candidate must win a majority of electoral votes to be elected. Adoption of a standard that allows participation in the debates by candidates who are not on enough ballots to win in the Electoral College would not further that purpose. Thus, although a candidate with less than a majority in the Electoral College could win in an election decided by the House of Representatives, the purpose of the Debates is to educate the electorate about the choice it must make in November, not the members of the House of Representatives who would elect the

President in the unlikely event that no candidate wins a majority in the Electoral College. On the other hand, a standard that requires a candidate to be on the ballot in more states than are necessary to secure 270 electoral votes exceeds the constitutional minimum and appears, therefore, to be unduly harsh. Most members of the Advisory Committee also suggested this standard.

2. When the LWVEF decides whom to invite to debate, it is possible that in a number of states there will be no clear indication of candidate ballot status. In some states, a candidate may have filed the requisite number of signatures but not be officially certified on the ballot. In others, there may be legal challenges to (1) early filing deadlines and (2) independent and third party candidate petitions. In addition, candidates still may be in the process of qualifying to be on ballots when the LWVEF is making its decisions on participants.

- a. The LWVEF will request selected non-major party candidates ^{1/} interested in participating in the Debates to provide it with reasonable assurances that they will meet the ballot

1/The non-major party candidates to be invited to demonstrate that they meet the ballot access criterion are those candidates who are required to file quarterly financial reports with the Federal Election Commission, who have indicated that they meet the financial threshold established by the FECA, and who have not formally terminated their candidacies.

The Federal Election Campaign Act defines a major party as a political party whose nominee for the Presidency received twenty-five percent or more of the popular vote in the preceding Presidential election. 26 U.S.C. § 9002 (6).

-5-

access criterion by the date of the election. The LWVEF will then assess whether the candidate is likely to qualify, taking into account, for example, the number of signatures already collected, the extent of the candidate's past efforts to qualify, and the likelihood that the candidate's planned efforts will be successful. To the extent indicated, the LWVEF will confirm with appropriate state officials the facts presented to it.

- b. In states where early filing deadlines have barred candidates from the ballot, state law will be respected unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.
- c. In states where a candidate appears to have qualified for the ballot, but the candidate's right to remain on the ballot is being challenged, certification by the appropriate state official will be conclusive unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.

Explanation: The LWVEF will not require candidates to be qualified on the requisite number of ballots at the times it needs to issue invitations to debate. This is because the law in some states permits candidates to qualify to be on the ballot after the times that the LWVEF will need to make its decisions. The LWVEF will not require candidates to meet a more onerous ballot access criterion than that required by the states themselves -- what the LWVEF seeks to ascertain by this criterion is whether a presidential candidate has a possibility of winning a general election in November, not in August or September.

III. Demonstrated Significant Voter Support and Interest Criterion.

In 1976, seven candidates eligible to become President were on the ballots in enough states to have a theoretical possibility of winning. Not all of them, however, were significant candidates. Meeting the above standards does not, therefore, necessarily mean that a candidate will be invited to participate in the 1980 debates. The LWVEF also will require that Presidential candidates have significant voter support and interest. "Significant" does not mean that a candidate is raising issues different from those raised by other candidates or that the candidate's views on already-defined issues may differ from those of other candidates. The definition of "significant" is based on magnitude of voter support for and voter interest in a person's candidacy.

1. Candidates invited to debate must either be a nominee of a major political party as defined in the Federal Election Campaign Act or meet LWVEF standards for demonstrated voter support and interest.

Explanation: There is ample precedent for treating the candidates of major parties differently from non-major party candidates. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court found that the Constitution did not require the government to treat all presidential candidates the same for public financing purposes. Major party nominees already have demonstrated significant voter support and interest by virtue of their nomination. Non-major party candidates, however, have not met any similar test. It is necessary, therefore, for the LWVEF to ascertain whether non-major party presidential candidates have the support of a significant portion of the electorate in addition to their being eligible for office and theoretically capable of winning the general election.

2. The LWVEF will rely on nationwide public opinion polls to determine voter support and interest.

Explanation: Although public opinion polls are not necessarily accurate predictors of future voting behavior, they present the best indicator of existing voter support for and voter interest in non-major party candidates at any given time during the elective process. There are other indicators, such as number of contributors, amounts of funds raised, and media attention, which also may indicate voter support and interest. These other indicators are more difficult to interpret and apply, and they measure less directly than national opinion polls voter support and interest. Other possible indicators of voter support and interest, such as petition requirements, place an unnecessary burden on non-major party presidential candidates.

3. An assessment of voter support and interest will be based on data derived from nationwide polling samples provided by several well-respected public polling organizations.

4. The LWVEF will make its decisions based on the outcome of the most recent polls taken by each of the polling organizations selected by the LWVEF.

Explanation: Polls may vary, not only due to polling methods but also as a result of the dates on which they were taken. This is especially true when the measure of public opinion is taken in election campaigns. The best the LWVEF can hope to do is to ascertain current voter support and interest as close as is feasible to the dates on which it makes its decisions.

5. The LWVEF will rely on questions which are as close as possible to the classic "trial-heat" approach -- "If the election were held today, would you vote for A, B, C, D, etc.?"

Explanation: The principal purpose of the Debates that the LWVEF

proposes to sponsor is a more informed electorate. To achieve that purpose, the LWVEF must attempt to ascertain which candidates the electorate regards as serious candidates for its vote. Identification of such candidates is most readily ascertained by the "trial-heat" type question proposed.

6. In order to participate in the Debates, a non-major party candidate must receive a level of voter support of fifteen percent or the level of voter support received by a major party candidate, whichever is lower.

Explanation: Advisory Committee members suggested voter support threshold levels ranging between fifteen and twenty-five percent, and the Board concluded that any figure within this range would be reasonable. After consideration of a number of factors, including the records of public opinion polls in previous presidential elections and their relationship to actual election results, the substantial obstacles faced by non-major party candidates and variations among public opinion polling techniques and the precision of their results, the Board decided to adopt the fifteen percent level of support or the level of support that a major candidate receives for the following reasons. First, non-major party candidates who reach even a fifteen percent level of support, despite the substantial odds facing them, should be regarded as significant forces in the election. In addition, we also found it appropriate to include non-major party candidates whose showing in the polls is equal to that of a major party candidate. The ability to garner such a level of support suggests the candidate's presence in the Debates would further the LWVEF's purposes/ for the debates. On the other hand, to lower the fifteen percent threshold in the absence of a comparable lower level of voter support for a major party candidate could result in participation by candidates who would not further the LWVEF's purposes. Their parti-

icipation would, moreover, decrease the time available to clearly significant candidates to set forth their views and differences in the Debates. The LWVEF recognizes that each additional candidate invited to the debates will diminish the other candidates' ability to make their views known.

7. The procedure adopted for testing whether a candidate meets the voter support requirement gives all the active, selected^{2/} non-major party candidates an opportunity to satisfy the requirement. The LWVEF will look at the nationwide results of the most recent polls taken by each of the major polling organizations selected by the League. All non-major party candidates who receive the requisite level of voter support of fifteen percent or the level of support received by major party candidates, whichever is lower, will be invited.

VICE-PRESIDENTIAL CANDIDATES

Other than being required to possess the personal qualifications to become President, the running mates designated by the participants in the Presidential Debates will be included in the Vice-presidential Debate.

^{2/} See page 5, fn. 1

SUMMARY OF AVAILABLE
 NATIONAL POLL DATA - 1980 PRESIDENTIAL
 LEAGUE OF WOMEN VOTERS EDUCATION FUND

| <u>POLL:</u> | <u>TIME</u> | <u>Roper</u> | <u>L.A. Times</u> | <u>Harris</u> |
|--------------|----------------|----------------|-------------------|----------------|
| <u>Dates</u> | <u>8/26-23</u> | <u>9/4-6</u> | <u>9/2-7</u> | <u>9/3-7</u> |
| Reagan | 39% | 40% | 37% | 41% |
| Carter | 39 | 34 | 36 | 37 |
| Anderson | 15 | 13 | 18 | 17 |
| | Unsure - 7 | Clark - 1 | Other - 3 | Clark - 1 |
| | | Commoner - 1 | Not sure - 6 | Commoner - * |
| | | Undecided - 12 | | Pulley - * |
| | | | | McCormack - * |
| | | | | Don't know - 4 |

| <u>POLL:</u> | <u>Gallup</u> | <u>Harris</u> | <u>AP/NBC</u> | <u>Roper</u> |
|--------------|---------------------------|----------------|----------------|----------------|
| <u>Dates</u> | <u>8/26-23</u> | <u>8/14-20</u> | <u>8/15-17</u> | <u>8/16-23</u> |
| Reagan | 37% | 42% | 39% | 37% |
| Carter | 35 | 36 | 32 | 36 |
| Anderson | 14 | 17 | 13 | 14 |
| | Commoner - 1 | Clark - 1 | Commoner - 1 | Pulley - 1 |
| | McCormack - 1 | Commoner - * | Clark - 0 | Commoner - * |
| | Clark - * | McCormack - * | Other - 2 | Clark - * |
| | Pulley - * | Pulley - * | Not sure - 13 | McCormack - * |
| | Hall - 0 | Not sure - 4 | | Hall - * |
| | Others/ Undecided - 12 | | | Other - 1 |
| | | | | Not sure - 10 |

* less than 0.5%

Attachment C

1980 PRESIDENTIAL
DEBATES League of Women Voters Education Fund
1730 M Street, NW, Washington DC 20036
NEWS RELEASE

Contact
Vera Hirschberg
Public Relations
296-1770, ext. 263

FOR IMMEDIATE RELEASE
September, 9, 1980

STATEMENT OF DR. HERBERT ABELSON, MERVIN FIELD AND LESTER FRANKEL

Eight separate polling reports, which were based on national cross sections of potential voters were reviewed. These were all the available national published polls reported since mid-August. Four of these polls were taken in late August and four in early September.

The four August polls showed Anderson's support to range from 13% to 17%. The four September polls showed Anderson's support ranging from 13 to 18% with three of the four polls at 15% or higher.

We were struck with the consistency of the data produced by these eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes.

In our individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher.

As research professionals we recognize the fragile nature of any statistic derived from a public opinion sample. We anticipated that League officials might be in receipt of a variety of disparate and ambiguous poll results. We volunteered our efforts to assist the League in the interpretation of the data. As things turned out, the data were quite clear and unambiguous and it was not necessary to use any involved analytical procedures to reach our conclusions.

Attachment D

POLLING DATA

1. AP/NBC Poll, 8/5-8/7/80

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

2. Harris Poll, 8/5-8/6/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

3. Harris Poll, 8/14-18/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

4. AP/NBC Poll, 8/15-8/16/80^{*/}

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

5. Gallup Poll, 8/15-8/17/80

| | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |

*/ Attachment C incorrectly states that this poll was taken on August 15-17, 1980.

6. Roper Poll, 8/16-8/23/80
- | | |
|------------|----------------|
| Commoner | less than 0.5% |
| Clark | less than 0.5% |
| Hall | less than 0.1% |
| McCormack | less than 0.5% |
| Pulley | 1% |
| Others | 1% |
| Don't know | 10% |
7. Gallup Poll, 8/26-8/28/80
- | | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |
8. L.A. Times Poll, 9/2-9/7/80
- | | |
|----------|------------------|
| Other | 3% ^{*/} |
| Not sure | 6% |
9. Harris Poll, 9/3-9/7/80
- | | |
|------------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| Pulley | less than 0.5% |
| McCormack | less than 0.5% |
| Don't know | 4% |
10. Roper Poll, 9/4-9/6/80
- | | |
|-----------|-----|
| Clark | 1% |
| Commoner | 1% |
| Undecided | 12% |

*/ Other than Reagan, Carter, and Anderson.

COVINGTON & BURLING

888 SIXTEENTH STREET, N.W.

WASHINGTON, D. C. 20006

TELEPHONE (202) 452-6000

WRITER'S DIRECT DIAL NUMBER

(202) 452-6202

August 22, 1980

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OF COUNSEL

TWR 710 882-0008
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CABLE COVLING

H. Richard Mayberry, Jr., Esq.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Mayberry:

This letter is written on behalf of the League of Women Voters Education Fund in response to your August 18 letter to the LWVEF regarding the 1980 Presidential and Vice-Presidential debates which it is sponsoring.

Your letter (1) requests that your clients, Barry Commoner and LaDonna Harris, Presidential and Vice-Presidential candidates of The Citizens Party, be included in the debates and (2) objects to LWVEF's 15 percent standard for determining whether non-major party candidates have achieved a significant measure of nationwide voter support and interest.^{1/}

We have advised the LWVEF that the criteria it has established meet any applicable legal requirements. Of particular importance are the regulations of the Federal Election Commission. Under those regulations, the LWVEF, as a nonprofit organization exempt from federal taxation under 26 U.S.C. § 501(c)(3) "may stage nonpartisan candidate debates in accordance with 11 C.F.R. 110.13(b) . . ." 11 C.F.R. § 110.13(a)(1). Section 110.13(b), in turn, states that "[t]he structure of debates . . . is left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." In promulgating these rules, the Federal Election Commission made clear that the LWVEF may "stage a general election debate to which only major party candidates are invited."
44 Fed.Reg. 76735 (1980).

^{1/} The precise standard is whether the candidate receives a level of voter support in the polls of 15 percent or the level received by a major party candidate, whichever is lower. Since undecided responses will be excluded, the actual standard is something less than 15 percent.

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H. Richard Mayberry, Jr., Esq.
August 22, 1980
Page Two

The LWVEF would comply with the FEC's nonpartisan requirement (or the requirements of any other government agency) if it included in the debates only the Democratic and Republican nominees. The fact that the LWVEF is providing an opportunity for non-major party candidates who meet its significant candidate criterion to participate does not render the proposed debates partisan or otherwise legally questionable.

That the LWVEF has discretion to distinguish between major party candidates and non-major party candidates in adopting standards to implement its voter support and interest criterion also is supported by Buckley v. Valeo, 424 U.S. 1 (1976). Buckley does not, as you suggest, bar the government (much less a private organization such as LWVEF) from treating major party candidates differently from non-major party candidates. Rather, in that case the Supreme Court upheld the public financing scheme of the Federal Election Campaign Act even though it differentiates among major party, minor party and new party candidates based on specific levels of past voter support.^{1/}

You appear to be arguing that the selection standards are discriminatory and that the debates will be partisan because some non-major party candidates will not participate. The logic of this argument, of course, is that all non-major party candidates must participate in the debates to avoid discrimination and for the debates to be non-partisan. Any such approach, however, would result in debates which would be less informative and enlightening to the electorate than the LWVEF debates. Moreover, unless all candidates are invited, any choice has the effect of excluding some candidates, and may have the effect of benefiting or injuring some of those who do and do not participate, depending upon what occurs in the debates. But the test of nonpartisanship is not whether the debates benefit or injure participants or non-participants. The test is whether they have been structured in a particular way for the purpose of benefiting a particular candidate. Here it is clear that LWVEF's purpose is truly nonpartisan.

The purpose of the debates is neither to benefit nor to disadvantage major parties or third parties. The purpose is to help

^{1/} The Supreme Court rejected the argument that such a scheme invidiously discriminates against non-major party candidates, i.e., nominees of parties whose candidates in the preceding general election received less than twenty-five percent of the popular vote. 424 U.S. at 93-108. The LWVEF, of course, has adopted a much less rigorous standard for determining whether non-major party candidates should be invited to share a forum with major party candidates.

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H. Richard Mayberry, Jr., Esq.
August 22, 1980
Page Three

inform the electorate of the views of the significant candidates on the issues in the campaign. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. So, too, debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF must limit its forum to candidates whose participation would most likely be critical to the electorate as a whole -- that is, the candidates whom the public itself regards as truly significant candidates.

The LWVEF's purpose would not be served best by inviting non-major party candidates to participate merely because they may raise issues different from those raised by the 1980 major party Presidential and Vice-Presidential candidates or because their views on already-defined issues may differ from those of the major party candidates. This is not to say that the LWVEF questions the importance of such candidates to the electoral process. Its debates must be limited because its purpose in sponsoring them is limited. The debates are not intended to be town meetings. To achieve the necessarily limited purpose of the debates, the LWVEF criterion excludes only those non-major party candidates whom more than 85 percent of the electorate do not support.

Your suggestion that the voter support and interest standard is improper appears to be based on the premise that it necessarily excludes participation by new parties. Thus, you state that the standard "does not bear a reasonable relationship to the purpose of the debates . . . for it effectively excludes new party participation." And in support of your legal argument, you state that "the percentile classification used by the League is so high as to exclude any new parties."

However, your premise is erroneous, as shown by the very data you cite in support of it, even though these are election results rather than poll results. Your letter specifies six non-major party candidates in previous Presidential elections who received more than three percent of the vote in the general election. All of these candidates who would have met the ballot access requirement, about which you do not complain, exceeded the LWVEF's 15 percent voter support standard. Theodore Roosevelt received 27 percent of the vote in 1912, Robert LaFollette received 16 percent in 1924, and George Wallace, who received 13 percent on election day, had 15 percent or greater support in the pre-election polls. Moreover, your letter points out that a non-major party candidate, John Anderson, "may well qualify for the general election debates" this year.

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H. Richard Mayberry, Jr., Esq.
August 22, 1980
Page Four

The LWVEF has no intention, therefore, of eliminating as a condition for non-major party candidate participation in the debates the voter support and interest standard that it has adopted. Moreover, any attempt by any Government agency to reduce the LWVEF's discretion under the FEC regulations would present serious constitutional problems. The Government may not interfere with the First Amendment rights of the LWVEF in its sponsorship of the 1980 debates.

All six non-major party Presidential candidates including your client have received a letter from the LWVEF requesting information concerning the ballot access criterion and informing them that invitations to debate will be issued by September 10, 1980 --after the LWVEF has had an opportunity to examine the results of various nationwide polls. As in the past and up until the time that such polls are taken, your clients, like other Presidential and Vice-Presidential candidates, have had and will have the opportunity to demonstrate significant voter support and interest.

Very truly yours,



Ernest W. Jenness

cc: General Counsel
Federal Election Commission
Washington, D.C. 20463

Chief
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Howard Schoenfeld
Special Assistant for Exempt Organizations
Internal Revenue Service
Washington, D.C.

9 0 7 1 0 2 2 0 3 5 4

NCPP

NATIONAL COUNCIL ON PUBLIC POLLS

*Task sent this
over
HK*

President
Albert H. Cantril
Cantril Research

Treasurer
Harry W. O'Neill
Opinion Research Corporation

Trustees

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Science Research

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National Opinion
Research Center

Louis Harris
Louis Harris & Associates

Warren J. Mitofsky
CBS News

Glenn H. Roberts
Des Moines Register
and Tribune

Burns W. Roper
The Roper Organization

Richard M. Scammon
Elections Research Center

Contact: Albert H. Cantril
(202) 393-5100

EMBARGOED FOR RELEASE
6 p.m., Friday, August 22, 1980

POLLING ASSOCIATION CAUTIONS LEAGUE OF WOMEN VOTERS

ON USE OF POLLS FOR DEBATES DECISION

Washington, D. C.—The National Council on Public Polls

expressed its concern today over the difficulty of specifying when a candidate has achieved a 15 percent level of support in order to satisfy the League of Women Voters' requirement for participation in the 1980 Presidential Debates.

While the National Council acknowledged the right of the League to set a threshold in its attempt to find a criterion capable of objective application, many members of the association of polling organizations regard a specific percentage as arbitrary. "What

really troubles our members, however," National Council President Albert H. Cantril explained, "are the many practical problems in applying the 15 percent criterion."

The National Council called attention to the different techniques used by polling organizations that can result in varying assessments of candidate strength. For example, some polling firms base their estimates on registered voters, others on "likely" voters, and others

Appendix C

(MORE)

on a "probable electorate." In addition all public opinion polls are subject to certain levels of sampling tolerance. Taking into account these factors and other differences in procedure, the National Council cautioned the League of Women Voters that in a close decision there is no incontestable way to confirm or refute the absolute validity of a candidate's standing relative to the 15 percent.

The National Council recognizes that the decision of which candidates to invite to debate can be made only by the League. If the League proceeds

to rely on polling data, however, the National Council feels that at a minimum two steps should be taken: (a) those polls on which the League will base its invitation decision should be accompanied by full disclosure of the methods employed; and (b) the League should consult several disinterested, but qualified, professionals in the field of survey research regarding measurement issues that bear on the reported poll results.

###

Members of the National Council on Public Polls include: the Bureau of Social

Science Research; Cantril Research; CBS News; The Des Moines Register and Tribune; the Elections Research Center; the Field Institute; the Gallup Poll; GMA Research Corporation; Louis Harris & Associates; Peter D. Hart Research; the National Opinion Research Center; the Opinion Research Corporation; Polls, Inc.; Response Analysis Corporation; The Roper Organization; and Yankelovich, Skelly, and White.

MUR 1287



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ACKNOWLEDGEMENT OF RECEIPT

This is to acknowledge receipt of a letter from the Federal
Election Commission addressed to:

H. Richard Wray, Jr.

2/16/80
Date of receipt

[Signature]
Signature of recipient
On behalf of:

80040220357

MUR 1287



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ACKNOWLEDGEMENT OF RECEIPT

This is to acknowledge receipt of a letter from the Federal
Election Commission addressed to:

Jennes, Gilbert

9/16/80
Date of receipt

K. Kaytrosh
Signature of recipient

On behalf of:

80010220358



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 16, 1980

HAND DELIVERY

H. Richard Mayberry, Jr.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

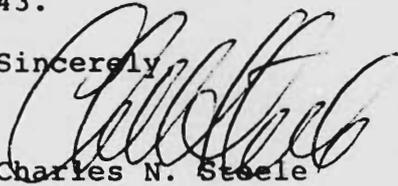
Re: MUR 1287

Dear Mr. Mayberry:

The Federal Election Commission has reviewed the allegations of your complaint filed on August 28, 1980 and determined that on the basis of the information provided in your complaint and information provided by the respondents there is no reason to believe that a violation of the Federal Election Campaign Act of 1971, as amended, or of any regulations promulgated thereunder, has occurred or is about to occur.

Accordingly, the Commission has decided to close its file in this matter. Should additional information come to your attention which you believe establishes a violation of the Act, please contact Lyn Oliphant, the attorney assigned to this matter at 523-4143.

Sincerely,


Charles N. Steele
General Counsel

80049220359



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

HAND DELIVERY

H. Richard Mayberry, Jr.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

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Sincerely,

Charles N. Steele
General Counsel

ok J.O.

8074000360



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 16, 1980

HAND DELIVERY

Ernest W. Jennes, Esq.
Scott Gilbert, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

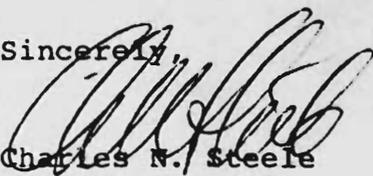
Re: MUR 1287

Dear Sirs:

This letter is sent to you in your capacity as counsel for the League of Women Voters Education Fund and Ruth Hinerfeld. On August 29, 1980, the Commission notified Ms. Hinerfeld and the League of a complaint alleging that the debates which the League plans to sponsor in September and October 1980 will violate 11 C.F.R. §§ 110.13 and 114.4, and that the League has, therefore, violated 2 U.S.C. § 433.

The Commission, on September 16, 1980, determined that, on the basis of the information in the complaint, and the information provided by the League in response, there is no reason to believe that a violation of any statute or regulation within its jurisdiction has occurred, or is about to occur. Accordingly, the Commission has closed its file in this matter. This matter will become a part of the public record within 30 days.

Sincerely,


Charles N. Steele
General Counsel

80040220361



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

HAND DELIVERY

Ernest W. Jennes, Esq.
Scott Gilbert, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Re: MUR 1287

Dear Sirs:

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Sincerely,

Charles N. Steele
General Counsel

ok. LO.

80049220362

FEDERAL ELECTION COMMISSION
1325 K Street, N.W.
Washington, D.C. 204

FIRST GENERAL COUNSEL'S REPORT

DATE AND TIME OF TRANSMITTAL
BY OGC TO THE COMMISSION EXECUTIVE SESSION
September 16, 1980

MUR # 1287
DATE COMPLAINT RECEIVED
BY OGC August 28, 1980

STAFF MEMBER Oliphant

COMPLAINANT'S NAME: Barry Commoner and the Citizen's Party

RESPONDENT'S NAME: Ruth Hinerfeld, Chairman
League of Women Voters Education Fund (LWVEF)

RELEVANT STATUTE: 11 C.F.R. §§ 110.13 and 114.4
2 U.S.C. § 433(a)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

SUMMARY OF ALLEGATIONS

On August 28, 1980, Barry Commoner and the Citizen's Party filed a complaint against Ruth Hinerfeld, Chairman, and the League of Women Voters Education Fund. The complaint alleges that the presidential and vice presidential debates which the LWVEF will sponsor during the months of September and October 1980: (1) will violate the nonpartisan requirement set forth in the Commission's debate regulations, 11 C.F.R. §§ 110.13 and 114.4, in that the selection criteria for participants are partisan; (2) that sponsorship of the debates is a contribution and the LWVEF has therefore violated the FECA registration requirements for political committees, 2 U.S.C. § 433(a); and (3) that the exclusion of minor party candidates renders the debates partisan in that they will promote the candidacies of the major party candidates over all others. The evidence put forward **consists primarily of newspaper** articles allegedly demonstrating that the influence of major party candidates, the role of the media and the subjective intent of the sponsor all **support** the partisan nature of the debates. The first debate is currently scheduled to take place on September 21, 1980, in Baltimore, Maryland.

For relief, the complaint seeks immediate action by the Commission by filing of a civil suit for mandatory injunctive relief compelling inclusion of Mr. Commoner in the debates. Alternatively, the complaint seeks an immediate hearing and investigation by the Commission to be held in public. On September 3, 1980, the Commission notified Mr. Commoner that it did not intend to take any action on the complaint until such time as the LWVEF had 15 days to respond, but indicated that the Commission would endeavor to consider the complaint and the response

prior to the first debate. The LWVEF response was received on September 15, 1980. 1/

FACTUAL AND LEGAL ANALYSIS

I. The Nonpartisan Requirement of 11 C.F.R. §§ 110.13 and 114.4

The League of Women Voters Education Fund is a trust exempt from federal income tax pursuant to Section 501(c)(3) of the Internal Revenue Code, Affidavit at 2, ¶ 3, and as such is permitted under the Commission's debate regulations to sponsor nonpartisan debates between federal candidates and may accept donations from other corporations to defray the costs of such debates. The LWVEF selected an Advisory Panel comprised of 27 individuals, Affidavit, Attachment A, to recommend the selection criteria to be used in choosing participants for the 1980 debates. The selection criteria chosen by the LWVEF Board of Trustees, based upon these recommendations, are as follows: (1) constitutional eligibility to serve as president; (2) a mathematical possibility of winning the election, i.e., ballot status in a sufficient number of states to win 270 electoral votes; 2/ and (3) demonstrated significant voter support and interest to be measured by achieving 15% or more in public opinion polls, or standing equal to that of major party candidates, whichever is lower. 3/ The major party candidates were to be invited regardless of the 15% requirement on the theory that nomination by a major party evidences significant voter support and interest, regardless of standing in the polls. (The statement of the LWVEF on the selection criteria is attached to the complaint in the appendix and as Attachment B to the Affidavit of Ruth Hinerfeld.)

The complaint challenges the third criteria only. Because the Commission's debate regulations leave the precise structure of the debate and the question of selection of participants to the sponsor, the Commission, in reviewing the complaint, must analyze the selection criteria to determine only whether or not there is evidence that the debates will be partisan in nature. The complaint makes four allegations as to the partisan nature of these debates: the 15% requirement itself; the influence of other major party candidates; the role of the media; and the subjective intent of the LWVEF.

A. The 15% Requirement

The LWVEF response indicates that the 15% requirement was selected to insure that all "significant" candidates were invited to participate. Affidavit at 7, ¶ 15. The decision to establish the third criteria

1/ The affidavit of Ruth Hinerfeld, Appendix A to the LWVEF response will be referred to as "Affidavit at ___".

2/ The LWVEF criteria statement indicates that likelihood of achieving ballot status is sufficient. Affidavit, Attachment B at 5. Mr. Commoner has apparently not yet achieved ballot status in a sufficient number of states but expects to. Complaint, Appendix at 2.

3/ The 15% is to be measured by counting only votes for candidates, not for "undecided". Affidavit at 6. John Anderson was the only nonmajor candidate to be invited.

was based on the belief that "there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other." The LWVEF response indicates that there are a potential of six other than major party candidates who may have been able to meet the criteria. However, it appears that, even without criteria #3, only John Anderson, Ed Clark and Barry Commoner would have been able to meet criteria #2.

The precise 15% figure apparently was selected as the lowest figure recommended by anyone on the Advisory Panel. Affidavit at 8, ¶ 15. While the LWVEF recognizes that 15% is not a "magic number", the allegations of the complaint require the Commission to consider whether the inclusion of this third criteria and the selection of the 15% figure render the debates partisan. 4/

The Explanation & Justification of the Candidate Debate Regulations indicates that a sponsor may stage a debate during the general election campaign, limited to major party candidates. The question raised by this complaint is whether or not, if one other-than-major-party-candidate is invited to participate, must all such candidates be invited, and if not, whether the 15% criteria establishes a reasonable nonpartisan method of determining who should be invited to participate.

The Commission debate regulations which were originally sent to Congress on June 28, 1979, and subsequently vetoed, utilized the "Party Standard" for the required structure of such debates. Under that standard, if one major party candidate was invited, all must be invited; if one minor party candidates was invited, all must be invited, etc. If that standard were applicable, the LWVEF, since they sought to broaden the debates to include other candidates, would be required to invite all minor party candidates. However, after Congress vetoed those regulations, the Commission's resubmitted regulations, now 11 C.F.R. §§ 110.13 and 114.4, did not adopt any specific standard, but rather left the selection of candidates to the sponsor, provided that it be done in a nonpartisan fashion. In the Nashua Telegraph MURs, Nos. 1167, 1168, and 1170, the Commission found reason to believe that the choice of two of five or six candidates who appeared to be relatively equally positioned at the time, in that all were qualified to be on the ballot for the primary, all were receiving and expending primary matching funds, and all were actively campaigning in the state, was not nonpartisan. In that case, no specific objective criteria were established prior to the selection of candidates, and no specific nonpartisan rationale was provided to justify the selection of candidates.

While both the use of polls to measure "significance" and the 15% requirement are arbitrary, it appears that the LWVEF sought to establish a criterion capable of objective application. In recognition of the imperfection of public opinion polls, the LWVEF sought to

4/ While the Commission in its debate regulations might have adopted a "ballot standard", it in fact explicitly rejected such a standard. Thus, where a sponsor has used a ballot standard, such as criteria #2, but additionally imposed further criteria, the Commission should evaluate those criteria to determine whether they are reasonable and nonpartisan.

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use a range of independently conducted polls, Affidavit, Attachments C & E, and retained a number of independent polling experts to advise on the methodology utilized by the various polls and any variations which should be taken into account because of the differing methodologies. Affidavit at 10-12, ¶ 23. Therefore, while the use of polls to measure voter interest and support may be highly suspect, the LWVEF appears to have taken efforts to minimize the difficulty of measuring public support in this manner. As to the 15% requirement itself, there appears to be no specific basis for its selection other than that it was the lowest figure recommended by the Advisory Panel. While it might have been more reasonable to utilize the 5% figure in the Presidential Election Campaign Fund Act, 26 U.S.C. § 9002(7), it appears from the poll data that John Anderson would still have been the only nonmajor candidate to meet that threshold. Affidavit, Attachments C & E. 5/ In any event, the Supreme Court in Buckley v. Valeo, 424 U.S. 1. (1976), noted that the selection of a figure, such as the 5% used in the Fund Act, is by its nature somewhat arbitrary, but indicated that the courts would not overturn a congressional selection unless clearly unreasonable. While the congressional selection of such a figure is distinguishable from the choice by a private party of an arbitrary figure, it would seem that the Commission should apply the same principle to its review of a debate sponsor's selection of a threshold figure, particularly in the absence of a specific direction by the Commission as to the criteria to be used for participant selection. Accordingly, since the 15% figure does not appear to be unreasonable, and since there is no evidence that the 15% figure was selected for partisan reasons, 6/ it would not seem to violate the debate regulations.

B. Influence of Major Party Candidates

The complaint alleges that the influence of the major party candidates over the selection criteria and over the structure of the debates demonstrates their partisan nature. In support of this claim, a variety of newspaper articles are included in the Appendix, one of which quotes Ruth Hinerfeld, Chairman of the LWVEF as stating that the League could change its rules. In their response, however, it is indicated that Ms. Hinerfeld merely **responded** that the LWVEF would review continued participation by minor party candidates based upon criteria 3, should their standing in the polls change. Affidavit at 13, ¶ 28. Furthermore, the affidavit indicates that the LWVEF Board unanimously voted on August 9, 1980, not to change any criteria. Subsequent to the filing of the complaint by Mr. Commoner, it has become

5/ Of course, the 5% figure in the Fund Act is not based on public opinion polls, but upon actual votes cast-- a far more reliable indicator of public support. Indeed, there is some suggestion in the legislative history of the Fund Act that public opinion polls were explicitly rejected as a means of determining pre-election funding eligibility for minor party candidates.

6/ The figure was recommended by the Advisory Panel, whose members were chosen from a variety of backgrounds. The LWVEF response **states** that it was the lowest figure suggested, thus indicating that the Board of the LWVEF had no partisan intent in the selection of the figure. Affidavit at 8, ¶ 15.

somewhat more apparent in the newspapers that the LWVEF did not respond to any **exerted** "pressure" by major party candidates to change the rules of the debates. The fact that the LWVEF established its criteria independently of candidates on the basis of recommendations by the Advisory Panel, and that the LWVEF did not change these criteria, despite pressure, suggests that the influence of the major party candidates over these debates was nil.

There is the additional suggestion in the complaint that the negotiation with participating candidates over matters such as scheduling, format, etc., also supports the conclusion that the debates are partisan in nature. However, as to questions such as timing and location, it is certainly not unreasonable for a debate sponsor to take into consideration the legitimate campaign demands placed upon participating candidates. There is no evidence that any change in scheduling has been to the detriment of any candidate.

C. The Role of the Media

The complaint alleges that the role of the media in the scheduled debates is further evidence of their partisan nature. No evidence is specifically put forth in support of this allegation. According to the LWVEF response, no consultation with the media occurred prior to the issuance of the selection criteria and the selection of the locations and dates. Affidavit at 4, ¶ 9. The locations of the debates were selected by the LWVEF "on the basis of geographical diversity and availability of physically suitable facilities," which are being provided to the LWVEF free of charge. Affidavit at 9, ¶20. ^{7/} There is, therefore, no evidence to support the allegation that the media has played any role in the sponsorship of these debates.

D. Subjective Intent of the Sponsor

The complaint alleges that the subjective intent of the sponsor is to favor certain candidates--most notably, major party candidates--over others. The only evidence of this is based upon newspaper articles included in the appendix to the complaint, some of which appear to be based on incorrect quotations. See page 4, supra at § B, first paragraph. The long history of nonpartisanship of the LWVEF and the facts concerning these debates, including the establishment of the Advisory Panel, the

^{7/} The provision of at least one facility free of charge has been challenged by Ed Clark in civil action brought in Baltimore to prohibit the Mayor and City of Baltimore from providing the civic center free of charge. A hearing on this matter is scheduled before federal court on September 18, 1980.

development of the criteria and the refusal of the LWVEF to alter the criteria, all support the statement of the LWVEF that the debates are being sponsored "to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues." Affidavit at 13, ¶ 28. While the LWVEF might have sought an advisory opinion from the Commission as to whether or not the criteria chosen would meet the nonpartisan requirement of the Commission's regulations--short of taking this step, the LWVEF appears to have taken measures to insure that its nonpartisan intent would be clear.

For the foregoing reasons, the Commission should reject the allegation that the debates as planned by the LWVEF will violate the Commission's debate regulations.

II. LWVEF Registration Obligation Under 2 U.S.C. § 433

On the basis of the foregoing analysis, the debates currently scheduled by the LWVEF would not result in contributions to any candidates, since payments in connection with sponsorship of nonpartisan debates are exempt from the definitions of "contribution" and "expenditure." Thus, the LWVEF would not incur any obligation to register as a political committee pursuant to 2 U.S.C. § 433.

III. Exclusion of Minor Parties

The final allegation set forth in the complaint is that the exclusion of minor party candidates from debates is discriminatory. Since the Commission stated in its Explanation & Justification of the regulations that a general election debate may be held for major party candidates only, and since the Commission in its revised regulations specifically rejected both the party and ballot standards which would have required all minor party candidates to be included if one was included, thus leaving the discretion to the sponsor, the Commission should reject this argument as well.

RECOMMENDATIONS

1. Find no reason to believe that the debates scheduled by the LWVEF will violate 11 C.F.R. §§ 110.13 and 114.4.
2. Find no reason to believe that the LWVEF has violated 2 U.S.C. § 433.
3. Send the attached letters.

Attachments: Complaint
Response of LWVEF
Letter to Richard Mayberry
Letter to Ernest Jennes and Scott Gilbert

Law Offices
H. Richard Mayberry, Jr.
Suite 701
1050 Seventeenth Street, N. W.
Washington, D.C. 20036
202/872-0005

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ELECTION COMMISSION

Barry Commoner of The Citizens Party,)
Complainant,)

v.)

Chairman Ruth Hinerfeld and the)
League of Women Voters Educational)
Fund,)
Respondents.)

Complaint

MUR NO.:

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RECEIVED

FEDERAL ELECTION COMMISSION

THE PARTIES

The Complainant is identified as follows:

BARRY COMMONER is the candidate of The Citizens Party for the general election of President of the United States. The Citizens Party is a non-major political party. The Citizens Party's principal office is Suite 5, 2126 Connecticut Avenue, N.W., Washington, D.C. 20009.

On information and belief, the Respondents are identified as follows:

RUTH HINERFELD is the Chairman of the Board of Trustees of the League of Women Voters Educations Fund, and responsible for management of the Fund.

THE LEAGUE OF WOMEN VOTERS EDUCATION FUND is a charitable trust organized for the purpose of providing the general public with voter and citizen educational services. Its principal office is 1730 M Street, N.W., Washington, D.C. 20036.

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THE FACTS

1. Chair Ruth Hinerfeld and The League of Women Voters Education Fund ("The LWVEF") will sponsor 1980 Presidential Debates in various cities during September and October and a Vice Presidential debate in the month of October, 1980. (LWVEF News Release, 8/10/80)*. The exact dates and locations are at this time only known by the LWVEF.

2. The LWVEF will invite candidates to participate in these debates who have met criteria adopted by the Board of Trustees:

- a) Constitutional Eligibility for the Office of the Presidency;
- b) Access on sufficient state ballots to have a mathematical probability of winning the electoral college; and,
- c) Demonstrated significant voter interest and support as evidenced by a major party candidate receiving the nomination of a major political party or a non-major party candidate receiving voter support in the polls of 15% or the level of voter support at least equal to that of a major party candidate. (LWVEF News Release, 8/10/80)

3. The LWVEF will automatically invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will automatically be invited. (LWVEF Criteria, 8/10/80), p.2). The automatic invitation arises from the express statement of the LWVEF and from the adoption of criteria tailored to major party candidates. For example, major party candidates are guaranteed ballot access and the percentile classification is tailored to state a minimum quantum equivalent to such a candidate's present rating. The invitation is absolute

* The matters of public record which complainant cites herein are appended in a separate appendix volume.

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and not subject to revocation.

4. The LWVEF will on a case by case basis invite to debate the non-major party candidates. Even if a non-major party candidate is invited, the invitation is qualified and subject to revocation. LWVEF reserves the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. (LWVEF Criteria, 8/10/80, p.2-3.)

5. Upon information and belief, the debates will be televised live by the major broadcasters; including ABC, CBS, NBC, and their owned affiliates. Such broadcast would require substantial logistical coordination and communication between the LWVEF and broadcasters. The broadcasters are subject to government regulation under the Federal Communications Act of 1934, as amended.

6. President Carter, nominee of the Democratic National Party, has set new debate terms under which he would participate in the LWVEF sponsored presidential debates. Specifically, Jack Watson, White House Chief of Staff, publicly stated details about the time, location, format, and number of debates are "items to be negotiated, not mandated (by the LWVEF)." ("Carter Sets New Debate Terms", Washington Post, 8/25/80, p.A1,A4). "Jimmy Carter's purpose in avoiding a three-way debate is clear: he figures John Anderson might take more votes from him than from Mr. Reagan." ("Will Voters League Silence Anderson To Please Carter?", Wall Street Journal, 6/13/80). In turn, "Mr. Anderson charged that the President was narrowly partisan in his approach to the public's right to know." (N.Y. Times, 8/23/80)

7. The LWVEF's Trust Agreement prohibits the publication of candidate statements:

Nor shall the (LWVEF) participate or intervene in (including the publishing or distributing

of statements) any political campaign on behalf of any candidate for public office or be partisan in its approach to political campaigns.

(LWVEF Trust Agreement, as amended June 22, 1960).

8. Under the rules and regulations of the Internal Revenue Service, and its own Trust Agreement, the LWVEF is prohibited from spending funds to sponsor the planned debates in the manner now proposed. (Washington Post, 7/20/80, p.A-5.)

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VIOLATION OF THE LAW

I. The LWVEF Debates are Partisan and Violate the Non-Partisan Debate Regulations, 11 C.F.R. Section 110.13 (1980)

The present method of candidate selection adopted by the LWVEF and public statements by a representative of President Carter make the staging of the debate a partisan event in violation of 11 C.F.R. Section 110.13 (1980).

A. LWVEF Candidate Selection Criteria Pertaining To Demonstration of Significant Voter Support Are Partisan In Structure and Application

The Commission Regulations provide, in pertinent parts, that the structure of debates sponsored by certain non-profit organizations is left to the discretion of the staging organization as long as "such debates are non-partisan in that they do not promote or advance one candidate over another." 11 C.F.R. Section 110.13 (b). The primary focus in judging non-partisanship is candidate selection and the standard for reviewing candidate selection by the Commission is whether the criteria adopted fulfill the purpose of educating and informing the voters, provide fair and impartial treatment of candidates, and do not promote or advance one candidate over another. FEC Explanation and Justification for Part 110.13(b).

The non-partisanship requirement of the regulations clearly control over the explanation and justification provisions which are merely interpretive in nature. The regulations require an examination by the Commission of the partisanship of the debates. See MUR Nos. 1167, 1168, and 1170. Therefore, reference in the justification section to hypothetical debates exclusively for the benefit of the two major party candidates is merely conclusory and does not vitiate the responsibility of the Commission to

investigate the partisan nature of candidate selection criteria, the subjective intent of the sponsor, the role of the media involved, or the outside influence of candidate participants in a debate sponsor. Indeed, the regulations preclude a sponsor from staging a debate upon a showing of partisanship.

The debates are structured to include candidates receiving a level of voter support in the polls of 15% or the level received by a major party candidate, whichever is lower. The use of this criteria is partisan in structure and effect:

1) Major party candidates are exempt from the polling requirement, while non-major parties are subject to the vagaries of an inappropriate and inaccurate measurement. The National Counsel on Public Polls warned the LWVEF that the 15% limit is arbitrary, impractical, and subject to error.

(Washington Star, 8-23-80, A3)

The Washington Post quoted Mr. Hart, that "the use of survey research to determine who should participate in the 1980 presidential debates is a perfect example of misuse of the tool of survey research" (Washington Post, 8-24-80, p. C6)

2) Because of the significant impact of political broadcast on candidate popularity, the onerous 15% requirement subjects Mr. Commoner to a classical Catch 22 dilemma that with it he is excluded from the debates and without it, he would have an opportunity to inform voters of his campaign positions and may very well achieve a 15% rating.

3) Historically, only 2 minor party candidates, Theodore Roosevelt and Robert La Follette, received more than 15% of the vote. Eugene McCarthy and

George Wallace did not, nor does it appear any other minor party candidates in 1980 will meet this arbitrary and capricious threshold.

4) A debate involving only the 2 major party candidates is not non-partisan, but bi-partisan. Moreover, it would promote the candidacies of the two major party candidates over Mr. Commoner's and other non-major party candidates.

For example, in the Nashua Telegraph case, the Commission found the exclusion of candidates not frontrunners in the Republican primary campaign a violation of the Campaign Act, because it "is evidence that the newspaper is not providing fair and impartial treatment of candidates, and that the debates will result in the promotion or advancement of the included candidates (over the excluded candidate)." MUR 1167, 1168, 1170, First General Counsel's Report, February 20, 1980, p. 9. The present debate regulations were not applicable at that time. However, the General Counsel states even if they were applicable, the "debate as planned would not be non-partisan...." Id.

5) The degree of interaction of the LWVEF must have with broadcasters to televise this event, the privilege of tax exemption bestowed by Congress to the LWVEF and the privilege of debate sponsorship bestowed by the Commission to the LWVEF, elevate private action to government action. In Buckley v. Valeo, the Supreme Court viewed government action which dramatically restricted minor party candidates' means for reaching the electorate and inhibited the opportunity for minor party to become major parties to be constitutionally suspect. 424 U.S.

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1, 96-97. More recently, a district court held handicapping access to communication channels, the mail, "because a political party has not achieved a required level of acceptance is not different from censoring speech because of its substance." Greenberg v Bolger, No. 80-0340 (E.D.N.Y. June 20, 1980). For these constitutional reasons, the voter support criteria of the LWVEF which excluded minor party candidates is invalid.

II. Sponsorship of Partisan Debates Is a Contribution and The Failure of the LWVEF to Register as a Political Committee Violates Registration Provisions of the Campaign Act, 2 U.S.C. Sec. 433(a).

The funds expended to defray costs incurred in staging debates is not considered a contribution, 11 C.F.R. Sec. 100.7 (b) (21), nor an expenditure, 11 C.F.R. Sec. 100.8 (b) (23) -- provided the structure of the debates is non-partisan. The selection process used by the LWVEF is not non-partisan, see discussion supra I. Therefore, the costs involved in preparation for the debates, including staff time, office rental, publication, and the cost in actual staging the debates, are expenditures which, upon information and belief, would exceed \$1,000. The failure of the LWVEF to register and report as a political committee violates 2 U.S.C. Secs. 433(a) and 434.

III. Statements by Presidential Spokesman Towards Exclusion of Non-Major Party Candidates Taint Debates Partisan

For the debates to be truly non-partisan, partisan influence on the sponsor concerning candidates selection must be scrupulously avoided. Through a representative, the President has brought partisan influence to bear on the LWVEF. (Washington Post, 8/25/80, p. A1 in which Mr. Watson stated details of the debates was

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negotiable). The effect of such influence was direct:" (Ms. Hinerfeld) said the league could change its debate rules" in regard to independent candidate Anderson's participation. (Washington Post, 8/27/80, p. A1). Accordingly, upon information and belief, the President would take similar action in excluding Mr. Commoner and other minor party candidates. Thus, the debates would, truly be partisan and promote the candidacies of the major party candidates over all other candidates.

In regards to the legal issue whether failure to permit certain candidates not deemed "major or front-runners" by the sponsor to participate in debates constitutes unfair and parties treatment of candidates and is inherently partisan, the holding in the Nashua Telegraph case is indistinguishable. There, such a structure was found to be partisan and the same standard of review is applicable in the instant case.

The partisan nature of the debates are evidenced by public pronouncements on behalf of one of the major party candidates and the resultant effect that the sponsor will now modify candidate selection criteria accordingly to exclude non-major party candidates.

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EXPEDITED COMPLIANCE PROCEDURES

In application of the Nashua Telegraph Case (see p. 11 of First General Counsel's Report) standard for expedited compliance procedures, I submit that

- 1) There is a substantial likelihood that this complaint sets forth a violation of the Act, which has been previously described;
- 2) Failure to act will result in irreparable harm for inclusion in the debate is the only remedy which will prevent a violation;
- 3) The LWVEF may suffer some disadvantage from a shortened response time. However, the LWVEF, upon information and belief, has been advised by their counsel of the Commission regulations, and has been put on notice by complainant's counsel of the possibility of a complaint being filed with the Commission (August 18, 1980 Letter to Ms. Hinerfeld); and
- 4) The public interest in permitting Mr. Commoner and other minor party candidates to communicate their views to the public would be served in an expeditious handling of this matter.

RELIEF SOUGHT

Complainant, therefore, respectfully requests:

1. That the Commission immediately authorize filing a suit for mandatory injunctive relief compelling inclusion of Mr. Commoner in all LWVEF debates.
2. That, in the alternative, the Commission should immediately convene a hearing including counsel for all parties at which a schedule and procedure for implementation of discovery and submission of all facts and argument by no later than September 5, 1980. The Commission should conclude that the public and private interests will best be served by opening the foregoing procedures to the public. Any decision on the debates after the first debate is a non-decision and in derogation of the Commission's statutory duties.
3. That the Commission immediately commence such investigation as necessary to determine the extent that representatives of major party candidates have influenced the partisanship of the candidate selection process.
4. That the Commission notify me in writing no later than September 3, 1980 if it does not intend to rule on the partisanship of the debates prior to the first scheduled debates so that other appropriate courses of action may be timely evaluated.

I fully understand that the relief sought places unusual burdens on the Commission and its procedures. However, the significance and public controversiality of the issue presented make these burdens necessary, and not unlike those normally accepted by other administrative agencies in emergencies. In order to

expedite this matter, I have sent copies to the named respondents of this complaint since the FEC is required by 2 U.S.C. Sec. 437g to take this action automatically anyway.

Respectfully submitted,

Barry Commoner
The Citizens Party

By

H. Richard Mayberry, Jr.
H. Richard Mayberry, Jr.
Attorney for Complainant

8-28-80
Date

VERIFICATION

The undersigned counsel for the complainants swears that, based on the matters of record referred to herein, the allegations and other facts in the complaint are true and correct to the best of his knowledge, information and belief.

By:

H. Richard Mayberry, Jr.
H. Richard Mayberry, Jr.
Counsel for Complainants

Subscribed and sworn to before me this 28th day of August, 1980.

Esther A. Williams
Notary Public
District of Columbia

My Commission Expires:
Jan 2, 1982
Date

APPENDIX

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GENERAL INVESTIGATIVE
DIVISION
FEDERAL BUREAU OF INVESTIGATION
U. S. DEPARTMENT OF JUSTICE

LAW OFFICES
H. RICHARD MAYBERRY, JR.
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TELEPHONE
(202) 872-0005

August 18, 1980

Ruth Hinerfeld
Chair
League of Women Voters Education Fund
1730 M Street, N.W.
Washington, D.C. 20036

Re: 1980 Presidential Debates

Dear Ms. Hinerfeld:

I represent Barry Commoner and LaDonna Harris who are the candidates of The Citizens Party for President and Vice-President of the United States of America. On behalf of The Citizens Party and pursuant to the guidelines enunciated in the League of Women Voters Education Fund Criteria for Selection of Candidates to Participate in the 1980 Presidential and Vice-Presidential Debates (August 10, 1980) (hereinafter referred to as "League Policy Statement"), I hereby request inclusion of both Mr. Commoner and Ms. Harris in the 1980 Presidential debates which are sponsored by the League and which are to be broadcast by the major television networks in September and October, 1980.

Mr. Commoner and Ms. Harris are legally qualified candidates in accordance with the applicable provisions of both the Federal Election Campaign Act of 1971, as amended, the Presidential Election Campaign Fund Act, as amended, and the Federal Communications Act of 1934, as amended. Both candidates are registered with the Federal Election Commission, and, based upon current ballot access in 17 states and substantial public support, anticipate receiving at least 5% of the popular vote, thus qualifying for retroactive public financing after the November elections. The Citizens Party is a new political party with state chapters in 32 states which support the candidacy of Commoner-Harris, as well as other federal candidates.

Mr. Commoner readily meets the League's criteria numbers 1 and 2. Mr. Commoner is eligible pursuant to Article II, Section 1 of the United States Constitution to be elected President of the United States.

Mr. Commoner is qualified for the general election ballot in Alabama, California, District of Columbia, Illinois, Kentucky, Louisiana, Maine, Michigan, New Jersey, North Carolina, New Mexico, Ohio, Oregon, Pennsylvania, Utah, Washington and Wisconsin. In addition, Mr. Commoner reasonably anticipates to meet the ballot access criteria in New York, Tennessee, Delaware, Mississippi, New Hampshire, Colorado, Indiana, Minnesota, New Mexico, North Dakota and Vermont - all jurisdictions with filing dates subsequent to submission of this request. Thus Mr. Commoner clearly has "a mathematical possibility of winning a majority of votes (270) in the Electoral College."

The third criteria for candidate participation requires a demonstration of significant voter support and interest as determined through the results of nationwide public opinion polls. A question will be added which takes a "trial-heat" approach - "If the election were held today, would you vote for A, B, C, D, etc.?" Mr. Commoner's name will appear in the following polls: Harris (poll taken August 14-18; results available August 19), Roper (poll taken August 16-23; results available August 25 or 26), Gallop (poll taken August 15-18; results available August 18) and NBC-AP (poll taken August 15-16; results available August 17 or 18).* Since the results of the polls are not public information at this time, I reserve comment on their methodologies and results.

However, the use of a 15% threshold for evidence of "significant" voter support does raise serious problems with regard to a fair evaluation of new and minor party candidates. The minimum quantum of support, "fifteen percent or the level of voter support received by a majority party candidate, whichever is lower" does not bear a reasonable relationship to the purpose of the debates, which is to provide voter education on the campaign issues, for it effectively excludes new party participation.**

New parties fulfill an important constitutional function in disseminating alternative positions on national problems for

*August 18, 1980, telephone conversation with Ms. Vera Hirschberg of the League.

**For example, the Supreme Court found in Buckley v. Valeo, 424 U.S. 1 (1976), that government action which invidiously disadvantages minor-party candidates would be unconstitutional, and that such discrimination would be evaluated from the perspective of the curtailment of the ability of such candidates to communicate with the electorate, rather than resources relative to major-party opponents.

consideration by the voter, which may lead to modification of the policies of major parties, and development of policies in advance of the time that established parties are ready to act.* Thus such a high standard for participation in the debates, denies the electorate an opportunity to truly evaluate the qualifications of presidential candidates, and the ability to be informed voters.

If the polls do truly reflect voter approval, and third parties play a vital role in the American political process, the percentile classification used by the League is so high as to exclude any new parties:

In this century, only six third party presidential candidates have received 3 percent or more of the popular vote: (1) Theodore Roosevelt, of the Bull Moose Party, in 1912 received 27 percent; (2) Eugene Debs, of the Socialist Party, in 1912 received 6 percent; (3) Allen Benson, of the Socialist Party, in 1916 received 3 percent; (4) Eugene Debs, of the Socialist Party, in 1920 received 3 percent; (5) Robert LaFollette, of the Progressive Party, in 1924 received 16 percent; and (6) George Wallace, of the American Independent Party, in 1968 received 13 percent. Also, in this century, only twelve candidates for President have received more than 1 percent and less than 3 percent of the popular vote, including Eugene McCarthy in 1976.**

It is noteworthy that prior to the Iowa Republican primary debates sponsored by the League, John Anderson had significantly less than 15% public support. After broadcast of this debate, his popularity rose such that he may well qualify for the general election debates. Therefore, the present onerous 15% requirement subjects non-major party candidates to a classical "Catch 22" dilemma that with it they are excluded and without it (or with other more reasonable criteria) they would have an opportunity to present their views to the American public and may very well achieve a 15% or more popularity rating.

*See Greenberg v. Bolger, No. 80-0340 (E.D.N.Y. June 20, 1980).

**"The Presidential Debates of 1976: Toward a Two Party Political System," 46 Cincinnati Law Review 123, 134 (1977). Debs and Benson would not have met League criteria 2 since they were not on sufficient state ballots to possibly win the election.

In furtherance of promoting the laudable goal of educating "the public about the issues in the campaign and the candidates' position on those issues," The Citizens Party urges you to include Mr. Commoner and Ms. Harris in the upcoming debates. It is noteworthy that Ms. Harris would bring a special perspective to the debates for, in comparison to other candidates, she is uniquely qualified to address issues of importance to the nation and the League's membership, e.g., ratification of the Equal Rights Amendment.

The Citizens Party asserts that exclusion of Mr. Commoner and Ms. Harris would be a disservice to the American people. Alternative debates for minor party candidates are inherently separate but unequal, and have no more of a place in the marketplace of ideas created by the candidate debates than they do in our schools.* Moreover, in our view, such discrimination would impact on the nonpartisan nature of the debates, and raise serious constitutional, election law, communications law, and tax-exemption questions concerning the League's activities.

Given the close proximity of time between receipt of the poll results, making decisions on candidate participation, and the actual debates, Mr. Commoner expects your reply on the invalidity of criteria 3 leading to his immediate invitation to participate in the debates no later than five working days from receipt of his letter so that he can evaluate what subsequent actions with the Federal Election Commission, Federal Communications Commission and the Internal Revenue Service will be necessary and appropriate.

Sincerely yours,

H. Richard Mayberry, Jr.

H. Richard Mayberry, Jr., Esq.

RM/ska

cc: 1) Ms. Vera Hirschberg
League of Women Voters Education Fund
1730 M Street, N.W.
Washington, D.C. 20036

(continued page five)

*Compare Plessy v. Ferguson, 163 U.S. 537 (1806) with Brown v. Board of Education, 347 U.S. 483 (1954).

cc:

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news release

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Embargoed for Release
3 p.m. Sunday, Aug. 10, 1980

LEAGUE ANNOUNCES SITES, ELIGIBILITY CRITERIA FOR PRESIDENTIAL DEBATES

The League of Women Voters today announced the four cities it has chosen as the sites of the 1980 Presidential Debates and the criteria it will use to invite candidates to participate. Both the sites and the criteria were adopted unanimously by the Board of Trustees of the League of Women Voters Education Fund, sponsors of the debates, at a three-day meeting ending August 9 in Washington, D.C.

The League proposes that debates be held in Baltimore, MD; Cleveland, OH; Louisville, KY and Portland, OR. Ruth Hinerfeld, Chair of the League's Education Fund, said that dates will be announced after discussions with the candidates. Three Presidential Debates and one Vice-Presidential Debate are planned. Sites were chosen on the basis of geographical diversity and the availability of suitable facilities.

The Board will invite to participate in the debates those candidates who meet the following criteria: (1) Constitutional eligibility, (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes (270) in the Electoral College, and (3) demonstrated significant voter interest and support.

The League will apply the criteria and extend formal invitations to candidates who meet them in late August. According to Hinerfeld, "The League has adopted criteria for inviting candidates that fulfill the purposes of the debates and are non-partisan, capable of objective application and understandable to the public.

"These criteria are consistent with our 60-year tradition of non-partisan service

to voters and are intended to stimulate and increase voter interest and participation in the electoral process."

The Board of Trustees will use the following standards in applying each of the three criteria:

Constitutional eligibility:

Only those candidates who meet requirements of Article II, Section 1 of the Constitution of the United States will be considered.

Ballot Access:

Since a candidate must win a majority of electoral votes to become President in the general election, adoption of a standard that allows participation in the debates by candidates who are not on enough ballots to win in the electoral college would not further the League's purpose in sponsoring the debates, which is to educate the public about candidates who may become President in the general election.

Demonstrated significant voter interest and support:

By receiving the nomination of a major party, a candidate demonstrates a significant level of voter interest and support. The League will consider invitations to minor party and independent candidates on a case-by-case basis. The League will examine nation-wide public opinion polls as an indicator of voter support for and interest in minor party and independent candidates. Those candidates who receive a level of voter support in the polls of 15 percent or the level of support at least equal to that of a major party candidate will be invited to participate in the debates.

"The League reserves the right to reassess participation of non-major party candidates in the event of significant changes in circumstances during the debate period," Hinerfeld said.

Editors: A document describing the criteria in more detail is available from the Public Relations Department at the League's National office: 1730 M Street, N.W., Washington, D.C. 20036

August 10, 1980

LEAGUE OF WOMEN VOTERS EDUCATION FUND
CRITERIA FOR SELECTION OF CANDIDATES TO
PARTICIPATE IN THE 1980 PRESIDENTIAL
AND VICE-PRESIDENTIAL DEBATES

It is the intention of the League of Women Voters Education Fund to sponsor a series of nonpartisan debates among candidates for the offices of President and Vice President of the United States. There will be three Presidential Debates and one Vice-Presidential Debate. The LWVEF's purpose in sponsoring the debates is to educate the public about the issues in the campaign and the candidates' positions on those issues. At the same time, the Debates are intended to stimulate and to increase voter interest and participation in the general election. These purposes are best served by inviting to participate in the debates only those presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest.

The criteria for selecting candidates to participate in the debates have been drawn in light of the requirements of the Federal Election Commission and the purposes of the debates. Federal Election Commission regulations permit the LWVEF to sponsor nonpartisan candidate debates. The structure of such debates is left by the FEC "to the discretion" of the LWVEF "provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate

over another."

The LWVEF has adopted criteria for selection which it believes are:

- nonpartisan
- capable of objective application so that they will be as free as possible from varying interpretation, and
- understandable by the public.

The criteria set forth have been adopted after careful consideration by the Board of Trustees. In its deliberations, the Board was fortunate to have available to it the views of its Advisory Committee, a group of 24 prominent citizens having diverse backgrounds and interests.

All participants must meet the League's criteria to ensure that the Debates further the LWVEF's purposes. Accordingly, the LWVEF will invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will be invited to participate in the Vice-Presidential Debate. The participation of non-major party candidates will be determined on a case-by-case basis.

There are three basic criteria for inviting Presidential candidates to debate: (1) constitutional eligibility; (2) ballot accessibility; and (3) demonstrated significant voter support and interest.

Based on these criteria, the LWVEF will determine in late August whom to invite to the debate series. The running mates of presidential candidates invited to participate in the debates automatically will be eligible to participate in the debate for vice-presidential candidates. In addition, throughout the debate series, the LWVEF will retain the option to reassess the participa-

tion of non-major party candidates in the event of significantly changed circumstances. The LWVEF will do so in order to determine whether any additional candidates, who did not satisfy the criteria in late August, will be invited to participate in the second and third Presidential Debate or whether future participation by a candidate would no longer advance the purposes of the debates.

CRITERIA FOR SELECTION OF
PRESIDENTIAL CANDIDATES
INVITED TO DEBATE

I. Constitutional Eligibility Criterion.

Only those candidates who meet the eligibility requirements of Article II, Section 1, of the Constitution will be invited to participate in the Debates since the purposes of the LWVEF would not be served by permitting participation of candidates who are ineligible to become President or Vice President.

II. Ballot Access Criterion.

1. A presidential candidate must be on the ballot in a sufficient number of states to have a mathematical possibility of winning a majority of votes (270) in the Electoral College.

Explanation: The LWVEF's purpose in sponsoring the debates is to educate the public about candidates who may become President in the general election. A candidate must win a majority of electoral votes to be elected. Adoption of a standard that allows participation in the debates by candidates who are not on enough ballots to win in the Electoral College would not further that purpose. Thus, although a candidate with less than a majority in the Electoral College could win in an election decided by the House of Representatives, the purpose of the Debates is to educate the electorate about the choice it must make in November, not the members of the House of Representatives who would elect the

President in the unlikely event that no candidate wins a majority in the Electoral College. On the other hand, a standard that requires a candidate to be on the ballot in more states than are necessary to secure 270 electoral votes exceeds the constitutional minimum and appears, therefore, to be unduly harsh. Most members of the Advisory Committee also suggested this standard.

2. When the LWVEF decides whom to invite to debate, it is possible that in a number of states there will be no clear indication of candidate ballot status. In some states, a candidate may have filed the requisite number of signatures but not be officially certified on the ballot. In others, there may be legal challenges to (1) early filing deadlines and (2) independent and third party candidate petitions. In addition, candidates still may be in the process of qualifying to be on ballots when the LWVEF is making its decisions on participants.

- a. The LWVEF will request selected non-major party candidates ^{1/} interested in participating in the Debates to provide it with reasonable assurances that they will meet the ballot

1/The non-major party candidates to be invited to demonstrate that they meet the ballot access criterion are those candidates who are required to file quarterly financial reports with the Federal Election Commission, who have indicated that they meet the financial threshold established by the FECA, and who have not formally terminated their candidacies.

The Federal Election Campaign Act defines a major party as a political party whose nominee for the Presidency received twenty-five percent or more of the popular vote in the preceding Presidential election. 26 U.S.C. § 9002 (6).

-5-

access criterion by the date of the election. The LWVEF will then assess whether the candidate is likely to qualify, taking into account, for example, the number of signatures already collected, the extent of the candidate's past efforts to qualify, and the likelihood that the candidate's planned efforts will be successful. To the extent indicated, the LWVEF will confirm with appropriate state officials the facts presented to it.

- b. In states where early filing deadlines have barred candidates from the ballot, state law will be respected unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.
- c. In states where a candidate appears to have qualified for the ballot, but the candidate's right to remain on the ballot is being challenged, certification by the appropriate state official will be conclusive unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.

Explanation: The LWVEF will not require candidates to be qualified on the requisite number of ballots at the times it needs to issue invitations to debate. This is because the law in some states permits candidates to qualify to be on the ballot after the times that the LWVEF will need to make its decisions. The LWVEF will not require candidates to meet a more onerous ballot access criterion than that required by the states themselves -- what the LWVEF seeks to ascertain by this criterion is whether a presidential candidate has a possibility of winning a general election in November, not in August or September.

III. Demonstrated Significant Voter Support and Interest Criterion.

In 1976, seven candidates eligible to become President were on the ballots in enough states to have a theoretical possibility of winning. Not all of them, however, were significant candidates. Meeting the above standards does not, therefore, necessarily mean that a candidate will be invited to participate in the 1980 debates. The LWVEF also will require that Presidential candidates have significant voter support and interest. "Significant" does not mean that a candidate is raising issues different from those raised by other candidates or that the candidate's views on already-defined issues may differ from those of other candidates. The definition of "significant" is based on magnitude of voter support for and voter interest in a person's candidacy.

1. Candidates invited to debate must either be a nominee of a major political party as defined in the Federal Election Campaign Act or meet LWVEF standards for demonstrated voter support and interest.

Explanation: There is ample precedent for treating the candidates of major parties differently from non-major party candidates. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court found that the Constitution did not require the government to treat all presidential candidates the same for public financing purposes. Major party nominees already have demonstrated significant voter support and interest by virtue of their nomination. Non-major party candidates, however, have not met any similar test. It is necessary, therefore, for the LWVEF to ascertain whether non-major party presidential candidates have the support of a significant portion of the electorate in addition to their being eligible for office and theoretically capable of winning the general election.

2. The LWVEF will rely on nationwide public opinion polls to determine voter support and interest.

Explanation: Although public opinion polls are not necessarily accurate predictors of future voting behavior, they present the best indicator of existing voter support for and voter interest in non-major party candidates at any given time during the elective process. There are other indicators, such as number of contributors, amounts of funds raised, and media attention, which also may indicate voter support and interest. These other indicators are more difficult to interpret and apply, and they measure less directly than national opinion polls voter support and interest. Other possible indicators of voter support and interest, such as petition requirements, place an unnecessary burden on non-major party presidential candidates.

3. An assessment of voter support and interest will be based on data derived from nationwide polling samples provided by several well-respected public polling organizations.

4. The LWVEF will make its decisions based on the outcome of the most recent polls taken by each of the polling organizations selected by the LWVEF.

Explanation: Polls may vary, not only due to polling methods but also as a result of the dates on which they were taken. This is especially true when the measure of public opinion is taken in election campaigns. The best the LWVEF can hope to do is to ascertain current voter support and interest as close as is feasible to the dates on which it makes its decisions.

5. The LWVEF will rely on questions which are as close as possible to the classic "trial-heat" approach -- "If the election were held today, would you vote for A, B, C, D, etc.?"

Explanation: The principal purpose of the Debates that the LWVEF

proposes to sponsor is a more informed electorate. To achieve that purpose, the LWVEF must attempt to ascertain which candidates the electorate regards as serious candidates for its vote. Identification of such candidates is most readily ascertained by the "trial-heat" type question proposed.

6. In order to participate in the Debates, a non-major party candidate must receive a level of voter support of fifteen percent or the level of voter support received by a major party candidate, whichever is lower.

Explanation: Advisory Committee members suggested voter support threshold levels ranging between fifteen and twenty-five percent, and the Board concluded that any figure within this range would be reasonable. After consideration of a number of factors, including the records of public opinion polls in previous presidential elections and their relationship to actual election results, the substantial obstacles faced by non-major party candidates and variations among public opinion polling techniques and the precision of their results, the Board decided to adopt the fifteen percent level of support or the level of support that a major candidate receives for the following reasons. First, non-major party candidates who reach even a fifteen percent level of support, despite the substantial odds facing them, should be regarded as significant forces in the election. In addition, we also found it appropriate to include non-major party candidates whose showing in the polls is equal to that of a major party candidate. The ability to garner such a level of support suggests the candidate's presence in the Debates would further the LWVEF's purposes/ ^{for the debates.} On the other hand, to lower the fifteen percent threshold in the absence of a comparable lower level of voter support for a major party candidate could result in participation by candidates who would not further the LWVEF's purposes. Their parti-

icipation would, moreover, decrease the time available to clearly significant candidates to set forth their views and differences in the Debates. The LWVEF recognizes that each additional candidate invited to the debates will diminish the other candidates' ability to make their views known.

7. The procedure adopted for testing whether a candidate meets the voter support requirement gives all the active, selected^{2/} non-major party candidates an opportunity to satisfy the requirement. The LWVEF will look at the nationwide results of the most recent polls taken by each of the major polling organizations selected by the League. All non-major party candidates who receive the requisite level of voter support of fifteen percent or the level of support received by major party candidates, whichever is lower, will be invited.

VICE-PRESIDENTIAL CANDIDATES

Other than being required to possess the personal qualifications to become President, the running mates designated by the participants in the Presidential Debates will be included in the Vice-presidential Debate.

^{2/}See page 5, fn. 1

Carter Sets New Debate Terms

By Peter Elkind
Washington Post Staff Writer

The Carter administration set new terms yesterday for the upcoming presidential debates, insisting that the first confrontation include only President Carter and Republican nominee Ronald Reagan.

In a television appearance yesterday, White House chief of staff Jack Watson said Carter believes it "essential" to have a debate "drawn sharply to show the contrast between the two men and the two parties." Asked whether Carter would insist that the first debate be limited to himself and Reagan, Watson said: "Yes, yes, he would."

Yesterday's announcement was the latest installment in an on-again, off-again effort to isolate independent presidential candidate John B. Anderson by Carter aides fearful that Anderson's candidacy will hurt the president.

The League of Women Voters, which has scheduled three presidential debates—the first for Sept. 18 in Baltimore—has said it will include Anderson if he has a 15 percent rating in the popularity polls by Sept. 10.

But Watson suggested on "Face the Nation" (CBS, WDCM) that Carter might meet Reagan in a head-to-head debate before Sept. 18—and perhaps not participate in any of the league debates.

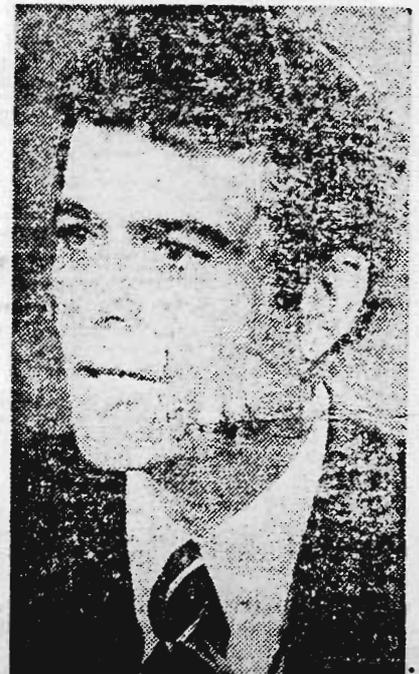
Saying the Carter camp "would prefer the debates to begin earlier," Watson said invitations from other groups for Reagan-Carter meetings before then are now "under consideration."

Watson said Carter would be willing to debate other candidates—including Anderson—in later meetings.

The league "does not have any franchise on presidential debates," said Watson. "The president has made no commitment whatsoever with the league thus far."

Details about the time, location, format and number of the debates are "items to be negotiated, not mandated," said a Carter-Mondale campaign spokesman.

The league official coordinating the debates said yesterday that "there is a certain amount of flexibility" in the group's arrangements, but that



JACK WATSON

... other sponsors being considered

See DEBATE, A4, Col. 4

DEBATE, From A1

the rules that could result in Anderson's participation would not be changed.

"We've set our criteria," said Ruth Hinerfeld, head of the league's education fund. Hinerfeld said it would be impossible for the league to reschedule its first debate earlier than Sept. 18.

The league official also said the president had committed himself, at the league's national convention May 5, to participate in the debates. "When asked directly if he would participate, he said 'yes,'" said Hinerfeld.

The Baltimore Sun reported yesterday, however, that Reagan and Carter strategists have begun negotiations for a one-on-one session in early September that could force the cancellation of the league's Sept. 18 debate, scheduled to take place in Baltimore. The prospects for the Baltimore debate are now "50-50 at best," an unidentified Carter campaign official told the newspaper.

Among the prospective alternative debate sponsors are the St. Petersburg Times, the Des Moines Register, and, in possible joint efforts, the Ladies Home Journal with the Women's Economic Roundtable, and Black Enterprise magazine with the Joint Center for Political Studies. It is not known if any of the groups would accept Carter's demand that the first debate include only himself and Reagan.

The Carter camp has tried for months to block a three-way debate that would include Anderson. The effort has been motivated by a belief that the ideologically moderate Illinois congressman would draw more votes from Carter than from the conservative Reagan.

In late May, White House press secretary Jody Powell said Carter would not participate in any debates that included Anderson. Calling it a "fantasy" to believe that Anderson could be elected, Powell said, "It is not our intention to participate in debates with third, fourth, or fifth party candidates."

The statement was viewed as an effort to pressure the league, which sponsored the 1978 debates and was then formulating its rules for the 1980 sessions, to exclude Anderson.

The president stated his position on June 1, when he told a television interview panel: "I see no reason why I should debate against two Republicans, who had been active in the Republican Party, who have held positions of leadership in the Republican Party who have a Republican voting record."

But polls showed Carter's stance was unpopular, and less than two weeks later, he told reporters aboard Air Force One that he would consider debating Anderson, as long as it didn't interfere with a head-to-head confrontation with Reagan.

In August, the league announced its qualifying rules for the debates.

Carter administration officials reportedly have been annoyed by the league's ruling, particularly its decision to give Anderson, whose support has been sagging, until Sept. 10 to achieve the 15 percent rating.

Carter's advisers reportedly believe they would fare better with Reagan in a one-on-one encounter, which would keep the Republican nominee from adopting the above-the-battle posture

that he used successfully in multi-candidate GOP debates during the primary campaign.

Anderson, responding yesterday to Carter's position, accused the president's advisers of trying "to manipulate the debates in order to benefit Jimmy Carter, even if it comes at the expense of the public." Senior officials in the Reagan campaign were not available for comment.

Will Voters League Silence Anderson To Please Carter?

By ALBERT R. HUNT

WASHINGTON—Ruth Hinerfeld, sitting in her tastefully decorated office here, doesn't look like a political boss, but she may be one.

Ms. Hinerfeld is president of the League of Women Voters, the organization scheduled to hold the presidential campaign debates this fall. In this role, the league will do much to determine the shape of the 1980 presidential election. "We know this is a serious responsibility and a tough job," says Ms. Hinerfeld.

This job has been complicated considerably by President Carter's shifting—and still-evasive—position on campaign debates. A few weeks ago he handed the league an ultimatum: either exclude independent candidate John Anderson from the debates or the President won't participate. By contrast, Republican candidate Ronald Reagan says he'll join in any debate format. This week, after polls showed that public opinion was turning against Mr. Carter on this issue, he modified his position: he said he might debate Mr. Anderson separately, but he still ruled out any three-way debate.

A series of two-man debates—the President vs. Mr. Reagan, the President vs. Mr. Anderson, Mr. Reagan vs. Mr. Anderson—would plainly be ludicrous if a three-way contest for the White House developed. And if the President went ahead with his latest suggestion, it's not impossible that he might debate Mr. Reagan one-on-one and never quite find time for Mr. Anderson.

Jimmy Carter's purpose in avoiding a three-way debate is clear: he figures John Anderson might take more votes from him than from Mr. Reagan. Thus he wants to avoid any forum that would give the independent candidate more exposure and more credibility. So the critical question now is whether the League of Women Voters, which sponsored the 1976 presidential campaign debates, will decide this year to invite Mr. Anderson to take part in three-way debates. This could be one of the most profoundly important decisions affecting the presidential race.

The Carterites calculate that the league, which has been losing membership, desperately needs the prestige of the debates and thus will feel compelled to bow to White House pressure against a three-way confrontation. Privately, some Carter supporters predict there would be other willing sponsors of a two-man debate if the League of Women Voters doesn't give in to the President's threat. "They (the league) can't afford to lose this forum," contends one Carter strategist.

But league officials insist they won't be intimidated. "The one thing there's a national consensus on in this country is a sense of fair play and we won't ignore that," says Ms. Hinerfeld. "I don't think we will be cowed by the possibility someone won't show up."

To establish criteria for the format of the debates, including standards for deciding who'll be invited, the league has commissioned an advisory panel of two dozen members, co-chaired by the respected Democratic lawyer Newton Minow and prominent Republican activist Anne Armstrong.

Although the advisory panel won't hold its first meeting until next month, certain guidelines seem sure to be approved. Any candidate outside the major parties must at least be on the ballot in most states and must have an active campaign in many of them. "A prerequisite should be that a candidate theoretically has a chance to win the election," says Mr. Minow.

That standard might include Mr. Anderson but it also would include several other aspirants, notably Libertarian Party candidate Edward Clark, who already has met the legal requirements for ballot status in 32 states, and possibly environmentalist Barry Commoner of the Citizens Party.

So league officials are considering other ways to limit the number of debaters. Another criterion likely to be applied to the candidates will be their support in the public-opinion polls. "There probably is no other objective measurement of popular standing," notes Ms. Hinerfeld. That would make it easier to exclude Messrs. Clark and Commoner; they have yet to register any significant support on public-opinion polls.

* * *

But John Anderson is a different matter. National polls show him consistently getting between 20% and 25% in a race against Jimmy Carter and Ronald Reagan. Moreover, leading politicians of both parties in states ranging from Massachusetts to New York to Oregon contend that, as of now, Mr. Anderson has a distinct shot at winning those states in November.

Still, some observers claim that to highlight the Anderson effort in a nationally televised debate would do grave damage to the two-party system, and the league ought to consider this prospect. Ms. Armstrong, for one, says, "This colors my thinking. . . . There would have to be very significant support for any candidate to be elevated on par with the major-party candidates." But Ms. Armstrong concedes, "as firmly as I believe in the two-party system, this shouldn't be locked in concrete (for the debates) if there are other candidates with significant support."

Were the Anderson campaign to stumble seriously, of course, the league's decision would become fairly simple. But if, two months from now, Mr. Anderson still is hovering around 20% in the polls, is qualifying for major state ballots, has raised \$4 million to \$5 million and remains a strong force in the presidential picture, the situation will be quite different. Under those conditions, it would be a travesty to argue that he lacks any "significant" support.

Then the leaders of the League of Women Voters would show whether they deserve to be entrusted with their enormous responsibility. Would they call Jimmy Carter's bluff and insist on including Mr. Anderson in three-way debates?

If they did, how would the White House react? If Mr. Carter were trailing in the polls then and needed a confrontation with his rivals, it's a good bet that he'd swallow his misgivings and show up to debate.

Anderson Warns President on Exclusion From Debate

By **WARREN WEAVER Jr.**
Special to The New York Times

MINNEAPOLIS, Aug. 22 — John B. Anderson served notice today that he would make a major political issue of any attempt by President Carter to stage a campaign debate with Ronald Reagan that did not also include him.

The independent candidate accused Mr. Carter of making "frantic behind-the-scenes efforts" to arrange for a debate with his Republican rival under rules that would not require the inclusion of Mr. Anderson.

Mr. Anderson charged that the President was "narrowly partisan in his approach to the public's right to know." He threatened to talk about freedom of political expression "from now until Nov. 4" if agreement is reached on a two-candidate debate.

The League of Women Voters has decided to include in its three television debates between the major-party Presidential candidates any challenger who

achieves 15 percent of the vote in national polls by Sept. 10, eight days before the first debate is to be held in Baltimore.

Recent Drop in Polls

Most of Mr. Anderson's poll ratings ran above 15 percent until recently, when most fell just below that mark, but he has predicted they will rise in the next 10 days and qualify him for inclusion.

Carter agents were reported yesterday to be attempting to set up a debate at a university in the South, with the sponsor agreeing to limit participation to the two major party candidates. At a news conference here this morning, Mr. Anderson compared this maneuver to the way the President "wriggled out of a debate with Ted Kennedy after he was ahead" in the primary campaign.

After a rousing rally of 2,500 supporters here last night, Mr. Anderson predicted that his chances of carrying Minnesota in November were "excellent." A recent poll in the Minneapolis newspapers showed him tied with President Carter at

23 percent, both trailing Mr. Reagan, who had 37 percent.

Decision on Running Mate

The Illinois Congressman also insisted that he was still in the process of choosing his running mate, despite authoritative reports in his campaign organization that the Vice-Presidential candidate will be former Gov. Patrick J. Lucey of Wisconsin, a Democrat.

Mr. Anderson confirmed that he had spoken with Mr. Lucey on the telephone last night but said that a planned weekend visit to Wisconsin by his wife, Keke, was "coincidental." Asked if Mrs. Anderson would meet with Mrs. Lucey, he replied: "I don't know . . . that's possible."

The Anderson staff announced that he would make a five-day whistle-stop railroad tour from his home in Rockford, Ill., to Pittsburgh, beginning on the Labor Day weekend, with stops scheduled in Illinois, Indiana, Michigan, Ohio and Pennsylvania. The first stop is set for Madison, Wis., Mr. Lucey's hometown.

Appendix

TRUST AGREEMENTLEAGUE OF WOMEN VOTERS EDUCATION FUND

THIS TRUST AGREEMENT, made this 26 day of September, 1957, between the Founders named on the annexed Schedule A, and

Mrs. Werner J. Blanchard
 Mrs. Donald F. Bishop
 Mrs. Harold D. Dyke
 Mrs. John G. Lee
 Mrs. A. A. Treuhart

Trustees,

WITNESSETH:

Each Founder hereby irrevocably grants and transfers unto the Trustees the sum set opposite the name of the said Founder on the annexed Schedule A, to have and to hold unto themselves, their successors, and assigns, in trust nevertheless, upon the following uses and trusts:

ARTICLE IName

The name of the Trust shall be League of Women Voters Education Fund, hereinafter referred to as FUND.

ARTICLE IIPurpose of FUND

The FUND is organized and shall be operated exclusively for educational purposes, and for other charitable, scientific, and literary purposes. No part of the net earnings of the FUND shall inure to the benefit of any private shareholder or individual and no substantial part of the activities of the FUND shall be the carrying on of propaganda, or otherwise attempting, to influence legislation. Nor shall the FUND participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office or be partisan in its approach to political campaigns.

ARTICLE IIIBoard of Trustees

A. Organization. The affairs of the FUND shall be managed in their sole discretion, subject to the terms and conditions of this Agreement, by not less than five* Trustees, hereinafter referred to as TRUSTEES. The TRUSTEES shall select a Chairman from among their number, and shall adopt such rules for the management of the FUND as they may from time to time deem proper.

* as amended June 22, 1960.

B. Election Term. The term of office of TRUSTEES named herein shall continue until June 15, 19 Thereafter, TRUSTEES will be elected for two year terms, commencing in the of each even year, by the Board of Directors of the League of Women Voters of the United States, a District of Columbia corporation. TRUSTEES shall continue to serve with full authority until their successors are duly elected.

* as amended April 26, 1974.

C. Vacancies. Upon the death, resignation, removal or inability to serve of any TRUSTEE herein named or subsequently elected, a successor TRUSTEE shall be elected promptly by the Board of Directors of the League of Women Voters of the United States to serve for the unexpired term of the predecessor TRUSTEE. The remaining TRUSTEES shall promptly notify the President of the League of Women Voters upon the occurrence of a vacancy in the office of TRUSTEE. In the event of failure of the Board of Directors of the League of Women Voters of the United States to elect a successor TRUSTEE within 90 days after such notice, the remaining TRUSTEES of the FUND shall select a successor TRUSTEE to serve until a successor is duly elected by the Board of Directors of the League of Women Voters of the United States.

D. Annual Meetings. An annual meeting of the Board of Trustees of the FUND shall be held at Washington, D.C. on the fifteenth day of June of each year; provided, however, that the TRUSTEES may designate for the annual meeting a place other than Washington, D.C., or another date during the year, or both. At such annual meeting any affairs of the FUND may be acted upon and no notice is necessary.

E. Special Meetings. Special meetings of the Board of Trustees may be held upon ten days' written call by any two TRUSTEES. Such special meetings shall be held at Washington, D.C. (or at such other place for special meetings as may be designated by the Board of Trustees), at a time fixed by the TRUSTEES making the call. The notice of the call shall contain a brief statement of the business to be transacted at such meeting, and no other business may be transacted; provided, however, that notice of the nature of the business to be transacted and of the time and place of the meeting may be waived by written consent of all TRUSTEES and shall be deemed waived if all TRUSTEES are present.

F. Quorum. A majority of the Board of Trustees shall constitute a quorum for the transaction of business.

G. Voting. Each TRUSTEE shall have one vote, and the vote of a majority of the TRUSTEES present at a meeting of the Board of Trustees duly called and at which a quorum is present shall be necessary for the exercise of the powers of the Board of Trustees hereunder.

H. Voting by Mail, Etc. The Chairman of the Board of Trustees or any two TRUSTEES may submit any question in writing to each member of the Board of Trustees. Each TRUSTEE shall then vote Yes or No on the said question and shall transmit a signed copy of her vote to the Chairman. An affirmative or negative answer by a majority of all the TRUSTEES shall constitute effective action in the premises by the Board of Trustees, to the same effect as if such action had been taken at a meeting of the Board of Trustees duly called and at which a quorum was present.

I. Removal. Ground for removal of a TRUSTEE shall be participation in a political campaign on behalf of any candidate or other conduct which would cause a TRUSTEE to be ineligible to serve on the Board of Directors of

the League of Women Voters. Removal shall be by vote of a majority of the other TRUSTEES, and reacquisition of said vote by the Board of Directors of the League of Women Voters.

J. Annual and Interim Reports. The TRUSTEES shall submit an annual report of the finances and activities of the FUND to the Board of Directors of the League of Women Voters, and shall furnish the said Board of Directors such other reports as it may direct.

ARTICLE IV

Power of Trustees

The TRUSTEES, without application to any Court for more especial authority therefor, shall have full discretionary power in the management of the FUND:

A. To receive and accept gifts and donations from the general public or any other source for the purpose of the FUND, hereinabove expressed, and for administration in accordance with the provisions of this Trust Agreement.

B. To receive and accept for administration in accordance with the provisions of this Trust Agreement, gifts and donations from any source, for an express purpose; provided such purpose is within the scope of the purposes of the FUND hereinabove expressed.

The officers or trustees of the Education Fund may accept on its behalf, any designated contribution, gift or devise consistent with its educational purposes. Where consistent with such purposes, designated contributions by donors will be accepted, and designations honored, as to special funds, purposes or uses provided, however, that the FUND at all times reserves all rights over, interest in and control of such designated contributions and full discretion as to the ultimate expenditure or distribution of the contribution, whether or not in satisfaction of any specified fund, purpose or use. In the event the Education Fund should be the beneficiary of any gift, devise, or bequest, subject to conditions subsequent with respect to the administration or alienation of said property, it shall at all times act in a manner consistent with such conditions and the educational purposes to be served by such conditions. *

C. To disburse all funds of the FUND, whether received as gift, donation, or income, to effectuate any of the purposes of this FUND as hereinabove expressed.

D. To sell, without notice, at public or private sale, and to exchange, mortgage, lease, pledge, partition, appraise, apportion, divide in kind, borrow on, or hypothecate any and all of the trust funds and properties, whether realty or personalty, upon such terms and conditions as they may deem best, and in so doing to execute all necessary deeds or other instruments. No person dealing with the TRUSTEES shall be required to look to the application of any money or other property paid or transferred to the TRUSTEES.

E. To retain any properties, securities, or investments now or hereafter transferred to them and to invest and reinvest any such assets or any fund or moneys coming into their hands as TRUSTEES, in stocks, bonds, securities or other properties, real or personal, without being limited to investments

which are prescribed by law for trust funds and without liability on the TRUSTEES' part for any loss or depreciation in value of any such investments; provided, however, that the TRUSTEES shall not make investments with a view toward obtaining short-term trading profits.

F. To hold or register securities in their names as TRUSTEES, or in the name of their nominees, or to take and keep the same unregistered and to retain them in such condition that they will pass by delivery.

G. To borrow money for any purpose in connection with the administration of the trusts and to encumber or pledge all or any part of the trust properties as security therefor.

H. To pay all reasonable costs, charges, and expenses incurred in the administration of the trusts.

I. To pay from principal or income such assessments, expenses, or sums of money as the TRUSTEES deem expedient for the protection of any of the trust investments.

J. To employ such agents, attorneys, and counsel, including investment counsel, as may be reasonably necessary or desirable in managing, protecting, and investing the trust funds, and to pay them reasonable compensation therefor.

K. To contract with others and to stipulate in the contract or contracts against the personal liability of the TRUSTEES.

L. To vote, in person or by proxy, any stock held in trust and to exercise any and all rights of stockholders, bondholders, and security holders, with respect to any stocks, bonds, or other securities held in trust, including the exercise of subscription rights and conversion privileges, and to participate in consolidation, merger, reorganization, or financial readjustment of any corporation or corporations, including the exchange of securities and stock in connection therewith.

M. To defend suits at law or in equity or before any other bodies or tribunals, affecting the trust; to begin suits and prosecute the same to final judgment or decree; to compromise claims or suits or submit the same to arbitration; to maintain actions to foreclose mortgages which may at any time form part of the Trust or, in lieu of foreclosure, to accept deeds from the owners.

N. To do any and all other acts and things necessary, proper, or advisable to effectuate the purposes of the FUND.

Notwithstanding the foregoing grant of powers, the TRUSTEES shall not engage in any prohibited transaction within the meaning of Section 503 (c) of the Internal Revenue Code of 1954 (or the corresponding provisions of any subsequent United States Revenue Laws), nor shall they accumulate income in such manner as to involve a denial of tax exemption under Section 504 of the said Code (or the said corresponding provisions).

In the exercise of any of the powers herein conferred the TRUSTEES shall be free and wholly exonerated from liability on account of any honest error of judgment or by reason of acts or things done, suffered, or omitted in good faith and without willful default or neglect.

ARTICLE VFunds and Properties

A. Separation. The TRUSTEES shall keep all property of the trust as a separate and distinct fund and in such manner as to be identifiable and shall not intermingle such fund with their personal funds or funds for other purposes. In no event shall any funds or property of the FUND be used for the general purposes of the League of Women Voters, or for any purpose not hereinabove provided.

B. Depository. The cash funds of the FUND shall be kept in an account maintained in the name of the FUND in such depository as the TRUSTEES shall from time to time select. Such depository shall be hereby authorized to pay out from the funds on deposit on the signature of any individual who may from time to time be given a power of attorney for such purpose for or on behalf of the TRUSTEES, or upon the signature of any three TRUSTEES.

ARTICLE VICompensation

The TRUSTEES shall not be entitled to any compensation for services rendered as TRUSTEES, but a reasonable and proper compensation may be paid to any TRUSTEE acting in a professional capacity in behalf of the FUND.

ARTICLE VIIDuration

The duration of the FUND shall be perpetual, subject to termination only by vote of the Board of Directors of the League of Women Voters or by the following circumstances:

In the event of dissolution of the League of Women Voters of the United States, thereby making it impossible for the new TRUSTEES to be elected, the then existing Board of Trustees of the FUND shall become self-perpetuating. Thereafter, any vacancies resulting from resignation, death, or inability to serve shall be filled by majority vote of the remaining TRUSTEES. The FUND shall be automatically terminated upon failure of any such self-perpetuating Board of Trustees to fill any vacancy within a period of one year. Termination may also be effected by a unanimous vote of any such self-perpetuating Board of Trustees.

Upon termination of the FUND, the TRUSTEES shall distribute all of its assets to such non-profit charitable, scientific, literary, or educational organizations as are described in Section 501 (c) (3) of the Internal Revenue Code of 1954 (or the corresponding provisions of any subsequent United States Revenue Laws), and as shall in the opinion of the TRUSTEES be best able to effectuate the purposes of the FUND hereinabove expressed.

ARTICLE VIIIApplicable Law

The trust herein created shall be administered in the District of Columbia and to the extent feasible shall be kept in said District. It is the

intention of the parties hereto that this trust agreement shall in all respects be construed and interpreted according to the laws of the District of Columbia, and that the parties in all things in respect thereto be governed by such laws. This Article, however, shall not be deemed a limitation upon any of the powers of the TRUSTEES, or to prevent their investing in properties, real or personal, located outside the District of Columbia.

ARTICLE IX

Special Power of Trustees

The TRUSTEES shall have power, by unanimous action in writing, and subject to approval by the Board of Directors of the League of Women Voters (if the said organization is in existence), to make such clarifying, administrative, or other amendments to this Trust Agreement as are consistent with the purposes of this Trust; provided, however, that no amendment shall be made to ARTICLE II, relating to purpose, nor to ARTICLE VII, relating to duration, nor shall any such amendment grant to the TRUSTEES any power expressly denied to them in ARTICLE IV.

ARTICLE X

Acceptance

The TRUSTEES by joining in the execution of this Agreement signify their acceptance of the trust. The trust upon execution hereof shall be given effect as of the day and year first above written.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals on the succeeding pages on the day and year stated by their names.

Voter Education' Tracts Jeopardize Lobbies' Tax Exemptions

By Joanne Omang

Washington Post Staff Writer

The Internal Revenue Service has changed its rules to halt most of the "voter education" literature that is the stock in trade of the country's tax-exempt organizations.

In a 1978 action that affects elections for the first time this year, the IRS decided that most traditional voters' guides, candidate questionnaires and issue scoreboards are political tracts in disguise. Since groups that receive tax-deductible funding are prohibited from engaging in any political campaign activity, the voter education material is now banned too, on pain of loss of tax-deductible status.

The result, according to Joel Thomas, general counsel of the National Wildlife Federation, is that "the good guys" who support the nation's mind-boggling range of special interests are going unthanked for their efforts and are beginning to think the interest groups are ungrateful.

For example, a senator who wants to vote to expand wilderness areas in Alaska this week can expect to be

blasted in oil industry trade association missives to its members, since that kind of association is permitted some political activity. But the National Wildlife Federation won't be able to tell its 3.5 million members about it, Thomas said.

"These guys turn on us and say, 'Why can't you tell your people what we've done for you? I'm being killed and you're not helping,'" lamented federation vice president Oliver Hauck. "Their eyes glaze over when we try to explain the technical reasons."

The IRS first tried in early 1978 to ban all voters' guides, but revoked that after a major outcry led by the League of Women Voters. In June 1978, a new ruling softened the ban to allow publication of voters' guides on "major legislative issues" as long as they contain no editorial opinion or implication of approval or disapproval.

But questionnaires that concentrate only on "a narrow range" of issues were forbidden. That effectively prevents any special interest group from

evaluating the positions of politicians and candidates on its favorite issue or issues.

And so it should, said Howard Schoenfeld, special assistant for exempt organization matters at IRS.

"Why would an organization distribute a voters' guide on selected issues among the electorate during a campaign, if not to influence the voters?" he asked. "If there's a wide range of issues it's okay . . . It depends on the facts and circumstances of each case."

The ban on direct or indirect participation or intervention in political campaigns is for "charitable and educational" groups only and was tacked onto another bill in 1953 as an amendment on the Senate floor by the then minority leader, Lyndon B. Johnson.

Allegedly irked by opposition to his 1952 reelection from one nonprofit group, he got the measure passed with no committee scrutiny or floor debate. This leaves regulators very little legislative history for guidance on just what the ban means.

While it clearly prohibits endorse-

ments or denunciations, the ban was interpreted until 1978 to allow the "educational" newsletters that monitor congressional action on a group's concerns, as long as readers were allowed to draw their own conclusions.

"But now we're not allowed to tell our grass-roots people whom they can thank," said Dr. Elvis Stahr, counselor and past president of the National Audubon Society. "It's hard for our people who are interested in issues to know if they're accomplishing anything or not when they write in."

The United Church of Christ has appealed the 1978 ruling to the commissioner of internal revenue and will take the issue to court if the appeal is denied, according to UCC legislative counsel Barry W. Lynn. "Our constitutional rights haven't just been chilled, they've been frozen," he said.

The ruling is ambiguous in several respects, he said. It eliminates "narrow" questionnaires but does not define the term. "How narrow is narrow?" asked Maudine Cooper, Wash-

ington vice president of the National Urban League.

The Urban League, she said, has always published "the records of everyone, on the issues we're concerned with, and we'll keep doing it until we get an interpretation of the word 'narrow.'"

That could mean trouble with the IRS. In its 1978 ruling, the agency disallowed an unnamed conservation organization's voters' guide as too narrow, even though it covered a range of environmental questions.

What really irks the groups concerned is that industry trade associations can use part of their money for politicking while the nonprofit groups cannot.

Business leagues, chambers of commerce, real estate boards and boards of trade as well as trade associations like the National Coal Association and the Chemical Manufacturers Association all live like the smaller groups on tax-deductible dues from their member businesses.

But unlike the educational groups, the business groups may receive some nondeductible funding, pay taxes on

it and use it for political activity like naming their friends and enemies.

Taxwise, the two kinds of groups are equal, said Schoenfeld, pointing out: "In no case can a taxpayer get a deduction for payments to any association for political activity," over the \$50 individual contribution that everyone may deduct, he said.

Trying to explain this difference to members of Congress is further complicated by the difficult distinction between lobbying for legislation, which the educational groups may do, and political campaigning, which they may not do. That means, according to the IRS, that the groups may not inform their members whether the lobbying changed anyone's mind, for that would be endorsing candidates' views.

The constitutionality of the ban on charitable groups' political acts has been upheld several times in court, but Lynn of the United Church of Christ said his group's argument would be different.

It would focus, he said, on the provision of free speech rights to trade associations while the charitable groups are denied such rights.

Washington Post, 8/24/80, p. C6.

John Anderson and the League

POLL-TAKER PETER HART was right in his op-ed piece Friday taking issue with the criterion the League of Women Voters has established for participation in its presidential debates. Mr. Hart argued that the League's insistence that to qualify a candidate must have got 15 percent of the vote in various polls by certain fixed times wildly flatters the accuracy, the consistency and the significance of the poll-takers' product. "The use of survey research to determine who should participate in the 1980 presidential debates," he said, "is a perfect example of misuse of the tool of survey research. . . . There is no reason to believe that the next 80 days will find public opinion any more stable than it has been in the first 230 days of this year."

polls in their place to make his pitch. The National Council on Public Polls, which includes George Gallup and Louis Harris, issued a similar warning to the League yesterday.

Now, there are about a hundred and eighty ways of seeing this one—we are aware of that. The argument really concerns whether Independent candidate John B. Anderson will get to take part in the League-staged debates, and a lot of people who want him in and a lot who want him out feel the episode is pretty high-stakes stuff in this election. Therefore, it can be reasoned, the League needs to take precautionary measures, to seek protection in its objective-sounding criterion. But this strikes us, in any event, as a no-win situation for the League. It will not be able to satisfy all the morally toney claims made for and against inclusion by people who have something other than morally toney purposes.

It is also a perfect example of something else: the disinclination of practically everyone these days to make judgments and to take the heat for making them. Instead, we have the universal search, it seems, for the perfect automatic "system," the social science dodge. What it says, or seems to say, anyway, is this: Look, you may have a complaint or feel that the result was too generous to your opponent or too ungenerous to you, but we can't help it—that was the system and it was as objective as we knew how to make it. There is a general wash of science or science-ish-ness over all of this, a greatly misleading one; and that is why it was so useful for Mr. Hart, no basic denigrator of the

Politics, as that great German county chairman, the late Otto von Bismarck, once observed, is "not an exact science." We would take it further. Politics is not even an inexact science. And political judgments, while making use of such information as public-opinion polling can provide, should not be abandoned to computer printouts and percentage points and the rest. Does John Anderson qualify to participate in the debates? Why doesn't the League decide?

Peter D. Hart

The League Passes the Buck

It appears that the League of Women Voters does not adhere to Harry Truman's adage, "The buck stops here." The league's most recent ruling that participants in the presidential debates will be determined by the results of surveys of public opinion shows that it knows how to pass the buck: To qualify as a participant, a candidate must receive at least 15 percent of the vote in the polls. Under this criterion, George Wallace, who managed to win five states in the 1968 general election but who received only 13.5 percent of the popular vote, would not have qualified.

I believe the league's decision is both bad and wrong. If there is one lesson that has been learned during this campaign, it is that polls do not predict the future. They simply reveal the attitudes of the American people—attitudes that have changed again and again throughout this campaign—at a given point in time. Yet the league is ready to let the crucial decision of whom the American people will be allowed to hear in a presidential debate be determined by polls taken in August.

I have another, more fundamental objection: the American people seem to be looking for one particular quality in this presidential election: leadership. I find it ironic that the League of

"This use of survey research is a perfect example of misuse of the tool."

Women Voters has decided to provide followership—to let the polls determine who should be in the debates.

As a pollster who has been measuring public opinion for 15 years, I believe strongly that survey research does and should play an important role in our democratic society. However, the selection of participants for the debates is not one of the roles of polling. The polls have come in for much criticism in recent months, but I think much of this criticism should be aimed at those who misuse and misread the polls.

The use of survey research to determine who should participate in the 1980 presidential debates is a perfect example of misuse of the tool of survey research. It serves neither the league nor the polling industry well. During the past year, I have witnessed the volatility and unpredictability of the American people and of the polls. There is no reason to believe that the next 80 days will find public opinion any more stable than it has been in the first 230 days of this year. Nevertheless, the League of Women Voters has decided to let polls taken within a single period of time determine which candidates will be allowed to participate in its presidential debates.

Let us look at some of the pitfalls of using survey research for such a purpose:

- A sample size of 1,500 (the normal national sample) has a margin of error of plus or minus at least 2 percent, assuming the survey was conducted under the strictest methodological procedures. This means that a candidate who receives less than 17 percent of the vote in the survey could be well above or below the arbitrary 15 percent the league has defined. A candidate who received only 13 percent of the vote could also qualify under the margin of error. In other words, because of the margin of error, the league may include a candidate who should not qualify or it may eliminate one who should.

- A national survey ignores the fact that an independent candidate can significantly affect the Electoral College results because he may garner a great deal of support from one region or state.

- The survey could not be taken at a worse time—when the political process is most uncertain. The Democrats have just concluded their national convention, and it is likely that there may be some short-term distortion of voter attitudes at this time. Yet 30 days prior to the first debate, the league will determine who is to qualify.

- A single question determining the standing hardly provides a true understanding of election dynamics. We know from our own polling that some candidates who do not show up well in the current standings have great appeal to the voters, but one question will be enough for the league's purposes.

- There are a number of methodological questions that anyone in survey research will want answered before accepting the results of the survey: Is the survey interviewing only likely voters? How will the survey determine who is a likely voter? Will respondents be interviewed by telephone and, if so, how will the survey ensure that the type of voter who does not own a telephone is represented? If the sample is not a perfect microcosm of the voting universe, will the league use a weighting procedure? Will the weighted and unweighted figures be available?

Debates are necessary to structure a dialogue and to help the voters understand what an election is all about. A country that is groping to find its moorings badly needs a series of presidential debates in 1980, and the league provides a valuable service in sponsoring them.

But as Harry Truman said, "If you can't stand the heat, get out of the kitchen." If the league cannot stand the heat of the selection process, it should delegate this responsibility to others who are willing to make tough decisions.

The writer, a public opinion pollster, conducted the polls for Edward Kennedy's primary campaign and does professional polling for a large number of governors, senators and other politicians.

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Washington Post, 8/27/80, p. A1

Carter-Reagan Deadlock Roils Debate Plans

By Lee Lescaze

Washington Post Staff Writer

Disagreements between the Carter and Reagan campaigns yesterday raised doubts about whether the presidential debates will take place as envisioned by the League of Women Voters.

The president wants the first debate soon and wants it to be a head-to-head encounter with Ronald Reagan. Carter campaign chairman Robert S. Strauss said yesterday, Carter accepted an invitation from the National Press Club for a head-on debate early next month with Reagan; the Reagan camp said it had received the invitation but had not decided on a reply.

Reagan wants the first debate to take place later in the campaign and favors holding it under the criteria established by the league, which would permit independent candidate John B. Anderson to participate if he has at least 15 percent support in the polls on Sept. 10. Reagan also wants a head-to-head debate with Carter to come second.

The first debate is the focus of the deadlock because both campaign camps consider it by far the most important. It is almost certain to capture the largest television audience and set a pattern of sorts for any subsequent encounters among the presidential candidates.

James Baker, senior adviser to the Reagan campaign, mentioned another reason the initial debate is being highlighted. "It's terribly important to John Anderson," he said.

Anderson draws more support away from Carter than from Reagan, and a strong debate showing could boost Anderson's declining fortunes.

Strauss and Baker spoke to reporters after meeting for more than two hours in the national headquarters of the League of Women Voters here.

Each expressed confidence that debates would take place, but despite

See DEBATES, A4, Col. 4

United Auto Workers executive board endorses Carter for reelection. A3

Carter, Reagan Deadlocked on Debates

DEBATES, From A1

protestations that their discussions yesterday were friendly and helpful, it appeared that the two sides were no closer together when they finished than when they began.

"It took three or four meetings to get things [for the debates] worked out in 1976," Strauss noted.

On one major point it appeared that the two sides had been talking past each other.

Strauss and presidential press secretary Jody Powell said they had been unable to get an assurance that at least one of the debates would be between only Carter and Reagan.

Baker expressed surprise when that statement was repeated to him. "If we haven't given them that, we give it to them right now," he said. Reagan is on the record favoring a head-to-head debate as well as one including any other candidates who meet the league criteria.

It is the Carter forces' preference and "almost insistence," Strauss said, that a head-to-head debate be the first encounter. Baker was adamant that Reagan will not agree to any debate in advance of the first league-sponsored debate, which is scheduled for Sept. 18 in Baltimore.

Carter sought to embarrass Reagan into an earlier head-to-head meeting by accepting the invitation from the National Press Club. Powell announced yesterday that the president hopes Reagan will also accept the invitation and that the debate can be held as soon as possible.

Reagan wants the date of the initial league debate pushed back a few days because he has an important fundraiser in Texas on Sept. 16 and wants more time to travel to Baltimore, to prepare himself and to rest before the debate. The league said it has no objection to a change of date.

Carter would like the first debate to be moved ahead to the second week of September.

The two major candidates also disagree over how many debates should be held.

Baker said Reagan wants two presidential debates and one vice presidential debate. He held out the possibility that if negotiations remain difficult, there might be only one presidential debate.

Strauss said Carter wants as many debates as possible, under the league's sponsorship or that of others, and wants them held in all regions of the nation.

Baker said that his side doesn't want more than two debates because "then we'd spend the entire campaign debating." He said that as the challenger Reagan needs time to hold his own campaign events around the country.

In the first 16 days of September following the formal kick-off of the Reagan campaign, the challenger's schedule calls for him to spend eight days in Washington; five of them are days off.

Carter officials expressed concern that Reagan was dragging out the planning discussions in order to make sure there would be time only for one or two debates.

The league, which organized the 1976 presidential debates, announced a series of three presidential debates — in Baltimore, Cleveland and Portland, Ore., and one vice presidential debate, in Louisville.

Ruth Hinerfield, head of the league's Education Fund, said she will call a board of directors meeting as soon as possible to discuss the problems raised at today's meeting.

She said the league could change its debate rules so that Anderson, should he qualify, would take part in the first debate, but not in a second.

The board will also discuss the number of debates, timing, and format; she said.

Anderson expressed outrage at Carter's efforts to arrange a two-man debate with Reagan. Anderson accused Carter of "political arrogance" for thinking "he has a right to tell the American people . . . who they ought to listen to in a debate."

Anderson said he was disappointed that the league had not invited him to participate in the planning negotiations. The Anderson campaign manager, Mike MacLeod, said his staff would be in touch with National Press Club officials today and ask them to reconsider the club's two-man debate plans.

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS) MUR No. 1287
EDUCATIONAL FUND)

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RECEIVED
OFFICE OF THE
GENERAL COUNSEL

RESPONSE OF RUTH J. HINERFELD
AND THE
LEAGUE OF WOMEN VOTERS EDUCATION FUND^{1/}

INTRODUCTION

Barry Commoner, The Citizens Party candidate for President, has filed a complaint alleging that the Presidential and Vice-Presidential candidate debates that the League of Women Voters Education Fund (LWVEF) intends to sponsor in September and October of 1980 violate the Federal Election Campaign Act and the regulations of the Federal Election Commission. More specifically, he claims that the criteria established by the LWVEF for selecting debate participants are partisan in structure and effect and that the LWVEF will invite candidates to participate based on partisan considerations.^{2/}

The allegations have no merit. The determination to limit participation in the LWVEF-sponsored debates to significant candidates and the criteria the LWVEF has adopted are nonpartisan. Moreover, the adoption of the criteria and any decision to invite or not to invite candidates to participate have been, and will continue to be, the LWVEF's independent actions made solely in light of its overriding purpose of educating the electorate about the issues in the campaign and the candidates' positions on those issues.

1/ This response is submitted pursuant to the provisions of the Federal Election Campaign Act, 2 U.S.C. § 437g(a)(1), and of the regulations of the Federal Election Commission, 11 C.F.R. § 111.6.

2/ Although Mr. Commoner names Ruth J. Hinerfeld as a respondent in his complaint, he does not allege that Ms. Hinerfeld has in any way violated the Act or regulations. Moreover, as Ms. Hinerfeld's affidavit shows, the LWVEF is the sole sponsor of the 1980 debates. Affidavit of Ruth J. Hinerfeld, ¶ 1. Accordingly, we will address only the question whether the LWVEF has acted improperly in staging the debates.

There is, therefore, no reason to believe that any violation of the Act or the Commission's regulations has occurred, or is about to occur, in connection with the LWVEF's sponsorship of the 1980 debates. Accordingly, Mr. Commoner's complaint should be dismissed.

STATEMENT OF FACTS

This matter arises out of the LWVEF's planned sponsorship of three Presidential candidate debates and one Vice-Presidential candidate debate scheduled to take place this year in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). The debates will be staged pursuant to § 110.13 of the Commission's regulations, a provision with which the LWVEF has considerable familiarity. Since its sponsorship of the 1976 Presidential and Vice-Presidential candidate debates, the LWVEF worked for the promulgation by the Commission of a rule that, like § 110.13, would permit its sponsorship of public debates among candidates for federal office with funds solicited by it for that purpose. It submitted pages of testimony and comments to the Commission in connection with rule-making proceedings that spanned a three-year period.^{1/} Affidavit of Ruth J. Hinerfeld, ¶¶ 7, 20.^{2/}

Section 110.13(a) of the regulations permits the sponsorship of nonpartisan candidate debates by an organization, such as the LWVEF, which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code and which does not

^{1/} Indeed, it would not be hyperbole to state that § 110.13 of the regulations was drafted with organizations like the LWVEF in mind.

^{2/} This affidavit is attached hereto as Appendix A.

support or oppose political candidates or political parties. Under § 110.13(b), the structure of the debates is left "to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another."

The LWVEF has, of course, a long tradition of nonpartisanship which it values, and which governs all of its activities. Moreover, because the LWVEF is a nonpartisan, educational trust, Article II of its Trust Agreement and its status as a § 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of the LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process. Since its establishment in 1957, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

Thus, when the regulations became effective on April 1, 1980, the LWVEF undertook the task of structuring the 1980 debates in light of: (1) its nonpartisan tradition, its Trust Agreement, § 501(c)(3) of the Internal Revenue Code, and the nonpartisan requirement of the FEC's regulations; and (2) its exclusive educational purpose of providing information about Presidential and Vice-Presidential candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the

LWVEF did not believe that participation in the debates necessarily should be limited to only major party candidates, as is clearly permitted under the regulations, the LWVEF determined that its purpose of educating the electorate in a nonpartisan manner would best be accomplished by developing criteria that would permit participation in the debates by both major party and non-major party significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 8.

Before establishing these criteria, the LWVEF received input from the Advisory Committee that it had established. The Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations,^{1/} was set up for the purpose of providing advice and ideas with respect to the debates. It was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone, and no one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted. Affidavit of Ruth J. Hinerfeld, ¶ 9.

On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates".^{2/} The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone; this decision was not in any way affected by the positions or views of any of the Presidential candidates, their running mates, or their

1/ The members of the Advisory Committee are named in Attachment A to the Affidavit of Ruth J. Hinerfeld.

2/ A copy of this document is attached to the Affidavit of Ruth J. Hinerfeld as Attachment B.

representatives. In addition, the LWVEF has had, and will have, exclusive responsibility for applying the criteria and in selecting participants. Affidavit of Ruth J. Hinerfeld, ¶ 10.

Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support. Affidavit of Ruth J. Hinerfeld, ¶ 11.

The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. Debates that are too lengthy or that include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 12.

In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support are: (1) nomination of a candidate by a major party; and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower. The 15 percent figure is exclusive of undecided respondents.^{1/} Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate with such a standing also should be considered significant and of sufficient interest to the electorate that his or her participation in a debate would be warranted. Affidavit of Ruth J. Hinerfeld, ¶ 13.

The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. The LWVEF did so in order to permit participation in the second or third Presidential debate by candidates who did not satisfy the criteria in early September and to permit exclusion of a previously invited candidate whose participation no longer would advance the purposes of the debates. Affidavit of Ruth J. Hinerfeld, ¶ 14.

^{1/} This means, for example, that in a poll where 10 percent of those polled were undecided, an actual showing of only 13.5 percent would be sufficient.

The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates. Affidavit of Ruth J. Hinerfeld, ¶ 15.

The LWVEF also concluded that the best test of voter interest in a candidate is the traditional trial-heat type question that asks simply and directly for whom the public would actually vote if the election were held today. Other possible questions that conceivably might have been asked involve a series of difficult and controversial hypothetical questions and were less likely to yield reliable

information about the question in which the LWVEF is interested, namely, the degree of support of, and interest in, particular candidates by the electorate as a whole. Affidavit of Ruth J. Hinerfeld, ¶ 16.

In deciding to adopt a 15 percent figure as the required level of support in the public opinion polls, the LWVEF recognized that there is no single magic number that separates significant from insignificant candidates. However, the 15 percent threshold figure, which was the lowest level of support suggested by any member of its Advisory Committee, was intended to take into account the fact that the results of polls are subject to a statistical margin of error and to other imperfections. Thus, the LWVEF recognized that the higher the threshold figure adopted, the more likely that the statistical margin of error would result in the exclusion of a candidate who is, in fact, significant. On the other hand, for the same reasons, it also took into account that a lower threshold would have increased the likelihood that candidates who are not significant would be included. Affidavit of Ruth J. Hinerfeld, ¶ 17.

The LWVEF therefore concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, provides a reasonable degree of confidence that statistical margins of error will not result in exclusion of candidates whose participation would advance the purposes of the debates. Conversely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate was not of sufficient interest to the

electorate to warrant participation in a debate with major party and other significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 18.

At the time the criteria were adopted, the members of the Board of Trustees knew, as did all informed citizens, that President Carter at one time had expressed his reluctance to participate in a debate with non-major party candidates. The LWVEF also was aware that several non-major party candidates wanted to participate in the debate series, and it anticipated that these candidates would object to whatever criteria the LWVEF established if their application resulted in non-participation. Affidavit of Ruth J. Hinerfeld, ¶ 21.

The LWVEF was, however, firmly committed to the belief that the debates should be structured so as to best serve the interests of the American electorate rather than what any particular candidate perceived as being in his own best interest. It remains committed to that belief, and it also believes that its candidate selection criteria fulfill that commitment. Affidavit of Ruth J. Hinerfeld, ¶ 22.

In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to all 6 non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The August 19 letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all prospective participants. Affidavit of Ruth J. Hinerfeld, ¶ 19.

Previously, on August 18, the LWVEF received a letter from counsel for the complainant in this proceeding objecting to the 15 percent standard and requesting the inclusion in the debates of Mr. Commoner and his running mate, LaDonna Harris.^{1/} This letter apparently was in response to the LWVEF's public announcement on August 10, of the candidate eligibility criteria. In a letter dated August 22, the LWVEF denied the request, explaining why it had selected the 15 percent standard and reaffirming its commitment to invite to debate any of the six non-major party candidates who satisfied its criteria.^{2/} On August 28, Mr. Commoner filed his complaint with the Commission.

By September 9, the LWVEF received the results of the several nationwide polls conducted during the periods August 27 and September 6 -- the most recent polls prior to that date. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14 to August 23.^{3/} The Committee also received the advice of Dr. Herbert Abelson, Mervin Field, and Lester Frankel, independent experts on polling.^{4/} Albert H. Cantril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Field to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel. Affidavit of Ruth J. Hinerfeld, ¶ 23.

1/ A copy of this letter is attached to the complaint.

2/ A copy of this letter is attached hereto as Appendix B.

3/ The results of these polls are set forth in a chart appended to Affidavit of Ruth J. Hinerfeld as Attachment C.

4/ The qualifications of these experts are set forth in Affidavit of Ruth J. Hinerfeld, ¶ 23.

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These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher."^{1/} Affidavit of Ruth J. Hinerfeld, ¶ 24.

After careful consideration, the LWVEF Board of Trustees concluded that of the six non-major party candidates to whom letters were sent on August 19, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in excess of 15 percent in the polls.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support. Affidavit of Ruth J. Hinerfeld, ¶ 25.

Accordingly, on September 9, 1980, the LWVEF invited Mr. Anderson to participate in the 1980 debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF's invitations. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore. The LWVEF expects to proceed with the Baltimore debate whether or not President Carter ultimately agrees to participate. Affidavit of Ruth J. Hinerfeld, ¶¶ 26, 27.

^{1/} The statement issued by these experts is appended to Affidavit of Ruth J. Hinerfeld as Attachment D.

^{2/} This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

The insignificant levels of voter support for non-major party candidates other than John Anderson are also shown consistently in the results reported not only in seven of the eight polls used in the LWVEF's determination which reported results for non-major party candidates, but also in three earlier polls. In nine polls taken between August 5 and September 6, 1980, the reported results for no non-major party candidate other than Mr. Anderson ever exceeded one percent and the reported result in the tenth poll for all such candidates other than Mr. Anderson did not exceed three percent.^{1/}

ARGUMENT

Mr. Commoner claims: (1) that the LWVEF's candidate selection criteria are partisan because major party candidates are treated differently from non-major party candidates; and (2) that the fifteen percent standard for the demonstration of voter support and interest by non-major party candidates is improper. These claims are unfounded.

Mr. Commoner's claims rest upon both an erroneous understanding of the Commission's regulations and an incorrect understanding of the facts. In essence, Mr. Commoner asks the Commission to misapply its own regulations, and to ignore the Explanation and Justification accompanying § 110.13, which the Commission provided for the very purpose of explaining the meaning of that section. In support of this request, Mr. Commoner serves up inaccurate and incomplete information and pure speculation.

As we demonstrate below, the LWVEF's candidate selection criteria are nonpartisan and in full compliance with the letter and the spirit of the Commission's regulations.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment E.

First, under Commission regulations, debate sponsors may treat major party candidates differently from non-major party candidates and limit participation in debates to significant candidates. Second, the decision of the LWVEF that its voter support and interest criterion can be satisfied either by nomination by a major party, as defined in the Federal Election Campaign Act, or by a showing of fifteen percent in public opinion polls in the case of non-major party candidates is a reasonable method of separating significant from non-significant candidates. Third, in any case, it is abundantly clear that Mr. Commoner does not meet any reasonable test of significance. With a one percent showing in numerous public opinion polls, his candidacy properly may be regarded as "hopeless." Buckley v. Valeo, 424 U.S. 1, 96 (1976). In addition, it is clear that the LWVEF has applied its criteria in a nonpartisan fashion and in light of its overriding purpose of educating the American electorate.

Finally, Mr. Commoner mistakenly brings to the attention of the Commission Constitutional questions, and erroneously claims that the LWVEF has violated his Constitutional rights. Although such questions are beyond the jurisdiction of the Commission, we will address them briefly here. Under applicable law, it is clear that: (1) the LWVEF sponsorship of candidate debates is a purely private matter, and (2) even if the LWVEF could be held to the exacting standards of the Constitution, its candidate selection criteria would pass muster. Moreover, any Government action that would reduce the discretion of the LWVEF beyond that required by its nonpartisan obligation would present far more serious Constitutional questions than those raised by Mr. Commoner's complaint.

I. THERE IS NO REASON TO BELIEVE THAT THE
LWVEF HAS VIOLATED, OR IS ABOUT TO VIOLATE,
THE ACT OR THE COMMISSION'S REGULATIONS

Section 110.13 of the Commission's debate regulations is the provision that sets forth who may sponsor a debate supported by corporate and union contributions, and the structure of such a debate. It provides, inter alia, that "[a] non-profit organization which is exempt from federal taxation under 26 U.S.C. § 501(c)(3) . . . and which does not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with 11 CFR 110.13(b) and 114.4(e)." 11 C.F.R. § 110.13(a). The LWVEF, which has a 23 year history of non-partisanship, is exempt from taxation under § 501(c)(3) of the Internal Revenue Code. Accordingly, it may use its funds and those donated by corporations and labor unions to sponsor nonpartisan candidate debates.^{1/} 11 C.F.R. § 114.4(e).

The "structure" of such debates is expressly "left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." 11 C.F.R. § 110.13(b). For the reasons that follow, the LWVEF has complied with the only requirement at issue here -- the requirement of nonpartisanship.

^{1/} Mr. Commoner's assertion that the 1980 debates violate the regulations of the Internal Revenue Service and the Trust Agreement of the LWVEF is unsupported and conclusory. Just as the 1980 debates satisfy the nonpartisan requirements of the Commission's regulations, so do they comply fully with the LWVEF's Trust Agreement and the rules and regulations of the Internal Revenue Service. Indeed, during the 23 years of its existence, the LWVEF has been keenly aware that it must maintain and strictly adhere to a policy of nonpartisanship to comply with Article II of its Trust Agreement as well as the requirements of the Internal Revenue Code. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

A. The LWVEF Debates Comply Fully With the Nonpartisan Requirements of the Debate Regulations.

1. The LWVEF May Limit Participation in the Debate to Significant Candidates.

In promulgating the debate regulations, the Commission expressly recognized that "[a] nonpartisan candidate debate . . . provides a forum for significant candidates to communicate their views to the public." Explanation and Justification, 44 Fed. Reg. 76734 (Dec. 27, 1979) (emphasis added). In providing such a forum, debate sponsors may, in accordance with the express provisions of 11 C.F.R. § 110.13(b)(2), exercise "discretion" so long as debates "are nonpartisan in that they do not promote or advance one candidate over another." According to the Commission, "[t]he primary question in determining nonpartisanship is the selection of candidates to participate in the debates." Explanation and Justification, 44 Fed. Reg. 76735.

The LWVEF criteria for inviting candidates to participate in the debates it plans to sponsor comply with the letter and the spirit of the Commission's regulations. In formulating and adopting them, the LWVEF exercised its "discretion" and attempted, in good faith, to identify "significant candidates" in order to educate the electorate and stimulate interest in the general election. They "are nonpartisan in that they do not promote or advance one candidate over another."

Mr. Commoner urges, however, that the LWVEF has improperly exercised its discretion in determining who is a significant candidate. Among other things, citing Nashua Telegraph, MURs 1167, 1168, 1170, First General Counsel's Report (Feb. 20, 1980), he asserts: "A debate involving only the two major party candidates is not nonpartisan but bi-partisan." Complaint, p. 7. Mr. Commoner is wrong.

In promulgating the debate regulations, the Commission stated that "[a]n organization staging a debate may invite candidates to participate . . . on the basis of party affiliation," and "that such an organization could stage a general election debate to which only major party candidates are invited." Explanation and Justification, 44 Fed. Reg. 76735. In testimony before Congress, moreover, both the former and present Chairmen of the Commission reaffirmed that debates could be so limited. Repeal of "Equal Time" Requirements: Hearings on H.R. 6103 before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2nd Sess. 14 (1980). If the LWVEF properly may invite to participate in a debate only the two major party nominees, then it also may invite to participate only these two candidates and any other candidate that it, in good faith, concludes is significant.

That debate sponsors may exercise considerable latitude in selecting debate participants is supported by Congressional reaction to the Nashua Telegraph case upon which Mr. Commoner relies. As the Chairman of the House Committee on Administration stated in a letter of March 10, 1980, to the Commission:

The Commission should be reluctant in enforcing these regulations to substitute its judgment of the propriety of a particular debate for the on-the-spot judgment of the sponsor. Before the Commission should choose to take any action, it should be clear on the face of a complaint that the sponsoring of a debate involves something other than the good faith editorial judgment of the sponsor. The mere fact that a debate does not include the full field of eligible candidates should not in itself be reason to believe that the debate falls outside these regulations.

126 Cong. Rec. H. 1822 (March 12, 1980) (remarks of Rep. Van Deerlin) (emphasis added). The Chairman of the Senate Committee

on Rules and Administration expressed similar views:

I will follow closely the Commission's interpretation of these regulations, and urge the FEC to apply a rule of reason to the end that the FEC in no case substitute its discretion and judgment for that of the sponsor.

126 Cong. Rec. S. 2813 (March 21, 1980) (remarks of Sen. Pell).

Moreover, even if there had been no adverse Congressional reaction to Nashua Telegraph, its precedential significance would be questionable. First, Nashua Telegraph involved a candidate debate at the primary level where different considerations may be present. Second, in that case, the selection of two of the seven candidates running in the New Hampshire Republican Presidential primary was made without the aid of objective criteria.

Thus, Mr. Commoner's assertion that a debate sponsor may not, in good faith, invite only the two major party candidates -- or presumably any two candidates it views as significant -- is directly at odds not only with Congress' understanding of what the law is, but also with the clear and plainly worded explanation of the Commission that promulgated the rule in question.^{1/} Indeed, Mr. Commoner's attempt to dismiss the Commission's Explanation and Justification of § 110.13 as "merely conclusory" ignores the very purpose of that document.

Mr. Commoner's assertion ignores as well the significant regulatory history of § 110.13. This regulation was promulgated in response to Senate disapproval of a more detailed and restrictive regulation governing the sponsorship and funding of candidate debates, S. Res. 236, 96th Cong. 1st Sess.,

^{1/} In addition, Mr. Commoner overlooks the fact that debate participants will not necessarily benefit by public exposure. It is impossible to predict until after the debate who, if anyone, may have been helped by participating in it, and who, if anyone, may have been harmed by not participating. Whether or not participants and non-participants benefit depends on many factors, including the electorate's perception of the performance of participants.

125 Cong. Rec. S. 12822 (Sept. 18, 1979). It is the product of two rulemakings, 44 Fed. Reg. 76734 (Dec. 27, 1979); 44 Fed. Reg. 39348 (July 5, 1979); two proposed rulemakings, 44 Fed. Reg. 59162 (Oct. 12, 1979); 42 Fed. Reg. 35856 (July 12, 1977); and hearings before the Commission on September 12, 1977, and October 23 and 24, 1979, at which numerous parties, including the LWVEF, testified and submitted comments. To argue, as Mr. Commoner appears to, that the Explanation and Justification, which accompanied § 110.13 to the Senate floor the second time, is not a carefully considered explanation by the Commission of the meaning of that regulation, and that the Commission did not mean what it said, is to miscomprehend the administrative process.

Moreover, even under the Commission's more detailed and restrictive predecessor to the present § 110.13, the LWVEF's criteria would have been proper. Former § 110.13(b)(1)(i) provided that if a sponsor invites one general election candidate who has been nominated by a major party to participate in a debate, then the sponsor must invite all candidates nominated for the same office by any major party to participate in the same debate. 44 Fed. Reg. 39348, 39350 (July 5, 1979). However, the sponsor also had "discretion to include any minor party, new party, independent or write-in candidate in any debate held under 11 CFR 110.13(b)(1)." Id.^{1/} As the Commission made clear in the Explanation and Justification accompanying that section, "[t]his structure is designed to permit

1/ Former § 110.13(b)(1)(v). The requirement contained in former § 110.13(b)(1)(iv) that all minor party candidates should be invited to participate in the event that only one major party candidate agrees to debate, would not have applied because in this general election, there are no minor party candidates as defined in the Federal Election Campaign Act. See former § 110.13(b)(5)(ii), 44 Fed. Reg. 39351.

participation in a debate by significant serious candidates for the same public office." Id. at 39348 (emphasis added).

Former § 110.13 was disapproved by the Senate, however, on September 18, 1979. One of the Senator's major concerns was the restrictiveness of the debate structure mandated by the Commission. As stated by Senator Hatfield, a co-sponsor of the resolution of disapproval, "I question whether Congress ever intended to involve the Federal Election Commission in determining the format for candidate debates . . ." 125 Cong. Rec. S. 12821-22 (Sept. 18, 1979). In response to that resolution, the Commission promulgated the present regulation, which retains the requirement of nonpartisanship but leaves the structure of the debates to the discretion of the sponsor. Thus, it is nonsensical to argue that the LWVEF's decision not to invite non-significant candidates to participate in the debates violates current § 110.13(b)(2), when this decision would have been proper even under the more restrictive debate scheme previously adopted by the Commission. Present § 110.13 clearly grants more leeway to the LWVEF in sponsoring debates.

In light of the regulatory history of § 110.13 and the Commission's own explanation of the purpose and effect of this regulation, it is clear that the LWVEF may invite to participate in its debates only major party candidates for President and Vice-President. Since that is so, it is also clear that the LWVEF may, in good faith, exercise its discretion to invite candidates in addition to major party candidates based on its determination whether candidates are significant.

2. The LWVEF's Criterion For Determining
The Significance Of A Candidate Is
Nonpartisan and Reasonable.

Although the LWVEF could have complied with its non-partisan obligation by inviting to participate in the debates

the major party candidates or candidates who it, in good faith, believed to be significant, instead, the LWVEF, to ensure an entirely nonpartisan approach to determining significance, developed and adopted the voter support and interest criterion. The two elements of this criterion are reasonably capable of objective application and, in the LWVEF's judgment, constitute reasonable indicators of significant voter interest and support. They are: (1) nomination of a candidate by a major party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower.^{1/} The 15 percent figure is exclusive of undecided respondents. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

1/ Of course, nomination by a major party and voter support in public opinion polls are not the only possible indicators of voter support and interest. The LWVEF could have established a standard that included, for example, the number of contributors to, or the amount of financial support received by, a candidate, or media interest in a candidate. Alternatively, it could have established a petition requirement. It is apparent, however, that such other possible indicators of voter support and interest may be more subjective and unreliable than the standards adopted and that they measure less directly than the standards adopted the question in which the LWVEF is interested. Moreover, any meaningful petition requirement would be quite onerous. In view of the problems of alternative standards, the LWVEF cannot be faulted for adopting two indicators of candidate significance that are reasonably capable of good faith, objective application.

Although Mr. Commoner is apparently of the view that his candidacy would be served by his participation in such a debate,^{1/} it is clear that the LWVEF reasonably could conclude that the electorate would not be served by being compelled, in effect, to listen to those candidates in which it has no significant interest and by being deprived of any meaningful exchange among those candidates in whom it has a serious and substantial voter interest. Moreover, the LWVEF, in light of the present dominance of the two major parties, acted reasonably by requiring as a condition of participation by non-major party candidates a showing of substantial voter support, such as 15 percent.^{2/}

In attempting to maximize the amount of useful information presented to the electorate in a debate in which the addition of each non-major party candidate necessarily reduces the time available to the electorate to learn about positions of the clearly significant candidates, it is reasonable to demand that such non-major party candidates have a level of voter support that distinguishes them from the numerous and quite insignificant candidates that abound in an election year. The 15 percent voter support standard does precisely that, and given the support of the two major parties in the last Presidential election, cannot be deemed too harsh.

1/ Mr. Commoner does not claim that he meets the LWVEF criteria but merely that he might meet the criteria after participation in a debate. Quite obviously, candidates hopeful of being "significant" could make similar arguments in seeking access to the ballot, but it is clear that not even the Constitution requires states to permit access to the ballot by insignificant candidates who are hopeful that such access will convert their insignificant candidacies into significant ones.

2/ If, as in other political systems, there were several political parties or candidates of roughly comparable strength or varying degrees of clearly substantial strength, a lesser threshold might well have been selected. In any event, to satisfy its nonpartisan obligation, the LWVEF does not have to demonstrate that all other possible standards would not be reasonable. The obligation of nonpartisanship does not preclude the exercise of discretion.

Mr. Commoner asserts, however, that the LWVEF's third criterion "is partisan in structure and effect" because, inter alia: (1) "[m]ajor party candidates are exempt from the polling requirements, while non-major parties are subject to the vagaries of an inappropriate and inaccurate measurement;" (2) George Wallace would not have met the LWVEF's standard and that it appears that no non-major party candidate will do so this year; and (3) the standard subjects him to "a classical Catch 22 dilemma." Complaint, pp. 6-7. These assertions are unfounded, irrelevant, or both.

While it is true that certain candidates are exempt from the polling standard measure of voter support and interest, they already have demonstrated significant voter interest and support by winning the nomination of a major party. Distinguishing between major and non-major party candidates on this basis is neither improper nor novel.^{1/} As the Commission stated in the Explanation and Justification accompanying former § 110.13:

Structuring debates on the basis of party affiliation is similar to the standard used in the Act for public funding entitlement. Under the Act, only those presidential primary candidates who are seeking nomination by a political party are entitled to receive matching funds (26 U.S.C. § 9033(b)(2)). Moreover, the amount of funding to which a general election candidate is entitled is based on whether the candidate is a major, minor or new party candidate.

44 Fed. Reg. 39348. Moreover, the very reason that the LWVEF adopted the separate standard for non-major party candidates was to afford them the opportunity to be invited to debate. Without the separate standard complained of by Mr. Commoner, the

1/ See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (public financing); American Party of Texas v. White, 415 U.S. 767 (1974) (ballot access); Jenness v. Fortson, 403 U.S. 431 (1971) (ballot access).

debates would not have included any non-major party candidates.

Nor did the LWVEF act improperly in setting the standard applicable to non-major party candidates. In urging that the 15 percent standard is improper, Mr. Commoner quotes from a Washington Star article that reported a statement issued by the National Council on Polls and cites an article by Peter D. Hart that was published in the Washington Post. Complaint, p. 6, Appendix pp. 23, 25. His reliance on these sources is misplaced.

The National Council on Polls did issue a statement warning that "different techniques used by polling organizations . . . can result in varying assessments of candidate strength" and that "public opinion polls are subject to certain levels of sampling tolerance."^{1/} In light of those potential problems, the Council recommended that the LWVEF "consult several disinterested but qualified professionals in the field of survey research regarding measurement issues that bear on the reported poll results."

At the time the LWVEF adopted the voter support and interest standard, it recognized that polls may not perfectly measure public opinion because there are methodological differences among polling experts as to the best ways to try to measure public opinion and because their results are subject to a statistical margin of error. In the absence of superior alternatives, however, the LWVEF decided that it would attempt to deal with possible polling imperfections by examining the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining

^{1/} A copy of the statement issued is attached hereto as Appendix C.

the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

In addition, the LWVEF, after consulting with Albert H. Cantril, the President of the National Council on Public Polls, appointed three experts to assist it in interpreting the results of the polls on which it would rely. After examining the results of these polls, these experts advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes."^{1/} Thus, the concerns expressed by Mr. Commoner did not materialize, and, in any event, as the reported results show, would not have affected his ability to participate in the debates.

The Hart article on which Mr. Commoner relies made several charges: (1) that the decision of the LWVEF was "both bad and wrong" because "polls do not predict the future"; (2) that the LWVEF had wrongly decided to rely on polls taken within a single period of time immediately following the Democratic National Convention; (3) that the use of a nationwide survey "ignores the fact that an independent candidate can significantly affect the Electoral College results because he may garner a great deal of support from one region or state"; (4) "that a single question determining the standing hardly provides a true understanding of election dynamics"; and (5) that George Wallace would not have qualified to participate in the LWVEF debate had the voter support and interest standard applicable to non-major parties been in effect in 1968. Complaint, Appendix, p. 25.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment D.

These charges are unfounded. First, the purpose of the LWVEF's polling standard is not to measure who ultimately might win the election or who ultimately might be significant candidates in November. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken, and it is because they do reflect contemporaneous electorate attitudes that polls were selected. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers a non-major party candidate to be significant.^{1/} Second, the LWVEF did not rely solely on polls taken immediately after the Democratic National Convention but also on polls taken in late August and early September. Third, in light of the LWVEF's educational purposes, it quite properly relied on nationwide polls. Indeed, if Mr. Hart's observation were taken to its logical extreme, presumably a candidate who is on the ballot in a single state where the election is likely to be close would have to be considered significant because he could tip the balance in the Electoral College even if he received only 100 votes in the state election. Fourth, the use of the trial-heat question was appropriate to measure what the LWVEF was interested in ascertaining -- whether a non-major party candidate has a significant level of voter support to warrant participation in a debate series intended to educate

1/ Despite their imperfections, there is no legal flaw in using public opinion polls to measure contemporaneous voter support and interest. As the Supreme Court observed in *American Party of Texas v. White*, 415 U.S. 767, 786-87 (1974), "[a] petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required the States to do the impossible." Respected public opinion polls are a reasonable tool for measuring nationwide voter support for a candidate at any particular time, even though no particular poll may be mathematically precise.

the electorate as a whole. Finally, had the LWVEF standard been in effect in 1968, Mr. Wallace would have been invited to participate because he met the fifteen percent threshold.

Mr. Commoner also argues that the 15 percent threshold is "partisan in structure and effect" because

[h]istorically, only 2 minor party candidates, Theodore Roosevelt and Robert La Follette, received more than 15% of the vote. Eugene McCarthy and George Wallace did not, nor does it appear any other minor party candidates in 1980 will meet this arbitrary and capricious threshold.

Complaint, pp. 6-7. Mr. Commoner is mistaken.

Among other matters, John Anderson clearly has met the 15 percent threshold, and, as already noted, George Wallace had 15 percent or greater support in the pre-election polls.^{1/} Moreover, no non-major party Presidential candidate who did not exceed 15 percent either in the general elections or in the public polls preceding the elections, received a vote of more than 3 percent in the general elections in the twentieth century. And, in fact, no non-major party candidate other than Mr. Anderson has received more than a one percent level of voter support in 1980.

Mr. Commoner complains, in addition, that the 15 percent requirement subjects him "to a classical Catch 22 dilemma that with it he is excluded from the debates and without it, he would have an opportunity to inform voters of his campaign positions and may very well achieve a 15% rating." Complaint, p. 6.

This complaint rings hollow. First, given Mr. Commoner's consistently poor showing in all of the nationwide polls, any reasonable method of measuring whether a candidate

^{1/} This fact was pointed out to counsel for complainant in the letter of August 22. See Appendix B.

has significant voter support and interest would have subjected him to the same dilemma. More importantly, however, the purpose of these debates is not to help candidates like Mr. Commoner make a better showing in the general election; it is to provide the electorate with information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole.

In short, while the 15 percent figure itself is not a magic number, the LWVEF, in determining who to invite to debate, exercised precisely the discretion and judgment which § 110.13 contemplates. It did so in a carefully considered and nonpartisan manner, concluding that a consistent showing below 15 percent in the nationwide polls would permit it to make a reasonable judgment that a particular candidate is not considered significant by the electorate, taken as a whole. Moreover, the LWVEF reasonably concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, would not result in exclusion of candidates who ought to be invited to debate. Indeed, as the results of the nationwide polls show, none of the non-major party candidates but Mr. Anderson would have satisfied even a one percent threshold.

3. The LWVEF Has Applied, And Will Apply, The Candidate Eligibility Criteria In An Independent, Objective, and Nonpartisan Manner.

Not only did the LWVEF develop and adopt nonpartisan, objective criteria for determining eligibility to participate in the 1980 debates: it also has objectively and fairly applied them. As noted above, on August 19, the LWVEF determined that President Carter and Governor Reagan satisfied the three criteria that it had adopted, and invited both candidates to

participate in the debates. On September 9, after examining the reported results of eight nationwide polls, and after consulting with the three independent polling experts, the LWVEF determined that Mr. Anderson was the only non-major party candidate whose standing exceeded 15 percent. None of the other non-major party candidates came within 14 points of that figure.^{1/} Accordingly, pursuant to its criteria, the LWVEF invited Mr. Anderson to participate in the 1980 debates.

Mr. Commoner, however, claims that the LWVEF's application of its criteria to the non-major party candidates is tainted by the fact that President Carter allegedly has brought pressure to bear on the LWVEF to exclude all non-major party candidates from the debates. The short answer to this is that contrary to Mr. Commoner's prediction, Mr. Anderson has demonstrated his significance as a candidate pursuant to the LWVEF's criteria, and he was invited to participate in the debates. Moreover, as stated above, the LWVEF plans to go ahead with the Baltimore debate as scheduled, whether or not President Carter ultimately agrees to participate.^{2/}

1/ See Affidavit of Ruth J. Hinerfeld, Attachment E.

2/ Affidavit of Ruth J. Hinerfeld, ¶ 27. In addition, it should be noted that Ruth Hinerfeld denies Mr. Commoner's claim that she stated that "the league could change its debate rules so that Anderson, should he qualify would take part in the first debate, but not in a second." See Complaint, p. 9; Appendix, p. 26. In fact, what she stated, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate. She also stated that she would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. She did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues. See Affidavit of Ruth J. Hinerfeld, ¶ 28.

Just as the LWVEF has no control over the public pronouncements of Mr. Carter, Mr. Commoner, or any of the other candidates, so the LWVEF has no control over a candidate's decision whether to accept the invitation to debate. Although the LWVEF would like to present a debate among all the significant Presidential candidates to the electorate, the LWVEF can do no more than create a mechanism which, in as nonpartisan, objective, and reasonable a manner as possible, will provide the opportunity for truly significant candidates to participate. This the LWVEF has done, and as shown above there is no reason to believe that it has failed, or will fail, to comply with § 110.13 of the Commission's regulations. Accordingly, Mr. Commoner' complaint should be dismissed.

B. The LWVEF Has Not Violated, And Is Not About To Violate, 2 U.S.C. § 433(a) and § 434.

Mr. Commoner alleges that the LWVEF is a "political committee" within the meaning of the Act because it has made "expenditures" in excess of \$1000 in order to stage the 1980 debates, and, as such, has violated the Act by not registering and reporting pursuant to § 433(a) and § 434. As Mr. Commoner notes, however, § 100.7(b)(21) and § 100.8(b)(23) of the Commission's regulations provide that the terms "contribution" and "expenditure" do not include funds used to defray the costs of staging nonpartisan candidate debates in accordance with § 110.13 and § 114.4(e). As shown above, the LWVEF has complied fully with the provisions of § 110.13 and § 114.4(e), and thus, under the Act, is not deemed to have made a "contribution" or "expenditure" in connection with the debates. Accordingly, the LWVEF is not a "political committee" within the meaning of 2 U.S.C. § 431(4), and need not register or report pursuant to the Act.

II. MR. COMMONER'S OTHER CONTENTIONS NOT ONLY RAISE ISSUES BEYOND THE JURISDICTION OF THE COMMISSION, BUT ALSO ARE MERITLESS

The jurisdiction of the Federal Election Commission is limited, with respect to civil enforcement proceedings, to the provisions of the Act, and chapter 95 and chapter 96 of title 26. 2 U.S.C. § 437c(b)(1), § 437d(6), and § 437g. Consequently, Mr. Commoner's charge that the LWVEF's exercise of its First Amendment rights in staging the 1980 debates somehow constitutes illegal government action and violates his First Amendment rights raises issues that are beyond the jurisdiction of the Commission.^{1/} Nevertheless, we will briefly discuss these issues.

A. The LWVEF's Sponsorship of Candidate Debates Does Not Constitute State Action.

Mr. Commoner asserts that "[t]he degree of interaction of the LWVEF must have with broadcasters to televise this event, the privilege of tax exemption bestowed by Congress to the LWVEF and the privilege of debate sponsorship bestowed by the Commission to the LWVEF, elevate private action to government action." Complaint, p. 7. He cites no authority whatsoever in support of this contention. It is plainly wrong.

First, of course, the privilege of debate sponsorship is not bestowed on the LWVEF by the Commission but is a privilege -- indeed, a right -- bestowed by the First Amendment. Moreover, even if Mr. Commoner were correct in identifying the source of the LWVEF's privilege, the privilege, even when conjoined with a charitable tax exemption and interaction with the

^{1/} Mr. Commoner also suggests that the LWVEF's debate series somehow will violate the Federal Communications Act. This suggestion is incorrect, but if Mr. Commoner wishes to pursue it, the agency with jurisdiction is the Federal Communications Commission.

broadcast media, does not convert the actions of the LWVEF into the actions of the state.

For a private entity's action to be regarded as that of the state, far more interaction between the two is required. Thus, even when the government grants a private entity a long-term and lucrative utility monopoly and engages in detailed regulation of its activities, a unilateral action by that entity is not regarded as state action even when the state knows in advance of that entity's policy. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Similarly, the provision of a scarce and lucrative resource, such as a liquor license, to a private entity does not convert that entity's action into that of the government. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Finally, even the heavily regulated broadcast licensees, which are granted an exclusive right to scarce resources and benefit financially therefrom, are not state actors. See Greenberg v. Bolger, 80 Civ. 0340, Slip Op. p. 43 (E.D.N.Y. June 20, 1980).

In light of these and other cases, any conclusion that the LWVEF is a state actor, or that its debates constitute state action, would be erroneous.

B. Assuming Arguendo That The LWVEF Is A State Actor, Its Criteria For Candidate Participation Are Lawful And Its Exclusion Of Mr. Commoner From Its Debates Is Proper.

Assuming arguendo that the LWVEF is a state actor, its criteria for candidate participation are lawful and its exclusion of Mr. Commoner from the debates is proper. There are "vital state objectives" that justify the criteria and the exclusion of Mr. Commoner, a "hopeless" candidate, from the debates. American Party of Texas v. White, 415 U.S. 767, 781 (1974); Buckley v. Valeo, 424 U.S. 1, 96 (1976).

In establishing standards to govern access to a debate, the Constitution would permit the LWVEF, as a state actor, to: (1) determine whether there is voter support for a candidate; (2) apply different standards for measuring such support in the case of major party candidates, on the one hand, and non-major party candidates, on the other; and (3) exclude from participation a candidate for whom there is insignificant support. See, e.g., American Party of Texas v. White, supra; Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). In particular, the LWVEF would be permitted to exclude from a debate a candidate who, like Mr. Commoner, has minimal voter support. Mr. Commoner received one percent or less of the vote in nine nationwide public opinion polls during the period August 5 to September 6, 1980. He properly may be treated, therefore, under Buckley v. Valeo, supra, 424 U.S. at 96, as a "hopeless" candidate.

In support of his argument that the LWVEF candidate selection criteria are unlawful, Mr. Commoner cites only Buckley v. Valeo, supra, and Greenberg v. Bolger, supra. Neither case supports his claim that he is entitled to participate in the LWVEF-sponsored debates.

In Buckely v. Valeo, of course, the Supreme Court upheld the public financing provisions of the Federal Election Campaign Act despite the fact that entitlement to public financing was dependent on a showing of voter support, that the Act distinguished between major party candidates and non-major party candidates, and that financing was not available to insignificant candidates. Moreover, although the court in Greenberg struck down a mail subsidy that was granted only to major parties, that case is distinguishable.

In Greenberg, the court recognized that "[e]ach medium of expression . . . must be assessed for first amendment purposes by standards suited to it, for each may present its own problems" Mem. Op., p. 47, quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975). In addition, the court recognized that the government has legitimate interests that must be balanced against the effect of government action on non-major parties. These interests include facilitation of public expression, ensuring the manageability and integrity of the resource to which access is sought, protecting scarce resources, and guarding against factionalism.

In Greenberg, the interests purportedly protected by the mail subsidy statute did not "survive impartial scrutiny and weighing." Mem. Op., p. 59. Manifestly, however, candidate access to a debate is different from political party access to a mail subsidy, and the considerations that the Greenberg court regarded as being a proper basis for government action support the exclusion of Mr. Commoner and others like him from the 1980 candidate debates.

As the Supreme Court has observed in the analogous context of ballot access:

The fact is that there are obvious differences in kind between the needs and potentials of a political party which historically established broad support, on the one hand, and a new or small political organization on the other. [A state is not] guilty of invidious discrimination in recognizing these differences Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike

American Party of Texas v. White, supra, 415 U.S. at 782 n. 13, quoting Jenness v. Fortson, supra, 403 U.S. at 441-42.

Just as there are obvious differences between political parties, there are obvious differences between their nominees for

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President. In the context of a debate among candidates for President, it would be the grossest discrimination to treat Mr. Commoner, showing one percent of voter support in nationwide polls, exactly like non-major party candidates having fifteen times his support. The Constitution would not require such an unsound result.

CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

Respectfully submitted,

/s/ _____
Ernest W. Jennes

/s/ _____
Donna M. Murasky

/s/ _____
Scott D. Gilbert

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September 15, 1980

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS) MUR NO. 1287
EDUCATIONAL FUND)

AFFIDAVIT OF RUTH J. HINERFELD

Ruth J. Hinerfeld, being duly sworn, deposes and says:

1. I serve as Chair of the Board of Trustees of the League of Women Voters Education Fund (LWVEF), and I am also the President of the League of Women Voters of the United States (LWVUS). I have served in these capacities since 1978. During the period 1972 to 1978, I held the positions of First Vice Chair, Vice Chair, and Trustee of the LWVEF, and served as First Vice President, Vice President, and Director of the LWVUS. I have been a member of the LWVUS since 1953. As Chair of the Board of Trustees of the LWVEF, I have been involved substantially in the initiation, structuring and scheduling of the 1980 Presidential and Vice Presidential candidate debates that are the subject of this proceeding; the LWVEF is the sole sponsor of such debates.

2. The LWVUS is a nationwide organization with 50 state leagues, 1,300 local leagues, and approximately 120,000 individual members. It has been sponsoring nonpartisan debates, forums and candidate events for 60 years. Under its by-laws, the LWVUS's purposes are to promote political responsibility through informed and active citizen participation in government and to act on selected governmental issues. In furtherance of these purposes, state and local leagues sponsor a variety of nonpartisan activities and citizen education programs.

These include publication of information about candidates for elective office and their positions on the issues, candidate forums and debates, get-out-the-vote drives, and demonstrations of voting machines. The LWVUS and the various state and local leagues are prohibited by their by-laws from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity.

3. The LWVEF was established by the LWVUS in 1957. It is a nonpartisan, educational trust exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code. Article II of its Trust Agreement and its status as a Section 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process.

4. Since its establishment, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship which it values highly.

5. In keeping with this tradition and its educational, nonpartisan purpose, the LWVEF sponsored three Presidential candidate debates and one Vice Presidential candidate debate between the Democratic and Republican nominees during the 1976 campaign.

6. The LWVEF takes great pride in its sponsorship of the 1976 Presidential candidate debates and believes that the debates helped American voters to make an informed decision in the election and generated increased public interest in the 1976 Presidential campaign. Independent studies support this belief. On the basis of their empirical studies, Steven H. Chaffee and Jack Dennis, in "Presidential Debates: An Empirical Assessment" (published in The Past and Future Presidential Debates, ed. A. Ranney, American Enterprise Institute 1979), conclude at page 98, "that the debates make substantial contributions to the process of democracy and perhaps even to the long-term viability of the system." And the March 1979 Report of the Twentieth Century Fund Task Force on Televised Presidential Debates concludes that Presidential debates should become a regular and customary feature of Presidential election campaigns. Since 1976, the LWVEF has worked to make this a reality.

7. After the 1976 election, the LWVEF worked over the next three years to secure the promulgation of regulations by the Federal Election Commission that would permit the sponsorship and funding of public debates among candidates for federal office. On September 12, 1977, Ruth Clusen, then Chair of the LWVEF testified before the Commission in connection with the first proposed rulemaking. I submitted comments on behalf of the LWVEF to the Commission on May 22, 1979, with respect to that proposed rulemaking, and testified before the Commission on October 23 and submitted written comments on November 13, 1979, with respect to a second proposed rulemaking, urging adoption of regulations that would enable the LWVEF to begin immediate fundraising for, and planning of, Presidential and Vice Presidential debates in 1980.

8. In keeping with its long tradition of nonpartisanship, the LWVEF undertook the task of structuring the 1980 debates so that they would comply fully with the nonpartisan requirements of the regulations of the Federal Election Commission and at the same time provide information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the LWVEF did not believe that participation in the debates should necessarily be limited to major party candidates, the LWVEF determined to develop criteria that would permit participation in the debate series by all significant candidates.

9. Before establishing criteria, the LWVEF received input from its Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations who are listed in Attachment A to this Affidavit. The Advisory Committee was set up for the purpose of providing advice and ideas with respect to the debates. The Committee was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone. No one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted.

10. On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection Of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates", a copy of which is attached hereto as Attachment B.

The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone. This decision was not in any way affected by the positions or views of any of the Presidential candidates, or their running mates, or their representatives. Nor has anyone but the LWVEF applied the criteria or selected participants.

11. On the following day, August 10, the LWVEF released the eligibility criteria that had been adopted by the Board, and announced the sites chosen for the 1980 debates. As described in the attached criteria paper, the LWVEF plans to sponsor three Presidential candidate debates and one Vice Presidential candidate debate to which the running mates of eligible Presidential candidates will be invited. Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support.

12. The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity

for effective interchange between or among the participants, on the other. Debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its educational purposes in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates.

13. In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support were: (1) nomination of a candidate by a major national political party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls^{1/} or a standing equal to that of a major party candidate, whichever is lower. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

^{1/} The 15 percent figure is exclusive of undecided respondents. This means, for example, that in a poll where 10 percent of those polled were undecided, a showing of only 13.5 percent of all respondents would be sufficient.

14. The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. It did so in order to permit participation in the second and third Presidential debates by candidates who did not satisfy the criteria in early September, and to permit it to reassess whether future participation by a previously invited candidate would continue to advance the purposes of the debates.

15. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

16. The LWVEF also concluded that the best test of voter interest in a candidate is the traditional trial-heat type question that asks simply and directly for whom the public would actually vote if the election were held today. Other possible questions that conceivably might have been asked involve a series of difficult and controversial hypothetical questions and were less likely to yield reliable information about the question in which the LWVEF is interested, namely, the degree of support of, and interest in, particular candidates by the electorate as a whole.

17. In deciding to adopt a 15 percent figure as the required level of support in the public opinion polls, the LWVEF recognized that there is no single magic number that separates significant candidates from candidates who are not significant. However, the 15 percent threshold figure, which was the lowest level of support suggested by any member of its Advisory Committee, was intended to take into account the fact that the results of polls are subject to a statistical margin of error and to other imperfections. Thus, the LWVEF recognized that the higher the threshold figure adopted, the more likely that the statistical margin of error would result in exclusion of a candidate who is, in fact, significant. On the other hand, for the same reasons, it also took into account that a lower threshold would have increased the likelihood that candidates who are not significant would be included.

18. The LWVEF therefore concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, would provide a reasonable degree of confidence that statistical margins of error would not result in exclusion of candidates who ought to be invited to participate in the debates. Con-

versely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate had not met the statistical threshold.

19. In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to the six non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all possible participants. To date, the LWVEF has received responses from all such non-major party Presidential candidates except Ms. Ellen McCormack and Mr. Gus Hall.

20. The LWVEF intends to stage the debates now planned in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). These sites were chosen on the basis of geographical diversity and availability of physically suitable facilities. In all four cities, the physical facilities necessary to stage the debates are being provided to the LWVEF free of charge.

21. At the time that the criteria were adopted, the members of the LWVEF Board of Trustees were aware, as were all informed citizens, that President Carter at one time had expressed reluctance to participate in a debate that included non-major party candidates. They were also aware that several non-major party candidates had indicated that they wanted to participate in the debate series, and they anticipated that these candidates might object to whatever criteria the LWVEF established if application of those criteria resulted in their exclusion.

22. Despite this information, the LWVEF was firmly committed to the belief that the debates should be structured so as best to serve the interest of the American electorate rather than what any particular candidate perceived as being in his self-interest. It remains committed to that belief, and it also believes its candidate selection criteria fulfills that commitment.

23. By September 9, 1980, the LWVEF had received the results of several nationwide polls conducted during the period August 27-September 6. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14-August 23. The results of these polls are set forth in a chart attached hereto as Attachment C. The Committee also received the advice of several respected independent experts on polling.

These experts were:

- (1) Dr. Herbert Abelson, co-founder of Response Analysis, Princeton, New Jersey. Dr. Abelson is a specialist in survey research methodology, especially as applied to social research and voter preference. He is a past president of the American Association for Public Opinion Research and currently vice-chairman of the Council of American Survey Research Organizations.
- (2) Mervin Field, Chairman of the Board of Field Research Corporation and Director of the California Poll, San Francisco. Mr. Field is a recognized authority on consumer behavior and public opinion. He has held offices in the American Marketing Association, and the American Association for Public Research. He is a trustee of the National Council on Public Opinion Polls.
- (3) Lester Frankel, executive vice-president of Audits and Survey, Inc. Mr. Frankel has been involved in a number of large scale sample surveys in government and in studies of consumer behavior and attitudes. Mr. Frankel is past president of the American Marketing Association and a regular member of the International Statistical Institute.

Albert H. Cantril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Field to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel.

24. These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher." See Attachment D.

25. The members of the Board of Trustees, some of whom were consulted by telephone, also concluded that of the six non-major party candidates under consideration, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in the polls of voter support in excess of fifteen percent.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support.

26. After concluding that Mr. Anderson had satisfied the LWVEF criteria, the LWVEF invited him to participate in its debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF invitations for the Baltimore debate. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore.

27. The LWVEF expects to proceed with the Baltimore debate whether or not the President ultimately decides to participate. It is nevertheless hopeful that the President will agree to participate because the LWVEF believes that his participation is important to informing the electorate and

^{2/} This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

making that debate of greatest use to the electorate.

28. On August 26, I did not state, as the complaint alleges, that "the league could change its debate rules so that Anderson, should he qualify, would take part in the first debate, but not in a second." What I did say, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate (see ¶ 14 of this Affidavit). I also stated that I would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. I did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues.

29. The LWVEF continues to believe that the electorate would not best be served by the inclusion of clearly non-significant candidates, such as Mr. Commoner, in its debate series, and that the educational purposes of the debate series would be frustrated by the inclusion of any or all such candidates. Attached as Attachment E is a summary of the standing of non-major party candidates as shown in nationwide polls taken between August 5, 1980, and September 7, 1980; it demonstrates that neither Mr. Commoner nor any other non-major party candidate, other than Mr. Anderson, has

achieved more than a minimal level of voter support.

Ruth J. Hinerfeld
Ruth J. Hinerfeld

District of Columbia, ss:

Sworn to and subscribed before me this 12th day
of September, 1980.

Marianne Peterson
Notary Public

My Commission Expires July 31, 1982

8 0 0 4 0 2 2 0 4 6 4

ADVISORY COMMITTEE

ROBERT ANDERSON -- Chairman of the Board of Atlantic Richfield Co.

GOVERNOR JERRY APODACA -- President, National Issues Council; Governor of New Mexico (1975-1978); Chairman of the President's Council on Physical Fitness.

JAMES DAVID BARBER -- James B. Duke Professor of Political Science, Duke University.

CHARLES BENTON -- Chairman, Films, Inc.; Chairman, National Committee of Library and Information Science.

SHIRLEY TEMPLE BLACK -- Former U.S. Ambassador to the Republic of Ghana; Former U.S. Chief of Protocol.

*HONORABLE WILLIAM BROCK -- Chairman, Republican National Committee; Former United States Senator from Tennessee.

DOUGLASS CATER -- Trustee and Senior Fellow, Aspen Institute for Humanistic Studies; Special Assistant on Education and Health Policy during the Johnson Administration.

SOL CHAIKIN -- President, International Ladies Garment Workers Union.

ARCHIBALD COX -- Chairman, Common Cause; Professor of Law, Harvard University School of Law; Solicitor General of the United States (1961-1964); Watergate Special Prosecutor.

LEE HANNA -- Director, 1980 Presidential Debates; former Vice-President and Director of NBC News.

DOROTHY HEIGHT -- President, National Council of Negro Women.

HARRIET HENTGES -- Executive Director, League of Women Voters Education Fund; Economist.

CARLA HILLS -- Attorney; Partner, Latham, Watkins & Hills, Washington, D.C.; Secretary of Housing and Urban Development during the Ford Administration.

RUTH J. HINERFELD -- Chair, League of Women Voters Education Fund.

BENJAMIN HOOKS -- Executive Director, NAACP; Attorney; Ordained Baptist Minister.

PAT HUTAR -- Director of the Office of International Medicine, American Medical Association; Immediate Past President, National Federation of Republican Women; former U.S. Representative to the U.N. Committee on the Status of Women.

JIM KARAYN -- President and General Manager, WHYI Inc., (Radio and TV); Director of the Presidential Debates in 1976.

JEWEL LAFONTANT -- Attorney, LaFontant, Wilkenson & Butler, Chicago; Former U.S. Delegate to the U.N.; Former Deputy Solicitor General of the U.S.

NEWTON MINOW -- Attorney, Sidley & Austin, Chicago; Chairman of the Federal Communications Commission (1961-1964); Co-Chair 1976 Presidential Debates Advisory Committee.

LEE MITCHELL -- Attorney, Sidley & Austin, Washington, D.C.; practices communications law.

AUSTIN RANNEY -- Resident Scholar and Co-Director of the Center for Political and Social Processes at the American Enterprise Institute for Public Policy Research; Edited The Past and Future of Presidential Debates.

SHARON PERCY ROCKEFELLER -- First Lady of West Virginia; Director, Corporation for Public Broadcasting.

CARMEN VOTAW -- President, Inter-American Commission of Women.

PAUL WAGNER -- President, Wagner & Barody, Public Relations Counselors, Washington, D.C.

CHARLS WALKER -- Chairman of Charls Walker, Washington consultants.

CASPER WEINBERGER -- Vice-President and General Counsel of Bechtel Power Corporation.

*HONORABLE JOHN WHITE -- Chairman, Democratic National Committee; Former Deputy Secretary of Agriculture.

*Ex Officio

August 10, 1980

LEAGUE OF WOMEN VOTERS EDUCATION FUND
CRITERIA FOR SELECTION OF CANDIDATES TO
PARTICIPATE IN THE 1980 PRESIDENTIAL
AND VICE-PRESIDENTIAL DEBATES

It is the intention of the League of Women Voters Education Fund to sponsor a series of nonpartisan debates among candidates for the offices of President and Vice President of the United States. There will be three Presidential Debates and one Vice-Presidential Debate. The LWVEF's purpose in sponsoring the debates is to educate the public about the issues in the campaign and the candidates' positions on those issues. At the same time, the Debates are intended to stimulate and to increase voter interest and participation in the general election. These purposes are best served by inviting to participate in the debates only those presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest.

The criteria for selecting candidates to participate in the debates have been drawn in light of the requirements of the Federal Election Commission and the purposes of the debates. Federal Election Commission regulations permit the LWVEF to sponsor nonpartisan candidate debates. The structure of such debates is left by the FEC "to the discretion" of the LWVEF "provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate

Attachment B

over another."

The LWVEF has adopted criteria for selection which it believes are:

- nonpartisan
- capable of objective application so that they will be as free as possible from varying interpretation, and
- understandable by the public.

The criteria set forth have been adopted after careful consideration by the Board of Trustees. In its deliberations, the Board was fortunate to have available to it the views of its Advisory Committee, a group of 24 prominent citizens having diverse backgrounds and interests.

All participants must meet the League's criteria to ensure that the Debates further the LWVEF's purposes. Accordingly, the LWVEF will invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will be invited to participate in the Vice-Presidential Debate. The participation of non-major party candidates will be determined on a case-by-case basis.

There are three basic criteria for inviting Presidential candidates to debate: (1) constitutional eligibility; (2) ballot accessibility; and (3) demonstrated significant voter support and interest.

Based on these criteria, the LWVEF will determine in late August whom to invite to the debate series. The running mates of presidential candidates invited to participate in the debates automatically will be eligible to participate in the debate for vice-presidential candidates. In addition, throughout the debate series, the LWVEF will retain the option to reassess the participa-

tion of non-major party candidates in the event of significantly changed circumstances. The LWVEF will do so in order to determine whether any additional candidates, who did not satisfy the criteria in late August, will be invited to participate in the second and third Presidential Debate or whether future participation by a candidate would no longer advance the purposes of the debates.

CRITERIA FOR SELECTION OF
PRESIDENTIAL CANDIDATES
INVITED TO DEBATE

I. Constitutional Eligibility Criterion.

Only those candidates who meet the eligibility requirements of Article II, Section 1, of the Constitution will be invited to participate in the Debates since the purposes of the LWVEF would not be served by permitting participation of candidates who are ineligible to become President or Vice President.

II. Ballot Access Criterion.

1. A presidential candidate must be on the ballot in a sufficient number of states to have a mathematical possibility of winning a majority of votes (270) in the Electoral College.

Explanation: The LWVEF's purpose in sponsoring the debates is to educate the public about candidates who may become President in the general election. A candidate must win a majority of electoral votes to be elected. Adoption of a standard that allows participation in the debates by candidates who are not on enough ballots to win in the Electoral College would not further that purpose. Thus, although a candidate with less than a majority in the Electoral College could win in an election decided by the House of Representatives, the purpose of the Debates is to educate the electorate about the choice it must make in November, not the members of the House of Representatives who would elect the

President in the unlikely event that no candidate wins a majority in the Electoral College. On the other hand, a standard that requires a candidate to be on the ballot in more states than are necessary to secure 270 electoral votes exceeds the constitutional minimum and appears, therefore, to be unduly harsh. Most members of the Advisory Committee also suggested this standard.

2. When the LWVEF decides whom to invite to debate, it is possible that in a number of states there will be no clear indication of candidate ballot status. In some states, a candidate may have filed the requisite number of signatures but not be officially certified on the ballot. In others, there may be legal challenges to (1) early filing deadlines and (2) independent and third party candidate petitions. In addition, candidates still may be in the process of qualifying to be on ballots when the LWVEF is making its decisions on participants.

- a. The LWVEF will request selected non-major party candidates ^{1/} interested in participating in the Debates to provide it with reasonable assurances that they will meet the ballot

^{1/}The non-major party candidates to be invited to demonstrate that they meet the ballot access criterion are those candidates who are required to file quarterly financial reports with the Federal Election Commission, who have indicated that they meet the financial threshold established by the FECA, and who have not formally terminated their candidacies.

The Federal Election Campaign Act defines a major party as a political party whose nominee for the Presidency received twenty-five percent or more of the popular vote in the preceding Presidential election. 26 U.S.C. § 9002 (6).

-5-

access criterion by the date of the election. The LWVEF will then assess whether the candidate is likely to qualify, taking into account, for example, the number of signatures already collected, the extent of the candidate's past efforts to qualify, and the likelihood that the candidate's planned efforts will be successful. To the extent indicated, the LWVEF will confirm with appropriate state officials the facts presented to it.

- b. In states where early filing deadlines have barred candidates from the ballot, state law will be respected unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.
- c. In states where a candidate appears to have qualified for the ballot, but the candidate's right to remain on the ballot is being challenged, certification by the appropriate state official will be conclusive unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.

Explanation: The LWVEF will not require candidates to be qualified on the requisite number of ballots at the times it needs to issue invitations to debate. This is because the law in some states permits candidates to qualify to be on the ballot after the times that the LWVEF will need to make its decisions. The LWVEF will not require candidates to meet a more onerous ballot access criterion than that required by the states themselves -- what the LWVEF seeks to ascertain by this criterion is whether a presidential candidate has a possibility of winning a general election in November, not in August or September.

III. Demonstrated Significant Voter Support and Interest Criterion.

In 1976, seven candidates eligible to become President were on the ballots in enough states to have a theoretical possibility of winning. Not all of them, however, were significant candidates. Meeting the above standards does not, therefore, necessarily mean that a candidate will be invited to participate in the 1980 debates. The LWVEF also will require that Presidential candidates have significant voter support and interest. "Significant" does not mean that a candidate is raising issues different from those raised by other candidates or that the candidate's views on already-defined issues may differ from those of other candidates. The definition of "significant" is based on magnitude of voter support for and voter interest in a person's candidacy.

1. Candidates invited to debate must either be a nominee of a major political party as defined in the Federal Election Campaign Act or meet LWVEF standards for demonstrated voter support and interest.

Explanation: There is ample precedent for treating the candidates of major parties differently from non-major party candidates. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court found that the Constitution did not require the government to treat all presidential candidates the same for public financing purposes. Major party nominees already have demonstrated significant voter support and interest by virtue of their nomination. Non-major party candidates, however, have not met any similar test. It is necessary, therefore, for the LWVEF to ascertain whether non-major party presidential candidates have the support of a significant portion of the electorate in addition to their being eligible for office and theoretically capable of winning the general election.

2. The LWVEF will rely on nationwide public opinion polls to determine voter support and interest.

Explanation: Although public opinion polls are not necessarily accurate predictors of future voting behavior, they present the best indicator of existing voter support for and voter interest in non-major party candidates at any given time during the elective process. There are other indicators, such as number of contributors, amounts of funds raised, and media attention, which also may indicate voter support and interest. These other indicators are more difficult to interpret and apply, and they measure less directly than national opinion polls voter support and interest. Other possible indicators of voter support and interest, such as petition requirements, place an unnecessary burden on non-major party presidential candidates.

3. An assessment of voter support and interest will be based on data derived from nationwide polling samples provided by several well-respected public polling organizations.

4. The LWVEF will make its decisions based on the outcome of the most recent polls taken by each of the polling organizations selected by the LWVEF.

Explanation: Polls may vary, not only due to polling methods but also as a result of the dates on which they were taken. This is especially true when the measure of public opinion is taken in election campaigns. The best the LWVEF can hope to do is to ascertain current voter support and interest as close as is feasible to the dates on which it makes its decisions.

5. The LWVEF will rely on questions which are as close as possible to the classic "trial-heat" approach -- "If the election were held today, would you vote for A, B, C, D, etc.?"

Explanation: The principal purpose of the Debates that the LWVEF

proposes to sponsor is a more informed electorate. To achieve that purpose, the LWVEF must attempt to ascertain which candidates the electorate regards as serious candidates for its vote. Identification of such candidates is most readily ascertained by the "trial-heat" type question proposed.

6. In order to participate in the Debates, a non-major party candidate must receive a level of voter support of fifteen percent or the level of voter support received by a major party candidate, whichever is lower.

Explanation: Advisory Committee members suggested voter support threshold levels ranging between fifteen and twenty-five percent, and the Board concluded that any figure within this range would be reasonable. After consideration of a number of factors, including the records of public opinion polls in previous presidential elections and their relationship to actual election results, the substantial obstacles faced by non-major party candidates and variations among public opinion polling techniques and the precision of their results, the Board decided to adopt the fifteen percent level of support or the level of support that a major candidate receives for the following reasons. First, non-major party candidates who reach even a fifteen percent level of support, despite the substantial odds facing them, should be regarded as significant forces in the election. In addition, we also found it appropriate to include non-major party candidates whose showing in the polls is equal to that of a major party candidate. The ability to garner such a level of support suggests the candidate's presence in the Debates would further the LWVEF's purposes/ for the debates. On the other hand, to lower the fifteen percent threshold in the absence of a comparable lower level of voter support for a major party candidate could result in participation by candidates who would not further the LWVEF's purposes. Their parti-

icipation would, moreover, decrease the time available to clearly significant candidates to set forth their views and differences in the Debates. The LWVEF recognizes that each additional candidate invited to the debates will diminish the other candidates' ability to make their views known.

7. The procedure adopted for testing whether a candidate meets the voter support requirement gives all the active, selected^{2/} non-major party candidates an opportunity to satisfy the requirement. The LWVEF will look at the nationwide results of the most recent polls taken by each of the major polling organizations selected by the League. All non-major party candidates who receive the requisite level of voter support of fifteen percent or the level of support received by major party candidates, whichever is lower, will be invited.

VICE-PRESIDENTIAL CANDIDATES

Other than being required to possess the personal qualifications to become President, the running mates designated by the participants in the Presidential Debates will be included in the Vice-presidential Debate.

^{2/} See page 5, fn. 1

SUMMARY OF AVAILABLE
 NATIONAL POLL DATA - 1980 PRESIDENTIAL
 LEAGUE OF WOMEN VOTERS EDUCATION FUND

| <u>POLL:</u> | <u>TIME</u> | <u>Roper</u> | <u>L.A. Times</u> | <u>Harris</u> |
|--------------|----------------|----------------|-------------------|----------------|
| <u>Dates</u> | <u>8/26-23</u> | <u>9/4-6</u> | <u>9/2-7</u> | <u>9/3-7</u> |
| Reagan | 39% | 40% | 37% | 41% |
| Carter | 39 | 34 | 36 | 37 |
| Anderson | 15 | 13 | 18 | 17 |
| | Unsure - 7 | Clark - 1 | Other - 3 | Clark - 1 |
| | | Commoner - 1 | Not sure - 6 | Commoner - * |
| | | Undecided - 12 | | Pulley - * |
| | | | | McCormack - * |
| | | | | Don't know - 4 |

| <u>POLL:</u> | <u>Gallup</u> | <u>Harris</u> | <u>AP/HBC</u> | <u>Roper</u> |
|--------------|---------------------------|----------------|----------------|----------------|
| <u>Dates</u> | <u>8/26-23</u> | <u>8/14-20</u> | <u>8/15-17</u> | <u>8/16-23</u> |
| Reagan | 37% | 42% | 39% | 37% |
| Carter | 35 | 36 | 32 | 36 |
| Anderson | 14 | 17 | 13 | 14 |
| | Commoner - 1 | Clark - 1 | Commoner - 1 | Pulley - 1 |
| | McCormack - 1 | Commoner - * | Clark - 0 | Commoner - * |
| | Clark - * | McCormack - * | Other - 2 | Clark - * |
| | Pulley - * | Pulley - * | Not sure - 13 | McCormack - * |
| | Hall - 0 | Not sure - 4 | | Hall - * |
| | Others/ Undecided - 12 | | | Other - 1 |
| | | | | Not sure - 10 |

* less than 0.5%

1980 PRESIDENTIAL
DEBATES League of Women Voters Education Fund
1730 M Street, NW, Washington DC 20036
NEWS RELEASE

Contact
Vera Hirschberg
Public Relations
296-1770, ext. 263

FOR IMMEDIATE RELEASE
September, 9, 1980

STATEMENT OF DR. HERBERT ABELSON, MERVIN FIELD AND LESTER FRANKEL

Eight separate polling reports, which were based on national cross sections of potential voters were reviewed. These were all the available national published polls reported since mid-August. Four of these polls were taken in late August and four in early September.

The four August polls showed Anderson's support to range from 13% to 17%. The four September polls showed Anderson's support ranging from 13 to 18% with three of the four polls at 15% or higher.

We were struck with the consistency of the data produced by these eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes.

In our individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher.

As research professionals we recognize the fragile nature of any statistic derived from a public opinion sample. We anticipated that League officials might be in receipt of a variety of disparate and ambiguous poll results. We volunteered our efforts to assist the League in the interpretation of the data. As things turned out, the data were quite clear and unambiguous and it was not necessary to use any involved analytical procedures to reach our conclusions.

Attachment D

POLLING DATA

1. AP/NBC Poll, 8/5-8/7/80

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

2. Harris Poll, 8/5-8/6/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

3. Harris Poll, 8/14-18/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

4. AP/NBC Poll, 8/15-8/16/80^{*/}

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

5. Gallup Poll, 8/15-8/17/80

| | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |

*/ Attachment C incorrectly states that this poll was taken on August 15-17, 1980.

6. Roper Poll, 8/16-8/23/80

| | |
|------------|----------------|
| Commoner | less than 0.5% |
| Clark | less than 0.5% |
| Hall | less than 0.1% |
| McCormack | less than 0.5% |
| Pulley | 1% |
| Others | 1% |
| Don't know | 10% |

7. Gallup Poll, 8/26-8/28/80

| | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |

8. L.A. Times Poll, 9/2-9/7/80

| | |
|----------|------------------|
| Other | 3% ^{*/} |
| Not sure | 6% |

9. Harris Poll, 9/3-9/7/80

| | |
|------------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| Pulley | less than 0.5% |
| McCormack | less than 0.5% |
| Don't know | 4% |

10. Roper Poll, 9/4-9/6/80

| | |
|-----------|-----|
| Clark | 1% |
| Commoner | 1% |
| Undecided | 12% |

* / Other than Reagan, Carter, and Anderson.

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J. RANDOLPH WILSON
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CHARLES A. MILLER
RICHARD A. BRADY
ROBERT E. O'MALLEY
EUGENE I. LAMBERT
MARK A. WEISS
HARRIS WEINSTEIN
JOHN B. DENNISTON
PETER J. NICKLES
MICHAEL SOUDIN
BINGHAM S. LEVERICH
ALLAN TOPOL
VIRGINIA G. WATKIN
RICHARD D. COPAREN
CHARLES LISTER
PETER D. TROSOFF
WESLEY S. WILLIAMS, JR.
DORIS D. BLAZER
WILLIAM D. IVERSON
S. WILLIAM LIVINGSTON, JR.
JOHN M. VINE
STUART C. STOCK

August 22, 1980

H. Richard Mayberry, Jr., Esq.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Mayberry:

This letter is written on behalf of the League of Women Voters Education Fund in response to your August 18 letter to the LWVEF regarding the 1980 Presidential and Vice-Presidential debates which it is sponsoring.

Your letter (1) requests that your clients, Barry Commoner and LaDonna Harris, Presidential and Vice-Presidential candidates of The Citizens Party, be included in the debates and (2) objects to LWVEF's 15 percent standard for determining whether non-major party candidates have achieved a significant measure of nationwide voter support and interest.^{1/}

We have advised the LWVEF that the criteria it has established meet any applicable legal requirements. Of particular importance are the regulations of the Federal Election Commission. Under those regulations, the LWVEF, as a nonprofit organization exempt from federal taxation under 26 U.S.C. § 501(c)(3) "may stage nonpartisan candidate debates in accordance with 11 C.F.R. 110.13(b) . . ." 11 C.F.R. § 110.13(a)(1). Section 110.13(b), in turn, states that "[t]he structure of debates . . . is left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." In promulgating these rules, the Federal Election Commission made clear that the LWVEF may "stage a general election debate to which only major party candidates are invited." 44 Fed.Reg. 76735 (1980).

^{1/} The precise standard is whether the candidate receives a level of voter support in the polls of 15 percent or the level received by a major party candidate, whichever is lower. Since undecided responses will be excluded, the actual standard is something less than 15 percent.

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H. Richard Mayberry, Jr., Esq.
August 22, 1980
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The LWVEF would comply with the FEC's nonpartisan requirement (or the requirements of any other government agency) if it included in the debates only the Democratic and Republican nominees. The fact that the LWVEF is providing an opportunity for non-major party candidates who meet its significant candidate criterion to participate does not render the proposed debates partisan or otherwise legally questionable.

That the LWVEF has discretion to distinguish between major party candidates and non-major party candidates in adopting standards to implement its voter support and interest criterion also is supported by Buckley v. Valeo, 424 U.S. 1 (1976). Buckley does not, as you suggest, bar the government (much less a private organization such as LWVEF) from treating major party candidates differently from non-major party candidates. Rather, in that case the Supreme Court upheld the public financing scheme of the Federal Election Campaign Act even though it differentiates among major party, minor party and new party candidates based on specific levels of past voter support.^{1/}

You appear to be arguing that the selection standards are discriminatory and that the debates will be partisan because some non-major party candidates will not participate. The logic of this argument, of course, is that all non-major party candidates must participate in the debates to avoid discrimination and for the debates to be non-partisan. Any such approach, however, would result in debates which would be less informative and enlightening to the electorate than the LWVEF debates. Moreover, unless all candidates are invited, any choice has the effect of excluding some candidates, and may have the effect of benefiting or injuring some of those who do and do not participate, depending upon what occurs in the debates. But the test of nonpartisanship is not whether the debates benefit or injure participants or non-participants. The test is whether they have been structured in a particular way for the purpose of benefiting a particular candidate. Here it is clear that LWVEF's purpose is truly nonpartisan.

The purpose of the debates is neither to benefit nor to disadvantage major parties or third parties. The purpose is to help

^{1/} The Supreme Court rejected the argument that such a scheme invidiously discriminates against non-major party candidates, i.e., nominees of parties whose candidates in the preceding general election received less than twenty-five percent of the popular vote. 424 U.S. at 93-108. The LWVEF, of course, has adopted a much less rigorous standard for determining whether non-major party candidates should be invited to share a forum with major party candidates.

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H. Richard Mayberry, Jr., Esq.
August 22, 1980
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inform the electorate of the views of the significant candidates on the issues in the campaign. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. So, too, debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF must limit its forum to candidates whose participation would most likely be critical to the electorate as a whole -- that is, the candidates whom the public itself regards as truly significant candidates.

The LWVEF's purpose would not be served best by inviting non-major party candidates to participate merely because they may raise issues different from those raised by the 1980 major party Presidential and Vice-Presidential candidates or because their views on already-defined issues may differ from those of the major party candidates. This is not to say that the LWVEF questions the importance of such candidates to the electoral process. Its debates must be limited because its purpose in sponsoring them is limited. The debates are not intended to be town meetings. To achieve the necessarily limited purpose of the debates, the LWVEF criterion excludes only those non-major party candidates whom more than 85 percent of the electorate do not support.

Your suggestion that the voter support and interest standard is improper appears to be based on the premise that it necessarily excludes participation by new parties. Thus, you state that the standard "does not bear a reasonable relationship to the purpose of the debates . . . for it effectively excludes new party participation." And in support of your legal argument, you state that "the percentile classification used by the League is so high as to exclude any new parties."

However, your premise is erroneous, as shown by the very data you cite in support of it, even though these are election results rather than poll results. Your letter specifies six non-major party candidates in previous Presidential elections who received more than three percent of the vote in the general election. All of these candidates who would have met the ballot access requirement, about which you do not complain, exceeded the LWVEF's 15 percent voter support standard. Theodore Roosevelt received 27 percent of the vote in 1912, Robert LaFollette received 16 percent in 1924, and George Wallace, who received 13 percent on election day, had 15 percent or greater support in the pre-election polls. Moreover, your letter points out that a non-major party candidate, John Anderson, "may well qualify for the general election debates" this year.

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August 22, 1980
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The LWVEF has no intention, therefore, of eliminating as a condition for non-major party candidate participation in the debates the voter support and interest standard that it has adopted. Moreover, any attempt by any Government agency to reduce the LWVEF's discretion under the FEC regulations would present serious constitutional problems. The Government may not interfere with the First Amendment rights of the LWVEF in its sponsorship of the 1980 debates.

All six non-major party Presidential candidates including your client have received a letter from the LWVEF requesting information concerning the ballot access criterion and informing them that invitations to debate will be issued by September 10, 1980 --after the LWVEF has had an opportunity to examine the results of various nationwide polls. As in the past and up until the time that such polls are taken, your clients, like other Presidential and Vice-Presidential candidates, have had and will have the opportunity to demonstrate significant voter support and interest.

Very truly yours,



Ernest W. Jenness

cc: General Counsel
Federal Election Commission
Washington, D.C. 20463

Chief
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Howard Schoenfeld
Special Assistant for Exempt Organizations
Internal Revenue Service
Washington, D.C.

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NCPP

NATIONAL COUNCIL ON PUBLIC POLLS

*Task Sent the
over
HK*

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Cantril Research

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Warren J. Mitofsky
CBS News

Gleason H. Roberts
Des Moines Register
and Tribune

Burns W. Roper
The Roper Organization

Richard M. Scammon
Elections Research Center

Contact: Albert H. Cantril
(202) 393-5100

EMBARGOED FOR RELEASE
6 p.m., Friday, August 22, 1980

POLLING ASSOCIATION CAUTIONS LEAGUE OF WOMEN VOTERS

ON USE OF POLLS FOR DEBATES DECISION

Washington, D. C. — The National Council on Public Polls

expressed its concern today over the difficulty of specifying when a candidate has achieved a 15 percent level of support in order to satisfy the League of Women Voters' requirement for participation in the 1980 Presidential Debates.

While the National Council acknowledged the right of the League to set a threshold in its attempt to find a criterion capable of objective application, many members of the association of polling organizations regard a specific percentage as arbitrary. "What

really troubles our members, however," National Council President Albert H. Cantril explained, "are the many practical problems in applying the 15 percent criterion."

The National Council called attention to the different techniques used by polling organizations that can result in varying assessments of candidate strength. For example, some polling firms base their estimates on registered voters, others on "likely" voters, and others

Appendix C

(MORE)

on a "probable electorate." In addition all public opinion polls are subject to certain levels of sampling tolerance. Taking into account these factors and other differences in procedure, the National Council cautioned the League of Women Voters that in a close decision there is no incontestable way to confirm or refute the absolute validity of a candidate's standing relative to the 15 percent.

The National Council recognizes that the decision of which candidates to invite to debate can be made only by the League. If the League proceeds

to rely on polling data, however, the National Council feels that at a minimum two steps should be taken: (a) those polls on which the League will base its invitation decision should be accompanied by full disclosure of the methods employed; and (b) the League should consult several disinterested, but qualified, professionals in the field of survey research regarding measurement issues that bear on the reported poll results.

###

Members of the National Council on Public Polls include: the Bureau of Social Science Research; Cantril Research; CBS News; The Des Moines Register and Tribune; the Elections Research Center; the Field Institute; the Gallup Poll; GMA Research Corporation; Louis Harris & Associates; Peter D. Hart Research; the National Opinion Research Center; the Opinion Research Corporation; Polls, Inc.; Response Analysis Corporation; The Roper Organization; and Yankelovich, Skelly and White.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

HAND DELIVERY

Ernest W. Jennes, Esq.
Scott Gilbert, Esq.
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Re: MUR 1287

Dear Sirs:

This letter is sent to you in your capacity as counsel for the League of Women Voters Education Fund and Ruth Hinerfeld. On August 29, 1980, the Commission notified Ms. Hinerfeld and the League of a complaint alleging that the debates which the League plans to sponsor in September and October 1980 will violate 11 C.F.R. §§ 110.13 and 114.4, and that the League has, therefore, violated 2 U.S.C. § 433.

The Commission, on September 16, 1980, determined that, on the basis of the information in the complaint, and the information provided by the League in response, there is no reason to believe that a violation of any statute or regulation within its jurisdiction has occurred, or is about to occur. Accordingly, the Commission has closed its file in this matter. This matter will become a part of the public record within 30 days.

Sincerely,

Charles N. Steele
General Counsel

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RECEIVED

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION
GENERAL COUNSEL

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS)
EDUCATIONAL FUND)

30 SEP 85 12:46

RESPONSE OF RUTH J. HINERFELD
AND THE
LEAGUE OF WOMEN VOTERS EDUCATION FUND ^{1/}

INTRODUCTION

Barry Commoner, The Citizens Party candidate for President, has filed a complaint alleging that the Presidential and Vice-Presidential candidate debates that the League of Women Voters Education Fund (LWVEF) intends to sponsor in September and October of 1980 violate the Federal Election Campaign Act and the regulations of the Federal Election Commission. More specifically, he claims that the criteria established by the LWVEF for selecting debate participants are partisan in structure and effect and that the LWVEF will invite candidates to participate based on partisan considerations.^{2/}

The allegations have no merit. The determination to limit participation in the LWVEF-sponsored debates to significant candidates and the criteria the LWVEF has adopted are nonpartisan. Moreover, the adoption of the criteria and any decision to invite or not to invite candidates to participate have been, and will continue to be, the LWVEF's independent actions made solely in light of its overriding purpose of educating the electorate about the issues in the campaign and the candidates' positions on those issues.

1/ This response is submitted pursuant to the provisions of the Federal Election Campaign Act, 2 U.S.C. § 437g(a)(1), and of the regulations of the Federal Election Commission, 11 C.F.R. § 111.6.

2/ Although Mr. Commoner names Ruth J. Hinerfeld as a respondent in his complaint, he does not allege that Ms. Hinerfeld has in any way violated the Act or regulations. Moreover, as Ms. Hinerfeld's affidavit shows, the LWVEF is the sole sponsor of the 1980 debates. Affidavit of Ruth J. Hinerfeld, ¶ 1. Accordingly, we will address only the question whether the LWVEF has acted improperly in staging the debates.

There is, therefore, no reason to believe that any violation of the Act or the Commission's regulations has occurred, or is about to occur, in connection with the LWVEF's sponsorship of the 1980 debates. Accordingly, Mr. Commoner's complaint should be dismissed.

STATEMENT OF FACTS

This matter arises out of the LWVEF's planned sponsorship of three Presidential candidate debates and one Vice-Presidential candidate debate scheduled to take place this year in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). The debates will be staged pursuant to § 110.13 of the Commission's regulations, a provision with which the LWVEF has considerable familiarity. Since its sponsorship of the 1976 Presidential and Vice-Presidential candidate debates, the LWVEF worked for the promulgation by the Commission of a rule that, like § 110.13, would permit its sponsorship of public debates among candidates for federal office with funds solicited by it for that purpose. It submitted pages of testimony and comments to the Commission in connection with rule-making proceedings that spanned a three-year period.^{1/} Affidavit of Ruth J. Hinerfeld, ¶¶ 7, 20.^{2/}

Section 110.13(a) of the regulations permits the sponsorship of nonpartisan candidate debates by an organization, such as the LWVEF, which is exempt from taxation under § 501(c)(3) of the Internal Revenue Code and which does not

^{1/} Indeed, it would not be hyperbole to state that § 110.13 of the regulations was drafted with organizations like the LWVEF in mind.

^{2/} This affidavit is attached hereto as Appendix A.

support or oppose political candidates or political parties. Under § 110.13(b), the structure of the debates is left "to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another."

The LWVEF has, of course, a long tradition of nonpartisanship which it values, and which governs all of its activities. Moreover, because the LWVEF is a nonpartisan, educational trust, Article II of its Trust Agreement and its status as a § 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of the LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process. Since its establishment in 1957, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

Thus, when the regulations became effective on April 1, 1980, the LWVEF undertook the task of structuring the 1980 debates in light of: (1) its nonpartisan tradition, its Trust Agreement, § 501(c)(3) of the Internal Revenue Code, and the nonpartisan requirement of the FEC's regulations; and (2) its exclusive educational purpose of providing information about Presidential and Vice-Presidential candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the

LWVEF did not believe that participation in the debates necessarily should be limited to only major party candidates, as is clearly permitted under the regulations, the LWVEF determined that its purpose of educating the electorate in a nonpartisan manner would best be accomplished by developing criteria that would permit participation in the debates by both major party and non-major party significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 8.

Before establishing these criteria, the LWVEF received input from the Advisory Committee that it had established. The Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations,^{1/} was set up for the purpose of providing advice and ideas with respect to the debates. It was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone, and no one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted. Affidavit of Ruth J. Hinerfeld, ¶ 9.

On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates".^{2/} The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone; this decision was not in any way affected by the positions or views of any of the Presidential candidates, their running mates, or their

1/ The members of the Advisory Committee are named in Attachment A to the Affidavit of Ruth J. Hinerfeld.

2/ A copy of this document is attached to the Affidavit of Ruth J. Hinerfeld as Attachment B.

representatives. In addition, the LWVEF has had, and will have, exclusive responsibility for applying the criteria and in selecting participants. Affidavit of Ruth J. Hinerfeld, ¶ 10.

Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support. Affidavit of Ruth J. Hinerfeld, ¶ 11.

The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. Debates that are too lengthy or that include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 12.

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In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support are: (1) nomination of a candidate by a major party; and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower. The 15 percent figure is exclusive of undecided respondents.^{1/} Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate with such a standing also should be considered significant and of sufficient interest to the electorate that his or her participation in a debate would be warranted. Affidavit of Ruth J. Hinerfeld, ¶ 13.

The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. The LWVEF did so in order to permit participation in the second or third Presidential debate by candidates who did not satisfy the criteria in early September and to permit exclusion of a previously invited candidate whose participation no longer would advance the purposes of the debates. Affidavit of Ruth J. Hinerfeld, ¶ 14.

^{1/} This means, for example, that in a poll where 10 percent of those polled were undecided, an actual showing of only 13.5 percent would be sufficient.

The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates. Affidavit of Ruth J. Hinerfeld, ¶ 15.

The LWVEF also concluded that the best test of voter interest in a candidate is the traditional trial-heat type question that asks simply and directly for whom the public would actually vote if the election were held today. Other possible questions that conceivably might have been asked involve a series of difficult and controversial hypothetical questions and were less likely to yield reliable

information about the question in which the LWVEF is interested, namely, the degree of support of, and interest in, particular candidates by the electorate as a whole. Affidavit of Ruth J. Hinerfeld, ¶ 16.

In deciding to adopt a 15 percent figure as the required level of support in the public opinion polls, the LWVEF recognized that there is no single magic number that separates significant from insignificant candidates. However, the 15 percent threshold figure, which was the lowest level of support suggested by any member of its Advisory Committee, was intended to take into account the fact that the results of polls are subject to a statistical margin of error and to other imperfections. Thus, the LWVEF recognized that the higher the threshold figure adopted, the more likely that the statistical margin of error would result in the exclusion of a candidate who is, in fact, significant. On the other hand, for the same reasons, it also took into account that a lower threshold would have increased the likelihood that candidates who are not significant would be included. Affidavit of Ruth J. Hinerfeld, ¶ 17.

The LWVEF therefore concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, provides a reasonable degree of confidence that statistical margins of error will not result in exclusion of candidates whose participation would advance the purposes of the debates. Conversely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate was not of sufficient interest to the

electorate to warrant participation in a debate with major party and other significant candidates. Affidavit of Ruth J. Hinerfeld, ¶ 18.

At the time the criteria were adopted, the members of the Board of Trustees knew, as did all informed citizens, that President Carter at one time had expressed his reluctance to participate in a debate with non-major party candidates. The LWVEF also was aware that several non-major party candidates wanted to participate in the debate series, and it anticipated that these candidates would object to whatever criteria the LWVEF established if their application resulted in non-participation. Affidavit of Ruth J. Hinerfeld, ¶ 21.

The LWVEF was, however, firmly committed to the belief that the debates should be structured so as to best serve the interests of the American electorate rather than what any particular candidate perceived as being in his own best interest. It remains committed to that belief, and it also believes that its candidate selection criteria fulfill that commitment. Affidavit of Ruth J. Hinerfeld, ¶ 22.

In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to all 6 non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The August 19 letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all prospective participants. Affidavit of Ruth J. Hinerfeld, ¶ 19.

Previously, on August 18, the LWVEF received a letter from counsel for the complainant in this proceeding objecting to the 15 percent standard and requesting the inclusion in the debates of Mr. Commoner and his running mate, LaDonna Harris.^{1/} This letter apparently was in response to the LWVEF's public announcement on August 10, of the candidate eligibility criteria. In a letter dated August 22, the LWVEF denied the request, explaining why it had selected the 15 percent standard and reaffirming its commitment to invite to debate any of the six non-major party candidates who satisfied its criteria.^{2/} On August 28, Mr. Commoner filed his complaint with the Commission.

By September 9, the LWVEF received the results of the several nationwide polls conducted during the periods August 27 and September 6 -- the most recent polls prior to that date. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14 to August 23.^{3/} The Committee also received the advice of Dr. Herbert Abelson, Mervin Field, and Lester Frankel, independent experts on polling.^{4/} Albert H. Cantril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Field to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel. Affidavit of Ruth J. Hinerfeld, ¶ 23.

^{1/} A copy of this letter is attached to the complaint.

^{2/} A copy of this letter is attached hereto as Appendix B.

^{3/} The results of these polls are set forth in a chart appended to Affidavit of Ruth J. Hinerfeld as Attachment C.

^{4/} The qualifications of these experts are set forth in Affidavit of Ruth J. Hinerfeld, ¶ 23.

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These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher."^{1/} Affidavit of Ruth J. Hinerfeld, ¶ 24.

After careful consideration, the LWVEF Board of Trustees concluded that of the six non-major party candidates to whom letters were sent on August 19, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in excess of 15 percent in the polls.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support. Affidavit of Ruth J. Hinerfeld, ¶ 25.

Accordingly, on September 9, 1980, the LWVEF invited Mr. Anderson to participate in the 1980 debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF's invitations. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore. The LWVEF expects to proceed with the Baltimore debate whether or not President Carter ultimately agrees to participate. Affidavit of Ruth J. Hinerfeld, ¶¶ 26, 27.

^{1/} The statement issued by these experts is appended to Affidavit of Ruth J. Hinerfeld as Attachment D.

^{2/} This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

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The insignificant levels of voter support for non-major party candidates other than John Anderson are also shown consistently in the results reported not only in seven of the eight polls used in the LWVEF's determination which reported results for non-major party candidates, but also in three earlier polls. In nine polls taken between August 5 and September 6, 1980, the reported results for no non-major party candidate other than Mr. Anderson ever exceeded one percent and the reported result in the tenth poll for all such candidates other than Mr. Anderson did not exceed three percent.^{1/}

ARGUMENT

Mr. Commoner claims: (1) that the LWVEF's candidate selection criteria are partisan because major party candidates are treated differently from non-major party candidates; and (2) that the fifteen percent standard for the demonstration of voter support and interest by non-major party candidates is improper. These claims are unfounded.

Mr. Commoner's claims rest upon both an erroneous understanding of the Commission's regulations and an incorrect understanding of the facts. In essence, Mr. Commoner asks the Commission to misapply its own regulations, and to ignore the Explanation and Justification accompanying § 110.13, which the Commission provided for the very purpose of explaining the meaning of that section. In support of this request, Mr. Commoner serves up inaccurate and incomplete information and pure speculation.

As we demonstrate below, the LWVEF's candidate selection criteria are nonpartisan and in full compliance with the letter and the spirit of the Commission's regulations.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment E.

First, under Commission regulations, debate sponsors may treat major party candidates differently from non-major party candidates and limit participation in debates to significant candidates. Second, the decision of the LWVEF that its voter support and interest criterion can be satisfied either by nomination by a major party, as defined in the Federal Election Campaign Act, or by a showing of fifteen percent in public opinion polls in the case of non-major party candidates is a reasonable method of separating significant from non-significant candidates. Third, in any case, it is abundantly clear that Mr. Commoner does not meet any reasonable test of significance. With a one percent showing in numerous public opinion polls, his candidacy properly may be regarded as "hopeless." Buckley v. Valeo, 424 U.S. 1, 96 (1976). In addition, it is clear that the LWVEF has applied its criteria in a nonpartisan fashion and in light of its overriding purpose of educating the American electorate.

Finally, Mr. Commoner mistakenly brings to the attention of the Commission Constitutional questions, and erroneously claims that the LWVEF has violated his Constitutional rights. Although such questions are beyond the jurisdiction of the Commission, we will address them briefly here. Under applicable law, it is clear that: (1) the LWVEF sponsorship of candidate debates is a purely private matter, and (2) even if the LWVEF could be held to the exacting standards of the Constitution, its candidate selection criteria would pass muster. Moreover, any Government action that would reduce the discretion of the LWVEF beyond that required by its nonpartisan obligation would present far more serious Constitutional questions than those raised by Mr. Commoner's complaint.

I. THERE IS NO REASON TO BELIEVE THAT THE LWVEF HAS VIOLATED, OR IS ABOUT TO VIOLATE, THE ACT OR THE COMMISSION'S REGULATIONS

Section 110.13 of the Commission's debate regulations is the provision that sets forth who may sponsor a debate supported by corporate and union contributions, and the structure of such a debate. It provides, inter alia, that "[a] non-profit organization which is exempt from federal taxation under 26 U.S.C. § 501(c)(3) . . . and which does not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with 11 CFR 110.13(b) and 114.4(e)." 11 C.F.R. § 110.13(a). The LWVEF, which has a 23 year history of non-partisanship, is exempt from taxation under § 501(c)(3) of the Internal Revenue Code. Accordingly, it may use its funds and those donated by corporations and labor unions to sponsor nonpartisan candidate debates.^{1/} 11 C.F.R. § 114.4(e).

The "structure" of such debates is expressly "left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." 11 C.F.R. § 110.13(b). For the reasons that follow, the LWVEF has complied with the only requirement at issue here -- the requirement of nonpartisanship.

^{1/} Mr. Commoner's assertion that the 1980 debates violate the regulations of the Internal Revenue Service and the Trust Agreement of the LWVEF is unsupported and conclusory. Just as the 1980 debates satisfy the nonpartisan requirements of the Commission's regulations, so do they comply fully with the LWVEF's Trust Agreement and the rules and regulations of the Internal Revenue Service. Indeed, during the 23 years of its existence, the LWVEF has been keenly aware that it must maintain and strictly adhere to a policy of nonpartisanship to comply with Article II of its Trust Agreement as well as the requirements of the Internal Revenue Code. Affidavit of Ruth J. Hinerfeld, ¶¶ 3, 4.

A. The LWVEF Debates Comply Fully With the Nonpartisan Requirements of the Debate Regulations.

1. The LWVEF May Limit Participation in the Debate to Significant Candidates.

In promulgating the debate regulations, the Commission expressly recognized that "[a] nonpartisan candidate debate . . . provides a forum for significant candidates to communicate their views to the public." Explanation and Justification, 44 Fed. Reg. 76734 (Dec. 27, 1979) (emphasis added). In providing such a forum, debate sponsors may, in accordance with the express provisions of 11 C.F.R. § 110.13(b)(2), exercise "discretion" so long as debates "are nonpartisan in that they do not promote or advance one candidate over another." According to the Commission, "[t]he primary question in determining nonpartisanship is the selection of candidates to participate in the debates." Explanation and Justification, 44 Fed. Reg. 76735.

The LWVEF criteria for inviting candidates to participate in the debates it plans to sponsor comply with the letter and the spirit of the Commission's regulations. In formulating and adopting them, the LWVEF exercised its "discretion" and attempted, in good faith, to identify "significant candidates" in order to educate the electorate and stimulate interest in the general election. They "are nonpartisan in that they do not promote or advance one candidate over another."

Mr. Commoner urges, however, that the LWVEF has improperly exercised its discretion in determining who is a significant candidate. Among other things, citing Nashua Telegraph, MURs 1167, 1168, 1170, First General Counsel's Report (Feb. 20, 1980), he asserts: "A debate involving only the two major party candidates is not nonpartisan but bi-partisan." Complaint, p. 7. Mr. Commoner is wrong.

In promulgating the debate regulations, the Commission stated that "[a]n organization staging a debate may invite candidates to participate . . . on the basis of party affiliation," and "that such an organization could stage a general election debate to which only major party candidates are invited." Explanation and Justification, 44 Fed. Reg. 76735. In testimony before Congress, moreover, both the former and present Chairmen of the Commission reaffirmed that debates could be so limited. Repeal of "Equal Time" Requirements: Hearings on H.R. 6103 before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2nd Sess. 14 (1980). If the LWVEF properly may invite to participate in a debate only the two major party nominees, then it also may invite to participate only these two candidates and any other candidate that it, in good faith, concludes is significant.

That debate sponsors may exercise considerable latitude in selecting debate participants is supported by Congressional reaction to the Nashua Telegraph case upon which Mr. Commoner relies. As the Chairman of the House Committee on Administration stated in a letter of March 10, 1980, to the Commission:

The Commission should be reluctant in enforcing these regulations to substitute its judgment of the propriety of a particular debate for the on-the-spot judgment of the sponsor. Before the Commission should choose to take any action, it should be clear on the face of a complaint that the sponsoring of a debate involves something other than the good faith editorial judgment of the sponsor. The mere fact that a debate does not include the full field of eligible candidates should not in itself be reason to believe that the debate falls outside these regulations.

126 Cong. Rec. H. 1822 (March 12, 1980) (remarks of Rep. Van Deerlin) (emphasis added). The Chairman of the Senate Committee

on Rules and Administration expressed similar views:

I will follow closely the Commission's interpretation of these regulations, and urge the FEC to apply a rule of reason to the end that the FEC in no case substitute its discretion and judgment for that of the sponsor.

126 Cong. Rec. S. 2813 (March 21, 1980) (remarks of Sen. Pell).

Moreover, even if there had been no adverse Congressional reaction to Nashua Telegraph, its precedential significance would be questionable. First, Nashua Telegraph involved a candidate debate at the primary level where different considerations may be present. Second, in that case, the selection of two of the seven candidates running in the New Hampshire Republican Presidential primary was made without the aid of objective criteria.

Thus, Mr. Commoner's assertion that a debate sponsor may not, in good faith, invite only the two major party candidates -- or presumably any two candidates it views as significant -- is directly at odds not only with Congress' understanding of what the law is, but also with the clear and plainly worded explanation of the Commission that promulgated the rule in question.^{1/} Indeed, Mr. Commoner's attempt to dismiss the Commission's Explanation and Justification of § 110.13 as "merely conclusory" ignores the very purpose of that document.

Mr. Commoner's assertion ignores as well the significant regulatory history of § 110.13. This regulation was promulgated in response to Senate disapproval of a more detailed and restrictive regulation governing the sponsorship and funding of candidate debates, S. Res. 236, 96th Cong. 1st Sess.,

^{1/} In addition, Mr. Commoner overlooks the fact that debate participants will not necessarily benefit by public exposure. It is impossible to predict until after the debate who, if anyone, may have been helped by participating in it, and who, if anyone, may have been harmed by not participating. Whether or not participants and non-participants benefit depends on many factors, including the electorate's perception of the performance of participants.

125 Cong. Rec. S. 12822 (Sept. 18, 1979). It is the product of two rulemakings, 44 Fed. Reg. 76734 (Dec. 27, 1979); 44 Fed. Reg. 39348 (July 5, 1979); two proposed rulemakings, 44 Fed. Reg. 59162 (Oct. 12, 1979); 42 Fed. Reg. 35856 (July 12, 1977); and hearings before the Commission on September 12, 1977, and October 23 and 24, 1979, at which numerous parties, including the LWVEF, testified and submitted comments. To argue, as Mr. Commoner appears to, that the Explanation and Justification, which accompanied § 110.13 to the Senate floor the second time, is not a carefully considered explanation by the Commission of the meaning of that regulation, and that the Commission did not mean what it said, is to miscomprehend the administrative process.

Moreover, even under the Commission's more detailed and restrictive predecessor to the present § 110.13, the LWVEF's criteria would have been proper. Former § 110.13(b)(1)(i) provided that if a sponsor invites one general election candidate who has been nominated by a major party to participate in a debate, then the sponsor must invite all candidates nominated for the same office by any major party to participate in the same debate. 44 Fed. Reg. 39348, 39350 (July 5, 1979). However, the sponsor also had "discretion to include any minor party, new party, independent or write-in candidate in any debate held under 11 CFR 110.13(b)(1)." Id.^{1/} As the Commission made clear in the Explanation and Justification accompanying that section, "[t]his structure is designed to permit

1/ Former § 110.13(b)(1)(v). The requirement contained in former § 110.13(b)(1)(iv) that all minor party candidates should be invited to participate in the event that only one major party candidate agrees to debate, would not have applied because in this general election, there are no minor party candidates as defined in the Federal Election Campaign Act. See former § 110.13(b)(5)(ii), 44 Fed. Reg. 39351.

participation in a debate by significant serious candidates for the same public office." Id. at 39348 (emphasis added).

Former § 110.13 was disapproved by the Senate, however, on September 18, 1979. One of the Senator's major concerns was the restrictiveness of the debate structure mandated by the Commission. As stated by Senator Hatfield, a co-sponsor of the resolution of disapproval, "I question whether Congress ever intended to involve the Federal Election Commission in determining the format for candidate debates . . ." 125 Cong. Rec. S. 12821-22 (Sept. 18, 1979). In response to that resolution, the Commission promulgated the present regulation, which retains the requirement of nonpartisanship but leaves the structure of the debates to the discretion of the sponsor. Thus, it is nonsensical to argue that the LWVEF's decision not to invite non-significant candidates to participate in the debates violates current § 110.13(b)(2), when this decision would have been proper even under the more restrictive debate scheme previously adopted by the Commission. Present § 110.13 clearly grants more leeway to the LWVEF in sponsoring debates.

In light of the regulatory history of § 110.13 and the Commission's own explanation of the purpose and effect of this regulation, it is clear that the LWVEF may invite to participate in its debates only major party candidates for President and Vice-President. Since that is so, it is also clear that the LWVEF may, in good faith, exercise its discretion to invite candidates in addition to major party candidates based on its determination whether candidates are significant.

2. The LWVEF's Criterion For Determining The Significance Of A Candidate Is Nonpartisan and Reasonable.

Although the LWVEF could have complied with its non-partisan obligation by inviting to participate in the debates

the major party candidates or candidates who it, in good faith, believed to be significant, instead, the LWVEF, to ensure an entirely nonpartisan approach to determining significance, developed and adopted the voter support and interest criterion. The two elements of this criterion are reasonably capable of objective application and, in the LWVEF's judgment, constitute reasonable indicators of significant voter interest and support. They are: (1) nomination of a candidate by a major party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls or a standing equal to that of a major party candidate, whichever is lower.^{1/} The 15 percent figure is exclusive of undecided respondents. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

1/ Of course, nomination by a major party and voter support in public opinion polls are not the only possible indicators of voter support and interest. The LWVEF could have established a standard that included, for example, the number of contributors to, or the amount of financial support received by, a candidate, or media interest in a candidate. Alternatively, it could have established a petition requirement. It is apparent, however, that such other possible indicators of voter support and interest may be more subjective and unreliable than the standards adopted and that they measure less directly than the standards adopted the question in which the LWVEF is interested. Moreover, any meaningful petition requirement would be quite onerous. In view of the problems of alternative standards, the LWVEF cannot be faulted for adopting two indicators of candidate significance that are reasonably capable of good faith, objective application.

Although Mr. Commoner is apparently of the view that his candidacy would be served by his participation in such a debate,^{1/} it is clear that the LWVEF reasonably could conclude that the electorate would not be served by being compelled, in effect, to listen to those candidates in which it has no significant interest and by being deprived of any meaningful exchange among those candidates in whom it has a serious and substantial voter interest. Moreover, the LWVEF, in light of the present dominance of the two major parties, acted reasonably by requiring as a condition of participation by non-major party candidates a showing of substantial voter support, such as 15 percent.^{2/} In attempting to maximize the amount of useful information presented to the electorate in a debate in which the addition of each non-major party candidate necessarily reduces the time available to the electorate to learn about positions of the clearly significant candidates, it is reasonable to demand that such non-major party candidates have a level of voter support that distinguishes them from the numerous and quite insignificant candidates that abound in an election year. The 15 percent voter support standard does precisely that, and given the support of the two major parties in the last Presidential election, cannot be deemed too harsh.

1/ Mr. Commoner does not claim that he meets the LWVEF criteria but merely that he might meet the criteria after participation in a debate. Quite obviously, candidates hopeful of being "significant" could make similar arguments in seeking access to the ballot, but it is clear that not even the Constitution requires states to permit access to the ballot by insignificant candidates who are hopeful that such access will convert their insignificant candidacies into significant ones.

2/ If, as in other political systems, there were several political parties or candidates of roughly comparable strength or varying degrees of clearly substantial strength, a lesser threshold might well have been selected. In any event, to satisfy its nonpartisan obligation, the LWVEF does not have to demonstrate that all other possible standards would not be reasonable. The obligation of nonpartisanship does not preclude the exercise of discretion.

Mr. Commoner asserts, however, that the LWVEF's third criterion "is partisan in structure and effect" because, inter alia: (1) "[m]ajor party candidates are exempt from the polling requirements, while non-major parties are subject to the vagaries of an inappropriate and inaccurate measurement;" (2) George Wallace would not have met the LWVEF's standard and that it appears that no non-major party candidate will do so this year; and (3) the standard subjects him to "a classical Catch 22 dilemma." Complaint, pp. 6-7. These assertions are unfounded, irrelevant, or both.

While it is true that certain candidates are exempt from the polling standard measure of voter support and interest, they already have demonstrated significant voter interest and support by winning the nomination of a major party. Distinguishing between major and non-major party candidates on this basis is neither improper nor novel.^{1/} As the Commission stated in the Explanation and Justification accompanying former § 110.13:

Structuring debates on the basis of party affiliation is similar to the standard used in the Act for public funding entitlement. Under the Act, only those presidential primary candidates who are seeking nomination by a political party are entitled to receive matching funds (26 U.S.C. § 9033(b)(2)). Moreover, the amount of funding to which a general election candidate is entitled is based on whether the candidate is a major, minor or new party candidate.

44 Fed. Reg. 39348. Moreover, the very reason that the LWVEF adopted the separate standard for non-major party candidates was to afford them the opportunity to be invited to debate. Without the separate standard complained of by Mr. Commoner, the

^{1/} See, e.g., *Buckley v. Valeo*, 424 U.S. 1 (1976) (public financing); *American Party of Texas v. White*, 415 U.S. 767 (1974) (ballot access); *Jenness v. Fortson*, 403 U.S. 431 (1971) (ballot access).

debates would not have included any non-major party candidates.

Nor did the LWVEF act improperly in setting the standard applicable to non-major party candidates. In urging that the 15 percent standard is improper, Mr. Commoner quotes from a Washington Star article that reported a statement issued by the National Council on Polls and cites an article by Peter D. Hart that was published in the Washington Post. Complaint, p. 6, Appendix pp. 23, 25. His reliance on these sources is misplaced.

The National Council on Polls did issue a statement warning that "different techniques used by polling organizations . . . can result in varying assessments of candidate strength" and that "public opinion polls are subject to certain levels of sampling tolerance."^{1/} In light of those potential problems, the Council recommended that the LWVEF "consult several disinterested but qualified professionals in the field of survey research regarding measurement issues that bear on the reported poll results."

At the time the LWVEF adopted the voter support and interest standard, it recognized that polls may not perfectly measure public opinion because there are methodological differences among polling experts as to the best ways to try to measure public opinion and because their results are subject to a statistical margin of error. In the absence of superior alternatives, however, the LWVEF decided that it would attempt to deal with possible polling imperfections by examining the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining

1/ A copy of the statement issued is attached hereto as Appendix C.

the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

In addition, the LWVEF, after consulting with Albert H. Cantril, the President of the National Council on Public Polls, appointed three experts to assist it in interpreting the results of the polls on which it would rely. After examining the results of these polls, these experts advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes."^{1/} Thus, the concerns expressed by Mr. Commoner did not materialize, and, in any event, as the reported results show, would not have affected his ability to participate in the debates.

The Hart article on which Mr. Commoner relies made several charges: (1) that the decision of the LWVEF was "both bad and wrong" because "polls do not predict the future"; (2) that the LWVEF had wrongly decided to rely on polls taken within a single period of time immediately following the Democratic National Convention; (3) that the use of a nationwide survey "ignores the fact that an independent candidate can significantly affect the Electoral College results because he may garner a great deal of support from one region or state"; (4) "that a single question determining the standing hardly provides a true understanding of election dynamics"; and (5) that George Wallace would not have qualified to participate in the LWVEF debate had the voter support and interest standard applicable to non-major parties been in effect in 1968. Complaint, Appendix, p. 25.

^{1/} Affidavit of Ruth J. Hinerfeld, Attachment D.

These charges are unfounded. First, the purpose of the LWVEF's polling standard is not to measure who ultimately might win the election or who ultimately might be significant candidates in November. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken, and it is because they do reflect contemporaneous electorate attitudes that polls were selected. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers a non-major party candidate to be significant.^{1/} Second, the LWVEF did not rely solely on polls taken immediately after the Democratic National Convention but also on polls taken in late August and early September. Third, in light of the LWVEF's educational purposes, it quite properly relied on nationwide polls. Indeed, if Mr. Hart's observation were taken to its logical extreme, presumably a candidate who is on the ballot in a single state where the election is likely to be close would have to be considered significant because he could tip the balance in the Electoral College even if he received only 100 votes in the state election. Fourth, the use of the trial-heat question was appropriate to measure what the LWVEF was interested in ascertaining -- whether a non-major party candidate has a significant level of voter support to warrant participation in a debate series intended to educate

^{1/} Despite their imperfections, there is no legal flaw in using public opinion polls to measure contemporaneous voter support and interest. As the Supreme Court observed in *American Party of Texas v. White*, 415 U.S. 767, 786-87 (1974), "[a] petition procedure may not always be a completely precise or satisfactory barometer of actual community support for a political party, but the Constitution has never required the States to do the impossible." Respected public opinion polls are a reasonable tool for measuring nationwide voter support for a candidate at any particular time, even though no particular poll may be mathematically precise.

the electorate as a whole. Finally, had the LWVEF standard been in effect in 1968, Mr. Wallace would have been invited to participate because he met the fifteen percent threshold.

Mr. Commoner also argues that the 15 percent threshold is "partisan in structure and effect" because

[h]istorically, only 2 minor party candidates, Theodore Roosevelt and Robert La Follette, received more than 15% of the vote. Eugene McCarthy and George Wallace did not, nor does it appear any other minor party candidates in 1980 will meet this arbitrary and capricious threshold.

Complaint, pp. 6-7. Mr. Commoner is mistaken.

Among other matters, John Anderson clearly has met the 15 percent threshold, and, as already noted, George Wallace had 15 percent or greater support in the pre-election polls.^{1/} Moreover, no non-major party Presidential candidate who did not exceed 15 percent either in the general elections or in the public polls preceding the elections, received a vote of more than 3 percent in the general elections in the twentieth century. And, in fact, no non-major party candidate other than Mr. Anderson has received more than a one percent level of voter support in 1980.

Mr. Commoner complains, in addition, that the 15 percent requirement subjects him "to a classical Catch 22 dilemma that with it he is excluded from the debates and without it, he would have an opportunity to inform voters of his campaign positions and may very well achieve a 15% rating." Complaint, p. 6.

This complaint rings hollow. First, given Mr. Commoner's consistently poor showing in all of the nationwide polls, any reasonable method of measuring whether a candidate

^{1/} This fact was pointed out to counsel for complainant in the letter of August 22. See Appendix B.

has significant voter support and interest would have subjected him to the same dilemma. More importantly, however, the purpose of these debates is not to help candidates like Mr. Commoner make a better showing in the general election; it is to provide the electorate with information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole.

In short, while the 15 percent figure itself is not a magic number, the LWVEF, in determining who to invite to debate, exercised precisely the discretion and judgment which § 110.13 contemplates. It did so in a carefully considered and nonpartisan manner, concluding that a consistent showing below 15 percent in the nationwide polls would permit it to make a reasonable judgment that a particular candidate is not considered significant by the electorate, taken as a whole. Moreover, the LWVEF reasonably concluded that the use of the 15 percent figure, together with the use of several different polls and the exclusion of undecided respondents, would not result in exclusion of candidates who ought to be invited to debate. Indeed, as the results of the nationwide polls show, none of the non-major party candidates but Mr. Anderson would have satisfied even a one percent threshold.

3. The LWVEF Has Applied, And Will Apply, The Candidate Eligibility Criteria In An Independent, Objective, and Nonpartisan Manner.

Not only did the LWVEF develop and adopt nonpartisan, objective criteria for determining eligibility to participate in the 1980 debates: it also has objectively and fairly applied them. As noted above, on August 19, the LWVEF determined that President Carter and Governor Reagan satisfied the three criteria that it had adopted, and invited both candidates to

participate in the debates. On September 9, after examining the reported results of eight nationwide polls, and after consulting with the three independent polling experts, the LWVEF determined that Mr. Anderson was the only non-major party candidate whose standing exceeded 15 percent. None of the other non-major party candidates came within 14 points of that figure.^{1/} Accordingly, pursuant to its criteria, the LWVEF invited Mr. Anderson to participate in the 1980 debates.

Mr. Commoner, however, claims that the LWVEF's application of its criteria to the non-major party candidates is tainted by the fact that President Carter allegedly has brought pressure to bear on the LWVEF to exclude all non-major party candidates from the debates. The short answer to this is that contrary to Mr. Commoner's prediction, Mr. Anderson has demonstrated his significance as a candidate pursuant to the LWVEF's criteria, and he was invited to participate in the debates. Moreover, as stated above, the LWVEF plans to go ahead with the Baltimore debate as scheduled, whether or not President Carter ultimately agrees to participate.^{2/}

1/ See Affidavit of Ruth J. Hinerfeld, Attachment E.

2/ Affidavit of Ruth J. Hinerfeld, ¶ 27. In addition, it should be noted that Ruth Hinerfeld denies Mr. Commoner's claim that she stated that "the league could change its debate rules so that Anderson, should he qualify would take part in the first debate, but not in a second." See Complaint, p. 9; Appendix, p. 26. In fact, what she stated, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate. She also stated that she would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. She did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues. See Affidavit of Ruth J. Hinerfeld, ¶ 28.

Just as the LWVEF has no control over the public pronouncements of Mr. Carter, Mr. Commoner, or any of the other candidates, so the LWVEF has no control over a candidate's decision whether to accept the invitation to debate. Although the LWVEF would like to present a debate among all the significant Presidential candidates to the electorate, the LWVEF can do no more than create a mechanism which, in as nonpartisan, objective, and reasonable a manner as possible, will provide the opportunity for truly significant candidates to participate. This the LWVEF has done, and as shown above there is no reason to believe that it has failed, or will fail, to comply with § 110.13 of the Commission's regulations. Accordingly, Mr. Commoner' complaint should be dismissed.

B. The LWVEF Has Not Violated, And Is Not About To Violate, 2 U.S.C. § 433(a) and § 434.

Mr. Commoner alleges that the LWVEF is a "political committee" within the meaning of the Act because it has made "expenditures" in excess of \$1000 in order to stage the 1980 debates, and, as such, has violated the Act by not registering and reporting pursuant to § 433(a) and § 434. As Mr. Commoner notes, however, § 100.7(b)(21) and § 100.8(b)(23) of the Commission's regulations provide that the terms "contribution" and "expenditure" do not include funds used to defray the costs of staging nonpartisan candidate debates in accordance with § 110.13 and § 114.4(e). As shown above, the LWVEF has complied fully with the provisions of § 110.13 and § 114.4(e), and thus, under the Act, is not deemed to have made a "contribution" or "expenditure" in connection with the debates. Accordingly, the LWVEF is not a "political committee" within the meaning of 2 U.S.C. § 431(4), and need not register or report pursuant to the Act.

II. MR. COMMONER'S OTHER CONTENTIONS NOT ONLY RAISE ISSUES BEYOND THE JURISDICTION OF THE COMMISSION, BUT ALSO ARE MERITLESS

The jurisdiction of the Federal Election Commission is limited, with respect to civil enforcement proceedings, to the provisions of the Act, and chapter 95 and chapter 96 of title 26. 2 U.S.C. § 437c(b)(1), § 437d(6), and § 437g. Consequently, Mr. Commoner's charge that the LWVEF's exercise of its First Amendment rights in staging the 1980 debates somehow constitutes illegal government action and violates his First Amendment rights raises issues that are beyond the jurisdiction of the Commission.^{1/} Nevertheless, we will briefly discuss these issues.

A. The LWVEF's Sponsorship of Candidate Debates Does Not Constitute State Action.

Mr. Commoner asserts that "[t]he degree of interaction of the LWVEF must have with broadcasters to televise this event, the privilege of tax exemption bestowed by Congress to the LWVEF and the privilege of debate sponsorship bestowed by the Commission to the LWVEF, elevate private action to government action." Complaint, p. 7. He cites no authority whatsoever in support of this contention. It is plainly wrong.

First, of course, the privilege of debate sponsorship is not bestowed on the LWVEF by the Commission but is a privilege -- indeed, a right -- bestowed by the First Amendment. Moreover, even if Mr. Commoner were correct in identifying the source of the LWVEF's privilege, the privilege, even when conjoined with a charitable tax exemption and interaction with the

^{1/} Mr. Commoner also suggests that the LWVEF's debate series somehow will violate the Federal Communications Act. This suggestion is incorrect, but if Mr. Commoner wishes to pursue it, the agency with jurisdiction is the Federal Communications Commission.

broadcast media, does not convert the actions of the LWVEF into the actions of the state.

For a private entity's action to be regarded as that of the state, far more interaction between the two is required. Thus, even when the government grants a private entity a long-term and lucrative utility monopoly and engages in detailed regulation of its activities, a unilateral action by that entity is not regarded as state action even when the state knows in advance of that entity's policy. See, e.g., Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974). Similarly, the provision of a scarce and lucrative resource, such as a liquor license, to a private entity does not convert that entity's action into that of the government. See, e.g., Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972). Finally, even the heavily regulated broadcast licensees, which are granted an exclusive right to scarce resources and benefit financially therefrom, are not state actors. See Greenberg v. Bolger, 80 Civ. 0340, Slip Op. p. 43 (E.D.N.Y. June 20, 1980).

In light of these and other cases, any conclusion that the LWVEF is a state actor, or that its debates constitute state action, would be erroneous.

B. Assuming Arguendo That The LWVEF Is A State Actor, Its Criteria For Candidate Participation Are Lawful And Its Exclusion Of Mr. Commoner From Its Debates Is Proper.

Assuming arguendo that the LWVEF is a state actor, its criteria for candidate participation are lawful and its exclusion of Mr. Commoner from the debates is proper. There are "vital state objectives" that justify the criteria and the exclusion of Mr. Commoner, a "hopeless" candidate, from the debates. American Party of Texas v. White, 415 U.S. 767, 781 (1974); Buckley v. Valeo, 424 U.S. 1, 96 (1976).

In establishing standards to govern access to a debate, the Constitution would permit the LWVEF, as a state actor, to: (1) determine whether there is voter support for a candidate; (2) apply different standards for measuring such support in the case of major party candidates, on the one hand, and non-major party candidates, on the other; and (3) exclude from participation a candidate for whom there is insignificant support. See, e.g., American Party of Texas v. White, supra; Storer v. Brown, 415 U.S. 724 (1974); Jenness v. Fortson, 403 U.S. 431 (1971). In particular, the LWVEF would be permitted to exclude from a debate a candidate who, like Mr. Commoner, has minimal voter support. Mr. Commoner received one percent or less of the vote in nine nationwide public opinion polls during the period August 5 to September 6, 1980. He properly may be treated, therefore, under Buckley v. Valeo, supra, 424 U.S. at 96, as a "hopeless" candidate.

In support of his argument that the LWVEF candidate selection criteria are unlawful, Mr. Commoner cites only Buckley v. Valeo, supra, and Greenberg v. Bolger, supra. Neither case supports his claim that he is entitled to participate in the LWVEF-sponsored debates.

In Buckley v. Valeo, of course, the Supreme Court upheld the public financing provisions of the Federal Election Campaign Act despite the fact that entitlement to public financing was dependent on a showing of voter support, that the Act distinguished between major party candidates and non-major party candidates, and that financing was not available to insignificant candidates. Moreover, although the court in Greenberg struck down a mail subsidy that was granted only to major parties, that case is distinguishable.

In Greenberg, the court recognized that "[e]ach medium of expression . . . must be assessed for first amendment purposes by standards suited to it, for each may present its own problems" Mem. Op., p. 47, quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975). In addition, the court recognized that the government has legitimate interests that must be balanced against the effect of government action on non-major parties. These interests include facilitation of public expression, ensuring the manageability and integrity of the resource to which access is sought, protecting scarce resources, and guarding against factionalism.

In Greenberg, the interests purportedly protected by the mail subsidy statute did not "survive impartial scrutiny and weighing." Mem. Op., p. 59. Manifestly, however, candidate access to a debate is different from political party access to a mail subsidy, and the considerations that the Greenberg court regarded as being a proper basis for government action support the exclusion of Mr. Commoner and others like him from the 1980 candidate debates.

As the Supreme Court has observed in the analogous context of ballot access:

The fact is that there are obvious differences in kind between the needs and potentials of a political party which historically established broad support, on the one hand, and a new or small political organization on the other. [A state is not] guilty of invidious discrimination in recognizing these differences Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike

American Party of Texas v. White, supra, 415 U.S. at 782 n. 13, quoting Jenness v. Fortson, supra, 403 U.S. at 441-42.

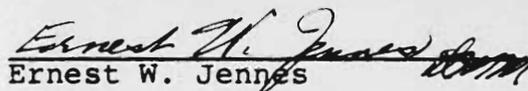
Just as there are obvious differences between political parties, there are obvious differences between their nominees for

President. In the context of a debate among candidates for President, it would be the grossest discrimination to treat Mr. Commoner, showing one percent of voter support in nationwide polls, exactly like non-major party candidates having fifteen times his support. The Constitution would not require such an unsound result.

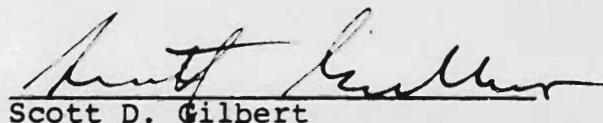
CONCLUSION

For the foregoing reasons, the complaint should be dismissed.

Respectfully submitted,


Ernest W. Jenness


Donna M. Murasky


Scott D. Gilbert

COVINGTON & BURLING
888 Sixteenth Street, N.W.
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September 15, 1980

UNITED STATES OF AMERICA
BEFORE THE FEDERAL ELECTION COMMISSION

IN RE RUTH HINERFELD AND THE)
LEAGUE OF WOMEN VOTERS) MUR NO. 1287
EDUCATIONAL FUND)

AFFIDAVIT OF RUTH J. HINERFELD

Ruth J. Hinerfeld, being duly sworn, deposes and says:

1. I serve as Chair of the Board of Trustees of the League of Women Voters Education Fund (LWVEF), and I am also the President of the League of Women Voters of the United States (LWVUS). I have served in these capacities since 1978. During the period 1972 to 1978, I held the positions of First Vice Chair, Vice Chair, and Trustee of the LWVEF, and served as First Vice President, Vice President, and Director of the LWVUS. I have been a member of the LWVUS since 1953. As Chair of the Board of Trustees of the LWVEF, I have been involved substantially in the initiation, structuring and scheduling of the 1980 Presidential and Vice Presidential candidate debates that are the subject of this proceeding; the LWVEF is the sole sponsor of such debates.

2. The LWVUS is a nationwide organization with 50 state leagues, 1,300 local leagues, and approximately 120,000 individual members. It has been sponsoring nonpartisan debates, forums and candidate events for 60 years. Under its by-laws, the LWVUS's purposes are to promote political responsibility through informed and active citizen participation in government and to act on selected governmental issues. In furtherance of these purposes, state and local leagues sponsor a variety of nonpartisan activities and citizen education programs.

These include publication of information about candidates for elective office and their positions on the issues, candidate forums and debates, get-out-the-vote drives, and demonstrations of voting machines. The LWVUS and the various state and local leagues are prohibited by their by-laws from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity.

3. The LWVEF was established by the LWVUS in 1957. It is a nonpartisan, educational trust exempt from federal income taxes under Section 501(c)(3) of the Internal Revenue Code. Article II of its Trust Agreement and its status as a Section 501(c)(3) organization prohibit it from participating or intervening in any political campaign on behalf of any candidate and from engaging in any partisan political activity. The purpose of LWVEF is exclusively educational: to inform citizens about public affairs and, in particular, the democratic process.

4. Since its establishment, the LWVEF has maintained a strict policy of neither opposing nor supporting candidates for public office. Its continued adherence to that policy over the years has earned the LWVEF the trust and respect of the public, and a reputation of nonpartisanship which it values highly.

5. In keeping with this tradition and its educational, nonpartisan purpose, the LWVEF sponsored three Presidential candidate debates and one Vice Presidential candidate debate between the Democratic and Republican nominees during the 1976 campaign.

6. The LWVEF takes great pride in its sponsorship of the 1976 Presidential candidate debates and believes that the debates helped American voters to make an informed decision in the election and generated increased public interest in the 1976 Presidential campaign. Independent studies support this belief. On the basis of their empirical studies, Steven H. Chaffee and Jack Dennis, in "Presidential Debates: An Empirical Assessment" (published in The Past and Future Presidential Debates, ed. A. Ranney, American Enterprise Institute 1979), conclude at page 98, "that the debates make substantial contributions to the process of democracy and perhaps even to the long-term viability of the system." And the March 1979 Report of the Twentieth Century Fund Task Force on Televised Presidential Debates concludes that Presidential debates should become a regular and customary feature of Presidential election campaigns. Since 1976, the LWVEF has worked to make this a reality.

7. After the 1976 election, the LWVEF worked over the next three years to secure the promulgation of regulations by the Federal Election Commission that would permit the sponsorship and funding of public debates among candidates for federal office. On September 12, 1977, Ruth Clusen, then Chair of the LWVEF testified before the Commission in connection with the first proposed rulemaking. I submitted comments on behalf of the LWVEF to the Commission on May 22, 1979, with respect to that proposed rulemaking, and testified before the Commission on October 23 and submitted written comments on November 13, 1979, with respect to a second proposed rulemaking, urging adoption of regulations that would enable the LWVEF to begin immediate fundraising for, and planning of, Presidential and Vice Presidential debates in 1980.

8. In keeping with its long tradition of nonpartisanship, the LWVEF undertook the task of structuring the 1980 debates so that they would comply fully with the nonpartisan requirements of the regulations of the Federal Election Commission and at the same time provide information about the candidates and their positions on the issues in a manner likely to be most beneficial and useful to the electorate as a whole. Because the LWVEF did not believe that participation in the debates should necessarily be limited to major party candidates, the LWVEF determined to develop criteria that would permit participation in the debate series by all significant candidates.

9. Before establishing criteria, the LWVEF received input from its Advisory Committee, a group of 27 prominent citizens having diverse backgrounds and varying political affiliations who are listed in Attachment A to this Affidavit. The Advisory Committee was set up for the purpose of providing advice and ideas with respect to the debates. The Committee was not involved in the actual decision-making process. All decisions were the responsibility of the LWVEF alone. No one other than the members of the Board of Trustees, the LWVEF's staff and legal counsel was even present during the meetings in which the criteria were considered and adopted.

10. On August 9, 1980, the LWVEF Board of Trustees by unanimous vote formally adopted the "League of Women Voters Education Fund Criteria For Selection Of Candidates To Participate in The 1980 Presidential and Vice Presidential Debates", a copy of which is attached hereto as Attachment B.

The adoption of these criteria was a decision made by the LWVEF Board of Trustees alone. This decision was not in any way affected by the positions or views of any of the Presidential candidates, or their running mates, or their representatives. Nor has anyone but the LWVEF applied the criteria or selected participants.

11. On the following day, August 10, the LWVEF released the eligibility criteria that had been adopted by the Board, and announced the sites chosen for the 1980 debates. As described in the attached criteria paper, the LWVEF plans to sponsor three Presidential candidate debates and one Vice Presidential candidate debate to which the running mates of eligible Presidential candidates will be invited. Because the debates are intended to educate the public about campaign issues and the candidates' positions on those issues, and to effectively stimulate increased voter interest and participation in the general election, the LWVEF determined that it would invite to participate in the debates only those Presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest. The three basic criteria selected by the LWVEF for Presidential candidates are: (1) Constitutional eligibility; (2) presence on the ballot in enough states to have a mathematical possibility of winning a majority of votes in the Electoral College; and (3) demonstrated significant voter interest and support.

12. The third criterion is particularly important. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity

for effective interchange between or among the participants, on the other. Debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its educational purposes in the limited amount of time available in the debates, the LWVEF decided to limit its forum to candidates whose participation would most likely be critical to the electorate as a whole, that is, the candidates whom the public itself regards as truly significant candidates.

13. In order to ensure that application of the third criterion would be nonpartisan, the LWVEF decided that it, like the other two, should be capable of objective application to the extent reasonably possible. After careful consideration, the LWVEF determined that two reasonable and objective indicators of voter interest and support were: (1) nomination of a candidate by a major national political party, and (2) as to non-major party candidates, a 15 percent standing in nationwide public opinion polls^{1/} or a standing equal to that of a major party candidate, whichever is lower. Because the LWVEF determined that receiving the nomination of a major party satisfied the criterion of a significant candidacy, it decided that in the event that a major party candidate had a standing of less than 15 percent in the polls, any other candidate having equal support also should be considered significant and of sufficient interest to the electorate that his or her participation would be warranted.

^{1/} The 15 percent figure is exclusive of undecided respondents. This means, for example, that in a poll where 10 percent of those polled were undecided, a showing of only 13.5 percent of all respondents would be sufficient.

14. The LWVEF also determined to retain, throughout the debate series, the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. It did so in order to permit participation in the second and third Presidential debates by candidates who did not satisfy the criteria in early September, and to permit it to reassess whether future participation by a previously invited candidate would continue to advance the purposes of the debates.

15. The LWVEF recognized that public opinion polls merely attempt to measure how the electorate would vote as of the time the polls are taken and that they do not attempt to measure who ultimately will win the election. It is because they do reflect contemporaneous electorate attitudes that polls are useful to the LWVEF. The LWVEF concluded that a determination of those candidates for whom the public would vote at any given time is a good, even if not perfect, measure of whether the electorate considers candidates to be significant. In recognition, however, that polls are imperfect devices to determine public opinion and that there are methodological differences among polling experts as to the best ways to try to measure public opinion, the LWVEF decided to examine the results of several independent polls conducted by nationally known and commonly accepted polling organizations. By examining the results of several different established and respected polls using somewhat different methodologies, the LWVEF concluded that it could exercise a reasoned and fair judgment whether the voter support and interest standard is met by non-major party candidates.

would provide a reasonable degree of confidence that statistical margins of error would not result in exclusion of candidates who ought to be invited to participate in the debates. Con-

versely, the LWVEF concluded that a consistent showing below 15 percent would permit it to make a reasonable judgment that a particular candidate had not met the statistical threshold.

19. In accordance with the foregoing criteria, on August 19, 1980, the LWVEF extended invitations to debate to the two major party candidates, President Carter and Governor Reagan, and their running mates. On that date, letters also were sent to the six non-major party Presidential candidates, required by law to file quarterly reports with the FEC, and who indicated that they met the financial threshold established by the FECA and who had not formally terminated their candidacies. These letters informed them of the criteria selected by the LWVEF, and requested information with regard to the ballot access criterion. The letters also sought to ensure that the tentatively scheduled debate dates would be acceptable to all possible participants. To date, the LWVEF has received responses from all such non-major party Presidential candidates except Ms. Ellen McCormack and Mr. Gus Hall.

20. The LWVEF intends to stage the debates now planned in the following cities on or about the dates indicated: Baltimore, Maryland (September 21); Louisville, Kentucky (October 2); Portland, Oregon (October 13); and Cleveland, Ohio (October 27). These sites were chosen on the basis of geographical diversity and availability of physically suitable facilities. In all four cities, the physical facilities necessary to stage the debates are being provided to the LWVEF free of charge.

21. At the time that the criteria were adopted, the members of the LWVEF Board of Trustees were aware, as were all informed citizens, that President Carter at one time had expressed reluctance to participate in a debate that included non-major party candidates. They were also aware that several non-major party candidates had indicated that they wanted to participate in the debate series, and they anticipated that these candidates might object to whatever criteria the LWVEF established if application of those criteria resulted in their exclusion.

22. Despite this information, the LWVEF was firmly committed to the belief that the debates should be structured so as best to serve the interest of the American electorate rather than what any particular candidate perceived as being in his self-interest. It remains committed to that belief, and it also believes its candidate selection criteria fulfills that commitment.

23. By September 9, 1980, the LWVEF had received the results of several nationwide polls conducted during the period August 27-September 6. On that day the Executive Committee of the LWVEF's Board of Trustees carefully examined these polls and several others conducted during the period August 14-August 23. The results of these polls are set forth in a chart attached hereto as Attachment C. The Committee also received the advice of several respected independent experts on polling.

Albert S. Castril, President of the National Council on Public Opinion Polls, brought the names of Dr. Abelson and Mr. Frankel to the attention of the LWVEF, and he was also consulted on their recommendation of Mr. Frankel.

24. These consultants, after examining the results of the nationwide polls selected by the LWVEF, advised that they "were struck by the consistency of the data produced by the eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes," and that in their "individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher." See Attachment D.

25. The members of the Board of Trustees, some of whom were consulted by telephone, also concluded that of the six non-major party candidates under consideration, Mr. Anderson had satisfied its criteria. Mr. Anderson alone had a consistent showing in the polls of voter support in excess of fifteen percent.^{2/} The other non-major party candidates, including Mr. Commoner, had only insignificant levels of voter support.

26. After concluding that Mr. Anderson had satisfied the LWVEF criteria, the LWVEF invited him to participate in its debates. As of this date, Governor Reagan and Mr. Anderson have accepted the LWVEF invitations for the Baltimore debate. President Carter, however, has informed the LWVEF that he will not participate in the September 21 debate to be held in Baltimore.

27. The LWVEF expects to proceed with the Baltimore debate whether or not the President ultimately decides to participate. It is nevertheless hopeful that the President will agree to participate because the LWVEF believes that his participation is important to informing the electorate and

^{2/} This level of support was achieved even without excluding undecided responses. Had those responses been excluded, Mr. Anderson's level of support would have been even greater.

making that debate of greatest use to the electorate.

28. On August 26, I did not state, as the complaint alleges, that "the league could change its debate rules so that Anderson, should he qualify, would take part in the first debate, but not in a second." What I did say, following a meeting with representatives of the two major party nominees, was that the LWVEF had retained the option to reassess the continued participation in the debates by a non-major party candidate (see ¶ 14 of this Affidavit). I also stated that I would inform the Board of the views that had been expressed at that meeting, including a request that the LWVEF sponsor a debate limited to the nominees for President of the two major parties. I did so inform the Board, and the Board unanimously decided not to change the criteria adopted on August 9. Moreover, if any change were to be made in the LWVEF's plan, that change would not be made for a partisan purpose but to further the educational purposes of the LWVEF to provide information to the electorate about the views of the candidates on the issues.

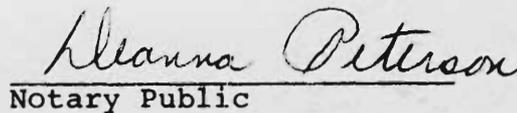
29. The LWVEF continues to believe that the electorate would not best be served by the inclusion of clearly non-significant candidates, such as Mr. Commoner, in its debate series, and that the educational purposes of the debate series would be frustrated by the inclusion of any or all such candidates. Attached as Attachment E is a summary of the standing of non-major party candidates as shown in nationwide polls taken between August 5, 1980, and September 7, 1980; it demonstrates that neither Mr. Commoner nor any other non-major party candidate, other than Mr. Anderson, has

achieved more than a minimal level of voter support.


Ruth J. Hinerfeld

District of Columbia, ss:

Sworn to and subscribed before me this 12th day
of September, 1980.


Notary Public

My Commission Expires July 31, 1982

ADVISORY COMMITTEE

ROBERT ANDERSON -- Chairman of the Board of Atlantic Richfield Co.

GOVERNOR JERRY APODACA -- President, National Issues Council; Governor of New Mexico (1975-1978); Chairman of the President's Council on Physical Fitness.

JAMES DAVID BARBER -- James B. Duke Professor of Political Science, Duke University.

CHARLES BENTON -- Chairman, Films, Inc.; Chairman, National Committee of Library and Information Science.

SHIRLEY TEMPLE BLACK -- Former U.S. Ambassador to the Republic of Ghana; Former U.S. Chief of Protocol.

*HONORABLE WILLIAM BROCK -- Chairman, Republican National Committee; Former United States Senator from Tennessee.

DOUGLASS CATER -- Trustee and Senior Fellow, Aspen Institute for Humanistic Studies; Special Assistant on Education and Health Policy during the Johnson Administration.

SOL CHAIKIN -- President, International Ladies Garment Workers Union.

ARCHIBALD COX -- Chairman, Common Cause; Professor of Law, Harvard University School of Law; Solicitor General of the United States (1961-1964); Watergate Special Prosecutor.

LEE HANNA -- Director, 1980 Presidential Debates; former Vice-President and Director of NBC News.

DOROTHY HEIGHT -- President, National Council of Negro Women.

HARRIET HENTGES -- Executive Director, League of Women Voters Education Fund; Economist.

CARLA HILLS -- Attorney; Partner, Latham, Watkins & Hills, Washington, D.C.; Secretary of Housing and Urban Development during the Ford Administration.

RUTH J. HINERFELD -- Chair, League of Women Voters Education Fund.

BENJAMIN HOOKS -- Executive Director, NAACP; Attorney; Ordained Baptist Minister.

PAT HUTAR -- Director of the Office of International Medicine, American Medical Association; Immediate Past President, National Federation of Republican Women; former U.S. Representative to the U.N. Committee on the Status of Women.

JIM KARAYN -- President and General Manager, WHYI Inc., (Radio and TV); Director of the Presidential Debates in 1976.

*JEWEL LAFONTANT -- Attorney, LaFontant, Wilkenson & Butler, Chicago; Former U.S. Delegate to the U.N.; Former Deputy Solicitor General of the U.S.

NEWTON MINOW -- Attorney, Sidley & Austin, Chicago; Chairman of the Federal Communications Commission (1961-1964); Co-Chair 1976 Presidential Debates Advisory Committee.

LEE MITCHELL -- Attorney, Sidley & Austin, Washington, D.C.; practices communications law.

AUSTIN RANNEY -- Resident Scholar and Co-Director of the Center for Political and Social Processes at the American Enterprise Institute for Public Policy Research; Edited The Past and Future of Presidential Debates.

SHARON PERCY ROCKEFELLER -- First Lady of West Virginia; Director, Corporation for Public Broadcasting.

CARMEN VOTAW -- President, Inter-American Commission of Women.

PAUL WAGNER -- President, Wagner & Baroody, Public Relations Counselors, Washington, D.C.

CHARLS WALKER -- Chairman of Charls Walker, Washington consultants.

CASPER WEINBERGER -- Vice-President and General Counsel of Bechtel Power Corporation.

*HONORABLE JOHN WHITE -- Chairman, Democratic National Committee; Former Deputy Secretary of Agriculture.

*Ex Officio

August 10, 1980

LEAGUE OF WOMEN VOTERS EDUCATION FUND
CRITERIA FOR SELECTION OF CANDIDATES TO
PARTICIPATE IN THE 1980 PRESIDENTIAL
AND VICE-PRESIDENTIAL DEBATES

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It is the intention of the League of Women Voters Education Fund to sponsor a series of nonpartisan debates among candidates for the offices of President and Vice President of the United States. There will be three Presidential Debates and one Vice-Presidential Debate. The LWVEF's purpose in sponsoring the debates is to educate the public about the issues in the campaign and the candidates' positions on those issues. At the same time, the Debates are intended to stimulate and to increase voter interest and participation in the general election. These purposes are best served by inviting to participate in the debates only those presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest.

The criteria for selecting candidates to participate in the debates have been drawn in light of the requirements of the Federal Election Commission and the purposes of the debates. Federal Election Commission regulations permit the LWVEF to sponsor nonpartisan candidate debates. The structure of such debates is left by the FEC "to the discretion" of the LWVEF "provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate

Attachment B

over another."

The LWVEF has adopted criteria for selection which it believes are:

- nonpartisan
- capable of objective application so that they will be as free as possible from varying interpretation, and
- understandable by the public.

The criteria set forth have been adopted after careful consideration by the Board of Trustees. In its deliberations, the Board was fortunate to have available to it the views of its Advisory Committee, a group of 24 prominent citizens having diverse backgrounds and interests.

All participants must meet the League's criteria to ensure that the Debates further the LWVEF's purposes. Accordingly, the LWVEF will invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will be invited to participate in the Vice-Presidential Debate. The participation of non-major party candidates will be determined on a case-by-case basis.

There are three basic criteria for inviting Presidential candidates to debate: (1) constitutional eligibility; (2) ballot accessibility; and (3) demonstrated significant voter support and interest.

Based on these criteria, the LWVEF will determine in late August whom to invite to the debate series. The running mates of presidential candidates invited to participate in the debates automatically will be eligible to participate in the debate for vice-presidential candidates. In addition, throughout the debate series, the LWVEF will retain the option to reassess the participa-

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tion of non-major party candidates in the event of significantly changed circumstances. The LWVEF will do so in order to determine whether any additional candidates, who did not satisfy the criteria in late August, will be invited to participate in the second and third Presidential Debate or whether future participation by a candidate would no longer advance the purposes of the debates.

CRITERIA FOR SELECTION OF
PRESIDENTIAL CANDIDATES
INVITED TO DEBATE

I. Constitutional Eligibility Criterion.

Only those candidates who meet the eligibility requirements of Article II, Section 1, of the Constitution will be invited to participate in the Debates since the purposes of the LWVEF would not be served by permitting participation of candidates who are ineligible to become President or Vice President.

II. Ballot Access Criterion.

1. A presidential candidate must be on the ballot in a sufficient number of states to have a mathematical possibility of winning a majority of votes (270) in the Electoral College.

Explanation: The LWVEF's purpose in sponsoring the debates is to educate the public about candidates who may become President in the general election. A candidate must win a majority of electoral votes to be elected. Adoption of a standard that allows participation in the debates by candidates who are not on enough ballots to win in the Electoral College would not further that purpose. Thus, although a candidate with less than a majority in the Electoral College could win in an election decided by the House of Representatives, the purpose of the Debates is to educate the electorate about the choice it must make in November, not the members of the House of Representatives who would elect the

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President in the unlikely event that no candidate wins a majority in the Electoral College. On the other hand, a standard that requires a candidate to be on the ballot in more states than are necessary to secure 270 electoral votes exceeds the constitutional minimum and appears, therefore, to be unduly harsh. Most members of the Advisory Committee also suggested this standard.

2. When the LWVEF decides whom to invite to debate, it is possible that in a number of states there will be no clear indication of candidate ballot status. In some states, a candidate may have filed the requisite number of signatures but not be officially certified on the ballot. In others, there may be legal challenges to (1) early filing deadlines and (2) independent and third party candidate petitions. In addition, candidates still may be in the process of qualifying to be on ballots when the LWVEF is making its decisions on participants.

- a. The LWVEF will request selected non-major party candidates ^{1/} interested in participating in the Debates to provide it with reasonable assurances that they will meet the ballot

1/The non-major party candidates to be invited to demonstrate that they meet the ballot access criterion are those candidates who are required to file quarterly financial reports with the Federal Election Commission, who have indicated that they meet the financial threshold established by the FECA, and who have not formally terminated their candidacies.

The Federal Election Campaign Act defines a major party as a political party whose nominee for the Presidency received twenty-five percent or more of the popular vote in the preceding Presidential election. 26 U.S.C. § 9002 (6).

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access criterion by the date of the election. The LWVEF will then assess whether the candidate is likely to qualify, taking into account, for example, the number of signatures already collected, the extent of the candidate's past efforts to qualify, and the likelihood that the candidate's planned efforts will be successful. To the extent indicated, the LWVEF will confirm with appropriate state officials the facts presented to it.

- b. In states where early filing deadlines have barred candidates from the ballot, state law will be respected unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.
- c. In states where a candidate appears to have qualified for the ballot, but the candidate's right to remain on the ballot is being challenged, certification by the appropriate state official will be conclusive unless it superseded in a judicial proceeding on or before the deadline set for qualifying.

Explanation: The LWVEF will not require candidates to be qualified on the requisite number of ballots at the times it needs to issue invitations to debate. This is because the law in some states permits candidates to qualify to be on the ballot after the times that the LWVEF will need to make its decisions. The LWVEF will not require candidates to meet a more onerous ballot access criterion than that required by the states themselves -- what the LWVEF seeks to ascertain by this criterion is whether a presidential candidate has a possibility of winning a general election in November, not in August or September.

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III. Demonstrated Significant Voter Support and Interest Criterion.

In 1976, seven candidates eligible to become President were on the ballots in enough states to have a theoretical possibility of winning. Not all of them, however, were significant candidates. Meeting the above standards does not, therefore, necessarily mean that a candidate will be invited to participate in the 1980 debates. The LWVEF also will require that Presidential candidates have significant voter support and interest. "Significant" does not mean that a candidate is raising issues different from those raised by other candidates or that the candidate's views on already-defined issues may differ from those of other candidates. The definition of "significant" is based on magnitude of voter support for and voter interest in a person's candidacy.

1. Candidates invited to debate must either be a nominee of a major political party as defined in the Federal Election Campaign Act or meet LWVEF standards for demonstrated voter support and interest.

Explanation: There is ample precedent for treating the candidates of major parties differently from non-major party candidates. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court found that the Constitution did not require the government to treat all presidential candidates the same for public financing purposes. Major party nominees already have demonstrated significant voter support and interest by virtue of their nomination. Non-major party candidates, however, have not met any similar test. It is necessary, therefore, for the LWVEF to ascertain whether non-major party presidential candidates have the support of a significant portion of the electorate in addition to their being eligible for office and theoretically capable of winning the general election.

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2. The LWVEF will rely on nationwide public opinion polls to determine voter support and interest.

Explanation: Although public opinion polls are not necessarily accurate predictors of future voting behavior, they present the best indicator of existing voter support for and voter interest in non-major party candidates at any given time during the elective process. There are other indicators, such as number of contributors, amounts of funds raised, and media attention, which also may indicate voter support and interest. These other indicators are more difficult to interpret and apply, and they measure less directly than national opinion polls voter support and interest. Other possible indicators of voter support and interest, such as petition requirements, place an unnecessary burden on non-major party presidential candidates.

3. An assessment of voter support and interest will be based on data derived from nationwide polling samples provided by several well-respected public polling organizations.

4. The LWVEF will make its decisions based on the outcome of the most recent polls taken by each of the polling organizations selected by the LWVEF.

Explanation: Polls may vary, not only due to polling methods but also as a result of the dates on which they were taken. This is especially true when the measure of public opinion is taken in election campaigns. The best the LWVEF can hope to do is to ascertain current voter support and interest as close as is feasible to the dates on which it makes its decisions.

5. The LWVEF will rely on questions which are as close as possible to the classic "trial-heat" approach -- "If the election were held today, would you vote for A, B, C, D, etc.?"

Explanation: The principal purpose of the Debates that the LWVEF

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proposes to sponsor is a more informed electorate. To achieve that purpose, the LWVEF must attempt to ascertain which candidates the electorate regards as serious candidates for its vote. Identification of such candidates is most readily ascertained by the "trial-heat" type question proposed.

6. In order to participate in the Debates, a non-major party candidate must receive a level of voter support of fifteen percent or the level of voter support received by a major party candidate, whichever is lower.

Explanation: Advisory Committee members suggested voter support threshold levels ranging between fifteen and twenty-five percent, and the Board concluded that any figure within this range would be reasonable. After consideration of a number of factors, including the records of public opinion polls in previous presidential elections and their relationship to actual election results, the substantial obstacles faced by non-major party candidates and variations among public opinion polling techniques and the precision of their results, the Board decided to adopt the fifteen percent level of support or the level of support that a major candidate receives for the following reasons. First, non-major party candidates who reach even a fifteen percent level of support, despite the substantial odds facing them, should be regarded as significant forces in the election. In addition, we also found it appropriate to include non-major party candidates whose showing in the polls is equal to that of a major party candidate. The ability to garner such a level of support suggests the candidate's presence in the Debates would further the LWVEF's purposes/ ^{for the debates.} On the other hand, to lower the fifteen percent threshold in the absence of a comparable lower level of voter support for a major party candidate could result in participation by candidates who would not further the LWVEF's purposes. Their parti-

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icipation would, moreover, decrease the time available to clearly significant candidates to set forth their views and differences in the Debates. The LWVEF recognizes that each additional candidate invited to the debates will diminish the other candidates' ability to make their views known.

7. The procedure adopted for testing whether a candidate meets the voter support requirement gives all the active, selected^{2/} non-major party candidates an opportunity to satisfy the requirement. The LWVEF will look at the nationwide results of the most recent polls taken by each of the major polling organizations selected by the League. All non-major party candidates who receive the requisite level of voter support of fifteen percent or the level of support received by major party candidates, whichever is lower, will be invited.

VICE-PRESIDENTIAL CANDIDATES

Other than being required to possess the personal qualifications to become President, the running mates designated by the participants in the Presidential Debates will be included in the Vice-presidential Debate.

^{2/}See page 5, fn. 1

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SUMMARY OF AVAILABLE
 NATIONAL POLL DATA - 1980 PRESIDENTIAL ELECTION
 LEAGUE OF WOMEN VOTERS EDUCATION FUND

| <u>POLL:</u> | <u>TIME</u> | <u>Roper</u> | <u>L.A. Times</u> | <u>Harris</u> |
|--------------|----------------|----------------|-------------------|----------------|
| <u>Dates</u> | <u>8/26-28</u> | <u>9/4-6</u> | <u>9/2-7</u> | <u>9/3-7</u> |
| Reagan | 39% | 40% | 37% | 41% |
| Carter | 39 | 34 | 36 | 37 |
| Anderson | 15 | 13 | 18 | 17 |
| | Unsure - 7 | Clark - 1 | Other - 3 | Clark - 1 |
| | | Commoner - 1 | Not sure - 6 | Commoner - * |
| | | Undecided - 12 | | Pulley - * |
| | | | | McCormack - * |
| | | | | Don't know - 4 |

| <u>POLL:</u> | <u>Gallup</u> | <u>Harris</u> | <u>AP/NBC</u> | <u>Roper</u> |
|--------------|---------------------------|----------------|----------------|----------------|
| <u>Dates</u> | <u>8/26-28</u> | <u>8/14-20</u> | <u>8/15-17</u> | <u>8/16-23</u> |
| Reagan | 37% | 42% | 39% | 37% |
| Carter | 35 | 36 | 32 | 36 |
| Anderson | 14 | 17 | 13 | 14 |
| | Commoner - 1 | Clark - 1 | Commoner - 1 | Pulley - 1 |
| | McCormack - 1 | Commoner - * | Clark - 0 | Commoner - * |
| | Clark - * | McCormack - * | Other - 2 | Clark - * |
| | Pulley - * | Pulley - * | Not sure - 13 | McCormack - * |
| | Hall - 0 | Not sure - 4 | | Hall - * |
| | Others/ Undecided - 12 | | | Other - 1 |
| | | | | Not sure - 10 |

* less than 0.5%

30040220541

1980 PRESIDENTIAL
DEBATES

 League of Women Voters Education Fund
1730 M Street, NW, Washington DC 20036
NEWS RELEASE

Contact
Vera Hirschberg
Public Relations
296-1770, ext. 263

FOR IMMEDIATE RELEASE
September, 9, 1980

STATEMENT OF DR. HERBERT ABELSON, MERVIN FIELD AND LESTER FRANKEL

Eight separate polling reports, which were based on national cross sections of potential voters were reviewed. These were all the available national published polls reported since mid-August. Four of these polls were taken in late August and four in early September.

The four August polls showed Anderson's support to range from 13% to 17%. The four September polls showed Anderson's support ranging from 13 to 18% with three of the four polls at 15% or higher.

We were struck with the consistency of the data produced by these eight polls using different questioning methods, different modes of interviewing, different techniques for qualifying respondents and different sample sizes.

In our individual and collective judgment, John Anderson at the time of the September polls had a support level of 15% or higher.

As research professionals we recognize the fragile nature of any statistic derived from a public opinion sample. We anticipated that League officials might be in receipt of a variety of disparate and ambiguous poll results. We volunteered our efforts to assist the League in the interpretation of the data. As things turned out, the data were quite clear and unambiguous and it was not necessary to use any involved analytical procedures to reach our conclusions.

Attachment D

8004000545

POLLING DATA

1. AP/NBC Poll, 8/5-8/7/80

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

2. Harris Poll, 8/5-8/6/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

3. Harris Poll, 8/14-18/80

| | |
|-----------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| McCormack | less than 0.5% |
| Pulley | less than 0.5% |
| Not sure | 4% |

4. AP/NBC Poll, 8/15-8/16/80^{*/}

| | |
|----------|----------------|
| Commoner | 1% |
| Clark | less than 0.5% |
| Other | 2% |
| Not sure | 13% |

5. Gallup Poll, 8/15-8/17/80

| | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |

^{*/} Attachment C incorrectly states that this poll was taken on August 15-17, 1980.

6. Roper Poll, 8/16-8/23/80
- | | |
|------------|----------------|
| Commoner | less than 0.5% |
| Clark | less than 0.5% |
| Hall | less than 0.1% |
| McCormack | less than 0.5% |
| Pulley | 1% |
| Others | 1% |
| Don't know | 10% |
7. Gallup Poll, 8/26-8/28/80
- | | |
|---------------------|----------------|
| Commoner | 1% |
| McCormack | 1% |
| Clark | less than 0.5% |
| Pulley | less than 0.5% |
| Hall | 0% |
| Other and undecided | 12% |
8. L.A. Times Poll, 9/2-9/7/80
- | | |
|----------|------------------|
| Other | 3% ^{*/} |
| Not sure | 6% |
9. Harris Poll, 9/3-9/7/80
- | | |
|------------|----------------|
| Clark | 1% |
| Commoner | less than 0.5% |
| Pulley | less than 0.5% |
| McCormack | less than 0.5% |
| Don't know | 4% |
10. Roper Poll, 9/4-9/6/80
- | | |
|-----------|-----|
| Clark | 1% |
| Commoner | 1% |
| Undecided | 12% |

*/ Other than Reagan, Carter, and Anderson.

COVINGTON & BURLING

888 SIXTEENTH STREET, N. W.

WASHINGTON, D. C. 20006

TELEPHONE (202) 452-6000

WRITER'S DIRECT DIAL NUMBER

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JAMES H. MCGLOTHLIN
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JOHN SHERMAN COOPER
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WILLIAM D. IVERSON
S. WILLIAM LIVINGSTON, JR.
JOHN M. VINE
STUART C. STOCK

August 22, 1980

H. Richard Mayberry, Jr., Esq.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Mayberry:

This letter is written on behalf of the League of Women Voters Education Fund in response to your August 18 letter to the LWVEF regarding the 1980 Presidential and Vice-Presidential debates which it is sponsoring.

Your letter (1) requests that your clients, Barry Commoner and LaDonna Harris, Presidential and Vice-Presidential candidates of The Citizens Party, be included in the debates and (2) objects to LWVEF's 15 percent standard for determining whether non-major party candidates have achieved a significant measure of nationwide voter support and interest.^{1/}

We have advised the LWVEF that the criteria it has established meet any applicable legal requirements. Of particular importance are the regulations of the Federal Election Commission. Under those regulations, the LWVEF, as a nonprofit organization exempt from federal taxation under 26 U.S.C. § 501(c)(3) "may stage nonpartisan candidate debates in accordance with 11 C.F.R. 110.13(b) . . ." 11 C.F.R. § 110.13(a)(1). Section 110.13(b), in turn, states that "[t]he structure of debates . . . is left to the discretion of the staging organization, provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate over another." In promulgating these rules, the Federal Election Commission made clear that the LWVEF may "stage a general election debate to which only major party candidates are invited."
44 Fed.Reg. 76735 (1980).

^{1/} The precise standard is whether the candidate receives a level of voter support in the polls of 15 percent or the level received by a major party candidate, whichever is lower. Since undecided responses will be excluded, the actual standard is something less than 15 percent.

80040130548

H. Richard Mayberry, Jr., Esq.
August 22, 1980
Page Two

The LWVEF would comply with the FEC's nonpartisan requirement (or the requirements of any other government agency) if it included in the debates only the Democratic and Republican nominees. The fact that the LWVEF is providing an opportunity for non-major party candidates who meet its significant candidate criterion to participate does not render the proposed debates partisan or otherwise legally questionable.

That the LWVEF has discretion to distinguish between major party candidates and non-major party candidates in adopting standards to implement its voter support and interest criterion also is supported by Buckley v. Valeo, 424 U.S. 1 (1976). Buckley does not, as you suggest, bar the government (much less a private organization such as LWVEF) from treating major party candidates differently from non-major party candidates. Rather, in that case the Supreme Court upheld the public financing scheme of the Federal Election Campaign Act even though it differentiates among major party, minor party and new party candidates based on specific levels of past voter support.^{1/}

You appear to be arguing that the selection standards are discriminatory and that the debates will be partisan because some non-major party candidates will not participate. The logic of this argument, of course, is that all non-major party candidates must participate in the debates to avoid discrimination and for the debates to be non-partisan. Any such approach, however, would result in debates which would be less informative and enlightening to the electorate than the LWVEF debates. Moreover, unless all candidates are invited, any choice has the effect of excluding some candidates, and may have the effect of benefiting or injuring some of those who do and do not participate, depending upon what occurs in the debates. But the test of nonpartisanship is not whether the debates benefit or injure participants or non-participants. The test is whether they have been structured in a particular way for the purpose of benefiting a particular candidate. Here it is clear that LWVEF's purpose is truly nonpartisan.

The purpose of the debates is neither to benefit nor to disadvantage major parties or third parties. The purpose is to help

^{1/} The Supreme Court rejected the argument that such a scheme invidiously discriminates against non-major party candidates, i.e., nominees of parties whose candidates in the preceding general election received less than twenty-five percent of the popular vote. 424 U.S. at 93-108. The LWVEF, of course, has adopted a much less rigorous standard for determining whether non-major party candidates should be invited to share a forum with major party candidates.

90710100549

H. Richard Mayberry, Jr., Esq.
August 22, 1980
Page Three

inform the electorate of the views of the significant candidates on the issues in the campaign. Within any debate framework, there is an inverse relationship between the number of participants, on the one hand, and the time available for the expression of views and the opportunity for effective interchange between or among the participants, on the other. So, too, debates that are too lengthy or which include candidates in whom the public has little voting interest will not effectively serve the purpose of the debates. To accomplish its purpose in the limited amount of time available in the debates, the LWVEF must limit its forum to candidates whose participation would most likely be critical to the electorate as a whole -- that is, the candidates whom the public itself regards as truly significant candidates.

The LWVEF's purpose would not be served best by inviting non-major party candidates to participate merely because they may raise issues different from those raised by the 1980 major party Presidential and Vice-Presidential candidates or because their views on already-defined issues may differ from those of the major party candidates. This is not to say that the LWVEF questions the importance of such candidates to the electoral process. Its debates must be limited because its purpose in sponsoring them is limited. The debates are not intended to be town meetings. To achieve the necessarily limited purpose of the debates, the LWVEF criterion excludes only those non-major party candidates whom more than 85 percent of the electorate do not support.

Your suggestion that the voter support and interest standard is improper appears to be based on the premise that it necessarily excludes participation by new parties. Thus, you state that the standard "does not bear a reasonable relationship to the purpose of the debates . . . for it effectively excludes new party participation." And in support of your legal argument, you state that "the percentile classification used by the League is so high as to exclude any new parties."

However, your premise is erroneous, as shown by the very data you cite in support of it, even though these are election results rather than poll results. Your letter specifies six non-major party candidates in previous Presidential elections who received more than three percent of the vote in the general election. All of these candidates who would have met the ballot access requirement, about which you do not complain, exceeded the LWVEF's 15 percent voter support standard. Theodore Roosevelt received 27 percent of the vote in 1912, Robert LaFollette received 16 percent in 1924, and George Wallace, who received 13 percent on election day, had 15 percent or greater support in the pre-election polls. Moreover, your letter points out that a non-major party candidate, John Anderson, "may well qualify for the general election debates" this year.

8071010750

H. Richard Mayberry, Jr., Esq.
August 22, 1980
Page Four

The LWVEF has no intention, therefore, of eliminating as a condition for non-major party candidate participation in the debates the voter support and interest standard that it has adopted. Moreover, any attempt by any Government agency to reduce the LWVEF's discretion under the FEC regulations would present serious constitutional problems. The Government may not interfere with the First Amendment rights of the LWVEF in its sponsorship of the 1980 debates.

All six non-major party Presidential candidates including your client have received a letter from the LWVEF requesting information concerning the ballot access criterion and informing them that invitations to debate will be issued by September 10, 1980 --after the LWVEF has had an opportunity to examine the results of various nationwide polls. As in the past and up until the time that such polls are taken, your clients, like other Presidential and Vice-Presidential candidates, have had and will have the opportunity to demonstrate significant voter support and interest.

Very truly yours,



Ernest W. Jenness

cc: General Counsel
Federal Election Commission
Washington, D.C. 20463

Chief
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Commission
Washington, D.C. 20554

Howard Schoenfeld
Special Assistant for Exempt Organizations
Internal Revenue Service
Washington, D.C.

3071910551

NCPP

NATIONAL COUNCIL ON PUBLIC POLLS

Fast sent this over
HK

President

Albert H. Cantril
Cantril Research

Treasurer

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Opinion Research Corporation

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National Opinion
Research Center

Louis Harris
Louis Harris & Associates

Warren J. Mitosky
CBS News

Glenn H. Roberts
Des Moines Register
and Tribune

Burns W. Roper
The Roper Organization

Richard M. Scammon
Elections Research Center

Contact: Albert H. Cantril
(202) 393-5100

EMBARGOED FOR RELEASE
6 p.m., Friday, August 22, 1980

POLLING ASSOCIATION CAUTIONS LEAGUE OF WOMEN VOTERS

ON USE OF POLLS FOR DEBATES DECISION

Washington, D. C. -- The National Council on Public Polls

expressed its concern today over the difficulty of specifying when a candidate has achieved a 15 percent level of support in order to satisfy the League of Women Voters' requirement for participation in the 1980 Presidential Debates.

While the National Council acknowledged the right of the League to set a threshold in its attempt to find a criterion capable of objective application, many members of the association of polling organizations regard a specific percentage as arbitrary. "What

really troubles our members, however," National Council President Albert H. Cantril explained, "are the many practical problems in applying the 15 percent criterion."

The National Council called attention to the different techniques used by polling organizations that can result in varying assessments of candidate strength. For example, some polling firms base their estimates on registered voters, others on "likely" voters, and others

Appendix C

(MORE)

GCC# 2582



League of Women Voters Education Fund 1730 M Street, NW, Washington, DC 20036

(202) 659-2685

CHAIR
RUTH J. HINERFELD

OFFICERS
Vice-Chairs

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September 9, 1980

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Fumi Sugihara
College Station, TX

EXECUTIVE DIRECTOR
Harriet Hentges

DIRECTOR
Martha T. Mills

Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Re: Commoner v. League of Women Voters
Education Fund MUR 1287

Gentlemen:

This is to inform you that the League of Women Voters
Education Fund is represented in this matter by

Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Please send notifications and any other communications
from the Federal Election Commission regarding this
matter to Ernest W. Jennes (Telephone No. 452-6202) and
Scott Gilbert (Telephone No. 452-4766) of that firm.

Sincerely,

Ruth J. Hinerfeld

SEP 10 1980

SEP 10 1980

80740320554

Scott D. Gilbert, Esq.

COVINGTON & BURLING

888 SIXTEENTH STREET, N. W.

WASHINGTON, D. C. 20006

By Hand

Mr. Charles N. Steele

General Counsel

Federal Election Commission

1325 K Street, N.W. *7th Floor*

Washington, D.C. 20463



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 3, 1980

H. Richard Mayberry, Jr.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Re: MUR 1287

Dear Mr. Mayberry:

8004022055
This letter is in response to your request that the Commission take expedited action on the above-referenced complaint which you filed on August 28, 1980 against the League of Women Voters Education Fund (LWVEF). As you know, 2 U.S.C. § 437g(a)(1) provides that a respondent shall have fifteen days to respond to a complaint before the Commission may take any action on the matter. Your request for expedited consideration includes a request that the time of the LWVEF to respond to your complaint be shortened to less than 15 days. In this case, the fifteen day period would expire on September 15, 1980, and unlike the previous Commission matters which you cite to shorten the time to respond, there will be time for the Commission to consider both your complaint and the LWVEF's response before the date on which the first debate is apparently scheduled to occur. Accordingly, the Commission must deny the request to shorten the response time of the LWVEF and have so notified them in the attached letter.

The Commission understands the reasons underlying your request that this matter be handled expeditiously, and will endeavor to consider the matter, with the response of the LWVEF, as soon after September 15 as possible.

If you have any questions, please contact Ms. Lyn Oliphant at 523-4143.

Sincerely,

A handwritten signature in cursive script, appearing to read "Charles N. Steele".

Charles N. Steele
General Counsel

cc: Ruth Hinerfeld



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

September 3, 1980

Ruth Hinerfeld
Chairman
League of Women Voters
Education Fund
1730 M Street, N.W.
Washington, D.C. 20036

Re: MUR 1287

Dear Ms. Hinerfeld:

30740120556
This letter is in reference to a complaint filed by Barry Commoner and the Citizens Party against the League of Women Voters Education Fund alleging that the Presidential debates scheduled by the LWVEF will be partisan in nature and in violation of the Commission's debate regulations, 11 C.F.R. §§ 110.13 and 114.4. A copy of the complaint was hand-carried to your office on August 29, 1980 by Commission staff.

As you were notified in the Commission's letter of August 29, the LWVEF has fifteen days to respond to this complaint. Your response will be due on September 15, 1980. As you are aware, the complainant has requested that the Commission take expedited action on this matter, including shortening your time to respond to the complaint. On September 3, 1980, the Commission denied the complainant's request to shorten the time to respond, on the grounds that there will be time for full Commission consideration before the first scheduled debate, but after the expiration of the fifteen day response period.

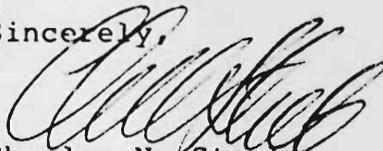
In order that we may have the opportunity to consider your response to the complaint fully and also afford Mr. Commoner expeditious consideration of his complaint, we request that your response be hand delivered to the Commission as soon as possible, but in no event later than September 15, 1980. While we recognize that 2 U.S.C.

Letter to Ruth Hinerfeld
Page Two

§ 437g(a)(1) affords you fifteen days to respond to this complaint, we would appreciate any effort to respond sooner.

If you have any questions concerning this matter, please contact Ms. Lyn Oliphant, at 523-4143.

Sincerely,



Charles N. Steele
General Counsel

cc: H. Richard Mayberry

30040120557

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
League of Women Voters Education) MUR 1287
Fund (LWVEF))

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission's executive session on September 3, 1980, do hereby certify that the Commission took the following actions in MUR 1287:

1. Decided by a vote of 6-0 to deny the request to shorten the time of the LWVEF to respond.
2. Decided by a vote of 4-2 to send to the LWVEF the draft letter attached to the General Counsel's September 3, 1980 report.
3. Decided by a vote of 4-2 to send to Richard Mayberry the draft letter attached to the General Counsel's September 3, 1980 report.

Commissioners Aikens, Friedersdorf, Rieche, and Tiernan voted affirmatively to send the letters; Commissioners Harris and McGarry dissented.

Attest:

9/8/80
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary to the Commission



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 3, 1980

MEMORANDUM

TO: The Commission

FROM: Charles N. Steele *CNS*
General Counsel

SUBJECT: MUR 1287 - Request for Expedited Handling

On August 28, 1980, Barry Commoner and the Citizens Party filed a complaint against the League of Women Voters Education Fund (LWVEF) alleging that the LWVEF debates scheduled for the general election campaign are not non-partisan in nature and, thus, would violate the Commission's debate regulations. The first debate is now apparently scheduled for September 21, 1980.

Mr. Commoner's complaint alleges that, even though the explanation and justification for the Commission's debate regulations states that a general election debate may be limited to major party candidates, such a debate must still be nonpartisan in all other respects. The complaint further alleges that there is evidence that the LWVEF debates are not nonpartisan. In support of this claim, the complaint alleges that the role of the media, the outside influence of the major party participants on the terms and structure of the debates and the subjective intent of the sponsor demonstrate the partisan nature of the debates. The LWVEF policy statement on selection criteria, the LWVEF Trust Agreement, and a variety of newspaper articles are attached. In addition to the factual issues raised with respect to nonpartisanship, the complaint sets forth a constitutional claim -- that the Commission's debate regulations and the tax exempt status of the LWVEF constitute state action, and therefore, that one of the selection criteria, the 15% requirement of public support as reflected in opinion polls, is discriminatory against nonmajor party candidates.

3004020559

Memorandum to the Commission
Page Two
MUR 1287 - Request for Expedited Handling

For relief, the complaint seeks immediate Commission action either by the filing of a suit for mandatory injunctive relief to eliminate one of the LWVEF criteria -- the 15% requirement -- or alternatively, a declaration by the Commission that it will act immediately to investigate, develop a factual record and make a determination on the complaint prior to the first debate. Thus, the complaint seeks to shorten the LWVEF's time to respond to less than 15 days.

Because of the factual issues raised by the complaint, the response of the LWVEF should be considered before any recommendation on this matter is made. Unlike the cases relating to the Nashua Telegraph debate, there will be opportunity for the Commission to consider this complaint even if the respondent takes the full 15 days to respond. Accordingly, there is insufficient justification for shortening the LWVEF's time to respond. On August 29, 1980, a copy of the complaint was hand-carried to the LWVEF. Under the Commission's ordinary compliance procedures, the LWVEF has fifteen days from that date to respond, that is, until September 15, 1980. (Since the 15 days ends on Saturday, September 13, the LWVEF has until September 15 to respond.) In order to make certain that a prompt review may be made, we recommend sending the attached letter to the League requesting that their response be hand-carried to the Commission on that date. This would permit the Commission to consider the merits of the complaint at its executive session on September 16, 1980, five days before the first debate is now apparently scheduled. The Office of General Counsel will circulate a First General Counsel's report by September 16, 1980 (if the LWVEF response is received on September 15), or sooner if a response is forthcoming.

Since the complaint requests a response to the request for expedited handling by September 3, the attached letter should be forwarded notifying Mr. Mayberry, on behalf of Mr. Commoner, that the Commission will afford the League the full fifteen days, since that still permits full Commission consideration of the complaint prior to the first debate, and further notifying him that the Commission will consider the complaint and response together as soon after September 15 as possible.

30040120360

Memorandum to the Commission
Page Three
MUR 1287 - Request for Expedited Handling

Recommendations

- 1. Deny request to shorten the time of the LWVEF to respond.
- 2. Send attached letter to LWVEF.
- 3. Send attached letter to Richard Mayberry.

Attachments

- Letter to LWVEF
- Letter to Richard Mayberry

30040220561



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

August 29, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

H. Richard Mayberry, Jr.
Suite 701
1050 Seventeenth Street, N.W.
Washington, D.C. 20036

Dear Mr. Mayberry:

This letter is to acknowledge receipt of your complaint of August 28, 1980, against Chairman Ruth Hinerfeld and the League of Women Voters Educational Fund which alleges violations of the Federal Election Campaign laws. A staff member has been assigned to analyze your allegations. The respondents will be notified of this complaint within 5 days and a recommendation to the Federal Election Commission as to how this matter should be initially handled will be made 15 days after the respondents' notification. You will be notified as soon as the Commission takes final action on your complaint. Should you have or receive any additional information in this matter, please forward it to this office. For your information, we have attached a brief description of the Commission's procedures for handling complaints.

Sincerely,

Charles N. Steele
General Counsel

Enclosure

9071010107562

| | | | |
|---|-------------|--|--|
| 1. The following service is requested (check one): <input type="checkbox"/> Show to whom and date delivered. <input type="checkbox"/> Show to whom, date, and address of delivery. <input type="checkbox"/> RESTRICTED DELIVERY Show to whom and date delivered. <input type="checkbox"/> RESTRICTED DELIVERY Show to whom, date, and address of delivery. (CONSULT POSTMASTER FOR FEES) | | 2. ARTICLE ADDRESSED TO: <i>H. Richard Mayberry, Jr.</i> | |
| 3. ARTICLE DESCRIPTION: REGISTERED NO. <i>94617</i> | INSURED NO. | 4. I have received the article described above: SIGNATURE <i>[Signature]</i> Address: Authorized agent DATE OF DELIVERY: | |
| 5. ADDRESSES' Complete only if request for return receipt is made. | | 6. POSTAL SERVICE STAMP SEP 2 1980 INITIALS | |
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75 Form 3811, Aug. 1979

RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 29, 1980

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ruth Hinerfeld, Chairman
The League of Women Voters
Education Fund
1730 M Street, N.W.,
Washington, D.C. 20036

Re: MUR 1287

Dear Ms. Hinerfeld:

This letter is to notify you that on August 28, 1980, the Federal Election Commission received a complaint which alleges that you may have violated certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act") or Chapters 95 and 96 of Title 26, U.S. Code. A copy of this complaint is enclosed. We have numbered this matter MUR 1287. Please refer to this number in all future correspondence.

Under the Act, you have the opportunity to demonstrate, in writing, that no action should be taken against your Committee in connection with this matter. Your response must be submitted within 15 days of receipt of this letter. If no response is received within 15 days, the Commission may take further action based on the available information.

Please submit any factual or legal materials which you believe are relevant to the Commission's analysis of this matter. Where appropriate, statements should be submitted under oath.

This matter will remain confidential in accordance with 2 U.S.C. § 437g(a)(4)(B) and § 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you intend to be represented by counsel in this matter, please advise the Commission by sending a letter of representation stating the name, address and telephone number of such counsel, and a statement authorizing such counsel to receive any notifications and other communications from the Commission.

30040220563

If you have any questions, please contact Lynn Oliphant, the attorney assigned to this matter at (202) 523-4143. For your information, we have attached a brief description of the Commission's procedure for handling complaints.

Sincerely,



Charles N. Steere
General Counsel

Enclosure

1. Complaint
2. Procedures

37710107364

PS Form 3811, Aug. 1978

| | | | | | | | |
|---|--|--|--|--------------------------------|--|------------------------------|--|
| 1. ADDRESSEE (Print name, street address, city, state, and ZIP code.) Ruth Hinerfeld | | 2. REGISTERED NO. 9468 | | 3. CERTIFIED NO. | | 4. INSURED NO. | |
| 5. The following services are required (check one): <input type="checkbox"/> Show to whom and date delivered <input type="checkbox"/> Show to whom, date, and address of delivery <input type="checkbox"/> RESTRICTED DELIVERY <input type="checkbox"/> RESTRICTED DELIVERY <input type="checkbox"/> Show to whom and date returned <input type="checkbox"/> Show to whom, date, and address of delivery (CONSULT POSTMASTER FOR FEES) | | 6. I have received the article described above: SIGNATURE <input type="checkbox"/> Addressee <input type="checkbox"/> Authorized agent Lynn Oliphant | | 7. DATE OF DELIVERY 8/10/78 | | 8. UNABLE TO DELIVER BECAUSE | |
| 9. RETURN RECEIPT, REGISTERED, INSURED AND CERTIFIED MAIL | | 10. POSTMAN'S OFFICE | | 11. CITY | | 12. STATE | |

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Law Offices
H. Richard Mayberry, Jr.
Suite 701
1050 Seventeenth Street, N. W.
Washington, D.C. 20036
202/872-0005

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL ELECTION COMMISSION

Barry Commoner of The Citizens Party,)
)
Complainant,)

v.)

Complaint)

~~Chairman~~ Ruth Hinerfeld and the)
)
League of Women Voters Educational)
)
Fund,)

MUR NO.:)

Respondents.)

30 AUG 28 P 5: 54

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AUG 28 1974

8-28-70

THE PARTIES

The Complainant is identified as follows:

BARRY COMMONER is the candidate of The Citizens Party for the general election of President of the United States. The Citizens Party is a non-major political party. The Citizens Party's principal office is Suite 5, 2126 Connecticut Avenue, N.W., Washington, D.C. 20009.

On information and belief, the Respondents are identified as follows:

RUTH HINERFELD is the Chairman of the Board of Trustees of the League of Women Voters Educations Fund, and responsible for management of the Fund.

THE LEAGUE OF WOMEN VOTERS EDUCATION FUND is a charitable trust organized for the purpose of providing the general public with voter and citizen educational services. Its principal office is 1730 M Street, N.W., Washington, D.C. 20036.

THE FACTS

1. Chair Ruth Hinerfeld and The League of Women Voters Education Fund ("The LWVEF") will sponsor 1980 Presidential Debates in various cities during September and October and a Vice Presidential debate in the month of October, 1980. (LWVEF News Release, 8/10/80)*. The exact dates and locations are at this time only known by the LWVEF.

2. The LWVEF will invite candidates to participate in these debates who have met criteria adopted by the Board of Trustees:

- a) Constitutional Eligibility for the Office of the Presidency;
- b) Access on sufficient state ballots to have a mathematical probability of winning the electoral college; and,
- c) Demonstrated significant voter interest and support as evidenced by a major party candidate receiving the nomination of a major political party or a non-major party candidate receiving voter support in the polls of 15% or the level of voter support at least equal to that of a major party candidate. (LWVEF News Release, 8/10/80)

3. The LWVEF will automatically invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will automatically be invited. (LWVEF Criteria, 8/10/80), p.2). The automatic invitation arises from the express statement of the LWVEF and from the adoption of criteria tailored to major party candidates. For example, major party candidates are guaranteed ballot access and the percentile classification is tailored to state a minimum quantum equivalent to such a candidate's present rating. The invitation is absolute

* The matters of public record which complainant cites herein are appended in a separate appendix volume.

and not subject to revocation.

4. The LWVEF will on a case by case basis invite to debate the non-major party candidates. Even if a non-major party candidate is invited, the invitation is qualified and subject to revocation. LWVEF reserves the option to reassess the participation of non-major party candidates in the event of significantly changed circumstances. (LWVEF Criteria, 8/10/80, p.2-3.)

5. Upon information and belief, the debates will be televised live by the major broadcasters; including ABC, CBS, NBC, and their owned affiliates. Such broadcast would require substantial logistical coordination and communication between the LWVEF and broadcasters. The broadcasters are subject to government regulation under the Federal Communications Act of 1934, as amended.

6. President Carter, nominee of the Democratic National Party, has set new debate terms under which he would participate in the LWVEF sponsored presidential debates. Specifically, Jack Watson, White House Chief of Staff, publicly stated details about the time, location, format, and number of debates are "items to be negotiated, not mandated (by the LWVEF)." ("Carter Sets New Debate Terms", Washington Post, 8/25/80, p.A1,A4). "Jimmy Carter's purpose in avoiding a three-way debate is clear: he figures John Anderson might take more votes from him than from Mr. Reagan." ("Will Voters League Silence Anderson To Please Carter?", Wall Street Journal, 6/13/80). In turn, "Mr. Anderson charged that the President was narrowly partisan in his approach to the public's right to know." (N.Y. Times, 8/23/80)

7. The LWVEF's Trust Agreement prohibits the publication of candidate statements:

Nor shall the (LWVEF) participate or intervene in (including the publishing or distributing

of statements) any political campaign on behalf of any candidate for public office or be partisan in its approach to political campaigns.

(LWVEF Trust Agreement, as amended June 22, 1960).

8. Under the rules and regulations of the Internal Revenue Service, and its own Trust Agreement, the LWVEF is prohibited from spending funds to sponsor the planned debates in the manner now proposed. (Washington Post, 7/20/80, p.A-5.)

VIOLATION OF THE LAW

I. The LWVEF Debates are Partisan and Violate the Non-Partisan Debate Regulations, 11 C.F.R. Section 110.13 (1980)

The present method of candidate selection adopted by the LWVEF and public statements by a representative of President Carter make the staging of the debate a partisan event in violation of 11 C.F.R. Section 110.13 (1980).

A. LWVEF Candidate Selection Criteria Pertaining To Demonstration of Significant Voter Support Are Partisan In Structure and Application

The Commission Regulations provide, in pertinent parts, that the structure of debates sponsored by certain non-profit organizations is left to the discretion of the staging organization as long as "such debates are non-partisan in that they do not promote or advance one candidate over another." 11 C.F.R. Section 110.13 (b). The primary focus in judging non-partisanship is candidate selection and the standard for reviewing candidate selection by the Commission is whether the criteria adopted fulfill the purpose of educating and informing the voters, provide fair and impartial treatment of candidates, and do not promote or advance one candidate over another. FEC Explanation and Justification for Part 110.13(b).

The non-partisanship requirement of the regulations clearly control over the explanation and justification provisions which are merely interpretive in nature. The regulations require an examination by the Commission of the partisanship of the debates. See MUR Nos. 1167, 1168, and 1170. Therefore, reference in the justification section to hypothetical debates exclusively for the benefit of the two major party candidates is merely conclusory and does not vitiate the responsibility of the Commission to

investigate the partisan nature of candidate selection criteria, the subjective intent of the sponsor, the role of the media involved, or the outside influence of candidate participants in a debate sponsor. Indeed, the regulations preclude a sponsor from staging a debate upon a showing of partisanship.

The debates are structured to include candidates receiving a level of voter support in the polls of 15% or the level received by a major party candidate, whichever is lower. The use of this criteria is partisan in structure and effect:

1) Major party candidates are exempt from the polling requirement, while non-major parties are subject to the vagaries of an inappropriate and inaccurate measurement. The National Counsel on Public Polls warned the LWVEF that the 15% limit is arbitrary, impractical, and subject to error. (Washington Star, 8-23-80, A3)

The Washington Post quoted Mr. Hart, that "the use of survey research to determine who should participate in the 1980 presidential debates is a perfect example of ~~misuse~~ misuse of the tool of survey research" (Washington Post, 8-24-80, p. C6)

2) Because of the significant impact of political broadcast on candidate popularity, the onerous 15% requirement subjects Mr. Commoner to a classical Catch 22 dilemma that with it he is excluded from the debates and without it, he would have an opportunity to inform voters of his campaign positions and may very well achieve a 15% rating.

3) Historically, only 2 minor party candidates, Theodore Roosevelt and Robert La Follette, received more than 15% of the vote. Eugene McCarthy and

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George Wallace did not, nor does it appear any other minor party candidates in 1980 will meet this arbitrary and capricious threshold.

4) A debate involving only the 2 major party candidates is not non-partisan, but bi-partisan. Moreover, it would promote the candidacies of the two major party candidates over Mr. Commoner's and other non-major party candidates.

For example, in the Nashua Telegraph case, the Commission found the exclusion of candidates not frontrunners in the Republican primary campaign a violation of the Campaign Act, because it "is evidence that the newspaper is not providing fair and impartial treatment of candidates, and that the debates will result in the promotion or advancement of the included candidates (over the excluded candidate)." MUR 1167, 1168, 1170, First General Counsel's Report, February 20, 1980, p. 9. The present debate regulations were not applicable at that time. However, the General Counsel states even if they were applicable, the "debate as planned would not be non-partisan...." Id.

5) The degree of interaction of the LWVEF must have with broadcasters to televise this event, the privilege of tax exemption bestowed by Congress to the LWVEF and the privilege of debate sponsorship bestowed by the Commission to the LWVEF, elevate private action to government action. In Buckley v. Valeo, the Supreme Court viewed government action which dramatically restricted minor party candidates' means for reaching the electorate and inhibited the opportunity for minor party to become major parties to be constitutionally suspect. 424 U.S.

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1, 96-97. More recently, a district court held handicapping access to communication channels, the mail, "because a political party has not achieved a required level of acceptance is not different from censoring speech because of its substance." Greenberg v Bolger, No. 80-0340 (E.D.N.Y. June 20, 1980). For these constitutional reasons, the voter support criteria of the LWVEF which excluded minor party candidates is invalid.

II. Sponsorship of Partisan Debates Is a Contribution and The Failure of the LWVEF to Register as a Political Committee Violates Registration Provisions of the Campaign Act, 2 U.S.C. Sec. 433(a).

The funds expended to defray costs incurred in staging debates is not considered a contribution, 11 C.F.R. Sec. 100.7 (b) (21), nor an expenditure, 11 C.F.R. Sec. 100.8 (b) (23) -- provided the structure of the debates is non-partisan. The selection process used by the LWVEF is not non-partisan, see discussion supra I. Therefore, the costs involved in preparation for the debates, including staff time, office rental, publication, and the cost in actual staging the debates, are expenditures which, upon information and belief, would exceed \$1,000. The failure of the LWVEF to register and report as a political committee violates 2 U.S.C. Secs. 433(a) and 434.

III. Statements by Presidential Spokesman Towards Exclusion of Non-Major Party Candidates Taint Debates Partisan

For the debates to be truly non-partisan, partisan influence on the sponsor concerning candidates selection must be scrupulously avoided. Through a representative, the President has brought partisan influence to bear on the LWVEF. (Washington Post, 8/25/80, p. A1 in which Mr. Watson stated details of the debates was

negotiable). The effect of such influence was direct:" (Ms. Hinerfeld) said the league could change its debate rules" in regard to independent candidate Anderson's participation. (Washington Post, 8/27/80, p. A1). Accordingly, upon information and belief, the President would take similar action in excluding Mr. Commoner and other minor party candidates. Thus, the debates would truly be partisan and promote the candidacies of the major party candidates over all other candidates.

In regards to the legal issue whether failure to permit certain candidates not deemed "major or front-runners" by the sponsor to participate in debates constitutes unfair and parties treatment of candidates and is inherently partisan, the holding in the Nashua Telegraph case is indistinguishable. There, such a structure was found to be partisan and the same standard of review is applicable in the instant case.

The partisan nature of the debates are evidenced by public pronouncements on behalf of one of the major party candidates and the resultant effect that the sponsor will now modify candidate selection criteria accordingly to exclude non-major party candidates.

EXPEDITED COMPLIANCE PROCEDURES

In application of the Nashua Telegraph Case (see p. 11 of First General Counsel's Report) standard for expedited compliance procedures, I submit that

- 1) There is a substantial likelihood that this complaint sets forth a violation of the Act, which has been previously described;
- 2) Failure to act will result in irreparable harm for inclusion in the debate is the only remedy which will prevent a violation;
- 3) The LWVEF may suffer some disadvantage from a shortened response time. However, the LWVEF, upon information and belief, has been advised by their counsel of the Commission regulations, and has been put on notice by complainant's counsel of the possibility of a complaint being filed with the Commission (August 18, 1980 Letter to Ms. Hinerfeld); and
- 4) The public interest in permitting Mr. Commoner and other minor party candidates to communicate their views to the public would be served in an expeditious handling of this matter.

RELIEF SOUGHT

Complainant, therefore, respectfully requests:

1. That the Commission immediately authorize filing a suit for mandatory injunctive relief compelling inclusion of Mr. Commoner in all LWVEF debates.
2. That, in the alternative, the Commission should immediately convene a hearing including counsel for all parties at which a schedule and procedure for implementation of discovery and submission of all facts and argument by no later than September 5, 1980. The Commission should conclude that the public and private interests will best be served by opening the foregoing procedures to the public. Any decision on the debates after the first debate is a non-decision and in derogation of the Commission's statutory duties.
3. That the Commission immediately commence such investigation as necessary to determine the extent that representatives of major party candidates have influenced the partisanship of the candidate selection process.
4. That the Commission notify me in writing no later than September 3, 1980 if it does not intend to rule on the partisanship of the debates prior to the first scheduled debates so that other appropriate courses of action may be timely evaluated.

I fully understand that the relief sought places unusual burdens on the Commission and its procedures. However, the significance and public controversiality of the issue presented make these burdens necessary, and not unlike those normally accepted by other administrative agencies in emergencies. In order to

expedite this matter, I have sent copies to the named respondents of this complaint since the FEC is required by 2 U.S.C. sec. 437g to take this action automatically anyway.

Respectfully submitted,

Barry Commoner
The Citizens Party

By

H. Richard Mayberry, Jr.
H. Richard Mayberry, Jr.
Attorney for Complainant

8 - 28 - 80
Date

VERIFICATION

The undersigned counsel for the complainants swears that, based on the matters of record referred to herein, the allegations and other facts in the complaint are true and correct to the best of his knowledge, information and belief.

By:

H. Richard Mayberry, Jr.
H. Richard Mayberry, Jr.
Counsel for Complainants

Subscribed and sworn to before me this 28th day of August, 1980.

Esther A. Williams
Notary Public
District of Columbia

My Commission Expires:

Jan 2, 1982
Date

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APPENDIX

30 AUG 28 P 5: 54

GENERAL

RECEIVED

LAW OFFICES
H. RICHARD MAYBERRY, JR.
SUITE 701
1050 SEVENTEENTH STREET, N.W.
WASHINGTON, D. C. 20036

TELEPHONE
(202) 872-0005

August 18, 1980

Ruth Hinerfeld
Chair
League of Women Voters Education Fund
1730 M Street, N.W.
Washington, D.C. 20036

Re: 1980 Presidential Debates

Dear Ms. Hinerfeld:

I represent Barry Commoner and LaDonna Harris who are the candidates of The Citizens Party for President and Vice-President of the United States of America. On behalf of The Citizens Party and pursuant to the guidelines enunciated in the League of Women Voters Education Fund Criteria for Selection of Candidates to Participate in the 1980 Presidential and Vice-Presidential Debates (August 10, 1980) (hereinafter referred to as "League Policy Statement"), I hereby request inclusion of both Mr. Commoner and Ms. Harris in the 1980 Presidential debates which are sponsored by the League and which are to be broadcast by the major television networks in September and October, 1980.

Mr. Commoner and Ms. Harris are legally qualified candidates in accordance with the applicable provisions of both the Federal Election Campaign Act of 1971, as amended, the Presidential Election Campaign Fund Act, as amended, and the Federal Communications Act of 1934, as amended. Both candidates are registered with the Federal Election Commission, and, based upon current ballot access in 17 states and substantial public support, anticipate receiving at least 5% of the popular vote, thus qualifying for retroactive public financing after the November elections. The Citizens Party is a new political party with state chapters in 32 states which support the candidacy of Commoner-Harris, as well as other federal candidates.

Mr. Commoner readily meets the League's criteria numbers 1 and 2. Mr. Commoner is eligible pursuant to Article II, Section 1 of the United States Constitution to be elected President of the United States.

Mr. Commoner is qualified for the general election ballot in Alabama, California, District of Columbia, Illinois, Kentucky, Louisiana, Maine, Michigan, New Jersey, North Carolina, New Mexico, Ohio, Oregon, Pennsylvania, Utah, Washington and Wisconsin. In addition, Mr. Commoner reasonably anticipates to meet the ballot access criteria in New York, Tennessee, Delaware, Mississippi, New Hampshire, Colorado, Indiana, Minnesota, New Mexico, North Dakota and Vermont - all jurisdictions with filing dates subsequent to submission of this request. Thus Mr. Commoner clearly has "a mathematical possibility of winning a majority of votes (270) in the Electoral College."

The third criteria for candidate participation requires a demonstration of significant voter support and interest as determined through the results of nationwide public opinion polls. A question will be added which takes a "trial-heat" approach - "If the election were held today, would you vote for A, B, C, D, etc.?" Mr. Commoner's name will appear in the following polls: Harris (poll taken August 14-18; results available August 19), Roper (poll taken August 16-23; results available August 25 or 26), Gallop (poll taken August 15-18; results available August 18) and NBC-AP (poll taken August 15-16; results available August 17 or 18).* Since the results of the polls are not public information at this time, I reserve comment on their methodologies and results.

However, the use of a 15% threshold for evidence of "significant" voter support does raise serious problems with regard to a fair evaluation of new and minor party candidates. The minimum quantum of support, "fifteen percent or the level of voter support received by a majority party candidate, whichever is lower" does not bear a reasonable relationship to the purpose of the debates, which is to provide voter education on the campaign issues, for it effectively excludes new party participation.**

New parties fulfill an important constitutional function in disseminating alternative positions on national problems for

*August 18, 1980, telephone conversation with Ms. Vera Hirschberg of the League.

**For example, the Supreme Court found in Buckley v. Valeo, 424 U.S. 1 (1976), that government action which invidiously disadvantages minor-party candidates would be unconstitutional, and that such discrimination would be evaluated from the perspective of the curtailment of the ability of such candidates to communicate with the electorate, rather than resources relative to major-party opponents.

consideration by the voter, which may lead to modification of the policies of major parties, and development of policies in advance of the time that established parties are ready to act.* Thus such a high standard for participation in the debates, denies the electorate an opportunity to truly evaluate the qualifications of presidential candidates, and the ability to be informed voters.

If the polls do truly reflect voter approval, and third parties play a vital role in the American political process, the percentile classification used by the League is so high as to exclude any new parties:

In this century, only six third party presidential candidates have received 3 percent or more of the popular vote: (1) Theodore Roosevelt, of the Bull Moose Party, in 1912 received 27 percent; (2) Eugene Debs, of the Socialist Party, in 1912 received 6 percent; (3) Allen Benson, of the Socialist Party, in 1916 received 3 percent; (4) Eugene Debs, of the Socialist Party, in 1920 received 3 percent; (5) Robert LaFollette, of the Progressive Party, in 1924 received 16 percent; and (6) George Wallace, of the American Independent Party, in 1968 received 13 percent. Also, in this century, only twelve candidates for President have received more than 1 percent and less than 3 percent of the popular vote, including Eugene McCarthy in 1976.**

It is noteworthy that prior to the Iowa Republican primary debates sponsored by the League, John Anderson had significantly less than 15% public support. After broadcast of this debate, his popularity rose such that he may well qualify for the general election debates. Therefore, the present onerous 15% requirement subjects non-major party candidates to a classical "Catch 22" dilemma that with it they are excluded and without it (or with other more reasonable criteria) they would have an opportunity to present their views to the American public and may very well achieve a 15% or more popularity rating.

*See Greenberg v. Bolger, No. 80-0340 (E.D.N.Y. June 20, 1980).

**"The Presidential Debates of 1976: Toward a Two Party Political System," 46 Cincinnati Law Review 123, 134 (1977). Debs and Benson would not have met League criteria 2 since they were not on sufficient state ballots to possibly win the election.

In furtherance of promoting the laudable goal of educating "the public about the issues in the campaign and the candidates' position on those issues," The Citizens Party urges you to include Mr. Commoner and Ms. Harris in the upcoming debates. It is noteworthy that Ms. Harris would bring a special perspective to the debates for, in comparison to other candidates, she is uniquely qualified to address issues of importance to the nation and the League's membership, e.g., ratification of the Equal Rights Amendment.

The Citizens Party asserts that exclusion of Mr. Commoner and Ms. Harris would be a disservice to the American people. Alternative debates for minor party candidates are inherently separate but unequal, and have no more of a place in the marketplace of ideas created by the candidate debates than they do in our schools.* Moreover, in our view, such discrimination would impact on the nonpartisan nature of the debates, and raise serious constitutional, election law, communications law, and tax-exemption questions concerning the League's activities.

Given the close proximity of time between receipt of the poll results, making decisions on candidate participation, and the actual debates, Mr. Commoner expects your reply on the invalidity of criteria 3 leading to his immediate invitation to participate in the debates no later than five working days from receipt of his letter so that he can evaluate what subsequent actions with the Federal Election Commission, Federal Communications Commission and the Internal Revenue Service will be necessary and appropriate.

Sincerely yours,

H. Richard Mayberry, Jr.

H. Richard Mayberry, Jr., Esq.

RM/ska

cc: 1) Ms. Vera Hirschberg
League of Women Voters Education Fund
1730 M Street, N.W.
Washington, D.C. 20036

(continued page five)

*Compare Plessy v. Ferguson, 163 U.S. 537 (1806) with Brown v. Board of Education, 347 U.S. 483 (1954).

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cc:

- 2) General Counsel
Federal Election Commission
Washington, D.C. 20463
- 3) Chief
Complaints and Compliance Division
Broadcast Bureau
Federal Communications Division
Washington, D.C. 20554
- 4) Howard Schoenfeld
Special Assistant for Exempt Organizations
Internal Revenue Service
Washington, D.C.

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to voters and are intended to stimulate and increase voter interest and participation in the electoral process."

The Board of Trustees will use the following standards in applying each of the three criteria:

Constitutional eligibility:

Only those candidates who meet requirements of Article II, Section 1 of the Constitution of the United States will be considered.

Ballot Access:

Since a candidate must win a majority of electoral votes to become President in the general election, adoption of a standard that allows participation in the debates by candidates who are not on enough ballots to win in the electoral college would not further the League's purpose in sponsoring the debates, which is to educate the public about candidates who may become President in the general election.

Demonstrated significant voter interest and support:

By receiving the nomination of a major party, a candidate demonstrates a significant level of voter interest and support. The League will consider invitations to minor party and independent candidates on a case-by-case basis. The League will examine nation-wide public opinion polls as an indicator of voter support for and interest in minor party and independent candidates. Those candidates who receive a level of voter support in the polls of 15 percent or the level of support at least equal to that of a major party candidate will be invited to participate in the debates.

"The League reserves the right to reassess participation of non-major party candidates in the event of significant changes in circumstances during the debate period," Hinerfeld said.

Editors: A document describing the criteria in more detail is available from the Public Relations Department at the League's National office: 1730 M Street, N.W., Washington, D.C. 20036

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3
August 10, 1980

LEAGUE OF WOMEN VOTERS EDUCATION FUND
CRITERIA FOR SELECTION OF CANDIDATES TO
PARTICIPATE IN THE 1980 PRESIDENTIAL
AND VICE-PRESIDENTIAL DEBATES

It is the intention of the League of Women Voters Education Fund to sponsor a series of nonpartisan debates among candidates for the offices of President and Vice President of the United States. There will be three Presidential Debates and one Vice-Presidential Debate. The LWVEF's purpose in sponsoring the debates is to educate the public about the issues in the campaign and the candidates' positions on those issues. At the same time, the Debates are intended to stimulate and to increase voter interest and participation in the general election. These purposes are best served by inviting to participate in the debates only those presidential candidates who have a possibility of winning the general election and who have demonstrated a significant measure of nationwide voter support and interest.

The criteria for selecting candidates to participate in the debates have been drawn in light of the requirements of the Federal Election Commission and the purposes of the debates. Federal Election Commission regulations permit the LWVEF to sponsor nonpartisan candidate debates. The structure of such debates is left by the FEC "to the discretion" of the LWVEF "provided that (1) such debates include at least two candidates, and (2) such debates are nonpartisan in that they do not promote or advance one candidate

over another."

The LWVEF has adopted criteria for selection which it believes are:

- nonpartisan
- capable of objective application so that they will be as free as possible from varying interpretation, and
- understandable by the public.

The criteria set forth have been adopted after careful consideration by the Board of Trustees. In its deliberations, the Board was fortunate to have available to it the views of its Advisory Committee, a group of 24 prominent citizens having diverse backgrounds and interests.

All participants must meet the League's criteria to ensure that the Debates further the LWVEF's purposes. Accordingly, the LWVEF will invite to debate the presidential nominees of the two major parties. The running-mates of these nominees will be invited to participate in the Vice-Presidential Debate. The participation of non-major party candidates will be determined on a case-by-case basis.

There are three basic criteria for inviting Presidential candidates to debate: (1) constitutional eligibility; (2) ballot accessibility; and (3) demonstrated significant voter support and interest.

Based on these criteria, the LWVEF will determine in late August whom to invite to the debate series. The running mates of presidential candidates invited to participate in the debates automatically will be eligible to participate in the debate for vice-presidential candidates. In addition, throughout the debate series, the LWVEF will retain the option to reassess the participa-

President in the unlikely event that no candidate wins a majority in the Electoral College. On the other hand, a standard that requires a candidate to be on the ballot in more states than are necessary to secure 270 electoral votes exceeds the constitutional minimum and appears, therefore, to be unduly harsh. Most members of the Advisory Committee also suggested this standard.

2. When the LWVEF decides whom to invite to debate, it is possible that in a number of states there will be no clear indication of candidate ballot status. In some states, a candidate may have filed the requisite number of signatures but not be officially certified on the ballot. In others, there may be legal challenges to (1) early filing deadlines and (2) independent and third party candidate petitions. In addition, candidates still may be in the process of qualifying to be on ballots when the LWVEF is making its decisions on participants.

- a. The LWVEF will request selected non-major party candidates ^{1/} interested in participating in the Debates to provide it with reasonable assurances that they will meet the ballot

1/The non-major party candidates to be invited to demonstrate that they meet the ballot access criterion are those candidates who are required to file quarterly financial reports with the Federal Election Commission, who have indicated that they meet the financial threshold established by the FECA, and who have not formally terminated their candidacies.

The Federal Election Campaign Act defines a major party as a political party whose nominee for the Presidency received twenty-five percent or more of the popular vote in the preceding Presidential election. 26 U.S.C. § 9002 (6).

access criterion by the date of the election. The LWVEF will then assess whether the candidate is likely to qualify, taking into account, for example, the number of signatures already collected, the extent of the candidate's past efforts to qualify, and the likelihood that the candidate's planned efforts will be successful. To the extent indicated, the LWVEF will confirm with appropriate state officials the facts presented to it.

- b. In states where early filing deadlines have barred candidates from the ballot, state law will be respected unless it is superseded in a judicial proceeding on or before the deadline set for qualifying.
- c. In states where a candidate appears to have qualified for the ballot, but the candidate's right to remain on the ballot is being challenged, certification by the appropriate state official will be conclusive unless it superseded in a judicial proceeding on or before the deadline set for qualifying.

Explanation: The LWVEF will not require candidates to be qualified on the requisite number of ballots at the times it needs to issue invitations to debate. This is because the law in some states permits candidates to qualify to be on the ballot after the times that the LWVEF will need to make its decisions. The LWVEF will not require candidates to meet a more onerous ballot access criterion than that required by the states themselves -- what the LWVEF seeks to ascertain by this criterion is whether a presidential candidate has a possibility of winning a general election in November, not in August or September.

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III. Demonstrated Significant Voter Support and Interest Criterion.

In 1976, seven candidates eligible to become President were on the ballots in enough states to have a theoretical possibility of winning. Not all of them, however, were significant candidates. Meeting the above standards does not, therefore, necessarily mean that a candidate will be invited to participate in the 1980 debates. The LWVEF also will require that Presidential candidates have significant voter support and interest. "Significant" does not mean that a candidate is raising issues different from those raised by other candidates or that the candidate's views on already-defined issues may differ from those of other candidates. The definition of "significant" is based on magnitude of voter support for and voter interest in a person's candidacy.

1. Candidates invited to debate must either be a nominee of a major political party as defined in the Federal Election Campaign Act or meet LWVEF standards for demonstrated voter support and interest.

Explanation: There is ample precedent for treating the candidates of major parties differently from non-major party candidates. For example, in Buckley v. Valeo, 424 U.S. 1 (1976), the Supreme Court found that the Constitution did not require the government to treat all presidential candidates the same for public financing purposes. Major party nominees already have demonstrated significant voter support and interest by virtue of their nomination. Non-major party candidates, however, have not met any similar test. It is necessary, therefore, for the LWVEF to ascertain whether non-major party presidential candidates have the support of a significant portion of the electorate in addition to their being eligible for office and theoretically capable of winning the general election.

2. The LWVEF will rely on nationwide public opinion polls to determine voter support and interest.

Explanation: Although public opinion polls are not necessarily accurate predictors of future voting behavior, they present the best indicator of existing voter support for and voter interest in non-major party candidates at any given time during the elective process. There are other indicators, such as number of contributors, amounts of funds raised, and media attention, which also may indicate voter support and interest. These other indicators are more difficult to interpret and apply, and they measure less directly than national opinion polls voter support and interest. Other possible indicators of voter support and interest, such as petition requirements, place an unnecessary burden on non-major party presidential candidates.

3. An assessment of voter support and interest will be based on data derived from nationwide polling samples provided by several well-respected public polling organizations.

4. The LWVEF will make its decisions based on the outcome of the most recent polls taken by each of the polling organizations selected by the LWVEF.

Explanation: Polls may vary, not only due to polling methods but also as a result of the dates on which they were taken. This is especially true when the measure of public opinion is taken in election campaigns. The best the LWVEF can hope to do is to ascertain current voter support and interest as close as is feasible to the dates on which it makes its decisions.

5. The LWVEF will rely on questions which are as close as possible to the classic "trial-heat" approach -- "If the election were held today, would you vote for A, B, C, D, etc.?"

Explanation: The principal purpose of the Debates that the LWVEF

proposes to sponsor is a more informed electorate. To achieve that purpose, the LWVEF must attempt to ascertain which candidates the electorate regards as serious candidates for its vote. Identification of such candidates is most readily ascertained by the "trial-heat" type question proposed.

6. In order to participate in the Debates, a non-major party candidate must receive a level of voter support of fifteen percent or the level of voter support received by a major party candidate, whichever is lower.

Explanation: Advisory Committee members suggested voter support threshold levels ranging between fifteen and twenty-five percent, and the Board concluded that any figure within this range would be reasonable. After consideration of a number of factors, including the records of public opinion polls in previous presidential elections and their relationship to actual election results, the substantial obstacles faced by non-major party candidates and variations among public opinion polling techniques and the precision of their results, the Board decided to adopt the fifteen percent level of support or the level of support that a major candidate receives for the following reasons. First, non-major party candidates who reach even a fifteen percent level of support, despite the substantial odds facing them, should be regarded as significant forces in the election. In addition, we also found it appropriate to include non-major party candidates whose showing in the polls is equal to that of a major party candidate. The ability to garner such a level of support suggests the candidate's presence in the Debates would further the LWVEF's purposes/ for the debates. On the other hand, to lower the fifteen percent threshold in the absence of a comparable lower level of voter support for a major party candidate could result in participation by candidates who would not further the LWVEF's purposes. Their parti-

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icipation would, moreover, decrease the time available to clearly significant candidates to set forth their views and differences in the Debates. The LWVEF recognizes that each additional candidate invited to the debates will diminish the other candidates' ability to make their views known.

7. The procedure adopted for testing whether a candidate meets the voter support requirement gives all the active, selected^{2/} non-major party candidates an opportunity to satisfy the requirement. The LWVEF will look at the nationwide results of the most recent polls taken by each of the major polling organizations selected by the League. All non-major party candidates who receive the requisite level of voter support of fifteen percent or the level of support received by major party candidates, whichever is lower, will be invited.

VICE-PRESIDENTIAL CANDIDATES

Other than being required to possess the personal qualifications to become President, the running mates designated by the participants in the Presidential Debates will be included in the Vice-presidential Debate.

^{2/}See page 5, fn. 1

Carter Sets New Debate Terms

By Peter Elkind

Washington Post Staff Writer

The Carter administration set new terms yesterday for the upcoming presidential debates, insisting that the first confrontation include only President Carter and Republican nominee Ron Reagan.

In a television appearance yesterday, White House chief of staff Jack Watson said Carter believes it "essential" to have a debate "drawn around to show the contrast between the top man and the two parties." Asked whether Carter would insist that the first debate be limited to himself and Reagan, Watson said, "Yes, yes he would."

Yesterday's announcement was the latest in a campaign in an on-again, off-again effort to lure late independent presidential candidate John B. Anderson to Carter's side, fearful that Anderson's candidacy will hurt the president.

The League of Women Voters, which has scheduled three presidential debates—the first for Sept. 13 in Baltimore—has said it will include Anderson if he has a 15 percent rating in the popularity polls by Sept. 13.

But Watson suggested on "Face the Nation" (CBS, WDM) that Carter might meet Reagan in a head-to-head debate before Sept. 13—and perhaps not participate in any of the league debates.

Saying the Carter camp "would prefer" the debate to begin earlier, Watson said meetings from other groups for Reagan-Carter meetings being there are now "under consideration."

Watson said Carter would be willing to debate other candidates, including Anderson, in later meetings.

The league "does not have any franchise on presidential debates," said Watson. "The president has made no commitment whatsoever with the league thus far."

Details about the time, location, format and number of the debates are items to be negotiated, not mandated, said a Carter-Mondale campaign spokesman.

The league official coordinating the debates said yesterday that "there is a certain amount of flexibility" in the group's arrangements, but that

SEE DEBATE, A4, Col 1



JACK WATSON

... other sponsors being considered

Will Voters League Silence Anderson To Please Carter?

By ALBERT R. HUNT

WASHINGTON—Ruth Hinerfeld, sitting in her tastefully decorated office here, doesn't look like a political boss, but she may be one.

Ms. Hinerfeld is president of the League of Women Voters, the organization scheduled to hold the presidential campaign debates this fall. In this role, the league will do much to determine the shape of the 1980 presidential election. "We know this is a serious responsibility and a tough job," says Ms. Hinerfeld.

This job has been complicated considerably by President Carter's shifting—and still-evasive—position on campaign debates. A few weeks ago he handed the league an ultimatum: either exclude independent candidate John Anderson from the debates or the President won't participate. By contrast, Republican candidate Ronald Reagan says he'll join in any debate format. This week, after polls showed that public opinion was turning against Mr. Carter on this issue, he modified his position: he said he might debate Mr. Anderson separately, but he still ruled out any three-way debate.

A series of two-man debates—the President vs. Mr. Reagan, the President vs. Mr. Anderson, Mr. Reagan vs. Mr. Anderson—would plainly be ludicrous if a three-way contest for the White House developed. And if the President went ahead with his latest suggestion, it's not impossible that he might debate Mr. Reagan one-on-one and never quite find time for Mr. Anderson.

Jimmy Carter's purpose in avoiding a three-way debate is clear: he figures John Anderson might take more votes from him than from Mr. Reagan. Thus he wants to avoid any forum that would give the independent candidate more exposure and more credibility. So the critical question now is whether the League of Women Voters, which sponsored the 1976 presidential campaign debates, will decide this year to invite Mr. Anderson to take part in three-way debates. This could be one of the most profoundly important decisions affecting the presidential race.

The Carterites calculate that the league, which has been losing membership, desperately needs the prestige of the debates and thus will feel compelled to bow to White House pressure against a three-way confrontation. Privately, some Carter supporters predict there would be other willing sponsors of a two-man debate if the League of Women Voters doesn't give in to the President's threat. "They (the league) can't afford to lose this forum," contends one Carter strategist.

But league officials insist they won't be intimidated. "The one thing there's a national consensus on in this country is a sense of fair play and we won't ignore that," says Ms. Hinerfeld. "I don't think we will be cowed by the possibility someone won't show up."

To establish criteria for the format of the debates, including standards for deciding who'll be invited, the league has commissioned an advisory panel of two women members, co-chaired by the respected Democratic lawyer Newton Minow and prominent Republican activist Anne Armstrong.

Although the advisory panel won't hold its first meeting until next month, certain guidelines seem sure to be approved. Any candidate outside the major parties must at least be on the ballot in most states and must have an active campaign in many of them. "A prerequisite should be that a candidate theoretically has a chance to win the election," says Mr. Minow.

That standard might include Mr. Anderson but it also would include several other aspirants, notably Libertarian Party candidate Edward Clark, who already has met the legal requirements for ballot status in 32 states, and possibly environmentalist Barry Commoner of the Citizens Party.

So league officials are considering other ways to limit the number of debaters. Another criterion likely to be applied to the candidates will be their support in the public opinion polls. "There probably is no other objective measurement of popular standing," notes Ms. Hinerfeld. That would make it easier to exclude Messrs. Clark and Commoner; they have yet to register any significant support on public opinion polls.

* * *

But John Anderson is a different matter. National polls show him consistently getting between 20% and 25% in a race against Jimmy Carter and Ronald Reagan. Moreover, leading politicians of both parties in states ranging from Massachusetts to New York to Oregon contend that, as of now, Mr. Anderson has a distinct shot at winning those states in November.

Still, some observers claim that to highlight the Anderson effort in a nationally televised debate would do grave damage to the two-party system, and the league ought to consider this prospect. Ms. Armstrong, for one, says, "This colors my thinking. . . . There would have to be very significant support for any candidate to be elevated on par with the major-party candidates." But Ms. Armstrong concedes, "as firmly as I believe in the two-party system, this shouldn't be locked in concrete (for the debates) if there are other candidates with significant support."

Were the Anderson campaign to stumble seriously, of course, the league's decision would become fairly simple. But if, two months from now, Mr. Anderson still is hovering around 20% in the polls, is qualifying for major state ballots, has raised \$4 million to \$5 million and remains a strong force in the presidential picture, the situation will be quite different. Under those conditions, it would be a travesty to argue that he lacks any "significant" support.

Then the leaders of the League of Women Voters would show whether they deserve to be entrusted with their enormous responsibility. Would they call Jimmy Carter's bluff and insist on including Mr. Anderson in three-way debates?

If they did, how would the White House react? If Mr. Carter were trailing in the polls then and needed a confrontation with his rivals, it's a good bet that he'd swallow his misgivings and show up to debate.

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Anderson Warns President on Exclusion From Debate

By WARREN WEAVER Jr.

MINNEAPOLIS, Aug. 21.—John S. Anderson served notice today that he would make a major political issue of any attempt by President Carter to stage a campaign debate with Ronald Reagan that did not also include him.

The independent candidate accused Mr. Carter of making "frantic behind-the-scenes efforts" to arrange for a debate with his Republican rival under rules that would not require the inclusion of Mr. Anderson.

Mr. Anderson charged that the President was "narrowly partisan in his approach to the public's right to know." He threatened to call "a long period of political expression" from now until Nov. 3 if agreement is reached on a two-candidate debate.

The League of Women Voters has decided to include in its three television debates between the major-party Presidential candidates any challenger who

achieved 15 percent of the vote in national polls by Sept. 18, eight days before the first debate is to be held in Baltimore.

Recent Drop in Polls

Most of Mr. Anderson's poll ratings ran above 15 percent until recently, when they fell just below that mark, but he has predicted they will rise in the next 10 days and qualify him for inclusion.

Carter agents were reported yesterday to be attempting to arrange a debate at a university in the South, with the sponsor agreeing to limit participation to the two major party candidates. At a news conference here this morning, Mr. Anderson compared this maneuver to the way the President "wriggled out of a debate with Ted Kennedy when he was alone in the primary campaign."

After a morning rally of 2,000 supporters here last night, Mr. Anderson predicted that his chances of carrying Minnesota in November were "excellent." A recent poll in the Minneapolis newspapers showed him tied with President Carter at

25 percent, both trailing Mr. Reagan, who had 31 percent.

Decision on Running Ohio

The Illinois Congressman also insisted that he was still in the process of choosing his running mate, despite authoritative reports in his campaign organization that the Vice-Presidential candidate will be former Gov. Patrick J. Lucey of Wisconsin, a Democrat.

Mr. Anderson confirmed that he had spoken with Mr. Lucey on the telephone last night but said that a planned week-end visit to Wisconsin by his wife, Karen, was "contingental." Asked if Mr. Anderson would meet with Mr. Lucey, he replied: "I don't know... the campaign."

Mr. Anderson said he announced that he would make a five-day whistle-stop rail tour that would include Rockford, Ill., to Pittsburgh, beginning on the Labor Day weekend, with stops scheduled in Illinois, Indiana, Michigan, Ohio and Pennsylvania. The first stop is set for Mackinac Wis., Mr. Lucey's hometown.

Appendix

TRUST AGREEMENT

LEAGUE OF WOMEN VOTERS EDUCATION FUND

THIS TRUST AGREEMENT, made this 26 day of September, 1957, between the Founders named on the annexed Schedule A, and

- Mrs. Werner J. Blanchard
- Mrs. Donald F. Bishop
- Mrs. Harold D. Dyke
- Mrs. John G. Lee
- Mrs. A. A. Treuhart

Trustees,

WITNESSETH:

Each Founder hereby irrevocably grants and transfers unto the Trustees the sum set opposite the name of the said Founder on the annexed Schedule A, to have and to hold unto themselves, their successors, and assigns, in trust nevertheless, upon the following uses and trusts:

ARTICLE I

Name

The name of the Trust shall be League of Women Voters Education Fund, hereinafter referred to as FUND.

ARTICLE II

Purpose of FUND

The FUND is organized and shall be operated exclusively for educational purposes, and for other charitable, scientific, and literary purposes. No part of the net earnings of the FUND shall inure to the benefit of any private shareholder or individual and no substantial part of the activities of the FUND shall be the carrying on of propaganda, or otherwise attempting, to influence legislation. Nor shall the FUND participate or intervene in (including the publishing or distributing of statements) any political campaign on behalf of any candidate for public office or be partisan in its approach to political campaigns.

ARTICLE III

Board of Trustees

A. Organization. The affairs of the FUND shall be managed in their sole discretion, subject to the terms and conditions of this Agreement, by not less than five* Trustees, hereinafter referred to as TRUSTEES. The TRUSTEES shall select a Chairman from among their number, and shall adopt such rules for the management of the FUND as they may from time to time deem proper.

* as amended June 22, 1960.

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B. Election Term. The term of office of TRUSTEES named herein shall continue until June 15, 1974. Thereafter, TRUSTEES will be elected for two year terms, commencing in the second half of each even year, by the Board of Directors of the League of Women Voters of the United States, a District of Columbia corporation. TRUSTEES shall continue to serve with full authority until their successors are duly elected.

* as amended April 26, 1974.

C. Vacancies. Upon the death, resignation, removal or inability to serve of any TRUSTEE herein named or subsequently elected, a successor TRUSTEE shall be elected promptly by the Board of Directors of the League of Women Voters of the United States to serve for the unexpired term of the predecessor TRUSTEE. The remaining TRUSTEES shall promptly notify the President of the League of Women Voters upon the occurrence of a vacancy in the office of TRUSTEE. In the event of failure of the Board of Directors of the League of Women Voters of the United States to elect a successor TRUSTEE within 90 days after such notice, the remaining TRUSTEES of the FUND shall select a successor TRUSTEE to serve until a successor is duly elected by the Board of Directors of the League of Women Voters of the United States.

D. Annual Meetings. An annual meeting of the Board of Trustees of the FUND shall be held at Washington, D.C. on the fifteenth day of June of each year; provided, however, that the TRUSTEES may designate for the annual meeting a place other than Washington, D.C., or another date during the year, or both. At such annual meeting any affairs of the FUND may be acted upon and no notice is necessary.

E. Special Meetings. Special meetings of the Board of Trustees may be held upon ten days' written call by any two TRUSTEES. Such special meetings shall be held at Washington, D.C. (or at such other place for special meetings as may be designated by the Board of Trustees), at a time fixed by the TRUSTEES making the call. The notice of the call shall contain a brief statement of the business to be transacted at such meeting, and no other business may be transacted; provided, however, that notice of the nature of the business to be transacted and of the time and place of the meeting may be waived by written consent of all TRUSTEES and shall be deemed waived if all TRUSTEES are present.

F. Quorum. A majority of the Board of Trustees shall constitute a quorum for the transaction of business.

G. Voting. Each TRUSTEE shall have one vote, and the vote of a majority of the TRUSTEES present at a meeting of the Board of Trustees duly called and at which a quorum is present shall be necessary for the exercise of the powers of the Board of Trustees hereunder.

H. Voting by Mail, Etc. The Chairman of the Board of Trustees or any two TRUSTEES may submit any question in writing to each member of the Board of Trustees. Each TRUSTEE shall then vote Yes or No on the said question and shall transmit a signed copy of her vote to the Chairman. An affirmative or negative answer by a majority of all the TRUSTEES shall constitute effective action in the premises by the Board of Trustees, to the same effect as if such action had been taken at a meeting of the Board of Trustees duly called and at which a quorum was present.

I. Removal. Ground for removal of a TRUSTEE shall be participation in a political campaign on behalf of any candidate or other conduct which would cause a TRUSTEE to be ineligible to serve on the Board of Directors of

the League of Women Voters. Removal shall be by vote of a majority of the other TRUSTEES, and ratification of said vote by the Board of Directors of the League of Women Voters.

J. Annual and Interim Reports. The TRUSTEES shall submit an annual report of the finances and activities of the FUND to the Board of Directors of the League of Women Voters, and shall furnish the said Board of Directors such other reports as it may direct.

ARTICLE IV

Power of Trustees

The TRUSTEES, without application to any Court for more especial authority therefor, shall have full discretionary power in the management of the FUND:

A. To receive and accept gifts and donations from the general public or any other source for the purpose of the FUND, hereinabove expressed, and for administration in accordance with the provisions of this Trust Agreement.

B. To receive and accept for administration in accordance with the provisions of this Trust Agreement, gifts and donations from any source, for an express purpose; provided such purpose is within the scope of the purposes of the FUND hereinabove expressed.

The officers or trustees of the Education Fund may accept on its behalf, any designated contribution, gift or devise consistent with its educational purposes. Where consistent with such purposes, designated contributions by donors will be accepted, and designations honored, as to special funds, purposes or uses provided, however, that the FUND at all times reserves all rights over, interest in and control of such designated contributions and full discretion as to the ultimate expenditure or distribution of the contribution, whether or not in satisfaction of any specified fund, purpose or use. In the event the Education Fund should be the beneficiary of any gift, devise, or bequest, subject to conditions subsequent with respect to the administration or alienation of said property, it shall at all times act in a manner consistent with such conditions and the educational purposes to be served by such conditions. *

C. To disburse all funds of the FUND, whether received as gift, donation, or income, to effectuate any of the purposes of this FUND as hereinabove expressed.

D. To sell, without notice, at public or private sale, and to exchange, mortgage, lease, pledge, partition, appraise, apportion, divide in kind, borrow on, or hypothecate any and all of the trust funds and properties, whether realty or personalty, upon such terms and conditions as they may deem best, and in so doing to execute all necessary deeds or other instruments. No person dealing with the TRUSTEES shall be required to look to the application of any money or other property paid or transferred to the TRUSTEES.

E. To retain any properties, securities, or investments now or hereafter transferred to them and to invest and reinvest any such assets or any fund or moneys coming into their hands as TRUSTEES, in stocks, bonds, securities or other properties, real or personal, without being limited to investments

which are prescribed by law for trust funds and without liability on the TRUSTEES' part for any loss or depreciation in value of any such investments; provided, however, that the TRUSTEES shall not make investments with a view toward obtaining short-term trading profits.

F. To hold or register securities in their names as TRUSTEES, or in the name of their nominees, or to take and keep the same unregistered and to retain them in such condition that they will pass by delivery.

G. To borrow money for any purpose in connection with the administration of the trusts and to encumber or pledge all or any part of the trust properties as security therefor.

H. To pay all reasonable costs, charges, and expenses incurred in the administration of the trusts.

I. To pay from principal or income such assessments, expenses, or sums of money as the TRUSTEES deem expedient for the protection of any of the trust investments.

J. To employ such agents, attorneys, and counsel, including investment counsel, as may be reasonably necessary or desirable in managing, protecting, and investing the trust funds, and to pay them reasonable compensation therefor.

K. To contract with others and to stipulate in the contract or contracts against the personal liability of the TRUSTEES.

L. To vote, in person or by proxy, any stock held in trust and to exercise any and all rights of stockholders, bondholders, and security holders, with respect to any stocks, bonds, or other securities held in trust, including the exercise of subscription rights and conversion privileges, and to participate in consolidation, merger, reorganization, or financial readjustment of any corporation or corporations, including the exchange of securities and stock in connection therewith.

M. To defend suits at law or in equity or before any other bodies or tribunals, affecting the trust; to begin suits and prosecute the same to final judgment or decree; to compromise claims or suits or submit the same to arbitration; to maintain actions to foreclose mortgages which may at any time form part of the Trust or, in lieu of foreclosure, to accept deeds from the owners.

N. To do any and all other acts and things necessary, proper, or advisable to effectuate the purposes of the FUND.

Notwithstanding the foregoing grant of powers, the TRUSTEES shall not engage in any prohibited transaction within the meaning of Section 503 (c) of the Internal Revenue Code of 1954 (or the corresponding provisions of any subsequent United States Revenue Laws), nor shall they accumulate income in such manner as to involve a denial of tax exemption under Section 504 of the said Code (or the said corresponding provisions).

In the exercise of any of the powers herein conferred the TRUSTEES shall be free and wholly exonerated from liability on account of any honest error of judgment or by reason of acts or things done, suffered, or omitted in good faith and without willful default or neglect.

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ARTICLE V

Funds and Properties

A. Separation. The TRUSTEES shall keep all property of the trust as a separate and distinct fund and in such manner as to be identifiable and shall not intermingle such fund with their personal funds or funds for other purposes. In no event shall any funds or property of the FUND be used for the general purposes of the League of Women Voters, or for any purpose not hereinabove provided.

B. Depository. The cash funds of the FUND shall be kept in an account maintained in the name of the FUND in such depository as the TRUSTEES shall from time to time select. Such depository shall be hereby authorized to pay out from the funds on deposit on the signature of any individual who may from time to time be given a power of attorney for such purpose for or on behalf of the TRUSTEES, or upon the signature of any three TRUSTEES.

ARTICLE VI

Compensation

The TRUSTEES shall not be entitled to any compensation for services rendered as TRUSTEES, but a reasonable and proper compensation may be paid to any TRUSTEE acting in a professional capacity in behalf of the FUND.

ARTICLE VII

Duration

The duration of the FUND shall be perpetual, subject to termination only by vote of the Board of Directors of the League of Women Voters or by the following circumstances:

In the event of dissolution of the League of Women Voters of the United States, thereby making it impossible for the new TRUSTEES to be elected, the then existing Board of Trustees of the FUND shall become self-perpetuating. Thereafter, any vacancies resulting from resignation, death, or inability to serve shall be filled by majority vote of the remaining TRUSTEES. The FUND shall be automatically terminated upon failure of any such self-perpetuating Board of Trustees to fill any vacancy within a period of one year. Termination may also be effected by a unanimous vote of any such self-perpetuating Board of Trustees.

Upon termination of the FUND, the TRUSTEES shall distribute all of its assets to such non-profit charitable, scientific, literary, or educational organizations as are described in Section 501 (c) (3) of the Internal Revenue Code of 1954 (or the corresponding provisions of any subsequent United States Revenue Laws), and as shall in the opinion of the TRUSTEES be best able to effectuate the purposes of the FUND hereinabove expressed.

ARTICLE VIII

Applicable Law

The trust herein created shall be administered in the District of Columbia and to the extent feasible shall be kept in said District. It is the

intention of the parties hereto that this trust agreement shall in all respects be construed and interpreted according to the laws of the District of Columbia, and that the parties in all things in respect thereto be governed by such laws. This Article, however, shall not be deemed a limitation upon any of the powers of the TRUSTEES, or to prevent their investing in properties, real or personal, located outside the District of Columbia.

ARTICLE IX

Special Power of Trustees

The TRUSTEES shall have power, by unanimous action in writing, and subject to approval by the Board of Directors of the League of Women Voters (if the said organization is in existence), to make such clarifying, administrative, or other amendments to this Trust Agreement as are consistent with the purposes of this Trust; provided, however, that no amendment shall be made to ARTICLE II, relating to purpose, nor to ARTICLE VII, relating to duration, nor shall any such amendment grant to the TRUSTEES any power expressly denied to them in ARTICLE IV.

ARTICLE X

Acceptance

The TRUSTEES by joining in the execution of this Agreement signify their acceptance of the trust. The trust upon execution hereof shall be given effect as of the day and year first above written.

IN WITNESS WHEREOF, the parties hereto have set their hands and affixed their seals on the succeeding pages on the day and year stated by their names.

'Voter Education' Tracts Jeopardize

Lobbies' Tax Exemptions

By Joanne Omang
Washington Post Staff Writer

The Internal Revenue Service has changed its rules to halt most of the "voter education" literature that is the stock in trade of the country's tax-exempt organizations.

In a 1978 action that affects elections for the first time this year, the IRS decided that most traditional voters' guides, candidate questionnaires and issue scoreboards are political tracts in disguise. Since groups that receive tax-deductible funding are prohibited from engaging in any political campaign activity, the voter education material is now banned too, on pain of loss of tax-deductible status.

The result, according to Joel Thomas, general counsel of the National Wildlife Federation, is that "the good guys" who support the nation's mind-boggling range of special interests are going unthanked for their efforts and are beginning to think the interest groups are ungrateful.

For example, a senator who wants to vote to expand wilderness areas in Alaska this week can expect to be

blasted in oil industry trade association missives to its members, since that kind of association is permitted some political activity. But the National Wildlife Federation won't be able to tell its 3.5 million members about it, Thomas said.

"These guys turn on us and say, 'Why can't you tell your people what we've done for you? I'm being killed and you're not helping,'" lamented federation vice president Oliver Hauck. "Their eyes glaze over when we try to explain the technical reasons."

The IRS first tried in early 1976 to ban all voters' guides, but revoked that after a major outcry led by the League of Women Voters. In June 1978, a new ruling softened the ban to allow publication of voters' guides on "major legislative issues" as long as they contain no editorial opinion or implication of approval or disapproval.

But questionnaires that concentrate only on "a narrow range" of issues were forbidden. That effectively prevents any special interest group from

evaluating the positions of politicians and candidates on its favorite issue or issues.

And so it should, said Howard Schoenfeld, special assistant for exempt organization matters at IRS.

"Why would an organization distribute a voters' guide on selected issues among the electorate during a campaign, if not to influence the voters?" he asked. "If there's a wide range of issues it's okay . . . It depends on the facts and circumstances of each case."

The ban on direct or indirect participation or intervention in political campaigns is for "charitable and educational" groups only and was tacked onto another bill in 1968 as an amendment on the Senate floor by the then minority leader, Lyndon B. Johnson.

Allegedly irked by opposition to his 1952 reelection from one nonprofit group, he got the measure passed with no committee scrutiny or floor debate. This leaves regulators very little legislative history for guidance on just what the ban means.

While it clearly prohibits endorse-

ments or denunciations, the ban was interpreted until 1978 to allow the "educational" newsletters that monitor congressional action on a group's concerns, as long as readers were allowed to draw their own conclusions.

"But now we're not allowed to tell our grass-roots people whom they can thank," said Dr. Elvis Stahr, counselor and past president of the National Audubon Society. "It's hard for our people who are interested in issues to know if they're accomplishing anything or not when they write in."

The United Church of Christ has appealed the 1978 ruling to the commissioner of internal revenue and will take the issue to court if the appeal is denied, according to UCC legislative counsel Barry W. Lynn. "Our constitutional rights haven't just been chilled, they've been frozen," he said.

The ruling is ambiguous in several respects, he said. It eliminates "narrow" questionnaires but does not define the term. "How narrow is narrow?" asked Maudine Cooper, Wash-

ington vice president of the National Urban League.

The Urban League, she said, has always published "the records of everyone, on the issues we're concerned with, and we'll keep doing it until we get an interpretation of the word 'narrow.'"

That could mean trouble with the IRS. In its 1978 ruling, the agency disallowed an unnamed conservation organization's voters' guide as too narrow, even though it covered a range of environmental questions.

What really irks the groups concerned is that industry trade associations can use part of their money for politicking while the nonprofit groups cannot.

Business leagues, chambers of commerce, real estate boards and boards of trade as well as trade associations like the National Coal Association and the Chemical Manufacturers Association all live like the smaller groups on tax-deductible dues from their member businesses.

But unlike the educational groups, the business groups may receive some nondeductible funding, pay taxes on

it and use it for political activity like naming their friends and enemies.

Taxwise, the two kinds of groups are equal, said Schoenfeld, pointing out, "In no case can a taxpayer get a deduction for payments to any association for political activity," over the \$50 individual contribution that everyone may deduct, he said.

Trying to explain this difference to members of Congress is further complicated by the difficult distinction between lobbying for legislation, which the educational groups may do, and political campaigning, which they may not do. That means, according to the IRS, that the groups may not inform their members whether the lobbying changed anyone's mind, for that would be endorsing candidates' views.

The constitutionality of the ban on charitable groups' political acts has been upheld several times in court, but Lynn of the United Church of Christ said his group's argument would be different.

It would focus, he said, on the provision of free speech rights to trade associations while the charitable groups are denied such rights.

30040220607

League Warned On Using Polls To Set Debates

By Mary Thornton
Washington Star Staff Writer

The National Council on Public Polls has warned the League of Women Voters that it may be very difficult to enforce the requirement that presidential candidates must have a 15 percent level of support in order to participate in the upcoming presidential debates the league is sponsoring.

The council includes such well-known pollsters as George Gallup, Louis Harris, Burns W. Roper and Mervin Field, all of whom are among the pollsters the league will be monitoring when they decide whether to allow independent candidate John Anderson to participate in the debates.

Several recent major national polls have placed him just below the 15 percent minimum.

Council president Albert H. Cantel said yesterday that many professional pollsters regard the 15 percent limit as "arbitrary" and warned that there are "practical" difficulties in applying such a criterion.

One major difficulty is that there can be significant differences among the national polls, depending on whether the polling firms base their results on general population, registered voters or "likely voters," a term to which virtually every pollster gives a different definition.

In addition, every poll is subject to a possible statistical sampling error which can produce a shift of at least two or three percentage points, even in the most sophisticated polls.

John Anderson and the League

POLL-TAKER PETER HART was right in his op-ed piece Friday taking issue with the criterion the League of Women Voters has established for participation in its presidential debates. Mr. Hart argued that the League's insistence that to qualify a candidate must have got 15 percent of the vote in various polls by certain fixed times wildly flatters the accuracy, the consistency and the significance of the poll-takers' product. "The use of survey research to determine who should participate in the 1980 presidential debates," he said, "is a perfect example of misuse of the tool of survey research. . . . There is no reason to believe that the next 80 days will find public opinion any more stable than it has been in the first 230 days of this year."

It is also a perfect example of something else: the disinclination of practically everyone these days to make judgments and to take the heat for making them. Instead, we have the universal search, it seems, for the perfect automatic "system," the social science dodge. What it says, or seems to say, anyway, is this: Look, you may have a complaint or feel that the result was too generous to your opponent or too ungenerous to you, but *we can't help it—that was the system and it was as objective as we knew how to make it.* There is a general wash of science or science-ish-ness over all of this, a greatly misleading one; and that is why it was so useful for Mr. Hart, no basic denigrator of the

polls in their place to make his pitch. The National Council on Public Polls, which includes George Gallup and Louis Harris, issued a similar warning to the League yesterday.

Now, there are about a hundred and eighty ways of seeing this one—we are aware of that. The argument really concerns whether Independent candidate John B. Anderson will get to take part in the League-staged debates, and a lot of people who want him in and a lot who want him out feel the episode is pretty high-stakes stuff in this election. Therefore, it can be reasoned, the League needs to take precautionary measures, to seek protection in its objective-sounding criterion. But this strikes us, in any event, as a no-win situation for the League. It will not be able to satisfy all the morally toney claims made for and against inclusion by people who have something other than morally toney purposes.

Politics, as that great German county chairman, the late Otto von Bismarck, once observed, is "not an exact science." We would take it further. Politics is not even an inexact science. And political judgments, while making use of such information as public-opinion polling can provide, should not be abandoned to computer printouts and percentage points and the rest. Does John Anderson qualify to participate in the debates? Why doesn't the League decide?

Peter D. Hart

The League Passes the Buck

It appears that the League of Women Voters does not adhere to Harry Truman's adage, "The buck stops here." The league's most recent ruling that participants in the presidential debates will be determined by the results of surveys of public opinion shows that it knows how to pass the buck. To qualify as a participant, a candidate must receive at least 15 percent of the vote in the polls. Under this criterion, George Wallace, who managed to win five states in the 1968 general election but who received only 13.5 percent of the popular vote, would not have qualified.

I believe the league's decision is both bad and wrong. If there is one lesson that has been learned during this campaign, it is that polls do not predict the future. They simply reveal the attitudes of the American people—attitudes that have changed again and again throughout this campaign—at a given point in time. Yet the league is ready to let the crucial decision of whom the American people will be allowed to hear in a presidential debate be determined by polls taken in August.

I have another, more fundamental objection: the American people seem to be looking for one particular quality in this presidential election: leadership. I find it ironic that the League of

"This use of survey research is a perfect example of misuse of the tool."

Women Voters has decided to provide follow-up—let the polls determine who should be in the debates.

As a pollster who has been measuring public opinion for 15 years, I believe strongly that survey research does and should play an important role in our democratic society. However, the selection of participants for the debates is not one of the roles of polling. The polls have come in for much criticism in recent months, but I think much of this criticism should be aimed at those who misuse and misread the polls.

The use of survey research to determine who should participate in the 1980 presidential debates is a perfect example of misuse of the tool of survey research. It serves neither the league nor the polling industry well. During the past year, I have witnessed the volatility and unpredictability of the American people and of the polls. There is no reason to believe that the next 80 days will find public opinion any more stable than it has been in the first 230 days of this year. Nevertheless, the League of Women Voters has decided to let polls taken within a single period of time determine which candidates will be allowed to participate in its presidential debates.

Let us look at some of the pitfalls of using survey research for such a purpose:

- A sample size of 1,500 (the normal national sample) has a margin of error of plus or minus at least 2 percent, assuming the survey was conducted under the strictest methodological procedures. This means that a candidate who receives less than 17 percent of the vote in the survey could be well above or below the arbitrary 15 percent the league has defined. A candidate who received only 13 percent of the vote could also qualify under the margin of error. In other words, because of the margin of error, the league may include a candidate who should not qualify or it may eliminate one who should.

- A national survey ignores the fact that an independent candidate can significantly affect the Electoral College results because he may garner a great deal of support from one region or state.

- The survey could not be taken at a worse time—when the political process is most uncertain. The Democrats have just concluded their national convention, and it is likely that there may be some short-term distortion of voter attitudes at this time. Yet 30 days prior to the first debate, the league will determine who is to qualify.

- A single question determining the standing hardly provides a true understanding of election dynamics. We know from our own polling that some candidates who do not show up well in the current standings have great appeal to the voters, but one question will be enough for the league's purposes.

- There are a number of methodological questions that anyone in survey research will want answered before accepting the results of the survey: Is the survey interviewing only likely voters? How will the survey determine who is a likely voter? Will respondents be interviewed by telephone and, if so, how will the survey ensure that the type of voter who does not own a telephone is represented? If the sample is not a perfect microcosm of the voting universe, will the league use a weighting procedure? Will the weighted and unweighted figures be available?

Debates are necessary to structure a dialogue and to help the voters understand what an election is all about. A country that is groping to find its moorings badly needs a series of presidential debates in 1980, and the league provides a valuable service in sponsoring them.

But as Harry Truman said "If you can't stand the heat, get out of the kitchen." If the league cannot stand the heat of the selection process, it should delegate this responsibility to others who are willing to make tough decisions.

The writer, a public opinion pollster, conducted the polls for Edward Kennedy's primary campaign and does professional polling for a large number of governors, senators and other politicians.

30040220509

Carter-Reagan Deadlock Roils Debate Plans

By Lee Lescaze
Washington Post Staff Writer

Disagreements between the Carter and Reagan campaigns yesterday raised doubts about whether the presidential debates will take place as envisioned by the League of Women Voters.

The president wants the first debate soon and wants it to be a head-to-head encounter with Ronald Reagan. Carter campaign chairman Robert S. Strauss said yesterday, Carter accepted an invitation from the National Press Club for a head-on debate early next month with Reagan; the Reagan camp said it had received the invitation but had not decided on a reply.

Reagan wants the first debate to take place later in the campaign and favors holding it under the criteria established by the league, which would permit independent candidate John B. Anderson to participate if he has at least 15 percent support in the polls on Sept. 10. Reagan also wants a head-to-head debate with Carter to come second.

The first debate is the focus of the deadlock because both campaign camps consider it by far the most important. It is almost certain to capture the largest television audience and set a pattern of sorts for any subsequent encounters among the presidential candidates.

James Baker, senior adviser to the Reagan campaign, mentioned another reason the initial debate is being highlighted. "It's terribly important to John Anderson," he said.

Anderson draws more support away from Carter than from Reagan, and a strong debate showing could boost Anderson's declining fortunes.

Strauss and Baker spoke to reporters after meeting for more than two hours in the national headquarters of the League of Women Voters here.

Each expressed confidence that debates would take place, but despite

See DEBATES, A4, Col. 4

United Auto Workers executive board endorses Carter for reelection. **A3**

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Carter, Reagan Deadlocked on Debates

DEBATES. From A1

protestations that their discussions yesterday were friendly and helpful, it appeared that the two sides were no closer together when they finished than when they began.

"It took three or four meetings to get things [for the debates] worked out in 1976," Strauss noted.

On one major point it appeared that the two sides had been talking past each other.

Strauss and presidential press secretary Jody Powell said they had been unable to get an assurance that at least one of the debates would be between only Carter and Reagan.

Baker expressed surprise when that statement was repeated to him. "If we haven't given them that, we give it to them right now," he said. Reagan is on the record favoring a head-to-head debate as well as one including any other candidates who meet the league criteria.

It is the Carter forces' preference and "almost insistence," Strauss said, that a head-to-head debate be the first encounter. Baker was adamant that Reagan will not agree to any debate in advance of the first league-sponsored debate, which is scheduled for Sept. 18 in Baltimore.

Carter sought to embarrass Reagan into an earlier head-to-head meeting by accepting the invitation from the National Press Club. Powell announced yesterday that the president hopes Reagan will also accept the invitation and that the debate can be held as soon as possible.

Reagan wants the date of the initial league debate pushed back a few days because he has an important fundraiser in Texas on Sept. 16 and wants more time to travel to Baltimore, to prepare himself and to rest before the debate. The league said it has no objection to a change of date.

Carter would like the first debate to be moved ahead to the second week of September.

The two major candidates also disagree over how many debates should be held.

Baker said Reagan wants two presidential debates and one vice presidential debate. He held out the possibility that if negotiations remain difficult, there might be only one presidential debate.

Strauss said Carter wants as many debates as possible, under the league's sponsorship or that of others, and wants them held in all regions of the nation.

Baker said that his side doesn't want more than two debates because "then we'd spend the entire campaign debating." He said that as the challenger Reagan needs time to hold his own campaign events around the country.

In the first 16 days of September following the formal kick-off of the Reagan campaign, the challenger's schedule calls for him to spend eight days in Washington; five of them are days off.

Carter officials expressed concern that Reagan was dragging out the planning discussions in order to make sure there would be time only for one or two debates.

The league, which organized the 1976 presidential debates, announced a series of three presidential debates — in Baltimore, Cleveland and Portland, Ore., and one vice presidential debate, in Louisville.

Ruth Hinerfield, head of the league's Education Fund, said she will call a board of directors meeting as soon as possible to discuss the problems raised at today's meeting.

She said the league could change its debate rules so that Anderson, should he qualify, would take part in the first debate, but not in a second.

The board will also discuss the number of debates, timing, and format, she said.

Anderson expressed outrage at Carter's efforts to arrange a two-man debate with Reagan. Anderson accused Carter of "political arrogance" for thinking "he has a right to tell the American people . . . who they ought to listen to in a debate."

Anderson said he was disappointed that the league had not invited him to participate in the planning negotiations. The Anderson campaign manager, Mike MacLeod, said his staff would be in touch with National Press Club officials today and ask them to reconsider the club's two-man debate plans.



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