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March 20, 2000

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Lawrence Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Noble:

We submit on behalf of the Reform Party of the USA, Pat Choate, the Chairman of the Reform Party, Patrick J. Buchanan, a candidate for the Reform Party nomination for President of the United States, Buchanan Reform, the principal campaign committee of Mr. Buchanan, and Angela M. Buchanan, the enclosed Complaint concerning the actions and proposed actions of the Commission on Presidential Debates in sponsoring a series of debates between the nominees of the Republican and Democratic Parties for the offices of President and Vice President of the United States.

We hope that the Commission will move expeditiously to address the matters in this Complaint, since they are time sensitive.

Sincerely,

John J. Duffy
Michael J. Yernick

Enclosure

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of the	)
	)
Commission on Presidential Debates	)
	)

COMPLAINT

The Reform Party of the United States of America (the "Reform Party"), the third political party in history to qualify for federal financing of its candidates in the general election for the offices of President and Vice President; Pat Choate, the Chairman of the Reform Party, and a registered voter in Virginia; Patrick J. Buchanan, a candidate for the Reform Party nomination for President of the United States, and a registered voter in Virginia; Buchanan Reform, the principal campaign committee of Mr. Buchanan; and Angela M. Buchanan, a registered voter in Virginia, for herself and other registered voters (collectively the "Complainants") file this Complaint concerning the conduct of the Commission on Presidential Debates (the "CPD"). The CPD is a non-profit corporation that has sponsored in past presidential election cycles a series of debates between the presidential and vice-presidential candidates of the Democratic and Republican Parties and has announced its intention to sponsor a similar series of debates in the present presidential election cycle.

Summary of Complaint

The CPD has made, and intends to make, in connection with its proposed series of debates between the Democratic and Republican candidates for the offices of President and Vice President, payments for goods and services, significantly in excess of $1,000. Such payments will provide substantial and tangible benefits to the Republican and Democratic candidates in

their campaigns for the offices of President and Vice President and will influence and improve the chances of election of the Republican and Democratic Party candidates over the chances of the Reform Party candidates for those offices. Such payments are, therefore, "expenditures" and "in-kind contributions" as defined by the Federal Election Campaign Act of 1971 (the "Act" or "FECA"), as amended, 2 U.S.C. §§ 431 et. seq. (1997 and Supp. 1999).

Because in the aggregate these contributions total in excess of $1,000 in a calendar year, the CPD is required by the Act to register as a "political committee," and to file regularly reports of receipts and expenditures, which, to date, it has not done, and which, to our knowledge, it has no intention of doing. Moreover, the CPD's expenditures for these debates are in violation of the prohibition against expenditures by a corporation that is contained in 2 U.S.C. § 441b. In addition, the CPD has received, and continues to receive, from other corporations donations that in the aggregate total more than $1,000 in a calendar year. Because these donations have been made for the purpose of sponsoring the debates between the Republican and Democratic candidates, they are "contributions" under the Act. As a political committee, the CPD's receipt of contributions from corporations constitutes a violation of 2 U.S.C. § 441a(f) and 2 U.S.C. § 441a(a).

The CPD's staging of the debates does not fall within the "safe harbor" of 2 U.S.C. § 431(9)(B)(ii), which has been construed by the Federal Election Commission (the "FEC") to exempt, under certain circumstances, corporate sponsorship of ***nonpartisan*** candidate debates from the general prohibition on corporate contributions and expenditures. See 11 C.F.R. § 110.13. The CPD's sponsorship of the debates is not, however, a ***nonpartisan*** voter education effort. It is, by the CPD's own admissions, a ***bipartisan*** voter education effort, an effort to inform the public about the views of the Republican and Democratic candidates, and,

consequently, to influence voters to choose one of those two candidates to the detriment of the candidates of third parties, including the Reform Party. Moreover, the CPD was created specifically to provide the Republican and Democratic Parties with control over the presidential and vice-presidential candidate debates in the general election and to exclude third party candidates from those debates, and it continues to operate to do so. The CPD does not, therefore, meet the requirement that staging organizations not support or oppose political parties. See 11 C.F.R. Section 110.13(a).

The CPD's criteria for the selection of candidates for the forthcoming presidential election cycle also do not satisfy the requirements of Section 110.13(c) of the FEC's regulations. The CPD's selection and application of its criteria must be subject to particular scrutiny in light of the CPD's creation, and continued control, by the former Chairmen of the Republican and Democratic Parties, its control by a Board of Directors consisting of persons closely identified with the Republican and Democratic Parties, and its identified goal of sponsoring ***bipartisan*** debates. The FEC's regulations were designed with "neutral" non-profit organizations in mind, organizations whose nonpartisan voter education goals could be presumed. The CPD is, on the other hand, a ***bipartisan*** organization, whose announced goals in the sponsorship of debates are antithetical to the fair treatment of candidates of parties other than the Republican and Democratic Parties.

Section 110.13(c) provides that a sponsoring organization may limit the number of candidates that can participate in a debate only if it uses "***pre-established objective criteria***." (emphasis added). The CPD's announced criteria for the present election cycle will exclude a candidate unless the candidate has a level of support, prior to the debates, of at least fifteen percent (15%) of the national electorate as determined by five selected national public opinion

polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination.

The CPD's criterion of a "level of support" in the national electorate prior to the debate is not an "objective criterion." The purpose of the debates is to provide a candidate with an opportunity to influence voters and to increase his/her support in the national electorate. Consequently, support for a candidate in the national electorate ***prior*** to the debates is not reasonably related to the selection of candidates for the debates. Moreover, the FEC's objective criteria requirement was designed to prevent a debate sponsor from manipulating the candidate selection process and making a "partisan selection" of debate participants. The criterion of pre-debate support does not serve these goals. The criterion permits the CPD to introduce "subjective" elements into the candidate selection process – such as the level of support required and the method of determining support – that allows the CPD to exclude third party candidates from the debates. The Reform Party demonstrated sufficient support in the national electorate in the 1996 general election to meet the standard set by Congress to separate significant "third parties" from insignificant "third parties," and to qualify for federal funding of its candidates for the present general election campaign. Its qualification for federal funding – a truly objective criterion – must satisfy any concern about its electoral significance or support for its candidates in the national electorate that would be appropriate for consideration.

The CPD's decision to select 15% as the level of support necessary to participate in the debates is solely the "subjective" judgment of the CPD concerning the level of "support" in the national electorate that it considers appropriate. The CPD has not provided any explanation or support for its choice, and it is three times the level selected by Congress for federal funding. Indeed, the only apparent basis for the selection of 15% was that it was deemed

by the CPD to be sufficiently high to deny the Reform Party nominee – and in particular the leading candidate for that nomination, Mr. Buchanan – the opportunity to participate in the debates.

Finally, the CPD's decision to use a "fixed percentage" (15%) of level of support and to use the average of five public opinion polls to determine level of support has no rational basis, and is purely subjective. No poll can "determine" a single percentage of support; it can only predict a "range" of values in which the actual figure may lie. Margins of error in the range of +/- 3% to +/- 5% indicate that an estimated plurality of 13% for a candidate could be as large as 16-18% with a high degree of statistical confidence. To eliminate a candidate, therefore, without considering the margin of error would produce an "unreasonable" and, consequently, "subjective" result. The CPD's decision to average five identified pre-existing polls with different methodologies is similarly flawed. Polls that relate to different populations, which the proposed polls are likely to do, cannot be combined under any circumstances. Moreover, if the sample sizes of the identified polls differ, a simple average would not account for the fact that polls with larger samples are inherently more reliable.

The Complainants, therefore, request that the FEC find that the CPD's pre-debate support criterion violates both the Act and the FEC's implementing regulations because it is neither pre-existing nor objective. The FEC should, therefore, direct the CPD to replace the pre-debate support criterion with the criterion of public funding in the general election. Additionally, the FEC should find that, as a result of its improper candidate selection criterion, the CPD is acting as an illegal, non-reporting political committee that is receiving and making illegal corporate contributions.

The Parties

Complainant **Patrick J. Buchanan** is an individual who complies with each of the eligibility criteria set forth in Article II, Section 1 of the United States Constitution: (a) he is at least 35 years of age, (b) he is a natural born citizen of the United States, and (c) he has been a resident of the United States for more than 14 years. Mr. Buchanan is, or will be prior to the time now set by the CPD for the selection of the debate participants, on a sufficient number of state ballots to have a mathematical chance of garnering in excess of 270 votes in the Electoral College. Mr. Buchanan is a candidate for the Reform Party nomination for the office of President of the United States, and prior to the time now set for the selection of debate participants expects to be the Reform Party candidate for the office of President. Consequently, Mr. Buchanan expects to be a competitor of the nominees of the Republican and Democratic Parties. As a competitor, Mr. Buchanan has an interest in knowing the persons who are supporting the candidates of the Republican and Democratic Parties and the level of their support to these candidates, and in insuring that those sources of support are legal. Moreover, as a competitor, if Mr. Buchanan is not permitted to participate in the presidential debates, his chances at prevailing in the general election will be significantly reduced. Indeed, the millions of dollars in free television time that the debates will offer Mr. Buchanan's competitors is a substantial and tangible benefit that Mr. Buchanan would find it difficult to overcome. Mr. Buchanan is also a registered voter in Virginia. As a registered voter interested in the presidential electoral process, Mr. Buchanan has an interest in knowing exactly which political committees are supporting which candidates, and information concerning individuals and entities that have chosen to support the Democratic and Republican nominees. Possession of this type of information would assist Mr. Buchanan, and others to whom he would communicate the

information, in evaluating the various candidates for President and Vice President. The inability of Mr. Buchanan to obtain information that the FECA expressly requires be made available will result in a substantial, concrete and particularized injury to him and other similarly situated voters. Mr. Buchanan's address is 8233 Old Courthouse Road, Vienna, VA 22182.

Complainant the **Reform Party**, whose nomination Mr. Buchanan is seeking, will be on the ballot on a sufficient number of states for the presidential and vice-presidential election to be held on November 7, 2000, prior to the time now set by the CPD for the selection of debate participants, to accumulate 270 votes in the Electoral College - the number needed to be elected President and Vice President of the United States. By virtue of its performance in the 1996 presidential elections, in which its nominee received more than 5% of the popular vote, the Reform Party is one of only three parties whose nominee will receive federal funds for the 2000 presidential election cycle. As a competitor of the Republican and Democratic Parties, the Reform Party has an interest in information about the persons who are supporting the Republican and Democratic Parties. If its candidates are not permitted to participate in the debates, the Reform Party will be injured by the resulting lack of exposure, which would in turn jeopardize its ability to obtain federal funding for its nominee in the 2004 election cycle. Moreover, the millions of dollars of free television time that the debates will offer the Reform Party's competitors will provide a substantial and tangible benefit to those entities that the Reform Party will be unlikely to be able to overcome. The Reform Party's address is 4100 Cathedral Avenue, N.W., #703, Washington, D.C. 20016.

Complainant **Pat Choate** is the Chairman of the Reform Party, which as a publicly funded party, is a direct electoral competitor of the Democratic and Republican Parties. As Chairman of the Reform Party, Mr. Choate has an interest in knowing the persons who are

supporting the candidates of the Democratic and Republican Parties and the level of support to those candidates, and insuring that those sources of support are legal. Mr. Choate also has a substantial need to have available accurate FEC reports reflecting the activities of all political committees and their relationships with other publicly funded political parties. As a registered voter in Virginia interested in the presidential electoral process, Mr. Choate is entitled to know exactly which political committees are supporting which candidates, and also is entitled to information concerning individuals and entities that have chosen to support the Democratic and Republican nominees. Possession of this type of information would assist Mr. Choate, and others to whom he would communicate the information, in evaluating the various candidates for President and Vice President. The inability of Mr. Choate to obtain information that the FECA expressly requires be made available will result in a substantial, concrete and particularized injury to him and other similarly situated voters. Mr. Choate's address is 4100 Cathedral Avenue, N.W., #703, Washington, D.C. 20016.

Complainant **Buchanan Reform** is the principal campaign committee of Patrick J. Buchanan. As Mr. Buchanan's principal campaign committee, Buchanan Reform is a direct competitor of the campaign committees of the Democratic and Republican presidential candidates. As such, Buchanan Reform would be harmed if its candidates are not permitted to participate in the presidential and vice-presidential debates as their chances of prevailing in the presidential election would be significantly reduced. Indeed, the millions of dollars of free television time will provide substantial and tangible assistance to the campaign committees of the Democratic and Republican candidates that Buchanan Reform would find it impossible to duplicate. Buchanan Reform's address is 8233 Old Courthouse Road, Vienna, VA.

Complainant **Angela M. Buchanan** is a registered voter and a political supporter of the Reform Party and Patrick J. Buchanan. As such, Ms. Buchanan has a specific interest in having an opportunity to compare and contrast the views of Patrick J. Buchanan and/or the Reform Party with those of the nominees of the Democratic and Republican Parties. Moreover, as a registered voter interested in the presidential electoral process, Ms. Buchanan is entitled to know exactly which political committees are supporting which candidates, and also is entitled to information concerning individuals and entities that have chosen to support the Democratic and Republican nominees. Possession of this type of information would assist Ms. Buchanan, and others to whom she would communicate the information, in evaluating the various candidates for President and Vice President. The inability of Ms. Buchanan to obtain information that the FECA expressly requires be made available will result in a substantial, concrete and particularized injury to her and other similarly situated voters. Ms. Buchanan's address is 8233 Old Courthouse Road, Vienna, VA 22182.

Respondent the **CPD** is a not-for-profit corporation organized under the laws of the District of Columbia. The CPD was organized and is controlled by the Republican and Democratic Parties. The Internal Revenue Service has exempted the CPD from taxes pursuant to Section 501(c)(3) of the Internal Revenue Code. The address of the CPD is 601 Thirteenth Street, N.W., Suite 310 South, Washington, D.C. 20005.

Violations

A. The CPD's Payments For Goods And Services In Connection With Its Proposed Series Of Presidential And Vice-Presidential Debates Are Expenditures And Contributions In-Kind Under The Act.

On or about January 6, 2000, the CPD announced that it will sponsor a series of three presidential debates and one vice-presidential debate to occur in October, 2000. See Commission on Presidential Debates, Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation (Jan. 6, 2000) (hereinafter 2000 Candidate Selection Criteria). **Ex. 1.** Staging the presidential and vice-presidential debates is an expensive proposition that will require the CPD to expend substantial sums from its corporate treasury and to obtain substantial donations of funds from various for-profit corporations. For example, in 1996, the CPD collected between $25,000-250,000 from five different companies to sponsor the Presidential debates. See Connie Cass, New Home for Special Interest Money: Companies to Underwrite Debates, Associated Press, Sept. 28, 1996. **Ex. 2.** In 1992, it was noted that "[t]he list of sponsors for [that] year's three presidential debates and single vice-presidential debate reads like a Who's Who of corporate America: Philip Morris, Atlantic Richfield, AT&T, and RJR Nabisco, to name a few." See Big Business May Be Debate Winner, Too, The Bergen Record, Oct. 20, 1992, , at EI (quoting The Associated Press). **Ex. 3.** In staging debates in the present presidential election cycle, the CPD will again rely on its corporate treasury and the assistance of donations that it has already received and will continue to receive from various large for-profit corporations. Indeed, Anheuser-Busch has already contributed $2 million to sponsor this year's debates. See Ariana Huffington, Include Buchanan in the Debates, Washington Times, Feb. 21, 2000, at A18. **Ex. 4.**

The funds that the CPD has expended and will continue to expend to stage the forthcoming presidential and vice-presidential debates will provide substantial and tangible benefits to the presidential and vice-presidential candidates of the Democratic and Republican Parties and will improve those candidates' chances for election and reduce the chances of the candidates of other parties, including the candidates of the Reform Party. Participation in the debates provides extensive television exposure and stimulates extensive media coverage. Such exposure increases automatically the candidate's ability to communicate his/her message and to obtain the support of voters.

In 1992, for example, when Ross Perot, a third party candidate, was permitted to participate in the debates sponsored by the CPD, polls taken before the debate showed that Mr. Perot had the support of approximately 7% of the electorate; after participating in the debates, Mr. Perot received the support of approximately 19% of the electorate in the general election. See Tom Squitieri, Panel Defends Debates' Limit As Fair, Reasonable, USA Today, Jan. 7, 2000, at 12A. **Ex. 5**. Conversely, the exclusion of a candidate from the presidential debates is a virtual death sentence to his/her candidacy. In this regard, John Anderson a former Independent candidate for the presidency, recently stated that it was "absolutely devastating" when he was excluded from the second presidential debate in 1980. See Douglas Kiker, Criteria Released for Fall Debates, AP Online (Jan. 7, 2000). **Ex. 6.** Mr. Anderson further noted that being excluded from the debates "sends a signal that [a candidate] is somehow less credible than the other two candidates invited to the debate." Id.

Because of the substantial and tangible benefit to the candidates of the Democratic and Republican Parties, any funds that the CPD has expended or will expend to stage the debates are "expenditures" as defined by the Act. See 2 U.S.C. § 431(9)(A) (defining an

expenditure as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office"); see also 11 C.F.R. § 100.8(a)(1). They are also in-kind contributions to the candidates of the Democratic and Republican Parties who will participate in the debate.

B. The CPD Must Register As A Political Committee And Its Expenditures In Connection With The Proposed Debates And Its Receipts of Contributions From Corporations Constitute Violations Of The Act.

The FECA defines a political committee as, *inter alia*, "any committee, club association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." See 2 U.S.C. § 431(4)(A). Entities falling within the ambit of that definition are required to file a Statement of Organization with the FEC. See 2 U.S.C. § 433. The Act also mandates that political committees file reports detailing the contributions received and expenditures made by the committee. See 2 U.S.C. § 434. Because the CPD has received contributions in excess of $1,000 and has made expenditures in excess of $1,000, it is required to register as a political committee and to file reports of receipts and expenditures, but has not yet done so, and to our knowledge has no intention of doing so. (See, e.g., Huffington, Include Buchanan in the Debates, *supra*). Moreover, the CPD's expenditures for these debates are in violation of the prohibition against expenditures by a corporation that is contained in 2 U.S.C. § 441b. In addition, the CPD has received, and continues to receive, from other corporations donations that in the aggregate total more than $1,000 in a calendar year. Because these donations have been made for the purpose of sponsoring the debates between the Republican and Democratic candidates, they are "contributions" under the Act. As a political committee, the

CPD's receipt of contributions from corporations constitutes a violation of 2 U.S.C. § 441a(f) and 2 U.S.C. § 441a(a).

C. The CPD's Staging Of The Debates Does Not Fall Within The Safe Harbor Of 2 U.S.C. § 431(9)(B)(ii) Because The CPD Is Not A Nonpartisan Organization And Its Candidate Selection Criteria Are Not Objective.

The FEC has promulgated regulations that equate nonpartisan candidate debates staged by a 501(c)(3) corporation with nonpartisan get-out-the-vote activities and allows such corporations to stage candidate debates ***if*** the staging organization "***do[es] not endorse, support, or oppose political candidates or political parties*** . . . ." See 11 C.F.R. § 110.13(a) (emphasis added). Moreover, it permits staging organizations to exclude from the debates some of the candidates for the office in question, if the candidate selection is determined by pre-existing objective criteria. See 11 C.F.R. § 110.13(c). Only if the corporate staging organization complies with these requirements may it (1) expend its own funds to stage a candidate debate and (2) collect funds from other corporations to help defray the costs of staging a candidate debate. See 11 C.F.R. § 114.4(f).[1] Absent compliance with Section 110.13(a) and (c), both the purported staging organization and its corporate contributors would be in violation of the Act.

[1] The D.C. Circuit has expressly endorsed the FEC's regulation allowing, under appropriate circumstances, the use of corporate funds to stage debates: "As early as 1976, the FEC recognized that § 441b could be construed to bar the use of corporate funds to stage debates. To remove doubt about the legality of corporate sponsorship of debates, the FEC promulgated a regulation incorporating its view that ***nonpartisan*** debates are designed to educate and inform voters rather than to influence the nomination or election of a particular candidate, and thus funds expended . . . to defray costs incurred in staging nonpartisan debates ought not run afoul of § 441b." See Perot v. Federal Election Comm'n, 97 F.3d 553, 556 (D.C. Cir. 1996) (internal quotations omitted) (emphasis added).

1. The CPD Was Created Solely To Provide The Republican And Democratic Parties With Control Over The Presidential Candidate Debates And To Exclude Third Party Candidates And It Continues To Operate To Do So.

The origins of the CPD can be traced back to 1985 when the Chairmen of the Democratic and Republican National Committees agreed that those two parties should cooperate in sponsoring presidential and vice-presidential debates. The two parties subsequently entered into an agreement that had as its goal the production of "nationally televised joint appearances conducted between the presidential and vice-presidential nominees ***of the two major political parties*** . . . ." See Joint Memorandum of Agreement on Presidential Candidate Joint Appearances signed by Paul G. Kirk, Jr., Democratic National Committee Chairman, and Frank J. Fahrenkopf, Jr., Republican National Committee Chairman (Nov. 26, 1985). **Ex. 7.** The agreement further provided that "to better fulfill our parties' responsibilities for educating and informing the American public and to strengthen the role of political parties in the electoral process, it is our conclusion that future joint appearances should be ***principally and jointly sponsored and conducted by the Republican and Democratic Committees.***" Id. (emphasis added). At the time of that statement, the presidential and vice-presidential debates were sponsored by the League of Women Voters (the "League"), which like the CPD is a non-profit 501(c)(3) corporation. In 1980, of its own volition, the League included Independent candidate John Anderson in certain presidential debates.

Fifteen months after stating their intention to assume control of the presidential and vice-presidential debates, the Democratic and Republican Parties issued both joint and individual press releases noting the formation of the CPD and expressly stating that the CPD was a ***"bipartisan"*** organization created "to implement joint sponsorship of general election . . . debates, . . . by the national Republican and Democratic Committees ***between their respective***

nominees." See, e.g., Joint News Release of the Democratic National Committee and the Republican National Committee, RNC and DNC Establish Commission on Presidential Debates (Feb. 18, 1987) (emphasis added). **Ex. 8.**

The CPD is currently, and has always been, Chaired by Frank J. Fahrenkopf, Jr., a former chairman of the Republican National Committee, and Paul G. Kirk, a former chairman of the Democratic National Committee. The CPD's Board of Directors is divided among representatives of the Democratic and Republican Parties and includes elected officials from those parties. There are no CPD members representing the Reform Party, or for that matter representing any other party. **Ex. 9.** The bipartisan nature and agenda of the CPD, and concomitant opposition to third parties, is not surprising, given the major parties' historical fear of third parties. Scholars who study the history of third parties in the American electoral process agree that third parties typically grow in size and strength when the public becomes increasingly dissatisfied with major-party attempts to skirt issues that the public deems significant. See Willmore Kendall & Austin Ranney, Democracy and the American Party System 458 (1956); Steven J. Rosenstone, Roy L. Behr & Edward H. Lazarus, Third Parties in America: Citizen Response to Major Party Failure, ch. 5 (2nd rev. ed., Princeton University Press 1996); Paul R. Abramson, John H. Aldrich, Phil Paolino & David W. Rhode, Third Party and Independent Candidates in American Politics: Wallace, Anderson and Perot, Pol. Sci. Q. 349 (1995). In large part, major parties have historically avoided certain issues because in order "to pull together heterogeneous national coalitions, they had to craft exceedingly broad and elastic campaign appeals." See Mark Voss-Hubbard, The "Third Party Tradition" Reconsidered: Third Parties and American Public Life, 1830-1900, 86 J. Am. Hist. 131 (1999). And major parties have therefore responded "rationally," in a sense, when seeking to avoid such polarizing issues. Id. at 133.

The Republican and Democratic Parties understand that third parties often redefine the terms of mainstream political debate. Third parties "take a cry from the margins of American life—an issue, or an interest, or a prejudice—and force it onto the agenda of the political elite." See Sean Wilentz, Third Out: Why the Reform Party's Best Days Are Behind It, New Rep., Nov. 22, 1999, at 23. **Ex. 10.** The Republican and Democratic Parties also recognize that third parties are best able to impact the political dialogue during presidential elections, which constitute a unique opportunity to attract the interest of the American electorate. The Republican and Democratic Parties therefore have a distinct incentive to silence third parties by excluding them from the presidential debates, thereby minimizing their ability to raise the issues that the major parties would rather not address. Presidential and vice-presidential candidate debates that included third party candidates would, of course, seriously undermine the major parties' efforts to maintain their silence on controversial issues. The CPD was created to avoid this situation.

To put into action its bipartisan agenda, in July 1987, soon after its formation, the CPD created an advisory committee tasked with developing candidate selection criteria for the 1988 presidential and vice-presidential debates. This committee recommended that only those candidates with a "realistic (i.e., more than theoretical) chance" of winning the election should be included. See Commission on Presidential Debates, Candidate Selection Criteria for 1996 General Election Debate Participation (Sept. 19, 1995) (hereinafter, 1996 Candidate Selection Criteria). **Ex. 11.**

In 1988, the CPD and the League agreed to alternate sponsorship of the 1988 presidential and vice-presidential debates. However, secure in their knowledge that the CPD would be amenable to their requests, the Bush and Dukakis campaigns presented the League

with an ultimatum setting forth detailed requirements addressing every facet of the debates with which the League would have to comply if it wished to have the major party candidates participate. Consequently, the League promptly withdrew its sponsorship.

Indeed, the League explained its decision as follows:

> The League of Women Voters is withdrawing its sponsorship of the presidential debates . . . because the demands of the two campaign organizations would perpetrate a fraud on the American voter. It has become clear to us that the candidates' organizations aim to add debates to their list of ***campaign-trail charades devoid of substance, spontaneity and answers to tough questions***. The League has no intention of ***becoming an accessory to the hoodwinking of the American public***.

See League of Women Voters, News Release: League Refuses to "Help Perpetrate a Fraud"; Withdraws Support from Final Presidential Debate (Oct. 3, 1988) (emphasis added). **Ex. 12.** After the League's withdrawal, the CPD become the sole sponsor of the presidential and vice-presidential debates and complied with each and every demand of the major party candidates. Since 1988, the CPD has maintained its monopolistic control over the presidential and vice-presidential debates.

In 1992, the CPD again demonstrated that it is nothing more than an alter ego of the major parties. Although the CPD had previously evidenced an intent not to invite Ross Perot and Admiral James B. Stockdale to participate in the presidential and vice-presidential debates, respectively, it altered its position in accordance with the desires of the Bush and Clinton campaigns. See Lessons from the 1992 Presidential Debates: Testimony Before the Subcomm. on Elections of the Comm. on House Administration, 103d Cong. 44, 50-51 (1993) (statement of Bobby R. Burchfield) (noting that the Bush and Clinton campaigns mandated the inclusion of Ross Perot and Admiral James B. Stockdale in the presidential and vice-presidential debates,

respectively). **Ex. 13.** Prior to the 1992 presidential debates, polling indicated that Ross Perot had the support of approximately 7% of the American people. In large part due to his participation in the debates, Ross Perot received approximately 19% of the popular vote in the 1992 election. See Squitieri, Panel Defends Debates' Limit As Fair, Reasonable, *supra*.

The 1992 presidential election also provides a prime example of a third party candidate successfully using the presidential debates to push an issue into the arena of legislative and executive branch action against the wishes of the major parties. Ross Perot's 1992 challenge gave President Bush and Governor Clinton dramatic incentives to discuss deficit reduction. The issue took hold and, after the 1992 election, became the focus of concerted government effort. As one historian writing in The New Republic remarked: "When Perot first proposed [to eliminate the deficit], it seemed like political and fiscal lunacy. In two years it was on the mainstream policy agenda. In six years it was reality." Wilentz, *supra*, at 2.

Not surprisingly, in 1996, the major parties determined that it was not in their interest to include a third party candidate and therefore contrived, with the assistance of the CPD, to keep Ross Perot out of the presidential debates, even though Mr. Perot had received a significant portion of the popular vote in 1992 and was backed by $30 million in federal funds. For example, George Stephanopolous, former Senior Adviser to President Clinton, candidly discussed why the major parties did not want Ross Perot in the 1996 debates: "[The Dole campaign] didn't have leverage going into the negotiations. They were behind, they needed to make sure Perot wasn't in it. . . . We didn't want [the public] to pay attention. . . . We wanted the debates to be a non-event." See Campaign for President: The Managers Look at '96, at 162, 170 (Harvard Univ. Inst. of Politics ed. 1997).

The CPD complied with the desires of the major parties by promulgating candidate selection criteria that instead of being objective and pre-existing, as required by the FEC's regulations, were subjective moving targets with which Mr. Perot could never conclusively comply. Moreover, the CPD invited President Clinton and Senator Dole to participate solely on the basis of their being the Democratic and Republican nominees, respectively. See 1996 Candidate Selection Criteria. The third party candidate selection criteria required (1) evidence of national organization; (2) signs of national newsworthiness and competitiveness; and (3) indicators of national enthusiasm or concern to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of [the CPD's] debates." Based on the subjective nature of these criterion, Mr. Perot was successfully excluded from the 1996 Presidential debates; as a direct consequence, Mr. Perot received a mere 8% of the popular vote in that election.

2. The FEC Cannot Reasonably Conclude That The CPD Satisfies The Requirement Of A Nonpartisan Staging Organization.

Section 110.13(a) of the FEC's regulations require that staging organizations be (1) non-profit organizations, and (2) not endorse, ***support*** or ***oppose*** political candidates or ***political parties***. The CPD does not meet this requirement. The CPD was created by the national committees of the Republican and Democratic Parties to provide for televised joint appearances between the nominees of the two major political parties. The CPD had its genesis in an agreement entered into by Messrs. Fahrenkopf and Kirk and, when they held the posts of Chairman of the Republican National Committee and Chairman of the Democratic National Committee, and after its formation they assumed the role of, and continue to serve as CPD's co-chairmen. The CPD has described itself as a "bipartisan" organization created to implement

joint sponsorship of debates by the Republican and Democratic committees between "their respective nominees."

The CPD's organizational history, public statements and present control by persons affiliated with the Republican and Democratic Parties evidence its ***support*** for the Republican and Democratic Parties, and its ***opposition*** to third parties, including the Reform Party. The FEC cannot reasonably construe ***support*** to reach only "contributions" or "expenditures," which the CPD could not make legally anyway, or explicit endorsements, which are specifically prohibited elsewhere in the regulations. The FEC must instead construe "support" and, indeed, Section 110.13(a) as a whole, in light of the purpose of that provision: to insure that staging organizations are nonpartisan. The FEC's debate regulations assume that a staging organization will be a "neutral" referee that is free of partisan bias and that will "select" participants for the debate on the basis of "objective" criteria. The CPD is clearly not such an organization. The CPD has conceded that it is a partisan organization, although its partisanship extends to two parties. Just as the fox cannot be allowed to guard the hen house, organizations like the CPD, which in this case represents the interests of two foxes, cannot be allowed to control the selection of candidates to participate in debates.

3. The CPD's Candidate Selection Will Not Be Determined By Pre-established Objective Criteria.

The FEC's regulations governing candidate selection criteria provide, in pertinent part, that staging organizations must use "pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organizations(s) [sic] shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in the debate." See 11 C.F.R. § 110.13(c). The CPD

has recently announced the criteria governing candidate selection for the 2000 presidential and vice-presidential debates: (1) evidence of Constitutional eligibility; (2) evidence of ballot access; and (3) indicators of electoral support. See 2000 Candidate Selection Criteria. "The CPD's third criterion requires that the candidate have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination." See id. The five polls on which the CPD is likely to rely are the ABC-Washington Post, CBS-New York Times, NBC-Wall Street Journal, CNN-USA Today-Gallup, and Fox News-Opinion Dynamics.

(a) The CPD's Creation By The Republican And Democratic Parties And Its Present Control By Persons Affiliated With Those Parties Requires Close Scrutiny Of Its Candidate Selection Criteria.

When it promulgated its debate regulations, the FEC declined to provide explicit criteria for the selection of participants. Instead, the staging organization was permitted to develop its own criteria, provided that they were "objective." The FEC's decision to rely on the staging organization to develop its own candidate selection criteria rested, however, on the premise that the organization would be "nonpartisan" and a "neutral" referee. We believe that the CPD does not meet the qualifications required of a staging organization, but even if the FEC concludes that it satisfies the technical requirement of Section 110.13(a), the FEC must conclude that it is not the "nonpartisan" "objective" decisionmaker that Section 110.13(c) presumes the staging organization will be. To the contrary, by its own admission the CPD is a bipartisan organization with a bias toward debates between the candidates of the Republican and Democratic Parties. The CPD's candidate selection criteria cannot, therefore, be accorded the

presumption of regularity that the criteria promulgated by a neutral organization might be accorded. Instead, the criteria must be subject to close scrutiny to determine if they are truly "objective," or only apparently objective, and subject to manipulation to achieve the CPD's explicit goal of bipartisan debates between Republican and Democratic nominees.

(b) The CPD Criterion Requiring Pre-Debate Support In The Electorate As Determined By Polls Is Not "Objective".

The CPD has chosen "pre-election support in the electorate" as a criterion to increase the chances that a third party candidate will not qualify for the debates and to avoid consideration of the Reform Party's status as the only party, other than the Republican or Democrats, to receive federal funding. The FEC's debate regulations require "pre-existing objective criteria." See 11 C.F.R. § 110.13(c). The CPD's new criteria require that debate participants meet the constitutional qualifications to be President or Vice President and have his/her name on the ballots in a sufficient number of states to have a mathematical possibility of achieving the 270 electoral votes needed for election. We agree that these criteria are objective. We also recognize that application of these criteria might result in a substantial number of candidates qualifying to participate in the debates. The obvious choice for an objective criterion to further winnow the field would be qualification for the receipt of federal funds in the general election. First, it is truly objective, and not subject to manipulation. Second, it links participation in the debates to a congressionally determined test of party and candidate significance. Third, it avoids the anomaly of a candidate who has been deemed of such electoral significance as to qualify - either in his own right or through his/her party - for federal funding being excluded from the debates on the ground of lack of electoral significance.

The CPD has determined, however, to use the candidate's position in pre-debate polls to select candidates for the debate. The CPD pre-debate "level of support" criterion makes no sense, of course, since the purpose of the debates is to provide a candidate with an opportunity to influence voters and to increase his/her support in the national electorate. A debate is intended to be an exchange of different views. Thus, it is not unreasonable for a voter to want to hear the views of candidates other than the candidate that he or she expects to support at the arbitrary instant in time when a poll is taken. In other words, the presidential and vice-presidential debates serve an important purpose in terms of developing issues and influencing a voter's ultimate decision. See Jamin B. Raskin, The Debate Gerrymander, 73 Tex. L. Rev. 1943, 1985 (1999) (comparing the manner in which Mr. Perot's ***inclusion*** in the 1992 presidential debates brought deficit reduction to the fore with the fact that his ***exclusion*** from 1996 debates deprived voters of an opportunity to hear from a candidate who opposed NAFTA). **Ex. 14.** Consequently, support for a particular candidate in the national electorate prior to the debates would appear to be irrelevant to a determination of who should take part in the debates. More importantly, however, the use of the candidate's position in pre-debate polls provides the CPD with an opportunity to exclude the candidates of the Reform Party, while a federal financing criterion would not. The pre-debate support criterion permits the CPD to introduce "subjective" elements into the candidate selection process – such as the level of support required and the method of determining support – that allow it to exclude third party candidates from the debates.

Congress has recognized the problems associated with using pre-election polls to determine questions of a candidate's electoral significance in a general election during its consideration of federal financing for candidates, and it chose to rely instead on a candidate's or party's performance in the general election. For example, when debating a prior, and now

repealed, campaign financing law, Congress considered a proposal containing a provision that would have allocated funding based in part on polling. The following colloquy demonstrates Congress' recognition of the obvious pitfalls associated with such a mechanism:

> Senator Williams: [I]f the polls [the candidate] relied on were as misleading and far off base as they were in 1948, [the candidate] may end up with 4.99% of the vote and $8 million debt and nothing to pay for it. . . .
>
> The Chairman: Those polls were not far off in 1948. They reached the wrong conclusion. But if you look at a poll that says you have 51 percent, the man who took the poll claimed a ten-percent margin for error, or at least 5 percent. So he would claim three points for his allowed error. So you say you got 51 or 52 percent. The outcome could be different just by the slippage in his own margin of error.
>
> Senator Ervin: [W]ho is going to run the poll? Certainly the Government would not let me run the poll if I were running for President and would not take my figures. You would have to set up some more Government machinery to take the poll.

117 Cong. Rec. 42,585 (daily ed. Nov. 22, 1971) (colloquy inserted into the 1971 Congressional Record at the request of Sen. Ervin). **Ex. 15.** This colloquy demonstrates that Congress was cognizant of the problems associated with using polls. Congress recognized both that polls have inherent weaknesses and are easily subject to manipulation or methodological defects. Indeed, polls accomplish nothing beyond providing limited insight into voters' preferences at a specific moment in time.

When considering the role of third parties in American politics, Congress rejected polls and instead reasonably determined that the only truly objective way to gauge electoral significance is to wait until the election itself occurs and then examine the actual results. Thus, when enacting the FECA, Congress opted to provide third parties with federal funding for the presidential election cycle only if the party met a truly objective test - obtaining the support of 5% of the electorate in the previous election cycle. This 5% criterion remains the only statutory definition we have of electoral significance.

Conversely, the CPD has chosen a criterion that is three times higher than the number chosen by Congress to determine entitlement for federal funding. Moreover, where Congress used a post-election indicator of electoral support that allowed a candidate to conduct his/her complete campaign, the CPD has opted to measure electoral support at the early stages of the campaign, thereby precluding candidates from having a full and fair opportunity to develop his/her message and attract voters.

There are innumerable examples of the inability of polls to make accurate predictions concerning the electoral significance of a candidate:

- During the 1992 Wisconsin senatorial race, an "important" late summer poll indicated that now Senator Russ Feingold trailed each of his primary rivals by thirty points. See David E. Umhoefer & Mike Nichols, Moody and Checota in Close Race for Senate Nomination, Milwaukee J., Aug. 16, 1992, at A1. **Ex. 16.**

- In 1994, a poll suggested that now Senator Bill Frist would be defeated by incumbent Jim Sasser by over 20 points. See Phil West, Cooper & Sasser Likely Wins in Senate, Poll Finds, The Memphis Commercial Appeal, July 28, 1994, at A13 Frist ended up prevailing by a 56 to 42 margin. **Ex. 17.**

- Most recently and most relevant to the instant dispute is the 1998 Minnesota Gubernatorial election. Two weeks prior to the televised state-wide debates, polls indicated that now-Governor Jesse Ventura had the support of approximately 10% of the electorate. However, the debates afforded Governor Ventura an opportunity to garner the eventual support of 37% of the voters and to prevail in the election. See Squitieri, Panel Defends Debates' Limit As Fair, Reasonable, *supra*.

Under the CPD's criteria, each of these candidates would have been excluded from the debates and would almost certainly not have defeated his rivals.

The 2000 presidential election has already produced several similar examples. For example, a recent Washington Post article addressed the extreme difficulty in predicting results in the 2000 Republican primaries in New Hampshire, South Carolina and Michigan. In

each of these primaries, although polls taken just before the primary election indicated that the races were too close to call, each primary was decided by a substantial margin, including an eighteen-point differential in New Hampshire. See Richard Morin, Hunting for the Story, The Media Got Lost, Washington Post, Feb. 27, 2000, at B1. **Ex. 18.** Indeed, Mr. Morin reminded the media that "[p]olls are useful tools; they aren't magic wands. And some polls are better than others." Id. A decision of such magnitude as inviting candidates to participate in the presidential debates simply should not be based on a process that even under the best of circumstances, which are lacking here, is at most a "useful tool."

(c) The CPD's Selection Of A 15% Threshold Is Completely Subjective.

The CPD has failed to articulate any rationale in support of a 15% cut-off point. It is a subjective criterion that is entirely lacking a rational foundation. The 15% criterion is analytically no different than the criteria described by the FEC's General Counsel in 1996 as requiring "that a number of highly subjective judgments . . . be made" to determine whether a particular candidate has satisfied the applicable standard. See First General Counsel's Report, Federal Election Commission, MUR 4451 & MUR 4473, at 18 (Feb. 6, 1998). **Ex. 19.**

(d) Polls Cannot Fix A Particular Point Of Electoral Support And Polls Based On Differing Underlying Populations And Methodologies Cannot Be Averaged As The CPD Has Proposed To Do.

The CPD's use of polls is indisputably defective because even the best polls have significant margins of error. For example, leading political scientist Larry Sabato recently stated in response to the CPD's candidate selection criteria that "[p]olling is not that precise. Even when you average five polls you don't eliminate the individual margins of error." Kiker, Criteria Released for Fall Debates, *supra*. Because of the margin of error inherent in even the best polls,

it is impossible to determine the exact level of support for a particular candidate. See Memorandum from Dennis Aigner, CPD Indicators of Electoral Support (Mar. 18, 2000) **Ex. 20**. For example, if a poll used to select candidates for inclusion in the presidential debates has a margin of error of plus or minus 4% and a candidate is found to have the support of 11% of the electorate, in reality that candidate could have the support of as much as 15% of the electorate or as little as 7% of the electorate. The poll, however, simply cannot indicate where, within the eight percentage point range, the candidate's support truly falls. The CPD's 15% criterion is therefore not only subjective but also operates in such a manner as to possibly exclude a deserving candidate from the debates because of the inherent margin of error found in every poll. Id. Because of the importance of the presidential debates to a candidate's electoral success, the only way to protect against such an improper exclusion would be to give each candidate the benefit of the doubt with respect to where in the range indicated by the poll, his or her support truly falls. Id. Thus, in the hypothetical poll with a 4% margin of error, a candidate receiving the support of 11% of the electorate should be included in the debates.

Further methodological problems are also present. Messrs. Kirk and Fahrenkopf have candidly admitted that the polling organizations on which the CPD intends to rely will have complete discretion with respect to deciding (1) the portion of the electorate polled, (2) the wording of the questions, and (3) the names of the candidates about which the polls inquire. See Squitieri, Panel Defends Debates' Limit As Fair, Reasonable, *supra*. It is methodologically inappropriate to simply take the average of five polls using different sample sizes. See Aigner Memorandum, *supra*. For example, if the polls used by the CPD are based on populations of 600, 700, 800, 900 and 1000 individuals, a simple average would overemphasize the smallest poll and underestimate the largest. It would also be methodologically improper to take the

average of five polls using different populations. Id. For example, if some polls use eligible voters and others use eligible voters likely to vote, a simple average would be methodologically flawed. Id. It is also beyond dispute that a pollster's decisions as to the pool of potential respondents and the wording of a poll's questions can have a dramatic impact on the poll's results. See Sheldon R. Gawiser & G. Evans Witt, 20 Questions a Journalist Should Ask, National Council on Public Polls (visited Feb. 8, 2000) <http://www.ncpp.org/qajsa.htm>. **Ex. 21.** Here, the pollsters will be free to limit their questions to asking respondents to name the candidate that they are likely to support in the general election; the pollsters are not required to ask the respondents who they would like to see in the debates.

The leading watchdog organization on public polling, the National Council on Public Polls (the "NCPP"), has recognized the possibility of these types of problems arising and has issued a statement expressing its concern with the degree of discretion granted to the pollsters. This statement provides, in pertinent part, that the 15% criterion raises "critical questions," and notes that "[w]hether or not a candidate is included in the presidential debates is obviously an important decision;" consequently, any "methodological or procedural differences among the five polls could call their credibility into question." National Council on Public Polls, Statement by the National Council on Public Polls to the Commission on Presidential Debates (visited Feb 8, 2000) <http://www.ncpp.org/presidential.htm.> **Ex. 22.**

D. If The CPD Is Permitted To Stage Bipartisan Debates That Exclude Significant Third Parties, The FEC's Debate Regulations Are Improper And Contrary To Congress' Clearly Expressed Intent To Protect And Facilitate The Development Of Significant Third Parties.

There are only three publicly funded political parties in the United States: The Reform Party, the Republican Party, and the Democratic Party. Congress has expressly stated

that a political party receiving in excess of 5% of the popular vote in the previous presidential election is entitled to public funding in the subsequent presidential election. As stated above, that is the only statutory definition of electoral significance and happens to be found in the very statute under which the FEC's regulations are promulgated. The Reform Party has received in excess of 5% of the popular vote in each of the last two presidential elections. By statutorily mandating the expenditure of public funds on behalf of the Reform Party and its nominee, Congress has unambiguously found that the views of the Reform Party reflect those of a significant segment of the American public.

Indeed, when debating the merits of what ultimately became the FECA, Senator Kennedy noted that the 5-25% formula that would be used to apportion federal funding for minor parties struck "a reasonable balance [because i]t neither freezes them out entirely, nor encourage[s] them excessively. The threshold showing required of such parties is low enough to prevent 'locking-in' the existing two-party system, and yet high enough to prevent the artificial proliferation of splinter parties set up merely to have a political joyride at the taxpayer's expense in a presidential election year." 117 Cong. Rec. 41,777 (daily ed. Nov. 17, 1971) (statement of Sen. Kennedy). **Ex. 23.** Because Congress in fact agreed to and the President signed into law the 5-25% provisions of the Act, it is abundantly clear that Congress intended for minor parties, which enjoy the support of millions of Americans, to have an opportunity to participate meaningfully in the presidential elections.

Moreover, Senator Long expressly noted that federal financing for the presidential election would allow voters to "help both parties as well as third parties. ***Then, having heard the debates***, they [the voters] can decide which candidate they think would be best for the Nation's interest." 117 Cong. Rec. 42,595 (daily ed. Nov. 22, 1971) (statement of Sen. Long)

(emphasis added). **Ex. 24.** Among the reasons why Congress felt it to be of paramount importance to protect the interest of serious third parties such as the Reform Party is that third party presidential candidates often produce seismic shifts in public policy. See Raskin, *supra*, at 1981. Numerous social innovations in American history "were third-party proposals years before major parties touched them with even the longest pole." See J. David Gillespie, Politics at the Periphery: Third Parties in Two-Party America, 24 (1993). These include, *inter alia*, the abolition of slavery, homesteading, graduated income taxes, Prohibition, the direct election of Senators, regulation of corporations, outlawing child labor, the right to collective bargaining and deficit reduction.

Clearly, Congress understood that the United States' interests are best served when its citizens are trusted to choose from each of the competing public policy visions that find advocates in the political marketplace. Indeed, as President John F. Kennedy noted "[w]e are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people." Richard Winger & Joshua Rosencrantz, What Choice Do We Have?, 93 (forthcoming 2000).

The presidential and vice-presidential debates are the single most important campaign event in terms of reaching the American public.[2] Thus, any truly objective criteria governing the selection of candidates for participation in those events must contemplate the inclusion of all publicly funded political parties.[3]

Prayer for Relief

WHEREFORE, Complainants respectfully request that the FEC find that (1) the CPD's current candidate selection criterion, and in particular, the pre-debate support in the national electorate criteria, are in violation of both the Act and the FEC's implementing regulations governing candidate debates because the pre-debate support criterion is neither objective nor pre-existing, but is instead subjective and results driven, intended to preclude the participation of a constitutionally eligible candidate representing the interests of a publicly

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[2] For example, the Supreme Court has recognized that "candidate debates are of exceptional significance in the electoral process. '[I]t is of particular importance that candidates have the opportunity to make their views known so that the electorate may intelligently evaluate the candidates' personal qualities and their positions on vital public issues before choosing among them on election day.'" Arkansas Public Television Comm'n v. Forbes, 523 U.S. 666, 675-76 (1998) (quoting CBS, Inc. v. FCC, 453 U.S. 367, 396 (1981)

[3] If the FEC's regulations governing candidate debates are found to authorize the use of results driven, subjective candidate selection criteria to (1) exclude certain candidates from the presidential and vice-presidential debates and (2) provide those candidates who are included with millions of dollars of free television time, the FECA is being applied in such a manner as to facilitate the disparate treatment of similarly situated candidates. Were the FEC to decline to take action to prohibit the CPD's illegal activity and find that the CPD is acting in accordance with the debate regulations, the FEC has promulgated regulations that facilitate the unconstitutional application of the Act.

Moreover, it has long been the case that government statutes or regulations that encourage private parties to engage in unconstitutional conduct create a cause of action against what might otherwise be a private actor. Although the CPD purports to be a private party, its membership includes elected officials each of whom has a vested interest in assuring that their respective political party obtains control of the presidency. The CPD is also an alter ego of the Republican and Democratic National Committees.

funded political party; (2) direct the CPD to substitute for the pre-debate support criterion the criterion of qualification for public financing in the general election; and (3) as a result of its improper candidate selection criteria, the CPD is acting as an unregistered and non-reporting political committee that is receiving and making illegal corporate contributions and expenditures in violation of the Act and the FEC's implementing regulations. Complainants further respectfully request that upon making the above-noted findings, the FEC take any and all action within its power to correct and prevent the continued illegal activities of the CPD.

Respectfully submitted,

Patrick J. Buchanan

Subscribed and sworn to before me this 20th day of March, 2000.

Joanne Hansen
Commissioned as Joanne H. McGuire

My commission expires on April 30, 2002.

Pat Choate

Subscribed and sworn to before me this 20th day of March 2000.

Joanne Hansen
Commissioned as Joanne H. McGuire

My commission expires on April 30, 2002

The Reform Party of the USA
By: Pat Choate

Subscribed and sworn to before me this 20 day of March 2000.

Joanne Hansen
Commissioned as Joanne H. McGuire

My commission expires on April 30, 2002.

Buchanan Reform
By: Angela M. Buchanan

Subscribed and sworn to before me this 28th day of March 2000.

Notary Public
My commission expires on April 30, 2002.

Angela M. Buchanan

Subscribed and sworn to before me this 20th day of March 2000.

Notary Public
My commission expires on April 30, 2002.

EXHIBITS
TO
COMPLAINT
SUBMITTED BY
THE REFORM PARTY, et al.

March 20, 2000

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COMMISSION ON PRESIDENTIAL DEBATES' NONPARTISAN CANDIDATE SELECTION CRITERIA FOR 2000 GENERAL ELECTION DEBATE PARTICIPATION

A. Introduction

The mission of the nonpartisan Commission on Presidential Debates (the "CPD") is to ensure, for the benefit of the American electorate, that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States. The CPD sponsored a series of such debates in each of the past three general elections, and has begun the planning, preparation, and organization of a series of nonpartisan debates among leading candidates for the Presidency and Vice Presidency in the 2000 general election. As in prior years, the CPD's voter educational activities will be conducted in accordance with all applicable legal requirements, including regulations of the Federal Election Commission that require that debate sponsors extend invitations to debate based on the application of "pre-established, objective" criteria.

The goal of the CPD's debates is to afford the members of the public an opportunity to sharpen their views, in a focused debate format, of those candidates from among whom the next President and Vice President will be selected. In the last two elections, there were over one hundred declared candidates for the Presidency, excluding those seeking the nomination of one of the major parties. During the course of the campaign, the candidates are afforded many opportunities in a great variety of forums to advance their candidacies. In order to most fully and fairly to achieve the educational purposes of its debates, the CPD has developed nonpartisan, objective criteria upon which it will base its decisions regarding selection of the candidates to participate in its 2000 debates. The purpose of the criteria is to identify those candidates who have achieved a level of electoral support such that they realistically are considered to be among the principal rivals for the Presidency.

In connection with the 2000 general election, the CPD will apply three criteria to each declared candidate to determine whether that candidate qualifies for inclusion in one or more of CPD's debates. The criteria are (1) constitutional eligibility, (2) ballot access, and (3) electoral support. All three criteria must be satisfied before a candidate will be invited to debate.

B. 2000 Nonpartisan Selection Criteria

The CPD's nonpartisan criteria for selecting candidates to participate in its 2000 general election presidential debates are:

1. Evidence of Constitutional Eligibility

   The CPD's first criterion requires satisfaction of the eligibility requirements of Article II, Section 1 of the Constitution. The requirements are satisfied if the candidate:

   a. is at least 35 years of age;

   b. is a Natural Born Citizen of the United States and a resident of the United States for fourteen years; and

   c. is otherwise eligible under the Constitution.

2. Evidence of Ballot Access

   The CPD's second criterion requires that the candidate qualify to have his/her name appear on enough state ballots to have at least a mathematical chance of securing an Electoral College majority in the 2000 general election. Under the Constitution, the candidate who receives a majority of votes in the Electoral College (at least 270 votes), regardless of the popular vote, is elected President.

3. Indicators of Electoral Support

   The CPD's third criterion requires that the candidate have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination.

C. Application of Criteria

The CPD's determination with respect to participation in the CPD's first-scheduled debate will be made after Labor Day 2000, but sufficiently in advance of the first-scheduled debate to allow for orderly planning. Invitations to participate in the vice-presidential debate will be extended to the running mates of each of the presidential candidates qualifying for participation in the CPD's first presidential debate. Invitations to participate in the second and third of the CPD's scheduled presidential debates will be based upon satisfaction of the same multiple criteria prior to each debate.

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COMMISSION ON PRESIDENTIAL DEBATES'
CANDIDATE SELECTION CRITERIA
FOR 1996 GENERAL ELECTION DEBATE PARTICIPATION

A. Introduction

The mission of the Commission on Presidential Debates ("the Commission") is to ensure, for the benefit of the American electorate, that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States. The Commission sponsored a series of such debates in 1988 and again in 1992, and has begun the planning, preparation, and organization of a series of nonpartisan debates among leading candidates for the Presidency and Vice Presidency in the 1996 general election.

The goal of the Commission's debates is to afford the members of the voting public an opportunity to sharpen their views of those candidates from among whom the next President or Vice President will be selected. In light of the large number of declared candidates in any given presidential election, the Commission has determined that its voter education goal is best achieved by limiting debate participation to the next President and his or her principal rival(s).

A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest warrants the extension of an invitation to the respective nominees of the two major parties to participate in the Commission's 1996 debates.

In order to further the educational purposes of its debates, the Commission has developed nonpartisan criteria upon which it will base its decisions regarding selection of nonmajor party candidates to participate in its 1996 debates. The purpose of the criteria is to identify nonmajor party candidates, if any, who have a realistic (i.e., more than theoretical) chance of being elected the next President of the United States and who properly are considered to be among the principal rivals for the Presidency. The realistic chance of being elected need not be overwhelming, but it must be more than theoretical.

The criteria contemplate no quantitative threshold that triggers automatic inclusion in a Commission-sponsored debate. Rather, the Commission will employ a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national enthusiasm or concern, to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates.

Judgments regarding a candidate's election prospects will be made by the Commission on a case-by-case basis. However, the same multiple criteria will be applied to each nonmajor party candidate. Initial determinations with respect to candidate selection will be made after the major party conventions and approximately contemporaneously with the commencement of the general election campaign. The number of debates to which a qualifying nonmajor party candidate will be invited will be determined on a flexible basis as the general election campaign proceeds.

B. 1996 Nonpartisan Selection Criteria

The Commission's nonpartisan criteria for selecting nonmajor party

candidates to participate in its 1996 general election presidential debates include:

1. Evidence Of National Organization

   The Commission's first criterion considers evidence of national organization. This criterion encompasses objective considerations pertaining to the eligibility requirements of Article II, Section 1 of the Constitution and the operation of the electoral college. This criterion also encompasses more subjective indicators of a national campaign with a more than theoretical prospect of electoral success. The factors to be considered include:

   a. Satisfaction of the eligibility requirements of Article II, Section 1 of the Constitution of the United States.

   b. Placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority.

   c. Organization in a majority of congressional districts in those states.

   d. Eligibility for matching funds from the Federal Election Commission or other demonstration of the ability to fund a national campaign, and endorsements by federal and state officeholders.

2. Signs Of National Newsworthiness and Competitiveness

   The Commission's second criterion endeavors to assess the national newsworthiness and competitiveness of a candidate's campaign. The factors to be considered focus both on the news coverage afforded the candidacy over time and the opinions of electoral experts, media and non-media, regarding the newsworthiness and competitiveness of the candidacy at the time the Commission makes its invitation decisions. The factors to be considered include:

   a. The professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks.

   b. The opinions of a comparable group of professional campaign managers and pollsters not then employed by the candidates under consideration.

   c. The opinions of representative political scientists specializing in electoral politics at major universities and research centers.

   d. Column inches on newspaper front pages and exposure on network telecasts in comparison with the major party candidates.

   e. Published views of prominent political commentators.

3. Indicators Of National Public Enthusiasm Or Concern

   The Commission's third criterion considers objective evidence of national public enthusiasm or concern. The factors considered in

for a candidate, which bears directly on the candidate's prospects for electoral success. The factors to be considered include:

a. The findings of significant public opinion polls conducted by national polling and news organizations.

b. Reported attendance at meetings and rallies across the country (locations as well as numbers) in comparison with the two major party candidates.

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1ST STORY of Level 1 printed in FULL format.

The Associated Press

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September 28, 1996, Saturday, PM cycle

SECTION: Political News

LENGTH: 724 words

HEADLINE: **New Home for Special Interest Money:** Companies Underwrite Debates

BYLINE: By CONNIE CASS, Associated Press Writer

DATELINE: WASHINGTON

BODY:

While President Clinton and Bob Dole share the limelight of the debates, Philip Morris, Sprint and other corporate giants will be offstage - paying the bills.

The Commission on Presidential Debates has already secured between $ 25,000 and $ 250,000 each from five companies to be national sponsors of the three debates. An additional $ 1.5 million is being raised from companies in the host cities.

All will get tax deductions.

Such coziness between corporations and political parties has long been criticized. And the critics have an ally in Reform Party candidate Ross Perot, who has been denied a seat at the debates.

In a lawsuit against the debate commission, Perot argues that his exclusion is evidence that Democrats and Republicans, and their financial supporters, have rigged the system against outsiders.

The debates, Perot said recently, are underwritten by "the same people and the same special interests who give a lot of money and get a huge return for their contributions."

To members of the debate commission, that sounds like sour grapes. They note that Perot participated in the 1992 debates, which were sponsored by some of the same companies.

"These corporations have no influence whatsoever or contact whatsoever with the commissioners or candidates about the debates," said Frank Fahrenkopf, co-chairman of the commission.

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"It is their contribution to good government and nothing more," Fahrenkopf said.

In addition to cigarette maker Philip Morris and the long-distance company Sprint, the commission said its national sponsors are Sara Lee, best known for frozen foods; Dun & Bradstreet, a financial information company, and the new telecommunications company Lucent Technologies, which breaks away from parent AT&T on Monday.

Three nonprofit foundations also serve as national sponsors: the Joyce Foundation, The Marjorie Kovler Fund, and Twentieth Century Fund.

Under campaign finance laws passed in response to the Watergate scandal, corporations are banned from contributing money to political campaigns.

But there are loopholes: Corporations are allowed to defray the parties' costs for their nominating conventions, as they did last month, and can give unlimited amounts of "soft money" to help the parties promote themselves.

Those contributions have to be reported to the Federal Election Commission; debate donations do not.

"The focus needs to be on the appearance of corruption, not just looking for a quid pro quo," said John Bonifaz, executive director of the National Voting Rights Institute.

"What does the public think of this process when they see this big money floating around?" asked Bonifaz, whose group wants the public financing of presidential campaigns extended to the debates.

Debate sponsor Philip Morris also is the top "soft money" contributor so far this election season, according to a study by Common Cause. Through the end of June, Philip Morris, its subsidiaries and executives had contributed $ 1.63 million to the Republican Party and $ 350,250 to the Democrats.

As the elections approach, Philip Morris money continues rolling in - $ 394,000 in August alone to national Republican committees.

Philip Morris' contribution to the debate in cash and donated goods will be worth between $ 200,000 and $ 250,000, company spokeswoman Darienne Dennis said.

"We have absolutely, absolutely nothing to do with the substance or selections of the debate," Dennis said. She said the company has supported the debates since 1988.

She said Philip Morris will pay for the media filing centers, including meals for journalists, to "showcase the breadth and depth of Philip Morris products," including Maxwell House coffee, Kool-Aid, Jell-O and Miller beer.

The national sponsors receive free tickets to the debates and recognition in the written program, but won't be mentioned during TV coverage, said Janet Brown, the commission's executive director.

Brown said the commission's policy is not to disclose the size of each

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donation "out of deference to our sponsors." The donations are reported to the Internal Revenue Service, which keeps them private.

Some $ 1.5 million will be kicked in by local sponsors solicited by committees in the presidential debate cities of Hartford, Conn., and San Diego and in St. Petersburg, Fla., site of the vice presidential debate.

LANGUAGE: ENGLISH

LOAD-DATE: September 28, 1996

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1ST STORY of Level 1 printed in FULL format.

Copyright 1992 Bergen Record Corp.
The Record

October 20, 1992; TUESDAY; ALL EDITIONS

SECTION: BUSINESS; Pg. E01

LENGTH: 790 words

HEADLINE: **BIG BUSINESS MAY BE DEBATE WINNER,** TOO

SOURCE: Wire services

BYLINE: The Associated Press

DATELINE: WASHINGTON

BODY:

Corporations, prohibited by law from donating to federal elections, got a rare chance with the presidential debates to inject some of their money into the political process, and grab a tax break, too.

The list of sponsors for this year's three presidential debates and single vice presidential debate reads like a Who's Who of corporate America: Philip Morris, Atlantic Richfield, AT&T, and RJR Nabisco, to name a few.

It's the same group that has donated millions of dollars directly to the two major parties in the form of "soft money", donations exempt from the post-Watergate contribution limits. And they also bankrolled posh receptions this summer at the Democratic and Republican conventions.

"It's the same old familiar faces showing up in all the old familiar places," said Larry Makinson, spokesman for the campaign watchdog Center for Responsive Politics.

The leader of the debate sponsors is beer giant Anheuser-Busch. It tossed in $ 500,000 on last-minute notice to cover the entire cost of the hastily arranged first debate Oct. 11 at St. Louis.

The tabs for the other three debates were picked up by a variety of donors, usually companies with interests in the host city.

Monday's debate in East Lansing, Mich., was financed by contributions from General Motors, Ford, Kellogg's, Upjohn, Dow Corning, and the United Food and Commercial International Union.

About two dozen other corporate giants donated between $ 25,000 and $ 250,000 apiece to the bipartisan, non-profit Commission on Presidential Debates, which sponsored the debates.

While no one questions the importance of supporting the debates, critics point to the side benefits that corporations may derive.

The sponsors get to write off their donations on their corporate tax returns because the debate commission is tax-exempt, IRS spokesman Ken Hubenak said.

They also get to rub elbows with the political elite, such as former GOP national chairman Frank Fahrenkopf and former Democratic Party chairman Paul Kirk, who now head the debate commission.

"Who knows what ulterior motives any sponsor has... maybe it's just to be connected with something good," Fahrenkopf said. "But I really believe the overwhelming majority are really interested in good government and care about the political system."

The companies say their motives for giving are altruistic.

Anheuser-Bush, based in St. Louis, made its donation after Sen. John Danforth, R-Mo., called to solicit its help, but insists it would have contributed anyway.

"It was a means of assisting the political process and where, in this case, the city of St. Louis had a benefit of having it there," said Stephen K. Lambright, vice president and chief executive officer.

"As far as we are concerned, this is part of our citizenship. We believe in the political process and in helping it along," said George Knox, vice president of public affairs for Philip Morris.

That doesn't stop the tobacco, food, and beer giant from getting in a little advertising along the way.

The company set up a display of its tobacco products in a media hospitality lounge it sponsored and gave reporters matchbook-size calculators sporting the company logo.

Many debate sponsors have business pending before the government, Makinson noted.

"Nobody's saying they're whispering answers into the candidates' ears.... But it's a cozy relationship between the top corporate donors and the people who run the parties and the government," Makinson said.

Corporations have been forbidden by law from donating to elections since 1907. But the Federal Election Commission has opened at least three avenues for corporate money in elections: soft-money donations to the parties, financial backing of the debates, and sponsorship of receptions at the nominating conventions.

The companies haven't hesitated to use them.

AT&T, which has been battling regional telephone companies over legislation pending in Congress governing the future of the lucrative

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electronic publishing business, sponsored receptions at both the Republican and Democratic conventions. It's also among the debate sponsors.

Agricultural products giant Archer Daniels Midland, the single largest soft-money donor with $ 1.14 million donated to the two parties this election, is another debate sponsor.

Philip Morris sponsored convention receptions and donated $ 597,000 in soft money to the parties in addition to its debate sponsorship.

Knox dismisses those who question the company's motives. If the companies didn't foot the bill for the debates, the tab probably would be left to taxpayers, he said.

LANGUAGE: English

LOAD-DATE: October 7, 1995

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4TH STORY of Level 1 printed in FULL format.

Copyright 2000 News World Communications, Inc.
The Washington Times

February 21, 2000, Monday, Final Edition

SECTION: PART A; COMMENTARY; Pg. A18

LENGTH: 894 words

HEADLINE: Final debate barriers

BYLINE: Arianna **Huffington**

BODY:

As the political world focuses on the increasingly acrimonious primary debates, behind the scenes, with little publicity or fanfare, the fate of the general election's presidential debates is being decided.

Thumbing its nose at participatory democracy, the Commission on Presidential Debates determined last month that only those candidates garnering "15 percent of the national electorate as determined by five polling organizations" would be included in the face-offs this fall. This is a particularly stringent test since it takes only 5 percent of the vote to qualify for public financing - and it all but ensures that the Democratic and Republican nominees won't have to share the national stage with any pesky interlopers.

Why not just skip the polling and hire armed guards to gun down any threat to the two-party domination of the debates instead? It would spare us those annoying dinner-time interruptions and have the same effect of excluding from the debates the views of one-third of American voters who identify themselves as neither Republican nor Democrat.

It's not as if the pollsters don't already wield an unhealthy amount of power both with politicians and with the media. Now the commission wants to institutionalize the influence of the same folks who were utterly blind-sided by John McCain's landslide victory in New Hampshire, who failed to predict Jesse Ventura's victory in Minnesota and who are notoriously unreliable when it comes to recording the opinions of independent voters.

Jamin Raskin has a much better plan. A professor of constitutional law at American University who represented Ross Perot in his efforts to be included in the presidential debates, Jamin Raskin has convened a task force to produce an alternative to the commission's qualifying criteria - a formula driven by the needs of democracy rather than the needs of the two parties, and by the assumption that these do not automatically coincide.

Since I am one of the people on the Raskin task force - together with, among others, John Anderson, who ran for president as an independent in 1980; John Bonifaz, director of the National Voting Rights Institute; and Rob Richie, executive director of the Center for Voting and Democracy - let me declare my interest. The Task Force on Fair Debates is about to produce its report calling on the commission to open the debates to any candidate who meets one of three

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criteria: represents a party whose nominee received 5 percent of the vote in the last presidential election and is therefore eligible for federal matching funds; registers at 5 percent in national polls; or registers at 50 percent in national polls when the question asked is not "Whom would you vote for if the election were held today?" but "Do you think the following candidate should be included in the presidential debates?"

"If the commission refuses to alter its criteria," states the report, "then the legitimacy of American presidential elections is undermined and new approaches for fair and meaningful candidate dialogue must be sought for the 2000 election."

But fair and meaningful dialogue was never the goal of the commission, which was formed in 1987 by the then-chairmen of the Democratic and Republican national committees. According to the agreement they drafted, the commission would replace the traditional League of Women Voters-sponsored debates with "nationally televised joint appearances conducted between the presidential and vice presidential nominees of the two major political parties."

Since then, the commission has become a central player in the growing electoral-industrial complex - with each debate held under its auspices yet another controlled corporate spectacle. "The same corporate interests bankrolling the commission," Jamin Raskin says, "also pump millions in soft money directly into Democratic and Republican coffers." Philip Morris sponsored the debates in 1992 and 1996, and Anheuser-Busch is picking up the $2 million tab this year in return for the public relations benefit and access to the candidates during the receptions. I guess none of the Clydesdales are independents.

The commission's role "is not to jump-start a campaign," according to Janet Brown, its executive director. I would not want to jump-start Pat Buchanan's or Ross Perot's candidacy, either, but it's not up to me any more than it should be up to the commission to stop third-party candidates from catching fire as Mr. Ventura did after he was included in the Minnesota gubernatorial debates.

A recent poll by Harvard's Vanishing Voter Project found that close to 50 percent of Americans would like to see a third-party candidate be a part of the 2000 race - in keeping with the steady growth of the public's desire to increase its electoral options. "Our charter is to help people to get to know the candidates who are going to be president," says Ms. Brown, once again displaying the commission's political tone deafness.

Throwing the debate doors open and letting a little fresh air in will definitely be a lot messier than a "televised joint appearance" by the two party nominees. But now that those two parties have become practically indistinguishable, we could live with some messiness if it helps restimulate our democracy.

Arianna Huffington is a nationally syndicated columnist.

LANGUAGE: ENGLISH

LOAD-DATE: February 21, 2000

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55TH STORY of Focus printed in FULL format.

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USA TODAY

January 7, 2000, Friday, FINAL EDITION

SECTION: NEWS; Pg. 12A

LENGTH: 734 words

HEADLINE: Panel defends debates' limit as fair, reasonable

BYLINE: Tom Squitieri

DATELINE: WASHINGTON

BODY:

WASHINGTON -- The **Commission on Presidential Debates** announced Thursday that it will limit participation in three fall debates to candidates who receive at least 15% in national polls, a threshold likely to exclude the Reform Party nominee and other third-party candidates.

"We will include the principal rivals, not just people who have great ideas and add some spice to the campaign, " said Paul Kirk, the commission's co-chairman.

Pat Buchanan, the front-runner for the Reform nomination, said his lawyers are already working on a legal challenge. "This is preposterous, a Republican-Democratic conspiracy to corner the market on the presidency of the United States," Buchanan said. "We can't have a fair fight if they decide what punches we can throw."

The 15% cutoff will be determined by the average that each candidate garners from five national polls: USA TODAY/CNN/Gallup, ABC/Washington Post, CBS/New York Times, Fox/Opinion Dynamics and NBC/Wall Street Journal. The average poll standing will be calculated in late September, before the first debate.

Kirk and Frank Fahrenkopf, the other co-chairman, said each polling organization would decide the wording of its questions and the candidates' names to include.

The 15% mark was selected after "an intensive review of historical patterns" and was a "fair and reasonable number," Kirk said. "This is the best we can do in an admittedly imperfect structure."

Reform Party leaders and candidates had expected unfavorable **criteria**, but they still expressed dismay.

"I'm not surprised that the two-party political establishment wants to keep the American people from having a third choice,"

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said New York developer Donald Trump, considering a run on the Reform ticket. "The Reform Party is a federally recognized party, which is entitled to federal subsidies for the general election. This should be the **criteria** for inclusion in the presidential debate."

Should Buchanan receive the Reform nomination, he is expected to draw much of his support from conservative voters, which could hurt the GOP nominee. Keeping him out of the debates, therefore, could help the GOP candidate. In addition to being at least 15% in the polls, to be included in the debates a candidate must also:

• Meet the constitutional threshold for being president (at least 35 years old, a natural born citizen and a U.S. resident for 14 years).

* Be on enough state ballots to have a mathematical chance of securing the Electoral College majority of 270 votes. The Electoral College consists of each state's electors who are expected to vote for the candidates selected by the popular vote in their state.

The **criteria** are supposed to provide objective measurements of a candidate's realistic chances of being elected. However, had the commission's requirements been applied to the Minnesota governor's race in 1998, Reform nominee Jesse Ventura would have been excluded because he was pulling less than 15% in the pre-debate polls. Ventura did well in the debates and won the three-way race with 37% of the vote.

Ventura, the Reform Party's highest elected official, said the party has earned the right to be in the debates. "If they don't allow us into the debates, I'll call them a bunch of gutless cowards," he said in an interview.

The debate commission is a non-governmental entity funded by corporations and foundations. It was formed in 1987 by Democratic and Republican party leaders and is headed by their former chairmen, Kirk and Fahrenkopf.

The Reform Party was certified as a national party by the Federal Election Commission after its 1992 and 1996 presidential nominee, Ross Perot, received more than 5% in each election. That is the threshold that automatically triggers federal matching funds for the party's presidential nominee in the subsequent presidential election. The party will receive $ 12.6 million this year.

The Reform Party is the only third party to hit that mark in two straight elections. Perot received 18.9% of the vote in 1992 and 8.9% in 1996.

The commission permitted Perot to participate in the 1992 debates, even though at the time he was pulling only 7% in the polls. In 1996, the commission excluded Perot from the debate over his strong

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protests, saying he had no realistic chance to win the election.
LANGUAGE: ENGLISH

LOAD-DATE: January 07, 2000

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31ST STORY of Focus printed in FULL format.

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AP Online

January 7, 2000; Friday 03:14 Eastern Time

SECTION: National political

LENGTH: 738 words

HEADLINE: **Criteria** Released for Fall Debates

BYLINE: DOUGLAS KIKER

DATELINE: WASHINGTON

BODY:

The Reform Party's presidential candidate and anyone other than the Republican and Democratic nominees could be excluded from presidential debates in the fall under new **criteria** established by an independent commission.

The decision angered Pat Buchanan, the former Republican turned Reform presidential candidate, who called he panel's decision Thursday a ''transparent farce.'' He stressed that the Reform Party is nationally recognized, and that its candidate should be included.

''Let's be plain: This is nothing but a Beltway conspiracy by the two establishment parties to corner the market forever on the presidency of the United States,'' he said.

The **Commission on Presidential Debates**, a nonpartisan group created in 1987 as an impartial sponsor of the debates, said the stage for nationally televised debates would be limited to candidates with at least 15 percent support in national public opinion surveys.

Frank Fahrenkopf Jr., the former Republican Party chief who is co-chairman of the commission, said the **rules** would limit the three scheduled debates to the ''realistic principal rivals to be president of the United States.''

The arrangement, he said, ''strikes a balance between reality and fairness.''

The commission set two qualifications for participation:

Candidates must appear on enough state ballots to have a mathematical chance of winning a majority in the Electoral College.

They also must have an average of 15 percent support in five major national polls: ABC-Washington Post, CBS-New York Times, NBC-Wall Street Journal, CNN-USA Today-Gallup and Fox News-Opinion Dynamics.

Buchanan was not the only one incensed by the decision.

Donald Trump, the New York real estate developer who is considering a run for

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the Reform Party nomination, said, ''I am not surprised that the two-party political establishment wants to keep the American people from having a third choice.'' He also threatened legal action.

The Libertarian Party also criticized the commission's rules.

''Their new criteria will unfairly exclude candidates with a chance to win the election, or with the potential to win the support of a substantial number of American voters. That's just wrong,'' said party national director Steve Dasbach.

Janet Brown, executive director of the commission, rejected the criticism.

''It would seem premature for any candidate to attack them given the fact we won't be applying them until late September,'' Brown said. ''By publishing these criteria 10 months before the election that we hope to make it absolutely clear to the candidates and the public how we will make these determinations.''

The commission also named three sites and dates for the debates, each of which will begin at 9 p.m. EST and last 90 minutes:

The John F. Kennedy Library and University of Massachusetts in Boston, Oct. 3.

Wake Forest University in Winston-Salem, N.C., Oct. 11.

Washington University in St. Louis, Oct. 17.

One vice-presidential debate will be held at Centre College in Danville, Ky., on Oct. 5.

Ross Perot, the Reform Party founder, was included in debates in 1992 and later won 19 percent of the popular vote but no electoral votes in the general election. The debate commission excluded him in 1996, despite his vigorous protests, saying his poll support was in single digits and that he had no realistic chance of winning the election. Perot also lost a court fight over the issue.

Larry Sabato, a professor of government at The University of Virginia, said the new criteria ignore the fact that polls, for all their popularity, can be wrong.

''Polling is not that precise,'' Sabato said. ''Even when you average five polls you don't eliminate the individual margins of error.''

John Anderson said it was ''absolutely devastating'' when he was excluded from the second of two general election debates in 1980 when he ran as an independent.

''It sends a signal that (a candidate) is somehow less credible than the other two candidates invited to the debate,'' he said.

But not everyone was upset.

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Mike Collins, spokesman for the Republican National Committee, said, ''There has to be some cutoff, some line has to be set for participating in these debates. ... Seems to us that the nonpartisan commission has worked very long and very hard and they have come up with a standard that is certainly reasonable and is clearly not arbitrary.''

LANGUAGE: ENGLISH

LOAD-DATE: January 7, 2000

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Memorandum of Agreement on Presidential Candidate Joint Appearances
November 26, 1985

Frank J. Fahrenkopf, Jr., Chairman of the Republican National Committee, and Paul G. Kirk, Jr., Chairman of the Democratic National Committee, acknowledge and recognize that nationally televised joint appearances by the presidential nominees of both parties have often played an important and constructive role in recent presidential campaigns. We hope that they will play a similar role in future presidential campaigns, and we hereby commit ourselves toward achieving that goal. We recognize, of course, that the ultimate decision regarding participation in joint appearances will necessarily be made by the nominees themselves. Nonetheless, this memorandum of agreement is intended to express our strong belief that joint appearances deserve to be made a permanent and integral part of the presidential election process and our determination to bring that about.

It is our bipartisan view that a primary responsibility of each major political party is to educate and inform the American electorate of its fundamental philosophy and policies as well as its candidates' positions on critical issues. One of the most effective means of fulfilling that responsibility is through nationally televised joint appearances conducted between the presidential and vice presidential nominees of the two major political parties during general election campaigns. Therefore, to better fulfill our parties' responsibilities for educating and informing the American public and to strengthen the role of political parties in the electoral process, it is our conclusion that future joint appearances should be principally and jointly sponsored and conducted by the Republican and Democratic National Committees.

We believe that the format and most other details of joint appearances for each general election campaign should be determined through negotiations between the chairmen and the nominees of the two political parties (or their designees) following the nominating conventions of each presidential election year.

We thank the League of Women Voters for having effectively laid the ground work on which we are building today. We hope that the League will continue to offer its experience, advice, and resources to the joint appearance process.

Democratic National Committee

Paul G. Kirk, Jr.
Chairman

Republican National Committee

Frank J. Fahrenkopf, Jr.
Chairman

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News from the...
DEMOCRATIC AND REPUBLICAN NATIONAL COMMITTEES

Release: Wednesday, February 18, 1987

Contact: Robert P. Schoemund, RNC
202/863-8550

Terry Michael, DNC
202/863-8020

RNC AND DNC ESTABLISH
COMMISSION ON PRESIDENTIAL DEBATES

WASHINGTON, D.C.--Republican National Committee Chairman Frank J. Fahrenkopf, Jr. and Democratic National Committee Chairman Paul G. Kirk, Jr. announced the creation of the Commission on Presidential Debates at a joint press conference today at the Capitol.

The 10-member commission is a bipartisan, non-profit, tax exempt organization formed to implement joint sponsorship of general election presidential and vice presidential debates, starting in 1988, by the national Republican and Democratic committees between their respective nominees.

In launching this new initiative, the two party chairmen said, "A major responsibility of both the Democratic and Republican parties is to inform the American electorate on their philosophies and policies as well as those of their respective candidates. One of the most effective ways of accomplishing this is through debates between their nominees. By jointly sponsoring these debates, we will better fulfill our party responsibilities to inform and educate the electorate, strengthen the role of political parties in the electoral process and, most important of all, we can institutionalize the debates, making them an integral and permanent part of the presidential process."

In emphasizing the bipartisan nature of the commission, both chairmen noted the contributions to the debate process by the League of Women Voters: "We applaud the League for laying a foundation from which we can assume our own responsibilities. While the two party committees will be sponsors for all future presidential general election debates between our party nominees, we would expect and encourage the League's participation in sponsoring other debates, particularly in the presidential primary process."

Kirk and Fahrenkopf, in stressing the need to institutionalize the debates, said it will be the Commission's goal to recommend the number of presidential and vice presidential debates, as well as the dates and locations of these debates, before the 1988 nominating conventions. Potential candidates for the parties' respective nominations have committed to support party-sponsored debates. The Commission's recommendations will be forwarded to all potential candidates for concurrence as soon as they are completed.

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"This degree of certainty about the debates going into the general election," the chairmen said, "is an historic breakthrough in institutionalizing them. It means that we won't spend most of the general election campaign debating about debates, as we have too often in the past. The American people have an expectation that debates will occur every four years; this process is designed to assure that that expectation will be realized."

Fahrenkopf and Kirk will serve as co-chairs of the new Commission. They appointed as vice chairs:

- Richard Moe, Washington lawyer and partner in the firm of Davis, Polk & Wardwell;

- David Norcross, Washington lawyer and partner in the firm of Myers, Matteo, Rabil, Pluese & Norcross.

Others named to the Commission are:

- U.S. Rep. Barbara Vucanovich (R-NV);

- former U.S. Senator John Culver (D-IA), now a partner in the Washington law firm of Arent, Fox, Kintner, Plotkin & Kahn;

- Republican Gov. Kay Orr of Nebraska;

- Vernon Jordan, a Democrat, former president of the Urban League, now a partner in the law firm of Akin, Gump, Strauss, Hauer & Feld;

- Pamela Harriman, chairman of Democrats for the '80's;

- U.S. Senator Pete Wilson (R-CA).

The two chairmen said the Commission will hire staff and open a Washington office shortly. They said articles of incorporation for the Commission have been filed in the District of Columbia as well as an application for tax exemption with the Internal Revenue Service.

Kirk and Fahrenkopf concluded by saying, "We have no doubt that with the help of the Commission we can forge a permanent framework on which all future presidential debates between the nominees of the two political parties will be based. It is our responsibility as Party chairmen to have an informative and fair presidential process. The establishment of the Commission on Presidential Debates will go a long way toward achieving that goal."

Today's announcement stems from a recommendation of the Commission on National Elections, which during 1985 studied the presidential election system. On Nov. 25, 1985, Kirk and Fahrenkopf signed a joint memorandum agreeing in principle to pursue the party sponsorship concept.

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Why the **Reform Party's** best **days** are behind it.

BODY:

American politics isn't physics, but it has rules nonetheless. And one of the clearest has to do with **third parties.** Since the nation's founding, no **third party** has knocked off one of the reigning two, and none has taken power. (The Republican **Party** of the 1850s, sometimes cited as an exception, actually emerged as a major **party** after the Whig **Party** expired.) That's not to say **third parties** always fail; they just succeed in a different way. When **third parties** succeed, it's because they change the terms of debate. They take a cry from the margins of American life--an issue, or an interest, or a prejudice--and force it onto the agenda of the political elite. When the cry is powerful enough--for instance, Prohibition in the 1910s--the two **parties** adapt, and the political landscape alters. But then the messenger is no longer needed. And so ideological success presages political failure. As the great historian Richard Hofstadter put it in The Age of **Reform, "Third parties** are like bees: once they have stung, they die."

Has anyone mentioned this to America's pundits? To hear the chattering on the nation's cable stations, you'd think the **Reform Party** is taking off. Sure, everyone makes fun of Pat Buchanan and Donald Trump and Jesse Ventura, but they're getting almost as much press as George W. Bush, Al Gore, and Bill Bradley. And, behind the mockery, the underlying theme is clear: In 1992, Ross Perot's presidential candidacy was just one man's ego writ large; in 1996, it was just one man's ego writ smaller; but, in the 2000 election, America has a real **third party.** It has enticed a serious Republican presidential contender and elected a governor. It has wads of cash at its disposal. It has activists and counteractivists and flacks. Most important, it's becoming the repository of deep, hitherto unexpressed yearnings from the heartland. Never mind that these yearnings are contradictory; they're authentic and fresh--the stuff of which paradigm shifts are made.

It's an intriguing idea in what looks to be an otherwise boring campaign season. And it's nonsense. In fact, the **Reform Party** is proof positive of Hofstadter's theorem. Perot in 1992 was the movement's zenith. Coming out of nowhere and running a makeshift, largely self-financed presidential campaign, Perot won 19 percent of the popular vote--the largest total for any American **third-party** candidate since Theodore Roosevelt's Progressive **Party** campaign in 1912. And it wasn't because of his personality. Perot had a cause--deficit reduction--that perfectly symbolized what many recession-weary Americans felt: that government was irresponsible, arrogant, and beyond their control. Before Perot, the conventional wisdom held that deficit reduction was a dry- as-dust issue, capable of mobilizing only the nerdiest of wonks and goo-goos. After Perot's 19 percent, both major **parties** made deficit reduction their own. The Clinton

administration famously chose Rubinomics over Reichonomics in 1993, and the Republicans in 1994 tried to do the administration one better. Upon winning Congress, they pledged that by a date certain they would not merely cut the deficit but end it. When Perot first proposed that idea, it seemed like political and fiscal lunacy. In two years it was on the mainstream policy agenda. In six years it was reality. That is how successful **third parties** work.

Today, by contrast, the **Reform Party** is all buzz and no sting. It survives because of a quirk in the campaign laws: the $12.6 million in federal matching funds waiting for its presidential nominee next year. It survives because the expansion--and dumbing down--of the broadcast media has blurred distinctions between the political mainstream and the political margin, turning the latter into a plausible simulacrum of the former. (Imagine what might have happened in 1912 if the schismatic Theodore Roosevelt or, for that matter, the socialist Eugene V. Debs could have schmoozed on camera with Larry King.) And it survives because it has become a Rorschach test. There are discontents in America, and discontented Americans of all stripes like to think of themselves as reformers.

But this does not add up to a political future. The **Reform Party** of 1999, unlike the Perot movement of 1992, does not have a compelling issue all its own. Its closest thing to an issue, campaign finance **reform,** has already been picked up by mainstream presidential contenders, in the time-honored American manner. In fact, none of its leaders has anywhere near as much credibility on the issue as does Republican John McCain.

What the **Reform Party** has is aging crusaders, each in desperate search of some political fountain of youth. The crusaders, notably the supporters of Minnesota Governor Jesse Ventura, may be young compared to the electorate as a whole, but their ideas are old and spent. They have a history in American politics--a history of coming to nothing. The **Reform Party** is fast evolving into a museum of quixotic causes tricked out in the latest telegenic gear. The **party** is about to fail spectacularly not just in one sense but in two. It will not elect anyone president, and, more important, it will not change the way American government addresses the major issues of the **day.**

One year before the election, there are really three **Reform Parties,** led, respectively (from right to left), by Buchanan, Ventura, and the (comparatively) obscure New York-based radical Lenora Fulani. Buchanan has the backing of Perot's crony (and 1996 vice presidential running mate) Pat Choate; Buchanan has apparently also struck an alliance with Fulani. Ventura hopes to keep the **party** from falling to the extremists; along those lines, he's helping promote Trump's candidacy while leaving open the possibility that he might enter the ring himself, so to speak. Perot, down in Dallas, is said to be leaning toward Buchanan, but the Texan has been known to change his mind, and it's by no means clear that Perot still controls the contraption he built. Anything could happen. And, no matter what happens, the **Reform** candidate will represent an earlier, failed political sensibility.

Buchanan would represent the biggest regression, at least in terms of chronology. Some of his dark apprehensions about the future are rooted in the deep, pre-American classical past. (The title, if not the content, of his new book, A Republic, Not an Empire, conveys much the same message as Thucydides's History of the Peloponnesian War: that a government overextended by military adventures will collapse of its own weight.) Moving closer to the present, Buchanan lays claim to the highly diverse legacies of Henry Clay (as a high-tariff protectionist), John C. Calhoun (as a prudent, not imperial, expansionist), and Andrew Jackson (ditto). But, more than anything, Buchanan harkens back to the 1930s--and to a brand of nationalist pseudo-populism that, then as now, had a curious appeal at either end of the political spectrum.

At heart, Buchanan is a man of the old Catholic right--echoing the anti-New Deal catechism popularized by the "radio priest," Father Charles Coughlin, and the muscular, pietistic, corporatist anti-communism that found a hero in Generalissimo Francisco Franco during the Spanish Civil War. (To call Buchanan a Hitlerite, as some of his opponents have, is unfair; Francoist comes closer to the mark.) He detests the welfare state, which he sees as an intrusive secularist force. He regards

the world beyond our shores as a tempest of savage tribalism, and he would like, on that account, both to halt immigration and to pull the United States out of the United Nations. He has a penchant for conspiratorial thinking, illustrated by his remarks about the devilish "foreign policy elites" and the pro-Israel "amen corner" that supposedly control our policies abroad and corrupt our politics at home.

The pundits who believe that Buchanan represents a genuinely new synthesis often say that his politics confound customary right-left distinctions. They point to his success among blue-collar Democrats and his ties to Teamster head James Hoffa Jr. But, if Buchanan's politics transcend right-left divisions, they transcend them in awfully familiar ways. The nostalgic view of America as a once-noble republic corrupted by special interests, the instinctive distrust of foreign involvements (and of foreigners), the economic nationalism that would enshrine nineteenth-century protectionism for all time--this has a long pedigree among supposed liberals and radicals as well as among conservatives and reactionaries. Sixty years ago, such ideas propelled the rise of the isolationist group America First, which Buchanan defends in his new book as a sort of forerunner of his own political insurgency. Although dominated, as Buchanan writes, by "small-government Republicans," America Firstism won over any number of leftish intellectuals, ranging from the aging historian Charles Beard (who later wrote obsessively that Franklin D. Roosevelt helped engineer Pearl Harbor) to younger authors- to-be such as Murray Kempton and Gore Vidal. No one should be surprised, then, that Buchanan has gained a respectful hearing in some pro-labor and erstwhile "anti-imperialist" circles, where his opposition to free trade and his polemics against the traitorous rich and the new world order outweigh his right-wing moralism.

Nor should anyone be surprised when Buchananism amounts to little or nothing. Isolationism, as commentators love to say, has a deep history in this country. But it is a history of failure. Isolationism has been a powerful force in twentieth-century America only once--after World War I, when phobias about entangling alliances defeated Woodrow Wilson's plans for American entrance into the League of Nations. America First dissolved for good on December 8, 1941, as soon as war became unavoidable. Some of its spirit lived on after 1945 in the Robert Taft conservative wing of the Republican **Party,** but it was quickly overwhelmed by the imperatives of the cold war.

The cold war, of course, is now over, which makes Buchananism possible. But 1999 is not 1919. World War II and the struggle with the Soviet Union have invested American internationalism with a moral dimension that it did not have in the aftermath of World War I. The cost-benefit argument for isolationism may retain wide appeal, but, early in this century, its defenders could claim that isolationism was also moral. In an America whose citizens remember Hitler, Stalin, and Milosevic, Buchanan has lost that argument before his campaign even starts.

Buchanan's crossover appeal may explain his weird alliance with the pro- Fulani Reformers. Or it may be a marriage of convenience. But, either way, the alliance brings into play yet another familiar fringe--what might be called the psycho-left. Fulani first attracted public notice in the early '80s as a perennial candidate of the New Alliance **Party,** based in New York. The NAP was, in turn, the offspring of the Institute for Social Therapy and Research, one of a number of peculiar psychological sects that arose in upper Manhattan after the New Left's demise in the early '70s. Dedicated to the idea that political protest is itself a form of developmental liberation, the Social Therapy acolytes took the logical step, in 1979, of organizing themselves into a formal political **party.** Then, late in 1994, after years of getting nowhere with the electorate, Fulani and her supporters shut down the NAP--only to moderate their rhetoric and refocus their abundant energies and tactical know-how on capturing various pro-Perot grassroots organizations.

Behind the Fulanites lies a lush history of left-wing efforts to unite the class struggle with the liberation of the psyche. Frustrated dissenters of the late '40s and '50s climbed into Wilhelm Reich's orgone boxes to overcome the repression of self and society. Campus New Leftists in the '60s fondled volumes of Herbert Marcuse and Frantz Fanon, charting the devious connections between capitalism, colonialism, and mass pathology. Poking around any well- stocked, reasonably

hip bookshop in the early '70s, you were bound to find further variations on the theme in the manifestos of left-wing drug mavens and left-wing nudists and left-wing psychoanalysts. But only a hardy few kept the tradition alive through the Reagan-Bush era; Fulani was among the hardiest.

Tactically, Fulani's insurgency also represents the old, parasitic Marxist tradition of "boring from within"--camouflaging its actual political agenda behind anodyne talk of ending racism and democratizing the political system. Back in the '80s, for example, NAP partisans tried to confuse voters and potential donors by calling themselves members of the "Rainbow Alliance" and the "Rainbow Lobby," as if they were nothing more than Jesse Jacksonians. In their latest, even more moderate incarnation, the Fulanites have suppressed their socialism and posed as hard-nosed welfare reformers to fit in with the more conservative Perotistas. Yet none of these efforts shows any greater likelihood of success than the Communists' infiltration tactics of the 1920s or their mendacious, pro-New Deal posturing in the mid-'30s. Even in the **Reform Party** itself, which is considerably more tolerant of marginal agendas than is the electorate as a whole, the Fulanites are being exposed. At a recent **party** convention in Dearborn, Michigan, Perotistas dismissed them as Reds.

The sight of Fulani joining forces with Buchanan is almost enough to make one sympathize with Ventura. The Minnesota governor does not truck in protectionist dogma, anti-immigration demagoguery, or left-wing psychobabble. More than that, he strikes many observers as a refreshing force in our national life--an anti-political politician, a down-to-earth man unafraid to call 'em the way he sees 'em. Yet Venturaism only seems new. It, too, has a history, and, like that of its **Reform Party** rivals, its history is not marked by success.

Nearly forgotten amid the hoopla over Ventura's rise to power is one of the chief reasons he won his election: the implementation of Election **Day** voter registration in Minnesota. To encourage the masses of stay-at-homes to exercise their civic duty, in 1973 Minnesotans enacted a law that permitted unregistered residents to sign up just before they cast their ballots. The **reform,** like the federal "motor voter" law linking driver's license registration with voting registration, was meant to amplify the voice of poorer and younger voters. And so it did--as swarms of Minnesotans (many young wrestling fans among them) showed up to vote for "the Body" instead of his staid, mainstream opponents. Ventura's improbable victory, in short, was an unintended consequence of his home state's high-minded progressive impulses.

Those impulses have a venerable history, especially across the nation's northern tier. Since the end of the last century, from the upper Midwest to the Pacific Northwest, all sorts of structural political **reforms**--including the ballot initiative, the recall, and the referendum--have flourished. If the technical aspects of the political system could be perfected, the reformers presumed, then the voice of the people would prevail, and good policy would reign. Ventura apparently agrees: His most audacious political effort since coming to office has been to try to abolish Minnesota's bicameral legislature and replace it with a single house.

Compared to the Buchanan-Fulani combine's machinations, Ventura's neo- Progressivism is encouraging. But it's hardly the vehicle for an independent political insurgency. Structural **reforms** may well benefit the political system, making it more efficient and responsible, as the turn-of-the-century Progressives hoped they would. But they can carry a political movement only so far. Eventually, the politics of clashing interests kick in, and the question of who gets what from whom overwhelms procedure. In other words, it's not enough to have beliefs about means. Eventually you must have beliefs about ends, as well.

Progressivism had mass appeal as a **third party** in 1912, when it combined good-government **reforms** with Theodore Roosevelt's "new nationalist" conception of a regulatory state that stood up to big business. Twelve years later, the Progressive **Party** revived under Wisconsin Senator Robert La Follette because of its strong labor support, winning 17 percent of the popular vote against Calvin Coolidge. Ventura, by contrast, lacks the compelling economic ideology that powered his Progressive predecessors. Insofar as he gets beyond structural **reform,** he seems to favor fiscal responsibility and social laissez-faire. Ten years ago that would have made him an unusual figure

in American politics; today, however, he fits fairly easily into the New Democrat camp of Bill Clinton and Al Gore. So Ventura's **Reform Party** is caught. If it focuses only on process, it will be a distinctive force, but one without a compelling message. If it combines process reformism with social liberalism and pro-business moderation, it will be redundant.

The **reform party** will produce a lot of sound and fury over the coming twelve months. It will keep talk-show hosts in business, and it will cause the major **parties** headaches. A Buchanan candidacy, in particular, could sap the Republican nominee of support, which might prove decisive in a close race.

Furthermore, the two-**party** system is not invincible. There has been a steady decline in partisan loyalty over the past three decades. According to one recent poll, two-**thirds** of the electorate now favors the existence of a **third party,** more than double the figure of 30 years ago. Somewhere down the line, a new movement will almost certainly do again what Perot did early this decade: knock our political system for a loop.

But the **Reform Party** will not. The two major **parties** have absorbed its best issues. What remains is a strange reunion of lost causes, causes that historically have caught fire only in circumstances that neither America nor the **Reform Party** can replicate. After their auspicious debut in 1992, the Perotistas had reasons to feel heady; and there is still some lingering headiness surrounding the **Reform Party.** But that bee has stung. The buzz you hear is its death rattle.

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COMMISSION ON PRESIDENTIAL DEBATES' CANDIDATE SELECTION CRITERIA FOR 1996 GENERAL ELECTION DEBATE PARTICIPATION

A. INTRODUCTION

The mission of the Commission on Presidential Debates ("the Commission") is to ensure, for the benefit of the American electorate, that general election debates are held every four years between the leading candidates for the offices of President and Vice President of the United States. The Commission sponsored a series of such debates in 1988 and again in 1992, and has begun the planning, preparation, and organization of a series of nonpartisan debates among leading candidates for the Presidency and Vice Presidency in the 1996 general election.

The goal of the Commission's debates is to afford the members of the voting public an opportunity to sharpen their views of those candidates from among whom the next President or Vice President will be selected. In light of the large number of declared candidates in any given presidential election, the Commission has determined that its voter education goal is best achieved by limiting debate participation to the next President and his or her principal rival(s).

A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest warrants the extension of an invitation to the respective nominees of the two major parties to participate in the Commission's 1996 debates.

In order to further the educational purposes of its debates, the Commission has developed nonpartisan criteria upon which it will base its decisions regarding selection of nonmajor party candidates to participate in its 1996 debates. The purpose of the criteria is to identify nonmajor party candidates, if any, who have a realistic (i.e., more than theoretical) chance of being elected the next President of the United States and who properly are considered to be among the principal rivals for the Presidency. The realistic chance of being elected need not be overwhelming, but it must be more than theoretical.

The criteria contemplate no quantitative threshold that triggers automatic inclusion in a Commission-sponsored debate. Rather, the Commission will employ a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national enthusiasm or concern, to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates.

Judgments regarding a candidate's election prospects will be made by the Commission on a case-by-case basis. However, the same multiple criteria will be applied to each nonmajor party candidate. Initial determinations with respect to candidate selection will be made after the major party conventions and approximately contemporaneously with the commencement of the general election campaign. The number of debates to which a qualifying nonmajor party candidate will be invited will be determined on a flexible basis as the general election campaign proceeds.

B. 1996 NONPARTISAN SELECTION CRITERIA

The Commission's nonpartisan criteria for selecting nonmajor party candidates to participate in its 1996

general election presidential debates include:

1. EVIDENCE OF NATIONAL ORGANIZATION

The Commission's first criterion considers evidence of national organization. This criterion encompasses objective considerations pertaining to the eligibility requirements of Article II, Section 1 of the Constitution and the operation of the electoral college. This criterion also encompasses more subjective indicators of a national campaign with a more than theoretical prospect of electoral success. The factors to be considered include:

a. Satisfaction of the eligibility requirements of Article II, Section 1 of the Constitution of the United States.
b. Placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority.
c. Organization in a majority of congressional districts in those states.
d. Eligibility for matching funds from the Federal Election Commission or other demonstration of the ability to fund a national campaign, and endorsements by federal and state officeholders.

2. SIGNS OF NATIONAL NEWSWORTHINESS AND COMPETITIVENESS

The Commission's second criterion endeavors to assess the national newsworthiness and competitiveness of a candidate's campaign. The factors to be considered focus both on the news coverage afforded the candidacy over time and the opinions of electoral experts, media and non-media, regarding the newsworthiness and competitiveness of the candidacy at the time the Commission makes its invitation decisions. The factors to be considered include:

a. The professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks.
b. The opinions of a comparable group of professional campaign managers and pollsters not then employed by the candidates under consideration.
c. The opinions of representative political scientists specializing in electoral politics at major universities and research centers.
d. Column inches on newspaper front pages and exposure on network telecasts in comparison with the major party candidates.
e. Published views of prominent political commentators.

3. INDICATORS OF NATIONAL PUBLIC ENTHUSIASM OR CONCERN

The Commission's third criterion considers objective evidence of national public enthusiasm or concern. The factors considered in connection with this criterion are intended to assess public support for a candidate, which bears directly on the candidate's prospects for electoral success. The factors to be considered include:

a. The findings of significant public opinion polls conducted by national polling and news organizations.
b. Reported attendance at meetings and rallies across the country (locations as well as numbers) in comparison with the two major party candidates.

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(12)

NEWS RELEASE

FOR IMMEDIATE RELEASE:
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LEAGUE REFUSES TO "HELP PERPETRATE A FRAUD"

WITHDRAWS SUPPORT FROM FINAL PRESIDENTIAL DEBATE

WASHINGTON, DC — "The League of Women Voters is withdrawing its sponsorship of the presidential debate scheduled for mid-October because the demands of the two campaign organizations would perpetrate a fraud on the American Voter," League President Nancy M. Neuman said today.

"It has become clear to us that the candidates' organizations aim to add debates to their list of campaign-trail charades devoid of substance, spontaneity and honest answers to tough questions," Neuman said. "The League has no intention of becoming an accessory to the hoodwinking of the American public."

Neuman said that the campaigns presented the League with their debate agreement on September 28, two weeks before the scheduled debate. The campaigns' agreement was negotiated "behind closed doors" and was presented to the League as "a done deal," she said. Its 16 pages of conditions not subject to negotiation.

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Most objectionable to the League, Neuman said, were conditions in the agreement that gave the campaigns unprecedented control over the proceedings. Neuman called "outrageous" the campaigns' demands that they control the selection of questioners, the composition of the audience, hall access for the press and other issues.

"The campaigns' agreement is a closed-door masterpiece," Neuman said. "Never in the history of the League of Women Voters have two candidates' organizations come to us with such stringent, unyielding and self-serving demands."

Neuman said she and the League regretted that the American people have had so real opportunities to judge the presidential nominees outside of campaign-controlled environments.

"On the threshold of a new millenium, this country remains the brightest hope for all who cherish free speech and open debate," Neuman said. "Americans deserve to see and hear the men who would be president face each other in a debate on the hard and complex issues critical to our progress into the next century."

Neuman issued a final challenge to both Vice President Bush and Governor Dukakis to "rise above your handlers and agree to join us in presenting the fair and full discussion the American public expects of a League of Women Voters debate."

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LESSONS FROM THE 1992 PRESIDENTIAL DEBATES

TESTIMONY BEFORE THE SUBCOMMITTEE ON ELECTIONS, COMMITTEE ON HOUSE ADMINISTRATION, UNITED STATES HOUSE OF REPRESENTATIVES

June 17, 1993

Bobby R. Burchfield
Covington & Burling
Washington, D.C.

Good morning. My name is Bobby R. Burchfield. I am a partner at the law firm of Covington & Burling here in Washington, D.C., where I am engaged primarily in corporate problem-solving and complex litigation. During 1992, I served as General Counsel of President Bush's re-election campaign, and participated on the team that negotiated and drafted the debate agreement.

The Subcommittee has asked me to comment on the 1992 Presidential Debates. I will take this opportunity to comment in a larger context about the lessons that can be learned from the 1992 Presidential Debates, and the appropriateness of Congressional action regarding future presidential debates. I should emphasize that I am here as an individual, not representing any client or cause, and the views expressed are solely my own.

THE 1992 PRESIDENTIAL DEBATES

The Subcommittee might find a brief description of the 1992 debate negotiations and agreement useful. To place the events leading up to the 1992 Presidential Debates in context, we

must begin in 1987. In that year, the Commission on Presidential Debates was formed as, in its words, "an on-going entity in the recognition that its lasting legacy lies in both debate sponsorship and in a continuing commitment to promote the value of debates and the educational information which they impart."[1/] The CPD was not established or funded by either the federal government or the Democratic or Republican Parties. It received its funding from private sponsors. "It is not an advocacy organization and does not take positions on public policy issues."[2/] The CPD sponsored all the 1988 presidential and vice presidential debates.

At the Bush campaign, our understanding was that the CPD held itself out primarily as one of many potential sponsors for the debates, that it claimed no mandate from either political party or any candidate in 1992, and that it would not insist or advocate any specific schedule or format for the 1992 presidential debates. This view was supported by a letter dated April 16, 1992 from CPD Co-Chairman Frank Fahrenkopf, Jr. to Samuel Skinner, White House Chief of Staff. In the first paragraph of that letter, Mr. Fahrenkopf wrote:

> "As I have indicated to you in person and in prior communication, it is the understanding of the CPD, and we reply to all press inquiries, that THE QUESTION AS TO WHETHER DEBATES WILL BE HELD, HOW MANY, WHERE, WHEN, FORMAT, ETC., IS A MATTER THAT WILL NOT BE FINALLY RESOLVED UNTIL THE NOMINEES AND/OR THEIR REPRESENTATIVES HAVE AN OPPORTUNITY

1/ CPD Brochure (1992).

2/ Id.

TO MEET AND DISCUSS SOON FOLLOWING THE TWO NOMINATING CONVENTIONS." (emphasis in original).

On June 11, 1992, the CPD issued the following proposal for three presidential and one vice presidential debates:

Debate	Date	Format
First Presidential Debate	Sept. 23	Single Moderator
Vice Presidential Debate	Sept. 29	Single Moderator
Second Presidential Debate	Oct. 6	Single Moderator
Third Presidential Debate	Oct. 15	Single Moderator

We at the Bush campaign viewed this proposal as just that -- one proposal to be considered in direct negotiations between the candidates, and certainly not a mandate. In contrast, the Clinton campaign immediately accepted the CPD's proposal as tendered.

By August, the dynamics of the race had changed dramatically. Governor Clinton, previously trailing both President Bush and H. Ross Perot in most polls, had become the frontrunner. On August 14, 1992, the Friday before the Republican Convention, the CPD announced sites for the four debates it had proposed: East Lansing, Michigan; Louisville, Kentucky; San Diego, California; and Richmond, Virginia, respectively. On September 16, Bush-Quayle '92 campaign Chairman Bob Teeter responded to the CPD on behalf of President Bush:

> "As in past campaigns, it is our belief the terms and conditions of presidential debates are appropriately the subject of discussion and agreement between the two candidates. Accordingly, I have been in contact with Governor Clinton's campaign.

> This is the same process used in the past four Presidential elections which serve the public interest and the interest of the candidates well.
>
> Therefore, I will not be attending any meeting involving the Commission on Presidential Debates until the two campaigns have agreed on the terms and conditions under which they will debate, have selected the Commission as the sponsor, and the Commission has agreed to sponsor the debate or debates in accordance with those terms and conditions."

Simultaneously, Mr. Teeter wrote to Mickey Kantor, chairman of the Clinton/Gore campaign, inviting discussions of debates, and stating further:

> "We strongly believe that in the General Election Campaign the candidates themselves should determine the criteria upon which they debate and then seek a sponsor who will agree to the terms and conditions of the candidates. No one organization or group should be able to arrogate unto itself the authority to unilaterally make decisions that can be so critical to the final election result. A considerable amount of time and effort has gone into evolving at these debate terms [used in prior presidential debates] by good Democrats and Republicans over a period of sixteen years."

From our perspective, it was unfortunate that the media and the public appeared to misunderstand what the CPD is and the source of its authority. Indeed, many in the public -- and I dare say in the media -- erroneously believed that the self-named "Commission on Presidential Debates" was either a government-created entity or an entity sponsored by the two political parties.

Not surprisingly, and this is not a criticism, the Clinton/Gore campaign took full advantage of this situation. Governor Clinton appeared at the sites proposed by the CPD for

the first presidential debate (East Lansing, Michigan on September 22) and the vice presidential debate (Louisville, Kentucky on September 25). Having obtained a tactical advantage for adhering steadfastly to the CPD's proposal, the Clinton/Gore campaign refused even to meet with representatives of the Bush campaign.

Only after President Bush's challenge on September 29 to Governor Clinton to debate on each of the last four Sundays before the election did the two campaigns finally sit down together, as the candidates' representatives had done in each of the preceding four elections, to negotiate a debate agreement. The negotiations began on September 30, and the outlines of an agreement were reached on October 1. Drafting the agreement consumed the next four days.

From my experience in many negotiations over the years, it is surprising in retrospect how few points of controversy there were in these negotiations. The Bush team entered the negotiations with the following goals:

First, we wanted debates, preferably four but at least three.

Second, we wanted Ross Perot to be included if, as expected, he reentered the race.

Third, it was important to us that each debate cover all topics, with a balanced treatment of both domestic and foreign policy issues.

Fourth, we preferred debates of one hour versus ninety minutes, although we recognized that inclusion of Ross Perot would likely require expansion to ninety minutes.

Fifth, the President was adamant in his refusal to sit at a table.

Sixth, we wanted the first debate to be in the traditional format featuring a moderator with a panel.

Finally, if audiences were allowed -- and we believed that audiences created a number of problems -- they should be strictly controlled, and each candidate should receive an equal share of the tickets.

The primary jousting during the negotiations concerned the scheduling of the debates. As in any negotiation, both sides spent the amount of time they thought necessary to probe the contours of the other side's position. Once it became clear that President Bush was unwilling to debate before October 11, and that Governor Clinton was unwilling to debate after October 19, the schedule fell promptly into line. Harry Thomason, Governor Clinton's media adviser in the negotiations, persuaded everyone that, like a television mini-series, the compact schedule of four debates in eight days would engage the public and build viewership from debate to debate. This would, he opined, reverse the trend in recent years in which viewership declined with each debate.

Discussion of formats, while extensive, was much less problematic. The Clinton campaign proposed, and we accepted, the

"town hall" format for one of the debates. Since 1979 in his first run for the presidency, George Bush had held "Ask George Bush" forums in which members of the audience could directly ask him questions; he liked the format, and had historically performed very well in it. Moreover, both campaigns recognized that the popularity of radio and television call-in shows during the 1992 campaign indicated considerable potential public interest and support for such a format.

On October 1, while the negotiations were in progress, Ross Perot announced his reentry into the presidential race. At that point, Mr. Perot stood at less than ten percent in every national poll, and few if any commentators gave him a chance of winning. Under the CPD's criteria for determining whether a non-major party candidate would be included in the debates, it was far from clear that Mr. Perot would qualify. For example, those criteria required consideration of such factors as whether the candidate had declared his candidacy before the major party political conventions, or after the conventions "by disaffiliating from the party"; national newsworthiness and competitiveness based on such indices as the opinions of Washington bureau chiefs of major newspapers, news magazines, and networks; and national public enthusiasm or concern as shown by "significant public opinion polls" and reported attendance at campaign meetings and rallies. Although other criteria favored Mr. Perot's participation, we were not able to predict with any confidence the result of applying these criteria. Therefore, the

Bush campaign insisted, and the Clinton campaign agreed, that Mr. Perot and Admiral Stockdale be invited to participate in the debates.

The final agreement was announced on October 5. It included the following schedule:

Debate	Date	Location	Format
First Presidential Debate	Oct. 11	St. Louis, MO	Panel
Vice Presidential Debate	Oct. 13	Atlanta, GA	Moderator
Second Presidential Debate	Oct. 15	Richmond, VA	Town Hall
Third Presidential Debate	Oct. 19	East Lansing, MI	Half-Moderator, Half-Panel

On October 5, the two campaigns submitted the agreement to the CPD and invited it to sponsor all the debates on a "take it or leave it" basis. The CPD expressed concern about the requirement that Mr. Perot be included, and ultimately asked its advisory committee, chaired by Professor Richard Neustadt of Harvard, to evaluate Mr. Perot's participation under the CPD's criteria. On October 6, the CPD wrote to Messrs. Teeter and Hunter accepting their invitation to sponsor the debates "subject to (four) conditions and understandings." The second such condition was:

> "The Commission has determined, pursuant to the recommendation of its non-partisan advisory committee on candidate selection, that H. Ross Perot and Adm. James Stockdale should be invited to participate in the October 11 and 13, 1992 debates, respectively. The Commission will make its candidate participation determination regarding the October 15 and 19 debates after the initial debates. The Commission understands that, if it subsequently determines not to invite Mr.

Perot to additional debates under its sponsorship, you each reserve the right to seek an alternative sponsor for these debates."[1]

The campaigns responded that piecemeal sponsorship of the debates was unacceptable. Accordingly, the CPD reconsidered its position and informed Messrs. Teeter and Rantor by letter dated October 7 that:

> "The Commission has determined that H. Ross Perot should be invited to participate in the October 11, 15, and 19 Presidential Debates and that Admiral James Stockdale should be invited to participate in the October 13 Vice Presidential Debate."[2]

Meanwhile, on October 6, Mr. Perot and Admiral Stockdale had accepted the campaigns' invitation "to participate in the debates in accordance with the Agreement."[3] The debates proceeded as agreed by the participants, under the sponsorship of the CPD, and achieved some of the highest ratings in the history of television.

LOOKING FORWARD

The Need to "Institutionalize" Presidential Debates by Legislation

One of the key lessons of the 1992 campaign is that, so long as public enthusiasm for debates is high, the political pressure to participate in debates will be an effective induce-

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[1] Letter from Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr. to Robert M. Teeter and Mickey Rantor dated October 6, 1992.

[2] Letter from Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr. to Robert M. Teeter and Mickey Rantor dated October 7, 1992.

[3] Letter from A. Clayton Watford to Mickey Rantor and Robert M. Teeter dated October 8, 1992.

ment for candidates to debate. For each of the last five presidential elections -- 1976, 1980, 1984, 1988, and 1992 -- the major party presidential candidates have debated each other during the fall campaign. Candidates who were perceived, whether correctly or incorrectly, as unwilling to debate (President Carter in 1980 and President Bush in 1992) paid a heavy price as a result of that perception. Not only did each candidate appear to lose support due to the uncertainty of whether he would debate, but the public and media focus on whether he would debate interfered with his campaign.

But public expectations of presidential candidates evolve over time, and it is not a foregone conclusion that the public will always be enamored of face-to-face candidate debates. Some persons have expressed the view that debates are not, in the final analysis, all that informative. Someday, the public might conclude that other forums are more effective at testing the candidates' positions and mettle. Although I personally believe that public enthusiasm for debates will continue into the foreseeable future, it is precarious at best to predict the public expectation three years hence.

Statutory Requirement To Debate

Even assuming debates are clearly in the public interest, attempts to require participation in such debates would present serious Constitutional and practical difficulties. Section 701 of the "Congressional Campaign Spending Limit and Election Reform Act of 1991" would add a new Section 315(b)(3)(A)

Appendix Four: Profile of Respondents, By Disposition

Disposition	Respondent: Individuals	Party	PAC or Private Org.	Campaign	Candidate	TOTAL
No Reason to Believe	8	5	18	14	14	59
Reason to Believe, No Action	20	4	16	21	15	66
Fine, 0-$1,000	6	4	8	2	0	20
Fine, $1,001-$3,000	4	1	3	5	0	13
Fine, $3,001-$5,000	0	0	4	3	0	9
Fine, $5,001-$10,000	0	3	2	2	0	7
Fine, $10,001-$20,000	0	0	0	0	0	0
Fine, $20,001-$50,000	0	2	0	0	0	2
Fine, $50,000-$100,000	0	0	0	0	0	0
Fine, $100,000+	0	0	0	0	0	0
Lawsuit, Default Judgment	0	0	2	2	0	4
Lawsuit, Contested	2	2	1	2	1	8
TOTAL	40	21	54	51	20	186

The Debate Gerrymander

Jamin B. Raskin*

Sitting on a sofa on a Sunday afternoon,
Going to the candidates debate.
Laugh about it, shout about it:
When you've got to choose,
Every way you look at it, you lose
—Simon and Garfunkel, Mrs. Robinson (1968)[1]

You wore our expectations like an armored suit.
—REM, What's the Frequency, Kenneth? (1994)[2]

I. Introduction: Democracy and Debate

Whether we view elections as the central forum for republican deliberation about our values, as a market for votes in which economic interests mobilize politically, as the formal arena for competing groups to press their agendas in a liberal pluralist polity, or simply as the constitutional mechanism by which the public chooses its leaders and holds them accountable, political debate during elections lies at the heart of a working democratic process. There is no real democracy without debate, which should be "uninhibited, robust, and wide-open"[3] in all cases, but above all during elections, when we as democratic citizens reconstitute the official leadership of government.[4]

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1. BOOKENDS (Columbia Records 1968).
2. MONSTER (Warner Bros. 1994).
3. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
4. The First Amendment "has its fullest and most urgent application precisely to the conduct of campaigns for political office." Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971).

In any contested election, of course, a debate of sorts will take place by virtue of the fact that different candidates will say different things in order to win. But this is the lowest kind of "debate," hardly deserving of the name. Candidates who run in campaigns without actual face-to-face dialogue tend to repeat themselves over and over again outside of one another's earshot, and to bombard particular segments of the electorate with carefully tailored messages. Candidates in campaigns like this are rarely forced to defend their positions and records in public, in depth, or over time; there is likely to be no refinement or change in their political thinking or plans for office; and public appreciation of the candidates' differences in vision and program remains generally unmoved through the course of the campaign.

Actual political *debates*—those in which candidates face one another and argue before an audience—force candidates and voters to address substantive issues in a serious way and to engage in real political dialogue. If the candidates do not or cannot rise to the occasion, their campaigns will suffer proportionately. Formal debates thus clarify and inform the public's choices.

The paradigm example in our history is, of course, the Lincoln-Douglas debates. Over a period of three months in 1858, "the nationally known forty-five-year-old, two-term Democratic incumbent, Senator Stephen A. Douglas, and his formidable challenger for reelection, ex-congressman Abraham Lincoln, a forty-nine-year-old Republican, met face-to-face publicly on seven memorable occasions before huge, ardent audiences throughout their state."[5] The debates were raucous affairs driven by the two candidates' increasingly lucid analyses and impassioned rhetoric. The debates generated intense public engagement with the campaign, which revolved around the issues of slavery, secession, and the nature of the Union:

> Through twenty-one hours of speeches, rebuttals, and rejoinders—all punctuated by choruses of cheers and jeers—the tall, awkward Lincoln, and the short, cocky Douglas offered exhaustive variations on their contrasting visions for America, one embracing life, liberty, and the pursuit of happiness regardless of race, the other stressing government by and for white men only, and in perpetuity. By fall, their "thunder tones," as Lincoln described them, were roiling the state and, increasingly, the nation. They galvanized public attention north as well as south, shaking the very foundations of what Lincoln called "the house divided."[6]

5. HAROLD HOLZER, THE LINCOLN-DOUGLAS DEBATES 2 (1993).
6. *Id.*

Of course, not every debate among political candidates rises to the levels of grandiloquence and historical significance of the Lincoln-Douglas debates, although we should remember that "the level of rhetoric by both of the 1858 candidates was seldom as majestic as folklore suggests."[7] The point is that every debate sharply focuses the attention of the entire body politic on the competing candidates' visions of the problems and possibilities of the society. This pervasive educational and integrative function of debates in elections has assumed even greater importance in the era of television, a fact recognized by the United States Supreme Court:

> Deliberation on the positions and qualifications of candidates is integral to our system of government, and electoral speech may have its most profound and widespread impact when it is disseminated through televised debates. A majority of the population cites television as its primary source of election information, and debates are regarded as the "only occasion during a campaign when the attention of a large portion of the American public is focused on the election, as well as the only campaign information format which potentially offers sufficient time to explore issues and policies in depth in a neutral forum."[8]

The thesis of this Article is that, while organized political candidate debates in the United States today are of critical and increasing importance to the outcome of elections, they are being drained of democratic value and constitutional legitimacy because of the pervasive phenomenon that I call "debate gerrymandering." This is the process by which public or private debate sponsors completely exclude one or more candidates on the ballot from participating in a structured debate among her opponents. The exclusion is normally justified by debate sponsors on the basis of the candidate's political party, her political ideology, or allegedly—and now this is the most frequently invoked explanation—her perceived "electability" or "viability." The invariably viewpoint-saturated exclusion of outsider and maverick political candidates not only violates the First Amendment rights of excluded candidates and their supporters, but artificially and drastically limits the nature of popular political debate and discourse.

In Part II, I argue that the structural gerrymander of candidate debates, when engineered by state actors, violates the Constitutional rights of the independent, minor-party, and maverick Democratic or Republican candidates who are the ones most often left standing in the cold. The

7. *Id.* at 20. Holzer points out that Douglas and Lincoln "attacked each other and defended themselves with biting humor, bitter sarcasm, and hellish fury, but seldom appealed—as generous eyewitnesses remembered—purely to 'logic.'" *Id.*
8. Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1640 (1998) (citing CONGRESSIONAL RESEARCH SERVICE, CAMPAIGN DEBATES IN PRESIDENTIAL GENERAL ELECTIONS, summ. (June 15, 1993)).

decision by government to organize and pay for an exclusionary political candidate debate cannot be reconciled with the First Amendment's command of political viewpoint neutrality or the democratic values guarded by the Equal Protection Clause. The government has no rightful authority or expertise to intervene in an election campaign by predicting winners and losers, thus conferring legitimacy on the anointed candidates and badges of political inferiority on those passed over. Nor does it have authority to redistribute the whole public's tax dollars to a few officially favored viewpoints, selectively awarding a huge in-kind campaign subsidy to the chosen candidates—all either on an explicitly partisan basis or on the basis of the hopelessly circular and subjective criterion of "viability," a standard which simply guesses, mirrors, freezes, and institutionalizes status quo public opinion.

The only possibly compelling interest government may have in preventing balloted candidates from debating their rivals is to keep the debate itself from being ruined by an unmanageable number of candidates. But there are far less restrictive alternatives available than banishing surplus candidates to the darkness, such as determining in advance how many candidates can reasonably be accommodated within a given format and then, if there is an overflow number, sponsoring a second (or third) debate to accommodate all balloted candidates on an equal basis. Thus, *Arkansas Educational Television Commission v. Forbes*,[9] the Supreme Court's decision last year upholding exclusion of a right-wing independent candidate for Congress from a public cable television debate on the alleged basis of his lack of viability, was an analytical mess and a First Amendment catastrophe. The majority decision is a jumble of deceptive and conclusory judgments that not only discards basic democratic premises but actively threatens the integrity of First Amendment viewpoint discrimination doctrine. Without so much as mentioning the phrase, the *Forbes* majority silently writes the "two-party system" into law and undermines the coherence of the First Amendment viewpoint neutrality principle so dramatically enunciated in *Rosenberger v. Rector and Visitors of University of Virginia*.[10]

In Part III, I argue that gerrymandering of candidate debates by private not-for-profit debate sponsors, like the Commission on Presidential Debates, and private for-profit debate funders, like Philip Morris and Dow Chemical, correspondingly runs afoul of the Federal Election Campaign Act (FECA), which generally prohibits corporate contributions and expenditures in federal election campaigns.[11] Focusing on the illustrative

9. 118 S. Ct. 1633 (1998).
10. 515 U.S. 819 (1995).
11. *See* Pub. L. No. 93-443, 88 Stat. 1263 (codified as amended at 2 U.S.C. §§ 431-456 (1994)).

decision by the corporate-funded Commission on Presidential Debates in 1996 to exclude Reform party candidates Ross Perot and Pat Choate from participating in the presidential debates with President Clinton and Bob Dole,[12] my contention is that when corporations organize and pay for a candidate debate in a federal election, but exclude certain balloted candidates from participation, they are in essence making illegal campaign contributions to—or expenditures on behalf of—those candidates who are invited to debate and actually participate. A televised debate is an expensive undertaking that, when structured on an exclusionary basis, gives invited candidates valuable exposure over the excluded ones. Since corporations, for-profit and not-for-profit alike, are supposed to be barred from such federal political activity, it is hard to see a corporate-funded and corporate-managed exclusionary debate as anything other than a dressed-up corporate campaign contribution to the invited candidates.

This interpretation of FECA is congruent with a proper and constitutional reading of the Federal Election Commission's current "debates regulation," which calls for the use of only "objective criteria" in candidate selection by corporate debate sponsors.[13] If that regulation is read to allow anything other than equal treatment of all balloted and legally electable candidates, then the regulation is clearly outside of FECA itself. Furthermore, if the whole essential meaning of FECA—to prevent corporate interference in democratic elections—is swept aside in order to uphold a regulation purportedly allowing corporate-funded debate exclusion, then the statute itself is unconstitutional for designing an electoral system that generally bans corporate expenditures in elections but allows them in order to give corporations the power to promote the candidacies of the well-funded status quo parties.

In Part IV, I close by arguing that, in order to reclaim the broadest possible participation and democratic legitimacy for our elections, we need to end the practice of debate gerrymandering and replace it with a set of fair democratic protocols for debate participation. I suggest what those protocols might be and argue that they should be adopted by the Federal Election Commission or by Congress and by all public and private debate sponsors. Although *Forbes* apparently leaves debate sponsors with wide latitude to pick and choose and anoint and exclude candidates, huge majorities of Americans have registered their objection to exclusionary debate tactics and would support a much more expansive and energized

12. *See* Margaret F. Garrett, *An Examination of the Process of Staging Presidential Debates: Why Perot was Left Out in 1996*, 66 GEO. WASH. L. REV. 909, 909-10 (1998) (describing the series of events leading to Perot's decision to file a complaint with the FEC about his exclusion); Lori Stahl & Jeffrey Weiss, *Upbeat Perot Keeps Vow to Stay in for the Finish*, DALLAS MORNING NEWS, Nov. 6, 1996, at 16A (discussing the exclusion of Perot and Choate from the 1996 debates).
13. 11 C.F.R. § 110.13 (1997).

political debate culture.[14] Fair-minded people should thus be persuaded that the extraconstitutional but deeply institutionalized two-party system must surrender its stranglehold on America's organized political discourse at election time.

II. When Government Gerrymanders Debates

A. *Ralph Forbes and the "Arrogant Orwellian Bureaucrats" of the Arkansas Educational Television Commission*

Like fall foliage tours and pumpkin carving, excluding third-party candidates from political debates is a familiar autumn ritual. When the constitutionality of this practice finally made its way to the Supreme Court in *Forbes v. Arkansas Educational Television Commission*,[15] a case involving state action, the Court's conservative majority lost the First Amendment clarity and conviction it had found in analogous cases involving suppression of speech by citizens with a religious viewpoint, such as *Rosenberger*.[16] In *Forbes*, Justice Kennedy's opinion for the majority blotted out the dramatic facts of the case,[17] mislabeled what was clearly a designated public forum as a "nonpublic forum"[18] and then, even in applying nonpublic forum analysis,[19] denied the obvious presence of viewpoint discrimination by confusing this objective concept with subjective political animus, thus watering down a pivotal First Amendment doctrine. The specific result, as the dissenting opinion of Justice Stevens pointed out, was to uphold an arbitrary system of candidate selection in "which the staff had nearly limitless discretion to exclude Forbes from the debate based on ad hoc justifications."[20] The larger social consequence is deeper establishment of the two-party system as America's official political orthodoxy, our secular religion in the electoral field.

14. In 1996, the public showed overwhelming dissatisfaction with the decision to exclude Ross Perot and Pat Choate from the presidential debates, only the most recent example of debate exclusion. *See Perot Should be Part of the '96 Debates*, S. F. CHRON., Sept. 16, 1996, at A20 (reporting a Harris Poll finding that 76% of the public said Perot should be invited to debate and an ABC News poll finding that 63% wanted him in).

15. *118 S. Ct. 1633 (1998)*.

16. *515 U.S. 819 (1995)* (invalidating on First Amendment grounds a university guideline which prohibited the use of a student activity fund to support a Christian newspaper solely because it promoted or manifested a particular belief in or about a deity); *see also* Widmar v. Vincent, 454 U.S. 263, 267 (1981) (upholding a university's equal-access policy for secular and religious groups as striking the proper balance of neutrality with respect to all viewpoints).

17. *See Forbes*, 118 S. Ct. at 1637-38; *see also infra* section II(A)(1).

18. *Forbes*, 118 S. Ct. at 1643.

19. *Id.* at 1644.

20. *Id.* at 1644 (Stevens, J., dissenting).

1. The Facts and Procedural History of Forbes.—In his wooden, bureaucratic prose, Justice Anthony Kennedy does his level best for the Court's majority to suppress the actual events that took place in Arkansas, but they add up to a striking episode in the history of political discrimination.

Ralph Forbes was a thorn in the side of the Arkansas political establishment for years—not a pest or a gadfly, but a serious rival to better-financed politicians. His maverick campaigns in the Republican party struck a deep chord in conservative white precincts. In 1990, Forbes ran for lieutenant governor and won forty-six percent of the vote in a three-way primary race for the Republican party nomination, defeating his two rivals.[21] He had become a force to be reckoned with in conservative politics.[22]

In that 1990 race for lieutenant governor, Forbes captured a majority of the vote in fifteen of the sixteen counties that make up the Third Congressional District of Arkansas.[23] So Forbes set his sights on Washington, and when the House seat in the district fortuitously opened up in 1992, Forbes announced his candidacy, this time stepping outside of the

21. *See* John Reed, *Pollsters Defend Wild Swings of Results*, ARK. GAZETTE, June 1, 1990, at 7B.

22. It should hardly need to be stated, but since so many cases like this are decided on the unspoken assumption that a particular candidate is crazy, it is worth pointing out that Forbes is an American original, not a "nut," or at least no more of one than Oliver North, G. Gordon Liddy, Steve Forbes, or any number of right-wing members of Congress, such as Jesse Helms or Strom Thurmond (to whom Forbes, with his red-tinted hair, bears a faint facial resemblance). To get the mental image right, Forbes is no "Willy Wacko," to invoke the imaginary candidate Chief Justice Rehnquist deviously hypothesized during the oral argument on Wednesday, October 8, 1998. *See* Oral Arguments, Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) (No. 96-779) 1997 WL 664266, at *33 (argued Oct. 8, 1997). He is simply right-wing religious Ralph. He probably represents the views of millions of Americans.

As candidates for public office go, Ralph Forbes is, needless to say, not my own cup of tea. He has had extreme right-wing associations, and there remains a distinctive whiff of barbed wire in his politics today. He is the kind of activist who attacks Newt Gingrich—from the Right. When he appeared at a press conference at the Supreme Court, NPR's Nina Totenberg got him to say that he stood with "the Promise Keepers, not the promise breakers," which is probably the most charitable depiction of his ideology one might find. *See* C. David Kotok, *Ruling Frees NETV to Again Air Debates*, OMAHA WORLD-HERALD, May 19, 1998, at 1 (indicating that Forbes is an independent candidate "espousing a white supremacist message"); Claudia Kuehl, *Tough Choice*, SCHOLASTIC UPDATE, Nov. 2, 1998, at 18 (noting that Ralph Forbes is a former member of the American Nazi Party and deeming his campaign "free speech on the fringe"); *High Court Ruling Backs Free-Speech Rights; Marginal Candidates Don't Have to be Asked to Debates*, DALLAS MORNING NEWS, May 19, 1998, at 5A (depicting Forbes as a self-described "Christian supremacist"); *Viewpoints*, NEWSDAY, July 6, 1998, at A21 (describing Forbes's views as "extremely right-wing"). Forbes's most endearing quality is probably his zesty and irrepressible anti-statism: he originally gave his case the caption, "Ralph P. Forbes and the People vs. The Crooked Lying Politicians; The Orwellian Bureaucrats of AETN; The Special Interests . . . ." *See* Brief of the Petitioner, Joint App. at 14, 17, *Forbes* (No. 96-759) (S. Ct. case No. 96-779); *see also* Jamin B. Raskin, *Let the Little Guy Have His Day on TV*, WASH. TIMES, Oct. 8, 1997, at A19. Beyond that, however, there is little for me to admire in Forbes's pro-life, anti-tax, anti-affirmative action, hard-right Republican politics.

23. *See Forbes*, 118 S. Ct. at 1645.

Republican party and declaring as an independent. He knocked on doors throughout the summer, sweating his way across the district to collect more than six thousand signatures from registered voters, earning a place on the general election ballot next to Republican Tim Hutchison and Democrat John Van Winkle.[24]

In a district closely divided among Democrats, Republicans, and a healthy number of independents, where Forbes just two years before had demonstrated potent vote-getting ability, this three-way contest would prove to be extremely competitive. Moreover, the sprawling, mountainous Third District has a mostly rural population dispersed in the countryside,[25] meaning that television plays a key role in shaping political consciousness and electoral outcomes.

Thus, it was no small thing when the Arkansas Educational Television Network (AETN) decided to sponsor congressional candidate debates. AETN is an agency created, owned, and run by the state of Arkansas which operates five public television stations, all of them paid for by state taxpayers. Governor Bill Clinton appointed a governing commission, the Arkansas Educational Television Commission (AETC), which in turn appointed AETN's executive director.[26]

AETN planned debates for candidates in each of the state's four House districts. There were nine congressional candidates in 1992: four Democrats, four Republicans, and one independent, Forbes. AETN invited all of the Democrats and Republicans to debate but did not invite Forbes. When Forbes contacted AETN to correct this oversight, he was told that he was not being invited to debate his opponents. AETN was going to stick with the "major party candidates" instead.[27] Forbes's frantic efforts to interest the FCC in his exclusion from the debate and to get AETN to reconsider were to no avail. On the evening of the debate, Forbes showed up but was turned away and locked out after being told by one AETN employee that the station would rather show reruns of "St. Elsewhere" than have a debate in which he was included.[28]

AETN repeatedly changed its explanation of why Forbes was excluded. Early on it stated plainly enough that the debate was for the

24. *See* Brief of the Petitioner, Joint App. at 14, *Forbes* (No. 96-759) (S. Ct. case No. 96-779).

25. *See generally* ALMANAC OF AMERICAN POLITICS 121-23 (1998).

26. *See* ARK. CODE ANN. §§ 6-3-101, -102(b)(1), -103(b) (Michie 1993). Although AETC was the named defendant in the case, the AETN was at least theoretically operating outside of the influence of Governor Clinton's appointed commissioners on the AETC. Thus, I will refer to AETN, rather than AETC, in discussing the events of the case.

27. *See* Petitioner's Brief at 25, *Forbes* (No. 96-779).

28. *See* Forbes v. Arkansas Educ. Television Comm'n Network Found., 22 F.3d 1423, 1426 (8th Cir. 1994) (explaining Forbes's reliance on the "St. Elsewhere" comment as evidence that the debates were discriminatory and designed to keep the public from learning his views on certain policy issues), *aff'd*, 118 S. Ct. 1633 (1999).

Democrat and Republican only. At trial, Ms. Howarth, the Executive Director, argued that Forbes was not a viable or serious candidate and that the public was not interested in him.[29] Howarth seemed to contend that, even though AETN concededly had no formal process for deciding whether or not to invite candidates outside of the Democratic and Republican parties, the basis for her judgment was whether Forbes had a "serious" or "reasonable chance to win."[30] In one of its formal answers in court, AETN stated that Forbes was excluded because he "was not perceived as a viable candidate."[31] It cited as factors in this perception the fact that Forbes's campaign headquarters was in his home, the level of popular support he enjoyed, the amount of media interest in his campaign and the amount of money he had raised.[32] His treatment by AETN was thoroughly disrespectful.

Forbes's case followed a tortuous path in court, but he ended up winning a resounding victory in the Eighth Circuit Court of Appeals, where Chief Judge Richard Arnold found for a unanimous panel that the debate was a "limited public forum" within the meaning of the First Amendment.[33] As a candidate for the Third District seat, Forbes fell naturally into the class of speakers invited into the public forum and the "government cannot, simply by its own ipse dixit, define a class of speakers so as to exclude a person who would naturally be expected to be a member of the class on no basis other than party affiliation."[34] The court found that AETN's subjective and standardless judgments about "viability" did not conform to the First Amendment because Forbes's viability as a candidate was a "judgment to be made by the people of the Third Congressional District, not by officials of the government in charge of channels of communication."[35]

AETN appealed this judgment to the Supreme Court of the United States, again shifting rhetorical grounds for its exclusion of Forbes. In its petition for certiorari, AETN wrote that "Mr. Forbes's participation would reduce the time available for debate between the two candidates in whose campaigns, and views, the public was interested."[36] It also invoked an

29. *Id.* at 118a-19a (mentioning Forbes's lack of a paid staff, a sizable volunteer force, or a formal campaign headquarters, and the fact that the local media were not planning on reporting Forbes's name on the election night results, as reasons AETN did not consider him a serious candidate).

30. *Id.*

31. *Id.* at 57a.

32. *See id.* at 126a-27a.

33. Forbes v. Arkansas Educ. Television Comm'n, 93 F.3d 497, 504 (8th Cir. 1996), *rev'd*, 118 S. Ct. 1633 (1998) (finding "without reservation" that the debate was a limited public forum).

34. *Id.* at 504.

35. *Id.* at 504-05.

36. *See* Petition for Certiorari, Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) (No. 96-779).

interest in not "giv[ing] Forbes a status" and an "implied . . . degree of legitimacy for his candidacy, that he had not earned on the campaign trail."[37] In the Supreme Court, AETN argued that Forbes was excluded because his candidacy was not "newsworthy."[38] The Supreme Court's majority opinion by Justice Kennedy reversed the Eighth Circuit and upheld Forbes's exclusion from the debate. To accomplish this result, the majority not only had to disregard the actual events that had taken place in Arkansas but also had to eviscerate First Amendment protection of core political expression by allowing the government to dress up old-fashioned political discrimination in the mask of bureaucratic neutrality.

B. Disappearing the Limited Public Forum and Puncturing the Doctrine of Viewpoint Discrimination

Justice Kennedy's pinched, antidemocratic decision in Forbes started off on a high note. Rejecting AETC's sweeping argument that the First Amendment should not bind government broadcasters in any way at all, Justice Kennedy found that the First Amendment must indeed apply to candidate debates on government channels. Such debates, he wrote, are subject to First Amendment inspection because they are designed as "a forum for political speech by the candidates" and "candidate debates are *of exceptional significance in the electoral process.*"[39]

So far, so good. Having found that the First Amendment applied, however, the next question for the Court was what kind of forum for speech had been created. The Eighth Circuit had found that AETC's

37. *Id.*

38. *Oral Argument, Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) (No. 96-779)*, 1997 WL 64266, at 19 (argued Oct. 8, 1997).

39. *Forbes*, 118 S. Ct. at 1640. This judgment was obviously correct, despite AETN's argument that the Court should treat a government-arranged debate not as government activity at all but as another forum of protected journalistic expression. *See* Petitioner's Brief at 20-24, *Forbes* (No. 96-779). On this theory, when AETC excluded Forbes, it did nothing more unlawful than omit him from a news report about the campaign, an editorial decision protected by the First Amendment. *See id.* at 24 (stating that AETN's decisions were driven by considerations of "newsworthiness"). It is as if the government's debate were just a private newspaper article.

It is true that the public media have a right to practice normal journalistic reporting of elections. But the analogy between a government-sponsored debate and government-sponsored news journalism is badly skewed. When a public television network covers a political campaign, it acts as a journalistic observer no different from any other network. It is not organizing campaign events but recording and analyzing them. It is a witness to—not a participant in—the campaign. Its corporate decisions do not shape the nature and content of political dialogue among the candidates.

When a government media entity decides to go beyond covering a campaign and chooses to organize a debate, it carves out a different role for itself. It no longer acts merely as a journalist but rather as the convener of a political town meeting, a televised public forum in which candidates debate issues, appeal to voters, and answer questions posed by moderators and appointed questioners. Here, the government's whole purpose for designing such a forum is to create a coherent public space for political dialogue. It inevitably creates a public forum

debate on cable television was a designated public forum.[40] This is the intermediate category between "traditional public fora,"[41] like parks and sidewalks, and nonpublic fora, where the government has not acted, and has never acted, to invite public communication or discourse on part of its property. In a designated public forum, *the government opens up public property for specific kinds of communication or discussion among certain classes of speakers. In a designated public forum, a speaker may not be excluded unless the government shows a compelling interest in it.*[42] The designated public forum in this case was not the government cable television channel, but the government cable television channel's congressional *candidate debates, specifically all of the facilities, resources, personnel,* and air time devoted to political debate among candidates for the Third District seat in the U.S. House of Representatives. If the government does not *designate a public forum for limited purposes when it invites candidates* for public office to use public resources to debate one another and reach other citizens, it is hard to think of a situation in which a designated public forum would be created. Surely this is a paradigm case.

Yet Justice Kennedy jettisoned the Eighth Circuit's conclusion that the candidates' government-sponsored debate on cable television was a designated public forum.[43] Slicing the bologna ever so fine, he wrote that AETC "*did not make its debate generally available to candidates* for Arkansas's Third Congressional District seat," but rather "reserved eligibility for participation in the debate to candidates for the Third Congressional District seat (as opposed to some other seat). At that point . . . [AETC] made candidate-by-candidate determinations as to which of the eligible candidates would participate in the debate. . . . Thus the debate was a nonpublic forum."[44]

But this is pure gibberish. AETC did not "reserve[] eligibility for participation in the debate to candidates for the Third Congressional District seat."[45] It simply decided without any formal process to invite two of the candidates for the seat and to exclude the third based on the fact

40. *See Forbes*, 118 S. Ct. at 1641 ("Forbes argues, and the Court of Appeals held, that the debate was a public forum to which he had a First Amendment right of access.").

41. *Id.* at 1636.

42. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37 (1983). In *Perry*, the Court laid out the rule for access to public fora:

> In a public forum, by definition, all parties have a constitutional right of access and the state must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject . . . .
>
> When speakers and subjects are similarly situated, the state may not pick and choose.

Id. at 55.

43. *See Forbes*, 118 S. Ct. at 1641.

44. *Id.* at 1642-43.

45. *Id.* at 1642.

that he was not a major-party candidate. The free-wheeling and secret "candidate-by-candidate determination" method that Justice Kennedy invokes as proof that the debate was a nonpublic forum, and thus not subject to strict scrutiny, *was itself the essential violation of Forbes's First Amendment rights*. For there were no explicit, much less objective, standards used in making these selections: not whether the candidates were balloted, not whether they had run for office before or how well they performed, nothing at all.[46] There was no formal process and no standards.

Thus, Justice Kennedy essentially found that the government can open its facilities to speech by a specific class of citizens without creating a designated public forum simply by *excluding members of the speaking class* who would normally be expected to be included. This perfectly tautological ruling cuts against Justice Kennedy's own opinion in *Rosenberger v. Rector and Visitors of University of Virginia*,[47] where he stated:

> The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics. . . . Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set.[48]

That is precisely what AETC *did not do*. It had the *right* to exclude congressional candidates from other districts or states and to exclude voters and journalists, but it had no right to exclude balloted congressional candidates from the third district itself. The state cannot build viewpoint discrimination into the definition of the speaker class.

Having punctured the limited public forum doctrine, Justice Kennedy faced one remaining question: given that AETC's Third Congressional candidate debate was a nonpublic forum, did the exclusion of Forbes constitute viewpoint discrimination? By giving a superficial gloss to both facts and First Amendment doctrine, Justice Kennedy quickly answered in the negative. His conclusion rests on the trial jury's finding that Forbes's exclusion was not based on "'objections or opposition to his views.'"[49] Fleshing out the evidence that led to this finding, Justice Kennedy quotes

46. Indeed, had there been some rational standard, based for example on past electoral performance, Forbes undoubtedly would have made the grade, having drawn more than 46% of the statewide vote in his run for lieutenant governor in the Republican primaries just two years prior. *See* David S. Broder, *A Close Governor's Race in Arkansas?*, WASH. POST, May 31, 1990, at A10. Such a standard would have been unconstitutional in my view because (as they say in the securities markets) past performance is no predictor of future results. But at least Forbes would have had some actual objective standard and process to argue about.

47. 515 U.S. 819 (1995).

48. *Id.* at 829 (citations omitted).

49. *Forbes*, 118 S. Ct. at 1643 (quoting the Appendix to the Petition for Certiorari 23a).

approvingly the AETN's Executive Director, Susan Howarth, who testified:

> Forbes' views had "absolutely" no role in the decision to exclude him from the debate. She further testified Forbes was excluded because (1) "the Arkansas voters did not consider him a serious candidate"; (2) "the news organizations also did not consider him a serious candidate"; (3) "the Associated Press and a national election result reporting service did not plan to run his name in results on election night"; (4) Forbes "apparently had little, if any financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission"; and (5) "there [was] no 'Forbes for Congress' campaign headquarters other than his house." . . . It is, in short, beyond dispute that Forbes was excluded not because of his viewpoint but because he had generated no appreciable public interest.[50]

But this conclusory, kitchen-sink treatment of the viewpoint discrimination problem collapses in the face of authentic First Amendment analysis. The trial jury's factual finding that Forbes's exclusion was not based on AETC's "objections or opposition to his views"[51] does not answer the legal question of whether his exclusion from the debate was viewpoint-based *within the meaning of the First Amendment*. The test of viewpoint neutrality is an *objective* test that focuses on the nature of a governmental classification that treats two classes of speakers differently.[52] It is not a *subjective* test that focuses on the intentions or motivations of specific government actors in suppressing someone's speech.[53] Subjective objections or opposition by government actors to a speaker's views may be *evidence* of objective viewpoint discrimination, but such evidence is not a necessary factual predicate in order for it to exist as a matter of law. Viewpoint discrimination exists wherever government offers a platform to certain vantage points but suppresses different viewpoints that offer an alternative premise or perspective, a different "standpoint from which a variety of subjects may be discussed and considered."[54]

This language is drawn from *Rosenberger*, a decision that Justice Kennedy should know quite well since he wrote it. In *Rosenberger*, the Court struck down the University of Virginia's practice of reimbursing the publishing costs of all student-run journals and newspapers except those

50. *Forbes*, 118 S. Ct. at 1643-44 (citations omitted) (brackets in original).

51. *Id.* at 1643.

52. *Id.* at 1648 (Stevens, J., dissenting).

53. *Id.* at 1649 (Stevens, J., dissenting) (arguing that campaigns, as "the essence of self-government," deserve the constitutional protection of "narrow, objective, and definite" standards rather than the subjective criteria applied by AETC).

54. Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995).

that were religiously identified or inspired.[55] Although there was no allegation, much less finding, of bias or antireligious sentiment on the part of the University of Virginia, the Court found that, in the University's marketplace of ideas, religiously motivated expression provided a distinctive vantage point and viewpoint that could not be blocked out from public consideration or treated unequally.[56] The University assuredly bore no malice or ill will towards religion and did not object to it in any way. But when the University declined to give the same speech privileges to religious student publications as it did to the secular ones, the Court found its policy viewpoint-discriminatory.[57] For the whole purpose and effect of the policy was to censor an entire viewpoint and perspective in the marketplace of ideas.

Thus, even (charitably) granting that there was no bureaucratic animus against Forbes as a person, the whole purpose and effect of excluding his appearance as a candidate was to block out presentation in the debate of a political viewpoint deemed unpopular by a candidate deemed unpopular. This is the very definition of viewpoint discrimination and, by definition, it radically changed the nature and dynamics of AETN's televised debate. Forbes's right-wing position outside the two-party system was simply lopped off and silenced.

Nor does it rescue the policy that the AETN would have just as likely excluded unpopular independent candidates of the left or the center, however defined. For, as Justice Kennedy wrote in *Rosenberger*:

> The . . . assertion that no viewpoint discrimination occurs because the Guidelines discriminate against an entire class of viewpoints reflects an insupportable assumption that all debate is bipolar . . . . *Our understanding of the complex and multifaceted nature of public* discourse has not embraced such a contrived description of the marketplace of ideas. . . . The . . . declaration that debate is not skewed so long as multiple voices are silenced is simply wrong; the debate is skewed in multiple ways.[58]

55. *Id.* at 822-23, 845-46.

56. *Id.* at 831.

57. In fact, the undisputed and perfectly innocent reason that the University of Virginia adopted the policy of reimbursing only secular publications was that it believed funding religiously oriented publications would violate the Establishment Clause. *Id.* at 845. The policy had nothing to do with "objections or opposition" to religion. *See id.* at 837 ("The University had argued at all stages of the litigation that inclusion [of religious publications] would violate the Establishment Clause."). Similarly, in *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), where the Court struck down a school system's practice of opening its facilities after hours to all groups except religious ones, *see id.* at 396-97, there was nothing in the record to suggest that the school system's policy reflected personal or political hostility towards the religious groups that it was excluding. *See id.* at 389-90. Nonetheless, the Court found the practice viewpoint-discriminatory. *See id.* at 396-97.

58. 515 U.S. at 831-32.

But in *Forbes*, Justice Kennedy's reliance on the ideology of viability and electability blocked from view the objective political meaning of the government excluding minor-party candidates from debates. It is this ubiquitous, opaque, and seductive ideology, saturated from top to bottom with viewpoint bias, which needs to be disassembled.

C. *The Antidemocratic Ideology of Viability, Seriousness and Electability*

Almost all of the reasons offered along the way for Forbes's exclusion from the debate were transparent rationalizations for partisan discrimination against a political outsider.[59] Justice Kennedy embraced the one explanation for exclusion that is plausible on the surface and that reappears all over the country in debate exclusion controversies, namely that the government had an interest in excluding Forbes because he lacked electoral "viability" or "seriousness" and the debate, for some unspoken reason, needs to be confined to the "viable" and "serious." This is a close variation on the test of "electability" (allegedly) used to determine Ross Perot's eligibility to debate Bill Clinton and Bob Dole in 1996.[60]

In fact, the use of "viability," "seriousness," and "electability" to exclude third-party, independent, and sometimes maverick Democratic and Republican candidates from debates is now a standard practice in both primary and general election campaigns. But the underlying assumptions of these screens for debate participation have never been satisfactorily examined in court and are rarely questioned in the media or in scholarly debate.[61] These tests represent restrictive and authoritarian concepts of

59. For example, in its Supreme Court brief, AETN said that it had a compelling interest "to operate the network in conformity with the FCC's licensing requirements." Petitioner's Brief at 37, *Forbes* (No. 96-779). Of course this is true, but nothing in FCC law compels or even allows AETN to exclude third-party candidates from political candidate debates. AETN also argued that it had "a compelling interest to provide the special educational, cultural and informational programming on public television that is not otherwise available to the public." *Id.* at 36. Fine. But what does that have to do with excluding Forbes? Should it not be the distinctive role of public media to serve the *entire* public, including the estimated 20% of American voters who are registered as independents or as supporters of minor parties? *See* Ballot Access News at 5 (Richard Winger ed., Dec. 12, 1996) (stating that in the 27 states and the District of Columbia which have political party registration, 46.7% of the people are registered Democrats, 33.8% are registered Republicans, and 20.5% are registered as independents or as third-party members). The numbers probably understate non-major-party preferences because many people register with the major parties in order to vote in primary elections.

60. *See infra* subparts III(A)-(B).

61. The best article touching on the problem of debate exclusion is Bennett J. Matelson, *Tilting the Electoral Playing Field: The Problem of Subjectivity in Presidential Election Law*, 69 N.Y.U. L. REV. 1238 (1994). Matelson does a superb job of demonstrating the hopelessly subjective and standardless nature of state laws governing candidate access to the ballot as well as federal law in the tax and broadcast areas relating to debate sponsorship and participation. However, Matelson appears sometimes to swallow ingredients in the ideology of viability, thus implicitly accepting the idea that "seriousness" and "electability" are themselves objectively definable concepts. *See id.* at 1286 ("Some method is needed to screen out nonserious candidates"). In debates, that "method" should be the

free speech and political competition wholly at odds with the First Amendment and democratic values.

1. Why Do Candidates of the Two-Party System Escape the Viability Test?.—Viability tests are ordinarily invoked by debate sponsors to exclude candidates outside of the two-party system. But debate sponsors never ask whether Democratic and Republican candidates are "viable," "serious," or "electable." Their party identification becomes a proxy for their viability. Nomination by the Democratic or Republican parties thus automatically validates and legitimizes a candidacy no matter how silly or frivolous the candidate.

As Justice Stevens recognized in his dissent, the *Forbes* case provides a dramatic example of this pretextual double standard at work.[62] Consider the debates in 1992 that AETN sponsored in Arkansas's First District. This is one of the most Democratic districts in the country and until 1994 had not sent a Republican to Congress since 1868.[63] In the eight elections just prior to 1992, the Democratic candidate took 68.9%, 100%, 100%, 64.8%, 97.2%, 64.2%, 100%, and 64.3% of the general election tally.[64] In the 1992 election Democrat Blanche Lambert, a 31-year-old former staff aide in the office of the prior Democratic incumbent, received an astonishing 69.8% of the vote in her first campaign for public office, leaving the Republican loser with less than one-third of the vote.[65] Yet, in this district where Democrats outnumber Republicans nearly three to one, and the hapless Republican challenger (unlike Forbes) had never collected any votes in a race for public office, he was nonetheless invited to debate the Democrat on AETN's station without passing any test of his seriousness, viability or electability.

The same story can be told about the Second Congressional District debate, to which AETN invited not only the "popular incumbent," Democratic Congressman Ray Thornton, but "long-shot Republican challenger Dennis Scott," who "filed at the last minute to run, saying [that] no incumbent should get a free ride."[66] Scott also had never before run for

ballot access rules themselves: if you are on the ballot, and you are not lampooning the process, then the government must treat you equally with respect to debates.

62. *See Forbes*, 118 S. Ct. at 1644-45 (Stevens, J., dissenting) (noting that in other districts "in which both major-party candidates had been invited to debate, it was clear that one of them had virtually no chance of winning the election")

63. *See* CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 1017-1321 (John L. Moore ed., 3d ed. 1994).

64. *See id.*

65. *See* CLERK OF THE HOUSE OF REPRESENTATIVES, STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 3, 1992, at 5 (1993).

66. James Jefferson, *Governor's Run for White House Heads Arkansas' Slate on Nov. 3*, ASSOCIATED PRESS, Oct. 24, 1992, *available in* 1992 WL 5148815.

public office and, despite his Republican party nomination, was able to raise only $5,724—less than what was raised by Forbes, who collected $9,754.[67] Congressman Thornton trounced Scott by a three-to-one margin, collecting 74.2% of the vote to Scott's 25.8%.[68] This was a landslide that, at least in AETN's terms, refutes any suggestion that the Republican had a serious chance of winning. Yet, Dennis Scott was invited to debate simply because he had an "(R)" next to his name on the ballot.

Of course, it might be said that the test of viability could not have been reasonably applied to the Democrats and Republicans running for Congress in Arkansas in 1992. For if AETN eliminated near-certain losers like the sacrificial-lamb Republicans in the First and Second Congressional District races, there would have been no debate at all. But this argument proves too much. It suggests that the point of the televised debate forum was to have an airing and clash of different political perspectives *regardless* of who was likely to win. But if that is true, then *all* ballot-certified candidates must be included regardless of their likelihood of winning, not just the Democrats and Republicans. If free political dialogue is the value that we seek, our debates must break out of the confines of the two-party system.

If the standard of "viability" or "seriousness," defined roughly as substantial prospects for victory, were applied neutrally and without discrimination in favor of the Democratic and Republican parties, there would be precious few debates at all in congressional campaigns. For candidates who challenge incumbents are rarely "viable" in the sense of having a "realistic" prospect of victory. The incumbent reelection rate is over ninety-three percent, and the vast majority of House districts can be reliably assigned to either the Democratic or Republican columns (or independent in Vermont).[69] According to the Center for Voting and Democracy, more than five out of six incumbents won in every election since 1954, including over ninety-eight percent of incumbents in 1968, 1986, and 1988.[70] Most crucially, the vast majority of House races are won by a victory margin of over twenty percent, "the traditional definition

67. FEDERAL ELECTION COMMISSION, FINANCIAL DATA FOR HOUSE GENERAL ELECTION CAMPAIGNS THROUGH DEC. 31, 1992, at 22.

68. *See Election '92: Associated Press Results of the U.S. House Races*, USA TODAY, Nov. 4, 1992, at 15A.

69. *Cf.* NORMAN J. ORNSTEIN ET AL., VITAL STATISTICS ON CONGRESS 1997-1998, at 61 (1998) (reporting the percentage of House representatives who successfully sought re-election in the years 1946 to 1996).

70. ELECTING THE PEOPLE'S HOUSE: 1998 (The Center for Voting and Democracy), Aug. 1998 (reporting election percentage rates in a table entitled *General Elections, U.S. House of Representatives, 1954-1996*).

of a political landslide."[71] In Arkansas, every House election between 1986 and 1990 ended in a landslide.[72] Because of the nature of our partisan gerrymandered districts and incumbency advantages, most Democratic and Republican challengers are simply *never* "viable" in the pinched mathematical terms of AETN: they lose by a landslide against an incumbent of the district's majority party.

Although Democrat-Republican debates in presidential campaigns are now a kind of gospel with establishment debate organizers,[73] the fact is that it often seems obvious which one of the two major-party candidates is going to lose. Barry Goldwater's quixotic run against President Johnson in 1964 was seen as doomed from the start, as was George McGovern's 1972 candidacy against Richard Nixon. In 1996, at the point when the bipartisan Commission on Presidential Debates tagged Ross Perot not "viable" and excluded him from the Clinton-Dole debates, Robert Dole himself had been described by the Beltway Establishment as "toast,"[74] and his campaign "dead meat."[75] Albert Hunt said, "This election has been over at least since August"; Jack Germond said, "It's been over for five months"; and Sam Donaldson remarked, "This election was over last February."[76] Yet, the partisan-skewed "viability" standard in practice presumes the nominees of the Democratic and Republican parties to be "viable" no matter how hopeless political observers actually consider their chances of winning.

But a major-party affiliation cannot validly be treated as a proxy for electoral "viability." It is certainly no guarantee of viability for Republicans running for Congress in Massachusetts or Democrats running for Congress in Idaho or either Democrats or Republicans running for Congress in Vermont.[77] By giving all the Democratic and Republican House candidates automatic seats at the debate table and subjecting Forbes alone to a nebulous "viability" test, the Arkansas public cable network practiced a blatantly discriminatory policy, imposing essentially no standards on Democratic and Republican candidates and essentially

71. *Id.*

72. *Id.*

73. It was not always so. Despite the fact that we think of head-to-head presidential debates as a fixture of general elections, they are a recent and still undependable innovation. The first televised one-on-one presidential debate took place in 1960 between John F. Kennedy and Richard Nixon.

74. Howard Kurtz, Time *Lets Writer Run Interference*, WASH. POST, Oct. 28, 1996, at D1.

75. Mary Beth Scheider et al., *Behind Closed Doors*, INDIANAPOLIS STAR, Sept. 29, 1996, at B3.

76. Kurtz, *supra* note 74.

77. Vermont has sent independent Bernie Sanders as its at-large Representative to the U.S. House for the last four elections, and the Democrats have rarely fielded an opponent. *See, e.g.*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, 104TH CONG., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOV. 3, 1992, at 73 (1993); CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, 104TH CONG., STATISTICS OF THE CONGRESSIONAL ELECTION OF NOV. 8, 1994, at 41 (1995) (both noting no Democratic challenger).

impossible ones on the independent. The two-party state employed two different standards to achieve a two-party debate.

2. *In Democracy, Can the State Label Political Candidates Winners or Losers Before the Election?*—Put aside for the moment the selective *application* of the seriousness test. Assume that AETN had a written test of political "viability" and formed a committee to apply it to all congressional candidates, including Democrats and Republicans. Would it be constitutional?

The answer is no. In a democratic society, the government has no rightful power to name or predict winners or losers in a *forthcoming* public election, much less to communicate its predictions to the electorate and selectively favor certain candidates with free publicity and an implied stamp of government approval.[78] If the government cannot add the words "(not viable)" next to candidates' names on the ballot, it is hard to see why it should be able to do effectively the same thing during the course of the campaign.[79]

Such intervention by the state into the electoral process capsizes proper political relationships. In democracy, the citizenry decides which candidates are electable by *electing them*. The government's role is to guarantee a fair counting of the ballots. If the people decide that a government-sponsored forum or debate is necessary, the government must provide an equal place for *all* ballot-qualified candidates regardless of wealth, politics, or social standing. Government may not play favorites in campaigns.[80] It may guarantee the *seriousness* of certified candidates by placing minimal conditions on access to the ballot, but this kind of seriousness must be defined with respect to a person's willingness to devote sufficient time and energy to running for office, as demonstrated by the

78. The one possible exception to this principle might be that the Secret Service, in preparing to protect the future president, should probably be allowed to husband its resources by extending protection only to those presidential candidates it deems most likely to win. This should be done in a nonpartisan and viewpoint-neutral way and in a fashion as low-key as possible so as not to skew the public perception of the candidates. Given that Secret Service protection does not extend to candidates at lower levels of office, this is a very slender exception.

79. Indeed, most candidates excluded from debates would probably prefer the option of debating their ideas face-to-face with their opponents and then receiving a "not viable" tag on the ballot. Getting the chance to debate creates the potential for real political growth in the campaign. At the same time, many voters would instinctively recoil at the gross manipulation of the ballot manifested by the government placing "not viable" next to the candidate's name.

80. This is a point the Framers themselves insisted upon. James Madison asked:

> Who are to be the objects of popular choice? Every citizen whose merit may recommend him to the esteem and confidence of his country. No qualification of wealth, of birth, of religious faith, or of civil profession is permitted to fetter the judgment or disappoint the inclination of the people.

THE FEDERALIST No. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961).

representative and arduous task of signature collection, rather than the person's likelihood of actually winning the election.[81] Once a candidate has obtained a place on the ballot, he must be treated the same as all other candidates on the ballot.

By pronouncing candidates "viable" or "not viable," the government effectively pastes gold stars or scarlet letters on candidates representing particular points of view. The government thus usurps the role of the electorate. "If there is any fixed star in our constitutional constellation," the Supreme Court said when it struck down compulsory flag salutes, "it is that no official, high or petty, can prescribe what shall be orthodox in politics . . . ."[82] But by turning predictions of defeat and victory into self-fulfilling prophecies, the debate-excluding government official does in fact convert his or her own assumptions about voter behavior into political orthodoxy. In structural terms, the two-party state wears "our expectations like an armored suit."[83]

It does not take much for debate exclusion to change election outcomes. In the *Forbes* case, it is very possible that, had Forbes been allowed to debate by AETN, he would have changed the outcome of the race, a point grasped by Justice Stevens in his dissent.[84] The Republican

81. The Supreme Court's ballot access jurisprudence has been erratic and fairly ungrounded in democratic principles. In *Williams v. Rhodes*, 393 U.S. 23 (1968), it properly invalidated as "*invidiously discriminatory*" an Ohio ballot requirement that new parties gather petition signatures a full nine months before the election equal to 15% of the votes case in the last election. *Id.* at 30-31. But in *Jenness v. Fortson*, 403 U.S. 431 (1971), the Court upheld a law requiring *minor-party* candidates to collect signatures equal to 5% of the registered voters in the last election. The *Jenness* Court found an important governmental interest in forcing outsider candidates to demonstrate "a *significant modicum of support*" *in the electorate* before having to place their names on the ballot. This approach completely misunderstands the government's appropriate interest in erecting some kind of seriousness threshold for a ballot position. A place on the public ballot does not belong to those who have earned it through the objective popularity of their political beliefs, but rather to those who have shown that they are subjectively serious about running for, and assuming, public office. Thus, a reasonably large but manageable *number of petition signatures* can be demanded in order to establish the candidate's serious commitment to running the race and taking office. A candidate should never have to show that the signatures belong to persons who plan or pledge to vote for him or her. The signatures are a mere barometer of the candidate's willingness to campaign.

82. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); *see also* Denver Area Educ. Telecomm. Consortium v. FCC, 116 S. Ct. 2374 (1996). *In Denver*, Justice Kennedy noted:

> In the realm of speech and expression, the First Amendment envisions the citizen shaping the government, not the reverse; it removes "governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity."

Id. at 2405 (Kennedy, J., concurring in part, concurring in the judgment in part, and dissenting in part) (quoting Cohen v. California, 403 U.S. 15, 24 (1971)).

83. REM, *What's the Frequency, Kenneth?*, *on* MONSTER (Warner Bros. 1994).

84. *See* Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633, 1645 (1998) (Stevens, J., dissenting) (noting that the "decision to exclude [Forbes] from the debate may have *determined* the outcome of the election in the Third District").

victor, Tim Hutchinson, received 125,295 votes, or 50.2% of the total; Democrat John Van Winkle received 117,775, or 47.2%.[85] Meanwhile, Forbes captured 6,329 votes, or 2.5%.[86] Had Forbes, an outspoken conservative with proven vote-getting power, been allowed to debate, and had he converted just one out of every fifteen of Hutchinson's eventual voters, the election would have gone to Van Winkle. The government's ham-fisted and lopsided intervention into the campaign process changed the dynamics of the race and probably altered its final result.

3. Is the Government Clairvoyant?.—Government has no expertise to make predictions about election outcomes. Because we have a secret ballot, declaring candidates electable or not is basically guesswork, and the history of politics is filled with great surprises, sudden illnesses, erupting scandals, last-minute decisions to drop out, and dramatic reversals of fortune.[87] The famous photo of President Truman holding up the newspaper headline reading "Dewey Defeats Truman" is an important cultural artifact. The whole point of a political campaign period is to allow candidates—through popular appeals, organizing, and debates—to *change* public opinion. Campaigns are characterized by a fluidity wholly incompatible with the practice of taking a snapshot of the electorate at one moment, superimposing that image on a hypothetical election day, and then invoking that distorted image from the future to cut off debate in the present.

The only vaguely scientific method we have of predicting election results is polling. But polls not only fluctuate madly but, at best, capture the present and tell us nothing reliable about the future. If AETN had sponsored a debate for candidates in the U.S. Senate Democratic primary in Wisconsin in 1992, it would have excluded the eventual winner of the election, Russ Feingold. A major poll showed Feingold at ten percent of the vote compared to forty-two percent for Congressman Jim Moody and forty percent for businessman Joe Checota.[88] Yet Feingold went on to overcome his rivals *less than three weeks after this poll was taken*, collecting sixty-nine percent of the vote to fourteen percent each for Moody and Checota. Feingold went on to defeat the incumbent Republican

85. CLERK OF THE HOUSE OF REPRESENTATIVES, 103D CONG., STATISTICS OF THE PRESIDENTIAL AND CONGRESSIONAL ELECTION OF NOVEMBER 3, 1992, at 5 (1993).

86. *Id.*

87. The Eighth Circuit was right to find that "political viability" is "so susceptible of variation in individual opinion" as to "provide no secure basis for the exercise of governmental power consistent with the First Amendment." Forbes v. Arkansas Educ. Television Comm'n, 93 F. 3d 497, 504 (8th Cir. 1996), *rev'd*, 118 S. Ct. 1633 (1998).

88. *See* David E. Umhoefer & Mike Nichols, *Moody and Checota in Close Race for Senate Nomination*, MILWAUKEE J., Aug. 16, 1992, at A1.

Senator, Bob Kasten, in the general election.[89] To take another example, public opinion polls in the late summer of 1994 showed that Tennessee Republican Senate candidate Bill Frist would "lose by a 53-29 percent margin" to Senator Jim Sasser,[90] but Frist ended up beating Sasser fifty-six to forty-two percent.[91]

The amazing gubernatorial victory of Reform party candidate Jesse "The Body" Ventura in Minnesota in 1998 may actually herald a surge in electoral success by outsider political parties and candidates. Governor Ventura's victory over his Democratic and Republican rivals stunned even close observers of the race. Significantly, one apparently indispensable component of his success was that he was invited to face his rivals on an equal basis in at least eight statewide televised debates. This fact suggests not only that the normal exclusion of third-party candidates on grounds of viability is a self-fulfilling prophecy, but also that debate inclusion can become a wedge for opening up democracy to new voices and new choices.

4. "Viability" Tests Enforce Viewpoint Discrimination and Unequal Protection of the Laws.—Even if government's electoral predictions were foolproof, the use of the viability criterion still fails to meet constitutional standards. Indeed, if government could predict with complete certainty final electoral outcomes, limiting the debate to the winner and the second place loser would be less justifiable. The critical thing to see about such a possibility is that one of the candidates who is destined to lose is nonetheless guaranteed to debate. The definite inclusion of one loser renders the exclusion of all other losers deeply suspect. If one loser has the right to debate, why not all the others? If we know which candidate is going to win, why not simply give him or her the free air time to discuss plans for the office and a smooth transition to power?

It will not suffice to define a candidate's "viability" with respect to being one of the top two candidates. This definition is arbitrary in a constitutional sense and politically transparent. The Constitution says nothing about a "two-party system," and the government has no power to enforce the orthodoxy of a two-party arrangement in a way that violates the equal right of others to speak.

Even if the government does not automatically confine the field to two parties, but simply invites the two candidates who are polling more support than the others, it is still a gross violation of free speech rights to tag the

89 *See* Kenneth R. Lamke, *Middleton Democrat Rides Winds of Change*, MILWAUKEE SENTINEL, Nov. 4, 1992, at 1A.

90 *See* Phil West, *Cooper and Sasser Likely Wins in Senate, Poll Finds*, THE MEMPHIS COMMERCIAL APPEAL, July 28, 1994, at A13.

91. *See* CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, 104TH CONG., STATISTICS OF THE CONGRESSIONAL ELECTION OF NOV. 8, 1994, at 37 (1995).

candidates bringing up the rear as "not viable" and to exclude them from the state-sponsored debate. For what does government really mean when it says that a candidate is not "viable"? It means that his candidacy is not popular with the electorate and is not likely to be popular on election day. In Forbes's case, this was the precise, nearly verbatim explanation of the executive director of the AETN, who testified in court: "He didn't have popular support and didn't have a chance to win the election."[92]

This frank justification violates the point of the First Amendment. If free speech means anything, it is that government cannot discriminate in favor of the political speech of *popular* citizens and against the political speech of *unpopular* citizens. Those with mainstream views and those with minority views must be treated equally. This was the logic of the Supreme Court's decision in *Texas v. Johnson*,[93] which upheld the right of political outsiders to burn the American flag in a way deliberately calculated to inflame the majority.[94] The Court stated: "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[95] This principle of free and equal political expression for all must be scrupulously respected in public elections, which are the people's basic form of maintaining control over government.

In this light, it becomes easy to see how all of the judgments about Forbes's nonseriousness and nonviability depend on the government's impressions of how other citizens, the media, and campaign donors regard him and will regard him on election day. The viability standard thus inescapably assimilates hunches about a candidate's political unpopularity, especially with financial and media elites.

Consider the judgments about Forbes that were (allegedly) made by AETN and explicitly, albeit amazingly, endorsed by Justice Kennedy:

> "'*Arkansas voters did not consider him a serious candidate* . . . .'"[96]

This summary conclusion was not supported by any showing that the government had a formal process to determine the public's views of particular candidates. How did AETN know what "Arkansas voters" thought? Where was Forbes's opportunity to challenge the government's determination as to the public's views? As the Court declared in 1988 when it struck down a city policy whereby the mayor could pick and choose which newspapers could set up sidewalk vending machines, the

92. *See* Petitioner's Brief, Joint App. at 119, Arkansas Educ. Television Comm'n v. Forbes, 118 S. Ct. 1633 (1998) (No. 96-779) (testimony of Susan Howarth).

93. 491 U.S. 397 (1989).

94. *Id.* at 399.

95. *Id.* at 414.

96. *Forbes*, 118 S. Ct. at 1643 (quoting AETC Executive Director Susan Howarth) (emphasis added).

"danger" of "content and viewpoint censorship" is "*at its zenith when the* determination of who may speak and who may not is left to the unbridled discretion of a government official."[97]

The *Forbes* dissenters likened the standardless discretion deployed by AETN to the ordinance condemned in *Forsyth County v. Nationalist Movement*,[98] which authorized a county official to set dollar amounts for assembly and parade permit fees. The dissenters quoted this language from *Forsyth County*:

> There are no articulated standards either in the ordinance or in the county's established practice. The administrator is not required to rely on any objective factors. He need not provide any explanation for his decision, and that decision is unreviewable. Nothing in the law or its application prevents the official from encouraging some views and discouraging others through the arbitrary application of fees. The First Amendment prohibits the vesting of such unbridled discretion in a government official.[99]

But even if AETN conducted a poll on the matter, with appropriate due process and administrative law protections in place, the majority's determination that a political candidate is not "serious" could not constitutionally be used to suppress the candidate's political speech. Under the First Amendment, all citizens are presumed to be serious, and all candidates who have passed the state's basic test of seriousness—state ballot access requirements—must be allowed to debate.[100] If the majority can keep a minority voice from debating, why can it not keep a minority candidate off the ballot altogether? Indeed, it is quite the same thing since officially marginalizing and delegitimizing a candidate makes his or her presence on the ballot an empty gesture, democracy in form but not in substance.

"'[T]he news organizations also did not consider him a serious candidate . . . .'"[101] This summary conclusion was also not based on any formal governmental process by which news organizations were canvassed and interviewed. How did AETN know what "news organizations" thought? Which news organizations were considered? How do we know that they are not politically interested in one candidate's success or another? And what if some of them disagreed? Forbes argued that there was much media interest in his campaign. Where was his opportunity to disagree?

97. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 763 (1988).

98. 505 U.S. 123 (1992).

99. *Forbes*, 118 S. Ct. at 1648 (Stevens, J., dissenting) (quoting *Forsyth County*, 505 U.S. at 133 (citations omitted)).

100. Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983).

101. *Forbes*, 118 S. Ct. at 1643 (quoting AETC Executive Director Susan Howarth) (emphasis added).

Even had a thorough polling of reporters taken place, it is a fun house distortion of democracy to use the hunches of newspapermen to foreclose the public's electoral choices and suppress political diversity. Who elected the media? Indeed, most journalists are properly offended at the idea that their forecasts should be used to eliminate candidates from debate when their proper role is to explore the views of all candidates.[102] This justification for debate exclusion betrays our basic understanding that the people govern and the press follows their decisions; under AETC's theory, the press governs and the people must follow.

"'[T]he Associated Press and a national election result reporting serice did not plan to run [Forbes's] name in [the] results on election night . . . .'"[103] It is unsettling that Justice Kennedy can endorse such a silly criterion for a governmental debate selection process. Forbes achieved ballot status by collecting thousands of signatures of voters in the district; his presence in the race could have thrown the election to one candidate or another; he was making important public policy arguments; he could even have won the election. And, yet, from the judgment of an unelected and anonymous copy editor at the Associated Press that he is not presently planning to display Forbes's name on election night, the government derives power to exclude Forbes from its candidate debate. Surely this is a lot of discretion to delegate to an intern at the Associated Press. Where does a candidate or citizen go to appeal AP's decision? What if AP's decision was based, in circular fashion, on the fact that Forbes had been forbidden to debate? What if its decision were wrong? Would it make any difference if the AP were planning to itself run Forbes's name if he actually won?

"Forbes 'apparently had little, if any, financial support, failing to report campaign finances to the Secretary of State's office or to the Federal Election Commission.'"[104]—This is perhaps the most pernicious justification for debate exclusion because it makes explicit what often underlies the exclusionary impulse in political debates: prejudice against less well-funded candidates and bias in favor of the wealthy and those bankrolled by big money. But it is constitutionally impermissible to use wealth or fundraising capacity as a classification to disadvantage people in the political process. When the Supreme Court struck down a state poll tax in 1966, it found that "a state violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."[105] Similarly, the Court in 1972

102. *Cf. id.* (reporting the testimony of AETC's executive director, who indicated that a candidate's views are irrelevant to their decisionmaking process).

103. *Id.* (quoting AETC Executive Director Susan Howarth) (emphasis added).

104. *Id.* at 1643-44.

105. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966); *see also* THE FEDERALIST No. 57, *supra* note 80.

invalidated a number of high candidate filing fees imposed by Texas in state elections, saying that the several-hundred-dollar fees gave the political process "a patently exclusionary character" that effectively eliminated from competition "potential office seekers lacking both personal wealth and affluent backers."[106] The Court noted that the discrimination against poorer candidates, by extension, reduced the field of candidates attractive to poorer citizens.[107]

Beyond the explicitly discriminatory nature of this justification, it ignores the fact that, despite the odds, poorly financed candidates can and often do beat better financed ones. Though increasingly decisive, the modern "wealth primary"[108] has yet to attain complete perfection in replacing popular control over public office with monetary control by economic interests. Thus, why should it even be *relevant* how much money a candidate has raised, much less permissible to take it into account?

"*'[T]here [was] no "Forbes for Congress" campaign headquarters other than his house . . . .'*"[109]—A sarcastic variation on the "poor fundraiser" theme, this justification is equally improvised and unprincipled. The "headquarters" test was never imposed on any Democratic or Republican congressional candidates, several of whom also did not have campaign offices outside of their homes. At any rate, is it really impossible to win or have something meaningful to say if your campaign office is in your house? This snobbish *Better Homes and Gardens* standard, if enacted as an explicit criterion for ballot or debate access, would be patently unconstitutional.[110] Ralph Forbes has as much right to run his campaign out of his home as did John F. Kennedy, who used his homes in Hyannisport and Palm Beach as the base of his presidential campaign.[111]

5. Elections Serve Purposes Broader Than Certifying the Candidate with the Most Votes on Election Day.—Even if a computer were invented that could predict with absolute certainty what the final vote total would be

106. Bullock v. Carter, 405 U.S. 134, 143 (1972).

107. *See id.*

108. *See* Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 273 (1993). Our purpose in describing the encroachment of campaign money on democratic equality was not to formalize a process by which better funded candidates enjoy superior rights, as debate sponsors like AETN seem to urge, but rather to insist upon basic Equal Protection scrutiny of core electoral processes.

109. *Forbes*, 118 S. Ct. at 1644 (1998) (quoting AETC Executive Director Susan Howarth).

110. That is, requiring candidates for Congress to set up an official outside campaign headquarters would be an additional qualification impermissible if added by a state or by Congress itself. *See* Powell v. McCormack, 395 U.S. 486 (1969) (stating that the House has no power to exclude a member-elect who meets the Constitution's membership requirements); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995) (reaffirming that Congress has no power to alter or add to the qualifications set forth in the Constitution).

111. *See* THEODORE C. SORENSON, KENNEDY 120 (1965).

in an election, even if it could be determined that excluding certain candidates would not alter the final outcome, even if we ignored the paradoxical fact that at least one definite loser is going to be included in the debate, even if we ignored the inherently viewpoint-discriminatory character of "viability" as a screen, there would still be a profound constitutional problem with the viability criterion for debate participation. It answers the wrong question, which is, "What are the candidate's chances of winning?" The right question is: "Regardless of the candidate's chances of winning, what does he or she have to contribute to the campaign discourse?"

An election campaign is more than a mechanical contest over who will take office when the election is over. It is also democracy's way of promoting robust political debate among citizens and allowing candidates and parties to inject new ideas and messages into public discussion in order to influence the public agenda.[112] Narrowly defining an election as a mechanical contest to certify the winner of the most votes hollows out the campaign process by suppressing voices of change and discontent and choking off avenues of political expression and development essential to robust democracy.

History is filled with politically significant losing candidacies by third-party and independent candidates. Populist and Socialist party candidates who lost elections for president and Congress in the early 1900s built the rhetoric and movements that led to enactment of the Sixteenth and Nineteenth Amendments.[113] Before Ross Perot reentered the 1992 presidential campaign, "there was little or no sign that George Bush and Bill Clinton were prepared to discuss [the] primal issues" of deficit reduction and generational equity.[114] But Perot's maverick candidacy made deficit reduction a central issue in the campaign—and, later, in the Clinton Administration.[115]

Candidates often run to establish legitimacy for an alternative political position and to position themselves for a future race. For example, after participating in their famous traveling debates in Illinois in 1858, Lincoln lost to Douglas in his bid for U.S. Senate. But Lincoln went on to capture the White House two years later, largely based on his extraordinary debate performance and the pro-Union philosophy he espoused while clashing with Douglas.[116] The fact that he lost the election did not render his debate

112. This idea finds support in Supreme Court case law. *See, e.g.*, Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 186 (1979) ("[An] election campaign is a means of disseminating ideas as well as attaining political office.").

113. *See* J. DAVID GILLESPIE, POLITICS AT THE PERIPHERY 26-27 (1993).

114. Tom Morganthau, *Citizen Perot*, NEWSWEEK, Nov. 9, 1992, at 23, 28.

115. *Id.*

116. *See* HOLZER, *supra* note 5, at 24 (1993) (noting the pervasive belief that "Lincoln shrewdly used the debates mainly to position himself for the presidency two years later")

performance a waste of time or an unfair imposition on the public; rather, the positions he articulated in debate proved to be critical rhetorical interventions in American public life, even if they were ahead of their time.

Sometimes a defeat can propel a candidate's political career. This was the case with Bill Clinton, who (like Ralph Forbes) lost his first race for the House in Arkansas's Third Congressional District, but then went on to be elected attorney general of Arkansas two years later.[117] Many politicians have faced multiple losses before finding success with voters. For example, Robert Casey "made a second career out of running for Governor" in Pennsylvania, where over the course of twenty years, from 1966 to 1986, he continuously ran and lost for the Democratic nomination before finally winning in 1986.[118] He narrowly won in the general election, and was re-elected to a second term in 1990 with sixty-eight percent of the vote.[119] Another Pennsylvania politician, Arlen Specter, waged an unsuccessful bid for mayor in 1967, lost his re-election campaign for district attorney of Philadelphia, and piled up back-to-back losses in the 1976 Senate primary and the 1978 gubernatorial primary before succeeding in his bid for Senate in 1980.[120]

Given declining party allegiance in modern American politics,[121] and the increased interest in new parties and independent candidacies,[122] third-party candidates today can affect electoral outcomes decisively. In a closely watched race for the House of Representatives in 1996, a special election in the heavily Democratic Third Congressional District of New

117. *See* Michael Kelly, *The President's Past*, N.Y. TIMES, July 31, 1994, at F20 (discussing Clinton's loss in the congressional race in 1974 and subsequent victory in his race for Attorney General in 1976).

118. *See* Michael deCourcy Hinds, *A Victory over Illness Plays Well in Politics*, N.Y. TIMES, Feb. 20, 1994, at A18.

119. *See id.*

120. *See* Michael deCourcy Hinds, *Trouble Shadows Specter in Senate Race*, N.Y. TIMES, Feb. 21, 1992, at A15.

121. *See* Gordon Black, *The End of the Two Party Era?*, POLLING REPORT, Sept. 18, 1995 ("The two parties have today lost the firm allegiance of a majority of the American electorate. Nearly 40% of the electorate is fully independent in its preferences and less than 30% is strongly attached to either of the two parties combined."); Emmet T. Flood & William G. Mayer, *Third-Party and Independent Candidates: How They Get on the Ballot, How They Get Nominated, in* IN PURSUIT OF THE WHITE HOUSE 283, 317 (William G. Mayer ed., 1996) (noting "long-term decay of party allegiances within the national electorate").

122. *See* John C. Berg, *Cracks in the U.S. Two-Party System*, at 41, Presented at the Annual Meeting of the New England Political Science Association (May 3-4, 1996) (showing rapidly growing numbers of independent and minor-party House candidates placing second in general elections and receiving more than 5% of the vote); *Third Party Prospects*, CQ RESEARCH, CONGRESSIONAL QUARTERLY, INC., Dec. 22, 1995, at 1139 ("The disposition to vote for an independent candidate is higher than it has ever been in the past. While it is difficult to make the choice, it is getting easier.") (quoting Andrew Kohut, Director of Times Mirror Center for the People and the Press).

Mexico, a Green party candidate received seventeen percent of the vote, which was widely identified as the reason the Democratic nominee, with forty percent, lost to the Republican, who won with forty-two percent.[123] This result influenced the positions taken by Democratic and Republican candidates in New Mexico in 1998 on the environmental and health issues raised by the Green party.[124] In 1994, no fewer than eighteen independents and minor-party candidates captured more votes than the margin of victory between the major-party candidates. A Green party candidate for California state assembly from Oakland recently upset a heavily favored Democratic party incumbent.[125] Like Governor Ventura in Minnesota, these candidates and parties are reshaping the nature of political life in their states.

Both First Amendment and equal protection principles require courts to squint hard at laws that disproportionately disfavor candidates of minor political parties and independents. In *Williams v. Rhodes*,[126] the Supreme Court invalidated on equal protection grounds an Ohio ballot access law that forced new parties to collect signatures equal to fifteen percent of the electorate nine months before the election.[127] In *Anderson v. Celebrezze*,[128] the Court mobilized First Amendment principles to strike down an election law that entrenched the two major parties and imposed selective and disproportionate burdens on other parties.[129]

D. The Untenable Cacophony Alibi

Justice Kennedy's endorsement of AETN's arbitrary decision-making leaves us with a rule in which exclusionary government debate sponsors can only be stopped if they are foolish enough to declare their subjective intention to censor a political viewpoint because they oppose it. The only remotely plausible rationale offered for this incredible shrinking of First Amendment liberty is that if government debate sponsors are not allowed broad discretion to pick and choose their participating candidates, they will be "faced with the prospect of cacophony," and "might choose not to air

123. *See* Barry Massey, *New Mexico 3rd District Voters Choose Republican in Upset*, Associated Press, May 14, 1997, *available in* 1997 WL 2524964 (citing as "[a] key factor" the presence of the Green party candidate and "how strongly she attracted support from Democrats").

124. *See* Micah L. Sifry, *Compose Rotten Politics (Green Party Politics' Impact on Democratic Party Election Victories)*, THE NATION, Nov. 9, 1998, at 7 (noting that in one election, a Green party candidate's strong showing convinced the Democratic contender to alter his position on such issues as Social Security and land conservation).

125. *See Green Party Member Sworn In*, SACRAMENTO BEE, Apr. 6, 1999, at A3.

126. 393 U.S. 23 (1968).

127. *Id.* at 34.

128. 460 U.S. 780 (1983).

129. *Id.* at 793-94.

candidates' views at all. . . . In this circumstance, a '[g]overnment-enforced right of access inescapably "dampens the vigor and limits the variety of public debate."'"[130]

This conclusion parallels AETN's strenuous argument before the Court that removing the viability filter from debate sponsors will cause huge numbers of candidates to flood debates, and "public broadcasters would abandon the effort."[131]

But there is not the slightest empirical basis for saying that opening up debates to all balloted candidates will produce a "cacophony." Over the last 50 years, in the last 25 general elections for the U.S. House of Representatives, there has been on average fewer than one independent or minor-party candidate running in each of America's 435 congressional districts.[132] The idea that government debate sponsors could not handle non-major-party candidates is unfounded.[133]

The House races in Arkansas in 1992 are illustrative of the national pattern. In the state's four congressional districts, Ralph Forbes was the *only* independent or minor-party candidate running.[134] Indeed, given the fact that the incumbent re-election rate usually floats way above ninety

130. *Forbes*, 118 S. Ct. at 1643 (quoting Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 656 (1994) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 279 (1964))).

131. Petitioner's Brief at 29, *Forbes* (No. 96-779).

132. This figure, along with all the others, was calculated from election returns reported in Congressional Quarterly Almanac and Congressional Quarterly Weekly Report for each of the respective election years from 1948 to 1996. Even if we look at just the last ten years, a period of growth in minor-party activity, the Supreme Court's parade of horribles looks silly. In 1986, there were 91 independents or minor-party candidates; in 1988, there were 154; in 1990, there were 170; in 1992, there were 458; in 1994, there were 256; and in 1996, the peak year this century for minor-party House candidacies, there were 487, or just barely more than one per district on average.

133. As an amicus in *Arkansas Educ. Television Comm'n v. Forbes*, CPD made a similar argument that presidential debates would become less manageable if the lock of the two-party system were broken. *See* Brief of *Amicus Curiae* Commission on Presidential Debates at 4, *Forbes* (No. 96-779) (arguing that a "mechanical" approach that allows any and all legally qualified candidates to participate "runs an unacceptable risk of resulting in crowded and cacophonous debates"). But in 1996, only three presidential candidates were eligible to receive public funding in the general election, which is the best federal statutory definition of seriousness we have, if seriousness rather than legal electability must be the standard. *See* Ron Scherer, *The Perot Factor: Maverick May Mine Voter Discontent*, THE CHRISTIAN SCI. MONITOR, Aug. 20, 1996, at 3 (noting the receipt of federal campaign funds by Perot as well as by the Republican and Democratic Parties). In addition, only four presidential candidates secured ballot status in all 50 states and the District of Columbia, *see* Mimi Hall, *Not to Forget the 18 Other Candidates*, USA TODAY, Nov. 5, 1996, at 8A, and only six candidates made it onto the ballot in sufficient states to be able theoretically to collect a majority of votes in the electoral college. *See* Donald P. Baker, *Third-Party 'Musketeers' Duel on TV*, WASH. POST, Oct. 23, 1996, at A20 (explaining that other candidates were excluded from a debate because they did not appear on enough state ballots to make election mathematically possible). If a government broadcaster were to sponsor a presidential debate (none presently do), it would have any of these stringent, yet viewpoints-neutral, tests available.

134. *See U.S. House*, WASH. POST, Nov. 5, 1992, at A34 (reporting the results of the 1992 U.S. House of Representatives elections).

percent,[135] it is even difficult to get a *second* candidate to run in many districts (witness the weak major-party challengers in Forbes's neighboring districts). With our excessively stringent ballot access laws, built-in incumbent advantages, and money-drenched elections, third-party and independent candidates are already discouraged to the point of despair. Can the suggestion that they will overwhelm government-run fora also be used to prevent them from debating other candidates?

The idea that debates among more than two candidates will dissolve into white noise also contradicts our experience with nationally televised debates in Democratic and Republican presidential *primaries*. In the 1992 presidential primary season, for example, there was a Democratic primary debate in St. Louis with Bob Kerrey, Jerry Brown, Bill Clinton, Tom Harkin, Paul Tsongas, and Douglas Wilder all on stage.[136] In the 1988 season, six Republicans squared off in Houston, including George Bush, Pete du Pont IV, Alexander Haig, Jr., Bob Dole, Pat Robertson, and Jack Kemp.[137] In recent years, we have been treated to large televised party primary debates which include such palpable long-shots as Morry Taylor and Alan Keyes. No one was injured during any of these debates, and rather than condemn them as *cacophony*, we should celebrate them as *democracy*.

Even if we accept the premise that government debate sponsors will be overrun by hoards of candidates, the concept that government can simply cancel out the speech rights of some candidates in order to amplify the speech of others is anathema. As the Supreme Court famously stated in *Buckley v. Valeo*:[138]

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"[139]

In a deep sense, the rhetoric of "cacophony" offends well-accepted First Amendment norms assuming not only that all citizens enjoy an equal right to speak, but that democracy thrives on diversity of thought. In

135. *See* FRANK J. SORAUF, INSIDE CAMPAIGN FINANCE 61 (1992).

136. *See* Bill Lambrecht, *The Democrat's Presidential Hopefuls to Use Debate to Kick Off Campaign*, ST. LOUIS POST-DISPATCH, Dec. 14, 1991, at 1B.

137. *See* Lloyd Grove, *GOP Presidential Hopefuls Prepare for Premiere Debate*, WASH. POST, Oct. 27, 1987, at A5.

138. 424 U.S. 1 (1976).

139. *Id.* at 48-49 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 266, 269 (1964)).

Cohen v. California,[140] the Supreme Court showed better perspective on the democratic necessity of multiple voices:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.
>
> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve. *That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength.* We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated.[141]

Indeed, the Court's apparent horror today at the possibility of multiple voices speaking in candidate debates contrasts sharply with the emerging jurisprudence of free speech on the Internet. As the United States District Court for the Eastern District of Pennsylvania put it a few years ago in a seminal decision of the new age of information, "Just as the strength of the Internet is chaos, so the strength of our liberty depends upon the chaos and cacophony of the unfettered speech the First Amendment protects."[142]

The suggestion that major-party candidates will pull out of debates if minor-party candidates are allowed to participate is not only wholly unproven, but also irrelevant and pernicious. To exclude some candidates because their presence may cause others not to come is, in effect, to impose a prior restraint on speech based on a third-party heckler's veto. It is like saying the University of Virginia should not be forced to subsidize religiously oriented student publications because it may respond by refusing to subsidize any student publications at all. Such an outcome might be unfortunate, but it would be the University's choice. We do not allow government to discriminate in a public function on the theory that forcing it to cease discrimination will cause others to stop utilizing the public

140. 403 U.S. 15 (1971) (upholding the right of a citizen to wear a jacket to a courthouse bearing the words "Fuck the Draft").

141. *Id.* at 24-25 (citations omitted) (emphasis added).

142. ACLU v. Reno, 929 F. Supp. 824, 883 (E.D. Pa. 1996).

function. The government may not give anticipatory legal effect to social prejudice in this way. If the major-party candidates choose to boycott a public debate that includes minor-party candidates, then the major-party candidates are simply deciding to pass up a valuable public benefit because they cannot shape it precisely to their private will.

At any rate, if preventing cacophony were to become a real and compelling interest, there would be an alternative much less restrictive than simply banishing all but two candidates from organized debate. A debate sponsor like AETN could first decide in advance how many candidates the voters can tolerate without losing focus--perhaps it is four or five. But it must be a number that the sponsor cannot change for the purposes of party *primary* debates; it must be based on something other than the desire to control and skew political dialogue. Assuming it is four candidates, for example, if there are eight candidates in the race and the room will not hold them all, the debate sponsor should add a second debate and randomly divide the candidates up between the two. In the most extraordinary, quite unimaginable, situation where time is so scarce that there is only time for a single debate and only four candidates can participate, then names should be drawn out of a hat and each candidate given an equal opportunity to be included regardless of party or ideology. This is the result clearly suggested by the Supreme Court in *Rosenberger*, where the Court stated that "government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity" and declared it "incumbent on the State . . . to ration or allocate the scarce resources on some acceptable neutral principle."[143] If some candidates need to be left out of a government-organized debate, all candidates should have an equal chance of getting in and being damaged by being left out. From a First Amendment and democratic perspective, it is better in a case like this simply to cancel the debate.

Of course, if the Democratic and Republican candidates in the Third District wanted to debate without Forbes being present, outside the presence of what they deem a fruitless cacophony, they had every right under the First Amendment to arrange a private meeting of their own.[144] But, as a government actor, AETN had no rightful authority to set up and pay for a private debate between them and exclude Forbes, who met every requirement of candidate seriousness set by Arkansas and had a right to be treated as an equal in the government's forum, however defined.

In the name of preventing cacophony, the Supreme Court in *Forbes* quietly sacralized our two-party arrangement and made a hash of First

143. 515 U.S. 819, 835 (1995).

144. *See* Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 557, 574-75 (1995) (upholding the right of a St. Patrick's Day Committee to exclude an unwanted contingent of gay and lesbian marchers from its privately organized parade).

Amendment forum doctrine.[145] As the doctrine now stands, you have a right to speak on the government's property if it is a park or a sidewalk or some other place "generally available" to the public,[146] but in most any other kind of government property, you have essentially the rights that the government tells you that you have. Public forum doctrine, which began as a statement of the historic rights of the people to communicate in public places,[147] has been turned into a license for the government to censor unwanted or threatening speech on public property. Rather than establishing a robust speech principle in public places, public forum doctrine has come to mirror and assimilate the court's exclusionary doctrine relating to citizen speech on privately owned corporate land.[148]

III. When Corporations Gerrymander Debates and Manipulate Elections

A. The Electoral-Industrial Complex

It is tempting to believe that government-sponsored debate exclusion is unimportant because even if government did not weed out minor-party candidates from participation, the major-party candidates would simply turn to private corporate debate sponsors to set up head-to-head debates. But the practice of gerrymandering debates is no more lawful in the corporate sector than in the government sector. Just as state-organized debate exclusion violates the First Amendment, corporate-organized debate exclusion is unlawful under the Federal Election Campaign Act, which bans corporate campaign contributions and expenditures. Corporate sponsorship of a gerrymandered and exclusionary debate can only be understood as a dressed-up campaign contribution to the invited candidates. These candidates get the differential benefit of free television exposure as an immense in-kind campaign contribution.

The key case testing this proposition is still unfolding in federal district court in the District of Columbia, where Perot '96, Ross Perot's

145 In this sense, it is a worthy successor to another First Amendment fiasco in the democracy field. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 354-56 (1997) (upholding a statutory ban on multiple-party endorsements of a single candidate, a measure widely used during the Populist period to empower minority political parties).

146. *See Forbes*, 118 S. Ct. at 1642-43 (explaining the distinction between general and selective access).

147. *See* Hague v. CIO, 307 U.S. 496, 515 (1939) ("Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.") Whatever the historical accuracy of this statement, it was an excellent proclamation of the Court's new libertarian approach to speech on public property.

148. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507 (1976) (invalidating the free speech rights of citizens in corporate-owned shopping centers and finding that access to such property depends on the will of the owners).

1996 presidential campaign committee, has appealed the Federal Election Commission's ruling that there is "no reason" to believe that the Commission on Presidential Debates (CPD) violated the FEC's rules on corporate debate sponsorship.[149] The case goes back to the 1996 presidential campaign when the ticket of Ross Perot and Pat Choate was on the ballot in all fifty states and the District of Columbia and had been given nearly $30 million in public financing under the Presidential Campaign Fund Act based on Perot's 1992 performance.[150] Despite Perot's astonishing showing in 1992 and Dole's lackluster 1996 campaign, Perot and Choate were excluded from the three 1996 presidential debates by their private corporate sponsor, the CPD, which is funded by large for-profit private corporations, such as Philip Morris, Sprint, Sara Lee, Dun & Bradstreet, and Lucent Technologies.[151] The CPD found that Perot and Choate had no "realistic chance" of winning the election and therefore kept them out of the debates.[152] This unpopular decision, opposed by the vast majority of Americans in public opinion polls,[153] meant that Perot and Choate would be missing in the only televised presidential debates of the campaign. The decision effectively destroyed Perot and Choate's campaign, and certainly its prospects for victory or a second-place finish. Although he stood at exactly the same place before the 1996 debates as he did before the 1992 debates, Perot's final vote total dropped from nineteen percent in the 1992 election, when he was allowed to debate, to eight percent in the 1996 election, when he was banned from the central public events of the campaign season.[154] This case exemplifies the active convergence of the two-party system, as represented by the proudly bipartisan membership of the CPD, with corporate capital, as represented by the pervasive corporate subsidization and funding of the CPD.[155] It is not too much to suggest

149. Perot '96, Inc. v. Federal Election Comm'n, No. 98-1022 (D.D.C. filed 1998).

150. Toni Locy, *Perot Sues for Spot in October Debates; Panel Accused of 'Unfairly' Harming Candidacy*, WASH. POST, Sept. 24, 1996, at A1 (recognizing that Perot had received $29 million in federal campaign funds and was on the ballot in all 50 states).

151. *See* Connie Cass, *New Home for Special Interest Money; Companies to Underwrite Debates*, ASSOCIATED PRESS, Sept. 27, 1996, *available in* 1996 WL 4442007 ("The Commission on Presidential Debates has already secured between $25,000 and $250,000 each from five companies to be national sponsors of the three debates.").

152. *See* Perot v. Federal Election Comm'n, 97 F.3d 553, 556 (D.C. Cir. 1996) (recording as fact that the CPD did not invite Perot to participate in the 1996 debates because he did not have a "realistic chance of winning").

153. *See Perot Assails Proposal to Bar Him from Debates*, STAR TRIBUNE, Sept. 19, 1996, at A21 (indicating that 76% of the public wanted Perot in the debate).

154. *See* Aron Zitner, *Future Uncertain for Perot, Party*, AUSTIN AM. STATES., Nov. 6, 1996, at A11 (discussing the impact of Perot's drop in the polls from 19% in 1992 to 8% in 1996).

155. Private corporate funding for American presidential debates is expansive and could erupt into scandal at any time. In 1992, the Associated Press reported: "The list of sponsors for this year's three presidential debates and single vice-presidential debate reads like a Who's Who of corporate America: Philip Morris, Atlantic Richfield, AT&T, and RJR Nabisco, to name a few." *See Big Business May*

that in the debate season we find what I would call an "electoral-industrial complex" hard at work shaping for the voters the precise choices and arguments it wants them to see and hear. The manipulation of debates by this electoral-industrial complex cuts against the purpose and meaning of FECA, which essentially intends to build a wall between corporate power and democratic elections.[156]

B. *How the CPD Violated the FEC's Debates Regulations: Perot v. FEC*

When the CPD announced that it was inviting only Bill Clinton and Bob Dole and their running mates to debate, Perot '96 immediately filed a complaint with the Federal Election Commission alleging that the CPD had violated the FEC's regulation on debates, which requires corporations seeking to sponsor debates to use only nonpartisan and "pre-established objective criteria" in selecting which candidates will participate.[157]

It is essential to see why the FEC has power to regulate the nature and content of corporate-subsidized debates in this way. Under FECA, private corporations, for-profit and not-for-profit alike, are absolutely forbidden to make contributions or expenditures in connection with federal elections.[158] The FEC created a narrow exception to this rule for corporations to spend money for candidate debates. The safe harbor exemption applies only so long as the corporation uses "pre-established objective criteria" in determining which candidates may participate and does *not* "use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate."[159]

Perot '96 alleged that the CPD had not used "pre-established objective criteria" in excluding Perot and that it had explicitly and forthrightly used the fact of "nomination by a particular party" as "the sole objective criterion" for including Clinton and Dole.[160] Thus, because the debates

Be Debate Winner, Too, REC. N. N.J., Oct. 20, 1992, at E1. In that year, Philip Morris Companies, "a longtime backer" of the Commission on Presidential Debates "*paid about $250,000 in cash and in-kind contributions. . . .*" *See* Jonathan Groner and Sheila Kaplan, *Buying Smoke and Mirrors at the Debates*, LEGAL TIMES, Nov. 2, 1992. Philip Morris also managed to buy a little bit of public association with the electoral system: "Sharp-eyed viewers of the presidential debates may have noticed a large banner visible during post-debate interviews. On it was the name of one of the events' two major national sponsors: the Philip Morris Cos." *Id.*

156. *See infra* note 228.

157. 11 C.F.R. § 110.13 (1996) provides in pertinent part: "*Criteria for Candidate Selection*: For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate."

158. *See* 2 U.S.C. § 441b(a) (1994); 11 C.F.R. § 114.2(b) (1995).

159. 11 C.F.R. § 110.13(c) (1996).

160. Verified Complaint for Declaratory Judgment and Injunctive Relief, at 11, *Perot* (No. 96-2132).

were outside of the safe harbor exception created by the FEC, the millions of dollars spent by the CPD on the national televised debates and surrounding publicity were nothing but illegal corporate campaign contributions to the Clinton and Dole campaigns.[161] Moreover, the CPD itself, rather than acting as an objective not-for-profit corporate debate sponsor, was acting as a political committee on behalf of the Democratic and Republican candidates and yet had failed to register as such, as required by law.[162]

The evidence for these claims is strong. The CPD's "Candidate Selection Criteria" for 1996 explicitly provided that the CPD would automatically extend "an invitation to the respective nominees of the two major parties to participate in the Commission's 1996 debates."[163] Thus, Clinton and Dole were invited to participate based *solely* on their "nomination by a particular political party."[164] They were never subjected to any other tests of their qualifications. No one ever asked whether Dole, for example, had a "realistic chance of winning the election."[165] The CPD thus violated the cardinal rule laid down for corporations that want to sponsor debates: it used political party as "the sole objective criterion"[166] for inviting Dole and Clinton to participate.

Moreover, Perot alone was subjected to a battery of arbitrary and subjective tests designed to assure his exclusion. The CPD employed "a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national enthusiasm or concern, to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates."[167]

The fact that even these three impenetrably foggy standards for consideration are described in a nonexhaustive way ("including a review of") shows how much the CPD refuses to be held accountable to *any* determinate or adjudicable standard. Within the second standard, consider the appalling vagueness and perilous arbitrariness of the five "factors" that the CPD claims to use to determine whether there are sufficient "signs of national newsworthiness and competitiveness":

> a. The professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks.

161. These contributions were in violation of 2 U.S.C. § 441b and 11 C.F.R. § 114.2(b).

162. *See* 2 U.S.C. § 433(a) (1994); 11 C.F.R. § 102.1(d) (1999).

163. *Commission on Presidential Debates' Candidate Selection Criteria for 1996 General Election Debate Participation*, <http://www.debates.org/criteria.htm>.

164. 11 C.F.R. § 110.13(c) (1996).

165. *Commission on Presidential Debates' Candidate Selection Criteria for 1996 General Election Debate Participation*, <http://www.debates.org/criteria.htm>.

166. 11 C.F.R. § 110.13(c) (1996).

167. *Id.*

b. The opinions of a comparable group of professional campaign managers and pollsters not then employed by the candidates under consideration.
c. The opinions of representative political scientists specializing in electoral politics at major universities and research centers.
d. Column inches on newspaper front pages and exposure on network telecasts in comparison with the major party candidates.
e. Published views of prominent political commentators.[168]

In Perot's case in 1996, there is a major question whether the CPD even went through the motions of talking to the various people called for by these factors.[169] The CPD never gave any specific description of the process that took place and the results of its various interviews. But even assuming that it happened, there are fatal problems with these factors as "pre-established objective criteria," problems that mirror the difficulties with the meandering criteria invoked by AETN in the *Forbes* case.

In the first place, unlike the requirement that the presidential candidate be on the ballot in a sufficient number of states to be able to collect a majority in the electoral college, or a requirement that the candidate have been granted general election public financing, these are not pre-established criteria at all. There is nothing the candidate can do in advance to make certain that he will pass the test short of lobbying the unknown bureau chiefs, unemployed campaign managers, pollsters, political scientists, and prominent political commentators who are responsible for a large part of the decision. Unlike ballot access rules which set an objective target for a candidate to meet, requiring only tremendous effort, concentration, and organization, a debate standard based on the opinions of individuals in the media or the political campaign business gives the candidate little or no opportunity to affect the outcome.

Second, there is nothing remotely "objective" about their judgments. Professional campaign managers and pollsters, for example, are almost always invested in the success of one party or another and will generally be disinclined to support a third-party or independent candidate. Political commentators are hired for their subjective opinions. There are no controls to make certain that the interviewees are not already supporting a candidate, and there is no way of knowing *why* a "political commentator" believes this or that candidate will win or lose. There is no methodology for determining what the basis of their opinion is as to who is going to *win*. As the general counsel of the FEC put it in his report upholding the Perot '96 claims, "it seems that a number of highly subjective judgments

168 *Id.*

169 Perot '96 received affidavits from numerous Washington news bureau chiefs attesting to the fact that they were never interviewed by the CPD (*affidavits on file with author*).

must be made to compile the data underlying this factor, ranging from the identification of which universities can be considered major universities to the question of what mix of political scientists would be 'representative.'"[170] Subjectivity of this kind in the campaign process, as Bennett Matelson has written, "is fraught with dangers for minor presidential candidates. . . . It tempts officials who have political interests at stake to abuse their discretion by manipulating the criteria according to their partisan aims."[171]

Most importantly, the judgment that these pundits and armchair analysts are called to make—whether the candidate has a "realistic chance of winning the election"—is illogical, irrelevant, and antithetical to the First Amendment. The "realistic chance" judgment is illogical because it completely inverts the proper sequence of events in a democratic election campaign. The idea of a campaign is that the debate among candidates *comes first, and then voters decide who they think* should be elected. Yet, asking pundits and pollsters whether a candidate has a "realistic chance" of winning (however defined—and it is *never* defined) *before* the debate takes place is to call part of the election over before some of the candidates have even spoken. This is not democracy, but government by punditry and polling; it destroys the sequence of dialogue and decision-making integral to democratic elections. In a very real way, debate exclusion robs the electorate of meaningful debate and choice. For the whole point of an election campaign is to allow candidates to change the voters' minds along the way, not to freeze the electorate's first impressions.

The judgment is also irrelevant, for even if we knew who was going to win, real democracy requires that losers have the opportunity to join public debate and influence the course of public events. Losers often set the frame for public decision making later, and often send powerful messages by taking votes from the winner or the second-place candidate.

Beyond the fantasy-land quality of the selection criteria imposed on Perot alone, there appears to have been direct involvement of the Democratic and Republican candidates in the CPD's supposedly objective deliberations.[172] This means that the CPD was likely acting as a "political committee" on behalf of the two parties.[173] As the general counsel of the FEC put it:

170. 1998 FEDERAL ELECTION COMMISSION, FIRST GEN. COUNSEL'S REP. ON MURS 4451, 4473, at 18.

171. Matelson, *supra* note 61, at 1241.

172. *See* Matelson, *supra* note 61, at 1277 (recognizing that the CPD is a coalition of mainstream Democrats and Republicans who tend to favor placing establishment candidates on the ballot).

173. The legal question is whether CPD made expenditures of $1000 or more and whether its major purpose is the nomination or election of candidates for federal office. *See* 11 C.F.R. § 114.12(a) (1999).

> The role played by Clinton/Gore and Dole/Kemp in CPD's debate participant selection process and the role played by the DNC and the RNC in the creation of CPD suggest that CPD's major purpose may be to facilitate the election of either of the major parties' candidates for president. Therefore, there is reason to believe that CPD is a political committee . . . .[174]

The origins of the Commission on Presidential Debates support the charge that CPD is a political committee in disguise. In 1985, the chairmen of the Democratic and Republican National Committees executed a memorandum of agreement stating that the two parties would work together to sponsor presidential debates. Over the vociferous objections of the League of Women Voters, the Committee chairmen, Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr., sought to replace the League's debates with "nationally televised joint appearances conducted between the presidential and vice-presidential nominees of the two major political parties during general election campaigns."[175] The party chairs stated that "to better fulfill our parties' responsibilities for educating and informing the American public and to strengthen the role of political parties in the electoral process, it is our conclusion that future joint appearances should be principally and jointly sponsored and conducted by the Republican and Democratic Committees."[176] They went on to agree that "the format and most other details of joint appearances" should be "determined through negotiations between the chairmen and the nominees of the two political parties. . . . ."[177] Finally, they "thank[ed] the League of Women Voters for having effectively laid the groundwork on which we are building today." Fifteen months later, the two parties issued a joint press statement announcing the incorporation of the CPD, declaring openly that it was a "bipartisan, non-profit, tax exempt organization formed to implement joint sponsorship of general election presidential and vice-presidential debates . . . by the national Republican and Democratic Committees between their respective nominees."[178] From the beginning, the CPD has been co-chaired by none other than Frank Fahrenkopf and Paul Kirk, who had together declared their commitment to bipartisan televised joint appearances and both of whose party affiliations are continually and carefully noted in major CPD communications.

174. 1998 FEDERAL ELECTION COMMISSION, FIRST GEN. COUNSEL'S REP. ON MURS 4451, 4473, at 29.

175. Joint Memorandum of Agreement on Presidential Candidate Joint Appearances signed by Paul G. Kirk, Jr., Democratic National Committee Chairman and Frank J. Fahrenkopf, Jr., Republican National Committee Chairman (Nov. 26, 1985) (on file with the *Texas Law Review*).

176. *Id.*

177. *Id.*

178. News from the Democratic and Republican National Committees (Feb. 18, 1987) (on file with the *Texas Law Review*).

The creation of the CPD set the stage for the Democratic and Republican nominees in 1998 to impose a set of meticulous and non-negotiable demands on the original debate sponsor, the League of Women Voters, which promptly withdrew its sponsorship and denounced the two parties. "The League of Women Voters is withdrawing its sponsorship of the presidential debates scheduled for mid-October because the demands of the two campaign organizations would perpetrate a fraud on the American voter," League President Nancy M. Newman told the press on October 3, 1998. She continued: "It has become clear to us that the candidates' organizations aim to add debate to their list of campaign-trail charades devoid of substance, spontaneity and have answers to tough questions. The league has no intention of becoming an accessory to the hoodwinking of the American Public."[179]

The experience with the 1992 presidential debates underscores how closely the Democratic and Republican parties control the CPD's decision-making. In that year, the CPD had not wanted to invite Perot and his running mate, Admiral James B. Stockdale, to debate President Bush and Governor Clinton, but "the Bush campaign insisted, and the Clinton campaign agreed, that Mr. Perot and Admiral Stockdale be invited to participate in the debates."[180] The CPD "expressed concern about the requirement that Mr. Perot be included,"[181] and refused the Bush-Clinton proposal at first, counteroffering that Perot and Stockdale should be invited to participate in only two of the four scheduled debates. The campaigns responded that this counteroffer "was unacceptable," and the CPD gave in to their decision.[182]

The Democratic and Republican parties continued their effective control of the CPD when its members acted to exclude Perot and Choate from the 1996 debates. The CPD had not only Messrs. Kirk and Fahrenkopf as co-chairs, but four Democratic and four Republican commissioners, three of whom were sitting members of the U.S. Congress: Senator Paul Coverdell (R. Ga.), Congresswoman Barbara Vucanovich (R. Nev.), and Congressman John Lewis (D. Ga.). The other commissioners were all either former elected Democratic and Republican party officials or Democratic and Republican party activists and luminaries.[183]

In approving the Perot '96 complaint and finding "reason to believe" that the debates were illegal in-kind contributions and that the CPD

179. *Id.*

180. *Presidential Debates: Hearing Before the Subcomm. on Elections of the Comm. on House Admin.*, 103d Cong., 1st Sess. 44, 50-51 (June 17, 1993) (testimony of Bobby R. Burchfield).

181. *Id.* at 51.

182. *Id.* at 52.

183. *See* Jamin B. Raskin, *Silencing the Other Parties*, WASH. POST, Oct. 30, 1996, at A23 (discussing the "avowedly 'bipartisan' private corporation made up of five Democrats and five Republicans, including three members of Congress").

operated as a political committee, the FEC's general counsel cited evidence that operatives for the Clinton and Dole campaigns used the question of Perot's participation in the debates as a bargaining chip in negotiations between the two camps.[184] What was supposed to be an objective decision by neutral nonprofit corporate actors was actually a political fix behind the scenes by Democratic and Republican partisans on the CPD following an explicit deal cut by the Clinton and Dole campaigns.

The FEC's general counsel cited the proceedings of a post-election conference that took place at the Harvard Kennedy School's Institute of Politics. He quoted George Stephanopolous, Senior Adviser to the President, saying in reference to the Dole-Kemp campaign:

> [T]hey didn't have leverage going into the negotiations. They were behind, they needed to make sure Perot wasn't in it. As long as we could agree to Perot not being in it we could get everything else we wanted going in. We got our time frame, we got our length, we got our moderator.[185]

Stephanopolous even pointed out that the Democrats themselves had no reason to want Perot in the debate raising difficult issues and drawing public attention: "[W]e didn't want [people] to pay attention. The debates were a metaphor for the campaign. We wanted the debates to be a nonevent."[186] The following exchange between journalist Chris Matthews and Stephanopolous brings the point home with even more emphasis:

> Matthews: Did they accept that deal to keep Perot out of the debate? Was that part of the deal? In other words, [the Dole camp] wanted Perot out and you wanted the debates over with, so you basically decided to keep the other guy out?
> Stephanopolous: Well, we didn't want Perot in either.
> Matthews: You didn't?
> Stephanopolous: No.
> Matthews: Well, why did you make us think you did?
> Stephanopolous: Because we wanted Perot's people to vote for us. [Laughter] How's that for candor? [Laughter][187]

This conversation shows that the CPD was not acting as an impartial debate sponsor, consistent with the FEC's rules, but rather as a "political committee" in service of the Democratic and Republican campaigns.

184. 1998 FEDERAL ELECTION COMMISSION, FIRST GEN. COUNSEL'S REP. ON MURs 4451, 4473, at 20-21.

185. CAMPAIGN FOR PRESIDENT: THE MANAGERS LOOK AT '96, at 170 (Harvard Univ. Inst. of Politics ed., 1997).

186. *Id.* at 162.

187. *Id.*

Under FECA, a political committee is defined as "any committee, club, association, or other group . . . which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year . . . ."[188] Political committees must register with the FEC, which the CPD did not do, and must report both the contributions it receives and the expenditures it has made in accordance with FECA and FEC regulations. It is understandable that President Clinton and his agents wanted the 1996 presidential debates to be a "nonevent," and it is understandable that Senator Dole and his agents feared that Perot might overtake him as Clinton's main rival, but the CPD had no authority to disregard federal election law in order to enforce the bipartisan wishes of candidates Clinton and Dole. The private agreement to exclude Perot and Choate, entered into first by the two campaigns and later ratified by the CPD, quietly turned the debates into millions of dollars of free television time purchased for the benefit of the Clinton and Dole campaigns by the CPD's commercial sponsors. Thus, the CPD's traditional corporate benefactors, like R.J. Reynolds and Philip Morris,[189] have located one more "soft money" loophole through which to funnel hard money to presidential candidates of the two-party system. Bipartisanship essentially means that you can buy either party, and if you buy one, you get the other one free.

The bipartisan "joint appearances" of 1996 robbed the American people of the opportunity for open and honest dialogue in the election. The two major-party candidates—who favored NAFTA and GATT and had no interest in talking about campaign finance reform—effectively excluded two candidates, Ross Perot and Ralph Nader, who opposed NAFTA and GATT and championed campaign reform.[190] This striking coincidence did not escape public notice at the time.[191]

When Perot '96 filed a complaint with the FEC in September, it simultaneously filed in federal court a suit for a preliminary injunction

188. 2 U.S.C. § 431(4) (1994).

189. *See Presidential Debate Commission Criticized for Accepting Tobacco Money*, U.S. NEWSWIRE, Sept. 25, 1996, *available in* 1996 WL 12123065.

190. *See* Christopher Hitchens, *The Incorporated Debates*, THE NATION, Oct. 21, 1996, at 8 (observing that it seemed more than coincidental that both Perot and Nader, who both led opposition to the bipartisan treaties, were "excluded by definition" from the debates).

191. For example, the Institute for Policy Studies noted it in a press release:

> The Commission on Presidential Debates has received funding from firms that are major contributors to political campaigns and involved in public policy . . . . [A] look at the Commission's top corporate sponsors in 1992 reveals that the majority were leading promoters of the North American Free Trade Agreement (NAFTA), a policy supported by Bill Clinton and Bob Dole, while the two candidates being excluded from the debates, Ross Perot and Ralph Nader, are outspoken NAFTA critics.

Press Release, *Corporate Power, Democracy and the Presidential Debates: Debate Commission Funded by Top Corporate NAFTA Supporters*, THE INSTITUTE FOR POLICY STUDIES, Sept. 26, 1996 (on file with author).

against the CPD's use of subjective criteria, alleging that the FEC would not itself act in time to provide relief and that, if the FEC allowed the CPD to go forward, Perot and Choate would be irreparably damaged.[192] But the plaintiff's motion for injunctive relief was denied on the grounds that Congress had designed the Federal Election Campaign Act in such a way as to foreclose a private right of action in federal court and to require all complaints to be heard first by the FEC in all cases.[193] Perot '96 filed an emergency appeal in the U.S. Circuit Court of Appeals for the District of Columbia, arguing that waiting for the FEC to rectify the CPD's violation of Perot's regulatory and statutory rights would be futile because of the FEC's slow-moving process and famous backlog and delay. However, the D.C. Circuit essentially found that its hands were tied by the statutory design, and there was nothing it could do to circumvent the statute's exhaustion of remedies requirement.[194] As expected, nothing was heard from the FEC for more than a year, long after the debates and the election were over.[195] Thus, the requirement that debate exclusion complainants wait for the FEC to act proved to be effective insulation from review for corporations engaged in debate gerrymandering.

Nevertheless, the first official response from the FEC was refreshingly honest and lucid, even going beyond what Perot '96 had alleged. The general counsel issued a 37-page report agreeing with Perot '96 that there is "reason to believe" that the contributions were illegal and that the CPD was acting as a "political committee."[196] He proposed an investigation and series of subpoenas to determine what exactly took place when the CPD decided to exclude Perot and to bend to the wishes of the Clinton and Dole campaigns.

True to form, however, when the general counsel gave his meticulous and exhaustive report to the all-Democrat and Republican commissioners of the FEC, they followed the lead of the Democrat and Republican

192. *See* Perot v. Federal Election Comm'n, 1996 WL 566762 (D.D.C.).

193. The U.S. Circuit Court of Appeals for the District of Columbia upheld the District Court's decision. *See id.* at *3. In rejecting Perot's request for injunctive relief, Judge Hogan stated:

> The Court recognizes the frustration and perhaps this, I think, admitted by the defendants perhaps unfairness in the process that does not allow all those who consider themselves legitimate candidates for our most important office in the country to fully participate, but I believe the complaint should be with Congress and the statutory framework established for the FEC to operate and that this carefully crafted statute and the regulations promulgated by the FEC under their authority and expertise are not easily challenged.

Id.

194. Perot v. Federal Election Comm'n, 97 F 3d 553, 558 (D.C. Cir. 1996) (citing the FEC's exclusive jurisdiction to enforce FECA and the procedure for appealing to the District Court an FEC order or failure to act after 120 days).

195. FIRST GEN. COUNSEL'S REPORT ON MURS 4451 & 4473, FEDERAL ELECTION COMM'N 29 (1998).

196. *Id.* at 29.

commissioners of the CPD and voted unanimously to override his analysis and recommendations. They found "no reason to believe" that the CPD had "violated the law by sponsoring the 1996 presidential debates or by failing to register and report as a political committee."[197] The FEC's statement is a dishwater regurgitation of the CPD's selection criteria topped off with conclusory bureaucratic language like: "The pool of experts used by CPD consisted of top level academics and other professionals experienced in evaluating and assessing political candidates. By basing its evaluation of candidates upon the judgment of these experts, CPD took an objective approach in determining candidate viability."[198]

Without any analysis at all, the FEC simply found that "viability" itself is an objective criterion for selecting debate participants, that poll results are also valid,[199] and that the amount of money a candidate has available to him or her "is certainly an objective factor which can be legitimately used by a sponsoring organization."[200]

Perot '96 has appealed the FEC's decision to federal district court in the District of Columbia, arguing (1) that the FEC erred as a matter of law in not following its own general counsel's recommendations as to the CPD's likely violation of the debate regulation; and (2) that, if it properly interpreted its regulation to allow such explicitly partisan and subjective considerations to govern the candidate selection process, then the regulation is itself *ultra vires*, outside of the FEC's authority under the statute.[201]

C. *Why the FEC's Regulation Must Be Read to Forbid Exclusionary Debates or Fail as Outside of the Statute and Unconstitutional*

The District Court should find that the CPD did not use objective and nonpartisan criteria when it excluded Perot and Choate from the debates. If it finds that the CPD did comply with the regulation, then the regulation is not only toothless but clearly outside of the terms of FECA. And if FECA is somehow read to authorize corporate-funded bipartisan debates of this kind, then the statute is itself in conflict with the First Amendment.

But there is no need to leap to the constitutional level, because FECA is adamant on this point. The purpose of FECA's ban on external campaign expenditures by corporations is to abolish the political influence of "those who exercise control over large aggregations of capital."[202] If the

197. STATEMENT OF REASONS ON MURS 4451 & 4473, FEDERAL ELECTION COMM'N 1 (1998).

198. *Id.* at 8.

199. *See id.* at 8 n.7.

200. *Id.* at 9.

201. Complaint for Perot '96, Inc. at 1, 4, Perot v. Federal Election Comm'n, 1996 WL 566762 (D.D.C.).

202. United States v. UAW, 352 U.S. 567, 585 (1957) (explaining the purpose of the congressional limitation on expenditures); *see also* Pipefitters Local Union No. 562 v. United States,

debates regulation allowed corporations to fund and sponsor politically *stilted and tendentious public candidate debates*, the regulation would dramatically conflict with this statutory purpose. Debates are not only obviously "in connection with" federal elections *within the meaning of the* statute,[203] but are often the central organizing event of the campaign.[204] *In presidential elections*, debates have become "the centerpiece of each quadrennial election, the Superbowl of American politics."[205] They *frame for voters their* whole concept of what the range of legitimate choices is in an election. Thus, it is understood perfectly well by debate sponsors and political analysts that "*the* most important action taken by a debate sponsor may consist of defining requirements [f]or participation in a debate."[206]

When challengers are included in a televised presidential debate, as Ross Perot was in 1992, it gives them a valuable chance to articulate their agenda and explain their views.[207] Conversely, when a debate *sponsor* acts to exclude certain candidates, it has dramatic significance that reverberates across the political *spectrum. Excluding a candidate* from a debate is almost always an electoral death sentence. While his opponents *are validated in the public eye and given millions* of dollars in free

407 U.S. 385, 416 (1972) (noting that the FECA limits on union contributions attempt to "eliminate the effect of aggregated wealth on federal elections"); Federal Election Comm'n v. National Right to Work Comm., 459 U.S. 197, 207 (1982) (holding that the purpose is to nullify the political influence of "substantial *aggregations of wealth amassed by the special advantages which go with the corporate* form of organization").

203. *See* 2 U.S.C. § 441(b) (1994).

204. Debates often make or break presidential (and congressional) candidacies. President Carter attributed both his victory in 1976 and his loss in 1980 to his debate performances in each campaign. NEWTON N. MINOW & CLIFFORD M. SLOAN, FOR GREAT DEBATES: A NEW PLAN FOR FUTURE PRESIDENTIAL TV DEBATES 20 (1987) (quoting Carter's statement about 1976 that "If it hadn't been for the debates, I would have lost," and his statement about 1980 that "I lost the debate . . . *and that* hurt badly."). Historians frequently cite the televised debate between John F. Kennedy and Richard Nixon as the turning point in the 1960 presidential election. *See* THEODORE H. WHITE, THE MAKING OF THE PRESIDENT: 1960, at 294 (1961) (suggesting, based on polling information, that two million citizens may have cast their votes for Kennedy on the basis of the debates alone, providing his margin of victory). Debates are especially critical for *challengers, who usually have much less access to public* attention than do incumbents. This is why pollster Pat Caddell told Jimmy Carter that "debates are the vehicles for challengers." JUDITH S. TRENT AND ROBERT V. FRIEDENBERG, POLITICAL CAMPAIGN COMMUNICATION: PRINCIPLES AND PRACTICES 255 (1983) (quoting Patrick Caddell, "Memo of October 21, 1980," at 412).

205. M J. Rossant, *Foreword* to NEWTON N. MINOW & CLIFFORD M. SLOAN, FOR GREAT DEBATES: A NEW PLAN FOR FUTURE PRESIDENTIAL TV DEBATES, at v (1987). The commonly invoked Superbowl metaphor is unwittingly revealing because large for-profit corporations pay for the Superbowl and, in the last two elections, paid for the presidential debates as well. The difference is that corporate sponsorship of the Superbowl is perfectly lawful while corporate sponsorship of political *events is expressly prohibited by law.*

206. Joel L. Swerdlow, BEYOND DEBATE: A PAPER ON TELEVISED PRESIDENTIAL DEBATES 41 (on file with author)

207. *See id.* at 35.

publicity, an excluded candidate receives a stamp of irrelevance, frivolousness, or marginality.[208] *The electorate gets the message, often explicitly* (as in this case), that the candidate is not serious and does not have a realistic chance to win.

Just as excluding candidates from debates undermines certain candidacies, it gives a major boost to the candidates included who are competing for votes against the excluded ones. Those who have studied the issue seem to agree that "every significant third-party candidate invariably takes more votes from one major-party nominee than from the other."[209] Thus, the "major-party nominee who is hurt most will quite logically try to make sure the independent candidate is excluded from the debates or to avoid all debates that include this independent."[210] In 1996, it was Bob Dole who had the most to fear from Ross Perot, and he insisted on keeping Perot out of the debates. It is very possible that, had Perot been permitted *to debate, he would have overtaken Dole and finished second to President* Clinton. At any rate, by spending millions of dollars on a presidential debate and excluding Perot, the CPD inevitably altered the dynamics of the race and changed the ultimate outcome of the voting.

Moreover, excluding candidates from debates skews and restricts political discourse. Invited candidates are able to influence public discussion in significant ways while excluded candidates lose the crucial moment to speak. Without Perot's focus in the 1992 debates on deficit reduction and generational equity, "there was little or no sign that George Bush and Bill Clinton were prepared to discuss these primal issues."[211] But Perot's participation made deficit reduction a central issue in both the campaign and the first Clinton administration.[212] Indeed, many observers noted that the 1992 debates were of an unusually positive and substantive *nature*: "*With three candidates, the whole dynamic of the event changes.* Instead of a duel in which your opponent's losses are your gains, the *debate becomes a beauty pageant in which trashing the opposition pays few*

208. As Joel Swerdlow wrote of why the League of Women Voters acted properly by inviting independent John Anderson to participate in the 1980 presidential debates, excluding a candidate "unfairly signal[s] to the public that his candidacy [is] insignificant" and, among other things, could "seriously harm[] his fund-raising efforts." *Id.* at 40.

209. *Id.* at 35.

210. *Id.* In 1980, President Carter refused to join the first League of Women Voters' debate because the League had invited John Anderson, who stood at 24% in the polls and posed a major threat to Carter. As Reuters put it, "The Carter organizers feel the publicity given to Mr. Anderson in the *debates could revive his falling support in the polls and lead to the President losing crucial states like* New York." Bruce Russell, REUTERS, Sept. 11, 1980.

211. Morgenthau, *supra* note 115, at 23, 28.

212. *See* William Schneider, *It's the Deficit, Stupid: Clinton Is Using All the Red Ink to Remake the Democratic Party in His Own Image*, L.A. TIMES, Dec. 27, 1992, at M1 (noting that after the election, "Clinton made a point of praising the testimony of John White, the author of Ross Perot's painful deficit-reduction plan").

dividends."[213] Conversely, the decision by the CPD to exclude Perot in 1996 artificially constricted the boundaries of political discourse in the election. With Perot closed out, there were no candidates in the debate who opposed NAFTA and GATT or wanted to talk about the growing revelations about soft money abuse by the Democratic and Republican parties.[214]

Thus, debate exclusion also changes the nature of campaign discussion. If a corporation is the sponsor, it has violated FECA by involving itself in a federal campaign. Indeed corporate sponsorship of debates may be the most insidious form of illegal corporate interference in federal elections because it tends to be invisible, meaning the public cannot determine for itself what impact the corporations have had on the framing of the candidates, the issues, and the dialogue. Corporations get to pose as good-willed friends of the democratic process while they stage-manage the main show.

Corporate debate sponsors inescapably make a whole series of judgment calls about the nature and format of debates that have tremendous political consequences. For example, debate sponsors typically invite journalists to pose questions. Which journalists? This is an intrinsically political decision. Exchanges between journalists and candidates often produce the defining moments in presidential campaigns: who will they target with what questions? In 1988, Governor Michael Dukakis's electoral fate was sealed when he gave a wooden response to a provocative question from CNN's Bernard Shaw about whether he would feel differently about the death penalty if his wife were raped.[215] Shaw could have just as well chosen to ask George Bush if his feelings about abortion would change if his daughter had been raped and wanted to have an abortion. The point is that the choice of Mr. Shaw as a participant ended up having a dramatic political effect on the course of the election. The selection of journalists, and the journalists' selection of questions, are not neutral choices.

Other questions similarly force political judgment calls. What cities should the debates be in? How high the podiums? Should there be an

213. Robert D. Deutch & Seldon Biggs, *Primer for a Debate Orgy: Tactics Change in 3-Man Clash*, ATLANTA J. & CONST., Oct. 11, 1992, at G1.

214. *See, e.g.*, Tom Diemer, *NAFTA Isn't A Burning Issue for Democrats*, THE PLAIN DEALER (Cleveland), Oct. 23, 1996, at 8A (quoting Representative Sherrod Brown: "[I]t is no mystery why free trade has not been a burning issue in the campaign for the White House. Clinton and Bob Dole are in basic agreement, while NAFTA-basher Ross Perot was excluded from the presidential debates . . .").

215. *See* Susan Page, *The New York Newsday Interview with Bernard Shaw: He Asked Dukakis the Killer Question*, NEWSDAY, Jan. 12, 1989, at 73 (quoting Shaw as asserting his duty to "provoke candor" in candidates and noting that later interactions with Dukakis told him that the candidate had been "haunted by the response he gave").

audience participation or reaction component? Should there be a rebuttal time? Should the candidates shake hands? Should a shorter candidate get a lift to equalize the candidates' height appearance? There is no right, objective answer to any of these questions, and they inevitably become part of the elaborate political negotiations that take place among candidates. "As the League [of Women Voters] itself has explained, and as many studies of the debates have shown, candidates and their aides exercised extremely close control over all aspects of debate preparations."[216] In 1960, the Kennedy and Nixon camps clashed bitterly over whether the television networks should use candidate reaction shots. CBS sided with Kennedy and decided to use them, but "apparently agreed to Vice-President Nixon's request that there be no left profile shots and no shots of a candidate wiping perspiration from his face."[217] In 1992, the cameraman's decision to focus on George Bush glancing at his watch as Bill Clinton spoke bolstered the Democrats' claim that "it's time for them to go."[218] The Democrats repeatedly invoked that mantra and placed it on a famous campaign button over the image of President Bush checking his watch.[219]

Allowing a corporation to set up federal candidate debates at all is thus in deep tension with the ban on corporate involvement in federal elections. There is a good argument under FECA that corporations should not be permitted to sponsor such debates even if they *do* invite all balloted candidates. After all, if the purpose of the ban on corporate contributions and expenditures in federal campaigns is essentially to build a wall between corporate power and democratic elections, that wall is arguably breached when the Philip Morris Companies, the Prudential Insurance Company of America, AT&T, the Atlantic Richfield Co., the Dun & Bradstreet Corp., the Ford Motor Co., Hallmark Cards Inc., and IBM effectively sponsor presidential candidate debates, as they did in 1992.[220] Rather than keeping their distance from the democratic process, corporations attempt to fuse their image with it, as when Philip Morris, a "major national sponsor,"[221] worked with the CPD in 1992 to hang "a large [Philip Morris] banner visible during post-debate interviews"[222] in the backdrop of the debate setting. Surely having its corporate logo displayed throughout the television coverage, being recognized in the debates printed

216. MINOW & SLOAN, *supra* note 204, at 39.

217. *Id.* at 13.

218. Maureen Dowd, *Bush Cheers His Advisors at Debate. His Red Necktie Outclassed Rivals*, ATLANTA J. & CONST., Oct. 20, 1992, at A15.

219. *Id.*

220. *See* Groner & Kaplan, *supra* note 155, at 5.

221. *Id.*

222. *Id.*

program,[223] and receiving free tickets to the vice-presidential debate[224] all gave Philip Morris—no stranger to public controversy and no disinterested investor in public affairs—an emphatic presence in the presidential election process. The message sent to the public is one of mutual endorsement between staging corporations and the democratic process itself, a kind of semiotics disallowed in the church-state area[225] and antithetical to FECA's effort to prevent corporate manipulation of democratic politics.

Whatever the legality of corporate-sponsored debates that include *all* balloted candidates, at the very least FECA cannot tolerate corporate-funded debates which give a platform to certain candidates but not others. This was an understanding once shared by the FEC itself, which aggressively took the position in the 1976 presidential campaign that the League of Women Voters had to invite *all* presidential primary candidates to its debate or not have the debate at all.[226] This is not a case in which a complete regulatory u-turn should be allowed under *Chevron* principles,[227] since the new upside-down interpretation is completely at odds with the statute itself. Congress clearly intended to permit funds to be spent by corporations on *internal* activity in connection with federal elections, but to prohibit any funds being spent on *external* corporate activity in connection with federal elections.[228]

223. *Id.*

224. *See* Sheldon Shafer, *City Raises $300,000 Toward Cost of Hosting Quayle-Gore Debate*, COURIER-JOURNAL (Louisville, Ky.), Aug. 14, 1992, at 4B (reporting that one-third of free tickets would probably go to local corporate sponsors, including, among others, Philip Morris).

225. *See, e.g.*, County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. 573, 601-02 (1989) (prohibiting the display of a Christmas creche in a county courthouse); Lee v. Weisman, 505 U.S. 577 (1992) (prohibiting religious invocation and benediction prayers at public school graduation ceremonies).

226. *See* Michael Malbin, *After Surviving Its First Election Year, FEC Is Wary of the Future*, NAT'L JOURNAL, Mar. 26, 1977, at 471 (discussing the FEC's original position that, under FECA, any corporation that spent money on a debate that included less than the full field of candidates was in fact making an illegal contribution or expenditure on behalf of included candidates, and thus limiting corporate-sponsored debates to truly nonpartisan and educational ones to which all legally qualified candidates are invited). In an "opinion of counsel" rendered on November 21, 1975, the FEC's general counsel stated that the FEC would approve of corporate contributions to the League of Women Voters for the purpose of sponsoring presidential primary forums, but only if "the League intended to invite all candidates to the forums." *Id.* at 470. On August 30, 1976, as the League of Women Voters planned its general election debate between Gerald Ford and Jimmy Carter, the FEC itself issued a ruling that, while FECA could not prevent the League from *sponsoring* presidential debates exclusively between Democrats and Republicans, "the League could not use its own money to pay for them, nor could it use corporate contributions of the sort it relied on for the primary forums [where it invited all qualified candidates]. Because the debates were not open to all candidates, the Commission said, any corporate contributions would be expenditures 'in connection with' an election and therefore illegal" under the Act. *Id.* at 470-71.

227. *See* Chevron U.S.A., Inc. v. Natural Resource Defense Council, 467 U.S. 837, 843 (1984) (requiring courts to give broad deference to agency interpretations of ambiguous statutes).

228. Congressman Hansen, the author of FECA's ban on corporate contributions and expenditures, explained his three narrow exceptions to the ban in these internal-external terms:

And yet that is precisely the reading that the FEC gives to its debate regulation. It has thus effectively delegated decisions regarding federal election debates to the very corporations that are supposed to be the object of the statutory prohibition on corporate contributions and expenditures. The FEC even explicitly anticipates that "objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes there are too many candidates to conduct a meaningful debate."[229] And it appears also to be accepted by the FEC now that the CPD and similar bipartisan-created corporations can use political party affiliation to certify major-party candidates to debate and meaningless

> If an organization, whether it be the NAM, the AMA or the AFL-CIO, believes that certain candidates pose a threat to its well-being or the well-being of its members or stockholders, it should be able to get its views to *those members or stockholders*.
>
> . . . it has also been recognized that it is proper to allow corporations and unions to conduct nonpartisan registration and get out the vote campaigns.

117 CONG. REC., 43380 (1971) (remarks of Rep. Hansen) (emphasis added).

> . . . *It is not entirely clear to me, even after substantial study, as to whether the* present law requires such campaigns to be limited to members and stockholders. *It is my* judgment that they should be, and the amendment I propose insures that such a limitation would have to be observed. The dividing line established by section 610 is between *political activity directed at the general public* in connection with Federal elections which *must* be financed out of political donations and *activities directed at members or stockholders which may be financed by general funds*.
>
> . . . .
>
> Finally, there can be no doubt that union members or stockholders should have the *right to set up special political action funds supported by voluntary donations from* which political "contributions and expenditures" can lawfully be made.
>
> . . . .
>
> [T]he underlying theory of section 610 is that substantial *general purpose treasuries should not be diverted to political purposes, both because of the effect on the political process of such aggregated wealth and out of concern for the dissenting member or stockholder*.

Id. (emphasis added).

In his concluding remarks, Congressman Hansen again emphasized the categorical line drawn in the statute between *external* election-connected activities, which are prohibited, and specific internal election-connected activities, which are allowed. The "proper balance," he stated,

> . . . consists of *a strong prohibition on the use of corporate and union treasury funds to reach the general public* in support of, or opposition to, Federal candidates and *a limited permission to corporations and unions, allowing them to communicate freely with members and stockholders on any subject, to attempt to convince members and stockholders to register and vote*, and to make political contributions and expenditures financed by voluntary donations which *have been kept in a separate segregated fund. This amendment writes that balance into clear and unequivocal statutory language*.

Id. (emphasis added).

Congressman Thompson, in this, the most authoritative legislative history we have available, repeatedly made clear that the statute itself was to allocate the proper spheres of election-related activity: "Congress should set out in a *clear statutory form* precisely what corporations and unions can and cannot do in the election area." *Id.* at 43383 (remarks of Rep. Thompson) (emphasis added).

229. Corporate and Labor Organization Activity, Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64260, at 64262 (1995).

subjective criteria to accomplish the foreordained exclusion of minor-party candidates.

The FEC's delegation to corporations of the power to pick and choose candidates to debate in this way is the very antithesis of FECA, which was designed to prevent corporations from manipulating the electoral process. Courts must either overrule the FEC's construction of its regulation or strike the regulation down as being ultra vires. If FECA itself is read to authorize corporate subsidy and sponsorship of debates among a subclass of candidates running for a particular federal office, then the statute is suspect under all of the First Amendment and equal protection principles discussed above in the analysis of government-sponsored debate exclusion.[230]

IV. Conclusion: Toward Democratic Debate Protocols

Both the *Forbes* case and the *Perot '96* case teach us that the "viability" screen for debate participation works not only as a form of ideological discrimination by silencing candidates who champion a minority political viewpoint, but as a form of wealth discrimination by silencing candidates who do not have the access to wealth (or willingness to spend it) that is needed to compete effectively. In *Forbes*, AETN explicitly identified Forbes's paucity of funds as a reason to exclude him from its debate. In *Perot '96*, the CPD ironically excluded billionaire Ross Perot from its presidential debates, inter alia, because he had accepted $29 million in public campaign funds in 1996 rather than deciding to spend to the heavens of his own personal fortune. The CPD was straightforward in saying that he could not run a serious race against the Democratic and Republican nominees on such a small war chest since they were each given $61 million in public funds and also had tens of millions of dollars in corporate soft money fueling their efforts.[231]

This stunning rationale for debate exclusion tells us that both governmental and corporate debate sponsors have declared for themselves the right to exclude essentially any third-party or independent candidate who does not have access to a private fortune that he is willing to spend on his campaign. For, at the congressional and state levels, we know that candidates have a nearly impossible time amassing sufficient money to run unless they are nominees of the major parties or are personally wealthy. At the presidential level, the Presidential Election Campaign Fund Act is built on a discriminatory distinction between "major" and "minor" parties

230. *See supra* notes 39-58, 105-08 and accompanying text.

231. *Perot Has No Chance*, USA TODAY, Sept. 18, 1996, at A14 (reciting the CPD's determination that Perot possessed no "realistic chance" in the election).

which guarantees that minor-party presidential candidates will never have the same public funds as the major-party candidates.[232] The political system thus grows ever more estranged from those who, because of their political ideology or social standing, simply do not have ready access to the money that candidates and parties need to buy their way into the inner circles of formal political debate. The "wealth primary" hardens, and the level of mutual democratic respect declines.[233]

But most Americans reject the narrow exclusionary premises of debate exclusion.[234] As in 1996, they want to see independents and third-party candidates included in public discourse, and are disenchanted with the patronizing spectacle of two quasi-official political party nominees debating each other as if "Democrat" and "Republican" were titles of nobility.[235] Indeed, the CPD's 1996 presidential debates had 100 million fewer viewers than the 1996 debates, which included the Perot ticket.[236] It is easy for citizens to discern that bureaucratic and corporate debate sponsors who purport to know the difference between viable and nonviable candidates are taking democracy out of the hands of the people. The debate gerrymander is not only a political power grab but a subtle form of political thought control.

Thus, with the egregious *Forbes* decision being used to validate debate gerrymandering all over America,[237] with Congress sitting inert on the handful of debate fairness bills,[238] with the *Perot '96* case twisting in the wind, the best hope for changing the corrosive dynamics of debate exclusion before the 2000 elections is for citizens to demand a new set of democratic debate protocols.

232. *See* 26 U.S.C. §§ 9002(6)-(8) (1994) (defining a major party as one whose presidential candidate received 25% or more of the popular vote in the last presidential election, a minor party as receiving 5% to 25% of the vote, and a new party as being neither minor nor major).

233. *See* Raskin & Bonifaz, *supra* note 108, at 279.

234. *See supra* note 14.

235. The reference here is, of course, to the constitutional prohibition against Congress granting titles of nobility. *See* U.S. CONST. Art. I, § 9, cl. 8.

236. *See* Raskin, *supra* note 183.

237. *See* DeBauche v. Virginia Commonwealth Univ., 7 F. Supp.2d 718 (E.D. Va. 1998) (dismissing on *non-Forbes* grounds a suit brought by an excluded candidate); Marcus v. Iowa Pub. Television, 150 F.3d 924 (8th Cir. 1998) (following *Forbes* by finding that a debate was a nonpublic forum and minority party candidates could be excluded). *Even on its own pinched terms, Forbes* does not have to be read to uphold debate exclusion in these cases. In *DeBauche*, for example, the district court entered summary judgment for the defendants without even letting a jury decide whether the exclusion of the Reform party's gubernatorial candidate *from* a government-sponsored debate was deliberately motivated by political opposition to her views.

238. *See* H.R. 178, 106th Cong. (1999) (establishing a presidential debate commission); S.B. 982, 106th Cong. (1999) (guaranteeing "clean money candidates" at least two debates); Bipartisan Campaign Reform Act, S.B. 26, 106th Cong. (1999); Campaign Finance Reporting Requirements, H.B. 32, 106th Cong. (1999).

The watchwords for debate protocols must be viewpoint neutrality, maximum democratic inclusion, and universal democratic respect. The First Amendment commands viewpoint neutrality but is not itself viewpoint neutral; rather, it favors the broadest possible participation of diverse political viewpoints. It is affirmatively prodemocratic.

Fair debate protocols begin with the premise that no particular government or corporate actor *must* sponsor a debate, so if it does not have sufficient resources to sponsor a *fair and open debate, it should simply not* sponsor one at all.

Debate sponsors should start by determining how many candidates they believe can reasonably participate in a debate without utterly destroying the value of the forum. As mentioned, there have been excellent debates in Iowa and New Hampshire involving six or more candidates. The eight debates that took place in the 1998 Minnesota gubernatorial contest all featured three candidates, each one including the long-shot Reform party candidate Jesse Ventura, and no one complained at all about cacophony or confusion. As a standard number, perhaps five candidates should be the benchmark figure beyond which debate sponsors can assume there might be problems with fair administration or audience attention. But for five balloted candidates or under, we assume that there is no problem that needs to be resolved.

If we begin with that assumption, the vast majority of problems in congressional and state races simply vanishes, because few races have anywhere near five balloted candidates. Most congressional races, for example, have three or fewer candidates. Debate sponsors in these cases should simply invite *all* candidates who have obtained a place on the ballot.

What about congressional or, say, gubernatorial contests that have more—say eight—balloted candidates in them? At this point the obligation of the debate sponsor is to accommodate all of the candidates in two different debate sittings. Thus, in the unlikely House race that has a Democratic candidate, a Republican candidate, a Green party candidate, a Reform party candidate, a Libertarian party candidate, a candidate of the Peace & Freedom party, and two independent candidates, it would be the responsibility of a government or corporate debate sponsor to sponsor two different debates, randomly dividing the eight candidates into two groups of four.

As we are well trained in the assumptions of the two-party system, immediately one wonders whether, in such a random division of the candidates, the Democrat and Republican will get to debate one another. The answer is that they will have a 50-50 chance to face one another just like any other two candidates. But the Democrat and Republican can always decide to debate one another privately if they do not get the chance in this context. They simply have no unique right to debate one another at public

or corporate expense by taxing citizens of other perspectives for their own joint self-promotion or collecting a camouflaged bipartisan campaign contribution from corporations. Of course, any candidate who chooses not to participate is perfectly free not to. A debate sponsor that does not believe it can accommodate eight candidates in one sitting but refuses to spend the extra money for a second debate should drop the whole matter and leave the debates to others with more patience for democracy.

At the presidential level, things are a bit more complicated because ballot access in a single state cannot determine a candidate's eligibility to debate. The question is whether the candidate, who must be constitutionally qualified to serve as president, has obtained ballot access in a sufficient number of states such that he or she has a mathematical chance to assemble a majority in the electoral college. If not, it simply makes no sense to place him or her in the debate. If this rule had been followed in 1996, there would have been six candidates debating.[239]

There should be two exceptions to this rule. The first is that, even if only two presidential candidates meet this test, the candidate on the ballot with the next highest number of electoral college votes represented by states in which he has obtained ballot status should be included in the debate even if he or she could not win an outright majority in the electoral college. This is because under the Twelfth Amendment to the Constitution, in any contingent election thrown to the House of Representatives as a result of one candidate not receiving a majority in the electoral college, the House must choose a president from the candidates with the top three electoral college vote totals.[240] Thus, the nation should always have the chance to see a likely third-place finisher debate his rivals since he or she is most likely to be a candidate in any contingent House presidential election.

A second exception to this general posture is what we might call a "*lampoon exception.*" Even if a congressional or state legislative candidate is balloted, or even if a presidential candidate is balloted in sufficient states so as to be able theoretically to collect an electoral college majority, the debate sponsor should have the authority to exclude such a candidate if he or she is not "serious" about the election. Seriousness here has nothing to do with prospects for victory—the standard definition offered by public and private debate sponsors—but rather whether the candidate is not taking the process seriously and is instead "lampooning" the democratic election process itself. Now, in democracy, citizens have a right to lampoon and

239. Joe Shaulis, *Perot, 20 Others Snubbed in Debates: From Libertarian to Socialist, Small Parties Won't Be Represented*, DETROIT NEWS, Oct. 6, 1996, at A13 (indicating that Bill Clinton, Bob Dole, Ross Perot, Harry Browne, John Hagelin, and Howard Phillips all had a mathematical chance of winning the election).

240. U.S. CONST. amend. XII.

mock even elections, but this right of expression should not be confused with the process by which the public actually chooses its governing officials.

Thus, comedian Pat Paulsen, even if balloted, should *not* be included in debates no matter how smart and funny he is if his subjective intention is primarily to mock the electoral process itself. But actor Ronald Reagan, if balloted, *should* be included in debates no matter how silly or frivolous some might consider his campaign so long as his *subjective intention* is not to mock the process but rather to participate in it seriously.[241] Even here, however, any close calls should be resolved in favor of inclusion given that many politicians have a good sense of humor that they rightfully train on the process itself. This does not mean that they are not running seriously and taking the election seriously. Many people dismissed now-Governor Jesse Ventura as a flake or a cut-up when he first declared for office in Minnesota, but *he* took the election and his campaign seriously. Similarly, in the same state, when he first ran for U.S. Senate, Paul Wellstone ran a series of hyped-up comical ads making fun of how expensive television time is and how little money his campaign had. Although he was lampooning the costs of campaigning and other absurd dimensions of the political system, he was making serious points and taking both his candidacy and the political process very seriously.[242]

It follows from everything else here that there should be scrupulously fair and equal allotments of time in the debate format itself. When corporations or governments sponsor debates, there is always the danger

241. This discussion invites the further possibility of an insanity exception as well. During the oral argument in *Forbes* in the Supreme Court, Chief Justice Rehnquist hypothesized a balloted candidate that he called "Willy Wacko." Respondent's Oral Argument at 33, Arkansas Educ. Television Comm'n v. Forbes, No. 96-779, 1997 WL 664266 (Oct. 8, 1997). The point of this Article may be resisted by people, like Chief Justice Rehnquist, who believe that it will force debate sponsors to include candidates who actually border on insanity and thus disrupt the debate—that is, candidates who take themselves seriously but whose presence actually mocks or lampoons the process. Unfortunately, it is probably impossible to develop any neutral and objective standards for excluding candidates based on their mental health, and could we really get all of the candidates to take a mental health exam? In any event, it is not clear that such standards would be constitutional given that the Constitution specifies qualifications for both presidential and congressional service but says nothing about sanity or mental health. *See* U.S. Term Limits v. Thornton, 514 U.S. 779 (1995); Powell v. McCormack, 395 U.S. 486 (1969). A mental health test for candidates seeking a place in the debates would be like the drug test for political candidates in Georgia recently struck down by the Supreme Court. *See* Chandler v. Miller, 520 U.S. 305 (1997). Craziness in politics is very much in the eye of the beholder; we should all be free to form such judgments about politicians without being able to use them to exclude qualified candidates from debate.

242. *See* Dane Smith, *Wellstone's TV Ad Campaign Running Full Speed Ahead*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Aug. 31, 1990, at 5B (reporting that Wellstone imitated Woody Allen in his television commercials); Dane Smith, *Wellstone Does "Roger and Me" Number at Boschwitz's Expense*, STAR-TRIB. (Minneapolis-St. Paul, Minn.), Oct. 10, 1990, at 1B (commenting on Wellstone's unique two-minute television commercial that detailed his manic efforts to find his elusive general election opponent).

that they will somehow slant things in such a way as to turn the forum into an implied endorsement of this or that candidate or party. Nothing in the format—moderator, questioners, time allotted, and so on—should communicate any kind of institutional endorsement or favoritism towards a particular candidate. When that happens, we enter the realm of viewpoint discrimination and illegal contributions. Of course, most debates will end up changing the dynamics of the campaign and ultimately the outcome of the election, but the key thing is to allow the dialogue among the candidates itself to produce the change without any conscious manipulation by debate organizers.

These rules for the road are not complicated but they are essential. Indeed, their simplicity only underscores the bizarre and tangled web of deception woven by the two party system and its self-justifying ideology of candidate viability and electability. Without any serious analysis, the Supreme Court has swallowed this ideology whole. It is now time for the people to restore the integrity of our electoral debates and reclaim democratic respect for all citizens, rich and poor, famous and obscure, well-connected and marginalized, orthodox in opinion and unspeakably radical. To the extent that we structure the electoral process to permit manipulation and exclusion, to that extent we surrender democracy itself.

ber of votes it received when the election takes place.

For example, you can apply that to Gov. George Wallace if he desires to run. He has no prior experience as candidate for election to President of the United States. He only has experience in primaries. But he could perhaps take a poll that would indicate he is going to get about 13 percent of the vote, which might be about 8 million. He could then derive from that the fact that he was entitled to a certain amount of money, and I would imagine some could be advanced to him by loans from supporters which could be paid back and reimbursed to them when the campaign is over. So the administration bill provides a method by which a third party just starting could nevertheless go and make his case before the people.

Senator ERVIN. The fundamental defect I see in that is that the established parties get theirs when they need it which is before the election, when the campaign is on, and the other people get theirs after the election is over. And as I said, it is like promising food to a dead man provided he is present at the resurrection.

Senator WILLIAMS. And one other point, if the polls he relied on were as misleading and far off base as they were in 1948, he may end up with 4.99 percent of the vote and $8 million debt and nothing to pay for it. Under the President's proposal he would get nothing.

The CHAIRMAN. Those polls were not far off in 1948. They reached the wrong conclusion. But if you look at a poll that says you have 51 percent, the man who took the poll claimed a 10-percent margin for error, or at least 5 percent. So he would claim three points for his allowed error. So you say you got 51 or 52 percent. The outcome could be different just by the slippage in his own margin of error.

Senator ERVIN. I say that that illustrates the undesirability of any kind of election reform in the financial field other than a tax deduction to be controlled by the taxpayer, the individual. Because who is going to run the poll? Certainly the Government would not let me run the poll if I were running for President and would not take my figures. You would have to set up some more Government machinery to take the poll. One of the great advantages of the tax deduction approach is that you do away with any necessity for any further Government regulation or any further Government employees except those they already have in the Internal Revenue Service, when the man would submit a receipt.

Furthermore, I think it is wrong to say the only man whose campaign is going to be financed is the President. I think if a man wants to make a campaign contribution to the sheriff's race, that man should be included. The President needs it less than anybody, at least the incumbent President, because the way Congress appropriates hundreds of millions of dollars to be expended at the discretion of the Government, the incumbent candidate already has a lot of money available to him, for all practical purposes.

The CHAIRMAN. If you do not tie it down, though, Senator, you have to be careful that some boys do not get together with another tax avoidance scheme and say, "Now, let us get old Joe Blow to run for constable every 4 years; he does not care about being constable, but that will make it possible for us to get a tax deduction, and we will split the profit with him."

So, the man ran and he did not spend the money, but look at the person in the 50-percent bracket. There would be a $25 gain there, and that would be enough to split the profit, $12.50 apiece between him and the man who contributed the dough.

Senator ERVIN. I would say the answer to that is simple. If the man receives the money for one purpose and uses it for another, he is subject to indictment under existing laws in every State in the Union. I do not think a man wants to give away money merely to get a tax deduction. He gives it away because he is interested in the cause to which he gives it, and also he would be interested in——

The CHAIRMAN. He cannot do it now, but if you pass that law and do not tie it down, you had better be careful.

Senator ERVIN. I would not be in favor of giving a man an unlimited amount.

Senator WILLIAMS. I might respectfully point out that the chairman has just made an excellent statement in favor of your proposal, and he has just shot the Metcalf voucher proposal full of holes, because it is wide open for abuse, as he says. I thank you for your support.

The CHAIRMAN. If you take a look at the bill I introduced, there are all kinds of safeguards in that one. He would go to the penitentiary.

Senator WILLIAMS. The administration itself recognizes that their original proposal is not good.

Senator ERVIN. The only limitation that I would put on the proposal is that the man make a contribution to the party of his choice, or to the candidate of his choice. That is all you need. You already have the law to control that, and the employees to administer it in the Internal Revenue Service.

Senator WILLIAMS. Also, it is attractive in that the individual making the contribution must dig into his own pocket and make some sacrifice. Otherwise, I do not think we are accomplishing anything.

Senator ERVIN. Instead of taking it out of the Treasury under any appropriation system, you are going to take the taxpayers' money. In many cases, you are going to use it for purposes which the taxpayer abhors.

Senator WILLIAMS. They would be taking the taxpayers' money and using this money to finance the two major political parties when he may be in strong opposition to those two parties, and he may wish to support the third party, which is his right. Why take his money and make him finance your party and my party, when his party is left out. I do not think that is fair.

Senator ERVIN. The plan I suggest also just takes a simple way. It lets the voter control, rather than the officer holder. And you need no new machinery. You need no more employees to supervise things. And it preserves the basic principle of freedom.

Senator WILLIAMS. And if they do not think you and I are worthy of an election, they do not have to finance our campaign. They can get rid of us.

Senator ERVIN. Any other kind of regulation is going to be something that complicates simplicity, when simplicity does not need to be complicated.

I thank the committee.

The CHAIRMAN. Thank you, Senator.

Mr. CURTIS. Mr. President, I yield 2 minutes to the Senator from Connecticut.

Mr. WEICKER. Mr. President, I wish to comment briefly on the remarks of the distinguished Senator from Louisiana. This is not a question of the Senate having an interest in corruption, rather I am saying that the Senate's interest must be in integrity and excellence. That certainly is not the case with the Pastore amendment. It relates to those who are going to share in emoluments. An interest in integrity and excellence is what we on this side are trying to bring to pass: Excellence in that availability funds should not be a limitation on running for office in this great country; integrity to the extent that legislation passed by the Senate, should not inure to the benefit of the Members of the Senate.

To the distinguished Senator from Louisiana, I say the whole bill is bad the way it is constituted. The $1 contribution, the deduction, the concept of Federal financing of campaigns. It is all rotten.

Mr. CURTIS. Mr. President, I yield the remainder of my time to the Senator from Kentucky.

Mr. COOK. Mr. President, the Senator from Louisiana talked about mischief on the part of the Members of the Senate and that, somehow or other, we will have scars.

We have here a bill that has nothing to do with how much is spent in primaries, and $25 million was spent by the Democratic nominees in the last election. We have a bill which says we will give money to minority candidates, but only so much money, and then they can raise money for the part they are short, up to the limitation of the major candidates. So if they win, they go in having just as big a war chest, having been gained in the methods the Senator from Louisiana says should not be done.

The Senator from Rhode Island asked the other day, "Do we want an election like we had in Saigon?" Consider the criminal penalties in this measure. Is the Comptroller General going to accuse a President-elect of the United States of having done something illegal, and are you going to try the President-elect and give him up to 5 years and fine him $10,000? That is the most ridiculous thing I can think of. As a matter of fact, if you do not try the President-elect but try one of the nominees who was unsuccessful, are you going to put him in jail? This is what they did in South Vietnam a few years ago. The losing candidate for President always went to jail.

You have a situation in which you are going to say to the American people that there is logic in this amendment when it contains things such as that, when you include a section that you are going to criminally fine a President of the United States up to $10,000, a President-elect, when you cannot try him between the time of the election and when he gets sworn in. Are you going to take him from the White House and send him to Lewisburg? Let us not be ridiculous. How are you going to do that? All I can say to the Senator from Louisiana is that that proves that when one has to do something in desperation, such as this amendment, one can make all kinds of mistakes. These are the things we ought to be debating and discussing.

Mr. President, how much time does the Senator from Nebraska have remaining?

The PRESIDENT pro tempore. The time has expired.

Mr. COOK. I thank the Senator.

Mr. CURTIS. Mr. President, I suggest the absence of a quorum.

Mr. PASTORE. If the Senator will withhold that request, Mr. President, how much time does the opposition have?

The PRESIDENT pro tempore. Ten minutes.

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Sunday, August 16, 1992

NEWS

Moody and Checota in close race for Senate nomination

DAVID E. UMHOEFER and MIKE NICHOLS

US Rep. Jim **Moody** and Milwaukee businessman Joe Checota are locked in a tight race for the Democratic nomination for US Senate, according to a statewide poll released Sunday by Political/Media Research, an independent polling firm based in Washington, D.C.

In the survey, 42% chose **Moody** and 40% chose Checota. Ten percent chose State Sen. Russ Feingold of Middleton, according to the survey conducted Wednesday and Thursday and released to The Journal. Eight percent were undecided.

The firm surveyed 389 likely Democratic primary voters statewide. The margin of error was 5 percentage points.

The primary is Sept. 8, with the winner advancing to an expected contest against Bob Kasten, the incumbent Republican.

Moody's campaign director, Jim Cunningham, said Saturday that the figures were "very good news. You know, if you look at this race, Checota has outspent us 3 1/2 to 1 with ads that have been called the most contrived in the history of the state. The idea is you have to stay close to him and then be ready to pass."

The poll, Cunningham said, proves that is happening. Checota, he said, "waved his checkbook and thought we would go away, and now he is going to be sitting around wondering why he came in second or last."

Checota Team Cites Gains

Checota spokesman Bill Christofferson said that when Checota first got into the race, a campaign poll showed he had only 4% of the vote.

"Clearly the movement and momentum is toward Checota. That is because people are looking for a change," Christofferson said. "We are in a dead heat and have come from 36 [points] behind. I would rather be in Joe Checota's shoes than Jim **Moody's**."

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The November general election is more than two months away, but in a hypothetical matchup, **Moody** at this point holds a 46% to 43% lead over Kasten, with 11% undecided. That is according to telephone interviews with 833 registered voters likely to vote in November. The margin of error for the expanded sample was 3.5 percentage points.

Those numbers represent a turnaround from an April survey, also by Political/Media Research, which showed Kasten with a 46% to 34% edge over **Moody**.

In the new poll, when Kasten was matched up with Checota, Kasten came out on top, 46% to 41%, with 13% undecided. The two-term senator led Feingold 46% to 28% in a head-to-head matchup with 26% undecided, according to the poll. In those matchups, the larger sample was used.

Poll Reveals Weaknesses

The new poll showed some vulnerabilities for all four men, and for Kasten in particular.

Of likely November voters, more than one-third, 34%, held an unfavorable opinion of Kasten, compared with 41% holding a favorable rating. Pollsters generally say that such a narrow gap between favorable and unfavorable ratings indicates trouble for an official.

Kasten's campaign manager, Paul Welday, could not be reached for comment Saturday.

In general, the numbers "confirm what everyone knows, that Kasten can be beaten, said Christofferson. "Kasten clearly can be beaten by any of these guys, including Feingold."

Still, Kasten's 41% positive rating topped the other three candidates.

In the poll, 37% of the general- election sample had a favorable opinion of **Moody** while 17% had an unfavorable opinion of the Milwaukee congressman. Of the same group, 18% did not recognize **Moody** and the rest had a neutral opinion.

Checota's statewide television ad blitz, financed largely with the millionaire's personal fortune, appears to have accomplished the goal of familiarizing voters around the state with his name. Only 11% said they did not recognize Checota.

But 26% had an unfavorable opinion of Checota, compared with 36% who viewed him favorably. The unfavorable rating was way up from 3% in the April poll, a slide that may reflect negative

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media attention surrounding Checota's business history.

Christofferson responded that Checota's unfavorable rating "is not as high as 34%, which is what the incumbent senator has. Most who have an unfavorable opinion about a candidate have a favorable opinion about someone else."

Feingold Not Widely Known

Feingold

Feingold's underdog campaign has yet to catch fire, according to the poll.

More than 4 in 10 of those surveyed statewide did not recognize his name. His favorable rating was 11% compared with 8% unfavorable; the rest were neutral. Feingold, with less to spend than his rivals, has not yet mounted a television campaign.

Bob Decheine, Feingold's campaign director, said Saturday that he still "fully expects" to win and questioned the accuracy of the poll. In low-turnout elections, which this one is bound to be, he said, it is extremely difficult to identify Democratic primary voters.

"We know that our opponents are going to rip each other's heads off," he said, "and frankly they will have some good ammunition which will be hard to resist." Feingold, he said, will be a viable alternative.

"This race really has not started yet," he said. "It starts when all the candidates are on the air. This will play itself out in the last 20 days."

In the theoretical matchup with **Moody**, Kasten ran strongest in western and central Wisconsin and the Fox River Valley.

Moody topped Kasten 51% to 39% in the four-county Milwaukee metro area and also led him around Madison, in the southeastern corner of the state and in northwestern counties.

Political/Media Research conducts polls in 40 states. It polls for newspapers and other media organizations, not partisan political candidates.

Moody

Checota

Word Count: 903

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COOPER AND **SASSER** LIKELY WINS IN SENATE, POLL FINDS
COMMERCIAL APPEAL (Memphis)
(CA)
- THURSDAY, July 28, 1994
By: Phil **West** The Associated Press
Edition: Final
Section: News
Page: A13
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TEXT:
NASHVILLE -
Nashville physician Bill Frist is leading the Republican Senate primary but would lose to incumbent Jim **Sasser** if the general election were held today, a statewide poll shows.

In the race for Tennessee's other U.S. Senate seat, Democrat Jim **Cooper** would defeat Republican Fred Thompson by 12 percentage points if the election were held today, according to the poll.

Frist would do better against **Sasser** than any of the other five Republicans but would still lose by a 53-29 percent margin with 16 percent undecided, the poll showed.

Chattanooga businessman Bob Corker was 7 points behind Frist in the poll, which had a margin of error of 3 1/2 percent. Two percent of voters said they would vote for independent John Jay Hooker.

The poll was conducted by Mason-Dixon Political-Media Research Inc. of Columbia, Md., for five Tennessee newspapers and four television stations.

Mason-Dixon conducted telephone interviews Sunday through Tuesday with 838 people who vote regularly in statewide elections.

Company officials said the 3 1/2 percent margin of error meant there was a 95 percent probability that the true figure would fall within that range.

According to the poll, **Sasser** would defeat Corker 55-26 with 16 percent undecided and 3 percent going for Hooker in a **Sasser** vs. Corker matchup.

In next week's primary, 24 percent of Republicans

responding to the survey said they would vote for Frist. Corker would get 17 percent of the GOP vote, the poll showed.

''The race for the GOP nomination to face **Sasser** appears now to be between Frist and Corker,'' said an analysis by Mason-Dixon's Brad Coker.

Among other Republican candidates, Harold Sterling of Memphis was third

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with 10 percent of the vote; Byron Bush was next with 9 percent, Andrew Benedict would get 5 percent and Steve Wilson, 1 percent.
Among the Republicans polled, 34 percent said they were undecided.

Of the interview subjects, 414 (49 percent) were men and 424 (51 percent) were women. Seven hundred were white, 136 were black and two were listed as other races.

Among the state's regions, 302 interviews were in East Tennessee, 272 were from Middle Tennessee, and 264 were in West Tennessee.

''Although the regional margin for error is high, it is worth noting that Corker runs ahead in the traditionally Republican East Tennessee region while Frist is stronger with GOP numbers in Middle and West Tennessee. Given the high number of 'undecided' voters, this race may be a turnout battle,'' Coker's analysis said.

Sasser generated a 61 percent favorable rating and a 15 percent unfavorable rating in November 1988. Sasser's favorable rating dropped to 48 percent in May and hit 45 percent last week, according to the poll.

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February 27, 2000, Sunday, Final Edition

SECTION: OUTLOOK; Pg. B01

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HEADLINE: Campaign Trail Oversight; **Hunting for the Story,** The Media Get Lost

BYLINE: Richard Morin

BODY:

Americans may be excused if they think political coverage this campaign season has been a wee bit delusional. From a premature obituary for the religious right to blowout primary elections that were predicted to be "too close to call" to backward turnout scenarios, reporters repeatedly have gotten it precisely and profoundly wrong.

These aren't minor gaffes, nor are they merely the woolly-headed pronouncements of the Sunday morning squawkers. They are the work of otherwise smart, serious journalists--me, for example--and have appeared in stories prominently displayed on the front pages of the country's best newspapers, and at the top of the network evening news.

Reporters seem to realize they have much to be modest about. "In a symbol of this topsy-turvy election, McCain's Michigan victory came as the ink was barely dry on many 'Bush comeback' stories," reporters for the Boston Globe wrote last week.

"That loud noise you hear is the crashing of all the models that pundits and politicians had constructed for how this year's Republican presidential race would go," ranking pundit Morton M. Kondracke wrote in Roll Call.

The loudest noise you hear may be the credibility of the media, already at a record low, crashing through the floor. It is death by a thousand flubs, which collectively feed the public's perception that politics is little more than public sport, a crapshoot organized by crafty schemers and reported by annoying fools. Journalists are routinely spanked for emphasizing the horse race at the expense of the issues. Lately, we're having a hard time getting the horse race right.

Some missteps are to be expected, even forgiven. This is, after all, one strange election year. But journalistic fads and fashions are also conspiring to make the "first rough draft of history" a bit rougher than usual.

The media's current infatuation with Big Picture stories, written in the narrative voice and awash in predictions, encourages journalists and opinion

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writers to simplify complex and fast-moving events, or to draw broad conclusions from scattered, conflicting or otherwise confusing facts. Will Michigan Democrats and independents stand by John McCain in November? The correct answer is, of course, who knows? But just try saying that on national network news.

So we tell the story of Everyvoter, or, better yet, we convene a focus group of Everyvoters. Then we project their sometimes idiosyncratic views beyond their worth in stories that may or may not reveal anything useful about what's happening.

Lawrence Jacobs, a professor of political science at the University of Minnesota, calls this trend "sitcom" journalism. "Political campaigns are reduced to a succession of story lines," Jacobs said. Strategy and tactics are easier to shape into a narrative than a discussion of issues. Reporters sit back, "much like television critics," and ponder and pontificate about what they see unfolding before them.

Or what they choose to see. In 1996, the Washington-based Center for Media and Public Affairs monitored the presidential campaign and television coverage. It found that 85 percent of the coverage focused on negative attacks--even though the candidates spent 85 percent of their time "making a positive case for themselves," said Thomas Patterson, a professor at Harvard's Kennedy School of Government.

Jacobs suggests one disturbing consequence of all this negative storytelling: a public that is more turned off by politics and joins reporters on the sidelines, watching but not participating in the process.

Of course a good narrative needs tension and action. And that's why reporters love to tell stories like these:

"New Hampshire typically is keeping the country guessing with a too-close-to-call Republican race."

--Bob Edwards, National Public Radio, on the eve of this year's New Hampshire primary

"On the eve of a South Carolina primary that's too close to call, both candidates were beginning to focus on the mechanics of getting voters to the polls."

--the Associated Press, the day before the South Carolina primary

"The race is too close to call."

--Alison Stewart on ABC's "World News This Morning" just before the Michigan Republican primary

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Let the record show that McCain comfortably beat George W. Bush by eight percentage points in Michigan. Bush beat McCain by 11 points in South Carolina, and McCain won by 18 points in New Hampshire. Voters might be forgiven if they wonder: How close do you have to get to see a wipeout coming?

To be fair, these reporters were only repeating the results of the tracking polls, those daily samplings of vox pop that have proliferated this election season. To be candid, tracking polls in primary elections are notoriously unreliable because it's difficult to determine who will actually show up at the polls in these low-turnout elections. To be blunt, reporters either don't know or choose not to disclose the limitations and tattered history of this type of polling, even as they dutifully report the latest results.

My favorite polling misadventure to date occurred in South Carolina, in the days immediately after McCain's huge win in New Hampshire. In the thrall of Big Mo, reporters were looking everywhere for signs of movement--the bigger, the better.

A few headline-hungry pollsters were there to fill the vacuum. Two overnight polls claimed that McCain had not merely closed the gap, but likely was leading. Both used dubious methodologies: One interviewed 500 "likely" voters--a sample too small and too quickly collected to be useful. The other was an auto-dial poll with a recorded message that asked people to press the buttons on their phones to respond to questions--a survey technique so discredited that the Hotline, the widely read daily political briefing sheet, apologized for printing its results.

No matter. Stories recounting those survey results were splashed on the front pages of papers all over the country and even abroad, including The Washington Post.

In fact, McCain did gain ground quickly on Bush in South Carolina after his New Hampshire victory. But he almost certainly never led and probably was never even tied. A Washington Post-ABC News poll conducted Thursday through Sunday in South Carolina after the New Hampshire primary--the likely high point of McCain's support--showed Bush with a five-point lead among a sample of rigorously screened likely voters.

Other carefully conducted, large-sample surveys done at about the same time produced similar results. In fact, every poll after Feb. 6--15 in all--had Bush leading McCain.

My own stumble occurred about a month ago in New Hampshire, where I moderated focus groups of Democrats and Republicans who complained bitterly about their choices in the upcoming primary. About the same time, a new national survey found that the proportion of Americans who supported a candidate--any candidate, in either party--had dipped in recent weeks. Stirring these together, I wrote the story of an electorate dismayed by its choices.

One problem: Subsequent polls revealed that Americans were quite happy, thank you, with their choices this election year.

The polls were partially responsible for another story line that went south in South Carolina. Many stories suggested that a big turnout in the open GOP

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primary would benefit McCain, because it would mean that Democrats and independents had come out to vote for him. Some even drew a numerical line in the sand: If more than 400,000 voters went to the polls, Bush was toast. Well, reporters or their sources forgot that turnout could increase among Republicans as well as among Democrats and independents, which is exactly what happened. More than half a million South Carolinians ended up voting, and Bush won going away.

Not all the early-season reporting stinkers can be laid at the feet of pollsters. Consider recent news accounts of the death of the religious right. Over a front-page story four days before the South Carolina primary, a Post headline declared that the "Christian Right's Fervor Has Fizzled; S.C. Reflects a Movement 'Gone Cold.' " The story went on to note that, "as a group, [Christian conservatives] are no longer locked into a political machine, ready to spring into action. For Robert J. Dole, they provided an army of volunteers and secured a crucial electoral victory." Not so this year, the story predicted: Turnout of Christian conservatives had been drifting downward in South Carolina.

On primary day, a record number of self-identified members of the religious right went to the polls in South Carolina, voted for Bush over McCain by nearly a 3 to 1 ratio, and secured a crucial electoral victory for the Texas governor. Three days later in Michigan, the Christian conservatives again turned out in record numbers, and again gave Bush two-thirds of their votes, though this time in a losing cause.

Another popular story written out of Michigan in the days before that state's primary suggested that a vast left-wing conspiracy was being organized to hobble Bush and embarrass Republican Gov. John Engler. According to this theory, Democrats would flood the polls to make mischief by voting for McCain. Reporters gave state Rep. LaMar Lemmons, a Detroit Democrat, his 15 minutes of national fame when he encouraged blacks to vote for McCain and set up an organization called "DOGG-Engler," which he said stood for "Democrats Out to Get even with Governor Engler."

Certainly some Democrats voted for McCain merely to thumb their noses at Engler or complicate Bush's life. But the Michigan exit polls, as well as a flood of interviews conducted by reporters on primary day, suggest they were the exception, not the rule. Independents and Democrats voted for McCain, they said, because they liked him, they really liked him.

"Was there a large amount of tampering, of tactical voting? No," says Bill Ballenger, editor of the Inside Michigan Politics newsletter. "My God, most of the Democratic leaders here are scared of McCain."

As for DOGG, the Michigan exit poll suggests its impact was negligible, at best. Only 5 percent of all GOP voters were African American, and more than 20 percent voted for Bush or Alan Keyes. (Black Republicans are rare but hardly nonexistent in Michigan: Four years ago, 10 percent of all black voters cast ballots for Republican Bob Dole, or roughly as many black voters as turned out in last Tuesday's primary.)

So what's a voter to do?

First, remember these are volatile times, when political attitudes and candidate preferences are in flux, says Harvard's Patterson. Stories that report what happened today are inevitably more accurate than stories predicting what's going to happen tomorrow or in the next primary. Reporters are trained observers. But sometimes they're looking at the wrong thing.

Polls are useful tools; they aren't magic wands. And some polls are better than others. Exit polls are the gold standard--they're more accurate than any other type of political polling. Tracking polls that measure candidate preference over time will be helpful later in the campaign, when attitudes are more fixed and settled. As a general rule, large-sample surveys done over several days are better in capturing popular attitudes than small sample surveys completed in a single day. But don't expect those big, multi-day polls to capture the most recent changes in candidate preference. And don't expect today's surveys to give much of a clue as to what will happen in November.

Remember, too, that nobody speaks for everybody, every state isn't like the nation, and no two states are exactly alike. Thus, what was true nationally or in South Carolina or Michigan may not be true in Washington state, New York, Missouri or California.

Be careful when reading stories based on focus groups. They're a popular research tool mainly because they're cheap, not because they accurately reflect the views of a larger public (that's what the best polls do). A focus group buttressed by survey results is a powerful and engaging way to characterize opinion. A focus group by itself is just 10 people yakking. Ditto for those stories in which reporters fan out across a state or nation to interview bunches of people whose comments are then stitched together into a single piece.

Finally, a word of advice for my colleagues: If you must write those Big Picture stories awash in narrative and dramatic sweep, then remember to use only the tastiest words.

Chances are you'll be eating them.

Richard Morin is The Post's director of polling and author of the biweekly Unconventional Wisdom column, which returns to Outlook next Sunday.

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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR 4451
DATE COMPLAINT FILED: September 6, 1996
DATE OF NOTIFICATION: September 13, 1996
DATE ACTIVATED: April 15, 1997

STAFF MEMBERS: J. Duane Pugh Jr.
Susan L. Kay

MUR 4473
DATE COMPLAINT FILED: September 20, 1996
DATE OF NOTIFICATION: September 26, 1996
DATE ACTIVATED: April 15, 1997

STAFF MEMBERS: J. Duane Pugh Jr.
Susan L. Kay

COMPLAINANTS:

MUR 4451: Dr. John Hagelin
Dr. Mike Tompkins
Natural Law Party

MUR 4473: PEROT '96, INC.

RESPONDENTS:

MUR 44[redacted]: ABC, Inc.
Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as Treasurer
Commission on Presidential Debates
Dole/Kemp '96, Inc., and Robert E. Lighthizer, as Treasurer
Fox Broadcasting Company
Public Broadcasting Service

MUR 4473

Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as Treasurer
Commission on Presidential Debates
DNC Services Corporation/Democratic National Committee and Carol Pensky, as Treasurer
Dole/Kemp '96, Inc., and Robert E. Lighthizer, as Treasurer
Republican National Committee and Alec Poitevint, as Treasurer

RELEVANT STATUTES/REGULATIONS:

2 U.S.C. § 431(4), (8) and (9)
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441a(b)
2 U.S.C. § 441b(a) and (b)(2)
11 C.F.R. § 100.5
11 C.F.R. § 100.7(a)(1), (a)(1)(iii)(A), (b)(2) and (b)(21)
11 C.F.R. § 100.8(a)(1), (a)(1)(iv)(A), (b)(2) and (b)(23)
11 C.F.R. § 102.1(d)
11 C.F.R. § 104.1(a)
11 C.F.R. § 110.8(g)
11 C.F.R. § 110.13
11 C.F.R. § 114.1(a)(1) and (a)(2)(x)
11 C.F.R. § 114.2(b)
11 C.F.R. § 114.4(f)
11 C.F.R. § 114.10
11 C.F.R. § 114.12(a)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTERS

These matters arose from two complaints filed with the Federal Election Commission (the "Commission"). The first complaint, MUR 4451, was submitted by the Natural Law Party and Drs. John Hagelin and Mike Tompkins, the Natural Law Party's candidates in the 1996 election for President and Vice President of the United States, respectively (collectively "NLP").

The second complaint, MUR 4473, was submitted by PEROT '96, INC. ("Perot"), which is the authorized general election campaign committee of Mr. Ross Perot, who was the Reform Party's candidate for President in the 1996 election.[1]

Both the NLP and Perot complaints challenge the criteria used by the Commission on Presidential Debates ("CPD") to select the candidates for President and Vice President to be invited to participate in debates sponsored by CPD, alleging that CPD's criteria do not comply with the standards for such criteria in 11 C.F.R. § 110.13(c). On this basis, the Perot complaint alleges that the debates constitute a corporate contribution to the participants' campaigns in violation of 2 U.S.C. § 441b and 11 C.F.R. § 114.2(b).[2] The Perot complaint further alleges that CPD is a political committee that has failed to register pursuant to 2 U.S.C. § 433(a) and 11 C.F.R. § 102.1(d). The NLP also challenges election-related television programming proposed by three television networks, alleging that the proposed programs would not qualify as news coverage or debate sponsorship and would therefore constitute prohibited corporate contributions.

In addition to CPD, the NLP names as respondents three television networks: ABC, Inc. ("ABC"), Fox Broadcasting Company ("Fox") and the Public Broadcasting Service ("PBS"),

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[1] The complainants were also among the parties to a lawsuit related to these debates, in which plaintiffs sought injunctive and declaratory relief. The U.S. District Court for the District of Columbia denied the requested injunctive relief and, deferring to the Commission's administrative enforcement procedure, granted summary judgment to the Commission. *See Hagelin v. FEC*, 1996 WL 566762 (D.D.C. Oct. 1, 1996), *aff'd sub nom. Perot v. FEC*, 97 F.3d 553 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 1692 (1997). In the candidates' appeal, the court of appeals held that the proper procedure was to dismiss the actions on jurisdictional grounds without prejudice to the filing of a new suit that challenges the Commission's authority to promulgate 11 C.F.R. § 110.13. *See Perot*, at 557 and 561. In doing so, the court of appeals expressly noted that it did not address "the merits of appellants other claims . . . that they were wrongfully excluded from the debates." *See id.*, at 555.

[2] Unlike the Perot complaint, the NLP complaint does not allege that the failures of CPD's debate participant selection criteria render the debates corporate in-kind contributions to the participants' campaigns. This analysis infers that NLP, like Perot, alleges that CPD's noncompliance renders the debates prohibited contributions to the campaigns. The respondents made similar assumptions.

alleging that the television programming each of the networks proposed would constitute corporate contributions to participating candidates.

The Office of General Counsel notified additional entities fairly implicated in the allegations in the complaints. To the NLP complaint, this Office also sought a response from Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as its treasurer (collectively "Clinton/Gore"), and Dole/Kemp '96 and Robert E. Lighthizer, as its treasurer (collectively "Dole/Kemp"). To the Perot complaint, this Office also sought a response from the general election committees and their treasurers named above and from the DNC Services Corporation/Democratic National Committee and Carol Pensky, as its treasurer (collectively the "DNC"), and from the Republican National Committee and Alec Poitevint, as its treasurer (collectively the "RNC").[3]

All of the responses to the complaints that were sought have been received. Attachments 1-10.

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[3] Several of the additional respondents noted objections to this Office's provision of an opportunity to respond when they were not named as respondents by the complainants. *See* Attachment 5, at 1; Attachment 7, at 1; and Attachment 8, at 1-2. The complainants' allegations implicate the additional respondents in the allegedly illegal conduct. This Office provided the respondents with an opportunity to respond in order to permit the respondents to be heard at the earliest feasible point and to provide the Commission with full information regarding the allegations. *See* 11 C.F.R. § 111.5(a).

Clinton/Gore responded to the complaint in MUR 4473 on October 11, 1996. Clinton/Gore responded to the complaint in MUR 4451 on March 4, 1997. *In its response in MUR 4451, Clinton/Gore states that it is relying* upon the response it submitted in connection with MUR 4473. Dole/Kemp responded to the complaint in MUR 4473 on November 27, 1996. Dole/Kemp responded to the complaint in MUR 4451 on February 18, 1997. With the exception of noting that the complaints were filed by different complainants and have different MUR numbers, both responses are otherwise identical.

II. CPD'S DEBATE SELECTION CRITERIA

A. Legal Standard

Under the Federal Election Campaign Act of 1971, as amended ("FECA"), corporations are prohibited from making contributions[4] or expenditures[5] in connection with federal elections. 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.2(b).[6] The Commission has promulgated a regulation that defines the term "contribution" to include: "A gift, subscription, loan . . ., advance or deposit of money or anything of value made . . . for the purpose of influencing any election for Federal office." 11 C.F.R. § 100.7(a)(1). *See also* 11 C.F.R. § 114.1(a). "Anything of value" is defined to include all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A). The regulatory definition of contribution also provides: "[u]nless specifically exempted under 11 C.F.R. § 100.7(b), the provision of any goods or services without charge . . . is a contribution." *Id.*

Section 100.7(b) of the Commission's regulations specifically exempts expenditures made for the purpose of staging debates from the definition of contribution. 11 C.F.R. § 100.7(b)(21). This exemption requires that such debates meet the requirements of 11 C.F.R. § 110.13,[7] which establishes parameters within which staging organizations must conduct such

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[4] FECA defines contribution to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i); *see also* 2 U.S.C. § 441b(b)(2).

[5] FECA defines expenditure to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i); *see also* 2 U.S.C. § 441b(b)(2).

[6] The presidential candidates of the major parties who accept public funds cannot accept contributions from any source, except in limited circumstances that are not raised herein. 26 U.S.C. § 9003(b)(2); *see also* 11 C.F.R. § 9012.2(a).

[7] The exemption also requires that such debates meet the requirements of 11 C.F.R. § 114.4, which permits certain nonprofit corporations to stage candidate debates and other

debates. The parameters address: (1) the types of organizations that may stage such debates, (2) the structure of debates, and (3) the criteria that debate staging organizations may use to select debate participants. With respect to participant selection criteria, 11 C.F.R. § 110.13(c) provides, in relevant part:

> *Criteria for candidate selection.* For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. For general election debates, staging organization(s) shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate.

11 C.F.R. § 110.13(c). When promulgating this regulation, the Commission explained its purpose and operation as follows:

> Given that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established objective criteria to avoid the real or apparent potential for a quid pro quo, and to ensure the integrity and fairness of the process. The choice of which objective criteria to use is largely left to the discretion of the staging organization. . . .
>
> . . . . Staging organizations must be able to show that their objective criteria were used to pick the participants, and that the criteria were not designed to result in the selection of certain pre-chosen participants. The objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes there are too many candidates to conduct a meaningful debate.
>
> Under the new rule, nomination by a particular political party, such as a major party, may not be the sole criterion used to bar a candidate from participating in a general election debate. But . . . nomination by a major party may be one of the criteria.

60 Fed. Reg. 64,262 (Dec. 14, 1995).

Thus, if an appropriate corporation staged a debate among candidates for federal office and that debate was staged in accordance with all of the requirements of 11 C.F.R. § 110.13, then the costs incurred by the sponsoring corporation would be exempt from the definition of contribution pursuant to the operation of 11 C.F.R. § 100.7(b)(21). *See also* 11 C.F.R.

§§ 114.1(a)(2)(x) and 114.4(f)(1). Similarly, other corporations could legally provide funds to the sponsoring corporation to defray expenses incurred in staging the debate pursuant to the operation of 11 C.F.R. §§ 114.1(a)(2)(x) and 114.4(f)(3). Conversely, if a corporation staged a debate that was not in accordance with 11 C.F.R. § 110.13, then staging the debate would not be an activity "specifically permitted" by 11 C.F.R. § 100.7(b), but would constitute a contribution to any participating candidate under the Commission's regulations. *See* 11 C.F.R. § 100.7(a)(1)(iii)(A) (noting "unless specifically exempted" anything of value provided to the candidate constitutes a contribution). The participating candidates would be required to report receipt of the in-kind contribution as both a contribution and an expenditure pursuant to 11 C.F.R. § 104.13(a)(1) and (2). *See* 2 U.S.C. § 434(b)(2)(C) and (4).

B. CPD's Debate Participant Selection Criteria

CPD was incorporated in the District of Columbia on February 19, 1987, as a private, not-for-profit corporation to "organize, manage, produce, publicize and support debates for the candidates for President of the United States." *See* Attachment 4, at 45. Prior to the 1996 campaign, CPD sponsored six debates, five between candidates for President, and one between candidates for Vice President. In the 1996 campaign, CPD sponsored two Presidential debates and one Vice Presidential debate. Only the candidates of the Democratic and Republican parties were invited to participate in the debates. CPD produced written candidate selection criteria for the 1996 general election debate participation. The introduction to these criteria explains as follows:

> In light of the large number of declared candidates in any given presidential election, [CPD] has determined that its voter education goal is best achieved by limiting debate participation to the next President and his or her principal rival(s).
>
> A Democratic or Republican nominee has been elected to the Presidency for more than a century. Such historical prominence and sustained voter interest

> warrants the extension of an invitation to the respective nominees of the two major parties to participate in [CPD's] 1996 debates.
>
> In order to further the educational purposes of its debates, [CPD] has developed nonpartisan criteria upon which it will base its decisions regarding selection of nonmajor party candidates to participate in its 1996 debates. The purpose of the criteria is to identify nonmajor party candidates, if any, who have a realistic (i.e., more than theoretical) chance of being elected the next President of the United States and who properly are considered to be among the principal rivals for the Presidency.
>
> The criteria contemplate no quantitative threshold that triggers automatic inclusion in a [CPD]-sponsored debate. Rather, [CPD] will employ a multifaceted analysis of potential electoral success, including a review of (1) evidence of national organization, (2) signs of national newsworthiness and competitiveness, and (3) indicators of national enthusiasm or concern, to determine whether a candidate has a sufficient chance of election to warrant inclusion in one or more of its debates.

Attachment 4, at 57-58. Thus, CPD identified its objective of determining which candidates have a realistic chance of being elected the next President, and it specified three primary criteria for determining which "nonmajor" party candidates to invite to participate in its debates. CPD further enumerated specific factors under each of the three primary criteria that it would consider in reaching its conclusion.

For "evidence of national organization," CPD introduces the factors by explaining that the criterion "encompasses objective considerations pertaining to the eligibility requirements . . . [and] also encompasses more subjective indicators of a national campaign with a more than theoretical prospect of electoral success." *Id.* The factors to be considered include:

> a. Satisfaction of the eligibility requirements of Article II, Section 1 of the Constitution of the United States.
>
> b. Placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority.
>
> c. Organization in a majority of congressional districts in those states.

d. Eligibility for matching funds from the Federal Election Commission or other demonstration of the ability to fund a national campaign, and endorsement by federal and state officeholders.

Id.

CPD's selection criteria note that the second criterion, "signs of national newsworthiness and competitiveness" focuses "both on the news coverage afforded the candidacy over time and the opinions of electoral experts, media and non-media, regarding the newsworthiness and competitiveness of the candidacy at the time [CPD] makes its invitation decisions." *Id.* Five factors are listed as examples of "signs of national newsworthiness and competitiveness":

a. The professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks.
b. The opinions of a comparable group of professional campaign managers and pollsters not then employed by the candidates under consideration.
c. The opinions of representative political scientists specializing in electoral politics at major universities and research centers.
d. Column inches on newspaper front pages and exposure on network telecasts in comparison with the major party candidates.
e. Published views of prominent political commentators.

Id.

Finally, CPD's selection criteria state that the factors to be considered as "indicators of national public enthusiasm" are intended to assess public support for a candidate, which bears directly on the candidate's prospects for electoral success. The listed factors include:

a. The findings of significant public opinion polls conducted by national polling and news organizations.
b. Reported attendance at meetings and rallies across the country (locations as well as numbers) in comparison with the two major party candidates.

Id.

C. Complainants' Allegations

Both complainants allege that CPD's criteria violate 11 C.F.R. § 110.13(c) in two ways: first, both allege that CPD's selection criteria are not objective as required by 11 C.F.R. § 110.13(c); and second, both allege that CPD's selection criteria provide an invitation to the Democratic and Republican nominees solely on the basis of their parties' nominations in violation of 11 C.F.R. § 110.13(c). On this basis, the Perot complaint alleges that the debates constitute a corporate contribution to the participants' campaigns in violation of 2 U.S.C. § 441b and 11 C.F.R. § 114.2(b).[8]

The Perot complaint alleges that CPD's criteria are not objective as required by 11 C.F.R. § 110.13(c). The Perot complaint contends that three of the factors listed under signs of national newsworthiness are examples of the "predominantly subjective" CPD criteria.[9] The Perot complaint identifies another factor that calls for examination of the findings of significant public opinion polls as "leaving much room for subjectivity." Finally, the Perot complaint cites *Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989), and argues that the Commission should adopt the Second Circuit's analysis in that case of whether data are objective or subjective. In the context of examining the Bar Association's tax exempt status, the Second Circuit evaluated what is objective by defining "objective data."[10] The Second Circuit stated:

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[8] See note 2 *supra*.

[9] The three factors identified as "predominantly subjective" in the Perot complaint are: "[t]he professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks; [t]he opinions of a comparable group of professional campaign managers and pollsters not then employed by the candidates under consideration; [and] [t]he published views of prominent political commentators." Although the Perot complaint concedes that four elements of CPD's criteria are objective, it does not identify which four are objective in its view.

[10] The Second Circuit stated that the Bar Association's ratings and endorsements of judicial candidates as "approved," "not approved," or "approved as highly qualified" were not objective, disagreeing with the bar

> Objective data are data that are independent of what is personal or private in our apprehension and feelings, that use facts without distortion by personal feelings or prejudices and that are publicly or intersubjectively observable or verifiable, especially by scientific methods. *Webster's Third International Dictionary*, 1556 (1971). Objective representations have been described judicially as "representations of previous and present conditions and past events, which are susceptible of exact knowledge and correct statement." United Ben. Life Ins. Co. v. Knapp, 175 Okla. 25, 26, 51 P.2d 963, 964 (1935).

Id., at 880-81."

Similarly, the NLP complaint discusses each of CPD's three criteria and the factors related to each, arguing that CPD's criteria are "inherently vague and subjective." With respect to the "evidence of national organization" criterion, the NLP complaint admits that the first two factors are objective, as is the portion of the third factor that examines eligibility for federal matching funds. NLP cites CPD's description of the remaining factors under this criterion, in which CPD admits: "This criterion also encompasses more subjective indicators of a national campaign with a more than theoretical prospect of electoral success." Organization in a majority of congressional districts in those states in which a candidate is on the ballot is too indefinite to be deemed objective, according to NLP. NLP added that this factor is also irrelevant and

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association's defense that it merely collected and disseminated objective data. The Second Circuit overturned the Tax Court's grant of a tax exemption under 26 U.S.C. § 501(c)(3) to the local bar association based on Section 501(c)(3)'s bar on participating or intervening in political campaigns. *See Assoc. of the Bar of the City of New York v. Commissioner*, 858 F.2d at 880-81.

" The Perot complaint argues that the Second Circuit's rationale in *Association of the Bar of the City of New York* with respect to subjective criteria was applied to a candidate debate sponsor in *Fulani v. Brady*, 809 F. Supp. 1112 (S.D.N.Y. 1992), *aff'd on other grounds*, 35 F.3d 49 (2d Cir. 1994).

In the *Fulani* case, the Southern District of New York found the League of Women Voters' debate participant selection criteria to be subjective and therefore inconsistent with the League's tax exempt status. *Fulani*, 809 F. Supp. at 1125-26 (stating that the following criteria are subjective: "significant candidate," "recognition by the national media as a candidate meriting media attention," "active campaigning in a number of states for the . . . nomination," and "such other factors that in the League's good faith judgment may provide substantive evidence of nationwide voter interest"). The district court also held, however, that it did not have the authority to grant the requested relief. *Id.* at 1127-28. The Second Circuit affirmed the result, but on the grounds that the plaintiff had no standing to challenge the tax exempt status of the League. 35 F.3d 49 (2d Cir. 1994). This case is part of a series of challenges brought by the plaintiff against the League and CPD. *See Fulani v. League of Women Voters Educ. Fund*, 684 F. Supp. 1185 (S.D.N.Y. 1988), *aff'd*, 882 F.2d 621 (2d Cir. 1989) and *Fulani v. Brady*, 729 F. Supp. 158 (D.D.C. 1990), *aff'd*, 935 F.2d 1324 (D.C. Cir. 1991), *cert. denied*, 502 U.S. 1048 (1992).

constitutes a "significant obstacle" to "debate inclusion" of third party candidates. NLP also argues that "ability to fund a national campaign" is too indefinite, as is "endorsement by federal and state officeholders." The latter is also a deemed an attempt "to disguise partisan bias as an objective criteria" due to the dominance of the Democratic and Republican parties among federal and state officeholders. Further, NLP alleges that endorsements are merely subjective evaluations, and such "secondhand subjective evaluations" should not be permitted in debate participant selection criteria.

NLP attacks each of the factors under the "national newsworthiness" criteria. Four of the five are based on the opinions of specified individuals, and NLP alleges that on this basis alone the four factors are subjective. All five of the factors under this criteria require the CPD to consider evidence from sources that are described, but not precisely identified, and NLP alleges that this permits CPD to "shop around" and include only certain opinions within its consideration.

Both of the factors related to the "national public enthusiasm" criteria are deficient according to the NLP. The first, related to findings of "significant public opinion polls," is subjective because the polls are not identified, leaving too much room for subjective decision making, in NLP's view. Additionally, the polls themselves reflect the subjective judgments of those polled and may also reflect biases of the polltakers. Reported attendance at rallies is insufficiently defined, and comparisons to the major parties are inappropriate because such standards reflect the preferential treatment afforded to the major parties, according to NLP.

Finally, the NLP complaint challenges CPD's criteria considered together because CPD fails to specify any relative weights assigned to each of the factors and criteria, which renders the

process of applying the criteria to candidates and evaluating the responses subjective.[12] Thus, even if the criteria were objective, "the process of evaluating and weighing the criteria is a subjective one," according to the NLP complaint. NLP argues that the logic and reasoning of this Office's 1994 recommendation to the Commission that the regulation should specify objective criteria should be invoked to invalidate CPD's criteria as subjective.[13]

Both the Perot complaint and the NLP complaint further allege a second failing of CPD's criteria to comply with 11 C.F.R. § 110.13(c), arguing that CPD's criteria provide an invitation to the Democratic and Republican nominees based solely on their nominations by their respective parties. Citing the CPD's selection criteria for 1996, the Perot complaint alleges that CPD did not reach the conclusion that either of the major party's candidates had a "realistic chance of being elected."

D. Responses

1. CPD's Response

CPD explains that both to develop and subsequently to apply the debate participant selection criteria, it convened advisory committees, which submitted recommendations to CPD. The Advisory Committee that was convened to apply the criteria to the 1996 candidates reached the unanimous conclusion that only the Democratic and Republican candidates met all of CPD's criteria and had a realistic chance of being elected. The CPD Board of Directors unanimously approved the Advisory Committee's recommendation that only the Democratic and Republican candidates met CPD's debate participant selection criteria.

CPD maintains that its criteria are objective and that the process used fully complies with the requirements of 11 C.F.R. § 110.13(c). CPD points out the regulation does not define "objective." CPD argues that its criteria are consistent with the ordinary meaning of that term because the criteria do not call for CPD members to rely on "personal" or "private feelings," but instead require CPD to consider a strictly proscribed body of evidence. CPD also points to several prior uses of the term "objective" in the context of debate participant criteria, arguing that these uses were similar to its own.[14]

Furthermore, CPD asserts that "complainants would read the rule to bar the exercise of any judgment whatsoever by the staging organization," but would instead mandate "that . . . determinations be made solely on criteria that can be mechanically applied." CPD argues that it "must retain at least a modicum of judgment in applying its 'objective criteria' so as to ensure the avoidance of a potentially 'bizarre' or unwelcome result . . . based solely on quantitative factors." In support of its position, CPD points to federal appellate court decisions that held that "objective criteria" in contexts other than debate participant selection criteria were not limited to "numerical or quantitative standards" and conceded that "utilization of 'objective criteria' allows for some subjective judgment on the part of the evaluators."[15] CPD claims that the interpretation of "objective" advanced in the Perot and NLP complaints is such a radical alteration of the previous

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[14] CPD cites a previous complaint before the Commission, MUR 1617, in which respondent Dartmouth College referred to similar debate participant selection criteria as objective, and the Commission did not challenge that characterization in its disposition of that complaint. CPD also cites the League of Women Voters Education Fund's 1988 Criteria for General Election Debate Participation, which stated that similar criteria would be "objectively appli[ed]."

[15] *See Wilson v. Dep't of Health & Human Servs.*, 770 F.2d 1048, 1055 (Fed. Cir. 1985). In this regard, CPD distinguishes the relevance of *Association of the Bar of the City of New York v. Commissioner*, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989). CPD argues that that case is irrelevant because CPD does not assess the merits of any candidate and does not endorse the election of any candidate. CPD cites the Bar Association's admission that its criteria were designed to prevent the election of the unqualified as a distinguishing factor.

standard that the regulation would be unenforceable as having been promulgated without adequate notice. CPD argues that Perot and NLP's interpretation of "objective" would render the regulation defective under the First Amendment to the Constitution for its failure to be narrowly tailored to achieve a compelling governmental interest.

Finally, CPD disputes that it "automatically" invited the nominees of the Democratic and Republican parties. CPD maintains that its determination to invite the nominees of the two major parties was limited to 1996 and was based on its evaluation of the sustained voter interest in the major parties as witnessed by the historical prominence of those parties. Furthermore, both the Executive Director of CPD, Janet H. Brown, and the chairman of CPD's Advisory Committee, Professor Richard E. Neustadt of Harvard University's John F. Kennedy School of Government, stated in declarations submitted with the response that the Advisory Committee applied the 1996 selection criteria to the Democratic and Republican candidates, although the criteria did not require them to do so.[16]

2. Clinton/Gore's Response

In response to the complaints, Clinton/Gore requests that the Commission find no reason to believe that any violations occurred and dismiss these matters. Clinton/Gore acknowledges that President Clinton participated in the debates, but maintains that it is inconsistent with FECA "to hold participating candidates responsible for the costs of the debates, when the sponsor has exercised its independent decision-making authority as to who should be included" in the debate.

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[16] The declarations were submitted to the United States District Court for the District of Columbia in the lawsuit described above in note 1 and the accompanying text. CPD's counsel does not refer to the Advisory Committee's application of the criteria to the major party candidates in its response to the Perot and NLP complaints.

citing Advisory Opinion ("A.O.") 1986-37.[17] Clinton/Gore maintains that doing so will "have an obvious chilling effect on the debates and cause candidates to decline participation in a forum which, to them, appears to be otherwise permissible, though in a less than perfect structure." Clinton/Gore further states that the Commission's regulations do not require "candidates, as a condition of participating [in a debate], to make an independent conclusion as to whether the sponsor complied with the requirements of" 11 C.F.R. § 110.13 and notes that it had nonetheless publicly sought for Perot to be included in the debates at issue here.

3. Dole/Kemp's Response

In its response to the complaints, Dole/Kemp also requests that the Commission find no reason to believe that any violations occurred. Dole/Kemp acknowledges that Senator Dole and Representative Kemp participated in the events, but asserts that Dole/Kemp "reasonably relied upon [CPD's] public statements that its selection criteria were objective, fair, and complied with Federal law." Dole/Kemp further states that CPD's selection criteria appear "to be rigorous and objective." In support of this assertion, Dole/Kemp identifies the various criteria that make up the CPD selection criteria and notes that CPD "relies upon the advice of nonpartisan professionals and federal election experts as to whether proposed participants have anything more than a theoretical chance of winning."

E. Analysis

Based upon the available evidence, there is reason to believe that CPD's Candidate Selection Criteria for 1996 General Election Debate Participation do not comply with the

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[17] In A.O. 1986-37, the Commission determined that the debates proposed by the National Conservative Foundation would not qualify as candidate debates because they would not include a face-to-face confrontation among the candidates. The Commission held that the proposed events would therefore violate 2 U.S.C. § 441b.

requirements of 11 C.F.R. § 110.13(c). Some of the factors appear to be subjective on their face and other factors are so vague as to be imprecise in their definition. Given the resulting uncertainty, it appears that CPD's criteria are not objective as required by 11 C.F.R. § 110.13(c).

As a general standard, CPD assessed whether particular candidates had a "realistic chance" of winning the general election. CPD used three elements to make this determination. CPD's criteria contain examples of factors to be considered with respect to each element. However, the list of factors to be considered uses nonexhaustive terms, which suggests that CPD may have used other factors that were not enumerated in making its decision.

Of the enumerated factors, CPD describes some of the factors as "more subjective" in its document presenting the candidate selection criteria. *See* Attachment 4, at 57.[18] Furthermore, Professor Neustadt, who served as Chair of the subcommittee that developed CPD's criteria and as Chair of the Advisory Committee that applied the criteria in 1996, has been quoted as describing CPD's standard of realistic chance of election and underlying criteria as follows:

> The criteria that were listed are to inform [CPD's] judgment [in applying] that standard. It's a single standard, it's a standard for the future, and to that extent it is by nature subjective. It has to be--it's a judgment in the future.

Campaign for President: The Managers Look at '96. 165 (Harvard Univ. Inst. of Pol., ed. 1997).

The five factors that are specified as part of CPD's criterion "signs of national newsworthiness and competitiveness" are the most problematic of the three groups of factors. Four of those five factors call for consideration of the opinions of groups of professionals that are described, but not precisely identified in the pre-established criteria. The Office of General

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[18] CPD first established its selection criteria under the earlier version of 11 C.F.R. § 110.13 which did not require that the criteria be objective. Despite the Commission's rulemaking that added the objectivity requirement, CPD adopted nearly identical criteria and continued to describe some of those criteria as "subjective." *See* Attachment 4, at 51, 57 and 124; *see also* 60 Fed. Reg. 64,260 (Dec. 14, 1995).

Counsel is unsure how CPD applied these factors, but such factors appear to suffer from at least two deficiencies. First, the data that underlie each factor appear to be accumulated subjective judgments. For example, "opinions of representative political scientists specializing in electoral politics at major universities and research centers" seems to call for consideration of the subjective determinations of the political scientists. Second, it seems that a number of highly subjective judgments must be made to compile the data underlying this factor, ranging from the identification of which universities can be considered major universities to the question of what mix of political scientist would be "representative." Thus, there is reason to believe that such criteria fail CPD's proffered definition of objective because such matters may not be independent of what is personal and rational minds could certainly disagree on such questions. Such criteria can be said to include two levels of subjectivity: first, identifying the pool of sources involves numerous subjective judgments, and second, once the pool is identified, the subjective judgments of its members is considered. Criteria with such double levels of subjective judgments may not be consistent with 11 C.F.R. § 110.13(c).[19]

Moreover, in the absence of additional information, there is reason to believe that the other selection criteria appear to be similarly insufficiently defined to comply with 11 C.F.R. § 110.13(c)'s objectivity requirement: "other demonstration of the ability to fund a national campaign," "[c]olumn inches on newspaper front pages and exposure on network telecasts in comparison with the major party candidates," "the findings of significant public opinion polls conducted by national polling and news organizations," and "reported attendance at meetings and

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[19] *See also Fulani* v. *Brady*, 809 F. Supp. 1112, 1124-25 (S.D.N.Y. 1993) (characterizing similar criteria as subjective).

rallies across the country (locations as well as numbers) in comparison with the two major party candidates."

As noted by the Commission when it promulgated the current version of 11 C.F.R. § 110.13, "[s]taging organizations must be able to show that their objective criteria were used to pick the participants," 60 Fed. Reg. 64,262 (Dec. 14, 1995), and so too must the staging organization be able to show that its criteria were objective. Thus, this Office does not foreclose the possibility that a criterion that is vague or undefined as written could be shown to be sufficiently objective to meet the requirements of 11 C.F.R. § 110.13(c).[20]

CPD's failure to describe its multifaceted analysis of its factors and criteria makes it impossible to know at this point whether the criteria were applied in an objective or subjective manner. Although 11 C.F.R. § 110.13(c) does not specifically require staging organizations to specify the relative importance of each factor, the Commission contemplated that a method of application would be included in debate participant selection criteria, as is shown by the example in the explanation and justification for this regulation. *See* 60 Fed. Reg. 64,262 (Dec. 14, 1995) (stating: "for example, candidates must satisfy three of five objective criteria").

The manner in which the factors are to considered and used to compare candidates is not clear. For example, the Advisory Committee cited Mr. Perot's acceptance of federal funds and the resultant limitation on total expenditures as one of the reasons why the committee recommended that he not be invited to participate in the CPD debates. *See* Attachment 4, at 128.

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[20] For example, one of CPD's criteria considers the endorsements of federal and state officeholders. As CPD puts forth this factor under its "evidence of national organization" criterion, it is vague in that it fails to identify which federal and state officeholders are to be considered. However, a staging organization could defend a similar criterion as objective if it narrowed the group of officeholders, thus eliminating the vagueness of the factor.

Yet, CPD's criteria list eligibility for federal funds as a factor that appears to support the invitation of a candidate.

CPD also lists its criteria and factors in non-exhaustive fashions, each time stating: "The factors to be considered include." That CPD apparently reserves the right to introduce additional criteria or factors into the consideration may add another aspect of subjectivity to the process.[21] Omitting such important aspects of the operation of the criteria is also inconsistent with the Commission's advice to make such criteria available to the candidates prior to the election. *See* 60 Fed. Reg. 64,262 (Dec. 14, 1995) ("staging organizations would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate").

Moreover, this Office has received additional information regarding the role that Clinton/Gore and Dole/Kemp may have played in excluding Mr. Perot from CPD's debates. In December 1996, a conference entitled "Campaign Decision Makers" was held, and it included representatives of Clinton/Gore, Dole/Kemp, and Perot as well as Frank Fahrenkopf, Co-Chair of CPD, and Professor Neustadt, Chair of CPD's Advisory Committee. An edited transcript of the conference was recently published, and some of the statements made at the conference appear to show that Clinton/Gore and Dole/Kemp both played a role in the decision to exclude Mr. Perot from CPD's debates. For example, George Stephanopoulos, Senior Adviser to the President, stated, referring to Dole/Kemp:

> [t]hey didn't have leverage going into the negotiations. They were behind, they needed to make sure Perot wasn't in it. As long as we would agree to Perot not

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[21] The Advisory Committee cited the election results of 1992 as one of the reasons why the committee recommended that Mr. Perot not be invited to participate in the CPD debates. *See* Attachment 4, at 128. Yet, CPD's criteria do not list prior election results as part of the debate participant selection criteria.

> being in it we could get everything else we wanted going in. We got our time frame, we got our length, we got our moderator.

Campaign for President: The Managers Look at '96, 170 (Harvard Univ. Inst. of Pol., ed. 1997). Tony Fabrizio, Chief Pollster for Dole/Kemp, seems to confirm Mr. Stephanopoulos's statement by following it with: "And the fact of the matter is, you got the number of dates." *Id.* Mr. Fabrizio also later stated: "George made very good observations about the positions we walked into the negotiations." *Id.*, at 171. Thus, there is evidence that both Clinton/Gore and Dole/Kemp campaigns appear to have participated in the selection process. Such information further obfuscates CPD's methodology and raises the possibility that CPD did not apply its pre-established criteria.

Thus, there is reason to believe that CPD's selection criteria, as written and as applied in 1996, do not comply with 11 C.F.R. § 110.13(c). If so, CPD is not entitled to the protection of the safe harbor created by 11 C.F.R. §§ 100.7(b)(21) and 110.13(c). *See also* 11 C.F.R. §§ 114.1(a)(2)(x) and 114.4(f). On this basis, there is reason to believe that the debates CPD sponsored were contributions to both of the participating candidates. Therefore, this Office recommends that the Commission find reason to believe that CPD violated 2 U.S.C. § 441b(a).

Additionally, CPD's criteria, as written, specify that the nominees of the Democratic and Republican parties are to be invited solely by virtue of their nominations by the respective parties. Such "automatic" invitations are in direct violation of 11 C.F.R. § 110.13(c). In this instance, however, CPD alleges that it did not follow its standards as written. Instead, CPD states that it applied its analysis of a realistic chance of being elected to both President Clinton and Senator Dole and determined that both candidates met the test. *See* Attachment 4, at 53 and 124-25. The Perot complaint contradicts CPD's claim, alleging that these criteria were not

applied to the Democratic and Republican candidates. Information obtained in discovery should resolve this disputed factual issue and determine whether CPD's selection criteria failed to comply with 11 C.F.R. § 110.13(c) in this regard.

In response to the allegation that they received an in-kind contribution, the Clinton/Gore and Dole/Kemp campaigns claim that they merely relied on CPD's determination of debate participants. However, these arguments appear to be inconsistent with the information showing that both campaigns played a role in the selection process. Even if the campaigns were not involved in the selection process, their claimed reliance upon CPD's determination of which candidates could participate in the debates would not vitiate their receipt of free appearances in the debates sponsored and organized by CPD, a corporation, as an in-kind contribution. FECA provides that it is unlawful for any candidate or political committee to "knowingly . . . accept or receive" corporate contributions, and it appears that Clinton/Gore and Dole/Kemp knowingly accepted the in-kind contributions from CPD.[22] 2 U.S.C. § 441b(a). Because CPD's standards include a statement that at least some of its criteria are subjective, reliance on any assurance that CPD's criteria complied with 11 C.F.R. § 110.13 may have been unreasonable. Therefore, there is reason to believe that Clinton/Gore and Dole/Kemp knowingly accepted a prohibited contribution. Accordingly, this Office recommends that the Commission find reason to believe

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[22] In *FEC v. California Medical Association*, 502 F. Supp. 196 (N.D. Calif. 1980), the court held that the recipient committee's knowledge of the facts that rendered its conduct unlawful was sufficient to create civil liability under the "knowing" standard of 2 U.S.C. § 441a(f). *Id.* at 203. That court so held despite its specific finding that a legal issue related to the illegal conduct had not yet been resolved at the time the committee received the contribution. *See id. See also FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985, 987 (D.N.J. 1986) (holding that a facially defective contribution requires further inquiry to determine whether it is in compliance); *United States v. Marvin*, 687 F.2d 1221 (8th Cir. 1982), *cert. denied*, 460 U.S. 1081 (1983) (analyzing knowing standard similarly in another context). The Commission's Advisory Opinion 1986-37, which is cited by Clinton/Gore, stated that the debates proposed therein would violate 2 U.S.C. § 441b, but does not state which parties would violate that provision. The cited statutory section prohibits both corporate contributions and the receipt of such contributions by candidates or committees.

that Clinton/Gore and Dole/Kemp violated 2 U.S.C. § 441b(a) by knowingly accepting a prohibited corporate contribution from CPD.[23] If Clinton/Gore and Dole/Kemp accepted an in-kind contribution from CPD, the general election committees were required to report the contribution.[24] However, neither committee did so. Therefore, this Office further recommends that the Commission find reason to believe that Clinton/Gore and Dole/Kemp violated 2 U.S.C. § 434(b) by failing to report CPD's in-kind contribution.

III. CPD'S ALLEGED STATUS AS A POLITICAL COMMITTEE

A. Legal Standard

FECA defines "political committee" as, in part: "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5. Political committees are required to register with the Commission, and to report contributions received and expenditures made in accordance with FECA and the Commission's regulations. *See* 2 U.S.C. § 433 and 11 C.F.R. § 102.1(d) (requiring political committees to register with the Commission); *see also* 2 U.S.C. § 434 and 11 C.F.R. § 104.1(a) (requiring political committees to file specified reports with the

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[23] As publicly financed candidates, Clinton Gore and Dole Kemp are subject to an expenditure limit, 2 U.S.C. § 441a(b)(1)(B), and expenditures made by any person at the candidates' request or authorization are counted toward the limit, 2 U.S.C. § 441a(b)(2)(B)(ii). *See also* 11 C.F.R. § 110.8. Any contributions from CPD may have caused Clinton/Gore and Dole/Kemp to exceed their expenditure limits. Both Clinton/Gore and Dole/Kemp have not reported expenditures in response to FEC Form 3P, line 13, "Expenditures Subject to Limitation," during the period from their inception through September 30, 1997. The amount of actual expenditures subject to the limitation will be determined in the Commission's audit and examination of each committee pursuant to 26 U.S.C. § 9007(a). Therefore, the Office of General Counsel will make any appropriate recommendations based on information from the Commission's audits and examinations.

[24] *See* 2 U.S.C. § 434(b)(2)(A) and (D) (requiring committees to report contributions from persons other than political committees and from political committees); 434(b)(3)(A) and (B) (requiring committees to identify certain contributors); 434(b)(4)(A) (requiring committees to report expenditures); *see also* 11 C.F.R. § 104.13(a)(2) (requiring committees to report in-kind contributions as expenditures).

Commission). Political committees that are "established, financed, maintained or controlled by the same . . . person, or group of persons . . . are affiliated." 11 C.F.R. § 100.5(g)(2).

In *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986), the Supreme Court cited *Buckley v. Valeo*, 424 U.S. 1, 79 (1976), and its requirement that "an entity subject to regulation as a 'political committee' under [FECA] is one that is either 'under the control of a candidate or the major purpose of which is the nomination or election of a candidate.'" *FEC v. Massachusetts Citizens for Life*, 479 U.S. at 252 n.6. Thus, in order to be a political committee under FECA, an organization that is not controlled by a candidate must have as its major purpose the nomination or election of a candidate in addition to meeting the statutory contribution or expenditure thresholds in 2 U.S.C. § 431(4).[25]

Political committees remain subject to the prohibition of contributing corporate funds to federal candidates in 2 U.S.C. § 441b. *See* 11 C.F.R. § 114.12(a) (exempting political committees that are incorporated "for liability purposes only"). In *FEC v. Massachusetts Citizens for Life*, the Supreme Court held that application of 2 U.S.C. § 441b's ban on corporate independent expenditures to corporations that meet certain qualifications was an unconstitutional restriction of First Amendment rights. However, its holding was expressly limited to corporate independent expenditures; even qualified nonprofit corporations remain subject to the prohibition of corporate contributions. *See* 11 C.F.R. § 114.10(d)(2).[26]

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[25] *But see Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1996) (holding that Supreme Court's major purpose test applies only to expenditures, and not to contributions or coordinated expenditures), *cert. granted*, 117 S.Ct. 2451 (1997). The Commission continues to contest this decision, and its petition for certiorari was granted. The Supreme Court has heard oral argument on the case, but has not yet issued a decision. *See also* A.O. 1996-3 (April 19, 1996) and A.O. 1996-13 (June 10, 1996) (applying major purpose test to organizations that made contributions after the *Akins en banc* hearing was granted and the panel decision was vacated).

[26] The Commission has codified the *FEC v. Massachusetts Citizens for Life* decision in its regulations. 11 C.F.R. § 114.10. CPD is not eligible for the exemption in 11 C.F.R. § 114.10 because it is a 26 U.S.C. § 501(c)(3) corporation. *See* 11 C.F.R. § 114.10(c)(5). Additionally, the exemption in 11 C.F.R. § 114.10 is limited to

Staging organizations for candidate debates are limited to organizations that are exempt from federal taxation under 26 U.S.C. §§ 501(c)(3) or 501(c)(4) and that do not endorse, support or oppose political parties or candidates. 11 C.F.R. § 110.13. Therefore, if political committees stage candidate debates, their efforts will be contrary to 11 C.F.R. § 110.13(a)(1) and the debates will be contributions to the participating candidates and must comply with the prohibitions and limitations for contributions.

B. Complainants' Allegations

The Perot complaint alleges that CPD qualifies as a political committee under FECA. Consequently, CPD is ineligible to stage candidate debates pursuant to 11 C.F.R. § 110.13(a) and it has failed to register as required by 2 U.S.C. § 433, according to the Perot complaint. The Perot complaint alleges that CPD is an affiliated committee of the Democratic National Committee and the Republican National Committee. CPD is "a bipartisan political organization that expends money and resources to assist in the election of either the nominee of the Democratic Party or of the Republican Party," according to the Perot complaint, which cites as evidence of this affiliation each of CPD's joint chairmen's status as a former chairman of one of the two major parties and CPD's membership's alleged equal division between representative of the Democratic and Republican parties. The Perot complaint also cites DNC and RNC press releases at the time of CPD's formation that describe the organization as "bi-partisan" that was formed to sponsor debates "by the National Republican and Democratic Committees between

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independent expenditures, 11 C.F.R. § 114.10(d), and CPD's activities were sufficiently coordinated with the campaigns to constitute contributions. With respect to 11 C.F.R. § 114.10, see *Minnesota Citizens Concerned for Life v. FEC*, 113 F.3d 129 (8th Cir. 1997) (holding 11 C.F.R. § 114.10 void) and *FEC v. Survival Educ. Fund, Inc.*, 65 F.3d 285 (2d Cir. 1995) (holding requirement that qualified nonprofit corporations have a policy of not accepting corporate contributions invalid).

their respective nominees." The NLP complaint also includes an allegation that CPD is a "bipartisan organization composed of Republicans and Democrats."

C. Responses

1. CPD's Response

CPD characterizes the Perot complaint's argument that CPD is a political committee as an "ancillary attack" that fails because CPD's debate participant selection criteria are in compliance with 11 C.F.R. § 110.13(c). CPD cites its limited mission to sponsor presidential debates and conduct closely related educational activities as evidence that its expenditures are not made to endorse, support or oppose any candidate or party. CPD cites *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 252 n.6 (1986), as stating that an entity's "major purpose" must be to secure the nomination or election of a candidate in order for that entity to constitute a political committee under FECA.

CPD maintains that it does not assess or endorse candidates; it only invites certain candidates to participate in debates sponsored by CPD. According to CPD, the Commission's debate regulation is premised on the notion that such invitations cannot constitute endorsement or support of the invited candidates. Finally, CPD states that because its funds are used to defray cost incurred staging debates, the expenditures do not constitute contributions or expenditures under FECA, and therefore, CPD does not meet FECA's definition of a political committee.

2. RNC's Response

In its response to MUR 4473, the RNC requests that the Commission find no reason to believe that a violation occurred. According to the RNC, the "CPD is not an affiliated committee of the RNC." The RNC acknowledges that the CPD was established by Frank Fahrenkopf and

Paul Kirk, then the chairs of the RNC and the DNC, respectively, but the RNC maintains that they did so "separate and apart from their party organizations" and that they no longer serve as the chairs of the major national party committees. The RNC further maintains that the CPD "was never an officially sanctioned or approved organization of the RNC," nor is it "a political committee established, . . . financed, maintained or controlled by the RNC." The RNC argues that, accordingly, the complaint in this matter should be dismissed.

3. DNC's Response

In its response to MUR 4473, the DNC also requests that the Commission find no reason to believe that any violations occurred in this matter and dismiss the complaint. The DNC argues that "even if CPD could conceivably be considered a 'political committee,' it has not been 'established, financed, maintained or controlled' by the DNC." The DNC acknowledges that CPD was established by the former chairs of the Democratic and Republican national parties, but denies that the DNC in anyway controls CPD. The DNC argues that the "CPD is controlled by an independent board of directors, none of whom are DNC members, officers or employees."

D. Analysis

The Office of General Counsel is recommending that the Commission find reason to believe that CPD violated 2 U.S.C. § 441b(a) as a result of CPD's status as a corporation. However, there are also allegations and some supporting information that CPD may be a political committee. Political committees that are incorporated for liability purposes are not prohibited by 2 U.S.C. § 441b(a) from making contributions or expenditures even though they have corporate status. 11 C.F.R. § 114.12(a). The reason for CPD's incorporating is unknown, so it is not possible to determine if 11 C.F.R. § 114.12(a) is applicable to CPD. Therefore, the questions

that must be addressed are whether CPD made expenditures of $1,000 and whether its major purpose is the nomination or election of a candidate.

As set forth in its Articles of Incorporation, CPD's purpose is "to organize, manage, produce, publicize and support debates for the candidates for President of the United States." CPD's purpose may have been to conduct debates and to do so in a manner that would not result in a contribution to either candidate. However, it appears that Clinton/Gore and Dole/Kemp may have played a role in the selection of debate participants. Such a role is not anticipated in CPD's criteria and the extent of involvement of the two campaigns in CPD actions cannot be known without further investigation. This factual issue raises the possibility that CPD might have a major purpose related to the election of candidates. Until the activities of Clinton/Gore and Dole/Kemp in connection with CPD have been investigated, it is impossible to be assured of CPD's major purpose.

Moreover, it appears that both the DNC and RNC played a substantial role in founding CPD. CPD continues to refer to its Co-Chairs' prior positions as former chairman of either the DNC or the RNC. At CPD's establishment in 1987, both Messrs. Fahrenkopf and Kirk were Chairman of the RNC and DNC, respectively, and it was in their capacity as party chairmen that they announced the creation of CPD at a joint press conference, according to a press release from the Democratic and Republican National Committees. According to that press release, the parties' chairmen stated that CPD was created to "better fulfill our party responsibilities to inform and educate the electorate, [and] strengthen the role of political parties in the electoral process" (emphasis added). Finally, the press release also cites an earlier agreement between the two party chairmen in which they "agree[d] in principle to pursue the party [debate] sponsorship

concept." That Memorandum of Agreement from November 26, 1985 was signed by both chairmen explicitly on behalf of their respective parties.

The role played by Clinton/Gore and Dole/Kemp in CPD's debate participant selection process and the role played by the DNC and the RNC in the creation CPD suggest that CPD's major purpose may be to facilitate the election of either of the major parties' candidates for president. Therefore, there is reason to believe that CPD is a political committee, and this Office recommends that the Commission find reason to believe that CPD violated 2 U.S.C. §§ 433 and 434.[27]

IV. NETWORKS' PROGRAMS

A. Legal Standard

FECA specifically exempts costs incurred by media organizations covering news stories from the definition of expenditures. The exemption states: "The term 'expenditure' does not include any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i). The Commission's regulations similarly exclude coverage of news events from the definitions of both contribution and expenditure. 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2).[28]

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[27] Because the role that the DNC and the RNC played in CPD's status as a political committee is unclear, the Office of General Counsel is not making any recommendations against the DNC and the RNC at this time. Additionally, if CPD is a political committee, it would be prohibited from receiving corporate contributions, 2 U.S.C. § 441b(a), and it would be permitted to accept contributions subject to the contribution limitations, 2 U.S.C. § 441a(f). With respect to these issues, this Office may make additional recommendations based on the investigation.

[28] The regulatory exemption is limited if the facility is owned or controlled by any political party, political committee, or candidate. If a facility is so-owned or controlled, the exemption will still apply if the costs for a news story "represent[] a *bona fide* news account communicated in a publication of general circulation or on a licensed broadcasting facility, and which is part of campaign-related news account which give reasonably equal coverage to all opposing candidates in the circulation or listening area." 11 C.F.R. §§ 100.7(b)(2) and 100.8(b)(2).

The legislative history for the statutory exemption for news stories explains that the exemption was intended "to make it plain that it is not the intent of Congress . . . to limit or burden in any way the first amendment freedoms of the press or of association. [This exemption] assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns." H.R. Rep. No. 1239, 93d Cong., 2d Sess. 4 (1974). Thus, television networks (as groups of television broadcasting stations) enjoy a statutory and regulatory exemption for any of the described costs incurred covering the election campaigns.

Certain media organizations are also permitted to sponsor candidate debates. The Commission's regulation on candidate debates permits broadcasters that are not owned or controlled by a political party, political committee or candidate to stage debates in accordance with the provisions of 11 C.F.R. § 110.13. 11 C.F.R. § 110.13(a)(2). That regulatory provision explicitly recognizes the dual role played by broadcasters in connection with candidate debates. It states: "In addition, broadcasters (including a cable television operator, programmer or producer), *bona fide* newspapers, magazines and other periodical publications, acting as press entities, may also cover or carry candidate debates in accordance with 11 C.F.R. 100.7 and 100.8." *Id.*

B. NLP's Allegations

NLP's complaint challenges television programming that Fox, PBS and ABC proposed to produce and broadcast in pleadings filed with the Federal Communications Commission ("FCC"). According to published reports, Fox permitted both President Clinton and Senator Dole to make 10 one-minute statements on its network. PBS permitted each of the two candidates to make six statements of two and one-half minutes per statement on its network. *See*

C. Adasiewicz et al., *Free Television for Presidential Candidates: the 1996 Experiment*, 6-7 (Annenberg Pub. Policy Ctr. of the Univ. of Pa. No. 11, 1997). ABC had proposed a one-hour debate, but both of the major parties' candidates declined to participate, and ABC canceled its program. *See* Stephen Seplow, *Experiment in Giving Candidates Free Airtime Had Mixed Results, Phila. Inquirer* (Nov. 1, 1996).

According to NLP, Fox and PBS proposed to invite only those candidates selected by CPD for participation in CPD's debates to participate in their programs. NLP alleges that, under Fox's proposal, Fox would place its production facilities at the candidates' disposal free of charge, and that such an action must constitute a contribution under FECA. NLP anticipates Fox's claim that the news story exemption would apply, but NLP argues that the news story exemption does not apply to the cost of producing (only "covering" or "carrying") a news story. NLP alleges that Fox's proposal is more analogous to an advertisement than to a news story. Further, NLP alleges that the news story exemption is inapplicable because Fox's facilities will be under the control of the candidates at least briefly and the news story exemption specifically requires that broadcasters with facilities under the control of candidates provide reasonably equal coverage to all opposing candidates in the viewing area.

The NLP complaint also challenges PBS's proposal because candidates would be "unrestricted as to content within certain minimal guidelines," according to NLP. This "gift of free air time" constitutes a contribution, according to NLP. Alternatively, NLP alleges that if PBS's programming is to be considered a debate, its debate participant selection are neither pre-announced, nor objective, to the extent PBS intends to rely on CPD's selection of candidates.

C. The Networks' Responses

In its response, Fox outlined its proposal, which included the format of the programs as aired: a series of one-minute position statements by each participating candidate, responding to ten identical questions from Fox that pertain to issues of "demonstrable concern to voters" that were broadcast on Tuesdays, Saturdays and Sundays from September 17 to October 15, 1996. *See* Adasiewicz, *supra*, at 6. Fox selected the candidates to participate "by reference to the decision of [CPD]" of which candidates to invite to participate in its debates. Fox retained a nonpartisan team of consultants to formulate the questions posed to candidates, and the order of appearance was determined by a coin toss. Fox did not permit the candidates to edit or otherwise modify or enhance the responses in the post-production process, and both candidates' presentations were recorded under the supervision of a Fox representative. The candidates declined Fox's offer to use its production facilities.

PBS responded by correcting a fact asserted in NLP's complaint: PBS proposed and, in fact, provided candidates with segments of two and one-half minutes, not hours, during which candidates stated their views without restriction as to content, except for PBS's reservation of the right to delete libelous material. These segments were broadcast on successive business days from October 17 to November 1, 1996. *See* Adasiewicz, *supra*, at 7. PBS also described its efforts to ensure equality of treatment. PBS maintained control over the program in the exercise

Both networks defend their proposals as meeting FECA's standards for news coverage that is excluded from the definitions of contribution and expenditure. Similarly, both networks presented the alternative argument that their programs also meet the standards of a candidate debate that is excluded from the definitions of contribution and expenditure. Both networks also emphasized that the FCC had determined that the programming as proposed in the networks' pleadings would be exempt from the "equal opportunities" requirement of Section 315 of the Communications Act of 1934, as amended, 47 U.S.C. § 315, because the programming would constitute *bona fide* news event coverage under the Communications Act.[29]

D. Analysis

Initially, the Office of General Counsel notes that NLP's complaint was filed before any of the programming was actually broadcast, and its allegations are based on the proposals for such programming put forth by Fox, PBS and ABC in their FCC pleadings. *See* 11 C.F.R. § 111.4(a). Some of the program details as actually produced and broadcast differed from the proposals; however, none of the variations was material to this analysis. Therefore, this report analyzes the programs as they were broadcast. Additionally, because ABC canceled its program, the complaint with respect to ABC is moot.

The networks' programs appear to comply with the requirements for the news story exemption from the definition of a contribution. Prior Commission actions have held similar programs to constitute news stories. The Commission has issued several Advisory Opinions that held programs similar to those challenged by NLP to fall within the news story exemption. In

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[29] The FCC's declaratory ruling resolved issues related to the Communications Act that are of great importance to networks, as broadcasters regulated by the FCC. However, the FCC's resolution of Communications Act issues raised by the networks' proposal does not resolve this matter that involves issues under FECA. Nonetheless, this Office's recommendation is consistent with the FCC's action in this matter.

Advisory Opinion 1982-44, the Commission stated that the provision of free air time on a cable television network was not a contribution. The air time was to be given to both of the major parties, one of which had outlined a program that included various leading party members discussing public issues from their party's perspective and soliciting contributions to their party. Some of the participants were candidates for office. Nonetheless, the Commission held that the program qualified as commentary on the election and therefore it fell within the news story exemption.

Another advisory opinion authorized a multimedia presentation proposed by U.S. News & World Report to include a series of articles and candidate interviews in its magazine and television programs. In this Advisory Opinion, the Commission did not limit its holding to any particular structure of the proposed news coverage. *See* A.O. 1987-8. Thus, Commission precedent does not require that news stories or commentary conform to particular formats. The presentation of candidate views and positions that each of the networks' programs entails qualifies each of the networks' programs to meet the standard for the news story exemption. On this basis, there is reason to believe that both networks' programs constitute the presentation of a news story or commentary that meets FECA's standards for an exemption from the definition of contribution and expenditure.

Finally, neither of the programs constituted a debate under the Commission's requirement that a face-to-face confrontation is an essential element to a debate for purposes of 11 C.F.R. § 110.13. *See* A.O. 1986-37. The programs consisted of serial appearances by the participating candidates and lacked even opportunities for one candidate to respond to another. Thus, the programs did not provide any confrontation and cannot be considered a debate. Therefore, the

requirements of 11 C.F.R. § 110.13(c) are not applicable to the networks' programs. Consequently, this Office recommends that the Commission find no reason to believe that any of the respondents[30] violated 2 U.S.C. § 441b(a) with respect to the challenged television programs.

V. CONCLUSION AND PROPOSED DISCOVERY PLAN

The Office of General Counsel proposes to seek information about CPD's selection criteria. Such information would include documents indicating how CPD defined the enumerated factors, how CPD applied the selection criteria, and what criteria were used to determine that the major parties' candidates should be invited to participate in the debates. Additionally, this Office proposes to seek information regarding the role of the Clinton/Gore and Dole/Kemp campaigns in the selection of debate participants. This Office also proposes to seek information to identify CPD's major purpose, including specifically the role of the campaigns and of the DNC and RNC in CPD's activities. In order to evaluate whether CPD should be considered a political committee that is affiliated with the DNC and RNC, information related to CPD's establishment is included within the information this Office proposes to seek. Finally, this Office proposes to seek documentation of the cost incurred by CPD to stage the debates by the candidates as a measure of the value of any contribution to Clinton/Gore and Dole/Kemp for the two Presidential debates and the Vice Presidential debate.[31]

In order to do so, this Office recommends that the Commission approve the attached subpoena directed to CPD requiring it to submit written answers to questions and to produce

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[30] The respondents to this allegation are: ABC, Inc.; Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as its Treasurer; Dole/Kemp '96 and Robert E. Lighthizer, as its Treasurer; Fox Broadcasting Company; and the Public Broadcasting Service.

[31] The value of any media coverage of CPD's debates is not included in the value of the contribution because the media's coverage of the debates is exempt pursuant to the news story exemption in 2 U.S.C. § 431(9)(B)(i) and 11 C.F.R. § 100.7(b)(2).

documents that relate to the debates it staged. Additionally, this Office recommends that the Commission approve the attached subpoenas directed to the participating candidates' committees and to the DNC and the RNC. After this Office has reviewed the responses to the subpoenas, we will report back to the Commission with appropriate recommendations.

VI. RECOMMENDATIONS

1. Find reason to believe that the Commission on Presidential Debates violated 2 U.S.C. §§ 433, 434 and 441b(a).

2. Find reason to believe that the Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as its treasurer; and Dole/Kemp '96 and Robert E. Lighthizer, as its treasurer, violated 2 U.S.C. §§ 434(b)(2)(C), 434(b)(4) and 441b(a) with respect to the candidate debates staged by the Commission on Presidential Debates.

3. Find no reason to believe that ABC, Inc., Fox Broadcasting Company or the Public Broadcasting Service violated 2 U.S.C. § 441b(a).

4. Find no reason to believe that the Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as its treasurer; and Dole/Kemp '96 and Robert E. Lighthizer, as its treasurer, violated 2 U.S.C. § 441b(a) with respect to the television programs challenged by the complaints filed in MURs 4451 and 4473.

5. Approve the appropriate letters.

6. Approve the attached Factual and Legal Analyses and subpoenas.

7. Close the files in MUR 4451 with respect to ABC, Inc., Fox Broadcasting Company and Public Broadcasting Service.

2/6/98
Date

Lawrence M. Noble
General Counsel

Attachments:

1 Response from Fox Broadcasting Company
2 Response from ABC, Inc.
3 Response from Public Broadcasting Service
4 Response from Commission on Presidential Debates
5 Response from Dole/Kemp '96 and Robert E. Lighthizer, as its treasurer, to MUR 4451
6 Response from Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as its treasurer, to MUR 4451
7 Response from Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as its treasurer, to MUR 4473
8 Response from DNC Services Corporation/Democratic National Committee and R. Scott Pastrick, as its treasurer, to MUR 4473
9 Response from the Republican National Committee and William J. McManus, as its treasurer, to MUR 4473
10 Response from Dole/Kemp '96 and Robert E. Lighthizer, as its treasurer, to MUR 4473
11 Factual and Legal Analyses (3)
12 Subpoenas (5)

(20)

March 18, 2000
Privileged and Confidential

MEMORANDUM

To: Steptoe & Johnson
From: Dennis Aigner and
Analysis Group/Economics
Re: CPD Indicators of Electoral Support

Introduction and Qualifications

On behalf of the Buchanan 2000 Campaign, Analysis Group/Economics and Professor Dennis Aigner were asked to review the selection criteria of the Commission on Presidential Debates ("CPD"). Specifically, we were asked to review and critique the statistical methodology used to determine a candidate's level of electoral support.

Analysis Group/Economics and Professor Aigner have conducted numerous studies involving statistical sampling, the design of statistical experiments, the treatment of measurement error in econometric models, and statistical and econometric estimation. Dr. Aigner is a professor of Management and Economics of the Graduate School of Management and Economics at the University of California, Irvine. Professor Aigner's fields of specialization are econometrics, statistical sampling, and sample design. He has written two text books in this field entitled: *Principles of Statistical Decisionmaking* and *Basic Econometrics*. Professor Aigner is a recognized authority in experimental design and sampling theory.

Review

We have reviewed the CPD January 6, 2000 media advisory entitled: "CPD Announces Candidate Selection Criteria, Sites and Dates for 2000 Debates." One of the selection criteria for determining whether a declared presidential candidate qualifies for inclusion in one or more of its debates "...requires that the candidate have a level of support of at least 15% (fifteen percent) of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recent publicly reported results at the time of the determination." We understand that no other guidelines or criteria govern the public opinion polls or the calculation of the average of those poll results. We also understand that the five polling organizations are likely to be ABC/Washington Post, CBS/New York Time, NBC/Wall Street Journal, CNN/USA Today/Gallup, and Fox/Opinion-Dynamics. Counsel for Buchanan 2000, Steptoe & Johnson, has supplied us with

characteristics of recent polls from these organizations. We assume that these recent polls will be representative of the polls used by the CPD in calculating the average for the selection criteria.

We do not have any findings regarding the results or implementation of these polls. There are, however, several issues concerning the implementation of this particular criterion (taking a simple average) that cast doubt on its efficacy.

1. The population to which each sample applies is not consistent across the five polls. For example, the CNN/USA Today poll of 3/13/00 consisted of approximately 1000 adults, of whom half were "likely voters." The CBS/NY Times poll of 2/12/00 consisted of 1225 adults, of whom 955 were "registered voters." And the 3/2/00 ABC/Washington Post poll consisted of 1200 adults without identifying whether they were "likely" or "registered" voters. Polls that relate to different underlying populations cannot be combined under any circumstances. Moreover, only poll results that represent the opinions of "likely voters" or "registered voters" should be used for the CPD's stated purpose. The opinions of non-voting or non-registered adults are irrelevant for this purpose.

2. The effective sample sizes are different across the five polls. A simple average does not account for the fact that polls with larger samples are inherently more reliable than polls with smaller sample sizes. A weighted average would be a more appropriate approach.

3. Using an average of poll results masks the uncertainty inherent in generalizing from these samples to the populations they represent. Margins of error in the range +/-3% to +/-5% indicate that an estimated plurality of, say, 13% for a candidate could be as large as 16-18% with a high degree of statistical confidence. Therefore, to eliminate a candidate on the basis of the estimate alone, without considering the margin of error, may lead to unfair results. In other words, there is a certain probability inherent in the CPD's method of rejecting a candidate who in fact should be included in the debates. A more sensible approach would be to use the upper bound of the estimated plurality derived from a margin of error based on the averaging procedure.

Dennis J. Aigner

Patrick G. Goshtigian for
Analysis Group/Economics

(21)

National Council on Public Polls

20 Questions A Journalist Should Ask About Poll Results

Second Edition

Sheldon R. Gawiser, Ph.D. and G. Evans Witt

For journalists and for pollsters, questions are the most frequently used tools for gathering information. For the journalist looking at a set of poll numbers, here are the 20 questions to ask the pollster before reporting any results. This publication is designed to help working journalists do a thorough, professional job covering polls. It is not a primer on how to conduct a public opinion survey.

The only polls that should be reported are "scientific" polls. A number of the questions here will help you decide whether or not a poll is a "scientific" one worthy of coverage -- or an unscientific survey without value.

Unscientific pseudo-polls are widespread and sometimes entertaining, if always quite meaningless. Examples include 900-number call-in polls, man-on-the-street surveys, most Internet polls, shopping mall polls, and even the classic toilet tissue poll featuring pictures of the candidates on each sheet.

The major distinguishing difference between scientific and unscientific polls is who picks the respondents for the survey. In a scientific poll, the pollster identifies and seeks out the people to be interviewed. In an unscientific poll, the respondents usually "volunteer" their opinions, selecting themselves for the poll.

The results of the well-conducted scientific poll can provide a reliable guide to the opinions of many people in addition to those interviewed -- even the opinions of all Americans. The results of an unscientific poll tell you nothing beyond simply what those respondents say.

With these 20 questions in hand, the journalist can seek the facts to decide how to handle every poll that comes across the news desk each day.

The authors wish to thank the officers, trustees and members of the National Council on Public Polls for their editing assistance and their support.

1. Who did the poll?
2. Who paid for the poll and why was it done?
3. How many people were interviewed for the survey?
4. How were those people chosen?
5. What area (nation, state, or region) or what group (teachers, lawyers,

Democratic voters, etc.) were these people chosen from?
6. Are the results based on the answers of all the people interviewed?
7. Who should have been interviewed and was not?
8. When was the poll done?
9. How were the interviews conducted?
10. What about polls on the Internet or World Wide Web?
11. What is the sampling error for the poll results?
12. Who's on first?
13. What other kinds of factors can skew poll results?
14. What questions were asked?
15. In what order were the questions asked?
16. What about "push polls"?
17. What other polls have been done on this topic? Do they say the same thing? If they are different, why are they different?
18. So I've asked all the questions. The answers sound good. The poll is correct, right?
19. With all these potential problems, should we ever report poll results?
20. Is this poll worth reporting?

1. Who did the poll?

What polling firm, research house, political campaign, corporation or other group conducted the poll? This is always the first question to ask.

If you don't know who did the poll, you can't get the answers to all the other questions listed here. If the person providing poll results can't or won't tell you who did it, serious questions must be raised about the reliability and truthfulness of the results being presented.

Reputable polling firms will provide you with the information you need to evaluate the survey. Because reputation is important to a quality firm, a professionally conducted poll will avoid many errors.

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2. Who paid for the poll and why was it done?

You must know who paid for the survey, because that tells you – and your audience – who thought these topics are important enough to spend money finding out what people think. This is central to the whole issue of why the poll was done.

Polls are not conducted for the good of the world. They are conducted for a reason – either to gain helpful information or to advance a particular cause.

It may be the news organization wants to develop a good story. It may be the politician wants to be re-elected. It may be that the corporation is trying to push sales of its new product. Or a special-interest group may be trying to prove that its views are the views of the entire country.

All are legitimate reasons for doing a poll.

The important issue for you as a journalist is whether the motive for

doing the poll creates such serious doubts about the validity of the results that the numbers should not be publicized.

Examples of suspect polls are private polls conducted for a political campaign. These polls are conducted solely to help the candidate win –and for no other reason. The poll may have very slanted questions or a strange sampling methodology, all with a tactical campaign purpose. A campaign may be testing out new slogans, a new statement on a key issue or a new attack on an opponent. But since the goal of the candidate's poll may not be a straightforward, unbiased reading of the public's sentiments, the results should be reported with great care.

Likewise, reporting on a survey by a special-interest group is tricky. For example, an environmental group trumpets a poll saying the American people support strong measures to protect the environment. That may be true, but the poll was conducted for a group with definite views. That may have swayed the question wording, the timing of the poll, the group interviewed and the order of the questions. You should examine the poll to be certain that it accurately reflects public opinion and does not simply push a single viewpoint.

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3. How many people were interviewed for the survey?

Because polls give approximate answers, the more people interviewed in a scientific poll, the smaller the error due to the size of the sample, all other things being equal.

A common trap to avoid is that "more is automatically better." It is absolutely true that the more people interviewed in a scientific survey, the smaller the sampling error – all other things being equal. But other factors may be more important in judging the quality of a survey.

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4. How were those people chosen?

The key reason that some polls reflect public opinion accurately and other polls are unscientific junk is how the people were chosen to be interviewed.

In scientific polls, the pollster uses a specific method for picking respondents. In unscientific polls, the person picks himself to participate.

The method pollsters use to pick interviewees relies on the bedrock of mathematical reality: when the chance of selecting each person in the target population is known, then and only then do the results of the sample survey reflect the entire population. This is called a random sample or a probability sample. This is the reason that interviews with 1,000 American adults can accurately reflect the opinions of more than 200 million American adults.

Most scientific samples use special techniques to be economically feasible. For example, some sampling methods for telephone interviewing do not just pick randomly generated telephone numbers. Only telephone exchanges that are known to contain working residential numbers are selected – to reduce the number of wasted calls. This still produces a random sample. Samples of only listed telephone numbers do not produce a random sample of all working telephone numbers.

But even a random sample cannot be purely random in practice since some people don't have phones, refuse to answer, or aren't home.

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5. What area (nation, state, or region) or what group (teachers, lawyers, Democratic voters, etc.) were these people chosen from?

It is absolutely critical to know from which group the interviewees were chosen.

You must know if a sample was draw from among all adults in the United States, or just from those in one state or in one city, or from another group. For example, a survey of business people can reflect the opinions of business people – but not of all adults. Only if the interviewees were chosen from among all American adults can the poll reflect the opinions of all American adults.

In the case of telephone samples, the population represented is that of people living in households with telephones. For most purposes, telephone households may be similar to the general population. But if you were reporting a poll on what it was like to be poor or homeless, a telephone sample would not be appropriate. Remember, the use of a scientific sampling technique does not mean that the correct population was interviewed.

Political polls are especially sensitive to this issue.

In pre-primary and pre-election polls, which people are chosen as the base for poll results is critical. A poll of all adults, for example, is not very useful on a primary race where only 25 percent of the registered voters actually turn out. So look for polls based on registered voters, "likely voters," previous primary voters, and such. These distinctions are important and should be included in the story, for one of the most difficult challenges in polling is trying to figure out who actually is going to vote.

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6. Are the results based on the answers of all the people interviewed?

One of the easiest ways to misrepresent the results of a poll is to report the answers of only a subgroup. For example, there is usually a substantial difference between the opinions of Democrats and Republicans on campaign-related matters. Reporting the opinions of

only Democrats in a poll purported to be of all adults would substantially misrepresent the results.

Poll results based on Democrats must be identified as such and should be reported as representing only Democratic opinions.

Of course, reporting on just one subgroup can be exactly the right course. In polling on a primary contest, it is the opinions of those who can vote in the primary that count – not those who cannot vote in that contest. Each state has its own rules about who can participate in its primaries. Primary polls should include only eligible primary voters.

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7. Who should have been interviewed and was not?

No survey ever reaches everyone who should have been interviewed. You ought to know what steps were undertaken to minimize non-response, such as the number of attempts to reach the appropriate respondent and over how many days.

There are many reasons why people who should have been interviewed were not. They may have refused attempts to interview them. Or interviews may not have been attempted if people were not home when the interviewer called. Or there may have been a language problem or a hearing problem.

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8. When was the poll done?

Events have a dramatic impact on poll results. Your interpretation of a poll should depend on when it was conducted relative to key events. Even the freshest poll results can be overtaken by events. The President may have given a stirring speech to the nation, the stock market may have crashed or an oil tanker may have sunk, spilling millions of gallons of crude on beautiful beaches.

Poll results that are several weeks or months old may be perfectly valid, but events may have erased any newsworthy relationship to current public opinion.

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9. How were the interviews conducted?

There are three main possibilities: in person, by telephone or by mail. Most surveys are now conducted by telephone, with the calls made by interviewers from a central location. However, some surveys are still conducted by sending interviewers into people's homes to conduct the interviews.

Some surveys are conducted by mail. In scientific polls, the pollster picks the people to receive the mail questionnaires. The respondent

fills out the questionnaire and returns it.

Mail surveys can be excellent sources of information, but it takes weeks to do a mail survey, meaning that the results cannot be as timely as a telephone survey. And mail surveys can be subject to other kinds of errors, particularly low response rates. In many mail surveys, more people fail to participate than do. This makes the results suspect.

Surveys done in shopping malls, in stores or on the sidewalk may have their uses for their sponsors, but publishing the results in the media is not among them. These approaches may yield interesting human-interest stories, but they should never be treated as if they represent a public opinion poll.

Advances in computer technology have allowed the development of computerized interviewing systems that dial the phone, play taped questions to a respondent and then record answers the person gives by punching numbers on the telephone keypad. Such surveys have a variety of severe problems, including uncontrolled selection of respondents and poor response rates, and should be avoided.

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10. What about polls on the Internet or World Wide Web?

The explosive growth of the Internet and the World Wide Web has given rise to an equally explosive growth in various types of online polls and surveys. Many online polls may be good entertainment, but they tell you nothing about public opinion.

Most Internet polls are simply the latest variation on the pseudo-polls that have existed for many years. Whether the effort is a click-on Web survey, a dial-in poll or a mail-in survey, the results should be ignored and not reported. All these pseudo-polls suffer from the same problem: the respondents are self-selected. The individuals choose themselves to take part in the poll – there is no pollster choosing the respondents to be interviewed.

Remember, the purpose of a poll is to draw conclusions about the population, not about the sample. In these pseudo-polls, there is no way to project the results to any larger group. Any similarity between the results of a pseudo-poll and a scientific survey is pure chance.

Clicking on your candidate's button in the "voting booth" on a Web site may drive up the numbers for your candidate in a presidential horse-race poll online. For most such efforts, no effort is made to pick the respondents, to limit users from voting multiple times or to reach out for people who might not normally visit the Web site.

The 900-number dial-in polls may be fine for deciding whether or not Larry the Lobster should be cooked on Saturday Night Live or even for dedicated fans to express their opinions on who is the greatest quarterback in the National Football League. The opinions expressed may be real, but in sum the numbers are just entertainment. There is

Never be fooled by the number of responses. In some cases a few people call in thousands of times. Even if 500,000 calls are tallied, no one has any real knowledge of what the results mean. If big numbers impress you, remember that the *Literary Digest's* non-scientific sample of 12,000,000 people said Landon would beat Roosevelt in the 1936 Presidential election.

Mail-in coupon polls are just as bad. In this case, the magazine or newspaper includes a coupon to be returned with the answers to the questions. Again, there is no way to know who responded and how many times each person did.

Another variation on the pseudo-poll comes as part of a fund-raising effort. An organization sends out a letter with a survey form attached to a large list of people, asking for opinions and for the respondent to send money to support the organization or pay for tabulating the survey. The questions are often loaded and the results of such an effort are always meaningless.

This technique is used by a wide variety of organizations from political parties and special-interest groups to charitable organizations. Again, if the poll in question is part of a fund-raising pitch, pitch it – in the wastebasket.

With regard to the Internet, methods are being developed to sample the opinions of those who have online access, although these efforts are just starting. Even a survey that accurately sampled those who have access to the Internet would still fall short of a poll of all Americans, since only a relatively small fraction of the nation's adults have access to the Internet.

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11. What is the sampling error for the poll results?

Interviews with a scientific sample of 1,000 adults can accurately reflect the opinions of nearly 200 million American adults. That means interviews attempted with all 200 million adults – if such were possible – would give approximately the same results as a well-conducted survey based on 1,000 interviews.

What happens if another carefully done poll of 1,000 adults gives slightly different results from the first survey? Neither of the polls is "wrong." Thi>

Transfer interrupted!

the error due to sampling, often called the margin of error.

This is not an "error" in the sense of making a mistake. Rather, it is a measure of the possible range of approximation in the results because a sample was used.

Pollsters express the degree of the certainty of results based on a

sample as a "confidence level." This means a sample is likely to be within so many points of the results one would have gotten if an interview were attempted with the entire target population. They usually say this with 95% confidence.

Thus, for example, a "3 percentage point margin of error" in a national poll means that if the attempt were made to interview every adult in the nation with the same questions in the same way at about the same time as the poll was taken, the poll's answers would fall within plus or minus 3 percentage points of the complete count's results 95% of the time.

This does not address the issue of whether people cooperate with the survey, or if the questions are understood, or if any other methodological issue exists. The sampling error is only the portion of the potential error in a survey introduced by using a sample rather than interviewing the entire population. Sampling error tells us nothing about the refusals or those consistently unavailable for interview; it also tells us nothing about the biasing effects of a particular question wording or the bias a particular interviewer may inject into the interview situation.

Remember that the sampling error margin applies to each figure in the results – it is at least 3 percentage points plus or minus for each one in our example. Thus, in a poll question matching two candidates for President, both figures are subject to sampling error.

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12. Who's on first?

Sampling error raises one of the thorniest problems in the presentation of poll results: For a horse-race poll, when is one candidate really ahead of the other?

Certainly, if the gap between the two candidates is less than the error margin, you should not say that one candidate is ahead of the other. You can say the race is "close", the race is "roughly even", or there is "little difference between the candidates." But it should not be called a "dead heat" unless the candidates are tied with the same percentages.

And just as certainly, when the gap between the two candidates is equal to or more than twice the error margin – 6 percentage points in our example – and if there are only two candidates and no undecided voters, you can say with confidence that the poll says Candidate A is clearly leading Candidate B.

When the gap between the two candidates is more than the error margin but less than twice the error margin, you should say that Candidate A "is ahead", "has an advantage" or "holds an edge". The story should mention that there is a small possibility that Candidate B is ahead of Candidate A.

When there are more than two choices or undecided voters – in the real world – the question gets much more complicated. While the solution is statistically complex, you can fairly easily evaluate this

situation by estimating the error margin. You can do that by taking the percent for each of the two candidates in question and multiplying it by the total respondents for the survey (only the likely voters if that is appropriate). This number is now the effective sample size for your judgement. Look up the sampling error in a table of statistics for that reduced sample size, and apply it to the candidate percentages. If they overlap, then you do not know if one is ahead. If they do not, then you can make the judgement that one candidate has a lead.

And bear in mind that when subgroup results are reported – women or blacks, or young people – the sampling error margin for those figures is greater than for results based on the sample as a whole.

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13. What other kinds of factors can skew poll results?

The margin of sampling error is just one possible source of inaccuracy in a poll. It is not necessarily the source of the greatest source of possible error; we use it because it's the only one that can be quantified. And, other things being equal, it is useful for evaluating whether differences between poll results are meaningful in a statistical sense.

Question phrasing and question order are also likely sources of flaws. Inadequate interviewer training and supervision, data processing errors and other operational problems can also introduce errors. Professional polling operations are less subject to these problems than volunteer-conducted polls, which are usually less trustworthy.

You should always ask if the poll results have been "weighted." This process is usually used to account for unequal probabilities of selection and to adjust slightly the demographics in the sample. You should be aware that a poll could be manipulated unduly by weighting the numbers to produce a desired result. While some weighting may be appropriate, other weighting is not. Weighting a scientific poll is only appropriate to reflect unequal probabilities or to adjust to independent values that are mostly constant.

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14. What questions were asked?

You must find out the exact wording of the poll questions. Why? Because the very wording of questions can make major differences in the results.

Perhaps the best test of any poll question is your reaction to it. On the face of it, does the question seem fair and unbiased? Does it present a balanced set of choices? Would most people be able to answer the question?

On sensitive questions – such as abortion – the complete wording of the question should probably be included in your story. It may well be worthwhile to compare the results of several different polls from different organizations on sensitive questions. You should examine

carefully both the results and the exact wording of the questions.

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15. In what order were the questions asked?

Sometimes the very order of the questions can have an impact on the results. Often that impact is intentional; sometimes it is not. The impact of order can often be subtle.

During troubled economic times, for example, if people are asked what they think of the economy before they are asked their opinion of the president, the presidential popularity rating will probably be lower than if you had reversed the order of the questions. And in good economic times, the opposite is true.

What is important here is whether the questions that were asked prior to the critical question in the poll could sway the results. If the poll asks questions about abortion just before a question about an abortion ballot measure, the prior questions could sway the results.

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16. What about "push polls"?

In recent years, some political campaigns and special-interest groups have used a technique called "push polls" to spread rumors and even outright lies about opponents. These efforts are not polls, but are political manipulation trying to hide behind the smokescreen of a public opinion survey.

In a "push poll," a large number of people are called by telephone and asked to participate in a purported survey. The survey "questions" are really thinly-veiled accusations against an opponent or repetitions of rumors about a candidate's personal or professional behavior. The focus here is on making certain the respondent hears and understands the accusation in the question, not in gathering the respondent's opinions.

"Push polls" are unethical and have been condemned by professional polling organizations.

"Push polls" must be distinguished from some types of legitimate surveys done by political campaigns. At times, a campaign poll may ask a series of questions about contrasting issue positions of the candidates – or various things that could be said about a candidate, some of which are negative. These legitimate questions seek to gauge the public's reaction to a candidate's position or to a possible legitimate attack on a candidate's record.

A legitimate poll can be distinguished from a "push poll" usually by:

a. The number of calls made – a push poll makes thousands and thousands of calls, instead of hundreds for most surveys;
b. The identity of who is making the telephone

calls – a polling firm for a scientific survey as opposed to a telemarketing house or the campaign itself for a "push poll";
c. The lack of any true gathering of results in a "push poll," which has as its only objective the dissemination of false or misleading information.

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a. What other polls have been done on this topic? Do they say the same thing? If they are different, why are they different?

Results of other polls – by a newspaper or television station, a public survey firm or even a candidate's opponent – should be used to check and contrast poll results you have in hand.

If the polls differ, first check the timing of the interviewing. If the polls were done at different times, the differing results may demonstrate a swing in public opinion.

If the polls were done about the same time, ask each poll sponsor for an explanation of the differences. Conflicting polls often make good stories.

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b. So I've asked all the questions. The answers sound good. The poll is correct, right?

Usually, yes. However, remember that the laws of chance alone say that the results of one poll out of 20 may be skewed away from the public's real views just because of sampling error.

Also remember that no matter how good the poll, no matter how wide the margin, no matter how big the sample, a pre-election poll does not show that one candidate has the race "locked up." Things change – often and dramatically in politics. That's why candidates campaign.

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c. With all these potential problems, should we ever report poll results?

Yes. Because reputable polling organizations consistently do good work. In spite of the difficulties, the public opinion survey, correctly conducted, is still the best objective measure of the state of the views of the public.

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d. Is this poll worth reporting?

If the poll was conducted correctly, and you have been able to obtain the information outlined here, your news judgment and that of your editors should be applied to polls, as it is to every other element of a story.

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For any additional information on any aspect of polling or a specific poll, please call the NCPP office at 800-239-0909.

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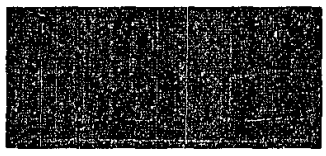

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National Council on Public Polls

STATEMENT BY THE NATIONAL COUNCIL ON PUBLIC POLLS TO THE COMMISSION ON

PRESIDENTIAL DEBATES

The decision of the Commission on Presidential Debates to use the combined survey results from five national polls to assess the viability of a candidacy as a condition for including him or her in the presidential debates raises critical questions. We believe that the Commission should establish criteria for including only comparable public polls in its determination. We also would like to know what the Commission means by "use the combined survey results." The National Council on Public Polls believes the Commission should make public its answers to these questions well in advance of using the results of public polls as a criterion for debate participation.

NCPP believes that for the polls to be comparable they should meet requirements established by the Commission. As a minimum, the polls should:

1. Be conducted within a fixed period of time;

2. Include the same segment of the voting population (all adults, or registered voters, or likely voters, defined in a similar manner);

3. Be asked essentially the same question or questions in the same questionnaire context;

4. Recalculate the candidate percentages after eliminating undecided voters or refusals, if it has not been done by the survey organization.

5. Use scientific survey methodology.

Any substantial methodological or procedural differences among the five polls could call their credibility into question. We believe this might provoke criticism of the Commission's decision.

Whether or not a candidate is included in the presidential debates is obviously an important decision. The National Council on Public Polls does not want unreliable or inappropriate poll results to play a role in that decision.

and it answered virtually every objection of the opponents of the original act of 1966.

Now, we have struggled through two more national campaigns since the bill was ready—the presidential campaign of 1968, and the congressional campaign of 1970. We know that the problem is worse and that the need is greater.

And, so today, we have the chance to act to meet the need. The presidential election campaign fund amendment offered by Senator JOHN PASTORE is similar in most respects to the legislation recommended by the Senate Finance Committee in 1967, except that it applies the principle of public financing only to presidential campaigns. The chief provisions of the amendment are as follows:

First. Under a "tax checkoff" method, each individual taxpayer is entitled to specify on his tax return that $1 of his taxes is to be used for the public financing of presidential campaigns. On joint returns, husbands and wives may each use the checkoff. If all taxpayers take advantage of the provision, approximately $113 million would go into the fund each year, based on the current number of taxpayers.

Second. The amount of funds determined by the checkoff is appropriated from the Treasury into a Presidential Election Campaign Fund. The amendment contains a "permanent appropriations" provision in order to avoid any controversy that might take place in Congress if the transfer of funds were to be left to the regular annual appropriations process. If the Fund contains any unused balance after a presidential campaign, the balance is returned to the Treasury. If the amount of the Fund is too low to provide the payments to which presidential candidates are entitled under the amendment, the payments are decreased pro rata, and private contributions may be accepted to make up the difference.

Third. Presidential candidates are given the option of either electing public financing for their campaigns, or continuing the present method of private financing. If major party candidates elect public financing, they may not accept private contributions, and they may not spend more than the amount of public funds allocated to them. Minor party candidates receiving public funds may also receive private contributions, but they may not spend more than the amount that a major party candidate receiving public funds may spend.

The same overall limits apply to all political committees authorized by a candidate to support him. Unauthorized committees supporting candidates who elect public financing are limited to expenditures of $1,000. None of these limits are applicable to candidates who continue to finance their campaigns privately and who do not elect public financing.

Fourth. Candidates of a major party—a party polling 25 percent or more of the votes in the preceding presidential election—are eligible to receive an amount equal to 15 cents multiplied by the number of eligible voters in the Nation. On the basis of current population estimates for 1972, major party candidates would be entitled to receive about $20 million.

Fifth. Candidates of a minor party—a party receiving between 5 and 25 percent of the vote in the preceding presidential election—are eligible to receive an amount based on their percentage of the vote of the major candidates. For example, under this formula, since Governor Wallace received 31 percent of the average vote for the two major candidates in 1968, he would be eligible to receive 31 percent of the funds available to each major party candidate in 1972, or about $6 million.

Sixth. Candidates of a new party are entitled to receive retroactive reimbursement based on their showing in the current election, if they win more than 5 percent of the vote. A new party may accept private contributions in the form of loans, to be returned if the party's showing in the election qualifies it to receive public funds.

In addition, candidates of a minor party are eligible for increased public funds if they make a better showing in the current election than in the preceding election.

Seventh. Public funds will be available only for expenses incurred for the period beginning with the date of the candidate's nomination—or September 1, whichever date is earlier—and ending 30 days after the election. Expenses for items and services incurred earlier, but used during this period, will also be covered. Thus, public funds will not be available for the expenses of primaries or party conventions. If a candidate electing to use public funds has excess private contributions left over from his primary campaigns, he cannot spend the private funds during the general election campaign.

Eighth. The distribution of public funds will be made by the Comptroller General, subject to strict auditing and accounting procedures, backed up by substantial civil and criminal penalties for violations.

In addition, the amendment also includes a major provision establishing a tax credit of $25 or a tax deduction of $100 for political contributions. These tax incentives are applicable to contributions to all candidates—Federal, State, or local—and to all elections—general, special, or primary. This provision is essentially the same measure that Senator CANNON, Senator PEARSON, and I had already offered as a separate amendment to the pending tax bill, and I am pleased that it is now a part of the overall amendment.

One of the most important points about the public financing amendment is that it has been carefully designed to meet all of the major constitutional, practical, and political objections to the version originally enacted into law in 1966.

The 5 to 25 percent formula strikes a reasonable balance for minor parties and new parties. It neither freezes them out entirely, nor encouraged them excessively. The threshold showing required of such parties is low enough to prevent "locking in" the existing two-party system, and yet high enough to prevent the artificial proliferation of splinter parties set up merely to have a political joyride at the taxpayer's expense in a presidential election year.

As the following table indicates, at least six minor parties would have qualified for public financing since 1892 if the provision had been in effect:

MINOR PARTIES RECEIVING APPROXIMATELY 1,000,000 OR MORE VOTES, 1892–1968

Year and candidate:	Party	Popular vote	Approximate percent
1892: James B. Weaver	People's	1,027,329	[1] 9
1912:			
Theodore Roosevelt	Progressive	4,216,020	[1] 28
William Howard Taft	Republican	3,483,922	[1] 23
Eugene V. Debs	Socialist	897,011	[1] 6
1920: Eugene V. Debs	do	917,799	4
1924: Robert M. LaFollette	Progressive	4,822,856	[1] 17
1948:			
Henry A. Wallace	do	1,157,172	2
J. Strom Thurmond	State's Rights	1,169,021	2
1968: George C. Wallace	American Independent	9,899,557	[1] 13

[1] Would have been eligible for public financing under the pending amendment.

By prohibiting private contributions to candidates who elect public financing, the amendment avoids the danger that public financing would become simply an additional layer on top of the existing level of spending. At the same time, by allowing unauthorized committees to spend up to $1,000 for their candidate, the amendment avoids the first amendment objections that might be raised against any complete prohibition of private spending.

Mr. President, I ask unanimous consent that the petition, with the signatures, be printed in the RECORD at the conclusion of the remarks of the Senator from Kansas.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. TAFT. Mr. President, I should like to read the wording of this precise petition. It reads:

We the undersigned feel it is ridiculous that the Senate would ever think of using tax funds for political campaigns when there are so many more important areas of concern in the United States today.

Mr. President, I close my remarks by recalling a remark on the part of the late great Mendel Rivers in the House and say that it is so ridiculous, it is ridiculous.

The PRESIDING OFFICER. The 2 minutes of the Senator have expired.

Mr. DOLE. Mr. President, I reserve the remainder of my time. However, before doing so, I ask for the yeas and nays.

The yeas and nays were ordered.

Mr. LONG. Mr. President, those who support the Pastore amendment hope to explain to the American people exactly how the Democratic campaign is being waged and precisely where the money is coming from. We welcome the opportunity.

We fully expect to go before the public to explain this dollar checkoff and to ask everyone to check a dollar off on their tax returns. We want to give the little person, the ordinary taxpayer, an opportunity to share in lifting the highest office in the land above the interest of private self-seeking contributions.

We expect to explain that it has been our honest belief that there is a link between the improper influence of money in the Government and private campaign contributions. If this matter was not explained to the public, they might not be aware of the opportunity they have to correct this situation by checking off their dollar on their tax return.

We expect to ask the people to earmark their dollars for the presidential fund so that everyone will have an opportunity to participate in financing the presidential campaigns, even though Richard Nixon might not be too receptive to the idea at this time. I think he is a good man. I do not think the Republican Party could do any better. I think they ought to nominate him. If the people wish a Republican for President, I do not think they can do better than this man. He is doing the best he can with what the good Lord has given him to work with. He is using that. I think that that is all we have the right to expect from a public servant. I think that he will decide in due course to support the amendment. It will provide him the opportunity to be adequately financed and not have to accept any contributions that would make him suspect in the campaign.

Mr. CANNON. Mr. President, will the Senator yield?

Mr. LONG. I yield.

Mr. CANNON. Mr. President, I have listened to the debate by the Senators on the other side of the aisle with considerable interest. It seems to me that they have made a pretty good point with respect to one matter, and that is that the amendment as it now stands would require all funds that people designate to go into one particular pot.

I wonder if it would not be wise—since I notice that one of the distinguished Senators on the other side of the aisle has an amendment he has drawn up, the Mathias amendment, which is printed and which would permit the designation of a particular party by the person—to accept that amendment.

I think that would be good. I do not think that an individual ought to check it off without having some say as to a particular party or candidate that he would prefer it to go to and then find out that his money was going to George Wallace or that he could not designate SHIRLEY CHISHOLM or someone else.

I think we ought to be able to vote for and accept this proposal from the Republican side of the aisle that would strengthen the amendment and make the Pastore amendment a better one.

Would the Senator care to comment on that?

Mr. LONG. Mr. President, I have no strong objection to the Mathias amendment. I have not had an opportunity to carefully study it. However, if it does what the Senator says, I have no strong opposition to that.

The point that occurs to me is that presumably in January, the people who are going to decide the election in the last analysis are going to be the voters who are not committed. It seems to me that they would like to allocate their dollars so they would help both parties as well as third parties. Then, having heard the debates, they can decide which candidate they think would be best for the Nation's interest.

If the Mathias amendment would permit them to make designations in that fashion and also permit someone else who might prefer to have his money go to the Democratic or Republican Party to make his designation in that way, I think that would be good.

We must admit that there are people who might say, "I wouldn't vote for George Wallace, and I would not want one penny of my money to be put out to help him." He could mark his tax return so that his dollar would go for his party.

The important point is that we want to assure both sides of an adequate opportunity to present their cases to the American public.

Mr. CANNON. Mr. President, I am wondering about this. Of course, the Senators on the other side of the aisle would prefer not to use this method. They would prefer to raise their funds from private contributions, and I can understand why they would prefer to do so. But let us assume that whoever the nominee or candidate might be, he might indicate otherwise. This way, I think that the amendment might create some real problems if he decides to come under the provisions of the bill.

For example, many contributors check off $1 and say, "I want to contribute $1 to go to the Republican Party." I can see this very likely would create a real problem. Assume they happen to win the election and the new President went to appoint ambassadors. I can see he might have a very difficult time if he could only consider that everyone contributed $1. This could pose real problems to determine who would be appointed ambassadors. Take France, as an example. The present ambassador contributed $54,000 in 1968. I am sure his name just happened to be taken from a hat. Maybe they could still do that if they elected to come under the $1 provision. Also, in the case of Austria the ambassador contributed $43,000 in 1968. Perhaps his name came from the hat, as well. The same might be true of the gentleman from Denmark.

On the other hand, I am sure, assuming those names were taken out of the hat, the $1 checkoff contributor could create another problem and that is when they prepare the invitation list for White House dinners. Would the Senator agree that this could create real problems?

For example, as I placed in the RECORD the other day, you would not have the situation of Mr. Clement Stone, who contributed $200,000. They would not have that sort of situation and they would have to draw from the hat for White House dinners to determine who should be invited or have an opportunity to go to White House dinners.

Would the Senator agree that this might create real problems if the Republican Party were elected, under this provision, where they had to deal with these large contributors? I am talking about $200,000 from Mr. Stone, Max Fisher, $103,000, Henry Salvatore, of Litton, $83,000, and Mr. Dreyfus, of the Dreyfus Fund, $72,000.

Would the Senator agree this could create real problems if we eliminate those contributors to a political campaign and if they relied on the small $1 contributor?

Mr. LONG. It could, but I would like to make it clear that those of us who favor the Pastore amendment, and who will vote for it, intend to explain all about this provision if it becomes law. We would urge the people to designate the checkoff. We hope those on the other side would do the same.

If they want to find some reason to be critical of it, let them go ahead. But we hope our candidate will avail himself of it. If their candidate does not avail himself of it, I hope he will explain why, if he thinks taxpayers should not be permitted to use the dollar checkoff as a method of making campaign contributions.

I suggested a similar proposal in the past. What I suggested was not as carefully drawn as this proposal and I got the worst of it, particularly from some of my Democratic colleagues who would not support my position. It was more or less put in deep freeze until guidelines could be added to it. Since that time I have gone back to the people. I was fortunate enough to be reelected. I was favored by 87 percent of the voters in the primary campaign and I have never yet had one person tell me that he was unhappy with me because I suggested this would be a better way to finance political campaigns. I do not say everyone agreed with me, but I had a great num-