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May 2, 2000

VIA HAND DELIVERY

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

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
MAY 31 1 06 PM '00

Re: MUR 4987

Dear Mr. Noble:

This firm serves as counsel for the Commission on Presidential Debates (the "CPD"). We respectfully submit this response on behalf of the CPD to the complaint filed by Patrick J. Buchanan, The Reform Party of the United States of America, Pat Choate, Buchanan Reform and Angela M. Buchanan (collectively, the "Reform Party").[1]

INTRODUCTION AND OVERVIEW

The sole mission of the nonpartisan CPD is to ensure, for the benefit of the American electorate, that general election debates are held every four years among the leading candidates for the offices of President and Vice President of the United States. The CPD is proud of its record of public service in sponsoring televised debates among the leading candidates in each of the last three presidential general elections, and the CPD looks forward to the debates it is planning for the fall of 2000.

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 each of the last two elections, there were over

[1] Along with this response, we submit Declarations from the following individuals: (1) Janet H. Brown, Executive Director of the CPD (attached as Exhibit 1); (2) Dorothy S. Ridings, Member of the CPD Board of Directors and former President of the League of Women Voters (attached as Exhibit 2); and (3) Dr. Frank Newport, Editor-In-Chief of the Gallup Poll (attached as Exhibit 3).

one hundred declared candidates for the Presidency, excluding those seeking the nomination of one of the major parties, and the same is true for the current election. During the course of the campaign, the candidates are afforded many opportunities in a great variety of forums to advance their candidacies. In order 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, regardless of party, who realistically are considered to be among the principal rivals for the Presidency.

In connection with the 2000 general election, the CPD announced, on January 6, 2000, that it will apply three criteria to each declared candidate to determine whether that candidate qualifies for inclusion in one or more of the CPD's debates.[2] As in prior election cycles, the CPD's Criteria examine (1) constitutional eligibility, (2) ballot access, and (3) electoral support. The CPD will invite to participate in its debates any candidate, regardless of party, who satisfies the three criteria.

The criteria regarding constitutional eligibility and ballot access are very similar to the corresponding criteria employed by the CPD in prior election cycles. In prior election cycles, CPD's criterion regarding electoral support provided for CPD to evaluate and weigh a series of enumerated factors in order to identify those candidates with a "realistic chance of being elected." This standard was challenged in 1996 by Perot '96 and the Natural Law Party as not "objective" as required by 11 CFR § 110.13(c) (the "1996 Complaints"). The CPD defended its criteria vigorously, and the Federal Election Commission (the "FEC") expressly held in MURs 4451 and 4473 that the CPD's 1996 criteria and debate sponsorship were fully in accordance with the requirements of the federal election laws.[3]

After each election cycle, the CPD has undertaken a thorough review of all aspects of the debates, including its candidate selection criteria, and the CPD undertook such a review after the 1996 debates. The CPD concluded that, despite the comfort that would come from remaining with the criteria that already had withstood very pointed attack, it would not refrain from modifying those criteria if to do so would enhance its contribution to the electoral process. For this reason, the CPD has adopted for 2000 an approach to the criterion addressing the required

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[2] The CPD's Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation ("Criteria") are attached at Tab F to the Declaration of Janet H. Brown (hereafter "Brown Declaration") (attached as Exhibit 1).

[3] See April 6, 1998 Statement of Reasons dismissing MURs 4451 and 4473 (hereafter "Statement of Reasons") (attached at Tab E to Brown Declaration) at 1 (setting forth the FEC's reasons for its February 24, 1998 finding that there was "no reason to believe that the [CPD] violated the law by sponsoring the 1996 presidential debates or by failing to register and report as a political committee").

level of electoral support that is intended to be clearer and more readily understood than experience demonstrated was the case with the prior criterion. Rather than weigh a series of enumerated indicia to identify those candidates with a "realistic chance of being elected," the streamlined criterion for 2000 sets forth a bright line standard with respect to electoral support. The criterion requires that eligible candidates have a level of support of at least 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 CPD's determination of eligibility before each debate.

Although the Reform Party's Complaint adopts a scattershot approach, the complaint is principally a challenge to this third criterion. The Reform Party's rather surprising position is that it is improper even to consider level of electoral support when identifying the candidates to be invited to debate. See Reform Party's March 20, 2000 complaint (hereafter, the "Complaint") at 4 ("support for a candidate in the national electorate ***prior*** to the debates is not reasonably related to the selection of candidates for the debates")(emphasis in original). However, in what appears to be a rather blatant inconsistency, the Reform Party urges in the Complaint that the CPD be ordered to invite to its debates any candidate eligible for general election funding, because such eligibility actually is the appropriate measure of pre-debate electoral support. The Reform Party presents this standard as the only legally permissible standard, although the Complaint sheds little light on why this is so under the pertinent regulations.

The Reform Party's position is without legal support, and the CPD's criteria are wholly in accord with applicable law. Contrary to the Reform Party's position, there is not but one acceptable approach to candidate selection criteria. The FEC explained when adopting its regulations that "[t]he choice of what objective criteria to use is largely left to the staging organization . . . ." 60 Fed. Reg. 64,260, 64,262 (Dec. 14, 1995). Moreover, the FEC has explained (1) that it is entirely appropriate for the criteria to include a measure of "candidate potential" or electoral support; and (2) that polling data is an appropriate measure of such potential or support. See Statement of Reasons at 8. Eligibility for general election funding, even if it would be an acceptable measure of electoral support, simply is not the only legally acceptable measure of such support.[4]

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[4] In fact, in the CPD's judgment, eligibility for general election funding is a highly flawed measure of electoral support. It is premised on the results of the previous election and not at all on the level of present public interest in the candidates running for office. Accordingly, it is potentially underinclusive to the extent it would automatically exclude a new candidate with significant national support if that candidate is not the nominee of a party eligible for funding based on the prior election. At the same time, it is potentially overinclusive to the extent it would automatically include a candidate with marginal present national public support solely because that candidate is eligible for federal funding based on the results of an election held four years earlier. The CPD determined that current polling data is a superior measure of present

The CPD's criteria are preestablished and objective, are reasonable, have not been adopted to bring about a preordained result or for any partisan or improper purpose, and otherwise are proper. For these reasons, all as explained more fully below, the CPD respectfully requests that the FEC find that there is no reason to believe any violation of the federal election laws has occurred and that the Complaint be dismissed.

I. BACKGROUND

A. The Commission on Presidential Debates

The 1984 presidential election campaign focused national attention on the role of debates in the electoral process. Specifically, although face-to-face debates between the leading presidential candidates ultimately were held in 1984, they were hastily arranged, virtually at the last minute, after an extended period of sporadic negotiations between representatives of the nominees of the Republicans and Democrats, President Ronald Reagan, and former Vice-President Walter Mondale. The ultimate decision to hold debates during the 1976 and 1980 general election campaigns followed a similar flurry of eleventh-hour negotiations among the leading candidates. In 1964, 1968 and 1972, such last-minute jockeying resulted in no presidential debates at all during the general election campaign. Thus, the 1984 experience reinforced a mounting concern that, in any given election, voters could be deprived of the opportunity to observe the leading candidates for President debate each other.[5]

Following the 1984 election, therefore, two distinguished national organizations, the Georgetown University Center for Strategic and International Studies and the Harvard University Institute of Politics, conducted separate, detailed studies of the presidential election process generally, and of the role of debates in that process specifically. The reports produced by these two independent inquiries found, inter alia, that: (1) debates are an integral and enhancing part of the process for selecting presidential candidates; (2) American voters expect debates between the leading candidates for President; and (3) debates among those candidates should become institutionalized as a permanent part of the electoral process. Both the Georgetown and Harvard reports recommended that the two major political parties endorse a mechanism designed to ensure, to the greatest extent possible, that presidential debates between the leading candidates be made a permanent part of the electoral process. Brown Declaration, ¶¶ 9-10.

(continued)

public interest in and support for a candidacy. See Brown Declaration, ¶¶ 34-36; Declaration of Dorothy S. Ridings (hereafter "Ridings Declaration") (attached as Exhibit 2), ¶¶ 10-12.

[5] See generally N. Minow & C. Sloan, For Great Debates 21-39 (1987); Commission on National Elections, Electing the President: A Program for Reform 41-42 (R.E. Hunter ed. 1986); Swerdlow, The Strange -- and Sometimes Surprising -- History of Presidential Debates in America, in Presidential Debates 1988 and Beyond 10-16 (J. Swerdlow ed. 1987).

In response to the Harvard and Georgetown studies, the then-chairmen of the Democratic and Republican National Committees jointly supported creation of the independent CPD. Brown Declaration, ¶¶ 9-11. The 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." Id. ¶ 3. The CPD has been granted tax-exempt status by the Internal Revenue Service under § 501(c)(3) the Internal Revenue Code. Id.

The CPD Board of Directors is jointly chaired by two distinguished civic leaders, Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr. Id. ¶ 6. While Messrs. Kirk and Fahrenkopf served as chairmen of the Democratic and Republican National Committees, respectively, at the time the CPD was formed, they no longer do so. Id. ¶ 11. In fact, no CPD board member is an officer of either the Democratic or Republican National Committees. Id. The CPD's Board members come from a variety of backgrounds, and while some are identified in one fashion or another with one of the major parties (as are most civic leaders in this country), that certainly is not the case for all of the CPD Board members. Id.; Ridings Declaration, ¶ 1.[6]

The CPD receives no funding from the government or any political party. Id. ¶ 5. The CPD obtains the funds required to produce its debates every four years and to support its ongoing voter education activities from the communities that host the debates and, to a lesser extent, from corporate and private donors. Id. The donors have no input into the management of any of the CPD's activities and have no input into the process by which the CPD selects debate participants. Id.

The CPD sponsored two presidential debates during the 1988 general election, id. ¶ 19; three presidential debates and one vice presidential debate in 1992, id. ¶ 22; and two presidential debates and one vice presidential debate in 1996, id. ¶ 30.

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[6] The Reform Party has chosen to include in its Complaint a series of false allegations also included in the 1996 Complaints, which as noted, were dismissed. The Reform Party's Complaint's claims to the contrary notwithstanding, the CPD is not controlled by the two major political parties, nor has it been operated for the purpose of strengthening the major parties. While the CPD's creation was enthusiastically supported by the then-chairmen of the major parties, it was formed as a separate and independent corporation. Before the CPD began its operations in earnest, there were, as the Reform Party notes, isolated references to the CPD as a "bi-partisan" effort. See, e.g., Reform Party Complaint at 14-15. In context, however, such references spoke only to the efforts of the CPD's founders to ensure that it was not controlled by any one political party, not an effort by the two major parties to control the CPD's operations or to exclude debate participation by non-major party candidates in CPD-sponsored debates. Those claims also ignore the CPD's history of scrupulously establishing and applying nonpartisan criteria for the selection of participants in its debates. Brown Declaration, ¶¶ 12-18, 20-23, 25-27 and 31-33.

In connection with the 2000 general election campaign, the CPD has formulated and announced plans to sponsor three presidential debates and one vice presidential debate, and the CPD and the communities hosting the debates already have spent considerable time, effort and funds to prepare for those events. Id. ¶¶ 10 & 42. The CPD's debates have been viewed by tens of millions of Americans, and have served a valuable voter-education function. Id. ¶ 4. In addition, the CPD has undertaken a number of broad-based, nonpartisan voter education projects designed to enhance the educational value of the debates themselves, and is presently involved in a project designed to increase the educational value of the debates through interactive activities on the Internet. Id. ¶ 41.

B. The CPD's Sponsorship of Debates in 1988, 1992 and 1996

Among the background allegations in the Reform Party Complaint are attacks -- taken from the 1996 Complaints -- on various aspects of the CPD's sponsorship of debates in 1988, 1992 and 1996.[7] None are new, and all are meritless.

With respect to the 1988 debates, the Complaint repeats baseless allegations that, somehow, an agreement between the Bush and Dukakis campaigns (addressing various production issues)

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[7] The CPD, of course, is hardly alone among debate sponsors that have faced a challenge to their candidate selection decisions. See, e.g., Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998) (upholding exclusion of independent congressional candidate from debate sponsored by public broadcaster); DeBauche v. Trani, 191 F.3d 499 (4th Cir. 1999), cert. denied, 120 S. Ct. 1451 (2000) (upholding exclusion of minor party gubernatorial candidate from debate sponsored by local radio station); Marcus v. Iowa Public Television, 150 F.3d 924 (8th Cir. 1998), cert. denied, 525 U.S. 1069 (1999); (upholding exclusion of third-party congressional candidate from debate sponsored by public broadcaster); Chandler v. Georgia Public Telecommunications Comm'n, 917 F.2d 486 (11th Cir. 1990) (rejecting efforts by third-party candidate for lieutenant governor to participate in debate sponsored by public broadcaster), rev'g 749 F. Supp. 264 (N.D. Ga.), cert. denied, 502 U.S. 816 (1990); Johnson v. FCC, 829 F.2d 157, 160 (D.C. Dir. 1987) (rejecting efforts of third-party presidential and vice-presidential candidates to prohibit the televising of debates sponsored by the League of Women Voters, from which they were excluded); Koczak v. Grandmaison, 684 F. Supp. 763, 764 (D.N.H. 1988) (upholding state political party's exclusion of candidate from primary debate); Martin-Trigona v. University of New Hampshire, 685 F. Supp. 23, 25 (D.N.H. 1988) (upholding state university's exclusion of candidate from primary debate); In re Complaint of LaRouche Campaign, MUR 1659 (Federal Election Commission May 22, 1984) (denying independent candidate's efforts to join primary debate sponsored by the League of Women Voters); In re House Democratic Caucus, MUR 1617 (Federal Election Commission May 9, 1984) (upholding Dartmouth College's exclusion of candidate from primary debate); see also Kay v. New Hampshire Democratic Party, 821 F.2d 31, 33 (1st Cir. 1987) (upholding state political party's exclusion of presidential candidate from party forum).

rendered the debates a fraud and a "hoodwinking of the American public." Complaint at 17. In fact, the 1988 debates, in which distinguished journalists including Jim Lehrer, Peter Jennings, Bernard Shaw and Tom Brokaw participated, Brown Declaration, ¶ 19, were widely praised. For example, the Wall Street Journal noted, after the first of the CPD's 1988 presidential debates, that "the 'no-issues' campaign issue is dead; by the time the debate finished, voters knew they had a clear-cut choice." Wall St. J., Sept. 27, 1988, §1, at 34. The Baltimore Sun asserted that the first Bush-Dukakis encounter was a "Gold Medal Debate" and "the best presidential debate in history." Baltimore Sun, Sept. 26, 1988, §A, at 6. Nationally syndicated columnist David Broder wrote that the debates provided the voters the "invaluable experience of watching the presidential and vice presidential candidates engage each other -- and panels of journalists" and further opined that sponsorship of future debates by the CPD "ought to be continued." Wash. Post, Nov. 9, 1988, §A, at 15.

With respect to the 1992 debates, in which the CPD invited Ross Perot and Admiral James Stockdale to participate, the Reform Party alleges that the CPD first decided not to include Mr. Perot and Admiral Stockdale in its debates, but later reversed itself because the major party candidates so insisted. See Complaint at 17-18. This is simply false. The CPD's initial decision not to include the Reform Party candidates was made at a time when Mr. Perot had withdrawn from the race. After Mr. Perot re-entered the race, just prior to the first debate, the CPD's independent Advisory Committee reapplied its nonpartisan debate criteria and concluded that an invitation should be extended to Mr. Perot and his running mate. Brown Declaration, ¶¶ 21-23.[8] The CPD made very clear to the major party candidates that it would only agree to sponsor debates that were consistent with its voter education purposes and its candidate selection criteria, even if that meant the 1992 debates would be conducted by another sponsor. See October 6 and 7, 1992 correspondence to campaigns (attached at Tab A to Brown Declaration).

With respect to 1996, the Reform Party claims that the CPD and the major parties "contrived" to keep Mr. Perot out of the CPD's debates in 1996. Aside from a statement by George Stephanopolous that President Clinton's campaign did not want Mr. Perot in the debates, Complaint at 18, the Reform Party cites to no evidence for its charge, and there is none. As in 1988 and 1992, the CPD followed the recommendation of an independent Advisory Committee with respect to whom to invite to its debates. Brown Declaration, ¶ 26. The major party campaigns had no input into that decision. Id. ¶ 39. The Reform

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[8] The Reform Party describes Mr. Perot's support prior to the 1992 debates as "7% of the electorate." Complaint at 18. In fact, prior to his July 1992 withdrawal, his support had been as high as 38%, and some polls taken prior to the CPD's decision showed his support at 17-20%. See October 2, 1992 Washington Post article noting that in June 1992, Perot's support had been as high as 38%; Gannett/Harris poll from September 21-23, 1992, showing Perot at 20%; Time/CNN poll from September 22-24, 1992, showing Perot at 17%. See also Brown Declaration, ¶ 24.

Party's claim that the major parties had influence into the promulgation of the CPD's criteria has no basis whatsoever. Id.[9]

C. The CPD's Promulgation of Objective Candidate Selection Criteria for its 2000 Debates

The specific voter education purpose of the CPD's debates is to bring before the American people, in a debate, the leading candidates for the Presidency and Vice-Presidency. Brown Declaration, ¶ 32; Ridings Declaration, ¶ 7. In any given presidential election year, there are scores of declared non-major party presidential candidates, including over 110 in 2000. See FEC's "2000 Presidential Address List," as of March 31, 2000. Accordingly, virtually from its inception, the CPD recognized the need to develop nonpartisan criteria to ensure that it identifies all of the candidates in a particular election year who, regardless of party affiliation and in light of the educational goals of the CPD's debates, properly should be invited to participate in those debates. Brown Declaration, ¶¶ 12-15.

An organization that seeks to sponsor a general election debate among leading candidates for the Presidency faces enormous challenges. No candidate is obliged to debate, and there is a significant risk that a leading candidate would not agree to share the debate stage with a candidate who enjoys only modest levels of national public support. Ridings Declaration, ¶ 7.[10] Thus, a debate sponsor's legitimate goal in formulating its candidate selection criteria is to be

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[9] The FEC rejected these same allegations when advanced in the 1996 Complaints.

> Absent specific evidence of a controlling role in excluding Mr. Perot, the fact the Committees may have discussed the effect of Mr. Perot's participation on their campaigns is without legal consequence. There certainly is no credible evidence to suggest the CPD acted upon the instructions of the two campaigns to exclude Mr. Perot. To the contrary, it appears one of the campaigns wanted to *include* Mr. Perot in the debate. . . . In fact, CPD's ultimate decision to exclude Mr. Perot (and others) only corroborates the absence to any plot to equally benefit the Republican and Democratic nominees to the exclusion of all others.

Statement of Reasons at 11.

[10] The League of Women Voters' experience in connection with the 1980 presidential debates demonstrates that these concerns and challenges are very real. In that year, the League invited President Carter, Governor Reagan and independent candidate John Anderson to debate. President Carter refused to participate in a debate that included the independent candidate. See Ridings Declaration, ¶¶ 4-7. See also Fulani v. Brady, 935 F.2d 1324, 1329 (D.C. Cir. 1991) (noting that it is uncertain whether the major party candidates would agree to debate candidates with only modest levels of public suport), cert. denied, 502 U.S. 1048 (1992).

sufficiently inclusive so that any candidate properly considered a leading candidate is invited to debate, but not so inclusive that one or more of the candidates in whom the public has demonstrated the greatest level of interest and support refuses to debate. Given that the purpose of the CPD's debates is to afford the voting public an opportunity to sharpen their views, in a debate format, of the principal rivals for the Presidency, the absence of one of the leading candidates would dramatically undercut the educational purpose of its debates. Id. The CPD adopted its candidate selection criteria for the debates it hopes to sponsor in 2000 with the foregoing considerations in mind, as well with the goal of adopting criteria that would be clear and readily understood by the public. Id. ¶ 8.

The CPD's 2000 Criteria were adopted after substantial evaluation and analysis of how best to achieve the CPD's educational purpose. Ridings Declaration, ¶ 8. Contrary to what the complainants have claimed, the CPD's 2000 Criteria were not adopted with any partisan or bipartisan purpose. They were not adopted with the intent to keep any party or candidate from participating in the CPD's debates or to bring about a predetermined result.[11] Rather, the Criteria were adopted to further the legitimate voter education purposes for which the CPD sponsors debates. Id.; Brown Declaration, ¶¶ 31-33. Although it would have been easier in some respects simply to employ again in 2000 the criteria that already had withstood legal challenge in 1996, the CPD recognized from the experience in 1996 that its contribution to the electoral process would be enhanced by adopting criteria that were clearer and simpler, and the application of which would be very straightforward. Ridings Declaration, ¶ 9.

The 2000 Criteria include the following three factors:

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 a 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.

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[11] Additionally, as noted in the FEC's Statement of Reasons dismissing Perot '96's Complaint, a key to assessing whether debate criteria are objective pursuant to the FEC's regulations is whether the participants are "pre-chosen" or "preordained." Statement of Reasons at 9. The CPD's 2000 Criteria have not been applied yet, and the results of that future application depend on the state of public opinion at the time the Criteria are applied. In contrast, if the CPD were to employ a general election federal funding criteria, as urged by the Reform Party, the debate participants would have been selected as soon as the criteria were determined, because decisions about funding have already been made.

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.

See 2000 Criteria (attached at Tab B to Ridings Declaration).

With respect to the application of the criteria, the CPD has made the following statement in the 2000 Criteria document:

> 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.

Id.

To assist in the implementation of its criterion regarding electoral support, the CPD has retained Dr. Frank Newport, Editor-in-Chief of the Gallup Poll. Brown Declaration, ¶ 37. The CPD has announced that in order to apply its 2000 Criteria, it will consider the publicly-reported results from the following national opinion polling organizations: ABC News/Washington Post; CBS News/New York Times; NBC News/Wall Street Journal; CNN/USA Today/ Gallup; and Fox News/Opinion Dynamics. Declaration of Frank Newport, Ph.D. (hereafter "Newport Declaration") (attached as Exhibit 3), ¶ 9.[12]

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[12] The CPD is working to identify any additional implementation issues that may arise in the fall, when it will make its invitation determinations. In order to ensure full compliance with the requirement that its criteria be "pre-established," the CPD intends to make publicly available any necessary further implementation plans or details.

II. THE CPD'S DEBATES IN 2000 WILL BE CONDUCTED IN FULL COMPLIANCE WITH THE FEDERAL ELECTION LAWS

In general, corporations are prohibited from making "contributions" or "expenditures," as defined in the Federal Election Campaign Act of 1971, as amended, (the "Act") in connection with federal elections. See 2 U.S.C. § 441b(a); see also 11 C.F.R. § 114.2(b). Pursuant to 11 C.F.R. § 100.7(b)(21), however, "[f]unds provided to defray costs incurred in staging candidate debates" in accordance with relevant regulations are exempt from the Act's definition of "contributions."[13]

To partake of this "safe harbor," a debate sponsor must comply with the FEC's regulation that is applicable to the mechanics of the staging of candidate debates. In applicable part, 11 C.F.R. § 110.13(c) provides as follows:

> 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.

A. CPD's Candidate Selection Criteria Fully Comply With Applicable FEC Regulations

The Reform Party argues that the CPD's debate selection criteria fail to comply with 11 C.F.R. § 110.13(c) because they allegedly are not objective. As discussed above, the CPD's criteria for use in the 2000 debates include evidence of constitutional eligibility, evidence of ballot access and indicators of electoral support.[14] The Reform Party Complaint only takes issue with the third criterion, which "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

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[13] Under 11 C.F.R. § 110.13(a), "nonprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with this section and 11 C.F.R. 114.4(f)." Pursuant to 11 C.F.R. § 114.4(f), a non-profit of this type "may use its own funds and may accept funds donated by corporations . . . to defray costs incurred in staging debates held in accordance with 11 C.F.R. 110.13."

[14] See Tab F to Brown Declaration. Although the CPD is not required to do so, see Statement of Reasons at 7 & n.5, it set forth its criteria in a written document that it distributed widely and made publicly available.

results at the time of the determination." The Reform Party agrees that a debate sponsor must "winnow the field" given the many declared candidates. Complaint at 22. The Complaint takes issue, however, with how the CPD has chosen to do so, and instead argues that the CPD ***must*** use eligibility for general election funding as the ***sole*** measure of electoral support. This standard would result in the inclusion of the Reform Party candidate (whatever his/her actual level of electoral support), but no other non-major party candidate (whatever his/her actual level of electoral support).

Campaigns, of course, are free to advance whatever partisan position they choose. Here, in order to advance its decidedly partisan purposes, the Reform Party badly misconstrues 11 C.F.R. § 110.13(c) and ignores FEC precedent on the proper application of that regulation.

1. The CPD's Criteria Are Objective

The Reform Party advances a hodge-podge of theories why the CPD's Criteria are not "objective." None is meritorious.

First, the Complaint claims that it is simply impermissible under the federal election laws even to consider pre-debate electoral support. Complaint at 4, 22-23. The principal rationale the Reform Party advances for this proposition is that 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." Id. at 23. This proposition collapses of its own weight since it is an argument for including every declared candidate, each of whom undoubtedly would like an "opportunity to influence voters and to increase his/her support in the national electorate."[15] In fact, the Reform Party does not appear to believe its own rationale because, as noted, it too calls for a "winnowing" of the field based on electoral support; it just prefers a self-serving measure -- whether the party achieved at least five percent in the polls in the previous election.

The Reform Party's position is not only internally inconsistent, it disregards the FEC's Statement of Reasons dismissing the earlier complaint by Perot's 1996 campaign committee. There, the FEC specifically noted that it was proper for a debate sponsor to consider a candidate's electoral support. Statement of Reasons at 8. The FEC rejected any notion that eligibility for general election funding was the sole measure of such support, stating that to prevent the examination of evidence of "candidate potential" (i.e., electoral support as reflected in public opinion polls) "made little sense." Statement of Reasons at 8 & n.7.[16]

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[15] CPD does not host debates for the benefit of the candidates, but for the benefit of the electorate.

[16] In Arkansas Educ. Television Comm'n v. Forbes, 523 U.S. 666 (1998), the Supreme Court recognized that a public television station's decision not to include an independent political candidate in its debates because of the candidate's lack of political viability could be --

Second, the Reform Party claims that the very act of the CPD in selecting the level of support required to participate in the debate is impermissibly "subjective" and is in violation of the FEC's regulations. Complaint at 4. This argument would make any criteria "subjective," because there must always be some decision made by the debate sponsor regarding what objective criteria it will apply. When the FEC adopted the current version of the regulation, it made clear that staging organizations would maintain substantial discretion in extending debate invitations, noting, for instance, that "[t]he choice of which objective criteria to use is largely left to the discretion of the staging organization," and that the 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." See 60 Fed. Reg. 64,260, 64,262 (1995). The FEC reaffirmed this position in its Statement of Reasons dismissing the Perot '96 complaint, noting that "the debate regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use." Statement of Reasons at 8.

Third, the Complaint's allegation that the fifteen percent threshold was enacted specifically to exclude the Reform Party nominee and to ensure debates solely between the Republican and Democratic Party nominees has no foundation. The Criteria were adopted to advance the CPD's legitimate voter education goals and not for any partisan or bipartisan purpose. Brown Declaration, ¶ 33; Ridings Declaration, ¶ 8.

Dorothy Ridings, CPD Board member and former President of the League of Women Voters, addressed the promulgation of the CPD's streamlined criteria, and the adoption of the fifteen percent standard, at length in her Declaration, which is submitted herewith. Ms. Ridings testified, in pertinent part, as follows:

> 7. As the events of 1980 [when President Carter refused to participate in a debate to which independent candidate John Anderson was invited] well demonstrate, an organization such as CPD that seeks to sponsor general election debates among the leading candidates for the Office of the President faces a difficult challenge. No candidate is obligated to debate, and there is a significant risk that a leading candidate would not agree to share the debate stage with a candidate who enjoys only modest levels of national public support. Thus, the debate sponsor's legitimate goal in formulating its candidate selection criteria is to be sufficiently inclusive so that any candidate properly considered a leading candidate is invited to debate, but not so inclusive that one or more of the candidates in whom

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(continued)

and was -- reasonable in light of the television station's goals in producing the debates. Id. at 682. The Court further found that such exclusion was not "an attempted manipulation of the political process," recognizing that the debate host "excluded Forbes because the voters lacked interest in his candidacy, not because [the debate host] itself did." Id. at 683.

the public has demonstrated the greatest level of support refuses to debate. Given that the purpose of the CPD's debates is to afford the voting public an opportunity to sharpen their views, in a debate format, of the principal rivals for the Presidency, the absence of one of the leading candidates would dramatically undercut the educational purpose of its debates.

8. CPD adopted its candidate selection criteria for the debates it hopes to sponsor in 2000 with the foregoing considerations in mind, as well as with the goal of adopting criteria that would be clear and readily understood by the public. . . .

* * *

10. One of the criteria set forth in the CPD's 2000 Criteria is the requirement that a candidate have a level of support of fifteen percent of the electorate, as described more fully in the Criteria. The CPD's selection of fifteen percent as the requisite level of support was preceded by careful study and reflects a number of considerations. It was CPD's considered judgment that the fifteen percent threshold best balanced the goal of being sufficiently inclusive to invite those candidates considered to be among the leading candidates, without being so inclusive that invitations would be extended to candidates with only very modest levels of public support, thereby creating an unacceptable risk that leading candidates with the highest levels of public support would refuse to participate.

11. I understand that the complainants have alleged that the fifteen percent is an unattainable level of support for an independent or minor party candidate to achieve without participation in the debates. CPD's review of the historical data is to the contrary. As noted, John Anderson achieved this level of support prior to the first debate in 1980 and, therefore, was invited by the League to debate. Other independent and third-party candidacies from the modern era demonstrate the point as well. George Wallace achieved significant voter support in 1968, and Ross Perot enjoyed a high level of popular support in 1992, particularly before he withdrew from the race in July of 1992. (Mr. Perot subsequently re-entered the race shortly before the 1992 debates.)

See also Brown Declaration at ¶¶ 34-35.[17]

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[17] It is worth noting that although Mr. Buchanan now insists that the fifteen percent threshold is evidence of a plan to keep him out of the debates, before the CPD announced its Criteria, he noted a fifteen percent threshold approvingly. See transcript of October 31, 1999

Fourth, the fifteen percent criteria is not subject to partisan manipulation, as charged by the Reform Party. Indeed, mindful that some will always doubt any candidate selection decision and process, the CPD has gone to great lengths to allay such concerns. The CPD has announced that it will rely on the publicly-reported results of five nationally-respected polling organizations. Newport Declaration, ¶ 9. The CPD itself will not control the methodology or content of the polls. Id. ¶ 10. Moreover, it has retained a well-known, neutral expert to assist it in implementing the criterion. Id. ¶¶ 1-3; Brown Declartion, ¶ 37.

2. CPD's Criteria are Methodologically Sound and Reasonable

Finally, the complainants criticize polling in general and the CPD's plan for reviewing polling data in particular. The various methodological points and criticisms the Reform Party offers up in opposition to the CPD's Criteria do not amount to a coherent argument that the Criteria are not "objective" as the term is used in the regulations.

Polls are most often criticized when the perception is that our elected leaders have substituted the reading of polls for the exercise of independent judgment and leadership. There is no legitimate dispute, however, that the science of public opinion polling is by far the best mechanism we have for measuring public sentiment. Newport Declaration, ¶ 4. Public opinion polling, and, in particular, national polling conducted during the presidential general election, has a high degree of reliability. Id.

The Reform Party's complaints about public opinion polling's accuracy focus on polls from the 1948 election and on Congressional deliberations on the unrelated issue of federal funding of elections from the 1970's. The science of polling has improved dramatically since that time. Id. Other anecdotes relied on by the complainants for their criticism of polling's "accuracy" are based on a fundamental misunderstanding of the purpose of public opinion polling. A public opinion poll is an objective estimate of public opinion at the time the poll was taken, and is not a prediction of where public opinion will be at a later point in time. Id. ¶ 6. As such, complaints (such as those advanced by the Reform Party) that a poll conducted in the summer failed to indicate who would ultimately win a fall election misunderstand that a poll's objective estimate is of public opinion at the time the poll is taken. Shifts in public opinion do take place, which is why the CPD has chosen to view the most recent poll data available from a set of well-respected polling organizations shortly before the scheduled debates.

(continued)

"Meet the Press", attached at Tab G to Brown Declaration. It is also noteworthy that, in 1980, the League of Women Voters also employed a poll-based standard to determine eligibility for participation in the debates, and the League also selected fifteen percent as the appropriate standard. See Ridings Declaration at ¶ 4.

The Reform Party also attempts to cast one of the virtues of the CPD's approach -- the averaging of multiple polling results -- into a liability. Given the purpose for which the CPD is considering polling data, an average of the polls of up to five well-known, well-regarded public opinion polling organizations is a reasonable and appropriate method. Newport Declaration, ¶ 12. The average of a number of polls can be determined in a scientific, objective manner, and that average will be a good indicator of a candidate's level of public support. Id. Use of an average may reduce random error that could come from relying on only one source, id., and allows the CPD to rely on the objective research of an array of polling professionals, all of whom have been selected because they can be expected to poll frequently and regularly in the 2000 presidential campaign, and because they have a record of conducting polls in a reliable, professional and scientific manner. Id. ¶ 9.[18] While there understandably will be some methodological differences among the polls consulted, that does not invalidate the averaging of the results. Id. at 11. In order to avoid any methodological differences, the CPD would have had to limit itself to the results of one poll, which the CPD rejected in order not to be overly-dependent on any one poll. Id.[19]

B. The Reform Party's Complaint is Flawed For Additional Reasons

1. The Complaint's Interpretation of the Debate Regulation Conflicts with the First Amendment

The Reform Party's effort to compel a cramped construction of the regulation would raise serious constitutional problems. In the 1996 litigation concerning the presidential debates, the D.C. Circuit specifically recognized the First Amendment concerns implicated by governmental restrictions on a debate sponsor's invitation decisions. Perot v. Federal Election Comm'n, 97 F.3d 553, 559 (D.C. Cir. 1996) (copy attached at Tab D to Brown Declaration) ("[I]f this court were to

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[18] The concerns raised in the National Council on Public Polls article, "20 Questions a Journalist Should Ask About Poll Results," see Complaint at 28, are associated with "unscientific pseudo-polls," such as Internet and call-in polls, as opposed to scientific polls like the ones identified by the CPD.

[19] The Reform Party also addresses margin of error, claiming that the CPD should invite any candidate with an 11% level of support, assuming a margin of error of plus or minus 4%. This view is flawed for at least three reasons. First, the percentage figure reported by a polling organization is that organization's best estimate of the matter surveyed. The margin of sampling error indicates that, due to a variety of factors, the reported sample could vary by a stated number of points, but that does not mean that a result anywhere within the margin of error is just as likely as the reported estimate. Newport Declaration, ¶ 5. Second, the averaging of five polls should enhance accuracy. Id. at 12. Third, the issue at hand is whether the criteria are objective, not whether there is room for discussion among polling experts about the various approaches that might be employed to measure public opinion.

enjoin the CPD from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment Rights.") (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) and Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, 515 U.S. 557 (1995)). In Arkansas Educ. Television Comm'n, the Supreme Court upheld the First Amendment interest of a public television station to exclude from a televised debate an independent candidate with little popular support. 523 U.S. at 680-81 (recognizing that a requirement that a debate be open to all "ballot-qualified candidates . . . would place a severe burden" on a sponsor, and could result in less public debates because sponsors would be less likely to hold them). Obviously, the rights of a private debate sponsor like the CPD in controlling the content of its speech are even greater than those of a public broadcaster.

In order to withstand First Amendment scrutiny, government regulation of political activity must be narrowly tailored to serve a compelling government interest. The only governmental interest that is sufficiently compelling to justify restrictions on the expression of participants in the political process is the prevention of corruption or the appearance of corruption. See, e.g., Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 296 (1981) (limits on political activity are contrary to the First Amendment unless they regulate large contributions given to secure a political quid pro quo); Buckley v. Valeo, 424 U.S. 1, 14, 18 (1976). In addition, even when a given regulation is designed to serve the government's compelling interest in preventing corruption, it must be closely drawn so as not to inhibit protected expression unnecessarily. Carver v. Nixon, 72 F.3d 633, 644 (8th Cir. 1995). The regulation at issue, if construed in the manner suggested by the Reform Party, would be unconstitutional precisely because it would greatly limit CPD's First Amendment rights, yet it would not be narrowly tailored to reduce corruption or the appearance of corruption.[20]

2. CPD, a Nonprofit, Nonpartisan Corporation, is Eligible to Sponsor Candidate Debates Pursuant to Applicable FEC Regulations

The Reform Party's Complaint argues that the CPD is in violation of 11 C.F.R. § 110.13(a) because its "bipartisan voter educational efforts" allegedly support two political parties and oppose all others, and that the "safe harbor" provisions of 2 U.S.C. § 431(a)(B)(ii) that allow nonprofit organizations to sponsor candidate debates are inapplicable to the CPD. This same argument was advanced unsuccessfully in MURs 4451 and 4473. See Statement of Reasons at 11. 11 C.F.R. § 110.13(a) states that

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[20] The Reform Party's construction of the regulation also would render it unlawful as having been promulgated without adequate notice. The FEC's Notice of Proposed Rulemaking with respect to the amendments to 11 C.F.R. § 110.13(c) gave no indication that the FEC would restrict debate sponsors' discretion in selecting selection criteria in the manner now urged by the Reform Party.

> Nonprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support or oppose political candidates or political parties may stage nonpartisan candidate debates in accordance with this section and 11 C.F.R. 114.4(f).

The CPD plainly meets this standard. As noted above, the CPD has a long history of conducting itself in a nonpartisan manner. The CPD is a nonprofit corporation, which has been granted tax-exempt status by the Internal Revenue Service under § 501(c)(3) of the Internal Revenue Code. A § 501(c)(3) corporation, by definition, "does not participate in, or intervene in . . . any political campaign on behalf of (or in opposition to) any candidate for public office." 26 U.S.C. § 501(c)(3). The CPD's limited mission, sponsoring presidential debates and closely related educational activities, is fully in accordance with the requirements of 501(c)(3), and similarly does not violate 11 C.F.R. § 110.13(a)'s prohibition of endorsement, support or opposition to any candidate or party. The CPD makes no assessment of the merits of any candidate's or party's views, and does not advocate or oppose the election of any candidate or party. Brown Declaration, ¶ 3.

At best, the Reform Party's claim that the CPD cannot host debates pursuant to 11 C.F.R. § 110.13(a) amounts to an argument that the very act of inviting candidates to debates constitutes "endorsement" of those invited and "opposition" to those not invited, regardless of the nonpartisan manner in which those selections are made. Under the Reform Party's analysis, no staging organization could ever hold a debate pursuant to § 110.13, because the act of using criteria required by § 110.13(c) would always result in an improper endorsement under §110.13(a). This result cannot be reconciled with the FEC's regulations and must be rejected, as it was by the FEC in connection with the 1996 Complaints. Statement of Reasons at 11.[21]

* * *

[21] The Reform Party alleges that CPD is in violation of the Federal Election Campaign Act because it has failed to register as a "political committee" pursuant to 2 U.S.C. § 433, but has made expenditures and received contributions in excess of $1,000. See Complaint at 12. In fact, FEC regulations provide that "[f]unds used to defray costs incurred in staging nonpartisan candidate debates in accordance with the provisions of 11 C.F.R. 110.13 and 114.4(f)" do not constitute contributions or expenditures subject to the provisions of the Act, see 11 C.F.R. §§100.7(b)(21) and 100.8(b)(23), and thus CPD does not constitute a "political committee" under the Act, see 2 U.S.C. § 431(4).

For the foregoing reasons, the Complaint filed by the Reform Party fails to set forth a possible violation of the Act.

Respectfully submitted,

ROSS, DIXON & BELL, L.L.P.

By _____
Lewis K. Loss
Stacey L. McGraw

bcc: Frank J. Fahrenkopf, Jr.
Paul G. Kirk, Jr.
Janet H. Brown

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4987
The Commission on Presidential Debates	)	

DECLARATION OF JANET H. BROWN

I, Janet H. Brown, Executive Director of the Commission on Presidential Debates ("CPD"), give this declaration based on personal knowledge.

Background

1. I have been the Executive Director of the CPD since March 1987. Under the supervision of the Board of Directors, I am primarily responsible for planning and organizing the debates the CPD intends to sponsor in 2000.

2. Prior to serving as Executive Director of the CPD, I served on the staffs of the late Ambassador Elliot Richardson and former U.S. Senator John Danforth. Additionally, I have held appointments at the White House Domestic Council and the Office of Management and Budget. I am a graduate of Williams College and have a master's degree in public administration from Harvard University.

3. The CPD is a private, nonpartisan, not-for-profit corporation dedicated solely to the sponsorship of general election presidential and vice presidential debates and related voter education functions. The CPD was organized in February 1987, under the laws of the District of Columbia, and has its sole office in the District of Columbia. CPD's Articles of Incorporation identify its purpose as "to organize, manage, produce, publicize and support debates for the candidates for President of United States . . ." The CPD has been granted

tax-exempt status by the Internal Revenue Service under §501(c)(3) of the Internal Revenue Code. Consistent with its §501(c)(3) status, the CPD makes no assessment of the merits of any candidate's or party's views, and does not advocate or oppose the election of any candidate or party.

4. The CPD has sponsored presidential and vice presidential debates in 1988, 1992 and 1996. The CPD's debates have been viewed by tens of millions of Americans and have served a valuable voter education function. Prior to CPD's sponsorship in 1988, televised presidential debates were produced in only four general election years: by the networks in 1960, and by the non-profit League of Women Voters in 1976, 1980, and 1984. No televised presidential debates were held in the general election in 1964, 1968 or 1972.

5. The CPD receives no government funding; nor does it receive funds from any political party. The CPD obtains the funds to produce its debates from the universities and communities that host the debates, and it relies on corporate and private donations to augment contributions from the debate hosts and to support the CPD's ongoing voter education activities. The CPD currently is attempting to raise funds and in-kind contributions from a variety of corporate and non-profit entities specializing in interactive application of the Internet in order to enable the CPD to expand and improve upon the voter education opportunities it provides on its website. None of the organizations that have donated to the CPD have sought or had any input whatsoever in the promulgation of CPD candidate selection criteria or in the selection of debate participants.

6. The CPD has a twelve-member, all volunteer Board of Directors ("CPD Board"). The Co-Chairmen of the CPD Board, Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr.,

each are distinguished civic leaders with extensive records of public service. Mr. Fahrenkopf has served as Co-Chairman of the Rivlin Commission, which investigated and reported on the government of the District of Columbia, was a founder of the National Endowment for Democracy, is a member of the Board of Trustees of the National Judicial College, the ABA-sponsored judicial education center for federal and state judges, and is the Chairman of the American Bar Association's Coalition for Justice, a group coordinating the ABA's initiative to improve the American system of justice. Mr. Fahrenkopf also serves on the Board of Trustees of the E. L. Wiegand Foundation and is a member of the Greater Washington Board of Trade, the Economic Club of Washington and the Federal City Council. Mr. Kirk has served as the Co-Chairman of the National Student/Parent Mock Election and on numerous civic and corporate boards. Mr. Kirk currently is the Chairman of the Board of Directors of the John F. Kennedy Library Foundation and is Of Counsel to the law firm of Sullivan & Worcester, LLP of Boston, Massachusetts.

7. The remaining members of the CPD Board are:

Clifford L. Alexander, Jr., President of Alexander & Associates; former Chairman of the Equal Employment Opportunity Commission.

Howard G. Buffett, Chairman of GSI, Inc.

The Honorable Paul Coverdell, Member of the U.S. Senate from Georgia.

John C. Danforth, Lawyer and Partner, Bryan Cave; Retired U.S. Senator from Missouri.

The Honorable Jennifer Dunn, Member of the U.S. House of Representatives from Washington.

Antonia Hernandez, President, Mexican American Legal Defense Fund.

Caroline Kennedy, Author.

Paul H. O'Neill, Chairman of the Board of Aluminum Company of America; former Deputy Director of the Office of Management and Budget.

Newton Minow, Lawyer and Partner, Sidley & Austin; former Chairman of the Federal Communications Commission.

Dorothy Ridings, President and CEO of the Council on Foundations; former President, League of Women Voters.

8. Former Presidents Gerald Ford, Jimmy Carter and Ronald Reagan serve as Honorary Co-Chairmen of CPD.

History of the Commission on Presidential Debates

9. CPD was organized in response to the recommendations of two separate studies on presidential elections and debates: (1) the April 1986 Final Report of the Commission on National Elections, entitled Electing the President: A Program for Reform, a nine-month study of presidential elections by a distinguished group of news executives, elected officials, business people, political consultants, and lawyers conducted under the auspices of the Georgetown University Center for Strategic and International Studies, and (2) the Theodore H. White Conference on Presidential Debates held in March 1986 at the Harvard Institute of Politics and chaired by Newton Minow, former chairman of the Federal Communications Commission.

10. Both of those studies underscored the importance presidential debates had assumed in American electoral politics. Rather than permit the existence of debates to turn on the vagaries of each election, the studies recommended that the debates be "institutionalized." More specifically, both studies recommended that the two major political parties create a mechanism designed to ensure, to the greatest extent possible, that debates become a permanent and integral part of the presidential election process.

11. Frank J. Fahrenkopf, Jr. and Paul G. Kirk, Jr., then-chairmen of the Republican and Democratic National Committees respectively, responded by initiating CPD as a not-for-profit corporation separate and apart from their party organizations.

While Messrs. Kirk and Fahrenkopf served as the chairs of the major national party committees at the time CPD was formed, they no longer do so; nor do the current chairs of those committees sit on CPD's Board of Directors. No CPD Board member is an officer of the Democratic or Republican National Committee. Although some CPD Board members, like the majority of this country's civic leaders, identify with the Republican or Democratic party, that certainly is not the case with every Board member. For example, I am not aware of what party, if any, Board members Dorothy Ridings or Howard Buffett would identify with if asked.

1988: The CPD Successfully Launches Its First Debates

12. On July 7, 1987, over one year prior to the sponsorship of the CPD's first debates, CPD formed an advisory panel of distinguished Americans, including individuals not affiliated with any party, in order to provide guidance to CPD with respect to several areas, including non-major party candidate participation in CPD-sponsored debates. From virtually the beginning of CPD's operations, CPD's Board recognized that, although the leading contenders for the offices of President and Vice President of the United States historically have come from the major parties, CPD's educational mission would be furthered by developing criteria by which to identify any non-major party candidate who, in a particular election year, was a leading candidate for the office of President or Vice President of the United States, and to whom an invitation should be extended to participate in one or more CPD-sponsored debate.

13. The individuals serving on that advisory panel (and their then-current principal affiliation) included:

Charles Benton, Chairman, Public Media Inc.;

Ambassador Holland Coors, 1987 Year of the Americas;

Marian Wright Edelman, President, Children's Defense Fund;

Mary Hatwood Futrell, President, National Education Association;

Carla A. Hills, Partner, Weil, Gotshall & Manges;

Barbara Jordan, Professor, LBJ School of Public Affairs, University of Texas;

Melvin Laird, Senior Counselor, Readers' Digest;

Ambassador Carol Laise;

William Leonard, former President, CBS News;

Kate Rand Lloyd, Managing Editor, Working Woman Magazine;

Newton Minow, Partner, Sidley & Austin;

Richard Neustadt, Professor, Kennedy School of Government, Harvard University;

Ed Ney, Vice Chairman, Paine Webber Inc.;

Paul H. O'Neill, Chairman and Chief Executive Officer, Aluminum Company of America;

Nelson W. Polsby, Professor, University of California at Berkeley;

Jody Powell, Chairman and Chief Executive Officer, Ogilvy & Mather Public Affairs;

Murray Rossant, Director, Twentieth Century Fund;

Jill Ruckelshaus, director of various non-profit entities;

Lawrence Spivak, former Producer and Moderator, "Meet the Press";

Robert Strauss, Partner, Akin, Gump, Strauss, Hauer & Feld;

Richard Thornburgh, Director, Institute of Politics, Harvard University;

Marietta Tree, Chairman, Citizen's Committee for New York City;

Anne Wexler, Chairman, Wexler, Reynolds, Harrison & Schule;

Mrs. Jim Wright.

14. The advisory panel convened in Washington on October 1, 1987 to discuss the issues of its mandate, including the candidate selection criteria, after which the CPD

Board appointed a subcommittee of the advisory panel, headed by Professor Richard Neustadt of the Kennedy School of Government, Harvard University, to draw on the deliberations and develop nonpartisan criteria for the identification of appropriate third-party candidates to participate in CPD sponsored debates.

15. On November 20, 1987, Professor Neustadt's subcommittee recommended to the CPD Board the adoption of specific nonpartisan candidate selection criteria intended to identify those candidates other than the nominees of the major parties with a realistic chance of becoming President or Vice President of the United States. The Neustadt subcommittee reported that the adoption and application of such criteria would help ensure that the primary educational purpose of the CPD -- to ensure that future Presidents and Vice Presidents of the United States are elected after the voters have had an opportunity to hear them debate their principal rivals -- would be fulfilled.

16. While the 1987 candidate selection criteria themselves were quite detailed, they included a review of three types of factors: (1) evidence of national organization; (2) signs of national newsworthiness and competitiveness, and (3) indicators of national public enthusiasm or concern, to determine whether a candidate had a realistic chance of election.

17. On February 4, 1988, the CPD Board unanimously adopted the selection criteria proposed by Professor Neustadt's subcommittee. The sole objective of the criteria adopted by the CPD in 1988 was to structure the CPD debates so as to further the nonpartisan educational purpose of those debates, while at the same time complying fully with applicable law. An Advisory Committee to the CPD Board, chaired by Professor

Neustadt, was created for the purpose of applying the 1988 candidate selection criteria to the facts and circumstances of the 1988 campaign.

18. Professor Neustadt's Advisory Committee met in advance of the debates and carefully applied the candidate selection criteria to the facts and circumstances of the 1988 campaign. The Advisory Committee unanimously concluded that no non-major party candidate satisfied the criteria and, accordingly, the Advisory Committee recommended to the CPD Board that no non-major party candidate be extended an invitation to participate in the CPD's 1988 debates. The CPD Board of Directors, after carefully considering the Advisory Committee's recommendation, the criteria and the facts and circumstances of the 1988 campaign, voted unanimously to accept the Advisory Committee's recommendation.

19. Although the Bush and Dukakis campaigns reached an agreement that addressed certain production aspects of the 1988 debates, that agreement in no sense impaired the voter education value of those debates, in which a number of prominent journalists participated, including Jim Lehrer, Peter Jennings, Tom Brokaw and Bernard Shaw.

1992: The CPD's Debates Include Three Candidates

20. On or about January 16, 1992, the CPD Board requested that the Advisory Committee, again chaired by Professor Neustadt, assist the CPD in promulgating nonpartisan candidate selection criteria in connection with the 1992 election. Pursuant to the Advisory Committee's recommendation, the CPD Board adopted substantially the same selection criteria used in 1988, with minor technical changes.

21. The 1992 Advisory Committee, consisting of Professor Neustadt; Professor Diana Carlin of the University of Kansas; Dorothy Ridings, Publisher and President of the Bradenton Herald and former President of the League of Women Voters; Kenneth

Thompson, Director of the Miller Center, University of Virginia; and Eddie Williams, President, Joint Center for Political and Economic Studies, met on September 9, 1992 to apply the candidate selection criteria to the 100-plus declared presidential candidates seeking election in 1992. At that time, it was the unanimous conclusion of the 1992 Advisory Committee that no non-major party candidate then seeking election had a realistic chance in 1992 of becoming the next President of the United States. Ross Perot, who had withdrawn from the race in July 1992, was not a candidate for President at the time of this determination.

22. On October 5, 1992, the Advisory Committee reconvened at the request of the CPD Board to update its application of the 1992 criteria to include subsequent developments, including Ross Perot's October 1, 1992 reentry into the campaign. The Advisory Committee concluded that Mr. Perot satisfied the selection criteria, and based on that recommendation, the CPD Board extended invitations to Mr. Perot and his running mate, Admiral James B. Stockdale, to participate in its first two 1992 debates. When it became clear that the debate schedule -- four debates in eight days -- would prevent any meaningful reapplication of the selection criteria, the CPD extended its original recommendation that the Perot/Stockdale campaign participate in two debates to all four debates. See October 6 and 7, 1992 letters (attached at Tab A). Thereafter, the CPD produced three presidential debates involving President Bush, Governor Clinton, and Mr. Perot, and one vice presidential debate between Vice President Quayle, Senator Gore, and Admiral Stockdale.

23. When the Advisory Committee applied the 1992 criteria to Mr. Perot, it faced the unprecedented situation in which a candidate, whose standing in the polls had

been approximately 40%, had withdrawn from the race, but then rejoined the campaign shortly before the debates, with unlimited funds to spend on television campaigning. The Advisory Committee found that it was unable to predict the consequences of that combination, but agreed that Mr. Perot had a chance of election if he did well enough that no candidate received a majority of electoral votes and the election was determined by the United States House of Representatives. Although the Advisory Committee viewed Mr. Perot's prospect of election as unlikely, it concluded that the possibility was not unrealistic, and that Mr. Perot therefore met the CPD's 1992 criteria for debate participation. See September 17, 1996 letter (attached at Tab B).

24. The Complainants in MUR 4987 suggest that, at the time the CPD decided to include Ross Perot in its 1992 debates, Mr. Perot's support was at 7% in national polls. In fact, some polls available at the time the CPD made its decision showed Mr. Perot's support at as high as 17-20%. In any event, before his abrupt withdrawal from the campaign, Mr. Perot's public support had been almost 40%.

1996: The CPD's Criteria are Upheld as Objective and Nonpartisan

25. After evaluation of the prior debates and careful consideration of how best to achieve its educational mission, on September 19, 1995, the CPD Board adopted the same selection criteria, with minor changes, for use in the 1996 debates, and appointed a 1996 Advisory Committee consisting of the same members as the 1992 committee.

26. On September 16, 1996, the Advisory Committee met to apply the candidate selection criteria to the more than 130 declared non-major party presidential candidates seeking election in 1996. Although the 1996 candidate selection criteria did not expressly require it to do so, the 1996 Advisory Committee independently applied the criteria to the Democratic and Republican party nominees. In light of its findings, the Advisory

Committee recommended to the CPD's Board that only President Clinton and Senator Dole be invited to participate in the CPD's 1996 presidential debate, and that only Vice President Gore and Congressman Kemp be invited to participate in the CPD's 1996 vice presidential debate. The CPD Board unanimously accepted the 1996 Advisory Committee's recommendation.

27. In a letter from Professor Neustadt, the Advisory Committee explained that after careful consideration of the circumstances in the 1996 campaign, it found that neither Mr. Perot nor any other non-major party candidate had a realistic chance of being elected president that year. With respect to Mr. Perot, the Advisory Committee emphasized that the circumstances of the 1996 campaign differed from the unprecedented circumstances of 1992, and that Mr. Perot's funding was limited by his acceptance of a federal subsidy. See September 17, 1996 letter, Tab B.

28. Just prior to the CPD's 1996 debates, Perot '96, Ross Perot's campaign committee, and the Natural Law Party (the "NLP") filed separate administrative complaints with the Federal Election Commission (the "FEC") alleging, among other things, that the CPD was in violation of the FEC's debate regulations because it provided an "automatic" invitation to its debates to the major party nominees and because it employed impermissibly "subjective" candidate selection criteria. Perot '96 and the NLP then filed lawsuits against the CPD and the FEC in federal court seeking to halt the scheduled debates. After expedited briefing, the District Court dismissed the suits. See Hagelin v. Federal Election Commission, 1996 WL 566762 (D.D.C. Oct. 1, 1996) (NO. CIV. A. 96-2132, CIV. A. 96-2196) (attached at Tab C). The U.S. Court of Appeals for the D.C. Circuit upheld the lower

court's decision, see Perot v. Federal Election Commission, 97 F.3d 553 (D.C. Cir. 1996) (attached at Tab D), and the Supreme Court declined to hear the matter.

29. Subsequently, in 1998, the FEC found that there was no reason to believe that the CPD had violated any of the Commission's regulations, and the administrative complaints were dismissed. In brief, the FEC agreed that the requirement that decisions be made based on "objective criteria" did not mean the criteria must be capable of mechanical application. Rather, it was sufficient that the CPD's criteria "reduce a debate sponsor's use of its own personal opinions in selecting candidates," and are not "arranged in some manner as to guarantee a preordained result." See Statement of Reasons, MURs 4451 and 4473 (April 6, 1998) (attached at Tab E). As to the contention that the criteria prohibited "automatic" invitations to the nominees, the FEC, again agreeing with the CPD, explained that the regulations do not prohibit such invitations; rather they require that other criteria exist to identify candidates other than the major party nominees who qualify for invitation. The CPD's criteria satisfied this requirement.

30. In October 1996, following the dismissal of the lawsuits, the CPD sponsored two presidential debates between President Clinton and Senator Dole and one vice-presidential debate between their running mates.

2000: The CPD Adopts More Streamlined Criteria

31. After each election cycle, the CPD has examined a wide-range of issues relating to the debates. These reviews have considered format, timing and other issues, including the candidate selection process. The review the CPD conducts after each election is part of the CPD's ongoing effort to enhance the contribution the debates make to the process by which Americans select their next President. After very careful study and deliberation, the CPD adopted more streamlined criteria in January 2000 for use in the 2000

general election debates. In summary, the CPD Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation (the "2000 Criteria") are (1) constitutional eligibility; (2) appearance on a sufficient number of state ballots to achieve an Electoral College majority; and (3) a level of support of at least 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 2000 Criteria (attached at Tab F). As I understand the Reform Party's complaint, it takes issue with only the third criterion.

32. The CPD believes that the approach to candidate selection it has adopted for 2000 will enhance the debates and the process by which we select our President. The approach is faithful to the long-stated goal of the CPD's debates -- to allow the electorate to cast their ballots after having had an opportunity to sharpen their views of the leading candidates. The approach also has the virtue of clarity and predictability. The CPD also hopes and expects that the criteria will further enhance the public's confidence in the debate process.

33. The CPD's 2000 Criteria were not adopted with any partisan (or bipartisan) purpose. They were not adopted with the intent to keep any party or candidate from participating in the CPD's debates or to bring about a preordained result. Rather, the 2000 Criteria were adopted to further the legitimate voter education purposes for which the CPD sponsors debates.

34. The CPD's selection of fifteen percent as the requisite level of support was preceded by careful study and reflects a number of considerations. It was the CPD's considered judgment that the fifteen percent threshold best balanced the goal of being

sufficiently inclusive to invite those candidates considered to be among the leading candidates, without being so inclusive that invitations would be extended to candidates with only very modest levels of public support, thereby creating an unacceptable risk that leading candidates with the highest levels of public support would refuse to participate.

35. Prior to adopting the 2000 Criteria, the CPD conducted its own analysis of the results of presidential elections over the modern era and concluded that a level of fifteen percent support of the national electorate is achievable by a significant third party or independent candidate. Furthermore, fifteen percent was the figure used in the League of Women Voters' 1980 selection criteria, which resulted in the inclusion of independent candidate John Anderson in one of the League's debates. In making this determination, the CPD considered, in particular, the popular support achieved by George Wallace in 1968 (Mr. Wallace had achieved a level of support as high as 20% in pre-election polls from September 1968); by John Anderson in 1980 (Mr. Anderson's support in various polls reached fifteen percent when the League of Women Voters invited him to participate in one of its debates); and by Ross Perot in 1992 (Mr. Perot's standing in 1992 polls at one time was close to 40% and exceeded that of the major party candidates, and he ultimately received 18.7% of the popular vote).

36. The CPD considered, but rejected, the possibility of using public funding of general election campaigns, rather than polling data, as a criterion for debate participation. That criterion is itself both potentially overinclusive and underinclusive. Eligibility for general election funding is determined based on performance in the prior presidential general election. The CPD realized that such an approach would be underinclusive to the extent that it would automatically preclude participation by a prominent newcomer (such as

Ross Perot in 1992), but also would be overinclusive to the extent it would mandate an invitation to the nominee of a party that performed well in a prior election, but who did not enjoy significant national public support in the current election. In addition, while the United States Congress determined that five percent was a sufficient level of support for purposes of determining eligibility for federal funding as a "minor" party (at a level that is substantially lower than that received by the "major" parties), as noted, a debate host hoping to present the public with a debate among the leading candidates (none of whom are required to debate) must necessarily take into account a different set of considerations. Moreover, unlike the CPD's fifteen percent standard, the standard of qualification for federal funding in the general election has a preordained result: it automatically includes the Reform Party candidate but necessarily precludes participation by any other third party candidate.

37. The CPD has retained Frank Newport, the Editor-in-Chief of the Gallup Poll, as a consultant to advise the CPD in connection with the implementation of the 2000 Criteria. Mr. Newport is a well-respected expert in the areas of polling methodology and statistics.

38. I understand that the complainants challenge the CPD's 2000 Criteria on the grounds that they are impermissibly subjective in that they are designed to exclude Patrick Buchanan from participating in the CPD's 2000 debates, and to limit the debate participants to the nominees of the Democratic and Republican parties. Those claims are false. The CPD adopted the 2000 Criteria for the sole purpose of furthering its educational mission. On their face, the criteria are pre-established and objective within the meaning of the FEC's debate regulations. The CPD, as a non-profit, nonpartisan debate sponsor, is

entitled to select its own objective criteria and nothing about its decision to use the 2000 Criteria, including its fifteen percent standard, is contrary to the guidelines the FEC has provided to debate sponsors. In fact, before the CPD announced the 2000 Criteria, Mr. Buchanan himself identified fifteen percent as a reasonable level of support for debate inclusion. See Transcript of NBC News' October 31, 1999 "Meet the Press" (attached at Tab G).

39. I am aware that the complainants cite statements attributed to George Stephanopolous, former advisor to President Clinton, that the Democratic and Republican party nominees in 1996 each wanted to exclude Mr. Perot from the CPD's 1996 debates. See Complaint at 18. I do not know if this is true, but it most certainly is true that the major party nominees had no input into the CPD's candidate selection decision in 1996. In 1988, 1992 and 1996, the CPD's decisions regarding which candidates to invite to its debates were made by the CPD's Board's unanimous adoption of the recommendations of independent Advisory Committees charged with the task of applying the CPD's pre-established, objective criteria. At no time did any campaign or the representative of any campaign have a role in the Advisory Committees' or the CPD Board's decision-making process.

40. Currently, the CPD is well along in its preparations for the production of the 2000 debates. On January 6, 2000, the CPD announced the following schedule for its 2000 debates:

- *First presidential debate:* Tuesday, October 3, University of Massachusetts, Boston, MA
- Vice presidential debate: Thursday, October 5, Centre College, Danville, KY
- Second presidential debate: Wednesday, October 11, Wake Forest University, Winston-Salem, NC

- Third presidential debate: Tuesday, October 17, Washington University in St. Louis, MO

41. In addition to sponsorship of the 1988, 1992, 1996 debates and its planned sponsorship of the 2000 debates, the CPD has engaged in a number of other related voter education activities, each intended in a nonpartisan manner to enhance the educational value of the debates themselves. In 1988, the CPD, in conjunction with the Library of Congress and the Smithsonian Institution, prepared illustrated brochures on the history and role of political debates. In 1990, the CPD sponsored a symposium on debate format attended by academic experts, journalists, political scientists and public policy observers. Also in 1990, the CPD produced a videotape and brochure giving guidance to schools and civic groups on how to sponsor debates. In 1992, the CPD produced a viewers' guide to debates in cooperation with the Speech Communication Association. In connection with the 1996 Debates, the CPD sponsored DebateWatch '96, in which over 130 organizations (including numerous cities and town, high schools, presidential libraries, civic associations, universities and chambers of commerce) participated by hosting forums in which citizens viewed the debates together and had the opportunity to discuss the debates afterwards with other viewers and listeners. In connection with the 2000 election, the CPD is planning to

increase the numerous voter education opportunities available on or through its website, and to produce a two-hour PBS special, "Debating our Destiny," in conjunction with McNeil/Lehrer Productions.

42. I know of no other debate sponsor that plans to host televised presidential debates in 2000. If the CPD is prevented from acting as a debate sponsor, debates including the major party candidates may not take place this year. If that were the case, in addition to the immeasurable injury to the American public and the electoral process, the time, energy and effort of an enormous number of people would have been expended for naught. Among those who would be injured are the CPD's many contributors, Debate Watch hosts and participants, and the communities hosting the debates themselves (the University of Massachusetts and Boston; Centre College and Danville, Kentucky; Wake Forest University and Winston-Salem, North Carolina; and Washington University and St. Louis).

43. I declare under penalty of perjury that the foregoing is true and correct. Executed this 17th day of May, 2000.

JANET H. BROWN

A

COMMISSION ON PRESIDENTIAL DEBATES 901 Thirteenth St., NW · Suite 310 South · Washington DC 20005 · (202) 872-1020

October 6, 1992

VIA FACSIMILE

Mr. Robert M. Teeter
Campaign Chairman
Bush/Quayle '92
1030 15th Street, N.W.
Washington, D.C. 20005

Mr. Mickey Kantor
National Campaign Chair
Clinton/Gore '92
National Campaign Headquarters
Post Office Box 615
Little Rock, Arkansas 72203

Gentlemen:

The Board of Directors of the Commission on Presidential Debates voted today to accept your invitation to sponsor debates between the leading candidates for President and Vice President of the United States on October 11, 13, 15, and 19, 1992. The Commission's decision is based on its conclusion that the Memorandum of Understanding (the "Memorandum") executed by your respective campaigns, a copy of which has been provided to us, appears to envision debates that comport with and further the Commission's nonpartisan, educational mission.

The Commission's acceptance is subject to the following conditions and understandings:

(1) The Commission's sponsorship is expressly contingent upon the ongoing validity of the conclusion that the debates envisioned by the Memorandum will comport with the Commission's nonpartisan educational mission;

(2) The Commission has determined, pursuant to the recommendation of its nonpartisan 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;

(3) The Commission understands that Mr. Perot finds the terms of the Memorandum to be acceptable; and

(4) The Commission has undertaken to provide an opportunity for the University of Richmond community to participate in the October 15 debate. The Commission's acceptance is subject to the understanding that suitable arrangements will be made for a modest number of representatives of the University of Richmond to attend the debate in Richmond. The Commission, working with University officials, will take all reasonable measures to attempt to ensure that the attendees do not interfere with the debate.

Please advise us at your earliest opportunity if these conditions are acceptable to you.

Yours sincerely,

COMMISSION ON PRESIDENTIAL DEBATES

By: Paul G. Kirk, Jr.
Paul G. Kirk, Jr.
Co-Chairman

By: Frank J. Fahrenkopf, Jr.
Frank J. Fahrenkopf, Jr.
Co-Chairman

cc: R. Clayton Mulford, Esq. (via facsimile)
Bobby Burchfield, Esq. (via facsimile)
Tom Donilon, Esq. (via facsimile)

COMMISSION ON PRESIDENTIAL DEBATES 601 Thirteenth St. NW • Suite 1111 South • Washington DC 20005 • (202) 872-1020

October 7, 1992

VIA FACSIMILE

Mr. Robert M. Teeter
Campaign Chairman
Bush/Quayle '92
1030 15th Street, N.W.
Washington, D.C. 20005

Mr. Mickey Kantor
National Campaign Chair
Clinton/Gore '92
National Campaign Headquarters
P.O. Box 615
Little Rock, AK 72203

Gentlemen:

The Board of Directors of the Commission on Presidential Debates convened a special meeting today to review changed circumstances since our letter to you of October 6, 1992. Paragraph (2) of the aforementioned letter of October 6 is hereby amended by the Commission to provide as follows:

(2) 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.

Co-Chairmen
Honorary Co-Chairmen
Gerald R. Ford
Jimmy Carter
Directors
Executive Director
Janet H. Brown
David Norcross
Ray Orr
Governor Pete Wilson

In all other respects, our letter of October 6, 1992 stands as submitted. If we do not hear from you to the contrary by 4:00 p.m. today, we will assume you are in full agreement and we will proceed accordingly.

Yours sincerely,

COMMISSION ON PRESIDENTIAL DEBATES

By: Paul G. Kirk, Jr.
Co-Chairman

By: Frank J. Fahrenkopf, Jr.
Co-Chairman

cc: R. Clayton Mulford, Esq. (via facsimile)
Bobby Burchfield, Esq. (via facsimile)
Tom Donilon, Esq. (via facsimile)

B

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Richard E. Neustadt
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September 17, 1996

Mr. Paul G. Kirk, Jr.
Mr. Frank J. Fahrenkopf, Jr.
Commission on Presidential Debates
601 13th Street, N.W.
Washington, D.C. 20005

Dear Chairman Kirk and Chairman Fahrenkopf:

The Advisory Committee has been asked to review the electoral prospects of minor party candidates in light of the latest available data on the Commission's criteria, and then to judge, by the Commission's standard for admission to its debates, whether each candidate does or does not have a realistic chance of becoming President of the United States next January 20. The chance need not be overwhelming but must be more than theoretical. An affirmative answer to that question is the only basis, under long-established policy, for the Commission to invite him or her to the debates it sponsors. That single standard ("realistic chance") is for the Commission to apply. This Committee merely offers its advisory judgment.

The electoral principle behind the Commission's single standard is, as we understand it, that this Fall's debates, coming at the end of a year-long nomination and election process, should help the voters face the actual choice before them, and therefore ought to be as realistic as possible. Since 1987, you, the Commissioners, have stressed, rightly in our view, that your debates should be confined to the presidential and vice presidential candidates who will be sworn in next January, along with their principal rivals.

"Realistic chance" is meant to focus attention on that real choice.

We began with Mr. Ross Perot, now of the Reform Party. We have reviewed the data your staff has assembled for us, supplemented by telephonic inquiries of our own to political scientists and political journalists across the country. We have concluded that, at this stage of the campaign, Mr. Perot has no realistic chance either of popular election in November or of subsequent election by the House of Representatives, in the event no candidate obtains an Electoral College majority. None of the expert

observers we have consulted thinks otherwise. Some point to possibilities of extraordinary events later in the campaign, but grant that those possibilities do not change the likelihoods as of today.

Four years ago, we confronted an unprecedented condition when Mr. Perot rejoined the campaign in October. We were mindful that the preceding Spring, before his withdrawal, he had registered approximately 40 percent in the polls, and that upon rejoining the campaign, he could spend unlimited funds on television campaigning. Unable to predict the consequences of this combination, we agreed that he must be presumed to have a remote chance of election, should he do well enough so that no one else won a majority of electoral votes. His chances in the House of Representatives we found incalculable. So, we concluded that his prospect of election was unlikely but not unrealistic.

With the 1992 results and the circumstances of the current campaign before us, including Mr. Perot's funding limited by his acceptance of a federal subsidy, we see no similar circumstances at the present time. Nor do any of the academic or journalistic individuals we have consulted.

Moving on to the other minor party candidates, we find no one with a realistic chance of being elected President this year. Applying the same standard and criteria to them individually as to Mr. Perot, our response is again "no" in each case. The observers we have consulted take the same view. Three of the minor party candidates, in addition to Mr. Perot, do have a theoretical chance of election in November, by virtue of placement on the ballots of enough states to produce an Electoral College majority. We do not, however, see their election as a realistic possibility.

Therefore, the Advisory Committee unanimously concludes at this time that only President Clinton and Senator Dole qualify for admission to CPD's debates. We stand ready to reconvene should present circumstances change.

Sincerely yours,

Richard E. Neustadt
For the Advisory Committee on Candidate Selection

Richard E. Neustadt, Chairman
Diana Prentice Carlin
Dorothy S. Ridings
Kenneth W. Thompson
Eddie N. Williams

Dr. John HAGELIN, Dr. Mike Tompkins, and the Natural Law Party, Plaintiffs,
v.
FEDERAL ELECTION COMMISSION, and Commission On Presidential Debates, Defendants.
Ross PEROT, Pat Choate, and Perot '96, Inc., Plaintiffs,
v.
FEDERAL ELECTION COMMISSION, and Commission On Presidential Debates, Defendants.

Civ. A. Nos. 96-2132, 96-2196.

United States District Court, District of Columbia.

Oct. 1, 1996.

Thomas M. Newmark, Daniel Vogel, Gallop, Johnson and Neuman, L.C., St. Louis, MO, for 96-2132 Plaintiffs.

Samuel W. Lanham, Jr., Cuddy & Lanham, Bangor, ME, Jamin Raskin, Thomas Sargentich, Professors of Law, American University, Washington, D.C., Ross Clayton Mulford, Hughes & Luce, L.L.P., Dallas, TX, and Robert E. Steinberg, Porter, Wright, Morris & Arthur, Washington, D.C., for 96-2196 Plaintiffs.

Stephen Hershkowitz, Richard Bader, Rita Reimer, Washington, D.C., for Defendant Federal Election Commission.

Lewis K. Loss, William H. Briggs, Jr., Stacey L. McGraw, Ross, Dixon & Masback, L.L.P., Washington, D.C., for Defendant Commission on Presidential Debates.

PROCEEDINGS

THOMAS H. HOGAN, District Judge.

*1 THE COURT: The Court is going to dictate a bench opinion at this time-- or announce a bench opinion; it's not dictating; it's spontaneous, as opposed to written out-- because of the, as I mentioned earlier, the exigencies of the case and the need for the public and the candidates and the parties before the Court, the agencies, and the Debate Commission to have a ruling by this Court in light of the oncoming debates this Sunday. I'm going to try to make a brief review of the status of the case and the issues pending before the Court and then make a ruling on the request for preliminary injunction and the motions that have been filed.

All right. First, the Court wants to recognize and thank counsel for their hard work in an expedited fashion in this serious matter, the counsel: Mr. Lanham, Mr. Raskin, Mr. Sargentich, and Mr. Steinberg assisting them and their other assistants; for the Natural Law Party, Mr. Newmark and Mr. Vogel as well; on the defense side, Mr. Loss and Mr. Briggs, Ms. McGraw, and others for the Commission on Presidential Debates; and for the Federal Election Commission, Mr. Hershkowitz and his assistants.

The Court had set a very tight time frame in this matter, and although it's on the public record, it may not be generally known, there were multiple motions to intervene by various pro se litigants that the Court denied and motions by the Green Party and by Mr. Nader and by the Rainbow Coalition, Mr. Jackson, to either file an amicus brief or, in Mr. Nader's case, to intervene. That was denied, but I allowed them both to file amicus briefs, briefs to assist the Court that I've considered as well on these issues.

The first case was Dr. John Hagelin and others, the Natural Law Party, versus the Federal Election Commission, was filed here on September 6 and had--I'm sorry, they had filed, I believe, an administrative complaint on September 6 to the Federal Election Commission, and on September 13 of this year, they filed this litigation.

On September 20, the Perot plaintiffs filed an administrative complaint with the Commission. On September 23, they then filed this litigation. I consolidated these two cases for the purpose of argument and so that we combined them on today's hearing schedule.

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The parties, since this is October 1, literally in one week have briefed fully the issues in this case, have had oppositions filed and reply briefs received as late as last evening that the Court and the parties worked on.

What the Court intends to do is, as it said, dictate its opinion in this matter at this time. It hopes that the time frame will be such it will be able to issue a fuller analysis and a written opinion in a few days, but because, as I've said, of the need for a decision, in fairness to the parties, I'll issue this bench opinion. It will rule upon the preliminary injunction and the motions that are pending to dismiss.

I will announce my ruling and then give the rationale, that is, the findings of fact and conclusions of law under the preliminary injunction standards under rule 65 and then the rulings on the motions to dismiss as well, and follow that by an entry of an order on the docket for appellate purposes as may be necessary.

*2 The preliminary injunction requested in both cases, for instance, in the Perot case, Mr. Lanham--I didn't recognize Mr. Lanham--in the Perot case, the remedies sought in their brief indicates that the plaintiffs recognize the Court should not unnecessarily intrude in the election process and it does not have authority to order the debates occur, select the participants in those debates, but argues it does have jurisdiction to guide the decision-making process of the CPD, that is, the Commission on Presidential Debates, to ensure it conforms to legal requirements and suggests that the Court review the criteria, inform defendants of the criteria it considers objectives, and lists three criteria that are objective, and that the Court allow that the plaintiffs, Mr. Perot and Mr. Choate, who meet those objectives, the objective criteria the plaintiff lists as objective, and order that the CPD allow them then to participate in the debates and that at least I should identify the criteria that they have set forth as the only pre-established objective criteria and enjoin the Commission on Presidential Debates from applying any debate selection criteria other than those pre-established objective criteria as set forth by the plaintiff that should be used.

In the alternative, they ask the Court to declare the debate regulations of the FEC to be ultra vires and unconstitutional and enjoin any further CPD or corporate spending on these debates.

Likewise, the Natural Law Party and Dr. Hagelin and Dr. Tompkins pray that the Court issue a temporary restraining order or preliminary injunction enjoining the CPD from using unlawful subjective selection criteria in requiring it to establish its pre-established subjective criteria or, in the alternative, ordering the FEC to make an immediate decision on the violations and authorizing it to take expedited action against the violations.

This case presents a rather unique issue for this Court that has not been directly decided before in this circuit and perhaps in any circuit as to the granting of a preliminary injunction that either would order, in essence, the attendance of certain individuals at the debates or stop the debates based upon the plaintiffs' assertions that the criteria, at least under the regulatory argument, that the criteria used were inappropriate, being subjective, and therefore the debates cannot go forward until appropriate criteria are drafted and established, and secondary to that, that the Court should indicate which criteria are appropriate so that debates could go forward with the individuals who may then fall under the criteria.

The arguments have consisted of, as I've said, not only the briefs and the additional materials and exhibits filed and affidavits, but also the presentations this morning by counsel that the Court has considered.

The Court is going to make the following ruling at this time on the preliminary injunction request following the factors that I must use in any preliminary injunction case in this circuit under Washington Metropolitan Area Transit Authority v. Holiday Tours, 559 F.2d 841, 843, a 1977 circuit case. The factors are the likelihood of success on the merits;

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whether without this relief the movants have shown they'll suffer irreparable injury; the balance of the equities or harm to other parties, as they say; and finally, wherein lies the public interest.

*3 Applying those factors, the Court is going to deny the motion for preliminary injunction in both cases, the case of Mr. Hagelin and the Natural Law Party and the case of Mr. Perot and the Perot Party--Reform Party at this time. As I have said, this bench opinion will be the findings of fact and conclusions of law giving the rationale for this decision.

While recognizing that the debate medium through the TV and the exposure is not only important but probably vital and essential in today's world of electronic communication, vastly different than referred to earlier in the Lincoln-Douglas debates, where it was a room perhaps of this size that the debates occurred in or outdoors with a group of people, today to really meaningfully communicate, it is, I would believe most will agree, essential that the candidates have access to TV.

Unfortunately, more people watch the TV and get their impressions, make their decisions perhaps from the TV exposure than they do from the print media in today's world. Perhaps someday we'll be doing virtual debates over the Internet, where this won't be the same problem, but right now we're faced with these issues of the participation of Mr. Perot and his party and his vice presidential candidate, Mr. Choate, and the Natural Law Party, Dr. Hagelin and his vice presidential candidate, Dr. Tompkins, to participate in the debates scheduled for October 6, this Sunday evening.

While recognizing the important interest and need, as I've said, for communication through the TV medium and access to the TV by the third-party candidates to establish their credibility with the electorate, it's apparent to the Court, after review of the authorities and the case law and the statutory framework of the Federal Election Commission, that the likelihood of success on the merits, whether I'm treating the statutory/regulatory claims of the Natural Law Party or, we use the terminology Perot Party to incorporate the various Perot plaintiffs, as to their statutory/regulatory claims, that there is substantial barriers to the likelihood of success on the merits that the plaintiffs have simply not overcome that I had to be convinced they could before I could grant a motion for preliminary injunction.

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.

The first issue to look at under the statutory claims of the Natural Law Party and the Perot plaintiffs is the jurisdictional problem, where Congress set forth very precise procedures and, after case decisions, amended the statute to reflect a more timely review of certain areas that could be raised or questions that could be raised as the elections approached.

*4 Congress obviously knew the problems--they are politicians who face election every two years in the House and every six in the Senate--that could occur if the election process, electoral process was interfered with by the courts willy-nilly and therefore prescribed the election laws as it has under the Federal Election Commission Act.

They easily could have, because they responded to certain case decisions, the Cort v. Ash case for one, amended the statute to create exceptions for procedures for cases like this one and could have certainly said in extraordinary circumstances the courts may intervene and grant injunctions, etc., but they did not, even though they have considered issues, obviously, of timing and concern to have the parties heard and grant a relief prior

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to elections mooting out the issues they've raised.

Congress created the FEC to hear issues such as this--I'm talking now on the statutory/regulatory claims--such as these issues and set up a procedure forth for them to do that. This Court has ruled, as other courts have ruled, the FEC is bound by those procedures and must follow those.

In this case, complaints have been filed with the FEC that the criteria used were not in accordance with their regulation and that violated the statute and that they should be granted some relief. There's no indication that the FEC is not doing other than they're prescribed to do by statute, that is, investigating the complaints, and will in due course rule upon them, and the plaintiffs, if dissatisfied, can eventually come to court.

That brings the case to the Court then to look at the futility issue, should that overcome this grant of exclusive jurisdiction to the FEC, and that was amended. The statute now, instead of reading primary, reads exclusive primary jurisdiction for the FEC.

The defendants have argued, the FEC, there is basically no case in which the Court could grant relief, that the exclusive and sole jurisdiction always lies with the FEC, and no matter what the circumstance could be, the Court could not intercede.

As argued to this Court by Mr. Newmark, who referred to the Rafeedie case with Justice--Judge then, I believe, now Justice Ginsburg, and tried to analyze the difference in the exhaustion requirements and original jurisdiction or subject matter jurisdiction and came up with a, there's something different between that and the classic jurisdiction requirements, such as diversity, etc., that has some appeal to the Court in its analysis, and I believe that the Court may be able in certain extraordinary circumstances to hear a case if the pursuit of the FEC remedy would be futile.

However, in this case, I do not see the plaintiffs are so different from other cases, such as the Carter-Mondale Re-election Committee v. FEC, 642 F.2d 538, a 1980 D.C.Circuit case. There the plaintiffs were making claims that were even perhaps more urgent than here involving the approaching presidential election by the one group of the presidential candidates essentially complaining about the other presidential candidates accepting illegal funds, etc., and were found not to have met the futility exception, and that involved the two presidential candidates with the election close upon them, and therefore, the Carter-Mondale people could not get relief even though they may have had a legitimate complaint.

*5 In this case, we have the situation of Mr. Perot and his party and the Natural Law Party and Dr. Hagelin complaining they cannot get relief in time and the debate is close upon them. It's not the final presidential election they're challenging in November, but a preliminary step which the Court has recognized is important but does not seem it overcomes the Carter-Mondale rule that was established in this circuit as to have met a futility exception, even if one should exist, but I believe the language of the case law referred to, NCPAC and others, does recognize there may be a hurdle over which the plaintiffs could leap in the appropriate case, but I do not find it exists here. As to their likelihood of success on the merits, it does not seem that the plaintiffs have a situation that would meet that exception.

Also, as to the remedy that may be available, I've referred to the relief sought by the plaintiffs in their motions that would have the Court order either criteria be accepted by the Presidential Debate Commission that I would say is the appropriate criteria, not the agency, the FEC, who is assigned this responsibility by Congress, and that I would rule that that criteria was met by the plaintiffs and essentially order they must attend then any debate that is then held, or I would rule eventually, I suppose, on the other hand there can be no debates until they redo the criteria, which obviously could not happen in this presidential election cycle.

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Weighing that against the plaintiffs not being able to partake in the debate or the remedy they may still pursue in their complaints to the FEC and may have a right to come back to this Court later on in the process that is provided by the Federal Election Commission Act, under 437g(a)(8), the Federal Election Commission lawyer asserted they would not be mooted out if they came back to court. What they would have lost if the FEC doesn't agree with them and they have to come to court is the opportunity to debate, but they still may be able to cure any defects in the criteria they allege the Debate Commission has used so that the next cycle would not have these defects and thereby have some relief, although not total relief.

But weighing the interference of the Court--and I'm going not only to likelihood of success on the merits and irreparable injury, but balancing the equities and the public interest--the harm that could occur by the Court's interference in this process and the reaching that the Court must make to grant the preliminary injunction that it would have the right to set the criteria or choose which criteria already out there are appropriate and disallow other criteria, overriding the FEC's opportunity to do that as the agency assigned to do that by Congress, and considering the plaintiffs can still pursue this complaint later in court, albeit without partaking in the debates, and the harm to the public interest and having the debates go forward as presently set and not interfering with those, the Court comes down against the plaintiffs on that issue.

*6 So that the Court is convinced, applying all the factors and even considering in some sense the irreparable injury to the plaintiffs by not being able to participate in the debates, but not overall irreparable injury, since I believe they can still go forward with their complaints and eventually come to court if they're not given appropriate relief, and recognizing that the third- party candidates who are not accepted for the debates have a stigma attached to them that they have been determined to be, I think the language given was losers already, that they lack the exposure and they will not be able to test their ideas in the crucible of a debate in front of the public, or, as urged by plaintiffs' counsel, they will not be able to take the job interview for the American public, and that they could lose as well the opportunity to earn additional federal funding by the level of votes that they can get if they are successful in running and collecting a certain percentage of the votes and that will hurt their opportunity to do that, I've considered all those factors and the irreparable injury, and weighing the chances of success, likelihood of success, and the harm to others and the public interest, and because of the statutory structure that I believe exists under the case law and its interpretation almost unanimously by all courts that this hurdle is great indeed, and following the scheme as put together by Congress, I do not believe the plaintiffs have shown a likelihood of success on the merits on their claims, and despite the fact they will suffer some injury, I do not believe it overcomes their, a lack of ability to succeed in this case.

The Court also had claims submitted to it on the injunction--then I'll get to the merits side in a minute on the motions--constitutional claims in the Perot suit only. Again, there was an objection to jurisdiction and claims against the FEC and CPD as to their constitutional issues.

Again, applying the Holiday Tours factors, I'm going to find that there's no likelihood of success on the merits again on the constitutional claims. Simply put for the purpose of this bench opinion, the claims against the Commission on Presidential Debates, the constitutional claims, I believe, cannot succeed, because the plaintiff has not shown that the CPD is a state actor.

An example of that is San Francisco v. USOC, United States Olympic Committee, and again it was found not to be a state actor despite it was under federal charter, got help from the government for fund raising, and certainly was in the area of public interest.

Here, where plaintiff has no right to participate in the debate, he's agreed to that

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under Johnson v. FCC out of this circuit, 829 F.2d, at 163 to 164, an '87 D.C. Circuit case, therefore, there is no constitutional issue I believe the plaintiff can recover on in the Perot litigation.

The plaintiff had argued and analyzed the issues in the context of an analogy to political conventions or voter access or to the ballot, but we do not have that here with the decision of law in this circuit as to the there is no right to participate in this debate in any event and that at least at this time, there is not sufficient evidence to show that the CPD is really a state actor in any fashion.

*7 Even going further to the merits of the constitutional claims, there's an argument that the equal protection clause of the 14th Amendment was violated by the CPD, and I do not see that available to the plaintiff in the context in which he's raised it. The same with the that a debate is not a public forum, where the plaintiff's First Amendment rights are being violated in any fashion.

And finally, he argued that his due process rights were violated because-- under the Fifth Amendment, as in Goldberg v. Kelly, but where there's no right to debate under Johnson, there's no right to a hearing, notice, etc., so I do not see that applying.

The plaintiffs argued an issue it had raised in its reply brief heavily before the Court today, and that is the FEC regulation at 11 C.F.R. 110.13 is ultra vires and unconstitutional interpretation of the FECA authority, because it permits corporate expenditures in violation of the FECA prohibitions.

The Court does not again find a likelihood of success on the merits of that claim. The FEC regulation has issued, they said, pursuant to the reference I made during argument to 2 U.S.C., Section 431(9)(B)(ii), which exempts from the definition of expenditures such nonpartisan activity designed to encourage individuals to vote, and then it goes on or to register to vote, so it included both the registration, but it also includes individuals to vote in general, that is, encourage them to go to the polls.

Obviously, the FEC in its expertise and using a Chevron analysis and deferring to their interpretation, it seems to me that their publication of regulations pursuant to the statute allowing expenditures to be exempted for nonpartisan activity, it seems it's not illogical to say that that appears to fit the statutory authority given to the FEC, and accepting their expertise, I do not see at this point a basis to declare ultra vires and unconstitutional that they have allowed under regulations private organizations to establish themselves for purposes of holding nonpartisan debates supported by corporate contributions.

Finally, the plaintiffs, the Perot plaintiffs claim the FEC has unconstitutionally delegated authority to the Debate Commission and that such delegation is unconstitutionally vague was raised. I had a hard time getting a handle on that. I think that I don't see any statutory authority delegated to the commission, and I think the claim is not that it was vague, but that they had precise criteria, they said, that the Debate Commission must establish, whatever group is set up to try to put on the debates that have to have this subjective criteria, and they're complaining their criteria accepted or used by the Debate Commission was inappropriate and not in accordance with the FEC rule. I don't see how that meets the unconstitutionally vague standard.

So again, I do not see a likelihood of success on the merits on the constitutional issues as raised by the Perot plaintiffs.

*8 And finally, again, the irreparable injury, certainly I share the concerns the parties have set forth and, as I've already articulated, that the Court has on this process, and perhaps in the future there will be a different process or the Presidential Debate Commission will be organized differently, with different qualifications in their criteria in the future, but that's not what I have before me now.

Certainly the previous courts that have

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considered interfering with debates or ongoing presidential elections have found substantial public injury if the debates are prevented from going forward or the elections are interfered with, and I believe that is the appropriate standard for the Court to consider.

And ultimately, there's a problem of redressibility, as I've referred to earlier, which is one of the factors to consider under the likelihood of success. As I mentioned, I do not tnink--and I--despite the parties' pleadings that I read in their motions, that the Court would be empowered to order Mr. Hagelin and Mr. Perot and their vice presidential candidates to participate in the debates, to require they be admitted and require that the two presidential candidates now in the debates continue their participation. I think everyone agrees that that would be beyond the Court's authority.

I think it's beyond the Court's authority to order CPD to use only certain of its criteria and I make the selection of which criteria. That does not go through any regulatory agency. That's one judge putting his imprimatur on certain criteria he believes is appropriate as urged by the parties, and those criteria, the ones that get them in the debate may not get others in the debate, and I begin to believe that that is not appropriate judicial rule making.

So that there's no guarantee that whatever the Court did today, if I found for the plaintiffs, the debates would take place under any of those circumstances. It's more likely that the best the Court would do if it found grounds to do so would be to order the CPD and the FEC to go forward with the complaints on an expedited basis and to see what came out of that. In the meantime, I expect that that would sabotage the debates themselves, so no one would really succeed.

Finally, before--so I'm denying the motions for preliminary injunction for those reasons under rule 65. I've consolidated these hearings, as I've said, under the rules, and there have been motions to dismiss filed by both defendants as to both cases. I'm going to treat those motions to dismiss as motions for summary judgment, because there have been affidavits filed and supplementary exhibits given to the Court taking it out of the motion to dismiss category and putting it under motion for summary judgment.

Under Celotex v. Catrett, 477 U.S. 317, at 322, an '86 case that came from this circuit, the Supreme Court ruled summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which the party will bear the burden of proof.

*9 I have gone back through these materials again in the context of the motions for summary judgment--I'm treating the motion to dismiss, as I've said, as summary judgment--to see whether or not there's any contested material issues of fact the parties have argued to the Court. In fact, there are none, that it is strictly a legal issue for the Court to consider this regulation under the statutory authority granted the FEC that they're questioning and the constitutional issues as raised by Mr. Perot.

Under the analysis I've given for the preliminary injunction, the Court is going to find that it should grant summary judgment on behalf of the defendants on the complaints herein, that the statutory claims that the CPD has violated the FEC regulations of 11 C.F.R. 110.13, again as I've indicated previously, I do not believe that they can establish that the FEC has issued an ultra vires or regulation that is beyond their authority to do so but that does fit in with the context of the Chevron analysis, their expertise in this area, where the statutory authority allowed them to have an exception for expenditures of nonpartisan activity designed to encourage individuals to vote, so that the establishment of regulatory scheme work by the FEC to allow private 501(c)-type organizations to exist to put on debates does not seem to the Court at this time, as the parties submit it was a legal issue, to be beyond the FEC's power under FECA, and I'm going to grant summary judgment on the issues of the regulatory

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authority and that the CPD has violated those, also, because I've ruled that that first will have to go through the FEC process, the complaint process before it comes to this Court in any event.

Additionally, as to the constitutional claims, again as I've addressed them already, incorporating that analysis, I simply do not see any of those established as a legal issue at this time. There are no material facts of dispute, and because CPD is not a state actor under the case law, because there's no right to participate in the debate under the case law, there's no equal protection clause or due process right that is trammeled upon by these regulatory regulations, and that I've already found the C.F.R. involved is not unconstitutional or ultra vires because it permits corporate expenditures, under that analysis then, there are no issues left for the Court to decide in the future, so that I'm going to grant summary judgment on behalf of both defendants and dismiss both cases at this time.

The Court is going to issue an order today incorporating this bench ruling. As I've said, if time allows, I'll issue a written opinion with perhaps a more articulate analysis of these issues, and it may be in the future, as I've already alluded, there will be a different arrangement in our debate system that has been set up under the FEC that would be perhaps more open and accessible to those who should be heard by the American public in a debate circumstance.

Sometimes one wishes we had more of the British system, where the party leaders debate many different characters, if you've ever been to Britain, and that they would appear and debate in Congress, as a matter of fact, as the prime minister has done. I think we're sort of at a point where it reminds me of the playoffs that are starting, in a baseball analogy, and we have the wild card team makes the playoffs but isn't allowed to play in the World Series eventually, even if it's succeeding well in the playoffs, and that's regrettable.

*10 But under the case law and the statutory scheme work that's been established by Congress after notice of these types of concerns, I cannot find the plaintiffs can show, as I've already ruled, sufficient evidence to the Court that they can have a likelihood of success on the merits, and I have to grant summary judgment for the defendants.

I want to thank counsel for their work. I know it was extensive, time- consuming, and difficult over the last week. The Court had them on a very tight schedule and also on a tight argument schedule, and I appreciate their cooperation and excellent arguments they presented to the Court.

All right. We'll stand in recess.
(Which were all the proceedings had at this time.)

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at all."[29]

In addressing both sets of arguments pressed by the petitioners, the *McMillan* Court not only affirmed the continued vitality of *Specht*, but also used language that limited its holding regarding the inapplicability of *Specht* to situations in which the sentence "enhancement" relates to the particular event on which the conviction is based. The Court held that the Act did not fall under *Specht* because it "only bec[ame] applicable after a defendant has been duly convicted of *the crime for which he is to be punished*." *McMillan*, 477 U.S. at 87, 106 S.Ct. at 2417 (emphasis added). Rejecting the claim that a higher burden of proof should apply, the Court noted that "[s]entencing courts necessarily consider the circumstances of *an offense* in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to *the crime*, without suggesting that those facts must be proved beyond a reasonable doubt." *Id.* at 92, 106 S.Ct. at 2419 (emphases added).

The Court's apparent assumption that punishment will relate to the crime of conviction, rather than to crimes for which the defendant has been acquitted, reflects a commonality of understanding about fundamental fairness shared by scores of judges and academics,[30] as well as every nonfederal jurisdiction in the nation that has implemented guideline sentencing.[31] The Federal Guidelines stand alone in perpetuating their anomalous treatment of acquittals in sentencing.

In sum, I do not believe the Supreme Court has yet sanctioned the intolerable notion that the same sentence can or must be levied on a person convicted of one crime, and acquitted of three "related" crimes, as can be imposed on his counterpart convicted of all four crimes. The result of such a system is subtly but surely to eviscerate the right to a jury trial or to proof beyond a reasonable doubt for many defendants. Yet we appear to have relentlessly, even mindlessly progressed down the path. It is time to turn back. The British novelist G.K. Chesterton once said: "[W]hen two great political parties agree about something, it is generally wrong."[32] I am afraid the same can be said in this one instance about great circuit courts.

Ross PEROT, Pat Choate, and Perot '96, Inc., Appellants,

v.

FEDERAL ELECTION COMMISSION, and the Commission on Presidential Debates, Appellees.

Dr. John HAGELIN, Dr. Mike Tompkins, and the Natural Law Party of the United States of America, Appellants,

v.

FEDERAL ELECTION COMMISSION, and the Commission on Presidential Debates, Appellees.

Nos. 96-5287, 96-5288.

United States Court of Appeals, District of Columbia Circuit.

Argued Oct. 3, 1996.

Decided Oct. 4, 1996.

Issued Oct. 11, 1996.

Rehearing Denied in No. 96-5288 Oct. 15, 1996.

Candidates who were not invited to participate in televised presidential debates

29. *McMillan*, 477 U.S. at 91–92, 106 S.Ct. at 2419.

30. *See supra* note 2.

31. *See Tonry, supra* note 2, at 356–57 (noting that the Federal Sentencing Commission is the only sentencing commission in the nation to reject the "charge offense" model, whereby sentences are based solely on crimes for which a defendant has been convicted, in favor of the "real offense" model, which allows sentencing courts to consider unconvicted and even acquitted crimes in setting the sentence).

32. JONATHON GREEN, THE CYNIC'S LEXICON 46 (1984).

sought to enjoin debates or require Federal Election Commission (FEC) to act on complaints. The United States District Court for the District of Columbia, Thomas F. Hogan, J., denied relief, and candidates appealed. The Court of Appeals held that: (1) district court lacked jurisdiction to enjoin impending debates or force FEC to act immediately; (2) FEC failure to rule on challenges to debates filed one month or less before first scheduled debate was neither unlawful nor unreasonable; (3) FEC did not delegate any authority to sponsor of presidential debates when it issued regulation permitting eligible nonprofit organizations to stage debates; but (4) where district court did not have opportunity to consider challenged regulations' legality in terms of administrative record, proper procedure was to dismiss without prejudice to filing of new suit.

Affirmed in part and remanded in part.

1. Elections ⇐311.1

District court lacked jurisdiction to ignore elaborate statutory requirements for consideration of complaint under Federal Election Campaign Act (FECA) and to enjoin impending presidential debates or force Federal Election Commission (FEC) to act immediately to adjudicate validity of complaints filed with FEC or to order FEC to do so before scheduled debates. Federal Election Campaign Act of 1971, § 309(a), as amended, 2 U.S.C.A. § 437g(a).

2. Action ⇐3

Apart from petition in district court by party aggrieved by Federal Election Commission's (FEC) dismissal of complaint or failure to rule within 120 days, there is no private right of action to enforce Federal Election Campaign Act (FECA) against alleged violator. Federal Election Campaign Act of 1971, § 309(a)(8)(C), as amended, 2 U.S.C.A. § 437g(a)(8)(C).

3. Elections ⇐311.1

Since Federal Election Commission (FEC) is given 120 days to act on submitted complaint, its delay in ruling on challenges to presidential debates filed one month or less before first scheduled debate was neither unlawful nor unreasonable. Federal Election Campaign Act of 1971, § 309(a)(8)(A), as amended, 2 U.S.C.A. § 437g(a)(8)(A).

4. Administrative Law and Procedure ⇐322.1

When Congress has specifically vested agency with authority to administer a statute, it may not shift that responsibility to private actor.

5. Elections ⇐311.1

Federal Election Commission (FEC) did not delegate any authority to sponsor of presidential debates when it issued regulation permitting eligible nonprofit organizations to stage candidate debates, provided that they employ "pre-established objective criteria" to determine who may participate, and gave individual organizations leeway to decide what specific criteria to use. Federal Election Campaign Act of 1971, § 316, as amended, 2 U.S.C.A. § 441b; 11 C.F.R. §§ 110.13, 114.4(f).

6. Elections ⇐311.1

Federal Election Commission (FEC) may not render advisory opinion upon request of third party concerning legality of organization's preannounced criteria for participation in election debate. Federal Election Campaign Act of 1971, § 308(a)(1), as amended, 2 U.S.C.A. § 437f(a)(1).

7. Elections ⇐311

Federal Election Campaign Act (FECA) has no provisions governing judicial review of regulations, so action challenging its implementing regulations should be brought under judicial review provisions of Administrative Procedure Act (APA). 5 U.S.C.A. § 701 et seq.; Federal Election Campaign Act of 1971, § 301 et seq., as amended, 2 U.S.C.A. § 431 et seq.

8. Administrative Law and Procedure ⇐678

Elections ⇐311.1

Where district court did not have opportunity to consider challenged Federal Election Commission (FEC) regulations' legality in terms of administrative record or the Administrative Procedure Act (APA) and the

case law under it, proper procedure was to dismiss without prejudice to filing of new suit challenging FEC authority to promulgate the regulations. 5 U.S.C.A. § 701 et seq.; Federal Election Campaign Act of 1971, § 301 et seq., as amended, 2 U.S.C.A. § 431 et seq.

Appeals from the United States District Court for the District of Columbia (Nos. 96cv2196 and 96cv2132).

Thomas O. Gorman, Washington, DC, argued the cause for appellants Ross Perot, et al., with whom Samuel W. Lanham, Jr., Bangor, ME, Jamin B. Raskin, and Thomas O. Sargentich, pro hac vice, and Robert E. Steinberg, Washington, DC, were on the briefs.

Thomas M. Newmark, St. Louis, MO, argued the cause (pro hac vice) for appellants Dr. Hagelin, et al., and was on the brief.

Richard B. Bader, Associate General Counsel, Washington, DC, argued the cause for appellee Federal Election Commission, with whom Lawrence M. Noble, General Counsel, was on the brief.

Lewis K. Loss, Attorney, Washington, DC, argued the cause for appellee Commission on Presidential Debates, with whom William H. Briggs, Jr., was on the brief.

Before: SILBERMAN, RANDOLPH, and ROGERS, Circuit Judges.

Opinion for the Court filed PER CURIAM.

PER CURIAM:

Two days hence a series of debates between candidates nominated by the Democratic Party and the Republican Party for President and Vice President of the United States is scheduled to begin. One day ago this court heard argument concerning those debates. The case was argued before the district court on October 1, 1996. In view of the importance of the issues and the short time remaining before the debates begin, this court granted the motions for expedited review.

Appellants in these consolidated appeals are Ross Perot and Pat Choate, the presidential and vice-presidential nominees of the Reform Party, and their campaign organization, Perot '96, Inc. (collectively "Perot"); and Dr. John Hagelin and Dr. Mike Tompkins, the nominees of the Natural Law Party of the United States, and their party (collectively "Dr. Hagelin"). They appeal from the denial of injunctive relief and the grant of summary judgment to the Federal Election Commission ("FEC") and the Commission on Presidential Debates ("CPD"). Appellants now raise only two contentions. Perot contends that the FEC has unlawfully delegated legislative authority to a private, non-profit corporation, in violation of Article I of the Constitution. Dr. Hagelin contends that the district court erred in granting summary judgment on the grounds that it lacked jurisdiction to enjoin a violation of the Federal Election Campaign Act of 1971 ("FECA"), 2 U.S.C. § 431 *et seq.* (1994), despite the inability of the FEC to address the violation prior to the 1996 presidential debates scheduled by the CPD to begin on October 6, 1996. Hence, we do not address the merits of appellants' other claims, presented to the district court, that they were wrongfully excluded from the debates. On the issues before this court, we find no merit in Perot's constitutional challenge or in Dr. Hagelin's contentions. As to the validity of the FEC regulation at the center of this controversy, we conclude that the grant of summary judgment sustaining it was premature. Accordingly, we affirm the denial of injunctive relief, vacate the grant of summary judgment relating to the claim that the regulation is inconsistent with the statute, and remand with instructions to dismiss the regulatory claim without prejudice.

I.

The CPD is a private, non-profit corporation formed in 1987 for the purpose of sponsoring presidential debates. In prior years, that task had been performed by another non-profit entity, the League of Women Voters. Beginning with the 1988 presidential election, the CPD assumed that function. The members of the CPD include a former chairman of the Democratic National Committee, a former chairman of the Republican

National Committee, and other representatives of the Democratic and Republican parties. In connection with the 1996 presidential election, the CPD has scheduled a series of two presidential and one vice-presidential debates, with the first presidential debate scheduled to take place on October 6, 1996. The only candidates invited to participate are President William Jefferson Clinton and former Senator Robert J. Dole, the respective nominees of the Democratic and Republican Parties, and their vice-presidential running mates. The CPD, relying on its preannounced criteria, and the recommendation of an advisory committee consisting primarily of political scientists, based its decision to exclude other candidates on the grounds that no other candidates have a "realistic chance of winning" the 1996 election.

To understand the nature of appellants' claims, we set forth the underlying statutory and regulatory framework. The FECA prohibits "any corporation" from making "a contribution or expenditure in connection with" any federal election. 2 U.S.C. § 441b(a). Both a "contribution" and an "expenditure" are defined to include, *inter alia*, any advance of "anything of value ... for the purpose of influencing any election for Federal office." *Id.* § 431(8)(A)(I); *id.* § 431(9)(A)(I). An "expenditure" does not, however, include "nonpartisan activity designed to encourage individuals to vote or to register to vote." *Id.* § 431(9)(B)(ii).

As early as 1976, the FEC recognized that § 441b could be construed to bar the use of corporate funds to stage debates. *See* 44 Fed.Reg. 59,162 (1979). 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. 44 Fed.Reg. 76,734 (1979). The current version of this regulation, to be codified at 11 C.F.R. § 110.13, was transmitted to Congress in December 1995, and became effective March 13, 1996. It provides that eligible non-profit organizations may stage candidate debates, so long as they "use pre-established objective criteria to determine which candidates may participate in a debate." [1]

On September 19, 1995, approximately six months before the effective date of § 110.13, the CPD announced its selection criteria for participants in the 1996 presidential debates. The CPD had concluded that the historical prominence of Democratic and Republican nominees warranted an invitation to the respective nominees of the two major parties in 1996. With respect to "non-major party candidates," the CPD announced criteria by which it could identify those who had "a realistic (i.e., more than theoretical) chance of being elected." These criteria included evidence of national organization (such as placement on the ballot in enough states to have a mathematical chance of obtaining an electoral college majority), signs of national newsworthiness (as evidenced, for example, by the professional opinions of the Washington bureau chiefs of major newspapers, news magazines, and broadcast networks), and indicators of public enthusiasm (as, for instance, reflected in public opinion polls). On

1. The regulation reads in relevant part:

§ *110.13 Candidate debates.*

(a) *Staging organizations.* (1) Nonprofit organizations described in 26 U.S.C. 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or political parties may stage candidate debates in accordance with this section and 11 C.F.R. 114.1(f).

* * * * * *

(b) *Debate Structure.* The structure of debates staged in accordance with this section and 11 C.F.R. 114.4(f) is left to the discretion of the staging organization(s), provided that:

(1) Such debates include at least two candidates; and

(2) The staging organization(s) does not structure the debates to promote or advance one candidate over another.

(c) *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.

September 17, 1996, the CPD issued a press release indicating its conclusion that no candidate other than President Clinton or Senator Dole had a realistic chance of being elected, and that, therefore, only those candidates and their vice-presidential running mates, would be invited to participate in the debates.

On September 6, 1996, Dr. Hagelin filed an administrative complaint against the CPD with the FEC, asserting that the CPD violated 11 C.F.R. § 110.13(c) by using subjective criteria to choose whom to invite as participants in its debates and by inviting President Clinton and Senator Dole based solely on their nominations by the Democratic and Republican parties. On September 13, Dr. Hagelin filed a verified complaint against the FEC and the CPD in the United States District Court for the District of Columbia seeking to enjoin the CPD from using unlawful debate selection criteria or, in the alternative, to order the FEC to take immediate action on his complaint as well as authorize it to take expedited action against the CPD's alleged violations of the FECA.

Meanwhile, on September 20, 1996, Perot filed an administrative complaint against the CPD with the FEC. He too challenged the CPD's application of its selection criteria. On September 23, 1996, Perot filed a verified complaint in the district court, requesting that the court enjoin the FEC and the CPD from violating the FEC regulations, the FECA, and various constitutional provisions.

The FEC and the CPD filed motions to dismiss the complaints. The district court consolidated the cases for argument, and, after expedited briefing, heard oral argument and ruled from the bench on October 1, 1996. The district court denied appellants' requests for preliminary injunctive relief. Applying the factors set forth in *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C.Cir. 1977), the court determined first that neither Dr. Hagelin nor Perot could show a likelihood of success on the merits. The court noted that Congress had granted the FEC exclusive primary jurisdiction to adjudicate civil claims under the FECA, and it emphasized that the FECA precluded its exercise of jurisdiction over the instant claims until the FEC acted on the claims or until 120 days after those claims had been filed. The district court then looked to the balance of equities presented in appellants' claims for injunctive relief. This factor also weighed against Dr. Hagelin and Perot, as the damage they would suffer if the debates were to be held without their participation could at least be partially remedied in subsequent proceedings, and in any event it did not outweigh the public interest in allowing the debates to go forward without interference.

In addition to denying both appellants' claims for injunctive relief, the district court rejected Perot's claim that the CPD threatened a violation of his First Amendment right to freedom of speech. Relying on *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 107 S.Ct. 2971, 97 L.Ed.2d 427 (1987), the court held that no such claim could lie against the CPD since it was not a state actor. The court summarily rejected Perot's equal protection, due process, and nondelegation claims. Finally, the court, treating the motions to dismiss as motions for summary judgment, granted summary judgment for appellees on the claim that § 110.113 was beyond the scope of its statutory authority. FED.R.CIV.P. 12(b), 56. Under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), the court found the regulation a permissible interpretation of the FECA's exemption from the definition of "expenditure" nonpartisan activity designed to encourage individuals to vote.

II.

[1] We agree with the district court that it lacked jurisdiction to adjudicate the validity of the complaints filed with the FEC or to order the FEC to do so before the CPD-sponsored debate on October 6, 1996. Accordingly, we affirm the district court's dismissal of these claims on jurisdictional grounds.

Congress could not have spoken more plainly in limiting the jurisdiction of federal courts to adjudicate claims under the FECA.

The statute explicitly states that "[e]xcept as provided in section 437g(a)(8) of this title, the power of the [FEC] to initiate civil actions under subsection (a)(6) shall be the exclusive civil remedy for the enforcement of the provisions of this Act." 2 U.S.C. § 437d(e); *accord* 2 U.S.C. § 437c(b)(1) ("The [FEC] shall administer, seek to obtain compliance with, and formulate policy with respect to, this Act.... The [FEC] shall have exclusive jurisdiction with respect to the civil enforcement of such provisions.").

Section 437g requires the FEC to proceed with due deliberation after it receives a complaint alleging violations of the Act. 2 U.S.C. § 437g(a)(1). Dr. Hagelin filed his complaint with the FEC on September 6, 1996; Perot filed his complaint on September 20, 1996. CPD, which is alleged to have violated the Act, had to be notified within five days. *Id.* § 437g(a)(1). We presume this was done. The next step is for the FEC to vote to determine whether there is reason to believe the subject of the complaint has violated the Act. *Id.* § 437g(a)(2). If the complaint is not dismissed at that stage, the FEC conducts an investigation. *Id.* If the FEC's general counsel recommends that the FEC proceed to the next statutory step—a vote on whether there is probable cause to believe the respondent violated the Act—the respondent is notified and is given fifteen days to submit a brief stating its legal and factual position and replying to the general counsel's brief. *Id.* § 437g(a)(3). If the FEC then decides there is probable cause, it "shall attempt, for a period of at least 30 days," or at least 15 days if an election is imminent, to have the respondent correct or prevent the violation. *Id.* § 437g(a)(4)(A)(i) & (ii). The FEC may skip this step and refer the matter to the Attorney General for enforcement action only if it determines that the violation is knowing and willful and only if the violation is of a type included in § 437g(d). *Id.* § 437g(a)(5)(C).

[2] Other procedural requirements, unnecessary to mention, also bind the FEC's deliberations about, and investigation of, complaints. The end of the administrative road is a civil complaint filed by the FEC in the district court or an action by the complaining party. Section 437g(a)(8)(A) states: "[a]ny party aggrieved by an order of the [FEC] dismissing a complaint filed by such party under paragraph (1), or by failure of the [FEC] to act on such complaint during the 120-day period beginning on the date the complaint is filed, may file a petition with the United States District Court for the District of Columbia." *Id.* § 437g(a)(8)(A).[2] The district court's decision may be appealed to this court. *Id.* § 437g(a)(9).

Dr. Hagelin claims that we may ignore these elaborate statutory requirements and force the FEC to act immediately because otherwise he would suffer irreparable harm. To do so, however, would place us in conflict with our decision in *In re Carter-Mondale Reelection Committee, Inc.*, 642 F.2d 538 (D.C.Cir.1980). *Carter-Mondale* is, as the FEC argues, directly on point. The plaintiffs in that case asked the court to find a violation of the federal election laws, and requested alternatively "that the FEC be directed to conduct an immediate investigation of the [plaintiffs'] charges." *Id.* at 542. The court held that "the exclusive jurisdiction of the FEC extends to assure that the [FEC's] initial investigation is completed, or the statutory time limit allowed for an investigation has expired, before any judicial review is invoked." *Id.* It therefore declined to hear the case because "the entire matter at this time is within the exclusive jurisdiction of the Federal Election Commission." *Id.*

It is true, as Dr. Hagelin points out, that the *Carter-Mondale* opinion said there might be extraordinary circumstances allowing a party to "hurdle the explicit time restraints of the [Federal Election Campaign] Act." 642 F.2d at 543. But the opinion never specified what these circumstances might be. It did not indicate on what basis, short of holding § 437g unconstitutional (which no one urges), a court could disregard the statu-

2. Apart from § 437g(a)(8)(C), there is no private right of action to enforce the FECA against an alleged violator. *See Karahalios v. National Fed'n of Fed. Employees, Local 1263*, 489 U.S. 527, 533, 109 S.Ct. 1282, 1286-87, 103 L.Ed.2d 539 (1989); *see also Cort v. Ash*, 422 U.S. 66, 82-85, 95 S.Ct. 2080, 2089-91, 45 L.Ed.2d 26 (1975).

tory commands. And the statement in *Carter-Mondale* was made before the Supreme Court instructed us that if "Congress specifically mandates, exhaustion is required." *McCarthy v. Madigan*, 503 U.S. 140, 144, 112 S.Ct. 1081, 1086, 117 L.Ed.2d 291 (1992). Section 437g is as specific a mandate as one can imagine; as such, the procedures it sets forth—procedures purposely designed to ensure fairness not only to complainants but also to respondents—must be followed before a court may intervene. We assume that in formulating those procedures Congress, whose members are elected every two or six years, knew full well that complaints filed shortly before elections, or debates, might not be investigated and prosecuted until after the event. Congress could have chosen to allow judicial intervention in the face of such exigencies, but it did not do so. And as we have said, a court is not free to disregard that congressional judgment.

[3] Even if we could somehow ignore the jurisdictional requirements of § 437g(a), *but see Carter-Mondale*, 642 F.2d at 542, Dr. Hagelin could not achieve the result he seeks. This court could not compel the FEC to enforce its regulation in accordance with the FECA. When the FEC's failure to act is contrary to law, we have interpreted § 437g(a)(8)(C) to allow nothing more than an order requiring FEC action. *See FEC v. Rose*, 806 F.2d 1081, 1084 (D.C.Cir.1986). Since the FEC is given 120 days to act on a submitted complaint, § 437g(a)(8)(A), its delay in this case is neither unlawful nor unreasonable. *See Rose*, 806 F.2d at 1084–85. Second, if this court were to enjoin the CPD from staging the debates or from choosing debate participants, there would be a substantial argument that the court would itself violate the CPD's First Amendment rights. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976) (prior restraint); *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, — U.S. ——, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (speaker's choice of content).

III.

In addition to the statutory arguments, Perot also raises a novel constitutional claim. As we understand it, he contends that the FEC's "candidate debates" regulation unlawfully delegates legislative authority to a private, non-profit corporation, in violation of Article I of the Constitution. In fact, this attack on the regulation rests on what might be termed a subdelegation of authority theory, since the claim is that Congress has delegated authority to the FEC, which in turn has delegated some portion of that authority to the CPD. The FEC acknowledges that we have jurisdiction under 28 U.S.C. § 1331 to decide this issue, although it questions whether Perot is entitled to any relief. We agree that we have jurisdiction over the claim, but we are unpersuaded that the regulation delegates legislative authority to the CPD.

[4] It is well established that Congress may, by a legislative act, grant authority to an executive agency such as the FEC to adopt rules and regulations, so long as it provides some "intelligible principle" by which the agency is to exercise that authority. *Mistretta v. United States*, 488 U.S. 361, 372, 109 S.Ct. 647, 654–55, 102 L.Ed.2d 714 (1989) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406, 48 S.Ct. 348, 351, 72 L.Ed. 624 (1928)). We agree with the general proposition that when Congress has specifically vested an agency with the authority to administer a statute, it may not shift that responsibility to a private actor such as the CPD. *Cf. A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537, 55 S.Ct. 837, 846, 79 L.Ed. 1570 (1935).

[5] In the cases before us, however, the FEC has not delegated any authority to the CPD. It has issued a regulation permitting eligible non-profit organizations to stage candidate debates, provided that they employ "pre-established objective criteria" to determine who may participate. Rather than mandating a single set of "objective criteria" all staging organizations must follow, the FEC gave the individual organizations leeway to decide what specific criteria to use. 60 Fed.Reg. 64,262 (1995). One might view this as a "delegation," because the organizations must use their discretion to formulate objective criteria they think will conform

with the agency's definition of that term. But in that respect, virtually any regulation of a private party could be described as a "delegation" of authority, since the party must normally exercise some discretion in interpreting what actions it must take to comply.

The contention that the regulation delegates authority to the CPD because it does not spell out precisely what the phrase "objective criteria" means goes far beyond the normal usage of the term "delegation." This position would go further than the position of Justice Scalia, who dissented from the Supreme Court's decision in *Mistretta* that a congressional grant of rulemaking authority to the United States Sentencing Commission was not an unconstitutional delegation of legislative power, but acknowledged that "no statute can be entirely precise, and ... some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it...." 488 U.S. at 415, 109 S.Ct. at 677 (Scalia, J., dissenting). So too, a regulation's use of a term that may be susceptible to differing interpretations does not automatically result in a delegation of authority to the entities that it governs.

Here, the FEC has chosen to give the CPD and any other organizations that wish to sponsor debates the latitude to choose their own "objective criteria." In adopting such standards, a staging organization acts at its peril, unless it first secures an FEC advisory opinion pursuant to 2 U.S.C. § 437f. Without such an opinion, the organization runs the risk that the FEC will subsequently determine that its criteria are not objective, and that its sponsorship of the debate violated § 441b. If that happens, the staging organization may be subject to the penalties provided in the FECA. The authority to determine what the term "objective criteria" means rests with the agency, however, and to a lesser extent with the courts that review agency action.

[6] In sum, we are unpersuaded that the FEC has unconstitutionally delegated legislative authority to the CPD. At oral argument counsel suggested that this court should order the FEC, either through mandamus or some other extraordinary remedy, to "take back" the authority it has "delegated" to the CPD. As we understand this argument, Perot seeks to have the FEC either withdraw its regulation or revise it to define in detail what are "objective criteria." It is unclear how the FEC could accomplish this goal in time to have any effect on the presidential debates. Before prescribing new regulations, the FEC must transmit a statement of its proposed action to Congress, and the regulation may not take effect until thirty legislative days have passed. 2 U.S.C. § 438(d). Nor may the FEC render an advisory opinion concerning the legality of the CPD's preannounced criteria upon request of a third party. *Id.* § 437f(a)(1). As noted in Part II, a complaint is subject to the statutory timetable that also would preclude relief prior to the debates.

IV.

Before the district court, Perot also argued as an appendage to the request for a preliminary injunction that the FEC lacked authority to promulgate 11 C.F.R. §§ 110.13 and 114.4(f), and that the regulations carve out an illegal exception to the corporate contribution and expenditure limits of 2 U.S.C. § 441b. On appeal Perot mentions this argument—that the FEC's debate regulation, 11 C.F.R. § 110.13, is *ultra vires*—only in a footnote of his brief, and counsel did not address it at oral argument.

The district court granted summary judgment on this claim, finding the regulations permissible under 2 U.S.C. § 431(9)(B)(ii), which exempts from the definition of "expenditure" "nonpartisan activity designed to encourage individuals to vote or to register to vote." Perot's footnote claims that the CPD's sponsorship of debates does not fall within this exemption, primarily because it is not truly nonpartisan. We need not reach the merits of this contention.

[7, 8] The FECA has no provisions governing judicial review of regulations, so an action challenging its implementing regulations should be brought under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.*

Among other things, the APA directs courts to consider the administrative record in determining the legality of agency action. *Id.* § 706. Perot has not invoked the APA, and no party has produced the administrative record. *See* FED. R.APP. P. 15, 17. Consequently, the district court did not have the opportunity to consider the regulations' legality in terms of that record or the APA and the case law under it. Especially since we do not have the administrative record before us, and this issue was not fully briefed, we will refrain from reviewing the district court's grant of summary judgment. The case is simply not in a posture to permit an important question of this sort to be properly adjudicated.

Accordingly, we remand this part to the district court with instructions to dismiss without prejudice only Count IV of Perot's complaint, which raises this claim. Perot will then be free to file a new suit properly challenging the FEC's authority to promulgate the regulations. He will not suffer unduly from any delay in resolving this issue, as even an immediate order invalidating the regulations would not provide him with any meaningful relief from the alleged harms. In all other respects, the district court's order is affirmed.

UNITED STATES of America, Appellee,

v.

Corey A. MOORE, Appellant.

No. 95-3169.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 3, 1996.

Decided Oct. 11, 1996.

Defendant was convicted in the United States District Court for the District of Columbia, Oliver Gasch, J., of possessing unregistered sawed-off rifle. Defendant appealed. The Court of Appeals, Harry T. Edwards, Chief Judge, held that: (1) evidence supported conviction, and (2) trial court's refusal to sever sawed-off rifle count from unrelated semi-automatic counts was proper.

Affirmed.

1. Criminal Law ⇐1139, 1144.13(3), 1159.2(7)

In reviewing sufficiency of evidence claim, Court of Appeals reviews evidence de novo, in light most favorable to government, to determine whether rational trier of fact could have found essential elements of crime beyond reasonable doubt.

2. Criminal Law ⇐1159.6

In evaluating government's proof, on review of sufficiency of evidence claim, court draws no distinction between direct and circumstantial evidence.

3. Weapons ⇐4

Defendant had requisite mens rea for conviction of possessing unregistered sawed-off rifle, whether defendant was required to know that weapon was shorter than prescribed length or merely that weapon was sawed off, where defendant had constructive possession of rifle, had handled rifle, and lived in apartment in which rifle was found, and rifle was obviously shorter than 16 inches. 26 U.S.C.A. § 5861(d).

4. Criminal Law ⇐1148

Court of Appeals reviews claim that trial court erred in failing to order severance of joined offenses under abuse of discretion standard.

5. Criminal Law ⇐620(3.1)

Joined offenses need not be severed if evidence of each crime would be admissible in separate trial for other. Fed.Rules Cr. Proc.Rule 14, 18 U.S.C.A.

6. Criminal Law ⇐620(6)

Trial court's refusal to sever sawed-off rifle count from unrelated semi-automatic counts was proper, where evidence relating to defendant's alleged possession of semi-

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FEDERAL ELECTION COMMISSION
WASHINGTON DC 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Commission on Presidential Debates	)	
	)	
Clinton/Gore '96 General Committee, Inc., and Joan C. Pollitt, as Treasurer	)	MURs 4451 and 4473
	)	
Dole/Kemp '96, Inc., and Robert E. Lighthizer, as Treasurer	)	
	)	
DNC Services Corporation/Democratic National Committee and Carol Pensky, as Treasurer	)	
	)	
Republican National Committee and Alec Poitevint, as Treasurer	)	

STATEMENT OF REASONS

Chairman Joan Aikens
Vice Chairman Scott E. Thomas
Commissioner Lee Ann Elliott
Commissioner Danny Lee McDonald
Commissioner John Warren McGarry

I. INTRODUCTION

On February 24, 1998, the Commission found no reason to believe that the Commission on Presidential Debates ("CPD") violated the law by sponsoring the 1996 presidential debates or by failing to register and report as a political committee. The Commission also found no reason to believe that Clinton/Gore '96 General Committee, Inc., Dole/Kemp '96, and their treasurers (collectively, the "Committees"), violated the law by accepting and failing to report any contributions from CPD. The Commission

closed the file with respect to all of the respondents. The reasons for the Commission's findings are set forth in this statement.

II. SELECTION OF PARTICIPANTS FOR CANDIDATE DEBATES

A. Legal Framework

Under the Federal Election Campaign Act of 1971, as amended ("FECA"), corporations are prohibited from making contributions[1] or expenditures[2] in connection with federal elections. 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.2(b).[3] 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,[4] which establishes parameters within which staging organizations must conduct such 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:

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[1] 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).

[2] 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).

[3] 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).

[4] 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 corporations and labor organizations to donate funds to organizations that are staging such debates. 11 C.F.R. §§ 114.4(f)(1) and (3). This section also requires the debates to be staged in accordance with the standards in 11 C.F.R. § 110.13. *Id.*

> *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. 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 rules, 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, in situations where, for example, candidates must satisfy three of five objective criteria, nomination by a major party may be one of the criteria. This is a change from the Explanation and Justification for the previous rules, which had expressly allowed staging organizations to restrict general election debates to major party candidates. *See* Explanation and Justification, 44 FR 76735 (December 27, 1979). In contrast, the new rules do not allow a staging organization to bar minor party candidates or independent candidates from participating simply because they have not been nominated by a major party.

60 *Fed. Reg.* 64,260, 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 legally could 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). On the other hand, 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 instead 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. Commission on Presidential Debates Selection Criteria

CPD was incorporated in the District of Columbia on February 19, 1987, as a private, not-for-profit corporation designed to organize, manage, produce, publicize and support debates for the candidates for President of the United States. Prior to the 1992 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 1996 debates. CPD produced written candidate selection criteria for the 1996 general election debate participation. Relying on these criteria and the recommendation of an advisory committee consisting of a broad array of independent professionals and experts, the CPD determined that only the Democratic and Republican candidates had a "realistic chance of winning" the 1996 election.

The introduction to the candidate selection criteria explains, in pertinent part:

> 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.

February 6, 1998 General Counsel's Report ("G.C. Report") at Attachment 4, at 57.

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 its first criterion, "evidence of national organization," CPD explained that this criterion "encompasses objective considerations pertaining to [Constitutional] 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 for Article II, Section I 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 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. at 58.

Finally, CPD's third selection criterion states 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. Discussion

After a thorough and careful examination of the factual record, the undersigned commissioners unanimously concluded the Commission on Presidential Debates used "pre-established objective criteria" to determine who may participate in the 1996 Presidential and Vice-Presidential debates. 11 C.F.R. §110.13.[5] As a result, CPD did not make, and the candidate committees did not receive, a corporate contribution.

The CPD was set up and structured so that the individuals who made the ultimate decision on eligibility for the 1996 debates relied upon the independent, professional judgment of a broad array of experts. The CPD used multifaceted selection criteria that included: (1) evidence of a national organization; (2) signs of national newsworthiness and competitiveness; and (3) indicators of national enthusiasm or concern. We studied these criteria carefully and concluded that they are objective. Moreover, we could find no indication or evidence in the factual record to conclude that the criteria "were designed to result in the selection of certain pre-chosen participants." Explanation and Justification of 11 C.F.R. §110.13(c), 60 *Fed. Reg.* at 64262.

The CPD debate criteria contain exactly the sort of structure and objectivity the Commission had in mind when it approved the debate regulations in 1995. Through those regulations, the Commission sought to reduce a debate sponsor's use of its own personal opinions in selecting candidates. It was essential, in the Commission's view, that this selection process be neutral. It is consistent with the 1995 regulations for a debate sponsor to consider whether a candidate might have a reasonable chance of winning through the use of outside professional judgment. Indeed, if anything, the use of a broad array of independent professionals and experts is a way of ensuring the *decision makers* are objective in assessing the "realistic chances" of a candidate.

[5] Although not required to do so under the Commission's regulation, CPD reduced its candidate selection criteria to writing. *See* Explanation and Justification of 11 C.F.R. §110.13, 60 *Fed. Reg.* at 64262.

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.[6]

Significantly, the debate regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use. During the Commission's promulgation of §110.13, the Commission considered the staff's recommendation to specify certain ostensibly objective selection criteria in the regulations and to expressly preclude the use of "[p]olls or other assessments of a candidate's chances of winning the nomination or election." *See* Agenda Document #94-11 at 74 (February 8, 1994) and Explanation and Justification of 11 C.F.R. §110.13, 60 *Fed. Reg.* at 64262. The Commission unanimously rejected this approach.[7] *Id.* Instead, the Commission decided the selection criteria choice is at the discretion of the staging organization and indicated that the use of outside professional judgment in considering candidate potential is permissible. Accordingly, the Commission cannot now tell the CPD that its employment of such an approach is unacceptable and a violation of law.

The Office of General Counsel, in effect, seemed to want to apply its own debate regulation proposal from several years ago in the instant matters. It argued the use of candidate assessments, such as CPD's "signs of newsworthiness and competitiveness," are "problematic" for many of the same reasons it argued in 1994. G.C. Report at 17. Specifically, the Office of General Counsel contended the CPD criteria contain "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." *Id.* at 18. The staff further insisted that there also is "reason to believe that the other selection criteria appear to be similarly insufficiently defined to comply with §110.13(c)'s objectivity requirement." *Id.*

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[6] That one reference in CPD's materials states that the criterion for evidence of national organization "encompasses more *subjective* indicators of a national campaign with a more than theoretical prospect of electoral success", *see* G.C. Report at 11(emphasis added), is not dispositive. Indeed, the factors referred to appear to be *objective* on their face and not subjective:

a. Satisfaction of the eligibility requirements of Article II, Section I 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.

Id. at Attachment 4, at 57.

[7] Under the staff's proposed regulation, a debate sponsor could not look at the latest poll results even though the rest of the nation could look at this as an indicator of a candidate's popularity. This made little sense to us.

The questions raised in the General Counsel's Report are questions which can be raised regarding *any* candidate assessment criterion. To ask these questions each and every time a candidate assessment criterion is used, however, would render the use of that criterion unworkable, contrary to the direction given by the Commission at the regulatory stage. Absent specific evidence that a candidate assessment criterion was "fixed" or arranged in some manner so as to guarantee a preordained result, we are not prepared to look behind and investigate every application of a candidate assessment criterion. This approach is consistent with the Commission's Explanation and Justification which states "reasonableness is implied" when using objective criteria. Explanation and Justification of 11 C.F.R. §110.13(c), 60 *Fed. Reg.* at 64262. We are satisfied with the affidavits presented by the CPD that its "criteria were not designed to result in the selection of certain pre-chosen participants." *Id.* *See* G.C. Report at Attachment 4, at 121-126 (affidavit of professor Richard E. Neustadt); Attachment 4 at 43-56 (affidavit of Janet H. Brown). Significantly, we have been presented with no evidence in the factual record which threatens the veracity of these sworn affidavits.

The General Counsel's Report contains several other points which must be addressed. First, the Report's suggestion that CPD misapplied Mr. Perot's qualification for public funding reflects a misunderstanding of CPD's reasoning. *See* G.C. Report at 19-20. While qualification for public funding is significant, the CPB observed that as a practical matter Mr. Perot's hands would be tied since he could not contribute his own money. Thus, compared to 1992, his "realistic" chances of winning in 1996 were greatly reduced:

> [In 1992], we concluded that his prospect of election was unlikely but not unrealistic. With the 1992 results and the circumstances of the current campaign before us, including Mr. Perot's funding limited by his acceptance of *a federal subsidy*, we see no similar circumstances at the present time. Nor do any of the academic or journalistic individuals we have consulted.

G.C. Report at Attachment 4, at 128 (Letter of Professor Richard E. Neustadt) (emphasis added). A limit on the amount of funds which can be spent by a candidate is certainly an objective factor which can be legitimately used by a sponsoring organization.

The General Counsel's Report also asserts the Democratic and Republican party nominees were issued "automatic" invitations to the debates as a result of their party nominations in violation of §110.13. *See* February 6, 1998 G.C. Report at 21-22. We find persuasive the specific denials by the CPD on this point. The CPD flatly denies it based its decision on this factor alone:

> [I]n 1996, the CPD Board asked me to act as chairman of the advisory committee that applied the 1996 candidate selection criteria. The advisory committee convened on September 16, 1996 for the purpose of applying CPD's nonpartisan candidate selection criteria to more than 130 candidates running for the Presidency and Vice-Presidency in the 1996 general election campaign. *Although the candidate selection criteria do not require it to do so, the advisory committee independently applied the criteria to the* Democratic and Republican party candidates. After reviewing and discussing the facts and circumstances of the 1996 general election campaign, it was the unanimous conclusion of the advisory committee that, as of September 16, 1996, only President Clinton and Senator Dole have a realistic chance in 1996 of being elected President, and only Vice President Gore and Congressman Kemp have a realistic chance of being elected Vice President.

G.C. Report at Attachment 4, at 124-125 (Affidavit of Professor Richard E. Neustadt)(emphasis added). *See also id.* at 53-54 (Affidavit of Janet H. Brown)("After receipt of the data provided to the 1996 Advisory Committee and its own deliberation and discussion, *the CPD Board unanimously accepted the 1996 Advisory Committee's recommendation* that only President Clinton and Senator Dole be invited to participate in CPD's 1996 Presidential debate and only Vice President Gore and Congressman Kemp be invited to participate in CPD's 1996 vice presidential debate."(emphasis added).

Additionally, we do not fully agree with the staff's conclusion that "'automatic' invitations are in direct violation of 11 C.F.R. §110.13(c)." G.C. Report at 21. Section 110.13(c) provides, in pertinent part, that "[f]or 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." The phrase "whether to include" was intended to prevent a debate sponsor from *excluding* a candidate from a debate solely because the candidate was not a major party nominee. For example, a debate sponsor could not use the following as its "objective" criterion: "Only major party candidates are eligible to participate in the debate." The regulation's purpose was not to prevent a debate sponsor from issuing debate invitations to major party nominees.

The Explanation and Justification of §110.13(c) confirms this understanding of the regulation: "Under the new rules, nomination by a particular party, such as a major party, may not be the sole criterion used *to bar a candidate from participating* in a general election debate." Explanation and Justification of 11 C.F.R. §110.13(c), 60 *Fed. Reg.* at 64262 (emphasis added). Indeed, the entire paragraph explaining this new regulatory language focuses on the fact that "the new rules do not allow a staging organization to bar minor party candidates or independent candidates from participating

simply because they have not been nominated by a major party." *Id.* Conversely, *no* mention is made in the Explanation and Justification that the new rules were somehow intended to prevent the issuance of invitations to major party nominees. We believe it is consistent with the purpose of the regulation for the CPD to issue an invitation to the major party candidates in view of the "historical prominence" of, and "sustained voter interest" in, the Republican and Democratic parties. G.C. Report at Attachment 4, at 57.

Finally, the General Counsel's Report suggests the Clinton/Gore Committee and the Dole/Kemp Committee expressed an interest to either include or exclude Mr. Perot and that, as a result, the two candidate committees somehow tainted the debate selection process. G.C. Report at 20-21. Absent specific evidence of a controlling role in excluding Mr. Perot, the fact the Committees may have discussed the effect of Mr. Perot's participation on their campaigns is without legal consequence. There certainly is no credible evidence to suggest the CPD acted upon the instructions of the two campaigns to exclude Mr. Perot. To the contrary, it appears one of the campaigns wanted *to include* Mr. Perot in the debate. *See* G.C. Report at Attachment 6, at 7 ("since the start of the general election, the [Clinton/Gore] Committee fully supported the wishes of Ross Perot to be included in the CPD-sponsored presidential debates and had hoped that the CPD would make a determination to include him.") (response of Clinton/Gore '96). In fact, CPD's ultimate decision to exclude Mr. Perot (and others) only corroborates the absence of any plot to equally benefit the Republican and Democratic nominees to the exclusion of all others.

III. STATUS AS A POLITICAL COMMITTEE

The 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 the 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 Commission). Since CPD did not make a contribution to or an expenditure on behalf of the Committees, it was not a political committee within the meaning of 2 U.S.C. § 431(4). Accordingly, CPD was not required to register and report with the Commission.

IV. CONCLUSION

For all the reasons set forth above, the Commission did not approve the General Counsel's recommendations with regard to alleged violations of the FECA by the Commission on Presidential Debates, Clinton/Gore '96 General Committee and the Dole/Kemp '96 Committee and their treasurers.

4/6/98
Date

Joan D. Aikens
Chairman

4/6/98
Date

Scott E. Thomas
Vice Chairman

Date

Lee Ann Elliott
Commissioner

4/6/98
Date

Danny L. McDonald
Commissioner

Date

John Warren McGarry
Commissioner

COMMISSION ON
PRESIDENTIAL DEBATES

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Executive Director

COMMISSION ON PRESIDENTIAL DEBATES ANNOUNCES CANDIDATE SELECTION CRITERIA, SITES AND DATES FOR 2000 DEBATES

(Washington, D.C.,...) Commission on Presidential Debates (CPD) co-chairmen Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr. today announced the candidate selection criteria to be used in the 2000 general election debates as well as the dates and sites for the debates.

Kirk and Fahrenkopf noted that after each of the last three general elections, the CPD had undertaken a thorough review of the candidate selection criteria used in that year's debates. After extensive study, the CPD has adopted a three-part standard for 2000 which is detailed in the attached document. "The approach we announce today is both clear and predictable," Kirk and Fahrenkopf said.

The CPD co-chairmen also announced four dates and sites for the 2000 debates:

- First presidential debate: Tuesday, October 3, John F. Kennedy Library and the University of Massachusetts, Boston, MA
- Vice presidential debate: Thursday, October 5, Centre College, Danville, KY
- Second presidential debate: Wednesday, October 11, Wake Forest University, Winston-Salem, NC
- Third presidential debate: Tuesday, October 17, Washington University in St. Louis, MO
- Madison, WI and St. Petersburg, FL have been selected as alternate sites.

Established in 1987, the nonpartisan, nonprofit CPD sponsored and produced the 1988, 1992, and 1996 general election debates. The CPD also undertakes research and partners with educational and public service organizations to promote citizen participation in the electoral process. In 2000, the CPD, with McNeil/Lehrer Productions, will produce "Debating our Destiny," a two-hour PBS special featuring interviews with participants in presidential debates since 1976.

The CPD intends to make extensive use of the Internet in its 2000 educational efforts, building on its 1996 voter outreach program, DebateWatch '96. Details of the CPD's Internet activities, which will be supported by corporate and nonprofit entities specializing in interactive application of the Internet, will be announced in the next several weeks. Background information on the CPD's mission, history and educational projects is available on its website: www.debates.org. The CPD will collaborate with the Freedom Channel in its work.

(more)

Co-chairmen
Frank J. Fahrenkopf, Jr.
Paul G. Kirk, Jr.

Executive Director
Janet H. Brown

Honorary Co-chairmen
Gerald R. Ford
Jimmy Carter
Ronald Reagan

Directors
Clifford L. Alexander, Jr.
Howard G. Buffett
Senator Paul Coverdell
John C. Danforth
Representative Jennifer Dunn
Antonia Hernandez
Caroline Kennedy
Newton N. Minow
Dorothy Ridings

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 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:

(more)

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.

Adopted: January 5, 2000

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HEADLINE: PAT BUCHANAN DISCUSSES HIS RUN FOR THE REFORM PARTY PRESIDENTIAL CANDIDACY

BODY:

MR. RUSSERT: And now to presidential politics. With us is Pat Buchanan. Welcome.

MR. BUCHANAN: Thank you, Tim.

MR. RUSSERT: You've left the Republican Party, joined the Reform Party. Are you in this race all the way, even if Perot, Ventura or Trump try to stop you?

MR. BUCHANAN: Sure, Tim. I'm running for the Reform Party nomination. I think I'm the front-runner right now according to the polls. Certainly in terms of organization and activity, it's as though we've got a 10-page calculus problem and we're off the first page, on to the second, and some of these others fellows don't even have their blue books yet.

MR. RUSSERT: Have you spoken to Ross Perot?

MR. BUCHANAN: I have not spoken to Ross Perot and I've not spoken to Governor Ventura since I indicated an interest in the Reform Party nomination.

MR. RUSSERT: Mr. Perot won't speak to you?

MR. BUCHANAN: No, my understanding is that Ross Perot welcomes everyone to the race and that he does not endorse anyone and that he does not--he's not interested really in having a conversation and having it misread one way or another because there have been some misreadings of where he stands.

MR. RUSSERT: Now, you did go to Minnesota, request a meeting with Governor Ventura.

MR. BUCHANAN: Right.

MR. RUSSERT: He put out a statement saying, "Buchanan's not on my schedule. As far as I'm concerned, he didn't even visit here."

MR. BUCHANAN: But the next day, Governor Ventura said, "I tried to arrange a meeting and we were unable to arrange it. Mr. Buchanan didn't show up." So let's just credit it or blame it on snafus by campaign staff but I'd be happy to meet with the governor on my next trip, and next time, Governor, I'll give you a call directly at the mansion, and I'll set it up with you.

MR. RUSSERT: Yesterday in North Dakota you said it may be necessary to body-slam Jesse Ventura on the way to this nomination.

MR. BUCHANAN: I have a way of getting carried away when I'm speaking to Christian Coalition and those folks, Tim. But clearly the governor opposes me for the nomination and his candidate appears to be Mr. Trump now. And I would have to defeat Mr. Trump and I guess Mr. Ventura's candidate to win.

MR. RUSSERT: If both Perot and Ventura oppose you, could you still be the nominee?

MR. BUCHANAN: Yes.

MR. RUSSERT: And you'll stay in the race.

MR. BUCHANAN: Tim, I think we are moving right now in various organizations, state by state. We're starting to pick up some delegates already. I've got a tremendous reception. I've met with probably half the state chairmen of the Reform Party. It is almost universal. They're welcoming me into that party and we're making progress. And as I say in the national polls, they consider me, the Reform Party people do, a very serious national candidate who almost won the Republican Party nomination and who agrees with them on a new trade policy, a foreign policy that keeps us out of wars that are none of our business and some measure of realistic control of immigration so we can become one nation in people again.

MR. RUSSERT: You mentioned Donald Trump. He was on this program last week.

MR. BUCHANAN: Really?

MR. RUSSERT: I asked him about your presidential bid.

MR. BUCHANAN: Right.

MR. RUSSERT: This is what he had to say. Let's give a listen.

MR. BUCHANAN: Sure.

(Videotape, October 24, 1999):

MR. RUSSERT: Tomorrow Pat Buchanan is announcing that he will be a candidate for the presidency on the Reform Party.

MR. DONALD TRUMP: I just think it's ridiculous. I mean he wrote a book...

MR. RUSSERT: Why?

MR. TRUMP: Because--look, he's a Hitler lover. I guess he's an anti-Semite. He doesn't like the blacks. He doesn't like the gays. It's just incredible that anybody could embrace this guy. And maybe he'll get 4 percent or 5 percent of the vote and it'll be a really staunch right wacko vote. I'm not even sure if it's right. It's just a wacko vote. And I just can't imagine that anybody can take him seriously.

(End videotape)

MR. RUSSERT: Your response.

MR. BUCHANAN: Well, I got three million votes for the nomination of the Republican Party in 1992 and 1996. And the idea of calling these good Americans, one-fourth of the Republican Party, wacko when basically they love their country like I do and they believe we needed a new direction for America, I think his name-calling--and I think that's pretty much what Mr. Trump engaged in--and, look, the Reform Party is a party that does believe in ethical politics and it desperately wants a national debate on foreign policy, on NAFTA and GATT and trade policy, on immigration policy, on campaign finance reform of getting the big money out of politics. I don't think they really want name-calling. And I think if that's what Mr. Trump intends to do, he's not going to go very far.

MR. RUSSERT: He said he would name himself U.S. trade representative if he was elected president to negotiate trade deals.

MR. BUCHANAN: I think The Donald would be much better off at HUD, quite frankly, Housing and Urban Development, Tim.

MR. RUSSERT: When you announced your candidacy, Mr. Trump alluded to it. The New York Times greeted your candidacy with this editorial. Let me put it on the screen for you and our viewers: Buchanan's warlike oratory draws fringe voters and surrounds his candidacy with the persistent whiff of racism and anti-Semitism.

MR. BUCHANAN: Well, The New York Times has never been sympathetic to me ever since I guess I was with Richard Nixon and Spiro Agnew and wrote the speech very critical of The New York Times. But, you know, again, you are talk there about millions of Americans who have supported me. And they are good people. And when you say those kinds of names and that's the appeal we got, you're demonizing them, as well as me. But if they read my speech to that Reform Party convention, I do believe it is time for a government of national unity and reconciliation.

Tim, I've got in mind, if I get elected, people in the Republican Party, for various Cabinet seats and the Reform Party for various areas and in the Democratic Party. I think a four-year term of a government of national unity can solve Social Security, Medicare, give us a new foreign policy, which is not as mindlessly interventionist, upon which all Americans would agree, a trade policy, which, frankly, is more in tune with the grass roots of the Democratic Party and the grass roots of the Republican Party than it is with the elites. I think these are majority issues in America today, and the reason I'm running is neither party at the national level articulates them right now.

MR. RUSSERT: You said four-year term. Would you only serve one term?

MR. BUCHANAN: I would--look, I think that as we go down the road, I'm going to say some things about Social Security and saving Medicare which lend themselves to the demonization and the fall--"Oh, he's going to raise taxes or he's going to do this or that." The first thing we've got to do is save Medicare before we add benefits to it. We've got to save Social Security way out into the future before we consider new benefits. I think there are folks in the

Democratic Party that are willing to bite that bullet. I am. There are folks in the Republican Party. And if you take those decisions, obviously, you run into problems. But I'm willing to do it. Tim, this is going to be the last great cause and campaign in my life, if I lose badly. If I win, it's different. And you might as well run the kind of campaign that I'm going to be proud of and that the people that support me will be proud of and the American people will say, "At least that fellow gave us a real choice."

MR. RUSSERT: You talk about the people who support you as being good Americans. Many black Americans, good Americans, are deeply concerned about your support of the Confederate flag flying over the capital of South Carolina. They believe that flag represents slavery, and you will not urge it be taken down.

MR. BUCHANAN: Well, some folks believe it represents slavery, Tim. That's the battle flag of the Confederacy. It did not fly over slave auctions; it flew over battlefields. It flew over Fredericksburg, it flew over Gettysburg, where 15,000 soldiers marched into the Union guns in one of the most heroic moments in American history, whether you agree with the cause or not.

Tim, I've got two great-grandfathers that fought under that flag. One died at Vicksburg; the other was captured defending Atlanta. I can't turn my back on my grandfathers and great-grandfathers and I don't ask anyone to do it. But we know that the cross of Christ itself has been used by wicked people to be burned at night, to manifest hatred. That doesn't make the cross bad. And I would say this is a subject to be settled by the good folks of South Carolina. I do believe the Confederate battle flag is a flag of--that represents honor, courage, defiance, valor and a spirit of independence. I can understand, given the way it's been used by some folks, wrongly, why some folks would feel otherwise.

MR. RUSSERT: Jewish-Americans, good Americans, are distressed when they hear you call Congress Israeli-occupied territory or say only those who support the Persian Gulf War are the Israeli Defense Ministry or the swan corner in U.S., or the kids who would fight the war are McAllister, Murphy, Gonzales, Leroy Brown, no Jewish names. Why--why don't you say to Jewish-Americans that they would be included in this and you really would apologize for those comments?

MR. BUCHANAN: First, there's no need to apologize. When I use the term, for example, McAllister, Murphy and Gonzalez and Leroy Brown, it wasn't about the Jewish folks. It was in response to an editorial in The British Economist, which said the Americans got to march up to Baghdad and hang Saddam Hussein. And I said it's not British kids; it's American kids who are going to be doing that. Tim--I mean, why was that list of names not anti-Italian? Why is it not anti-Greek? Why is it not anti-Polish? So I don't apologize for anything that I've said in the course of a debate if there's no malice in it. And I don't believe there was.

I will say this into the camera: Jewish-Americans are in my campaign. They are welcome to this cause. They are in the Reform Party. They are--very many of them I met in the Reform Party meeting I had last Sunday night. I am open to appointment of Jewish-Americans to a Cabinet, to a vice presidential seat. They are a tremendously able group of Americans. And quite frankly, I've worked with them all my life because my life is journalism, politics and government. And

that is a place, quite frankly, where many Jewish-Americans have made major contributions, and they are welcome. Tim, let me just say this: In this heart, there is no malice or hatred of any individual. But you are looking at someone who does enjoy fighting. And if that means fighting occasionally with the Israeli lobby, as liberals like to fight occasionally with the Christian Coalition, that does not make you an evil person.

MR. RUSSERT: The Israeli ambassador to the Vatican has said, in light of commentary, discussion of the role of Pope Pius XII, that his canonization should be delayed at least 50 years until we can find out what actually his role was, vis-a-vis Hitler and Nazi Germany. Would you postpone the canonization of the canonization of Pope Pius XII?

MR. BUCHANAN: Well, that's really a decision for the present pope. In my judgment, we do know, at the time Pope Pius XII died, 1958, I believe, Tim, Golda Meir eulogized him and mourned him. The rabbi of Rome during World War II converted to Catholicism and took the name Eugenio because of what the pope had done. The World Jewish Congress gave a million dollars to the Vatican in 1946. A Jewish historian, Pinchous Lapee, said that the pope saved 850,000 Jews during World War II. Now, since '59 and especially '62 when that anti-papal play, "The Deputy," there's been savage attacks on the pope, and now he's called Hitler's pope and he's anti-Semitic. I think that reflects a change of the times. I do believe this, the whole issue should be aired and all the evidence brought forward before the holy father, Pius XII, who I believe was a saintly and good man, before he is canonized. But I would not delay it for political reasons or because of political attacks or pressure. If you can demonstrate the truth and what I believe to be the truth that he was a great, good, saintly pope and probably one of the greatest if not the greatest of the century.

MR. RUSSERT: Jack Essenberg, the chairman of the New York Independance Reform Party...

MR. BUCHANAN: Right.

MR. RUSSERT: ...has been very outspoken about your candidacy. Let me put it on the screen for you and our viewers. He said, "I think Buchanan has belittled himself by becoming aligned with Lenora Fulani. Buchanan is pretty far to the right. Some people have compared him to the Nazis. Fulani's way to the left. In her own speeches, she said she considers herself to be a Communist and a Marxist. Of course, there's a precedent for such an alliance. At one time, Hitler and Stalin got together in an accord."

MR. BUCHANAN: Well...

MR. RUSSERT: This is the chairman of the Reform Party.

MR. BUCHANAN: Buchanan and Lenora Fulani and Hitler and Stalin. OK, look, my understanding was I thought my sister was in touch with that chairman. But, look, Lenora Fulani is an African-American lady who's a Marxist, or was a Marxist, and I understand was sympathetic to Qadafi. I was the one that helped write the speech with Ollie North when they bombed...

MR. RUSSERT: She was in Libya celebrating Qadafi denouncing America.

MR. BUCHANAN: Who do you think wrote the speech or the final draft of the speech when Ronald Reagan bombed Qadafi? And we did the right thing. And I believe she was wrong there.

But, Tim, I said, we've got to reach out. That means you've got to reach out to African-Americans. She's an authentic leader. And if she has Marxist views, I'm a free enterprise conservative. And I think if I'm elected president--you know what she told me her main concern is, she wants black kids to stop looking at themselves as victims who are angry and that she wants them to build up a sense of self-esteem and she wants to open up this political system all over America. You know, I've come to the conclusion she's right on the political system. But I think I'm right on Reagan. And I'm right on Libya.

MR. RUSSERT: George W. Bush and his mom...

MR. BUCHANAN: Right.

MR. RUSSERT: ...had this to say about your entry into the Reform Party race.

MR. BUCHANAN: OK.

MR. RUSSERT: Here's George W. "Pat sees an America that should have stayed home while Hitler overran Europe and perpetrated the Holocaust. Pat Buchanan is leaving the Republican Party because Republicans rejected his views during his three failed attempts to earn the Republican Party's presidential nomination." The first lady had this to say, Barbara Bush, "I'm sorry he left. He's like a whiny child who picks up his marbles and leaves."

MR. BUCHANAN: I understand why Mrs. Bush would want to protect her son. But he's going to have to come out, Tim, onto the playground some time. He cannot continue to duck these debates and arguments.

MR. RUSSERT: He said he will not debate you as a third-party candidate. Can you win without being part of the debates?

MR. BUCHANAN: You know, somebody once said, there's a lot of things you cannot do with a man. You cannot talk to him or dine with him and argue with him, but if he wants to fight you, you have got to oblige him. And I'm going to do battle with Mr. Bush. And I don't think he can duck the debates with me the way he's been ducking them with the Republicans. And for his own sake, frankly, because he's a good candidate, I would urge him to get in with these Republicans and mix it up and get himself bloodied a little bit because Al Gore's a tough debater. And I know how to conduct myself in a debate. And if we're at 15 percent, I think the press and the nation will say, "Let's have it out. They all disagree. Let's see who's best for America." And Mr. Bush is not going to be able to sit down there in Austin and say, "We're not going to debate him. We're not going to do this or that."

MR. RUSSERT: But Ross Perot...

MR. BUCHANAN: Or he's not going to be president of the United States.

MR. RUSSERT: Ross Perot was kept out of the '96 debates. If Buchanan is kept out in the 2000 race, can you be elected without that forum?

MR. BUCHANAN: Well, Tim, if somehow the two parties--and let's say I had 15 percent--two parties managed to keep me out of that debate, I would go to the American people and say, "I told you this was a fraud. I told you this system is fixed. I told you we got a duopoly, which hands the presidency back and forth and doesn't want anyone outside to even have a reach at it. Do you agree with that, whether you're a liberal, moderate, conservative? Do you members of the press agree with that when you know the arguments that I'm making have validity?" And I think there'll be such a firestorm that the two main parties will be risking losing it all. So I would fight through to the end. It would be better, I believe, if I'm in the debate, but if they conspire to keep me out, I think they'll be pulling a razor across their throats.

MR. RUSSERT: The Reform Party platform is silent on abortion.

MR. BUCHANAN: Yes.

MR. RUSSERT: It urges tolerance for all views on those kinds of issues. Will Pat Buchanan, if he's the nominee, continue to insist that Roe v. Wade should be overturned and all abortions should be banned in America?

MR. BUCHANAN: When you talk about tolerance, we have to be tolerant of people we disagree with, of people who are flawed. But an idea that unborn children do not have a soul and do not have a right to life, that is an idea that you're not tolerant of so much as you have to fight against it and continue to fight against it because it's a false idea. And so what I will do, Tim, I've given my word--and I was at the Christian Coalition--I gave my word when I was speaking to the Reform Party folks. I will appoint justices who are as determined to overturn Roe v. Wade as Mr. Lincoln's justices were determined to overturn Dred Scott??.

MR. RUSSERT: Ban all abortion?

MR. BUCHANAN: No, they will overturn Roe v. Wade. That will send the decision back to the states. I believe, at the state level, I will fight for the preservation of human life, all human life, including the elderly and those that Dr. Kevorkian and friends are putting to death. I will fight for that. But the decision will then be made democratically, as it was made, at the state level. But I will fight, you're right, to try to preserve all human life.

MR. RUSSERT: Reform Party platform says no tax cuts, period. Pat Buchanan has called for at least an $ 600 billion tax cut. How do you reconcile that?

MR. BUCHANAN: That's where we're going to have to do some negotiating with fellows.

MR. RUSSERT: You're against the Reform Party platform.

MR. BUCHANAN: I am for paying down the debt, but I do believe we need an entirely new tax code. And let me say something here. I've called for national unity. You know who I think's got some good ideas on taxes? Richard Gephardt. I have been in favor, basically, of a flat-tax idea. But if I can get...

MR. RUSSERT: But you're still for tax cuts.

MR. BUCHANAN: Listen, we're going to reduce the tax burden, we're going to alter it, put part of it on the Chinese Communists, who are importing here tariff-free, and on the Japanese to get rid of the trade deficit. We'll use those funds to get rid of taxes on small businesses, small savers, middle-class inheritances for sure. But if Gephardt would insist--for example, we get a flat tax, he insists on a second rate for the superrich. If that's the compromise you got to make to get us the lowest taxes in the Western world and eliminating taxes here and there, my objective is to get it done.

MR. RUSSERT: All right.

MR. BUCHANAN: It's not to take an ideological position.

MR. RUSSERT: Couple quick ones. Would you be in favor of increasing the minimum wage?

MR. BUCHANAN: I would go along with an increase in the minimum wage.

MR. RUSSERT: Should Americans have a right to sue their HMOs?

MR. BUCHANAN: Yes. Wait. Listen, I do not necessarily go along with some of that, but, look, if an HMO denies care to some individual and the individual dies as a consequence, should his wife or survivor have a right to sue? Yes.

MR. RUSSERT: What should be taught in public schools, creationism or evolution?

MR. BUCHANAN: That should be decided at the local level by the school itself. I would prefer that children have voluntarily right to be taught the Bible in public school or the Torah or anything as long as it's voluntary. And that's what's good about it, Tim. If you take it down to the local level, if you decentralize, if you get back to constitutional government, that can be decided in McLean or Topeka or Manhattan. Let it be decided there by majority rule.

MR. RUSSERT: Let me show you a couple polls. First, a head race between George Bush and Al Gore. The numbers with Bradley are very similar. Bush wins 49,39. When you include Pat Buchanan, you'll see George Bush's margin reduced by 5 points. It's suddenly a 6-point race: 44 percent, 38 percent, 6 percent. When you ask people who want Pat Buchanan to be the Reform Party nomination, if he wasn't running, where would they go? It's George W. Bush, 52 percent; Al Gore, 27 percent. You are hurting the Republican nominee.

MR. BUCHANAN: He's not the nominee. And the premise of your question is that the Republican Party has a pre-emptive right to the presidency of the United States or the Democratic Party, and anyone in the Reform Party or Taxpayers Party who challenges and offers a candidate to the American people is somehow a thief. He is an interloper. He has no right to be there. He is stealing from Mr. Bush. Mr. Bush has debated no one. He has won no caucuses. He has won no primaries. And all of a sudden, because I, who have as much experience almost as his father does, because I'm running for the Reform Party nomination, therefore I'm intruding on his right of inheritance.

MR. RUSSERT: But as a conservative, would it bother you if you help elect a Democrat president?

MR. BUCHANAN: Tim, if I get in that race and I lose to Al Gore, I'm going to be terribly bothered but I'm going to be more bothered by the fact that I got beat by Al Gore than that some other Republican or some Republican got beat by Al Gore. I'm going in this to win the presidency. And I'll tell you, I know we're a long shot, and we're not supposed to bet because we're against all that gambling, Tim. But if you get some good odds out there in Vegas, long odds on the nomination and what I'm going to get, you take them.

MR. RUSSERT: It's Halloween. And here's...

MR. BUCHANAN: Is that an editorial comment on what I just said?

MR. RUSSERT: Here's a poll that you won. Fox News said, "It's Buchanan 27, Gore, 22; Bush, 10; Forbes, 10. Whose face would make the scariest Halloween mask?" You win, Pat Buchanan.

MR. BUCHANAN: Who we got? Gore in there?

MR. RUSSERT: You're a landslide winner.

MR. BUCHANAN: Well, listen. I don't know how I beat Forbes, OK?

MR. RUSSERT: Pat Buchanan, we thank you very much. Be safe on the campaign trail.

MR. BUCHANAN: OK. Thank you.

MR. RUSSERT: Coming next, the race for the Democratic nomination heats up. Who will be able to lead the Democrats to victory next year? Senator Bob Kerrey: He says Bill Bradley. Senator Evan Bayh: He says Al Gore. Then Campaign 2000 is now center stage. Our roundtable with David Broder, Jack Germond and Wayne Slater. They're all coming up right here on MEET THE PRESS.

(Announcements)

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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
The Commission on Presidential Debates	)	MUR 4987

DECLARATION OF DOROTHY S. RIDINGS

I, Dorothy S. Ridings, give this declaration based on personal knowledge.

1. Since April 1997, I have been a member of the Board of Directors of the non-profit, nonpartisan Commission on Presidential Debates (the "CPD"), which is a voluntary, unpaid position. Since 1996, I have been the President and CEO of the Council on Foundations. In addition, I currently am a Director of the Foundation Center and a Trustee of the Louisville Presbyterian Theological Seminary. I have never held a position with any political party, and my service on the CPD's Board is not tied to any political party.

2. Prior to joining the Council on Foundations, I was the Publisher and President of The Bradenton Herald from 1988-1996 and the General Executive of Knight-Ridder, Inc. from 1986-1988. I also have worked as an editor, a writer, and an adjunct professor, and as a technical assistant on a public housing project. I obtained my bachelor's degree from Northwestern University and my master's degree from the University of North Carolina.

3. From 1982-1986, I served as the President of the League of Women Voters of the United States (the "League"), and prior to that time I had been associated with that organization in other capacities since 1976. In that regard, I am familiar with and was involved in the League's sponsorship of general election presidential debates in 1976, 1980

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and 1984. The League's goal in sponsoring general election debates, like that of the CPD, was to provide the electorate with the educational opportunity of seeing debates among the leading contenders for the Office of the President.

4. The League sponsored two presidential general election debates in 1980, using criteria for invitations that are very similar to the CPD's 2000 criteria: constitutional eligibility, ballot access, and demonstrated significant voter interest and support. ("The 1980 Presidential Debates: Behind the Scenes," a League of Women Voters Education Fund publication, is attached at Tab A.) A candidate could satisfy the League's demonstrated voter interest requirement either by obtaining the nomination of a major party or by achieving a 15% level of national support (or a level of support at least equal to that of a major party nominee) in national public opinion polls.

5. Based on the application of the foregoing criteria, independent candidate John Anderson was invited to participate in the first presidential debate sponsored by the League in 1980. However, President Carter declined to participate in that debate because of the presence of the independent candidate. As a result, Mr. Anderson and Ronald Reagan, then the Republican nominee, participated in a two-candidate debate without President Carter.

6. After the nationally televised presidential debate in which he participated, Mr. Anderson's support in the polls dropped, taking his support level below 15% in four of five polls reviewed by the League after its first debate. Consequently, when the League sponsored a second debate in 1980, only candidates Carter and Reagan were invited, and the debate went forward between those two candidates.

7. As the events of 1980 well demonstrate, an organization such as CPD that seeks to sponsor general election debates among the leading candidates for the Office of the President faces a difficult challenge. No candidate is obligated to debate, and there is a significant risk that a leading candidate would not agree to share the debate stage with a candidate who enjoys only modest levels of national public support. Thus, the debate sponsor's legitimate goal in formulating its candidate selection criteria is to be sufficiently inclusive so that any candidate properly considered a leading candidate is invited to debate, but not so inclusive that one or more of the candidates in whom the public has demonstrated the greatest level of support refuses to debate. Given that the purpose of the CPD's debates is to afford the voting public an opportunity to sharpen their views, in a debate format, of the principal rivals for the Presidency, the absence of one of the leading candidates would dramatically undercut the educational purpose of its debates.

8. CPD adopted its candidate selection criteria for the debates it hopes to sponsor in 2000 with the foregoing considerations in mind, as well as with the goal of adopting criteria that would be clear and readily understood by the public. In my capacity as a member of the CPD's Board, I was involved in the discussions and the decision-making process that led to the Board's unanimous decision to adopt the document entitled Commission on Presidential Debates' Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation (the "2000 Criteria"), a copy of which is attached here at Tab B. The 2000 Criteria were adopted after extensive consideration of how best to achieve the CPD's educational goals. Contrary to what I understand the complainants have claimed, the CPD's 2000 Criteria were not adopted with any partisan or bipartisan purpose. They were not adopted with the intent to keep any party or candidate from participating in

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the CPD's debates or to bring about a predetermined result. Rather, the Criteria were adopted to further the legitimate voter education purposes for which CPD sponsors debates.

9. In connection with the debates it sponsored in 1988, 1992 and 1996, CPD employed an approach to candidate selection that involved the consideration of multiple factors in an effort to identify those candidates with a "realistic chance of being elected." The earlier criteria, like the current criteria, were intended to identify the leading candidates for the Presidency. It is my understanding that the Federal Election Commission rejected a challenge to the CPD's earlier criteria brought in 1996 and found that the CPD's criteria were "objective" and otherwise consistent with the FEC's regulatory requirements. Although it would have been easier in some respects simply to employ again in 2000 the criteria that had already withstood legal challenge in 1996, the CPD recognized from the experience in 1996 that its contribution to the electoral process likely would be enhanced by adopting criteria that were clearer and simpler, and the application of which would be very straightforward.

10. One of the criteria set forth in the CPD's 2000 Criteria is the requirement that a candidate have a level of support of fifteen percent of the electorate, as described more fully in the Criteria. The CPD's selection of fifteen percent as the requisite level of support was preceded by careful study and reflects a number of considerations. It was CPD's considered judgment that the fifteen percent threshold best balanced the goal of being sufficiently inclusive to invite those candidates considered to be among the leading candidates, without being so inclusive that invitations would be extended to candidates with only very modest levels of public support, thereby creating an unacceptable risk that leading candidates with the highest levels of public support would refuse to participate.

11. I understand that the complainants have alleged that the fifteen percent is an unattainable level of support for an independent or minor party candidate to achieve without participation in the debates. CPD's review of the historical data is to the contrary. As noted, John Anderson achieved this level of support prior to the first debate in 1980 and, therefore, was invited by the League to debate. Other independent and third-party candidacies from the modern era demonstrate the point as well. George Wallace achieved significant voter support in 1968, and Ross Perot enjoyed a high level of popular support in 1992, particularly before he withdrew from the race in July of 1992. (Mr. Perot subsequently re-entered the race shortly before the 1992 debates.)

12. The CPD considered, but rejected, the possibility of using eligibility for public funding of general election campaigns as the criterion for debate participation rather than another measure of public support. However, that criterion is itself both potentially overinclusive and underinclusive. Eligibility for general election funding is determined based on performance in the prior Presidential general election. We realized that such an approach would be underinclusive to the extent that it would automatically preclude participation by a prominent newcomer (such as Ross Perot in 1992), but also would be overinclusive to the extent it would mandate an invitation to the nominee of a party that performed well in a prior election, but who did not enjoy significant national public support in the current election. In addition, while the Congress determined that five percent was a sufficient level of support for purposes of determining eligibility for federal funding as a "minor" party (at a level that is substantially lower than that received by the "major" parties), as noted, a debate host hoping to present the public with a debate among the

leading candidates (none of whom are required to debate) must necessarily take into account a different set of considerations.

I declare under penalty of perjury that the foregoing is true and correct. Executed on April 24, 2000.

Dorothy S. Ridings

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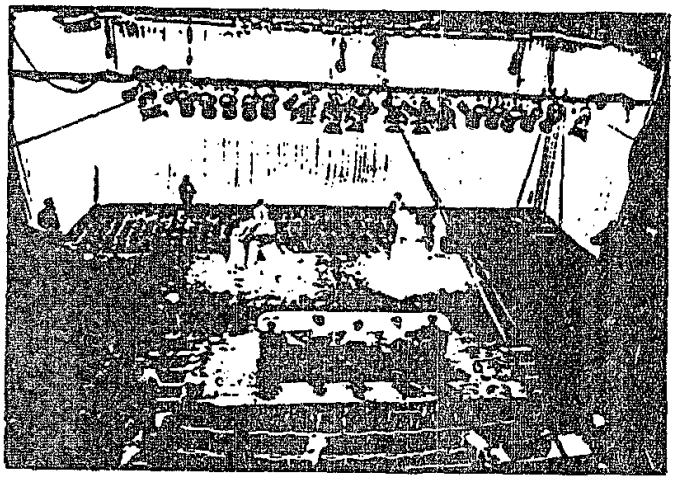
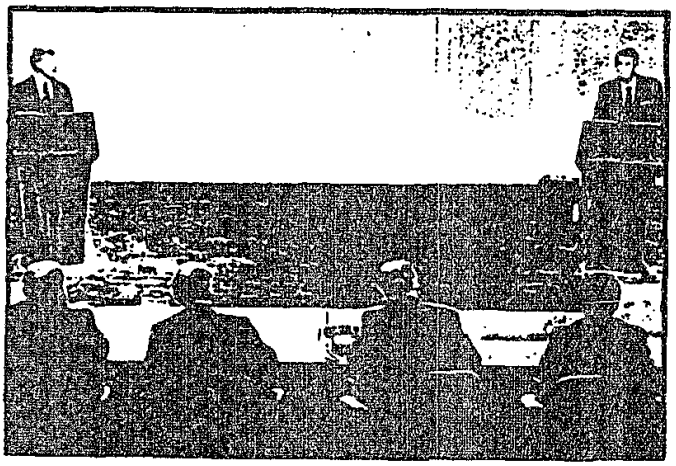
THE 1980 PRESIDENTIAL DEBATES: BEHIND THE SCENES





League of Women Voters Education Fund

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The LWVEF also acknowledges, with great appreciation, the many cash and in-kind contributions of League members and citizens throughout the country to defray the costs of the Forums and Debates.

The 1980 Presidential Debates: Behind the Scenes

On October 28, 1980, 120 million Americans, the largest television audience in our nation's history, watched Jimmy Carter and Ronald Reagan debate face-to-face. This event climaxed a long and grueling presidential campaign. Interest in it – on the part of both press and public – intensified as the long-playing drama unfolded and election day approached. Would the major presidential candidates actually face one another in what had been billed as the superbowl of the 1980 election?

The League of Women Voters, which sponsored this and the preceding Debate between Ronald Reagan and John Anderson, as well as three Presidential Forums during the primary season, undertook many roles during that critical time. It was by turns negotiator, mediator, fundraiser and producer, as it tried to overcome the obstacles and resolve the conflicting aims of all those with a stake in the debates. The public clearly wanted to see and hear presidential candidates at the same time, in the same place and under the same conditions. The candidates and their strategists understandably were seeking the most advantageous conditions and were anxious to control the terms of debates. If they didn't get what they wanted at any given time – conditions that changed as the political fortunes of the campaign shifted – they could walk away. The League's difficult job was to resolve those often conflicting interests and make the Presidential Debates a reality.

Against considerable odds, the League was successful in making two Presidential Debates happen in 1980 – Debates that set several benchmarks that promise to have a lasting effect on the way voters choose their presidents. It was the first time a debate sponsor grappled with the participation of nonmajor party candidates, an issue that is likely to persist in future debate presentations. What is perhaps more important, the League's successive sponsorship of 1976 and 1980 Presidential Forums and Debates puts the organization well on the way toward achieving one of its major voters service goals – to establish such debates as an integral part of every presidential election.

Laying the Groundwork for 1980

The League's determination to sponsor Presidential Forums and Debates in 1976 and 1980 was deeply rooted in its own history and sense of mission. The League has been committed to providing a variety of services to voters since its founding in 1920. State and local Leagues throughout the country have for years offered nonpartisan arenas for candidates to discuss campaign issues so that voters could make side-by-side comparisons of the candidates and their views. These candidate events have dealt with every elective office from local school boards to the United States Senate.

When the League set out in 1976 to bring presidential candidates together in a series of primary forums and general election debates, its sponsorship was thus a natural, though major, extension of the long tradition of these state and local League-sponsored candidate events. And the timing was right. There had not been presidential debates since 1960, when John Kennedy and Richard Nixon faced one another in network-sponsored debates. Sixteen years later, in 1976, the public wanted presidential debates (a Gallup poll showed that seven out of 10 people were in favor of debates), and very significantly, the candidates wanted them, too. With this tide flowing in its favor, the League was successful in its first Presidential Debates project. By the end of the 1976 election season, the League had presented four Forums at key points during the primaries and three Debates between the Republicans' candidate, Gerald Ford, and the

Democrats' candidate, Jimmy Carter, as well as one between their running mates, Robert Dole and Walter Mondale.

As the next presidential campaign approached, the League's national board weighed the merits of making so major an effort once again. The League knew from experience that there was a huge "consumer demand" for more thoughtful treatment of the issues in the campaign and for getting the candidates to discuss their positions on the issues in a neutral setting. The board concluded that debates could serve as essential a role in 1980 as they had in 1976, by providing a necessary alternative to the 30- and 60-second spots and the paid political programs.

Once again, the League mobilized state and local Leagues throughout the country, undertook a massive fundraising drive, hired staff to direct the project, began visiting potent debate sites and committed the whole zation to ensure that a series of Preside Forums and Debates would be a part o 1980 presidential election.

As it turned out, a series of four Presi Forums throughout the primary seasor scheduled, only three of which took pla Though the original schedule provided events at each site, one for Democratic one for Republican aspirants, political r dictated that in 1980 only Republican c dates met face-to-face to address key c paign issues. The opposite was true in when forums took place only between I cratic candidates. (See Appendix A for d on 1980 Forums).

Near the end of the 1980 primaries, F Reagan and Jimmy Carter, who each se

The League of Women Voters Education Fund — Sponsor of the Debates

The League of Women Voters Education Fund (LWVEF) was established in 1957 as a research and citizen education organization (with 501(c)(3) tax status) by the League of Women Voters of the United States (LWVUS), a membership and action organization (with 501(c)(4) tax status) dedicated to promoting political responsibility through informed and active participation of citizens in government.* The LWVEF provides local and state Leagues as well as the general public with research, publications and other educational services, both on current issues and on citizen participation techniques. The network of local Leagues has a multiplier effect in bringing the Education Fund's services to the wider public. Through workshops, conferences and the distribution of publications, Leagues disseminate the LWVEF's research and "how-to" citizen aids.

On the national level, the Education Fund's historic 1976 Presidential Forums and Del ates paralleled the service to voters that local and state Leagues provide at election time with their candidate meetings. The Forums were the first series of their kind presented before the primaries, and the Debates marked the first time in more than 16 years that presidentia candidates met face-to-face.

*The two organizations, LWVUS and LWVEF, are explicitly identified in the text only where the distinctions are important to the particular points being discussed. Otherwise, the term "League used throughout to refer to the LWVEF.

likely to be his party's nominee, publicly agreed to participate in League-sponsored Debates that fall. In fact, Reagan's announcement came during the last League-sponsored Forum on April 23 in Houston, Texas. Moderator Howard K. Smith put the direct question to Reagan and to George Bush: "If nominated by your party, would you agree to participate [in League-sponsored Presidential Debates]?" Governor Reagan's reply: "I can't wait."

Carter's promise came on May 5, 1980 when he addressed the national convention of the League of Women Voters of the United States in Washington, DC. He was asked, "Mr. President . . . we'd like to know if you'd give your promise to us today to participate in the League-sponsored Presidential Debates this fall if you are the nominee of the Democratic Party." Mr. Carter's reply: "Yes! Yes I will be glad to participate this fall if I am the nominee. It would be a great pleasure to be the nominee and to debate . . ."

With public commitments in hand, the League turned toward several other issues related to the Debates, such as eligibility requirements for candidate participation, format, number of debates, and selection of debate sites. As a means of soliciting preliminary advice on these and other topics, the League's board established a 28-member Public Advisory Committee on Presidential Debates. The committee was chaired by Carla Hills, former Secretary of Housing and Urban Development with the Ford Administration, and Newton Minow, former chairman of the Federal Communications Commission under President Kennedy.

In July, the League's board announced its proposed schedule for the series: three Presidential Debates and one Vice-Presidential Debate, starting in September. At the same time, they reviewed some 20 potential debate sites and identified Baltimore, Maryland; Cleveland, Ohio; Louisville, Kentucky; and Portland, Oregon, as the proposed sites for these Debates. Geographical diversity was a factor in selecting the sites, as was the availability of suitable facilities.

What was left to determine were the criteria by which candidates would be invited to debate – a process that was to become a *cause célèbre*.

Criteria: The Debate About Who Should Debate

The inclusion of independent and third-party candidates in presidential debates was completely uncharted territory. There was no history to look back on. The Kennedy-Nixon debates in 1960 and the Ford-Carter debates in 1976 had set a precedent for debates between major-party candidates, but there was no precedent for how to deal with the fact that from time-to-time an independent or minor-party candidate emerges as a significant force in a presidential campaign. Since 1980 seemed to be such a year, it was imperative that the League set objective criteria early by which to determine which candidates merited treatment as "significant."

Literally dozens of candidates were interested in being included. Yet the goal of having candidates deal with the issues in some depth would be defeated if the cast of characters became too large. The League knew that it would also be much harder to get the major-party candidates to agree to debate if they ha to share the platform with candidates they considered less significant. Therefore, the League decided not only to establish criteria for the selection of debate participants, but also to announce these criteria well before applying them, so that both the public and th candidates would know all the rules.

For the League, no issue took more attention or involved more discussion than the development of these criteria. The League knew that such criteria would not only play a critical part in the 1980 debates planning, but also that these criteria and the process by which they were determined would be carefully scrutinized. Moreover, the Federal Election Commission (FEC), the agency set up to regulate federal elections, would view the criteria as a measure of the League's nonpartisanship. (The FEC permits a debate sponsor to exercise its discretion as to whom to invite as long as debates are nonpartisan and include at least two candidates. See box, p. 8, for a detailed description.)

The criteria for selecting candidates to appear were based on the FEC's requirements and the League's own long-standing and strict standards for offering voters reliable, nonpartisan pre-election information about candidates and their positions on issues. They had to be nonpartisan; they had to be capable of objective application, so that they would be as free as possible from varying interpretations; and they had to be easy to understand.

UPI

LWV President Ruth J. Hinerfeld meets with James Baker, chairman of the Reagan for President committee (L) and Carter Campaign Chairman Robert Strauss (R) to work out details for a Carter-Reagan debate.

On August 9, the League's board adopte three criteria by which invitations would be extended. Any candidate invited to particip would have to meet *all three:*

1. *Constitutional eligibility* — Only those c didates who met the requirements of t Constitution of the United States were considered. Article II, Section I require the President to be a "natural born citizen," at least 35 years of age, and a resident within the United States for at least 14 years.
2. *Ballot access* — A presidential candidat had to be on the ballot in enough state have a mathematical possibility of winn the election, namely, a majority of vote (270) in the Electoral College.
3. *Demonstrated significant voter interest and support* — A candidate could demo strate significant voter interest and sup port in one of two ways: nomination by major party; or, for minor-party and ind pendent candidates, nationwide public opinion polls would be considered as a indicator of voter interest and support. Those candidates who received a level of voter support in the polls of 15 percent or a level of support at least equal to that of a major-party candidate would be invited to participate in the Debates.

The criteria were announced at a press conference in New York City on August 10. The first and second criteria occasioned little comment, but the 15-percent level of support in nationwide public opinion polls created considerable controversy, with the press, t public and the candidates all getting into a mini-debate about the use of polls and the appropriate threshold for deciding who should be invited to debate.

Some, including pollsters, questioned th use of polling data to measure significant voter support, since polls are subject to

sampling error and variation in techniques. The League acknowledged the fact that poll data were not perfect, but argued that polls were the best objective measure available for determining how much voter interest and support a nonmajor party candidate had at a given point in the course of the campaign. And that is what the League had to gauge before extending invitations.

Others criticized either the use of a specific figure or the choice of 15 percent as that figure. Threshold levels ranging between 15 and 25 percent had been discussed by the Advisory Committee. The League's board, after carefully weighing the options, decided that a specific figure, though admittedly arbitrary, would provide the most objective basis for a decision. In settling on the 15-percent figure, the board took into account a number of factors: the records of public opinion polls in previous presidential elections and their relationship to election outcomes; the substantial obstacles faced by nonmajor party candidates; and variations among public opinion polling techniques and the precision of their results. The board concluded that any nonmajor party candidate who, despite the odds such candidates face, received even a 15-percent level of support in the polls should be regarded as a significant force in the election.

The League's board also decided that it was essential to apply the criteria to nonmajor party candidates as close in time to the first Debate as was realistically possible. To allow a sufficient amount of poll data to be gathered between the last major-party convention and the scheduled first Debate, which was targeted for the third week in September, it was clear that the League could not effectively apply the criteria until the second week in September.

At the same August 10 press conference, it was announced that the League would extend formal invitations to the major-party candidates later that week at the conclusion of the Democratic National Convention. (The Republicans had met in July.)

Realizing that decisions made in early September, while appropriate at that time, might not remain so, the League's board had also determined that it was essential, in order to be faithful to the purposes of the Debates, to reserve "the right to reassess participation of nonmajor party candidates in the event of significant changes in circumstances during the debate period." League President Ruth J. Hinerfeld gave clear notice at the August 10 press conference that the board would review such candidates' standings before subsequent debates in light of the established criteria, then extend or withhold invitations accordingly.

The establishment of the criteria cleared the way for the League to invite candidates to debate.

The Politics of Debating

By the summer of 1980, as the League was ready to extend invitations to the major-party candidates, the public commitments those candidates had made in the spring to participate in League-sponsored Debates had begun to waver. The political climate had changed. John Anderson's independent candidacy had gained momentum and had become a force to be reckoned with by both the candidates and the League.

On August 19, a week after the Democrats nominated Jimmy Carter as their standard bearer in 1980 (Ronald Reagan had already been nominated by the Republican Party), the League formally invited Jimmy Carter and Ronald Reagan to participate in a series of three Presidential Debates — the final date

sites and formats to be worked out at a later time.

By late August, neither candidate had said yes to the League's invitation. Starting on August 26, the League began to meet with their representatives in joint session to discuss the whole debate package, including the number of debates, dates, sites and formats, and to secure an agreement from both candidates to debate. Carter strategists wanted earlier debates, Reagan strategists wanted later debates; Carter representatives wanted more debates, Reagan representatives wanted fewer debates. All these specifics were put on the table for discussion – none of the differences seemed insurmountable. Yet at the end of this meeting neither side made a commitment to debate – each was waiting to see whether John Anderson would be included.

On September 9, after reviewing data from five different polling organizations, in consultation with three polling experts (not involved in the polls being used), the League announced that John Anderson met its criteria, and he was immediately invited to participate in a three-way Debate in Baltimore on September 21.* He accepted immediately, as did Ronald Reagan. Jimmy Carter announced that he would participate in a three-way Debate only after a two-way Debate with Ronald Reagan. Having established its criteria and having invited John Anderson, the League would not agree to Carter's proposal.

Following the September 9 decision, the League set up meetings with the candidat representatives to reach agreement on the details of the first Debate, scheduled for September 21. All aspects of this first Deb in Baltimore were agreed upon by Reagan Anderson representatives. Carter had still agreed to debate.

The invitation to debate remained open Jimmy Carter, and the League indicated th third podium would be held in readiness f him at the Baltimore Debate in the hope th he would be present. For several days, the possibility of a third podium or "empty cha was the source of considerable speculatior the press and a favorite topic for political cartoonists. However, when it became app ent that Jimmy Carter would not change hi mind about participating in a three-way De bate, the League announced that there wo be no "empty chair" in Baltimore. The first 1980 League-sponsored Debate took place September 21 as scheduled, but only Reag and Anderson took part. (See Appendix B f details on 1980 Debates.)

In sponsoring the Baltimore Debate, the League had held firm to its plan to invite al significant candidates to debate and had not agreed to Carter's condition that he would appear in a three-way Debate only after debating Ronald Reagan one-on-one. However, the League also recognized that the Baltimore Debate had failed to meet its goal of giving voters an opportunity to see and hear all of the significant presidential candidates at the same time, in the same place under the same conditions. Unfortunately, prospects for a three-way Debate did not improve after September 21. With Carter's terms unchanged and with Anderson still showing enough support in the polls to m the League's criteria for participation, it appeared there might be no further debates.

Yet it was becoming increasingly clear th the public wanted more debates. The Leag

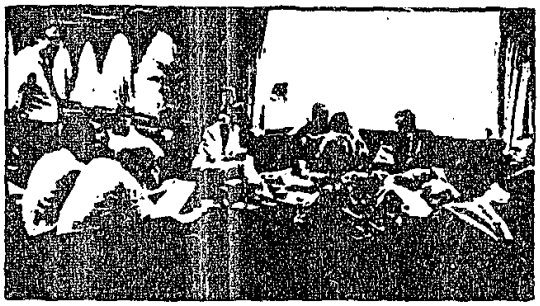
*The five polling organizations whose data the League examined were: Louis Harris Associates, the Los Angeles Times, the Roper Organization, NBC/Associated Press and the Gallup Poll. The three polling experts consulted by the League were : Mervin Field, Chairman of the Board of the Field Research Corporation; Lester R. Frankel, Executive Vice-President of Audits and Surveys, Inc.; and Dr. Herbert Abelson, Chairman of the Board of Response Analysis Corporation.

was caught between the "irresistible force" of voter demand and the "immovable object" of Carter's demand. In an effort to break the stalemate, the League called all three candidates' representatives shortly after the Baltimore Debate and put forward a new package. The League now offered a two-way Debate between Carter and Reagan *tied to* a three-way Debate among Carter, Reagan and Anderson. This time Carter and Anderson accepted, but Reagan rejected the plan.

At the same time the League made this offer, it also invited all three vice-presidential candidates to participate in a Debate in Louisville, Kentucky. Democrat Walter Mondale said yes, Independent Patrick Lucey said yes, but Republican George Bush said no. When Bush said no, Mondale then declined the League invitation, and the vice-presidential debate was cancelled.

The presidential series also appeared doomed. The League withdrew its proposal when no agreement could be reached, and there seemed very little hope of working out any future agreement. In the next few weeks, however, several developments helped to break the stalemate. Voter interest in a debate between the major-party candidates continued to build, as evidenced by major national public opinion polls released during that period. Editorials and columns appeared in some of the nation's leading newspapers and magazines calling on Jimmy Carter and Ronald Reagan to debate one-on-one.

During this same period, the polls also showed that John Anderson's support was eroding. In mid-October, in keeping with the policy established when the criteria were announced, the League's board reviewed his eligibility for participation. The board examined the results of five national polls taken between September 27 and October 16, conducted by the same polling organizations whose results the League had examined in



LWVEF officials brief the journalists who formed the panel of questioners for the debate in Baltimore between Ronald Reagan and John Anderson.

making its early September decision. Four of these five polls showed John Anderson's level of support below 15 percent, clearly below the levels of support he received in those same polls in early September. In consultation with the same three polling experts with whom it had conferred earlier, the League's board determined that John Anderson no longer met the League's criteria. The League then — on October 17 — invited Jimmy Carter and Ronald Reagan to debate in Cleveland, Ohio on October 28. Both candidates accepted the invitation.

The scenario was very different from that first envisioned by the League. As originally planned, a debate so late in the campaign would have been the last in a series of three, a series that would have offered the possibility of varying the subject matter and format. Now, the two main contenders would have only one chance to face one another. October 28 had become transformed from one in a series of opportunities for candidates and voters to deal thoughtfully with the issues into a winner-take-all event.

With such high stakes, planning for the actual Debate was a delicate process. Candidates' representatives were concerned about audience size, color of backdrop, the place-

ment of still photographs in the hall, etc. But the format was of greatest concern.

For the very reason that the Cleveland Debate would now be the only one between the two major-party candidates, the League urged a format that would produce the freest possible exchange on the broadest possible range of campaign issues — namely, using only a moderator to direct the flow of exchange between the two candidates. It was a format that had worked exceptionally well in the second of the 1980 League-sponsored Forums in Chicago.

For exactly the same reason — that it was to be the only Debate between Carter and Reagan — this format was not acceptable to either candidate. With the stakes so high, neither was willing to take his chances on such a free-flowing format. Both insisted on a more predictable exchange, using a moderator and panelists as in the 1960 and 1976 debates.

The League, like many viewers and press critics, was far from satisfied with either this format or that of the September Debate. The fact was, however, that the candidates' representatives insisted on the "modified press conference" format of both Debates, negotiated to the minutest detail. It was that or nothing.

Closely allied to the format issue was that of panel selection. The League had developed a roster of 100 journalists from which the moderators and panelists for both Debates were finally drawn. League staff conducted an exhaustive search through consultation with professional media associations, producers of major news analysis shows and editors and news directors representing minority media. Particular attention was given to the journalists' areas of expertise and their reputation for fair and objective reporting of the issues.

The final selections were made by the League in consultation with the co-chairs of

The Lea

When the League announced in No[illegible] 1979 its intention to sponsor a seri[illegible] Presidential Forums and Debates, it [illegible] the midst of a prolonged struggle o[illegible] ing sources and the structure of fed[illegible] candidate debates with the Federal [illegible] Commission (FEC), the agency set u[illegible] regulate federal elections under the [illegible] Federal Election Campaign Act (FEC[illegible] the provisions of that act made it un[illegible] any corporation or union "to make a [illegible] tion or expenditure in connection wi[illegible] election to any political office...." I[illegible] while the LWVEF was planning the 19[illegible] Presidential Forums, the FEC inform[illegible] vised the League that corporate and [illegible] funds to finance the Forums would n[illegible] prohibited as long as such contributi[illegible] not have the "effect of supporting or [illegible] particular parties or candidates." But [illegible] after the LWVEF had already conduct[illegible] forums series partly financed by corporate and union contributions, the FEC issued a policy statement barring 501(c)(3) organizations such as the LWVEF from accepting corporate or union donations to defray the costs of such events as debates. The FEC admitted that corporate and union donation[illegible] to the LWVEF were not political contribution[illegible] or expenditures under FECA's definition of those terms, but the agency said tha[illegible] LWVEF's expenses were nevertheless [illegible] bursements "in connection with" an e[illegible] and therefore could not come from c[illegible] or union sources.

The 1976 decision, which was mad[illegible] advance of the League-sponsored Fo[illegible] Debates, had a devastating effect on [illegible]

and the FEC: Financing the Debates

plans to fund these Presidential Debates. Forced to rely solely on contributions from individuals and unincorporated organizations, the League was unable to raise enough money to cover the full cost of the 1976 Debates.

On February 11, 1977, convinced that Presidential Debates were an important educational service to the public, and fearing the FEC decison would have an impact on state and local League-sponsored candidate events, the League of Women Voters of the United States, the League of Women Voters Education Fund and the League of Women Voters of Los Angeles sued the FEC, challenging its decision to prohibit the LWVEF from accepting corporate and union money.

As a result of the lawsuit and FEC public hearings on the importance of debates to an informed electorate, the FEC cancelled its earlier decision and agreed to begin the process of writing regulations that would clarify issues of debate funding and sponsorship. The League did not believe that any regulations in this area were necessary but saw them as a way to remove the chilling effect of the FEC's prior action on potential corporate donors.

The process of setting those regulations took almost three years. In order to guarantee nonpartisanship, the FEC formulated regulations limiting sponsors of debates to those who might reasonably be expected to act in a nonpartisan manner and by establishing strict rules as to who might be invited to participate in the debate.

The agency's first attempt at regulation was vetoed by the Senate in September 1979. Thus the FEC began the rulemaking process again and developed a regulation that took effect on April 1, 1980, barely in time for the League to undertake the massive fundraising necessary to sponsor the 1980 Presidential Debates. This regulation broadened sponsorship of debates to 501 (c)(3) and 501 (c)(4) organizations that did not endorse, support or oppose political candidates or parties. It also allowed bona fide broadcasters and the print media to spend corporate money to stage debates. It left to the discretion of the sponsor the method by which candidates were chosen to participate. The FEC stated that debates are required to be nonpartisan and left it up to the sponsor as to how that was to be achieved.

As soon as the new regulation went into effect, the League began to raise money from corporations for the 1980 Presidential Debates. A breakthrough in securing the necessary amount of funding came when six major corporations each contributed $50,000. (See inside front cover for list of corporate contributors.) (The largest single contribution in the history of the LWVEF's Debates project was a gift of $250,000 from the Charles Benton Foundation in 1976, made before the 1976 FEC ruling.)

In all, the League raised and spent nearly $700,000 for the 1980 Presidential Forums and Debates, which could not have taken place without the generous contributions of the corporations and individuals involved. This $700,000 was greatly augmented by the value of volunteer hours — particularly those of League members in Baltimore, Louisville, Portland and Cleveland — making the Debates far more than a million dollar effort.

the Advisory Committee, Carla Hills and Newton Minow, after they discussed the pool of journalists with the candidates' representatives.

The League preferred to keep the candidates' representatives entirely out of the panel selection process. However, because of the tremendous significance of the Cleveland Debate, the candidates' representatives insisted on being involved in almost every decision — large and small.

A Look Back . . . and a Look Ahead

Scholars Steven Chaffee and Jack Dennis write that while many questions about debates need more study and research, one conclusion drawn from studies of the 1960 and 1976 presidential debates is that "the debates make substantial contributions to the process of democracy and perhaps even to the longer-term viability of the system. The research offers a great deal of support for the proposition that the debates serve important informational functions for voters."[1] They enable the voter to weigh the alternatives being proposed by each candidate, and "as an information-gathering device they have the unique virtue of allowing a simultaneous consideration of the alternatives,"[2] without which the voter is forced to gather information from "a large series of such discontinuous, one-sided presentations as advertisements, news reports of speeches, and party conventions."[3]

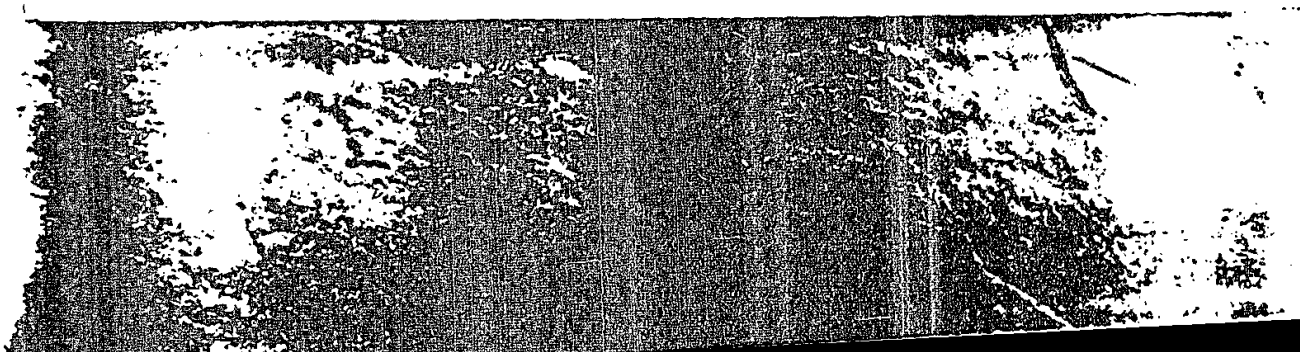
When scholars, historians and political observers write the definitive history of the Presidential Debates, how will they be vi What contributions did they make towar democratic system of government? How the League's experience as sponsor — bo successes and its failures — serve to imp the quality of debates in the future?

Although it is too early to achieve an historical perspective, it is possible to ma some telling observations about the sign cance of the 1980 Presidential Debates ar the lessons to be learned. The nature anc quality of the 1984 presidential campaign — fast-approaching event — will be affected how constructively we use the intervening time to evaluate the 1980 Presidential Deb experience in order to build a better one i 1984.

Presidential Debates in 1984? Yes. Presi tial Debates every four years are now beco ing the norm: never before have we had debates in consecutive presidential electio This nascent tradition, together with voter heightened sense of entitlement — a right to see and hear presidential candidates debate the issues at the same time, in the same place and under the same conditions — will weigh heavily against the reluctance of future candidates to participate.

But even if the weight of voter expectation overrides the resistance of major-party candidates, the complex problems surrounding the participation of minor-party and independ candidates remain. In a 1979 report, the 2 Century Fund Task Force on Televised Pres dential Debates called this "the single mos difficult issue confronting Presidential Debates." (The 20th Century Fund is an independent research foundation that studies economic, political and social institutions a issues.) In 1980, the League tackled the iss with its eligibility criteria. That approach will be a starting point for all future efforts to se rules for debate participation.

[1]*The Past and Future of Presidential Debates*, Austin Ranney, Ed. "Presidential Debates: An Empirical Assessment" by Steven H. Chaffee and Jack Dennis, 1979, American Enterprise Institute, p. 98.
[2]Ibid., p. 99.
[3]Ibid., p. 99.



Backstage at the Debates

In 1975, the Federal Communications Commission ruled that debates could be exempt from the "equal time" restrictions of Section 315 of the Communications Act of 1934 if sponsorship was independent of both broadcasters and candidates and the debates could be classified as bona fide news events. Thus, in 1976 and 1980, the League served as the independent sponsor of the Debates, which were covered by the broadcast media as news events.

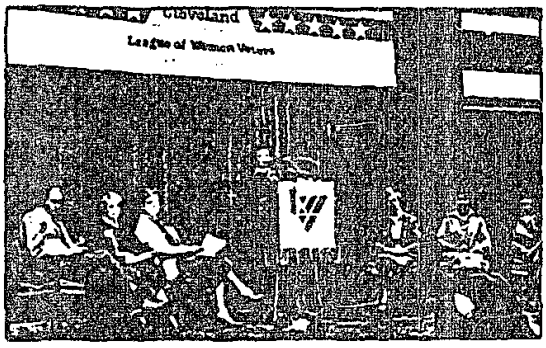
In 1980:

- 45.8 million households, approximately 120 million viewers, in the United States watched the Carter-Reagan Debate.
- 1,204 members of the media were present in Baltimore to cover the Anderson-Reagan Debate; 1,632 media representatives were in Cleveland to cover the Carter-Reagan Debate. This included still photographers and print, TV, radio and foreign journalists.
- The Voice of America broadcast the Debates live or tape-delayed in English to a worldwide listening audience. VOA's 39 language services used excerpts of the Debates in translation for newscasts. The Debates were broadcast live in Spanish to all of Latin America.

The League itself gives the 1980 Presidential Debates experience mixed reviews. It takes pride in the history-making nature of its efforts. And it takes pride in adhering to its main goal. The League's persistence *did* enable American voters, in record-breaking numbers, to hear significant presidential candidates debating the issues. It met an unquestionable "consumer demand": an October 1980 national public opinion poll found that 73 percent of the people surveyed wanted such debates. Voters had two opportunities to make side-by-side comparisons of candidates and their positions on the issues. In an election characterized by slick candidate packages — 30- and 60-second radio and television advertisements and canned speeches — the League Debates gave the voters the solid information they needed to help them cast an informed vote.

Yet despite the clear demand from voters for this service, the 1980 Presidential Debates were in constant jeopardy. League plans for a comprehensive series of four Debates — three among presidential candidates and one among their running mates — had to be abandoned; a three-way Debate never took place; and because the major-party candidate met only once, that Debate took on all the burdens of a "winner-take-all" event. Issues concerning structure and format were negotiated to the minutest detail. Candidates were unwilling to try new formats, and they threatened to walk away from debating at many turns if they did not get what they wanted.

These difficulties faced by the League in 1980 will be facing the League or any other debates sponsor in the future. Whenever a major candidate sees disadvantages in sharing a platform with an opponent, a debate may not take place. And whenever the smallest featu of the plan seems disadvantageous, the thre to walk away can hold the effort hostage. To ensure that improved debates become a regular part of every presidential election, ar to examine and improve the political communications process (how candidates communicate to voters their stands on issue the LWVEF has embarked on a three-year



Above, LWVEF Chair Ruth J. Hinerfeld briefs the press the day before the Cleveland debate between Jimmy Carter and Ronald Reagan.

project leading up to the 1984 presidential election. The League will reach out to the 73 percent of Americans who have said they are in favor of debates through their various organizations, institutions and as individuals.

The purpose of this effort is to raise issues about the ways in which candidates communicate with the electorate, and to educate the public about debates and the whole political communication process. Th events will include town meetings, opinion leader gatherings and hearings among others. Above all, this project will identify a mobilize the debates constituency so that constituency can demand of future candid that they face each other and the public in open exchange of ideas.

The League's primary goal is to see that presidential debates occur in 1984 and in t future, and that the debates process contir to be improved. The League's experience a sponsor of Presidential Debates in 1976 ar 1980, combined with the long tradition of state and local League-sponsored candida events, places the organization in an ideal position to ensure that this happens.

Appendix A
1980 Presidential Forums*

First Presidential Forum

Wednesday, February 20, 1980
8:30-10:00 p.m. EST
Manchester, New Hampshire

Moderator: Howard K. Smith, broadcast journalist

Panelists: Joseph Kraft, syndicated columnist
Eileen Shanahan, managing editor, *Washington Star*

Candidates: Representative John Anderson
Senator Howard Baker
Ambassador George Bush
Governor John Connally
Representative Philip Crane
Senator Robert Dole
Governor Ronald Reagan

Format: Part I. Seven questions were posed. The candidate to whom a question was first addressed had two minutes to respond; the other six candidates each had one minute to respond. Total: 1 hour.

Part II. Individuals from the audience directed their questions to a specific candidate who was given one and one-half minutes to respond. Total: 23 minutes.

Part III. Each candidate was given one minute to make a closing statement. Total: 7 minutes.

*Questions for each forum could cover any subject.

Second Presidential Forum

Thursday, March 13, 1980
8:00-9:30 p.m. CST
Chicago, Illinois

Moderator: Howard K. Smith

Candidates: Representative John Anderson
Ambassador George Bush
Representative Philip Crane
Governor Ronald Reagan

Format: Part I. The moderator directed questions to specific candidates; after the initial response, all the candidates were free to participate in a discussion of the issue. Total: 90 minutes.

Part II. Individuals from the audience asked questions; the format for response was the same as in Part I. Total: 26 minutes.

Part III. Each candidate was allotted one minute for a closing statement. Total: 4 minutes.

Third Presidential Forum

Wednesday, April 23, 1980
8:00-9:00 p.m. CST
Houston, Texas

Moderator: Howard K. Smith

Candidates: Ambassador George Bush
Governor Ronald Reagan

Format: Same as in Second Presidential Forum. Part I: 45 minutes. Part II: 13 minutes. Part III: 2 minutes.

Appendix B
1980 Presidential Debates*

First Presidential Debate

Sunday, September 21, 1980
10:00-11:00 p.m. EST
Baltimore, Maryland

Moderator: Bill Moyers, public television commentator/producer

Panelists: Charles Corddry, reporter, *Baltimore Sun*
Soma Golden, editorial writer, *New York Times*
Daniel Greenberg, syndicated columnist
Carol Loomis, board of editors, *Fortune* magazine
Lee May, reporter, *Los Angeles Times*
Jane Bryant Quinn, columnist, *Newsweek* magazine

Candidates: Representative John Anderson
Governor Ronald Reagan

Format: Each panelist asked one question. Each candidate was given two and one-half minutes to respond; then each had an additional one minute 15 seconds to challenge the other's response. Each candidate was allotted three minutes for a closing statement. Total: one hour.

*Questions for each debate could cover any subject.

Second Presidential Debate

Tuesday, October 28, 1980
9:30-11:00 p.m. EST
Cleveland, Ohio

Moderator: Howard K. Smith

Panelists: Harry Ellis, Washington staff correspondent, *Christian Science Monitor*
William Hilliard, assistant managing editor, *Portland Oregonian*
Marvin Stone, editor, *U.S. News and World Report*
Barbara Walters, correspondent, ABC News

Candidates: President Jimmy Carter
Governor Ronald Reagan

Format: Part I. Each panelist directe one question to a candidate who was given two minutes respond. The panelist then asked a follow-up question, and the candidate had one minute to respond. The san question was directed to the other candidate, who had the same opportunity to respond to that question and a follow-up question. Each candidate was then given one minute to challenge the other's response. Total: 40 minutes.

Part II. Each panelist aske one question to which eac candidate had two minute respond. Each candidate v then given one and one-ha minutes for a rebuttal. Eac had one minute for a surr buttal. Total: 40 minutes.

Part III. Each candidate h three minutes for a closin statement. Total: 6 minute

Appendix C

Public Advisory Committee*

Carla Hills, Co-Chair
Robert Anderson
Jerry Apodaca
James David Barber
Charles Benton
Shirley Temple Black
Douglass Cater
Sol Chaikin
Archibald Cox
Lee Hanna
Dorothy Height
Harriet Hentges
Ruth J. Hinerfeld
Newton Minow, Co-Chair
Benjamin Hooks
Pat Hutar
Jim Karayn
Jewel Lafontant
Lee Mitchell
Austin Ranney
Sharon Percy Rockefeller
Carmen Delgado Votaw
Paul Wagner
Charls Walker
Caspar Weinberger

Ex-officio

Bill Brock, Chairman
Republican National Committee

John White, Chairman
Democratic National Committee

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*When the Advisory Committee was formed, Anne Armstrong served as one of the co-chair She resigned on July 2, 1980 to play a major role in the Republican presidential campaign. was succeeded as co-chair by Carla Hills.

B

COMMISSION ON
PRESIDENTIAL DEBATES

1200 New Hampshire Avenue, N.W. • Suite 445 • Washington, D.C. 20036 • (202) 872-1020 • Fax (202) 783-5923

Embargoed for release until
10:00 a.m. EST,
Thursday, January 6, 2000

Contact: John Scardino (202) 737 7733
Media Director, or
Janet Brown (202) 872 1020
Executive Director

COMMISSION ON PRESIDENTIAL DEBATES ANNOUNCES CANDIDATE SELECTION CRITERIA, SITES AND DATES FOR 2000 DEBATES

(Washington, D.C.,...) Commission on Presidential Debates (CPD) co-chairmen Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr. today announced the candidate selection criteria to be used in the 2000 general election debates as well as the dates and sites for the debates.

Kirk and Fahrenkopf noted that after each of the last three general elections, the CPD had undertaken a thorough review of the candidate selection criteria used in that year's debates. After extensive study, the CPD has adopted a three-part standard for 2000 which is detailed in the attached document. "The approach we announce today is both clear and predictable," Kirk and Fahrenkopf said.

The CPD co-chairmen also announced four dates and sites for the 2000 debates:

- First presidential debate: Tuesday, October 3, John F. Kennedy Library and the University of Massachusetts, Boston, MA
- Vice presidential debate: Thursday, October 5, Centre College, Danville, KY
- Second presidential debate: Wednesday, October 11, Wake Forest University, Winston-Salem, NC
- Third presidential debate: Tuesday, October 17, Washington University in St. Louis, MO
- Madison, WI and St. Petersburg, FL have been selected as alternate sites.

Established in 1987, the nonpartisan, nonprofit CPD sponsored and produced the 1988, 1992, and 1996 general election debates. The CPD also undertakes research and partners with educational and public service organizations to promote citizen participation in the electoral process. In 2000, the CPD, with McNeil/Lehrer Productions, will produce "Debating our Destiny," a two-hour PBS special featuring interviews with participants in presidential debates since 1976.

The CPD intends to make extensive use of the Internet in its 2000 educational efforts, building on its 1996 voter outreach program, DebateWatch '96. Details of the CPD's Internet activities, which will be supported by corporate and nonprofit entities specializing in interactive application of the Internet, will be announced in the next several weeks. Background information on the CPD's mission, history and educational projects is available on its website: www.debates.org. The CPD will collaborate with the Freedom Channel in its work.

(more)

Co-chairmen
Frank J. Fahrenkopf, Jr.
Paul G. Kirk, Jr.

Executive Director
Janet H. Brown

Honorary Co-chairmen
Gerald R. Ford
Jimmy Carter
Ronald Reagan

Directors
Clifford L. Alexander, Jr.
Howard G. Buffett
Senator Paul Coverdell
John C. Danforth
Representative Jennifer Dunn
Antonia Hernandez
Caroline Kennedy
Newton N. Minow
Dorothy Ridings

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 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:

(more)

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.

Adopted: January 5, 2000

###

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4987
The Commission on Presidential Debates	)	

DECLARATION OF FRANK NEWPORT, Ph.D.

I, Frank Newport, give this declaration based on personal knowledge.

1. I am Editor-in-Chief of the Gallup Poll. For over sixty years, the Gallup Organization has been the world leader in the measurement and analysis of people's attitudes, opinions and behaviors. I have been associated with the Gallup Organization since 1987, and have served as Editor-in-Chief of the Gallup Poll since 1990. In my present capacity, I have direct or indirect responsibility for the over 50,000 interviews conducted annually by the Gallup Poll.

2. Prior to joining the Gallup Poll, I was a partner at the Houston research firm of Tarrance, Hill, Newport and Ryan, where I conducted public opinion and market research for a wide variety of businesses and organizations across the country. In that capacity, I was involved in the implementation and analysis of hundreds of market research and public opinion polls.

3. I obtained my master's degree and Ph.D. in Sociology from the University of Michigan and have taught sociology at the University of Missouri – St. Louis. My writing on public opinion polling has appeared in numerous scholarly publications, including the American Sociological Review, the New York Times, the American Journalism Quarterly, the Journal of Political and Medical Sociology, Social Forces, Public Opinion Quarterly, and Public Perspectives, and I regularly appear on national television and radio programs as

an expert on public opinion polling. I also serve on the Board of Directors of the Roper Center for Public Opinion Research and as a Trustee of the National Council on Public Polls. I have extensive experience in the conducting of public opinion polling, the methodologies used by public opinion pollsters, the leading organizations involved in public opinion polling and the strengths and weaknesses of public opinion polling.

4. The science of public opinion polling is by far the best mechanism we have for accurately measuring public sentiment. Public opinion polling in this country is a highly developed and tested scientific process by which polling experts seek to arrive mathematically and objectively at the best estimate of public opinion on a specific topic at specific time. Public opinion polling, and in particular national polling conducted during the presidential general election campaign, has a high degree of reliability. The National Council on Public Opinion Polls ("NCPP") recently conducted a study to examine the reliability of pre-election polling conducted in the 1996 presidential election. NCPP averaged the final poll estimates of several leading survey organizations and found that the public polling results matched very closely, within 2%, the actual electoral results. The NCPP also analyzed final presidential election polls dating back over 50 years. NCPP's study found that average poll error has been similarly low for presidential elections between 1956 and 1996. Moreover, both the methodology and frequency of political polling have improved and continue to improve. (The 1948 election is often cited by polling critics as proof of the unreliability of polls. Not only has the science of conducting public opinion polling advanced tremendously since 1948, but the polls conducted in 1948 were conducted far in advance of Election Day. It is likely that significant shifts in voter sentiment occurred in the substantial interval between the time the polls were conducted and Election Day.)

5. One element of public opinion polling that is often misunderstood is the margin of sampling error. A poll seeks to pinpoint the best estimate of public opinion at a given time. The percentage figure reported by a polling organization reflects that organization's best estimate of the matter surveyed. The margin of sampling error that is usually reported with survey results indicates that, due to a variety of random factors, the reported sample estimate *could* vary by a certain number of percentage points from the actual state of public opinion on that day. That does not mean that a result anywhere within the margin of error is just as likely as the reported estimate. Rather, the reported result is the polling organization's best objective estimate of where public opinion stands at a specific point in time.

6. Another way in which polls can be misinterpreted is when the result of an election is compared to a poll taken well before the election as a means of criticizing the perceived accuracy of the poll. A public opinion poll is an estimate of public opinion at the time the poll was taken, and is not a prediction of where public opinion will be at a later point in time.

7. I currently serve as a consultant to the CPD and in that regard provide CPD with consulting services and advice in the areas of polling methodology and statistics. I was retained in this connection prior to the CPD's announcement of its Nonpartisan Candidate Selection Criteria for 2000 General Election Debate Participation.

8. The CPD has made the determination that one of the criteria it will apply in deciding which candidates it will invite to participate in its 2000 debates is whether the candidate has 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 CPD's determination. I have been retained as a technical advisor to the CPD in connection with its implementation of the 15% standard.

9. The CPD has decided that in order to apply the above criterion, it will consider publicly reported results from the following national opinion polling organizations: ABC News / Washington Post; CBS News / New York Times; NBC News / Wall Street Journal; CNN / USA Today / Gallup; and Fox News / Opinion Dynamics. Each of these five polling organizations is nationally recognized and well-respected and each has a fine record of conducting public opinion polls in a reliable, professional and scientific manner. These polls are referred to widely for reputable estimates of a candidate's standing. In addition, these organizations each can be expected to poll frequently and regularly in the final weeks of the 2000 Presidential campaign.

10. CPD will not be conducting its own polls or instructing the organizations on how to conduct their research. Rather, CPD has made the decision to rely on the professional judgment of the survey research scientists and professionals who work for the polls to make decisions on how to collect their data and report their results. I am generally familiar with the methods employed by the five organizations, and I believe that it is reasonable to conclude that polls by these organizations will be conducted in a responsible, professional manner, and that they will be conducted frequently during the time period directly before and between the CPD's scheduled debates.

11. There will be some unavoidable differences in the methodology employed by each polling organization; for example, there may be differences in the definition of the national electorate, the sample size used, and the wording of questions used by the polling

organizations. These types of differences do not in and of themselves mean that any of the polls use unreasonable methodology or that any of the polls are conducted in a manner that is not objective. To avoid any methodological differences the CPD would have to limit itself to using one poll. Instead, in order to eliminate over-dependence on any one poll, CPD has chosen to use a simple average from among results recently reported by the above-listed organizations.

12. The use of an average of a number of polls in this context is reasonable. The average of a number of polls can be determined in a scientific, objective manner, and that average will be a good indicator of a candidate's level of public support. Indeed, the use by the CPD of an average could have the result of reducing random error that may be associated with the use of data from only one source.

13. Most national polls provide respondents the opportunity to volunteer the name of candidates whose names are not presented in the survey question. Some survey organizations also will ask "open-ended" questions in order to pick up the names of any candidates whose support appears to be building among the electorate. It is up to each polling organization to determine at what level of support it will report results relating to a particular candidate and at what level of support it will include a candidate's name in the question itself. Based on my experience, I believe that there is an extraordinarily high likelihood that any candidate who enjoys a level of support that approaches 15% of the national electorate would be included among the candidates identified in the polling questions asked by the organizations on whose polls CPD will rely.

14. Given polling practices in the recent past and my professional expectations regarding polling to be done in connection with the 2000 general election campaign, I

expect that the sample sizes for the five polls selected by the CPD will be roughly the same. In the event that they are not, I do not expect that minor differences in sample sizes used will in and of themselves cause significant variation in the results reported by the polls, or that small differences in sample sizes will make one poll significantly more reliable than another. This is based on my belief that each of the organizations employs professional, scientific and reliable methods. In addition, given past experience, the polling organizations are not likely to allocate undecided votes among the candidates at that stage of the campaign when the CPD will be consulting their polls. Some polling organizations allocate undecideds in their last polls before an election, while others never do allocate undecideds. Polling organizations also have different mechanisms they use to allocate undecideds. It is my understanding that the CPD has made the decision to rely on the judgment of the polling firms themselves in regard to the undecided allocation issue, and that the CPD will not attempt to repercentage or allocate undecideds itself.

15. I declare under penalty of perjury that the foregoing is true and correct. Executed on May 1, 2000.

Frank Newport