

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

AUG 02 2002

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR 5207

Date Complaint Filed: May 15, 2001¹

Date of Notification: May 29, 2001

Date Activated: September 11, 2001

Staff Member: Delbert K. Rigsby

Statute of Limitations: September 27, 2005

COMPLAINANT:

Max Englerius

RESPONDENTS:

Commission on Presidential Debates

Paul G. Kirk, Jr., Co-Chairman of the Commission on
Presidential Debates

Frank J. Fahrenkopf, Jr., Co-Chairman of the Commission
on Presidential Debates

Democratic National Committee and Andrew Tobias, as
treasurer

Republican National Committee and Robert M. Duncan, as
treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(4)

2 U.S.C. § 431(8)(A)(i)

2 U.S.C. § 431(9)(A)(i)

2 U.S.C. § 433

2 U.S.C. § 434

2 U.S.C. § 441a(f)

2 U.S.C. § 441b(a)

2 U.S.C. § 441b(b)(2)

11 C.F.R. § 100.7(b)(21)

11 C.F.R. § 102.1(d)

11 C.F.R. § 104.1(a)

11 C.F.R. § 110.13

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¹ On October 27, 2000, Max Englerius filed a complaint with the Commission. The Office of General Counsel determined that the complaint was improper because it was not sworn and notarized. Thereafter, Mr. Englerius refiled the complaint on May 15, 2001 which was sworn and notarized and this Office sent notifications to the respondents.

11 C.F.R. § 114.1(a)(2)(x)

11 C.F.R. § 114.2(b)

11 C.F.R. § 114.4(f)

INTERNAL REPORTS CHECKED: None

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter arose from a complaint filed with the Federal Election Commission (the "Commission") by Max Englerius (the "Complainant"). The complaint alleges that the Commission on Presidential Debates (the "CPD") was partisan in selecting candidates to participate in the Presidential debates in 2000. The complaint also alleges that the Democratic and Republican parties worked to arbitrarily restrict the participation in the Presidential debates to the candidates of the two parties. All of the respondents have responded to the complaint.²

II. FACTUAL AND LEGAL BACKGROUND

A. Law

The Federal Election Campaign Act of 1971, as amended, (the "Act") prohibits corporations from making contributions or expenditures in connection with federal elections. 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.2(b). The Act defines a 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);

² The Reform Party, the Natural Law Party and Mary Wohlford and Bill Wohlford, respectively, filed similar complaints against the CPD, the Democratic National Committee (DNC) and the Republican National Committee (RNC). *See* MURs 4987, 5004 and 5021. In those MURs, the Commission found no reason to believe that the CPD, the DNC and RNC violated the Act. The Complainants in MURs 4987 and 5004 appealed the Commission's decisions to the federal courts and those courts upheld the Commission's decisions. *See Buchanan v. Federal Election Commission*, 112 F. Supp. 2d 58 (D.D.C. 2000) and *Natural Law Party of the United States v. Federal Election Commission*, 111 F. Supp. 2d 33 (D.D.C. 2000).

see also 2 U.S.C. § 441b(b)(2). A contribution is also defined in the Commission's regulations at 11 C.F.R. § 100.7(a)(1). "Anything of value" is defined to include all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii)(A). The Act defines an 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).

The Commission's regulations at 11 C.F.R. § 100.7(b)(21) specifically exempt expenditures made for the purpose of staging candidate debates from the definition of contribution provided that the debates meet the requirements of 11 C.F.R. §§ 110.13 and 114.4(f). Non-profit organizations described in 26 U.S.C. §§ 501(c)(3) or 501(c)(4) that do not endorse, support, or oppose political candidates or political parties may stage candidate debates. 11 C.F.R. § 110.13(a)(1). The debates must include at least two candidates, and not be structured to promote or advance one candidate over another. 11 C.F.R. §§ 110.13(b)(1) and (2). Organizations that stage presidential debates must use pre-established objective criteria to determine which candidates may participate in the debate. 11 C.F.R. § 110.13(c). With respect to general election debates, staging organizations shall not use nomination by a particular political party as the sole objective criterion to determine whether to include a candidate in a debate. *Id.*

If a corporation staged a debate in accordance with 11 C.F.R. § 100.13, the expenditures incurred by that sponsoring corporation would be exempt from the definition of contribution. See 11 C.F.R. §§ 100.7(b)(21), 114.1(a)(2)(x) and 114.4(f)(1). As long as the sponsoring corporation complied with 11 C.F.R. § 110.13, other corporations may provide funds to the

sponsoring corporation to defray expenses incurred in staging the debate without being in violation of the Act. 11 C.F.R. § 114.4(f)(3).

The Act defines the term "political committee" to include "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 Act and the Commission's regulations. *See* 2 U.S.C. § 433 and 11 C.F.R. § 102.1(d); *see also* 2 U.S.C. § 434 and 11 C.F.R. § 104.1(a).

B. CPD's Criteria for Selecting Candidates to Participate in the 2000 General Election Debate

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."³ *See* CPD response (5/22/00) at 5. The Co-Chairmen of the CPD are Paul G. Kirk, Jr., and Frank J. Fahrenkopf, Jr. The CPD sponsored two presidential debates during the 1988 general election, three presidential debates and one vice presidential debate in 1992, and two presidential debates and one vice presidential debate in 1996. *Id.* The CPD sponsored three presidential and one vice presidential debate during the 2000 general election. The CPD accepts donations from corporations and other organizations to fund these debates.

³ In response to this complaint, the CPD submitted a letter to this Office stating the response that it made to MUR 4987 on May 2, 2000 would serve as its response in this matter.

On January 6, 2000, the CPD announced its candidate selection criteria for the 2000 general election debates. *Id.* at 2. It stated, "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." *Id.* The criteria are: (1) evidence of the candidate's constitutional eligibility to serve as President of the United States pursuant to Article II, Section 1 of the United States Constitution; (2) evidence of ballot access, such as the candidate appearing on a sufficient number of state ballots to have at least a mathematical chance of securing an Electoral College majority; and (3) indicators of electoral support by having 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 of eligibility.⁴ *Id.* at 9, 10. A candidate must meet all three criteria to participate in the debate. The CPD also stated that it would determine participation in the first scheduled debate after Labor Day 2000. *Id.* at 75. Furthermore, the CPD also stated that it would extend invitations to participate in the vice presidential debate to the running mates of the presidential candidates qualifying for participation in the CPD's first presidential debate, and invitations to participate in the second and third debates would be based upon the same criteria prior to each debate. *Id.*

⁴ Those five polling organizations are the ABC News/*Washington Post*; CBS News/*New York Times*; NBC News/*Wall Street Journal*; CNN/*USA Today*/Gallup; and Fox News/*Opinion Dynamics*. The CPD also retained Frank Newport, Editor-in-Chief of the Gallup Poll, as a consultant in implementing the 2000 candidate selection criteria. *Id.* at 9, 10.

C. Complaint

The complainant alleges that the Commission failed to ensure "free, open and fair elections in the 2000 Presidential election by establishing or allowing to be established, a privately held and completely partisan 'Presidential Debate Commission,' a [principal] aim of which was to keep other legitimate candidates from participating." Complaint at 1. The complaint also alleges that operatives of the Democratic and Republican parties monopolized the debates by "arranging to arbitrarily restrict participation in the Presidential debates to only candidates of their parties." *Id.* Furthermore, the complainant argues that other Presidential candidates were deprived of the right to campaign at those public forums and the public was deprived of the right to showcase and solicit votes for the candidates of their choice. *Id.*

D. Responses

1. Responses from the CPD to the Complaint

In response to the complaint, the CPD argues that no CPD Board member is an officer of either the Democratic National Committee or the Republican National Committee, and the CPD receives no funding from the government or any political party. CPD Response (5/22/00) at 5. The CPD also argues that any references to its founding as a bipartisan effort was an effort to ensure that it was not controlled by any one party, not an effort by the two major parties to control CPD's operations or to exclude non-major party candidates in CPD-sponsored debates. *Id.*, footnote 6.

In regard to its candidate selection criteria, the CPD argues that the purpose of the candidate selection criteria is to identify those candidates, regardless of party, who realistically are considered to be among the principal rivals for the Presidency. *Id.* at 2. Moreover, in regard

1 to the third criterion, the CPD states that it sets forth a bright line standard with respect to
2 electoral support, which is at least 15% of the national electorate as determined by the average
3 results of five selected national public opinion polling organizations at the time of the CPD's
4 determination of eligibility before each debate. *Id.* at 3. The CPD argues that in promulgating
5 the regulation, 11 C.F.R. § 110.13, the Commission permits the staging organization to
6 determine the objective criteria. *Id.*

7 With respect to the issue of electoral support and polling, the CPD argues that the
8 Commission has ruled in a previous matter regarding its 1996 candidate selection criteria that it
9 is appropriate for the criteria to include a measure of candidate potential or electoral support and
10 to use polls to measure that support.⁵ *Id.* at 3. Moreover, the CPD states that the five polling
11 organizations that it planned to employ are well-known, well-regarded, and will poll frequently
12 throughout the 2000 election. *Id.* at 16.⁶ The CPD also argues that, because public opinion shifts,
13 it will use the most recent poll data available before the debates. *Id.* In regard to any
14 methodological differences among the polls, the CPD states that taking the average of five polls
15 may reduce the random error that could come from using only one source, and averaging does
16 not invalidate the results. *Id.* Furthermore, the CPD, citing the declaration of Dorothy Ridings, a
17 CPD Board member, argues that requiring a level of electoral support of 15% of the national
18 electorate is reasonable because the "fifteen percent threshold best balanced the goal of being

⁵ The CPD is referring to the Commission's Statement of Reasons dismissing MURs 4451 and 4473 in which the Natural Law Party and Perot '96, Inc. respectively, challenged the CPD's 1996 candidate selection criteria for participation in the debates.

⁶ While this complaint was filed in May 2001 after the presidential debates, the CPD's response to the complaint was the same response that it submitted in May 2000 to the complaints referenced as MURs 4987, 5004 and 5021. Thus, the CDP's arguments cited here and below are in the present tense instead of the past tense.

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1 sufficiently inclusive to invite those candidates considered to be among the leading candidates,
2 without being so inclusive that invitations would be extended to candidates with only very
3 modest levels of support.”⁷ *Id.* at 14.

4 **2. Response from the DNC to the Complaint**

5 The DNC urges the Commission to dismiss the complaint against them and find no
6 reason to believe that the DNC has violated the Act or Commission regulations. DNC Response
7 at 2. The DNC argues that it is independent of the CPD and that Mr. Paul Kirk, CPD Co-
8 Chairman, who also served as DNC Chairman from 1985-1989, has held no office and played no
9 role in the DNC since 1989. *Id.* The DNC also states that no DNC member, officer or employee
10 sits on the Board of the CPD, and the DNC does not now play, nor has it ever played, any role in
11 determining CPD's criteria for candidate selection for the debates. *Id.*

12 **3. Response from the RNC to the Complaint**

13 The RNC requests that the Commission find no reason to believe that it violated the Act,
14 dismiss the complaint and close the file. RNC Response at 2. The RNC acknowledges that
15 Mr. Frank Fahrenkopf, Co-Chairman of the CPD, was Chairman of the RNC during the founding
16 of the CPD, but the CPD was never an official or approved organization of the RNC and does not
17 receive any funding or other support from the RNC. *Id.* at 1. Finally, the RNC states neither its
18 chairman during the 2000 election nor its current chairman have ever sat on the CDP's Board,
19 and that the RNC neither organized nor controls the CPD. *Id.*

20

⁷ The CPD also notes that John Anderson achieved this level of electoral support prior to the first presidential debate in 1980 and was invited by the League of Women Voters to participate in that debate. Furthermore, the CPD states that other presidential candidates, such as George Wallace in 1968 and Ross Perot in 1992, had high levels of support. *Id.* at 14.

III. ANALYSIS

Based upon the available evidence, it appears that CPD has complied with the requirements of section 110.13 of the Commission's regulations governing sponsorship of candidate debates. While the complainant argues that the CPD is a partisan organization, he has provided no evidence that the CPD is controlled by the DNC or the RNC. There is no evidence that any officer or member of the DNC or the RNC is involved in the operation of the CPD. Moreover, there does not appear to be any evidence that the DNC and the RNC had input into the development of the CPD's candidate selection criteria for the 2000 presidential election cycle. Thus, it appears that the CPD satisfies the requirement of a staging organization that it does not endorse, support or oppose political candidates or political parties. 11 C.F.R. § 110.13(a).

Furthermore, CPD's criteria for participation in the candidate debates appear to be pre-established, objective criteria as required by 11 C.F.R. § 110.13(c), and not designed to result in the selection of certain pre-chosen participants. The CPD's criteria for determining who may participate in the 2000 general election presidential debates consist of constitutional eligibility, appearance on sufficient state ballots to achieve an Electoral College majority, and electoral support of 15% of the national electorate based upon an average of the most recent polls of five national public opinion polling organizations at the time of determination of eligibility.

The Commission has accorded broad discretion to debate sponsors in determining the criteria for participant selection. In promulgating 11 C.F.R. § 110.13(c), the Commission stated:

Given that the rules permit corporate funding of candidate debates, it is appropriate that staging organizations use pre-established 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

1 were used to pick the participants, and that the criteria were not designed to result
2 in the selection of certain pre-chosen participants. The objective criteria may be set to
3 control the number of candidates participating in a debate if the staging organization
4 believes that there are too many candidates to conduct a meaningful debate.

5
6 60 Fed. Reg. 64,262 (December 14, 1995).

7 The CPD's candidate selection criteria have been challenged in the past. In MURs 4451
8 and 4473, the Natural Law Party and Perot '96, Inc. filed complaints with the Commission
9 against the CPD regarding its 1996 candidate selection criteria. The Commission found no
10 reason to believe that the CPD violated the law by sponsoring the presidential debates or by
11 failing to register and report as a political committee. The Commission noted, "the debate
12 regulations sought to give debate sponsors wide leeway in deciding what specific criteria to use."
13 Statement of Reasons in MURs 4451 and 4473 at 8 (April 6, 1998). With respect to polling and
14 electoral support, the Commission noted in MURs 4451 and 4473 that it declined to preclude the
15 use of polling or "other assessments of a candidate's chances of winning the nomination or
16 election" when promulgating 11 C.F.R. § 110.13. Furthermore, the Commission stated that
17 questions can be raised regarding any candidate assessment criterion and "absent specific
18 evidence that a candidate assessment criterion was 'fixed' or arranged in some manner so as to
19 guarantee a preordained result, we are not prepared to look behind and investigate every
20 application of a candidate assessment criterion." *Id.* at 9. Finally, in MURs 4451 and 4473, the
21 Commission referred to the Explanation and Justification for 11 C.F.R. § 110.13 which states
22 reasonableness is implied when using objective criteria. *Id.*

23 It should be noted that the CPD used a different set of candidate selection criteria for the
24 1996 debates than it used for the 2000 debates. However, the CPD's candidate selection criteria
for 2000 appear to be even more objective than the 1996 criteria. In 1996, the CPD's candidate

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1 selection criteria were: (1) evidence of national organization; (2) signs of national
2 newsworthiness and competitiveness; and (3) indicators of national enthusiasm or concern.

3 With respect to signs of national newsworthiness and competitiveness, the CPD listed factors,
4 such as the professional opinions of Washington bureau chiefs of major newspapers, news
5 magazines and broadcast networks; the opinions of professional campaign managers and
6 pollsters not employed by the candidates; the opinions of representative political scientists
7 specializing in electoral politics; a comparison of the level of coverage on front pages of
8 newspapers and exposure on network telecasts; and published views of prominent political
9 commentators. The CPD's candidate selection criteria for 2000, which consist of constitutional
10 eligibility, ballot access, and a level of electoral support of 15% of the national electorate based
11 upon the average of polls conducted by five major polling organizations, make it easier to
12 determine which candidates will qualify, and appear to be more objective than the 1996
13 candidate selection criteria. Given this, and the fact that the Commission's dismissed similar
14 challenges to CDP's selection criteria for the 2000 Presidential election in MURs 4987, 5004 and
15 5021 that have subsequently been upheld in federal court, it appears that the CPD's candidate
16 selection criteria for participation in the 2000 general election debates are in accordance with the
17 requirements of 11 C.F.R. § 110.13.⁸

18 Based upon the available evidence, it appears that the CPD satisfies the requirements of
19 11 C.F.R. § 110.13 to stage the debates. Because the CPD meets the requirements of 11 C.F.R.

⁸ In *Buchanan v. FEC*, 112 F. Supp. 2d 58 (D.D.C. 2000), Patrick Buchanan appealed the Commission's decision dismissing a complaint (MUR 4987) challenging the CPD's nonpartisan status, the CPD's selection criteria and his exclusion from the 2000 Presidential debates. The court granted the Commission's motion for summary judgment in that case.

§ 110.13, its expenditures are specifically exempted under 11 C.F.R. § 110.7(b)(21) from being considered contributions and are not subject to the Act. Additionally, because the CPD meets the requirements of 11 C.F.R. § 110.13, the CPD is not considered a political committee under 2 U.S.C. § 431(4) nor subject to the registration and reporting requirements of 2 U.S.C. § 433 and 2 U.S.C. § 434. Finally, as long as the CPD complies with 11 C.F.R. § 110.13, funds provided by corporations to the CPD to be used to defray expenses to stage Presidential debates are not prohibited contributions, but permissible under 11 C.F.R. § 114.4(f)(3).

For the foregoing reasons, the Office of General Counsel recommends that the Commission find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr., and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 441b(a) by making expenditures in connection with a federal election, 2 U.S.C. § 441a(f) by accepting prohibited contributions from corporations or making contributions to the Democratic National Committee or the Republican National Committee, 2 U.S.C. § 433 by failing to register as a political committee, or 2 U.S.C. § 434 by failing to report contributions.

Furthermore, the Office of General Counsel recommends that the Commission find no reason to believe that the Democratic National Committee and Andrew Tobias, as treasurer, violated 2 U.S.C. § 441b(a) by accepting prohibited contributions from the Commission on Presidential Debates, or 2 U.S.C. § 434 by failing to report contributions from the Commission on Presidential Debates. The Office of General Counsel also recommends that the Commission find no reason to believe that the Republican National Committee and Robert M. Duncan, as treasurer, violated 2 U.S.C. § 441b(a) by accepting prohibited contributions from the

Commission on Presidential Debates, or 2 U.S.C. § 434 by failing to report contributions from the Commission on Presidential Debates.

IV. RECOMMENDATIONS

1. Find no reason to believe that the Commission on Presidential Debates and Paul G. Kirk, Jr. and Frank J. Fahrenkopf, Jr., as Co-Chairmen, violated 2 U.S.C. § 433, 2 U.S.C. § 434, 2 U.S.C. § 441a(f), and 2 U.S.C. § 441b(a);
2. Find no reason to believe that the Democratic National Committee and Andrew Tobias, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a);
3. Find no reason to believe that the Republican National Committee and Robert M. Duncan, as treasurer, violated 2 U.S.C. § 434, and 2 U.S.C. § 441b(a);
4. Approve the appropriate letters; and
5. Close the file.

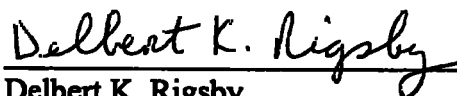
Date

8/2/02


Lawrence H. Norton
General Counsel


Gregory R. Baker
Acting Assistant General Counsel


Peter G. Blumberg
Acting Assistant General Counsel


Delbert K. Rigsby
Attorney