

THE LOCKED GATES TO TENSION CITY: THE COMMISSION ON PRESIDENTIAL DEBATES, THE FEC, AND THE TWO-PARTY SYSTEM

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ABSTRACT

Since John F. Kennedy and Richard Nixon walked into a Chicago television studio for the first general election presidential debate in 1960,¹ candidate debates have been a fundamental aspect of presidential campaigns and have had broader effects on society at large. The Commission on Presidential Debates (“CPD”) has been in charge of organizing the general election debates since it was created in 1987 by the Democratic and Republican parties.² In its tenure, the CPD has restricted its massive platform almost every election³ to the Republican and Democratic candidates through the use of criteria that seemingly follow the law’s requirement of being pre-established and objective.⁴ But the CPD’s criteria is neither truly objective, nor nonpartisan; it is effectively bipartisan. By ignoring and dismissing complaints about the CPD’s exclusion of third-party and independent presidential candidates, the Federal Election Commission (“FEC”), which is itself based on a bipartisan structure, reinforces the power of the partisan duopoly in American presidential elections.

There is a strong argument that the FEC should hold the CPD to the legal requirement of non-partisan access to its debates. The spirit of the law points in this direction. But in this, the law is wrong. Rather than commit to the pretense of entirely

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1. See *Debate History*, COMMISSION ON PRESIDENTIAL DEBATES, <http://debates.org/index.php?page=debate-history> (last visited Jan. 27, 2018) (the only presidential debates before 1960 were intraparty, for primary elections) [hereinafter *Debate History*].

2. *The Commission on Presidential Debates: An Overview*, COMMISSION ON PRESIDENTIAL DEBATES, <https://www.debates.org/about-cpd/overview/> (last visited Jan. 27, 2018) [hereinafter *CPD Overview*].

3. *1992 Debates*, COMMISSION ON PRESIDENTIAL DEBATES, <https://www.debates.org/debate-history/1992-debates/> (last visited Jan. 27, 2018).

4. See 11 C.F.R. § 110.13 (2017); *CPD Overview*, *supra* note 2.

open access in the elections, the FEC should revise its regulations to reflect the reality: American politics is run through a two-party system.

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INTRODUCTION

It is a popular myth that the first televised presidential debate, held in September 1960 between John F. Kennedy and Richard Nixon, was the triumph of style over substance.5 The belief that radio listeners thought Nixon won the debate, while television watchers were swayed by Kennedy's visual charisma, is based on weak empirical data and further biased by the demographics of the people who still did not own a television in 1960.6 But Nixon himself may have been persuaded, as he refused to participate in any more televised debates, which ensured that there were no presidential debates in 1968 and 1972.7

After Nixon, presidential candidates were once more willing to debate each other. The televised presidential debates returned, sponsored by the League of Women Voters in 1976, 1980, and 1984.8 Between 1984 and 1988, the Democratic and Republican National Committees joined together to take control of the presi-

5. Marie Morelli, 3 Myths about First Presidential TV Debate between Kennedy, Nixon, SYRACUSE.COM https://www.syracuse.com/politics/index.ssf/2016/09/3_myths_about_first_presidential_debate_between_kennedy_nixon.html (last updated Sept. 26, 2016) .

6. Id.

7. Id.

8. History, LEAGUE OF WOMEN VOTERS, https://www.lww.org/about-us/history (last visited Jan. 27, 2018).

dential debates and formed the Commission on Presidential Debates (“CPD”).⁹ The CPD claims it was formed to ensure stability in presidential debates, in contrast to the presidential debates between 1976-1984, which were “hastily arranged after negotiations between the candidates that left many uncertain whether there would be any debates at all.”¹⁰ The CPD has sponsored every televised general election presidential debate since 1988.¹¹

The thirty debates sponsored by the CPD since 1988 have had a total viewership of over 1.6 billion.¹² Eighty-four million people watched the first presidential debate in the 2016 general election, a race in which 137 million votes were cast.¹³ Access to this massive platform is controlled by a bipartisan joint venture between the Democratic and Republican parties.¹⁴ FEC regulations require that the CPD, in its role as a “staging organization,” act in a *nonpartisan* way; it may not simply select the nominees of the two major parties to participate in its debates.¹⁵ The CPD is nominally following the law as it selects debate participants based on seemingly neutral criteria.¹⁶ Candidates must: be constitutionally eligible for the presidency, have a mathematical possibility of winning the electoral college, and poll at 15 percent or more in an average of five surveys.¹⁷

But only one independent or third-party candidate has ever been invited to participate in a CPD debate.¹⁸ The Libertarian and Green parties have challenged the CPD’s criteria by filing an administrative complaint with the Federal Election Commission (“FEC”) and are now pursuing judicial review after their complaint was dismissed in *Level the Playing Field v. FEC*.¹⁹ In the greatest legal success to date in third-party candidates’ attempts to be included in presidential debates, a

9. *The League of Women Voters and Candidate Debates: A Changing Relationship*, LEAGUE OF WOMEN VOTERS, <https://www.lvv.org/league-women-voters-and-candidate-debates-changing-relationship> (last visited Jan. 27, 2018) [hereinafter *Changing Relationship*].

10. *CPD Overview*, *supra* note 2.

11. *Our Mission*, COMMISSION ON PRESIDENTIAL DEBATES, <http://debates.org/index.php?page=about-cpd> (last visited Oct. 11, 2018).

12. *Debate History*, *supra* note 1; A.J. Katz, *The Presidential Debates Set Ratings Records in 2016*, ADWEEK (Oct. 24, 2016, 5:30 PM), <http://www.adweek.com/tvnewser/the-presidential-debates-set-ratings-records-in-2016/309089>.

13. FED. ELECTION COMM’N, OFFICIAL 2016 PRESIDENTIAL GENERAL ELECTION RESULTS 7 (2017), <https://transition.fec.gov/pubrec/fe2016/2016presgeresults.pdf>.

14. See Harrison Wills, *Debate Commission’s Own Hot Topic*, OPENSECRETS.ORG (Oct. 2, 2012), <https://www.opensecrets.org/news/2012/10/debate-commission/> (stating “[t]he board of directors of CPD, a tax-exempt 501(c)(3) organization, certainly seems far more bipartisan than nonpartisan”).

15. “For general election debates, staging organizations(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.” FEC Candidate Debate Rule, 11 C.F.R. § 110.13(c) (2017).

16. See *CPD Overview*, *supra* note 2.

17. *Id.*

18. *1992 Debates*, *supra* note 3.

19. *Level the Playing Field v. Fed. Election Comm’n*, 232 F. Supp. 3d 130 (D.D.C. 2017).

federal judge has ordered the FEC to reconsider and better explain its rejection of this complaint.²⁰

If the third-party candidates are successful in court, the FEC will face two options: enforce the law as it stands, which requires nonpartisan access to the debates, or revise and clarify their regulations to allow for staging organizations to be bipartisan. The former would be in line with an idealized view of American politics; just as any kid can grow up to become president, any independent or third-party presidential candidate can participate in a debate. But the latter would more honestly reflect the overpowering two-party system that is the result of how our government and elections are structured.²¹

This note examines the legal structure controlling presidential debates through the hook of campaign finance. In Part I, I lay out the legal and historical background, explaining the relevant aspects of the Federal Election Campaign Act, the FEC, the CPD, and presidential debates in the U.S. In Part II, I discuss third-party and independent candidates' access to presidential debates generally. In Part III, I focus on an administrative complaint against the CPD filed with the FEC on behalf of third-party candidates, and the subsequent litigation. And in Part IV, I discuss the potential remedies that the FEC can employ.

I. LEGAL AND INSTITUTIONAL BACKGROUND

A. *The Federal Election Campaign Act and the FEC*

The origin of campaign finance reform can be traced back to 1907, when Teddy Roosevelt and Congress banned corporate contributions to political campaigns.²² The current regulatory structure was put in place when Congress passed the Federal Election Campaign Act of 1971 ("FECA") which required disclosures of federal campaign contributions, placed limits on media expenditures, established a public funding option for presidential campaigns, and created the legal framework for Political Action Committees ("PACs").²³ Congress amended FECA in

20. *Id.* at 148.

21. See Aaron Blake, *Why are There Only Two Parties in American Politics?*, WASH. POST: THE FIX (Apr. 27, 2016), <https://www.washingtonpost.com/news/the-fix/wp/2016/04/27/why-are-there-only-two-parties-in-american-politics/>.

22. *Mission and History*, FED. ELECTION COMMISSION, <https://www.fec.gov/about/mission-and-history/> (last visited Jan. 27, 2018); Jack Beatty, *A Sisyphian History of Campaign Finance Reform*, THE ATLANTIC (July 2007), <https://www.theatlantic.com/magazine/archive/2007/07/a-sisyphian-history-of-campaign-finance-reform/306066/>.

23. *The FEC and the Federal Campaign Finance Law: Historical Background*, FED. ELECTION COMMISSION, https://transition.fec.gov/pages/brochures/fecfeca.shtml#Historical_Background (last visited Jan. 14, 2019) [hereinafter *FEC Historical Background*]; 52 U.S.C. § 30101 (2012).

1974, and created the Federal Election Commission, an independent regulatory agency that administers and enforces federal campaign finance law.²⁴

The FEC is headed by a six-member commission, no more than three of whose members can be from the same political party.²⁵ Four votes are needed for any official FEC action, a requirement that was set “to encourage nonpartisan decisions.”²⁶ This peculiar characteristic of the FEC leads to “frequent 3-3 deadlocks on key votes” and as a result, the FEC has been criticized as an “institution designed to fail.”²⁷ The FEC’s paralysis crisis is so serious that Ann Ravel, FEC Chair in 2015, remarked that the “likelihood of the laws being enforced is slim . . . I never want to give up, but I’m not under any illusions. People think the FEC is dysfunctional. It’s worse than dysfunctional.”²⁸ Ravel agreed with a *New York Times* report²⁹ that the FEC is effectively making “unofficial law” by its deadlocked votes and referenced a quote from a campaign finance lawyer in a *Washington Post* article³⁰ that “we are in an environment in which there has been virtually no enforcement of the campaign finance laws.”³¹ The FEC’s systemic deficiencies can lead to under- and non-enforcement of federal election laws without requiring a deadlocked vote. It is worth noting that the Commission is not nonpartisan; it is bipartisan, a fact recognized by the Supreme Court.³² Thus, the FEC can—at least theoretically—agree harmoniously on actions (and inactions) that disadvantage third-party and independent candidates.

When the FEC and Congress have attempted structural reform to federal campaign finance laws, they have had a difficult time in the Supreme Court. In *Buckley v. Valeo* in 1976,³³ the Court developed a theory that using money to influ-

24. *FEC Historical Background*, *supra* note 23; 52 U.S.C. § 30101 (2012).

25. *Leadership and Structure*, FED. ELECTION COMMISSION, <https://www.fec.gov/about/leadership-and-structure/> (last visited Jan 27, 2018).

26. *Id.*

27. *Republican Election Commissioners Just Released Key Legal Documents—Nearly a Decade Too Late*, MOTHER JONES, <https://www.motherjones.com/politics/2017/02/federal-election-commission-republicans-mother-jones/> (last visited Jan 14, 2019).

28. Eric Lichtblau, *F.E.C. Can’t Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), <https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html>.

29. Nicholas Confessore, *Election Panel Enacts Policies by Not Acting*, N.Y. TIMES (Aug. 25, 2014), <https://www.nytimes.com/2014/08/26/us/politics/election-panel-enacts-policies-by-not-acting.html>.

30. Matea Gold, *Trump’s Deal with the RNC Shows how Big Money is Flowing Back to the Parties*, WASH. POST (May 18, 2016), https://www.washingtonpost.com/politics/trumps-deal-with-the-rnc-shows-how-big-money-is-flowing-back-to-the-parties/2016/05/18/4d84e14a-1d11-11e6-b6e0-c53b7ef63b45_story.html.

31. *See, e.g.*, Ann M. Ravel, Opinion, *Dysfunction and Deadlock at the Federal Election Commission*, N.Y. TIMES (Feb. 20, 2017), <https://www.nytimes.com/2017/02/20/opinion/dysfunction-and-deadlock-at-the-federal-election-commission.html>.

32. *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981).

33. *Buckley v. Valeo*, 424 U.S. 1 (1976).

ence an election is equivalent to political speech, and thus is protected under the First Amendment.³⁴ The Court used this principle to strike down the 1974 FECA amendment's overall limits on what a campaign can spend and limits on what wealthy candidates can spend on their own behalf.³⁵ In *Citizens United*,³⁶ the Supreme Court famously struck down the ban on corporate financing for advertisements that are "susceptible to no reasonable interpretation other than as an appeal to vote for or against a specific candidate."³⁷ That ban, which had been put in place by the 2002 Bipartisan Campaign Reform Act (also known as McCain-Feingold), had already been narrowed down from applying to all "electioneering communications" by the Supreme Court in 2007.³⁸

Despite these setbacks, FECA has the potential for robust enforcement beyond relying upon the FEC's actions. FECA states that "[a]ny person who believes a violation of this Act . . . has occurred, may file a complaint with the Commission."³⁹ If the Commission fails to act on that complaint within 120 days, or dismisses the complaint, an aggrieved party may file a petition with the U.S. District Court for the District of Columbia.⁴⁰ The District Court may then find that the FEC's dismissal or failure to act is contrary to law and order the agency to reconsider its (in)action within 30 days, "failing which the complainant may bring, in the name of such complainant, a civil action to remedy the violation involved in the original complaint."⁴¹ The ability to use administrative procedure to privatize election law enforcement comes in handy when the enforcement agency has developed such a reputation for inaction.⁴²

B. *The Commission on Presidential Debates*

The CPD is a private, nonpartisan organization, categorized under Section 501(c)(3) of the Internal Revenue Code, as required for it to be a "staging organization" per FEC regulations.⁴³ The CPD was formed in 1987 by an agreement between the chairmen of the two major parties,⁴⁴ and has sponsored the presidential

34. Adam Lioz, *Buckley v. Valeo at 40*, DEMOS (Dec. 15, 2015), <http://www.demos.org/publication/buckley-v-valeo-40>.

35. *Id.*

36. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

37. Adam Liptak, *Justices, 5-4, Reject Corporate Spending Limits*, N.Y. TIMES (Jan. 21, 2010), <http://www.nytimes.com/2010/01/22/us/politics/22scotus.html?pagewanted=all>.

38. *Id.*; *Fed. Election Comm'n v. Wis. Right to Life*, 551 U.S. 449 (2007).

39. 52 U.S.C. § 30109(a)(1) (2012).

40. 52 U.S.C. § 30109(a)(8)(C) (2012).

41. *Id.*

42. Katie O'Connor, *Obstinate Inaction at the FEC*, ACSBLOG (Mar. 1, 2017), <https://www.acslaw.org/acsblog/obstinate-inaction-at-the-fec>.

43. *CPD Overview*, *supra* note 2; 11 C.F.R. § 110.13(a) (2017).

44. *CPD Overview*, *supra* note 2.

and vice-presidential debates in every general election since 1988.⁴⁵ The debates it sponsors draw tens of millions of viewers and are moderated by prominent journalists such as Gwen Ifill, Bob Schieffer, and Jim Lehrer.⁴⁶

The parties, through the CPD, took over the role of debate sponsor for the 1988 presidential election, a role that the League of Women Voters Education Fund (“League”) played for the prior three presidential election cycles.⁴⁷ The League accused the Democratic and Republican parties of “trying to steal the debates from the American voter,”⁴⁸ and then waged a public battle over this move, arguing that this “change in sponsorship . . . put control of the debate format in the hands of the two dominant parties [and] deprive[s] voters of one of the only chances they have to see the candidates outside of their controlled campaign environment.”⁴⁹ The CPD did invite the League to co-sponsor the last debate in 1988, but the League would have had to agree to “its 16 pages of conditions not subject to negotiation,” which had been “negotiated ‘behind closed doors’ and was presented to the League as ‘a done deal.’”⁵⁰ The League refused to participate and put out this statement:

The League has no intention of becoming an accessory to the hoodwinking of the American public . . . the agreement [. . .] gave the campaigns unprecedented control over the proceedings. [League President] Neuman called “outrageous” the campaigns’ demands that they control the selection of questioners, the composition of the audience, hall access for the press and other issues Neuman said she and the League regretted that the American people have had no real opportunities to judge the presidential nominees outside of campaign-controlled environments.⁵¹

The League specifically objected to each campaign having a dedicated telephone line to the debate’s television producer, pre-approval of the moderator’s script, and

45. *Id.*

46. *Debate History*, *supra* note 1; A.J. Katz, *The Presidential Debates Set Ratings Records in 2016*, ADWEEK (Oct. 24, 2016, 5:30 PM), <http://www.adweek.com/tvnewsr/the-presidential-debates-set-ratings-records-in-2016/309089>.

47. See *Changing Relationship*, *supra* note 9. Notably, the League invited independent presidential candidate John Anderson to be a part of its debate in September 1980. Both Anderson and Ronald Reagan accepted, but Jimmy Carter declined to participate. The debate was held without him. *Presidential Debate in Baltimore (Reagan-Anderson)*, UNIV. OF CAL., SANTA BARBARA: THE AM. PRESIDENCY PROJECT (last visited Mar. 18, 2018), <http://www.presidency.ucsb.edu/ws/index.php?pid=29407>.

48. Phil Gailey, *Democrats and Republicans Form Panel to Hold Presidential Debates*, N.Y. TIMES (Feb. 19, 1987), <http://www.nytimes.com/1987/02/19/us/democrats-and-republicans-form-panel-to-hold-presidential-debates.html>.

49. *Changing Relationship*, *supra* note 9.

50. *League Refuses to “Help Perpetrate a Fraud”*, LEAGUE OF WOMEN VOTERS (Oct. 3, 1988), <https://www.lwv.org/newsroom/press-releases/league-refuses-help-perpetrate-fraud>.

51. *Id.*

control over “the pattern for rebuttal and follow-up questions.”⁵² Despite these objections, the CPD has sponsored every general election presidential debate since this conflict in 1988.⁵³

The CPD’s debates are major cultural events: they are frequently parodied by *Saturday Night Live*,⁵⁴ were dramatically imitated by the sole live episode of *The West Wing*,⁵⁵ and have produced popular internet memes.⁵⁶ The media treats the presidential debates as “a kind of Super Bowl for American democracy.”⁵⁷ Closely tied to the popular conceptions of democracy and the marketplace of ideas,⁵⁸ the debates have been lauded as the most crucial events in a presidential campaign related to “public involvement in the electoral process.”⁵⁹ Presidential debates are analyzed as a curious standout in an fragmented media environment; tens of millions of people watch the same “live event television, the last remaining civic common in an atomized world.”⁶⁰ But the debates have also been ridiculed as “vacuous exchanges”⁶¹ and dismissed as shallow and theatrical.⁶² Analyses of the CPD’s

52. Jack Nelson, *Bipartisan Group to Sponsor L.A. Debate After League of Women Voters Drops Out*, L.A. TIMES (Oct. 4, 1988), http://articles.latimes.com/1988-10-04/news/mn-3511_1_presidential-debate.

53. *CPD Overview*, *supra* note 2.

54. See, e.g., SATURDAY NIGHT LIVE, *Donald Trump vs. Hillary Clinton Town Hall Debate Cold Open – SNL*, YOUTUBE (Oct. 16, 2016), https://www.youtube.com/watch?v=qVMW_1aZXRk.

55. Frazier Moore, *Who Won the ‘West Wing’ Live Debate?*, WASH. POST (Nov. 7, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/07/AR2005110700196.html>.

56. See, e.g., Eyder Peralta, *Presidential Debate Spins ‘Binders Full of Women’ Meme, Fact Checks*, NAT’L PUB. RADIO (Oct. 17, 2012, 9:35 AM), <https://www.npr.org/sections/thetwoway/2012/10/17/163071667/presidential-debate-spins-binders-full-of-women-meme>.

57. Denise-Marie Ordway & John Wihbey, *Presidential Debates and Their Effects: Research Roundup*, JOURNALIST’S RESOURCE (Sept. 20, 2016), <https://journalistsresource.org/studies/politics/elections/presidential-debates-effects-research-roundup>.

58. See Bill Moyers & Michael Winship, *Ditch the debates: Without Effective Moderators, the Presidential Debates are Pointless*, SALON (Sept. 20, 2016, 5:59 AM), <https://www.salon.com/2016/09/20/ditch-the-debates-without-effective-moderators-the-presidential-debates-will-hurt-democracy/> (arguing that the sham-like nature of the debates is a threat to American democracy); Len Niehoff, Opinion, *The Marketplace of Ideas has Crashed*, DETROIT NEWS (Dec. 1, 2016, 2:18 PM), <http://www.detroitnews.com/story/opinion/2016/12/01/marketplace-ideas/94692632/> (tying together the lack of discussion of climate change in the debates to the failure of the greater marketplace of ideas); Charles S. Faddis, *The Presidential Debates: Let Them Talk*, HILL (Aug. 18, 2016, 6:33 AM), <http://thehill.com/blogs/pundits-blog/presidential-campaign/291760-the-presidential-debates-let-them-talk> (arguing that the presidential debates would be improved without the influence of a moderator).

59. Opinion, *First, Three Big Debates*, N.Y. TIMES (Sept. 6, 2000), <http://www.nytimes.com/2000/09/06/opinion/first-three-big-debates.html>.

60. David Carr, *TV Debates That Sell More Than Just Drama*, N.Y. TIMES (Oct. 14, 2012), <http://www.nytimes.com/2012/10/15/business/media/televised-debates-that-sell-more-than-just-drama.html>.

61. Ronald P. Seyb, Letter to the Editor, *DEBATES; Unfair Play*, N.Y. TIMES (Oct. 8, 2000), <http://www.nytimes.com/2000/10/08/arts/l-debates-unfair-play-501883.html>.

debates seem to confront two different issues. First, there is the question of whether general election presidential debates *should* carry much significance given the reputation for style over substance.⁶³ Second, and more pertinent to the context behind this analysis of the CPD's debates, is whether the debates matter.

The short answer to the second question is likely yes, that presidential debates do matter.⁶⁴ The closer a race is, the more impactful the debates can be.⁶⁵ That still does not take into account the other effects debates can have beyond their impact on the presidential election. The "binders full of women" line from a 2012 debate between Mitt Romney and Barack Obama was more than just an awkward, humorous meme;⁶⁶ it was seen as an expression of how far women still had to go in the workplace.⁶⁷ Hillary Clinton's discussion of implicit bias in a 2016 debate with Donald Trump was noted for having "moved to the forefront of public conversation an issue that scientists have been studying for decades."⁶⁸ Regardless of the direct impact on an election, the debates can have a broader impact on society.

Given its role in elections and the millions of dollars in contributions the CPD receives to stage its debates,⁶⁹ the CPD is subject to FECA and the FEC's regulations, particularly those concerning staging organizations, as outlined below. The CPD cites FEC regulations on its website, where it outlines the criteria for selection to participate in its debates.⁷⁰ The selection criteria are:

[I]n addition to being Constitutionally eligible, candidates must appear on a sufficient number of state ballots to have a mathematical chance of

62. See Charles McNulty, *Critic's Notebook: Presidential Debates as Theater*, L.A. TIMES (Oct. 21, 2012), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-mcnulty-presidential-debates-20121022-story.html>.

63. See Kenneth T. Walsh, *Style over Substance*, U.S. NEWS (Sept. 23, 2016, 6:00 AM), <https://www.usnews.com/news/articles/2016-09-23/presidential-debates-a-victory-for-style-over-substance>.

64. Andrew Prokop, *Do Presidential Debates Matter? Here's the Political Science Evidence*, VOX (Sept. 26, 2016, 8:09 AM), <https://www.vox.com/2016/9/12/12847632/debates-trump-clinton-polls-political-science>.

65. *Id.* ("The data shows . . . that small changes, of a few percentage points or so, are common.")

66. Peralta, *supra* note 56.

67. See, e.g., Elmira Bayrasli & Lauren Bohn, *Binders Full of Women Foreign Policy Experts*, N.Y. TIMES (Feb. 10, 2015, 12:03 PM), <https://kristof.blogs.nytimes.com/2015/02/10/bindings-full-of-women-foreign-policy-experts/>; Elizabeth Dwoskin & Craig Timberg, *Uber's Search for a Female CEO has been Narrowed Down to 3 Men*, WASH. POST (Aug. 4, 2017), <https://www.washingtonpost.com/news/the-switch/wp/2017/08/04/ubers-search-for-a-female-ceo-has-been-narrowed-down-to-3-men/>.

68. Daniel A. Yudkin & Jay Van Bavel, *The Roots of Implicit Bias*, N.Y. TIMES (Dec. 9, 2016), <https://www.nytimes.com/2016/12/09/opinion/sunday/the-roots-of-implicit-bias.html>; see also John A. Powell, *Implicit Bias in the Presidential Debate*, BERKELEY BLOG (Sept. 27, 2016), <http://blogs.berkeley.edu/2016/09/27/implicit-bias-in-the-presidential-debate/>.

69. Wills, *supra* note 14.

70. CPD Overview, *supra* note 2.

winning a majority vote in the Electoral College, and have a level of support of at least 15 percent of the national electorate as determined by five selected national public opinion polling organizations, using the average of those organizations' most recently publicly-reported results at the time of the determination. The polls to be relied upon will be selected based on the quality of the methodology employed, the reputation of the polling organizations and the frequency of the polling conducted. CPD will identify the selected polling organizations well in advance of the time the criteria are applied.⁷¹

The final criterion, that a candidate poll at a minimum of 15 percent in national polls, is a major point of contention for third-party and independent presidential candidates that want to be on stage at the debates.⁷²

C. Candidate Debate Regulations

In its role of enforcing federal campaign laws, the FEC has enacted regulations that cover debates for federal elections and the organizations that run these debates. These regulations include 11 C.F.R. § 110.13,⁷³ in which the FEC defines "staging organizations" and establishes how candidate debates can be structured to avoid "the general ban on corporate contributions to or expenditures."⁷⁴ Staging organizations must be either 501(c)(3) or (c)(4) nonprofits that "do not endorse, support, or oppose political candidates or political parties . . ."⁷⁵ The debate itself

71. *Id.*

72. Jonathan Easley & Ben Kamisar, *Third-Party Candidates Face Uphill Climb to Get Place on Presidential Debate Stage*, HILL (May 12, 2016, 6:00 AM), <http://thehill.com/homenews/campaign/279624-third-party-candidates-face-uphill-climb-to-get-place-on-presidential> ("Johnson has railed against the commission and its criteria, describing it as a rigged process designed by a closed cabal of Republicans and Democrats hell-bent on maintaining power by keeping insurgent candidates at bay.")

73. The FEC defines staging organizations as: "(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. 114.4(f)."

11 C.F.R. § 110.13(a)(1) (2017). The FEC also establishes rules for selecting which candidates may participate in a debate:

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 organizations(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. For debates held prior to a primary election, caucus or convention, staging organizations may restrict candidate participation to candidates seeking the nomination of one party, and need not stage a debate for candidates seeking the nomination of any other political party or independent candidates.

11 C.F.R. § 110.13(c) (2017).

74. *Level the Playing Field v. Fed. Election Comm'n*, 232 F. Supp. 3d 130, 135 (D.D.C. 2017).

75. 11 C.F.R. § 110.13(a)(1) (2017).

must include at least two candidates, and cannot be structured in a way “to promote or advance one candidate over another.”⁷⁶ Section 110.13(c) requires that staging organizations use “pre-established objective criteria” to select debate participants.⁷⁷ A general election debate may not use the nomination by a particular political party as the “sole objective criterion to determine whether to include a candidate in a debate.”⁷⁸ Participants must be selected through objective criteria established in advance of the debate, not including nomination by a party, for the debate’s organizer to be able to qualify as a staging organization.⁷⁹

If the requirements found in 11 C.F.R. § 110.13 are met, regulations allow a staging organization to use its own funds and “accept funds donated by corporations or labor organizations . . . to defray costs incurred in staging candidate debates”⁸⁰ This is vital. Absent explicit authorization by the FEC, the platform that the CPD offers candidates would fall under FECA’s blanket ban on corporate and labor union contributions to federal campaigns.⁸¹

The Supreme Court’s 2010 ruling in *Citizens United*,⁸² paired with the D.C. Circuit’s *SpeechNow.org v. Federal Election Commission* decision months later,⁸³ opened the floodgates for corporate contributions to independent groups focused on influencing elections (*i.e.*, “Super” PACs).⁸⁴ But while corporations may make their own independent expenditures to support candidates or donate to Super PACs, the law still bans direct corporate contributions to the candidates’ actual

76. 11 C.F.R. § 110.13(b)(2) (2017).

77. 11 C.F.R. § 110.13(c) (2017).

78. *Id.*

79. See 11 C.F.R. § 110.13(a)(1) (2017); 11 C.F.R. § 110.13(c) (2017).

80. FEC regulations read:

(f) Candidate debates.

(1) A nonprofit organization described in 11 CFR 110.13(a)(1) may use its own funds and may accept funds donated by corporations or labor organizations under paragraph (f)(3) of this section to defray costs incurred in staging candidate debates held in accordance with 11 CFR 110.13. . . . (3) A corporation or labor organization may donate funds to nonprofit organizations qualified under 11 CFR 110.13(a)(1) to stage candidate debates held in accordance with 11 CFR 110.13 and 114.4(f).

11 C.F.R. § 114.4(f) (2017).

81. 52 U.S.C. § 30118 (2012).

82. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

83. *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686 (2010). In applying the recent *Citizens United* decision, the D.C. Circuit, which determined that independent expenditures “do not give rise to corruption or the appearance of corruption,” held that the government could not use protection against corruption or the appearance of corruption as justification to limit contributions to groups that make only independent expenditures. See Adam Liptak, *Courts Take On Campaign Finance Decision*, N.Y. TIMES (Mar. 26, 2010), <http://www.nytimes.com/2010/03/27/us/politics/27campaign.html>.

84. Libby Watson, *6 Years Later, the Impact of Citizens United Still Looms Large*, SUNLIGHT FOUND. (Jan. 21, 2016), <https://sunlightfoundation.com/2016/01/21/6-years-later-the-impact-of-citizens-united-still-looms-large/>.

campaign organizations.⁸⁵ Without the FEC's regulatory blessing, staging organizations would be accepting millions in corporate contributions and then turning around to effectively donate to the candidates who are selected to participate in their debates by granting them a televised platform before a massive audience. This is why debate organizers like the CPD need to fall under the FEC's regulatory definition of "staging organizations"; otherwise, these groups would be funneling corporate contributions to candidates in violation of federal law.⁸⁶

II. THIRD-PARTY AND INDEPENDENT CANDIDATES' ACCESS TO THE DEBATES

Some independent presidential candidates have very real effects on elections. Considering popular disillusionment with the two main parties, these effects could continue to grow.⁸⁷ Gallup recently recorded the popular desire for a third major political party at an all-time high of 61 percent in the U.S.⁸⁸ Third-party candidates' attempts at inclusion in the presidential debates are widely reported,⁸⁹ as is their seemingly inevitable exclusion.⁹⁰ An editorial by the Chicago Tribune in late August 2016 called for the inclusion of Libertarian candidate Gary Johnson in the upcoming presidential debates, citing polling by Quinnipiac University that 37 percent of respondents would consider voting for a third-party candidate.⁹¹ Moreover, 62 percent thought that Johnson should be allowed to participate in the debates.⁹² This editorial is just a recent example of a long line of ineffective calls for

85. *Who Can and Can't Contribute*, FED. ELECTION COMMISSION, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/who-can-and-cannot-contribute/> (last visited Feb. 3, 2018).

86. Contributions are "anything of value given, loaned or advanced to influence a federal election." *Types of Contributions*, FED. ELECTION COMMISSION, <https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/types-contributions/> (last visited Oct. 14, 2018).

87. David Smith, *Most Americans Do Not Feel Represented by Democrats or Republicans – Survey*, GUARDIAN (Oct. 25, 2016, 5:49 PM), <https://www.theguardian.com/us-news/2016/oct/25/american-political-parties-democrats-republicans-representation-survey>.

88. Lydia Saad, *Perceived Need for Third Major Party Remains High in U.S.*, GALLUP (Sept. 27, 2017), <http://news.gallup.com/poll/219953/perceived-need-third-major-party-remains-high.aspx>.

89. See, e.g., David Weigel, *Libertarians Hope Rallies and Ads can Nudge Them into the Presidential Debates*, WASH. POST (Aug. 27, 2016), https://www.washingtonpost.com/politics/libertarians-hope-rallies-and-ads-can-nudge-them-into-the-presidential-debates/2016/08/27/2517567c-6b9d-11e6-8225-fbb8a6fc65bc_story.html.

90. See, e.g., David Weigel, *Third-Party Candidates Miss Cut for First Presidential Debate*, WASH. POST (Sept. 16, 2016), <https://www.washingtonpost.com/news/post-politics/wp/2016/09/16/third-party-candidates-miss-cut-for-first-presidential-debates/>.

91. Editorial, *Clearing a Debate Path for Gary Johnson*, CHI. TRIB. (Aug. 29, 2016, 7:45 AM), <http://www.chicagotribune.com/news/opinion/editorials/ct-gary-johnson-debate-clinton-trump-edit-0830-md-20160829-story.html>.

92. *Id.*

the presidential debates to include third-party candidates.⁹³ These pleas for inclusion make intuitive sense. Independent and third-party candidates are included in the presidential election; it seems odd that they are not included in the presidential debates. It also seems to go against the law.

The CPD is hostile to third-party presidential candidates. At the time of its creation, the two co-chairmen stated as much to the press: “Mr. Fahrenkopf indicated that the new Commission on Presidential Debates . . . was not likely to look with favor on including third-party candidates in the debates Mr. Kirk was less equivocal, saying he personally believed the panel should exclude third-party candidates from the debates”⁹⁴ Since 1988, only one independent or third-party candidate for president has been invited to a CPD debate: Ross Perot in 1992.⁹⁵ Other third-party candidates have complained,⁹⁶ sued,⁹⁷ and even set up their own alternative debates.⁹⁸ But no independent presidential candidate since 1992 has come close to the portion of the popular vote total that Perot received: 18.9 percent.⁹⁹ That includes Perot in 1996, when he was shut out of the CPD debates and went on to receive 8.4 percent of the popular vote.¹⁰⁰

That independent candidates have been excluded from the debates does not mean that their campaigns are inconsequential—Americans still vote for them. Ross Perot’s campaign was influential in determining who would be elected presi-

93. See, e.g., John Nichols, Editorial, *Open the Presidential Debates!*, NATION (Aug. 29, 2012), <https://www.thenation.com/article/open-presidential-debates/>; see also Editorial, *Let Nader Debate*, CRIMSON (Oct. 10, 2000), <http://www.thecrimson.com/article/2000/10/10/let-nader-debate-pwhen-green-party/>.

94. Gailey, *supra* note 48.

95. See *1992 Debates*, *supra* note 3. Perot, a billionaire, spent \$64 million—about \$115 million in 2018 dollars—on his 1992 campaign. Melissa Yeager, *The Trump Question: How do Self-Financed Candidates Fare in Elections?*, SUNLIGHT FOUND. (Aug. 28, 2015, 12:09 PM), <https://sunlightfoundation.com/2015/08/28/the-trump-question-how-do-self-financed-candidates-fair-in-elections/>; US INFLATION CALCULATOR, <https://www.usinflationcalculator.com> (last visited Oct. 11, 2018) (converting \$64 million in 1992 to 2018 dollars).

96. *Nader Upset Over Likely Exclusion from Debates*, CNN (June 17, 2004, 7:13 PM), <http://www.cnn.com/2004/ALLPOLITICS/06/17/nader.debates/index.html>.

97. See, e.g., *Level the Playing Field v. Fed. Election Comm’n*, 232 F. Supp. 3d 130 (D.D.C. 2017).

98. Annie Groer, *Third-Party Candidates Finally Get Their Own Presidential Debate*, WASH. POST (Oct. 24, 2012), <https://www.washingtonpost.com/blogs/she-the-people/wp/2012/10/24/third-party-candidates-finally-get-their-own-presidential-debate/>.

99. FED. ELECTIONS COMM’N, FEDERAL ELECTIONS 92 at 9 (June 1993), <https://www.fec.gov/pubrec/fe1992/federaelections92.pdf>; Christopher Klein, *Here’s How Third Party Candidates Have Changed Elections*, HIST. CHANNEL (May 31, 2018), <https://www.history.com/news/third-party-candidates-election-influence-facts>.

100. *1996 Popular Vote Summary For All Candidates Listed On At Least One State Ballot*, Fed. Election Commission (Oct. 1997), <https://transition.fec.gov/pubrec/fe1996/gevote.htm>; Pete Tucker, *How Third Parties Are Kept Out of Presidential Debates*, HUFFINGTON POST (Aug. 03, 2017), https://www.huffingtonpost.com/pete-tucker/what-the-hell-how-third-p_b_11277474.html.

dent in 1992.¹⁰¹ The exact outcome of elections without third-party candidates is uncertain. There is reason, however, to expect that Green Party voters would either vote for Democrats or not vote at all, while Libertarian Party voters would vote for a Republican-heavy mix of the two parties.¹⁰² The official results from the infamous 2000 election in Florida show a gap of 537 votes between George W. Bush and Al Gore, compared to 97,488 votes for Ralph Nader (and 138,016 votes across all independent candidates).¹⁰³ In 2016, the Green Party's Jill Stein's 51,643 votes in Michigan compare to a gap between Donald Trump and Hillary Clinton of 10,704.¹⁰⁴ Stein's 49,941 votes in Pennsylvania outnumber that state's Trump-Clinton gap of 44,292.¹⁰⁵ The Wisconsin Trump-Clinton gap of 22,748 votes was under Stein's total Wisconsin vote of 31,072.¹⁰⁶ Libertarian candidate Gary Johnson significantly outperformed Stein in each of these states.¹⁰⁷ The Clinton-Trump gaps in Minnesota and Maine (states which Clinton won) also were smaller than each of Johnson and Stein's vote totals.¹⁰⁸ This is not to say that independent candidates necessarily change the outcome of presidential elections, but they wield that potential.

III. LITIGATION

Third-party candidates have not just complained about their treatment by the CPD; they have also sued the CPD, filed complaints with the FEC about the CPD, and then sued the FEC for failing to act on those complaints.¹⁰⁹ The lawsuits against the CPD itself have largely been a wash; Ralph Nader sued the CPD

101. See Katie McNally, *The Third-Party Impact on American Politics*, UVA TODAY (Aug. 3, 2016) <https://news.virginia.edu/content/third-party-impact-american-politics> (arguing that Ross Perot partially split the Republican vote and led to the election of a Democrat). The Perot campaign's singular focus on the federal government's deficits was also impactful in bringing about the balanced budgets of the late 1990s. *Id.*

102. Euel Elliott, Commentary, *What Voters' Frustrations Mean for Third-Party Candidates*, FORTUNE (June 7, 2016), <http://fortune.com/2016/06/06/donald-trump-hillary-clinton-third-party-candidates/>.

103. FED. ELECTION COMM'N, 2000 OFFICIAL PRESIDENTIAL GENERAL ELECTION RESULTS (Dec. 2001), <https://transition.fec.gov/pubrec/2000presgeresults.htm>.

104. FED. ELECTION COMM'N, FEDERAL ELECTIONS 2016: ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 33 (Dec. 2017), https://transition.fec.gov/pubrec/fe2016/federal_elections2016.pdf.

105. *Id.* at 39.

106. *Id.* at 44.

107. *Id.* at 33, 39, 44.

108. *Id.* at 31, 33-34.

109. See, e.g., Connie Farrow, *Nader Sues Debate Commission*, WASH. POST (Oct. 17, 2000, 10:09 AM), http://www.washingtonpost.com/wp-srv/aponline/20001017/aponline220928_000.htm; Alan Rappeport, *Third-Party Groups Sue F.E.C. to Try to Open Up Presidential Debates*, N.Y. TIMES: FIRSTDRAFT (June 22, 2015, 6:33 PM), <https://www.nytimes.com/politics/first-draft/2015/06/22/third-party-groups-sue-f-e-c-to-try-to-open-up-presidential-debates/>.

for physically barring him from the debates in 2000 and settled for lawyers' fees and an apology eighteen months later.¹¹⁰ Gary Johnson and Jill Stein sued the CPD directly for violating their First Amendment free expression rights by refusing to include them in its debates in 2012.¹¹¹ The suit also alleged that the CPD violated the Sherman Antitrust Act by being, in effect, an agreement to restrain competition in presidential debates.¹¹² This concept has been explored academically, albeit with little expectation of success in court.¹¹³ The D.C. District Court dismissed the suit for lack of standing and, alternatively, failing to state a claim upon which relief could be granted.¹¹⁴ The D.C. Circuit upheld the dismissal in 2017.¹¹⁵

Johnson, Stein, and their parties have fared better by taking a route through administrative law. As discussed above, 52 U.S.C. § 30109 allows private parties to file complaints with the FEC and petition the U.S. District Court for the District of Columbia to review the complaints should the FEC dismiss the complaint or fail to act.¹¹⁶ Johnson, Stein, and their parties filed a complaint with the FEC about the CPD's exclusion of third-party candidates, as did another organization, Level the Playing Field ("LPF"), and its head, Peter Ackerman.¹¹⁷ When both complaints were dismissed, LPF, Ackerman, Johnson, Stein, and the Libertarian and Green Parties sued the FEC in the District Court, where litigation is ongoing.¹¹⁸ Should the plaintiffs succeed in court, they will be allowed to sue the CPD directly through a private right of action to enforce FECA.¹¹⁹ While the third-party candidates and their parties still have far to go, they have come as close as anyone to opening the door to the CPD debate stage.

110. Will Lester, *Ralph Nader Settles Lawsuit*, SOUTHEAST MISSOURIAN (Apr. 17, 2002), <http://www.semissourian.com/story/70279.html>.

111. Brian Doherty, *Dismissal Upheld by D.C. Appeals Court in Gary Johnson Lawsuit Regarding Presidential Debates*, REASON (Aug. 29, 2017, 6:53 PM), <http://reason.com/blog/2017/08/29/dismissal-upheld-by-dc-appeals-court-in>.

112. *Id.*

113. Samuel F. Toth, *The Political Duopoly: Antitrust Applicability to Political Parties and the Commission on Presidential Debates*, 64 CASE W. RES. L. REV. 239, 276 (2013) (stating that "[t]he Supreme Court's sweeping statements in direct opposition to antitrust application in the political arena would probably be very influential in a court's analysis").

114. *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976 (D.C. Cir. 2017).

115. *Id.* at 979.

116. *See supra* Section I.A.

117. *Level the Playing Field v. Fed. Election Comm'n*, 232 F. Supp. 3d 130, 137 (D.D.C. 2017). LPF was created by Peter Ackerman, a fund manager and former board member of the libertarian Cato Institute, and has been funded entirely by over \$2.6 million in donations by Ackerman. Ctr. For Responsive Politics, *Level the Playing Field—Donor Search*, OPENSECRETS.ORG https://www.opensecrets.org/527s/527cmtedetail_donors.php?ein=471788821&cycle=2016 (last visited Feb. 5, 2018).

118. *See Level the Playing Field*, 232 F. Supp. 3d at 137.

119. *See* 52 U.S.C. § 30109 (2012).

A. *The Administrative Complaint*

LPF's 2014 administrative complaint lays out its criticism of CPD's alleged violation of FEC regulations regarding the 2012 debates.¹²⁰ The FEC's summary for their staging organization regulations refers to "establish[ing] a structure for various types of nonpartisan debates . . .," stating that "[a] properly held nonpartisan public candidate debate sponsored by a qualified nonpartisan organization provides a forum for significant candidates to communicate their views to the public."¹²¹ This is codified in the FEC's requirement that staging organizations "be 501(c)(3) or 501(c)(4) organizations – which by law face significant restrictions on political activity – that do not 'endorse, support, or oppose political candidates or political parties.'"¹²²

But the CPD is an inherently partisan—bipartisan—organization.¹²³ It was created by the two major parties to wrest control of the debates away from the League of Women Voters.¹²⁴ The parties had clashed with the League over control of debate structure, as well as the fact that the League had included independent candidate John Anderson in a 1980 debate.¹²⁵ The parties envisioned bipartisan "televised joint appearances," as they wrote in their memorandum of understanding.¹²⁶

LPF and its co-plaintiffs argue that the 15 percent threshold is so high that it is designed to guarantee that only the Democratic and Republican nominees will qualify: "[n]o third-party or independent candidate has satisfied the CPD's polling criterion in the four election cycles in which it has been in place; nor would Ross Perot have satisfied it had it been in effect in 1992 or 1996."¹²⁷ Further, the LPF

120. *Exhibit I—Administrative Complaint Filed with the FEC by Level the Playing Field, Detailing Why the CPD's Rules Violate the Law*, CHANGE THE RULE, <http://www.changetherule.org/wp-content/uploads/2014/10/AdministrativeComplaint.pdf> [hereinafter *Admin. Complaint*]. The Libertarian and Green parties filed a separate complaint in 2015, which makes very similar arguments. See *Level the Playing Field*, 232 F. Supp. 3d at 136.

121. *Funding and Sponsorship of Candidate Debates*, 44 Fed. Reg. 39,348 (July 5, 1979) (to be codified at 11 C.F.R. § 100.4(b)(16) & 11 C.F.R. § 100.7(b)(18)).

122. *Admin. Complaint*, *supra* note 120, at 15 (internal citations omitted).

123. See *supra* note 14 and accompanying text.

124. *Changing Relationship*, *supra* note 9.

125. *Admin. Complaint*, *supra* note 120, at 16-17.

126. *Id.* at 18-19. The complaint goes on to detail the ways in which the CPD has rolled over to comply with the two parties' desires, including the inclusion of independent candidate Ross Perot in 1992, which both parties wanted. *Id.* at 23. Further, the CPD is run by major donors and boosters of the two parties and is funded by corporations that also make massive contributions to the two main parties. *Id.* at 26-29.

127. *Id.* at 34. The parties cite "polls conducted over October 2 to 4 [1992] by the CBS News/New York Times, the ABC News/Washington Post, and CNN/USA Today/Gallup poll – three of the five polls the CPD has previously purported to rely on in applying the 15% rule – had Perot at 7, 9, and 10%, respectively." *The 1992 Campaign: Polls; Despite Perot's Re-entry, Clinton Retains Big Lead*, N.Y. TIMES (Oct. 7, 1992), <https://www.nytimes.com/1992/10/07/us/the-1992-campaign-polls-despite->

states that the CPD measures the 15 percent statistic by making arbitrary decisions about which polls to use:¹²⁸ polls that are based on the decisions of pollsters about which candidates' names to include in the surveys.¹²⁹

The complaint closes by arguing that the CPD, by taking in millions in corporate contributions to stage bipartisan debates that exclude independent and third-party candidates, is furthering the corruption and appearance of corruption of the electoral process.¹³⁰ Given that it has flouted the FEC's regulations on how a staging organization can behave, the CPD is alleged to be "funneling corporate money to pay for the Democratic and Republican presidential candidates' most-watched campaign appearances," in violation of "the strict rules FECA places on political contributions and expenditures."¹³¹ By effectively excluding independent candidates, the CPD is allowing corporate funds to provide a platform for both of the major parties' candidates to reach tens of millions of viewers, contrary to law.

B. *Judicial Review*

By allowing complainants to bring suit against the FEC when their complaints are dismissed or ignored, FECA provides a potential avenue for litigation to lead to reforming the CPD's 15 percent rule. In 2015, the FEC dismissed both LPF's administrative complaint (and the similar one filed by the Libertarian and Green parties) by voting to find no "reason to believe" that the CPD violated the law.¹³² The FEC explained its decision by noting "that past administrative complaints . . . had "made similar allegations," and that in those cases the FEC had found no reason to believe that the CPD and its co-chairs had violated regulations or the FECA."¹³³ Further, the FEC's prior analysis of the "CPD's fifteen percent requirement had been reviewed and upheld in *Buchanan v. Federal Election Commission*."¹³⁴

The LPF and the Libertarian and Green Parties responded to the FEC's dismissal of their complaints by filing suit in the D.C. District Court, alleging that the FEC's dismissal violated the Administrative Procedure Act, 5 U.S.C. § 706

perot-s-re-entry-clinton-retains-big-lead.html. Objectivity "incorporates a 'reasonableness' requirement," and "as one federal court has explained, a criterion that 'only the Democratic and Republican nominees could reasonably achieve' does not satisfy the FEC's rules." *Admin. Complaint, supra* note 120, at 11 (citing *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 74 (D.D.C. 2000)).

128. *CPD Overview, supra* note 2.

129. *Admin. Complaint, supra* note 120, at 41-42 (explaining the greater volatility in predicting turnout, key to the accuracy of a poll, associated with the inclusion of new and independent voters).

130. *Id.* at 58.

131. *Id.* at 57-58.

132. *Level the Playing Field v. Fed. Election Comm'n*, 232 F. Supp. 3d 130, 137 (D.D.C. 2017).

133. *Id.*

134. *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58 (D.D.C. 2000).

because it was “arbitrary, capricious an abuse of discretion, or otherwise not in accordance with law.”¹³⁵ They asserted:

That the FEC: (1) applied a legal standard contrary to the text of the regulations; (2) failed to properly consider the submitted evidence; (3) failed to consider the allegations raised against most of the respondents; and (4) ultimately reached the wrong conclusion regarding the objectivity of the CPD’s debate requirement.¹³⁶

The plaintiffs moved for summary judgement, which was granted.¹³⁷

The court found that because the FEC had failed to elaborate the legal standard it employed to dismiss these complaints, it had effectively adopted the legal standard used to dismiss the prior complaints that it cited as precedent.¹³⁸ The court held that this older legal standard—that the complainants “have not provided evidence that the CPD *is controlled by the [Democratic National Committee] or [Republican National Committee]*”—is “contrary to the text of the agency’s own regulations.”¹³⁹ The FEC’s regulations, the court noted, are concerned with nonprofit organizations that “support, endorse, or oppose” candidates, not with the control test.¹⁴⁰ The plaintiffs did not allege that the Democratic National Committee and Republican National Committee actually control the CPD, but rather “the CPD and its directors acted on a partisan basis to support those parties.”¹⁴¹ In summarily dismissing these complaints by relying on bad precedent, the FEC was instinctively protecting the bipartisanship of the CPD and its 15 percent rule.

The court found that its task was “made all the more difficult” because of how much evidence the FEC did not address “or outright ignored.”¹⁴² In *Buchanan*, where the District Court ruled that the FEC’s decision to allow the 15 percent rule was not itself arbitrary or capricious, the record lacked the substance (such as expert reports) that was included by the complainants in this case.¹⁴³ Thus, the FEC’s reliance here on *Buchanan* was “misplaced.”¹⁴⁴ Here, complainants put together “substantial and lengthy evidence and arguments,” which the FEC did not even mention, nor did the agency present any real “legal analysis applying the agency’s regulation.”¹⁴⁵

135. *Level the Playing Field*, 232 F. Supp. 3d at 137.

136. *Id.* at 137.

137. *Id.* at 148.

138. *Id.* at 139.

139. *Id.* (citations omitted, emphasis in original).

140. *Id.* (internal citations omitted).

141. *Id.*

142. *Id.* at 144.

143. *Id.* at 145.

144. *Id.*

145. *Id.*

Having found that the FEC applied the wrong legal standard (or failed to explain its rationale), failed to reasonably consider the evidence before it (or failed to explain that it had considered the evidence), and failed to “demonstrate that it actually considered the full scope of [the] evidence,” the court agreed with the plaintiffs that the FEC acted arbitrarily, capriciously, and unlawfully in dismissing their two complaints.¹⁴⁶ The FEC was ordered to reconsider the complaint and issue a new decision within 30 days, or else LPF may renew its litigation.¹⁴⁷

Judge Chutkan issued her order granting summary judgment in February 2017, and it has been many more than thirty days since the order.¹⁴⁸ Litigation in the case remains ongoing.¹⁴⁹ Even if the plaintiffs fully prevail at this stage, they would need to bring a successful suit against the CPD to enforce FECA and the FEC’s regulations regarding staging organizations. Still, this decision marks the greatest potential to date in third-party and independent candidates’ attempts to gain access to presidential debates. The FEC effectively rubber-stamped the CPD’s actions based on the precedent of the last time they rubber-stamped the CPD’s actions, but this time they ignored “substantial” evidence.¹⁵⁰ It seems that the agency will need to come up with a better basis to satisfy the court that its dismissal of these complaints against the CPD are not arbitrary and capricious.

IV. REMEDIES

Outside of their characteristic inaction,¹⁵¹ the FEC can pursue one of two main remedies regarding the presidential debates. The first is to follow the letter and spirit of the law by actually requiring staging organizations to be nonpartisan and recognizing that the CPD excludes third-party candidates by intent and effect. The second is to revise its own regulations and allow staging organizations to be bipartisan, an endorsement of the two-party system as clear as the very structure of the FEC’s commission itself. This second option would be more honest about the reality of American politics, and about the purpose of the presidential debates.

A. *Enforcing the Law as It Is Written*

Should the FEC reverse course and determine that there is reason to believe that the CPD’s actions violate the law, it would be required to “attempt to remedy the violation first through conciliation and then, if unsuccessful, through litiga-

146. *Id.* at 140, 145.

147. *Id.* at 145.

148. *Id.* at 130, 148.

149. *FEC Record: Litigation*, *Level the Playing Field v. FEC (District Court)*, FED. ELECTION COMMISSION, <https://www.fec.gov/updates/level-playing-field-et-al-v-fec-district-court-orders/> (last visited Dec. 15, 2018).

150. *Id.*

151. O’Connor, *supra* note 42.

tion.”¹⁵² The simplest way for the CPD to come into alignment with federal election law is to drop its 15 percent rule. To replace it with any other requirement for popularity in national polling becomes a line-drawing exercise to create an “error-prone and arbitrary test.”¹⁵³ The national popular vote is not how the United States elects its presidents; based on data from the 2012 election, a candidate could win the electoral college, and the presidency, with 23.1 percent of the popular vote.¹⁵⁴ That particular statistic may be farfetched, but in two of the last five presidential elections and in two of the last three presidential elections without an incumbent running, the loser of the popular vote won the presidency.¹⁵⁵ National polling does not show who will win the electoral college, which makes the CPD’s reliance on national polls an arbitrary decision to use an arbitrary measure and an unnecessary way to select candidates for the CPD’s debates.

The immediate counterargument to dropping the 15 percent threshold is that it would allow too many participants into the debates for them to remain effective. But the CPD’s current criteria, other than the 15 percent rule, are sufficient to keep its debate stage both accessible and uncrowded. The requirement that a candidate be on enough state ballots to have a mathematical shot at winning 270 electoral college votes is itself a significant barrier. Ballot access is “often difficult,” especially for candidates without party resources and expertise.¹⁵⁶ Each state has its own requirements for independent candidates to be placed on the ballot, often requiring the signatures from thousands of voters, distributed across congressional districts, or a certain percentage of registered voters in the state.¹⁵⁷ On the other hand, nominees of established parties can have near-automatic ballot access.¹⁵⁸ In large part due to the difficulty in gaining access to a sufficient number of state ballots, the greatest number of independent or third-party candidates in any election

152. *Level the Playing Field v. Fed. Election Comm’n*, 232 F.Supp.3d 130, 136 (D.D.C. 2017) (citing 52 U.S.C. § 30109(a)(4)(A)(i), (a)(6) (2012)).

153. *Admin. Complaint*, *supra* note 120, at 5.

154. Danielle Kurtzleben, *How to Win the Presidency with 23 Percent of the Popular Vote*, NAT’L PUB. RADIO (Nov. 2, 2016, 6:00 AM), <https://www.npr.org/2016/11/02/500112248/how-to-win-the-presidency-with-27-percent-of-the-popular-vote>.

155. See D’Angelo Gore, *Presidents Winning Without Popular Vote*, FACTCHECK.ORG (Dec. 23, 2016), <https://www.factcheck.org/2008/03/presidents-winning-without-popular-vote/>.

156. Jeff Cohen et al., *Why Not Open the Debates to Others?*, FAIR (Sept. 24, 2000), <https://fair.org/article/why-not-open-the-debates-to-others/>.

157. See NAT’L ASS’N OF SEC’YS OF STATE, SUMMARY: STATE LAWS REGARDING PRESIDENTIAL BALLOT ACCESS FOR THE GENERAL ELECTION (Oct. 2016), <http://www.nass.org/sites/default/files/surveys/2017-08/research-ballot-access-president-Oct16.pdf>.

158. Virginia, for example, requires 10,000 petition signatures from qualified voters, including at least 400 from each congressional district, for an independent candidate to get ballot access. *Id.* But the nominees from established parties only had to have their names given to the state board of elections 74 days in advance of the election to appear on the Virginia ballot. *Id.* Established parties are defined as “an organization which received at least 10% of the total vote cast for any statewide office at either of the two preceding statewide general elections.” *Id.*

since 1988 to meet the criteria of having a mathematical chance of winning was five, in 2000. This number has often been three or fewer.¹⁵⁹ Had the CPD dropped this requirement in 2016, four candidates would have qualified: Clinton, Johnson, Stein, and Trump.¹⁶⁰ So long as the electoral college is the method by which the United States chooses its president, it seems a rational basis by which the CPD should choose the participants for its debates in order to comply with the legal requirement of nonpartisanship.

B. *The FEC Should Adapt to the Reality of the Two-Party System*

Expecting open access to presidential debates regardless of party membership sounds in freedom, liberty, and the American way. But the American reality is that of the two-party system. While George Washington, the only independent president in U.S. history,¹⁶¹ was warning his constituents about the danger of factions and partisanship,¹⁶² the other founding fathers were founding parties.¹⁶³ The Federalists and Democratic-Republicans began our American tradition of a partisan duopoly with the election of our second president, John Adams.¹⁶⁴ The two current major parties have been cemented in place since before the Lincoln-Douglas debates.¹⁶⁵ Only once since 1852 has there been a presidential candidate that placed first or second that was not a member of the Republican or Democratic parties, and his face is carved into Mount Rushmore.¹⁶⁶ In terms of tradition and history, the two-party system is actually as American as apple pie, which also reached mass popularity in the late 18th century.¹⁶⁷

In our current political reality, third-party and independent candidates will not win the presidency. Ross Perot in 1992, who came the closest since Teddy Roosevelt in 1912, may have won 18.9 percent of the national popular vote, but he

159. *Admin. Complaint*, *supra* note 120, at 49-50.

160. *Open the Debates Letter*, JILL 2016, <https://www.jill2016.com/opendebates> (last visited Nov. 11, 2018).

161. W.E. Messamore, *George Washington: THE Independent OG (Original Gangsta) of US History*, IVN (Feb. 5, 2018), <https://ivn.us/2018/02/05/george-washington-the-independent-og-of-us-history/>.

162. John Avlon, *George Washington's Farewell Warning*, POLITICO MAG. (Jan. 10, 2017), <https://www.politico.com/magazine/story/2017/01/washingtons-farewell-address-warned-us-about-hyper-partisanship-214616>.

163. *Federalist Party*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/federalist-party>.

164. *Id.*

165. *See 1858 Debates*, COMMISSION ON PRESIDENTIAL DEBATES, <http://www.debates.org/index.php?page=1858-debates> (last visited Mar. 18, 2018).

166. Blake, *supra* note 21. That candidate was Theodore Roosevelt in 1912, a candidate of his own Progressive party, and a former Republican president. *Id.*

167. Simran Sethi, *As Chinese, Iranian and Indonesian As Apple Pie*, NAT'L PUB. RADIO (July 3, 2016), <https://www.npr.org/sections/thesalt/2016/07/03/482854462/as-chinese-iranian-and-indonesian-as-apple-pie>.

received zero electoral college votes—which are the only votes that matter.¹⁶⁸ That candidates such as Nader in 2000 and Johnson and Stein in 2016 may have played the role of spoiler in deciding which major-party candidate won the presidency¹⁶⁹ ought not earn those individuals an invitation to the debates. If, in a tight election between a Democrat and a Republican, an independent candidate was popular and included on the ballot in a single state with enough electoral college votes to decide the election, then that independent candidate could determine who wins the presidency. But while that candidate’s popularity with voters in one state could have an outsized impact on the election, she would not be invited to a CPD debate as she would not be mathematically able to win the Electoral College, being on only one state ballot. Just as mathematical reality does block candidates from access to the debates, the law should also allow for political reality to block candidates.¹⁷⁰

The stability that comes from the two-party system, apparent from its nearly 170-year tenure, has been repeatedly recognized by members of the Supreme Court.¹⁷¹ In *Timmons v. Twin Cities Area New Party*, the Court even held that the government, based on its interest in a stable political system, may favor the two-party system so long as it does not “completely insulate” the two parties.¹⁷² The two major parties have an inherent set of advantages, the Court acknowledged, and “[s]tates need not remove all of the many hurdles third parties face in the American political arena today.”¹⁷³

The FEC has the authority to update its current regulations requiring nonpartisanship and objectivity.¹⁷⁴ But instead, it can and should recognize the value of the two-party system’s stability, as authorized by the Supreme Court.¹⁷⁵ The FEC should use its rulemaking authority through its typical notice-and-comment proce-

168. FEDERAL ELECTIONS 92, *supra* note 99.

169. Daniel P. Franklin, Abigail C. Bowen & Judd Thornton, *Are Third-Party Candidates Spoilers?*, U.S. NEWS (Jan. 19, 2017, 2:02 PM), <https://www.usnews.com/news/national-news/articles/2017-01-19/are-third-party-candidates-spoilers-what-voting-data-reveal>.

170. Political reality includes the structure of congressional representation—single-member districts and first-past-the-post voting—which reinforces the two-party system. *See, e.g.*, Thomas F. Schaller, *Our Electoral Structure Not Only Shuts Out Third Parties; It Shuts Out Women*, BALTIMORE SUN (June 9, 2015, 3:10 PM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-schaller-0610-20150609-column.html>.

171. *See, e.g.*, *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 107 (1990) (Scalia, J., dissenting) (“The stabilizing effects of such a [two-party] system are obvious.”); *Davis v. Bandemer*, 478 U.S. 109, 144-145 (1986) (O’Connor, J., concurring) (“There can be little doubt that the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government.”); *Branti v. Finkel*, 445 U.S. 507, 532 (1980) (Powell, J., dissenting) (“Broad-based political parties supply an essential coherence and flexibility to the American political scene.”).

172. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366-67 (1997).

173. *Id.* at 367.

174. *See The FEC and the Federal Campaign Finance Law*, FED. ELECTION COMMISSION (Feb. 2017), <https://transition.fec.gov/pages/brochures/fecfeca.shtml> (“The Commission clarifies the FECA and the public funding statutes through regulations . . .”).

175. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366-67 (1997).

ture¹⁷⁶ to revise its regulations and allow debate staging organizations to be bipartisan, rather than nonpartisan. The agency could then continue its practice of allowing the CPD to be bipartisan in structure and access without abdicating its mission of enforcing the law. While the FEC is generally associated with gridlock and disfunction,¹⁷⁷ it is not unreasonable to think that this type of reform, being inherently bipartisan, could be persuasive to four of its six commissioners.¹⁷⁸ Given that the FEC has defended the status quo in court multiple times,¹⁷⁹ it should be feasible for the agency to endorse it in its regulations and allow staging organizations to be openly bipartisan.

CONCLUSION

This is not the first time that the idea of dropping the 15 percent rule has been suggested.¹⁸⁰ But the FEC has reached a critical moment: it has been ordered to reconsider its position on access to the presidential debates, meaning that this may be the time that *nonpartisan* access is taken seriously. Or the FEC may revise its regulations to reflect the two-party system and allow for staging organizations to be bipartisan. Until the FEC takes action one way or the other, the CPD's structure will be in violation of the letter and spirit of the law requiring debate staging organizations be nonpartisan.

176. See, e.g., *Pending Rulemaking Matters for Comment*, FED. ELECTION COMMISSION, <https://www.fec.gov/legal-resources/regulations/pending-rulemaking-matters-comment/> (last visited Oct. 20, 2018).

177. See, e.g., Ravel, *supra* note 31.

178. As of this writing, the FEC is down to four commissioners, a bare quorum, possibly making this proposed reform more difficult. *Leadership and Structure*, FED. ELECTION COMMISSION, <https://www.fec.gov/about/leadership-and-structure/> (last visited Oct. 20, 2018).

179. See, e.g., *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58 (D.D.C. 2000); *Level the Playing Field v. Fed. Election Comm'n*, 232 F. Supp. 3d 130 (D.D.C. 2017).

180. See, e.g., Cohen, *supra* note 156.

