

May 10, 2005

BNA Money & Politics Report

Presidential Debates: Federal Appeals Court Hears Challenge to FEC Dismissal of Case on 2000 Debate

By Kenneth P. Doyle

Lawyers for the Federal Election Commission and minor-party and independent presidential candidates faced off May 9 in a federal appeals court over the FEC's decision to dismiss a complaint about the presidential campaign debates in 2000 (*Hagelin v. FEC*, D.C. Cir., No. 04-5312, oral argument 5/9/05).

Critics have long charged that the Commission on Presidential Debates (CPD)--the sponsor of all presidential and vice presidential debates since 1988--is a partisan organization favoring the two major parties, which operates in violation of federal campaign finance. In 2000, minor-party and independent candidates complained to the FEC that they were excluded from even being in the audience for a debate in Boston, but the FEC dismissed the complaint without a full investigation.

The complaining candidates--including Ralph Nader and others--were excluded from the 2000 event after Nader announced that he had obtained a ticket and planned to appear in the audience for the debate between Republican nominee George W. Bush and Democrat Al Gore.

Tilt to Major Parties Seen

Jason Adkins, an attorney representing Nader, Natural Law Party candidate John Hagelin, and others, told a panel of judges from the U.S. court of Appeals for the District of Columbia Circuit that the exclusion of minor-party candidates indicated that the CPD was a partisan organization. He said that the FEC should have at least investigated the debates commission for possible violations of campaign finance law, based on numerous indicators over the years that the presidential debates process favors the major-party candidates.

But FEC attorney Richard Bader told the three-judge panel that the FEC has reviewed complaints about the debates commission several times previously and concluded that the CPD is not controlled by the major parties. He noted that the courts generally have upheld the FEC's determination that presidential debates do not violate campaign finance rules. Bader said CPD officials told the FEC that they excluded minor-party candidates from the 2000 debate audience solely to ensure that the other candidates did not disrupt the nationally televised debate between Bush and Gore.

Adkins countered, however, that there was no objective justification for excluding all minor-party and independent candidates, and the FEC should have more closely scrutinized the CPD's rationale for its actions.

"It's not a private party," Adkins said of the debates. "This was a major political event."

The three-judge appellate panel consisting of U.S. Circuit Judges Harry Edwards, Karen Henderson, and David Tatel is considering the FEC's appeal of a decision last year by a federal district judge in Washington. During the argument, FEC attorney Bader was questioned closely by Tatel, who asked whether the FEC had considered

"cumulative evidence" that the CPD favored the major-party candidates. The other two judges asked few questions.

District Judge Ruled Against FEC

U.S. District Judge Henry Kennedy ruled last August that the FEC acted contrary to law in dismissing an administrative complaint in Matter Under Review (MUR) 5378. The complaint was filed against the debates commission by Nader and several other independent and minor-party presidential candidates. Kennedy remanded the case to the FEC for further action but set no deadline for the agency to act.

The judge's 18-page ruling on a summary judgment motion said the FEC did not consider evidence that Nader and others were improperly excluded for partisan reasons from being in the audience for presidential debates held in 2000. The judge's decision did not, however, question previous rulings that presidential debates could legally exclude Nader and other candidates from participating in debates, as long as the debate sponsor uses objective criteria to determine whom to invite.

The independent and minor-party candidates have long charged that the debates commission is a partisan organization that is ineligible to conduct presidential debates. Critics say corporate sponsorship of debates including only Democrats and Republican constitutes illegal contributions to the major parties. The candidates criticizing the debates process have been supported by the National Voting Rights Institute, a Boston-based campaign reform organization.

John Bonifaz, founder and general counsel of the NVRI, watched the appeals court argument and said afterward that the three-judge panel was "very engaged" when listening to arguments about whether the FEC should have dismissed or investigated charges regarding the debates commission.

###