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Countering the Questionable Actions of the CPD and FEC

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Countering the Questionable Actions of the CPD and FEC

by

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of the requirements for the degree of
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ABSTRACT

For his study, the author determines whether the Commission on Presidential Debates (CPD) and the Federal Elections Commission (FEC) are sovereign entities, or if they are pawns of the Democratic and Republican parties (Political Duopoly) aimed to prevent smaller candidates from participating in the CPD's Presidential Debates.

The author's rationale for his research is based on the fact that, despite a large majority of American voters want to hear other voices in the CPD debates, the CPD has not allowed other voices to participate in the debates since 1992, through use of the CPD's 15-percent support requirement (starting in 2000). Every time an entity questions the CPD's requirements, the FEC dismiss the challenges. This has led to lawsuits against the commissions from Level the Playing Field (LPF) and Gary Johnson.

The author completed a literature review and case view analysis related to this matter, introduces the Marketplace of Ideas Theory, and the theory's fallacies. Results from research indicates that both the CPD and FEC have behaved questionably, keeping the threshold at a level that outside candidates cannot breach, and that the lawsuits against the commissions are valid. In conclusion, the American voters are largely limited to the status quo parties despite increasingly looking for other options. This thesis will elaborate upon the misdeeds of the Political Duopoly have also reduced other freedoms and liberties once protected by the United States Constitution.

INTRODUCTION

In 1992, the Commission on Presidential Debates (CPD) allowed non-party affiliated Ross Perot's inclusion in that year's three CPD-sponsored debates. Perot's success in the debates led an additional 13.5 million voters, split evenly between alienated Democrats and Republicans, to return to the polls during the 1992 Presidential Election. These extra voters almost universally preferred Perot over Democratic Candidate Bill Clinton and Republican Candidate George H. W. Bush (Leinsdorf, 1997). While Perot failed to win any electoral votes, his 19.5 million votes, representing 18.7 percent of 1992's popular vote, shocked the Democratic and Republican parties, more accurately known as the "Political Duopoly" (Leinsdorf, 1997). The reactions of the two parties to the election results led to two decades of changes related to electoral freedom in the United States.

Although the name "The Commission on Presidential Debates" (CPD), may sound non-partisan in nature, the CPD is, in fact, a privately owned entity jointly operated by leaders of the Democratic and Republican parties. The word "bipartisan" differs enormously from "non-partisan," and the CPD is, in fact partisan. Beginning with the 2000 election cycle, the CPD added a requirement of 15-percent support, averaged among five political polls, for inclusion in the commission's presidential debates. At these debates, each of the presidential candidates try to convince the U.S. voters to vote for him/her as the next President of the United States (POTUS).

Prior to the CPD's rule adopted in 2000, there was no minimum percentage requirements for participating in the debates. This new rule stemmed from the need to rationalize Perot's exclusion from the 1996 CPD Presidential Debates. The 15-percent criterion has prevented any other candidates, apart from those representing the Democratic and Republican parties, from participating in the debates through the last five Presidential Election Cycles – 2000, 2004, 2008, 2012, and 2016 (Fair Debates website, 2016).

Following their exclusion from the 2012 CPD presidential debates, Gary Johnson, Libertarian Party candidate for POTUS; Dr. Jill Stein, Green Party candidate for POTUS; and each candidates' respective political party filed lawsuits claiming the CPD's 15-percent threshold violated two sections of the *Sherman Antitrust Act*, an act aimed at breaking up monopolies and trusts that result in the constraints on interstate commerce. Both Gary Johnson and Jill Stein had met the constitutional requirements for winning the presidential election.¹ However, neither Johnson nor Stein could achieve 15-percent preference in 2012's pre-election political polling (Fair Debates website, 2016). Therefore, Johnson, Stein, and the two political parties continued their fight for inclusion in the 2016 CPD presidential debates.

Johnson's and Stein's quest for participation in the 2016 CPD Presidential Debates serves as the basis of two more lawsuits against the CPD and the FEC. Level the Playing Field (LPF), an organization originating from the unsuccessful Americans Elect project, which worked to have a third-party candidate on every ballot in the 2012 Presidential

¹ U.S. Constitution Art. 2 Sec. 1

Election, has sued both commissions in efforts to force the CPD to include at least one additional party in its presidential debates.² Gary E. Johnson, leader of the Our America Initiative (OAI); Gary Johnson 2012, Inc., Libertarian National Committee; James P. Gray (Libertarian Vice President nominee); Green Party of the United States; Jill Stein; Jill Stein for President; and Cheri Honkala (Green Vice President nominee); have also sued the CPD³ in an effort to force the commission to accept all candidates who satisfy the constitutional preconditions for debate inclusion.⁴

On August 15, 2016, a lawsuit dismissal again permitted the CPD to exclude Johnson and Stein from participating in its presidential debates. As a result, Socially Liberal and Fiscally Conservative (SOLIFCO), a pro-Johnson Political Action Committee (PAC) sent a letter to the CPD that the PAC was working to revoke the commission's nonprofit status. The letter explicitly referenced the CPD's 15-percent threshold (Lyman, 2016, p. 1) and its bipartisan, rather than nonpartisan, nature, (Lyman, 2016, p. 2).

The U.S. Constitution does not restrict the number of parties or candidates running for the presidency each election cycle. However, the actions of entities, such as the CPD and FEC, appear to work together to prevent other parties from challenging the Political Duopoly (Miller, 2015). As a result of continued third-party exclusions from the debate, the two parties have passed hundreds of laws and mandates since 1980 aimed at empowering the duopoly and large corporations at the expense of every day Americans, small businesses, and other political parties (Miller, 2015).

² *Level the Playing Field v. Federal Election Commission*, 15-cv-1397 (TSC)

³ *Gary Johnson and others v. Commission on Presidential Debates*, 15-1580 (RMC)

⁴ U.S. Constitution, Art. 2 Sec. 1

On August 5, 2016, Rosemary M. Collyer, a senior-level District Judge presiding in Washington, DC, nominated by Republican President George W. Bush, and confirmed by the then Republican-controlled senate (Federal Judicial Center, 2016), dismissed all four grievances filed in *Johnson v. CPD*. While the author will go into greater detail about Judge Collyer's dismissal of this lawsuit later in the paper, she first dismissed Johnson's claim that the actions taken by the CPD's amounted to antitrust violation, noting legal precedent set through the *Noerr-Pennington Doctrine*⁵, originating from two Supreme Court verdicts where the courts have held that antitrust laws only govern commercial markets, not political activity (Collyer, 2016, p. 1). Collyer also ruled that Johnson's assertion of First Amendment infringements were invalid because the amendment "guarantees freedom from government intervention," and the defendants "are private parties" (Collyer, 2016, p. 9). Lastly, Collyer said that Johnson, and the other plaintiffs in the lawsuit, failed to prove their grievance involving "international interference with prospective business advantage" (Collyer, 2016, pp. 15-16). Collyer seemingly chose to simply reiterate the CPD's defense, as well as the brief filed by Romney attorney James M. Burnham,⁶ to explain why the commission was automatically exempt from any violation of the Sherman Antitrust Act regulations. On January 31, 2017, Johnson's attorney Bruce Fein filed an appeal to Collyer's decision.⁷ On March 17, 2017, the U.S. Court of Appeals granted Gary Johnson and the other affiliated parties an appeal of the lower court's decision. However, the Court has yet to issue its ruling.

⁵ *Eastern Railroad Presidents Conference v. Noerr Motor Freight, and United Mine Workers v. Pennington*

⁶ Romney Motion to Dismiss *Johnson v. CPD* 1:15-CIV-01580-RMC

⁷ *Johnson v. FEC appeal* – 15-cv-1397 (TSC)

In contrast, on January 5, 2017, Tanya Chutkan, another U.S. District Judge in Washington, D.C., appointed by President Obama in 2014, heard the closely related lawsuit, *Level the Playing Field v. Federal Election Commission*. In her judgment, Chutkan repeatedly questioned the FEC's assertion that the commission was entitled to exemptions from government controls, simply because court cases had granted the FEC these allowances in the past. Chutkan chose to take an in-depth review of the lawsuit, and at the actual actions taken by the FEC and CPD. On February 1, 2017, Judge Chutkan sided with the LPF, and the Libertarian and Green parties. Chutkan's decision required the FEC to "reconsider the allegations against the CPD within 30 days" (Chutkan I, Feb. 2017, p. 28).

In a later hearing to accommodate a request by the FEC, asked Chutkan to "reconsider" and "clarify" her recent ruling, and for more time to review the documents, the judge further scolded the FEC, reminding all present of her previous ruling that the FEC "acted arbitrarily and capriciously and contrary to law" through its numerous actions and inactions related to the plaintiffs (Chutkan II, Feb. 2017, p. 1). Chutkan questioned the necessity for this extension, given the fact that both the FEC and CPD had testified that they had already read all of the LPF's documents prior to appearing in her courtroom in January (Chutkan II, Feb. 2017, p. 2). However, Judge Chutkan agreed to extend the FEC's deadline for reviewing the documents to April 3, 2017 (Chutkan II, 2017, p. 2).

In March, after announcing that the commission would not appeal Chutkan's decision, the FEC again reiterated its assertion that neither changes nor rulemaking were necessary, as it relates to the composition and actions of the CPD. Through its attorney Robert Bonham, the FEC based its decision not to initiate rulemaking on insubstantial

evidence from Dr. Clifford Young (2014) and Douglas Schoen (2008), who provided the legal arguments on which the action was based. The FEC argued that Dr. Young's (2014) "Change the Rule" article, which was appended to the action was "one dimensional" in its analysis of polling data (Federal Register, 2017, p. 15469). The commission said that Schoen's "unexplained second-hand analysis undercuts his credibility" (Federal Register, 2017, p. 15471). Nevertheless, the LPF argued that the FEC was still acting contrary to law. On May 26, 2017, Judge Chutkan ruled that the FEC must once again respond to the LPF's amended complaint.

In this thesis, the writer will examine the *Level the Playing Field (LPF) v. Federal Election Commission (FEC)*⁸ and the *Gary Johnson and others (Johnson) v. Commission on Presidential Debates (CPD)*⁹ lawsuits, explore arguments from both sides in the cases, and also include a wide variety of sources to determine whether the CPD 15-percent candidate support threshold violates anti-trust laws introduced more than a century ago. The writer will also provide research related to the role of the CPD, and also the decline in all aspects of freedom in the U.S. since 2000. The writer will cite details from the *Sherman Antitrust Act*, in an attempt to determine whether or not the act was breached by the actions of the CPD and FEC, as argued in *Johnson's* anti-trust lawsuits against the CPD and the FEC. The author will also discuss the origins and the composition of the FEC. Finally, he will examine the distinct differences between the judgments by Collyer's *Gary Johnson v. CPD*, and Chutkan's judgment in *LPF v. FEC*.

⁸ *LPF v. FEC*

⁹ *Johnson v. CPD*

RESEARCH QUESTIONS ADDRESSED IN THIS THESIS

Are the FEC's and CPD's ties to the Political Duopoly too strong for them to set objective criteria for the CPD's Presidential Debates? Is there enough sufficient evidence to prove the CPD is violating *Sherman Antitrust Act* legislation, and, if so, is it outside of the political activity precedent set by *Noerr-Pennington*? Has the duopoly's decades-long grip on governmental power in the United States responsible for the significant loss of freedoms once protected by Americans, and do the voters or major corporations now control the majority of the legislative action in Washington, D.C.?

LITERATURE REVIEW

The Platforms of the Libertarian and Green Parties

The Libertarian Party (LP), founded in 1971, is the third-largest political party in the United States, with approximately 500,000 registered members (LP website, 2016). The LP is committed to a free-market economy, protecting civil liberties and personal freedoms, and advocating for a foreign policy consisting of free trade, avoiding military intervention, and preserving peace in the U.S. (LP website, 2016). The Green Party (GP), founded in 1984, is committed to “ecological politics and social justice, peace and non-violence, local and regional self-management and grassroots democracy” (GP website, 2016). The GP is the fourth-largest political party in the U.S., with approximately 250,000 registered voters (GP website, 2016).

Both the LP and GP share a commitment to ending military intervention abroad and protecting Americans’ civil liberties and personal freedoms. However, the two parties diverge dramatically in their economic ideologies. The LP is committed to limiting the size of the federal government, taxation, and ending what Libertarians see as unconstitutional federal governmental agencies, programs, and mandates (LP website, 2016). In contrast, the GP’s economic philosophy centers on the tenets of Socialism (GP website, 2016).

In the 2016 Presidential Election cycle, the presidential candidate for the Libertarian Party, Gary Johnson, surged by 252 percent over its 2012 support, and earning more than three percent of the 2016 voters' support (Election Outlet website, 2017). Meanwhile the Green Party's presidential candidate Jill Stein's percentage of the popular vote increased by 211 percent when compared to 2012, representing one percent of the total electorate (Election Outlet website, 2017). In comparison. Republican Candidate Donald Trump won 46.4 percent of the vote, while Democratic Candidate Hillary Clinton won. 48.5 percent. However, due to the rules regarding the Electoral College, Trump won 306 electors, while Clinton only earned 232 (CNN website, 2017).

The Origins, Composition, and Functions of the FEC

In 1971, Congress worked to consolidate all of its previous efforts at reform, passing the Federal Election Campaign Act (FECA)¹⁰. The FECA required more transparent financial disclosures for political parties, candidates running for federal offices, as well as political action committees (PACs). After allegations of more serious monetary mismanagement throughout the 1972 Election Cycle, Congress further amended FECA, setting contribution limits for people, PACs, and political parties. The added amendments led to the establishment of the independent [or bipartisan] Federal Elections Commission (FEC) in 1975 (FEC website, 2017). Comprised of an equal number of Democrats and Republicans, the FEC administrates and enforces laws as they relate to campaign finance in federal elections (FEC website, 2017). The FEC maintains

¹⁰ FN: 52 U.S.C.S. 30101

jurisdiction over campaign financing of both houses of Congress, as well as the positions of President and Vice President (FEC website, 2017).

The FEC and its finance laws for federal campaigns serve three basic functions. First, the FEC ensures transparency in how candidates raise and spend in order to better leverage the outcome of federal elections (FEC website, 2017). Secondly, the FEC restricts certain types of donations and expenses aimed at influencing federal elections. Finally, the FEC oversees how everyday citizens finance presidential campaigns (FEC website, 2017).

Explaining the Electoral College's Significance

The Electoral College's (EC) originates from the passage of the U.S. Constitution¹¹ in 1789, Article 2, Section 1, of the U.S. Constitution, states:

Each state shall appoint, in such manner as the legislature thereof may direct, a number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector (Constitution Art. 2 (1)).

Every state is represented equally in the Senate, with two senators, equaling 100 electors in the EC.¹² The population of the state determines the number of congressmen in the House of Representatives, and the District of Columbia is awarded three electors

¹¹ U.S. Constitution, Art. 2 (1)

¹² U.S. Constitution, Art. 1(3)

in the EC.¹³ Presidential candidates must win a majority of electors, 270, to win the presidential election.¹⁴

The *Sherman Antitrust Act*

In December 1889, Ohio Senator John Sherman introduced legislation to address the “unlawful trusts and combinations in restraint of trade and production” (Gardner, 1912, p. 340). After coordination between the House and Senate, congress added amendments and revised the Sherman Anti-Trust Act. President Benjamin Harrison signed the legislation into law on July 2, 1890.¹⁵

Sherman proposed the legislation to counteract the creation of what he called “unlawful combinations,” after applying “common law” and “human experience” (Gardner, 340, 1912). Sherman felt that trusts worked to limit competition and inhibited trade across the country (Gardner, 1912, pp. 340-341). The trusts not only inhibited interstate commerce, but also intrastate commerce (Gardner, 1912, p. 341).

Section 1 of the *Sherman Antitrust Act* states that “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal”¹⁶. Section 2 affirms that “Every person who shall monopolize, or attempt to monopolize, or combine or conspire

¹³ U.S. Constitution, Art. 1(3)

¹⁴ U.S. Constitution, Art 2 (1)

¹⁵ *Sherman Antitrust Act*, 15 U.S.C.S. 1-7 (1890)

¹⁶ *Sherman Antitrust Act*, 15 U.S.C.S. 1-7 Sec 1, (1890)

with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony.”¹⁷

After the legislation was passed, members of Congress waited for the courts to interpret the act to determine to whom the law applied, and how to best implement the act based on different areas of commerce restrained by trusts (Gardner, 1912, pp. 340-341). How would the new law apply to contracts? Also, in what ways would the act affect railroads? Additionally, how would the law affect labor unions? Finally, how could the act impact product regulation? (Gardner, 1912, pp. 340-341)

Why the *Sherman Antitrust Act* Could Apply to *Johnson v. CPD*

Gary Johnson challenged the CPD alleging violations of sections 1 and 2 of the *Sherman Antitrust Act*. Johnson argued that the CPD’s actions violated section 1, because the commission’s actions in restricting party participation in its debates to those meeting the 15-percent threshold effectively restricts trade between the states, creating a monopoly of the presidential debates.¹⁸ Johnson maintained that the CPD has violated section 2 through its actions limiting the presidential debates to candidates who can earn 15 percent in political polling within one month of the election.¹⁹ Johnson argued that the commission conspired with the Political Duopoly to monopolize trade and commerce between the states (*Johnson v. CPD, 2016*).

¹⁷ *Sherman Antitrust Act*, 15 U.S.C.S. 1-7 Sec 2, (1890)

¹⁸ *Sherman Sec. 1*

¹⁹ *Sherman Sec. 2*

The Origins and Information Regarding the Lawsuits filed against the CPD

In 2012, Governor Gary Johnson, the Libertarian nominee for POTUS; Dr. Jill Stein, the Green Party nominee for POTUS; and the Libertarian and Green parties sued the CPD for inclusion in the debates. Both Johnson and Stein had successfully met two of the three criteria for participation in the presidential debates: Both are constitutionally qualified to run for POTUS – being 35 years of age or older, born in the United States, and living in the United States for more than 14 years.²⁰ Also, both Johnson and Stein were on the voters' ballots in enough states to win the Electoral College (Constitution Art. 2 (1)). However, neither candidate could achieve the required 15-percent threshold for inclusion in the CPD Presidential Debates (Fair Debates website, 2016). According to CNN polling data taken in September 2012, four-percent of registered voters supported Johnson for president, and two-percent backed Stein (CNN website 2017). Even though neither the Libertarian nor Green Party presidential candidates were included in the 2012 debates, both the nominees and their respective political parties continued fighting for inclusion after the 2012 Presidential Elections (Fair Debates website, 2016). Despite Johnson's and Stein's best efforts, the courts did not resolve the issue in time for the 2016 Election Cycle. Once again, neither candidate attained the 15-percent requirement to participate in the 2016 CPD Presidential Debates.

Johnson's and Stein's demands for inclusion in the three 2016 CPD Presidential Debates have resulted in two separate lawsuits against the CPD. *Level the Playing Field* (LPF), an organization originating from 2012's ineffective "Americans Elect" initiative, has

²⁰ U.S. Constitution Art. 2, Sec. 1

sued both the CPD and the Federal Elections Commission (FEC) to force the inclusion of the third-place candidate in the CPD Debates. Although the Constitution does not limit the number of parties and presidential candidates from which Americans can choose on Election Day, the Political Duopoly has written and enacted nearly 1,800 state and federal laws since 1980 aimed at keeping itself in power and excluding candidates not belonging to either the Democratic or Republican parties from participating in the CPD's Presidential Debates (Gilens & Page, 2014). The commission has accomplished this with complicit assistance from the FEC – also a bipartisan, rather than non-partisan, entity. Despite grievances filed in almost every election cycle since 1996, the FEC has repeatedly refused to question the CPD's 15-percent threshold for inclusion in the commission's debates (Toth, 2013).

The second lawsuit, filed by Gary Johnson and others, is aimed at forcing the CPD to allow the participation, in its debates, of all constitutionally-eligible candidates – over 35 years of age, born in the United States, and who have lived in the U.S. for at least 14 years – who have submitted enough petitions to place on the ballots in states totaling at least 270 Electoral Votes, to participate in the 2016 CPD Debates (Fair Debates website, 2016). *Johnson v. CPD* has the commission for violations of both sections 1 and 2 of the *Sherman Antitrust Act*. This would have resulted in the inclusion of both the Libertarian and the Green party nominees in the 2016 CPD Debates (Fair Debates website, 2016).

Samuel Toth Examines Johnson's Lawsuit against the CPD

In 2013, Samuel F. Toth, an attorney currently based in Cleveland, Ohio, published an article in the *Case Western University School of Law Review* titled "The Political

Duopoly: Antitrust applicability to political parties and the Commission on Presidential Debates.” Toth (2013) explored possible precedents that courts could follow in the lawsuit brought by Libertarian Presidential Candidate Gary Johnson, the plaintiff in the *Johnson v. CPD* lawsuit, as they related to the *Sherman Antitrust Act (Johnson v. CPD)*. Toth (2013) reviewed the “catch-22” created by the CPD for third-party candidates wishing to get into the Presidential Debates. Third parties are required to obtain 15-percent in order to participate in the CPD debates. However, Toth (2013) wrote that this threshold is virtually impossible without participating in the debates.

Toth (2013) opened his article with a recap of a 2012 Presidential Debate, moderated by Ralph Nader that took place just two days before the POTUS election. In this debate, Libertarian Party nominee Gary Johnson, Green Party nominee Jill Stein, Constitution Party nominee Virgil Goode, and Justice Party nominee Rocky Anderson sparred over issues that Republican and Democrat candidates failed to address during the CPD Debates (Toth, 2013). These “lesser” candidates discussed campaign finance reform; the utilization of immigration provisions, the application of controversial provisions in the National Defense Authorization Act of 2012; the implementation of the PATRIOT Act, the act’s constitutionality, and its continued renewal; and more engaged detailed discussions related to climate change than addressed by either Barack Obama or Mitt Romney (Toth, 2013). While both Obama and Romney were invited to the multi-party debate, neither of them attended or participated.

A Brief History of the Equal Opportunities Rule, 1934 *Communications Act*

In his article, Toth (2013) discussed section 315 of the *1934 Communication Act*²¹, better known as the “equal time” and or “equal opportunity” rule, and how its implementation (or lack thereof) has impacted political debates for more than 40 years. Section 315 provides, in part:

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: Provided, that such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any —

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), Communications Act 47 U.S. Code Sec 315 (1934) or

²¹ Communications Act 47 U.S. Code Sec 315 (1934)

While the section does mandate on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto), it does not require broadcasts to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance, coverage, and prohibits censorship of all of the candidates campaigning for an office (Communications Act, 1934)

In the 1959 Chicago mayoral election, independent candidate Lar Daly, running for office cited section 315 in his challenge of the local networks' coverage of the election. The Chicago stations refused to provide balanced reporting for all of the "legally qualified candidates" campaigning for mayor. After this controversy, Congress amended section 315 to ensure the media provided all "legally qualified candidates" with news coverage, interviews, and documentaries (Toth, 2013).

Following this expansion of equal news coverage, the next controversy surrounded the inclusion of all "legally qualified candidates" in political debates, as Congress debated whether political debates counted as actual "news coverage" (Toth, 2013). Instead of reaching a consensus about considering debates "news," the House and Senate voted to suspend section 315, thereby allowing the restrictions of the 1960 Presidential Debates to Democratic Presidential Candidate John F. Kennedy and Republican Presidential Candidate Richard Nixon (Toth, 2013).

In 1962, when the Federal Communications Commission (FCC) originally decided that political debates did not fit within the definition of “news coverage,”²² Eric Hass, a Socialist Labor candidate running for governor of Michigan, contested the FCC’s decision not to expand equal news coverage to include political debates (Toth, 2013). The FCC ruled in favor of the minor party candidate in a decision known as “Goodwill Station.”²³ However, in 1975, Congress passed Public law 94-335, resulting in the demise of the Goodwill Station precedent. The law re-implemented the exclusion of political debates from “bona fide news events,” legislators noting that the Goodwill Station decision had misinterpreted legislative history (Toth, 2013, p. 244). This provided the opportunity for the airing of future televised presidential debates.

The Women’s League of Voters sponsored the 1976, 1980, and 1984 presidential debates (Toth, 2013). Because third-party candidate John Anderson was polling at approximately 20 percent in 1980, the League invited him to the debates (Toth, 2013). However, incumbent Democratic President Jimmy Carter refused to participate in a debate that would include Anderson, preferring one limiting the debate to only the Democratic and Republican candidates, Carter and Reagan respectively. This resulted in a debate between Anderson and Reagan (Toth, 2013). Carter’s refusal to participate gravely disappointed the League, which noted that the president prevented the public from hearing all of the viable candidates for the office together on the same stage. In a series of tense negotiations, the two major parties pressured the League to accept more control by the candidates and parties in the 1984 Presidential Debates, simply because

²² Inquiry Concerning Section 315 of the Communications Act of 1934 as Amended (Goodwill Station, Inc.), 40 FCC 362 (1962)

²³ Inquiry Concerning Section 315 of the Communications Act of 1934 as Amended (Goodwill Station, Inc.), 1975

the League was unable to adequately pressure Carter to participate in the 1980 three-way debate (Toth, 2013).

In November 1985, representatives from the two major parties decided that, in order to ensure participation by the Democratic and Republican presidential candidates in scheduled debates, the parties should assume a greater role in upcoming presidential debates. Because of the increasing demands by the two major parties, the League of Women Voters withdrew its sponsorship of the presidential debates (Toth, 2013). The League withdrew from the debates because it believed “the demands of the two campaign organizations would perpetrate a fraud on the American voter,” due to the increasingly rigid demands imposed by the major parties, including “the selection of questioners, the composition of the audience, hall access for the press and other issues” (Toth, 2013, pp. 247-248).

On October 3, 1988, Nancy Neuman, president of the League of Women Voters, issued the following statement regarding the League’s withdrawal from sponsorship of the presidential debates:

After the 1984 election, the League decided that it would go ahead with plans to sponsor a full series of primary and general-election presidential debates in 1988. In early 1987 -- our site selection process and other planning already under way -- the chairmen of the two political parties announced plans to sponsor their own series of debates. They had set up a commission, they said, and they thanked the League for all we had done and urged us to step aside.

We did not.

Since their press conference that day, the League has argued that an organization set up by the political parties is not an appropriate sponsor of presidential debates. Obviously, the political parties have a huge stake in the outcome of debates and elections. And obviously, a political party will not be party to an event that puts its titular head at risk.

Under partisan sponsorship debates will become just another risk-free stop along the campaign trail (League of Women Voters website, 2017).

In place of the League of Women Voters, representatives from both major political parties created the “Commission on Presidential Debates” (CPD), which would thereafter serve as the sole sponsor of all of the upcoming presidential debates. The CPD described itself as “a bipartisan, non-profit, tax-exempt organization formed to implement joint sponsorship of general election presidential and vice presidential debates” (Toth, 2013). Notably absent from the CPD’s description is the label “non-partisan,” which formed the basis of Gary Johnson’s lawsuit questioning the CPD’s right to remain tax exempt (Our America Initiative website, 2016).

In 1992, because Ross Perot’s popularity with the American voters was estimated at around seven percent at the time of the debates (Leinsdorf, 1997), the CPD invited him and his vice presidential candidate to participate in the commission’s debates (Toth, 2013). In spite (or possibly because) of Perot’s success earning 18.7 percent of the popular vote in the 1992 Presidential Elections, the CPD concluded Perot “did not meet the realistic chance standard” for inclusion in the 1996 CPD debates (Toth, 2013, p. 248).

Prior to the 2000 Presidential Debates, the CPD provided three necessary criteria all candidates for President of the United States (POTUS) must meet for inclusion in the CPD's debates.

Though previously mentioned, the writer will review the criteria for readers of his paper. The first rule required candidates to be "constitutionally eligible" (as defined in the U.S. Constitution), qualify for ballot access in enough states to earn 270 (a majority of) electoral votes in the Electoral College, and they must attain 15 percent support across an average of five political polls (Toth, 2013). While the first two requirements align with the Constitution's definition of eligibility, the last requirement is the subject of the lawsuits filed by Johnson and LPF (OAI website, 2016).

Toth Resumes his Examination of *Johnson v. CPD*

Johnson and the LPF are not the first organizations to challenge the CPD's 15-percent threshold. In 2000, Reform Party Presidential Candidate Patrick Buchanan who sued the commission for inclusion in the debates (Buchanan v. FEC). Initially, when the CPD decided to exclude him from the debates, Buchanan filed an official complaint with the FEC (Buchanan v. FEC). When the FEC denied his request for action, Buchanan took the CPD to court (Buchanan v. FEC). While the Federal District Court affirmed the CPD's right to exclude Buchanan from the debates, the court acknowledged some skepticism relating to the CPD's threshold, suggesting that including third parties would benefit public policies on both domestic and international issues, related to hosting the debates (Buchanan v FEC).

In part two of his “Elements of Bringing an Action against the FEC,” Toth (2013) outlines what Johnson must prove to be successful in a lawsuit against the CPD. Johnson and the other plaintiffs must not only provide proof of “standing” in the action, but also to convince the court that the “political activity exemption” was not applicable to those campaigning for a political office (Toth, 2013, p.252).

Toth (2013) describes standing as providing evidence of “injury in fact,” connecting the injury or harm to the conduct of the defendant, and emphasizing that a decision in favor of Johnson would help to mediate the harm caused by the CPD (p. 252). The inability to participate in the CPD’s debates blatantly handicaps minor party and independent candidates from succeeding, as it limits their ability to fully explain their platform to the general public (Toth, 2013). Therefore, the CPD ensures voters know little, if anything at all, about the smaller political parties and their respective candidates on Election Day (Toth, 2013). By directly suing the CPD, Johnson directly links the harm to the actions taken on the part of the defendant(s), which, in turn, proves the connection is not simply a coincidence (Toth, 2013). By ensuring the possibility of debate inclusion on a recurring basis, the judgment could remedy the abuse caused by the CPD and FEC) (Toth, 2013). Considering that more than three-fourths of U.S. voters wanted a third and viable option in the 2016 Presidential Election (USA Today, 2017), the American voters hold a strong interest in making sure the CPD and FEC conduct debates in a fair and objective manner.

Toth (2013) then discusses the necessity for Johnson and the LPF to properly engage the “political activity” portion of the *Sherman Antitrust Act* (p. 254). To do so, Johnson and the LPF must find a way to disprove the *Noerr-Pennington Doctrine*. This

doctrine results from two U.S. Supreme Court decisions in the 1960s. In the first case, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*²⁴, Eastern Railroads Presidents Conference argued that Noerr Motor Freight engaged in a campaign to disenfranchise the conference. The U.S. Supreme Court ruled that the *Sherman Antitrust Act* did not apply to cases where the plaintiffs ask the legislative and executive branches to create laws that could result in a monopoly, or reduce the options available to the general public (Toth, 2013). The court ruled similarly in *United Mine Workers v. Pennington*²⁵, when the union coaxed the acting Secretary of Labor to hike minimum wages past a point that would put smaller companies out of business. In both rulings, the Court stated that Sherman was not appropriate for application in cases taking place in the political arenas granted protections related to political activities by exempting them from antitrust actions.

Despite these apparent precedents that prohibit the use of antitrust actions in cases related to political campaigns, Toth (2013) asserts that the lawsuits against the CPD should proceed. As Toth (2013) explains, the televising of the CPD's presidential debates does not require an "official action by the government" (p. 255). The CPD hosts debates between candidates running for an office, and not (necessarily) officials already holding an office (Toth, 2013). Toth (2013) assumes that the CPD will rely on the *Noerr-Pennington Doctrine* as precedent for allowing the commission to continue excluding third-party candidates from the CPD debates. However, *Noerr-Pennington* would not

²⁴ *Eastern Railroad Conference v. Noerr Motors* 365 U.S. 127 (1961)

²⁵ *United Mine workers v. Pennington*, 381 U.S. 657 (1965)

apply to candidates running for office who are excluded from the opportunity to participate in the debate (Toth, 2013).

Assuming that Johnson can successfully cross the first two hurdles of the race, the affected parties must definitively prove that the CPD's selection criteria do indeed restrain trade, violating section 1 of the Sherman Antitrust Act. Also, Johnson must confirm that the CPD and the Political Duopoly have concocted "an agreement or conspiracy" to eliminate competition at the debates, prove how this agreement disrupts interstate commerce, and, as a result, has led to an unlawful restriction on trade (2013).

Toth (2013) further describes the agreement and/or conspiracy as actions taken by entities resulting in "concerted action" violating section 1 of the *Sherman Antitrust Act*. However, he suggests that the U.S. Supreme Court bases this interpretation upon "functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate," and these concerted actions need not involve more than one body (Toth, 2013, p. 255). The court will also look at the situation's central substance, and the actions taken by the identified people and/or groups, regardless of who is taking the action (Toth, 2013). Despite the CPD's status as a single legal entity, Johnson can easily provide evidence showing that the CPD is owned and operated by the Democratic and Republican parties, and as cited by the commission's chairs from both parties, as a bipartisan body (Toth, 2013). In the *Buchanan v. Federal Election Commission* decision, the courts have also already noted the FEC's unwillingness to acknowledge that this matter results in increasing distrust among voters (Toth, 2013). The courts would not need to defer to the FEC's interpretation of the CPD, but, simply the results found from the functioning of the commission. Therefore, the courts could uphold Johnson's claim

that the CPD is, indeed, composed of competitors looking to undermine competition, which violates the *Sherman Antitrust Act* (Toth, 2013).

Toth (2013) then describes how the CPD's agreement restricts commerce between states. Admittedly the OAI has emphasized the "interstate" implications of the CPD's exclusionary process. However, Toth (2013) asserts that Johnson's most difficult challenge relates to proving that the CPD's behavior substantially impedes commerce. Currently, no precedent exists for the argument that the CPD inhibits trade. However, Toth (2013) notes that, should the individual allegations not convince the judge on their own, the "totality of circumstances" could prove the CPD's behaviors worked together to impede trade (p. 261).

Toth (2013) provides a few examples of arguments that Johnson could use as evidence that commerce took place. First, Toth (2013) presents case laws also involving intrastate commerce where the courts ruled that there were violations of the *Sherman Antitrust Act*. In the case, *Goldfarb v. Virginia State Bar*²⁶, the Court held that exchanging money for services constituted "commerce."²⁷ Based on this precedent, Johnson can argue that, since the President earns a salary, the exchange of money for services is a violation of the *Sherman Antitrust Act* (Toth, 2013).

Toth (2013) also questions the CPD's nonprofit status, given the fact the commission is a bipartisan, rather than a nonpartisan, entity. Large corporations from within the U.S. and around the world donate millions of tax deductible dollars each

²⁶ *Goldfarb v. Virginia State*, 421 U.S.773 (1975)

²⁷ *Sherman Antitrust Act*, 26 Stat, 209, 15 U.S.C .Sec, 1-7)

election cycle to the CPD. Since such businesses and the two political parties in power wish to sustain what Toth (2013) refers to as “a business-friendly two party system,” that neither the contributing corporations nor the CPD want to disturb (Toth, 2013, pp. 260-261). Smaller political parties and businesses could argue that the quid pro quo nature of these relationships violate FECA laws (Toth, 2013).

SOLIFICO, a pro-Johnson PAC, too Toth’s quid pro quo assertion, and added the request for the court to strip the CPD of its nonprofit status (Lyman, 2016, p. 1). This implied relationship has been echoed by Martin Gilens’ and Benjamin Page’s (2014) article which concludes that over the last 35 years the U.S. has transitioned from a Constitutional Republic into an Oligarchy.

Toth’s (2013) next argument relates to the undeniable reality that politics and economics are connected at their cores. Toth (2013) describes the “competitor standing doctrine” as providing that economic actors have the right to challenge the apparent bestowal on the part of the government that results in benefitting their competitors. He provides evidence that, through this doctrine, the courts already recognize the ever-growing link between politics and economics (Toth, 2013). This could provide a pathway into Johnson’s argument that the CPD’s presidential debates are far from purely political (Toth, 2013).

In his final example of how Johnson could successfully challenge the CPD’s rules of debating, Toth (2013) discusses the “unreasonable restraint” clause, through which third parties could argue that the CPD’s 15-percent threshold unreasonably restrains competition and commerce in the political arenas. Should the courts determine that, on

weighing all of the components of a case, consumers could benefit from removal of the threshold requirements, then the CPD should remove its third prerequisite for participation in political debates (Toth, 2013).

Toth (2013) concludes that the courts should consider Johnson's complaints. He acknowledges possible judicial resistance in wake of earlier precedents that have denied any political applications of the Sherman Antitrust Act. However, Toth (2013) argues that there is a recognizable distinction between the remedies sought by smaller political parties and the two 1960s cases used to establish the *Noerr-Pennington Doctrine*, to which previous verdicts have deferred to avoid any political applications of the *Sherman Antitrust Act*.

Gilens and Page Discuss the United States' Transformation into an Oligarchy

In April 2014, Princeton University Professor Martin Gilens and Northwestern University Professor Benjamin Page detailed how the two political parties in power have colluded with conglomerate corporations over the last 35 years to transform the system of government in the United States from a Constitutional Republic into an Oligarchy. Gilens and Page (2014) discuss the four traditional theories that characterize the U.S. political system: Majoritarian Electoral democracy, the Economic-Elite Domination, Majoritarian Pluralism, and Biased Pluralism.

Gilens and Page (2014) use data from 1,779 policy issues to determine whether decisions by elected officials are directed at typical U.S. citizens; the economically elite players in society; or organized interest groups business or mass-based (Gilens & Page, 2014, p. 568).

Majoritarian Electoral democracies are systems of government in which the wills and needs of traditional voters and constituents play the primary role in the passage and implementation of legislation and public policies (Gilens & Page, 2014). The authors contrast this model with the concept of Economic-Elite Domination, where businesses and individuals with vast amounts of money and influence control the laws and mandates proposed by congressmen in Washington (Gilens & Page, 2014).

The Majoritarian Pluralism system is determined by the extent to which average voters and their interests are represented equally in the U.S. political realm (Gilens & Page, 2014). The authors contrast this theory with Biased Pluralism, in which the interests of professional groups, business associations, and corporations dominate the political system. The authors discuss how these two extremes impact traditional voters, the economically elite, and the larger-scale interest groups – all of which compete for influence in Washington, D.C. (Gilens & Page, 2014). The authors provided analyses as to whether all of these equally play a role in the laws and mandates passed and implemented by elected governmental officials in D.C., or whether these interests unequally affect the legislation approved in congress and signed into law by the president (Gilens & Page, 2014).

Gilens' and Page's (2014) study concentrates on the democratic and/or non-democratic nature, and the origins, of the public policies and procedures implemented by the U.S. government. Through their research, Gilens and Page (2014) determined that big business interests and the economically elite override any influences that typical voters and grassroots organizations should have in the governing process. Based on their findings, Gilens and Page found extensive evidence for the existence of Biased

Pluralism and Economically-Elite Dominance theories, with virtually no support for the concepts of Majority Pluralism and/or Majoritarian Electoral Democracy (2014).

Gilens and Page (2014) took their aforementioned 1,779 cases regarding policy measures from legislation passed by Congress between 1981 and 2012. Then, the researchers compared public opinion behind these policies with the actions taken by the lawmakers in Washington, D.C. (2014). The analyzed cases had to meet seven criteria: 1) include distinct for or against positions, 2) include specificities relating to the policies, 3) cases had to be relevant were to decisions made by the federal government, 4) reflect the usage of categorical rather than conditional phrasing, 5) include available data of income relevant to those responding to the questions, 6) the exclusion of Constitutional amendments and/or Supreme Court decisions, and 7) include cases where clarity outweighed ambiguity (Gilens & Page, 2014). While these 1,779 cases could not cover every aspect of political policy and ideology, they did relate to matters about which public opinion should play a part in the passage and/or defeat of given pieces of legislation (Gilens & Page, 2014).

Upon dividing income into tenths – where the bottom tenth is poor, fifth tenth is middle-class, and the top tenth is wealthy – Gilens and Page (2014) asked respondents to give their opinion on a given policy issue with the scale of responses being: believes highly unfavorable, somewhat unfavorable, somewhat favorable, and highly favorable. In addition to the income criteria, the researchers categorized the influence of interest groups, both grassroots and corporate-related in composition (Gilens & Page, 2014).

For their study, Gilens and Page (2014) chose their dependent variable based upon whether or not the policy proposal change actually happened within a four-year period. Their three independent variables included the policy preferences of average citizens, the preferred policies of the economic elite, and the stances of applicable interest groups. Gilens and Page (2014) found that the interests of the middle-class respondents correlated more strongly with those of the affluent than with those of the impoverished. In such cases, while the middle-class constituents regarded the outcomes of the congressional votes as a victory, politicians relied on the donations and influences from the affluent in deciding which legislation should be passed (Gilens and Page, 2014).

However, the research also shows virtually zero (0.04) correlations between stances of interest groups and the preferences of average citizens (Gilens & Page, 2014). Even grassroots groups (such as Second Amendment defense and pro-life organizations) showed only minimal correlation (0.12) with the views of “middle America” (Gilens & Page, 2014). Still, grassroots organizations outperformed the positions of corporate interest groups, the latter of which was actually negatively correlated (-0.10) with the desired outcomes of middle-class voters. Surprisingly, even the preferences of the more-affluent participants rarely correlated with those of big business. While higher-income Americans prefer reducing the size and spending of the federal government, big business interests (health care, military spending, agri-business) consistently lobby Congress for subsidies and other types of economic support (Gilens & Page, 2014).

When measuring the correlation between each one of the three independent variables (policy preferences of middle class, policy preference of economic elites, and policy changes desired by organizations), and the dependent variable (whether or not the

desired policy change took place within four years) separately, the correlation between any of the single independent variables with the dependent variable remained quite high (Gilens & Page, 2014). This would support the view of those favoring the Majoritarian Electoral Democracy and Majoritarian Pluralism theories.

However, when simultaneously comparing all three of the independent variables with the dependent variable, the correlation of middle class voters to changes in public policy drops to almost zero (Gilens & Page 2014). Under this model, the impact of the most affluent 10-percent more closely correlates with the actual policy change (Gilens & Page, 2014). The research also shows a strong correlation between interest groups and actual policy change (Gilens & Page, 2014). These findings enhance the credibility of the position that Economic-Elite Domination and Biased Pluralism theories in the U.S. are the most applicable tenants to explain politics in the USA (2014). This asserts that the wealthier voters and special interest groups actually control policy changes (2014). Furthermore, this confirms that the preferred positions of the average voters only minimally impact the legislation and policy-making decisions made by governmental figures in Washington, D.C. (Gilens & Page, 2014).

CPD's Reasons for the Threshold and Refusal to reconsider for 2016 Debates

The Commission on Presidential Debates issued the following statement on October 29, 2015 regarding its decision not to change the selection criteria for the 2016 CPD Presidential Debates (CPD website, 2015)

It was the CPD's judgment that the 15-percent threshold best balanced the goal of being sufficiently inclusive to invite those candidates considered to

be among the leading candidates without being so inclusive that invitations would be extended to candidates with only very modest levels of public support, thereby jeopardizing the voter education purposes of the debates (CPD website, 2015).

In response to the aforementioned request referenced in “The Letter,” the CPD announced in November 2015 that the commission would not change the 15-percent threshold for the upcoming presidential debates. CPD Co-Chairs Frank J. Fahrenkopf, Jr. and Michael D. McCurry stated:

We are mindful of the changes in the electorate and the large number of voters who now self-identify as independents. We believe our candidate selection criteria appropriately address this dynamic. The CPD’s criteria make participation open to any candidate, regardless of the candidate’s party affiliation or status as an independent, in whom the public has demonstrated significant interest and support... It is appropriate for a debate sponsor to take the campaign as it finds it in the final weeks leading up to Election Day. The CPD’s debates are not intended to serve as a springboard for a candidate with only very modest support. Participation in the debates is determined by the level of public support a candidate enjoys as Election Day approaches (Fahrenkopf & McCurry, 2015).

U.S. Declines in Freedom Rankings Worldwide

At the same time that Gilens’ and Page’s (2014) aforementioned democratic pluralities are under threat, the United States continues to free fall in worldwide freedom

rankings. According to data from the Cato Institute released in 2016 the U.S. ranked number 23 in overall freedom, with a score of 8.27 (Cato, 2016). This rating represents a three-slot drop compared to 2015, when U.S. placed at number 20 (Cato, 2016). The U.S. actually climbed ever so slightly to 28 (8.79/10) in personal freedom, up from 32 in 2015 (Cato, 2016). However, the country dropped to sixteenth (7.75/10) in economic freedom, down from number 12 in 2015 (2016). This resulted in the overall fall to number 23 worldwide (Cato, 2016).

The Cato Institute compiles its data and ranking for each country measuring the following 12 areas of freedom: Rule of Law; Security and Safety; Movement; Religion; Assembly, Association, and Civil Society; Expression; Relationships; Size of Government; Property Rights and Legal System; the Ability to Access Sound Money; Freedom to Trade Around the World; and the Overall Regulation of Business, Credit, and Labor (Cato, 2016).

In addition to the overall Cato Institute rankings and the breakdown between economic and personal freedom, the U.S. also lags behind many other nations in the three other major aspects of freedom (Cato, 2016).

According to the World Justice Project (WJP), the U.S. has fallen to number 18 in “Rule of Law,” or fairness and lack of corruption in the judicial system, with a score of 0.74 out of a possible 1.00 (WJP website, 2016). The WJP obtains its world-wide rankings through surveying 2,400 legal experts, and also interviews in excess of 100,000 households (WJP website, 2016).

Reporters Without Borders (RWP website, 2016), an organization that monitors Press Freedom around the world, places the U.S. at number 41 with a score of 22.49. The RWP tracks 180 countries, and sends expert journalists within these nations an online questionnaire tracking 87 areas that the organization feels are vital to overall press freedom (RWP website, 2016). RWP then combines these answers with actual abuse and violence against the press in each country through the one-year tracking period (RWP website, 2016). The lower the score, the less government interference there is with freedom of the press (RWP website, 2016).

However, possibly the most damning ranking of all come from “The Democracy Index” calculated by The Economist Intelligence Unit (EIU), the researchers and analysts working with the Economist. EIU places the U.S. at number 21, tied with Italy in the world’s rankings of Electoral Freedoms, with a score of 7.98 out of 10 (EIU, 2016). In the EIU rankings, any score below 8.00 is categorized as a “Flawed Democracy” (EIU, 2016). The EIU’s primary criticism of U.S. politics is that political participation in the U.S. is “restricted to a duopoly of parties, the Democrats and the Republicans” (EIU, 2016). To determine the level of “democracy” in each country, the EIU tracks the following five criteria: Pluralism and electoral process, the overall functioning of government, a country’s political participation, overall political culture, and commitment to civil liberties (EIU, 2016). Thus, it is clear that the lack of access to the electoral process for minority political parties in the U.S. has been recognized internationally as a flaw in the U.S. democratic process.

Young Explores Problems with CPD Polling Rules

Dr. Clifford Young has served as President of the United States' branch of Ipsos Public Affairs since May 2014, where he leads the company's political risk and general election polling practice (Young, 2014). Ipsos, a France-based company founded in 1975, has built a reputation as one of the world's most-reputable independent market research companies, and currently operates offices in 87 countries. In his journal article, "Change the Rule," Dr. Young draws from his experience in analyzing election results in the U.S. in 2010, 2012, and 2014 to effectively challenge the CPD's 15-percent threshold required for inclusion in the private entity's Presidential Debates (Young, 2014). Young's research indicates that a presidential candidate from outside the Political Duopoly needs at least 60-percent, and likely closer to 80-percent, name recognition in order to reach the 15-percent threshold in political polling (Young, 2014).

However, in Exhibit II of Young's "Change the Rule" (2014), he notes that as the election draws near, polls ask only "Would you vote for candidate X or candidate Y?" (Young, 2014, p. 10) and neglect mentioning any third-party and/or independent nominees running for the office (Young, 2014). The omission results in the "party halo effect" surrounding the two establishment political parties (Young, 2014, p. 12). Young (2014) concludes that this usually lowers an independent candidate's name recognition to less than the share needed to secure 15 percent in the political polling conducted prior to the CPD debates.

To further expand upon his analysis relating to the difficulty third parties encounter when trying to reach the minimum threshold for inclusion in the CPD's debates, Young

(2014) introduces three models. These three models are the “All Elections Model,” which observes primary as well as general election questions on the ballot, the “All Primary Model,” which observes primary elections; and the “Early Primary Model,” which observes data from early primary elections (Young, 2014). Under the “All Elections Model” third party and/or non-party-affiliated candidates would need 70-percent name recognition to achieve the 15-percent threshold, while the “All Primary Model” and the “Early Primary Model” both indicate candidates would need more than 80-percent name recognition to successfully reach the required 15-percent threshold needed to participate in the CPD debates (Young, 2014).

Young (2014) examined 16 legitimate three-way races for governor and compared the results to 40 two-way elections for governor and six presidential elections. Because polling in three-way races have a higher margin of error, there is a 40-percent chance that candidates could achieve the above-mentioned arduous name-recognition thresholds and still inaccurately poll below the CPD’s 15-percent threshold (Young, 2014). Young’s research also concludes that sampling sizes must exceed the standard 1,000 of survey interviews to fall within the plus or minus five-percent error goal (Young, 2014). Young expresses significant concerns that the CPD could incorrectly use “false negatives” in polling data to intentionally exclude any presidential candidates who may be right at 15 percent, and push them back below the required threshold for inclusion in the commission’s presidential debates (Young, 2014, p. 24).

Change the Rule Submits “The Letter” to the CPD

Change the Rule (CTR), an organization also chaired by Dr. Young and committed to increasing the number of participants in the CPD Debates, submitted its report, “The Letter,” to the CPD on January 12, 2015. This document requests that the commission eliminate the 15-percent requirement for inclusion in the CPD Debates (Young, 2015). By February 26, 2015, Young’s letter featured 48 signatories, including current and former law professors, CEOs, chairs of non-profit organizations; and congressmen, governors, and senators from both major political parties (Young, 2015).

CTR elaborates on the basis that 62 percent of Americans feel that the federal government no longer follows the wants and needs of those it governs, 86 percent consider the political system broken and no longer serves the interests of the voters, 81 percent convey the importance of having independent candidates running for office, and 65 percent wish they could vote for independent candidates in the U.S. Presidential Elections (Young, 2015).

Diamond Discusses the Republicans’ and Democrats’ ‘Cozy Duopoly’

Larry Diamond, a senior fellow at Hoover Institute, Stanford University, authored “A Very Cozy Duopoly,” which was published in the October 2015 edition of the Hoover Digest, a journal affiliated with the Hoover Institution – a think tank related to public policy that promotes political, individual, and economic freedom. In his article, Diamond (2015) discussed the uncomfortably close relationship shared by Republicans, Democrats, the CPD, and the FEC (Diamond, 2015). Diamond (2015) proposed that, while on the surface the two major parties rarely agree on matters important to their constituents, both parties

believed that keeping political competition repressed will protect the governing duopoly (Diamond, 2015). Diamond (2015) described the CPD as “the ultimate gatekeeper,” a commission allowed by the establishment political parties to act in a manner not accountable to the will of U.S citizens.

According to Diamond (2015), since 1960 no third-party presidential candidate has attained the required 15-percent threshold in political polling by mid-September, which is the deadline set by the CPD to meet the threshold for inclusion in the commission’s debates. Diamond (2015) also addressed Young’s (2015) “Change the Rule” letter, which he and 48 other prominent political figures signed, and asked the CPD to lower the thresholds and/or create new criteria for inclusion in the presidential debates (Diamond, 2015). The CPD refused to meet with any of the letter’s signatories (Diamond, 2015).

Diamond also discusses the Petition for Rulemaking filed in December with Federal Election Commission members. Out of the 1,252 comments from the public, in response to questions considering a new, and improved, method to determine eligibility for CPD inclusion,, only one commentary, from the CPD itself, said no changes were necessary (Diamond, 2015). The 1,251 public comments drew their opinions from research, including Clifford Young’s (2015) “The Letter,” which exposes the enormous difficulties third parties face when trying to reach the 15-percent threshold.

Comparing Political Debates in the United States to Others around the World

Televised Election Debates, International Perspectives, a 2000 book edited by Steve Coleman, a professor of Political Communication at the University of Leeds, U.K., includes chapters written by scholars from around the world who discuss political debates

in their countries. The chapters in the book examine experiences with televised debates in several countries. Coleman (2000) was particularly struck by the explanation of the debates in Australia and New Zealand. Coleman dedicated other chapters in his book to the discussion regarding what people can actually learn from political debates, and the role third parties could and/or should play in these televised events.

An International Review of 'Third Parties' in Political Debates

Richard Holme, a 1997 member of the United Kingdom's Parliament representing the third-party Liberal Democrats (Holme, 2000), provided his mindset relating to whether or not smaller political parties should have access to the CPD Debates in his contribution to Coleman's book. In the U.K. Parliament, the Liberal Democrats are, in fact, a "third party" with a somewhat "libertarian-leaning" ideology and platform that falls between the larger Labour and Conservative parties (U.K. Parliament website, 2016).

Holme (2000) presented arguments favoring both the exclusion and inclusion of minor political parties and/or independent candidates. In terms of reasons for excluding minor parties Holme notes the inherent desire of the media to present a "binary" (two person) debate, and to prevent multiple leaders from "ganging up" on the sitting leader and his or her political party. However, Holme (2000) argued that the inclusion of minor parties in political debates has the positive effect of diminishing the propensity of the two "major" parties to alter the rules governing a country's political options by creating impenetrable barriers for the smaller political parties. Also, allowing minor parties into the debate provides a voice for voters and potential voters who cannot find common ground with nominees of the two major parties (Holme, 2000).

Admittedly, Holme (2000) notes that the single district plurality voting system in the U.K. does largely exclude all but two parties from the political process. However, Holme (2000) points out that while Canada, India, Australia (lower house), and the United Kingdom (U.K.) share this system of voting, each of these nations operates as a multi-party, rather than a two-party, system. The United States is the only one of the 35 largest democratic countries where only two political parties have monopolized governmental power (Holme, 2000).

While he provided arguments for the exclusion of minor parties, Holme pondered whether the duopolists actually created impermeable barriers that prevent prospective voters from hearing about other options they will see on the ballot each Election Day (Holme, 2000). Also, Holme (2000) questioned the motivations of the two larger parties for withholding other issues and options from the electorate, thereby forcing them to choose between two parties that have historically held power in a country.

Holme (2000) identifies Canada and Australia as the two countries with electoral processes that are the most-comparable to that in the U.S. Like in the U.S., Australian political debates only feature that nation's two major political parties, the Liberal Party and the Labour Party. However, even in that setting, the smaller political parties ultimately help build ruling coalitions in parliament. These smaller parties influence the stances of the bigger parties' political platform upon winning an election (Holme, 2000). In Canada, all of the political parties in the Canadian government take part in the initial debates, with only the last debate serving as a "playoff round" between the two finalist parties (Holme, 2000, p. 94). Holme's analysis showed that even in countries with single-district pluralities, designed to "produce an electoral majority out of a popular minority," and that

use attempts to complicate conditions for debate participation, “third parties” still had an opportunity to help govern the nation (Holme, 2000).

Holme (2000) chronicled three attempts by minor parties or independent candidates in the U.S. to participate in the debates. He pointed to 1968, when Nixon refused to debate George Wallace, arguing that this third participant “would imperil the two-party system” (Holme, 2000, p. 95). In 1980, independent presidential candidate John Anderson debated Republican nominee Ronald Reagan, but the Democratic incumbent Jimmy Carter refused to take part in the exchange (Holme, 2000). In fact, 1992 was the only year when three presidential candidates participated in the Presidential Debates – Democratic nominee Bill Clinton, independent candidate Ross Perot, and Republican nominee George H.W. Bush (Holme, 2000).

Australia

While multiple smaller parties, including (as of 2000) the Australian Democrats, the Greens, and the National help fill seats in Australia’s Parliament (Ward & Walsh, 2000), only the two major political parties, the Australian Labor Party (ALP) and the Liberal Party of Australia actually participate in the televised debates. Australians vote for political parties instead of actually selecting Prime Ministers (Ward & Walsh, 2000). However, because of the “Americanization” of the broadcast debates, the two party leaders take on “presidential” roles as they discuss the issues most important to Australian voters (Ward & Walsh, 2000, 44). Like the United States, Australia uses a “first past the post,” system under which the person with a plurality, not a majority, of the votes automatically wins (Holme, 2000, 93). Unlike the United States, which stands alone among the 35 largest

democracies as a country that basically limits voters to two choices, Australia has multiple political parties serving within the country's Parliament (Holme, 2000). However, like the U.S., Australia does limit the televised debates to the two major political parties in the country's parliament (Holme, 2000). The smaller political parties join the two major parties in forming coalitions to attain a majority in parliament.

According to Ian Ward, a professor of Political Science and International Studies at the University of Queensland, and Mary Walsh, academic fellow at the Institute of Government Party Analysis at the University of Canberra, 1972 was the first national election where television actually played a part in the Australian election (Ward & Walsh, 2000). The first televised political debates in Australia took place in 1984, a year after the 1983 national elections. In 1984, Australian Labor Party Prime Minister Robert Hawke agreed to debate Liberal Party of Australia's Opposition Leader A.S. Peacock. After Peacock walked away as the debate's perceived winner in 1984, Hawke refused to debate the Liberal opposition leader, J.W. Howard. However, Hawke felt more vulnerable by 1990, and he agreed to a televised debate against Liberal leader Peacock (2000). Labor won the elections, but P.J. Keating took over the role of Prime Minister, while Dr. J.R. Hewson ascended to lead the opposition Liberal Party (Wade & Walsh, 2000).

In 1993, Australia's Nine Networks introduced a "worm," during the debate. The worm's purpose was to reflect which party the 120 undecided voters making up the studio audience believed was winning the debate (Ward & Walsh, 2000). However, the Australian Broadcast Corporation (ABC), accused its rival network of turning the debate into a "game show," and did not use the "worm" reflecting opinion on who was winning

the debate. In 1996, when the Nine Networks hosted the next round of debates, the station reserved use of the “worm” for post-debate analysis (Wade & Walsh, 2000).

In the 2016 Australian National Elections, the center-right “coalition,” consisting of the Liberal Party, the Liberal National Party, the National Party, and Country Liberals, won 76 votes, barely enough to form a majority in Parliament, while receiving 42 percent of the popular vote (Australian Broadcasting Corporation [ABC], 2016). The Labor Party, the center-left main opposition party, won 69 seats and 34.7 percent of the vote (ABC, 2016). Despite earning 10.8 percent of the popular vote, the Green Party (left) only won one seat. The new centrist Nick Xenophon Team also secured one seat, though winning only 1.8 percent of the vote (ABC, 2016). Two independent candidates, each, won one seat, while the Katter’s Australia Party took one seat (ABC, 2016).

New Zealand

Australia admittedly serves as a sort-of “middle ground” regarding political parties and televised debates between the United States and other countries. However, Australia’s South Pacific neighbor, New Zealand, features proportional representation, and includes all parties in the televised debates (Holme, 2000). New Zealand’s change from a single district plurality to proportional representation occurred in 1996, rather recently in that country’s political history (Holme, 2000). As a result, the two-party binary debates featured in New Zealand’s first televised political debates in 1984 changed dramatically when the country implemented its new method of electing representatives (Holme, 2000).

The change in New Zealand's electoral process also altered the country's televised political debates (Clark, 2000). While the 1993 televised debates only included the National and Labour parties, the 1996 debates also added the Alliance and the New Zealand First parties (Clark, 2000). New Zealand Television (NZTV), broadcast the debates in the nation's largest cities – Christchurch, Auckland, and Wellington (2000). Like Australia, New Zealand's political debates featured "the worm," giving viewers an indication of the audience opinion on which candidate it considered was winning the debate (Clark, 2000). While New Zealand's worm was not visible to the general public, the worm infuriated the leaders of the National Party, who were unaware of this method of indicating which party was winning the exchange until just minutes before the debate began (Clark, 2000).

While the book refers to New Zealand's electoral system as a Proportional Representation (PR), voters in the country actually cast two votes in each election, under what New Zealand refers to as MMP, or Mixed Member Proportional (New Zealand Elections, 2011). In this system, of the 120 Members of Parliament (MP) in New Zealand's government, for the first selection, voters choose 70 of the seats, Electoral MPs strictly by proportional representation (New Zealand Elections, 2011). In this first vote, participants select their preferred political party (New Zealand Elections, 2011). For the remaining 50 seats, voters then choose the people they prefer to represent their actual district (New Zealand Elections, 2011). The winners of these 50 seats, List MPs, are chosen in a single-district plurality, or "first past the post" manner (New Zealand Elections, 2011). However, since the List MPs represent the parties already in the Parliament, and are allotted "List" seats based on their party's percentage of the popular vote, the List

seats are also to some extent proportionately representative (New Zealand Elections, 2011). To receive recognition in New Zealand's Parliament, a party must win five percent of the popular vote, or win at least one List Member of Parliament Seat (New Zealand Elections, 2011).

Effectively, to different degrees, both Australia and New Zealand have demonstrated the ability to effectively incorporate third-parties into the electoral and political process, and still maintain the integrity of the electoral process in a manner that the FEC has never attempted.

THEORY DISCUSSION

The Marketplace of Ideas Theory

The Marketplace of Ideas Theory finds its origins in English Poet John Milton's *Areopagitica*, written in the 17th Century to reflect an enlightened view of freedom of expression, and was further defined by John Stuart Mill, a 19th Century philosopher who argued that "free expression was valuable on individual and social grounds because it served to develop and sustain the rational capacity of man and, in an instrumental sense, facilitated the search for truth" (US Civil Liberties website, Tokarev, 2012). In the United States, the theory is best articulated in Justice Oliver Wendell Holmes' dissent (against the majority) in the 1919 case *Abrams v. United States*²⁸ Holmes said:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct, that like the ultimate good deserved is better reached by free trade of ideas – that the best test of truth is the power of the thought to

²⁸ 250 U.S. 616 (1919)

get itself accepted in the competition of the market, and truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.²⁹

The basic premise of the Marketplace of Ideas Theory asserts that “with minimal government intervention — a laissez faire approach to the regulation of speech and expression — ideas, theories, propositions, and movements will succeed or fail on their own merits.” (US Civil Liberties website, Tokarev, 2012). The theory also argues “Left to their own rational devices, free individuals have the discerning capacity to sift through competing proposals in an open environment of deliberation and exchange, allowing truth, or the best possible results, to be realized in the end.” (US Civil Liberties website, Tokarev, 2012).

Barron and Bambauer Expose the Numerous Fallacies of the Marketplace Theory

However, professors Jerome A. Barron (1967) and Derek Bambauer (2006), have each, within 40 years of the other, exposed the numerous fallacies within the Marketplace of Idea Theory. In the 1960s, Barron (1967), a professor at the George Washington University Law School, found fault with the Marketplace Theory. Almost 40 years later, Bambauer (2006), a professor at Brooklyn Law School, with the additional insight of almost 40 years, and added his concerns building upon Barron’s assertions.

Long before the mass consolidation of the traditional media, Barron (1967) discussed the trends toward an increasingly exclusive press in his article “Access to the Press: A New First Amendment Right,” published in the June 1967 edition of the *Harvard*

²⁹ *Abrams v. United States*, 250 U.S. 616, 630 (1919)

Law Review. Barron (1967) discussed the shortcomings of the United States' "romantic view" of the First Amendment, which was written to protect the rights to free speech and press freedom (pp. 1647-1648). Barron (1967) believed this romantic view of the First Amendment has led to a "Rationale for Repression" (1642).

Barron (1967) cited an example from the 1930s: the conflict between the Newspapers Guild and the American Newspapers Publishers Association, where the latter tried to prevent the former from organizing successfully. He argued that the Marketplace of Ideas Theory incorrectly assumed that "protecting the right of expression is equivalent to providing for it" (Barron, 1967, pp. 1647-1648), and suggested that the necessity of ensuring that "unorthodox ideas" are granted equal access by its mass media to prevent the repression of non-majoritarian points of view (1967).

In 1927, the U.S. Supreme Court upheld Charlotte Anita Whitney's conviction in *Whitney v. California*³⁰. In this case, the state of California had convicted Whitney of "criminal syndication," or the carrying out of organized crimes. Whitney was known for her leftist ideology and her activism within California's Communist Labor Party. Justice Louis Brandeis, a civil liberties and free speech advocate known for dissenting from the majority in similar cases, actually concurred (rules with the majority, but for different reasons) with other justices in affirming the lower court's conviction. However, in Brandeis' "unusual concurrence," he expressed concerns in regard to the discouragement of hope, imagination, and thoughts not considered acceptable to the mainstream media

³⁰ 274 U.S. 357 (1927)

(Barron, 1967). This fear of freely expressing ideas leads to repression, and the creation of hate, and this hate works to undermine the stability of government.³¹

More specifically, Brandeis said:

Whether in 1919, when Miss Whitney did the things complained of, there was in California such clear and present danger of serious evil, [and] might have been made the important issue in the case. She might have required that the issue be determined either by the court or the jury. She claimed below that the statute as applied to her violated the federal Constitution; but she did not claim that it was void because there was no clear and present danger of serious evil, nor did she request that the existence of these conditions of a valid measure thus restricting the rights of free speech and assembly be passed upon by the court or a jury. On the other hand, there was evidence on which the court or jury might have found that such danger existed (p. 379).

Thus, essentially Brandeis suggested that an action based on the subjective question of whether, in fact, Whitney's actions could have amounted to a clear and present danger of selling evil, rather than a general question of constitutionality of the statute, could have succeeded.

Barron (1967) believed a true test of opportunities for freedom of expression in communities should not rely on "an abundance of alternative media" but, instead, that

³¹ *Whitney v. California*, 274 U.S. 357, 379 (1927)

unorthodox opinions are granted coverage in the media most likely to make an impact on public opinion (1653).

Barron (1967) blamed much of the mass media's repression of non-traditional opinions and ideologies on the 1964 *New York Times v. Sullivan*³² decision, when the U.S. Supreme Court created the "Times privilege." This privilege protects newspapers from libel claims by public officials in cases involving political-related advertising and speech (Barron, 1967). In *Sullivan*, the Court ruled that, because of the commitment to public debate in public issues, newspapers were protected by the First Amendment, and libel suits would be determined in accordance with the needs of the First Amendment, such that public officials who brought an action for libel had to prove actual malice.³³ Barron (1967) asserted that counterattack opportunities should be the main rationale for constitutional theories centered on whether citizens should be given the opportunity to reply to criticisms in the media. Citing Professor V.O. Key's (1961) suggestion that communications itself is a "big business." Barron (1967) noted "If monopoly newspapers are indeed quasi-public, their refusal of space to particular viewpoints is state action abridging expression in violation of the most romantic view of the First Amendment" (p. 1669).

Bambauer echoes Barron's Concerns of Mass Media's free expression repression

In his 2006 journal article published in the *University of Colorado Law Review*, Bambauer echoed Barron's beliefs that mass media actually uses free speech and

³² *New York Times v. Sullivan*

³³ *New York Times v. Sullivan*, 376 U.S. 254 (1964)

freedom of the press protections to repress opinions and ideologies inconsistent with what they want to print.

Bambauer (2006) began his analysis with Secretary of State Colin Powell's testimony before the United Nations (U.N.) Security Council relating to "evidence" of Saddam Hussein's ongoing "Weapons of Mass Destruction" (WMD) in Iraq. This resulted in the U.S. military's invasion of Iraq in March 2003. Bambauer (2006) also noted the mass media's refusal to report findings from Charles Duelfer's Iraq Survey Group. This group had determined that Iraq had eliminated these arms during the 1990s. David Kay, the leader of U.S. efforts to find Iraq's WMDs, resigned his position when he also found Duelfer's reports to be reliable and credible (Bambauer, 2006)

By December 2004, the U.S. military had abandoned its search for WMDs, realizing none existed (Bambauer, 2006). Despite the military's inability to find these weapons just one month prior to the 2004 Presidential Election, approximately 50 percent of Americans still believed there were WMDs in Iraq (Bambauer, 2006). Surprisingly, 39 percent actually believed Duelfer's report verified Iraq's WMD program – the exact opposite of that Duelfer had written in his organization's findings (Bambauer, 2006). Despite overwhelming proof that the Iraqi government had destroyed all WMDs in Iraq years earlier, the WMD theory dominated mass media coverage of the subject (2006). Thus, Bambauer (2006) asserts that the Marketplace of Ideas has proven irrelevant to ensuring that all opinions and ideologies are provided by the mainstream media.

The Marketplace of Ideas theory, which dates back to Europe's Enlightenment movement, posits the inaccurate assumption that the best ideas are always adopted by the majority of the public, and bad ideas are rejected and exposed for what they are

(Bambauer, 2006). The theory asserts that, by preventing government interference, the self-correcting and self-operating forces will allow for full and free discussions preventing the public from subscribing to false information (Bambauer, 2006). However, Bambauer (2006) believed the amount of available information today always competes with the scarcity of time for communicating alternate opinions. Relying largely on the Marketplace of Ideas theory, the Federal Communications Commission (FCC) created the “Fairness Doctrine,” which requires electronic media to discuss and present matters of public interest and provide fair coverage for both sides (2006).

Bambauer (2006) described the practices of excluding information through content control, where “low-value information” competes against “high-value information” (p. 661). Obscenity, threats, fighting words, defamation, and provoking hostile audiences to immediately begin participating in unlawful steps are considered low-value information, and, therefore, are subject to government regulation (Bambauer, 2006). Conversely, courts have thwarted attempts by the government to censor high-value information, especially in cases where the media presents truthful information acquired lawfully. While the government has the ability to deny broadcasting licenses, most attempts to present high-value information remain immune from governmental interference (Bambauer, 2006). However, the courts allowed the government to block the broadcast of high-value information including how to design hydrogen bombs and ways to rapidly spread infectious diseases like small pox on the grounds of national security concerns (2006).

Bambauer also connected the theory’s fallacies to the current dearth of political ideologies in the American government. While Bambauer (2006) agreed that the Marketplace of Ideas Theory once worked to protect political dissenters, he argued the

theory had become oppressive toward “minority” opinions as early as the Vietnam War. Bambauer (2006) asserts that “The market model offers the strongest protection of speech and expression where it was first established: political communication” (p. 667). Bambauer (2006) saw attempts to regulate internet content by the federal government as evidence of these exclusions. Furthermore, Bambauer (2006) suggests that the Marketplace of Ideas Theory fails on three tenants: Loss Aversion, Status Quo Preference, and Certainty Preference. Bambauer (2006) also cited the traditional media’s techniques of Framing, Priming, Agenda-Setting, news coverage with “Gate-Keeper” controls as a method of limiting the ideas that are truly allowed in today’s marketplace (2006).

Just as the mainstream media excludes “unpopular” voices, leading to a flawed marketplace, so does the electoral process when it excludes the voice of the minority parties can be said to hamper the search for truth by the electorate as it makes its choices.

METHODOLOGY

This paper utilizes legal research methods to base the conflicting judgments by two district court judges in the District of Columbia in relation to the actions brought by Johnson and the LPF, respectively, against the CPD and FEC. In these thorough case analyses, the author will first examine the arguments brought by the two parties to the action. Then, the author will trace the decisions by the judges, the analysis of the issues, and the rationale that underlie those written decisions. The author was able to locate decisions online through the use of Bing and/or USF Library scholarly search engines.

PRECEDENTS RELEVANT TO THE LAWSUITS CHALLENGING THE FEC AND CPD

In virtually every challenge to the CPD's 15-percent threshold, the judges have deferred to the *Noerr-Pennington Doctrine*, which set the precedent that has (to this point) prevented plaintiffs from using the *Sherman Antitrust Act* to remedy commerce incursions into "political activity." This section of the paper will identify the two cases that set the precedent along with the *Noerr-Pennington Doctrine* at the federal and state elections.

The *Noerr-Pennington Doctrine*

The *Noerr-Pennington Doctrine* results from two cases argued before the U.S. Supreme Court. In the first case, *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*³⁴, the Eastern Railroads Presidents Conference, which consisted of 24 railway companies and their respective presidents, argued that Noerr Motor Freight, a grouping of 41 truck owners in Pennsylvania and their respective union, engaged in a public relations campaign to disenfranchise the conference. In this case, the U.S. Supreme Court held that the *Sherman Antitrust Act* did not apply to cases where the plaintiffs ask the legislative and executive branches to create laws that could result in a monopoly, or reduce the options available to the general public³⁵ (p. 136). Going further,

³⁴ 365 US 127 (1961)

³⁵ *Eastern R. Conf. v. Noerr Motors*, (1961)

the court stated that Sherman was “not at all appropriate” for application to activity taking place in the “political arena.” (p. 141). Four years later, the court reiterated its position the 1965 case *United Mine Workers v. Pennington*,³⁶ when the union coaxed the acting Secretary of Labor to hike minimum wages past a point that would put smaller companies out of business. Citing the *Noerr* precedent, the justices instructed juries of the protections granted to political activities, exempting them from antitrust actions³⁷.

Wyllie v. Leadership Florida Statewide (2014)

In *Adrian Wyllie, et al. v. Leadership Florida Statewide*³⁸ Adrian Wyllie, the Libertarian Party of Florida’s nominee for governor in 2014, filed suit against defendants – Leadership Florida Statewide Communication, Inc., a not-for-profit organization, the Florida Press Association, Inc., also a not-for profit organization, and Broward College, a public college using taxpayer money to sustain the school’s ability to operate. Wyllie alleged that the defendants implemented a “mid-game change” in polling criteria that led to Broward College disinviting him from the Gubernatorial Debates.

According to Wyllie’s attorney Luke Lirot, in July 2014, the defendants had invited Adrian Wyllie to participate in the three gubernatorial debates in the fall provided that he breached the 12-percent threshold, with a four percent margin of error (MOE) one month prior to the debates, based on polls selected by the defendants. Luke Lirot provided evidence that Wyllie had met the criteria. However, the defendants then increased the threshold to 15 percent (with the four-percent MOE). In addition to his 25-page request

³⁶ 381 U.S.657 (1965)

³⁷ 381 US 657 (1965)

³⁸ *Wyllie v. Leadership Florida Statewide* Brief (2014)

for a hearing, Lirot provided multiple exhibits for the court to indicate that the defendants changed the rules in “the middle of the game” to ensure Wyllie’s exclusion from the debates. Wyllie requested an injunction, postponing the debate until he was granted equal access to the event. However, the defendants also submitted expedited paperwork to the court that challenged Wyllie’s assertion that the hosts increased the participation threshold to ensure Wyllie’s exclusion from the debates.

Because of Broward College’s proximity to Fort Lauderdale, Judge James L. Cohn, representing the United States District Court in the Southern District of Florida, presided over the case. Wyllie argued that the defendants had increased the threshold just one month prior to the debates. Leadership Florida Statewide said that the 12-percent threshold applied to a different convention-related event that took place in July 2014. The college also asserted that it had issued a press release in August 2013, which stated that the 15 percent requirement must be met for the 2014 Florida Gubernatorial Debates. Following Judge Cohn’s request, the defendants quickly filed their responses in opposition to the motion, including evidence to counter the plaintiff’s claims that the defendants took actions contrary to the Constitution.³⁹

The question for the court was whether Wyllie, had, in fact, met the criteria originally agreed upon by the defendants when he received the invitation to participate in the debates, only to have the defendants change the qualification close to the debate? Or, had the defendants clearly stated the 15-percent requirement for debate participation from the beginning. Since Broward College is a taxpayer-funded public institution, the

³⁹ *Wyllie v. Leadership Florida Statewide* 14-62332

court also had to determine whether the college was allowed to determine which candidates could participate in the debate. The big question was whether Wyllie's exclusion from the debate restricted his right to free speech through the actions of equitable estoppel. Wyllie argued that the acts, conducts, and/or words of the defendants intentionally misled him, resulting in personal injury. Thus, he had standing to bring the actions (*Wyllie v. Leadership Florida Statewide* Brief, p. 2).

In *Wyllie v. Leadership Florida Statewide*, Judge Cohn held that Wyllie's need for an emergency motion requesting a preliminary injunction was directly caused by errors and needless procrastination on the part of Wyllie and his own campaign. Judge Cohn also noted that Wyllie did not provide proof that the defendants had originally set the threshold for debate inclusion at 12 percent, instead of the 15-percent threshold required for participation (*Wyllie v. Leadership Florida Statewide*, p. 4). Furthermore, Judge Cohn said that Wyllie relied on an improper interpretation of *Major League Baseball v. Morsani*⁴⁰ to argue he risked becoming a victim of equitable estoppel. Judge Cohn wrapped up his ruling using the precedents set by *DeBauche v. Trani*⁴¹, where the Court held that a mere debate at the college by its president "did not amount to state action" (*Wyllie v. Leadership Florida Statewide*, p. 5)

On October 14, 2014, following the dismissal of Wyllie's lawsuit, *Sunshine State News* reporter Nancy Smith penned an article providing additional information about Dean Ridings. Ridings, the president of the Florida Press Association at the time of the debates, may have had a conflict of interest that resulted in his decision to disinvite Wyllie, less

⁴⁰ 790 So. 2d 1071, 1076 (Fla. 2001)

⁴¹ 191 F.3e 499, 508-509 (4th Cir. 1999)

than a month before the Broward College gubernatorial debate. (Smith, 2014). Wyllie's camp asserted that Ridings' conflicts of interest were far too large and many to miss, and provided evidence that Ridings wanted to keep Wyllie out of the three 2014 Florida Gubernatorial Debates. However, in response to Smith's article, Ridings vehemently denied that his alleged connections with the Charlie Crist for Governor Campaign was his reason for disinviting Wyllie from the debates (Smith, 2014).

Buchanan v. FEC (2000)

The LPF and Gary Johnson cases are by no means the only actions brought by a third-party presidential regarding unfair exclusions from the CPD Presidential Debates. In *Buchanan et al. v. FEC (2000)*,⁴² the Plaintiffs, Reform Presidential Candidate Patrick Buchanan, the Reform Party, and others, sued the FEC after the commission refused to address Buchanan's complaint regarding the unfair criteria used by the CPD to determine whether third-party candidates were eligible to participate in its presidential debates. Richard W. Roberts, United States District Judge in the District of Columbia, heard the case.

In this case, presidential candidate Patrick Buchanan, his Reform Party, and others, asked the FEC to intervene after the CPD refused to allow Buchanan to participate in the commission's presidential debates basing its decision to exclude Buchanan on the 15-percent polling support criterion that candidates were required to meet one month prior to the debates. After the FEC refused to consider Buchanan's complaint, Buchanan sued the FEC. The FEC argued that there was no proof that the CPD violated laws in

⁴² Civil Action No. 00-1725 (RWR) CD DC, September 2000

preventing Buchanan's participation in the 2000 Presidential Debates. Buchanan also questioned the FEC's commitment to 1971's Federal Election Campaign Act, which (at the time) prohibited large corporations and labor unions from contributing to campaigns. Buchanan asserted that the CPD's declared status as a not-for-profit entity was deceitful. He argued that since the CPD was bipartisan, rather than nonpartisan, the CPD should be considered a Political Action Committee (PAC), and required to report both its donors' names, and amounts donated, to the FEC.

Buchanan questioned the subjectivity of the polls, the nonprofit status of the CPD, and claimed he had been injured by the exclusion from the debate. The FEC and CPD argued that there was no proof that the two major parties "controlled" the CPD Presidential Debates, and that the Plaintiffs had no standing to bring the case to court. The FEC said that, even if Buchanan and the other plaintiffs did have standing, they could not prove that the CPD broke any laws in refusing to allow Buchanan to participate in the 2000 CPD Presidential Debates.

The question before the U.S. District Court of the District of Columbia was whether the CPD was truly non-partisan, and, therefore, eligible for not-for-profit status. At the heart of the matter was the determination of whether the CPD, and the FEC, were both owned and controlled by the two major parties, and therefore attempting to keep other political parties out of the debates. Also, the plaintiffs stated that the five-percent criterion used to obtain public funding should also be used as the threshold for debate inclusion. Finally, the court had to determine whether Buchanan suffered injury because of the 15-percent threshold imposed by the CPD, and the FEC's refusal to remedy the problem.

The United States District Court found many of Buchanan's concerns valid, and questioned whether the CPD's high participation threshold resulted in the increase in voter cynicism among U.S. voters. However, the court also held that Buchanan and the Reform Party failed to produce enough evidence to prove that the CPD was actually a political action committee that was not eligible for not-for-profit status. The Court said that Buchanan had failed to prove that the CPD and FEC were owned and operated by the Republican and Democratic parties. The court found that Buchanan failed to offer actual evidence of injury in the case. For these reasons, the court ruled in favor of the FEC, but not without questioning the CPD's and FEC's actions aimed at keeping smaller parties out of the presidential debates.

The U. S. District Court based its ruling on a number of cases, but also acknowledged that the FEC misused cases to support its reasons for dismissal. The Court applied *International Association of Machinists and Aerospace Workers v. OPEC*⁴³ and *Common Cause v. Bolger*⁴⁴ as reasons for agreeing to hear the case, citing that there were, indeed, viable reasons for an entity to sue the FEC and/or the CPD for political activity. The Court criticized the FEC's reliance on *Gottlieb v. FEC*⁴⁵ and *Fulani v. Brady*⁴⁶ cases, noting that those rulings "never completely resolved the thorny issue" relating to the scope of political doctrine. However, the Court also noted that Buchanan and others relied on an improper interpretation of *Common Cause v. FEC*. In that case, the court

⁴³ 678 F.2d 1092 (220 U.S. App. D.C. 45) (1982) holding

⁴⁴ 574 F. Supp. 672 (D.D.C. 1982) holding

⁴⁵ 143 F.3d 618 (D.C. Cir. 1998)

⁴⁶ 729 F. Supp. 158 (D.D.C. 1990) holding

ruled the Plaintiffs had not sufficiently proved injuries caused by the CPD's decision to exclude them from the commission's presidential debates.

Gary Johnson v. Commission on Presidential Debates Brief

Following the CPD's 2012 decision to exclude Libertarian Party candidate Gary Johnson and Green Party candidate Jill Stein, the candidates, along with their respective parties, organized the Our America Initiative (OAI) Foundation. The OAI's main mission is to coordinate, educate, and provide a platform that grants the general public access to alternate ideologies not typically represented through traditional politics and the Democratic and Republican parties. Because of the FEC's refusal to remedy Johnson's alleged injuries, the foundation filed a lawsuit, *Johnson, et al. v. Commission on Presidential Debates*⁴⁷ (*Johnson v. CPD*) asking the courts to find that the CPD's 15-percent requirement by excluding them from the presidential debate had injured them.

Along with the CPD, the other defendants in *Johnson v. CPD* include the Republican National Committee (RNC); the Democratic National Committee (DNC); Frank J. Fahrenkopf (former RNC chair and CPD co-chair and co-founder); Michael D. McCurry (former press secretary under Bill Clinton and CPD co-chair); President Barack Obama; and 2012 Republican Presidential Candidate Willard Mitt Romney.

On September 29, 2015, Bruce Fein, attorney for Gary Johnson and the other plaintiffs, filed *Johnson v. CPD* in the United States District Court in the District of Columbia. Fein alleged that the CPD and the other defendants conspired illegally in the

⁴⁷ *Johnson v. CPD Brief*

2012 CPD Presidential Debates, and all of the other CPD debates dating back to 1996, to exclude minor-party candidates from the debates through what the OAI considered the arbitrary 15-percent polling threshold.⁴⁸ Since Gary Johnson and Jill Stein had satisfied the two Constitutional requirements for the presidency – both being over 35 years of age, born in the United States and residents in the country for more than 14 years; and were on the ballots in enough states to secure a majority of electors in the Electoral College – Johnson alleged that the CPD used its 15-percent polling threshold solely to exclude candidates outside of the Political Duopoly, thus creating a monopoly over the “official presidential debates” (*Johnson v. CPD* Brief, p. 3). This alleged monopoly prevented the nominees from minor political parties from gaining the needed media and news coverage that would allow U.S. voters to hear from these alternative smaller-party candidates’ platforms.

Fein breaks down the action into four claims that he asks the courts to address. The first claim for relief is based on the “Combination and Conspiracy to Restrain Interstate Commerce in Violation of Section 1 of the Sherman Antitrust Act” (*Johnson v. CPD* Brief, p. 3) Fein provides data reflecting that tens of millions of people watch each of the presidential debates over the years, and breaking down the amount of money had been donated to each candidate and/or his political party since 1960. The repeated transfer of money provides proof of commerce the action alleges (*Johnson v. CPD* Brief, p. 45). Fein concentrates on the increase in audience watching the 1992 CPD Presidential Debates, which included independent/non-party affiliated presidential candidate Ross Perot, as compared to the 1996 CPD Presidential Debates. Although the

⁴⁸ *Johnson v. CPD* lawsuit 33

action provides objective evidence that the large majority of U.S. voters wanted the CPD to include Perot in its 1996 presidential debates, the commission acted contrary to public opinion. Most importantly, Fein quotes statements from both GOP Frank J. Fahrenkopf and CPD co-founder Democrat Paul Kirk, that effects shared sentiments, on the record, aimed at avoiding participation in the CPD debates by candidates from outside of the political duopoly. Therefore, Johnson provided evidence that the CPD deliberately contended to exclude third-party candidates from the commission's debates.

In Johnson's second claim for relief, Fein addresses the "monopolization, attempt to monopolize, and conspiracy to monopolize in violation of section 2 of the *Sherman Antitrust Act*" (*Johnson v. CPD* Brief, p. 37). Once again, Fein argued that both the DNC and RNC, in collusion with the CPD, have worked to monopolize the presidential debates and electoral political markets through a wide range of practices to eliminate competition from the CPD debates, from both within (through the exclusion of other political parties) and beyond (preventing other presidential debates that include the lesser known candidates from gaining any notoriety).

Fein alleges that coordination and collusion by the CPD, DNC, and RNC date back to the 1988 Presidential Debates – the first debate after the CPD took over as sole sponsor of the presidential debates. Once again, Fein insisted this was the reason for implementing the 15-percent threshold, using polls picked by the three entities, to prevent U.S. voters from learning about the proliferation of divergent ideologies not shared by the Political Duopoly. Fein added that the CPD had used the 15-percent requirement as a way to prevent the Democratic and Republican candidates from challenges and embarrassment presented by the potentially more-knowledgeable smaller party and/or

non-party affiliated candidates (*Johnson v. CPD* Brief, p. 39). This results in injuries to virtually everyone not associated with the DNC, RNC, CPD, and the FEC.

Johnson's third claim for relief related to what the organization alleges is a "violation of First Amendment rights of free speech and association." (*Johnson v. CPD* Brief, p. 41). Fein cited U.S. Supreme Court case *Terry v. Adams*⁴⁹ as an example, which was brought by candidates from outside the Jaybird Party, a private club in Fort Bend, Texas, to which membership was required for a successful campaign for office. Candidates not affiliated with the Jaybird Party lost their rights to free speech and free association. Fein likened this scenario to the "de facto" requirement that a candidate for any major office who does not belong to one of the two major political duopolies is denied his/her right to free speech (*Johnson v. CPD* Brief, p. 43).

Johnson's fourth claim for relief relates to the "international interference with perspective economic advantages and relations." (*Johnson v. CPD* Brief, p. 45) In the final part of *Johnson v. CPD*, Fein argues that the Political Duopoly had conspired to prevent outsiders from engaging in economic and related benefits enjoyed by Democrats and Republicans. Therefore, the behavior of the CPD, DNC, and RNC once again proves to be anticompetitive and tortious, furthering the need of the three entities must remedy the injuries inflicted upon Gary Johnson and his fellow plaintiffs.

⁴⁹ 345 U.S. 461 (1953)

Romney's Motion to Dismiss *Johnson v. CPD*

Upon receiving notice of *Johnson v. CPD*, James M. Burnham, attorney for Mitt Romney, filed a motion to dismiss the case.⁵⁰ Burnham broke down his case for dismissal into three sections.

Section I, broken down into two parts, argued first that the plaintiffs' (Gary Johnson and others) antitrust claims against Romney, failed citing the *Noerr-Pennington Doctrine* as precedent that the *Sherman Antitrust Act* did not regulate political debate. Burnham cited precedents showing the courts' repeated refusal to tie the two together. However, in the case that the *Sherman Antitrust Act* did apply to the regulation of political debates, Burnham argued that trying to tie Romney into the lawsuit violated his client's First Amendment rights. Burnham provided applicable constitutional law precedents, courts cannot compel a private citizen (which Romney was) to debate with another person.⁵¹

In Section II, Burnham insisted that Romney was actually a private citizen, while he was running for POTUS in 2012. Romney did not play the role of "state actor" during the campaign, and Romney never acted "on behalf of the government." (Romney Motion to Dismiss, p. 6). Parties can only file First Amendment claims against government entities. Burnham added that the 14th Amendment actually supplements Romney's First Amendment rights.

In Section III, Burnham maintained Romney had no ability to interfere with any of Johnson's potential business interests. While some of the defendants listed may have

⁵⁰ Burnham Motion to Dismiss 1:15-cv-01580-RMC

⁵¹ *Williams v. Savage*, 569 F. Supp. 2d 99, 111 (D.D.C. 2008)

had the capacity to hurt Johnson's ability to conduct unobscured commerce, Johnson could not provide any proof that Romney personally profited from corporate decisions at the expense of Johnson.

Judge Collyer's Decision in *Johnson v. CPD*

On August 6, 2016, four months after the submission of *Johnson v. CPD*, United States District Judge Rosemary M. Collyer, a George W. Bush appointee representing the District of Columbia, weighed arguments from Gary Johnson and others about behaviors by the CPD and FEC that, the plaintiffs argued, directly violated the *Sherman Antitrust Act*. The Plaintiffs argued that the CPD, with the assistance of the FEC, had set thresholds for inclusion in the CPD Presidential Debate beyond the reach of candidates not belonging to the Democratic and/or Republican parties, thereby impeding the flow of commerce both within and across state lines.

Even though the precedent from the case *Buchanan v. FEC*⁵² ultimately led to the dismissal of the lawsuit, Judge Richard W. Rogers, after hearing the case, had sympathized with Buchanan and the Reform Party. Nevertheless, he found that, the CPD could limit its invitations to Democratic Presidential Candidate Al Gore and Republican Presidential Candidate George W. Bush, respectively, based on the *Noerr-Pennington Doctrine*, which had repeatedly been used in arguments to exclude any challenges to the authority of the FEC and CPD. The 2016 action brought by Johnson sought to focus the court's attention on the criticisms made by Judge Rogers in deciding the case.

⁵² *Buchanan v. Federal Election Commission*, 112 F. Supp. 2d 58 (U.S.D.C., 2000)

After a four-month delay in hearing the matter, which frustrated the plaintiffs, Judge Collyer issued her ruling on *Johnson v. CPD*. Johnson had sued the CPD for violating the Sherman Antitrust Act, but, based on the *Noerr-Pennington Doctrine*, the CPD had maintained that it was protected from having to consider (or reconsider) any changes to its 15-percent criteria used for debate inclusion and the format of the debates.

In the impressive length and attention to detail in the foundation's lawsuit, the hope was that Gary Johnson and the others could successfully encourage the judge to override the *Noerr-Pennington Doctrine*.

However, Judge Collyer issued a ruling that reiterated the precedent set by the *Noerr-Pennington Doctrine*, which strictly adhered to the principle of protecting the CPD and FEC from risk of liability for incursions on the *Sherman Antitrust Act*. Collyer cited numerous cases where the precedent set by the *Noerr-Pennington Doctrine* excluded application of the Sherman Antitrust Act to "political activities." Collyer dismissed Count I, which related to the CPD's actions in violating section 1 of the *Sherman Antitrust Act*, which states "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal." Collyer also dismissed Count II, which alleged that both commissions violated section 2 of the act which states "every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." Judge Collyer cited rulings,

including *Steel Co. v. Citizens for a Better Environment*⁵³ and *Lujan v. Defenders of Wildlife*,⁵⁴ as precedents for reaching her verdict (*Johnson v. CPD*, p. 7). She also used violations of the Federal Rule of Civil Procedure⁵⁵ dismissed the lawsuit for its inadequate attempt to state claims related to injuries incurred by Johnson and his fellow plaintiffs (*Johnson v. CPD*, p. 7).

Collyer then dismissed Count III, which related to Johnson's claim that the FEC and CPD conspired to strip the other political parties of their constitutional rights of speech and association. Finally, Collyer dismissed Count IV, in which the Johnson had claimed that the CPD interfered internationally regarding prospective economic relations. Collyer did not believe that the evidence brought by the Plaintiffs in *Johnson v. CPD* provided the proof necessary to question the actions and motives of the CDP. On March 17, 2017, the U.S. Court of Appeals, D.C. Circuit granted *Johnson* a re-hearing of the case (Shain, 2017). Although opening arguments related to the rehearing began on April 21, 2017, the Court has yet to release any rulings.

Level the Playing Field v. Federal Election Commission Brief

In August 2015, when the LPF had asked the FEC to review the CPD's debate criteria, the FEC decided unanimously that the debate criteria did not violate campaign finance laws. However, two of the six members acknowledged that the FEC could change the rules "to provide greater participation" (FEC Ravel and Weintraub statement, 2015, p. 1). Ann Ravel and Ellen Weintraub, two of the three Democrats sitting on the FEC while

⁵³ 523 U.S. 83, 101 (1998)

⁵⁴ 504 U.S. 555, 560 (1992)

⁵⁵ *Federal Rule of Civil Procedure 12(b)(6)*

agreeing with the majority that the CPD had not violated FECA laws, they encouraged changes in a rulemaking session. The two commissioners issued a statement as to why they voted for refining the rules for CPD Presidential Debates:

At a time when an increasing number of Americans identify as independent, we should not be satisfied with regulations that may be preventing their points of view from being represented in public debates. At a minimum, we ought to engage with the public on this issue. It has been over 20 years since the commission has taken a serious look at its rules on candidate debates. Such a re-examination is long overdue (FEC Ravel and Weintraub statement, 2015, p. 2).

On April 6, 2016, attorneys Alexandra A.E. Shapiro and Chetan A. Patil of Shapiro Arato, LLP, filed an updated version of *Level the Playing Field et al. v. Federal Election Commission (LPF v. FEC)*⁵⁶. In this lawsuit, the attorneys representing LPF and the other plaintiffs (Peter Ackerman, the Green Party of the United States, and the Libertarian National Committee, Inc.) referenced the increasing discontent among American voters looking for alternatives to the Political Duopoly. However, the lawyers noted that the CPD, with the protection of the FEC, continued to take actions resulting in the exclusion of candidates not belonging to either the Democratic or Republican parties (*LPF v. FEC* Brief, p. 10).

Since the CPD is owned and operated by former Democrats and Republicans, and overseen by the FEC, which also consists of only Democrats and Republicans, the not

⁵⁶ *LPF v. FEC* Brief

for profit CPD is, in fact, a bipartisan entity, rather than a non-partisan organization as the commission has defined itself.⁵⁷ With the exception of the 1992 electoral campaign, the CPD, due to inactions on part of the FEC, has consistently, and intentionally, excluded third-party candidates from its three presidential debates in each election cycle. The LPF also argued that the CPD had continually violated the FECA and FEC rules that limit organization's use of corporate funding to finance the commission's activities. Since the CPD is bipartisan, and not nonpartisan, the commission actually functions as a political action committee (PAC), and not as nonprofit organization the CPD claims to be.⁵⁸

Shapiro and Patil broke the LPF's 80-page lawsuit down into three major sections – the background of each Plaintiff and Defendant involved in the lawsuit, the argument the attorneys and their respective plaintiffs presented in *LPF v. FEC*, and the FEC's blatant refusal to open a rulemaking petition. The lawyers further break down each section as shown below.

The attorneys for the LPF note the CPD's political origins, debate sponsorship, selection criteria, and the FEC's repeated and unconditional protection of the CPD's debate criteria. Shapiro and Patil also note the LPF's numerous administrative complaints and the CPD's refusal to address the bias issues at hand; and its petitions to the FEC for more objective rulemaking.⁵⁹ They also argue that the FEC continued to dismiss administrative complaints as "arbitrary, capricious, and an abuse of discretion." (*LPF v. FEC* Brief, p. 11) These intentional inactions on the part of the FEC includes the

⁵⁷ *LPF v. FEC* Brief, p. 9

⁵⁸ *LPF v. FEC*

⁵⁹ *LPF v. FEC*

commission's refusal to acknowledge that the CPD's pattern of behavior runs contrary to law, and the FEC's astonishing refusal to recognize the subjectivity and bias used in the CPD's political polling process (*LPF v. FEC* Brief, pp. 10-11).

After the LPF's attorneys admonished the FEC for its unwillingness to consider changes to the process used by the CPD to determine which candidates can participate in the presidential debates, the attorneys provided 37 cases relevant to *LPF v. FEC*⁶⁰; and 23 rules, statutes⁶¹, and other authorities⁶² challenging the FEC's refusal to recognize the CPD's favoritism toward the Political Duopoly (*LPF v. FEC* Brief, p. 24).

The LPF attorneys also rebuked the FEC for its repeated refusal to address the LPF's "mountain of evidence" and the more than 1,250 voters who petitioned the FEC explaining the need for change in the CPD Presidential Debates. Instead, the FEC sided with the one respondent, the CPD itself, to determine that there was no need to change the restrictions on participation in the commission's presidential debates. The LPF attorneys also wanted to strip the CPD of its non-profit status because of the commission's continued loyalty to the multinational corporations who help the CPD sponsor the debate, instead of the voters who need accurate and adequate coverage of all viable candidates in a presidential election, not just the Democrats and the Republicans (*LPF v. CPD* Brief, p. 20)

⁶⁰ *Am. Horse Prot. Ass'n Inc. v. Lyng*, 812 F.2d 1 (D.C. Cir. 1987); *Auer v. Robbins*, 519 U.S. 452 (1997)

⁶¹ 52 U.S.C. § 30101

⁶² First General Counsel's Report, MUR 5530 (Commission on Presidential Debates) (May 4, 2005)

Judge Chutkan's Disparate Interpretation of the FEC's Exclusion Discretion

U.S District Judge Tanya Chutkan, appointed by Barack Obama to represent the District of Columbia, interpreted *LPF v. FEC*⁶³ and its arguments dramatically differently from her colleague, U.S. District Court Judge Rosemary Collyer, who had dismissed *Johnson v. CPD* in August 2016. Although the 2016 Presidential Election Cycle had ended in November, Chutkan, granted the LPF's request for a hearing in early January 2017 (Doyle, 2017). Alexandra Shapiro represented the Plaintiffs in *LPF v. FEC*. Robert Bonham represented the FEC in the lawsuit (Doyle, 2017).

In contrast to other judges over the past few decades, Chutkan acknowledged the argument that the FEC had ignored the evidence that LPF had brought indicating that the CPD, to ensure the debates were "rigged" in a manner to exclude third-party and independent candidates (Doyle, 2017). In the hearing on January, 5 2017, Chutkan repeatedly asked Bonham, attorney for the FEC, why the FEC refused to explain its reasoning for dismissing the LPF challenge of the CPD. Also, Chutkan wanted to know why the FEC ignored the relevant evidence provided by the LPF, which pointed to what could constitute a conflict of interest for the CPD, the sponsor of the Presidential Debates (Doyle, 2017).

At the hearing, Shapiro told Chutkan about the compelling evidence gathered by the LPF, which indicated that the FEC allowed the CPD to create and maintain inclusion

⁶³ *LPF v. FEC*, 15-cv-1397 (TSC)

criteria which consistently excluded all third-party and non-party affiliated candidates from the CPD Presidential Debates (Boyle, 2017). Shapiro referenced Dr. Clifford Young's research in his 2015 article "Change the Rule," in which he indicates third-party and non-party affiliated candidates must achieve 80 percent name recognition in order to breach the 15 percent threshold for debate inclusion (Young, 2015). Young argued that without the opportunity to participate in the CPD's debates, the third-party and non-party affiliated candidates could not raise the funds needed to approach 80-percent recognition, leading to a continuous disenfranchisement of voters unhappy with the candidates offered by the Political Duopoly (Young, 2015). Since both the FEC and CPD are owned and operated by the Democratic and Republican parties, the LPF also suggested that the FEC had a conflict of interest in regard to the matter, as its actions could result from a need to protect the Political Duopoly from outside challengers (*LPF v. FEC*, p. 3)

Following Shapiro's opening testimony on behalf of the LPF, Chutkan again pressed the FEC attorney as to why his clients had disregarded the LPF's evidence, which pointed to a possible conflict of interest by the CPD (*LPF v. FEC* oral arguments, p. 25). Bonham, in response, noted that the FEC rules and court decisions over the previous 20 years had established that the CPD has legally operated each election cycle (though not without challenges) (p. 25). Furthermore, Bonham argued that FEC rulings in such areas are "entitled to deference" (p. 28). Bonham's answers did not appear to convince Judge Chutkan, who continued to question why "the FEC that chose to ignore the very subjective record" of evidence that the CPD wanted "to keep out third-party candidates (pp. 33-34). Judge Chutkan insinuated that the CPD had operated in a manner to protect the Political Duopoly from third-party and no-party affiliated candidates in each election cycle's

presidential debates. Following the initial hearing on January 5, 2017, the LPF and FEC have reconvened on four occasions – February 1, 2017 (Chutkan’s ruling), February 10 2017, March 23, 2017, and May 22, 2017.

The FEC cited 20 years of prior legal precedents as proof that the CPD had not broken any laws, and that previous courts had ruled that the FEC’s rulings are “entitled to deference” (*LPF v. FEC* oral arguments, p. 28). In 2000, after choosing to exclude Ross Perot from the 1996 CPD Debates, The CPD set a 15-percent threshold, as averaged among five political polls. The FEC considered the CPD’s criteria “objective,” and refused to hear any challenges from candidates against the 15 percent requirement. As of 2017, the CPD has not allowed a candidate from outside the Political Duopoly to participate in the debate for 25 years since the commission had allowed non-party affiliated Ross Perot to participate in the Presidential Debates alongside Democratic nominee Bill Clinton and Republican nominee George H. W. Bush.

Judge Chutkan began her February 1, 2017 ruling by acknowledging that the FEC and CPD were both bipartisan, rather than nonpartisan, commissions. Despite numerous challenges to the FEC regarding the CPD’s inclusionary criteria, the FEC has repeatedly ruled that the CPD used an “objective” 15 percent requirement. Furthermore, the judge noted the FEC had argued that the courts had ruled the commission is “entitled to deference,” or “immune” to court interference in its commitment to the FECA (Federal Elections Campaign Act) (*LPF v. FEC*, Feb 1, 2017, p.4). However, the judge said that the courts can no longer ignore the abundance of evidence that increases after each CPD debate.

Judge Chutkan noted that, after Ross Perot's inclusion in the 1992 CPD Presidential Debates, only Democratic and Republican nominees have received invitations to the debates. In fact, the LPF provided evidence that the CPD's Democratic and Republican co-chairs have made statements on record that indicate the CPD has an expressed preference to exclude "third-party" and "no-party affiliation" candidates from any and all CPD Presidential Debates. Over the years, the FEC relied heavily on prior precedents, particularly the 2000 decision *Buchanan v. FEC*⁶⁴, to circumvent the commission's rule for its existence. Judge Chutkan found that the FEC acted contrary to the law by dismissing any challenge to the CPD's exclusion of candidates outside of the two major parties, and, in effect, allowed the CPD to violate FECA rules. Judge Chutkan granted LPF's motion, and denied the FEC's cross-motion. However, Chutkan granted the FEC 30 days to draft a more inclusive method of bringing third-party candidates into the CPD debates (cite page #).

Nonetheless, five days after Chutkan's ruling, the commission asked her to "clarify" and "reconsider" her decision, and grant the commission "an extension" to review the 700 pages of evidence the Plaintiffs included in *LPF v FEC*, February 10, 2017 (p. 1). During the initial hearing on January 5, 2017, the FEC asserted that it had read the LPF's lawsuits, although adding that it had no need to read the document because prior court precedents had ruled that the FEC was "entitled to deference" in every decision related to the CPD.⁶⁵ On February 9, 2017, LPF filed a motion for clarification of the reasoning behind the FEC's motion, and to partially oppose the FEC's requests in the motion.

⁶⁴ *Buchanan v. FEC*

⁶⁵ Judge Chutkan Feb. 10, 2017 ruling

When the matters came before Chutkan, she further rebuked the commission, and reminded all parties involved that the FEC had acted in an “arbitrary and capricious” manner that was “contrary to law,” and listed the multiple ways that the FEC had violated the legal rights of the LPF. Judge Chutkan referenced the FECA, which allows courts to find FEC dismissals “contrary to law” and direct the FEC to remedy the mistake within 30 days. Judge Chutkan admitted she was perplexed by the FEC’s request for extra time to read the 700-page *LPF v. FEC* lawsuit, given the fact that the FEC had said it had read the lawsuit prior to coming to court on January 5, 2017. Nevertheless, Chutkan did allow the FEC an additional 30 days to review the evidence, which extended the deadline for properly addressing the complaints in *LPF v. FEC* to April 3 (p. 2).

On March 8, 2017, the FEC announced that it would not appeal Chutkan’s verdict to a higher court. Three weeks later, on March 29, 2017, the FEC responded to the LPF and the court in a rather brief analysis of the LPF’s (and other plaintiffs’) evidence (FEC response). The FEC announced that it still refused to undertake any rule-making sessions as requested by the LPF’s lawsuit.

However, the FEC only attempted to challenge two, though admittedly important points, of the claims the LPF included in its lengthy lawsuit against the commission. Furthermore, the FEC continued to insist the 15-percent threshold was “objective” and not “arbitrary.” The FEC actually cited *Buchanan v. FEC*⁶⁶ as case law that favored the use of political polling as one of the criteria to decide who takes part in the debates (while ignoring many of the judge’s concerns in that verdict).

⁶⁶ *Buchanan v. FEC*

The FEC challenged both Dr. Clifford Young (2014) and Douglas Schoen's (2008) research that suggested that third-party/non-party affiliated candidates faced insurmountable odds when trying to compete against the Political Duopoly. Young's (2014) study concluded that to reach the needed 60 to 80 percent name recognition which was required to reach 15-percent in the political polling was gross overestimation. Additionally, Douglas Schoen's estimation that the cost for a third-party/non-party affiliated candidate to reach 60 percent name recognition prior to Election Day was far higher than Johnson and Stein needed to be recognized by three-fifths of respondents living in the U.S.

In reference to Young (2014), the FEC considered his study "one-dimensional," simply trying to correlate name recognition to results in political polling. Also, Young admitted that his results found in polling are more complex than relying solely upon name recognition. The FEC argued that Young's (2014) report failed to clearly establish a cause and effect relationship between political polling and name recognition. For these reasons, the FEC decided Young's work was too inconclusive to convince the commission to change the 15-percent threshold (*LPF v. FEC*, FEC March 2017 response, p. 15469).

The research in the Schoen Report (2008) also failed to persuade the FEC, as the commission argued that the report concluded with a combination of overstated and unsubstantiated assertions and suppositions. Schoen's report had estimated that candidates from outside the Political Duopoly would need more than \$250 million to reach the name recognition needed to compete with Democrats and Republicans. However, the FEC argued Gary Johnson surpassed the 60 percent threshold at a cost of just \$5.5

million. The FEC cites Schoen's reliance on this and other "second hand" accounts as a reason to disregard his evidence.

On May 22, 2017, LPF filed its response to the FEC's findings in early April, providing evidence that there were multiple Gary Johnsons mentioned in the news during the FEC's proposed time frame of spring and summer of 2016. That is how Gary Johnson had achieved the 60 percent name recognition that the FEC claimed in its report. Because of the FEC's continued unwillingness to right what the LPF considered wrong, LPF again accused the FEC of continuing to work "contrary to the law," even blatantly violating sections of FECA. In early 1975, Congress had actually created the FEC to ensure that all of the mandates, amendments, and rules. The LPF, enraged by the FEC's continued refusal to acknowledge, much less correct, the criteria that allowed both commissions to protect the Political Duopoly's grip on power at all levels of government in the U.S., sent a scathing 38-page response to the FEC and CPD on 26 May 2017. Chutkan ordered the FEC to find a solution to the 15-percent threshold requirement.

CONCLUSION

Over the last 30 years, because of the refusal of the United States' self-serving and self-preserving judicial system, coupled with traditional media news outlets that are unwilling to hold either commission accountable for actions contrary to electoral statutes and provisions in the U.S. Constitution. The CPD and FEC have been empowered and enabled to take actions that are clearly contradictory to the nation's laws.

Because both commissions are bipartisan, rather than nonpartisan, the CPD and FEC have concocted criteria aimed at preventing challenges to the Political Duopoly. Such threats could allow other political parties, and their respective ideologies, to influence the electorate in a manner that would lessen, if not eliminate, the Democratic and Republican parties grip on powers at all levels of government in the U.S. Ironically, the FEC, the commission that Congress created in 1975 to prevent FECA violations (FEC website, 2017), now protects the CPD and its blatant FECA violations. Because the CPD's quid pro quo agreements benefit both the country's "two-party" political system and its big business interests (Gilens and Page, 2014), the FEC has refused to act in any manner that could imperil the Political Duopoly and/or the corporations relying upon the duopoly.

It remains unclear why the courts have, until very recently, refused to consider any challenges to the *Noerr-Pennington Doctrine*. Perhaps lower-level judges perceive their attempts to nullify this precedent would quickly be reversed by higher level courts. Also,

since judges are appointed by the two political parties in power, there may be some sense of self-preservation that deviating from *Noerr-Pennington* would result in a dramatic redesign in United States politics, which could end the Political Duopoly's grip on all levels of government in the country.

This undeniable relationship between the CPD's and FEC's efforts to protect the Democratic and Republican parties from political competition has led to a series of lawsuits filed against both commissions. Level the Playing Field (LPF), an organization that originated from 2012's unsuccessful Americans Elect project, filed two lawsuits. The first case, *LPF v. FEC*, questions why the FEC has repeatedly denied any attempts to challenge the CPD's exclusion of candidates, and failed to initiate a rulemaking session to address the lack of third-party inclusion in the debates.⁶⁷ The second suit, *LPF v. CPD*, challenged the objectivity of the commission's 15 percent threshold for debate inclusion⁶⁸, based on extensive research compiled by Dr. Clifford Young (2014) in his article "Change the Rule." Deliberations regarding *LPF v. FEC* are still ongoing in U.S. District Judge Tanya Chutkan's courtroom. While Judge Chutkan has already ruled in favor of the LPF, she has granted the FEC the opportunity to adjust the criteria in a manner appropriate to be more inclusive of third-party candidates for office. Although *LPF v. FEC* and *LPF v. CPD* share much of the same research, the latter case has yet to be heard in a court of law.

In addition to the two LPF lawsuits, the Our America Initiative's (OAI) Gary Johnson and others have also sued the CPD. The first claim in *Johnson v. CPD* relates to the

⁶⁷ *LPF v. FEC*

⁶⁸ *LPF v. CPD*

alleged *Sherman Antitrust Act* violations by the CPD that violate U.S. Section 1 of the act, through the “combination and conspiracy to restrain interstate commerce.”⁶⁹ Johnson also filed claims alleging violations of Section 2 of the act, by “monopolization, attempts to monopolize, and conspiracy to monopolize” the marketplace for presidential debates.⁷⁰ U.S District Judge Rosemary Collyer dismissed the lawsuit based on a popular, but not necessarily accurate, interpretation of the *Noerr-Pennington Doctrine*. This doctrine, which originates from two U.S. Supreme Court Cases in 1961 and 1965 respectively, argues that “political activity” is not subject to the Sherman Marketplace Act. Case law indicates that the FEC and CPD have relied on an overly broad interpretation of *Noerr-Pennington* for decades, contending that the doctrine completely shields them from any antitrust activity. However, Samuel Toft (2013) suggested ways Johnson could successfully bypass *Noerr-Pennington* by arguing that the CPD’s Presidential Debates and other actions related to campaigning for a political office are not engaging in “political activity”

Essentially, by not allowing Johnson, Stein, and countless other POTUS candidates who were constitutionally eligible to participate in political debates, the CPD, with the backing of the FEC, has not only infringed on the constitutional rights of these candidates, but robbed the American public of a marketplace where all ideas are heard and considered. All of these candidates have standing to bring an action against the

⁶⁹ *Johnson v. CPD*

⁷⁰ *Johnson v. CPD*

CPD. However, arguably, the most affected party is the American public, who has lost the opportunity to participate in a plurality and the democratic process.

This foray into the issue of standing leads to the following questions. The first – is there a Constitutional right afforded all Americans born in the United States, who have resided here for 14 years, and attained the age of 35 can run for POTUS? If such a right exists, then should section 15 of 1934's *Communication Act* and other such laws protect the constitutional right to equal time before the American people to make a case for being nominated? Does the exclusion of candidates from the debate stage defy the fairness associated with the Marketplace of Ideas Theory? This theory, is aimed at protecting the voice of the majority as well as ideas hated by the majority of the public? As Mill wrote:

If all mankind more or less were of one opinion, and one were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the powers, would be justified in silencing mankind.

After Judge Collyer's dismissed *Johnson v. CPD*, Gary Johnson and others amended the suit to also request that the courts strip the CPD of its not-for-profit status. The overwhelming amount of evidence indicates that the CPD operates as a bipartisan political action committee (PAC), and not as a nonpartisan organization. PACs are not eligible for nonprofit status, which means the CPD is not entitled to any tax exemptions. In March 2017, the U.S. Court of Appeals granted Johnson's request to appeal Collyer's dismissal of *Johnson and others v. CPD*. Although the Court solicited arguments from both Johnson and the CPD in April, both parties are still awaiting the verdict.

While the FEC and the CPD flaunt the precedent set in *Buchanan v. FEC*⁷¹, where U.S. District Judge Richard W. Rogers ruled in the commission's favor, Rogers actually sympathized with Buchanan, suggesting the need for greater inclusiveness. However, Rogers ultimately determined that Buchanan had failed to provide conclusive evidence of how the FEC's and CPD's actions had resulted Buchanan's lack of standing or any of the other affiliated plaintiffs. So, although Judge Rogers did rule in the FEC's favor in *Buchanan v. FEC*, he did not do so without seriously questioning the commissions' commitment to ensuring free and fair elections.⁷²

Through this indisputable relationship, the Political Duopoly heavily subsidizes huge corporations in order to eliminate their smaller competitors. In turn, big businesses donate large amounts of money to the duopoly to prevent challenges from smaller political parties. Martin Gilens and Benjamin I. Page (2014) referenced this uncomfortably close relationship in their article "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens." Gilens and Page (2014) provide evidence that, since 1980, the two major parties have introduced policies and procedures and passed legislation, to transform the U.S. from a Constitutional Republic into an Oligarchy. Larry Diamond (2015) also referenced these facts in "A Very Cozy Duopoly."

The Political Duopoly's reign has also resulted in a trajectory of the decline in civil liberties and personal freedoms enjoyed by Americans prior to the start of the 21st

⁷¹ *Buchanan v. FEC*

⁷² *Buchanan v. FEC*

Century. Using a set of 12 criteria related to freedom and liberty around the world, the Cato Institute, one of the largest organizations in the world dedicated to freedom and liberty, showed that the U.S. fell to 23rd place in 2016 in overall freedom (Cato website and journal, 2016). The World Justice Project (WJP) ranked the country 18th for 2016 as it applies to fairness and objectivity in rule of law due to the increasing corruption within the U.S. Judicial system (WJP, 2016). Also, in 2016, Reporters Without Borders (RWB), a France-based group dedicated to protecting press freedom around the world, ranked the U.S. number 42 out of its 180 surveyed countries (RWB website, 2016). Finally, The Economist Intelligence Unit (EIU), which studies electoral freedom around the world, reclassified the U.S. as a “flawed democracy” in its 2016 report (EIU website and journal, 2016). Much of this decline relates to the U.S. being the only “free” country, out of 35 nations worldwide, with only two functioning major political parties (Coleman, 2000).

Jerome A. Barron (1967) and Derek Bambauer (2006) blame America’s “romantic view” of the Marketplace of Ideas theory for the traditional media’s resistance to acknowledge parties outside of the Political Duopoly, as well as the media’s unwillingness to allow the inclusion of alternate political ideologies in its regular news coverage. While the First Amendment gives U.S. Citizens the right to free speech, the media often wants to use the First Amendment as the reason to exclude coverage of dissenting political opinions not conforming to the norm. “The right to receive information” results in the press refusing to provide time for any commentary that deviates from (what the media considers to be) the “majority.”

All of these aforementioned sub-factors center on the continued dominance of the Political Duopoly in the United States. The Democrats and the Republicans, and the large corporations that collude with the two establishment parties, fear any threat to the political status quo. These “risks” come from “third-party” and non-party affiliated candidates. For these reasons, the CPD and FEC, both bipartisan commissions aimed at protecting the interests and undisputed power of the Political Duopoly, will continue to act contrary to law. That is, unless the Judicial Branch of the federal, state, and local governments, as well as the traditional media sources, show a willingness to care less about self-serving and self-preservation, and more about the perilous state of electoral (and related) freedoms and liberties that were once championed in the United States of America.

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