

# THE DEBATE DEBATE

A REPORT BY THE NEW YORK CITY CAMPAIGN  
FINANCE BOARD

JUNE 1994



New York City Campaign Finance Board

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## THE NEW YORK CITY CAMPAIGN FINANCE BOARD

The New York City Campaign Finance Board is the independent, non-partisan City agency charged with administering New York City's Campaign Finance Program, which provides matching funds to candidates who agree to contribution and expenditure limits and detailed disclosure of their campaign finances. The Board also publishes New York City's Voter Guide, which provides information about candidates, ballot proposals, and voting in municipal elections to all registered voters in New York City.

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## TABLE OF CONTENTS

INTRODUCTION .....	1
"DON'T WANNA! DON'T GOTTA!" .....	1
THE CALL FOR MANDATORY DEBATES .....	3
HOW USEFUL ARE DEBATES? .....	4
SHOULD GOVERNMENT STEP IN? .....	5
MANDATORY DEBATES AND PUBLIC FUNDS: A "FAUSTIAN BARGAIN" .....	7
AN ALTERNATIVE APPROACH: THE VOTER GUIDE DEBATE PROGRAM .....	8
THE DEVIL IS IN THE DETAILS .....	10
CONCLUSION; REQUEST FOR PUBLIC COMMENT .....	11
ENDNOTES .....	13
APPENDIX: List of Those Who Have Presented Testimony on the Subject of Debates Before the Campaign Finance Board ...	A1

*As the mayoral race limps and lurches toward the finish line, it's all but certain that Mayor Dinkins and Rudolph Giuliani will not meet in debate. Both men took public money to run and then deprived voters of a potentially defining encounter. . . . The outrageous dodge, made more infuriating because both hid behind the pretext of principle, can be solved by tightening the campaign finance law. It should be rewritten to force debates in the future.*

- *Daily News* editorial<sup>1</sup>

*You can well imagine my surprise, then, on reading at least a dozen columns and news stories during this mayoral campaign arguing that since this is a publicly financed election, the candidates have an obligation to debate and, in fact, 'we' should change the law to require them to debate. . . . This is simply a proposal for government to control political speech, albeit under the flapping banner of civic goo-gooism.*

- Richard Vigilante, *New York Newsday* columnist<sup>2</sup>

## Introduction

The 1993 mayoral election in New York City will be remembered, among other things, for the debates that weren't. The two leading mayoral contenders, both of whom accepted public matching funds for their campaigns, failed to agree on terms for meeting in a face-to-face debate. Many concluded that the campaign finance law should have forced the candidates to debate and called for an amendment to the New York City Campaign Finance Act that would accomplish this.

The New York City Campaign Finance Board recognizes that debates can play an important role in educating voters about the candidates and issues in an election campaign. The Board questions the merits of linking New York City's campaign finance reform to a debate requirement, however, and concludes, for the reasons outlined in this report, that it would be unwise and even counterproductive to do so. The Board believes, however, that its voter education mandate in conjunction with the force of public opinion may effectively induce candidates for City-wide offices to engage in debates. This report describes the Board's recommendations for a "Voter Guide Debate Program" that could be established under the Board's existing authority, without amending the New York City Campaign Finance Act.

The Board intends to disseminate this report widely in the hope that comments elicited in response to it will help the Board to evaluate the wisdom and practicality of its ideas before it makes any formal proposal.

### "Don't wanna! Don't gotta!"<sup>3</sup>

In late October 1993, this refrain caricatured the standoff between mayoral candidates David Dinkins, the incumbent and Democratic Party nominee, and Rudolph Giuliani, the Republican and Liberal parties' nominee, over terms for meeting in a face-to-face debate. Their disagreement turned on whether George Marlin, the Conservative and Right-to-Life parties' nominee, should also take part in any debate between the two major candidates. From the beginning of the general election campaign, Dinkins refused to participate in a debate that excluded Marlin, while Giuliani similarly refused to participate in a debate that included Marlin. In a race too close to call, neither candidate compromised. Stalemate ensued, punctuated by lost opportunities.<sup>4</sup> In the end, New Yorkers saw no face-to-face general

election mayoral debate in 1993.

In defense of his position, Mayor Dinkins asserted that "democracy and the American way require[d] that George Marlin be permitted"<sup>5</sup> to participate in the debates. (Together, Dinkins, Giuliani, and Marlin represented the five statewide political parties.<sup>6</sup>)

In response, Giuliani pointed to Marlin's low results in public opinion polls (1 to 2 percent) as the basis for his refusal to meet in a debate that included a "spoiler," explaining that, in presidential campaigns, candidates with a similarly low polling percent are excluded from debates.<sup>7</sup>

The press and political analysts insisted that the real cause for the standoff was the two candidates' concern for tactical advantage in a close race. An article by *Daily News* reporter Frank Lombardi ascribed the following strategic considerations to Dinkins and Giuliani:

. . . Dinkins wants to build voter recognition of Marlin through the media exposure that debates bring -- if the race remains close, votes for Marlin could cost Giuliani the election.

Also, Marlin's presence could force Giuliani to take more conservative positions to protect his Republican base, driving away some of the Democratic and independent voters he needs to overcome the Democrats' 5-to-1 enrollment edge.

Giuliani's strategy: Avoid Dinkins' trap and give voters an uncluttered choice between him and Dinkins. A tough cross-examiner from his years as a prosecutor, Giuliani believes he would best Dinkins in an unscripted, free-wheeling exchange.<sup>8</sup>

In 1989, Dinkins and Giuliani had had a similar disagreement, over whether or not to include Conservative Party candidate Ronald Lauder and Right-to-Life Party candidate Henry Hewes in mayoral debates. While Dinkins insisted that mayoral debates had to include the two third-party candidates, Giuliani initially took the position that he would only debate Dinkins alone. Late in that election season, after extensive negotiations, Dinkins and Giuliani finally debated each other twice -- once together with Hewes and once without. Why, then, were there no debates in 1993? Gail Collins wrote:

Here is David Dinkins, explaining why he will not debate Rudy Giuliani one-on-one: "Why should I?"

And now, a spokesman for Rudy Giuliani on the subject of why Giuliani will not debate Dinkins under the same format he used four years ago: "Four years ago he [Giuliani] was *behind*".<sup>9</sup>

## The Call for Mandatory Debates

In both 1989 and 1993, an angry New York press bemoaned the fact that the mayoral candidates' campaign strategies dictated if, when, and how debates would be held. David Seifman, *New York Post's* City Hall Bureau Chief, warned that the failure to debate would set "a dangerous precedent . . . [of] manipulated messages [winning] over true discourse."<sup>10</sup> Asserting that candidates whose campaigns were being subsidized by voters' tax dollars had a special obligation to appear before the voters, the newspapers began to call for a requirement that publicly financed candidates participate in debates.<sup>11</sup> This view reverberated at public hearings conducted by the Campaign Finance Board after the 1989 and 1993 elections, at which former candidates, public officials, representatives of citizens' groups, and political consultants endorsed the idea that participation in debates should be required of candidates taking public funds.<sup>12</sup>

At the Board's 1993 public hearings, then-Mayor-elect Giuliani testified that City-wide candidates who qualify for campaign finance funds and are participating in the Program should be required to take part in debates to "satisfy some of the public frustration with the fact that a million or two million dollars can be given to a candidate [without] a requirement for a debate."<sup>13</sup> Former Mayor David Dinkins has not taken a public position on the issue of mandatory debates.<sup>14</sup>

At the Board's 1993 public hearings, proponents of mandatory debates included, among others, then-Public Advocate-elect Mark Green and Gene Russianoff, senior staff attorney at the New York Public Interest Research Group, who testified that "debates are the return on the investment of tax-dollars in campaigns that voters have a right to expect."<sup>15</sup>

Opponents of a debate requirement include Dr. Herbert Alexander, professor of political science at the University of Southern California and director of the Citizens Research Foundation. He warns that the addition of new requirements, such as mandatory debates, could deter candidates from joining a voluntary campaign finance program, thus weakening the effectiveness of campaign finance reform.<sup>16</sup> Former Corporation Counsel Peter Zimroth has advised against a debate requirement, stating that the campaign finance law should not be seen as "the panacea for every issue of campaigning -- of ethics in campaigning or fairness in campaigning."<sup>17</sup> In written testimony submitted to the Board in connection with its 1993 public hearings, Giuliani campaign attorney Lawrence Mandelker, writing on his own behalf and not on behalf of the Giuliani campaign, argued against government regulation of political speech and suggested that "it should be left up to the candidates to decide the most advantageous use of their time and campaign resources."<sup>18</sup> Harold Ickes, Counsel to Dinkins' re-election committee, similarly expressed strong doubts about the public value of debates and the wisdom of governmental interference in the management of political campaigns.<sup>19</sup>

After reviewing the performance of the Campaign Finance Program during the 1989 election campaign and the particular circumstances surrounding the mayoral debates, the Board, although recognizing the "importance of promoting debates in the political process,"

did not endorse the idea that they should be required by law.<sup>20</sup> Furthermore, the Board expressed concern that "its involvement in the administration of a debate requirement might interfere with its ability to appear nonpartisan and objective."<sup>21</sup>

In December 1990, then New York City Council Members Abraham Gerges and Carolyn Maloney introduced a bill (Intro. No. 594) to require debates for candidates seeking City-wide office who participate in the Campaign Finance Program.<sup>22</sup> This bill was reintroduced in 1992 as Intro. No. 283. To date, the Council has not held hearings on any bill that would require candidate debates.

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The fact that no mayoral debates were held between Dinkins and Giuliani in 1993 shows that public pressure was insufficient to induce these candidates to debate. The following sections of this report discuss whether it is appropriate for New York City government to intervene in the political process by requiring or otherwise inducing mayoral and other candidates for City-wide office to debate and describe a mechanism that might be implemented for doing so.<sup>23</sup>

#### How Useful Are Debates?

For candidates, debates are one of a variety of forums for addressing the public during an election campaign. Because every candidate attempts to communicate with the voters in a manner that serves to promote his or her campaign goals and to undermine those of opposing candidates, considerations of campaign strategy will dictate if, when, and how a candidate decides to engage in debates.

For voters, debates are an opportunity to compare and contrast candidates, face-to-face. At best, debates offer voters a clear sense of substantive differences among candidates. When a debate informs and motivates voters, it contributes to a healthier democracy and, ultimately, a more responsive and effective government.<sup>24</sup>

Election campaigns in the United States are often dominated by carefully staged campaign appearances, discussion framed in sound-bites, "negative" attacks on opponents, and glossy thirty-second commercials. The public, feeling manipulated by the candidates, their handlers, and the media, has become more cynical and apathetic about voting.<sup>25</sup> Against this backdrop, debates have the potential to serve an important function: educating the electorate and increasing voter turnout.

There is a public perception that debates can offer a fair and open exchange, reveal a more candid glimpse of the candidates, and challenge candidates to bare and defend their views on important issues. Debates may elude campaign consultants' efforts at "spin control" and significantly expand the public's information base beyond candidate advertisements and other second-hand sources such as news reports, political columns, and editorial commentary.



Moreover, live television coverage of debates may serve to stimulate voter interest and increase voter awareness of the candidates.<sup>26</sup> Debates require an allocation of significant airtime, giving voters more in-depth coverage of the candidates. Because television reaches into the homes of the overwhelming majority of voters, televised debates are especially beneficial for poorly-financed and lesser known candidates who are unable to pay for extensive advertising or to attract "free" coverage in the news media. Exposure gained from inclusion in a face-to-face debate can translate into additional votes.<sup>27</sup>

This positive view of debates is not unchallenged.<sup>28</sup> Debates may not be helpful for voters when, as often occurs, they feature questions posed on pre-set topics, resulting in stage-managed forums packed with slogans and personal attacks. Commentators providing "instant analysis" of who "won" the debate limit the viewer's opportunity to make an independent assessment. Indeed, candidate debates, as we know them now, are rarely "debates" in the classic sense of formal contests of argumentation in which two sides defend and attack a proposition, or even question each other. Modern televised debates tend to focus attention on candidate images and personalities, rather than on a discussion of substance. Charm, wit, and composure may "win" a televised debate.<sup>29</sup> In addition, television stations remain free to ignore debates that do take place, or to relegate them to late-night coverage.

Assuming that debates can be useful for educating voters, the question remains whether the debate that best serves to inform voters is limited to the major contenders or includes minor party candidates. Some have suggested that the inclusion of minor party candidates shifts a debate's focus from personalities to policy issues, enhancing voter awareness of a wider range of positions on controversial issues.<sup>30</sup> For minor party and poorly-financed candidates, debates can be the one forum in which they get to compete on equal terms.<sup>31</sup> Inclusive debates also serve a political socialization function, perhaps motivating disaffected citizens or marginal constituencies to participate in elections.<sup>32</sup>

On the other hand, minor party candidates may bring a relatively narrow ideological or political agenda to a debate. A candidate's single-minded focus on one issue might detract from, and reduce the time available for, substantive examination of a variety of issues. Moreover, the inclusion of many candidates with marginal support or candidates perceived as "spoilers" could lessen the debate's value for helping voters make an informed choice among the main contenders.<sup>33</sup> The challenge to structure a debate that is the most useful for voters is formidable. Many would question the wisdom of placing this challenge in the hands of government.

### Should Government Step In?

The public and the media have come to expect that mayoral candidates debate, and, usually, they do. Dinkins's and Giuliani's delay in agreeing to debate in 1989, and their complete failure to debate in 1993, may be aberrations resulting primarily from their "neck-and-neck" contests. These aberrations, however, were all the more conspicuous because they coincided with the advent of public financing of mayoral campaigns, and both Dinkins and

Giuliani received substantial public subsidies for their campaigns in 1989 and 1993.<sup>34</sup>

In response to this situation, government intervention is now widely sought to assure that debates are held in every City-wide election, at least among those candidates receiving public funds. In addition to setting up a "failsafe" mechanism to bring about debates, government regulation is advocated as a vehicle for addressing the ground-rules of debates. The government could act to assure that the leading candidates no longer control who will be included in a debate and to establish a format that best serves the goal of voter education.

The call for mandatory debates comes amidst recent trends --locally and around the country -- toward a more active role for government in encouraging competition among candidates, facilitating voter registration, and promoting voter education and turnout. For example, the New York City Campaign Finance Act, adopted in 1988, provides optional partial public financing to enable candidates to compete more effectively in City elections.<sup>35</sup> Amendments to the New York City Charter, adopted by referendum in 1988, mandate that the Campaign Finance Board publish and distribute a Voter Guide to all eligible voters, containing information about City elections and ballot proposals, as well as biographical information, photographs, and statements submitted by candidates seeking City offices.<sup>36</sup> These Charter amendments also established a Voter Assistance Commission charged with disseminating voter registration forms through City agencies and developing strategies to increase voter registration and turnout.<sup>37</sup> At the federal level, the National Voter Registration Act was enacted in 1993 to facilitate voter registration in federal elections.<sup>38</sup> Mandatory debate requirements for publicly financed candidates were adopted by New Jersey in 1989, Los Angeles in 1990, and Kentucky in 1992.<sup>39</sup>

However worthwhile the objectives, any intrusion by government into the dynamic of a political campaign must be carefully structured so as not to tread on Constitutional principles intended to assure a political process that is open and free from state control. To be credible, and legally defensible, a debate requirement must have non-partisan voter education as its sole purpose, and the administration of the requirement must be, and appear to be, conducted without regard to partisan strategic concerns. If government is to be involved at all, it should seek the least intrusive means for bringing about debates that will best serve the interests of the voting public.

A debate requirement would, of course, clash with the strategic interests of candidates who might otherwise choose either to avoid debates entirely, or to keep open the option of avoiding debates under conditions they believe are unfavorable. Under the First Amendment, candidates also have a right to "remain silent"; that is, there are constitutional limits on the government's authority to compel candidates to engage in debates.<sup>40</sup> The United States Supreme Court, however, has given approval to the imposition of expenditure limits upon candidates who choose to receive public funds.<sup>41</sup> For this reason, commentators have argued that it would not be held unconstitutional to condition receipt of public funds upon participation in debates.<sup>42</sup>

## Mandatory Debates and Public Funds: A Faustian Bargain

New York City provides public financing to candidates who join and qualify under its Campaign Finance Program, and a case could be made to support the constitutionality of a debate requirement for publicly financed candidates. Assuming its constitutionality, the question becomes: does public policy support making participation in debates an additional obligation for those candidates who receive public funds?

The New York City Campaign Finance Act was enacted, in part, to reduce the influence that large contributions and access to wealth may unduly exercise on elected public officials and to promote meaningful and informed participation of candidates and voters in City elections. To achieve these goals, the Board provides public funds that match certain private contributions received by candidates who voluntarily agree to a variety of conditions, including contribution and spending limits, disclosure of detailed campaign finance information, and audits by the Board.<sup>43</sup>

The demand to make participation in debates mandatory for publicly funded candidates in New York City appears in large part to be a visceral reaction to the prolonged "debate over debates" in both 1989 and 1993. This reaction is also rooted in a desire for a tangible return on the investment of public dollars. Because New Yorkers may have lost faith that the pressures of the campaign itself will bring about debates, the withholding of public funds is a tempting threat to achieve a goal that is entirely unrelated to the goals of the Campaign Finance Program.

But should a new obligation, a debate requirement, be grafted onto New York City's campaign finance reform? The Campaign Finance Program is voluntary; candidates need not participate and submit to its strictures. A candidate who calculates that his or her overriding interest is not to commit to debate might choose, for that reason alone, not to join the Program, and thus avoid, and attempt to justify avoiding, campaign finance reform as well.

Furthermore, the "mandatory" aspect of the debates could be enforced only against candidates participating in the Campaign Finance Program. These candidates would no longer be able to "pick and choose" whether to debate as a matter of campaign strategy, but opposing candidates who remain outside the Program would continue to be free to do so. A mandatory debate requirement enforceable only against Program participants would thus be a double boon for non-participants, for whom debates would remain an option, not a requirement. The public would be poorly served by a policy that gives this strategic edge only to candidates who refuse to take part in campaign finance reform. For these reasons, a debate requirement for publicly financed candidates would run counter to the goals of the Campaign Finance Program.

Public funds are not gifts given to municipal candidates, but the price New Yorkers have agreed to pay for the substantial benefits of campaign finance reform: campaign contribution and expenditure limits, better information about how candidates raise and spend

campaign funds, and, ultimately, a higher degree of public confidence in the City's political process. The provision of public funds was never intended to regulate the time, place, and manner of candidates' communications to voters.

By contrast, the primary purpose of staging debates is to provide substantive information to voters about the choice they must make on election day. This objective is significantly different from the goals of campaign finance reform. Rather, the reasons suggested for government action to bring about debates are the same voter education purposes served by the Board's mandate to publish the non-partisan New York City Voter Guide, which contains campaign information the candidates have supplied, such as candidate statements, biographies, and photographs.

The Board concludes that the obligation to debate should not be tied to the acceptance of public funds. A debate requirement linked to the Campaign Finance Program will not create forums that are both fair to candidates and educational for voters. The pressure of public opinion, not coercive government regulation, should remain the ultimate determining force behind candidates' decisions to engage in debates.

#### An Alternative Approach: The Voter Guide Debate Program

If government is to be involved in bringing about debates among opposing candidates, it should play a constructive role in shaping debates to benefit the interests of voters. Rather than imposing mandatory debates as a condition for the receipt of public funds, government can help induce candidates to debate by harnessing public sentiment. A far less intrusive approach can be devised to set rules for a debate program that would promote non-partisan, voter education goals in a manner that is fair to all opposing candidates, whether or not they join the Campaign Finance Program. In this way, government action would reduce the possibility that campaigns could continue to make strategic choices that undermine debates through manipulation, posturing, and delay.

The key is to establish a process by which candidates commit publicly to participate in debates early in the campaign, before the field of opposing candidates is known and before campaign strategy is set. This can possibly be achieved within the context of a debate program that reflects positive aspects of the Board's experience with its twin mandates, the Campaign Finance Program and the Voter Guide. Like the Campaign Finance Program, such a debate program would be voluntary; no candidate would be compelled to participate. The candidates would be required to make their choice to participate -- and make that choice public -- by a specified date, well in advance of the campaign proper, and well in advance of "strategic" determinations about whether or not it would be in any particular candidate's best interests to debate. To meet the voter education goals of debates, the debates staged under the government program would be open to all opposing candidates, based on objective, non-financial criteria. The Board's mandate to publish a Voter Guide is relevant both as analogy and authority.

The Voter Guide, published by the Campaign Finance Board, is designed to give voters a concise, non-partisan package of information about municipal candidates, local ballot issues, and voting. By providing free and equal space for each candidate's submission, the Voter Guide fosters competition among candidates and promotes voter education in a fair and equitable manner. The Voter Guide is a model of a legally mandated non-partisan forum that is open for all opposing candidates, regardless whether they join the Campaign Finance Program.

Under the City Charter, the Board is authorized to:

take such actions as it deems necessary and appropriate to improve public awareness of the candidates . . . in all elections in which there are contested elections for the offices of mayor, public advocate, borough presidents, comptroller, or city council. . . .<sup>44</sup>

This authorization expressly includes, but is "not necessarily limited to" the publication and distribution of the Voter Guide.<sup>45</sup> Pursuant to this authorization, the Board may adopt rules to give candidates an opportunity to commit publicly to participate in debates by filing a written agreement with the Board. This commitment could be due at the same time that candidates must file statements for inclusion in the Voter Guide.<sup>46</sup> The Voter Guide itself would explain the debate commitment and would note which candidates had agreed to debate, and which had not, for the public's information.

Because the terms for candidate inclusion and the terms for the debate format would be set in advance, it would be difficult to disguise a refusal to debate as a principled position.<sup>47</sup> By requiring potential candidates to decide whether to take part in debates before the final make-up of the ballot is determined, the rules providing for debates would significantly limit the option that candidates now exercise to negotiate the inclusion or exclusion of other candidates late in the campaign.

A Voter Guide Debate Program would require less government involvement than a scheme that links debates to public financing. In all likelihood, public pressure would force eligible candidates to join the Debate Program. Candidates would find it extremely difficult to justify hiding from debates as opponents impute to them a fear of confrontation and the media condemn their conduct.

Having decided to join the Debate Program, candidates would find it even more difficult to back out of the commitment to debate. Although failure to abide by the commitment to debate would not be punished by a civil penalty or the withholding of public funds, the adverse comment that can be expected from the media before election day is a more appropriate and unquestionably more significant punishment. Candidates who refuse to carry through on their promise to debate will be in the unenviable position of having to explain why they have reneged, even before election day, on a campaign pledge made to the voters.

The Voter Guide Debate Program would, like the Voter Guide itself, be open to all candidates on the ballot, whether or not they have chosen to participate in the Campaign Finance Program. This Debate Program would therefore not conflict with the goals of campaign finance reform, nor would it impinge on candidates' rights of political expression.

Under this proposal, campaign strategy would no longer control decisions about the date, time, location, and format of the debates. These matters would be resolved either by the government agency, or the non-partisan sponsors it selects, far in advance of a heated political campaign. By focusing on what is best for the purpose of informing the voters, without regard to what best suits the strategy of particular candidates, decisions made under the Voter Guide Debate Program could help reduce the possibility that the debates would degenerate into uninformative, parallel press conferences. In this way, the Voter Guide Debate Program could also add a certain integrity to the campaign, perhaps giving the public greater confidence in the fairness of the political process and motivating citizens to vote.

Of course, a Voter Guide Debate Program would only promote candidate debates. It would not guarantee them. City-wide candidates, including those receiving public funds, who believe that dodging debates is the expedient course will still be able to avoid debating, albeit at the cost of increased public and media criticism. Furthermore, candidates who choose to participate in a Voter Guide Debate Program might use this as an excuse for avoiding debates organized for other forums.<sup>48</sup>

Finally, the integrity and non-partisanship of a government sponsored debate program would itself subsist on a fragile reed of public opinion. The administrative agency, or the sponsors it selects, would be faced with many difficult decisions about how the debates should be structured. It is critical that these issues be resolved in a time and manner that eliminates any credible allegations of biased or partisan decision-making. Because of the difficulties inherent in resolving these intricate questions, detailed in the next section, perhaps the best argument for having a Voter Guide Debate Program, rather than debates linked to public financing, is that it would involve the government less in the political fray.<sup>49</sup>

### The Devil is in the Details

In written testimony submitted in connection with the Board's December 1993 public hearings, Harold Ickes warns of the "myriad of details involved in arranging even the most perfunctory debates."<sup>50</sup> In deciding how to handle each of these administrative details for any debates established by law, a government agency administering the debates, or other non-partisan sponsors, would be making decisions that could have an impact on how well particular candidates perform.

The Campaign Finance Board continues to have reservations about its involvement in the administration of candidate debates. The Board therefore favors a framework that would delegate most of the administration of a Voter Guide Debate Program to a non-partisan citizens' group to be selected by the Board. The Board also remains concerned with the fact

that every administrative decision involved in setting the ground rules for a debate has political consequences. Early and clear resolution of the following administrative matters is critical for insulating the decision-makers from the appearance of partisanship during the election season:

Should any candidates on the ballot be excluded from debates? What are the criteria for inclusion? Would minor party candidates be included? If ballot-qualification is a criterion for inclusion in a debate, should candidates in the process of appealing an administrative or judicial decision disqualifying them from the ballot be permitted to debate?

What will the format be for debates? Who, and based on what criteria, will choose the topics, panelists, moderator, location, and time of day for the debates? Should a debate be limited to a narrow range of topics? Should rebuttals and sur-rebuttals be permitted? May candidates ask questions -- and follow-up questions -- of each other? Should questions from the audience be included? Should there be an audience? May the candidates invite audience members? What rules should govern audience behavior? How much time should be allowed for opening and closing statements? In what order should candidates be permitted to speak? Should the debate format be established by law or rule or be left up to sponsors? Should candidates' campaigns be consulted before the final format is decided? Even the most trivial format arrangements may raise potentially significant strategic issues for candidates.

When should debates be held? How far in advance of the election should debates be held? Should separate debates be held for each party primary? How many primary election debates should be established? If a candidate is running in more than one primary, should the candidate be required or permitted to appear at a separate debate for each of these primaries? Should debates be established for run-off primary elections? How many general election debates should be established?

Who should sponsor or host the debates? What criteria should be established for selecting sponsors? What happens if no private sponsors meet the qualifications for hosting a debate? What happens if a sponsor withdraws? What provisions should be made for television, radio, and other coverage?

### Conclusion: Request for Public Comment

The Board is publishing this initial report in response to the significant expression of public opinion during the 1993 election in favor of government action to bring about debates among candidates seeking City-wide office. The Board recognizes that public frustration at candidates who receive substantial public funds and decline to debate would not be fully addressed by the proposal for a Voter Guide Debate Program described in this report. The Board also continues to have reservations about the ultimate value of debates as a tool for voter education and about proposing any role for government at all in candidate debates. Any debate program, whether mandatory or not, would create an administrative quagmire, requiring the thoughtful and non-partisan handling of many complex details.

Because of these reservations, the Board wishes to encourage discussion about this report and its proposal before issuing any proposed rules and looks forward to receiving comments. In light of the impact this proposal might have on future New York City elections, the Board intends to consider all comments it receives carefully before deciding whether to make a formal proposal for rules that would provide for a Voter Guide Debate Program.

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The Board would greatly appreciate receiving comments before January 1, 1995, in order to give sufficient time for developing this proposal, or an alternative, well in advance of the City-wide elections that will next be held in 1997.



## ENDNOTES

1. "Debate Flop Shows Campaign Law Loopholes," *Daily News*, October 31, 1993, p. 42.
2. "Who Cares if the Candidates Debate?" *New York Newsday*, November 2, 1993, p. 85.
3. Gail Collins, "Two Big Babies," *New York Newsday*, October 20, 1993, p. 1. See also Gail Collins, "They're Still Acting Like Babies," *New York Newsday*, October 22, 1993, p. 7; and Editorial, "Infantile Pols," *New York Newsday*, October 25, 1993, p. 36.
4. David Dinkins and George Marlin met for a mayoral debate hosted by WNBC-TV, on the morning of October 17, to which Giuliani was invited, but he declined to appear. Another mayoral debate, sponsored by the National Abortion Rights Action League and scheduled to take place on October 19, was cancelled when Dinkins refused to attend because George Marlin had not been invited. An October 21 forum on issues concerning senior citizens, in which Dinkins, Giuliani, and Marlin were to appear back-to-back, was rescheduled so that each candidate would appear on a different day.

WCBS-TV announced its intention to host a debate between Dinkins and Giuliani on October 28. The Dinkins campaign objected to Marlin's exclusion. Giuliani appeared alone on October 28. (George Marlin argued that because not all mayoral candidates had been invited to participate in the WCBS-TV debate, the costs incurred to broadcast this debate were in-kind contributions to and expenditures on behalf of Dinkins and Giuliani under the Campaign Finance Act. The Campaign Finance Board found that costs incurred by a bona-fide broadcaster to stage a non-partisan debate do not constitute in-kind contributions to and expenditures on behalf of the candidates invited to appear. The Board stressed that the Act's limits on contributions and expenditures were not intended to regulate legitimate news coverage of candidates, including debates. See Campaign Finance Board Advisory Opinion No. 1993-11 (October 28, 1993).)

On election eve, Dinkins and Giuliani appeared separately on the Charlie Rose show on WNET-TV.
5. Quoted in Joel Siegel, "Debate? Not Them. Dave, Rudy Just Say No," *Daily News*, October 22, 1993, p. 7. See also Todd Purdum, "Hopes Fade for Debate in Big Race," *New York Times*, October 28, 1993, p. B9.
6. The five statewide parties in New York are: Democrat, Republican, Conservative, Liberal, and Right-to-Life. See New York State Election Law § 1-104 (statewide political party defined as one having polled at least 50,000 votes in last election for governor).

There were two independent party candidates in the 1993 mayoral election: Mary Nell Bockman, the Socialist Workers' Party nominee, and Joseph Brennan, the Libertarian Party nominee. No great demand was made by the press or the public to include these candidates in the debates.
7. See Purdum, *supra* note 5.
8. Frank Lombardi, "Voters' Groups Push for Mayoral Debates," *Daily News*, October 1, 1993, p. 6. Other newspapers featured similar analyses. See, e.g., Michael Powell and Bob Liff, "This Time, Dave Ducks," *New York Newsday*, October 19, 1993, p. 4; Editorial, "The Debate Over Debates," *New York Post*, October 21, 1993, p. 22; and Purdum, *supra* note 5.
9. See Collins, *supra* note 3.
10. David Seifman, "We're the Losers in the Debate Flap," *New York Post*, October 12, 1993, p. 2.

11. See, e.g., "Make Debates Mandatory," *New York Newsday*, October 30, 1993, p. 21, and "Debate Flop Shows Campaign Law Loopholes," *supra* note 1.  
David Dinkins and Rudolph Giuliani both participated in the Campaign Finance Program and received public funds for the 1989 and 1993 mayoral elections. In 1993, George Marlin was not a Program participant; neither were Ronald Lauder and Henry Hewes in 1989.
12. See **Hearings before the New York City Campaign Finance Board**, December 13-14, 1989, and **Hearings before the New York City Campaign Finance Board**, December 8-9, 1993. Similar testimony was given after the 1991 City Council elections. See **Hearings before the New York City Campaign Finance Board**, December 11-12, 1991. For a listing of letters and other testimony relevant to debates presented at these hearings, see Appendix.
13. See **Hearings before the New York City Campaign Finance Board**, December 1993, *supra* note 12. Rudolph Giuliani also endorsed a debate requirement for City-wide candidates who receive public money at the Campaign Finance Board's public hearings in 1989 and 1991. Others who testified in favor of mandatory debates at the 1989 hearings include Dean John Feerick, then Chairman of the State Commission on Government Integrity, who stated that "whether or not to participate in a debate should not itself be the subject of debate." Then-Mayor Edward I. Koch voiced support for the "imposition of the requirement that all candidates for [City-wide] office receiving public funds agree to engage in public debates," but cautioned that "a debate requirement should be the last stop, not the first step, in government regulation of the non-financial aspects of [electoral] campaigns." See **Hearings before the New York City Campaign Finance Board**, December 1989, *supra* note 12, pp. 546 and 11, respectively.
14. During the 1993 stalemate on mayoral debates, Lee Jones, a spokesman for Mayor Dinkins, was quoted as saying that Dinkins "would want to see any proposals [before commenting on the linking of public campaign funding to debates]." See David Seifman, "Force 'Em," *New York Post*, October 22, 1993, p. 4.
15. See **Hearings before the New York City Campaign Finance Board**, December 1993, *supra* note 12, p. 108.
16. See **Hearings before the New York City Campaign Finance Board**, December 1989, *supra* note 12, pp. 287-288.
17. *Ibid.*, p. 332.
18. Letter from Lawrence Mandelker to Nicole A. Gordon, dated December 13, 1993, on file with the Campaign Finance Board. See **Hearings before the New York City Campaign Finance Board**, December 1993, *supra* note 12 (written testimony).
19. Letter from Harold Ickes to Laurence Laufer and Andrew Schwartz, dated December 23, 1993, on file with the Campaign Finance Board. See **Hearings before the New York City Campaign Finance Board**, December 1993, *supra* note 12 (written testimony).
20. New York City Campaign Finance Board, **Dollars and Disclosure: Campaign Finance Reform in New York City** (New York, September 1990), p. 134.
21. *Ibid.* The Board reiterated this position in 1992. See New York City Campaign Finance Board, **Windows of Opportunity: Campaign Finance Reform and the New City Council** (New York, July 1992), p. 93.

22. The bill would require those candidates for City-wide office participating in the Campaign Finance Program and who meet the Program's threshold requirements to take part in at least two primary election debates and at least two general election debates. Sponsors for the debates would be selected by the Campaign Finance Board from among private organizations not affiliated with political parties, candidates, or incumbents. Sponsors would choose the date, time, location, and rules of conduct for the debates. The Board would provide sponsors with a list of candidates required or permitted to participate in the debates. (The bill does not make clear how, or if, candidates who do not join the Campaign Finance Program would participate in mandated debates.) Candidates who failed to participate in debates without reasonable justification would be subject to civil penalties in an amount not to exceed ten thousand dollars.
23. This report does not discuss debates for candidates other than at the City-wide level.
24. See Myles Martel, **Political Campaign Debates: Images, Strategies and Tactics** (Longman, New York: 1983), p. 2.
25. Curtis Gans, Vice-President and Director of the Committee for the Study of the American Electorate, sees a direct correlation between the rise of negative television campaign advertisements and decreasing voter participation. See Curtis B. Gans, testimony before the Subcommittee on Communications (Committee on Commerce, Science and Transportation), United States Senate (July 19, 1989), pp. 4-5.
26. See, e.g., Lee M. Mitchell, **With the Nation Watching: Report of the Twentieth Century Fund Task Force on Televised Presidential Debates** (1979), quoted in Eisner, *infra* note 30 (discussing the dramatic interest in the election campaign and presidential candidates John F. Kennedy and Richard M. Nixon following the first televised debates in 1960), p. 977.
27. In testimony in 1989, Republican political consultant James Severin emphasized the fact that debates worked to "neutralize large dollar disparities among candidates," using mayoral candidates Ronald Lauder and Henry Hewes as examples. See **Hearings before the New York City Campaign Finance Board**, December 1989, *supra* note 12, pp. 227-229. While Conservative candidate Ronald Lauder spent over \$13 million for the mayoral primary election, Right-to-Life Party candidate Henry Hewes spent less than a thousand dollars. Hewes, however, polled twice as many votes as Lauder in the November election, presumably as a result of his participation in a televised general election debate with Dinkins and Giuliani.
28. See, e.g., letter from Herbert London to Nicole A. Gordon, dated November 22, 1989, on file with the Campaign Finance Board, in which London, who does not favor mandatory debates, states that "[w]hile debates in themselves rarely illuminate issues or serve as an appropriate tool for evaluating a candidate's credentials, they do create impressions -- sometimes accurate and occasionally misleading." See also Harold Ickes' comment that "[t]here is no clear consensus on the public value of debates as we know them. Indeed, much informed commentary depicts debates as little more than set piece statements by candidates." See *supra* note 19.
29. See, e.g., Mitchell, quoted in Eisner, *infra* note 30 ("In determining who had 'won' the [1960 Kennedy-Nixon] debates, the most important determinant seemed to be the 'style' of a candidate . . . and his personality"), p. 974.
30. See, e.g., Susan E. Spotts, "The Presidential Debates Act of 1992," **29 Harvard Journal on Legislation** 561, (1992), pp. 575-579; and Keith Darren Eisner, "Non-Major-Party Candidates and Televised Presidential Debates: the Merits of Legislative Inclusion," **141 University of Pennsylvania Law Review** 973 (1993), quoting Representative Timothy Penny of Minnesota's Democrat-Farmer-Labor Party: "Historically, [minor party and independent] candidates have been fertile sources of new ideas and new programs, and provide opportunities for the American public to enter into a diverse and open dialog on the critical issues of the day. . . . Including [significant] independent and minor party candidates is a critical aspect of [democratizing] the debates and

broadening our national dialog."

31. Joel Swerdlow, "The Strange -- and Sometimes Surprising -- History of Presidential Debates in America," in **Media Technology and the Vote: A Source Book**, Joel Swerdlow, ed. (Westview Press, Colorado: 1988), p. 79.

32. See Spotts, *supra* note 30, p. 579, who concludes that "it is important to provide information on these other [minor party] candidates and their positions so that voters can make not only a more informed choice, but a more effective one. . . . Without this information, a voter dissatisfied with the two major parties will not be aware of a viable alternative and may simply decide not to vote."

33. Xandra Kayden, who played an important role in drafting Los Angeles' campaign finance law and is now a visiting scholar at the Center for Politics and Policy at the Claremont Graduate School, finds that if "serious candidates have to compete with the marginal for the spotlight," the voters may ultimately be cheated. (Xandra Kayden, "Will Democracy Let Los Angeles Down?" *Los Angeles Times*, February 21, 1993.) She bases her opinion on issues raised by the 1993 mayoral primary election debate in Los Angeles, when would-be sponsors found it impossible to stage a debate that included all 31 mayoral candidates on the ballot. See *infra* note 39.

34. For the 1989 general election, David Dinkins received \$524,410 in public funds and Rudolph Giuliani received \$462,776. For the 1993 mayoral elections, to date, the Campaign Finance Board disbursed \$1,329,283 in public funds payments to David Dinkins and \$1,676,479 to Rudolph Giuliani. In return, these candidates agreed to abide by the Campaign Finance Act's contribution and spending limits and detailed public disclosure requirements.

35. New York City Administrative Code §§3-701 *et. seq.*

36. New York City Charter §§1052(b); 1053.

37. New York City Charter §§1054-1056.

38. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77.

39. New Jersey implemented its debates requirement in gubernatorial elections held in 1989 and 1993. In New Jersey, participation in debates is mandatory for all gubernatorial candidates who apply to receive public funds and meet a deposit and disbursement threshold, which was \$177,000 in 1993. The Election Law Enforcement Commission ("ELEC") selects debate sponsors, which must be unaffiliated with any political party or candidate. Sponsors are selected for two primary election and two general election debates. The sponsors decide on the date (within a timeframe established by law), time, location, and format of the debates. The law and Commission regulations establish a complaint procedure for candidates who violate the debate requirement. (The Commission determines whether the failure to participate in a mandated debate occurred under circumstances beyond the control of the candidate.) The penalty for failure to participate in a debate without reasonable justification includes the withholding of public funds payments and the repayment of all previously received public funds. Participation in debates is optional for gubernatorial candidates who have met the financial threshold but have declined to take public funds.

Frederick M. Herrmann, the Executive Director of the ELEC, describes the nation's first "debate law" as "a big improvement in [New Jersey's] public financing law." "The debate requirement," Herrmann stated in a March 1994 telephone conversation with Raluca Oncioiu of the Campaign Finance Board staff, "enables candidates of limited means to get public exposure and run strong gubernatorial campaigns."

Criticism of New Jersey's debate requirement was voiced at hearings held by ELEC in 1990 and 1994. New Jersey Common Cause opined that the debate requirement is an unfair burden on, and unrelated to, the

goals of the public financing program. Several independent gubernatorial candidates criticized the fundraising threshold, arguing that it effectively limited debates to Republican and Democratic candidates.

Criticism of the debate format selected by a sponsor appeared during the 1993 gubernatorial election in a *Times* editorial's assessment of the first Florio-Whitman debate. The format of that debate was characterized as "unnecessarily rigid, allowing for no satisfactory rebuttal by the candidates, [and] no follow-up questions from the journalists' panel . . .". ("The First Debate," *The Times*, October 11, 1993, p. A16.)

In Los Angeles, the public financing program covers the four municipal offices of mayor, comptroller, city attorney, and city council member. In order to qualify to receive matching funds, candidates for these four offices must agree in writing to participate in at least one debate before the primary election and at least two debates before the general election. The law does not make any specific provisions for the administration and enforcement of the requirement.

In a March 1994 telephone conversation with Raluca Oncioiu, Ben Bycel, the Executive Director of the Los Angeles City Ethics Commission ("CEC"), described problems encountered by the agency as it first tested the debate requirement during the 1993 elections. First, there was the question who should be invited to participate in the debates. CEC and the League of Women Voters had planned to host a primary election debate, but backed out when it became apparent that a debate including 31 mayoral candidates would be unwieldy, and one that would exclude a good number of these candidates would most likely result in a lawsuit. CEC also found it difficult to negotiate a debate format with candidates at the same time as it was in a position to penalize them for having violated campaign finance law requirements. Understaffed, overwhelmed by a great number of candidates, and having no clear administrative procedures for overseeing and enforcing the debate requirement, the agency did not become involved in any aspect of primary election debates. For the general election, CEC's involvement was minimal, as the agency approved debates sponsored by other groups, providing candidates with a list of debates, among which they could participate in any two to satisfy the debate requirement. Community groups traditionally involved in sponsoring other debates were dissatisfied that candidates used the debate requirement as official approval for participating in only two debates.

The Kentucky debate requirement will first apply to gubernatorial elections in 1995. In addition, bills have been introduced in Congress to require that presidential candidates receiving public funds participate in debates that would be sponsored by non-partisan organizations and which would include qualified third-party candidates.

40. See Spotts, *supra* note 30, p. 568.

41. Buckley v. Valeo, 424 U.S. 1, 57, fn. 65 (1976).

42. See Spotts, *supra* note 30, pp. 568-575, and Eisner, *supra* note 30, pp. 1012-1015.

43. To qualify to receive public funds, candidates must show that they have significant public support by raising a threshold dollar amount of contributions from a specified number of New York City residents. See New York City Administrative Code §3-703(2).

44. New York City Charter §1052(b).

45. Ibid.

46. Under current Board rules, Voter Guide statements are due 12 weeks before the primary election. See Campaign Finance Board Rule 10-02(b)(4), codified as 52 RCNY §10-02(b)(4) (1992).

47. See discussion at p. 2 above.

48. See *supra* note 39.

49. Mandating that candidates receiving public funds participate in debates would require the resolution of the following issues:

Who should be required to debate? Would participation in debates be required for all candidates who join the Campaign Finance Program, or only for those candidates who qualify to receive public funds? Would a candidate in the Program who meets the threshold, but declines to accept public funds, be required to debate? Would a candidate in the Program who does not meet the threshold by the time the first debate is scheduled be banned from taking part in that debate?

Who should be permitted to debate? What criteria should be established to determine which candidates outside the Program are eligible to take part in debates? Must these candidates indicate their agreement to debate by a certain deadline? Would this agreement be revocable? Should meeting a financial threshold be a criterion? Would candidates outside the Program be permitted to "buy" entry into a debate simply by using their personal funds to meet a financial threshold?

What penalties should be assessed for failure to comply with a debate requirement? A penalty that withholds public funds payments or requires the repayment of previously disbursed public funds would not affect candidates who do not join the Campaign Finance Program. If candidates not in the Program agree to participate in debates, but then fail to do so, should they be subject to civil penalties? If a candidate in the Program fails to take part in a required primary election debate, would he or she be eligible to receive public funds in the general election? What provisions should be made for administrative complaints and hearings regarding allegations that a candidate has failed to debate as required? What criteria would be used to determine whether a candidate had a reasonable justification for failing to participate in a mandatory debate, and who -- the Board or the sponsor -- would decide?

50. See supra note 19.

## A P P E N D I X

### LIST OF THOSE WHO HAVE PRESENTED TESTIMONY ON THE SUBJECT OF DEBATES BEFORE THE CAMPAIGN FINANCE BOARD

(in alphabetical order)

#### 1989 Public Hearings:

Albanese, Sal F.-- City Council member, 31st District  
Alexander, Herbert -- Professor of Political Science, University of Southern California  
Berman, Herbert -- City Council member, 23rd District  
Costikyan, Edward N. -- Attorney (letter dated 12/19/89)  
Cropf, Robert -- Citizens Budget Commission  
Duane, Tom -- City Council candidate, 3rd District  
Feerick, John D. -- Chair of the New York State Commission on Government Integrity  
Gerges, Abraham -- City Council member, 29th District  
Giuliani, Rudolph -- Mayoral candidate  
Kahlenberg, Jeanette -- Executive Director, Citizens Union  
Kaufman, Robert M. -- Attorney, Friends of Giuliani (letter dated 11/27/89)  
Koch, Edward I. -- Mayor  
London, Herbert -- Mayoral candidate (letter dated 11/22/89)  
Macchiarola, Frank -- Comptroller candidate  
Maloney, Carolyn B. -- City Council member, 8th District  
Michels, Stanley -- City Council member, 6th District  
Palmer, Julian -- Executive Director, New York State Common Cause  
Rosenstein, Neal -- Government Reform Coordinator, New York Public Interest Research Group  
Severin, James -- Political consultant  
Zimroth, Peter -- Corporation Counsel

(continued on next page)

### **1991 Public Hearings:**

Abzug, Liz -- City Council candidate, 3rd District  
Cornett, Delco -- City Council candidate, 2nd District  
Duane, Tom -- City Council member-elect, 3rd District  
Giuliani, Rudolph -- Mayoral candidate, 1989  
Palmer, Julian -- Executive Director, New York State Common Cause  
Russianoff, Gene -- Senior Attorney, New York Public Interest Research  
Group

### **1993 Public Hearings:**

Albanese, Sal F.-- City Council member, 43rd District  
Berns, Michael T. -- Chair, New York County Conservative Party  
Bienstock, Peter -- Attorney, on behalf of the Association of the Bar of the  
City of New York  
Costikyan, Edward N. -- Attorney (letter dated 11/24/93)  
Duane, Tom -- City Council member, 3rd District  
Falk, Bob -- Public Advocate candidate  
Fintz, Alan S. -- City Council candidate, 48th District  
Giuliani, Rudolph -- Mayor-elect  
Green, Mark -- Public Advocate-elect  
Greenblatt, Andrew -- Executive Director, New York State Common Cause  
Hayduk, Ron -- Voter Assistance Coordinator, Voter Assistance Commission  
Ickes, Harold -- Attorney, Committee for David Dinkins (letter dated  
12/28/93)  
Kriss, Arnold -- Campaign Manager, Friends of Jane Crotty '93  
Mandelker, Lawrence A. -- Attorney, Giuliani for New York (letter dated  
12/23/93)  
Perfetto, Ralph -- Member, Democratic State Committee of the 52nd  
Assembly District  
Russianoff, Gene -- Senior Attorney, New York Public Interest Research  
Group  
Urban, Mary Lou -- President, League of Women Voters of the City of New  
York

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