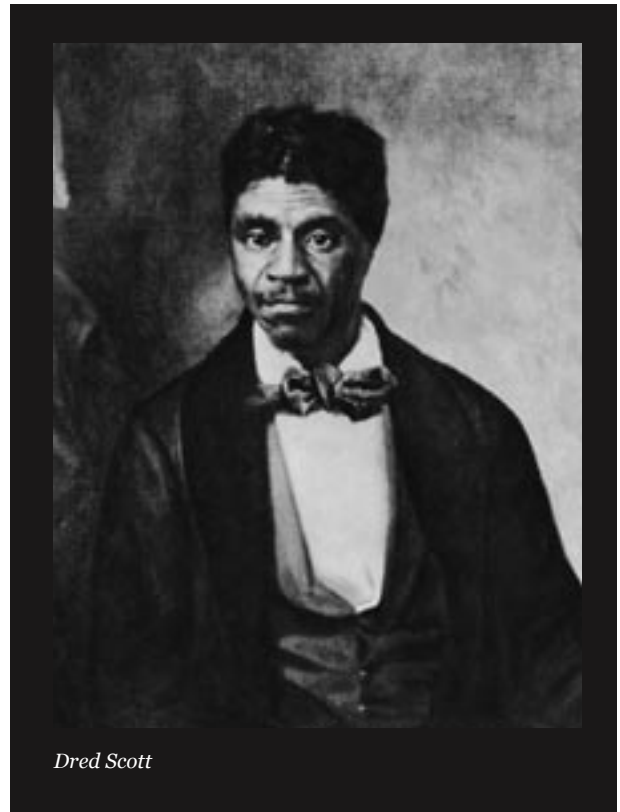


A Constitutional Crisis

Harry Kresky

What is a constitutional crisis? In a democracy a constitutional crisis occurs when the normal mechanisms for resolving social and political conflict are unable to do so. During our country's first 75 years of existence, a variety of constitutional and legislative compromises avoided a showdown over the issue of slavery. Opponents of slavery among the country's founders and leaders hesitated to assert that the institution was incompatible with the nation's founding principle that all men are created equal and that consequently it must be eliminated. Why did they hesitate? Because they believed that the support of the states whose economies depended heavily on slavery was vital to success in the war for independence and in the new nation that followed. They hoped that as the country grew, economically, politically and morally, the "peculiar institution" would wither away.

They were wrong. Slaveholders became more militant in their defense of the institution, while abolitionists – white and black – became more outspoken in their opposition to it. As the United States expanded across the continent, the burning issue was whether or not each newly admitted state would be slave or free and how its admission would affect the political balance on the slavery question. Slaves voted with their feet, thousands fleeing north to free states and Canada. Slave owners sent bounty hunters to capture and return them to their former masters. In 1856 the U.S. Supreme Court decided the case of *Dred Scott v. Sandford*, 60 U.S. 393 (1856). It held that Scott, a former slave captured in a state where he was



free, could not legally challenge his forcible return to Missouri. Because he was not, legally speaking, a person, the court claimed it lacked jurisdiction to address his plight. The *Dred Scott* decision made clear that the conflict was irreconcilable. After a bloody civil war the

question was resolved by the 13th Amendment to the Constitution that outlawed slavery.

Obviously not every effort to suppress the rights of another person or group creates a constitutional crisis. Indeed the job of the courts could be described as deciding when such suppression will or will not be permitted. In the case of *Dred Scott*, the Supreme Court decided that his right to freedom could be suppressed by returning him to the slave state from which he fled. A more abhorrent, more morally repugnant, result could hardly be imagined, but that alone does not a crisis make. During WWII the Supreme Court upheld the internment of Americans of Japanese descent in concentration camps on the grounds that they posed a national security risk. (*Korematsu v. United States*, 323 U.S. 214 (1944)). The crisis this created for those interned cannot be denied. But a constitutional crisis did not result. The war was won, the internees released, and Americans of Japanese descent have become a respected and important part of society. That there was no crisis may perhaps be understood by the fact that in 1944 most Americans were sufficiently committed to winning the war at all costs that they could accept the internment of their fellow citizens. Clearly, there is an inverse relationship between the degree of consensus and the existence of a crisis.

The current political situation in the country contains significant elements of a developing constitutional crisis. While a political realignment has been taking place over the past 25 years, the country's political institutions have resisted the process of reorganization necessary to accommodate it. That realignment is, of course, the emergence of the independent voter statistically and as a political force. Thirty-five percent of American voters now consider themselves independents.¹ In 1992, 20 million Americans (19% of those voting) cast their ballots for a political unknown, billionaire Ross Perot, who ran a populist independent campaign against the political establishment. Moreover, 50% of eligible Americans are so discouraged by the current political state of affairs that they don't vote. Just as the pre-Civil War population growth in the western territories and states blew apart the status quo on the issue of slavery, the changing political identity of Americans in the present era has left our political system – oriented toward and controlled by the two parties – at once brittle and destabilized.

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With the two major parties at rough parity in their ability to win elections, their efforts to win over swing voters and gain immediate political advantage – even as participation declines and their positions on fundamental issues grow closer – has brought escalating displays of partisanship. An important characteristic of the developing crisis is that the issue at hand is the very functioning of our democracy: namely whether the electoral system can give expression to the will of the people, or whether the two major parties will completely succeed in their goal of turning it into an instrument for their self-perpetuation.

The current manifestation of the crisis is the determined effort by the Democratic Party to keep Ralph Nader's independent candidacy off the ballot in as many states as it can. Democratic Party lawyers and operatives have challenged his nominating petitions in Arizona, Colorado, Illinois, Iowa, Maine, Michigan, Missouri, New Jersey, New Mexico, Nevada, Oregon, Pennsylvania and Wisconsin.² The Nader campaign reports that in every state where a petition is filed, more lawyers are assigned to eyeball it. Democrats have also organized and funded fierce propaganda efforts to discourage people from signing Nader's petitions in New Mexico, Oregon and Wisconsin – "battleground" states where the election is likely to be close.

The two parties have never been receptive to accommodating, much less empowering, independent voters. In their eyes, independents are simply voters who for the time being have not decided whether they will vote for a Democrat or a Republican. The parties recognize that limiting voter choice in this respect is essential to maintaining their political control. The 1992 Perot breakthrough demonstrated what a well-funded, highly organized, anti-establishment independent candidate can accomplish. It is no accident that Perot was the last independent or third-party candidate to appear in a presidential debate; his standing in the polls jumped from seven percent to 19% after the debates in which he participated.³



Ross Perot with Jim Mangia, the Reform Party's first national secretary, now a champion for the rights of independent voters in California

Even prior to Perot, independent candidates faced institutional barriers that exacerbated their relative lack of power *vis à vis* the major parties. Consider, for example, the effort by Lenora B. Fulani, the first woman and first African American presidential candidate to be on the ballot in all 50 states, to gain entrance into the 1988 presidential debates. In 1980 the League of Women Voters insisted that moderate Republican-turned-independent Congressman John Anderson be included. After the first debate his standing in the polls climbed from 15 to 19%. The two parties responded swiftly to this and other efforts by the League to maintain its independence. First, they organized the bipartisan-controlled Commission on Presidential Debates, securing for it the tax-exempt status required to make it eligible to be a debate sponsor under the guidelines of the Federal Election Commission. Then, with the CPD in place, they moved to have it supplant the League as a debate sponsor by setting conditions for their candidates' participation in League-sponsored debates that the organization would not meet; the CPD, of course, was more accommodating and took over as the "official" debate sponsor.

When the CPD refused to include Fulani in the 1988 debates she sued the Internal Revenue Service, seeking an order that the Commission be deprived of its tax exemption because it was a partisan (albeit bipartisan) and not a nonpartisan organization. The U.S. Court of Appeals for the District of Columbia ruled that Fulani, like *Dred Scott*, did not have standing to seek this relief. In a dissenting opinion, however, Chief Judge Abner Mikva stated:

The problems of conducting national elections through the electronic media have become nigh impossible to solve. The "simple" difficulty of reaching voters, the more complicated difficulty of substantively informing them, and the need for huge sums to fund such communications all drive an engine of chaos in the national campaign regimen. Congress and the courts have struggled with this urgent matter, often with frustration. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1976). But whatever its proper role in correcting imbalances and imperfections in the status quo, government certainly must not abandon its posture of nonpartisanship. The government of any democracy, let alone one shaped by the values of our Constitution's First Amendment, must avoid tilting the electoral playing field, lest the democracy itself become tarnished.

Fulani v. Brady, 935 F.2d 1324, 1336-37 (DC Cir. 1991).

Judge Mikva's eloquence and prescience notwithstanding, until Perot anything other than a major-party candidacy was decidedly "fringe" – the domain of ideologically driven third parties (from Socialist Workers to Libertarian), breakaway major-party players like John Anderson and George Wallace, and activists like Lenora Fulani and her supporters, who recognized the need for an independent alternative to the two parties if American ideals of democracy and fairness were to be realized.

As the independent movement grew in prominence, the legal maneuvering to stifle it became more blatant. In 1996 the CPD refused to allow Ross Perot into the presidential debates despite his showing in 1992 that had entitled him to \$29 million in federal funding for his second run – the first time a non-major candidate had received general election public funding. Perot filed a complaint with the FEC claiming that the CPD had violated FEC regulations by failing to use pre-existing objective criteria in its decision to exclude him.⁴ However, the FEC (consisting of six commissioners, three Democrats and three Republicans) delayed ruling on the complaint to run the clock until after the debates. Perot sued in federal court, but the court held that it had no jurisdiction to act until the FEC had made a decision on the complaint. *Perot v. Federal Election Commission*, 97 F.3d 553 (DC Cir. 1996).

In 2000 the CPD again excluded all but the two major-party candidates from the presidential debates. Lawsuits filed by Ralph Nader and the Committee for a Unified Independent Party did not succeed in remedying the situation. But it was the response to the battle raging within Perot's Reform Party over its presidential nomination that displayed the two-party bias of the electoral/legal system most clearly. The nominating convention split in two, with the result that both Pat Buchanan and John Hagelin claimed to be the Reform Party nominee.⁵

They both applied to the FEC for general election funding. The Commission sidestepped the issue of which one was the party's legitimate candidate; instead, it relied on a provision in the Federal Election Campaign Act that sets a different standard for minor parties, namely, gaining ballot access in ten or more states (26 U.S.C. 9002(2)). The Buchanan forces were able to demonstrate that they had accomplished this and were consequently awarded the disputed \$12 million (the amount was based on Perot's showing of 8.4% in 1996). The New York Independence Party delegation to the Reform Party convention protested the FEC's decision on the grounds that in refusing to address the question of who was the nominee it discriminated against minor parties. At the September 12, 2000 hearing on the issue, Commissioner Sandstrom expressed his agreement with the IP's position; in a Memorandum to the Commission dated September 1, FEC General Counsel Larry Noble (now the head of the Center for Responsive Politics) had raised the possibility of splitting the funding between both candidates. For all practical purposes the FEC chose the Reform Party nominee, notwithstanding what had taken place at the convention.

Of course, the main event in the political/legal arena was the electoral deadlock in Florida and the decision of the U.S. Supreme Court that put the state in Bush's column, thereby giving him just enough electoral votes to win the presidency. Many commentators have told their version of those events. However, an aspect of the Florida story that did not receive the emphasis it deserved is the extent to which our electoral system is owned and operated by the two parties; in an election as close as the one in Florida, the winner is determined by which party controls the local Boards of

Elections that do the counting; which way the chad is hanging depends on which party you are working for.

The closeness of the 2000 election, and the assumption that the 97,000 votes for Ralph Nader as the Green Party candidate in Florida would have gone to Gore, making him the clear winner there and, in turn, the President of the United States, have introduced a new urgency to the need for the two parties, in particular the Democrats, to keep other candidates from being a factor in the 2004 electoral equation. The May 24, 2004 issue of *Time* magazine reported that Jim Pederson, the Democratic Party state chair in Arizona, a "battleground" state, had "...assembled a team of lawyers to look at every one of the signatures Nader collects. 'Our first objective is to keep him off the ballot,' Pederson says. 'The vote is about George Bush and John Kerry, and we think it distorts the entire electoral process to have his name on the ballot.'" Soon thereafter a lawsuit was filed that resulted in Nader being denied a place on the Arizona ballot.

The ferocity of the effort to obstruct Nader's participation in the election has moved us a step closer to a constitutional crisis. Democratic National Committee chairman Terry McAuliffe has given the green light to party leaders across the country to go after Nader: "We can't afford to have Ralph Nader in the race," he has asserted (*Business Week*, July 29, 2004). At the 2004 Democratic convention in Boston this past July, former Democratic Congressman Toby Moffet led an effort to recruit and train lawyers to keep Nader off the ballot (*The New York Times*, August 2, 2004; UPI, July 29, 2004). According to Moffet, the objective is to impede Nader's ballot access efforts even in non-swing states so as to "drain his resources and force him to spend time and money."

The efforts against Nader have gone beyond the usual petition challenges. In Charleston, West Virginia the county prosecutor, a Democrat, announced an investigation into the activities of Nader signature gatherers (Associated Press, July 18, 2004). Even after Nader's petitions were approved by state election officials, West Virginia's Democratic attorney general, in a highly unusual move, brought legal proceedings to overturn the determination. In Illinois, House Speaker and Democratic Party chair Michael Madigan is reported to have assigned state employees to work on the challenge to the Nader nominating petitions. The Nader campaign, invoking the state's Election Interference Act, has gone to court over this apparent irregularity.⁶

In Portland, Oregon the Multnomah Democratic organization obstructed Nader's effort to meet the state's unique ballot access requirement of a nominating caucus with 1,000 registered voters in attendance who express their support for the candidate. Democratic Party activists were organized to attend the meeting, pack the room and then refuse to support Nader; his organizers ended up with 1,130 people in attendance but fewer than the requisite 1,000 supporting the candidate (*The Oregonian*, July 23, 2004). Defenders of the strategy, ignoring Oregon, West Virginia and Illinois, argue that it is perfectly proper to insist that an opponent's petition meet legal standards. Perhaps – but don't forget that the ballot access laws are already stacked against independents.⁷

Government officials, from election commissioners to the judges who rule on these challenges, are themselves all too often Democratic or Republican partisans. Even the establishment *New York Times* was forced to comment on this structural bias in its July 9, 2004 editorial "An Umpire Taking Sides," although it did so from a decidedly two-party perspective.

In some states, such as New York, petition challenges in local and even statewide races are standard operating procedure. Party operatives go over petitions with a fine-tooth comb and, even if they don't succeed in getting an independent or insurgent candidate removed from the ballot, drain enough of his or her resources to make an effective campaign impossible. Indeed, supporters of President Bush unsuccessful-

fully tried to block delegates pledged to John McCain from running in the 2000 Republican primary. In 1976 and 1980 Jimmy Carter engaged in legal maneuvers designed to impede first Eugene McCarthy and then John Anderson from gaining access to the ballot. But never before in the general election for President of the United States has a major party made it a central element of its campaign for the White House to keep an opponent off the ballot.

Legal proceedings underway in Michigan and Texas illustrate how effective a legal framework that's biased against independents and administered by political partisans can be in limiting democratic options. In Texas an independent candidate such as Nader must collect 65,900 signatures between March 9 and May 10, 2004, an eight-week period; a candidate of a minor party need collect only 45,000 signatures between March 9 and May 24, 2004, a ten-week period. While both independent and minor party candidates have far more onerous burdens than do major-party candidates, who secure an automatic line on the ballot once they secure their party's nomination, the discrimination *between* independent and third-party candidates is striking – particularly given that Anderson, Fulani and Perot, who besides Nader were the most significant non-major presidential candidates since George Wallace in 1968, ran as independents and not as candidates of a minor party.⁸

The experience of the past 15 years shows that Americans – left, right and center – are far more will-



ing to vote for a candidate who presents himself or herself as a non-ideological independent than as the representative of an ideologically driven third party.

Nader supporters in Texas were able to file more than 80,000 signatures, but not within the permitted time frame for an independent. Furthermore, a line by line review by the Texas secretary of state may well find that he submitted fewer than the required 65,900 signatures, the filing deadline notwithstanding. Nader has brought a federal lawsuit challenging both the number of signatures required and the filing deadline.

In Michigan, the situation is a continuation of the discrimination practiced against the Reform Party in 2000, when the FEC refused to address the issue of which candidate was nominated by the party's convention. The Michigan state organization affiliated with the Reform Party seeks to put Nader on the ballot as the candidate of the national party, which nominated him at its May, 2004 convention. In 2002, however, a rival group also claiming to be the Reform Party was recognized by Michigan's secretary of state, thereby giving the group the right to name a presidential candidate without having to file the 31,000 signatures required of an independent candidate – something the Nader forces would be hard pressed to accomplish, given the drain on their resources from the Democratic Party assault. The Michigan secretary of state is refusing to accord this right to the body affiliated with the national Reform Party. Litigation is likely to follow.⁹

Even something as intense, unprecedented and wrongheaded as the campaign to drive Nader from the ballot does not necessarily tend toward crisis. As in the 1850s, the present potential for crisis has something to do with what is at stake – not simply for Ralph Nader, but for the country and its citizens.

The United States faces an enemy unlike any it has faced before. Osama bin Laden and his followers, with their 9/11 attack on the World Trade Center and the Pentagon that killed almost 3,000 people, demonstrated a capacity to wreak havoc in a major city and destroy or damage key symbols of America's economic and military might. In the aftermath of 9/11 the U.S. launched a preemptive attack on Iraq although no link between Saddam Hussein and the events of 9/11 had been demonstrated and although he, unlike bin Laden, posed no imminent threat to the U.S. Both major parties supported the attack and the continued conduct

of this war. They, and their respective presidential candidates, still do. However, millions of Americans – indeed, what is now a majority of the people in this country – no longer support it.

Opposition to the war began to propel the relative political outsider Howard Dean toward the Democratic Party presidential nomination until the party establishment – from Al Sharpton to Joe Lieberman to Dick Gephardt – ganged up to shove him out of the way so that the pro-war party insider John Kerry could become the nominee. What was most significant about the Dean campaign, however, was its capacity to connect with independent voters, who now represent 35% of the electorate. (See J. Salit, "How the Democratic Party Sabotaged an Independent Movement to Beat Bush," *The Neo-Independent*, Vol. I, No. 1, Spring 2004.)

Enter Ralph Nader, a genuine American hero, who declared his second successive run for the presidency not, as before, as a candidate of a minor party, but as the independent candidate of all those Americans who believe that the two parties have so aligned themselves that there was no candidate opposed to the war and the policies that led to it. Nader is willing to speak the truth about the extent to which the major parties collude to overdetermine our political agenda consistent with the needs of special interests (from the trade unions to the multinational corporations) to an extent that serious policy dialogue, much less genuine reform, has become impossible.

The two parties, of course, hope that by eliminating or marginalizing the Nader campaign they can return (regardless of who prevails in November) to business as usual. When the question of Nader's candidacy was briefly discussed on NBC's *McLaughlin Report* on July 11, the two liberals, Eleanor Clift and Lawrence O'Donnell, referred to the Democrats' campaign to remove him from the ballot as if it were a perfectly acceptable thing to do and predicted that he will not be a factor in November. The conservatives – including Pat Buchanan, who ran for president on the Reform Party line in 2000 – were silent.¹⁰

However, a return to business as usual cannot occur without solutions to the underlying problems confronting America at home and abroad – the grossly disproportionate distribution of wealth, the challenge of militant Islamic fundamentalism, the extent to which the needs of special interests dominate the policy agenda, the failure of public education in the inner cities, the inability to eliminate or even reduce poverty, the decline in real income and the quality of jobs avail-

able to many Americans, and a less than satisfactory status quo on issues of racial justice. In a functioning democracy, the electoral arena is where the voters choose those best able to develop solutions to such problems and where new political forces gain recognition and inclusion. When this does not or cannot occur the results can be disastrous, as the tortured history of the 20th century demonstrates – fascism on the right and bureaucratic, anti-democratic, non-developmental communism on the left. Both movements, albeit in different ways, mounted an assault (ideological and sometimes physical) on democracy itself.

Those who believe in democracy cannot stand by and allow the crisis to reach the breaking point. We cannot allow our democratic institutions to continue to atrophy, to go on being manipulated by two parties with no respect for the democratic process itself other than as an instrument for their own preservation and

the special interests with which they collude. For one thing, if democracy fails, there is no guarantee of what will follow. More fundamentally, it is only through democracy that change can occur with the social consensus and cohesion necessary for lasting peace, justice, freedom, equality and progress. NEO

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Special thanks to Richard Winger, the editor and publisher of Ballot Access News, for his insightful comments on an early draft of this article.

Notes

- 1 This figure is based on polling data. In states that use a partisan voter enrollment system, roughly 25% of all voters do not align themselves with any party when they register.
- 2 In states that do not have formal challenge procedures, such as Maryland, Massachusetts, South Carolina, Virginia and West Virginia, the Democrats have used their political clout to pressure state election officials to subject the Nader petitions to a higher level of scrutiny than would otherwise be the case. As *The Neo-Independent* goes to press, Nader's status in several states remains unclear because the challenge process is still underway or because litigation is likely to follow.
- 3 George Farah. *No Debate: How the Republican and Democratic Parties Secretly Control the Presidential Debates*. New York: Seven Stories Press, 2004. p. 54.
- 4 The CPD's rationale for the exclusion was that by accepting federal funding Perot was precluded from spending more than \$50,000 of his own money and that therefore – in contrast to 1992, when he spent millions of it – he had no realistic chance of winning because \$29 million is simply not enough to win the presidency. (See Farah, *No Debate*, pp. 62-64.) The major parties receive a significantly larger amount of federal funding based on their showing in the previous election. Furthermore, their tremendous institutional advantage, including control of the presidential debates, virtually guaranteed that one of their candidates would win. Of course the only chance Perot had of winning was to participate in the debates.
- 5 The split was precipitated by the Reform Party's Presidential Nominating Committee when it questioned the bona fides of Buchanan's submission of voter lists for the vote-by-mail primary and the subsequent steps taken by Buchanan forces to exclude from the convention delegates who opposed his nomination. Having stacked the convention, Buchanan's followers then voted to ignore the primary and nominated him from the floor.
- 6 Socialist Equality Party press release, July 20, 2004. *Socialist Workers Online*. August 6, 2004. pp. 8-9; *The Illinois Leader*, August 28, 2004.
- 7 An independent candidate for president must collect more than 850,000 signatures to gain ballot access in all 50 states. Major-party nominees, on the other hand, gain an automatic place on the ballot. Moreover, the petitioning requirements for a ballot line in Democratic and Republican presidential primaries is minimal, a nationwide total of 82,000 for Democrats and 30,000 for Republicans. In Florida alone an independent candidate needs 93,000 signatures, while in California an independent needs 153,000 signatures to qualify for the ballot.
- 8 In 1988 and 1992 Fulani was the presidential candidate of the New Alliance Party (NAP), at the time the fourth largest national political party. Unlike the Libertarians (ranked third) and later the Greens, however, the NAP tactic was to act as a catalyst for the emergence of a broader independent movement, not as an end (a party) in itself. In 1994, NAP dissolved itself into the Patriot Party, a coalition with leaders of the 1992 Perot movement. Two years later Patriot merged into the national Reform Party.
- 9 Ironically, a group of Republicans filed 55,000 signatures to place Nader's name on the ballot. Democrats have not only challenged the filing, but party operatives are threatening to file a complaint with the FEC against Nader for having accepted an illegal contribution from the Republican Party unless he disavows these signatures. Two FEC complaints have already been filed against Nader by an entity calling itself Citizens for Responsibility and Ethics in Washington. One of the complaints focuses on Oregon. However, these "ethical citizens" ignore the tactics of the Democrats there and instead go after Nader, claiming that he accepted help from Republican-oriented not-for-profit corporations in his efforts and thereby violated strictures against contributions from corporations. Of course the CPD is a not-for-profit corporation and has undoubtedly been of great assistance to the Democratic and Republican candidates over the years, taking advantage of the loophole created by the FEC's debate regulations.
- 10 Democrats have used concern over constitutionally questionable provisions of the Patriot Act and other anti-terrorism initiatives by the Bush administration to fuel their "Anybody but Bush" campaign. With one hand they frighten Americans by arguing that only the election of John Kerry can prevent the destruction of cherished civil liberties, while with the other they engage in the campaign to deny Nader a place on the ballot and his supporters the opportunity to vote for the candidate of their choice. (So much for their post-Florida mantra, "let every vote count.") The Committee for a Unified Independent Party, its chairperson, Lenora B. Fulani, and a number of independent activists across the country have filed a lawsuit against the Kerry-Edwards campaign, the Democratic National Committee, and assorted Democratic elected officials and operatives for conspiring to deprive Nader and his supporters of these constitutionally protected rights and freedoms. CUIP and Fulani have filed a complaint with the Federal Election Commission charging that the publicly funded Democratic Party presidential campaign and nominating convention are misusing government money in furtherance of this conspiracy.