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Don't lose this!

Hadley

will
done

To: Tony Dolan

From: Hadley Arkes

Re: Material for the debate

Here are a few things we might be able to use, and of course I may add other things later.

(1) Reprise of Carter's taunt to Ford during the debate in 1976

During one of the debates in 1976 Carter remarked tartly that Ford was speaking as though he was "running for President for the first time." He pointed out that Ford had been President for two years, and that he bore, after all, some responsibility for the state of the Union. It may be useful to recall these words as the Governor directs attention to Carter's record.

(2) ERA

Carter is likely to mention this issue, since it has been a source of vulnerability for Reagan among many Republicans and women as well as ardent feminists. RR might be able to draw material from the draft I wrote on ERA, but we might extract a few points that could be conveyed in a short reply:

(a) There are many lawyers and constitutional scholars who also have reservations about ERA--and here it would be worthwhile to mention people like Prof. Philip Kurland of the Law School at the University of Chicago and Paul Freund of Harvard. The reservations usually arise from the understanding that there is nothing which could be accomplished by a new amendment that is not already covered in the Fourteenth Amendment with its provision for the "equal protection of the laws." It is through that amendment that the courts have already struck down many discriminations against women.

(b) A new amendment would not provide any advantage in sweeping away discriminations more quickly without the need to have separate lawsuits or change specific acts of legislation. The new amendment would have that effect if it really meant what its language suggested: a sweeping, categorical rejection of all discriminations based on sex! But the proponents of ERA have already assured us that the amendment would not have that meaning: It would not make it unlawful to have separate bathrooms or locker rooms or schools for men and women. And it would not necessarily make it unlawful for a state to deny a marriage license to partners of the same sex. But if these "assurances" are correct, the proponents of ERA are selling the amendment to us on the premise that it does not really mean what it says--which is a dubious basis on which to buy a new amendment. More importantly, if the proponents are telling the truth, then the ERA offers no advantage in speeding up the course of justice: ERA could not sweep away all statutes

that contain discriminations based on sex, because the proponents of ERA admitted that the amendment would not be presumed to strike down every discrimination between men and women. We would still have to look at each statute and problem in a case-by-case way.

(c) In the meantime there is a danger of serious mischief in the law and the erosion of other constitutional rights for other groups:

(i) Mischief

HEW raised objections to father-son and mother-daughter dinners; a federal district judge declared that the government could not compel military registration for men without including women. These impulses and judgments were arrived at on the basis of the Fourteenth Amendment. The ERA is likely to produce judgments that are even more bizarre. It is not beyond imagining that a federal judge will take a complaint and deny federal money to schools that are reserved for men and women. Some judges may find in the amendment a device that establishes, in the Constitution, the defense of abortion (since only women have abortions, and it would be wrong then to impose on women restrictions that are not placed on men!).

(ii) The erosion of other rights for other groups

The supporters of ERA insist that a new amendment is necessary because the Fourteenth Amendment was meant mainly for blacks and the judges don't uniformly understand that it cuts against discrimination based on sex. But the Fourteenth Amendment has been used for women and many other groups apart from blacks, and if we accept the reasoning of the pro-ERA people, the judges would have to reason in this way: When faced with the adverse treatment of other groups, it would be only logical to conclude that the Fourteenth Amendment does not cover them, and that if they were meant to be protected in the Constitution, they would have been mentioned in a separate amendment. The logic of the ERA would work to call into question the protection offered to any group which hasn't been mentioned. There are cases coming up involving the rights of the handicapped and the terminally ill, and of course Justice Blackmun argued in *Roe v. Wade* that unborn children were not protected by the Constitution since they were nowhere mentioned in that document. We would have the task, then, also, of how we explain our laws which forbid discrimination on the basis of religion or nationality in the sale or rental of housing: After all, the Constitution does not mention Jews or Albanians.

Does Reagan run counter to this argument when he supports an amendment on abortion? The answer is no, because the Court has declared that unborn children are not covered by the Constitution, much in the way that the Court, in the *Dred Scott* case, declared that blacks were not beings with a claim to the protection of the law. The Thirteenth Amendment was an appropriate

response to that decision, and the human life amendment would be, for the same reason, a necessary response to Roe v. Wade (if the Court does not revise itself). But in the case of women, the Court has already made it clear that the Constitution, through the Fourteenth Amendment, encompasses the rights of women.

In my draft on ERA I mention (on p. 9) items from Reagan's record on legislation for women, and we could pick up some of that material. But I would hit the high points of the argument I've covered here, and our pitch is that, if so much has been done in the law already without a constitutional amendment, why should we need an amendment to supply what is missing? At the same time, why should we risk the mischief that comes along with a new amendment, framed in the sweeping categorical language of this amendment?

(3) The Russians and Cubans in the Caribbean

The Wall Street Journal had a substantial editorial on this matter yesterday (October 23, 1980, p. 34), and the information was quite disturbing. Carter was tested in his resolve last fall when the Russian brigade was discovered in Cuba, and when he backed away from that test he virtually led the Russians and Cubans to believe that they could exploit an opening and get on the move. There are 120 Russian planes in Cuba which could provide air cover for land or sea operations. There are 133 fighter-bombers and 80 transports, which could lift large portions of Cuba's 200,000-man army anywhere in the Caribbean in a matter of hours. In short, the Russians and Cubans are suggesting a formidable presence and a capacity to project their power. There is evidence now that they are investing equipment with the Sandanistas in Nicaragua as a new base of operations. From there they are likely to direct their activities at El Salvador and perhaps other places. The buildup of arms in Nicaragua is apparently being directed by two Cuban generals, one of whom is a veteran of what the Journal calls "Soviet-China overseas campaigns."

What we have here is an ominous deterioration of our position in the Caribbean, with strategic implications. The Journal describes the response of the Administration in this way:

"As its latest contribution, the administration has instructed the Federal Broadcast Information Service not to translate press reports in Central American newspapers dealing with the Soviet-Cuban penetration, intelligence sources say. It is desperately trying to prevent further word for leaking out about the Sandanista involvement in these operations, since the President had to certify that no such thing was happening in order to win congressional approval for the \$75 million aid package to the Nicaraguans."

(4) The hostages

If the President wishes to take credit for the pending release of the hostages, even by suggesting in an indirect way that his posture of patience is far better in dealing with foreign affairs, RR can point out that it is legitimate then to discuss the question of the hostages and assess Carter's own responsibility for leaving the embassy vulnerable.

It would not be indecorous for RR to point out that the Iranians apparently have a strong preference in this election, which explains their moves in this late hour. (He could cite the quote from Ghotzbodeh /spelling?/.) He could then raise the possibility that if the elections were held six months earlier, this Administration might have been successful in gaining the release of the hostages six months earlier.

--And since it is evident that the Iranians are willing to do a number of things to avoid dealing with Reagan as President, it is not inapt to point up the possibility that the hostages might not have been taken if Reagan had been President. (It must surely be as legitimate to raise that suggestion as it is to consider the credit that may belong to ~~Reagan~~ Carter in gaining the release of the hostages.)

--Beyond that, I don't think it would be improper of unwise for RR to feed the dubiety abroad in the land by saying simply that this whole business of "liberation" on the eve of the election has a bad "smell" to it. But you have, I know, other material on this, and I don't think we ought to hold it back. I think we could profit from hitting Carter hard at this moment.

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Carter 'lied all during the debate,' says expert

By RICHARD JOHNSON
PRESIDENT Carter was lying throughout the Great Debate last night, says an expert on detecting lies.

Barry Kaufman, vice president of the International School of Polygraph Science said, "Carter was showing hard stress throughout the debate, which indicates he was lying."

"It was amazing. Carter was bull—ing all the way through."

"Both were showing situational stress but only Carter showed hard stress."

Kaufman, who performed his voice stress analysis for ABC's TV News and The New York Post, used a sophisticated \$8000 electronic machine that measures micro-tremors in the voice.

"This instrument is very, very accurate," Kaufman said. "It's almost infallible."

Carter's voice showed particular stress when he denied any deal in the works in Iran to get the hostages back.

At the point where Carter spoke of selling warlike material to Iran, Kaufman said, "He was not telling the truth."

"There must be some secret deal," Kaufman said.

Kaufman, who has worked on some of the top criminal cases in recent years, said Carter also showed stress when he promised that the "Social Security system will not go bankrupt."

Kaufman said, "He does not believe what he's saying here."

The Psychological Stress Evaluator machine records voice tremors with a sensitive pen which inscribes tremors on graph paper.

Kaufman said, "During his wrapup, Carter showed such stress, the pen jumped off the paper."

Reagan, on the other hand, showed no such stress during the one and a half hour debate.

When Reagan said, "I am for women's rights," the graph showed unblocked, open lines on the graph. "He was telling the truth," Kaufman said.