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Ghosts At The Presidential Debates



By Marty Kaplan



AARON BERNSTEIN / REUTERS

Like many others who watched the presidential town hall in St. Louis, I loved how it revealed Donald Trump's character, and I wanted to take a shower when it was over. I also wondered whether some structural reform could make these debates more useful to voters who view both candidates so unfavorably, which is most voters.

Imagine, for example, if Libertarian Party nominee Gary Johnson and Green Party nominee Jill Stein had been at the town hall, too. Would the discussion have been better or worse? Could Johnson or Stein have emerged as plausible competitors for the prize? Or would enough undecided or frustrated voters who'd never seen or heard of them before vote for one of them instead of Clinton to throw the election to Trump, or instead of Trump to elect Clinton?

We'll never know. Even though the Libertarian and Green candidates are on enough state ballots to hypothetically win 270 electoral votes, Johnson and Stein were ghosts in St. Louis because they didn't meet the Commission on Presidential Debates' 15 percent polling threshold. But if a long shot lawsuit brought by those parties and now in the District of Columbia Court of Appeals prevails, the Commission's threshold could be kaput.

Watching the debates on TV, you might think the Commission is an official body whose policies are set by statute or regulation, but its rules are no more public or quasi-public than the criteria of Top Chef. The Commission was established by the chairmen of the Democratic and Republican Parties in 1987 to displace the League of Women Voters as sponsors of the presidential debates - and no, the Democratic and Republican Parties aren't public or quasi-public, either. When the Trump campaign barred reporters from entering his rallies or threw silent Constitution-wielding protesters out of them, it wasn't breaking the law. Partisan events are private; political parties belong to the public no more than the Boy Scouts do.

The power of the Commission, a nonprofit, comes not from law, but from the Memorandum of Understanding signed every four years by the General Counsels of the two parties' campaigns. These MOUs cover everything from the dates, sites and formats of the debates to the heights of the lecterns and what the candidates can put on them. It's the MOUs that set the debate eligibility criteria: Candidates must meet the Constitution's requirements to be president; be on enough state ballots to win an electoral college majority; and reach at least 15 percent in a specified set of polls prior to the debate. That percentage, says the lawsuit, is "arbitrary and capricious." Actually, it's pretty thoughtful - it's designed to keep independent party candidates off the stage.

The suit charges that elections essentially function as markets that are rigged by the two parties; this duopoly violates anti-trust laws and the First Amendment. Debates are both big business and "essential facilities" for competing for president. They generate millions of dollars of commerce, and they provide the equivalent of many millions more in free media — bringing public attention,

ideological branding and fund-raising credibility that an independent candidate couldn't otherwise afford. The suit cites expert estimates that acquiring enough name recognition to meet the 15 percent cutoff would cost \$270 million in paid ads. Absent that, an independent candidate's only recourse is big time news coverage, the kind you get from participating in debates. Catch-22: You need to get into a debate in order to get the name recognition you need in order to get into a debate. Since message access to voters depends on access to mass media, the plaintiffs say that excluding a candidate from a debate is a *de facto* violation of free speech.

I'm sympathetic to the charge that presidential campaigns have become cash cows for corporate media in cahoots with the two parties. During the primaries, the networks not only cut deals with the parties that dictated the polling criteria for debate participation; they also had exclusive rights to broadcast them, and they sold their audiences' eyeballs to advertisers at rates reaching hundreds of thousands of dollars — 40 times the usual cost — for 30-second spots.

If the Commission's 15 percent rule (first laid down by the sainted League in 1980) is engineered to protect the parties' duopoly, what fairer bar should an independent candidate have to clear to get on the debate stage? The suit suggests that being on enough ballots to win 270 electoral votes should be enough. Really? Spoiler alert: If that had been the rule in 1992, there would have been five candidates in the general election debates; in 1996, six; in 2000, seven; in 2004, six; in 2008, six. The solution is worse than the problem it's supposed to solve.

The Constitution says nothing about political parties, and the glories of the venerable two-party system we congratulate ourselves on turn out to include dysfunction, bitterness and a people aching for alternatives. The public didn't make this system; neither did the Congress, the courts or the Founders. It may or may not be illegal for the two major parties and their corporate partners to operate like a cartel, but it's clearly not accountable to anyone but their two candidates and the Commission's board.

America doesn't have a parliamentary system, and multi-party campaigns and coalition governance isn't in our democratic DNA. If we don't figure out how to empower independent and grassroots political movements without succumbing to the mischief of factions that Madison feared (hello, Breitbart Party), it's unlikely that the playing field of the next quadrennial spectacle will be any less tilted toward the power elite and oligarchs than the sorry one we have now.

This is a crosspost of my column in the Jewish Journal, where you can reach me if you'd like at martyk@jewishjournal.com.

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