



Portfolio Media, Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

OPINION: Why I Sued To Open The Presidential Debates

Law360, New York (July 10, 2015, 6:49 PM ET) -- Suppose Congress passed a law that said only Democrats and Republicans can ever be president of the United States. You don't need to be a lawyer to know this would be unconstitutional — and completely antithetical to what a democracy is supposed to be about. In our form of government, people get to choose their leaders.

Of course, there is no law like this. Leaders of the Democratic and Republican parties are more clever. They have stealthily rigged our elections by creating a series of rules to squelch competition. One of the most pernicious is not even a law. It was created and enforced by a private organization — unaccountable to the public, run by party insiders, funded by large multinational corporations and lobbyists, and operating in complete secrecy.



Alexandra Shapiro

That organization is the Commission on Presidential Debates (CPD). To be elected president you must participate in the debates held in September and October of election years. Debates are validators. They tell Americans who the official choices are. The parties use the CPD to make sure that only their nominees, and no one else, can ever become president, or even seriously influence the presidential election. For the last 20 years, the CPD has perpetuated a duopoly.

This threat to our democracy might not have been as significant back when most Americans were satisfied with the two major parties, but things are quite different now.

Today, a record 42 percent of voters identify themselves as independents, compared with 31 percent who say they are Democrats and 25 percent who identify as Republicans. Some 53 percent say they are unsatisfied with the two-party system, and an astonishing 62 percent say they would vote for an independent presidential candidate in 2016. A survey for the Annenberg Working Group on Presidential Debate Reform found that, by a 56 percent to 28 percent margin, voters say they want the rules changed so that a third candidate can participate in the fall 2016 debates "even if it is unlikely they would win the presidency."

Yet the debate commission is preventing a third candidate from ever appearing on stage. It is doing so illegally, and I have filed a lawsuit to enforce the laws the CPD is violating.

Under federal law, debate-hosting organizations like the CPD must be "nonpartisan" and must use "objective criteria" to decide who can participate in debates. But the CPD is not nonpartisan at all. It is bipartisan — the Republican and Democratic parties created it in 1987 to keep Independents from competing on a level playing field. The CPD today is still run by

longtime Democratic and Republican insiders such as its co-chairman and co-founder, Frank Fahrenkopf. He was formerly chairman of the Republican National Committee and the gaming industry's top lobbyist.

Instead of using the "objective criteria" required by law, Fahrenkopf freely acknowledged in a recent televised interview that the CPD's "system" for selecting candidates consists of "going with ... the two political party candidates." The CPD achieves this result with a rule that requires a candidate to poll at 15 percent in an average of five national polls taken in mid-September. No one who has not run in the Democratic or Republican primaries has satisfied this criterion in a half-century. Douglas Schoen, a prominent political strategist, estimates that, in order to achieve enough name recognition to poll at 15 percent, an independent candidate would have to spend nearly \$270 million.

Data also demonstrate that polling — which is often highly misleading — is even more inaccurate in three-way races. And most importantly, no independent candidate can get enough media attention or donor support if the decision about who gets into the debates is delayed until September of the election year.

Over nine months ago, Level the Playing Field, a nonpartisan, nonprofit corporation not affiliated with any candidate, asked the Federal Election Commission to enforce the law against the CPD and to change the FEC's own regulation to ensure that rules like the 15 percent polling requirement are not used to discriminate against independent and third-party candidates. Yet the FEC has not acted, even though all 1,253 commenters except the CPD supported the request.

Since the FEC apparently will not or cannot enforce the election laws, Level the Playing Field, along with the Libertarians and Greens, the two largest parties in the U.S. after the Republicans and Democrats, has filed suit to break the two-party stranglehold on the presidential debates. We are asking the court to direct the FEC to enforce the laws the CPD is violating and act on the rulemaking request — or allow us to do the FEC's job for it and sue the CPD.

This lawsuit is an important step in our efforts to reform the political system to allow more competition in the presidential elections, provide American voters with greater choice in their leaders, and improve our democracy.

There are dozens of accomplished Americans who would make great presidents, but who won't run in the Democratic and Republican primaries. It is time for the CPD's members to rise above their partisan interests and change the debate rules. They have a unique opportunity to revitalize the health of an ailing American political system.

—By Alexandra Shapiro, Shapiro Arato LLP

Alexandra Shapiro is a partner at Shapiro Arato in New York. She formerly served as a U.S. Supreme Court clerk and an assistant U.S. attorney in the Southern District of New York, where she also served as deputy chief appellate attorney. In addition, Shapiro served as an attorney-adviser in the Office of Legal Counsel of the U.S. Department of Justice.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2015, Portfolio Media, Inc.