

DECEMBER 4, 1982

BRIEF ON BEHALF OF THE PETITIONERS TO THE JUDICIAL COMMITTEE
CONCERNING THE DISMISSAL OF THE NATIONAL DIRECTOR BY THE CHAIR

FACTS AND EVENTS

The original and amended agenda for the August 7-8, 1982, meeting of the National Committee in Billings contained no item concerning the dismissal of the National Director. Indeed, there was no mention of the action until the morning of the second day of the two-day meeting.

At that time, the Chair asserted that in her role as the chief executive officer (Article 7, Paragraph 4 of the Bylaws) she was unilaterally dismissing the National Director and that in her view the National Committee had no role in the matter.

Objections were raised by several members and a motion was made to devote 20 minutes in discussing the issue. This motion was voted down because the Chair contended that it needed a two-thirds vote. A point of order was then raised suggesting the dismissal action was an illegal usurpation of power reserved exclusively to the National Committee outlined in (Article 8, Paragraph 8 of) the Bylaws.

The Chair, in her role as presiding officer of the National Committee, ruled that in her other role as chief executive officer, she did have authority to dismiss the National Director. She then added that the point of order was without merit.

The ruling of the Chair as presiding officer was appealed. In the debate which followed, the Chair remained as presiding officer and defended her action as being an appropriate exercising of her power as chief executive officer. In addition, she cited a statement of the previous Chair made at the time the National Director was selected (by an overwhelming vote of the National Committee) that the contract with the National Director could be terminated by either party. The contention of the Chair implies that she, and not the National Committee, is the other party and that the unilateral declaration of the previous Chair is binding on the National Committee.

She also presented for the first time a verbal list of complaints that were answered by the National Director as best he could, since the lack of advance notice precluded his being able to produce documented support of his conduct as National Director.

The vote on the appeal was 17 yeas and 11 nays, more than half but less than two-thirds. It is this action of the National Committee that the Petitioners are appealing for a determination of whether or not it violates the Bylaws of the Party.

THE CASE AGAINST THE UNILATERAL DISMISSAL OF THE NATIONAL DIRECTOR BY THE CHAIR

The key issue in the controversy of the dismissal of the National Director is how should important issues be decided, especially those which are vital to the functioning of the libertarian movement. There are two models which produce quite different institutions. One is individual exchange where the only explicit or implied contract is between the seller and the purchaser. The other involves group effort on the part of the supplier, thereby requiring a system of direction on the part of the principals with respect to the management of the effort. This latter system comprises corporations, organized religions and governments, except for dictatorships.

An important part of group direction of activities is a system of information and analysis of issues. For large groups like the Libertarian Party, a system of delegated authority is established to avoid the high costs of consulting the entire membership or even convention delegates for each issue of significance requiring decision.

The system which has been adopted by the Party can be characterized as having four levels, identified below:

1. Entire membership
2. State parties
3. Biennial convention
4. National Committee

The basic document which defines relationships is the set of Bylaws. The Bylaws have been adopted by a two-thirds vote of convention and contain explicit apportionment of powers and where the assignment is not explicit, Robert's Rules of Order, Newly Revised is established in Article 13 of the Bylaws as the fallback authority.

The principal effect of this structure is to lay out a formalized system wherein issues of importance can be addressed in a systematic way. This is not only a matter of right in a society which voluntarily adopts rules governing its functioning, it is also a matter of what works well. Indeed, the only kind of system which works at all is one where the decision-makers are those responsible for the consequences of their decisions.

This brief will show that the Chair does not have the authority to take important actions unilaterally. In particular, she lacks the power to dismiss the National Director, and make the National Committee and the Party as a whole bear the financial and other consequences. The brief will also request that the Judicial Committee repair to a reasonable extent the damage already done and limit the discretion of the Chair to inflict similar damage in the future by retaining jurisdiction over this case until the next national convention.

BOARDS CANNOT FORMULATE THEIR OWN RULES

The first point which should be established is that the National Committee is not the basic decision-making body of the Party. That is the biennial convention. The National Committee, by contrast, has power to act by virtue of authority delegated to it in the Bylaws adopted at past conventions. The National Committee is not a "society" in the sense that Robert's uses the term. It is a "board" acting on behalf of the larger society.

The distinction is important because boards do not have the same broad authority as the society itself. According to Robert's (page 401) a

board has only such power as is delegated to it by the bylaws or by vote of the society's assembly referring individual matters to it.

The authority granted in the Bylaws is contained in Article 8, Paragraph 8.

The National Committee shall have control and management of all the affairs, properties and funds of the Party consistent with these Bylaws.

There are two important powers which boards do not receive automatically. One is the authority to formulate its own rules of procedure. Boards cannot adopt their own rules of procedure when they are part of a larger society. (See Robert's page 404.) Thus, the fact that the National Committee is a subdivision of the Party, means that it is not entitled to establish its own permanent standing rules.

The other power which a board does not possess has to do with delegating authority. Since the National Committee is itself a recipient of delegated authority, it cannot further delegate without a specific provision in the Bylaws. Robert's says it clearly on page 403.

As a general principle, a board cannot delegate its authority--that is, it cannot empower a subordinate group to act independently in its name--except as may be authorized by the bylaws (of the society) or other instrument under which the board is constituted; but any board can appoint committees to work under its supervision or according to its specific instructions; such committees of the board always report to the board. (Emphasis is in the original.)

The operational word in the citation is "independently." That is, boards cannot delegate authority to act independently, without a specific provision in the Bylaws. A rereading of the Bylaws will show that there is no such provision either with respect to the National Committee's formulating its own rules, or with respect to the ability of further delegating authority to act independently of the National Committee.

The implication that these two limitations of the National Committee's authority hold for the Chair's dismissal of the National Director, is important. By virtue of these two limitations imposed by Robert's, neither the past Chair nor the National Committee itself could have properly established its own permanent rules with respect to the selection or dismissal of the National Director.

In addition, the National Committee is not empowered to delegate its authority to contract with the National Director. Moreover, the Chair is never entitled to usurp such a power by mere declaration. Thus, the claim that the Chair has independent power to dismiss the National Director is patently false.

AGENDA, RULINGS BY THE CHAIR, APPEAL, AND REQUIRED VOTES

To understand the extent to which the wrong procedures were used, it will help if the correct ones were outlined. To begin with, the Chair should have placed the item on the agenda. Advance notice would have enabled a full and frank discussion of the problem, with all sides prepared to make positive contributions to a solution.

If time did not permit advance notice, then the Chair should have entertained a suspension of the rules to consider the issue. This, of course, would have required a two-thirds vote. It would also require in either case that the Chair step down temporarily from being the presiding officer while she is proposing a course of action for the National Committee. The motion that the Chair proposes would also require a two-thirds vote, because it is in the nature of a motion to rescind without previous notice.

It can be seen that the underlying principle is that important issues should be carefully considered in an environment where the impartiality of the Chair is above question. Having said that, let us now step through the correct procedure, comparing it with what was actually done and identifying the procedural rules which should have been followed.

First, the purpose of the agenda is to prepare for an orderly and efficient debate. The key is having enough time to prepare so that time is not spent on repetitious debate and so that important dimensions of an issue are not left out of the discussion.

Once the agenda for a meeting is set, changes, especially the inclusion of a new item, require a two-thirds vote. As Robert's puts it (on page 316)

After an agenda or program has been adopted by the assembly, no change can be made in it except by a two-thirds vote (or by unanimous consent).

This means that the Chair is not entitled to introduce a new item on the agenda without first obtaining a suspension of the rules. It does not suffice to interpret the subsequent vote of 17-11 as tantamount to an effective suspension. The reason, of course, is that 17/28 is less than two-thirds.

The mistake of not suspending the rules was compounded when the Chair ruled in response to a point of order that she was entitled to dismiss the National Director because of her position as chief executive officer. Putting aside the substantive merits of that assertion, the procedural point to be made is that a presiding officer is not entitled to rule on an issue which is unrelated to presiding. Indeed, the Chair has no business presiding when the issue being discussed relates to another office she holds. Robert's makes this point on pages 333 and 334.

If the presiding officer is a member of the society, he has—as an individual—the same rights as any other member; but the impartiality required of the chair in an assembly precludes his exercising these rights while he is presiding. Normally, especially in a large body, he should have nothing to say on the merits of pending questions.

... In debate on an appeal or a point of order that the chair has submitted to the judgement of the assembly, the foregoing rule does not apply, and the presiding officer does not leave the chair, since his participation in the debate relates to the function of presiding.

When the issue does not relate to presiding, then the Chair should properly step down and in no case attempt to assure approval of the issue by ruling in a matter which is not one of procedure. At another point Robert's (on page 218) indicates that the Chair cannot make rules on any subject, just "on questions relating to parliamentary law." This clearly precludes the Chair from ruling on powers she holds under another title, and remaining as presiding officer to defend her asserted prerogatives in another role. This is precisely what the Chair did in Billings, and it was patently out of order.

POWERS OF A CHIEF EXECUTIVE OFFICER

The authority of the chief executive officer is not defined in the Bylaws. Thus, one must look elsewhere for guidance on whether or not the widely used definition of the past implies the ability to remove other senior managers.

The position of chief executive officer is, of course, common in business. Usually, a distinction in a large corporation is made between present operations and investment in future operations. Typically, the chief executive specializes in the latter and the chief operating officer has major responsibility for the former. A large corporation may even have a chief financial officer, a chief administrative officer, and other officers reflecting major divisions of responsibility within the firm. Corporations tend to decentralize not only into profit centers at the operating level, but also into cost centers at the senior staff level.

That in itself is insufficient to shed light on whether the chief executive officer or the board of directors typically have authority to remove officers. However, according to one source, R. M. Miller in the Manual and Guide for the Corporate Secretary (Englewood Cliffs: Prentice-Hall, Inc., 1969):

The general rule is that, in the absence of any contrary provision in the statute, articles, or bylaws, the removal of an officer by a corporation must be made by the person or body authorized in the first instance to elect or appoint him. The power of removal and appointment is generally granted to the board of directors by the bylaws of the corporation As in other matters, the statute prevails over a bylaw that is inconsistent with it. Thus, if the statute gives the directors power to elect an officer, the directors may remove him, even though the bylaws provide [otherwise].

The question of what is the law in that regard requires a more authoritative answer than provided by just one author, even of a manual. It is submitted that the conclusive answer is given by the Model Business Corporation Act. This act, as of January 1978, "has been adopted in substance in more than 25 states" according to the American Bar Association.* Moreover,

major portions have been followed in many others. Its provisions embody the collective judgement of experienced corporate lawyers and academicians from diverse locations in the United States and, the Committee believes, are entitled to persuasive weight.

Not unlike Article 8, Paragraph 8, in the Party's Bylaws, Section 35 of the MBCA provides that

All corporate powers shall be exercised by or under the authority of, and the business and affairs of a corporation shall be managed under the direction of, a board of directors . . .

Included in the responsibilities of the board of directors is to select and remove officers (MBCA Sections 50 and 51).** Specifically,

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- * The Committee on Corporate Laws, Section of Corporation, Banking and Business Law, Corporate Director's Guidebook (Chicago: The American Bar Association, 1978), page 1. The number of states now exceeds 35, according to the Preface in the MBCA revised in 1979.
 - ** The Committee on Corporate Laws, Section of Corporation, Banking and Business Law, Model Business Corporation Act (Philadelphia: The American Bar Association, 1979), page 44.

any officer or agent may be removed by the board of directors whenever in its judgment the best interests of the corporation will be served thereby, but such removal shall be without prejudice to the contractual rights.*

It would appear that the clear intent of the prevailing law governing the structure of corporations places the removal of senior management in the hands of the board of directors rather than the chief executive officer.

One still might question whether the law is reflected in actual practice. In other words, are a sizeable number of important corporations operating outside the MCBA with respect to the responsibility for selecting and removing senior management. To answer that question, one can consult a survey of chief executive officers from 248 member companies of the Business Roundtable conducted in 1977.

In the sample, all but five of these companies had (in 1977) more than \$200 million in assets, 136 companies had assets in excess of \$1 billion, and 70 corporations actually had assets in the \$3 billion plus range.** Clearly, the sample includes chief executive officers from most of the successful corporations in the United States.

This is what they have to say about "management and board selection and succession."

From our own experience, we would describe the board's functions along the following lines.

It is generally understood that a principal board function is the selection of the chief executive officer and his principal management associates. A corollary function is to replace managers . . .

One is compelled to conclude, therefore, that the law and the prevailing practice in large corporations is to place the responsibility for selection and removal of all senior managers in the hands of the board of directors, not the chief executive officer. To assert that a chief executive officer has exclusive license to hire and fire all others in the firm is a gross misunderstanding of the role of the chief executive officer and the manner in which responsibility is actually assigned in a corporate environment.

Before leaving the survey of the Business Roundtable, the major conclusion from the report deserves detailing because of its relevance to the practice of the Chair's not notifying the National Committee in advance of important issues which might require action. The Business Roundtable report

* Ibid.

** The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation (New York: Business Roundtable, January 1978), page 18.

concludes that the flow of information is crucial for sound decisions by the board and

the chief executive officer is central to this process. The CEO himself will be one of the principal sources of board information. He should collaborate with the board in assuring a proper flow of information from operating components and staff functions. Indeed, it is fair to say that the typical CEO devotes a substantial fraction of his time to engaging in, or arranging for, communications to the board or to board committees.*

Having established that chief executive officers are typically not vested with the authority to select and remove the other senior management, attention can now turn to the proper relationship as outlined by Robert's with respect to the president of an organization and an executive secretary. These terms, of course, correspond to Chair and National Director as we use them in the Party.

PRESIDENT (CHAIR) AND THE EXECUTIVE SECRETARY (NATIONAL DIRECTOR):
ROBERT'S VIEW OF THEIR ROLES

The Bylaws of the party do not mention the position of National Director. One would presume this is a carryover from an earlier day when there were insufficient funds to hire a salaried officer and the Chair was also the general manager of the organization. In this context, identifying the Chair as the chief executive officer is understandable, if a bit out of date.

Remarkably, Robert's sketches out a parallel scenario on page 387.

In some organizations, the executive and managerial function that would otherwise be exercised by the president is entirely split off and vested in the executive secretary. This arrangement leaves the president his duties as presiding officer and spokesman for the organization. In any case, the president should not attempt to give orders to the executive secretary independently unless the bylaws so authorize; in the absence of such a provision the executive secretary receives his direction from the board or executive committee.

This is what has evolved over time in the Party, except that the current Chair has apparently missed the transition.

It is also remarkable how the organization of a corporation is similar to the arrangement sketched out by Robert's. There is a natural division of responsibility between the day-to-day operations and the other functions. At the senior level of a nongovernmental organization, the characteristic which promotes success is a division of responsibility, rather than a detailed supervision of one officer by another.

* Ibid., page 24.

Lest it be claimed that Robert's is ambiguous about the functions of an executive secretary and the relationship between that person and the board, note the following from Robert's, page 387.

In most organizations, the executive secretary is employed by the board of directors under contract

The executive secretary is in charge of the central office of the society and acts under the immediate direction of the board and the executive committee.

It would also be a mistake to assume that the Chair is essentially the executive committee and thereby entitled to supervise the National Director. Here is the definitive statement in Robert's (page 403) on that matter.

The executive secretary, if there is one, should work closely with the executive committee, but should be appointed by the parent body or at least the board. A board cannot appoint an executive committee unless the bylaws so authorize.

An inspection of the Party's Bylaws shows that no such authorization exists.

To summarize this section, the Bylaws are silent on the post of National Director, but Robert's is not. It says that an executive secretary is responsible to the board and not the presiding officer. The identification in the Bylaws of the Chair as chief executive officer does not in any sense overrule Robert's in this matter. The Bylaws do not define the powers of a chief executive officer, and there is, therefore, no basis for the Chair to claim overriding authority.

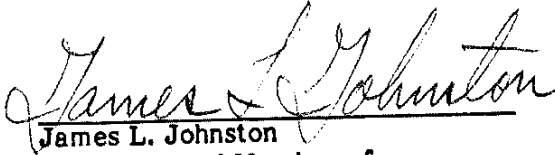
When one looks to established law and practice where the roles of the chief executive officer and the board of directors are defined, one finds that CEOs do not typically possess the power to select and remove other senior management. Robert's view on the division of responsibility parallels the prevailing practice in business, suggesting that the Chair's view of her role as chief executive officer is seriously flawed.

JUDICIAL COMMITTEE RULING OPTIONS

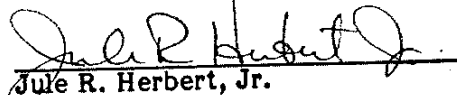
The procedures used by the Chair and the National Committee to dismiss the National Director should be declared illegal. The Judicial Committee should take steps to restrain the Chair and the National Committee from using any of the illegal procedures in the future (1) by retaining jurisdiction of the case until the next National Convention, or (2) by securing agreement by the Chair that she will not abuse the duties of the Chair and mislead the National Committee in the future.

The responsibilities of the Chair should be distinguished from the National Director. It should be reiterated that the Chair is the chief executive officer, but the National Director is the chief operating officer, responsible solely to the National Committee, not the Chair.

Eric O'Keefe should be offered reinstatement or, if the offer is not accepted, the Chair should be made personally liable for damages inflicted on Eric O'Keefe. The Judicial Committee should collect evidence and decide on the damage award.



James L. Johnston
Petitioner and Member of
the Libertarian Party
312-856-6553



Julie R. Herbert, Jr.
Petitioner and Member of
the Libertarian Party
202-546-5190