

On the matter of the Suspension of the LNC Secretary

Filed by and on behalf of:

Ken C Moellman Jr, LNC Vice-Chair

TABLE OF CONTENTS

INTRODUCTION	PAGE 3
DUE PROCESS AND PARLIAMENTARY LAW	PAGE 4
“FOR CAUSE”	PAGE 8
CLOSING SUMMARY	PAGE 11
APPENDIX A	PAGE 12

INTRODUCTION

The issue at hand is the suspension of the LNC Secretary by the LNC. As the Vice-Chair, I cast the lone abstention from the vote on the suspension, in protest of the procedure.

As the Acting Chair during two previous malformed attempts to remove the Secretary, and having partaken in extensive study, research, and contemplation on the matter, it is my hope that the Judicial Committee will review these findings.

After the aforementioned research and contemplation, it is my opinion that the process used to suspend the LNC Secretary is flawed. The key issues at hand are the concerns of Due Process and of the meaning of the phrase “for cause”.

Given the short time provided for submitting such a document, and the lack of formal legal training, it is hoped that any typographical or formatting errors are forgiven.

DUE PROCESS AND PARLIAMENTARY LAW

The LNC functions as the Board of Directors, managing the party's affairs between conventions. The LNC has adopted *Robert's Rules of Order: Newly Revised* (RONR), in which Chapter 20 deals with the discipline and/or removal of an officer from a board. However, it has been ruled by the Chair - a ruling not overruled by act of the LNC - that the Bylaws of the party override Chapter 20 wherever it speaks to removal from a board. It may not, however, remove Due Process.

The National Party Bylaws codify the discipline procedure in Article 6, Section 7:

The National Committee may, for cause, suspend any officer by a vote of 2/3 of the entire National Committee, excepting the officer that is the subject of the vote who may not participate in that vote.

Multiple parliamentarians have opined on this matter and similar language in the bylaws of other organizations, including Roberts III (now deceased) and Bulch, two of the authors of RONR, and appear to agree with the Chair's ruling. There is not much debate on this item within the parliamentary community, other than to say that if an organization re-codifies the removal procedure, even in just as simple of a way as the Bylaws have done, it creates a direct conflict and therefore overrides the provisions of RONR Chapter 20 on trials, notice, etc.

But does it remove Due Process?

Previously, the two aforementioned gentlemen have been asked by members of the LNC about our suspension process, specific to removal using an email ballot. In their response, they opined that it is in-order to bring such a motion to suspend via email ballot, because the ballot lasts for 15 days, and debate could be had during the ballot. They also incorrectly stated that an email ballot could be amended (it cannot). These items provided the basis of their opinion that an email ballot to suspend an officer was in order.

It's important to note, at this point, that there was still a principle of Due Process in that opinion. The opinion was rendered by RONR authors, and RONR is our parliamentary authority, under Bylaws Article 16:

The rules contained in the current edition of Robert's Rules of Order, Newly Revised shall govern the Party in all cases to which they are

applicable and in which they are not inconsistent with these bylaws and any special rules of order adopted by the Party.

Though our Bylaws may moot large sections of Chapter 20, there were, and still are, the principles of parliamentary law which extend beyond Bylaws Article 16.

Parliamentary law is a philosophy. Importantly, that philosophy is not in conflict with our own philosophy; in fact, parliamentary law complements our philosophy of non-aggression, as a peaceful, conflict-resolution tool.

While our Bylaws may indeed override parts of Chapter 20, they do not override the underlying principles of parliamentary law (*Appendix A*). While such a removal procedure, as is outlined in RONR Chapter 20, is not spelled out in the Bylaws, it is also not forbidden by our Bylaws. The procedure for removal used by the LNC should both conform to our Bylaws and follow the principles of parliamentary law.

Due Process is part of parliamentary law, and is critical for peaceful adjudication of disputes.

Some have claimed that Due Process only applies to crimes. Others have claimed that this Judicial Committee review is Due Process. Both statements are false.

Due Process applies to civil proceedings, in addition to criminal law¹. Per the Legal Information Institute, the following are features of Due Process:

Notice: “An elementary and fundamental requirement of Due Process in any proceeding which is to be accorded finality is notice reasonably calculated, **under all the circumstances**, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” [emphasis added]

Hearing: “[S]ome form of hearing is required before an individual is finally deprived of a property [or liberty] interest.” This right is a “basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions.”

¹ PROCEDURAL DUE PROCESS: CIVIL, Legal Information Institute, Cornell Law School
<https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/procedural-due-process-civil>

Impartial Tribunal: “Just as in criminal and quasi-criminal cases, an impartial decisionmaker is an essential right in civil proceedings as well.” [emphasis added]

Confrontation and Cross-Examination: “In almost every setting where important decisions turn on questions of fact, Due Process requires an opportunity to confront and cross-examine adverse witnesses.”

Discovery: “where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government’s case must be disclosed to the individual so that he has an opportunity to show that it is untrue.”

Decision on the Record: “... the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law”

Counsel: In *Goldberg v. Kelly*, the Court held that a government agency must permit a welfare recipient who has been denied benefits to be represented by and assisted by counsel.

Due Process extends well beyond criminal cases (Cornell):

... thus, the state was deemed to have obligated itself to accord students some Due Process hearing rights prior to suspending them, even for such a short period as ten days. “Having chosen to extend the right to an education to people of appellees’ class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.

Due Process applies to private organizations (Cornell):

In *Brock v. Roadway Express, Inc.*, a Court plurality applied a similar analysis to governmental regulation of private employment, determining that an employer may be ordered by an agency to reinstate a “whistle-blower” employee without an opportunity for a full evidentiary hearing, but that the employer is entitled to be informed of the substance of the employee’s charges, and to have an opportunity for informal rebuttal. The principal difference with the *Mathews v. Eldridge* test was

that here the Court acknowledged two conflicting private interests to weigh in the equation: that of the employer “in controlling the makeup of its workforce” and that of the employee in not being discharged for whistleblowing. Whether the case signals a shift away from evidentiary hearing requirements in the context of regulatory adjudication will depend on future developments.

Further, there is not a presumption of innocence in our processes. Presumption of innocence is a critical component of Due Process², whereas our Bylaws place the burden of proof on the subject of suspension in Article 6 Section 7: “*At the hearing the burden of persuasion shall rest upon the appellant.*”³

Due Process transcends the LP Bylaws, is a fundamental part of our society, is congruent with and assists in the fulfillment of the NAP, and should be used in any adjudication where the parties cannot otherwise resolve their differences privately. Due Process applies in public and private scenarios. Due Process applies in this scenario, as the Secretary was granted a title, for a two-year term, by the delegates in convention that the LNC seeks to revoke. While our Bylaws do not outline Due Process, it is a fundamental right and conflict resolution mechanism, which should be applied within the Libertarian Party.

² Proof, Burden of Proof, and Presumptions. Legal Information Institute, Cornell Law School
<https://www.law.cornell.edu/constitution-conan/amendment-14/section-1/proof-burden-of-proof-and-presumptions>

³ LP National Bylaws
<https://www.lp.org/wp-content/uploads/2020/12/2020-Indexed-LP-Bylaws-and-Convention-Rules-w-2020-JC-Rules.pdf>

“FOR CAUSE”

The LP Bylaws codify the removal procedure in Article 6, Section 7:

*The National Committee may, **for cause**, suspend any officer by a vote of 2/3 of the entire National Committee, excepting the officer that is the subject of the vote who may not participate in that vote. [emphasis added]*

Did the LNC have the authority to remove the Secretary? Only by voting 2/3rds in favor, and only “for cause”. The LNC did vote by 2/3rds to remove the Secretary.

The question then becomes about the phrase “for cause”. A “cause” in the land of employment can be something as simple as “doesn’t get along with their coworkers” or “not a team player”. But the LNC members are not employees; they are elected at convention by delegates who entrust those elected to execute the duties to which those members were elected.

Elected officials, whether in public elections or in private organizations, are generally given guidelines as to acceptable behavior. Usually, this is codified in a Code of Ethics⁴ or a Code of Conduct^{5 6}. Unfortunately, the LP has never codified such a document, or incorporated it into the Policy Manual.

Certainly, there have been times where a super-majority in a legislative body could oust members of the ultra-minority. This generally doesn’t happen, for pragmatic reasons. The first is that you give a spotlight to the ultra-minority, amplifying their cause; in short, it’s a poor political tactic. Another is that one day, that super-majority may find itself in the ultra-minority and would have set a precedent for the new super-majority removing those who previously used that power to remove others.

So what is “for cause” in a scenario where no such rules have been codified?

⁴Code of Ethics, Institute of Business Ethics

<https://www.ibe.org.uk/knowledge-hub/ibe-business-ethics-framework/code-of-ethics.html>

⁵Code of Official Conduct, US House of Representatives

<https://ethics.house.gov/publications/code-official-conduct>

⁶ THE SENATE CODE OF OFFICIAL CONDUCT, US Senate

https://www.ethics.senate.gov/public/_cache/files/3507e6ae-2525-40ac-9ec8-7c6dbfe35933/2015---red-book---the-senate-code-of-official-conduct.pdf

Congress provides an example. In fact, the US Congress has a similar 2/3rds provision to the LP; there are no rules codified in the Constitution as to how or why someone is removed, other than a 2/3rds vote of the body. Yet, only 5 members of the US House and 15 members of the US Senate have ever been ousted from office by their colleagues; 14 of the US Senators and 3 of the US Representatives were removed for supporting secession from the Union.

The other expelled members of the US House were expelled for bribery, and the remaining US Senator to be expelled was expelled for inciting Native Americans to interfere with British and Spanish fighting over Florida. Most of this occurred before a formal Code of Ethics was adopted by either house^{7 8}.

Using the US Congressional standards, which are standards of an elected body and with a codified Code of Ethics, bribery and treason are clearly unacceptable.

In a private setting, terminating a member of a board “for cause” is most commonly because of that member’s failing to live up to the terms of a contract. In that contract are often roles, responsibilities, expected performance, and a code of conduct expected of an officer of the corporation.

Within the LP, the roles and responsibilities are outlined in the Bylaws. There was one claim of the Secretary being late with the production of minutes. This is certainly a violation of the duties of the Secretary, regardless of the personal reasons the Secretary may have had for the delay. However, it is unlikely that any other Secretary would have been removed from the board for a one-time failure.

Based on the body of evidence provided by those who brought forth the motion to suspend the Secretary, it appears that the primary concern was the language used by the Secretary in public settings; though importantly not during a meeting. There were claims made of defamation of other board members, though there was not any harm proven as part of the “bill of particulars”.⁹

⁷ Enforcement of Congressional Rules of Conduct: A Historical Overview

<https://www.everycrsreport.com/reports/RL30764.html#:~:text=Initially%20proposed%20in%201951%20by,by%20the%20Federal%20Trade%20Commission.>

⁸ Senate Select Committee on Ethics: A Brief History of Its Evolution and Jurisdiction

<https://sgp.fas.org/crs/misc/RL30650.pdf>

⁹Defamation of Character Lawsuits: Proving Actual Harm

<https://www.alllaw.com/articles/nolo/civil-litigation/defamation-character-lawsuit-proving-harm.html>

The concern brought forth to this committee is that an overly-broad definition of “cause” will lead to future removals on shaky ground. As we are all unfortunately aware, there are caucuses and other political and personality-based divides within the party. Is “cause” truly to mean that the 2/3rds majority on the LNC just disagrees with 1/3rd of the LNC, and therefore creates ground for removal because the super-majority “cannot work with” a member who belongs to another faction or caucus?

“Cause” should be clearly defined and codified; today it is not. And without that definition and clarity, there is a real potential for future abuse.

Those items that go against our principles - the NAP - should certainly be considered “cause”. But personality conflicts, campaign rhetoric, and genuine misunderstandings should not be.

Lacking anything substantive in writing to provide a clear path, it is up to the Judicial Committee to decide what is proper “cause” to remove a board member; knowing that such decision will create precedent for future suspensions from the LNC.

CLOSING SUMMARY

Because the LNC and the LP Bylaws lack specifics, there is a wide breadth of potential interpretation. The outcomes are subject to be extended beyond this instance, and become precedent. It is my hope that the Judicial Committee sees past the current personalities and views their decision through the lens that, one day, they themselves may find themselves in the ultra-minority and the protections they would like to have for themselves.

Due Process should be honored as a matter of parliamentary law.

“Cause” should be well-defined and should be applied for actual infractions.

A short-term solution would be for the LNC to codify a Code of Ethics or Code of Conduct. While it is not within the power of the Judicial Committee to command the LNC engage in such a task, it is within their power to request it.

A long-term solution would require the delegates in convention, which, given that we have now faced this situation, is also a possibility; that is left for the delegates to decide.

APPENDIX A

PRINCIPLES UNDERLYING PARLIAMENTARY LAW

The rules of parliamentary law found in this book will, on analysis, be seen to be constructed upon a careful balance of the rights of persons or subgroups within an organization's or an assembly's total membership. That is, these rules are based on a regard for the rights:

- of the majority,
- of the minority, especially a strong minority—greater than one third,
- of individual members,
- of absentees, and
- of all these together.

The means of protecting all of these rights in appropriate measure forms much of the substance of parliamentary law, and the need for this protection dictates the degree of development that the subject has undergone.

Parliamentary procedure enables the overall membership of an organization—expressing its

general will through the assembly of its members—both to establish and empower an effective leadership as it wishes, and at the same time to retain exactly the degree of direct control over its affairs that it chooses to reserve to itself.

Ultimately, it is the majority taking part in the assembly who decide the general will, but only following upon the opportunity for a deliberative process of full and free discussion. Only two thirds or more of those present and voting may deny a minority or any member the right of such discussion.

In this connection, there is an underlying assumption of a *right* that *exists* even though it may not always be prudent or helpful for it to be exercised. Each individual or subgroup has the right to make the maximum effort to have his, her, or its position declared the will of the assembly to the extent that can be tolerated in the interests of the entire body.

Another important principle is that, as a protection against instability—arising, for example, from such factors as slight variations in attendance—the requirements for changing a previous action are greater than those for taking the action in the first place.

Fundamentally, under the rules of parliamentary law, a deliberative body is a free agent—free to do what it wants to do with the greatest measure of protection to itself and of consideration for the rights of its members.

The application of parliamentary law is the best method yet devised to enable assemblies of any size, with due regard for every member's opinion, to arrive at the general will on the maximum number of questions of varying complexity in a minimum amount of time and under all kinds of internal climate ranging from total harmony to hardened or impassioned division of opinion.