

LNC Executive Committee Meeting

Teleconference

May 10, 2000

Present: David Bergland, Chair
Hugh Butler, Vice Chair (joined during the discussion)
Steve Givot, Secretary
Mark Tuniewicz, Treasurer
Joe Dehn

Staff: Steve Dasbach, National Director

Also present: Bill Hall, At-Large Representative and General Counsel (joined during the discussion)

The meeting was called to order by Bergland at 2:05 PM EDT.

Item: Lawsuit Against FEC

Bergland said that the committee should first decide what should be accomplished by the meeting.

Dehn said that the Executive Committee should decide whether the LP should participate in this lawsuit. He said that the more general topic of how lawsuits should be initiated should be dealt with later and probably by the full LNC.

Bergland asked, in the event that the Executive Committee decides that the LP should not be involved in the lawsuit, what action would be proposed.

Dehn said that withdrawal from the lawsuit would be the appropriate action.

Dehn moved that the Libertarian Party should participate in this lawsuit. He said that he was making the motion for purposes of discussion and intended to vote against it.

Givot seconded.

Bergland summarized the lawsuit as seeking a declaration by the court that the FEC does not have statutory authority to promulgate the debate regulations being challenged. He said that the court is also being asked to rule that the scheme set up by the regulations is unconstitutional because it treats any party other than the Democrats and Republicans unfairly and thus violates their First and Fifth Amendment rights.

Dasbach said that according to the statutes -- statutes which we oppose -- corporations are precluded from participation in federal elections with two exceptions: corporate sponsorship of activities is permitted to encourage people to vote or to encourage people to register to vote as long as the sponsored activities are non-partisan in nature. He said that there is nothing specifically dealing with debates or exempting corporate sponsorship of debates in the statutes.

Bergland said that he believes it is appropriate for the LP to participate because it gives the LP an opportunity to publicly attack the FEC and to get publicity. He said that the remedy in the lawsuit is to declare these regulations invalid.

Givot said that in this instance the remedy sought, if granted, would lessen the freedom of corporations to participate financially in the political process. He said that since the effect would be a reduction in liberty, he does not see how we can participate in the lawsuit.

Bergland said that there is a larger picture -- the battle which the LP is doing with the FEC and the FEC Act. He said that this is a step forward in that battle.

Dasbach said that if these regulations were repealed -- depending on what interpretation the court makes -- that there is nothing to prevent corporations from financial participation in debates that are truly non-partisan.

Dehn said that the whole lawsuit is flawed from a libertarian point of view. Dehn read directly from a memo which he had sent to the committee and Dasbach. (A copy of that memo is appended to these minutes.)

Dasbach said that he completely disagrees with Dehn's interpretation.

Givot said that the First Amendment claim in the lawsuit is offset by the fact that the remedy being sought is a reduction in First Amendment rights. He said that the LP should not publicly take a position which accepts any compromise or reduction of any rights.

Tuniewicz asked Dasbach for his opinion.

Dasbach said that perhaps the lawsuit should be modified to address the First Amendment claim issue. He said that because these regulations favor the Democrats and Republicans and because the regulations violate the statutes, it does not make sense to endorse these regulations.

Givot said that no one is suggesting that the LP endorse these regulations. He cited the prior Executive Committee discussion regarding commenting on proposed FEC rule making. He said that the Executive Committee decided that the LP should be silent on that issue because it could not be responsive to the subject without violating principle.

Dasbach said that the issues in the case are different than those in the prior Executive Committee discussion. He said that these regulations favor Democrats and Republicans.

Dehn said that the regulations do not name either the Democrats or Republicans. He said that opposition seems to be based on the fact that corporations are willing to spend money in support of partisan debates.

Bergland said that the bigger picture remains. He said that "utopia is not an option." He said that he understands the argument against participation in the lawsuit, but that he continues to believe that the LP should continue to participate in the lawsuit.

(Hall entered the meeting at this time.)

Bergland said that the LP could dismiss itself from the lawsuit or file an amended complaint to differentiate the LP's viewpoints from some of those expressed in the lawsuit. He said that he believes that Dehn and Givot would still oppose participation in the lawsuit.

Tuniewicz asked for clarification on what would happen if the motion fails.

Dehn said that it is his intention that if the motion fails, that the committee would discuss how to proceed.

Givot said that if the LP withdraws from the lawsuit, it will still continue. He said that any benefits from a verdict in favor of plaintiff would inure to the LP. He acknowledged that whatever publicity benefits the LP might have gotten would be foregone.

Tuniewicz asked Bergland and Hall what probability of success they would assign.

Bergland said that if he had to assign a probability, it would be 40% - 60%. He said that, regardless of the outcome of the lawsuit, there is value to the LP in being involved in the public attack on the FEC and changes in the law and debate access that could ultimately result from the lawsuit.

Hall said that -- while he would not peg the likelihood of success as high as 40% -- this lawsuit makes a good argument, one that is worth pursuing because it might prevail.

Dasbach said that it would remain the LP's position that the LP opposes all statutes relating to the FEC.

Tuniewicz asked Dasbach whether he supports complying with FEC regulations or whether he might support non-compliance.

Dasbach said that the LP should fully comply with FEC regulations unless the LP is prepared to challenge specific regulations in court. He said that because the LP is an organization with a long-term obligation to its members, it would be inappropriate for the LP to simply ignore the law.

Tuniewicz said that, having listening to the merits of the lawsuit, he believes that there is a certain element of opportunism in the LP's participation. He said that lack of notification to the Executive Committee prior to joining the lawsuit gives rise to concern by him.

Givot urged Tuniewicz to set aside his concerns about the procedural issues and vote only based on the merits of participation in the lawsuit.

A vote was taken on the motion. Bergland voted in favor of the motion. Dehn and Givot voted against the motion. Tuniewicz abstained.

Givot moved that the LP should withdraw from the lawsuit.

Tuniewicz seconded.

Dasbach said that if this motion passes, it should not be implemented immediately. He said that if this motion passes, the matter should be referred to the LNC.

Tuniewicz said that the Executive Committee has both the right and the obligation to act in this situation.

Givot said that it was his intention that if the motion passes that the LNC would be notified, sent a copy of the lawsuit, sent a copy of the minutes of this meeting, and given an opportunity to convene a special telephonic LNC meeting to consider this subject if a sufficient number of LNC members wish to do so.

The committee discussed several alternative ways to proceed.

Dehn suggested that the motion be amended to read: "that the LP shall withdraw from the lawsuit unless, prior to Thursday May 18, there is a call for an LNC mail ballot and the resulting mail ballot overturns the decision of the Executive Committee."

Givot accepted Dehn's amendment as friendly.

There was no objection to amending the motion as Dehn suggested.

(Butler entered the meeting at this time.)

Bergland noted that he supports the motion for the purpose of supporting the procedure outlined although he believes that the LP should continue to participate in the lawsuit.

Butler questioned whether the time until May 18 was sufficient for LNC members to become educated on the issues.

Dehn said that the time until May 18 was intended only for LNC members to decide whether they wish to conduct a mail ballot to overturn the Executive Committee's decision. He said that additional time to learn about the issues involved in participation in the lawsuit would be available while the mail ballot was being conducted.

The motion was adopted unanimously.

The meeting was adjourned at 3:24 PM EDT.

Memo from Joe Dehn:

I have reviewed the draft complaint in the suit regarding the presidential debates, and in my opinion it is fundamentally flawed from a libertarian standpoint.

Counts 1-3 relate to the question of the authority of the FEC to allow contributions and expenditures relating to presidential debates, in relation to the enabling statutes and previous interpretations thereof. Essentially, all of these boil down to a matter of interpretation of legal language, in which the FEC's current interpretation is the *more liberal* interpretation, while the complaint is arguing for a more restrictive interpretation. The FEC is saying that non-profit organizations MAY put on debates and that corporations MAY make contributions -- the complaint is saying that the law does not allow this.

Now I'm sure that good legal arguments can be made either way -- the complaint contains pretty convincing language for its point of view, but I'm sure the FEC's lawyers have some basis for their view also. However, the essence of this is that the FEC's position is, in this instance, PRO-FREEDOM, in that it allows more kinds of debates and more kinds of contributions and expenditures.

Suing to force the FEC to be more strict in these matters would, in my view, be equivalent to suing the IRS because it was allowing too many deductions or exemptions, compared with what somebody thought the tax laws enacted by Congress gave the IRS authority to allow. This may be a fine exercise for legal scholars to pursue, but it is NOT something that the LP, as an organization, should be pursuing.

Count 4 alleges that, in addition to allowing certain kinds of contributions and expenditures, the FEC (in alleged excess of its authority) is allowing "debate staging organizations to escape the obligation to register as political committees ... and publically disclose their contributions and expenditures". Maybe so, but WHY ARE WE COMPLAINING ABOUT THIS. Our Platform calls for repeal of the whole FECA. If the FCC said certain broadcasters had to file fewer reports, would we complain? If the IRS said certain people didn't have to file tax forms, would we complain?

Count 5 alleges that the FEC's regulation violates freedom of speech and freedom of association "by allowing the conduct of presidential candidate debates which are not non-partisan". Even assuming this is true (which I suspect the FEC would argue is not the case -- they would claim that their regulation, even if it does not use the word, defines a class of debates which are "non-partisan"), SO WHAT? Allowing debates which are not non-partisan is not the same as prohibiting debates which *are* non-partisan. This is then alleged to "impede the dissemination" of information on "issues such as trade, foreign policy, and political reform". Apparently the idea is that since people with money are willing to sponsor a debate which doesn't address these issues, nobody will pay attention to a debate which does.

The FEC's regulation does NOT prohibit non-partisan debates. It does NOT prohibit a debate in which our candidates or our issues are included. All it does is ALLOW more people to sponsor more kinds of debates, some of which some people don't like *because of their content*. To claim that this is a violation of the 1st Amendment is to stand Freedom of Speech on its head.
