Date: Sun, 01 Sep 2019 12:13:24 -0700
From: Joe Dehn <jwd3@dehnbase.org>
To: lpcjc-201908-lmhoff@lists.dehnbase.net
Subject: some answers to various questions

I've put together this message as a way to answer a number of questions that various people have asked recently relating to the Ihmoff case. To understand its purpose, it may be helpful to think of it as a "FAQ" document. I'm doing this because trying to answer every question from each person individually just doesn't seem a very effective use of anybody's time. We all have various levels of interest in and tolerance for discussing things online using facilities like Facebook or by e-mail -- not to mention in-person conversations and phone calls. I normally have what I think is an above-average tolerance for those kinds of activities, but when a lot of people become involved, and they aren't all interested in communicating the same way, it can all become pretty time-consuming and there is also a good chance that some people will end up missing something important. But I do want to make information about this case available to anyone who is honestly looking for information. And so in this message I have collected together what I hope you will find to be useful information on a variety of topics.

I want to make clear that nothing I am saying here is intended as a reply to anything in the response document that Mimi Robson filed with the JC yesterday. I actually had a first draft of this message already prepared and was working on putting it into final form when I saw that we had received that response. And there is very little overlap between the topics I will be addressing here and the topics addressed in that response, so I have made only slight changes to a couple of my points as a result, basically to acknowledge what seems to be some kind of progress. I thank Mimi for providing her arguments on the points she has chosen to address so far, and for doing so in an organized and professional manner. If the JC decides to act on or reply to any of those points prior to the hearing, we will do so through a separate communication.

I want to start here with what seems to be a misunderstanding that a number of people have about the nature of the appeal currently before the JC. When somebody files an appeal they raise particular issues, and those become the basis for how the JC proceeds with the case. The respondent and certain other interested parties appear determined to introduce arguments that have no relevance to the issues raised by the appellant. It is possible that in part this is a result of a more basic misunderstanding of the JC's job, so let me say something about that first.

The JC is set up to handle appeals of actions already taken by somebody else. In the case of something like a disciplinary action, things like an investigation of the facts that is sufficient to support a decision, determination of guilt, and assessment of a penalty are all somebody else's job. In particular, since under our Bylaws it is the EC that has the power to suspend a person's membership, it is the EC's job to do everything else that properly leads up to any decision to suspend a person's membership. Also under our Bylaws the transition from "suspension" to "termination" is _automatic_, unless the JC intervenes -- which cannot happen unless somebody complains, and which the JC is not under any obligation to do even if somebody does complain. As noted in Robert's, expelling a person from the organization is the most severe penalty, the ultimate sanction, that a private organization can impose on its members. There is no question that an organization has the power to do this, there is no question that under our Bylaws the EC has the power to do this, and the appeal before us does not question either of those points. However, just like anything else that the EC has the power to do, it must be done according to the rules contained in our governing documents.

The Imhoff appeal asserts, in essence, that before the EC can act to exercise their power to expel somebody from the party they must judge that person guilty of a serious enough charge, and that before they can find anybody guilty of a charge they must do certain things that are typically referred to as constituting "due process". Their appeal raises this general issue by citing a number of specific

things that must be done, but that's the general nature of their complaint. They are saying that the EC failed to do things that they are required to do, before they can act in this way. The JC has not decided whether the Imhoffs' claims are correct. We do not make a decision in any case until after both sides have had a chance to give their input. Respondent has the right to contest these claims, for example by explaining why these rules do not apply, or by providing evidence that the EC did comply with the rules. But these are the issues before us in this appeal, and so these are the issues on which we need to hear arguments and evidence.

If somebody is hoping that if they failed to do their own job correctly the JC is going to step in and save them by re-doing it for them -- sorry, but that is not our responsibility. We do have the job of reviewing what others in the party have done in exercising their powers and possibly reversing it. But it is not our responsibility to take on a task that, if it needed to be done at all, somebody else was supposed to do, or to re-do it from scratch if they did it incorrectly.

Please understand that we do not choose the arguments that are presented to us in an appeal. None of the members of the JC were involved in writing this appeal. We did not decide what claims would be included, or when it would be filed. Our job is to respond, to the arguments presented, when somebody decides to bring a matter to us.

We do of course have a choice of whether to consider an appeal or not. In accordance with the Bylaws, we don't consider an appeal unless at least two members of the JC want to do so. The purpose of this rule should be obvious -- it would be a waste of the rest of the JC's time, plus the time of others, if everybody were forced to work on something that only one member of the JC thought was even worth considering. But note that this is still a pretty low standard, and I think intentionally so. In particular it does not require a majority. And it is important to understand that being in favor of considering an appeal is a completely different thing from supporting any particular outcome. A JC member could easily be in favor of considering an appeal even if he or she had no idea at all about how the case might end up being decided, just because the issues look like ones that are important enough that both sides should have a chance to make their case. It's even possible that on some occasions some JC members might favor taking a case even if they do _not_ support the claims made in the appeal, because they think it would be useful to have the case be decided negatively as a way to establish a precedent. However, the Bylaws do not require members of the JC to have any particular reason for wanting to consider an appeal -- all that is required is that more than one of them want to do so.

I've seen a couple of questions about "who were the two" in this case. I'm sorry but I can't really give a simple answer to that question the way it has been posed. It's not that I am trying to hide anything. I just don't consider it a meaningful question, because that's not how the process works. Since all that is required by the Bylaws is that two members agree, I do not conduct a complete vote. I simply pose the question to the whole committee, and as soon as it becomes clear that at least two members do support going forward with a case I consider the question answered. It doesn't matter for anything that follows who the first two were, or even if I can determine who the first two were, and it doesn't mean that anybody else didn't support it. As long as there are at least two, it then becomes the business of the entire committee to proceed. It is similar in that way, because it serves basically the same purpose, to the question of who seconds a motion in an ordinary committee meeting. If one member proposes a motion and then three other members immediately shout out "Second!" at the same time, the secretary writes somebody's name down, but which one doesn't matter. The purpose is simply to make clear that the motion was not supported by only one member.

If it really matters to anybody, I will stipulate that I was one of the members who agreed to consideration of this appeal. But I will not accept that as meaning that I was one of "the two" -- because there were more than two and I see no reason or good way to decide which two deserve either the honor or the blame, whichever way others might see it. My recollection is that there was one

member whose initial reaction was clearly negative, but after some discussion at least three members, including that one, ended up supporting consideration, and that there was one other who seemed favorable but didn't make make as clear a statement on the question. And it may be that the fifth member was also in support but just didn't say so -- and I saw no need to continue asking once it became obvious that there were at least two. So if what you really want is a count of how many were in favor, I'm afraid the best answer I can give you is "somewhere between 3 and 5".

Another thing about which there seems to be considerable misunderstanding is the nature of a Judicial Committee hearing and related written submissions. Before we can come to a decision in any appeal, the JC needs to get input from both sides. Traditionally, a hearing has been the primary mechanism for achieving this objective. Arguments presented in writing, in some cases along with supporting evidence, can also play an important role -- and it is even possible that in some cases they could serve instead of a hearing. However the purpose of both a hearing and any written submissions is to provide the members of the JC with the information that we need to do our job. And although it can be very helpful in understanding arguments made either orally or in writing to give each side an opportunity for rebuttal, this does not mean that any of these communications are properly conducted in the form of a continuing open debate. When we hold a hearing, we give each side a chance to make their points in a structured way. And while written arguments allow for a bit more flexibility, including the possibility of response to arguments before the hearing, it is important to still maintain some structure, in order to keep the process manageable. It does not mean turning the entire pre-hearing period into one long and continuous debating session. The JC is not in the business of running a chat room or other online open forum.

In this connection, I want to clarify the role of the web page that we maintain for each case. We have been providing, in what is intended as both a gesture of openness and a convenience to all concerned, a place where copies of documents submitted to us for consideration can be posted. But this doesn't mean that everything that anybody says about this case is going to be posted there. Lots of people have been writing lots of things -- that doesn't automatically give them the status of formal submissions to the JC. Generally what we have been posting there are the same sorts of things one might expect for us to consider part of the formal "record" of the case. Primarily this means documents submitted by the parties, and primarily it means things that directly address points at issue in the case or which by their nature require a formal response. It's not that we are unwilling to hear from others, but as a practical matter we cannot give every e-mail that everybody writes to us or CCs to us equal consideration. We are volunteers with limited time -- several of the members of the JC have expressed concern about the possible burden of having to read every bit of even certain documents that would clearly have the nature of a formal submission related to a case, if they turned out to be very long. I also suspect that some members of the EC might come to regret having written some of the things they have been writing recently if they became part of the formal, permanent record. And I simply do not have time to compile everything everybody has written everywhere about this case into that record. It is not the JC's job to run the equivalent of an e-mail discussion list or a Facebook group -- and the fact that we are making a limited number of documents available online should not be mistaken for an offer to do so.

More fundamentally, it is simply not the job of the JC to sift through and organize everybody else's thoughts. It is the responsibility of the parties in a case, and anybody else who may feel they have something helpful to contribute, to organize their own thoughts and present them in a form that makes it easy for the JC to process them. Anyone who feels that they have something important to say that needs to be considered by all members of the JC and that should become part of the record but that has not yet been mentioned in a formal statement in the record is welcome to do that. The appropriate way to do that is to include it in a formal statement that lays out what they believe to be the essential points in an organized way, supported by any relevant evidence, and to file that document with us before the hearing.

An example of an issue that has come up multiple times in informal communication and to which we have not responded in a way that everybody considers satisfactory is the one which has been referred to as "standing". Some may consider this obvious grounds for dismissal, or even for us to have ignored the appeal entirely in the first place. However it often happens that what is obvious to one person, or even to many people, is not quite so obvious to everybody else. Some members of the JC don't see a problem with this aspect of the appeal at all. We have also seen commentary from others outside the JC who share that view. So calls for dismissal on this basis would seem to be premature. There may be an issue to be considered here, whether or not "standing" is the right name for it, and I see that it is one issue addressed in the response filed by the respondent yesterday. Now that she has done that, we will be in a better position to consider that argument just as we will be in a better position to consider whatever other arguments she chooses to include in her further responses.

The respondent has expressed concern about the scheduling of the hearing -- and also about the implications of this for the submission of additional written documents. There is a trade-off in any judicial process between allowing enough time for receiving input and resolving the question in a timely fashion. It has been famously observed that justice delayed is justice denied. On the other hand, we must give consideration to the practical question of allowing enough time for arguments to be written and any relevant evidence assembled. Specific factors relating to both sides of this trade-off may vary from case to case.

However, the Bylaws do provide some guidance, and actually constrain our choice to a considerable degree. The Bylaws contain a very clear statement of the minimum time required for notice of a hearing -- ten days. But they also put a less obvious but still very real limit in the other direction. As Chair of the JC, I must schedule the hearing for a date no later than 30 days after receiving the appeal. And since it is rarely the case that the JC can come up with a hearing date the moment an appeal arrives -- in this case it took me almost three days to do it -- the effect in most cases is to leave a window only a little over two weeks long within which I can choose the hearing date and still be in compliance with the Bylaws.

It is only within that window that I am able to exercise any discretion on the basis of the trade-off outlined above. In a previous communication I outlined my reasons for considering the time allowed for a response to this appeal to be reasonable -- I'm not going to repeat all that here. And others have communicated in various ways their feeling that this case needs to be dealt with as quickly as possible, because of ongoing harm to the Imhoffs or to other activists with whom they would normally be working. There is no obviously best answer to this, but the respondent got the amount of notice that is required by the Bylaws. If the membership considers that amount of time unreasonably short, they may wish to amend the Bylaws to make it longer -- but then they should probably also increase the time after the appeal is filed that a hearing can be held, and this of course might mean that in some cases the JC would not be able to act quickly enough to avert some kinds of harm.

I also want to address one more point about the burdens that scheduling decisions can impose on the people involved. It is not just the parties to the case who are affected. The members of the JC are also people with other things to do and potentially having significant personal issues with which they must deal during the course of a case. We are not like the employees of a government court, with judges and staff being paid a salary by the taxpayers to work on a case as long as it may drag on. We are ready and willing to listen to serious attempts by either side to explain their position. But at the same time as libertarians we want to be responsive to a membership that rightly condemns the way justice is so often denied by government courts, which seem all too willing to do things like let citizens rot in jail or leave owners without access to their own computers or other property for an extended period while lawyers collect enormous hourly fees filing endless procedural motions. The stress on members of the JC themselves in trying to balance these considerations becomes greater the longer a case drags out. As with most things in life, not everybody can get what they might prefer here. The JC has the right and the responsibility to take not only the costs to both parties, but also to its own ability to deal with a

case, into account in deciding on an appropriate schedule.

This applies also to other choices we need to make about the hearing. We have the responsibility to conduct a hearing in a way that makes sense for our purposes. The bylaws explicitly give us the option of holding a hearing in person, by teleconference, or by videoconference. We do of course take things like the ability of the parties to participate into account. For example, we are not likely to chose to hold an in-person hearing in San Francisco if all the parties live in San Diego. But it's our meeting, and we will run it as we see fit. That includes setting reasonable limits on who may participate, how long people may speak, and the details of any electronic communications tools we may use. The fact that something works well for the EC or some other committee doing some other job is of little relevance here. Our meetings have a different character, and we will conduct them in a way that serves our needs.

A number of people have raised questions about the wisdom of hearing an appeal that involves only some of the potential issues -- specifically about considering issues of "due process" without also considering at the same time the specifics of the Imhoffs' guilt or innocence of whatever may have been the charge and the appropriateness of the penalty assuming they are in fact guilty. As with many other questions, there are trade-offs here. Considering all issues together might make things conceptually simpler, but it is not at all clear that it would make anything simpler as a practical matter. As I see it, considering the due process claims first represents a significant simplification in some respects. It provides an opportunity for everybody involved to address those issues specifically, while at the same time minimizing the need for a level of secrecy which many LPC members are likely to consider suspicious.

And specifically with respect to scheduling, those who are saying it would be better for us to be considering all possible issues at the same time have only to look at the respondent's recent request for a delay in the hearing to see how little sense that makes. Note that the Imhoffs _could_ have filed an appeal of everything at once, as certain members of the EC seem to think is the only logical approach. But if they had done that they could still have, and likely would have, included exactly the same complaints about lack of due process that they raised in the current appeal. And they could have filed that entire, significantly more complicated appeal as early as the afternoon of 10 August. If they had done that it is possible that the hearing could have been schedule to take place _last week_, and the respondent would have been in the position of having to prepare arguments and evidence to address _all_ of those claims _including_ the ones concerning due process as well as the ones that she says will take a considerably longer time, _all_ by some time last week. Instead, because the Imhoffs chose to file an appeal with a much more limited number of issues and chose to file it almost two weeks after the EC meeting, the respondent has far less work to do now and it will have been almost four weeks since the EC meeting by the time she needs to have that work completed.

Finally, I feel I must address the complaints about "bias" that have been made by certain members of the EC. Everybody approaches everything they do with some degree of bias -- that is just human nature. Some of us also have biases that are especially relevant to the job of serving on the JC, including a bias against misapplication of decision-making authority. That doesn't mean that we believe that everyone in authority should be presumed to be wrong, but it does mean that we are inclined to question authority and to allow others to do so. This is why appeals bodies such as the JC exist - to provide a mechanism for people to "question authority". That is our job. That does NOT mean we know how we will decide a case before we hear the evidence. We do not know the answer to the questions raised in this appeal yet. But somebody has raised some questions -- and we are the sort of people who expect to hear answers to those questions.

In summary, we are considering a case which raises concerns about due process -- questions that appear to be resolvable in a relatively expeditious manner. None of us knows what our decision will be yet, because we haven't yet heard from both sides. But both sides should also understand that this is

unlikely to be the final determination of the question of the Imhoffs' membership. Both sides have indicated that, should they lose in this appeal, they intend to pursue a determination through future proceedings of the merits of the Imhoffs being allowed to remain members. And those who are protesting the timeline of this appeal should welcome that, as this will give them plenty of additional time to prepare their arguments on those apparently much more problematic issues.

Meanwhile, on behalf of my fellow JC members I feel I must ask that those who have been approaching this matter by attacking the JC and its members try to refrain from doing so. Such attacks are not helpful, either to resolving this case or to the interests of the organization as a whole. The JC is a group of volunteers with a job to do, and it is the nature of that job that in almost every case doing that job will make somebody unhappy. It's hard enough doing that job, without being under repeated personal attack by fellow activists. EC members who also have occasion to make decisions that may not be popular should especially understand this, and for them to engage in this kind of abuse of their fellow activists who are trying to do a job for the party is especially unbecoming of the positions that they hold.

The JC is a group of people chosen by the delegates to do a job under constraints set by the delegates. If the delegates feel that 10 days notice is insufficient for a hearing, they will have an opportunity to change that in February. If the delegates prefer a JC more inclined toward supporting authority and less toward protecting the rights of members, they will also have an opportunity to make that choice in February.

In the meantime, let's just focus on the work that needs to be done.

Joe Dehn
Chair, LPC Judicial Committee