December 8, 2016

In Re: Sanctuary Campus

The Constitutional Council has a majority concurrence in judgment on the outcome of this case but no majority opinion which holds for future cases.

Via a concurrence in judgment, the Council rules that Senate may not currently pass a resolution concerning sanctuary campuses. The Council was unable to reach a majority consensus on whether Senate can pass a resolution concerning sanctuary campuses if national policy were to change such that the implications of a sanctuary campus would also change.

Contents

CHIEF JUSTICE BUCHBINDER joined by Associate Justice Stolberg. (see page 2)

ASSOCIATE JUSTICE SCHER-ZAGIER joined in concurrence in thought by Alternate Justice Kirley. (see page 3)

ASSOCIATE JUSTICE BROITMAN dissenting, joined by Justice Henzer concurrence in part. (see page 6)

ASSOCIATE JUSTICE HENZER, dissenting, joined by Justice Broitman concurrence in part. (see page 8)

References for this Case:

Majority Concurring in Judgment- A concurrence in judgment occurs when the signatories agree with the final outcome of an opinion, but not with the logic behind the decision.

Majority Consensus/Opinion- Majority consensus/opinion is when the signatories agree with both the final outcome of an opinion as well as the logic behind the opinion and such a vote holds the majority of the Council. The opinion holds as the order from the Council.

Concurrence- Concurrence occurs when the signatories agree with both the final outcome of an opinion as well as the logic behind the opinion.

Dissent- A dissent is written when a Justice disagrees with both the end outcome and logic of an opinion.

Concurrence in Thought- Concurrence in thought applies only to Alternate Justices who have actively participated in discussion and feel strongly enough to vote. Their vote does not carry weight for the holding.
CHIEF JUSTICE BUCHBINDER joined by Associate Justice Stolberg.

On November 18th, 2016, Senator approached the Constitutional Council asking if a resolution regarding a declaration of Wash U as a sanctuary campus, was permissible. The reason for this question regards Article II Section 3c. stating:

*The Senate and the Treasury shall refrain from taking stands on national or local political issues, which do not directly affect constituents in their capacity as students at Washington University in St. Louis.*

This question can be broken down into three separate issues. The first is a question of ripeness; since the resolution has not been written, can the Council offer an opinion? The second regards the theory of whether or not this is a political question. The last issue acknowledges that this is a political issue, but questions whether the content of the resolution would directly affect constituents as students.

The Council as a whole was split. While I agree with other members of this body that the issue of ripeness plays a major role, as a problem of boundaries, it is within the bounds of the judicial branch to state whether a senator’s actions are constitutional, and taking a political stance is unconstitutional. In this sense, I agree with Justices Scher-Zagier and Kirley with the idea that it is part of the duty of the Council to take this case and provide Student Union an answer.

However, taking the argument any further than this is beyond the bounds of the Council. It is simply enough that this is a highly political issue to curtail any further action by the Legislative Branch. The question on how this issue directly or indirectly affects constituents as students of this institution is irrelevant beyond the point that the issue at hand is political in nature to such an extent that it no longer holds to the mission of the Senate. The purpose of the legislative body is to represent the interests of all of the constituents of Student Union. While the nature of what the resolution is trying to address is not necessarily polarizing on a strictly political level, the idea that it is happening in this political climate makes such a resolution unconstitutional. With a nation as divided politically as it is, such a resolution is not pushing for merely a sanctuary city, but also creating a potential “voice” of the student body in regards to national politics. Since we at Washington University are a diverse group of individuals, I state that it is not within the scope of the Senate to speak as one political voice of its diverse constituents.

I am not attempting to draw a line in defining a political action or stifle the voice of one of our three branches. I am reminding the Senate to take a look at its purpose and the purpose of such an amendment. It is a body for all students.
ASSOCIATE JUSTICE SCHER-ZAGIER joined in concurrence in thought by Alternate Justice Kirley

The Constitutional Council received an interpretation request from a Student Union Senator requesting an interpretation of the Student Union political stance statute as to whether the statute precludes Senate from passing a “resolution regarding the declaration of Wash U as a sanctuary campus.”¹ The political stance statute states that “The Senate and the Treasury shall refrain from taking stands on national or local political issues, which do not directly affect constituents in their capacity as students at Washington University in St. Louis.” (Statutes. Art. II, § 3, cl. c).

Upon receiving this request, the Council proceeded to formally interview both the Senator who filed the request and the Speaker of the Senate. After conducting these interviews, the Council decided that three questions must be answered:

1. Does the Council have jurisdiction over this case?
2. Does a “resolution regarding the declaration of Wash U as a sanctuary campus” constitute a political issue?
3. Does such a resolution meet or fall short of the other requirements for Senate stances?

Regarding the first question, the Constitution states that the Council “shall…[d]ecide all cases in which an officer of the Legislative or the Executive branches of the Student Union is involved.” (Const. Art. VI, §. 1, cl. e). This is clearly a case in which an officer of the Legislative branch is involved. Furthermore, precedent demonstrates that the Council has authority to rule on this issue. In In re: Absentee Voting in the Legislative Branch, this Council ruled on a different clause of the same section and article of the Statutes. Since the other sources from which this Council’s authority is derived under Article VI of the Constitution do not apply to this case, it logically follows that the authority to rule on a case involving a similar portion of the statutes was derived from the portion of the Constitution referring to “cases in which an officer...is involved.” Thus, under Article VI, Section 1, Clause e of the Student Union Constitution, this Council has the authority to rule on this interpretation request.

In terms of the second question, such a resolution is clearly a “political issue” as defined in the Statutes. After the 2016 U.S. Presidential Election, references to sanctuary campuses increased to nearly 100 times their level beforehand, according to an examination of Google Trends. Politicians have both called for sanctuary campuses to be instituted² and started drafting legislation to eliminate funding for universities which choose to become sanctuary campuses³. The legislation and statements mean that—almost by definition—this must be a political issue. Moreover, the Senator who filed this request argued that the resolution in question is “no mere

---

¹ Initial interpretation request from SU Senator Danny Weiner.
political stance,” which is an acknowledgment that such a resolution would clearly be taking a stance on a political issue.

However, there is no prohibition on Senate taking positions on political issues in and of themselves. Rather the prohibition is on taking stands on issues “which do not directly affect constituents in their capacity as students at Washington University in St. Louis.” There are two reasons for why constituents are not directly affected in their capacity as WashU students:

(a) There is currently no specific national policy proposed that would have a direct and tangible effect on WashU students. Although the statute refers to issues, not policies, the lack of a specific policy means that the issue does not “directly affect constituents,” since the word “directly” is in the present tense and refers to the current effect—not a hypothetical future effect. Thus, a resolution cannot be passed because it violates the first part of the statute.

(b) Similarly, for this statute to have any meaning, which we must assume is the intention, the clause must be clearly specifying that Senate can only take stances on political issues that directly affect students in their capacity as students at Washington University in St. Louis. This makes it clear that political issues that affect students broadly are not within the purview of Senate: Only issues that affect students as students at Washington University are within their purview. This is important, because the statute does not say “in their capacity as students” but “in their capacity as students at Washington University in St. Louis.” The extra phrase referring specifically to Washington University means that this statute is precluding legislative stances on political issues except on a very narrow set of issues which affect constituents as WashU students in particular or which affect constituents more acutely in their capacity as WashU students than in other capacities. Although some issues may be less clear-cut, the issue of a sanctuary campus—a political issue on national immigration and citizenship decisions—is certainly far too broad to meet the narrow requirements of this rule.

For both of these reasons, Senate cannot pass a sanctuary campus resolution until there is a definitive national policy that immediately affects the constituency in their capacity as students and until the resolution addresses an issue which is narrower than just national immigration policy.

The other justices raise good points in their opinions and I want to take a minute to address these:

(1) Justice Broitman argues that by ruling on this case, this Council would be “engag[ing] in legislation.” However, the hypothetical nature of this case itself precludes such an

---

4 Justice Broitman opinion.
entanglement from taking place. Because this opinion does not address a specific, drafted resolution, it leaves ample room for Senate and Treasury to engage in the legislative process and decide how they wish to address issues within the constitutional and statutory framework. Indeed, as Justice Broitman correctly notes, this Council’s job is to “execute its constitutionally granted duties” by ruling on cases brought by officers of the legislative branch. Failing to do so might violate these duties.

(2) Similarly, Justice Henzer points out that the concept of a sanctuary campus is ill-defined, and she argues that this Council would be creating policy in ruling on this. For similar reasons as above (the fact that this opinion does not in and of itself preclude a drafted resolution with a specific policy), by determining that a sanctuary campus resolution is impermissible at this moment, this Council is not intruding on Senate’s power to “‘enact any legislation concerning matters of policy’ (V.2.2).”5 Indeed, the very addition of the political stance clause to the statutes shows that Senate’s power is limited. The role of Constitutional Council is to interpret the Constitution in the instances outlined in the Constitution (in this case, because it was brought by a legislative officer), so by interpreting this limitation on Senate’s power, we are not “overstepping [our] constitutional powers, and encroaching into the powers conferred by the Constitution to Senate.”6

(3) Chief Justice Buchbinder takes the political stance statute too far in saying that it precludes the legislative branch from taking a stance on any political issue. The clause purposefully includes the phrase “which do not directly affect constituents in their capacity as students at Washington University in St. Louis.”7 Chief Justice Buchbinder’s interpretation would render this clause entirely useless; instead, we must assume that it was included in the statutes for a reason. Moreover, such an interpretation would preclude Senate and Treasury from acting on a wide range of issues urgently relating to the students—such as sexual assault and mental health—just because they are political issues as well.

---

5 Justice Henzer opinion.
6 Justice Henzer opinion.
7 Justice Buchbinder opinion.
ASSOCIATE JUSTICE BROITMAN, dissenting, joined in part by Justice Henzer

On November 18th, 2016, the Constitutional Council received an interpretation request from a Senator concerning the permissibility of pursuing a Senate resolution urging the administration to declare Washington University in St. Louis a sanctuary campus. Both national and local politics aside, the Constitutional Council is faced with addressing the constitutional questions at hand. In deliberation, I identified three main questions:

1. Does Constitutional Council have the jurisdiction to hear this case, and if not, why?
2. According to Statutes, Article II, Section 3, Part C, is this a political issue?
3. If so, does the issue “directly affect constituents in their capacity as students at Washington University in St. Louis?”

The Council has been asked whether it is permissible for Senate to pursue such a resolution. I believe that there is a lack of jurisdiction to adjudicate this case on (a) the issue of ripeness and (b) for fear of overstepping judicial boundaries and encroaching on legislative duties. For these reasons, I must dissent from the conclusion reached by the plural majority.

First, on the issue of ripeness, I questioned the immediate circumstances of this case. The Senator wanted to see if such a resolution would gain traction, but had not yet proposed and drafted the resolution. After interviewing both the Senator and Speaker of the Senate, it became apparent that this resolution was just an idea and not a concrete effort as of yet. The resolution was not even drafted, on the floor of the senate, or anywhere near voting. While this Council has been known to give advice before a measure has been passed, this instance of intervening in the legislative process (as it pertains to inquiry and fact finding), before any real controversy or dispute has surfaced, is too ripe to beget the jurisdiction of this Council.

On the issue of separation of powers, I fears that by issuing a decision in the present case, the judiciary would be encroaching on legislative powers. Since the case involves crafting a resolution, the main legislative output of the senate, it would be unacceptable for the judiciary to have a direct say in crafting, or in this case censoring, policy. The role of Constitutional Council is to uphold the constitution in the face of challenges and to execute its constitutionally granted duties, not to engage in legislation. It would lead Student Union down a dangerous path if the Constitutional Council had ultimate say on what the Senate could or couldn’t discuss and pass resolutions on.

Chief Justice Buchbinder’s concern about the overly political nature of the case makes this difficult for Constitutional Council to engage, however I do not agree with her rigid interpretation of Statutes II.§3.c. since there are cases where political issues may be considered by Senate. Justices Scher-Zagier and Kirley raise this point, and I agree with their assertion that
this Council has the constitutional jurisdiction to hear this case, however, I believe it is inapt to provide insights on the remaining questions. On want of jurisdiction and for the aforementioned reasons, I feel it is inappropriate to comment further on the merits of this case.

_I respectfully dissent from the concurrence in judgment._
On November 18, 2016, Constitutional Council received an interpretation request from a Student Union Senator concerning sanctuary campuses. The Senator requested that the Council decide if a Senate resolution “regarding the declaration of Wash U as a sanctuary campus” would be in conflict with the statute stating the Senate “shall refrain from taking stands on national or local political issues, which do not directly affect constituents in their capacity as students at Washington University in St. Louis” (Statutes, II.3.c). The Council cannot decide this matter because doing so would require the Constitutional Council to unconstitutionally infringe on the powers and responsibilities of Senate.

I posed two questions to reach this conclusion. First, would a resolution on sanctuary campuses address a political issue? Taking a stance on sanctuary campuses would constitute taking a stance on a political issue for two reasons. First, the issue of undocumented students in the United States has been a political issue for some time. University of Houston professor of law Michael Olivas\(^8\) noted in 2004 that undocumented college student residency is “a political issue” that has become “complex and contentious” (Olivas 435). The issue of undocumented students has become more politicized recently, following the 2016 presidential election. *Time Magazine*\(^9\), *The Atlantic*\(^10\), and CNN\(^11\) all reported that students at college campuses across the country began to call for their campuses to become sanctuary campuses in the wake of the 2016 election results.

Having established that sanctuary campuses are in fact a political issue, I then asked whether or not sanctuary campuses would “directly affect constituents in their capacity as students at Washington University in St. Louis”. In order to answer this question, I would need to evaluate what implementing a “sanctuary campus” would look like. In other words, to determine the impact of a sanctuary campus on constituents in their capacity as students, I would need to examine the policies involved in making a campus a sanctuary campus. Unfortunately, as CNN’s Catherine Shoichet astutely noted, what constitutes a sanctuary campus “depends who you ask”. There are a broad range of policy measures that fall under the sanctuary campus umbrella. Declaring a campus to be a sanctuary campus can mean anything from refusing to share information on students’ immigration status to providing legal counsel to undocumented students to doing absolutely nothing.

Because no Senator has written a resolution on sanctuary campuses, or more narrowly defined what is meant by the term “sanctuary campus”, this interpretation request is rendered

---

largely meaningless. For all I can tell, advocating for a “sanctuary campus” could mean anything. Furthermore, by deciding whether or not a sanctuary campus would affect constituents in their role as students, Constitutional Council would have to define what policies are implied by a sanctuary campus. This action would involve Constitutional Council overstepping its constitutional powers, and encroaching into the powers conferred by the Constitution to Senate. The Constitution gives Senate the power to “to enact any legislation concerning matters of policy” (V.2.2). Because the Constitution specifically gives this power to Senate, and does not give this power to Constitutional Council, a decision by Constitutional Council in favor or against the constitutionality of a resolution concerning sanctuary campuses would be unconstitutional.

Because this opinion lies in the dissenting minority, I would like to remark on my reasons for disagreeing with the opposing opinions.

1. Chief Justice Buchbinder and Associate Justice Stolberg argue that any Senate resolution concerning the issue of sanctuary campuses would be unconstitutional because sanctuary campuses are “political in nature to such an extent” that by passing a resolution concerning sanctuary campuses, Senate would no longer represent “the interests of all of the constituents”. There are two problems with this line of reasoning. First, this reasoning inappropriately extends the mandate of the constitution for elections to create a student government that represents all constituents to the powers of Senate. Chief Justice Buchbinder and Associate Justice Stolberg incorrectly suggest that a resolution passed by Senate has the potential to misrepresent the will of the constituency. The constitution, however, makes clear that constituents receive representation through their “right to vote in Student Union elections” (II.2), not through any other means. Any resolution passed by senators elected to office is therefore representative of the constituency (on a side note, that’s literally how democracy works- if a constituent disagrees with a Senator’s actions, they don’t vote for that Senator in the next election cycle. They don’t, however, say that that senator’s decision is “unconstitutional” because they are personally not being represented). The second major problem with Chief Justice Buchbinder and Associate Justice Stolberg’s reasoning is that it is not based in the text of the constitution. In fact, the text of the Constitution is not quoted or referenced once in the portion of the opinion in which the reasoning is explained. Specifically, I am not aware of the portion of the Constitution that implies a “political climate” can make a resolution unconstitutional. Rather, Chief Justice Buchbinder and Associate Justice Stolberg ignore the very part of the constitution that directly states politically focused resolutions can be constitutional under certain circumstances. The Constitution specifically states the Senate can “take stands on national or local political issues” if they “directly affect constituents in their capacity as students at Washington University in St. Louis”. There is no mention that Senate should take into account the “political climate”. Rather, Chief
Justice Buchbinder and Associate Justice Stolberg’s opinion takes the power granted to Senate by the Statutes to create resolutions regardless of the political climate. This action limits what Senate can and cannot write resolutions on without a constitutional basis, and is therefore a clear violation of the separation of powers defined within the Constitution.

2. Associate Justice Scher-Zagier argues that because there is currently no national policy proposed that would result in a departure from the status quo for undocumented students, a resolution concerning sanctuary campuses could not “directly affect constituents”. I disagree. Associate Justice Scher-Zagier assumes that all policies under the sanctuary campus “umbrella” would affect undocumented students only if a national policy were implemented limiting DACA or expanding deportations. This reasoning is flawed. There are policies that one could argue to be included in a sanctuary campus policy that could affect undocumented students in the status quo, such as policies providing legal advice to concerned students. Even if that is not the case, however, it is not in the power of Constitutional Council to propose and dismiss these potential policies. By dismissing any sanctuary campus policy as unconstitutional in the status quo without giving Senate the opportunity to propose their own policies clearly encroaches on Senate’s power “to enact any legislation concerning matters of policy” (V.2.2). Associate Justice Scher-Zagier also interprets the portion of the constitution stating that for a resolution addressing a political issue to be constitutional, that issue must “directly affect constituents in their capacity as students at Washington University in St. Louis” to mean that the issue in question must affect constituents more in their capacity as students at Washington University in St. Louis than in their capacity in any other role. The problem with this interpretation is that Associate Justice Scher-Zagier confuses the word “directly” with “exclusively” or “primarily”. A policy can “directly” affect an individual in more than one role. For example, if congress passed a policy forbidding people from using pencils, that policy would directly affect a student’s role as a student and as an artist.