

February 24, 2017

In re: Recall Petition on Four Officers of Student Union

*ASSOCIATE JUSTICE BROITMAN AND ASSOCIATE JUSTICE STOLBERG joined by Associate Justice Henzer, concurrence in judgment Chief Justice Buchbinder, and concurrence in thought Alternate Justice Kirley.*

On February 20th, 2017, Constitutional Council received a recall petition from Student Union President Kenneth Sng regarding four officers: three senators and one class council officer. The Senators' comments in the Senate Slack were deemed inappropriate, anti-Semitic, sexually-driven, and insensitive to victims of trauma by the Senator who reported this incident to President Sng and the SU Executive Branch. The class council officer was overheard making offensive remarks in a face-to-face conversation with senators. Prior to releasing a statement to the student body on February 20th, President Sng submitted a petition for the recall of these four Student Union officers.

Article IX, Section 3 (d) gives Constitutional Council the power to either approve or reject a petition for recall, stating that a recall shall only proceed if "Constitutional Council approves the petition for recall".

As such, the Council has the jurisdiction to hear this petition for recall. In order to determine if the recall petition has merit, we look to the criteria outlined in the Constitution. The Constitution states three requirements for a recall petition:

- a. *"This procedure shall be followed by Student Union constituents in order to recall an officer in dereliction of their duties.*
- b. *Any constituent may petition for the recall of an officer of the Student Union who is in dereliction of their duties.*
- c. *The party petitioning for recall must submit a formal request before the Constitutional Council in accordance with its Grievance Policy, and appear before the Council to make their case."*

The procedure for recall must be followed (Article IX, 3 (a)), the party petitioning must file the petition properly (Article IX,3 (c)), and the officer being recalled must be "in dereliction of their duties" (Article IX, 3 (a)).

First, the Council looked at the requirement to follow constitutional procedure; because there are no officers being recalled without having gone through the process outlined in Section 3, this requirement is satisfied.

Second, the Council unanimously agreed that the petition has been filed correctly and that President Sng has fulfilled his duty to appear before the Council.

Thus, in order for Constitutional Council to approve a recall petition, we must find an officer to be “in dereliction of their duties.” It is clear that if this condition is not satisfied, then a recall shall not be approved by this council. Ultimately, the Council fails to find any of the officers in this case to be in dereliction of their duties. However, this analysis requires more nuance and a key distinction in what the Constitution means by “duties.”

As the first case of its sort, this recall petition has generated intense debate and critical analysis on the depth, meaning, and applicability of “dereliction of duties.” The Council believes that the following framework closely follows the Constitution and prevents Constitutional Council from embroiling in student affairs and from devolving into an internal review board.

The key word in the phrase “dereliction of duties” is simply duties. What is a duty? For the purposes of any officer of the Student Union, a duty is specifically restricted to the “*duties and powers*” grants (listed under the respective officer’s sections) within the Constitution. For example, the duties of a senator are specifically enumerated in Article V Section 2 (a) .1- (a).12. These duties serve as clear standards for the function of senators within the realm of Student Union. All SU officers must adhere to their respective duties under the SU Constitution. If they are to shirk any of their constitutionally enumerated duties, they may be considered by this council to be “in dereliction of their duties.” Therefore, the Council believes that a dereliction of duty must violate a specific constitutional duty or mandate.

Furthermore, Constitutional Council believes that duties are primarily restricted to only those found in the Constitution. Since we are a council whose purpose is to “preserve and defend the Constitution of the Student Union of Washington University in St. Louis,” we must base our decisions off of the SU Constitution and Statutes.

There are certain cases in which community or internal standards could be taken into account; if a student officer acted in an unquestionably egregious manner violating laws, that student would certainly be in dereliction of their duties. Evaluating community standards in this case, however, is inappropriate. Given that internal standards are constantly changing and prone to retrospective editing, to evaluate the internal standards held by the entities of the Student Union officers in question is inherently unjust in this case. We cannot make a judgment on standards that are likely altered by the very event we are evaluating.

The Council here also agrees with Chief Justice Buchbinder’s distinction between student and officer. We note that it is the responsibility of Constitutional Council to judge the parties in question based on their role as officers rather than as student members of the Washington

University community. This opinion is in no way a commentary on the language used by those officers, but rather a narrower analysis evaluating if that language is in conflict with their constitutional duties.

Regarding the Senators, we must first look at the Constitution's enumerated duties for senators, found in Article V Section 2 (a) .1-(a) .12. Looking through each of these duties and given the evidence accrued during its investigations, the Council fails to see a specific dereliction of the Senators' constitutional duties. Additionally, we find no dereliction of the duties for the class council officer with respect to the Class Council Constitution.

This Council does not concede that the words used were in any way appropriate or a representation of how officers of the Student Union should conduct themselves. Due to the fact that this Council fails to find each of the respondents in dereliction of their constitutionally enumerated duties, the process for recall cannot continue. As a result, this Council *does not approve* President Sng's recall petition.

*It is so ordered.*

February 24, 2017

In re: Recall Petition on Four Officers of Student Union

*CHIEF JUSTICE BUCHBINDER joined in concurrence by Associate Justice Stolberg.*

On February 20, 2017, Constitutional Council received a recall petition from the SU President, Kenneth Sng. This case was deliberated during a time when other bodies at Washington University, external from Student Union, were conducting their own investigations. Unlike many other Constitutional Council cases, this particular request crossed into several different departments and was faced with several levels of personal privacy that are important to note. Therefore, background information, including names of the parties involved, will not be included in specificity in this opinion.

There were several different areas of examination for the Council stemming from Article IX, Section 3. The first point to consider is Subsection (c)

*“The party petitioning for recall must submit a formal request before the Constitutional Council...”*

On this point, the entirety of the Council is in agreement. The grievant filed all of his paper work correctly and the case could now accurately proceed to discussion in the Council.

The next step is to decide the jurisdiction of the Council in this matter. This discussion stemmed from Article IX Sections 3 (d) and 3 (a) conjointly.

Section 3 (d) states that:

*“If the Constitutional Council approves the petition for recall: 1. The Constitutional Council shall proceed by taking the petition to the executive officers of the affected organization within ten (10) business days...”*

The main question from this line is the definition of “approves”. Some on the Council hold that the Justices will determine whether or not there was a dereliction of duties and if so, the Council will pass on the case to the proper “affected organization” to decide whether or not this dereliction of duties is enough to warrant action, and if so what type of action. However, as the sole judicial body of the Student Union, it lies within the Constitutional bounds of the Council to

*“[d]ecide all cases in which an officer of the Legislative of the Executive branches of the Student Union is involved...” (Article VI, Section 1 (c) .5)*

We are bound to the rules of the Constitution as much as all other Student Union branches and therefore the power and responsibility to be the determinant factor in approval of this case lies with us. But beyond just approval, we are also bound to *decide*. Anything less would be holding

ourselves to a lesser standard than is fit. And so, while some on the Council may choose to pass along the responsibility of making any decision to groups that are more internally ingrained in the case, I believe that doing so would go against my *constitutional* duty to make a choice. We are making a decision on whether or not there was a dereliction of duties, the evidence will be confirmed and the ruling will be final on the end of this Council. If approved (which would constitute a “yes” on dereliction of duties) then the “affected organization” will proceed in determining the severity of the punishment.

It is now important to explain where dereliction of duties comes into play. The question of dereliction of duties is brought in via Section 3 (a), the very nature of what a recall is:

*“This procedure shall be followed by Student Union constituents in order to recall an officer in dereliction of their duties.”*

Members of the Council hold that a dereliction of duties must stem from a constitutional or statutory position, without these bounds, it would be impossible for any individual, on this Council or in the “affected body”, or any other member of Student Union, to hold a just and unbiased investigation and determination. Internal standards, a potential secondary source for discussion, are constantly changing and merely presenting a case such as this to a group of individuals can cause a change in thought process severe enough that a previously held standard is no longer valid. Therefore, use of such standards in this case cannot be applied. This is not a commentary on what Senate’s and Class Councils’ specific internal standards are, rather this is an acknowledgment that as Justices we must provide as equal an opportunity for all parties to be heard and investigated as possible.

So what are proper dereliction of duties that can come into play? In the received petition, there is no mention of specific duties or actions that directly return back to the officer’s in questions’ positions. As such, the Council returns to our governing documents to determine these duties. There is no point in the Constitution that mentions a specific duty that these officers violated. No actions were taken by an officer *in the capacity as an officer* in these circumstances.

While some may look to Article XIII, the equality clause, for answers, there are several reasons why this still does not count as a dereliction of duties. The first is that the Constitution and Statutes separate the notion of official documents and correspondents. These conversations were not official documents of the bodies. We acknowledge that these comments were stated in an inappropriate place and time, however, they are not official documents of Student Union, and are not publications that “reflect the views of the Student Union as a whole”, a key phrase of this article that bounds our abilities to limit a student’s freedom of speech.

We are not making any determination on the nature of the words themselves. Rather we are acknowledging the role of the Constitutional Council to determine if as officers, the Constitution or Statutes were violated. It is a dangerous path to assume that as the judicial body, we are also responsible for cases regarding individual *student* conduct, and for us, the distinction between *student* and *officer* must be clear. Our ruling is in regards to these individuals as *officers* not as *students*. We do not presume to have the jurisdiction or power to determine the freedom of speech or negligence of thought of individual members of this campus. However, we do hold that it is our right, and our constitutionally bound duty to make a determination on individual's actions as officers. As such, we *do not approve the petition for recall*.

*Vote: 4-1*

February 24, 2017

In re: Recall Petition on Four Officers of Student Union

*ASSOCIATE JUSTICE Scher-Zagier, dissenting, dissenting in thought Alternate Justice Tam*

### **Facts**

On February 20th, 2017, Constitutional Council received a recall petition from Student Union President Kenneth Sng on behalf of SU Exec. The recall petition described two incidents involving four SU members. The incidents involved (1) anti-Semitic comments, (2) sexually explicit remarks, and (3) inappropriate pronouncements about trauma victims.<sup>1</sup> The existence of these comments was announced to the entire undergraduate student body by President Kenneth Sng at 8:35 p.m. on February 20th, 2017, although the specific officers involved and the details of the comments were not released at that time.

Constitutional Council was asked to “look into the conduct of the SU officers involved and recommend appropriate disciplinary actions.” Given the importance of this issue and the relevance to the entire student body, it is important to describe the immediate steps that this Council took in reviewing the recall petition:

1. Per the SU Constitution (Article IX, Section 3 (c)), the Council requested the appearance of President Kenneth Sng and interviewed him on February 20th, 2017.
2. In order to preserve the integrity of our review and to ensure fairness to all SU Officers who were the subject of the recall petition, this Council requested comments from two of the senators involved and from the member of class council involved. The senators were provided with the text of the conversations in question and returned written statements to the Council on February 21st. The class council member was not provided with the specific details of the allegation and therefore did not return a written statement.
3. At the same time, Constitutional Council granted President Sng’s request for temporary suspension of the involved SU Officers. In a separate email accompanying the recall petition, Sng argued that three of the officers’ roles in positions of leadership within Senate and the class council meant that the officers should be suspended. In a 3-1 decision, the Council exercised its authority under the Constitution to issues writs “as it shall require,” in this case to suspend the two remaining senators and the class council officer from their positions and all official activities (Article VI, Section 1 (c). 7.). The

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<sup>1</sup> Importantly, some of the comments occurred in conversation between several senators, while others were communicated over the SU Senate Slack channel. (Slack is a “real-time messaging” system with additional functionality.) [NOTE: This is largely how the comments were described in the petition submitted by Kenneth Sng.]

only people informed of this suspension beyond members of the Council were the officers suspended, President Sng, and Campus Life advisers.<sup>2</sup>

## **Findings**

Our conversations centered around Article IX, Section 3, of the SU Constitution, which discusses the process and rules for recall. Parts a-c state the following:

- a. This procedure shall be followed by Student Union constituents in order to recall an officer in dereliction of their duties.*
- b. Any constituent may petition for the recall of an officer of the Student Union who is in dereliction of their duties.*
- c. The party petitioning for recall must submit a formal request before the Constitutional Council in accordance with its Grievance Policy, and appear before the Council to make their case*

As a constituent who submitted a formal recall request to Constitutional Council and appeared before the Council, the President followed the rules set out within the Constitution for a recall petition. On this, the Council is unanimous.

As a recall petition has never previously been submitted, the task fell to Constitutional Council to determine our proper role in cases of recall. This is where problems arise. The Constitution states in Section d.:

- d. If the Constitutional Council approves the petition for recall:*

However, this section does immediately make clear in what cases the Constitutional Council should approve recall petitions. The Council is largely in agreement that we should make some attempt to determine if the subject of a recall petition is in “dereliction of their duties,” as

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<sup>2</sup> This blatant failure by the majority to share the suspension with anyone else rendered it both useless and dangerous. The Council members who voted in favor of the temporary suspension argued that it would protect the senator who brought the incidents to the attention of President Sng, by ensuring that he would not have to interact with the senators who were accused of inappropriate conduct. However, this makes little sense, because: (1) the suspension also applied to the class council officer, who would not be interacting with senators, (2) the suspended senators were allowed to attend Senate proceedings anyway, since they are open to the public, and (3) the suspension failed to prevent any interactions, since neither the senator who raised the issue of the comments nor other non-suspended senators were aware of the suspension and even the suspended senators were left in the dark that the point of the suspension was to eliminate these potential interactions. Secret suspensions that do not have any effect are a dangerous overstep of this Council's authority and throw its judgment into question. In no case should this Council be making secret decisions. The fact that this Council essentially is saying it can suspend anyone, for any length of time, for any reason, without releasing who is suspended at any point is breathtaking. This gives the Council virtually unlimited authority with no check, since the secrecy of the suspension means that nobody might find out. The Constitution does not grant us this power and we ought to be clear-minded enough to realize that such power is perilous.

required above (Article IX, Section 3 (a-b)). In doing so, we should look for a clear failure to follow duties or other requirements set out in the Constitution and the Statutes.

In this specific case, there is disagreement on whether the officers involved were in “dereliction of their duties” through violation of some clause in the Constitution and Statutes. One possibility is that Article XIII of the Constitution is violated, since it mandates that all “official documents of the Student Union” must reflect equality. The conversation clearly is not an official document, although the Slack conversation might well be. Longstanding case law and court cases treat electronic communications as documents<sup>3</sup>, and the fact that this was communication among nearly all senators and was used to communicate about official business means that these communications are certainly official documents as required under Article XIII of the Constitution. However, it is not immediately clear that the messages themselves violate this equality clause.

At least as important as clear violations of the Constitution and Statutes are other actions that may constitute dereliction of duties. The Constitution explicitly uses this phrase so as to not limit recallable offenses to violations of the Constitution and Statutes.<sup>4</sup> Indeed, we can think of many cases where SU officers might behave in a manner so totally inconsistent with their duties and expectations as officers that they fall into dereliction of duties. For instance, committing capital crimes or other felonies might not explicitly violate either the Constitution or Statutes but might well make a student unfit for service. Other actions that attempt to undermine or damages SU institutions by behaving in ways that are anathema to internal standards of each body might also be considered dereliction of duties, despite the lack of an explicit prohibition. For instance, within Constitutional Council, we have the informal—never explicitly written—expectation that all Council members will hold in confidence internal deliberations, except in describing reasoning in opinions or where warranted in other cases. Failing to do so would violate neither the Constitution nor the Statutes but would almost certainly be considered by Council members as dereliction of duty.

Indeed, every organization with Student Union—as well as Washington University and the world more generally—has internal standards, whether formal or informal, that officers are aware of and expected to abide by. While I can certainly speak to Constitutional Council’s standards, I cannot speak to others. Therefore, I believe the proper role of Constitutional Council in instances of recall where there is a high likelihood that internal standards have been violated is to approve

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<sup>3</sup> This is, for example, the reason why government electronic communications are public records, as courts have consistently held that electronic communications are official documents subject to public record laws.

<sup>4</sup> If intended to limit this to violations of the Constitution and Statutes, it would have said so. For instance, the Constitution explains the process of impeachment by saying that senators shall “Have the power to bring articles of impeachment against any officer of the Student Union **on the grounds of incongruence with this Constitution.**” (Article V, Section 2, Part (a) .5.) (emphasis added). Thus, impeachment is limited to violations of the Constitution, while recall applies in broader cases.

the petition (assuming everything else is in order) and proceed to the second constitutional step, allowing the affected organization to determine if they feel that the violation rises to dereliction of duty and should be punished with removal from office.

That is, the Constitution explains that the “executive officers of the affected organization” or the “entire group” will rule on the recall petition if the Council approves it. The proper role of the Constitutional Council is to (1) ensure that the petitioner follows the steps outlined within the Constitution for a recall and (2) confirm that the alleged “dereliction of their [the recall subjects’] duties” is serious enough to merit recall and falls broadly within that category. If there is not a clear Constitutional violation but there is high likelihood of other dereliction of duty, it is not the place of Constitutional Council in the recall process to decide if a student’s conduct is egregious enough to merit removal from office.

In this particular case, it is clear that the petitioner followed the proper procedures under (1). As for part (2) of our standard, allegations of inappropriate comments—at least some of which were made by the students in their roles as members of Student Union about other SU members—are clearly serious enough to merit consideration by the relevant body as to violation of internal standards.

Therefore, having met both parts of our standard, these 4 recall petitions should be ruled in order. It is up to the relevant body to determine if the conduct by the students named in this petition is serious and relevant enough to merit removal from office. In the case of the three Senators, this falls to the Senate as a whole. In the case of the class council member, this falls to the Joint Class Council.

*I respectfully dissent.*

### **Petition Release**

This opinion should have included the full petition given to us by SU President Sng and made no attempt to hide the text of the comments nor the identities of the SU officers involved. My attempt to do so has elicited much debate among the council and likely the wider student body, as President Sng’s February 20th email did not name the officers involved nor detail the specific comments that led to this recall petition. Unfortunately, whatever the merits of this decision may be, it has had the effect of confusing both Student Union and the student body. Constituents wondered which senators were involved. Were they friends? What exactly did these SU officers engage in? Some thought that severe action needed to be taken by SU while others saw an outrageous overreaction by their student government.

At the end of the day, however, few (if any) of these students know the details. Instead rumors abound—and continue to spread without evidence. This has worrying implications for everyone involved, as well as those who are uninvolved. Students who are the subject of this recall petition have little means to defend themselves as exaggerations or outright falsehoods are parried back and forth.

Moreover, releasing the petition is vital to protecting the interests of students uninvolved in these incidents. A failure to release this information might put senators and class council members who were not implicated at risk of being accused of making comments that are anti-Semitic, insensitive to trauma victims, or sexually aggressive. Indeed, some senators who were not a part of this recall petition nor involved in these conversations (to the best of this Council's knowledge) have been implicated—incorrectly—by other students as the SU officers who made these comments. Regardless of the proper response, if any, to these comments, such a situation is unacceptable and unfair to all the SU officers who did not make inappropriate comments. It is also unfair to those who *did* make these comments, but are accused of different or more severe comments. If only for this reason, we must release the details of these incidents to protect wrongfully accused SU officers and those involved.

But this is not the only reason. This Council was tasked with determining if these officers should be recalled in accordance with the constitutional process. However, regardless of the decision in this case, the student body as a whole has a right to know what occurred among classmates that they put in a position of power and trust as officers within this student government. They deserve to know what was said and by whom, so that they can draw your own conclusions, uncolored by the preconceptions, biases, and limitations of this Council. An opinion released without the context of the comments or the involved participants would be unhelpful to SU and the student body. As elected representatives, these officers serve at the pleasure of the student body and it is unfair and unwise to ask you to vote in elections with key information withheld by your student government.

For all of these reasons, as well as the sake of transparency within the student government and our judicial processes, we must release the petition information we received. Given that so many Council members have connections with the SU officers involved, both through student government and outside<sup>5</sup>, anything otherwise reeks of a whitewash by this Council and does the student body and this Council a grave disservice by casting this Council as untrustworthy. Although this Council remains impartial, anything less than full disclosure would leave this Council at risk of losing the trust that you, as students, place in us to faithfully and fairly carry out our job and interpret the Constitution.

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<sup>5</sup> I, for instance, have known several of the officers involved since freshman year, if only as acquaintances. I was confirmed by at least some of the senators and have been in classes with at least 2 of the officers involved.

