November 11, 2017
In re: Senate Election Disqualifications

Facts

On Tuesday, November 7, 2017, Election Commissioner Steven Kish notified Constitutional Council of his decision to disqualify two Senate candidates from the Fall 2017 election. Kish charged both candidates, Mia Hamernik and Nathan Card, with violating Student Union Fall 2017 Election Packet Campaign Rule #11:

“Any fraudulent activity of any kind shall result in immediate disqualification of the offending candidate. This clause includes any activity on the part of one candidate to discredit or incriminate another candidate or to in any way circumvent the spirit of the election.”

In the case of Hamernik, Kish received a screenshot from Gregg Adams of a request by Hamernick to Elijah Peña to release screenshots of Adams’s comments to Student Life. Kish found that this was a “clear effort to discredit Adams...and thus circumvents the spirit of the election.” After disqualifying Hamernick, Kish received from Hamernick screenshots of conversations between her and Card in which she gave Card the screenshots of Adams’s comments. Kish found that Card’s sending of screenshots to Student Life reporter Elena Quinones and his request for Hamernick to submit an op-ed in regards to Adams demonstrated a “clear intention to discredit Adams...and thus Card also circumvents the spirit of the election in this sense.”

On being informed of the availability of appeal by Kish, both candidates appealed their disqualification to Constitutional Council. This Council reverses the Election Commissioner’s decision to disqualify Hamernick and Card and reinstates both.

Majority Opinion

CHIEF JUSTICE HENZER and ASSOCIATE JUSTICE BROITMAN joined by Associate Justice Kirley, and Associate Justice Stolberg. Joined in thought by Alternate Justice Tam.
*Part 1 penned by Associate Justice Scher-Zagier.

Constitutional Council’s authority to hear this case:
We first evaluated whether Constitutional Council has the authority to rule in this case. The Statutes state that the Election Commission has the power to “bring charges before the Constitutional Council in cases of violation of election rules when the persons charged plead
not-guilty or elect such a hearing” (Statutes Article IV, Section 2, Part j). While the charges were brought by the Election Commissioner rather than the Election Commission, we still find that we can hear the case. Constitutional Council holds that the Election Commissioner possesses the powers of the Election Commission, even though he has not proposed members to serve on an Election Commission. The Statutes name the Election Commissioner the “chair of the Election Commission” (Statutes Article IV, Section 3, Part a). The Commissioner is therefore inherently a member of the Commission, and acts as the Commission even if when there are no other members of that Commission.

Because Kish brought charges before Constitutional Council to which Card and Hamernick pleaded not guilty, Constitutional Council was tasked with evaluating the validity of the Election Commissioner’s case against both candidates. Constitutional Council limited the scope of our evaluation to the evidence and logic Kish used to make his case against both candidates, statements from the accused candidates, and consistency with the Student Union Constitution and Statutes. We did not investigate whether there was any wrongdoing beyond what Kish based his initial decision upon, as doing so would have infringed on the Election Commission’s power to “interpret the election rules” and “decide a suitable penalty for the failure to abide by any of the election rules” (Statutes, Article IV, Section 2, Parts h and i).

The Council reverses Kish’s decision to disqualify Hamernick and Card. We divide our reasoning into two parts.

**Part 1: Campaign Rule #11 was not approved.**

Per the Constitution, “The Election Commission shall determine the rules by which the election shall be run. The Senate and the Treasury shall approve all election rules.” (Article VII, Section 2, Part a). However, rule #11, as applied by the Election Commissioner in this case, was not approved by Senate or Treasury. In conversations with members of this Council, Election Commissioner Kish explained that he changed a previous rule to its current form after being advised that he need not seek approval for minor changes.

Before this illegitimate change, the rule read: “Any fraudulent activity on the part of one candidate to discredit or incriminate another candidate or in any way circumvent the spirit of the election shall result in the immediate disqualification of that candidate.” While the candidates likely did not violate this rule, it was not given to candidates in the Election Packet and cannot, therefore, be viewed as applicable.
Since the rule which candidates were given was not approved by the constitutionally mandated procedures, it is not binding, and the Election Commissioner has no power to exact a penalty for violating the unapproved rule.

**Part 2: Even if the rule upon which the Election Commissioner based his charges against Hamernick and Card had been valid, his reasoning behind disqualifying both candidates was flawed.**

Based on the evidence provided by Kish, Hamernick and Card did not break Campaign Rule #11. Kish initially disqualified both Hamernick and Card because of their intention to discredit Adams. While this may have been the case, intending to discredit another candidate is not enough to violate Campaign Rule #11. The Campaign Rule can reasonably be interpreted to mean that in order to result in disqualification, an activity must first be fraudulent. The rule clarifies that these fraudulent activities include those that discredit or incriminate another candidate. The rule does not, however, apply to actions that discredit or incriminate, but are not fraudulent. It is important to note that this rule could instead be read to define an activity which discredits or incriminates another candidate as a “fraudulent activity”. This latter interpretation, which Kish prescribed to, seems to be a less likely interpretation given that the definition of “fraudulent” does not typically encapsulate the definition of “discredit” or “incriminate”.

Given that a reasonable person could read the rule either way, it is unfair to hold candidates to an interpretation of the rule which is unclear, perhaps even to the Election Commissioner based on his statements to Constitutional Council. Due to the ambiguous wording of Election Rule #11, we can only justly hold Hamernick and Card to the more forgiving interpretation. The test of whether Hamernick and Card violated Election Rule #11 therefore becomes a test of whether their actions were fraudulent. Their alleged intention was to publicize a screenshot of a group message. There was no evidence presented by Kish to suggest that they intended to falsify these screenshots or deceive voters. Because their actions as presented to Constitutional Council were not fraudulent, there was no violation of Election Rule #11.

Further, regardless of whether Election Rule #11 should be interpreted to allow for the penalization of non-fraudulent activities that discredit or incriminate, Election Rule #11 clearly emphasizes activity, rather than intended activity, as the basis for disqualification. While Kish charged Hamernick and Card based on their intentions, Election Rule #11 focuses on action; for example, the rule specifies activities that discredit other candidates, rather than activities that intend to discredit. Text messages provided by Card demonstrate that while Card subsequently sent the the screenshots to Student Life reporter Elena Quinones, he requested that the screenshots be off the record. The screenshots captured a messaging app chat which was available to many people. Given the near-public nature of the group chat, and given that Card
provided the screenshots to Quinones off the record, it seems the screenshots could have reasonably been publicized during the election by various third parties.

Ultimately, the already somewhat public nature of the screenshots in question make it difficult to hold Hamernick and Card responsible for their publication. The actions taken by both Hamernik and Card cannot be causally linked to perpetrating fraudulent activity. Since the screenshots were near publically available within the campaign and election period, and since the candidates themselves did not try to spread the screenshots with discrediting messages (the screenshots were simply the affirmed words of Adams), their actions cannot be considered fraudulent by “discrediting” or “incrimination.”

Therefore, Commissioner Kish’s interpretation of the (unapproved) rule is misguided and this Council reverses.

Concurring Opinion

ASSOCIATE JUSTICE SCHER-ZAGIER, concurring in judgement and in Part 1 of the Majority Opinion.

While Constitutional Council may have the power to examine the rationale for disqualification, it is neither necessary nor advisable for this Council to interpret this rule, a power statutorily prescribed to the Election Commission: “The Election Commission shall...Interpret the election rules [and] Decide a suitable penalty for the failure to abide by any of the election rules.” (Statutes, Article IV, Section 2, Parts g and h). I concur completely with Part 1 of the Majority Opinion, but I do not believe this Council should engage in a hypothetical about whether Hamernik and Card violate a rule that we have already deemed invalid, as the Majority does in Part 2 of its opinion.

Instead, our primarily role should be to review the Election Commissioner’s decision for consistency with the Constitution, the Statutes, and the Election Rules—not to question a reasonable interpretation.

Furthermore, there are two additional reasons why this Council must reverse this decision.

Part I: Election Commissioner Powers

Part 1 of the Majority Opinion hints at a larger problem. Regardless of whether the rules were approved by Senate and Treasury, does the Election Commissioner have any power to apply a penalty for violations of the rule? As discussed above, the Election Commission—not the
Election Commissioner—is tasked with interpreting election rules and determining a penalty in cases of violation.

It is true that “The Chair of the Election Commission shall be the Election Commissioner.” (Statutes, Article IV, Section 3, Part a). However, a person cannot chair a non-existent body. In this case, since no Election Commission has been created pursuant to constitutional procedures, the Election Commissioner cannot chair the Election Commission.

After this Council’s initial ruling to reinstate these candidates on Tuesday, Election Commissioner Kish made the argument that he is the Election Commission; however, he never made this argument beforehand. When asked in an interview whether he had proposed an Election Commission, he responded that he had not. In addition, he did not follow the relevant procedure for “propos[ing] an Election Commission for approval to the Senate by a majority vote of the officers present.” (Constitution Article VII, Section 1, Part b, Subpart 3). Therefore, whether or not he can serve as the Election Commission, he did not follow the procedures for forming an Election Commission and cannot exercise the powers of the Election Commission, which includes the power to enact a penalty for election rules violations.

Part II: Election Commissioner Rationale

Finally, Election Commissioner Kish’s rationale for disqualification was incoherent and internally inconsistent. While it is not the role of this Council to question a reasonable interpretation, we must reverse a capricious or arbitrary ruling whose basis in the Election Packet rules is questionable.

As reflected in the Facts of this case, Kish’s stated rationale for disqualifying these candidates was that their actions constituted an attempt to discredit Adams. He did not claim that their actions were fraudulent or incriminatory and said that their actions circumvented the election insofar as they were an attempt to discredit Adams. In an interview with this Council, he initially reiterated these comments, stating that their conduct was neither deceptive nor fraudulent.

Yet Kish then claimed that there would be no violation if a candidate posted the comments on their Facebook page and stated that they do not like the comments, or something of that nature. The difference with this case, he said, was that the comments circumvented the spirit of the election.

After these statements, Kish then stated that Hamernik’s actions were deceptive (which falls under fraudulent), although he said Card’s actions were not.
These are just a sampling of the mercurial statements that Kish made in stating his rationale for disqualifying Hamernik and Card, and they make clear that any rationale is not clearly rooted in the Election Packet rules, even if they were valid. Candidates cannot be disqualified without a clear violation of Election Packet rules.