

Dissenting Opinion

in RB 315-002, *Kennedy-Shaffer v. SBA et al.*

October 7, 2007

Introduction

In *Kennedy-Shaffer v. SBA et al.*, the majority of the Review Board opined that the Constitution of the Student Assembly allows for the appointment of Graduate Senators by their respective schools. We believe that a careful examination of the Constitution reveals the majority opinion to be either dangerously incomplete or incorrect. Of the two, we suspect that the majority opinion is incorrect.

The wording of the Constitution itself is not in dispute, and the sundry exhibits introduced in this case must by necessity be considered of secondary importance to the Constitution. The Petitioner's and Respondent's claims may be each summarized in a single sentence. The Petitioner asserts that the governing Constitutional article in the selection of Graduate senators is one of two synonymous articles, either Article I-I.II or Article V-III.I, and that by consequence such senators must be selected by direct popular election. The Respondents in this case assert that Article V-III.IV of the Constitution governs the selection of Graduate senators, and that the Graduate schools are thus able to appoint Senators directly.

We believe that a reading of the Constitution may only be judged to be 'plain' and 'reasonable' or 'obscure' and 'unreasonable' by comparison to other readings. It is in this spirit that we restate, and elaborate on, the readings suggested both by the Petitioner and by the Respondent here before we explain our conclusions further.

The Petitioner's Reading

The Petitioner believes that the tendency of the language of the Constitution is to support elections. He holds that Article I-I.II and Article V-III.I, which call for the election of Senators by direct popular vote, fundamentally govern the selection of Graduate Senators. He further asserts that Article V-III.IV does not act to exempt the graduate schools from the requirements to elected Senators.

Neither the reading of Article I-I.II nor the reading of Article V-III.I can be disputed easily. The reading of Article V-III.IV, however, can be subject to some scrutiny. Since its exact wording is critical, Article V-III.IV has been reproduced below:

Graduate Senators shall be sent, and Graduate School Officers chosen, as the Graduate Council shall designate, provided that Senators and Officers are selected no later than the last Tuesday of the following September.

Two phrases in this paragraph might seem to grant the Graduate Council leeway to allow selection of Senators by means other than direct popular election; it states that, "Graduate Senators shall be sent... as the Graduate Council shall designate" and that, "[Graduate] Senators... are selected." Both of these phrases are far more permissive than those that require elections, as it is clearly possible for the Graduate Council to *designate* that Senators be appointed and for graduate schools to *select* Senators by appointment; this, in fact, is the current state of affairs.

The Petitioner asserts instead that Article V-III.IV does not override the election of Senators, but that it does grant the Graduate Council autonomy in the management of its member schools' elections. Under this interpretation, it grants the ability to set the

dates, times, and methods of elections; and it exempts graduate schools elections entirely from oversight by the Elections Commission.

This reading of Article V-III.IV was discussed to a minimal extent at the hearing, and the primary textual support for it was never mentioned; we will expand upon it here. The article is already read in this context with respect to the selection of Graduate School Officers, although it uses similarly broad language to describe the powers that the Graduate Council has over their selection. The article states that, "... Graduate School Officers [shall be] chosen... as the Graduate Council shall designate" and that, "[Graduate School] Officers are selected."

Reading Article V-III.IV in this way with respect to the selection of Graduate School Officers is required to avoid a contradiction with Article I-V.II, which requires that "[e]ach Graduate School shall *elect* a President, Vice President, Treasurer, Secretary and other such representatives." These clauses both refer to graduate schools specifically, so it is unreasonable to claim that Article V-III.IV overrides Article I-V.II; the only way to avoid a contradiction is to accept that the power of the Graduate Council to designate how Graduate School Officers are chosen is restricted to defining administrative details of elections. It is in this light that the Petitioner's argument suggests that Article V-III.IV be viewed with respect to the selection of Senators as well.

The Respondent's Reading

The Respondent argues that Article V-III.IV of the Constitution allows for appointment of Graduate Senators. They state, correctly, that it is the only specific mention of Graduate Senators (as opposed to all Senators collectively, or other groups of Senators) in the Constitution, and argue that as a consequence of this specificity the

language of Article V-III.IV governs supremely the method of selection of Graduate Senators *vis-à-vis* all other references to the selection of Senators in the Constitution.

The Respondent, like the Petitioner, does not consider the interaction of Article V-III.IV with Article I-V.II. The only natural way to extend the Respondent's argument to the interaction between these two articles is to claim that Article V-III.IV allows for the appointment of Graduate Senators but does not contradict the election of Graduate School Officers. We will not consider the specific sentence parsing that could permit this reading of Article V-III.IV until later; for now, it is sufficient to note that it requires the use of at least one double entendre.

The Respondent supports this reading with an extensive discussion of original intent, provided by Dave Solimini over e-mail. In this discussion, Mr. Solimini asserts that Article V-III.IV specifically provides graduate schools autonomy in the selection of Graduate Senators. He further asserts that the Constitution was designed to allow graduate schools to, "figure [their] shit out and send [the Senate] reps," and that the Respondent's reading of the Constitution is consistent with this original intent

Our View on These Readings

We agree with the Petitioner's reading in this case, and hold that the Constitution requires Graduate Senators to be selected by direct popular elections. We think that the Petitioner's reading of the Constitution, which allows the disputed passages to be read without any conflict to each other, is fundamentally superior to the Respondent's reading which asserts a conflict and then attempts to resolve it. In particular, we are inclined to see the relationship of Article V-III.IV to Article I-I.II in the same way as we see the relationship of Article V-III.IV to Article I-V.II. We believe that the reference to

“selection” no more contradicts Constitutionally mandated elections of Graduate Senators than does the same reference to “selection” with respect to Constitutionally mandated elections of Graduate School Officers.

Article V-III.IV makes no sense in the broader Constitution if viewed as a granting of appointment powers for Graduate Senators. It does, however, make a great deal of sense when viewed as granting the Graduate Council the ability to set the dates, times, and methods of their own member schools’ elections. It would also seem to exempt graduate schools elections entirely from oversight by the Elections Commission. It gives the Graduate Council dramatic powers, but not the powers that the Respondents assert.

The respondent’s argument on the use of language is suspect. In particular, we consider the word “Senators” as an abbreviation equivalent to, “Undergraduate Senators and Graduate Senators.” The Constitution was written, proofed, and ratified mostly by students trained to use one word in place of five, when the meaning was substantially the same. And it was written mostly by students who lacked formal training in legal principles. We believe that the distinction between general references to Senators and specific references to Graduate Senators is unreasonable in this context, and that this inferred meaning leads the Respondent to err in their reading.

On Inferences of Intent

The original intent arguments of Mr. Solimini deserve some further consideration. His first argument, on the behavior of graduate schools, is the most reasonable argument he gives. Since the graduate schools have appointed Senators at all times since their

ratification of the Constitution, it seems reasonable to claim that they intended to do so when they ratified the Constitution.

He also argues that graduate schools are omitted from multiple requirements that bind undergraduates, and that these omissions indicate an intent to provide flexibility; that “[n]ot explicitly telling the grads how to select their senators was clearly intentional” These omissions are cited to suggest the lack of a requirement to hold elections to select Graduate Senators. Such a line of argumentation is logically fallacious; an absence of evidence is not evidence of absence.

Mr. Solimini places special emphasis on the omission of procedures for Graduate Senator elections. This emphasis is misplaced and misleading. A seemingly similar omission of procedures for Graduate School Officer elections occurs in the context of an explicit requirement for elections provided by Article I-V.II. It is markedly more reasonable to find that the procedures for holding such elections are subsumed in the delegation of authority over those elections to the Graduate Council in Article V-III.IV, than to suggest that the absence of elections procedures indicates a lack of requirement for elections.

His assertion that the omission of procedures for the selection of Graduate Senator replacements also suggests the lack of a requirement to hold elections for Graduate Senators is similarly flawed. It too is an argument from absence of evidence. Furthermore, the procedures for mid-season replacements of officials given in Article V-II are in any event unrelated to the normal method by which such officials are selected. Even the seats of Undergraduate senators, who are subject to elections, may be filled by appointment under sufficiently extenuating circumstances.

Overall, we hold that the current language of the Constitution fails to realize Mr. Solimini's stated original intent, and that the language must prevail over an after-the-fact statement of intent.

The Failure of SB 315-011 Is Not a Precedent

The Petitioner and Respondent both referenced briefly an Act introduced in the current Senate: SB 315-011, "The Law School / Graduate Student Government Reform Act" by Will Coggin. The failure of this act is cited in the current version majority opinion as a precedent in this case. This is history, but it is not a precedent. The Senate is not competent to determine what the Constitution means; only the Review Board is.

When the Petitioner came before the Review Board, he asked a question about what the Constitution already said and what it means. He did not propose to subject the graduate schools to the Elections Commission, either in his brief or during oral arguments. The Review Board should not avoid handling a matter because of overlaps with the "Whereas" sections of a bill that the Senate considered last year. We would be doing our jobs by finding that the Constitution already requires elections.

Philosophical Difficulties with the Respondent's Argument

During the hearing, the Respondent offered several arguments contrary to our views on the Student Assembly. We feel that it is important, and in the interest of mutual understanding, to repeat these arguments here and highlight how they differ from our views. A claim that appointment is "more representative" than elections is foremost among these. We view the Student Assembly as having an inherently democratic basis. Given a choice between elections, which directly ask students what they want, and

appointments, which asks leaders what they think students want, we believe that elections will inherently produce closer alignment with student interests than appointments.

Appointment is always more convenient than election. But the only way that someone can support a claim to make appointments that are more representative than elections is to claim that they know student interests better than the interested students themselves do.

Also, it is not the student body's job to ensure its representation in the Student Assembly; it is the job of the Student Assembly to ensure that it is representative of the student body. Andrew Jones discussed several issues that face the Graduate Arts & Sciences government, including abysmal elections turnout [20 voters out of a school of several hundred], and difficulty in getting students to run in elections; they are serious problems indeed. But they will not be resolved by appointing officers. They are a call to improve interest in the GSA and improve the turnout of elections.

The appeals to graduate school "autonomy" as an unqualified good are deeply flawed in light of these previously given arguments. This autonomy is currently being used to hedge out student participation in student government. If administrative autonomy is more important to the current Graduate student governments than providing democratic representation to students, then there is a truly deep divide between the way they interpret their responsibilities, and the way we interpret ours.

We must also remember that Senators are advocates as well as accountants. The Student Assembly is effective in advocacy on behalf of students in direct proportion to its ability to speak for and to lead students in activism. The appointment of Senators does not increase, and almost certainly decreases, the ability of the Student Assembly to speak for students.

Keeping Our Promises

The Constitution of the Student Assembly and the Code of the Student Assembly represent promises to students. When the Student Assembly fails to follow them, and breaks its promises, it becomes that much less effective. We, on the Review Board, are supposed to help the Student Assembly keep its promises. Our goal is not to make the Student Assembly run with perfect efficiency, but to make it run with perfect honesty; and when we cannot tell what the correct action is, we should err on the side of students instead of the Student Assembly.

The Review Board has a long history of siding with the Student Assembly instead of with students. We stopped Nathan Miller and Michelle Tresseler from running for the Presidency for a missed deadline on a form, even though their mistake posed no jeopardy to the elections. We denied Student Legal Services funding that the Senate gave them, allowing the then-current President to veto a spending bill without communicating with the Chair of the Senate as required by Article I-II.II of the Constitution.

And we are repeating this history. We ignored the clear promise made to students in Article I-I.II, which states, “The Senate shall be composed of members chosen in election every year by the students of the College,” in favor of a weak technicality and the sorry *status quo*. We may not be able to be popular, but we are always able to keep our promises. We have forgotten lessons that we should have learned in kindergarten.

A Note of Caution

Even accepting the Respondent’s arguments wholesale, one must note that there is no mention of “appointment” in Article V-III.IV. The current majority opinion of the

Review Board maintains that this article governs the selection of Graduate Senators outright, and overrides any discussion of election or selection not specific to Graduate Senators. In doing so, the Review Board should note that it is allowing much more than simple appointment. It is allowing the Graduate Council free reign of its whims, as to what it “shall designate” as the method of selecting Senators. The Review Board cannot allow appointment, and disallow other methods of selection of Graduate Senators, without inventing Constitutional requirements from whole cloth. In this way, the majority opinion is dangerously incomplete.

More distressingly, the requirement that a potential Senate member be a student in good standing is applied in a nonspecific section on elections. The Graduate Council, under the current ruling, has a very strong case to claim that its member schools can ignore this requirement because of Article V-III.IV. Undergraduate Senators would be at a serious disadvantage arguing against a Professor of Law or a Dean of a graduate school.

Conclusion

We believe that the Constitution as written does not support the appointment of Graduate Senators as a primary means of filling such offices, and that the Petitioner’s argument is predominantly correct. Although Graduate Senators have been chosen by appointment for four years now, and they have by and large represented the interests of their constituencies effectively in the Senate, the expediency of such appointments provides no excuse to disregard their unconstitutionality.

That said, we do not support the removal of graduate Senators from their seats. We believe that the current graduate Senators should be able to finish their terms, and the Constitution should be amended to resolve the disputes brought in this case. Either an

amendment mandating elections, or an amendment clarifying the Graduate Council's ability to choose between elections or appointments to fill the seats of Graduate Senators, should be passed before the end of these Senators' terms. In any event the current language, which allows arbitrary and destructive practices, should be removed from the Constitution.

Signed,

William Angley

[1 anonymous]