

JUDICIARY of the DUKE STUDENT GOVERNMENT

Scharff v. Markis



Office of the Justices

Docket No. 00025

Case No. 25

Filed on:

February 12th, 2020

Reviewed on:

February 13th, 2020

Dismissed on:

February 14th, 2020

Overview

On February 12th 2020, Jason Felix Scharff, a member of Duke's Undergraduate Student Body, filed a petition with the Judiciary alleging the Attorney General, John Markis, violated the DSG Constitution and By-Laws by including issue framing statements in the email sent to the Undergraduate Student Body containing the link to the Instant Runoff Vote (IRV) for the 2020 Young Trustee Election. The Petitioner alleged the inclusion of statements related to the issues of "the cost of tuition" and "Duke's investment in fossil fuel industries" may have primed voters towards or against specific candidates. The Judiciary found that the actions of Attorney General Markis, while not in violation of the Duke Constitution or By-laws, overstepped the purview of the role of the Attorney General. The Judiciary had no opinion on the matter of priming, and the case was dismissed.

Parties

Parties of the Petitioner

Jason Felix Scharff, *Petitioner*

Parties of the Respondent

John Markis, Attorney General of Duke Student Government, *Respondent*

Held

The Judiciary finds that Attorney General Markis did not violate the Duke Constitution or By-laws when he included statements related to the issues of "the cost of tuition" and "Duke's investment in fossil fuel industries" within the email sent to the Undergraduate Student Body containing the link to the Instant Runoff Vote (IRV).

The complaint against Attorney General Markis is dismissed.

OPINION of the COURT

Chief Justice Georgia Lala delivered the opinion of the Judiciary.

Joined by

Associate Chief Justice Justice Marc Chmielewski

Associate Justice Vicki Qingning Zhang

Associate Justice William C. Brodner

Associate Justice Emma Coleman

Associate Justice Carlee Goldberg

Assisted by

Clerk Chitra Balakrishnan

Clerk Hanna Bigal

Clerk Weston Lindner

Clerk Jonathan Griffin

Clerk Sagan Singh

Note: Associate Justice Anjali Kunapaneni was absent.

Facts of the Case

On February 11th, 2020, Attorney General John Markis sent two emails to Duke's Undergraduate Student Body with a link to the Instant Runoff Vote (IRV) for the Young Trustee election. At around 12:10 PM, the Attorney General sent an email with the subject line "TEST Email for YT," and around 12:50 PM, "Young Trustees - Link to Vote." The two emails differed only in the subject line and formatting details. The poll was open from noon February 11th 2020 to noon February 12th 2020.

At 10:29 AM on February 12th 2020, Mr Scharff, a member of Duke's Undergraduate Student Body, filed a complaint with the Judiciary against

Attorney General Markis regarding the contents of the emails, specifically the inclusion of the following statements:

“The Young Trustee has an outsized impact on the direction of this institution, especially in terms of expenditures. The Young Trustee sits on the council which determines the cost of tuition as well as Duke’s investment in fossil fuel industries, so if these issues matter to you, voting offers the most time-efficient chance to be heard.”

The petitioner argued the inclusion of specific issues in the email, namely the “cost of tuition” and “Duke’s investment in fossil fuel industries” may have primed voters towards or against specific candidates. The petitioner requested an injunction on the release of the results and a repeat of the election using neutral wording after adequate time had been given to reduce the effect of priming.

At 12:56 PM on February 12th 2020, the Judiciary issued an injunction to withhold the release of the election results until 1:00 PM on February 14th 2020¹. The results were originally intended to be released at 1:30 PM on February 12th 2020.

Questions Raised

What is the role of the Attorney General in elections according to the DSG Constitution and By-Laws?

The first question raised considers the specific role of the Attorney General in elections. Article VI §2 of the Executive By-Law defines the role of the Attorney General to include the coordination of the Election Process in

¹ The Judiciary derives its power from the DSG Constitution. Article V grants the Judiciary the power of judicial review (§1) as well as the power to conduct investigations, subpoena evidence and witnesses, authorize the issuance of such writs as it shall require, and make all rules necessary and proper for the conduct of its business (§5.d). Injunctions are one such action used by the Judiciary to execute judicial review and conduct investigations.

consultation with the Vice President and President Pro Tempore. Title 1 §1 of the Election By-Law further defines the role of the Attorney General to be the primary officer responsible for the implementation and supervision of all DSG elections. Title 1 §10 tasks the Attorney General with the action of conducting the balloting procedure in cooperation with university administrators. Title 1 §10 provides little guidance regarding the electronic method through which the instant runoff voting (IRV) is disseminated.

Did Attorney General Markis violate the DSG Constitution or By-Laws?

The second question raised is if the Attorney General violated the DSG Constitution or By-laws by including statements related to the issues of “the cost of tuition” and “Duke’s investment in fossil fuel industries” within the email sent to the Undergraduate Student Body containing the link to the IRV.

From a procedural standpoint, the Judiciary finds that no violation of the DSG Constitution or By-laws occurred, as the statements themselves do not directly violate any procedural responsibilities assigned to the Attorney General. Instead, the statements at issue were additional commentary that Attorney General Markis chose to include of his own accord. In his petition, Scharff requested a new election as relief. However, Title 1 §10.3 of the Election By-Law provides that, “Further extensions, or rescheduling of the election, may be made only by the Judiciary, to remedy an otherwise irreparable breach of procedure...”. While Markis’s additional phrasing was unnecessary, his choice to include the statements does not rise to the level of an irreparable breach of procedure.

The Judiciary has no opinion on the allegation of priming made by the petitioner. It is possible that the inclusion of language relating to the “cost of tuition” and “Duke’s investment in fossil fuel industries” biased students as they cast their votes. Despite this, there is no feasible way for the Judiciary to determine the extent, if any, to which priming may have influenced voter behavior and finds no conclusive evidence for or against the claim.

Following the Judiciary's decision to not rule on the merits of priming, we also hold no opinion on whether Attorney General Markis' additional phrasing influenced the results of the election.

In refraining from issuing an opinion on the issue of priming, the Judiciary is conscious of the two legal arguments advanced by the petitioner. First, Scharff alleges that the Attorney General's email violates the Preamble to the DSG Constitution which states that the purpose of Duke Student Government is to allow students to engage in the "highest ideals of democratic representation." Second, Scharff alleges the Attorney General's email violated "equal protection under the law" which is guaranteed to students by Article IX, §5 of the DSG Constitution.

The Judiciary dismisses Scharff's first argument as it does not consider the Preamble to the DSG Constitution to be justiciable law. Previously, the United States Supreme Court declined to consider litigation deriving from the Preamble to the United States Constitution (see *Jacobson v. Massachusetts*, 1905). Like the Preamble to the United States Constitution, the Preamble to the DSG Constitution is a general statement of purpose. To apply its broad, aspirational statements to specific cases is an exercise that should only be carried out if there is a strong indication that the framers of the DSG Constitution intended to depart from the established historical precedent of the non-justiciability of constitutional preambles.

The Judiciary also dismisses Scharff's second argument as it finds the facts of this case do not implicate equal protection. In context, Article IX, §5 of the DSG Constitution seeks to prevent "discrimination on the basis of" a host of distinctions. The closest this court has come to deciding a case on an equal protection clause argument is Justice Fuchs's dissent in *Silk v. DSG*, in which he perceived an equal protection violation as to an enumerated distinction of Article IX §6: socioeconomic status. While Article IX §6 does state that the enumeration of some distinctions "shall not be construed to condone other equal protection violations," the Judiciary is not prepared to

extend consideration of the equal protection clause to conduct this far removed from distinction-based discrimination.

Recommendations by the Judiciary

The Judiciary found no evidence that Attorney General Markis violated the DSG Constitution or By-Laws through the inclusion of issue-framing statements within the email sent to the Undergraduate Student Body containing the link to the IRV. However, the Judiciary found Attorney General Markis' conduct to overstep the purview of his role. The Constitution and By-Laws are clear: the role of the Attorney General in elections is to coordinate, implement and supervise elections. Nowhere does it state the Attorney General should highlight, advocate for, or communicate specific issues to the Undergraduate Student Body.

It is entirely possible students were led to believe that the issues of “the cost of tuition” and “Duke’s investment in fossil fuel industries” were more salient than others due to their inclusion in the Attorney General’s email, and students voted with this biased understanding. This becomes particularly problematic should a Young Trustee candidate have mentioned either issue during their campaign. However, there is simply no way for the Judiciary to quantify what effect, if any, the additional content may have had on the outcome of the 2020 Young Trustee election. It is also beyond the capability of the Judiciary to review all material, speeches and social media posts by Young Trustee candidates to confirm or deny if any candidates vocalized their stance regarding the two named issues. Any further decisions relating to the Attorney General’s conduct lie in the hands of the Senate.

Moving forward, to avoid the risk of misleading voters or introducing bias into future elections, the Judiciary recommends that the Attorney General avoid making comments on specific issues relevant to the election cycle. This can include references to individual candidates, the theme of their campaigns, individual policy issues considered by the Board of Trustees, or

any other information related to the election that the Attorney General is not explicitly required to provide to students under the Election By-Law, relevant Election Rules and Procedures passed by the Senate, or other governing documents of the Duke Student Government.

It comes as no surprise to the Judiciary that the Election Rules and Procedures established by the Statute of Duke Student Government for 2020 describe where the responsibility of the Attorney General begins but fail to delineate where it must end, given that the Statute was introduced to Senate by Attorney General Markis himself. As it stands, the 2020 Statute provides the Attorney General considerable leeway by not specifying any relevant prohibitions that shall constrain the rights and duties of the Attorney General. The Judiciary recommends such consideration for future legislative work.

Conclusion

The Judiciary found that the actions of Attorney General Markis, while not in violation of the Duke Constitution or By-laws, overstepped the purview of the role of the Attorney General. The Judiciary had no opinion on the matter of priming.

It is so ordered.