

**JUDICIAL COUNCIL OF THE ASSOCIATED STUDENTS
OF THE UNIVERSITY OF NEVADA**

ANDERSON v. ENTSMINGER

Filed November 05, 2008
Decided December 12, 2008

DIRECT JUDGMENT OF THE JUDICIAL COUNCIL OF THE ASSOCIATED
STUDENTS OF THE UNIVERSITY OF NEVADA

CHIEF JUSTICE KAUFMAN and JUSTICE NIKKEL, writing for the unanimous opinion of the Council...

Plaintiff alleges that Mr. Entsminger violated the ASUN Constitution in his creation of SOAR (Student Organizations as Academic Resources). Plaintiff's charge argues that the Director of Clubs and Organizations lacks statutory or constitutional authority to create such a program.

Plaintiff's argument rests on two assumptions. The first is that the President lacks the constitutional authority to issue directives. If accepted, the second assumption – that the only constitutional avenue for the creation of SOAR is through the Senate – follows logically. However, as the first assumption is without merit, the second assumption cannot be accepted either.

Plaintiff has based his argument on the fact that the President's constitutional powers are limited to those contained in Article III, Section 2, Clause (g), "The President shall take care that the laws be faithfully executed." Plaintiff points out that no law exists concerning SOAR; therefore, Presidential action pertaining to SOAR would be outside his constitutional power. However, Plaintiff ignores the vesting clause of Article III, Section 1, and "The executive power of the Association shall be vested in a President of the Associated Students." The constitutional conception of the phrase "executive power" is not limited to a strict execution of clauses contained in statutes, but also includes the direction of executive officers. Therefore, "executive

power” also includes executive directives when those directives are targeted towards aiding in the realization of statutory objectives on the part of executive officers.

Consequently, it would be within the executive power to create SOAR if SOAR falls within the objectives that the Director of Clubs and Organizations. SB 75-10 outlines one of the missions of the Department of Clubs and Organizations as, “serv[ing] as a resource for Clubs and Organizations, and a clearinghouse for information” (Sec. 201 (b)(1)(C)). The executive directive from October 29, 2008 creates the “Organizing Committee of the Student Organizations as Academic Resources Initiative within the Department of Clubs and Organizations,” which is intended to, “(1) provide a forum and network for recognized student organizations with an interest in the Student Organizations as Academic Resources program; (2) develop a Plan of Organization, Plan of Action and Plan of Promotion related to the initiative; (3) work to organize the efforts and actions of students and student groups in developing and implementing the program; (4) evaluate periodically the success of the program.” However, nothing in this language provides for the creation of the SOAR program itself. This conclusion is supported by the “General Provisions” clause of the directive, which states, “This directive is intended only to promote the development and implementation of a peer-tutoring initiative by clubs and organizations. It is not intended to, and does not create any right or benefit, substantive or procedural, enforceable at law or in equity by a party against the ASUN, its departments, agencies, instrumentalities or entities, its officers or employees, or any other person.” These provisions remain in line with the mission statement of the Department of Clubs and Organizations and, as Director (who is tasked with the “direction, authority, and control” over the department) is the appropriate authority in which to vest the responsibilities of this directive.

The Judicial Council can find no fault with this directive, and it appears to be consistent with both constitutional and statutory restrictions on executive power. If or when the government decides to create SOAR, it will clearly have to be done by the Senate, not the President, nor the Director of Clubs and Organizations. However, the directive in question does not create SOAR. It creates an information clearinghouse for gauging the level of interest and logistical constraints that would have to be considered, and the best way to use the clubs and organizations of the university towards these ends.

The Judicial Council might treat this directive with more scrutiny if there was not evidence of intent on the Senate’s part to continue with the structure employed by President

Reilly. The evidence presented to the Council in the form of resolutions and testimony indicates that the Senate is attempting to work with the executive branch to create an organization that is realistic in its goals. Far from being retroactive authorization (which, in fact *is* a viable theory of presidential-legislative relations), this directive and its accompanying proposed resolutions indicate that the legislative and executive branches are taking a very practical approach to problem-solving within the government. The Council is willing to give them the most judicial latitude in doing this, as they appear to be acting within their constitutional authority for the best interests of the students.

As for the claim that such co-operation would violate some concept of separation of powers, the Judicial Council would like to stress that this separation is not absolute and *cannot* be if a government is to operate effectively. This “separation” is more of a semi-permeable membrane, intended to encourage co-operation on a policy basis between the branches while relying on the structural checks and balances enumerated in the constitution to ensure that no single branch usurps its authority over another. Such a usurpation does not exist in this case, so the separation of powers argument lacks support.

Therefore, the Council does not find Mr. Entsminger (nor Mr. Reilly, who issued the directive) in violation of the ASUN Constitution because a) SOAR does not exist yet, and b) the executive directive creating the Organizing Committee is within the President’s constitutional authority. However, the Council would like to stress that if plans to create SOAR as an organization proceed, they must be done on a legislative level.

It is so ordered.

CHIEF JUSTICE KAUFMAN and JUSTICE NIKKEL, joined by JUSTICE PALAFOX,
JUSTICE MALDONADO, and JUSTICE LEE.