

Opinion of the Court

**BRANDEIS UNIVERSITY STUDENT  
UNION JUDICIARY**

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Nos. 04-I-01  
04-01  
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IN RE LOBER

&

LOBER V. BRANDEIS UNIVERSITY  
UNDERGRADUATE STUDENT UNION

ON ARTICLES OF IMPEACHMENT FROM THE BRANDIES  
UNIVERSITY STUDENT UNION SENATE, AND ON WRIT OF  
CERTIORARI

[May 4<sup>th</sup>, 2004]

MR. JUSTICE DEWEY, delivered the opinion of the Court:

We have before us once more matters touching upon the protracted, and, most regrettably, seeming endless litigation, related to the Impeachment of Bryan Andrew Lober.<sup>1</sup> As the facts of this case have more than adequately

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<sup>1</sup>[Footnote of MR. JUSTICE DEWEY only.] It is alleged by MR. JUSTICE SAMBURG that I complicate proceedings to much, and he gives as an example my dissent in In Re Lober III, claiming my numerous citations and arguments were excessive. However, as MR. JUSTICE SAMBURG

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been set out elsewhere we shall not discuss them except as is necessary to the resolution of the specific questions before us.<sup>2</sup>

Currently, pending before us are the preliminary jurisdictional questions related to Mr. Lober's attempt to have his judgement of conviction in In Re Lober III rendered a nullity. These questions come before us: (1) on an application for leave to file a motion to set aside the verdict in the original impeachment case, and (2) on Certiorari in a civil suit for a Writ of Error Coram Nobis.<sup>3</sup> Additionally, we

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wells knows they were necessary to show the Majority utter eschewence of the principles that ought be followed by any body exercising "judicial power" S.U. Const. Art. IV § 1. The perfidy of his argument it apparent when he levels the charges I, "quot[ed] from archaic texts, obscure Supreme Court decisions, and even the bible" *post* at 4. As to the Bible I just find its language more eloquent in expressing certain feelings then others, I suppose however, in our godless society that even an acknowledgement of the Bible as a suburb literary work is passe. As to the "archaic texts" I only quote one old enough to be archaic, which is part of the Sequence in the Catholic Requiem mass. It follows then that MR. JUSTICE SAMBURG considers one of the highest rights of a large religious body upon campus to be "archaic". Finally, I don't think I cited to any "obscure" Supreme Court cases considering the vast majority of my citations were to cases considered seminal.

<sup>2</sup> See In Re Lober I at 2-4 (2004)(DEWEY, J., dissenting); In Re Lober II at 2-6 (DEWEY, J., concurring in judgement in part and dissenting in part); In Re Lober III at 5-8 (2004)(Statement of DEWEY, J.).

<sup>3</sup> Although this Writ is a motion on the case in contemporary practice that is the result of statutory intervention. Here the Writ is sought in its

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have before us a motion to dismiss all proceedings filed by the Union. See Mot. to Dis. (Doc. # 2). This jurisdictional question boils down to the simple of question of does this Court have the power to revisit a final judgement which it has handed down, whether upon motion upon the case or collateral review ? It has as a corollary the question of what restrictions should we place on this corrective power (which is equitable in its exercise though it sounds at law) to cause it to be exercised in a just and prudent manner. Specific questions to this end have been propounded to counsel and answer received in briefs and argument. See In Re Lober IV (2004); Brief for Lober (Doc. # 4).

**I.**

We start with setting forth fundamental principles as to what “jurisdiction” is taken to mean within our Constitutional system. As this matter is a question of jurisdiction, it is a question of power; does this Court have the power to hear this particular cause ? See Union v. Khots at 10-11 (DEWEY, J., joined by Mauer, J., concurring in judgement). The nature of an inquiry into a jurisdictional question has been most eloquently stated in a previous opinion in this case:

The Constitution clearly states we possess only “judicial power” S.U. Const. Art. IV § 1. Judicial power is, “ the authority vested in courts and

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original form, in which it would have issued out of Chancery. In this Court it shall issue in a separate civil suit.

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judges to hear and decide cases and to make binding judgement of them; the power to construe and apply the law when controversies arise over what has been done or not done under it.” BLACK’S LAW DICTIONARY, 851 (7<sup>th</sup> ed.) However, this power is clearly of a limited nature S.U. Const. Art. IV § 1 goes on to confine this power to a certain classes of cases. Such an enumeration must be construed in accordance with the established rule that when there is a detailed enumeration, all not enumerated is excluded. Thus, it is clear our Court is a Court of limited jurisdiction, that is to say power granted to us by the Constitution. The exercise of non-enumerated powers would be the issuance of an advisory opinion at best, a usurpation of others powers at worst. See, e.g., Hayburn’s Case, 2 U.S. (2 Dal.) 409 (1792); Muskrat v. United States, 219 U.S. 346 (1911). In determining a question of jurisdiction the court essentially ask the purely legal question does the court have the power in one of the constitutional enumerations of power to hear this case. No facts are involved; it is purely a legal question based upon the legal nature of the question before us and the text of the Constitution.

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In Re Lober II at 8-9 (2004)(DEWEY, J., concurring in judgement in part and dissenting in part).<sup>4</sup>

**II.****A.**

The first argument presented to our jurisdiction to rehear this case is in essence that as we had jurisdiction over the case in the first instance, we have jurisdiction over an application to set aside the judgement therein. However, this argument fails for the reasons advanced by the Union, namely that jurisdiction here is specifically pre-empted by S.U. Const. Art. IV § 10 which states, “All decisions of the Union Judiciary shall be final and binding”. This language cannot be plainer and we interpret the Constitution whenever possible by its plain textual meaning. See e.g. Balsam et. al. v. Union at 1 (2003) and Gorman v. Brandzel at 2 (2000). It follows that once a final judgement is rendered in a case, the case is closed; it cannot be opened even for the most rank of offenses against justice for we have not the power to do it.

However, it is not unknown to us to find certain classes of cases where that which purports to be a final judgement is in fact no judgement at all, and indeed might be found to have never existed. The only doctrine we know of along these lines (applicable here) is that which allows a

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<sup>4</sup> We feel a brief response it necessary to the Unions Argument that this Court should not even entertain this jurisdictional question. Thus we say as Mr. Justice Holmes sayeth: “[This Court] and it alone necessarily ha[s] jurisdiction to decide whether the case [is] properly before it.” United States v. Shipp, 203 U.S. 563 (1906)(Orig.).

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judgement to be set aside for fraud against the Court. We believe that no final judgement is entered where it was gained by an act of the prevailing party which by design and operation committed a fraud upon the Court. A party cannot benefit from its own fraud; one cannot gain from a perversion of the course of justice. Thus, should an allegation of fraud against the Court be made, we might assume jurisdiction over the case and re-open the case and find that no judgement was rendered by virtue of the fraud, and accordingly proceed to re-hear the case and enter judgement in the first instance. In other words we might find the judgment it is alleged is final to have never existed and thus avoid the jurisdictional limitations of S.U. Const. Art. IV § 10. In order for “fraud upon the court” to be proven, it must be shown that the prevailing party, acting willingly and knowingly, committed acts which had the effect of committing a fraud on the Court.<sup>5</sup> This doctrine, it should be noted is most certainly an exception to the general rule; a case might not be re-opened.<sup>6</sup>

**B.**

Applying this standard to the motion to re-open the case, the question becomes does Mr. Lober meet the standard

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<sup>5</sup> An example of such a situation, to take a classic case, would be where a party, knowing a witnesses’ testimony to be damaging to them, suborns perjury from that witness.

<sup>6</sup> However, we leave open for another day the argument whether or not this exception would apply if it should be alleged the Court lacked jurisdiction to enter the judgement it did.

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for leave to file a motion under In Re Lober Special Rule 6(b). Although the Court in Lober I was quite confusing as to the nature of this rule and we find no fixed statement upon the subject, we believe the Court in the main to have loosely applied the legal standard set out by Mr. Justice DEWEY, namely that the movant must:

“show that reasonable jurists could debate [the merits of the motion] or that the issues presented were ‘adequate to deserve encouragement to proceed further.’” Miller-El [v. Cockrell], 537 U.S. [322] at 337[(2003)](internal citations omitted). Thus, an application under 6(b) should not be denied merely because the Court believes it will ultimately deny the motion for which leave to file is being sought. While an applicant under Rule 6(b) must demonstrate, “‘something more than the absence of frivolity’ or the existence of mere ‘good faith’ of his part...a claim can be debatable even though every jurist of reason might agree, after...the [motion] has received its full consideration,” that the motion should be denied. Id. at 388.

In Re Lober I at 8-9 (DEWEY, J. dissenting). On the face of Mr. Lober’s application it is clear that fraud on the court is not alleged. Accordingly, under the law as we have set it out above, the application clearly must be denied. However, as the law on this point was most certainly not clear this denial is without prejudice.

**III.****A.**

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An additional ground under which Mr. Lober seeks jurisdiction is by bringing a suit for a Writ of Error Coram Nobis<sup>7</sup> against the Union to collaterally attack his judgement of conviction and its attendant consequences. The Union urges to that allow such a suit would violate the rule against final judgments, although it did not seem to dispute the notion that jurisdiction would lie to a dispute between the Union and a member of the Union under S.U. Const. Art. IV § 1 ¶ 6. To put it another way the Union appears to submit that although generally we would have jurisdiction in this case under S.U. Const Art. IV § 1 ¶ 6, jurisdiction would be limited in this instance by the mandate of S.U. Const. Art. IV § 10. The Union's submissions are in error. A collateral attack upon final judgements in criminal cases is as old as the common law. Here as Impeachment is a quasi-criminal case a collateral attack will lie; whether or not in the context of our constitutional system we would permit collateral attacks on civil judgements is something which we need not consider today as it is not necessary to the resolution of the case before us. The reason that a collateral attack does not fall afoul of S.U. Art. IV § 10 is due to its nature. When one makes a collateral attack the judgement in the original case is final and remains final for that case; the collateral case is simply an entire new proceeding. Even though a collateral

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<sup>7</sup> As noted in our Order In Re Lober IV, this Writ is essentially the "sister" of Habeas Corpus. See United States v. Morgan, 346 U.S. 502, 507(1952).

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attack might reverse the results of a previous case that judgement is still final. Indeed, in most American Courts one can only make a collateral attack upon a final judgement. To take an example let us suppose one is convicted in Massachusetts state court of buggery. One has alleged below that the buggery law is unconstitutional. He appeals to the Court of Appeals which affirms then the SJC which affirms. The Supreme Court denies certiorari. At that point his conviction is considered final by any court that looks to it. However, nothing is to prevent a Massachusetts Circuit Court from finding the act unconstitutional in another, completely independent, civil suit for habeas corpus, and ordering the prisoner released. In such a case although all effects of the conviction are voided the conviction in the original case is final.<sup>8</sup> Accordingly, given our jurisdiction over cases between the members of the Union and the Union, and the fact that S.U. Art. IV § 10 is no bar to collateral review of an impeachment, proceeding we find we have jurisdiction to consider the suit.<sup>9</sup>

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<sup>8</sup> In response to MR. JUSTICE SAMBURG's claims that this analogy is inapposite we would simply note that in Massachusetts, as in this Court, the Courts sit upon both criminal and civil causes, the distinction between the King's Bench and Common Pleas is dead in our country.

<sup>9</sup> The CHIEF JUSTICE asserts that we have erred in two respects, (1) in our reading of the Constitution, and (2) in our ignoring of the intent of the Constitution. However, both of these contentions are utterly baseless. As to the first point, although the CHIEF JUSTICE asserts we do not "tak[e] Article IV [§] 10... at face value" *post* at 1, the CHIEF JUSTICE

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does not contest the essential legal distinction between a collateral attack and a final judgement on direct review as he essentially admits that lawyers would concede our construction of the text based upon a plain legal reading to be correct. *post* at 1. As to his claim that we are assuming jurisdiction not enumerated, the opposite is true, we have cited to explicit jurisdiction, namely S.U. Const. Art. IV § 1 ¶ 6. Essentially the CHIEF JUSTICE's argument boils down to the following proposition: we ignore the Constitution and legislate from the bench when we ignore the intent surrounding it, which controls always over the plain text of the Constitution. As the CHIEF JUSTICE writes, "Instead of respecting the Constitution's purpose of making the Union Judiciary process as simple as possible, the majority is adding layers of complexity to the already convoluted process of a Union Judiciary case-which by all accounts was intended to be as simple as possible" *post* at 1. This argument is utterly fallacious and indeed represents a legal approach which, far from eschewing legislation from the bench, constitutes such legislation. It is a hornbook rule of construction that one begins by construing text according to its plain legal meaning. The plain meaning of the text will control unless it can be shown by compelling evidence, in the form of a legislative history, that the original understanding of the specific provision in question (not intent) was to the contrary. To hold otherwise would open our Constitution up to essentially represent nothing more than the opinions of Justices. Text is immutable and though at times complicating, holds limited meanings; intent upon other hand is eminently fungible to the personal preferences of individual justices. Indeed, the CHIEF JUSTICE does not cite to a signal piece of legislative history to support his sweeping propositions as to the intent of the Constitution, demonstrating the fungible nature of his argument. Indeed, his argument is infamous and constitutes the very "slippery slope" to judicial legislation which he supposedly admonishes. His opinion essentially embraces the notion that broad statements of intent might vitiate the explicit text of numerous portions of the Constitution; the general spirit of the law shall control its letter. Such an approach is the anti-thesis of judicial restraint, making the CHIEF JUSTICE's accusations that we have not adhered to a strict construction of the law laughable. See e.g. Lawrence v. Texas, 539 U.S. 558; 123 S.Ct. 2472, 2488-2498 (2003)(Scalia, J., dissenting); Romer v. Evans, 517 U.S. 620, 636-653

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However, this is not to say that we shall consider any suit seeking to collaterally attack a judgement. To do so would open the door to a plethora of utterly frivolous litigation. Rather we shall exercise our equitable discretion in issuing a Writ whose powers are equitable in nature to set

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(1996); Planned Parenthood v. Casey, 505 U.S. 833, 979-1002 (1992)(Scalia, J., dissenting).

MR. JUSTICE SAMBURG's submissions fall due to the same error, except in broader conception. He openly admits that, "The majority rightly points out that if this case is examined from a lawyer's perspective, the process they have constructed falls well within the provisions of the Constitution" *post* at 5, which would seem to make peculiar his arguments that we are ignoring the Constitution and legislating from the bench. Instead he seems to argue that simplicity will take precedence over all else, and this "intent" (supported again with no citation), will allow him to ignore the clear wording of the Constitution. If this is not a prescription for unbridled judicial power we know not what is. Contrary to MR. JUSTICE SAMBURG's assertions WE ARE a court, as discussed, *infra*, **IIA**, the Constitution grants us powers only judicial in nature. Of course, it must be admitted that to resolve disputes above all else before the pagan idol of simplicity is not new to our history, indeed in the time of Henry VIII such a court was fully envisioned, The Court of the Star Chamber. The fact of the matter is we would presume by proscribing our powers as judicial in nature the framers preferred to have a Court with its attendant complexity then a Star Chamber. We would rather model ourselves after a Mr. Justice Holmes, then a Lord Chief Justice Jefferies; we have already had one "bloody assize" (See In Re Lober III (2004)(Dewey, J., dissenting), and if there is a God in heaven we shall have not another.

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certain constraints on the situations in which a judgement might be collaterally attacked. In so determining on the one hand we have the interest of not seeing a patently unjust judgement remain in force, on the other the prospect of nothing being settled and our Court open to a perpetual circle of litigation. Weighty considerations set the best rule as a clear adherence to regularity and order in our administration of law. For a through examination of these rules and principles See In Re Lober III at 39-43 (2004)(Statement of DEWEY, J.).

Accordingly, it seems to us that we ought not allow collateral attacks upon alleged errors of law or the alleged erroneous findings of facts upon the record before the original Court, but only upon claims of new evidence. An attack upon an error of law (or alleged erroneous factual finding) essentially requests a new UJ to review *vel-non* the conclusions of the old, which given the constant change in its composition, would produce an unseemly results inimical to the consistency which justice and the rule of law demands. A student might attack a conclusion of law or fact rendered in his Freshman year for three years subsequent hoping to essentially “forum shop”. However, a collateral attack based upon the discovery of new evidence is entirely different if made within the constraints discussed below. There the allegations are that new evidence has come about which the previous Court did not consider, and as discussed below, it is presented for consideration in light of the old Courts decision. Thus, the inquiry upon collateral attack citing new evidence would not present the unseemly aspect of reviewing a decision of the previous Court *vel-non*, but rather would consider what is, much simplified, the question: what would

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the prior Court have done had they the new evidence before them ? Thus, we hold that the substantial interests of justice in not allowing a conviction based upon faulty evidence to stand outweigh the minimal threat to finality in allowing a collateral attack based upon new evidence.

In addition pursuant to our powers to set essentially equitable rules governing the issuance of the Writ of Error Coram Nobis, we shall impose certain rules to regulate such attacks, namely those imposed by most Courts upon collateral attacks to prevent the specter of abuse by forum shopping or delay in the form of frivolous appeals. Namely we shall require a petitioner claiming new evidence to demonstrate: (1) good cause as to why that evidence was not raised at trial, (2) prejudice to his case by the failure to raise that evidence, and (3) that the substantial interests of justice are in his favor. If all three factors are demonstrated the petitioner might have a hearing upon the merits of his request for a Writ. Of course within this hearing upon the merits, the facts of the case would then be tried *vel-non* under the controlling law as set down by the Court within its opinion upon the proceeding in which the underlying facts are challenged.<sup>10</sup> In the interests of clarity we shall elaborate upon each factor *seriatim*.

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<sup>10</sup> In making such a holding we leave open the question of whether or not these factors might be dispensed with if a showing of complete and total actual innocence is made by an introduction of new facts. See e.g. Dretke v. Haley, 541 U.S. \_\_\_ (slip op.)(2004).

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The first area of abuse with which we are concerned, the Union rightly identified as the potential for a party to hold back points of evidence hoping to prevail none the less, but hoping that by holding back four or five substantial pieces of evidence, they might obtain a re-trial four or five times under the pretenses of the discovery or new evidence, so as to “forum shop”. Accordingly, we hold that in order for a collateral attack on “new evidence” to lie good cause must be shown to why that evidence was not raised in the original proceeding.<sup>11</sup> Generally speaking the test is: that a reasonably prudent attorney would not have discovered the evidence through a reasonable investigation of in preparation for trial.

The second area of abuse which concerns us is the filing of frivolous appeals, namely those appeals in which although good cause is shown as to why the alleged “new evidence” was not recovered, the petitioner would have received no benefit from the possession of such evidence at trial. Accordingly, if good cause is show it must be further shown that the Petitioner was prejudiced by not having this evidence. That is to say the petitioner must demonstrate how the lack thereof caused specific and concrete harm to his case. Moreover, as this Court will not entertain collateral attacks upon the law, such harm must be shown within the context of the law applied to that factual proceeding. That is

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<sup>11</sup> Good cause if of course a term of legal art, and is used in this context as such.

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to say in the context of an impeachment trial, the prejudice from a lack of evidence at trial, must be shown under the law as construed at the trial phase by the old Court.

Finally, we are aware that situations might arise in which even though the forgoing factors are met the Petitioners guilt is so apparent upon the face of the record that justice demands denying him collateral relief. While normally the interests of justice militate in the granting of the Writ if un-defaulted new evidence is discovered-the absence of which prejudiced the Petitioner's case-if it can be shown that even with the new evidence no reasonable person would have acquitted the petitioner, the interests of justice weigh in favor of finality, as a re-trial it follows would invariably result in conviction, and would consequently be waste of time.

**B.**

As upon the face of the petition for Certiorari the petitioner has demonstrated none of the factors listed above to our satisfaction, further proceedings by Certiorari are denied, without prejudice to the filing of a Certiorari petition in accordance with the law as set out in this opinion.

LEAVE TO FILE DENIED WITHOUT PREJUDICE  
PETITION FOR CERTIORARI DENIED  
WITHOUT PREJUDICE

*It is so ordered.*

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[May 4<sup>th</sup>, 2004]

MR. JUSTICE KURTZBERG, concurring:

Although I agree in entirety with the decision issued.  
I, however, write separately for clarity's sake.<sup>1</sup>

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<sup>1</sup> Therefore, I encourage all Justices to remember this is a student run court, not the Supreme Court of the United States, and should refrain from Latin when it is possible.

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The case before the Union Judiciary, begs two questions:

- 1) Can the Union Judiciary re-open former UJ cases? and
- 2) Can individuals convicted in Union Judiciary proceedings “collaterally attack” their convictions in the Union Judiciary?

One thing is clear: it does not fall within our Constitutional powers to re-open former proceedings: Article 4, Section 10 of the Brandeis University Undergraduate Student Union Constitution clearly states that “[a]ll decisions of the Union Judiciary shall be final and binding.” Accordingly, the former Union Judiciary’s opinion in *In Re Lober* is the ultimate determination by this court.<sup>2</sup>

The fact that the decision in *In Re Lober* is the end-point, however, does not mean the decision can be disputed. As Mr. Lober rightly points out, a decision based on incorrect evidence, is a decision that should have its validity questioned. Thus, if a carefully designed test is applied, the original decision can be invalidated by a **new** proceeding. The defendant may only initiate this procedure, for if the plaintiff did so, it would violate double jeopardy.

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<sup>2</sup> As a personal aside, I am tempted to interpret this constitutional provision as one created to ensure separation of powers. What this means is that the Senate cannot overrule a UJ decision without an amendment, not that the UJ itself cannot correct any possible wrongs within its jurisdiction. Once again, the majority does not say there was anything wrong about the decision *In Re Lober*.

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In order for such an attack to be granted, there must have been an instance of perjury or false evidence at the trial, or another misrepresentation of *fact*, and the following must be demonstrated:

1. The party bringing the appeal must provide a substantial reason why the evidence was not recognized by that party at the trial.
2. The party bringing the appeal must show the faulty evidence or testimony was **essential** to the verdict. The appellee must show that if the newly found evidence was factored in, the original decision would have been different.
3. The party bringing the appeal must demonstrate such a procedure favors the interests of justice and fairness.

One may initiate an entirely new UJ proceeding against the Union as a whole, alleging that a factual error meets the test above. Should the UJ find in that subsequent hearing that the new evidence would have been adequate to turn the decision, the original decision of conviction will be void, and stricken from Union records.

Although the Student Union Constitution does not explicitly provide for such a process, Article 4, Section 1, Clause 7 does give the Union Judiciary the power to rule “[o]n the constitutionality of any Union Government decision, or action.” Also, the preamble to the Student Union Constitution declares the Student government has a whole must, “protect the individual... rights of students.” Any decision that denies a student of his right to a fair and honest

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trial, even accidentally, is a decision whose constitutionality is inherently questionable.

Thus, it is true that the action taken today is not explicitly enumerated in the Student Union Constitution. However, it is also not forbidden. What if the (real) Supreme Court took the same view the dissenters are taking today, and never ruled there is a “right to privacy” in *Griswold v Conneticut*? I believe the Student Union Constitution includes within it the fundamental right, as recognized by the Bill of Rights, to procedural due process (i.e. fair trial). Indeed, the United States Constitution does not stop at Brandeis’ main gates.

The dissents have very good arguments, but I would like to side in the error of caution, and guarantee one’s day in court. It is ridiculous to read into the Student Union Constitution hostility towards the opportunity to reopen a case. I am not saying Mr. Lober can pass the test laid out; but, Mr. Lober deserves the right to try. As a member of the majority, I do not believe we are creating a right in this case. Instead, the issues of justice and fairness require a right that has never been recognized to come into fruition. There is no precedent to this case. There has not been an impeachment in the Brandeis University Student Union for the first 60 years of the school’s existence. This action, unlike any taken by the Court before, will affect a student body member’s future in a substantial way. Mr. Lober has the right to persuade us that his verdict was based on fraudulent testimony.

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This decision, therefore, does not make the system more complicated. Indeed, next semester, this court will issue, for the first time, an online form to write petitions for the *writ of certiorari*. The only person who has the right to complain about the complexity of the system is Mr. Lober, and he is the one who started this process, and does not have to re-open the case, if he finds the process meaningless.

I concur in totality with the judgment issued by the majority of this court.

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[May 4<sup>th</sup>, 2004]

THE CHIEF JUSTICE dissenting:

The majority ruled that a party can “collaterally”, read: indirectly, attack a decision of the Union Judiciary for an indeterminate amount of time. They are in fact employing a lawyer’s trick that has no place in the Student Union Judicial process. Basically, they are leaving the door wide open for appeals of old Union Judiciary rulings for as long as the harm of those rulings can be rectifiable.

The majority does not have the right to subvert the Constitution through such a play on words. Instead of setting clear precedent in support of the Constitution, they are

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issuing a ruling that will just complicate matters. Instead of respecting the Constitution's purpose of making the Union Judiciary process as simple as possible, the majority is adding layers of complexity to the already convoluted process of a Union Judiciary case—which by all accounts was intended to be as simple as possible. It's as if the majority wants to make the Union Judiciary a meaningless body; one that is ignored by all other branches of the Union and not used to help resolve conflicts in the Union or between students.

It's as if the majority is saying in their ruling, "we are not creating our own jurisdiction, we are just finding it." If what they are saying is so evident in the constitution, why haven't previous Union Judiciaries applied it? The answer is simple. The previous Union Judiciary's were basing all their rulings on the Brandeis Student Union Constitution and its intentions and not any outside authority or legal trickery that the current Justices thought of.

By not taking Article IV section 10 of the Union Constitution at face value, which clearly states that "all decisions of the Union Judiciary shall be final and binding," the UJ is creating a process that can in essence unbind any decision. **Instead of interpreting the written words in the constitution, the court is extrapolating something that is not there.** They have created an appeals process, one not enumerated anywhere, of old Union Judiciary decisions that will add uncertainty to any decision and question the finality of them. This ruling subverts all previous Union Judiciary decisions by opening them to "collateral" attacks.

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The majority opinion does set good standards under which a review may reasonably be conducted. However, the court has no right to create its own power—which it does in this case. It’s up to the students to give the court this power and the students, through the constitution, have not. Such sweeping changes should only be done in the form of a constitutional amendment and **not** through legislating from the bench by **three** Justices. *Let me repeat: such a process should be created through constitutional amendments and not through an activist reading of the constitution.*

If an appeals process is clearly enumerated in the constitution, then all students will be able to follow a process that is fair, however by imposing this process through a decision such as this, there is no guarantee of the consistency of the process. Even though this decisions limits appeals to only matters of fact, *this* court cannot guarantee that a future Union Judiciary loosen the requirement even further to a matter of law; thus, even opening up today’s decision to being overruled.

The majority claims that this in fact preserves the finality of the previous decision by issuing another ruling annulling the first decision’s power. This is a fallacy. Any new decision that nullifies an old one is creating a severe contradiction. How can two **binding** decisions be contradictory—one issuing a ruling and another saying not to follow that ruling? This makes a mockery of the Union Judiciary and violates the constitution’s assertion that all decisions are “final and binding.” If a decision is later contradicted or reversed, it is thus not final, and definitely not binding as its effects will be undone—unbound.

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There seems to be an implicit claim in the majority decision that any power not explicitly granted (or denied) to the Union Judiciary (or any other government body) by the constitution is in fact reserved by the Union Judiciary (or that government body). By following this logic, the Union Judiciary is establishing this new appeals process of “collateral” attacks on previously final decisions. Such a principle may be applicable when it comes to individual rights (as in a right not enumerated and not denied is rights granted), but when it comes to a power of a government body it is a very dangerous precedent to set. Suppose next the Union Judiciary decides through some vague and loose interpretation of the constitution, instead of a strict one, that it has the power to arbitrarily review all senate legislation and then the court goes on to enumerate such a process.

If the framers of the Student Union Constitution were going to allow the Union Judiciary to hear appeals they would have explicitly stated so. They did not. One cannot interpret their lack of denial as an implicit permission. If the framers of were going allow a Union Judiciary to undermine previous rulings, they would have been explicit. However in the interest of expediency, fairness, and accessibility they did not list this as one of the powers of the Union Judiciary. Their silence on this matter cannot be seen as an implicit approval.

Such standards, as established in this case, are arbitrarily established, post fact, by the Union Judiciary. It is not up to the Union Judiciary to establish such things, but up to the students. The further it gets from the actual case, the more circumstances are lost. Collateral attacks, if a case is granted,

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only open up the possibility of a case being overruled by a Union Judiciary not based on all facts present at trial (especially if no member of the original Union Judiciary is present at the new hearing or even if some witness are no longer available to counter new claims) but on certain, probably manipulated, facts only available at the time of appeal. An appeal, which under their decision, can happen several months or even years withdrawn from the actual conflict—when one or several parties in the case have already been carrying on as if the decision is final. To reverse it, would be a travesty and would undermine the Union Judiciary process and devalue the time and effort of all parties involved in the original proceedings.

Yet, there maybe times when to preserve Justice and fairness, such a process may need to be applied. However, it's not the Union Judiciary place (as the power is not granted to them) to establish such a process as it's a body of five Justice's imposing their will on an entire student Union. Instead, if the student body believes that there exist the very limited circumstances where an appeal is the only fair way to proceed, then there needs to be a constitutional amendment saying so.

The intent of the Union Judiciary process is for an average student or any organization to use in reaching a resolution to a disagreement. By creating this second tier to the Union Judiciary process, the Union Judiciary is complicating the process to the point of incomprehension to an average student. It also, puts the question the weight and finality of

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any resolution ever reached through the Union Judiciary and significantly diminishes its usefulness to the student body.

The Union Judiciary is dismissing this case because they say the complainant's filings are incorrect, but they are willing to hear the case if the complainant files correctly the answers to the questions they outlined in their decision.

The Union Judiciary process was not designed to make people jump through hoops to figure out proper filings for the Union Judiciary to hear a case but for the Union Judiciary to act as a mediator between two sides, and when neither side could find a compromise to be the final arbiter in the matter. As of right now, all it is is a laughing stock.

I respectfully dissent.

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**BRANDEIS UNIVERSITY STUDENT  
UNION JUDICIARY**

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No. 04-02  
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HAUPTMAN V. SILVERMAN

ON WRIT OF CERTIORARI

[May 4<sup>th</sup>, 2004]

THE CHIEF JUSTICE delivered the opinion of the Court:

The state of Union of elections is a troubling one. Not one cycle goes by without several elections needing to be rerun due to technical or human glitches. Election procedures are arbitrary and inconsistent each cycle. The Union Judiciary is alarmed by the increasing severity of election snafus and urges the Union to undertake the task of election reform seriously by proposing a series of constitutional amendments that clearly define eligibility, the process and the conditions for victory.

In the case before us, Hauptman v. Commissioners, the complainant alleges:

- a) The Union secretary overstepped his authority by decertifying an election and running an additional round in which he already certified the final result and declared a winner.
- b) Having had three graduate and one non-degree student vote in the subsequent addition of round II

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nullifies the election as this election is to elect undergraduate representatives.

- c) Ms. Hauptman, having received a plurality of the votes in the final round, is the rightfully elected senator for Grad Quad.

On the first charge, the Union Judiciary finds that the secretary did overstep his authority decertifying an election which he had already certified. Although, it is unclear what exactly certification is due to an ill-conceived constitutional amendment, both parties acknowledge that the secretary did indeed certify that Ms. Hauptman was the winner before making a backroom deal several days to decertify the result. It is thus we order that Ms. Hauptman is the rightly elected Grad Quad senator. All future election results for this quad are to be thrown out.

Art III, Sect 5, Item 4 specifically grants the secretary the power to “Oversee and certify all Union elections, petition referenda, and amendment referenda.” However, this section does not allow the secretary to decertify.

The defendants argued that the election becomes final only following Inauguration and not certification and thus the secretary can treat certification as an election dispute which he is empowered to resolve. This argument is rejected. The inauguration is a ceremonial formality. One which is clearly triggered by the “official certification of election results” per Art. 11, Sect. 4 Item 2. Therefore, an inauguration cannot take place until an election is certified.

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Once certified though, the secretary hands are tied. The only way to decertify an election is for the secretary to file UJ case against himself within the constitutionally permitted time window after an election and ask the Union Judiciary to overturn his certification. This ensures that certification is done with due diligence and not haphazardly as it appears was the case this time around. If the secretary thinks he erred in certification, he can file a friendly Union Judiciary case against himself and barring objections from any of the affected parties, the Union Judiciary will grant it without hearing.

In fact previously Art 11, Sect 7 concluded with "The Secretary shall certify the results of all elections no more than five academic days after the final election. The Secretary shall not certify the results of any contested election. Election results shall remain unofficial until the Secretary has certified the results in writing to the Union." However, this was removed during a round of amendments yet it remains clear that this is in fact what certification is.

Another reason why certification is final is if in fact the secretary had the power to decertify then there is no time table set as to when he could do it. A secretary can suddenly decide to decertify an election months after an election for political reasons.

*The constitution further grants the chief of elections the "The Chief of Elections and the Elections Commissioner(s) shall be empowered to resolve any and all election disputes," per Art. 11, Sect 7, Item 4. However, seeing as no complaint was filed by any undergraduate resident or candidate from Grad Quad, there was no valid election dispute regarding the*

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*results of grad quad. It is thus, the secretary had no power to resolve it.*

Even still the constitution does not define how the secretary is limited in resolving election disputes. It is alarming that a broad reading of this clause may allow the secretary to spend the entire union allocation to resolve a dispute.

It is alarming that the Election Commissioners would make such a deal out of the public's eye. The deal not only negatively affected a candidate in the election but also changed the ground rules on the candidates half way through the election. We strongly condemn the both parties in signing this deal without the consent of all parties affected in an attempt to subvert the already plagued election process. Such trickery is unacceptable.

To the public the decision to overturn this certification was unexplained. Inexplicable decisions that change the outcome of elections need to be done in the open. Thus, in order to make sure all rules are uniformly applied, all parties have a fair say in any election defining events and all decisions are not secret, it is up to the Union Judiciary to make oversee any future process regarding any possible deals that may overturn certification.

In regards to the second and third counts, the UJ finds that it is irrelevant who voted or what the result was in the Final round since the winner had already been declared after the primary round. It is therefore inconsequential that several non-union members voted in the round. However, with at least four visible errant votes, who knows what other glitches there were. This system is inherently flawed. No one knows

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what the computer is tallying and who actually votes. We strongly hope that this system is scrapped in place of one that can ensure a fair election for all candidates. Not one that is marred by irregularities every single election cycle. While a new system is being developed we recommend the union use alternate forms of voting such as a paper ballot.

We hereby rule unanimously,