

Minutes*

Academic Freedom and Tenure Committee
Friday, April 8, 2011
9:30 – 12:00
300 Morrill Hall

Present: Barbara Elliott, Karen Miksch (co-chairs), Yusuf Abul-Hajj, Tracey Anderson, William Craig, Joseph Gaugler, Barbara Loken, Linda McLoon, Christine Marran, Paula O'Loughlin, Gary Peter, Paul Porter, Terry Simon

Absent: Arlene Carney, Carol Wells

Guests: Professor Teresa Kimberley (incoming Committee member 2011-12); Vice President Aaron Friedman, Vice President Tim Mulcahy; Professors Raymond Duvall and Martin Sampson (Political Science)

[In these minutes: (1) statement on proposed changes to P&A non-renewal policy; (2) academic freedom and allegations against faculty members; (3) more on emails and Data Practices Act requests; (4) responses to questions about "Troubled Waters"; (5) academic freedom questions about the University policy "Education Abroad Opportunities: Addressing Health and Safety Risks"]

Professor Elliott convened the meeting at 9:30 and welcomed Professor Teresa Kimberley, a new Committee member beginning on July 1.

1. Statement on Proposed Changes to P&A Non-Renewal Policy

Professor Elliott noted that this Committee had only briefly reviewed the proposed changes to the policy on the non-renewal of P&A staff at the previous meeting. The proposal came to the Committee on Faculty Affairs last week, but it only had time for a brief discussion there as well.

Professor Miksch said that as part of the ongoing policy-review process, a committee was formed to look at the non-renewal policy for P&A staff; she noted that no reason needs to be given for the non-renewal of a P&A staff member under current policy. Historically, if a P&A staff member has been employed here more than 10 years, the person has received a 12-month notice period (and there is a sliding scale of notice periods for those who have been at the University for fewer than 11 years). The proposal would reduce the maximum notice period to six months (after five years of service), and also provide that if one works less than 75% time, the notice period would be two weeks (even if one had been at the University for 30 years on a 67%-time appointment, for example). The Committee on Faculty Affairs on this proposed change yet. This Committee at its last meeting expressed concern about the implications of the policy change for academic freedom. The Committee has already expressed concern that although the Academic Freedom and Responsibility Policy applies to all at the University, P&A staff may not feel the full strength of when they are on annually-renewable contracts. If the notice period is reduced to six months, that could have even a more chilling effect, especially because no cause is needed for non-renewal.

* These minutes reflect discussion and debate at a meeting of a committee of the University of Minnesota Senate; none of the comments, conclusions, or actions reported in these minutes represents the views of, nor are they binding on, the Senate, the Administration, or the Board of Regents.

Professor Abul-Hajj inquired who is responsible for these changes. Professor Miksch said that they were brought forward by Ms. Wilhelmson in Human Resources; they will go to the University Senate for information. The Faculty Affairs Committee is being consulted, CAPA has been made aware of them, and they will ultimately go to the President's Policy Committee for approval.

Dr. Craig said that he was involved in discussions about these changes when he was involved in CAPA. There are some good things in the broader proposed policy changes: Explanation of the reason for non-renewal is to be given, and counting service in different employee categories is improved (because some employees go back and forth between P&A and civil service appointments). As for the notice period, it is true that the University needs flexibility, but if someone has been a valuable employee for more than ten years, there should be a better plan to get rid of them than this proposal. He said he sees no reason to change the policy in this respect—and said he believed he could speak for CAPA on this point.

The Committee considered a draft statement; the final version, below, was adopted unanimously:

The Senate Committee on Academic Freedom and Tenure has taken note of the proposed reduction in the length of notice for non-renewal for Academic Professional and Administrative (P&A) employees. The current policy calls for a notice period of 12 months for employees with 11+ years of consecutive service, 6 months for those with 6-10 years of service, 3 months for those with 2-5 years, and 1 month for those with one year of service. The proposed policy calls for 6 months notice for those with 6+ years of consecutive service, 3 months for those with 3-5 years, 1 month for those with 1-2 years, and reasonable notice (2 weeks minimum) for those with less than 1 year of service. In addition, part-time P&A employees would only be entitled to two weeks' notice under the proposal.

We are very concerned about the implications of these proposed changes for the academic freedom of P&A staff. The Board of Regents' policy on Academic Freedom and Responsibility guarantees academic freedom to all members of the University community. We have discussed a number of times, however, the practical limit of this guarantee on staff members (and contract faculty members) who have annually-renewable appointments: Those whose continued employment at the University depends on the approbation of their superiors on a year-to-year basis could be at risk if, in fully exercising their academic freedom, they put themselves at odds with their superior. To shorten the notice period for P&A staff, and to reduce it to two weeks for part-time P&A staff, in our judgment, puts them at even greater risk. With a year's notice for long-term employees, they have at least some insurance (12 months' salary) against finding themselves unexpectedly on the job market as a result of exercising their academic freedom. To shorten that notice period will make P&A staff even more unlikely to exercise the academic freedom the Board of Regents has guaranteed.

We recommend that the University not change the notice provision for P&A staff. We recognize that P&A staff may be terminated for misfeasance or malfeasance and are subject to normal annual performance reviews. But we believe that this change, which may be motivated by the financial situation of the University, conflicts with the fundamental value of academic freedom and should not be adopted.

2. Academic Freedom and Allegations Against Faculty Members

Professor Elliott welcomed Vice Presidents Friedman and Mulcahy to the meeting to help the Committee discuss a question framed by General Counsel Mark Rotenberg and referred to this Committee by the Faculty Consultative Committee (FCC): What is the faculty collective role in addressing factually-incorrect attacks on particular University faculty research activities? The question arose in the context of the case of the young man who committed suicide while participating in a clinical trial, Professor Elliott noted, and Committee members had been provided with materials related to the case as background, including the letter from the bioethicists to the Board of Regents and the responses to it from Regent Allen, General Counsel Rotenberg, and Vice President Friedman.

Professor Gaugler inquired what this issue had to do with academic freedom. Is it not an ethical question, rather than academic freedom? And if so, why is it before this Committee? If he were accused of doing something wrong in his job, and exonerated, but continued to be accused, what should he do, Professor McLoon asked? It is a question of the limits of academic freedom, Professor Elliott said, the notion that one can continue to pursue an idea but not to the point of defaming someone. In part the Committee is also addressing the question because it was asked to do so by FCC.

Professor Gaugler said that it is his take that the letter from the faculty members to the Board of Regents, asking that the case be reopened, was based on a lack of information, given the response of General Counsel Mark Rotenberg, and was not defamation. The events have included continuing publications with factually incorrect information in the media since the Regents,' General Counsel Rotenberg's, and Vice President Friedman's responses, Professor Elliott responded.

Vice President Mulcahy said that he presumed the reason he and Vice President Friedman were at the meeting was because of the circumstances surrounding this particular case. He has given thought to what happened, he related, and from his perspective, this event—seven years ago—was dealt with appropriately by the University, by the legal system, and by the medical system. Where academic freedom comes into play, he said, is that others are free to formulate positions even after the results of the various evaluations. He said he viewed the letter from the bioethicists as a legitimate expression of concern that disagreed with the record and said they have the right to express those views. It is uncomfortable for the University, makes it more difficult to conduct research, and is unfair to the faculty members accused, but it is a part of academic freedom.

Dr. Mulcahy said he has heard General Counsel Rotenberg talk about academic freedom, and Mr. Rotenberg has made the point that academic freedom is not boundless and it does run up to legal boundaries (e.g., defamation). Dr. Mulcahy said that he is not a lawyer so cannot comment on whether what has been said is defamation, but the point is that one cannot defame another and rely on academic freedom for protection from consequences. His view is that the statements that have been made are not legally defamation, and even though they make people uncomfortable, they must defend the right of those who make the statements to do so.

His role, and that of the University, Dr. Mulcahy said, is to be responsible for putting out the facts and letting reasonable people decide. There was a presumption the administration should respond to the charges; his view is that academic freedom should level the playing field for controversial issues and that faculty members should respond when alternative interpretations or positions are espoused by their colleagues. They wanted to defend the University, and the academic-freedom message is important, and

Professor McLoon's point is also important: How would one feel if constantly put in a poor light, with academic freedom protecting those casting aspersions? Members of the faculty must play a role in responding to criticisms of other faculty or their academic work, he said. The University has an obligation to put the facts into play.

This is academic freedom, Dr. Mulcahy concluded. There is criticism of some part of the University enterprise; faculty members have the right to make those criticisms but it is also a faculty responsibility to respond. The University can only do so much, and few take his word for things because he's an administrator. Faculty views will be taken much more seriously. There is academic freedom in both directions; people can make statements and others can counter them, as long as neither side runs up against the legal limits on academic freedom.

Vice President Friedman said that there are two issues at hand. One, was the process appropriate? One of the complaints is that it was not. The University's position—and it is responsible for process—is that there were X number of investigations conducted from outside the University that reached conclusions, so the claim that it was a whitewash are not accurate. Two, there is a continuing examination of a set of faculty members, and one question is whether the IRB is good enough to protect human subjects. The claim is made that it is not. The University, however, has a large number of tenured faculty members on the IRB; the claim is that they are not good enough to protect human subjects. The faculty members on the IRB should say that is not true. If the University says the process works, that is seen as the University defending its position. If the faculty members on the IRB say so, that statement goes into the marketplace. It is not only a question of what to do when faculty members take on other faculty members, it is a question of what to do when faculty members take on other faculty members and do not like the outcome. This has dragged on for a number of years, and the position taken by the faculty members on the IRB is more important than what University administrators may say.

Professor Abul-Hajj commented that faculty members read about these issues and say that it is the opinion of those individuals, but most faculty members will say it is not their responsibility to get involved. They will say those faculty members have the right to speak their minds, but most will not spend hours responding.

Dr. Mulcahy agreed and said it was not incumbent on any faculty member to invest time to develop and publish an opinion. But there are subsets of faculty members who could, such as those on the IRB who are aware of the history—they could be vocal. The point about academic freedom was well made: In the court of public opinion, faculty debating with faculty is very different from University administrators with vested interests, who are seen as taking a defensive position. With faculty members who have less of a vested interest, there can be academic dispute. Professor Abul-Hajj suggested that the Academic Health Center FCC could look at the issues and response on behalf of the AHC faculty.

Perhaps this has to do with IRB policy, Professor Loken said, not the IRB faculty, and perhaps policy could be reconsidered. It might not be faculty versus faculty but rather faculty versus policy. Vice President Mulcahy said what he deals with most frequently in his position is faculty versus policy, and there are legitimate issues in many cases. In this case, however, it is not IRB policy. There was a statement made that the IRB is not providing adequate protection to human subjects and that there was a need for outside review. The University participates in a rigorous IRB accrediting process and has gone through it three times; the University's program is recognized as one of the best in the country. When the attack is on practice, that is different from a dialogue about policy, but the University has been told by an

external group that it has an excellent program. This case goes beyond policy. Dr. Mulcahy said he has seen cases elsewhere where, after lengthy review, a faculty member is exonerated; the federal government requires in those cases that institutions do all they can to protect the reputation of the accused. The faculty members involved in the case here have been exonerated over and over again and the University is obligated to defend them. That is why the message from Vice President Friedman is important: It points out that the faculty members have been exonerated and they should not be bothered further about the case.

What have been the responses to the message Dr. Friedman sent to the AHC faculty on this issue, Professor Elliott inquired? With one exception, he has received a "thank you" from the investigators and support for his position, but nothing beyond emails sent to him. The University took a position: Enough is enough. For whatever reasons, that is insufficient for some. And there is the attitude out there: "I don't have a dog in this fight and I'm not going to get involved."

Professor Gaugler said that he has read a considerable amount about the case, as an individual faculty member, and then saw the responses from Regent Allen and Mr. Rotenberg. He is not willing to go on blogs and get in the muck, but the responses gave him some understanding of the history and particulars of the case.

Dr. Friedman said that the individual faculty members who have been through this scrutiny—he has spent time talking with them—did not hear from other faculty members on the campus until they wrote the letters. They were unclear where the rest of their colleagues stood. He and Vice President Mulcahy spent a lot of time in the public arena on this matter. There were no new facts in the last two years, but the accused faculty members were bombarded by the media without any indication of faculty support. Academic freedom is not only the freedom to complain but also the opportunity to support fellow faculty members.

Professor Gaugler said this is an issue of the environment in academe: When a faculty member is under investigation, other faculty members keep their distance. This is true across the country. No one wants to touch the issue. Professor Elliott agreed and said there is a parallel with bullying: It is a cultural issue. People see what is happening and do nothing about it.

Professor Elliott asked if Dr. Friedman had brought the matter to the AHC FCC. He has not, Dr. Friedman said, simply because they have been dealing with other issues. He can do so.

Professor McLoon said, apropos of becoming involved, that she would never feel she had sufficient information. She could not spend hours reading all the materials, but if she said she supported the accused faculty members, and received questions she could not answer, it would not look good. Could this Committee act?

Professor Miksch said, apropos of the comments of Vice Presidents Friedman and Mulcahy, that the limits of academic freedom have not been met in this case. Controversy is what academic freedom is about, but there is also academic responsibility. If this has not stepped over the defamation line, faculty members have the right to question actions and policies, and other faculty members have the right to question those who ask the questions.

Professor O'Loughlin commented that in political science (her discipline), they call it "the spiral of silence." When someone voices a minority opinion and gets shouted down for it, others of like minds

silence themselves. In this case, it appears that people are comfortable stating opposition to what is being done to their colleague privately, but not publicly, for some reason. "This is not what we usually talk about when we speak of academic freedom and responsibility, but it is part of our community responsibility. Tenured faculty members, who have academic freedom and responsibility, all can speak to it without knowing all the facts. We make assumptions all the time that if something has gone through x amount of review, it is credible. Every faculty member with or without specific background could speak up when they feel that these standards are being ignored. Indeed, it is our responsibility to do so." She said she did not know if the issue belonged in this Committee, but it is a part of academic freedom and responsibility.

Professor Gaugler agreed. The accusers should not be censored, regardless of whether they are right or wrong. This is an academic-culture issue and one can see it happen over and over.

The last sequence of events was initiated by the letter to the Board of Regents demanding a new investigation, Dr. Friedman recalled. This is a perfect time for faculty members to respond. If it had been kept in that domain, the Board of Regents should have heard from the faculty that after this much time and effort they did not believe it a good idea for the University to spend time investigating the case again. They did not hear that, so they needed to respond on behalf of the University. He thought he was responding on behalf of both the University and the faculty, but it is a risky business to have administrators respond on behalf of faculty on academic freedom.

They asked the University to respond, Professor Porter pointed out, and that response was seen as inadequate. That charge is debatable, Dr. Friedman responded. This was not something hidden for a number of years with a lot of faculty not knowing about it. Dr. Mulcahy said he would point out that this is a position he frequently sees people take: "The University" means him, Morrill Hall, Johnston Hall, the deans; when he says "the University," he means all of us. This is a University issue: administration, faculty, and staff. He said he would also observe (and not just in this case), when one sees debates in the media, the reporters can get validation but they are not motivated to gather all the facts in order to reach a conclusion—they want to sell newspapers. The accused faculty members wanted an opportunity to respond, but they could not do so because of legal matters, so no one was voicing their views. So their voice is not heard.

A question came to him recently related to the case, Dr. Mulcahy said. Some faculty members took exception when there was a seminar related to this case scheduled with a title along the lines of "How the pharmaceutical industry dupes innocent victims into clinical trials." He was asked how the University could let someone use such a provocative title; one which could damage the entire clinical-trial enterprise. His response: academic freedom. It is not their role as administrators to try to manage controversial perspectives. However, it might have been appropriate for the sponsors of such a seminar to consider the implications of such a title—how it might damage all clinical trials. That would be an example of how "responsibility" might factor into the academic freedom realm. Academic freedom provides two opportunities: the freedom to express opinions that express a contrary view, and the freedom to respond. He would not say one cannot express views, and would be even more concerned if anyone did say that.

The ideal outcome from their perspective, Professor O'Loughlin said, is that other faculty members would engage their academic freedom in this discussion. Dr. Friedman said they are regularly involved in issues that faculty members bring up—procedural questions—and most others are not directly

implicated in the outcome. This is different: Faculty members saying the University should investigate other faculty members because there is a scandal. Faculty members have the freedom to say that another faculty member is not performing well, and is killing people, but the responses should not be email messages to him asking "how can you let them say that?"

They are at the point that the faculty members have been exonerated, Professor Elliott said, and it seems they are still asking whether those faculty members should be able to do their work. They are not saying the system is a problem.

If there three options (or doing nothing), to move this out of the Committee, what would they be, Dr. Craig asked? Vice President Mulcahy returned to Professor O'Loughlin's point: It could identify the role of responsibility in the context of academic freedom and the need for it to be exercised if the system is to work. He and Dr. Friedman are of the view that faculty must engage in a dialogue or debate and it should not just be one side that takes a position. He said he could imagine faculty members who are experts in the field writing something.

Why haven't they, Professor Abul-Hajj asked? He does not know, Dr. Mulcahy said. There is a greater expectation that the administration will respond. He is not saying that faculty have to do this, but they should keep it in mind. He said he was also surprised at the number of people who rushed to judgment without all the facts; he said he thought "all of our training" is to verify facts before reaching a conclusion. Some hear the "facts" the first time as presented in seminars or the media and rush to judgment.

Dr. Craig suggested giving FCC a summary of the statements and letting it decide what to do.

Dr. Friedman said he wished to take his point farther. The point of academic freedom is to give faculty members the freedom to weigh in on the events of the day. What if the exercise of that freedom is aimed at someone else on the faculty? That is where FCC could think about the responsibility and ability to respond. He said he understands that one can go up to the point of defamation; what is unique here is that a group of faculty members is going after other faculty members and saying the University's process needs changing, but in the meantime have done something seriously wrong because those faculty members have spent years in the spotlight as part of what was called a scandal.

Vice President Mulcahy thanked the Committee for the opportunity to have the conversation. He said it is his first time in his experience with this case to have a meaningful discussion; he has not had the opportunity with any faculty group before this to talk about limits and what principles should apply.

Professor Elliott thanked Drs. Friedman and Mulcahy for joining the Committee.

Following the departure of Drs. Friedman and Mulcahy, Professor McLoon inquired what the Committee would do. It was agreed that the Committee would return to this matter at its next meeting.

3. More on Emails and Data Practices Act Requests

After reading additional reporting on the requests for the Wisconsin faculty member's emails, and raising questions, the Committee received the following response from Associate General Counsel Tracy

Smith (quoted here with her permission):

I read through the Wisconsin materials & looked at the law the UW GC cites. UW applied the Wisconsin public records law, which evidently permits governmental entities to engage in a common-law balancing of interests in determining whether to produce work-related communications that are otherwise public under the law. In Minnesota, in contrast, no court has recognized a common-law balancing test to be applied to government data that is classified as public under the Minnesota Government Data Practices Act. It appears from the materials that the Republican Party is accepting UW's response without legal challenge. Should we face such requests in the future, we will analyze the requests and the records covered by the request carefully and thoroughly to protect our faculties' and students' interests to the full extent permitted by the law.

4. Responses to Questions About "Troubled Waters"

Committee members reviewed the revised draft of the responses to the questions posed by FCC related to the film "Troubled Waters." There were a number of editorial suggestions; the Committee approved the statement unanimously, as amended, with the understanding it would see the revised version with Word track changes before it is distributed further.

The statement is appended to these minutes.

5. Academic Freedom Questions About the University Policy "Education Abroad Opportunities: Addressing Health and Safety Risks"

Professor Elliott next welcomed Professors Duvall and Sampson from the Department of Political Science to raise a question about a University policy on education abroad.

Professor Duvall began by telling the Committee that in political science, dissertation field research is often critical for Ph.D. students. He is chair of the department, and also served as chair of the Task Force on Academic Freedom appointed by Provost Maziar in 2004. The latter experience served to solidify his long-standing sensitivity to subtle challenges to academic freedom; the Task Force members tried in their report to move the conversation from the well-known domain of academic freedom as an individual faculty member's rights to include the broader and equally important concept of academic freedom as an institutional obligation to foster a climate of intellectual openness and free inquiry in pursuit of knowledge.

Professor Sampson said that for 30 years he has felt it a privilege to be at the research university of a state that has a long heritage of missionaries, business people, academic researchers, and others working overseas, some encountering enormous challenges in areas where they worked. His concern about what looks like an extension of a good policy for undergraduate programs to the very different realm of dissertation research has two roots. Five years as the Director of Graduate Studies in the Political Science Department deepened his awareness of the importance of Ph.D. dissertation research for the careers of young scholars and for the success of Ph.D. programs in recruiting new students; dissertations are not simply "an educational experience." Second, five years long ago working for the Peace Corps gave him first hand awareness of distinctions between situations that are hopelessly

dangerous for Americans and situations that are very risky for tourists and casual undergraduates but are in fact viable work situations for other categories of Americans.

Professor Duvall said the University now has a policy that serves as an inadvertent impediment to academic freedom. It is probably a well-intended policy, and in many respects defensible, but it is nonetheless a threat—a subtle threat, but a threat. The policy, "Education Abroad Opportunities: Addressing Health and Safety Risks," is administered by the International Travel Risk Assessment and Advisory Committee (ITRAAC), a small committee that until recently had four members: Senior Vice President Robert Jones, Associate Vice President and Dean Meredith McQuaid, General Counsel Mark Rotenberg, and then-Senior Vice President Frank Cerra. ITRAAC decides on permissibility of travel abroad. Students planning education abroad must receive permission if the location they plan to go to is on the State Department's travel advisory list. The subtle threat to academic freedom in this policy is to original research by Ph.D. candidates; what the policy says, by implication, is that in certain fields, certain research cannot be conducted in certain places, even if that is the only place the research can be done because of the research topic or question. At present, the restriction does not apply to faculty members, suggesting that it is recognized that such a restriction would be a violation of their academic freedom. Because the original research of a Ph.D. candidate has much the same character as that of faculty research, and should not be equated with an "educational opportunity," the policy is an inappropriate institutional limitation of academic freedom. Moreover, this restriction limits the ability of faculty to recruit and supervise the research of graduate students, and it can adversely affect their ability to maintain strength in certain fields in their discipline (e.g., comparative politics).

The example at hand, Professor Duvall said, is a Ph.D. candidate in their department who did a great deal of work to develop a proposal to do research in Nigeria. Her committee enthusiastically endorsed the proposal, the IRB approved it, she obtained a Nigerian visa, and established ties for hosting at a Nigerian university, as well as secured housing, and contacted the U. S. Embassy in Nigeria to confirm the feasibility of the proposed work under conditions of travel warnings. ITRAAC denied permission to the student to travel to Nigeria on the grounds that it was too risky, given the University's fiduciary responsibility, even though the student had signed a waiver and had obtained insurance.

Professor Abul-Hajj asked if the policy requires that ITRAAC give reasons for a decision. The policy speaks to University calculations of risk, Professor Duvall said. Nigeria is on the State Department travel advisory list. He called the U.S. Embassy in Abuja, Nigeria, and spoke at length to the Chief of U.S. Citizen Services. That official said he thought the PhD candidate could conduct her research without great difficulty; the official also reported that there are four U.S. Ph.D. students conducting research in that general area, and said there is an ex-pat U.S. community in the town that does not feel it is threatened.

Dr. Craig asked if other students are approved to go to other locations that are on the State Department travel advisory list. They are, Professor Duvall said.

Are there appeals, Professor Elliott asked? Professor Duvall said he, the PhD candidate, and her primary advisor tried to do so, unsuccessfully.

Professor Duvall said he saw three academic-freedom problems with the policy. One, the policy is designed for undergraduate students and "educational opportunities." It is applied to graduate students as if they were the same, but Ph.D. students are much closer to faculty than to undergraduates. Two, the

assessment of risk is trumping everything else; it seems that the core value of academic freedom (and the ethically-responsible conduct of research) is less important. Three, the policy conflates the idea of an advisory role with a disapproval role. It is appropriate for the committee to exist, and to advise students not to go somewhere, but to have approval authority puts it in the way of research. He said he hoped the Committee would take up the issue, not of the particular case, but of the potential threat to academic freedom posed by the policy.

Professor Sampson said his understanding is that the U.S. government is sending Fulbright scholars to the area ITRAAC said the student in question could not go. He is concerned that what may be an excellent policy for undergraduate programs seems to be an inappropriate and probably inadvertent limitation on dissertation research. Dissertation research is part of the University's research mission, not just an "educational opportunity" as that phrase is applied to undergraduate education. Second, given his 5 years of Peace Corps background, he is aware that things can happen that make it unwise for an outsider to remain in a particular location, and he does not belittle those risks. At the same time, it is not unusual for the State Department to issue travel warnings for places that have thriving expatriate communities, including many Americans (and often some Minnesotans), who work and live in those areas. Advice to an 18-year-old undergraduate or to a tourist has its place; something is askew, however, if identical criteria, oversight mechanisms and enforcement drive the assessment of risk for PhD research, especially if the Ph.D. candidate has connections with a local university or other institutions, and the Ph.D. candidate is assuming the risks for being there.

Some research questions can only be pursued in certain places, Professor Duvall pointed out.

Professor Miksch told the Committee that her husband needed to do his research in El Salvador during its civil war, so she understands the question. This matter raises academic-freedom issues in a number of areas. ABD students who has done everything for which they are responsible—IRB and faculty approval, etc.—can be made aware of State Department travel advisories. The IRB assesses risk to the researcher as well as to human subjects, she noted. But to say that the student cannot do the research because it is too risky for him or her also raises academic-freedom questions for faculty members. One cannot have a comparative politics field because one cannot go where it might be dangerous. That impinges on the curriculum and the faculty member's ability to do research with graduate students. If one is studying conflict, one must go where the conflict is.

Professor Marran said she agreed completely with the views expressed by Professors Duvall and Sampson. Risk can be assessed in so many ways that the policy seems arbitrary. One could talk about climactic risk, geologic risk, and so on; it could be dangerous to work in so many places on the Pacific Rim right now, for example. The policy is arbitrary in analyzing only on the basis of political concerns and the State Department travel list. Of most concern to her (she is going to northeastern Japan in the summer on a grant and so thinking about this) is that students and faculty in a field could be affected by this policy and consequently the health of a field itself could be at risk. One cannot do languages and literature, for example, if one cannot go to another country.

Professor O'Loughlin inquired what the response was when they raised the question of academic freedom with ITRAAC. This Committee has talked about the academic freedom of undergraduates, faculty, and staff, but not about graduate students, she observed. What is a graduate student? What is the recourse for appeal? Some chairs might not be willing to go to the mat for one of their students, she said,

and she was concerned about ITRAAC. Graduate students cannot go to the Senate Judicial Committee; can they go to the Office for Conflict Resolution? Or where?

Professor Porter recalled that there were students in Japan who were told to leave and refused. What does University policy say about that? It cannot force them to come back. Professor Marran said she has heard that Princeton told the students it would not give them credit for their study abroad. Professor Porter noted that he is taking undergraduates to South America to ride bicycles through four countries—they let undergraduates do that. In many places, Professor Sampson said, the greatest hazards are traffic accidents and disease.

Professor Marran said that the policy could be used to limit the opportunities for undergraduates. She said she would want undergraduates to have the opportunity to travel abroad to different areas; ITRAAC would have too much jurisdiction over the decisions. The challenge is to determine how something is too risky, Professor Porter said; how does this committee do it? Professor Loken said that ITRAAC is useful but that it should have an advisory role. The criteria it is using are based on the State Department and does not take into account all risk, so it is arbitrary. It can advise students but should not decide.

Professor O'Loughlin surmised that risk factors are probably focused on insurance, and undergraduates must have University insurance to study abroad. Aside from that issue, it does not matter how ITRAAC decides, it is still a matter of academic freedom. She said she could envision a case coming to the Senate Judicial Committee—which she chairs—with a claim that a faculty member could not do research because of this policy.

Professor Duvall said that, in explaining the decision to deny the request, ITRAAC reported that they balance concerns about safety, reputation of the University, risk and liability, and they use information from diplomatic and other channels. Anyone willing to spend his or her own resources can travel; ITRAAC exercises fiduciary responsibility on behalf of the University when it comes to using University resources. So one can travel wherever one wants but cannot get credit or do dissertation research, Professor Miksch observed.

More and more research is being done in other countries by students from U.S. research universities Professor Sampson said. A policy that impedes the academic freedom of U of M scholars, including Ph.D. candidates, from doing certain kinds of such research damages the university's academic reputation in these very significant areas. University departments work very hard to recruit outstanding faculty and Ph.D. students. If a construal of university responsibilities of some kind has the effect of blocking ground-breaking international research, then people interested in international research will see the U of M as a place that is unsupportive of the basic academic freedom their research requires.

Professor Abul-Hajj said he was appalled by ITRAAC and was glad that they had challenged it. If it can limit the travel of graduate students, how far can it go in limiting faculty travel to dangerous places?

Professor Loken asked if they had raised the question of a waiver of liability. The student signed it, Professor Duvall said. Professor Sampson said that if this is an era when faculty and graduate students must do research in such places, the University should pick up the cost of insurance. The institution

should not go in the direction of significantly limiting academic freedom because of the cost of an insurance policy.

Professor Duvall said he is deeply concerned about the implications of the policy and that it calls for reflection and careful thought. This Committee is charged to determine if the institution is creating impediments to academic freedom, and he said he appreciated its willingness to consider the policy.

Professor Elliott thanked Professors Duvall and Sampson for bringing the issue to the Committee, said it would take up the matter at its next meeting, and adjourned this one at 12:05.

-- Gary Engstrand

University of Minnesota

* * *

April 18, 2011

MEMORANDUM

To: The Faculty Consultative Committee
From: The Committee on Academic Freedom and Tenure
Re: Responses to "Troubled Waters" Questions

Background

In September 2011, a University vice president determined that a film, "Troubled Waters," (TW) that had been produced in the College of Food, Agriculture, Natural Resource Sciences as a sponsored project, was not appropriate for public release. Considerable controversy and discussion followed. In November 2011, the University's Faculty Consultative Committee (FCC) asked the Academic Freedom and Tenure committee (AF&T) to respond to six inquiries regarding how the TW experience should be considered in light of our understanding of Academic Freedom and Responsibility at the University of Minnesota. This report is submitted in response to FCC's request.

Definitions

Academic freedom is recognized in the law as a subpart of the First Amendment that is special to the academy. The Board of Regents reaffirmed its policy on Academic Freedom and

Responsibility (AF&R) in June 2009. The current policy, as recently amended by the Faculty Senate, provides:

- "**Academic freedom** is the freedom, without institutional discipline or restraint, to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write on matters of public concern as well as on matters related to professional duties and the functioning of the University."
- "**Academic responsibility** implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest, one is not speaking for the institution."

In addition, these provisions are embedded in the tenure code and the University's Code of Conduct. Key language from the tenure code includes these statements that indicate the connection between tenure and academic freedom and responsibility:

- "Tenure is the keystone for academic freedom."
- "Both tenure and academic freedom are part of an implicit social compact."
- "In return, faculty have the responsibility of furthering the institution's programs of research, teaching, and service."

FCC QUESTIONS re: Academic Freedom and "Troubled Waters" Film

1. Under what circumstances does academic freedom extend to individuals beyond faculty, faculty-like staff, and other University employees who produce intellectual and artistic content? Conversely, what personnel or functions of the University are not covered by academic freedom? In general, what are the limits to academic freedom?

In the 2009 policy, the Board of Regents affirmed that the protections of academic freedom are accompanied by commensurate responsibilities. They are extended to all University employees who produce intellectual and artistic content as part of their employment; anyone (of any employment status or rank) who designs, creates, or discovers content as part of their University employment has academic freedom, accompanied by its responsibilities, including professors, museum directors, artists, etc.

Academic freedom and responsibility do NOT extend to employees who have been hired to complete the intellectual / artistic work of their supervisor. Anyone hired by someone to accomplish that person's design/plan/etc. is not extended academic freedom and responsibility; the creative effort and responsibility remain with the supervisor who is directing the employee's effort.

The limits of academic freedom have been defined by the United States Supreme Court, which has established that academic freedom is not a defense to an illegal act such as academic fraud,

slander or defamation, obscenity, or the clear and present danger of bodily harm (as a result of one's speech).

In the case of "Troubled Waters," a P&A staff member, using her own ingenuity, came up with a project, proposed it, earned grant support to complete it, worked on it, edited it, and also hired others to work with her on the project. The film was her intellectual product, a result of her curiosity and effort. None of the limits to academic freedom were present in the TW case. The staff person's creative work (the film's content) was protected by academic freedom.

2. What is the understanding of academic freedom and responsibility as they apply to University administrators, only some of whom are tenured faculty members? What are the limitations of academic freedom that arise from their responsibilities as administrators?

In recent years, the federal courts have established that administrators have limited academic freedom. The courts have recognized that administrators have the responsibility to engage in vigorous, robust discussion up to the point a decision is made; once the decision is made, administrators do not have a First Amendment right to criticize the decision, and they can be fired if they do so. These United States Supreme Court rulings are based on long-standing traditions. As a public employee in a position of authority, the administrator relinquishes certain free speech and academic freedom rights as part of the employment bargain. When we revised the Board of Regents' policy on Academic Freedom and Responsibility in 2009, we were aware of these court cases. We therefore included the following comment to the Board as part of the background discussion:

The Committee recognizes that freedom to speak about the affairs of the University without institutional discipline or restraint does not extend to those who hold senior administrative positions. The Committee understands that the Board of Regents and the President have the right to expect that senior officers and others in key administrative positions (for example, at the level of dean or above) and their immediate staff will support the University's mission and the policies, procedures, goals, and programs established and announced by the Board of Regents and the President, and will not publicly undermine them. This includes, for example, statements before the legislature, to the media, etc.

Some employees and faculty at the University have both administrative and creative / departmental positions. In cases where the person functions as an administrator, the person does not have academic freedom for that work; however, when teaching and doing creative work within the person's discipline, they are protected by academic freedom.

In the case of the "Troubled Waters" film, a (former) University vice president (in her administrative role) asserted the film was not ready for public release. The record of events surrounding TW shows that the Vice President later apologized for going beyond her role and responsibilities with her actions. Prior to any decision, the Provost, as Chief Academic Officer,

should have been consulted. Once consulted, the Provost determined that the film was protected by academic freedom and he immediately released the film.

Recommendations: To avoid this from happening again, **we recommend a change in both policy and procedure. Policy:** The Board of Regents delegates its responsibilities to the University administrators in “Delegations Documents.” These documents need an additional sentence/section stating that if an administrator (including unit heads, directors, deans, and those in central administration) receives any question regarding any research, educational, or intellectual effort that include the slightest implication of academic freedom, the question should be referred to the Provost's office (or the Office of the General Counsel, as appropriate) for review and decision. This policy statement obligates **Procedural change**, as well, which is discussed in #5, below.

3. What measures, if any, should be taken to ensure that administrators and others who are not faculty members understand the meaning and implications of the policy on academic freedom and responsibility?

As posed, this question implies that only administrators and non-faculty University employees can benefit from additional understanding of the AF&R policy. We submit that all employees can benefit from additional measures to enhance this understanding.

Currently, there is limited training about the meaning and implications of the AF&R policy. The Provost's office now leads the New Faculty Orientation and New Department Chairs' training sessions as they begin their positions; Human Resources administrators run other new-employee sessions. These are full-day orientations, and all employers are encouraged to send their new hires. At these sessions, senior administrators talk about the concept of a university.

In the “Troubled Waters” experience, there is a question whether the University Relations administrators involved in the decision making had adequate understanding of the AF&R policy. General Counsel Rotenberg's memo summarizing the events related that University Relations was contacted by the college and asked to review the film. The film was reviewed; it was thought controversial and in need of further discussion prior to release, and University Relations took the lead in seeking to have that happen, seemingly without recognizing the academic freedom dimensions of the issues that were being discussed.

Recommendations:

There is a need to do a better job in orienting all employees, regardless of their status and / or title, about academic freedom and responsibility, and how it is a core value of our University.

All New Employees

We recommend that academic freedom and responsibility be added to the orientation discussion of what a research university is, what a land-grant university is, and what employees of the

University do. Employees need to be provided more information about the nature of a university, including an explanation of academic freedom and responsibility, as they are the basis of the creative work accomplished at the University. These additions to the orientation can alert the employees to the job they are doing and enhance their pride in the University.

Deans and Senior Administrators

It is important that the current orientations and discussions with individuals in positions of authority continue, and that they are also educated on the limits to their authority. University administrators and staff need to know about, understand, and adhere to the policy and procedure statements (which we recommend be amended, see #2 and #5, here) regarding academic freedom and responsibility. In recent months, the Provost has met with the deans and all senior administrators, leading discussion and articulating the importance of academic freedom—and their roles and responsibilities with the issue. We recommend this become a routine topic for discussion at those orientation meetings and for sessions with experienced chairs, as well.

Current Employees

We are also aware that current University employees are not included in these orientation sessions since they are not new hires. There also needs to be ongoing education (perhaps through Responsible Conduct of Research and other in-service educational settings) to review the meaning and implications of academic freedom and responsibility in the University setting. One idea is to develop a one-page guide about the subject for the Provost's web page with links to the policy, procedures, and other resources. An "Academic Freedom and Responsibility" link could be added to the faculty and staff "one-stop" websites as well.

4. When projects that involve the production of intellectual or artistic content are undertaken as works-for-hire or otherwise by non-University employees, or the products of such projects are expected to be copyrighted or otherwise owned by the University (which may imply approval or endorsement by the Board of Regents of the University), what does that mean for application of the policies of academic freedom and responsibility? What oversight by University faculty or administration, if any, is appropriate? What actions are appropriate if concerns arise about the connection of the project with the University? When the University holds the copyright to products, is there, or should there be, routinely a disclaimer stating that views do not represent those of the University, the Regents, the University administration or the faculty in general? If such a disclaimer is discretionary, who decides whether to include one, and on what basis?

In general, when a University employer hires an employee to complete work as part of the employer's creative work ("works for hire"), academic freedom and responsibility extend to the creative leads on the project, but not to the others hired to work on the project. This applies when the employee is hired from an internal or external pool of applicants and regardless of where the funding originates. For example:

- When a graduate student or post-doc is working on another's creative work, it is a "work for hire," and the employer has AF&R but the student/post-doc, consistent with the agreement under which the student/post doc was hired, does not.
- When a student or post-doc is creating his/her own work, AF&R apply.
- Some creative work at the University is funded by external sources, awarded to the Board of Regents, and managed through grants and contracts; AF&R apply to the creative lead for the project. Those hired merely to assist the creative leads in the completion of the project do not have AF&R.
- AF&R in a "work for hire" should be clearly defined in the contracts and other documents that are signed in the hiring process.

When concerns regarding the connection of a funded project with the University are raised, systems exist to review those concerns (Sponsored Projects, IRB, animal safety, etc.); when the issues of concern focus on academic freedom and responsibility, the Provost and Office of the General Counsel respond.

When something carries the Board of Regents' copyright, it is not determinative of academic freedom and responsibility. For example, several Law School journals carry the University copyright, but the scholarly work in the journals' articles is protected by the authors' academic freedom and responsibility. There is no disclaimer on those journals. The Board of Regents' Policy on Copyright states that, consistent with academic tradition, academic work (scholarly, pedagogical, or creative work) is owned by the faculty member who created the work. The only exceptions to this rule require a written agreement between the faculty member and the University. The Board of Regents' policy on Copyright is available at:
<http://www1.umn.edu/regents/policies/academic/Copyright.html>

In the case of "Troubled Waters," the Board of Regents copyright was on the film. The P&A staff member who came up with the idea for the film and provided the lead for the project was covered by AF&R. She also hired an artistic director (who was not protected by AF&R) to complete the funded work. The work was funded by a combination of a legislative grant and additional grants, which were managed through University offices. The lead person enjoyed both academic freedom in creating the work, and the responsibility to meet the grant requirements.

Recommendations:

Currently there is no policy at the University that requires all work with a Board of Regents copyright include a disclaimer. In the academy, it is understood that journals, books, creative work, and other forms of scholarship reflect the ideas of the University faculty or staff member who created the work, not the Board of Regents. It is the opinion of the AF&T Committee that requiring a disclaimer on some work that carries the Board of Regents copyright, but not all work, could send the wrong message. Rather, the Committee recommends that we continue with our current practice of not requiring a disclaimer.

5. What procedures are in place to govern decisions about University products that are in a gray area, where it is not certain whether rights and responsibilities of academic freedom apply?

There are no current administrative procedures that accompany the Board of Regents' policy on Academic Freedom and Responsibility, although the recognized and assumed procedure has been that any emerging issues are to be referred to and discussed with the Provost. In addition, according to the provisions of the tenure code, faculty members may file a case with the Judicial Committee if they believe their rights under the AF&R policy have been violated. P&A employees and staff may file a charge with the Office of Conflict Resolution.

In the “Troubled Waters” experience there may have been confusion regarding appropriate review of the film and decisions regarding its public release. When the TW events occurred, several of the senior administrators were out of town. In this case, clarity was missing among some administrators regarding roles and responsibilities of administrators in responding when issues of academic freedom and responsibility arise.

Recommendation:

A short set of administrative **Procedures attached to the Academic Freedom and Responsibility Policy** should be developed to provide guidance and specify the response when issues arise that involve academic freedom and responsibility in the future. The AF&T Committee will draft a short set of Procedures with the Provost’s office.

6. The decision to delay showing the film was based in part on concern over controversy that would ensue from its showing. Some controversy is to be expected in disseminating intellectual work products associated with the University, however. The critical question is what actions are appropriate in the face of expected controversy? What have we learned from this particular controversy over how better to handle such concerns?

Expected controversy must not be a determining factor when disseminating intellectual and artistic work products from the University. The core work of the University is based in debate that results from doing cutting-edge work. Controversy must be expected, whether the controversy results from a challenging presentation, creation, or idea. The University’s dissemination of controversial intellectual and artistic work products is protected by academic freedom. Preserving academic freedom should take precedence; it is just a question of how to handle the controversy.

In the “Troubled Waters” experience, the film was not released when a University vice president (whose job is to protect the University’s name) perceived that the film would result in controversy and negative publicity for the University. Once that decision was made public, considerable controversy and negative publicity for the University resulted as a consequence of her decision. This controversy had an impact on employee and public trust in the University’s

commitment to AF&R, as well as its decision-making processes and its role in honoring funded commitments. When the film was ordered to be released and was released in the following weeks, an open panel discussion followed its initial presentation to encourage discussion of the challenging ideas presented in the film.

Recommendations:

As part of a University, we do need to expect controversy, and we need to have administrators who protect the core values of the University (not just protect the University from negative publicity). When circumstances raise academic freedom as among the relevant core values in a controversy, academic freedom must have priority. The Provost needs to be consulted in a timely way regarding resolution to the conflict (see Recommendations for changes to policy and procedure, #2 and #5, above).

Certain University administrators, such as those in University Relations and other offices, have the complex job of managing communications surrounding controversy. These administrators' decisions, and their communications that address controversial issues, must be guided by the core values and principles codified in University policies and procedures (and laws). As one of these essential core values, academic freedom explains, justifies, and enables us to see the value in diverse viewpoints expressed in University work products. Open dialog about the ideas through panel discussions with the audience (as was done in the TW experience) is a useful example of how these principles can be exercised in managing controversy.