

SENATE COMMITTEE ON SOCIAL CONCERNS
MINUTES OF MEETING
OCTOBER 27, 2003

[In these minutes: Call to Order and Introductions, Review of Charge, The Constitutionality of Divestment, Update on Resolutions Going to Senate on October 30, 2003, Discussion of How to Proceed with the Divestiture from Israel Issue, Ranking of Agenda Items for 2003 – 2004]

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

PRESENT: Margaret Kuchenreuther chair, Barbara Boysen, Jennifer Oliphant, Ruth Taylor, Greg Schooler, Julie Sweitzer, Kenneth Heller, Kara Ferguson, Bobak Ha'Eri, Joel Helfrich, Brian Wachutka, Melissa Williams

REGRETS: Roger Beck, Karen Holtmeier, Ravi Norman, Michelle Dawson, Thomas Augst, Robert Blair, Mani Subramani, Ben Senauer, Susan Von Bank

ABSENT: Joseph Nowak

GUESTS: Mark Rotenberg, Heidi Noonan

OTHERS: Jon Vermedahl, Michal Haimov, Dennis Royzenfeld, Ted Held, Janet Shanedling, Amy Olson, Koby Nahmias

I). Professor Kuchenreuther called the meeting to order and asked all those present to introduce themselves.

II). Professor Kuchenreuther noted that in conjunction with the reorganization of the Senate structure, Professor Judith Martin, chair of the SCC, requested that all Senate committees review their charge and make suggestions for changes. The following comments/suggestions were made:

- Under Duties and Responsibilities section a. reads: "To make recommendations to the Senate for the University's response to social problems and to advise the president and senior academic officers with respect to these matters". A member commented that the verbiage "social problems" in this sentence is very broad and vague.
- Professor Kuchenreuther noted that there is no mention in the Committee's current charge of the proxy voting which the Social Concerns Committee has been charged by the Board of Regents to do on an annual basis. Professor Kuchenreuther suggested taking the following excerpt out of the Regents' policy and adding it to the Committee's charge: "Annually determine which shareholder resolutions should be of concern to the University and recommend specific votes on these resolutions to the senior vice president for finance and operations". By adding this sentence to the Committee's charge would

make it a complete rendering of what the Committee does. Julie Sweitzer added that all Regents' Delegation of Authority policies are being reviewed, and, therefore, this delegation of authority may change as a result of this review. Another member raised the question whether the Social Concerns Committee has permission from Senate to do proxy voting for the Regents. Professor Kuchenreuther will try to get clarification on this responsibility prior to the Committee's next meeting, on November 24, 2003.

- Consider changing the ex-officio without vote position held by Greg Schooler of Asset Management into a voting position. Ms. Dempsey, Senate staff, was charged with investigating whether there is any precedent for an ex-officio having a voting membership on a committee.

III). Professor Kuchenreuther introduced Mark Rotenberg, the University's General Counsel. Mr. Rotenberg was invited to speak, in general, about the notion of divestment and the constitutionality of such actions by the University. Mr. Rotenberg prefaced his remarks by stating that he would not comment on the administration's position on the divestment issue nor his own personal views.

To begin, Mr. Rotenberg noted examples of the University's past involvement in foreign policy and foreign relations matters:

- Divestment from South Africa.
- The University received on two occasions, in 1996 and 1998, resolutions from the University Senate concerning the University's investments in Total Oil Company and Mitsubishi Motors Corporation. The Total Oil resolution requested the University to not invest in Total Oil Company (Total S.A.) stock until there was a reestablishment of a democratic government and a redress of human rights abuses in Burma, or until Total Oil Company suspended its operations in Burma. The Mitsubishi resolution recommended that the Board of Regents instruct the University of Minnesota administration to refrain from purchasing products that carry the Mitsubishi name until the Senate Social Concerns Committee determined that the logging, mining and trading practices of Mitsubishi companies were ecologically sustainable.
- The University's role as a charter member of the Workers' Rights Consortium (WRC).

Next, he provided members with information concerning constitutional law that bears on state government activity in the area of foreign commerce and foreign relations, which he noted is fairly murky. To illustrate, in 2002, the United States Supreme Court issued a divided opinion in *Crosby v. National Foreign Trade Council*. In this case, Massachusetts' law prohibited its state entities from buying goods or services from any person or business that did business with Burma because, in the view expressed by the Commonwealth of Massachusetts' legislature, it did not like what was happening in Burma at the time. According to the U.S. Supreme Court, Massachusetts' statute was unconstitutional because it conflicted with a federal statute that had bearing on United States foreign relations and foreign policy relating to Burma. The federal statute only banned new investments in Burma, not purchasing. Furthermore, the federal statute delegates to the President exclusive authority to impose and lift sanctions against Burma. The

Court held that the effort by the Commonwealth of Massachusetts to regulate in this same area was unconstitutional because it conflicted with the supremacy clause and the foreign commerce clause, which gives Congress and the federal government exclusive authority in this area. To conclude, statutes or activity by states and local governments, which are inconsistent with an area that has been assigned by the federal constitution exclusively to the President or the Congress, are unconstitutional.

The U.S. Supreme Court in the *Crosby v. National Foreign Trade Council* case did not discuss two other holdings addressed by the U.S. Court of Appeals for the 1st Circuit (residing in Boston), which dealt with this case before it went to the Supreme Court:

1. This statute unconstitutionally interfered with the federal government's exclusive authority in foreign affairs, generally speaking. The premise in this holding is that states do not have foreign policies; only the United States has foreign policies.
2. This statute violated the Dormant Foreign Commerce Clause.

Again, the Supreme Court did not squarely address these concerns it only ruled that because Congress had passed a statute giving the President the authority to impose and lift sanctions against Burma, for that reason the Commonwealth of Massachusetts was disempowered and denied the constitutional authority to regulate in that area.

Regarding the question of divestment from Israel before the Social Concerns Committee, the issue is whether or not such an action by the State of Minnesota (meaning the University of Minnesota in this instance, which is a constitutional arm of the State) requiring the divestment of its stock in companies that do business with Israel would be invalid under the *Crosby* or *Natsios* doctrines. In Mr. Rotenberg's opinion, there is no clear constitutional bar or proscription in terms of state divestment resolutions or policies relating to Israel. However, such resolutions and policies are vulnerable and subject to legal doubt under the *Crosby* or *Natsios* cases.

The position of the Congress and the President on various issues relating to Israel is lengthy and complicated. The Congress has legislated numerous times on questions affecting Israel and the Palestinians. Therefore, how the divestment resolution is drafted, and what conditions are put forth in the resolution, etc., will impact its validity. Once the resolution is drafted, the verbiage of the resolution would need to be compared to particular acts of Congress to see if they coincide. Then, the question of whether the resolution constitutes an undue interference with the Congressional and Presidential authority in the area of foreign policy will need to be determined. The overall perspective on this matter is very clear according to Mr. Rotenberg - a state may not develop its own foreign policy in conflict with the foreign policy of the United States. The foreign policy authority of the United States is vested largely in the executive branch of the federal government under Article II of the constitution. Congress has substantial authority over foreign policy insofar as it can regulate appropriations, rules for the armed services and foreign and interstate commerce.

Mr. Rotenberg noted that there is an exception to the Dormant Foreign Commerce Clause, which permits states and local governments to operate as market participants called the Market Participant Exception. The Market Participant Exception affirms that state and local governments

have the right to do business with whomever they choose when participating in the market. There have been cases where the statutes or policies of a particular state have been challenged and upheld, even though these statutes tend toward interference with foreign policy e.g., New Jersey's Buy America statute. Arguably, such statutes interfere with the exclusive foreign policy power of the federal government. The Supreme Court opinion that endorsed the Market Participant Exception doctrine involved efforts by a state to advance its own citizens' agenda e.g., preserve jobs in New Jersey. However, there is no Supreme Court case that authorizes a state to influence a foreign sovereigns' behavior directly. Therefore, to the extent that the University of Minnesota would be involved directly in an effort to affect the State of Israel's domestic, foreign or military policy, the Market Participant Exception would unlikely be a successful defense. While this does not mean that there is a case or principle that directly bars such a resolution from being brought forward, the use of the Market Participant Exception doctrine would be unlikely to save the resolution if it were challenged.

To summarize, Mr. Rotenberg noted the law in this area is not well established. With this in mind, he added that there is no clear constitutional bar to a state's divestment from Israel. Nevertheless, there is reason to believe that such a resolution or policy might be vulnerable or subject to attack given the post South Africa boycott cases of the past 3 years from the 1st Circuit Court and the United States Supreme Court. Mr. Rotenberg noted that Minnesota is in the 8th Circuit Court and it is not uncommon for the various circuit courts to conflict with each other. Because this area of constitutional law does not have 8th Circuit precedent, it is not free from substantial doubt in Mr. Rotenberg's opinion.

Questions and comments from members included:

- Is it possible to get this information in writing and distribute it to the Committee? Mr. Rotenberg replied that his remarks can be transcribed in the minutes, but he would prefer not to provide a written opinion on this subject at this time. Before issuing a written opinion, Mr. Rotenberg indicated he would want to consult with the President and the Board of Regents should the Committee decide to move forward with this issue. The member who put forth this request believes it would be a good idea to have this policy in writing because it will impact not only this issue, but other issues that are bound to come forward in the future.
- Did the Massachusetts' case (*Crosby v. National Foreign Trade Council*) prohibit both public and private entities in Massachusetts from buying goods or services from any person or business that did business with Burma? According to Mr. Rotenberg, he believes the case impacted state actors only e.g., the state and its municipalities, counties, etc. Mr. Rotenberg provided this member with the statute site so that he could read the case for himself.
- Is the University of Minnesota a 'wing' of the State? Mr. Rotenberg stated that the University of Minnesota is the State of Minnesota for this and most other purposes.
- What constitutional law is the Market Participation Exception doctrine based on? Mr. Rotenberg explained that the Dormant Commerce Clause gives Congress the power to regulate interstate commerce. The history of the Dormant Commerce Clause incorporates the interstate commerce clause and the foreign commerce clause, which date back to the early federal period. The struggle doctrinally has to do with allowing Congress and

federal authorities enough space to regulate commerce among the states and foreign states as well, while simultaneously allowing state governments and local entities the ability to regulate themselves in a way that does not frustrate the national power. To illustrate, Mr. Rotenberg used the waterways of the United States as an example. He added that there has been a series of exceptions to the Dormant Commerce Clause doctrine giving states the ability to deal with local concerns and one of these exceptions is the Market Participation Exception. The Market Participation Exception allows states, when they are acting as a market participant, to make decisions independent of the Dormant Commerce Clause.

- A member heard that the Office of the General Counsel (OGC) is arguing that the University is not an arm of the State because its charter predates the State of Minnesota charter. By making this argument, the University is optimistic that it will not have to abide by the Minnesota Conceal and Carry Law. Mr. Rotenberg clarified that the OGC has taken the position that the Board of Regents have the constitutional authority to regulate the possession of weapons at the University of Minnesota. This is a question of separation of powers within the State's constitutional structure. It has absolutely nothing to do with whether or not the University is part of the State of Minnesota. The University of Minnesota is clearly a part of the State of Minnesota. The question, as it relates to the Conceal and Carry Law, is whether the legislature can disempower the Board of Regents from regulating guns on campus. It has nothing to do with whether the University of Minnesota is part of the State of Minnesota, instead it is a question of whether the constitutional autonomy of the Board of Regents from legislative dictation extends to this issue or not.

Should other questions arise regarding this issue, Mr. Rotenberg volunteered to be a resource for the Committee.

IV). Resolutions going to the Senate on October 30th include:

- Mount Graham.
- Recycled paper requesting a minimum of 30% post consumer recycled content.
- Duplex (double-sided) copier.

Professor Kuchenreuther noted that the Essential Medicines resolution would not be going to the Senate on October 30th. Because this resolution was not drafted in a suitable format, it is difficult to know what it is asking the University to do. In addition, the SCC felt it would be important for the Research Committee to be consulted on this issue before it is put on the Senate docket.

Professor Kuchenreuther noted that the Mount Graham resolution has been the source of some consternation on the part of the SCC and the Research Committee. It is likely this resolution will stir a lot of contention. As a result, the Mount Graham resolution will be brought to the Senate floor for information rather than action at the October 30th meeting. Subsequently, action on this resolution will be postponed to a future Senate meeting.

Joel Helfrich will introduce the resolution. He noted that one Apache elder, two anthropologists and a lawyer plan to attend the meeting and hope to speak to the issue.

A member, after rereading the resolution, does not believe it is actually a resolution because it does not ask the Senate to do anything. Based on this, it should only be coming to the Senate for information and not action. This resolution basically reports on where the Social Concerns Committee stands on this issue.

Joel Helfrich questioned the relationships of the various Senate committees. Just as the Social Concerns Committee was reprimanded for not consulting with the Research Committee on its resolution on Mount Graham, why did the Research Committee fail to consult with the Social Concerns Committee on a motion they passed last year relating to Mount Graham? Professor Kuchenreuther noted that whenever the Social Concerns Committee passes resolutions in the future, it is imperative that other committees be consulted, should the resolution impact their area of expertise/interest.

V). Professor Kuchenreuther asked members how they want to proceed with the divestment from Israel issue in terms of the Committee's work. As noted by Mr. Rotenberg, it might be prudent to invite the administration to comment on the University's position on the issue.

Other comments on how to proceed with the divestment from Israel issue:

- The South Africa divestment issue is completely separate from the Israel divestment issue.
- Because the situation with Israel and Palestine is constantly changing, it would seem rash to pass a resolution dealing with divestment from Israel.
- Hold for a on:
 1. Divestiture in general, how does it work, provide historical examples outlining positive and negative results.
 2. Socially responsible investing by the University both historically and in the future.
 3. Human rights abuses and violations of international law particularly with regard to Israel.
- Debate ideas:
 1. Divestiture as an effective way to motivate social change.
 2. The University of Minnesota should divest from companies investing in the State of Israel until they abide by international law and human rights standards.
- Based on the information received today from the OGC, continue the divestment from Israel discussion in order to better understand the information that was brought forward today.
- Divestment from Israel is a complex international relations issue. Is the Social Concerns Committee the best forum to deal with this issue? While the issue is important, it may not be the best use of the Committee's work and abilities. In response, a member noted that this same argument could be made for the Mount Graham issue and the sweatshop issue,

both of which have been dealt with by the Committee. Many issues this Committee deals with do not directly impact students. This issue is very much within the purview of this Committee.

VI). A ballot was distributed and Professor Kuchenreuther asked members to rank the potential agenda items for the year. For those not present, a ballot will be sent out and should be completed and returned to Ms. Dempsey, Senate staff. Professor Kuchenreuther noted that the divestment from Israel item is on this list, not to diminish its precedence to date in the Committee, but to see how members are feeling about all the issues brought forward to date.

A member updated the Committee on the issue of substandard off-campus housing. There is a new Housing and Residential Life (HRL) policy for listing properties. Criteria have been established that will restrict some landlords with chronic code and other violations from listing their properties with HRL. In addition, the City of Minneapolis has undertaken some new initiatives e.g., safety sweeps and a new licensing policy. A process is being set up to survey students about their off-campus housing experiences, which will be yet another resource for students. New educational programs related to tenants rights are also being planned.

Professor Kuchenreuther noted that MPRIG is bringing forth a resolution asking the University to stop doing business with Lehman Brothers. The MPRIG resolution and a letter from Lehman Brothers were distributed to the Committee. According to Greg Schooler of Asset Management the Lehman Brothers resolution is a moot resolution if indeed the Lehman Brothers correspondence to the University is accurate and they keep their word. Professor Kuchenreuther stated that it is very possible that MPRIG does not necessarily agree with this point of view.

Next, Brian Wachutka distributed information on the genetic manipulation and genome patenting of wild rice.

Lastly, Professor Kuchenreuther announced that she, as chair of the Social Concerns Committee, was invited to attend a conference at Columbia University, 'Socially Responsible Investing and the 21st Century: A Look at the Role of Universities as Institution Investors and the Issues'. Due to lack of funding, Professor Kuchenreuther will be unable to attend. However, Greg Schooler from Asset Management will represent the University. Mr. Schooler noted that the meeting date was moved from November 2003 to February 2004 so Yale and Harvard can participate.

VII). Hearing no further business, Professor Kuchenreuther adjourned the meeting.

Renee Dempsey
University Senate