SENATE COMMITTEE ON SOCIAL CONCERNS
MINUTES OF MEETING
NOVEMBER 7, 2005

[In these minutes: Openness in Research Policy, Solomon Amendment]

[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 represent the views of, nor are they binding on, the Senate, the Administration or the Board of Regents.]

PRESENT: Ken Heller, chair, Joseph Marchesani, Jennifer Oliphant, Todd Tratz, Peter Hiniker, Richard Lidstad, Elizabeth Richardson, Benton Schnabel, Greg Schooler, Julie Sweitzer, David Fox, Catherine Jordan, Christopher Barrett, Samantha Butts, Reid Johnson, Mira Reinberg

REGRETS: Amelious Whyte, Katherine Fennelly, Mani Subramani, Samuel Stone

ABSENT: Sandy Ulsaker Wiese

OTHERS: Julie Carvel, Jewish Community Relations Council; Melinda Sewell, Office of the Vice President for Research

GUESTS: Steven Marchese, director, Career & Professional Development Center, Law School; Tim Mulcahy, vice president, Office of the Vice President for Research; Mark Rotenberg, general counsel, Office of the General Counsel, Tracy Smith, associate general counsel, Office of the General Counsel

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

II). Openness in Research policy: Professor Heller called on Vice President Mulcahy to provide members with additional information on the Openness in Research policy. Vice President Mulcahy began by highlighting the major changes to the Board of Regents policy:

- The policy is a combination of two previous polices, Publication of Investigation Results, and Research Secrecy.
- The name of the policy was changed from Research Secrecy to Openness in Research.
- A privacy protection clause was removed. This was done because both State and Federal laws protect individual privacy issues, and, therefore, there was no compelling reason to retain this clause in the policy.
- An exclusion was reworded because it was unclear about whether clinical trials were covered by the policy. This exclusion was rephrased to clarify that clinical trials are covered by the policy.

- Verbiage pertaining to external sales was tightened up to clarify that there is an exclusion for external sales; hence, no obligation to publish the findings of external sales research.

Vice President Mulcahy noted that overall the changes to the Board policy were relatively minor.

The administrative policy, however, is new and reflects substantive changes to the process for granting exemptions to the policy. Vice President Mulcahy highlighted the major changes:

- Exemption protocol was revamped. Rather than the full Senate approving an exemption request, the Senate Research Committee (SRC), after receiving a recommendation from the Openness in Research Subcommittee, will put forward a recommendation to the administration through the Vice President for Research to either grant or deny a given request. Advantages for having the Vice President for Research making final exemption decisions include:
    - Exemption decisions will be made close to the research base.
    - Dissatisfaction with an exemption recommendation made by the Vice President for Research can be appealed to the President.
- The Openness in Research Subcommittee is responsible for notifying other committee chairs of exemption requests as a means to garner additional input.
- Guidelines were created to help determine whether requests for exemptions are compelling. These guidelines are simply a list of items that should be considered when deciding if a request for an exemption is compelling, and still leaves room for judgment by the group.
- Principle investigators requesting an exemption must complete a form to help the committee evaluate the merits of his/her request.

Comments/questions from members:

- The language regarding notifying other committees about exemption requests should be more explicit. Vice President Mulcahy will share this feedback with the Openness in Research Subcommittee who is revising this policy.
- In instances of Ôwork for hireÕ, if a researcher uncovers findings that are detrimental to the public good, what is this personÕs responsibility in terms of disclosing this information? There should be an administrative policy to stipulate how this information is handled. According to Vice President Mulcahy, this issue most frequently arises in relation to clinical research situations. He noted that the University has both legal and ethical obligations to disclose this type of information. In these situations, the University would work with the sponsor to recognize the importance of disclosing the findings.
- Guideline #2 incorporates two conflicting criteria for consideration of an exemption, academic freedom and the UniversityÕs strategic goals. The way this guideline is worded it appears that it would be acceptable to dispense with academic freedom as long as the University achieved its strategic goals. Vice President Mulcahy noted that this is not the intent of this guideline, and agreed that the wording is somewhat confusing. He will bring this back to the Openness in Research Subcommittee for possible rephrasing.

- With respect to Guideline #5, ÒAre students depending on the publication in order to complete their degree?Ó Does this ever occur? Vice President Mulcahy stated that at other institutions, situations have arisen where students have been put in jeopardy of graduating because they were not allowed to publish their thesis. This question is included to make sure the exemption request takes into account the impact to not only the PI, and the institution, but the student as well.
- What is the rationale for allowing space on the ÔRequest For Exemption To Openness in Research PolicyÕ form for comments by the Office of the General Counsel? This space was intentionally included to give the Office of the General Counsel (OGC) an opportunity to review whether a certain exemption might put the University in a vulnerable position (e.g. export control issues - the position the government takes on making certain technologies publicly known or restricting students from certain countries from seeing or being exposed to certain types of technology). The OGC has a great deal of experience in dealing with contracts that contain information only they would be knowledgeable about, which could impact whether an exemption should be granted or denied.
- The fundamental research definition contained in the document Openness in Research Policy X.X.X. seems inadequate because it only references science and engineering. Vice President Mulcahy agreed that this is another area that could use further clarification.
- Is this an evolving set of documents? Yes, the policy will be a starting point, which will be able to be refined as needed. Annually, a report will be given to the University Senate on the number of exemptions requested and their outcomes as a means of monitoring this policy.

Members unanimously endorsed a motion in support of the both the Board of Regents Openness in Research policy and the supplemental administrative policy. Vice President Mulcahy thanked members for their time and endorsement of these policies.

III). Next item of business was discussion on the Solomon Amendment. Professor Heller called on Steve Marchese, representing the Law SchoolÕs Solomon Amendment Amelioration Committee, to provide background information on this agenda item. Mr. Marchese noted that the issue is the Law SchoolÕs non-discrimination policy, which prohibits discrimination on the basis of sexual orientation, is in direct opposition to the Solomon Amendment. The Solomon Amendment is a federal law that provides for the Secretary of Defense to deny federal funding to institutions of higher learning if they prohibit or prevent ROTC or military recruitment on campus.

In 1995, Congress passed the Solomon Amendment as an attempt to ensure that the military would be able to recruit on college campuses despite its ÒdonÕt ask, donÕt tellÓ anti-gay policy. Essentially this policy prohibits openly gay, lesbian, bi-sexual or transgender individuals from being hired by the United States military.

Under the original Solomon Amendment, Department of Defense funding to a law school could be withdrawn if it refused to permit a service branch to use its facilities for recruitment purposes, a position which clearly violates the Association of American Law

Schools (AALS) non-discrimination policy. Initially, many law schools took the position that they would bar military recruiters from recruiting on their campuses anyway because most law schools do not receive Department of Defense funding. However, the law was amended relatively soon thereafter to include all federal funding (e.g. Department of Education, Department of Labor and the Department of Health and Human Services) to a school that prohibited military recruitment. Realizing the financial predicament this put many law schools in, the AALS created a policy that allowed law schools to permit military recruiters on their campuses as long as the schools engaged in amelioration activity (http://www.aals.org/about_handbook_sgp_mil.php).

In 1999 the financial aid component of the legislation was removed from the Solomon Amendment. In turn, the amelioration requirement under the AALS policy was removed, and law schools were able to bar military recruiters once again. Then, in 2000, the Department of Defense took the position that if law schools denied access to military recruiters, federal funding to an entire institution could be withheld. In response, the AALS reinstituted its amelioration activity requirement.

In 2002, a coalition of law schools under the acronym FAIR (Forum for Academic and Institutional Rights) instituted litigation along with several other named parties to challenge the Solomon Amendment, which forced law schools to violate their non-discrimination policies by allowing military recruiters on campus, or suffer financial repercussions. The litigation proceeded through the federal district court in New Jersey. A motion by the plaintiffs for a preliminary injunction against enforcement of the Solomon Amendment for law schools and universities was originally denied by the district court. The district courtÕs order denying the injunction was then appealed to the Third Circuit Court of Appeals and was overturned late last year. The U.S. Supreme Court granted the federal governmentÕs petition for certiorari earlier this year and in December 2005 will take up the issue of whether the Third Circuit Court of Appeals decision to reverse the injunction was correct.

The University of Minnesota Law School voted last spring to join FAIR as a faculty, not as an institution. Additionally, Dean Johnson created the Solomon Amendment Amelioration Committee to organize and coordinate the Law SchoolÕs amelioration efforts. Prior to the formation of this committee, amelioration activities consisted of disclaimers that were posted around the Law School and electronic communication with students when the military would conduct their on-campus interviews. The Solomon Amendment Amelioration Committee has conducted several fora on issues related to ÒdonÕt ask, donÕt tellÓ and the Solomon Amendment. The committee plans additional activities during the spring semester.

Next, the floor was opened up for questions and comments from members:

- Please explain the implications for a public institution versus a private institution relative to the Solomon Amendment. Mr. Rotenberg stated that the thrust of the FAIR position is that associational and other first amendment rights e.g. free expression and free speech, are in conflict with the Solomon Amendment

stipulations that attach compliance to federal government funding of higher education. When this position is transferred to a state entity, e.g. the University of Minnesota, there is considerable question as to whether the University, as an institution, has these associational or expressive rights under the first amendment. To the best of Mr. RotenbergÕs knowledge, there is no case that an entity of the State of Minnesota has asserted it has a first amendment right to associate or not associate with, or to express or not express a position that varies from those established by Congress, especially when Congress has an assigned responsibility for a particular area – raising and supporting the military. The effect, if any, of this case for the University is somewhat ambiguous. It is unclear whether the University will be bound by the result because of the nature of the claim asserted by the plaintiff. Because this claim relates to expressive activity, it rests uneasily with the UniversityÕs status as a constitutional part of the State of Minnesota.

- What is happening currently in terms of military recruiting at the Law School? According to Mr. Marchese, accommodations provided to the military are identical to the accommodations provided to other employers. Traditionally, only two of the service branches recruit on campus, and they are recruiting for JAG (Judge Advocate General) positions. Parenthetically, when military recruiters come on campus, they are not coming to necessarily make a hiring decision. Rather this is an opportunity for the military to explain the JAG Corps, and answer studentsÕ questions.
- Is the Law School in complete compliance with the Solomon Amendment? Mr. Marchese stated that the Law School is in compliance with the Solomon Amendment. To clarify, he added that the Law School faculty, based on its policy of non-discrimination, decided to join FAIR in order to oppose the Amendment and what the Amendment was doing to their expressive rights in terms of carrying forth the message that discrimination on the basis of sexual orientation is not supported by the Law School. Mr. Rotenberg added that the Office of the General Counsel (OGC) and the University do not exempt the military from signing non-discrimination statements when they come to campus to recruit. The military takes the legal view that they are complying with the law in so far as the supremacy clause of the Constitution, and CongressÕ mandate that the Department of Defense follow the ÒdonÕt ask, donÕt tellÓ policy. Professor Heller noted that if the military signs the statements, then, presumably, they are in compliance. Mr. Rotenberg stated that there is a secondary issue implicit in this comment, and that is that the University does not investigate the certifications of the myriad of recruiters that come to campus to see if they are deceptive or erroneous.
- It seems unlikely that the *FAIR v. Rumsfeld* outcome will have much impact on the UniversityÕs relationship with the military. According to Mr. Rotenberg, the Supreme Court looms much larger today in individualÕs legal and political lives than ever before in American history. With this said, it is difficult to predict the impact that this case will have on the University per se. This is due in large part to the arguments the plaintiffs have chosen, which do not mesh with the UniversityÕs status as a state institution.

- Please explain the issue for the Law School that influenced its decision to join FAIR. Mr. Marchese prefaced his response by noting that in terms of access, the Law School permits access to military recruiters as required under the Solomon Amendment. He added that the Law School faculty voted to join FAIR, the organization bringing forward litigation challenging the Solomon Amendment, in an effort to signal their opposition to the AmendmentÕs requirement of access for the military despite the Law SchoolÕs (and UniversityÕs) non-discrimination policy. In addition to joining FAIR, Dean Johnson, at the request of the faculty, created a Solomon Amendment Amelioration Committee. This committee, through amelioration activities, serves to compensate for harm that is done when military recruiters, who do not observe the UniversityÕs anti-discrimination policy, come on campus. Mr. Rotenberg added that the Military Recruitment Policy is singled out on the Law SchoolÕs website: http://www.law.umn.edu/cso/nondiscrim.html for special censure.
- Is the primary reason the military is allowed to recruit on campus tied to the federal purse string dollars it controls? Mr. Rotenberg asked members to image a law firm having a policy similar to ÒdonÕt ask, donÕt tellÓ. Technically, under the State of Minnesota, while such a policy may be legal, it would not be privileged the same way as the Congressional law that requires the Pentagon to follow ÒdonÕt ask, donÕt tellÓ. If this were the case, the Law SchoolÕs Career & Professional Development Center could refuse such a law firm from recruiting on campus. The issue is not that the military has more money than a particular law firm, but that each entity has a different legal relationship with the University. The Pentagon operates consistent with a statute of Congress, but there is no such statutory protection for a law firm.
- Does the Law School review all the policies of the multitude of employers that recruit on campus? Mr. Marchese stated that the Law School has a non-discrimination policy, which is in each employerÕs registration packet that they are required to sign. Each employer is required to affirm, by completing the form that their hiring practices are in compliance with the governing Law School and University policies. Mr. Rotenberg added that the State of Minnesota has statutes that bar discrimination against individuals based on several protected classifications, one of which is sexual orientation. The Board of Regents also has a policy under its charter, which holds a legal status. This policy is referenced on the Law SchoolÕs website at http://www.law.umn.edu/prospective/policies.html. Additionally, law faculty and schools that are members of the AALS, use the AALSÕs standards to guide their anti-discrimination practices.
- Are the State anti-discrimination law, the Board of Regents anti-discrimination policy, and the AALS anti-discrimination policy consistent with each other? Yes, stated Mr. Rotenberg, as it relates to what is being discussed today.
- Which Articles in the U.S. Constitution are at issue in *FAIR v. Rumsfeld?* Article 1 and Article 5 stated Mr. Rotenberg.
- Why is only the Law School concerned about the militaryÕs discriminatory recruiting practices on campus, and not other colleges at the University? Mr. Rotenberg stated that the University does not have a systemwide Board of Regents policy on recruiting. Unlike many other colleges on campus, the military

regularly recruits Law School students. The UniversityÕs anti-discrimination policy, however, applies to all recruiters who come to the University to recruit students.

- Have any public law schools initiated litigation around the Solomon Amendment? No, stated Mr. Rotenberg. In Mr. RotenbergÕs opinion, over the past six/seven years there has been a trend to strengthen the Solomon Amendment. As a result, most public institutions, which are governed by boards that are elected, are disinclined to challenge this issue at this time. However, if *FAIR v. Rumsfeld* is decided in favor of the plaintiffs, there are implications for public institutions that may lobby for an amendment to weaken or rescind the Solomon Amendment. A solution to the conflict between the UniversityÕs non-discrimination policy and the militaryÕs ÒdonÕt ask, donÕt tellÓ policy would be to have Congress pass a different law, other than the Solomon Amendment, for the regulation and raising of the Army and Navy.
- Do any public law schools preclude the military from recruiting on their campuses? No public law schools, to the best of Mr. MarcheseÕs knowledge, preclude military recruitment.
- Could the University rent space for military recruiters at an adjacent off-campus facility (e.g. a hotel) for recruitment purposes? It was noted that statute language requires that recruiting services be provided to the military Òon the same termsÓ as other employers/organizations. For the University to facilitate recruitment at an off-campus location would not really solve the problem.
- Does the Solomon Amendment apply to the Public Health Service? Mr. Rotenberg stated that he was unsure whether there exists a statute of Congress that requires equal access for the Public Health Service, but would be willing to look into the question further if desired.
- The committee has heard of two instances, the Solomon Amendment and the Maranatha Christian Fellowship lawsuit, where for legal reasons the UniversityÕs hands are tied when it comes to enforcing its non-discrimination policy. Mr. Rotenberg stated that the Maranatha issue was a little different in that it involved a clash of Constitutional first amendment rights. In the instance of the Solomon Amendment, the issue is a non-discrimination value being asserted against Congress.
- Has this issue spawned interest on the part of faculty outside of law schools e.g. medical schools? Mr. Marchese and Mr. Rotenberg were unaware of any interest around this issue outside of law schools.
- From a social concerns perspective, the Solomon Amendment seems indefensible.

In closing, Professor Heller thanked todayÕs guests for attending todayÕs meeting. He announced that at the December 5th meeting the committee would continue its discussion of the Solomon Amendment, and receive a proposal for the University to adopt a code of conduct for its business vendors.

IV). Hearing no further business, Professor Heller adjourned the meeting.

Renee Dempsey

University Senate