

Minutes*

Academic Freedom and Tenure Committee
Friday, October 22, 2010
9:30 – 11:30
300 Morrill Hall

Present: Barbara Elliott, Karen Miksch (co-chairs), Yusuf Abul-Hajj, Tracey Anderson, William Craig, Joseph Gaugler, Barbara Loken, Linda McLoon, Gary Peter, Paul Porter, Terry Simon, Carol Wells

Absent: Arlene Carney, Christine Marran, Paula O'Loughlin

Guests: Professor Michele Goodwin (Women's Faculty Cabinet); General Counsel Mark Rotenberg

[In these minutes: (1) report from the Women's Faculty Cabinet; (2) academic freedom issues: (a) legal protection for students and (b) Facebook comments; (3) academic freedom issues: "Troubled Waters"]

1. Report from the Women's Faculty Cabinet

Professor Elliott convened the meeting at 9:30 and welcomed Professor Michele Goodwin from the Law School, chair of the Women's Faculty Cabinet (WFC).

Professor Goodwin related that she had been invited to talk about tenure and promotion and consideration of automatic extensions of the tenure clock. She began by reviewing briefly the activities of the WFC. She reported on the efforts it has made to study pay-equity at the University and the historical issues it has also considered. The WFC has brought to the attention of the Provost the results of the study; he has concluded that there is an issue worthy of investigation and is now retaining an outside consultant to review the data and develop the right model for addressing the problem. A member of the WFC will be part of the team reviewing proposals from potential consultants. Professor Goodwin commented that sometimes disparities arise without ill intentions on anyone's part. For example, women are less likely to seek outside offers, which can raise salaries for those who pursue them.

The Committee discussed the study with Professor Goodwin for a few moments, and urged strongly that the Academic Health Center be included in the future (it was not included in the just-completed study).

Professor Goodwin turned to the question of extending the probationary period and provided Committee members with a bibliography of literature on the topic; she said the WFC plans to take up the topic this year. Two members of the WFC, Professor Jill Hasday in the Law School and Professor Erin Kelly in Sociology, study equity in the workplace. What is on the table is how the University should move forward, and she would like the Committee's opinion. The WFC is at the beginning of considering the matter.

* 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 Goodwin provided an overview of what they know about automatic extensions of the probationary period. Princeton was the first to adopt an automatic extension; they had task forces that concluded that fewer female faculty requested extensions than expected. Both males and females said they were reluctant to request extensions because they were not sure how the request would be viewed and were worried it would be seen as a sign of weakness (which apparently was worse than a lack of sleep because they had to work too much and be parents of infants or small children). More men applied for extensions than women. As a result of reviewing this information, Princeton made the extensions automatic. Emory has also done so. [So has the University of Iowa.]

Professor Gaugler said he liked the idea of an automatic extension because it eliminates the problem of perception. He recalled that the Committee has talked about this in the past. That is a concern identified in the research, Professor Goodwin said. She said she did not know the number of institutions that have adopted an automatic extension but it appears that elite institutions are moving in that direction.

If many women use the extension, what effect does it have on their salaries, Professor Abul-Hajj asked? Over time, women's salaries could be lower because their merit increases during the period of the extension might be lower. How can that problem be addressed? That is a great question, Professor Goodwin said. If men and women seek extensions at an equal rate, that concern should be alleviated, but it is still a relevant concern. Professor Abul-Hajj asked how frequently men and women seek an extension; Professor Goodwin did not know. He said that in his department, women took it but men did not. There are a lot of anecdotes, Professor Goodwin said, and there may be differences across departments, which is why they need data.

If the extension is automatic, could there be a legal challenge from faculty members who do not have or adopt children, Professor Loken asked? Professor Goodwin expressed doubt that such a suit would be successful and said it was related to caretaking burdens: Faculty members without caretaking responsibilities would also not have an opportunity to request an extension for that reason, which is permitted by section 5.5 of the tenure code, Professor Miksch pointed out.

[5.5 Exception For New Parent Or Caregiver, Or For Personal Medical Reasons.

The maximum period of probationary service will be extended by one year at the request of a probationary faculty member:

1. On the occasion of the birth of that faculty member's child or adoptive/foster placement of a child with that faculty member; or
2. When the faculty member is a major caregiver for a family member [2] who has an extended serious illness, injury, or debilitating condition. A faculty member may use this provision no more than two times; or
3. When the faculty member has an extended serious illness, injury, or debilitating condition.]

The question in the case of caregiving, compared to an extension for childbirth or adoption, is whether it would also be automatic or would need to be requested, Professor Miksch said. One can request an extension now; the question is whether it also should be automatic if the caregiving responsibilities are disclosed. One would need to make it clear one is taking care of an elderly parent, for example, Professor Loken said. The problem is that caregiving is more nebulous than childbirth or adoption, Professor Gaugler commented; there would need to be definitions for caregiving in other situations such as caring for an elderly relative, he said.

There is a concern in some of the research, Professor Goodwin reported, that sometimes a policy designed to help women in their careers may not do so because men use the policy more than women do. That is why he would like to see it be automatic, Professor Gaugler said, because it eliminates that kind of disparate use. Professor Goodwin encouraged the Committee to engage the CIC because it could be useful to learn what takes place at the peer schools in the CIC.

Even with the automatic extension, do faculty members still have responsibilities, Professor Gaugler asked? They do, Professor Goodwin said.

For her and her academic culture in the Academic Health Center, Professor Wells said, the faculty live and die by NIH grants; obtaining grants is the primary way they get promoted. They have raised the question of extending the probationary period with the NIH, which has said it will look into it. She said she advises women faculty never to seek an extension because the grant money does not stop, and if they take an extension, the grant work may not be completed and that will be the end of their career. Until NIH and NSF cooperate, faculty members who receive grants cannot take an extension. They who live and die by federal funding cannot listen to the advice to extend the probationary period.

Professor Loken commented that this is like a Gordian knot. Professor Goodwin agreed that is true in an era of patent or perish or publish or perish. Professor Gaugler said, however, that if one has an R01 grant, an automatic extension allows the faculty member to focus on the research and not be burdened with other responsibilities, but he shared Professor Wells's concern that getting an extension would not mean anything for faculty on grants. Professor Wells also pointed out that many of these faculty members have comparatively few structured teaching responsibilities (e.g., formal lectures) to start with, and in the meantime they have trained employees and they can't close their labs. Professor Goodwin reported that the WFC had hosted a conference, Women in Higher Education: Power, Progress, and the Promise of Equality, which took place on October 7-8, 2010. The conference included a panel of women scientists who laid it on the table and who offered very candid comments about their careers and the difficulty breaking through the glass ceiling. That these women were successful deans and administrators demonstrated the great strides women have made. But, it was worth noting the sacrifices made along the way; in some cases delaying child rearing or not disclosing pregnancies for fear of creating the misperception of not being serious about their work.

Professor Miksch said it would be interesting to learn from the CIC schools that have decided on automatic extensions; if the CIC were to adopt them, that could make it more likely there would be a response from NIH and NSF. Professor Goodwin agreed that the collective power of these large institutions could have an effect.

Professor Goodwin reported on a report from the Sloan Foundation, which has provided grants to study these issues. In a report it issued last year, they found that policies are necessary but there also has to be a cultural shift if the policies are to be meaningful. As the WFC gathers data on the policies that institutions have adopted, they will also need to think about culture.

Professor Loken commented that it is interesting how norms develop in different units. In her college (the Carlson School), most women have children. In certain others, almost none do. That varies by institutional culture, Professor Goodwin observed. Women have a perception problem, a fear that if they have a child, it means they are less committed to their career. There have been qualitative studies of

cultural issues concerning perceptions, Professor Goodwin said, especially for women, and why they do not take advantage of policies on their campus. She noted some of the data from the research:

- 51% of women came back earlier than they would have liked after having a child to be taken seriously as an academic;
- 46% reported missing their children's important events when they were young to appear committed to their jobs;
- 34% did not bring children to the office during their school breaks because they worried that other faculty would be bothered;
- 33% did not ask for reduced teaching load when needed for family reasons, because of adverse career repercussions.

Nearly 20% of women and 18% of men did not ask for an extension even though it would have helped them. Perception thus still drives the decisions in many cases; as Professor Gaugler has pointed out, she said, an automatic extension could minimize that problem. An important question could be to examine the tenure rate after faculty members have taken leaves. But the decision is very subjective even if the institution says faculty members who take leaves should not be discriminated against.

The Committee has worked hard to make the tenure decisions as non-subjective as possible, Professor Gaugler said. If a faculty member received four extensions, someone approved them. Even the chairs only get one vote in the tenure decision, Professor Goodwin observed.

Professor Miksch commented that the Committee is working on a template letter for new hires that will direct people to the tenure code and the procedures. She wondered if letters to external reviewers should not also know about extensions of the probationary period and have the policy explained to them. It is not possible to get into faculty heads, but if chair push on this, it might help. Some may believe that the probationary period has been too long and so more should be expected; they need to understand that the person should be treated as though in the sixth year even if extensions have been taken. Professor McLoon said she serves on the Medical School promotion-and-tenure committee, which looks for continuous progress; if there is a gap, there is a problem.

Changing the culture means knowing the culture and engaging the leaders, Professor Goodwin said, and tying the issue to the mission, training key gatekeepers, increasing campus awareness, reviewing use of the policies, and building the business case (extensions can help retention and quality of life and increase morale and commitment to the institution). She said she looked forward to following up with the Committee.

Professor Elliott thanked Professor Goodwin for joining the Committee.

2. Academic Freedom Issues: (1) Legal Protection for Students and (2) Facebook Comments

Professor Elliott welcomed General Counsel Mark Rotenberg to the meeting and noted that the Committee has had a number of academic-freedom items on its agenda since last year, and now there is a new elephant in the room.

Mr. Rotenberg said he was offered three topics in a message last August but also knows the Committee is interested in and has jurisdiction over academic-freedom questions related to the film

"Troubled Waters." He said he has spent a lot of time on the film in the last several weeks and he knows the President has spoken about it on a number of occasions, including with the Faculty Consultative Committee yesterday. He is also aware the President intends to involve faculty in the discussion, and in particular this Committee, in the follow-up. Professor Elliott suggested Mr. Rotenberg take 30 minutes to discuss the three issues and use the other 30 minutes for "Troubled Waters."

The first topic, Mr. Rotenberg said, was whether students are entitled to legal defense and indemnification from the University (1) if they are employed by the University or (2) if not. The answer to the question is governed by the Regents' policy on Legal Defense and Indemnification of Employees. Under the policy the University offers very broad defense and indemnification (D&I) benefits for any employee defined by the policy, during a period of paid employment, who is acting within the scope of his or her employment. The University has a long history of interpreting the policy broadly; his office investigates when a request for D&I arises and makes a report to the President, who makes the decision in almost all cases (except, for example, for the President himself or herself) whether D&I benefits will be provided. The President almost invariably accepts the recommendation from the General Counsel's office.

Many people are deemed to be "employees" under the provisions of the policy, such as the members of the Board of Regents (who are not employees by any usual measure), Mr. Rotenberg explained. The policy covers volunteers working under the direction or control of a University employee, and members of advisory boards and task forces and commissions (and the University has hundreds of such bodies). So the direct and simple answer is that his office will provide D&I benefits to any student who is doing any of those things. If a student is "merely" going to school, Mr. Rotenberg said, he or she is not covered by the D&I policy.

Dr. Craig inquired about the "scope of work" language: If a custodian is involved in something that requires a legal defense that has nothing to do with work, does the employee relationship trump the fact the activity had nothing to do with work? Mr. Rotenberg said that one must be an employee, the events must have happened while the person was an employee, and the employee's actions must be within the scope of employment or official capacity. If a current University employee is sued for divorce, the University will not defend him/her. However, his office interprets "scope of responsibilities" quite broadly, and if someone does something he or she believes is within the scope of employment, even though it is unwise, the General Counsel's office generally will defend the person. There are, however, limits to how far that will go.

The question came up in regard to a graduate student doing Ph.D. research who is not on an assistantship, Professor Miksch recalled. The student was asked to disclose information that he had promised in his IRB statement he would not; perhaps this is a case that would be handled by Student Legal Services rather than through D&I benefits from the University. Mr. Rotenberg agreed that was likely. He pointed out that Student Legal Services does not report to the General Counsel and is independent of the University; it will represent students in their private capacities (e.g., landlord-tenant disputes). That service is free and it is important to keep in mind when thinking about students.

The second issue he was asked about was students, free speech, and comments on Facebook last spring by two Duluth students, Mr. Rotenberg said. He collected information about the incident, and the Duluth equal-opportunity officer looked into the events; he said he assumed the Committee was interested

in the free-speech and First Amendment questions, not those of racial harassment, racial harmony, sensitivity training, and the like; Professor Elliott said it was.

Mr. Rotenberg said his comments would be directed to the free-speech and First Amendment components of the incident, but noted that his office was not consulted on how the discipline of the students should be handled (and there has been no legal action taken, so his office would not necessarily be involved). The facts as he understands them, Mr. Rotenberg told the Committee, are that two undergraduates at Duluth were engaged in writing on Facebook with one another in a study hall on campus. An African-American student (woman) walked in, at which point the two undergraduates started posting comments on their Facebook wall that were highly inflammatory and racist. (Because of the way they were posted on Facebook, the comments were not just between the two of them but were also available to others on Facebook.) Everyone involved, including one of those who posted the comments, agreed that they were inflammatory and racist.

One of the two students doing the posting had not attended class for some time and, he is told, has not re-enrolled at UMD this semester, Mr. Rotenberg told the Committee. Because that person is not a University student, there can be no University discipline. The other student is back; there was a report by the Director of the Equal Opportunity office on the Duluth campus that found the student had violated the UMD Policy on Racial Harassment and the Student Conduct Code. The report recommended certain sanctions. The student did not contest the recommendations and apparently accepts the sanctions (e.g., participating in a course on undoing racism, community work).

There is a question, Mr. Rotenberg said, whether postings on a Facebook wall between two students about a third person are covered by the Student Conduct Code or the Duluth equal-opportunity policy. He offered a few observations.

-- It is clear, on the one hand, that the University can discipline people who create an intimidating or hostile environment in University settings—classrooms, debates, conferences, etc. In the case of this Committee meeting, for example, the chair can bar humiliating, harassing, and embarrassing comments. So can a professor in class. The University can discipline that speech. The law has long recognized that the First Amendment does not protect every kind of speech one might wish to utter; the classic case is that one may not yell "fire" in a crowded theater. There are also University policies that impose time/place/matter restrictions, such as on the Mall—but the University cannot engage in viewpoint discrimination. So it is clear that the University can and will discipline certain kinds of speech in certain University settings.

-- It is equally clear that just because they are affiliated with the University does not make faculty members, staff members, and students subject to University speech restrictions in settings that have nothing to do with the University. One could be sitting in a bar downtown after a professional football game making comments that are vile and inflammatory to those present; the University does not and cannot punish such speech through its policies.

-- One emerging question here arises from the fact that technology changes at a geometric rate while the law changes much more slowly. When two people are "talking" to each other on Facebook, such speech does not clearly resemble either of the examples he just gave. Attorneys argue by analogy, Mr. Rotenberg observed, and one criterion he could suggest in the Facebook case is the extent to which that speech on Facebook had an impact on UMD's teaching, research, and outreach missions. He said he

did not know the answer. If the Facebook wall, however, is more like acting out in the downtown bar, featuring extremely offensive speech that has nothing to do with the University's teaching, research, and outreach missions, then it not may be something that the University can punish. Mr. Rotenberg reminded that Committee that the University is a government institution and it can only regulate what the government can regulate, which is different from what private institutions can do. For example, under the law, Macalester could require that all students march in a Scottish Day parade every Wednesday; it would be unthinkable for the University to impose such a requirement. If the speech at issue here is highly disruptive and restrictions directly serve important objectives of the University, then perhaps the Facebook postings can be regulated by the University, especially at the extreme edges. On the other hand, what if the comments had been directed at the Chancellor instead? What if they had attacked the Chancellor on the basis of gender or religion or sexual orientation? The "speech" might have been very inflammatory, and perhaps a violation of the Student Conduct Code, but the government (i.e., the University) would need to be extremely careful about punishing students who attack the Chancellor on Facebook.

These are just ruminations of the General Counsel, Mr. Rotenberg concluded, intended to help the Committee consider some of the parameters of free speech and academic freedom related to the Facebook incident.

Professor Gaugler said he views Facebook as a private place that it would be problematic for the University go on someone's Facebook page and use its contents as the basis for disciplinary action. What would stop the University from going into private email accounts? If someone uses University equipment to send a message through a personal account, with no University identification, does the University have access to it?

There is a difference between the University having access to information and using it to punish, Mr. Rotenberg said. The University asserts the right to search University databases (including email) or University computers for lawful reasons, but taking disciplinary action based on the data it collects is a different issue. University policy explicitly allows ancillary use of its equipment, for example, to send personal emails about a dinner appointment. The limitation is that one cannot use the University equipment in such a way that it diminishes the University's use or value in it.

Professor Gaugler said he sees Facebook as more akin to the guy in the bar after the football game versus its potential impact on the academic mission. But the messages were sent in a University setting and may have created a hostile environment on campus, Professor Loken observed. Mr. Rotenberg cautioned again that he did not have first-hand knowledge of the events and was drawing from the report of the Duluth equal-opportunity officer, but said the events took place in a University study hall and the African-American student was not aware of them at the time the comments were written. And it was probably not on University equipment, Professor Gaugler commented. What they did is no different from gossiping, Professor Loken said, but in this case others could see it. Mr. Rotenberg agreed that others could see it, and the comments eventually got to the African-American student and many other people. So if one had a significant number of Facebook friends, one could create a hostile environment by such postings, Professor Loken commented. Professor Gaugler agreed that cyber-bullying is problematic. One could have written the same comments from home and created a hostile environment, Professor Abul-Hajj pointed out. So it is like cyber-bullying, Professor Loken said. It is, Mr. Rotenberg agreed, and said these are emerging First Amendment questions that the experts and public-university attorneys need to deal with.

3. Academic Freedom Issues: "Troubled Waters"

The Committee put off the third question originally posed to Mr. Rotenberg because Professor Marran had raised it and needed to be present for the discussion, so it moved to the questions arising from the controversy surrounding the film "Troubled Waters." Professor Elliott provided Mr. Rotenberg with a set of questions that the Faculty Consultative Committee (FCC) had developed, some of which it is expected will be taken up by this Committee. There are three categories of questions, Professor Elliott pointed out: what happened, what are the questions related to academic freedom, and what are the questions related to University communications; there is some overlap between the latter two.

Mr. Rotenberg said that with respect to the first set of questions, "what happened," the President has indicated to FCC that he understands it (FCC) would refer questions to this Committee and that this Committee will work with the Provost and the General Counsel on those questions. Mr. Rotenberg offered to help the Committee with what happened and in trying to answer the questions related to academic freedom.

The President also asked Mr. Rotenberg to prepare a brief chronology, and in the course of doing so, he and some members of his staff have gone through several thousand pages of documents. Those same documents have been made available to the media and spawned several articles, some of them fairly accurate and some of them less so. He said he would be glad to provide to the Committee a summary of what happened. He said that Committee members are also free to review all several thousand pages and reach their own conclusions.

With respect to the academic-freedom questions, he can provide an impressionistic perspective now and would be glad to meet with the Committee again to talk in more detail about academic freedom and some other components of the chronology, such as the responsibilities of University officials in terms of who should review items, and so on. The academic-freedom questions are very important, as both the President and Provost have said a number of times: The Regents' Academic Freedom and Responsibility policy is a cornerstone of everything that happens at the University and academic freedom must be the hallmark of what happens at the University or its work would be fatally undermined and no one would be able to trust its scholarly output. The Board of Regents is fully appreciative of the importance of its Academic Freedom and Responsibility policy.

The challenge in the case of "Troubled Waters" is partly a question of what this project was all about, Mr. Rotenberg said. He said he could pose rhetorical questions, noting again that attorneys typically argue by analogy to concrete cases.

On the one hand, faculty notes and lectures, the articles they write, the books they publish, and the grants they carry out are the overwhelming preponderance of the products of the University, perhaps 99% of what it produces. In those cases it is not debatable whether University administrators can try to stop or censor or edit those works absent an extreme situation (e.g., falsification of data, abusing human subjects). It is unthinkable, for example, that an administrator would insist on reviewing a faculty member's article to be submitted to a peer-reviewed journal.

On the other hand, perhaps 1% of the products of the University come out of the Foundation, the Vice President for University Relations, the President's office, the Office of the General Counsel, and so

on, and those items contain speech on behalf of the University. They are produced by highly-trained employees who are certainly engaged in creative expression, but they are routinely subject to careful review and editing by University officials. For example, he would fire a lawyer who insisted on writing his or her own brief on behalf of the University without permitting careful General Counsel review and editing. The staff member who prepared notes for the President for an FCC meeting cannot argue with the President about what he will say. Vice President Himle exercises a similar responsibility all the time (the sidewalk slips that have appeared across campus, for example, are prepared by staff members in her office, but she can edit or stop them). These are a very small part of what the University produces, but they are not trivial—there are thousands of pages of such materials published by University employees each year.

The question about the film relates to its underlying character, Mr. Rotenberg said. They know it was based in part on a legislative appropriation to the University to create an educational film about the watershed in Minnesota, that it would be copyrighted by the University, and as such it was intellectual property owned by the University. The Office of the General Counsel negotiated the contract with TPT giving them a non-exclusive right to broadcast the film if it met their standards. So one possible understanding—Mr. Rotenberg said he was not saying this is what the understanding should be—is that the film is "the University speaking." The University has the right to be concerned how it speaks.

They also know that a P&A employee wrote the grant for which the legislature appropriated the funding, and that that person worked under the direction of a tenured faculty member and consulted with a number of faculty. Faculty members are quoted in the movie and offered academic viewpoints. So another way to conceptualize the film is that a P&A employee, working with tenured faculty, created an educational product on a matter of substantial public importance. From this perspective, one wonders on what basis the administration could say it doesn't like the way the information is presented and believes it should be presented in some other way. In this conceptualization, the question is about the University's right to restrict academic freedom related to this scholarly work. It is not absolutely clear-cut, Mr. Rotenberg said. Saying that does not mean one does not come down on a particular side, and—the President and the Provost decided the movie would be shown when it was supposed to be, without editing, and that TPT could also broadcast it.

Mr. Rotenberg said he would help the Committee in any way he could as it delves into these questions.

Professor Abul-Hajj asked Mr. Rotenberg where he would categorize the film: In the 1% or the 99%? Mr. Rotenberg said he is the lawyer; his clients, the President and the Provost, have already answered the question. Before the fiasco it was perceived to be in the 99%, Professor Abul-Hajj said, a research project funded from different sources and one the University had sanctioned. In between creation and release there was interference by a University administrator to delay it, and that is what is troubling to many. Mr. Rotenberg said he fully appreciated the concern, and those concerns are why he was asked to become involved. It is exactly for that reason: One job his office can perform is help University officials better understand the law of academic freedom and of the First Amendment.

If a pharmaceutical company asks her to write a review of drugs in a particular class because the company believes its drug will look good, Professor Wells said, and she does the research, is the company allowed to review her research results? It is the same as the legislature funding this film. Mr. Rotenberg said that Professor Wells's example is covered in the new administrative conflict-of-interest policy.

Faculty members are not allowed to engage in scholarly work that is nothing more than a promotional piece for industry. If she is asked to do a piece of scholarly work, it must be objective, something she stands behind, and the industry can't muscle her. Sponsored Projects Administration typically negotiates with research sponsors and does not allow great intrusions into faculty academic freedom. The University will not take gifts if the donor wants to intrude too deeply into academic freedom—and the University will turn millions of dollars away if that is the case. They try to protect University research activities from predation.

The Committee recently discussed consulting contracts and the danger they can present to academic freedom, Professor Elliott noted. She also noted that the President, at the FCC meeting the preceding day, had said that the default for decision-making must be to forward the issue to the Provost if there is a question about academic freedom. Her question now, to which she invites Mr. Rotenberg to respond in the future, is what, in existing policies and procedures, did not happen? What flaw is there in policies and procedures that caused the problem? The Committee would like to work with him on answering that question. Mr. Rotenberg said that he would review the questions from FCC and that he and the Provost would do whatever they can to deal with them and will follow the Committee's guidance on what it needs.

Professor Elliott thanked Mr. Rotenberg for joining the Committee and adjourned the meeting at 11:30.

-- Gary Engstrand

University of Minnesota