

Minutes\*

**Faculty Consultative Committee  
Thursday, July 10, 2008  
1:15 – 3:00  
238A Morrill Hall**

Present: Emily Hoover (chair), Gary Balas, Nancy Carpenter, Carol Chomsky, Shawn Curley, Dan Dahlberg, Janet Fitzakerley, Marti Hope Gonzales, Carolyn Hayes, Mary Jo Kane, Michael Oakes, Nelson Rhodus, Martin Sampson, Cathrine Wambach, Becky Yust

Absent: William Durfee, Michael Hancher, Brian Isetts, Jeff Kahn, Judith Martin, Geoffrey Sirc, Jennifer Windsor

Guests: Professor Tom Clayton (Chair, Committee on Academic Freedom & Tenure)

Other: Kathryn Stuckert (Office of the President)

[In these minutes: (1) items from the Academic Freedom & Tenure committee; (2) committee business]

Professor Hoover convened the meeting, welcomed Professors Fitzakerley and Oakes, and called for a round of introductions.

**1. Items from the Academic Freedom & Tenure Committee**

Professor Hoover welcomed Professor Clayton to the meeting, who brought four items from the Academic Freedom and Tenure Committee (AF&T) for discussion. Professor Clayton related that AF&T had been over the documents several times and presents them to this Committee for information and discussion before it prepares versions for the Faculty or University Senate to consider.

Professor Clayton suggested that the Committee take up the proposed revision to the Board of Regents policy Academic Freedom and Responsibility later in the meeting, as the one likely to be the most controversial, but he did note language that Professor Chomsky had discovered that had been adopted at a Canadian university: Academic staff "shall be free to carry out research and to publish its results, free to teach, to discuss and to criticize both the University and the wider society it serves. However, in doing so they shall maintain the proper academic tradition of reasonable discussion." That language, Professor Clayton commented, "tells it like it is" in the right language and at the right length.

(Item #1) Professor Clayton turned first, however, to a draft statement on the responsibility of the University to researchers:

**MOTION:**

The Faculty Senate and the President affirm their mutual understanding that, in cases of unpreventable major adversity affecting faculty members, whether due to accident, the weather,

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\* 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.

or any other cause, the administration will immediately do all in its power to enable faculty members affected to resume their professional activities as soon as possible; and will insure that they will not be held responsible for professional performance as usual to the extent that their professional activities are disrupted through no fault of their own.

COMMENT:

The Committee on Academic Freedom and Tenure (AF&T) heard reports about the impact of the collapse of the 35W bridge on research being conducted in a building near the site of the bridge. Our general concern was the potential impact on review of individuals for promotion, tenure, and merit in the case when research facilities are disrupted because of natural disaster or other causes beyond the control of the faculty member. After several discussions, including a discussion with Vice President for Research Tim Mulcahy, we concluded that a general statement, to be embraced by the President as well as the Faculty Senate, would establish expectations without binding anyone to particular solutions. The range of possible problems precludes the adoption of a more specific policy, so AF&T recommends this general statement.

Professor Clayton pointed out, as noted in the COMMENT, that the genesis of the statement was the collapse of the 35W bridge and the effect on the nearby research facilities of a faculty member who was left without the facilities he needed. The draft is an ethically hortatory statement that is not legally binding but says that the University will do its best promptly to help faculty when they need it. The draft elicited a number of comments and questions.

-- Professor Kane asked if one can stop the tenure clock in a case like this. If a probationary faculty member loses six months or loses his or her research? Professor Chomsky thought not, although there is probably sufficient flexibility in the tenure code to make allowances for such an occurrence—but what a department could do may depend on what is contained in its 7.12 statement. There are provisions for maternity and paternity, and for caregiving and personal illness, but there may not be an easy way to recognize this situation. Professor Clayton agreed that is a big loophole, but one that probably should not be dealt with in this statement. Professor Chomsky suggested that perhaps a sentence could be added to the tenure code providing for stopping the tenure clock in cases not specified or anticipated but which the department, college, and Provost could take into account. Professor Clayton agreed that AF&T should look at the code because it should be accommodate all legitimate causes for for stopping the tenure clock.

-- "Professional activities" is too broad a phrase; does that mean someone could also decline to teach or provide service? What about more mundane occurrences, such as having one's research animals die? Professor Clayton said he thought AF&T had covered these kinds of event by indicating they must be unpredictable and said he did not believe it wise to write policy to cover the very few people who might try to take advantage of it. He agreed, however, to bring the draft back to AF&T in light of the comments.

-- Professor Clayton agreed that it should be "ensure" rather than "insure" and that "as usual" should be deleted because it adds nothing to the point.

(Item #2) Professor Clayton turned next to an amendment to the Senate policy on the evaluation of teaching:

MOTION:

Amend the Senate's Policy and Protocol on the Student Rating and Peer Evaluation of Instruction as follows (new language in CAPS):

PROTOCOL

...

Open Ended Questions

1. What did the instructor do that most helped your learning?
2. What could you have done to be a better learner?
3. Additional Comments.

--The disposition of written comments on student-rating forms shall be decided by each college or campus. IN UNITS WHERE ALL WRITTEN COMMENTS ON STUDENTS' EVALUATIONS ARE ROUTINELY SENT TO THE CHAIR AND/OR TO REVIEWING BODIES AND INCLUDED IN THE FILE, THE INSTRUCTOR CONCERNED HAS THE RIGHT, WITH THE APPROVAL OF THE CHAIR OR A DESIGNATED SENIOR FACULTY MEMBER, TO HAVE WITHHELD FROM THE FILE INAPPROPRIATE COMMENTS HE OR SHE VIEWS AS LIKELY TO BE PREJUDICIAL. (THIS PROVISION IS INTENDED TO COVER SCURRILOUS, RACIST, SEXIST, HOMOPHOBIC, AND OTHER INSULTING COMMENTS UNRELATED TO THE CONDUCT OF THE COURSE, AND IS NOT INTENDED TO INCLUDE NEGATIVE COMMENTS DIRECTLY RELATED TO THE COURSE.)

COMMENT:

The Committee on Academic Freedom and Tenure (AF&T) noted the difference of opinion between the Senate Committee on Educational Policy and the Senate Committee on Faculty Affairs about the disposition of written comments on student-rating forms when the most recent version of the Senate policy was adopted. AF&T concurs with the concern expressed by SCFA about the potential impact of inappropriate negative comments on evaluation of instructors for promotion, tenure, and merit. After reviewing the comments provided to SCFA by Professor Marti Gonzales on the social-psychological research that demonstrates the disproportionate effect of a small number of negative comments, AF&T recommends the changes indicated above, noting that this policy does not include the excision of negative comments directed to the content or pedagogy of a course.

Professor Clayton noted the rationale in the COMMENT. He agreed with Professor Yust that the parentheses around the last sentence should be deleted and with Professor Chomsky that the phrase "exclude from the file" should be substituted for "include" in the last sentence.

Professor Wambach said this was a good and sensible solution to the problem, and better than lengthy admonitions to students on the rating forms.

(Item #3) Professor Clayton next asked Committee members to review a proposed change to the Regents policy Code of Conduct:

MOTION:

Amend the Board of Regents policy Code of Conduct, as follows (new language is IN CAPS; language to be deleted is [in brackets]):

**Subd. 6. Preserve Academic Freedom and Meet Academic Responsibilities.** Academic freedom is essential to achieving the University's mission. Community members are expected to:

- promote academic freedom, including the freedom to discuss all relevant matters in the classroom; to explore all avenues of scholarship, research, and creative expression; and to speak or write as a public citizen without institutional restraint or discipline; and
- meet academic responsibilities, which means to seek [and state the] truth, to develop and maintain scholarly competence, to foster and defend intellectual honesty and freedom of inquiry and instruction, to respect those with differing views, to submit knowledge and claims to peer review, to work together to foster education of students, and to acknowledge THAT [when] ONE [an individual] is not speaking for the institution WHEN THAT IS NOT CLEAR.

COMMENT:

In reviewing the Code of Conduct, the Committee on Academic Freedom and Tenure had reservations about the stated obligation to "state *the*" truth. "The truth" can be a contentious issue in many disciplines, and no faculty member or any other instructor should be held to the standard of teaching "the truth," whereas it clearly is the obligation of all to "seek truth."

The proposal led to a long discussion among Committee members.

-- In terms of "state the truth," what about someone who denies the Holocaust? Where does that fit in? Professor Clayton agreed that the point was well taken; this is an abstraction, he noted, and there are such examples that make it clear that the abstraction does not always work.

-- In terms of "when that is not clear," must a faculty member issue a disclaimer in every lecture? When talking to a community group? When? One can find absurd examples, Professor Clayton said, and everyone knows in the vast majority of cases when one is not speaking for the institution. Professor Chomsky noted that the AAUP statement on academic freedom uses the same language as the draft: "College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution."

-- It is still not clear when one must say one is not speaking for the University. Faculty are experts who share information; the idea that they must go out of their way to say they do not speak for the institution

seems strange. Experts speak about their discipline, not for the institution, Professor Clayton said, even if the institution provides the facilities; he maintained that most would understand that, requiring no disclaimer.

-- There is a difference between (1) talking about one's work as an academic who is identified with the University, and (2) speaking on a policy position when one does not represent the University. In the latter case, one should make it clear that one is not speaking for the institution, but otherwise faculty should not have to go out of their way to say they do not speak for the University. There is a clear distinction between the President's or Board of Regents' asking someone to represent the University versus his or her speaking as an expert or a citizen in other circumstances.

-- What about if one writes an op-ed piece supporting Barack Obama or John McCain? The institution exists to nurture ideas; this proposal moves toward saying that people can express ideas but must say they do not represent the University. What they are trying to do, Professor Chomsky explained, is to avoid confusion; one must say one does not represent the University when otherwise people would be confused. This requires a statement so people are not misled. But who would not understand that an op-ed piece is one's own, not representing the University? One need not put the disclaimer on everything. (Other FCC members were not so sure in the case of the op-ed piece if the individual is identified as a professor at the University.) In nine out of ten cases it will not be confusing, Professor Clayton said, and the language provides for that tenth case.

-- What is not clear is when it is not clear one is not speaking for the University. It is a difficult judgment and perhaps the clause should be struck. This is Regents policy, Professor Balas said, and the Board does not want University community members walking around speaking for the University. The response: it is not enforceable so why have it in there? Professor Balas demurred and thought it could be enforced; there can be consequences of violation. But, it was said, there remain large gray areas.

-- Who does speak for the University? The President and the Board of Regents.

-- The premise of this policy is that what a faculty member says is what the University thinks unless the faculty member notes otherwise. The policy accordingly asks a faculty member to provide the "noting." But what is the scope of that responsibility? "Am I required at every classroom lecture to issue a disclaimer that I am not speaking on behalf of the University? The language defining the scope needs to be more clear."

-- The distinction is speaking AS a member of the University versus speaking FOR the University. It is clear to a reasonable person/audience when one is not speaking for the University. In the case of an op-ed piece, one would say one is a professor if the University asks him or her to write it; otherwise, only one's name should be noted. Laws are for people who are not reasonable and this language is in the Regents policy so the Board or administration can say someone did something wrong. One must assume a reasonably well educated audience, Professor Clayton agreed.

Professor Clayton agreed once again to bring the draft back to AF&T in light of the comments.

(Item #4) Professor Clayton returned to the proposed amendment to the Regents policy Academic Freedom and Responsibility:

MOTION:

Amend the Board of Regents policy Academic Freedom and Responsibility as follows (language to be added is in CAPS; language to be deleted is [in brackets]):

Academic freedom is the freedom OF FACULTY MEMBERS [\*\*\*] to discuss all relevant matters in the classroom; to explore all avenues of scholarship, research, and creative expression; and to speak or write [as a public citizen] without institutional discipline or restraint ON MATTERS OF PUBLIC CONCERN AS WELL AS ONE MATTERS RELATED TO THEIR PROFESSIONAL DUTIES AND TO THE FUNCTIONING OF THE UNIVERSITY. Academic responsibility implies the faithful performance of academic duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that the individual is not speaking for the institution in matters of public interest.

COMMENT:

The Senate Committee on Academic Freedom and Tenure has taken note of what it considers to be an ominous development in case law in the United States and recommends an amendment to the Regents policy Academic Freedom and Responsibility.

In the case of *Garcetti et al. v. Ceballos* (2006), the U. S. Supreme Court ruled that an employee (in this case, a district attorney) who wrote a memo about his employer is not protected by the First Amendment. The Court wrote that "the First Amendment does not prohibit managerial discipline based on an employee's expressions made pursuant to official responsibilities. . . . [T]he controlling factor is that Ceballos' expressions were made pursuant to his official duties. That consideration distinguishes this case from those in which the First Amendment provides protection against discipline. Ceballos wrote his disposition memo because that is part of what he was employed to do. He did not act as a citizen by writing it. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance. Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen." The Court went on to note that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."

Justice Souter dissented in the *Garcetti* case and wrote that "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write "pursuant to official duties." See *Grutter v. Bollinger*, 539 U. S. 306, 329 (2003) ("We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition"); *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of

transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (quoting *Shelton v. Tucker*, 364 U. S. 479, 487 (1960)); *Sweezy v. New Hampshire*, 354 U. S. 234, 250 (1957) (a governmental enquiry into the contents of a scholar's lectures at a state university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread").

Public-employee First-Amendment law, up until the *Garcetti* case, was governed by the Court's decision in *Pickering v. Board of Education* (1968), which held that a school board could not dismiss a teacher who wrote a letter to a newspaper complaining about the board's decisions on allocating funds and other matters. The Court held that the teacher was speaking on a matter of public concern so her speech was protected by the First Amendment.

Although the Supreme Court did not decide how the *Garcetti* ruling applies to colleges and universities, one federal court in California has applied the *Garcetti* rule in the case of a faculty member at the University of California-Irvine (in *Hong v. Grant*). The faculty member complained about not receiving a merit salary increase and was disciplined; he sued. The District Court cited the *Garcetti* case in dismissing the faculty member's lawsuit. (The *Hong* case is on appeal.)

The Academic Freedom and Tenure Committee is concerned about the implications of these cases. While the caveat in the *Garcetti* opinion ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.") might be reassuring, we are concerned that it refers only to scholarship and teaching. What of a faculty member who speaks up at a meeting of a Senate committee, or a departmental meeting, or at a meeting of the Faculty Senate, to object to actions by a department, college, or the University? If such speech is "made pursuant to official responsibilities," as the *Garcetti* case provides, then it is NOT protected by the courts as coming under the First Amendment; whether it would be protected in the courts by the traditions of academic freedom to which Justice Souter referred is an open question.

As Professor Neil Hamilton from St. Thomas University pointed out, in a visit with the Committee, the *Garcetti* case, if it were applied to higher education, presents a paradox for faculty. On the one hand, the faculty believe in and are committed to the consultative processes of the governance system in the University (as are the senior officers and the members of the Board of Regents, as they have assured the faculty repeatedly in the last decade). On the other hand, if consultation is part of their "official duties" as understood by the courts, then speech uttered in the course of consultation could put someone at risk of discipline if an administrator took issue with it.

The Committee is thus recommending to the Faculty Senate and to the Board of Regents that the University pre-empt the possibility that internal discussions and debates about institutional policy and decisions could subject an employee to discipline. If everyone who participates in a committee or Senate discussion must worry about facing sanctions as a result of what he or she said, the consultative governance system that has served the University well could

wither away. The proposed amendment would put the institution on record as protecting speech made about the functioning of the University.

\*\*\* As part of the copy provided to the Committee, the following comment from Professor Chomsky was included: "Why add this phrase ["of faculty members"]? The minutes reflect what is often said—that everyone at the University (but especially P&A folks, who teach and/or research along with faculty) has academic freedom. I saw some concern about who would have the right to speak about the functioning of the U, but adding this phrase limits other forms of academic freedom to faculty as well. Is that what's intended? If some limitation seems necessary (because not everyone at the U should have the right to speak out on the functioning of the U?) then perhaps this should refer to 'academic staff' or something like that?"

Professor Clayton commented that it is peculiar for the policy not to identify WHOSE academic freedom is in question. It seemed to AF&T that the policy should apply to some but not others.

-- With respect to the phrase "of faculty members," those who teach classes should have the same academic freedom as faculty. That is the main point of contention, Professor Clayton said, and thus the suggestion for "academic staff." The "of faculty members" language was adopted because tenured and tenure-track faculty are an endangered species to some extent, and this recognizes that problem. Academic freedom, however, clearly extends beyond just the faculty.

-- This is a definition; the tenure code provides that all faculty are covered by academic freedom; all TEACHERS should have it. Students have academic freedom, but theirs is different. But there is nowhere any declaration that anyone has academic freedom except in the tenure code, which guarantees it for faculty. It is made confusing by adding "of faculty members."

-- The biggest problem arises when the University takes a position on something and University people speak out against that position. It is more difficult to retaliate against faculty than it is against staff, and to exclude staff from the policy dampens their ability to criticize administrative proposals (e.g., in the case of the salary and fringe benefit proposals made to the union).

-- The language extending the coverage of the policy to professional duties and the functioning of the University goes beyond the traditional definition of academic freedom, Professor Chomsky said, which covers only teaching and research. But the University can say that if it wishes, and if it wants to say that academic freedom extends to students and staff, it can do that as well. Professor Balas responded that the wider one tries to make the definition of academic freedom, the more one loses, and the concept should be confined to teaching and research. Extending rights to others can be done, but not with the academic freedom policy—it needs to be kept crisp.

-- Teaching and research subdivides the University but academic freedom is related to more than teaching and research; it is important to have the language about speaking without fear of retaliation.

-- A narrower definition of academic freedom is more defensible; if made too broad, it is not true and not defensible.

-- "Faculty member" is too limiting. And in the third clause ("and to speak or write [as a public citizen] without institutional discipline or restraint ON MATTERS OF PUBLIC CONCERN AS WELL AS ON

MATTERS RELATED TO THEIR PROFESSIONAL DUTIES AND TO THE FUNCTIONING OF THE UNIVERSITY"), where research is relevant, even if the findings run contrary to a University position, the speech should be protected.

-- It would be best to split the policies. Academic freedom applies not only to faculty but also P&A staff and students who teach and do research. But it should not be extended to what one might consider employment or labor conditions (such as the union negotiations).

-- The first two clauses are really academic freedom; the third one goes beyond it. Professor Clayton said the Canadian statement is clearer.

-- Professor Chomsky reported that the AAUP statement on academic freedom (which one might or might not accept as the gold standard) contains three parts: "Teachers are entitled to full freedom in research and in the publication of the results. . . . Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject. . . . [and the language cited previously] College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline. . . ." She said she has contacted the general counsel for the AAUP about the draft language and will pass along any comments she receives. It is important to have language somewhere that protects faculty who speak out on the functioning of the University or the governance system is at risk.

Professor Hoover thanked Professor Clayton for joining the meeting and presenting the proposals.

## **2. Committee Business**

Professor Hoover asked for a motion to close the meeting; it was adopted unanimously. She discussed several items with the Committee.

-- Food and beverages at meetings of committees of the Faculty Senate (will no longer be provided).

-- Other ways to have "greener" committee meetings.

-- The issues for the year and data the Committee may want (e.g., instructional expenditures, how colleges attribute funds to utilities & staff, size of administrative personnel, longitudinal data on department budgets, faculty/student ratios, etc.). She asked Committee members to identify their five highest priorities.

Professor Balas reported on a conversation he had had with the President and on the progress in crafting administrative procedures to accompany the Regents policy on copyright.

Professor Hoover adjourned the meeting at 3:10.

-- Gary Engstrand