Minutes*

Academic Freedom and Tenure Committee
Friday, March 25, 2011
9:30 – 11:30
300 Morrill Hall

Present: Barbara Elliott, Karen Miksch (co-chairs), Yusuf Abul-Hajj, William Craig, Joseph Gaugler, Gary Peter, Paul Porter, Terry Simon

Absent: Tracey Anderson, Arlene Carney, Barbara Loken, Christine Marran, Linda McLoon, Paula O'Loughlin, Carol Wells

Guests: William Donohue (Deputy General Counsel), Provost E. Thomas Sullivan

[In these minutes: (1) draft responses on "Troubled Waters"; (2) responses to question #4 about "Troubled Waters"; (3) punctuation change to the Regents' policy Academic Freedom and Responsibility]

1. Draft Responses on "Troubled Waters"

Professor Elliott convened the meeting at 9:30 and said the Committee had two tasks at the meeting: Review the draft responses to the questions from the Faculty Consultative Committee about the "Troubled Waters" film and discuss with Provost Sullivan and Mr. Donohue the response to question #4.

Committee members reviewed the draft responses and made a number of changes. The final report will be included in a future set of minutes.

2. Responses to Question #4 about "Troubled Waters"

Professor Elliott welcomed Mr. Donohue and Provost Sullivan to the meeting to help the Committee respond to question #4 from the Faculty Consultative Committee, which read as follows:

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

Provost Sullivan began by offering his views. Works for hire are farther out on the scale of academic freedom, he said, and the general rule is that they are not covered by the principles of academic

* 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.

freedom. In the context of "Troubled Waters," the lead person in the Bell Museum hired an artistic director, who was not protected by academic freedom. The person was not a University employee but was contracted to do the work.

Dr. Craig referred to the two hypothetical examples in the draft report and suggested that neither applied in the case of "Troubled Waters." There is a flow and progression to the examples, Provost Sullivan said. A museum director who creates a project and tells museum employees to create the exhibit has academic freedom; if the staff members do not do what the director requested, they do not have academic freedom. Nor does someone from the outside hired on contract, not a University employee, have academic freedom to do the work as he or she wishes.

Professor Miksch said that with respect to question #4, if someone works at the University and wants to do a public-relations piece, hires an outside agency to prepare it, and the University employee does not like what was done, there is no obligation to use the work.

What about postdocs, Professor Abul-Hajj asked? Where do they fall? They are working with a professor. That situation could be similar to the research assistant a faculty member might have, Provost Sullivan said. If working on a publication, the faculty member has academic freedom in writing it, in the employer-employee relationship, the RA would not. But if the RA is working on his or her own piece, independent of the employee-employer relationship, the RA would have academic freedom.

Professor Miksch asked if, in the case of works for hire, there are University employees who would be responsible to other University employees. It is possible to have works for hire within the University, Mr. Donohue said, where an employee is hired to do specific work or projects. The question is how broad work for hire is; he believes it is very broad at the University. University policy generally provides ownership rights to faculty of academic works created by them. Academic freedom is different; it is clear that the person at the Bell Museum had academic freedom. This was a legislative appropriation, however, that directed what was to be done with the money; if the person had wanted to do something different from the legislative directive, the University could have imposed restrictions. The balance between academic freedom and responding to limits place on funding is not simple.

Provost Sullivan agreed that this is an important demarcation: Works for hire can be inside the University as well as involving hiring from outside. That makes the issue even murkier.

One question that was raised with the review of copyright/intellectual property policy, Professor Miksch said, was about works for hire; everyone will know something is a work for hire because one must sign a document so they will know that usual academic freedom protections and ownership do not apply. (Provost Sullivan noted that he had insisted that works for hire internally be accompanied by a written document so there would be no questions.) Mr. Donohue agreed that the usual academic freedom protections would not apply in that case. Professor Miksch said she could conceive of a case where someone is asked to do a special project, does it, and turns it over to the person who contracted the work—and at that point, the person who did the work loses control over it. Ownership issues do arise, Mr. Donohue said, but the Committee is concerned about academic freedom and when an administrator can review the work of faculty and staff.

Professor Gaugler asked about the example of a P&A staff member who has a grant and who deviates from the original expectations of the grant. If the funder does not disagree with the direction of

the work, does an administrator have the right to intervene? If so, any administrator could stop almost all faculty research because everyone deviates to some extent—that is the point of research.

If a faculty or staff member obtains a grant, with restrictions and protocols, and the supervisor or department chair or Sponsored Projects Administration believes the terms of the grant are not being met, there could be legal liability problems, Provost Sullivan said, and the University has the right to say that the person must change what he or she is doing. If the protocol is being followed, the University's interest goes away and the administrative role is diminished. But the University is required to fulfill the terms of a grant, and if the agency says that deviation is acceptable, then the University role is also diminished.

The University has a large interest in grant administration and compliance with grant and law requirements, Mr. Donohue agreed, but once one gets to the intellectual content, that is what the faculty do.

And when money is diverted, Professor Abul-Hajj asked? That is fraud, Professor Gaugler said, and is not covered by academic freedom.

Professor Porter asked if the Director of the Bell Museum serves at the discretion of the dean. Was she told she had academic freedom? Provost Sullivan said he is sure there is a contract and a term of appointment; the person is appointed by the dean. The person is a faculty member, Professor Gaugler observed, but there is no guarantee that she would remain as Director.

Mr. Donohue offered to provide a draft response to question #4 for the Committee to consider.

Professor Elliott moved on to the question of University copyright. Part of the reason that "Troubled Waters" ended up being reviewed in University Relations was because it carried the University copyright. What expectations are there with respect to the University copyright?

Provost Sullivan said that it was his view that the fact something carries the Board of Regents copyright is not determinative of academic freedom. The Law School publishes five or six journals, all of which carry the University copyright, but they are scholarly work protected by academic freedom and the University copyright has no effect. The University copyright shows up in many places and does not determine academic freedom, Mr. Donohue agreed.

Should there be a disclaimer that the material does not represent the views of the University, even though it carries the University copyright, Professor Elliott inquired? Mr. Donohue said it was a good question, and there is a body of law that addresses it; he said he would be glad to provide a written view.

One question for him, Mr. Donohue said, is about the person in the Bell Museum who created "Troubled Waters": Was that a work for hire? The legislative appropriation was to the University, not to her. An NIH grant comes to the University, not the faculty member, Professor Abul-Hajj commented, and that is a parallel. The results of the research are from the work of the researcher, not the University. The arrangement should say that and treat it like a grant, and accord it academic freedom, Mr. Donohue said. The facts in the case of "Troubled Waters" made it like a grant, Provost Sullivan said, including the writing, editing, and so on.

The question about a disclaimer is an interesting one, Provost Sullivan commented, and broader than just the question itself. He said he did not believe there was any regental or administrative policy on the point, and if the Committee wished to recommend there be disclaimers, implementing the recommendation would require a policy change. Professor Miksch alluded to the Academic Freedom and Responsibility policy, which provides that individuals are expected to have "the candor to make it clear that when one is speaking on matters of public interest, one is not speaking for the institution." But she does not include such a disclaimer on her scholarly work. If a disclaimer is to be used, then it must be used on everything, or those with it could be tainted if there are other items that do not carry it. The lack of a disclaimer could also imply that something was produced by the Board of Regents. A disclaimer could be inserted with one's name on a research paper, Provost Sullivan suggested; it could be a uniform disclosure with the University copyright that would be very bland, Mr. Donohue added. Professor Miksch said it would be her suggestion not to adopt a disclaimer. Whenever any faculty member published in any journal, would he or she have to include the disclaimer? Provost Sullivan agreed that he had never seen the practice and did not believe it would be a good path to go down. Moreover, Professor Gaugler pointed out, in most cases the copyright on a journal article is owned by the publisher.

Dr. Craig reported that his unit regularly places disclaimers on its reports, even when written by faculty. It does not put a disclaimer in its newsletter. Committee members, Provost Sullivan, and Mr. Donohue discussed further the wisdom and desirability of a disclaimer. Professor Miksch pointed out that she uses her title for identification purposes on everything she writes, but she does not include a disclaimer. And the University wants people to put their names and affiliation on papers, Mr. Donohue responded; that benefits both the person and the University.

Professor Elliott next noted a comment raised by Professor Loken in an email message (Professor Loken was unable to attend the meeting). "One related issue is that when the job of the employee is to promote the University or to protect the University's name (e.g., which may be the case in the office of University Relations), what that mission includes is promoting and protecting the core values of the University (rather than simply promoting the University and protecting it from negative publicity). Those core values include [academic freedom and responsibility]. If two core values seem to conflict with one another (e.g., academic freedom and, say, outreach to the local community, such as the agricultural community in this case), then the employee needs to know from whom to get counsel to resolve the conflict, and perhaps to understand that academic freedom will generally take precedence over other core values." Provost Sullivan responded by saying that it is clear that academic freedom is the higher value.

Mr. Donohue reaffirmed his offer to provide advice on the response to question #4 and on the issue of the relationship between copyright and academic freedom.

Professor Elliott thanked Provost Sullivan and Mr. Donohue for joining the Committee.

Later in the meeting, Professor Gaugler returned to his question about possible administrative interference in a grant and a process for doing so. Such intervention should not occur without contacting the funder, he said. There is a yearly process of review; if an administrator feels differently from the researcher about how a grant is being carried out, there should be contact with the funder. This will be rare, but if someone raises a question about a grant (about, for example, fraud or misconduct), the University does have an interest when it has liability.

Professor Miksch observed that if she plagiarizes, but has no external funding, she could nonetheless be censured by her profession. What is a department head to do? That is the role of the scientific community, not the University, Professor Abul-Hajj said. But if there were misconduct, the University MUST investigate, Professor Miksch said.

3. Punctuation Change to the Academic Freedom and Responsibility Policy

Professor Elliott noted that there had been discussion of the Academic Freedom and Responsibility policy at the March Regents' meetings. The Board proposed to insert commas around the phrase "without institutional discipline or restraint" when it agreed to move the phrase from one place to another (as this Committee and the Faculty Senate had recommended; commas inserted in this excerpt):

> Academic freedom is the freedom, without institutional discipline or restraint, to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write on matters of public concern as well as on matters related to professional duties and the functioning of the University.

The point in moving the phrase, Provost Sullivan noted, was to make it clear that the clause "without institutional discipline or restraint" applied to the full paragraph.

The Committee agreed without dissent that inserting commas around the phrase was acceptable.

Professor Elliott adjourned the meeting at 11:00.

-- Gary Engstrand