

Minutes*

**Academic Freedom and Tenure Committee
Friday, October 17, 2008
9:30 – 11:30
300 Morrill Hall**

Present: Tom Clayton (chair), Yusuf Abul-Hajj, Arlene Carney, Joseph Gaugler, Barbara Loken, Linda McLoon, Paul Porter, Terry Simon, Carol Wells

Absent: Tracey Anderson, Carol Klee, Karen Miksch

Guests: none

[In these minutes: (1) policy revisions, student rating of instruction; (2) policy revisions, University Responsibility to Researchers; (3) policy revisions, Regents Policy on Academic Freedom and Responsibility; (4) University of Minnesota Rochester personnel plan; (5) AAUP statement on border searches; (6) "The Last Professors"]

1. Policy Revisions: Student Rating of Instruction

Professor Clayton convened the meeting at 9:30 and reported that three pieces of legislation from this Committee had been presented to the Faculty Consultative Committee (FCC) the previous day. FCC had suggested minor changes and then approved them for the Senate docket. This Committee, however, also needs to review the changes. He turned first to the student-rating-of-instruction policy.

With the amendments it made, FCC approved the policy amendment, including the quote from Hamlet that accords with what Professor Gonzales told the Committee on Faculty Affairs about the disproportionate effect of even a single negative comment in a dossier.

FCC voted to include the word "unfairly" before prejudicial in this paragraph:

--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 to ask the chair, a designated senior faculty member, or a standing or ad-hoc committee to withhold from the file comments he or she views as likely to be unfairly prejudicial. This provision is intended to cover racist, sexist, homophobic, and other personal comments, and is not intended to exclude from the file negative comments directly related to the course.

The Committee deliberated about whether to disagree with FCC and concluded it would not. The point made by FCC that something could be positively prejudicial, but, Professor Clayton said, "unfair is unfair." The Committee had inserted "or a standing or ad-hoc committee" in response to a comment at the October 2 Senate meeting that some departments may wish to use a committee.

* 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.

FCC also voted to substitute the word "personal" in the following comment on the policy that will appear in the Senate docket, in lieu of either "inappropriate" or "negative."

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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 personal 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 even a single negative comment, AF&T recommends the changes indicated above. Speaking not of slurs but of traits, Shakespeare's Hamlet noted a very similar effect:

So oft it chances in particular men that, . . .
Carrying, I say, the stamp of one defect,
Being nature's livery, or fortune's star,
Their virtues else—be they as pure as grace,
As infinite as man may undergo—
Shall in the general censure take corruption
From that particular fault.

Be it noted that this policy does not include the excision of negative comments directed to the content or pedagogy of a course.

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The Committee accepted the suggestion from FCC. It then voted unanimously to approve the revised proposal for the Faculty Senate docket on December 4.

2. Policy Revisions: University Responsibility to Researchers

Professor Clayton noted only one small amendment to the statement that had been presented for information to the Senate on October 2: rather than holding (impliedly) only the central administration of the University responsible to a researcher faced with unpreventable adversity, the statement now reflects a commitment on the part of "the relevant administrations." This is intended to cover college and department administrations, as may be appropriate.

The Committee approved the change unanimously.

3. Policy Revisions: Regents Policy on Academic Freedom and Responsibility

The Committee noted two minor amendments from the Board of Regents' office, which it accepted, made one additional change in the Comment, and voted unanimously in favor of the proposal, appended to these minutes. On the change in the Comment, Professor Clayton said that "necessarily" is redundant and misleading and should be removed. FCC discussed what administrators can and cannot

do; if they feel compelled to follow their conscience, they do so at their peril because they must be part of a team. Any administrator who sees serious damage being done, or something wrong being done, has the protection of whistleblowing statutes.

4. University of Minnesota Rochester Personnel Plan

Professor Clayton next distributed a draft statement of advice to the Provost on the Rochester personnel plan.

Vice Provost Carney noted that the non-tenure/tenure-track faculty will not be contract faculty, they will be P&A appointees with multi-year (e.g., 3) year contracts. The plan does leave open the door for some contract faculty. Professor McLoon said that if they are going to hire faculty, they should be tenured/tenure-track faculty, and it does not matter what other campuses are doing.

There was discussion about units where faculty develop courses and others teach them. Dr. Carney said it was not appropriate to project to UMR what other units might be doing; the Committee should take the plan presented in good faith.

Committee members discussed at length the number and proportion of tenured/tenure-track faculty they believed it would be appropriate for UMR to hire. Professor Wells maintained that what distinguishes the University from other types of institutions is the type of people students encounter: people doing research. It is normal for faculty here to transfer knowledge to students, rather than expecting them to absorb it all from a textbook. Professor Abul-Hajj said Professor Wells's description is true for the Twin Cities campus but they are proposing a new way to provide technical training at Rochester; this is more like a vocational school, he said, a preparatory program for the health sciences. When the Committee asked what its graduates would do, it was said they could continue in the health sciences. It is not appropriate to ask the campus to hire researchers when they will not be in an environment conducive to research. The Committee would be telling Rochester administrators they should hire researchers when there is no research except in teaching. It is not designed to be a research institution.

It is part of the University of Minnesota, Professor McLoon contended. She urged the Committee to say it believes the proportion of tenured/tenure-track faculty is too low and should be 90%.

Professor Simon asked if the Committee would be content with that number and with people being hired to do research on teaching and learning. It is not up to her to define what they are doing for research, Professor McLoon said, and she would not say that research in teaching is not valid. The plan is based on that kind of research, Professor Clayton observed, so if the Committee were to recommend against it, it would be recommending that the faculty at UMR do no research. The faculty will have a choice about where to do research, Dr. Carney pointed out.

Dr. Carney recalled that Vice Chancellor Neuhauser pointed out that UMR will have no graduate assistants so could not teach calculus as it is done on the Twin Cities campus, with sections led by graduate students. The task of the "student-based" faculty appointments is to run labs and recitations and provide the equivalent to the "smart commons" on the Twin Cities campus. Professor Clayton said the Committee had been given a different impression, that the "design" faculty would not teach. They would teach, Dr. Carney responded. The original information the Committee received was from Ms.

Wilhelmson in Human Resources, who was trying to interpret the plan; the Committee should heed the presentation from the Chancellor and Vice Chancellor.

Professor Clayton said his second impression was that the design faculty would design courses and give lectures (the 40% of their responsibilities related to teaching). The student-based faculty would be instructional consultants 85% of the time (the remaining time to be given to research and service). They would be appointed in lieu of TAs.

Professor Simon asked if the faculty on the Twin Cities campus are 90% tenured or tenure-track. Professor Abul-Hajj said he agreed with Professor McLoon's proposal but not with the 90% figure because he did not believe the Twin Cities campus reached that percentage. Dr. Carney said that with respect to teaching, the percentage of classes varies with the unit and the level of instruction. There is tremendous variation, she said; at the 3xxx level and above, it is probably close to 90%. One concern, Professor Clayton said, is that if UMR has such a small proportion of its faculty tenured or tenure-track, that sets a precedent for other units, and thus becomes a threat to tenure and to academic freedom. Professor McLoon concurred; just because there is an escalating number of non-tenured/tenure-track faculty at other places, primarily for financial reasons, does not mean the Committee should say that development is acceptable. Individuals hired outside the tenure track do not have the same academic freedom and must worry about retaining their jobs. Dr. Carney observed, however, that the number of tenured/tenure-track faculty at the University has remained remarkably stable over the years.

Professor Loken said the Committee should make a strong statement about what it believes, but asked if the statement would be ignored. Professor Clayton said it would have an effect; whether it will result in a change in policy is another question. He said he doubted the UMR program would be reconstituted, but the Committee can recognize the threat to tenure and academic freedom without saying anything about the curriculum to be offered.

Professor Wells agreed that UMR should not be held to a standard not achieved on the Twin Cities campus. She asked Dr. Carney what the numbers are for the Twin Cities. Dr. Carney said it is perhaps 85%, but she noted that the AHC has a lot of clinical scholars, a category that does not exist in other colleges. Most faculty are tenured and tenure-track. The increase in the number of P&A staff at the University has been primarily in research and administration, not teaching. She said she could provide the Committee with the data. She said there is a complex constellation of teaching at the University. None of the Composition classes—required of all undergraduates—are taught by tenured/tenure-track faculty; they are taught by P&A staff and graduate students (faculty supervise the program). Few lower-level language classes are taught by tenured/tenure-track faculty. The practices vary by college as a result of history and various deans' decisions.

The fraction of interest to the Committee is the percentage of instructors who will be tenured or tenure-track at UMR, Professor Clayton said. It will be well below 80%, correct? That is not necessarily true, Dr. Carney said. If the student-based faculty are P&A staff, they do not count as faculty. The UMR plan has 100% of the faculty tenured or tenure-track because the student-based faculty are not faculty as defined by the University. Those hired as assistant professors or instructors should be tenured/tenure-track, Professor Wells said; UMR could also hire Teaching Specialists, who are not faculty.

Professor McLoon maintained that the UMR model does not propose to hire tenured and tenure-track faculty to teach and they will hire a lot of other people to do things that tenured and tenure-track

faculty do. Dr. Carney did not agree and asked the Committee to recall what was said. The people who will develop and teach the courses will be tenured and tenure-track faculty. Recitations, labs, advising, and the smart commons will be handled by P&A staff. It is unfortunate that they chose to use the title "faculty" for these positions. Professor Abul-Hajj said that if they changed the title, he would find the plan more acceptable.

Dr. Carney said she thought it was legitimate for this Committee to say that any University of Minnesota campus must have a strong foundation in tenured and tenure-track faculty and that using a faculty title for other kinds of appointments is not appropriate, and that if individuals are hired for teaching support, they should be P&A employees. Professor Clayton agreed that hiring people who are being called faculty but who are not doing faculty work and not being paid as faculty was inappropriate; he said he wished that there would be more faculty in the usual sense hired at UMR.

After further debate, Professor Clayton suggested the Committee say it regrets the use of the term "faculty" for people who are not faculty and urge that the appointments accord with policy. Professor McLoon said that positions can be defined to accord with policy. Dr. Carney assured the Committee, in response, that there are no hidden categories of appointments, and that P&A staff hired in the roles envisioned at UMR will be supervised by faculty. At least 75% of the appointments should be tenured or tenure-track faculty, Professor Clayton suggested; Professor Simon said it should be 75% of those involved in instruction. Dr. Carney pointed out, however, that no institutional policy requires that 75% of instruction in any unit must be delivered by tenured and tenure-track faculty. She agreed with the proposition that the Committee should make a strong statement on what a faculty member is.

Professor Gaugler and Professor Wells both expressed a concern that there will not be enough tenured and tenure-track faculty to accomplish the research and teaching mission and also that the faculty to be hired to teach "social science" and "physical science" needed to be discipline-based.

Professor McLoon agreed to draft a statement for Committee consideration. It was debated by email for several days after the meeting, and the version finally adopted read as follows:

The Committee on Academic Freedom and Tenure cannot endorse the personnel plan proposed by the senior administrators at the University of Minnesota, Rochester. The Committee believes that the proportion of tenured and tenure-track faculty is too low to provide the kind of liberal-arts education that merits awarding a University of Minnesota baccalaureate degree to the students who will matriculate at this campus.

The proposed plan has two groups of personnel participating in the teaching mission, tenured and tenure-track faculty as one group and "student-based faculty" as the other, a large proportion of each group to be hired at the outset. The high proportion of personnel not tenured or on the tenure track in the plan represents a threat both to tenure and to academic freedom at the University of Minnesota, since non-tenured faculty cannot fully exercise academic freedom without some fear that their jobs may be in jeopardy, and many if not all would be reluctant to exercise it fully. Furthermore, a large proportion of personnel who are not tenured or on the tenure track whose primary responsibility is teaching (85%) would appear to provide an insufficient regular-faculty cohort to ensure that the research mission of a large research university is carried out and embodied in the instruction provided to the students. The Committee recommends that at least 75% of those hired be tenured or on the tenure track. [Footnote: This

figure does not include those who might be hired on a temporary basis to cover for faculty members on leave.]

The Committee also recommends eliminating the use of the term student-based "faculty" because those individuals, who will hold P&A appointments, are not faculty as that term is defined by University policy.

5. AAUP Statement on Border Searches

Professor Clayton provided Committee members with a recent message from the national office of the AAUP:

* * *

Subject: AAUP Legislative Alert: Border Searches of Electronic Materials

October 14, 2008

Over the past few months there has been a great deal of publicity surrounding the searches of electronic materials at the border. Until recently, Customs and Border Patrol agents could seize and copy electronic and printed materials if they had probable cause to believe that the law was being broken. In July 2008, the Department of Homeland Security revealed that its internal policies no longer require any suspicion of illegal activity to search and seize travelers' materials. While privacy issues are everyone's concern, and all citizens should actively defend their civil liberties, faculty members have particular areas of concern about this policy due to their research and collaboration with colleagues around the world. Below, we offer links to press coverage and a congressional hearing on the issue.

Please consider calling your representatives and senators to express your concerns about this issue. Talking points are directly below.

Obtain the contact information for your elected officials, as well as some general pointers on grassroots advocacy by visiting the AAUP's online advocacy center.

You could also call or e-mail the offices of Senator Russ Feingold and Senator Patrick Leahy to thank them for convening a hearing on this vital issue and encourage them to continue their oversight work.

Talking Points

-- Professors commonly collaborate on research with colleagues in other countries. In places with restrictive governments, researchers and scholars may be taking risks to work on certain projects. Knowing that such collaboration will no longer be kept confidential may have a chilling effect on collaboration across borders.

-- Similarly, faculty working in areas such as human rights may have a much more difficult time making contacts or finding sources, if they cannot guarantee the anonymity of sources of information. This would greatly impede the amount and quality of information obtained about various political and socio-economic situations around the world, of which academics are a vital source.

- There is little or no information about how information that is copied and kept by Homeland Security will be kept secure, leading to concerns about the protection of original research. This extends to projects that may have patents pending or are in an otherwise precarious stage of development.
- It is unlikely that the Customs and Border Protection agents conducting such searches at the border would have the specialized knowledge to determine whether or not certain types of data, particularly in areas of science such as engineering or biochemistry, pose a genuine threat.
- The invasion of privacy may extend well beyond the individual whose possessions are being searched. Many faculty members have outside practices or jobs. An adjunct at a school of law may have confidential client records. An instructor from a psychology department may have patient records. Thus, obligations of confidentiality may be breached through no fault of the professional's own under these searches.

Press coverage of this issue:

"Expanded Powers to Search Travelers at Border Detailed" Washington Post, 9/23/08

"Search and Replace" [editorial], Washington Post, 8/13/08

"US Border Agency Says It Can Seize Laptops" PC World, 8/3/08

"Travelers' Laptops May Be Detained At Border: No Suspicion Required Under DHS Policies"
Washington Post, 8/1/08

Congressional Hearing: Senate Judiciary Committee, "Laptop Searches and Other Violations of Privacy Faced by Americans Returning from Overseas Travel"

Sincerely,
Cary Nelson, AAUP president
Nicole Byrd, AAUP government relations associate

* * *

This is alarming, Professor Clayton said. Committee members offered several comments, including that faculty will no longer take data overseas, Homeland Security can take computers and analyze what is on them, and human rights work will be jeopardized. Professor Gaugler suggested the Committee develop a statement and that all faculty should be made aware of the new practice. Departments should also have discussions about how to protect data, he added.

It was also agreed that the Committee would draft a statement that the Faculty Senate might forward to the Minnesota Congressional delegation.

6. "The Last Professors"

Professor Clayton inquired what the Committee might do or say to help tenure and academic freedom, given the conversation at the last meeting about the book *The Last Professors*. It is easy to see the erosion that is taking place, so there will be fewer and fewer tenured faculty, and then none.

Vice Provost Carney asked if Committee members are seeing, in their departments, requests for tenured or tenure-track faculty lines being denied and instructions that they are to hire contract faculty. That would be her worry, she said, that departments are told to hire contract faculty. She said she has not seen that happen, but the process would start in the units.

Professor McLoon said she sees fewer tenured and tenure-track faculty in her department, and hers is only one example of many departments in the AHC. She said she recognized the significant financial liability of hiring a lot of tenured faculty, but those individuals are expected to do a lot: raise money, teach, and do research. Clinical faculty do very good work but they are not regular faculty. She said she sees the hiring practices signaling the death of the Medical School as an academic place; it is being run more and more like a business. She said she knows that change is driven by funding but it is not good for the Medical School or the University.

Professor Simon said that things are going in the opposite direction in IT. Departments are challenged if they request a non-regular faculty position. Professor Porter said that in CFANS he sees declining faculty numbers and the replacements are postdocs and other kinds of positions. That could be based in the number of student enrolling in the college, Dr. Carney said, and said she did not see any move to fewer tenured and tenure-track faculty in CLA. She said she would be concerned if she saw a pattern in a college or department such as the one Professor McLoon described.

Professor Wells agreed with Professor McLoon. She said the pattern can be seen all across the Academic Health Center, not just the Medical School. The situation is driven by dollars: clinical faculty must generate money to support the Medical School. Some of them have research responsibilities they cannot fulfill because of their clinical work, so they transfer to the clinical track because of the stress on them if they seek to obtain tenure. Or they are hired into the clinical track.

Dr. Carney said it is difficult to compare across institutions, in part because national databases on faculty typically exclude medical schools. Federal databases have non-AHC colleges so it is difficult to do a long-term trend analysis.

Professor Abul-Hajj said the situation may be more prevalent in medical schools. In his case, in Pharmacy, most faculty are tenured or tenure-track, not clinical or contract. They use some outside faculty but he said he does not believe there has been an erosion of regular faculty in Pharmacy. Professor Gaugler said the School of Nursing needs and desires to hire tenured/tenure-track faculty. They have a large number of clinical faculty teaching clinical courses but they see the tension between contract/clinical faculty and tenured/tenure-track faculty in governance. The tension is day-to-day, based on a sense by some that they are disenfranchised, but it will always exist, given the natural hierarchy. One of the Twin Cities colleges had a problem, Professor Abul-Hall recalled, when it gave adjunct faculty voting rights, and the regular faculty found itself outvoted. Dr. Carney agreed that a college can try to be inclusive—with effects it did not expect.

Dr. Carney asked if contract faculty participate in hiring. Professor Gaugler said they participate in hiring but on the tenured and tenure-track faculty vote.

Professor Loken related that for years, her department in the Carlson School had hired adjuncts for faculty on leave, and then hired a P&A staff member to fill in for those leaves so they needed fewer temporary adjuncts. They started with one such position and the P&A staff member was such an asset to

the department that now the question is whether they will hire one or two more full time P&A staff for teaching needs. The faculty, of course, think it is a great idea because of the efficiencies; she and her department head have raised questions about longer-term effects on numbers of tenured faculty. That is erosion, Professor Clayton commented.

Professor Wells said she is from a large department in the Medical School and has been there for 26 years. She said she has never been asked to vote on a hire and never has heard who was involved in a decision to hire. She said she goes to once-per-year faculty meetings to see who the new faculty are. She said she does not know who hires in her department; there is a committee that does everything. Dr. Carney said Professor Wells's experience is atypical.

Professor Clayton asked about the number of non-regular faculty in CLA. Dr. Carney said there are very few, and most are hired to replace someone on leave. Given its size, the number of contract faculty in CLA is low. Professor Abul-Hajj said he knows of people who are teaching liberal arts courses, people who propose a course to a department chair in a specialized field, who are hired and paid to teach it. CLA does not allow that, Dr. Carney said. It may be that those individuals are teaching courses with a liberal-education focus but through the College of Continuing Education. Some CLA faculty also teach in CCE.

What is the Committee's contribution, Professor Clayton asked? There is need for vigilance in departments but he said he did not want to call on faculty to make reports on their departments. The Last Professors could be circulated as a matter of general interest but the Committee does not want to cry wolf. It was agreed that the Committee might consider adopting a statement for circulation to the faculty.

Professor Gaugler said that in his reading in *The Chronicle of Higher Education* and *Inside Higher Ed* about contract faculty, the problem seems to arise in the humanities and there is no discussion about academic health centers. He said he assumes that clinical faculty in the health sciences can support themselves with outside funds whereas an English professor cannot. But the number of tenured and tenure-track faculty is increasing in the basic sciences, Professor Abul-Hajj commented.

Professor Wells related that she has made the case that tenure equals a guaranteed salary. She knows of a faculty member who, when she came to the University, signed an agreement that 50% of her salary would come from grant funding. If she loses the grant, does her salary go down 50%? tenure equals a guaranteed salary. She knows of a faculty member who, when she came to the University, signed an agreement that 50% of her salary would come from grant funding. If she loses the grant, does her salary go down 50%? Professor Clayton said he believed it would. At top institutions, Professor Gaugler said, if one does not bring in funding, one is not retained. That issue does not come up when one looks at the number of tenured and tenure-track faculty, Professor Wells said. Professor Clayton said the Committee should see the data.

Professor McLoon said that when NIH was doubling its budget, a lot of faculty were hired. When NIH budgets are flat, there is a problem. This is not a sustainable model. There is not enough money inside the Medical School to pay all the faculty who have been hired. Another model, Professor Wells said, is to hire young faculty on a nine-month salary and allow them to supplement their salaries with grant funding. That is also true in CLA, Dr. Carney said. In the health sciences faculty can always get supplemental or grant funding, Professor Abul-Hajj said. There are ups and downs, and units expand faculty with indirect-cost funds.

Professor McLoon said she does not define tenure as a guaranteed salary. She defines it as guaranteeing academic freedom so that she can do what she believes in and can argue at this Committee and in her department without placing her job in jeopardy. People on year-to-year appointments cannot do that and they also must teach differently. Professor Wells disagreed and said the guaranteed salary gives Professor McLoon the freedom to do what she described.

Professor McLoon said there is a philosophical point. When the University increases the number of faculty who are not linked to the teaching mission, or hire teaching staff, what is the job of the tenured faculty? Professor Abul-Hajj said that depends on the definition of teaching—working with postdocs and graduate students is teaching.

Professor Clayton adjourned the meeting at 11:25.

-- Gary Engstrand

University of Minnesota

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Proposed amendment to the Board of Regents policy on Academic Freedom and Responsibility for the Faculty Senate

MOTION:

Amend the Board of Regents policy Academic Freedom and Responsibility as follows (new language is IN CAPS, language to be deleted is [IN BRACKETS]):

Academic freedom is 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 discipline or restraint ON MATTERS OF PUBLIC CONCERN AS WELL AS ON MATTERS RELATED TO PROFESSIONAL DUTIES AND 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. The Committee wishes to make it clear that the amendment it has proposed is intended to preserve the status quo, in response to a trend in federal court cases that may restrict the subjects of discourse in the University. The amendment does not abridge any authority or freedom of action that is already the prerogative of the Board of Regents or of members of the University administration.

The focus of the amendment the Committee has proposed is on faculty members and other University staff who participate in the governance system and who may express views critical of institutional proposals. The Committee recognizes, however, that freedom to speak about the affairs of the University "without institutional discipline or restraint" does not [NECESSARILY] extend to those who hold senior administrative positions. The Committee understands that the Board of Regents and the President have the right to expect that senior officers and others in key administrative positions (at the level of dean or above, for example) and their immediate staff will support the University's mission and the policies, procedures, goals, and programs established and announced by the Board of Regents and the President, and will not publicly undermine them. This includes, for example, statements before the legislature, to the media, and the like.

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 department 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 preclude 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.