

Minutes*

Academic Freedom and Tenure Committee
Friday, November 21, 2008
9:30 – 11:30
4-101 Hasselmo Hall

Present: Tom Clayton (chair), Yusuf Abul-Hajj, Tracey Anderson, Carol Klee, Barbara Loken, Linda McLoon, Karen Miksch, Paul Porter, Terry Simon, Carol Wells

Absent: Arlene Carney, Joseph Gaugler

Guests: Provost E. Thomas Sullivan; Chancellor Stephen Lehmkuhle (University of Minnesota, Rochester)

[In these minutes: (1) amendments to the Regents policy on academic freedom and responsibility; (2) Rochester academic personnel plan]

1. Amendments to the Regents Policy Academic Freedom and Responsibility

Professor Clayton convened the meeting at 9:35 and welcomed Provost Sullivan to discuss amendments to the Regents policy on Academic Freedom and Responsibility that have been proposed by this Committee and additional amendments proposed by General Counsel Mark Rotenberg.

Provost Sullivan began by asking what the Committee's goal is in seeking the amendments it has proposed in Section II. Professor Clayton said that when the Committee became aware of the decisions in Garcetti and Hong (see the appendix to these minutes), it proposed amendments that would preserve what the Committee believes to be standard practice by making explicit in the policy that which all have assumed. (Language to be added IN CAPS; language to be deleted [in brackets].)

SECTION II. ACADEMIC FREEDOM

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.

Provost Sullivan said that was his assumption. He has reviewed the cases cited by the Committee, and noted that he is a lawyer, has practiced and taught, served as Dean of the Law School, and still follows court decisions closely. The Garcetti case was about an assistant district attorney and he said he does not believe that universities need be concerned that the case would be applied in the context of academic freedom. He said he doubted that this Supreme Court, which is quite conservative, would apply the case to academic freedom, which has its own niche in the law. He said it is also clear, in the Court opinions, that if an academic freedom case were to come before the Court, that academic freedom

* 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.

would be defended, because this Court has been a steadfast defender of the First Amendment. The Garcetti case is an exception and he is not concerned that academic freedom will be trampled by this Supreme Court.

The Committee's view is that it is better to be safe than sorry, Professor Clayton responded, because it is possible that the principles enunciated in Garcetti could be extrapolated to academic freedom.

Provost Sullivan turned next to Section III, which contained amendments proposed by the General Counsel:

SECTION III. ACADEMIC RESPONSIBILITY.

Academic Responsibility [implies] IS the faithful performance of ALL ASSIGNED academic duties and UNIVERSITY 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.

Provost Sullivan said he would need clarification from Mr. Rotenberg on how he uses the term "all assigned duties." Professor Clayton has taken the view that they are subsumed under academic responsibility. He suggested that the phrase "academic duties and obligations" is comprehensive and concludes what is understood, whereas "all assigned academic duties and University obligations" is more specific and narrower in application.

Provost Sullivan said he was uncertain what "University obligations" might include. They may, for example, include, in the course of conducting one's academic duties, such obligations as following conflict-of-interest and conflict-of-commitment policies, rules governing the use of human subjects in research, and so on. That is his interpretation, he said.

Professor Clayton noted that the substitution of "is" for "implies" affects the sense for the worse in asserting that "responsibility is . . . performance," while also eliminating the force of "implies" in the original statement, which comprehends everything Mr. Rotenberg wishes to prescribe. "Faithful performance" includes activities that are not assigned; "faithful," he said, is a strong word. "Implies" could be replaced by "assumes," he said. It may be that Mr. Rotenberg was simply seeking a parallel construction between academic freedom and academic responsibility, Provost Sullivan said. When the term "implies" is used, it comes before there has been a definition of the term, and it could be that the term should be defined before getting into its implications. Professor Clayton said that "implies" expresses obligation and persons affected are to act according.

Professor Clayton asked Provost Sullivan if he approved the changes proposed by Mr. Rotenberg. Provost Sullivan said he would like to hear Mr. Rotenberg's definitions and why the language speaks to "academic duties" in one paragraph and "professional duties" in another. What is the distinction between "University obligations" and academic responsibility? Professor Clayton said the Committee would be happy to hear from him but the words speak for themselves. Provost Sullivan said it would help him to have Mr. Rotenberg's and the Committee's interpretations before putting his imprimatur on them. He said he would not worry about Garcetti, and he praised the Committee for seeking to anticipate problems.

The discussion turned to the use of the terms "professional" and "academic" duties. Professor Clayton said that "professional" includes duties beyond those that are "academic." Provost Sullivan said that it creates ambiguity when two different terms are used, but it is acceptable if the Committee means the full range of duties with the term "professional." He was concerned that the document may use two different words that are intended to carry the same meaning. It is usually advisable to have parallel construction in paragraphs when the same meaning is intended, because courts interpret language accordingly. If a document uses a different term, the courts assume there must be a different meaning intended.

Professor McLoon noted that the Committee inherited the document. She went on to say that she was troubled by "all assigned" duties because the language could be used to get rid of a faculty member. Say that a new chair dislikes a faculty member, so assigns him or her a lot of extra duties. Provost Sullivan said that normally there are annual discussions between a faculty member and chair, and perhaps dean, with assignments agreed on. In Professor McLoon's hypothetical there has been no agreement, or there was mutual agreement followed by a unilateral change. In either case, the issue is grievable. Perhaps so, Professor McLoon said, but grieving would create an uncomfortable situation in the department and pressure on the faculty member to leave.

Professor Loken said that the way the language is phrased, it appears that as a faculty member she need not do research—but that is part of one's academic responsibilities. The language is both too broad and too narrow and is not in the spirit of academic freedom. Provost Sullivan said the language could be defended if it is read as differentiating between academic duties and an assignment to teach X. If the faculty member decides not to teach X and says he or she will teach Y instead, something outside the discipline, doing so would not violate one's academic duties (i.e., to teach) but it would be a refusal to perform assigned duties (i.e., to teach X). Faculty are hired because of their professional specialization, Professor Clayton said, and if they teach something else, they are not performing their academic duties. Professor Loken said that the language is not in the spirit of the document. Professor Clayton added that "implies" means "it goes without saying that," which could also be substituted.

Professor Miksch said that the reason the Committee did not propose any amendments to Section III was that its intent was only to clarify that at the University of Minnesota academic freedom is understood to be pre-Garcetti. The Committee is not trying to change academic freedom or academic responsibility, only to clarify the policy at the University if the courts apply Garcetti. She has shared the Committee's proposal with friends in the academic legal community, and they are impressed by the Committee's anticipation of the potential effects of Garcetti. One would hope that if these cases continue, the Supreme Court will say that Garcetti was fact-specific, but in the meantime the Committee wants to be sure that if someone is critical of something at a meeting, there will not be retaliation. Professor Clayton said he was pleased that the University was ahead of the game rather than behind it.

Provost Sullivan next asked about the amendment to the explanatory language that Mr. Rotenberg had proposed:

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. **NOTHING IN THE AMENDMENT OR THE POLICY EXEMPTS OR EXCUSES THOSE COVERED BY IT FROM FAITHFUL PERFORMANCE OF THEIR ASSIGNED DUTIES AND UNIVERSITY OBLIGATIONS.**

Professor Clayton said the new language is redundant and prescriptive. It is consonant with the changes proposed in Section III but not with the unamended language. It carries the prescription further than the amendments to Section III and brings a judgmental cast that is out of keeping with the document. Provost Sullivan suggested asking Mr. Rotenberg, if Section III were not amended, if the comment means "keep this in mind" but that it does not apply to assigned duties. If it is possible to work out a satisfactory explanation to accompany the policy, it may be that changes to Section III need not be made.

So are you suggesting that those changes in Section III be removed and added in the explanation portion of the document, Professor Clayton asked? Provost Sullivan said a compromise may be possible if there is language in the legislative history interpreting "faithful performance of academic duties" so that it need not appear in the policy. One problem is that the Regents have gone through all of their policies and taken out all procedural and explanatory language so that they only have "black letter" policy. If the Committee reached an agreement about commentary, it would be contrary to the current practice for construction of Regents policies. The policies now are very pithy, very general, and do not contain a lot of detail; the Board has directed that details should appear in administrative policies. Thus, there are broad Board policies followed by explanatory (administrative) policies. If the original document establishes principles, Professor Clayton said, perhaps it would be appropriate to write an administrative policy to accompany Academic Freedom and Responsibility and remove the text added by Mr. Rotenberg.

Provost Sullivan suggested that Professor Clayton contact Mr. Rotenberg and explain that the Committee has considered his proposals, has a different view than his added wording implies, understands Regents policies are intended to be broad and general, and suggests that there could be an administrative policy written that would contain the language to which the committee objects. He said he would be glad to be involved in starting the dialogue, and that if an agreement could be reached, the revised policy could then be brought to the Board and an accompanying administrative policy also adopted.

The Committee agreed it would remove the proposed amendments from the December 4 Faculty Senate docket and would contact Mr. Rotenberg.

Provost Sullivan said that if Mr. Rotenberg wants a comment on the policy, the Regents' office would need to be asked if they would make an exception. Nothing is more important than academic freedom and its value to the University, he concluded, so if it is necessary to comment on the policy, perhaps the comment could be added.

Professor Clayton thanked Provost Sullivan for joining the meeting.

Later in the meeting, after the discussion with Chancellor Lehmkuhle, Committee members took up the policy again. They expressed views on various points: the Committee would prefer to see no changes in the policy rather than accept the proposals for Section III; "assumes" should be substituted for "implies"; the use of the word "assignments" implies that faculty have "supervisors," which they do not; and a concern that faculty could bring academic freedom claims in cases where they have been assigned to teach classes in one area after their research interests have evolved in another direction and want to teach in their new area of research (the proposed language would not make it violation of academic freedom if the chair assigns teaching irrespective of the faculty member's areas of research).

It is changes in research that matter, Professor Abul-Hajj said. He recalled hiring faculty whose research focus changed and for whom he needed to provide space for the new research. But he said he had never encountered faculty who say they would not teach assigned courses. There is a mechanism to deal with faculty who do not teach a normal load, Professor Wells observed.

As for the possibility of grieving, Professor Abul-Hajj was skeptical. How many times will a faculty member win a grievance against the University? About 5% of the time, he surmised; the faculty, he said, will be on the losing end.

2. Rochester Academic Personnel Plan

Professor Clayton now welcomed Chancellor Stephen Lehmkuhle to the meeting to discuss once again the Rochester (UMR) campus academic personnel plan.

Chancellor Lehmkuhle began by saying he wished to make a correction to the plan the Committee had received earlier. They had used the term "student-based faculty," which is incorrect nomenclature. The individuals appointed to those positions will hold the title of Lecturer or Teaching Specialist.

Of the instructors of record for courses at UMR, 75% or more will be tenured or tenure-track faculty. They will be responsible for the courses; the Lecturers and Teaching Specialists will be responsible for the extensions of classes (labs, recitations, etc.) and will not offer courses that are not under the supervision of tenured or tenure-track faculty. The Lecturers and Teaching Specialists will function in some ways like graduate students. Similarly for postdocs, who will be mentored by tenured and tenure-track faculty and will not have courses of their own.

They have hired three "design" faculty so far, Chancellor Lehmkuhle reported, and are beginning to advertise for the next cohort. In fall 2009 they expect to have about 150 students and 8 tenured or tenure-track faculty (if they are successful in hiring). The number of Lecturers and Teaching Specialists they hire will be dictated by the number of students who enroll. He recalled that the Faculty Consultative Committee had asked how many tenured and tenure-track faculty they intend to hire; the question was how many they would have if they had 1000 students. If they maintain a 25:1 ratio at UMR, he could envision hiring about 40 faculty—but the number will depend on how successful their pedagogy is.

Professor Clayton said that earlier the Committee had been told there would be four groups of employees: design faculty, postdocs, Lecturers and Teaching Specialists, and adjunct faculty, with about equal numbers of each, perhaps 15-17. At one point they thought there would be about equal numbers, Dr. Lehmkuhle agreed. The initial hires will be the faculty, and they will fill the Lecturer and Teaching Specialist positions as needed. They are hiring four postdocs; the total number will be determined by how the learning process unfolds. They will not say they will never hire contract faculty, but such appointments will not be routine. Affiliated or adjunct faculty will be hired from Mayo, for example, to give a lecture in a course.

Professor McLoon said she was under the impression that the faculty would develop the curriculum, but the advertisements for the postdocs indicated they will develop curriculum. Those two do not mesh. The postdocs will develop curriculum under the supervision of the faculty, Dr. Lehmkuhle

said, not independently. The postdocs will have the normal relationship with the faculty that they do elsewhere.

Professor Anderson commented that they do not have postdocs at the Morris campus. Are postdocs not usually grant-supported, she asked? Are they typically a line item in a budget? Initially they will be funded from campus resources, Chancellor Lehmkuhle said, and will have appointments of 2-3 years, so they will turn over, but they hope eventually to support some of them through grants. He said he has been at institutions where some postdocs are supported from institutional funds.

Professor Porter asked how the University's "hiring pause" will affect UMR. It will not affect faculty hiring, Dr. Lehmkuhle responded; they will proceed with hiring the next four faculty. Other positions will be on hold until they see the enrollment numbers.

One issue the Committee has talked about is the "student-based faculty," Professor Abul-Hajj said, and one question they have is why these individuals are not considered for tenure-track appointments. There are many institutions that hire faculty based primarily on their teaching; why not these? Because what they will do will not qualify them for tenure, Dr. Lehmkuhle said. They will be working under the supervision of the tenured and tenure-track faculty, and there will be no expectation for research. They will lead discussion sections, for example, and will not accrue experiences that would qualify for tenure.

Professor Wells asked what the difference is between the work of the postdocs and the Lecturers/Teaching Specialists. The postdocs, under the mentorship of the faculty, will deepen their teaching and research experiences and strengthen their C.V., Dr. Lehmkuhle said, and will also have more of a design role under faculty leadership. The Lecturers and Teaching Specialists will not do research nor will they have a direct role in designing courses.

Professor Clayton asked about the target number of faculty for next fall and then "for all time." Chancellor Lehmkuhle noted again that they hope to have 8 tenured/tenure-track faculty for the first-year class of about 150 students. The number of Lecturers and Teaching Specialists will be determined by economic conditions. They expected to need about 4 Lecturers/Teaching Specialists and 4 postdocs, and if the size of the classes double, they would scale up the number of those appointments (although not double them). He offered to provide the Committee with progress reports on hiring patterns.

Professor Abul-Hajj said that on this campus faculty are hired to do research and teach. It appears the design faculty at UMR will do limited teaching and that much of it will be done by Lecturers and Teaching Specialists. What will the teaching load of the faculty be? How much time will they spend on teaching? Dr. Lehmkuhle said that if one defines teaching as classroom lecturing, then they will perhaps do less of it than faculty on this campus. They might give one lecture at the start of the week and then students would work on projects the rest of the week. The credit hours would be similar to those on the Twin Cities campus but would include reliance on a support structure that the faculty oversee. He said he did not anticipate they would spend a lot of time lecturing.

Professor Anderson said she was perplexed by how the faculty would spend their time. They will spend little time with students, it seems. They talk about distribution of work efforts in teaching, research, and service; it appears that the faculty will have about 190% appointments. Dr. Lehmkuhle gave an example. In a chemistry course that all first-year students must take, the content will be managed

by the faculty, would include some lectures, learning objectives will be developed, and there will be exercises in the lab (that will be led by the Lecturers and Teaching Specialists). The faculty will also work together to design the overall curriculum; they will not be each doing part on their own. He said he could not lay out specific proportions of time because how the faculty spend their time will depend on how the faculty design the programs. He said he did not intend to convey the impression that the faculty would be disconnected from the students, but they will have a lot of support in delivering the curriculum.

Professor Loken reiterated Professor Abul-Hajj's point: the Committee has been concerned about the number and proportion of tenured faculty. Why not hire more tenured/tenure-track faculty in order to keep UMR more consistent with other units. Dr. Lehmkuhle asked what number of faculty Committee members would expect for 150 students. What about 1000 students? The design faculty (those who will be tenured/tenure-track) will be completely responsible for the curriculum, all content, and the courses delivered. There may be spot shortages that will require hiring contract faculty, but those appointments are not part of the long-term plan. The others are support staff, not faculty, who could never meet promotion-and-tenure criteria.

Professor McLoon asked about the background of the Teaching Specialists and Lecturers they would seek to hire. They are individuals who would have worked in learning-support centers, as tutors, people who work well individually with students, and perhaps (in the sciences) people who have managed labs. They would be content specialists, mostly with Master's Degrees, and some could have a Ph.D.

Professor Wells inquired how many credits would be offered the first year by the design faculty. In the first year, one course, Dr. Lehmkuhle said. All students will have a common curriculum of five courses for 15 credit hours, and would have the same curriculum for the first two or three years. After that they would branch out in a capstone project that would require additional courses.

Professor Porter asked about the split between teaching and research for the faculty. They have a 7.12 statement, Dr. Lehmkuhle said, but they have not laid out proportions. There are research and teaching expectations but he cannot answer a question about percentages. New faculty will have responsibility for a course but will have duties in designing the curriculum as the campus moves forward.

Professor Clayton asked if at least 75% of the design faculty will be tenured or tenure-track, as suggested by the Committee in the statement it forwarded to the Faculty Senate. If one counts Lecturers and Teaching Specialists in the denominator, the answer is that they will not. If one counts only faculty, they will meet the 75% standard. He noted again that it is their plan that individuals responsible for courses will be tenured or tenure-track faculty.

Professor Anderson said the Committee's concern is about who will be interacting with students and doing the instruction and what role the tenured and tenure-track faculty will play. It sounds as if the Lecturers and Teaching Specialists will play a critical role. The faculty will interact with students, Dr. Lehmkuhle assured the Committee, as will the Lecturers and Teaching Specialists, in a different way. The tenured and tenure-track faculty will design the curriculum and be accountable for it; the Teaching Specialists and Lecturers will implement it, but everyone will interact because the system will not work if the faculty are not interacting with the students.

Lecturers and Teaching Specialists have different responsibilities across the Twin Cities campus, Professor Klee observed; in some units they serve as the instructor of record for a course (e.g.,

Composition). That will not be true at UMR? That is not their plan, Dr. Lehmkuhle said. If they need contract faculty to fill in a language course, for example, they will hire them, but they will not be regular appointments, and Lecturers and Teaching Specialists will not be instructors of record. He also pointed out that UMR will offer a fairly restricted curriculum, so the number of faculty needed will be smaller than might be required for other kinds of programs.

Professor Clayton summarized by saying that the Committee has been concerned about the percentage of tenured/tenure track faculty at UMR and what is required to be part of a university, living up to tenure as the norm, and the academic freedom of people employed. Dr. Lehmkuhle said he did not disagree with those concerns.

Professor Clayton thanked Chancellor Lehmkuhle for joining the meeting.

Following Chancellor Lehmkuhle's departure, the Committee concluded that it wished to amend slightly the resolution it had adopted in October. It was still unclear to Committee members what the proportion of faculty and Teaching Specialists/Lecturers will be and the extent to which the latter will actually be involved in instruction. There was also concern about hiring people who would be implementing a curriculum but not engaging in activities that would qualify them for tenure. There remained concern about the balance between teaching and research expected of the design faculty. Professor Clayton pointed out that this Committee is concerned with tenure and academic freedom and who should constitute the academic personnel of the University; if the characterization of the program is acceptable to the University, the Committee can only express its reservations.

Professor Wells, noting a recent comment by Governor Pawlenty that MNSCU and the University should offer more online education, recalled that at first all of UMR's instruction would be online; now it appears that none of it will be (for this degree program, anyway). Where will the students in this program come from, she asked. It is possible that most of them will be foreign, and for those without permanent residence, the law requires that only three or fewer credits of their education may be offered online. She also wondered if there will not be problems with accreditation, because accreditation requires that 120 credits be planned, and UMR is not that far along yet.

The Committee voted 8-1 to revise the resolution to be reported to the Faculty Senate for information.

-- Gary Engstrand

University of Minnesota

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Appendix

Commentary for the Faculty Senate docket item on proposed amendments to the Regents policy on Academic Freedom and Responsibility

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 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.