

UNIVERSITY OF CALIFORNIA

ACADEMIC SENATE

UNIVERSITY COMMITTEE ON ACADEMIC FREEDOM

MINUTES OF MEETING

THURSDAY, NOVEMBER 13, 2008

Attending: Patrick Fox, Chair (UCSF), Raymond Russell, Vice Chair (UCR), Ronald Amundson (UCB), Gregory Pasternack (UCD), Isaac Scherson (UCI), Erik Menke (UCM), Ethan Bier (UCSD), Roberta Rehm (UCSF), Paul Amar (UCSB), Naomi Lew (Undergraduate Student Representative), Hironao Okahana (Graduate Student Representative), David Birnbaum (University Counsel), Harry Powell (Academic Council Vice Chair), Martha Winnacker (Academic Senate Executive Director), Brenda Abrams (Policy Analyst)

I. Chair's Announcements

The Chair started to work on the Student Freedom of Scholarly Inquiry Principles statement in 2003. The statement came about after a student inquired about the implications of the revised university academic freedom statement (APM 010). A joint administration and Academic Senate task force developed the statement that articulates that students have freedom of scholarly inquiry. It was approved by Academic Council after systemwide review and was sent to the Office of the President (OP). Staff in OP were to submit a memo to Council requesting some minor changes and outlining the basis for the changes. Chair Fox noted that there was an unsuccessful effort by the state legislature to pass laws defining academic freedom. UCAF will request the OP memo in order for the statement to be revised and finalized. UCAF's request for membership on Council is currently under systemwide review.

Discussion: Students were broadly defined in the statement. Chair Fox described how students hired to teach summer session as the faculty of record were not given a title that protected them under the concept of academic freedom. A statement from UCEP recommended providing these students with a title that would protect them. Whether academic freedom applies once the student is no longer teaching a course is not clear. The statement provides a framework that helps with consideration of this complex issue. APM 010 may apply to students while they are teaching. There are questions regarding where the statement belongs and how it should be implemented administratively. A goal is for the statement to be cross referenced to APM 010 and any administrative manual addressing student conduct. It was noted that where protection under academic freedom ends and protection under free speech begins is vague. A department's administration might consult with the division CAF on cases involving students who feel their scholarly inquiry was abridged by faculty.

II. Consent Calendar

Action: The June 18, 2008 minutes were approved.

Action: The 2007-2008 Annual Report was approved.

III. Consultation with Academic Senate

Harry Powell, Vice Chair and Martha Winnacker, Senate Executive Director

There are a number of changes this year including the new president, the Senate's new executive director, and the restructuring of OP. The primary focus now is the budget and UC did not receive \$100 million from the state and there have been another \$100 million in cuts. President Yudof is looking at long term needs of UC and plans to submit a budget reflecting what UC actually needs to maintain its excellence. This should be about \$900 million. The state will be reminded of UC's role as an employer, and the appropriate investment by the state in higher education has been a focus for the president. The accountability framework helps assess everything UC does and connect this to the public relations effort.

Discussion: The committee discussed the use of collegiality when considering merit and promotion with the Vice Chair. UCAP provided an opinion in response to UCAF but it was not completely satisfactory. One campus is considering creating an ethics committee but there is concern about whether it will end up policing behavior. UC's Chief Compliance Officer will be issuing an ethics compliance standard and additional compliance measures will probably be introduced. UCAF should consider the faculty response to the compliance measures. UCAF asked the Vice Chair to follow up with OP about its memo on the scholarly inquiry principles statement. One reason for the delay may be Student Affairs' focus on the Eligibility Reform proposal, which the Vice Chair explained. There was a question about whether there is a relationship between the budget situation and academic freedom in light of attempts by administration to obtain money controlled by faculty. A request was made for UCAF's chair to be present at the Council meeting when the committee's request for membership is discussed. One committee member commented that the accountability framework should include qualitative indicators that will help smaller departments justify their research funding needs.

IV. The Use of "Collegiality" in Academic Personnel Process

There was concern about using collegiality as a basis for determining if someone should be promoted or not. There is not a clear definition of collegiality. If otherwise productive, a person should not be penalized if their personal interaction style is not the most collegial. UCPT and UCAP were asked for their opinions on this issue and UCAP was asked to suspend the use of collegiality.

Discussion: The term "collegial" is vague and should be replaced with specific descriptions. The concept is not precise and it can be abused. The committee discussed different perspectives of collegiality and whether or not it should be used in the review process. The evaluation should focus on failure to perform duties properly, not on what might be perceived as nonconformist behavior. UCAP indicated that collegiality is not used in the reviews as a category separate from service, whereas Council's response implied that it is used. In addition to this contradiction, neither memo clarified what behavior is not collegial. UCAF previously investigated this matter and findings suggested that collegiality was used. A next step will be for committee members to discuss this issue with their divisions to determine if this is an issue. UCAF will also submit a memo to Academic Council indicating our response to the issues raised by the UCAP and UCPT reviews of the issue.

Action: The Chair will draft a memo to UCAP and circulate it to the committee for input.

V. Implementation of RE 89

RE 89 is a policy from the Regents requiring review of research funded by tobacco companies and their derivative companies. The policy was instituted in spite of opposition from UCAF and the majority of the divisions. Campuses are developing implementation plans for the reviews. UCAF requested that local divisions are able to monitor the reviews because the policy sets aside a specific classification of faculty research for an extra level of review based on the source of funding. Many campuses do not have tobacco funding. Certain foundations specify that for a campus to receive funding it must have a policy forbidding faculty from obtaining tobacco company funding.

Discussion: A question is how faculty can know whether a company is a subsidiary of a tobacco company since it is difficult to monitor the ownership of companies. At least one campus will have a list of companies and all grants will be checked. There is a concern about the Chancellor selecting the review committee and UCAF would like faculty participation in this process, including a CAF member. UCAF members should check with the divisions and ask that their policies are amended to specify that a CAF representative is on the review committee to monitor academic freedom issues. The COC should identify the faculty that should be on the review committee, and this recommendation will be discussed with the UCOC. The recommendation will be submitted to Council in a memo and distributed for systemwide review. The committee also noted the potential expansion of a required review to other funding sources.

Action: The Chair will draft a memo to UCOC. If UCOC agrees with the recommendation, a second memo will go to Council requesting a systemwide review. The local CAFs should also build consensus at the campuses for this approach.

VI. Legal Fees for Faculty Accused of Misconduct in Research

David Birnbaum, University Counsel

The Chair provided background on this issue. UCAF requested Council's endorsement of its recommendation to modify UC policy to require reimbursement of legal fees incurred by faculty members accused of misconduct in research and found innocent. There is an existing policy for faculty who select outside representation to request reimbursement but guidelines for making reimbursement decisions have to be developed. UCAF was asked by Council to work with University Counsel and UCFW on the guidelines. It was noted that UC has proposed that faculty purchase the legal insurance available through the University to cover some of the legal fees, but this coverage is inadequate.

University Counsel Birnbaum indicated that with respect to the recommended Senate study of the viability of an insurance policy that covers workplace related legal fees for all faculty regardless of the outcome of the proceeding for which counsel was retained, University Counsel is not working on this matter yet. It will also depend on the kinds of reimbursement UC would be prepared to provide with respect to internal UC investigations. If there is a lawsuit related to the scope of a faculty member's employment, UC is obligated by policy and state law to defend and indemnify the faculty. In the case of external investigations, UC is the responding party and provides counsel. Where UC is investigating the matter and if faculty and UC have different

interests, there may be situations where faculty want independent legal advice. With reassurances that UC will reimburse the faculty's legal fees, there would be less need for insurance. Some insurance policies would cover the legal fees for a faculty member found culpable.

The Office of General Counsel has not started work on the proposed guidelines and it would be useful to have the Senate's views of what would be appropriate. The criteria suggested in Counsel Birnbaum's May 2, 2008 letter to Immediate Past Senate Chair Michael Brown are open to multiple interpretations and who will make the decision to reimburse the faculty member is not clear. In past cases, vice chancellors have made these decisions and this may be appropriate for future cases since the campus would be the funding source. The potential for self-incrimination creates a situation where it would be reasonable for faculty to want independent legal advice. The role of General Counsel is to ensure that the process is fair to the parties involved.

Suggested criteria that will need to be satisfied in order to reimburse faculty legal fees include: the faculty member is found not guilty of the accusations; it is reasonable that faculty would retain counsel (for example if accused of potentially criminal misconduct); the reasonableness of the fees being charged (and there would be criteria for determining whether to pay all or a portion of the fees); and the fees must be incurred in connection with the charges being investigated and not other matters. The whistleblower policy requires employee cooperation. If the faculty member's counsel attempts to prevent the investigation from going forward, this might be criterion to decide if UC will pay the legal fees. This would be difficult to make objective since the attorney has a responsibility to the client.

Discussion: It was noted that these cases are commonly the result of accusations by whistleblowers, and they may not occur frequently. The relevance to academic freedom is the importance of defending a researcher against unfounded complaints that would intimidate the researcher into abandoning their work. One problem with the policy is that faculty and administrators may interpret it differently.

At different points in some of these cases UC may be the adversary, stand by the defendant, or be a neutral party. In a whistleblower case, the chancellor will investigate whether the charges are well-founded, and UC is neutral at this time. UC will bring charges under the faculty code of conduct if the accusations are deemed to be true. If deemed unfounded and the whistleblower sues, UC will defend the faculty member. UC is obliged to defend the faculty member in cases of scientific misconduct where the charges were deemed to be well-founded and the whistleblower sues. When an administrative agency is investigating the charge that the University believes are well-founded, UC and the faculty member would have different attorneys, and it is up to UC's discretion to provide an attorney to the faculty member. Although complex, cases of scientific misconduct are infrequent.

With respect to who will make the decision about whether the criteria have been met, it should be at the campus level since the campus would have to pay for the legal fees. The decision to pay the legal fees would be at the discretion of the chancellor and an appeal mechanism could be included in the guidelines. It was noted that faculty could face a dilemma when deciding whether or not to have representation. When the charges are serious, retaining counsel is reasonable and

the guidelines could clarify when the reimbursement policy is applicable. It was suggested that the guidelines state if the accusations would constitute a violation of law, not just policy, it is reasonable to retain an attorney. UCAF members expressed concern about the potential for arbitrary decisions and unequal treatment if the decision-maker has too much discretion. Examples of situations when it is reasonable or unreasonable to retain counsel could be in the guidelines. If the request for reimbursement is declined, the guidelines should require that the decision-maker justifies the decision. The appeal process might allow for cases to be discussed in light of other cases where different decisions were made.

There is a question of whether UC should provide support even if the faculty member is not found innocent, paralleling the state's provision of a public defender to someone accused of a crime. Faculty can consult with General Counsel and receive advice unless Counsel determines that divergence of interests prevents this. Counsel represents the institution, not a particular individual during the investigation. Advice about how to proceed could be provided but it would be better for, and probably preferred by, faculty that advice about strategic decisions to be provided by private counsel.

Action: The draft guidelines will be submitted to Chair Fox and Senate Chair Croughan. UCAF will request input from UCFW.

VII. Academic Freedom and the UC Education Abroad Program

The Chair summarized the issue with the Education Abroad Program (EAP) and the State Department's travel restrictions. The EAP relies on the State Department guidelines to determine countries that are safe and unsafe for students. UCAF's focus is on whether this restricts students from going somewhere that would provide them with a good educational opportunity. The EAP reported to UCAF that it does not have the resources to make judgments about a country's safety and indicated that students can sign a waiver alleviating UC from liability if something happens to them when visiting a country deemed unsafe by the State Department. There is a need to determine UCAF's next steps.

Discussion: A waiver may not prevent UC from being held liable. The basis for this being an academic freedom issue is that if students are restricted from going to a specific country, they will be unable to research a certain subject that can only be researched in that country. The EAP policy does not prevent students from going to the countries deemed unsafe, but the students will not be sponsored and reimbursed by UC. Academic Council denied UCAF's request for a faculty committee to further investigate the travel restriction policy. This issue is also related to student rights. It was noted that some students travel to countries that do not have study centers and supervising faculty. Since UCEAP has submitted a new business plan, the committee agreed to postpone further discussion of this matter until the outcome of the restructuring is known.

VIII. Academic Freedom Paper

It is not clear why the request for systemwide review of the statement on Academic Freedom was denied by Council last year. One concern was about the duplication with President Atkinson's

statement related to APM 010. The UCAF statement was revised by the UCLA representative to UCAF based on the feedback from Council.

Discussion: The committee agreed that the revised statement is an accurate reflection of the issues related to academic freedom and discussed next steps. This statement might be connected to the Student Freedom of Scholarly Inquiry Principles statement and APM 010. There was a discussion about whether statement is too subjective and it should be clearly noted that it is not Senate or UC policy. Due to concerns about the potential reaction by Council to the revised statement, the suggestion was made to further review it before resubmitting. It was mentioned that the original idea was that the statement be made available in pamphlet form to clarify issues related to academic freedom on campuses and that it the statement was endorsed by the Divisions. The committee agreed that it is important to confirm the accuracy of legal interpretation of the issues. The committee proposed submitting the statement for review by UC experts on academic freedom and for peer review in a journal before sending it to Council again. One idea is that APM 010 could have a link to a UCAF website where the Academic Freedom statement and President Atkinson's statement are posted. Future UCAF committees could be encouraged to continue to debate the issues involved and update the statement as needed.

Action: Chair Fox will discuss the potential next steps with the UCLA representative. Two members will share the paper with UC faculty with expertise in academic freedom issues.

IX. Hong vs. UC Regents

Chair Fox provided background information on the case of Hong vs. UC Regents. Dr. Hong is a now retired UC Irvine professor who has a lawsuit against the Regents over his statements criticizing the administration's actions. Dr. Hong was denied a merit and claims this was in response to his criticism. UC's position is that his criticism of administration does not fall under academic freedom since it criticized the operation of the university.

Discussion: There was a discussion about whether his criticism was within the range of what a faculty member would discuss since it was an opinion about teaching. How merit was denied is not clear, and the relevance of the case to academic freedom needs clarification. Dr. Hong argued that he made the comments within the context of shared governance. The concern for UCAF is that faculty should be able to exercise free speech in the context of shared governance. UC's position is that academic freedom does not apply in the shared governance process, and the committee does not believe the distinction between the shared governance responsibilities and the teaching and research responsibilities should be made. The committee agreed to express its concerns in a memo to Council about the Office of General Counsel's approach to defending the Hong case and attach the UC Irvine Divisional Assembly resolution.

Action: The UCSB representative will draft a memo on UCAF's position about this case.

X. Campus Reports

Irvine: The Hong vs. UC Regents case is a major focus.

San Francisco: There will be an academic freedom forum focusing on the relationship between academia and industry and the relationship to academic freedom. There is a continued focus on clarifying guidelines for the liability of faculty members in the case of overspending grant funds, and a task force is in place to address this issue.

Davis: There is a proposal from administration to cap the annual payouts to faculty who have endowed chairs and professorships. Berkeley recently implemented this and there is a question of whether this was debated from an academic freedom perspective. Davis faculty will decide if this is an academic freedom issue.

Merced: The representative to UCAF is not aware of the issues.

Riverside: The divisional committee has only had routine issues to deal with to date.

Santa Barbara: This campus is focused on the budget issues and freezing of the hiring processes.

Berkeley: This campus is also dealing with issues related to budget. The Hewlett foundation provided matching funds to 100 endowed chairs with a required match from the colleges in specific areas of research, not generic college-wide chairs. This does restrict the academic focus of the college and the university. Chancellor announced that all chairs would be modeled after the Hewlett chairs, in terms of how much the recipient receives and where any additional funding is directed. There is a task force looking at industry partnerships.

San Diego: The CAF is waiting for final document regarding security for events organized on campus and the liability for any inappropriate incidents. This is an attempt to deal with police protocols and the fear of terrorism on campus.

XI. New Business

There was no new business.

Meeting adjourned at 3:45

Minutes prepared by Brenda Abrams

Attest: Pat Fox