

UNIVERSITY OF CALIFORNIA

ACADEMIC SENATE

UNIVERSITY COMMITTEE ON ACADEMIC FREEDOM

MINUTES OF MEETING

THURSDAY, MARCH 5, 2009

**Attending:** Patrick Fox, Chair (UCSF), Raymond Russell, Vice Chair (UCR), Ronald Amundson (UCB), Gregory Pasternack (UCD), Isaac Scherson (UCI), Eugene Volokh (UCLA), Erik Menke (UCM), Paul Amar (UCSB), Chris Connery (UCSC), Roberta Rehm (UCSF), Hironao Okahana (Graduate Student Representative), Charles Robinson (Office of General Counsel), Chris Patti (Office of General Counsel), Mary Croughan (Senate Chair), Harry Powell (Senate Vice Chair), Brenda Abrams (Policy Analyst)

**I. Announcements**

The Chair announced that General Counsel Robinson and staff attorney Chris Patti will join the meeting for the Hong v Regents discussion.

**II. Consent Calendar**

**Action:** The minutes were approved.

**III. Consultation with the Academic Senate Office**

- *Mary Croughan, Academic Senate Chair*
- *Harry Powell, Academic Senate Vice Chair*

Chair Croughan provided a budget update. All options, and their pros and cons, to address the shortfall are being considered. Contributions to the retirement plan are to restart but the state is claiming it is not legally required to pay the employers contributions. The state agreed to a \$20 million contribution that would reflect a 2% employer contribution which was then eliminated from the state budget. The Senate has been asking for a restart of contributions for the past five years when it recognized the need to put money back in since a billion dollars per year is spent on retirement. The eligibility reform proposal was approved by the Regents and will result in more access to UC. The changes will broaden the pool of students guaranteed admissions. It will also result in significant increases in the numbers of African American and Latino students, and, except potentially for Chinese American students, there will be increases in the number of Asian American students. Some external groups are incorrectly asserting that the eligibility reform proposal is a way to circumvent Proposition 209. There are efforts to improve financial aid.

**Discussion:** Chair Croughan's view is that academic freedom and shared governance are connected, and there is a need to protect academic freedom for the governance aspect of shared governance. The Senate Chair and Vice Chair sit on the Board of Regents as faculty representatives and the Chair represents the view points of the Academic Senate. A committee member commented that there is no independent mechanism to enforce shared governance. Chair Croughan indicated that faculty can make a vote of no confidence in their leadership and there are five year stewardship reviews where faculty concerns can be documented. Faculty can also contact the divisional Senate chairs, who convey concerns to the systemwide Senate chair.

There are procedures in place to address efforts to thwart shared governance. When shared governance is active at a campus, the benefits of having consensus are clear.

#### **IV. Hong v UC Regents**

- *Charles Robinson, UC Office of General Counsel*
- *Chris Patti, UC Office of General Counsel*

Chair Fox provided a brief overview of the Hong v UC Regents case, and the UCLA and UCSB representatives described the academic freedom issues involved in the case. It was noted that First Amendment issues are the floor and academic freedom builds from there. The interpretation of First Amendment rights in the workplace is narrowed by the Garcetti argument. There is a First Amendment issue because Garcetti makes inroads into citizen speech. Dr. Hong tried to expand the definition of whistleblower in his case. When the 9<sup>th</sup> circuit decision comes out, UCAF may need to make a statement.

General Counsel Robinson and Counsel Patti explained UC's perspective of the issues in the case. OGC recognizes both the institution and the individual as clients and the individual's rights to use certain arguments on their behalf. General Counsel understands faculty concerns about the Hong case. General Counsel met with Senate Chair Croughan and immediate past chair Michael Brown and implemented a new process. The new procedure for cases potentially involving academic freedom issues includes discussing with higher levels of the administration whether consultation with faculty is needed.

Dr. Hong was denied merit in 2004 and claimed this was in retaliation for comments he made about personnel actions related to a potential hire and another promotion case in his department. The UCI CAP denied the merit and recommended to the vice provost that merit be denied. Dr. Hong did not go to Privilege and Tenure. There was no evidence that higher level administrators were aware of Dr. Hong's comments. Dr. Hong filed a lawsuit in state court that was dismissed and then filed a lawsuit against UC, various administrators and several colleagues in his department in federal court claiming that his First Amendment rights had been violated. In the defendants' motion for summary judgment, they argued there was no evidence of retaliation and that Dr. Hong's speech was not protected by the First Amendment. The district court ruled in favor of the defendants on the grounds that the speech was not protected, relying on the 2006 Supreme Court's decision in the Garcetti case. The Garcetti argument held that when public employees are speaking in the scope and course of their official duties, the First Amendment does not protect them and the Constitution does not insulate their communications from employer discipline. Garcetti was one of the arguments used by UC and the other defendants in favor of its motion for summary judgment; it was not introduced by the judge.

One justice in the Garcetti case dissented and stated that the ruling could be a problem in the academic setting. Academic principles have been recognized by the Court that allow faculty to engage in research, scholarship, and teaching without external restrictions, and the ruling could infringe on these rights. The majority opinion indicated that no decision is needed on whether faculty speech relating to scholarship and teaching is covered by their decision in Garcetti. The district court decision is argued to mean that Dr. Hong's speech was not constitutionally protected therefore no retaliation claim can be made. An appeal in the 9<sup>th</sup> Circuit Court of

Appeals is pending now. The position taken in the appeal by UC and the top level administrative defendants is that the court can rule on grounds that do not require it to decide the academic freedom issue. UC is arguing that the statute under which Dr. Hong is suing does not apply to the University. The individual defendants are using the qualified immunity doctrine and arguing there is no First Amendment right in this case under Garcetti. They argue this does not involve scholarship and teaching but an internal administrative issue just as in Garcetti. A recent Supreme Court decision on qualified immunity has allowed UC to argue that the Court does not need to delve into the unsettled issue and the defendants should not be subject to damages.

The individual defendants argue UC faculty have a right to participate in shared governance and in discussions about promotion decisions. They state the source of the right comes from UC policies not from a constitutional right. If it is a constitutional right, this would allow for lawsuits between faculty members when there are disputes about what happens in personnel matters. It is better to have the issues resolved internally using UC grievance procedures, which is a better way for faculty's rights to be protected. Faculty would be discouraged from participating in personnel decisions if they have to worry about being sued for saying someone does not deserve a promotion. This is the argument used by the attorneys for the individual defendant, not by UC. Separate briefs were filed, one on behalf of UC and one on behalf of the individual defendants.

**Discussion:** There is a difference between the arguments that would help an individual defendant win the case and the position that UC might choose that faculty would agree with. One committee member commented that UC's argument that the First Amendment does not protect speech that is part of shared governance is not easy to defend and questioned why, if Garcetti applies to faculty, it does not apply to speech in the classroom or scholarship. The position of the individual defendants is that academic freedom concerns have to do with research, scholarship and teaching, and not internal administrative procedures. It is agreed that academic freedom is part of shared governance. How broadly academic freedom is viewed and whether it extends more broadly to the realm of shared governance is the issue.

UC relied on Garcetti in the lower court but not in the current appeal. It was not the favored position of OGC but the individual defendants requested the use of this argument. Chair Croughan commented that UC considers academic freedom to cover shared governance. OGC understands the position of the faculty on this issue. If a similar case comes up in the future that affects teaching, research and shared governance, it will be brought to UC leadership for in-depth discussions. General Counsel is obliged to describe all options available to the defendants. In the current action, the focus is also on the claims of retaliation. UC and the individual defendants are making a strong statement that the right to participate in shared governance is protected, but whether it is protected through UC policy or the Constitution is the question. The individual defendants are stating the latter is the better way for the rights to be protected. Dr. Hong's claim was not subject to the administrative exhaustive requirement because it is a federal constitutional case brought under a federal statute that does not require it. The 9<sup>th</sup> circuit might avoid the issue, taking advantage of the recent Supreme Court ruling on qualified immunity.

A committee member remarked that future cases may involve policy disputes. As funding from the state decreases, faculty have to bring in a certain amount of money. At the same time, UC is imposing compliance policies that constrain faculty behavior. Mechanisms for faculty to voice

concerns about policies are not adequate to avoid future lawsuits. There are also no opportunities to discuss how shared governance should work. While academic freedom covers research, it is unclear whether it covers the administration of research and there is potential for conflicts to arise. Another member questioned whether the APM should say more about the shared governance component of academic freedom. OGC suggested that, while the faculty code of conduct is clear, it may be appropriate to examine the APM. Shared governance needs to be defined, including what is meant by participation.

## **V. Implementation of RE-89**

The campus reports to the president show there is not significant money from the tobacco industry being used for research and this varies from campus to campus. UCORP was asked to support UCAF's plan to request that Academic Council recommend that a member of CAF be appointed to each campus' RE 89 implementation review panel as an ex officio member. UCAF will also request that UCORP recommends faculty to the chancellors for the review panels. UCORP supports UCAF's ideas but suggested that the Committee on Committees should identify individuals to serve on the review panel. UCORP also suggested that a member of the divisional committee on research policy should be an ex-officio member.

**Discussion:** UCAF members agreed with UCORP's recommendations.

**Action:** The Chair will write a letter to the Committee on Committees asking if they agree with the recommendations.

## **VI. Memo on Collegiality**

The Chair drafted a memo regarding general guidelines for the legitimate and illegitimate uses of collegiality in academic reviews.

**Discussion:** Vague concepts like collegiality should be avoided and more specific behaviors that are expected should be identified. In case law, hostile work environment could include expressing political views that some find to be racist or sexist or personal face to face insults. Hostile work environment includes issues that UC should prohibit and issues over which UC has no authority. Documentation of collegiality needs to be clear if it is to be used to positively or negatively evaluate faculty. Creating procedures for documenting what is problematic about behavior provides a more formalized process and the documentation will provide a basis for peers to evaluate the faculty member. If Council endorses the letter, it might be included as an addendum in the APM. UCAF could recommend where this memo would go in the APM in order to become part of university policy. UCAF should specify the language to use to document collegiality. The committee discussed the need to institutionalize its work, and including this statement in the APM is one way to achieve this. Collegiality has been used by administration to evaluate a case, not by the CAPs. The goal is to address collegiality explicitly and put it in the APM even if it is not used by CAPs. Specific changes to the memo were suggested.

**Action:** Chair Fox will make the changes and determine where the memo might fit in the APM.

## **VII. Revision of Senate Bylaws 125 A.4, 128, and 130**

The committee submitted a request to Academic Council to extend the UCAF's chair appointment to two years and for the UCAF chair to sit on Council.

**Discussion:** Vice Chair Powell indicated that UCAF's Chair could come to Council at any time to discuss an issue, and indicated that if in the future issues related to academic freedom escalate, UCAF might want to submit the request again. UCAF's Chair can also contact Chair Croughan to request an invitation to Council meetings. Vice Chair Powell explained that the rejection of UCAF's request was based on pragmatic reasons. It was noted that UCAF's request was made on a philosophical basis since academic freedom differentiates universities from other types of institutions. There is a disjunction between UC's claim that academic freedom is a cornerstone of its legitimacy as a social institution and the fact that no one on the systemwide governing body represents that frame of reference.

There was a lengthy discussion about the connection between academic freedom and shared governance. Faculty have the authority to make decisions about certain things and the right to advise in other areas. A member expressed concerns about administrators taking money from endowments and research grants or making policies that regulate research activities. One question is whether academic freedom is stronger than shared governance or vice versa. The Standing Orders of The Regents define the areas exclusively under the faculty's purview but shared governance is still murky. The relationship of shared governance to the administrative and pragmatic decisions should be clarified. UCAF might write a paper about academic freedom and shared governance. This requires more thought by UCAF and the committee needs to decide whether it should pursue this issue now or postpone it until the next academic year.

## **VIII. Student Freedom of Scholarly Inquiry Principles**

The issue of student freedom of scholarly inquiry principles started several years ago. UCAF submitted a paper to Academic Council which was then forwarded to OP with minor revisions. The statement is now being reviewed by the campuses.

## **IX. Sexual Harassment Prevention Training Compliance**

A UCI professor refused to take the sexual harassment prevention training and the committee should think about whether there are issues related to academic freedom. There are a number of new required trainings for faculty. Chair Fox explained new legislation, Senate Bill 1370. This bill would prohibit UC and other schools from dismissing, suspending, disciplining, reassigning, transferring, or otherwise retaliating against an employee for acting to protect a student engaged in conduct authorized by state law or refusing to infringe upon conduct that is protected by the First Amendment or the California Constitution. The bill is designed to protect high school and college teachers and other employees from retaliation by administrators as a result of student speech. President Yudof recommended a policy to The Regents in response to SB 1370.

**Discussion:** Committee members agreed that the particular case involving the UCI professor is not an academic freedom issue. A committee member remarked that arguments have recently

been made that non-discrimination policies include prohibitions on speech. One part of the policy recommended by the president implicitly endorses the idea that certain kinds of speech constitute discrimination and should be prohibited and punished. Under current First Amendment rights, hate speech is protected. UCAF had a lengthy discussion about free speech, hate speech, and what should be tolerated. It was noted that academic freedom covers the faculty's rights to make statements about issues in their area of expertise in the role of professor. UCAF decided not to weigh in on SB 1370.

## **X. Campus Reports and Member Items**

**Berkeley:** There has been no activity for the CAF this year. There is a situation involving law professor, John Yoo, who provided legal advice to the Bush administration regarding torture and this might become an issue for CAF. The CAF sees this as an academic freedom issue and has had a preliminary discussion about it. The City of Berkeley wrote a non-binding statement requesting that John Yoo be removed from teaching and there is a question about whether UC will fire him if he is indicted.

**San Francisco:** Plans for the academic freedom symposium have been solidified and the focus will be on the academic freedom issues involved with university and industry collaboration. A list of speakers is being developed and a proposal has been submitted to the campus executive committee for financial support. There are implications for new faculty who may not want to be affiliated with industry and whose departments may have made some arrangement with industry. A survey of departments on overspending of grants found that there is no consistent policy on recouping funds from faculty and the CAF recommended to the vice chancellor that there should be guidelines. This is related to the fact that the campus' accounting system is out of date. This has been referred to the executive council and a task force has been convened to investigate this issue and suggest guidelines to the vice chancellor.

**Santa Barbara:** The CAF is active but no major issues are being discussed.

**Merced:** There have been no issues related to academic freedom this year.

**Davis:** There is an issue with department chairs proposal to tax endowed funds. Money intended for specific academic purposes should not be taxed to generate funds to be utilized for non-academic uses. Departments provided feedback on the academic freedom aspect of this practice. The CAF wrote a letter indicating that distribution of these funds should be a decision made in the academic realm, and that there had been an infringement on academic freedom. There was concern that faculty might be pooling money instead of spending it, so CAF suggested that it would be reasonable for administration to ask faculty to report on their spending. Endowments have little to no overhead in contrast to grants. Campuses are trying to find other sources of funding as money from the state is reduced.

**Riverside:** No academic freedom issues are currently under discussion.

**Santa Cruz:** The CAF has discussed policies for a free university network and the issues of privacy, communications and information technology policy. IT policies in terms of storage

facilitate a degree of surveillance that exceeds what is necessary for university functions. UC has given up more of its freedom of communication and privacy than necessary, and may want to think about reclaiming those rights. One policy relates to changes in IT policy and record maintenance that would affect the ability of outside entities to subpoena email records. A subcommittee with members of CAF and the committee on technological and communication issues will develop recommendations to address concerns about the policies.

**Los Angeles:** The Foundation for Individual Rights in Education complained in a report about policies at UCLA. One policy relates to not tolerating any form of bigotry in on campus housing. The administration will be asked to clarify the policies. The CAF will be examining this in order to be proactive about the matter. This year there have not been any issues related to the animal rights activists.

### **X. New Business**

The committee was encouraged to think about agenda items for the committee in 2009-2010. One item could be exploring the relationship between shared governance and academic freedom.

UCAF members thanked Chair Fox for his wonderful service as chair. Chair Fox thanked the committee members for their participation and contributions.

Meeting adjourned at 3pm  
Minutes prepared by Brenda Abrams  
Attest: Pat Fox