

# MINUTES OF A MEETING OF THE FACULTY SENATE

Wednesday, February 12, 1997

The Speaker, John Pollak, Professor of Animal Science, called the meeting to order. He then called on Dean Stein for remarks

## 1. REMARKS BY THE DEAN

Peter C. Stein, Dean of Faculty: "Well, let's see, I was not at the December meeting. I was on vacation in the sunny vacationland of Hanoi, which is sort of interesting and it got my mind off of the Senate. Well anyway, when I came back, I started to read the minutes and I have a couple of comments I'd like to make about something that happened at the last meeting. What I want to talk about are 'calling the question' and 'calling quorums'.

"The basic construction of Parliamentary procedure is that people talk for something and they talk against something, hear everything, and then make up their minds. Of course, there's always the question of when we've talked enough. One of our problems is that we'll talk forever about just about anything. 'Calling the question' is the appropriate way to limit that but it does seem to me that when someone introduces a motion and then speaks for it, it is not according to the spirit of Parliamentary procedure to call the question immediately, because there has been no opportunity for the other side to be heard. It seems to me that judicious people should wait until there has been at least one or two sequences of arguments back and forth before calling the question.

"Comment number two relates to 'quorum calls'. Robert's Rules says the following. Once a quorum is called, it is assumed that there is a quorum until it is shown to be otherwise. Which is to say that quorum calls are not done retroactively. But then, there is a little qualifying clause which adds: '. . . unless it is absolutely clear to the speaker that there was not a quorum at the previous vote.' It seems to me that this is a good idea - that quorum calls not take effect retroactively. One of the worst things that can happen to a legislative body is to have some confusion about what the body decided, whether the vote taken was legal, what the count was, and so forth. You can imagine a situation where a series of votes are taken and then somebody calls the quorum and then the quorum is missing and then there is the question; well, was the last vote legal, what about the second to last vote, what about the third to last vote? It calls into question the whole integrity of the process. It also strikes me that calling the question after a vote is a little like the student who wants to decide whether to take a grade in a course of S/U after the letter grade has been assigned. It just doesn't seem quite right that if you have lost the vote, that it is fair to ask for a second bite at the apple and to declare the vote illegal.

"The other quick comment that I would like to make is that I think people should try to stay here until the end of the meeting. If there are items that you are not interested in, I think it's really unfair to the other people here who are interested in the points that may come up to leave the meeting because that may make it impossible for the Senate to decide anything. People's time is valuable. I learn this all the time. But of course, it's just as valuable for the people who stay in the meeting as it is for the people that leave. I think we should ask members of the Senate to make this commitment from 4:30-6:00; to be here and to stay here once they come. And that concludes my remarks."

## 2. APPROVAL OF MINUTES OF NOVEMBER 13 AND DECEMBER 11, 1996 FACULTY SENATE MEETINGS

The Speaker called for approval of the minutes from the past two meetings, November 13 and December 11. Hearing no corrections, the minutes were approved.

He next called on Professor Robert Lucey for a report from the Nominations and Elections Committee.

## 3. REPORT FROM THE NOMINATIONS AND ELECTIONS COMMITTEE

Professor Robert Lucey, E.V. Baker Professor of Agriculture and Associate Dean and Secretary of the University Faculty reported on the following recommendations from the Nominations and Elections Committee.

### ACADEMIC FREEDOM AND PROFESSIONAL STATUS COMMITTEE

Elaine Wethington, H.E. - spring replacement for S. Kay Obendorf, on leave

## AFFIRMATIVE ACTION COMMITTEE

Gary J. Simson, Law - appointed chair

## FINANCIAL POLICIES COMMITTEE

Paul Sherman, A&S - spring replacement for K. Stone, on leave

## MINORITY EDUCATION COMMITTEE

Ronald Booker, A&S - appointed thru 1999

Beena Khurana, A&S - appointed thru 1999

## RESIDENTIAL COMMUNITIES COMMITTEE

Donald Barr, H.E.

David Delchamps, Engr.

On a vote call, the report was approved.

The Speaker called on Professor Peter Schwartz to revisit the Academic Integrity proposal postponed from the last meeting.

### **4. CONTINUATION OF RESOLUTION AMENDING THE CODE OF ACADEMIC INTEGRITY**

Professor Peter Schwartz, Textiles and Apparel: "If I may make one quick comment and that is the resolution that you have in front of you has two minor stylistic changes suggested by some of the members who came up to me after the meeting. The stylistic changes are in proposal two, number five, and also in proposal three."

There being no discussion, on a vote call the resolution was adopted as follows:

*whereas, maintaining the highest standards of Academic Integrity is among the primary responsibilities of the University Faculty, and*

*whereas, proper maintenance of these standards requires that they be explicit and clear to faculty, students, and administration,*

*therefore be it resolved, that the Committee on Educational Policy recommends that the following three proposals be approved by the Senate and amended in the Code of Academic Integrity.*

#### **PROPOSAL #1**

*Add the following to II.C.4 **The Board may act in one or more of the following ways:***

*c. The dean of the student's college shall be notified of the decision of the college Hearing Board within 7 days. Unless an appeal is filed under the guidelines established below, the dean of the student's college shall ensure that the decision of the Hearing Board is carried out and shall notify all parties of the implementation and the decision.*

#### **PROPOSAL #2**

*Completely replace the current II.C.5 with the following:*

**5. Review of Decision.** *The student may appeal a decision of the Hearing Board. The appeal must be directed to the dean of the student's college, in writing, and shall be constructed according to one or both of the guidelines established below. The appeal shall normally be submitted within 4 weeks of notification of the*

*Board's decision, but exceptions to this deadline may be granted by the dean on showing of good cause. If the Board's decision involves students from more than one college, the deans involved shall consult with each other.*

*a. Appeal of a finding of guilt. A student who has received a finding of guilt from the Board, or whose finding of guilt in a Primary Hearing was upheld by the Board, may appeal on one or both of the following grounds:*

*i. Additional evidence which might have affected the outcome of the hearing became available following the hearing.*

*ii. A violation of procedure by the Hearing Board that might have prejudiced the outcome of the hearing.*

*The dean may deny the appeal or send the case back to the Hearing Board for reconsideration.*

*b. Appeal of a penalty. The student may appeal the findings of the Hearing Board regarding penalties. The appeal shall specify the reasons why the student believes the penalty is inappropriate. After consultation with the Hearing Board, the dean may take one of the following actions:*

*i. If a grade penalty has been exacted (II.C.4.b.i-iii), the dean may recommend to the faculty member that the grade penalty be reduced.*

*ii. If another penalty has been exacted (II.C.4.b.iv-viii), the dean may modify or decline to carry out the recommended penalty.*

*In all but the most unusual circumstances, it is the expectation that the findings and recommendations of the Hearing Board will be upheld by the dean. The dean's decision cannot be appealed.*

### **PROPOSAL #3**

*Completely replace the current II.C.8 with the following:*

**8. Records of Action.** *If a student is found guilty, a record of the outcome of the case and the nature of the violation shall be kept by the Hearing Board, and copies shall be sent to the record keeper in the student's college, if different from the College in which the violation occurred. The record keeper shall disclose this record to Hearing Boards considering other charges against the same student, to deans or associate deans of colleges in furtherance of legitimate educational interests, to the Registrar for notation on the transcript when provided by the decision of the Hearing Board and the dean, but to no one else unless specifically directed by the student.*

*If the student is found not guilty by the Hearing Board, all records of the case, including the report of the primary hearing, shall be expunged from the files of the record keeper.*

The Speaker then called on Dean Stein for introduction of the budget to be followed by questions with the Provost.

## **5. DISCUSSIONS WITH PROVOST RANDEL ON THE BUDGET**

Dean Stein: "One of the features of FCR meetings and now Senate meetings for time immemorial is, around this season of the year, to have the Provost come and give a presentation on the budget. It is customary for the Provost to give the talk or some version of the talk that he gave to the Deans' Council, the Trustees, and the Executive Staff, and at various other places. Those of us who have sat through many of those felt that it was not the best use of the Provost's time or the faculty's time to go through that whole presentation. It's a little hard to grab the numbers off the wall and sort of formulate the questions. We thought we would try something different. Namely, we mailed the transparency to you beforehand, so that the time can be used with him instead for a discussion on various items. Now, if you haven't read it, then of course you are in trouble. But, hopefully, people read it and have questions. With that, I call on the Provost to answer the questions."

The Provost called for questions.

Professor Charles Walcott, Neurobiology and Behavior: "There is an item in here on a salary increase. I wondered if you could give us in general terms how that is likely to move the endowed salaries with respect to its peer institutions, and the same sort of thing on the statutory side?"

Provost Randel: "There is a clear recognition, plenty of evidence to suggest that we have lost ground in relation to peers on both the statutory and endowed sides. On the endowed side where we are more nearly the masters of our circumstances, but not entirely, what we have planned in the budget for next year is the beginning of a five year program to try to regain some of that ground. This will entail some reallocation on the part of us all. Whether we actually gain back some of the ground before depends in part on what the competition does. And we are, of course, enjoined from conspiring with them about this matter.

"On the statutory side, of course, the ability to mount a full-scale salary improvement program does depend on the State's willingness to do such a thing and as we all know there has been a couple of years without such a program although in the current year we have been able to exercise some flexibility on that frontpiece of the statutory side. It is our belief that there will be a program for salary improvement for the coming academic year that is a function of negotiations with the union that represents SUNY faculty. So we will once again not have a strong role in determining, with SUNY, what that program ought to be. We must develop over time with SUNY and it has been difficult over the past year because there has been such a vacuum in SUNY leadership. What we must develop over time is some greater flexibility for ourselves to generate our own resources for faculty salary improvements. That's not a trivial proposition. If SUNY were to see us able to generate resources for salary resources while the rest of SUNY wasn't, there would be the temptation on their part I fear to reach for a piece of those resources for themselves or to lower their appropriation to us. We have it very much in mind on both sides of the house that the obstacles on the statutory side are not entirely of our making."

Associate Professor Randy O. Wayne, Plant Biology: "I wonder if the obstacles are so high for the top administrative salaries and I was wondering what the percent increase is over these years to your salaries and how well you fare in comparison with various institutions."

Provost Randel: "Well, the first year I was Dean of Arts & Sciences, I remember having a talk in Mal Nesheim's office, and he said: 'Don, I want you to take this job and I want you to know we can reward performance.' There was no salary program that year on the statutory side and Mal announced at one of our Dean's meetings, that in solidarity with our statutory brethren, there would be no salary increase for any executive officer or dean anywhere in the University, statutory or endowed. I thought OK. Then came lag pay for the statutory side, but no lag pay for endowed. I took a beating thanks to that one year. We clearly think of the endowed salary program as necessarily being somewhat independent. We are all sympathetic but if the State of New York doesn't allow salary improvements, I think we cannot say to everybody, even lowly administrators on the endowed side, no increase. I can tell you for a fact that coming into this year's budget the salary pool for Senior Executive Staff was 3%, that's the way it was for faculty and the President was quite insistent that the Senior Executive Staff should not have an enhanced pool."

Assistant Professor Anna Marie Smith, Government: "In light of the fact that Cornell has concentrated less on our support staff than on all our complements to the University and that 80% of the employees on this campus covered by the U.A.W. bargaining unit, are currently receiving wages under the poverty line, what are you doing to raise their wages so that they are being paid appropriately given the value of what they do?"

Provost Randel: "The President and I have committed the University to enhancing faculty and staff compensation. An enhanced pool on the endowed side will be made available for staff compensation as well as for faculty. How that works out in the case of those employees who are represented by a bargaining unit is subject to negotiations. It's not so easy to comment on that. But, yes, we aim to try to improve staff salaries as well as faculty salaries at levels above what we've already been able to do."

Associate Professor Walter Mebane, Government, raised a question on the importance of indirect cost recovery.

Provost Randel: "The stream of income that comes from indirect cost recoveries is very important to the entire University. One of the first things that we all ought to understand is that even if we don't do sponsored research ourselves, the

financial health of the University depends on being able to recover certain kinds of costs through the indirect cost rate. In Cornell's case, a very substantial chunk of what's recovered goes to support the library and the library's research capacity, its capacity to do Musicology and Classics as well as Physics and Chemistry. The Feds have steadily pressed down and sometimes in quite arbitrary ways the rate that they allow us to recover. So we now recover certainly not more than 80% of what we would be entitled to recover under established rules. Further caps look as if they will be in the offing. If in the mean time, research volume does not grow, that further depresses that stream of income from indirect costs, and the costs don't necessarily go away. So the result is a hole in the University's general purpose budget. And that is sort of worrisome. If the rate were to go down two more points, and if in changing from one agency to the next we are disallowed the amount that we now charge for libraries, we would all come to know about it and have to deal with it in ways that may not be altogether pleasant. Another thing, for example, the Theory Center produces an extraordinary amount of indirect cost recovery upwards of three million dollars. If all of those grants going to the Theory Center were to go away, the building would still be there, and many of the indirect costs that we try to cover through the rate would still be there, but we'd have three million less in revenue to deal with it. It's a serious issue."

Francis Moon, Joseph C. Ford Professor of Mechanical Engineering: "In this last item, since these funds come from writing proposals is there any thought to creating some sort of incentive for faculty to engage in more efforts to create more research dollars. There is evidence that there are peer institutions that are increasing their research budgets quite substantially, while in recent years ours has been stagnating."

Provost Randel: "We are increasingly called on to supply matching grants from institutional funds. In point of fact, whether pursuant to the renewal of the Materials Science Center, the hoped for renewal of the Theory Center, the hoped for upgrade of the Arecibo project, a whole range of these things, more institutional funds are going in and that is itself worrisome, as we think of providing cash incentives, that in the end is going to have to come from undergraduate tuition dollars. The thing to understand about the overhead rate is that it is a reimbursement system, you cannot make a profit by this method. You can only set a rate that recovers money that you have already, in fact, spent by some method. So when we say that we ought to kick back some percentage of the overhead rate there are limits to the degree that you can do that without giving money away twice. Namely, you spent it, and instead of recovering that cost, you give it away to somebody else, and so you've spent that dollar twice in effect. The situation on the Statutory side is entirely different than on the endowed side. The State covers most of those indirect costs, pays for them directly, and the colleges get to keep the amount that comes in as an overhead reimbursement. So, that's one reason why the rates are lower on the statutory side, those rates are being covered. Anything that comes in under indirect costs is, as it were, gravy. My worry about that is the State may decide that this is not to their advantage and too much to our advantage and someday they may want a piece of that as well."

Dean Stein: "Don, first a comment, and then a question. The comment is that when one looks at this sheet, that has got the major drivers of the budget and you start to look at items of revenue and items of expense the first thing that pops into your eye is that tuition is only going up by only 4.5% but faculty salary by 5% and staff salary is going up by 4%. But that's really not quite right, because my understanding of it is that five and four is really only three that is a burden on the general purpose budget and that the two is from reallocation from the colleges. Is that correct or incorrect?"

Provost Randel: "Institution-wide it is certainly true that contributions don't grow faster than tuition or than any other stream of revenue except for certain endowment funds, given that we've increased the payout from them. Institution-wide, therefore, if you want to pay out more than you are taking in is that you have got to get it from somewhere. And so the only way we can fund steady increases in compensation at rates exceeding growth of any of our revenue streams is to reallocate within the budget, and to cut certain budgets in order to put more money into salaries. We have sort of a mixed approach in which we have gone to the colleges and said, 'we'll provide a certain amount of money, you'll have to come up with a certain amount of money, but we're not going to charge you for this sort of thing.' It's a little bit complicated, but here are some of the things.

"The colleges have had, on the endowed side, a tax to pay for the campaign. Nobody wants to continue paying a tax after the good is supposedly got, but we agreed to this going in and now we are sort of locked into it. We have reduced that tax, and have looked into other ways to pay for development expenses. But what we've been obliged to do is to say, 'Alright you don't have to pay as much for the campaign (which for Arts & Sciences was upwards of \$600,000-\$800,000 per year), we'll reduce that tax, but you've got to take the savings from that and put it into salaries.' Another thing we did was

increase the payout rate on the endowment, which created something of a windfall in all restricted endowments. And we've said, 'O.K., what you have to do there is reduce the unrestricted money by an amount comparable to the increase in the restricted money and take that difference and put some of that to work towards the salaries.' So for this year, we are asking colleges to generate some of the resources for this purpose, but in most cases, it should be close to a wash within colleges. In future years, it is absolutely clear that the only way to find more money for salaries when every other revenue stream is flat or declining, will be to cut people's budgets and so to take it from one thing and put it into another."

Dean Stein: "Can I ask the second part of my question? Another thing that strikes my eye is that the number of FTEs is constant over this five year period (1996-97 - 2001-02), and one wonders how this jogs with the savings we were supposed to see from the re-engineering efforts."

Provost Randel: "Well, we are certainly not far enough along in the re-engineering effort, so called, to have captured any savings from it directly. I mean we have not yet implemented any of the systems that we have been talking about in Project 2000, nor have we gotten far enough along in the redesign of these work processes. Yes, you can do with fewer people. One of the things about our FTE count is, especially with respect to faculty, that we don't have very good attendance rated data systems. It is not easy to know centrally how many faculty we have for whom we have a permanent position. Colleges know that, but the central administration is in the dark. Well, it is often said, and I'll say it again, a lot of the neatest things that happen at Cornell happen because the central administration is in the dark about it and we should keep it that way. But the FTE count, that we can create centrally derives simply from looking at the payroll and seeing who gets a check every other week. What we don't know is if that's a pre-fill appointment that's going to go away next year, or if that person is just a visitor who's just on the payroll for a year. We know that over time, every college certainly on the endowed side, has had some number of pre-fills. I can assure you that in the College of Arts & Sciences the number of permanent FTE faculty has come down, by something like twenty-five in the last four or five years."

Professor Philip D. Nicholson, Astronomy: "I think you answered most of my question before, but I was puzzled, considering the indirect cost rate, whether the loss that you see coming along in off years is really a serious problem at the moment or whether to some extent it is in the noise of the projections and the predictions. And do you see that as mostly a problem with paying these salary increases while keeping the tuition level reasonable, or is it mostly from the indirect cost rate coming down that this problem arises?"

Provost Randel: "The biggest driver of our fortunes around here really is undergraduate education on both endowed and statutory sides. As you know, for a long time we have had the policy here that we put people's academic year salary one hundred percent on our money. We have not followed the policy that places like M.I.T. and others have done and asked people to charge a portion of their academic year salary to grants. That is a prudent thing for us to have done in one way, but if they change the rules on us, we may come to regret it. So, in any case, it is undergraduate tuition dollars that pay the major part of that bill. So, what happens to tuition, financial aid, the regular things around those concerns, are the biggest effects. So if indirect cost recoveries don't keep up with the rate of growth of the costs that we are trying to recover them for, then they make this hole. For us to go out there and try to find a million dollars is never easy in the end."

Professor John M. Abowd, ILR: "I want to make one comment and then I'll ask a question, I want to discuss the indirect cost rate, because in the language of my profession, it's predetermined. The money that is coming through from indirect cost recoveries is not something that you can adjust to balance the annual budget in the negotiations. Subsequent years are very important and have to be a concern of the Provost's plan, but there was no point in talking about adjusting the indirect cost recovery to balance the budget. That said, my question is what are we going to do about the 4.5 million in the brackets under 1997-98, because I don't think that I'm speaking out of school when I say that the latest projections continue to have that."

Provost Randel: "Well, we believe ourselves to have methods for dealing with next year. One of the things is that increasing the payout rates has helped a lot but we have to have the discipline to capture the good of it. I'm already starting to hear from people around town, 'yes, I know that you've increased the amount of my endowment payout rate, but surely you're not going to cut my unrestricted funds at the same time, because that endowment was mine, and the unrestricted was mine too.' So we'll have to maintain some self-discipline on that. But, there are several methods by which we will close the 4.5 million dollar gap, and we are presenting to the Trustees in March a more fully worked out budget, and in May the final deal, which will have us in balance for the next year. Now, for the year after, we have not developed the plans for coping with that. Our aim was to get through next year with as little disruption as possible taking advantage

of techniques that will enable us to do that, so as to give ourselves time to think with colleges and operating units about the longer term problems. So we will be, this spring within the next month or so, beginning the discussions with everybody about what it is going to take to close the gap in the years beyond next year."

Professor Emeritus Donald Holcomb, Physics: "I'd like to quote from John Abowd's words on behalf of the Financial Policies Committee, under 'Balancing the Cornell operating budget in the long run.' It says, 'long run budget balancing in all of Cornell's operating budgets is primarily a matter of controlling personnel costs.' I believe that sentence could have been lifted from almost any financial policy report in the last five years. That does not mean that it is not true. It's a little bit like the federal entitlements in that everyone knows this is true, but nobody wants to take it seriously. I was struck by, I think Peter's question, about the assumption about fixed numbers over a five-year period. In the long run, if we have fixed numbers, we will never balance the budget."

Provost Randel: "That's exactly right, especially if you want to pay those fixed numbers at rates higher than we are able to grow any of our revenue sources. This is Keith Kennedy's immortal formulation of the horses and hay problem, and that's why we will have some serious work to do in the out years. At last we have met the enemy and the enemy is us. Because when we talk about reducing the administration and having fewer people, everybody can subscribe to that notion in a large gathering. Take it to the department and say that means you're prepared to do without this or that, it gets to be more difficult. Many of our costs of administration at this University are not in Day Hall, they're in the departments all over town. Computer support people don't all work for CIT, many of them work in the departments. That's for very good reasons, but we will have to learn to deal with that at all levels or we will not be able to fix it."

Professor Tom Davis, Economics: "Who determines what the payout rate will be?"

Provost Randel: "The Board of Trustees has the responsibility for setting the endowment payout rate, which they do on the recommendation of the administration. This is a matter that is of considerable scrutiny, it had not been raised in some time. It operates on the basis of a five-year rolling average, which tries to keep it within a band where it does not fluctuate too much. All of us remember 1987. If we had a policy that tied our payout on the endowment to good years like this one, it would also have to be tied to bad years. So we try to have a policy that is prudent with respect to the long term outcome. One of the key features of this policy is that we set an increase in the amount of payout, that is the dividend per share to grow at basically 5.6%. So if you, as a department, own certain shares of the endowment restricted to the use of your department, those funds are growing faster than any general purpose allocations you're getting.

"The aims are two-fold then, to provide a predictable rate of increase for that which is in fact better than we're growing tuition, and to keep the whole thing inflation-proof, that is to prevent the principle from going down. Now because of very good performance, the effective return on total investment, that is the consequence of this policy, had in fact fallen to the very low edge of the band in which we try to keep it. So on that basis, we approached the Trustees with the recommendation that the payout rate be stepped up. It is by that method that we have gotten some new resources to apply to a variety of things here, it has enabled some reallocation. This is a matter that we think very hard about, but the ultimate goal of it is to produce some prudent kind of stability over time and not simply that we should take advantages of the ups without having to deal with the downs. I see Senior Vice President Rogers in the back of the room and he is sort of a wizard on this topic."

Fred Rogers, Senior Vice President and Chief Financial Officer: "You've done quite well, the only thing that I would add is that at the moment the target is 4.4%."

Professor Wayne: "I have a very technical question. I'm wondering if when we use an L-order to buy things, for example, locally they charge me ten dollars and I pay the University ten dollars. How much does the University pay the vendor?"

Provost Randel: "Fred are you raking off anything on L-orders? If he pays an L-order for ten bucks, are you giving that ten bucks to a vendor or are you raking a piece off the purchasing somewhere?"

Senior Vice President Rogers: "Not that I know about, but I'd be happy to check that."

Provost Randel: "I know that I'd like to look into it."

Professor Wayne: "Would you? Would you and report to us?"

Provost Randel: "Pardon?"

Professor Wayne: "Would you look into it and report to us?"

Provost Randel: "Oh I would be glad to look into it. But, I am fairly confident that we are not making a commission on those sales, and what I was going to look into was whether we could."

Professor Wayne: "There are rumors."

Provost Randel: "Well, I mean we have told this story many times. The University does drive bargains with bulk purchases, but those savings are passed directly on to you consumers."

Professor Gary Rendsburg, Near Eastern Studies: "Most of the figures on the five- year projections remain the same or very close to the same. One that is not is 'currently budgeted Provost initiatives,' which is 5.8% this year, going up to 11.4% in five years. Can you give us an idea of what is involved in that category and does 'currently budgeted' mean that things are already now budgeted for 2001?"

Provost Randel: "In some degree. One of the things we started doing three years ago was to identify a set of priorities around the University in which we needed to make some new investments, and thus to carve out of the budget through a series of reductions, funds with which to make new investments. So, that basket of Provost initiatives includes various things: upgrades to classroom facilities, a major effort to bring technology into classrooms so that every classroom would have a basic minimum standard, and some of them would be fitted out with high end technology. To that effort we have spent a million and a half, by the end of the year, we spent close to two million dollars on, that's part of that initiative we're talking about.

"Another part of it is maintenance, a Trustee committee devoted a considerable study to the degree to which we were keeping up maintenance. Did we have a maintenance backlog? Did we want to fall into Yale's sorry condition? The decision was that we needed to put somewhat more into maintenance. So about one million dollars out of that basket of initiatives is going to that. A few other things: a piece of that is to fund for the endowed general purpose budget, Project 2000. Among the initiatives that we're adding to that basket that will be built into that is of course the enhanced pools for faculty and staff compensation. There are about five or six that have been discussed in various fora."

Associate Professor Risa Lieberwitz, ILR: "In light of what you were just talking about in terms of Provost initiatives, is there also a plan to promote affirmative action efforts?"

Provost Randel: "We do indeed have a substantial pool of money with which we try to encourage affirmative action appointments, always of course, in the context of a belief that if we are to have a more diverse faculty and workforce that it has to be a part of everybody's daily life. You don't just achieve diversity with the University's money, you have to achieve it with your own as well. So, what I have available is a pool of money with which I can facilitate appointments in anticipation of retirements, we are not growing the faculty by this method. Institutional funds, that is unrestricted funds that are spent from my office for this purpose, total in the present year a bit over \$800,000 and funds that have been given to us from external parties for this purpose total about a half a million dollars."

Professor Lieberwitz: "But you said that is only in anticipation of retirement?"

Provost Randel: "Yes, these funds are made available to colleges to make appointments, and we'll support them. I mean a deal is done at the beginning of such an appointment to say, O.K. we'll support them on the Provost's funds for however long it takes given the individual circumstance. But, ultimately that appointment has to come from the college's budget. And the logic of that I think is pure and simple. If we're going to achieve diversity it has to be the responsibility of us all in our daily lives with our own resources and not just suppose that the only way we get diverse is by adding people and getting somebody else to pay for it."

Professor Subrata Mukherjee, Theoretical and Applied Mechanics, questioned why resources are so tight.

Provost Randel: "We have managed our affairs very prudently. We have for a long time been playing against competition that was somewhat better heeled and we have been doing more with less in the margins, very thin. So if you look at that



\$260 million, it's lumped up in tenured appointments to a very considerable degree and in some other things that it is not easy to get out of. The amount of discretionary room to maneuver is very thin and we need more of it, in point of fact."

Senior Vice President Rogers added that over the last six years, we are now about 500 people smaller than we were in positions that are non-faculty. The projections are what would happen if nothing is changed.

Provost Randel: "I think the same thing goes for the tuition numbers. It's not that we are committed to holding it at 4.5% for the future, however we may feel compelled to try and reduce it still further. This is just the pictures of if you let everything go along the way it is going along now, what happens to you? We will certainly be in balance in all of the years that are named there, and it's likely to mean by fewer people and reduced activity in a variety of subjects."

The Speaker thanked the Provost and moved on to the motion regarding the Sexual Harassment Procedures.

## **6. SEXUAL HARASSMENT PROCEDURES**

Dean Stein: " I think I forgot to acknowledge the contributions of John Abowd, who prepared the report that contained the data that was sent around to you, and Dorothy Mermin, both selected by the Senate to serve on the Provost's Budget Advisory Group. In some sense they are our representatives on that critical body. O.K. on to the Sexual Harassment Procedures.

"Let me try to put it very briefly into context to remind you how we got to where we are. Last November, following two raucous faculty meetings in the College of Arts and Sciences and the Law School, we received a letter from Phil Lewis, the Dean of Arts and Sciences, saying that his faculty seemed supremely disturbed with the current Sexual Harassment Policy and asked the Senate to look into that. What the University Faculty Committee did was bring to the Senate, at its November meeting, a motion to ask the Academic Freedom and Professional Status of the Faculty Committee to look into this Sexual Harassment Policy, to prepare a series of amendments to it following consultation and interaction with the faculty and to report back to this body at this time to consider what they came up with.

"That committee did a Herculean task. It was extremely difficult since these are very contentious issues. They prepared a draft, put it on the web, and we sent a mailing to the faculty about a month ago advising them that the draft policy was on the web, and asked them to respond. We got many responses, the committee met several times including one long marathon meeting which seemed like it would never end to respond to all of the comments, which didn't mean to accept them, but to consider all of the comments that came from you, and at the end of that meeting, that committee prepared the policy that you have before you. Let me remind you that this body does not have the authority to pass a Sexual Harassment Policy. That authority rests with the Administration, with the Provost and the President. What we are doing is telling the Provost and the President what the sense of this body is, what we believe the Sexual Harassment Policy should be and we have every confidence that they will take our comments very seriously. Thank you."

Speaker Pollak: "There are a series of amendments that were circulated appropriately and I'd like to go through those before we address the main motion on the floor, and I'd like to ask Robert Green to make a quick comment on the first one, which has to do with page 15."

Associate Professor Robert Green, Law and Chairman, Committee on Academic Freedom and Professional Status of the Faculty: "I'm Bob Green and the chair of the Committee on Academic Freedom and Professional Status of the Faculty. Because the time for debate is extremely limited, I've decided not to give you a prepackaged summary in order to maximize the time for debate. If there are any questions about what the Committee did, or why the Committee took the approach it did, I'd be happy to try to answer them.

"Also, with respect to two of the amendments, one concerning lawyers, one concerning the definition of sexual harassment, when those amendments are proposed I would like to respond to them and explain why the Committee took the approach that it took instead of the approach suggested by the amendments. There is also one amendment that I'm making and I characterize it as a clarifying amendment because it simply reflects the Committee's intent and this intent is in fact reflected in the internal procedures for the Academic Freedom Committee, applying oversight that was not included in a note in the basic document. What it does is it addresses some evidentiary questions that I think in the past have been very controversial, and simply tries to come up with a resolution before we actually have a case. It deals with

essentially things relating to the 'locked box' saying that except for two categories, records which are very reliable, other records concerning accusations which never resulted in convictions and concerning allegations of similar behavior, will not be admissible, but testimony which is subject to cross-examination will be admissible, but in order to prevent very stale allegations from coming up, we're limiting the testimony to allegations about things that happened within the statute of limitations. So the idea basically is that somebody, who for any number of reasons does not want to bring a formal complaint, but nevertheless has relevant information about other actions that the charged party was allegedly engaged in, can come before the Committee and make those allegations subject to cross examination and subject to some limitations on time period."

Speaker Pollak: "This is an amendment from the Committee?"

Professor Green: "This is an amendment from the Committee, yes."

Speaker Pollak: "O.K. so we don't need to have a second on that. Is there some discussion on the amendment?"

Assistant Professor Tony L. Simons, Hotel Administration: "If somebody is gone from the University and something happened a few years ago, then they can't write a letter that is relevant to the hearing because they wouldn't be subject to cross-examination."

Professor Green: "That is correct. Well, they can bring a complaint, and once you bring a complaint, if you are within the statute of limitations, then you can have the complaint adjudicated. The complaining party does not necessarily have to be present at the hearing. What we are talking about is people who do not want to bring a complaint, but nevertheless believe that they have something to contribute. The rule there is that they must attend and make their testimony orally and they cannot bring stale evidence, it has to be within the statute of limitations."

Assistant Professor Carlo D. Montemagno, Agricultural and Biological Engineering: "Will there be any pre-discovery, so that the person that comes down to the hearing also does not see people lined up that he has not seen or heard of before, so that he cannot prepare? There's no requirement that somebody else might be writing testimony against that person and the accused can't defend himself."

Professor Green: "That's a difficult question. I think that the procedure now, does not provide for any identification, I would hope that many of these cases the people come forward during the investigation and then there would be information about what happened during the investigation. I think that you actually raised a good point. We don't actually provide a system that eliminates the possibility of surprise. Perhaps that's something that should be considered."

There being no further discussion, a vote was taken and the amendment carried as follows:

Amendment: On page 15, delete the "Note" in the section entitled, "Time Period for Filing a Complaint," and replace it with the following:

*Note: Prior convictions of sexual harassment and prior mediation agreements in sexual harassment cases shall be admissible in proceedings hereunder. Other than such records, however, records of prior accusations of sexual harassment not leading to convictions and records concerning similar harassing behavior not subject to the complaint(s) in the case shall not be admissible. Testimony about such prior accusations or similar harassing behavior shall be admissible, but only with respect to behavior that satisfies the time requirements set forth above for filing a complaint.*

The Speaker called on Dean Stein to present the second amendment, which follows:

Page 8, second paragraph of the Section entitled

"Prohibited Conduct: Sexual Harassment Defined"

Current Wording:

**Educational Environment:** Unwelcome sexual advances, requests for sexual favors... Speech and other

expression occurring in an instructional or research context is protected by academic freedom principles. Speech or other expression...or (c) persists despite the reasonable objection of the person targeted by the speech.

Proposed Wording (changes in uppercase):

**Educational Environment:** Unwelcome sexual advances, requests for sexual favors... Speech and other expression occurring in an instructional or research context is GENERALLY protected by academic freedom principles. Speech or other expression...or (c) persists despite the reasonable objection of the person(S) targeted by the speech.

The amendment was seconded.

Dean Stein: "I want to describe why I offered this amendment and then speak about it and probably something, a procedure that is very odd. First I will describe the amendment, why I brought it to the floor and then tell you why I'm going to vote against it.

"The Senate, at a meeting about a year ago, considered certain wording, debated on it and then voted on it and put that into the document that they sent to the Provost for his adoption. I argued very vociferously with the Provost at that time that this was decided by the Senate, and since it was decided by the Senate, it was the best approximation as to the will of the faculty at this University and that they should adopt that. I was not entirely successful in that, but I argued it as strongly as I could. It seems to me that we ought to feel the same way about past decisions of the Senate.

"The Senate did in fact decide this. Now I see nothing wrong with the Senate changing its mind, but I do think that if the Senate changes its mind it ought to do so openly, in the Senate, in a setting where they recognize that they do that instead of having the Committee make these changes and not really giving the Senate the opportunity to decide directly. So that's why I bring this amendment to the floor. Now, having brought it to the floor, I'd like to make my argument, which is against it.

"I think that the decision that the Senate made approximately a year ago was a mistaken one. I went through the minutes, the two issues are the use of the word generally, 'generally protected by academic freedom.' I find myself uncomfortable with that. The argument for it is that not all speech in an academic setting is protected, therefore to be consistent, we ought to write a qualifier which says 'generally.' But it seems to me that this can be related to the First Amendment. The First Amendment is very forceful in its statement, 'Congress shall make **no** law', it doesn't say 'generally Congress shall make no law.' That does not prohibit Congress and the states from making lots of laws. I mean we have laws against libel, laws against conspiracy, we have laws against many things which the courts have deemed do not violate that particular very strong wording. Be that as it may, I feel more comfortable in my bed at night knowing the wording is 'Congress shall make **no** law' than I would feel if the first amendment said 'Congress shall generally make no law.' Because the test is very hard to find. In fact, we're not going to eliminate a lot of speech in an academic setting, but the excesses that we know about happened in one or two instances in one or two places.

"For instance, in the case of Professor Silva at the University of New Hampshire, if they had a statement that said that speech in an academic setting is generally, blah, blah, blah, the administration could say, 'well this is the only time we've done it, so this is what's meant by putting in 'generally'. That's why I think that 'generally' does not belong there.

"The other change was to put an 's' after the word person. I read through the debate there, it seems to me that the debate was between two rather far-fetched interpretations. One was that if you put the word 'persons' there, it could be interpreted that that means class of persons. That a person making a comment referring to a particular group, I don't know, pick a group, all women, or all Chinese, or something like that, that could fall into a remark directed at a person if the word 'person' had a plural on it. I don't think that it's very likely, but in fact, it's reasonable. The reason that people argued for having an 's' is, I think, an even more far-fetched interpretation. Namely, that if you had the word in the singular, that if I had made a demeaning remark to this gentleman over here and then made a demeaning remark to this person over here, I could argue that the remark to him was prohibited. I could argue that since I made it to two people, it was allowed, because the word was singular. It's almost like saying that if you murder two people simultaneously, you're not guilty of anything because the law is written in the singular. I think that this is somewhat far-fetched. I think that I am

somewhat more comfortable with having this amendment defeated."

Professor Emeritus Holcomb: "I do not disagree with Peter's concern about the 'generally,' but this phrase 'other expression' in here always bothers me."

Dean Stein: "I can answer that. There has been a lot of discussion about that. Several faculty asked, 'do we cover materials in class,' 'do we cover music in class,' or 'is it only speech?' The answer made by our colleagues, is that the First Amendment says speech, which has been widely been expanded to wrapping yourself in the flag, or something else like that. The courts were making a very broad interpretation, but others said that we're not the courts and I think that we should make something that will instantly be understandable to members of the community."

On a vote call, the amendment was defeated.

Professor Mary Beth Norton, Mary Donlon Alger Professor of American History: "I wanted to start today by congratulating the Committee on doing what I thought was an excellent job on the proposed revising of the procedures overall. I know what a tough job it is to deal with these issues. The amendment that I propose and that Terry Fine joins me in proposing, less represents a major criticism of their work than I think a philosophical difference. That's the amendment, as you all know, removing lawyers from speaking at the final phases of the hearings before the faculty committee. I have to say that some of my best friends are lawyers, indeed my favorite cousin is a lawyer, so I have no personal animosity toward lawyers. However, let me talk about why Terry and I thought that this amendment ([Appendix A](#) attached) was a good idea.

"First, let me remind everyone of what I don't think you need to be reminded of, which is that a University hearing is not a court of law and in many ways it does not function as a court of law. For example, rules of evidence are completely different. We do not have technical rules of evidence for what can be allowed and what can't be allowed. What would be applied in these hearings would be these very procedures or some version of them, promulgated eventually by the Provost. That is University policy and procedure, not New York State law or U.S. law. I would argue that, in fact, lawyers have no special expertise in dealing with University law as opposed to dealing with statutory law. The University, I would also remind everybody here, is not legally obligated to allow the presence of lawyers at these hearings in any capacity. Indeed, I've read handbooks of employment law that suggest that you shouldn't have lawyers present at these things.

"So, the issue for me, as I was thinking about this was, why so many lawyers? Now, I'm not a Committee member, but I imagine that the reasoning went something like this: the immediate trigger was the quite understandable desire of the charged party to be accompanied by a legal and another adviser at the hearing. I want to interject here that I have throughout the revisions that have occurred on these procedures supported the presence of another speaking adviser to both the complainant and the charged party at these hearings. I think that it is very important to have someone there who is an ally of both sides who can have a different perspective, can stand back from a very emotionally charged situation and raise objections and questions, or just point things out that maybe the people who are so intimately involved with the details don't see, either the complainant or the charged party. So I don't believe that either person should be in that room without assistance. I just don't think that assistance should come from lawyers who have a right to speak.

"Now, the Committee, on the other hand, decided that it had to have a lawyer with the right to speak on behalf of a charged party. And that to my mind is what triggered everything else. Once the charged party in these procedures has an active lawyer, then that triggered what I would regard as an exponential multiplication of lawyers. First, the complainant must also have a right to a lawyer if the charged party has a right to a lawyer. Secondly, the University case must be presented by an active lawyer, and third, because we have all those lawyers, the Committee must have a lawyer to help it direct things along. Otherwise, the Committee might be flummoxed by all these lawyers. In addition, in this procedure, as you may have noticed, in paragraph 19, witnesses can also come in with lawyers, not just complainants or charged parties, but witnesses who are called before the Committee. Therefore, given the logic of this situation, one lawyer for the charged party has turned into four if not more lawyers.

"Now, as I said, I really personally have many lawyers that I like, but I thought this was above and beyond. Therefore it struck me that a Committee under this draft procedure would take on the appearance of a court of law and with all those lawyers, we might as well be in court, so why bother with a University hearing, let's just send everything through the courts right away. So I asked myself as I read this draft procedure, what is the purpose of the original lawyer? Because it seems that the initial lawyer for the charged party is what sets everything off and creates the multiplication of lawyers,

having the lawyer for the charged party.

"My answer, and I thought if I were the charged party under these procedures, why would I want to have a lawyer present? And I said to myself, not to help me in the hearing so much, because after all as I said earlier, a lawyer is not going to be or is not an expert on these procedures, but rather, what I would be interested in having a lawyer there for is to make sure that I didn't make any mistake in the hearing that would cause me trouble later on if I wanted, in fact, to pursue something in a court of law. So it struck me that the purpose of a lawyer in this hearing from the standpoint of the charged party, is to keep the charged party or the complainant for that matter, from making a mistake that could cause them legal difficulties later. Now, what struck me then as I reached that conclusion, is that having a lawyer there, to ensure that the client (whichever side the client was on) does not make any mistakes that will cause any difficulties later on in a subsequent legal proceeding, does not require that a lawyer has the right to speak in the hearing. It only requires the lawyer to have the right to whisper in the hearing, that is whisper into the ear of a client.

"Now, so this amendment would, I argue, seek the objective that the Committee sought which is protecting the rights of the charged party, also protecting the rights of a complainant who felt the need to be accompanied by an attorney, but without leading to the necessary presence of so many lawyers, which I see as a negative. I've also argued that adoption of this amendment will have positive consequences of its own. There are three positive consequences that I see coming from the adoption of this amendment that Terry Fine and I have proposed.

"First, as I have said in this body before and I will repeat, if speaking lawyers are removed from the final phase of the hearings, this will not raise the issue of fundamental fairness that I think is raised by the current draft. That is, the current draft gives the complainant the right to a lawyer but explicitly does not provide one for the complainant. It says that 'the University has no requirement to provide a lawyer for the complainant.' This seems to me, that it raises a clear means test for complainants. That is only wealthy members of the Cornell University community who feel that they can afford to hire lawyers might feel free to complain against sexual harassment by Cornell University faculty. I think that is a real serious drawback. I don't think that the pool of voluntary advisers and attorneys that is established by these procedures is enough, in my opinion, to resolve this difficulty. Maybe a pool of voluntary advisers would be adequate, but I don't think that once a charged party is allowed an active attorney for whom the charged party will presumably pay, that whatever volunteer pool may be available will be adequate to give a complainant the kind of legal support that would be necessary under these circumstances, given the presence of an active lawyer. So, it would resolve the fundamental unfairness I think of the procedure with respect to a power imbalance between the charged party and the complainant. The whole idea of these procedures is to make a level playing field.

"Secondly, I believe that as currently drafted, the procedure itself can discourage legitimate complainants against the faculty from coming forward because potential complainants will read these procedures and say 'Oh my God, if I complain, I can't afford a lawyer and I'm going to be in a hearing with faculty members judging, with lawyers everywhere and there's no way I want to bring this complaint in the first place.' I don't think that we set up this procedure specifically to discourage complaints. I think that the way this procedure is set up would do that.

"Finally, I think that removing speaking lawyers from this will put control of this faculty procedure back in the hands of the faculty, which is where I think it belongs. This should be a University procedure, this should not be a sort of a bastard court of law. It would be one thing if all of the lawyers involved in this procedure were required to be members of the Cornell faculty, I would not however, put that requirement on the lawyers on the Cornell faculty. We can't do that. My consistent theme in front of this body has been that I think it is important for the faculty to accept responsibility in a whole variety of ways, I think that the way this procedure is written, abrogates to lawyers what I think the faculty should be doing. Thank you."

Speaker Pollak: "You have the write-up of the amendment, and I would call for a second to that before we go to discussion."

Professor Norton: "There are two of us, we don't need a second."

Speaker Pollak: "O.K. are there any responses?"

Professor Green: "I'd like to reply, I'm the chair of the Committee and I'd like to explain why we took the approach we

took. First, I'd like to start by saying that there is at least one argument that I'm quite sympathetic to, that's the argument about discouraging complaints, the last thing we would want to do is to discourage complaints. On the other hand, I think that this is extremely exaggerated. A good lawyer would not treat a complaining party in a way that was hostile, unfriendly or disrespectful, not only would it be unprofessional, it would be counterproductive.

"I admit that there are bad lawyers out there and maybe you'd have a bad lawyer that treated a party badly or hostilely, but there are all sorts of safe-guards built into the process. The University's attorney has a right and a duty to object. The Committee's legal adviser, if it has one, has a right and a duty to object. It is written into the procedures that the Committee itself has an obligation to make sure that everyone is treated fairly and properly and politely. The complaining party can object. The complaining party's lawyer, which we allow the complaining party to have, can object. There are many people who ought to object who can and should put a stop to this. Basically good lawyers won't do it, I assure you. People have this perception that lawyers come in and they destroy the witness, and that is not really what happens all of the time, and I think that bad lawyers can be confined.

"Now Professor Norton also says that this is not a court of law and lawyers have no expertise here, they have expertise in state law, in federal law, but not in University procedure, I think this really misses the real expertise that good lawyers bring. That is an ability to administer a fact finding tribunal, which is what this is. An awful lot of what lawyers do in practice is they appear before administrative tribunals. Many lawyers never go to court in their entire life. They bring understanding as to what evidence is and is not relevant. Second, they know how to use questioning to bring out the relevant evidence and how to follow-up with other questions if that is necessary. It is being able to explain to someone why the evidence is necessary. This is something that lawyers have expertise through training, through experience, through education to do. Lay people often do this extremely poorly.

"So the problem here is you have somebody who is defending themselves against a heinous charge, sexual harassment. I don't care what the official sanction is, this is a charge that is going to irreparably damage this person's name and career. It seems to me this person is entitled to make the best defense that he or she possibly can and the best defense is to have a lawyer. Lawyers are trained in bringing out the facts, lay people very often do not do a very good job of doing this. I guess what I would say is yes, I have a little bit of concern that we are going to discourage legitimate complainants, but I really think that is manageable and perhaps overstated, and on the other side we have the interests of the defendant in making the best possible case which I think absolutely requires lawyers. I think that those are essentially the points I would like to make at this time."

Professor Benjamin Widom, Goldwin Smith Professor of Chemistry: "I would like to ask a question of the proposer. Would your amendment exclude the possibility that the speaking adviser in some other capacity and elsewhere be also a practicing lawyer?"

Professor Norton: "Yes, it is already written into the procedure that the adviser cannot be a lawyer, somewhere, or a law student."

Professor Steven H. Shiffrin, Law: "I'd like to say that I'm pleased that I'm allowed to at least speak here. I want to suggest first that I don't doubt Mary Beth when she says that the reason she would want a lawyer would not be for any reason other than a lawyer's ability to deal with legal procedure. But I would suggest that in that respect Mary Beth is one of the few people on the planet that would choose a lawyer in an advocacy situation for only that skill. Lawyers are trained to be advocates of clients. They are good at cross-examination, they are good at arguing things to fact finding bodies and the reason why a defendant in a case would want an attorney is for that reason. Yes, they can get the advice but they want an attorney for that reason.

"Now I actually come to this from a pro-plaintiff concern. So, my concern is less with the fact that defendants are going to have problems here, my concern is that defendants in sexual harassment cases win way more often than they ought to, and you need skilled cross-examination and you need people who can argue effectively to fact finders on behalf of the complaining party.

"And the exponential lawyery that Mary Beth talks about is matched by the exponential discrimination that occurs once you take a lawyer away from the defending party, you take the lawyer away the complainant's lawyer, for heaven sakes, she even takes the lawyer away from the Committee. It seems to me that this proposal ultimately appeals to a naked bias

that is socially constructed. It is when you get lawyers into a hearing they cause a lot of trouble, and it's true. Lawyers can be obstreperous, they can cause a lot of trouble, but our civil system, our criminal system is based on the notion that you can best find truth by having those skilled advocates on both sides present. It seems to me that it's absolutely right to say that these are very serious sanctions that are being imposed and these are very serious charges which deserve to be considered on their merits, seriously. I think that there is no real good reason to exclude lawyers from this process. It will harm plaintiffs. It will harm the truth-finding abilities of the University."

Associate Professor David Wippman, Law: "As you can see by the first three speakers, the members of the Law School faculty have a very strong interest in opposing this amendment. I think it is not because we have some undue professional self-regard, rather, the entire Law School faculty is united in their opposition to this amendment. Notwithstanding the diverse political views of the Law School faculty, we all agree that the absence of lawyers that is called for in this amendment does not correspond to or is not consistent with what we consider to be the basic considerations of due process. We all believe that a principle function of lawyers is as people who can elicit evidence, evaluate evidence, and present evidence in a way that is relevant to the charges and is consistent with the appropriate burden of proof. People who have no training are really not qualified to do that. What this amendment says in effect is that anyone in the world can represent one of the parties in this proceeding except someone who is trained to do that. I think that this is a rather strange way to go about this.

"I understand that the concern is that this is not a court of law. It won't be a court of law even if lawyers are present. There is no procedure for pre-trial discovery as we've just discovered. This is not going to be conducted with formal rules of evidence and procedures. The Committee is a faculty committee, it is not a set of judges. This procedure will be a faculty procedure, even with lawyers present. Now I share the concern that this may discourage legitimate complaints. On the other hand, there are even greater concerns, in my mind, with respect to the rights not only to the rights of the accused, but also, those of the accuser. The accuser will want someone who is able to elicit the appropriate evidence to support his or her charges of grasping. An untrained or unqualified adviser may not be able to do that. So it cuts against conceivably either the accused or the accuser. The rights of neither one are adequately protected.

"Finally, if we adopt this amendment, what was initially drafted as a carefully balanced set of procedures by the committee, will be turned the into something that looks more like a Congressional hearing than an evidentiary hearing. A group of people who have no experience in conducting an evidentiary hearing will be wandering in different directions with their own preconceived, presumably well-intentioned but untrained views as to how they can do this. I think what will really happen is that we will get at people's preconceived political agendas. So, on behalf of the Law School faculty as a whole, we are all opposed to this amendment."

Speaker Pollak: "I'd like to have somebody speak for the amendment now so that we can get some balanced input."

Professor Henry Shue, Wyn and William Y. Hutchinson Professor of Ethics and Public Life: "This is an extremely difficult issue and I've just heard a reasonable argument on both sides of it, but I think that on balance the amendment is right, and I'd like to speak in support of it. Professor Norton, I think, gave a comprehensive account and many good reasons for it and I'd like to respond to some of the criticism that has just been made by my various friends here.

"Steve Shiffrin, spoke very eloquently on behalf of the value to the plaintiff of having an attorney and I think that everything that he said is true. The problem is that the procedures drafted by the Committee don't guarantee the plaintiff an attorney. The procedures guarantee the right of the plaintiff to an attorney if she or he can afford one and get one. Other things being equal it is very likely that the accused will have an attorney and a very good one, while the complainant will be left to his or her own devices.

"Robert Green stressed that lawyers are very good at arriving at facts. That is true, however, another thing that lawyers are very good at is tangling things up in technicalities. A lawyer's job is to be a zealous advocate as Steve Shiffrin said. That means, if possible, taking over the procedures. I think that at the lowest level of this thing, which of course can end up in the courts anyway, that it is more likely that one will get at the truth if the process is not dominated by zealous people who generally tangle things up in technicalities. David Wippman is quite right to emphasize due process. But, it occurs to me that there are many kinds of fairness. Legal fairness is one kind, there are other kinds of fairness. One doesn't have to have lawyers, and one doesn't have to have legal considerations and procedures in order to have a fair process. So, on the one hand, I think if one just looked at the process and the first stage, I think that it would be best to have legal counsel

present, but no cross-examination by people trained to be zealous cross-examiners and professionals at it.

"So even if one didn't worry about the disincentives I think that it is a better process anyway, however, there are still these issues that someone who brings up a complaint of sexual harassment is taking on an enormous burden. This has a lot of different forms. I'll describe an extreme case, but, consider a freshman from a small town, who in high school used a textbook written by a leading world authority, now here she is at a major university, the world authority is her teacher, she goes into his office, he attempts to harass her. She's at the bottom of a very steep slope, and if I were she, I would not take this on. A very public spirited and dedicated person might nevertheless take it on if he or she knows that taking it on means being cross-examined by someone trained to cross examine people, maybe politely as Professor Green says, but nevertheless zealously, I think it is going to take a rare person to start this person and we probably are going to have many fewer complaints, but the point is not to have as many complaints as possible, but is to have a reasonable one or two."

Associate Professor Jeremy Rabkin, Government: "Let me first say that I am not a lawyer and I haven't written a world famous textbook, so I don't have a fervent stake in this one way or another. What's very, very misleading about what Professor Shue just said is that he's thinking about this as a confrontation between the complainant and the defendant. The way this is written, the complainant is not a party. We have a public prosecutor, we have the O.E.O. which investigates and prepares the case. If the O.E.O. doesn't think that the case can go forward, we tell the complainant 'good-bye, you don't have a case.' The prosecutor will be pursuing this case, will be presenting the evidence and can go forward and stand up to the lawyers whether the complainant melts or not. I would also like to remind you of two other things. One, the AAUP says you're supposed to have a lawyer, when we debated this in the Arts College, and I don't think we should be disregarding the AAUP now.

"Most important I want to say, and I saved this for last, and that is that students are allowed to have a lawyer when they have a case before the Judicial Administrator or one of the committees under the Campus Code. Professor Norton told us in a previous debate that she helped to draft the Campus Code. That previous time when we were dealing with students Professor Norton thought it was good to have lawyers, I don't know why she changed her mind. You should also know that even the faculty is allowed to have lawyers if they are brought under the Campus Code which they can be for other offenses. So we are saying that this is the one exceptional thing on this whole campus where lawyers are destructive and distracting and I don't believe it. All the abstract arguments about lawyers didn't hold water in the other situations, why are we singling out sexual harassment. It seems very strange to me."

Professor Abowd: "There is social science evidence on this and it's a prisoners' dilemma. It turns out there aren't very many proceedings where it's a choice whether you have a lawyer or not, but it turns out in proceedings that who wins and who loses. It's about equal in the cell where nobody has a lawyer and where everybody has a lawyer, and disproportionately by the person with the lawyer in the other two cells. So it's a classic prisoners' dilemma. The issue is whether the optimal number of lawyers in the room are even. So, I think that the way the procedures are written, as soon as there is one lawyer in the room, everyone has to have one, and anyone involved in this game will know that. Whether they speak or not doesn't seem to be very much of an issue, but we don't have any social science evidence on that, so I won't make an opinion based on such introspection. It does seem to me that the amendment doesn't really get rid of the lawyers which is something that some people here wanted to do, including me.

"It seems to me that it silences them, but there isn't any social science evidence on that either, so I won't do the argument from introspection. If you're not going to have zero then everyone is going to have to be represented, because they can solve this game just as easily as anyone in freshman economics can solve it. So, I think the question before us is whether or not having non-speaking lawyers is the equivalent of removing them. If it is, then zero is good with me, if it isn't, then I think we should just not bother because once there is one in the room, everyone should have one."

Speaker Pollak: "O.K. it is 6:00 o'clock and our mode of operation is to cease the meeting at this time, and that will mean that we will have to continue on this amendment when we do meet again."

Dean Stein: "Well the University Faculty Committee will have to meet, to decide when we have to meet again to end this matter."

The meeting was adjourned at 6:00 p.m.



Respectfully submitted,

Robert Lucey, Associate Dean and Secretary of the University Faculty