

MINUTES OF A MEETING OF THE FACULTY SENATE

Wednesday, February 19, 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: "I only have one comment. Despite my promise that I wouldn't have anything to say, something arose. We have a rule here that the media cannot photograph us, or tape us, or otherwise make transcripts. I had a request from the *Cornell Sun* today, asking if it would be possible if we could just have a few pictures taken as an illustration for the story that they will be doing on this meeting. It seems to me that it would be in our best interest to have student interest in our activities and so I told the *Sun* that it would be distracting if they were to take pictures during the meeting, but it seemed to me that it would be O.K. if they took a few shots of us before the meeting started. So with your permission, I am going to interpret our rules in that broad way. That concludes my remarks, Mr. Speaker."

Speaker Pollak: "We have just reached a quorum, and we will now move on to the report from the Nominations and Elections Committee, Mr. Lucey."

2. 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 suggestions from the Nominations and Elections Committee:

UNIVERSITY APPEALS PANEL - PRESIDENTIAL APPOINTMENTS - thru January 2002

Harold Bierman, JGSM

W. Donald Cooke, A&S

Barclay G. Jones, AAP

Sally McConnell-Ginet, A&S

Maureen O'Hara, JGSM

PROFESSORS-AT-LARGE SELECTION COMMITTEE - thru 12/31/99

John Ford, H.E.

Paul Houston, A&S

John Lumley, Engr.

Peter Nathanielsz, Vet.

Margaret Washington, A&S

Mary Woods, AAP

ACADEMIC FREEDOM AND PROFESSIONAL STATUS COMMITTEE

Henry Shue, A&S - spring replacement for B. Strauss, on leave

NOMINATIONS AND ELECTIONS COMMITTEE

Tove Hammer, ILR - spring replacement for D. Lipsky, on leave

MINORITY EDUCATION COMMITTEE

Jennifer Greene, H.E. - chair for spring term

PROJECT 2000 CAMPUS ADVISORY GROUP

Les Trotter, Engr.

There being no comments, the Committee's report was approved.

Speaker Pollak: "We will now move on to the discussion we were having at the last meeting on the amendment brought forth by Mary Beth Norton and Terry Fine on allowing speaking lawyers in the Sexual Harassment proceedings. The floor is now open for discussion."

3. CONTINUED DISCUSSION OF THE SEXUAL HARASSMENT PROCEDURES

Professor P.C.T. deBoer, Mechanical and Aerospace Engineering: "At last week's meeting, a remark was made about the policy of the American Association of University Professors with respect to this. As the regional chairman of the local chapter of AAUP, I decided to look into it. I found out that the closest section that pertains to this one is on dismissal procedures and that there is an elected faculty committee, and I will read what it says: 'During the proceedings the faculty member will be permitted to have an academic adviser and counsel of the faculty member's choice.' That is item number five. Item number eleven says: 'The faculty member and the administration shall have the right to confront and cross-examine all witnesses.' So it doesn't say anything about lawyers having the right, although the faculty member may in fact have counsel present. I also called Robert Kreiser, the Associate Secretary who aides in coordinating all of these policies for the national AAUP and he confirmed this interpretation. But he said that the staff of the AAUP is also interpreting these regulations and that their interpretation is that the preference would be to have lawyers have the right to speak and cross-examine."

Speaker Pollak: "I would like, as we go through this, to have a balance in the discussion. I don't know beforehand what side you are going to speak on, and if I notice that it does start to get out of balance, I would ask for people on the other side. In saying that, I would like to remind you that the amendment is to reduce the activity of the lawyers. So if I ask you to speak in favor, you are favoring limitation."

Professor Peter Schwartz, Textiles and Apparel: "I'm speaking in favor of the motion, because I believe it represents a reasonable middle ground for those who feel that the proceedings should be in fact at least run by lawyers and people like myself who feel that they should be kept out unless they are a party to the proceedings. That being said, I would like to say why I support this. I was reading an article by Jonathan Walker in last week's *Newsweek* about high-profile trials and their consequences to society. I would just like to read a few sentences, 'The worst consequence is that the structure and aesthetics of trials are reaching into the rest of society. The underlying premise of the legal system is that justice emerges from a clash of advocates. Inside a courtroom this does not always work; outside a courtroom, adversarialism can be a disaster for both civility and truth.'"

Associate Professor Jeremy Rabkin, Government: "Regarding the AAUP, this is not something that I mentioned last time just out of the blue, Mr. Kreiser wrote a letter to the Shue Committee, in which he didn't say, this is just my personal opinion. I think that there is some uncertainty about on what basis he did say that, but he did write us a formal letter, saying that there ought to be lawyers. I think that the more serious argument is this, at the end of the original draft, the Provost's draft, Mr. Mingle's draft, what is in there is that the committee that conducts the hearing can establish its own procedures. So, they were allowed to have lawyers, even Mr. Mingle, who I think shares your view that lawyers are dangerous, and he ought to know, even Mr. Mingle said that we can have lawyers if that's what the committee wants. Now, the Senate is turning around and saying that Mr. Mingle and the Provost were too permissive, there was too much due process, we don't want as much due process. Mr. Mingle makes a good suggestion in there, he suggests that if you are thinking about due process, you ought to think about it in this way: give more due process when the consequences of the conviction will be more severe. Now, for a faculty member, the consequences of any conviction can be absolutely devastating."

"We are in the following, what I think utterly bizarre position. If a student gets convicted of sexual harassment, we don't even remember their names. Does anyone remember the names of the four, what were they called. . . the four players who got in trouble last year? Students have very little at stake, and yet, we guarantee to students that they can have a lawyer to defend them. It's a little bit late now to be saying that, 'the O.J. Simpson trial and lawyers are trouble'. The University has had this policy for a long time. Professor Norton was involved in setting up this policy. Students should have a lawyer. It just seems to me utterly bizarre to say that students can have a lawyer and faculty can't because there really isn't all that much at stake, or that we really don't want that much due process for the faculty. Lawyers are important because all these specific guarantees that we have written into this procedure will get lost if we don't have a lawyer to say 'wait a minute'. It doesn't mean that it is going to be the O.J. Simpson trial. It does mean that somebody who does know something about procedure will be there to say what the Senate's implications and safeguards mean. I don't mean any disrespect to my colleagues, but it has been my experience that most professors who don't have any regular dealings with legal procedures are very, very foggy about these things and without meaning to do an injustice it can be very easy to lose sight of specific procedural safeguards that the Senate as a whole is now preparing to endorse. If we mean the procedural safeguards in other areas, we ought to see them, and see some meaning in them in ours."

Professor Terrence L. Fine, Electrical Engineering: "I am one of the movers of the amendment, in some sense to quiet lawyers, we wouldn't want to eliminate them, we don't want to go that far. The argument that I'd like to make with you has three grounds which in my view end up with the conclusion that the amendment is in fact correct. The first ground is basically addressing what it is that lawyers do and Professor Schwartz has already discussed some of that. The second ground is what environment does it take for what lawyers do to actually be productive, and the third ground is what is the environment that we were trying to achieve when setting up this committee. My feeling is that that environment does not support the one that lawyers need to be productive."

"So what is it that lawyers do? At the last meeting, a number of them spoke and at least twice mentioned the word 'truth', to search for truth, to uncover truth. I take it as obvious that that is not what they do. It is in fact as you said, Professor Schwartz, they are advocates, their goal is to win for their party. And winning can often lead to obscuring the truth, and I think that is legitimate in their view, because their role is that of an advocate, it is not as a discoverer of truth. They wouldn't be able to defend the people that they defend if they were after the truth. So, given that they have this role, what is it that can make this role work for us. When you have one role, you have more. It is very much like the camel's nose, when the camel's nose is in the tent, the rest of the camel is sure to follow. You can't have one lawyer, that is one hand clapping for itself. If you have one lawyer in there, you need another one to confront what the first one says, to counterbalance what the first one says. You need at least two of them. Do you need only two of them? No, you need another one to act as a referee, one to be in charge, to maintain the realm of discourse, the environment in which it takes place, so you need three of them. Do you need just three of them? No, you need a body of procedure, you need traditions, precedents, procedure. These are all taught in the law schools. There are volumes on these things, how to conduct, what the rules of engagement are. When you have all of those things active, and you need all of those things, then, yes, the legal system can make progress. I agree that it may not be the first choice, but I agree with Professor Shue, it becomes our last best choice. It can make progress with all the components active. Let's turn to what we're talking about here though. We are talking not about a mock court. There is no need for a mock court, there is no need for something that looks very much like a courtroom because there is a courtroom. Courts will accept cases on this matter. If you want a court that has real rules and procedures that has real lawyers and real judges, go to court, it sits there downtown, and you can bring your case to it and they will hear cases on sexual harassment. You can bring your case there if that is what you want."

"What is it instead that is being created here? What is being created here is a faculty based peer committee to make a judgment on charges of sexual harassment. What is the capability of this faculty committee to make such judgments? Why might they, in fact, be appropriate as a means of investigation? I think that there are two reasons, one has to do with principles and the other has to do with character or characteristics. You can expect the faculty group to maintain at least two principles. One is that it is important to have an educational environment that is free from sexual harassment. You can also expect the faculty group to maintain a second principle, that of academic freedom, that in so maintaining that principle will encourage faculty members to teach the fruit of their scholarship and research, feeling that they will have protection, should those issues arise by a committee that knows what is involved in protecting you when you teach, that which you have researched, and that which you have studied. The other characteristic is that, lawyers are not the only ones, if, in fact, they are at all concerned with, the pursuit of truth. Faculty members do that for a living. That is what we do when we engage in scholarship and research. We are very well trained in many different disciplines to uncover and to

study complex issues, to see how far they go, if we can't resolve them, to admit to the fact that we can't resolve them. It's being honest about that, about what we know, about what we don't know. So a committee of faculty members with training in uncovering the truth if you will and reasoning tightly and being well skilled in the use of their minds is a very good committee for examining a complex issue such as a charge of sexual harassment. It is not the only mechanism. The courts are another mechanism. So what I conclude is that the environment you need for lawyers to be effective and not be a source of chaos and confusion is not the environment which we can actually offer here. There is no intent in this to write volumes of procedure and how to conduct the rules of evidence. None of that would be needed here nor would it be appropriate to create that now. Given the environment that we have now, given the committee, I think lawyers. . . active lawyers would be counter-productive. I think the committee is far more likely to come up with a sound decision in the absence of zealously contending lawyers who are poorly regulated. And finally, please don't create a committee that will not be just another passive jury."

Professor Gordon Teskey, English: "I am going to speak against the amendment. Being an English professor, I have to always begin with a quotation or an allusion to English literature and in this case, I am thinking of the second part of Henry VI, where a mob has decided to set up its own state based on chaos and disorder. He says first 'let's kill all the lawyers.' It seems to me that the coarseness of this discussion is not quite at that level. It's just 'let's muzzle all the lawyers'. I don't think that we should deceive ourselves into thinking that when a procedure has gone this far that is somehow disastrous to add a non-adversarial situation. It is an adversarial situation. Most of the people who will be in the room, on the committee are very interested in the case, in getting a conviction, by this time are probably convinced of the guilt of the professor who may very well be guilty. If we are to avoid the situation where guilt is assumed on principles, that while not identical to mob rule, but have many of its characteristics, we'll actually meet many people there who care about due process, who care about seeing the proper procedures followed. So, I urge you to vote down this amendment and to allow lawyers to be present. Lawyers have no more interest in seeing that these are particularly unfair or egregious. By this stage, things have become adversarial, the person accused, especially if innocent, is feeling like a hunted animal and it's absurd to think that it's an equal situation."

Associate Professor Robert Green, Law and Chair of the Committee on Academic Freedom and the Professional Status of the Faculty: "At the end of last week's meeting, two members of the Committee, spoke with me briefly. They were Anna Marie Smith and Kay Obendorf, and they suggested that it might be useful for me to give a little bit of background into what the Committee's thinking was. . . "

Professor Mary Beth Norton, Mary Donlon Alger Professor of History: "Point of Order Mr. Speaker, didn't you say that you were going to alternate speakers on one side and the other? I seem to hear two anti speakers. . . "

Professor Green: "I thought I. . . "

Speaker Pollak: "I'll answer that. I did look to see if there were any other hands of people who wanted to speak at that time. Seeing none I addressed the one person who raised his hand. There was no alternate speaker available. Continue Mr. Green."

Professor Green: "So, they suggested to me that I give a little bit of background about what the Committee's thoughts were behind coming up with these procedures. The way that Professor Norton described them the other day, it was almost a mindless exercise. You start with a lawyer for the defendant. Bang! All of a sudden you get four lawyers. The first point that Anna Marie and Kay suggested is, just to keep this in perspective, we're only talking about the adjudication stage. There are several stages that come before that. There is mediation, investigation, what we on the committee, call the 'plea bargain' stage, where there is a probable cause of determination and a recommended sanction and the faculty can accept that and make a plea of guilty and accept the recommended sanction. I think everybody on the Committee thinks that the majority of the cases will be settled or resolved, quite possibly with a guilty before it gets to even adjudication. There are no lawyers at these earlier stages. We're talking about a stage when that is all broken down and essentially we're talking about a last resort."

"Second, the procedures only require one lawyer and that is the University appointed lawyer whose sole responsibility is to support the charges of the O.E.O. Why did we come up with this lawyer? Well, the first thinking was the University has a real interest in the case at this point. The O.E.O. which is part of the University has already found that there is probable cause to bring this case to trial and it seemed to us that at this point the University has a real duty to prosecute this case.

We felt that sexual harassment is really an offense against the community rather than an offense against single or multiple individuals, and that the community as in the criminal system where the community is there as the *State v. O.J. Simpson*, we felt that there ought to be a University prosecution. Now, why a lawyer? We simply felt that a lawyer would be the most effective person in this capacity. Also a University provided lawyer would have resources available to mount a good prosecution. We looked at a few alternatives. One of which was to have the Committee engage in the essential examination of the witnesses, which is essentially what I think the Norton amendment would produce. The main problem that I had was that you can't have a Committee that is an impartial fact finder also being the advocate for the prosecution, the advocate for the complainant. You simply can't change roles like that. You can't have an advocate hat on one minute and then say I'm going to change my role and be completely impartial and fairly decide this case. So, we really felt that the Committee cannot be in the position of either appearing or being the prosecutor. Another possibility is the student or whoever the complainant is. It seems to me, at least, that a very possible outcome is what you really have is two students. You have a student complainant and the student's friend who is a friendly adviser. That is not an effective prosecution; they have no expertise, they have no experience. In addition they are severely handicapped because they are not detached. I cannot imagine anyone with more emotional stake in the case than somebody bringing a sexual harassment case. The last thing you want is someone who lacks detachment to prosecute the case. Lawyers have a saying that a lawyer who represents himself has a fool for a client. The reason is that when you represent yourself, you cannot step back and look at the case analytically, you cannot ask yourself how you can best present the case to a neutral party. You don't want this person to be the prosecutor. The final problem is a quite practical one. The statute of limitations for students is until they are out of the control of the faculty member. It is fully expected that in many cases they will wait until they have graduated to bring the case. Students who graduate from Cornell do not stay in Ithaca, they might as well be in China. We fully expect in many cases that the complaining party will not be present in the adjudication. We don't have subpoena power. We're not going to bring somebody from half-way around the world. Now, one possibility is to dismiss the case if the complaining party won't show up. We thought that was completely inappropriate. There is a probable cause determination, you prosecute that case, you have to use written testimony, or something, but that is not a reason not to prosecute. You cannot rely on the complaining parties.

"The next aspect is the lawyer for the accused. Why have a lawyer for the accused? There actually was a lot of debate about this and the buzz words we used were 'due process light' and 'due process heavy'. Our idea of due process light is minimal procedures, no lawyers, and 'due process heavy' was sort of the whole works, and we thought of having maybe a seriatim approach where we start out light and then go heavy if necessary. There were some members who were really opposed to lawyers, maybe I'm speaking out of school, but Professor Richard Baer was strongly opposed, and he said, we are a community and lawyers will destroy the sense of community. These arguments have force. But in the end the Committee's draft did not accept them, we have lawyers. My reasons for this, at least are, one, look at what is at stake, we are talking about the ruination of a career, the ruination of somebody's name, and I think we owe it to let them make the best case they can. Second, you want reliable verdicts, and in spite of what we've heard about lawyers aren't interested in the truth, people who are experts at bringing out the facts, in fact will promote the truth. If you get all the facts out, you have a Committee of faculty members who are very smart, they are very capable of looking at the evidence, they can see through tactics. The main thing is to get the truth out, lawyers can do it. They can prepare, they can cross-examine, and so forth. The final thing and I think Anna Marie Smith was the one who is the most adamant about this, in fact she's been E-mailing me this week about this, you want a process so that when there is a verdict of guilty, the community will accept it. In fact, even the accused faculty member will accept it. They will not be able to say, 'this is meaningless, this is a kangaroo court.' They have to be able to say 'I was given every possible opportunity to defend myself and I was still found guilty and now I've got to face the consequences.'"

Professor Rabkin: "Can I ask a question of you?"

Professor Green: "A question of me?"

Professor Rabkin: "Yes, a question of you. Could you just please comment on the validity of Professor Fine's claim that the defendant has the choice to go to civil court. As a lawyer, is that true?"

Professor Green: "No, no, no, the defendant is in a situation where the O.E.O. has found probable cause to find the defendant guilty and has proposed a sanction. The Professor now has two choices and only two choices. One is to plead guilty and the other is to go to adjudication before the Committee on Academic Freedom and Professional Status of the

Faculty. There are only those two choices. The complaining party can go to court. Now, after the whole process is over, then the defendant can go to court and say I was not given academic due process and that was in violation of my contract."

Speaker Pollak: "Is there anyone else who would like to speak in favor of the motion?"

Professor Sally McConnell-Ginet, Linguistics: "It is quite unclear to me that there are any processes at the end of which everybody involved is going to be completely satisfied. So this hope, that by having enough lawyers there we will produce belief in results, is completely misguided. I would like to stress the point that has been made several times, that the advocacy system is not designed to get truth, but it is designed to make the best case for each side."

Professor Steven Shiffrin, Law: "I argued last time that one of the main reasons that I am opposed to this is that I think that it is very important to have the best case put forward on behalf of the prosecution of the case. As I thought about it over this last week, it occurred to me that this has substantial implications for whether complaining witnesses will come forward. Imagine what you are telling complaining witnesses if you adopt the current amendment. What will we give you if this goes to a hearing? We will give you a non-zealous, non-advocate, that is, if you meet the sort of community notion that you have. We will not give you a lawyer, now I am not talking about a lawyer for the party, I'm talking about the prosecutor.

"Henry Shue argues that there is a conflict between the prosecutor and the complaining witness, because the University has a distinct interest according to President Rawlings. Bob Green talked about that. The University does have a distinct interest, indeed, it has a stronger interest in the prosecution than the complaining witness, because the complaining witness may be worried about the cross-examination and the like and may want to go away, and the prosecution has a strong interest in getting as many witnesses into that case as possible. In addition, if the defendant is guilty the University has an overriding interest in strong sanctions against the person. So there is a distinct interest, but it is not the kind of interest in which the complaining party needs a lawyer. That is why complaining parties, for example, in criminal cases do not bring lawyers into the courtroom with them; the prosecutors are already representing their interests. With respect to the defendant, it seems to me exceedingly odd that we would say in our society that if you have a few dollars at stake, you have a right to an attorney, you have a right to a trial by jury. But, if you are a tenured professor and are in danger of losing your job, something that is worth a whole lot in terms of money, and worth a whole lot in terms of intangibles, we would then say you have no right to an attorney. It is simply wrong to say that this will all be settled some day in court. If the professor loses in this hearing, the professor has virtually nothing to say in court unless that professor's first amendment rights have been violated, or some other constitutional right has been violated.

"We are deciding whether to have a hearing in which the prosecution will get its best representation of the University's interest, rather than an amateur, non-advocate. I really believe that what will happen is that we will have advocates, we just won't have trained advocates. If you're there, if one of you is representing a defendant, your going to advocate on behalf of the defendant, you're not going to say, 'I give up, my person looks guilty to me.' The person is going to be an advocate. So, I don't think that it makes any sense at all for people to say that you're opposed to advocates, rather the question is will you have trained advocates or will you have people who have no training at all. You're worried about the abilities of attorneys to pull the wool over the eyes of people. I think that what you have in your mind is a jury made up of a group of people who aren't like you. If you think about yourself, you know that you won't be fooled by an attorney, you know that you'll be able to figure out what the truth is, that's who is representing the community's interests."

Professor Paul Steen, Chemical Engineering: "I left last week's meeting, feeling that, unlike many of the votes put forth in this body that this was not a clear cut issue. So, I went to some of my colleagues in my department and I solicited their opinions and I had several strong opinions and I'd just like to quote from one. This comes from a recent colleague who joined us from Johns Hopkins as a senior faculty member. He says, 'Paul, I strongly support a procedure that is managed by the faculty to the maximum extent, in other words, one that limits the role of lawyers. I had a colleague involved in a sexual harassment hearing. That is, his daughter, who was employed by Hopkins, was harassed by her supervisor. I observed that a lot of the difficulty in reaching a decision was created by an inappropriate adversarial climate created by lawyers, both University and outside lawyers. I would like to see a procedure where there is an opportunity to reach a just resolution before discovery and other, often inflammatory procedures begin.' It seems to me that there is a distinction here between resolution of a problem. I would like to emphasize his choice of words, 'resolution of a problem or coming to a verdict in a case'. I think on the one hand, if we are trying to reach a verdict on a case, many of the things that have been

spoken against this amendment are appropriate, but on the other hand, if we are trying to resolve a problem, I would say that we should be voting in favor of this amendment."

Professor Sheri Johnson, Law: "I am reluctant in some ways to speak, because, I think, the framers of this amendment are people who I generally admire and whose goals I generally agree with. But, as a lawyer and as a feminist both, I cannot agree that this can be the right means to eradicate sexual harassment in the University. I want to say three things very briefly, hopefully showing that lawyers need not unduly protract the proceedings. First of all, I think that it is a really amazing idea that a University like Cornell would forbid speech by the very people who have the most knowledge. Really, for an institution of learning to say, 'you know about how to present evidence and you may not talk.' We do not need to be afraid of people who have knowledge. Lawyers have knowledge, not only about laws, but also about presenting evidence, we ought to be welcoming what they have to contribute. Now I'm not saying that the rest of you do not have knowledge about fact finding in other contexts. But if you're really claiming that you have knowledge about finding disputed facts when credibility is largely what is at issue, I would beg to disagree, that is what lawyers really are good at.

"The second thing is, you may laugh, but lawyers really are supposed to be the hand-maidens of justice, that's not to say that each side is not an advocate, but to say that the process as a whole is supposed to produce justice, that advocacy on each side in the end is more likely to result in truth. A worthy prosecution, and this is a prosecution, not a mediation, it is not talking with your rabbi about something that you can't really come to an agreement. It is a finding of wrong-doing. Mediation would have taken place before. This is a process that is supposed to find who did something wrong. That process needs an advocate to present it, not a victim who may be shaken, but someone who can organize and put together a case. On the other hand, a wrongful prosecution certainly needs a lawyer to defend against it. The University is best-served in both truthful and worthy prosecutions and in unworthy prosecutions, in my view, by having a lawyer to present what is true on both sides.

"Finally, I don't think that women as a class, or victims as a class, or feminism as a cause is in the end served by presenting women as incapable of withstanding cross-examination. The women I know are of course, unnerved, find it unpleasant, as does anyone else, but they are not incapable of standing up to it, and in the end we are better off to have them heard, and have them tested, and show themselves to be telling the truth, because then we will not be talking about, as we endlessly talked about in the Maas case, the process. We will be able to talk about a convicted person who has done wrong and who we rightfully wish to punish."

Professor Norton: "I said most of what I wanted to say last week, but I just want to say a couple of more things in support of this amendment that Terry Fine and I presented. I've been listening to the arguments from the lawyers here, and it's interesting how many phrases I picked up that do indeed make this system, or this hearing analogous to criminal proceedings and I reject that basic premise from the very beginning. What the hearing should be is faculty controlled. I want to thank the man from the Chemistry Department for making that statement. This should be a fact-finding endeavor, by faculty members, for faculty members, to preserve the integrity of the educational environment. This is not the same thing as a court of law. I go back to one of the things my colleague Terry Fine said, it should not be regarded as a mock trial, which is what all of the lawyers who have gotten up here and talked about it have said. They talk about looking at the evidence, they use phrases that do indeed create the sense that Professor Fine talked about, that this board is supposed to somehow be a passive jury. It is not, it is supposed to be a fact-finding faculty body to investigate, on its own what was going on. Even if there was a finding against a faculty member, let me remind you that this is not the final phase, the final phase is the Board of Trustees' Dismissal Procedures, which have totally different issues and where, of course, lawyers are allowed to be entirely active.

"With respect to Professor Johnson's comment that somehow this amendment suggests that women are incapable of standing up against cross-examination, that was not my point at all. My point in advocating this amendment last week has a lot to do with the perception of complainants or potential complainants when they look at these procedures. And as Henry Shue said last week, a potential complainant will be very much put off by this very elaborate hearing replete with lawyers, feeling that the complainant has to have a lawyer, has to pay for that lawyer, has to withstand that cross-examination, whether they are capable of doing it or not, is not the issue. The question is how they will perceive that situation. It's a daunting process enough to bring such a complaint against a faculty member. It seems to me that a complainant would be much more likely, not to remain silent, but rather, to bring the complaint which is in the interest of all of us to protect the integrity of this environment. We should make this as easy as possible for the complainant, as well

as, as fair as possible for the accused party, and I think that the amendment that Professor Fine and I have proposed will do just that. "

Speaker Pollak: "Is there a speaker opposed?"

Professor Kenneth Strike, Education: "I think, I have some considerable doubts as to whether the amendment will accomplish its purposes. I cannot quote Shakespeare I confess, but I can at least relate a story. Some years ago I was deposed in conjunction with my role as an expert witness in a court case. The lawyer I was working for, as we were walking into the room said it something like this, he said, 'Ken, professors talk too much in these circumstances, the lawyer asking the questions is not your student, don't try to educate him. If I think you're talking too much, I'm going to kick you in the shin.' After a few dents in the shins, I learned yes and no pretty well. Which is pretty good because it took about eight hours. My point in this story is that the lawyer with whom I was involved found a pretty effective way to interject himself into the hearings, even though he was not allowed to speak. I think that is precisely what will happen if we muzzle the lawyers, we will not make the process simpler, we will not get the lawyers out, what we will do is to convert speaking lawyers into kicking lawyers and scribbling lawyers and whispering into ear lawyers and 'let's adjourn so we can go out in the hall and talk this over,' lawyers. I think that it will make the process a lot more complicated because the lawyers will respond by finding other ways of instructing their clients to do what they would otherwise do in much simpler fashion. My hunch is that this will make it more rather than less complicated."

A member of the Faculty Senate called the question.

The Speaker: "The question has been called. We will vote on whether or not to cease debate, we need a two-thirds vote to cease debate. All those in favor of calling the question, signify by raising your hand. All those opposed. We will call the question, and move to a vote on the issue. Remember we are looking to limit the role of lawyers in the hearings. All those in favor of the amendment signify by raising your hand. All those opposed, signify by raising your hand. I have the feeling that the amendment carried."

Dean Stein: "I'm going to read the names of the people who signed in. If your name is not called, at the end, please make it known."

The amendment was defeated by a vote of 22 in favor and 47 opposed.

Speaker Pollak: "O.K. the amendment has been defeated and we will now move on to a discussion of the main motion."

Professor Rabkin: "I would like to say first that the Committee worked very hard and on the whole they did a very, very, good job. I would say that this is about seventy-five percent of what I hoped for. The difference between myself and Dean Stein is that I think that the difference between 75% and 95% is important and worth counting. I would like to first ask the Committee whether they would accept a friendly amendment. I'm not really making a motion, but it seems to me that some of this is just silly. The flow chart at the end, the table which defines responsibilities, and the definitions at the beginning in a number of ways contradict some of the changes we've made. We've cut the dean out of the process until the end, but if you look at the flow chart, it still looks as if it still goes through the dean. Would the Committee just be willing to assure us that before they send this to the Provost, they will edit the charts at the back and the definitions at the beginning so that they will be consistent with the text. Is that something we can do?"

Professor Green: "I can't really speak about what I can or can't do, but I can say that the charts shouldn't even be in that. Last week I had a revised chart, but the chart should not be a part of this document. As far as the definitions go, I thought we took those out, I thought we explicitly took all the definitions out and inserted a caption stating that they would be added after this document was accepted. So on those two points, I don't think that there is anything to be done."

Professor Rabkin: "Another small point, but, at least the text of this amendment that I got from the dean's office, says that this will go into effect on July 1996."

Dean Stein: "Yes, I would just like to ask for some forbearance. This Committee worked very hard against many deadlines, and the position that they took was that they wanted to get you a version of what they thought would be the proper body of the policy. Fine points that clothe it, the Committee started to do that, but then the Committee found that it was very difficult and we were up against a deadline. So, it is understood that it will be done afterwards, not by the Committee, but

by some editor someplace."

Professor Rabkin: "Just to his point, about the deadline. Look I'm not looking to pick nits here, I wanted to get rid of some minor stuff at the beginning, but it seems that with the deadline there is a real substantive issue. What if there is a case that is arising right now? Are we saying to the Provost that it is O.K. for you to use the existing procedures until you've had thorough, etc... etc... "

Dean Stein: "Well today is today and tomorrow is tomorrow. It is my fervent hope, that at the end of this day I will never hear the words 'Sexual Harassment Policy' ever again, that this body will endorse it and give it over to the Provost and that the Provost will look at it and think that this is a very fine Sexual Harassment Policy and that we will be done with this. I'd like to believe that that is not a real problem and I do not want to face it until it arises, there is no case coming up now."

Professor John Sherry, Hotel Administration: "You have to appreciate something, this is purely advisory folks. We have no power to overrule the Board of Trustees or even the Provost for that matter. All we do here, as far as the timing of this goes, or whether he will agree and put these amendments into effect are purely discretionary with him and our role is to convince him with powers of persuasion and common sense that this is very worthwhile. But we have no authority to change his mind or force the Board of Trustees to endorse this. I'm sorry to disabuse you of this but that is a fact. That is not to say that what we do here today is of no importance, it is of great importance. I don't mean to imply that at all or to insult your intelligence, but we do have more on the process. This present sexual harassment policy adopted by the Board of Trustees is in effect. If it is to be changed, it will be changed with their consent only and we hope that they will change it, but we really don't have any authority to dictate to them that these changes will become. . . more or less, the law of the land. I think you appreciate that don't you."

Professor Richard Baer, Natural Resources: "I thought that it might be helpful to say why I was persuaded to change my mind on the whole lawyer thing. It is still my hope that most of these issues can be resolved as a community before it ever gets to the stage that we are talking about. I think that was spoken about many times in the Committee. I was also on the committee that formulated this. But, the statements that various ones of you made, Jeremy Rabkin and Bob Green and Steve Shiffrin really persuaded me to change my mind on this. Also for another reason that I have tremendous confidence in those of us that are going to be sitting there. I don't think that we are going to be as easily swayed as some juries are. I have enormous confidence in us as a community that we will listen very carefully to these issues. It is still my hope that a great deal of these issues, perhaps the majority of them could be determined before they even get to this stage. I think in terms of the viability of the community that would be in our best interests."

Professor Walter Mebane, Government: "I have a question for, I guess the Committee regarding the separation between the mediation stage and I guess it's the adjudication stage. The language does do what I think is appropriate which is an absolute separation of those processes, and the difficulty is that the O.E.O. is sort of the active agent in both of those. So, there is language that says that the investigative, I'm reading from page 19, 'The investigative and mediation processes will be distinct from each other. The same person may not perform the functions of mediator and investigator in a single case. Statements or records made in the mediation process may not be introduced into the adjudication process.' My question is whether that is the strongest possible separation the Committee was able to think of, or whether it would be possible to strengthen it further to have not only the documents or statements not be carried across, but also have some kind of mandate for absolute separation of information. Otherwise it seems to me the mediation process will be severely hindered. "

Professor Green: "First of all, the separation is between mediation and investigation. There is an absolute separation between mediation and investigation on the one hand and adjudication is completely separate. But, the question is the separation of the mediation from adjudication. We refer to this as a Chinese Wall, I'm not sure how much control we really have over the O.E.O., they are going to do what they are going to do. The idea was to have separate people and that basically information should not be passed back and forth. I think what you are suggesting is cut the O.E.O. out of one of the roles, I really don't see cutting them out of the investigation role, maybe I could see cutting them out of mediation, but to tell you the truth, we really didn't consider that. But just as a point of order in terms of amending this at this point, I don't think that it could be done. Many of you are going to come up with suggestions that I wish would have been made as comments earlier, but I just don't think that we can amend this at this point, even though maybe I'd like to."

Dean Stein: "To answer that question, I thought a lot about that section and how to word it, and there is a concern on the

other side that if one writes a statement that says that nothing that is said in the mediation process can make its way into the investigation, then one runs the danger that that's interpreted in a way that immunity is interpreted. That a person who, during the mediation phase, gives information and says, 'so and so saw me do it,' and that person is called as a witness, that can be claimed to be a violation of the Chinese Wall in between the two. So that was a concern. Do I make myself clear? I don't know if I said it right, maybe you can say it better."

Professor Green: "It is very difficult to draft this, because what you don't want somebody to be able to do is you don't want them to go into mediation and give away all the facts that incriminate them and then they don't accept the mediation agreement and then it goes to trial and somebody gets up and gives evidence because that came out through the mediation process and now I have immunity for everything I said in the mediation process. So the idea was really that we had to be careful not to have a rule that what people say can never be used again. So we restricted it to records, with the idea that testimony can always be used against you. There really is a tension between having a mediation process that encourages people to be forthcoming and yet not canistering the prosecution later. We kind of walk a fine line and I'm beginning to see that we could have done it differently, but we didn't."

Associate Professor Robert Corradino, Physiology: "I would like to ask Professor Green a legal question. If someone is accused of sexual harassment, is he compelled to go through this process in house?"

Professor Green: "Yes."

Professor Corradino: "He is compelled to go through this process without any counter complaint or any other constitutional rights he may have outside of the University."

Professor Green: "That is basically correct, but keep in mind that the unfavorable outcome of this process would be a finding of guilty by the Committee and then a sanction imposed by the dean. At that point, he could go to court and bring forth any kind of constitutional or contractual argument that he may have."

Professor Rabkin: "This is a very disturbing provision in the procedures as they stand now that supervisors and department heads have to inform the O.E.O. if they hear about sexual harassment and I think that is a very bad idea. This gossip can go through a chairman's office and he suddenly triggers a sexual harassment investigation. This is particularly troubling considering that the O.E.O is given the authority to go ahead even if the complainant doesn't."

"Two other quick things, there is no serious appeal here, the appeal provisions are bizarre. What happens is you appeal to the U.F.C., the U.F.C. says that decision was arbitrary and capricious, 'this was biased' and 'this didn't follow procedure,' and then you say to the very same Committee that found the person guilty of being biased and arbitrary and capricious, 'do it again,' and they do it again without any further review. So it is really sort of saying that wasn't nice, and would you reconsider being nice, and they say 'no,' and that is considered to be an appeal. That is not really a good thing and that is something that we ought to consider changing in the future."

"Finally, the last thing that is really bothering me, there isn't anything about confidentiality. We advertise to everyone in the process that the University does not and cannot guarantee confidentiality, which is making nonsense of several revisions."

Speaker Pollak: "The question has been called, can we have a second? We have a second. All those in favor of calling the question signify by raising your hand. All those opposed. O.K., we will vote on the motion."

"All those in favor of the motion, please signify by raising your hand. Remember that the motion is to accept and recommend to the Provost and the Board of Trustees the Sexual Harassment Policy that has been the topic of discussion for the last two meetings. Once again, all those in favor, please signify by raising your hand. All those opposed. The motion has carried."

Dean Stein: "I would just like to make two quick comments. First, I'd like to apologize to Professor Torng, I thought it was a piece of legal jargon that I learned and I didn't realize that it would be offensive to anyone. I thought that it was a reference to the Great Wall of China and it wasn't intended to be an offensive comment, but in any case, I won't use it again."

"Secondly, I'd like to ask you to thank the Committee. This was very long, very hard, very tiring work, they met meeting after meeting, and they did, I think, a magnificent job of addressing a large number of issues in a short period of time. I think we are all indebted for the work they have done. "

The meeting was adjourned at 5:35 pm.

Respectfully submitted,

Robert F. Lucey, Associate Dean and Secretary of the University Faculty