5. RESOLUTION FROM THE ACADEMIC FREEDOM AND PROFESSIONAL STATUS COMMITTEE REGARDING THE PROVOST'S PROPOSED SEXUAL HARASSMENT POLICY

Dean Stein: "I cannot recall the number of times I have stood before you to give the context on Sexual Harassment Procedures. This is complicated and a little bit hard to follow, so let me once again proceed. As of yesterday, we had a Sexual Harassment Policy that was put in place about a year and a half ago. Then, following that, this body submitted to the Provost an extensive set of proposed revisions to that policy. It has taken a year and half for the Provost to decide what to do with those suggestions that this body submitted to him. He proposed to modify those Senate recommendations in what many people on the Academic Freedom Committee felt was a very substantial way. The response to that intention was sent around to you in a motion from the Academic Freedom Committee. Then after that motion was sent around, there were subsequent discussions between the Provost and the Academic Freedom Committee that caused them to change what they and the UFC are bringing to you today. So according to Roberts’, what is before you is their original motion, which they intend to ask you to modify and then there is an additional amendment on the floor from Professor Norton which will ask for a further modification."

Speaker Pollak: "The order will be that Professor Strike will come down and present his original resolution and then the AFPS/UFC amendment and then Professor Norton will present her amendment."

Professor Ken Strike, Education, and Chair of the Committee on Academic Freedom and Professional Status of the Faculty: "I am apparently going to be the agent of the public flogging. But, I only brought my cat-of-two-tails along."

The original motion follows:

WHEREAS, a just and well-governed community must strive to eliminate all forms of unlawful discrimination and at the same time provide adjudicatory procedures that satisfy reasonable standards of process and fairness, and

WHEREAS, the Provost has shared with AFPS the sexual harassment policy he proposed to adopt, and has, after discussion with the AFPS, stated his intention to modify this policy in some measure in accordance with the proposals below, and

WHEREAS, the Senate finds that by narrowing the jurisdiction of the AFPS adjudicatory hearing, the Provost’s proposed policy -- which does not guarantee the charged the right to confront his or her accuser(s), the right to know and rebut the evidence for the charges brought, or the right to present evidence on his or her behalf -- does not guarantee fairness or process to a faculty member accused of sexual harassment, and

WHEREAS, the proposed policy affords significantly less fairness and process to a faculty member accused of sexual harassment than the July 1996 policy that it is proposed to replace, and

WHEREAS, the Senate understands and is sympathetic to the Provost’s desire to reduce inappropriate asymmetries between the fairness and process afforded to different segments of our community, and

WHEREAS, both subordinate-supervisory academic relationships and issues of academic freedom are unique to the academic staff, and

WHEREAS, the February 1997 Senate adopted recommendations were triggered by strong dissatisfaction with the current (July 1996) Sexual Harassment Policy expressed by the faculties of the College of Arts and Sciences and the Law School,

THEREFORE, BE IT RESOLVED THAT THE SENATE RESPECTFULLY REQUESTS THAT the procedures in the Provost’s proposed policy be redrafted to expand the fairness and process afforded to both academic and non-academic staff and to reduce the asymmetry between the two parallel procedures. The changes made should minimally provide every charged individual with a right to confront his or her accuser(s), a right to know and rebut the evidence for the charges brought, and a right to present evidence on his or her own behalf and,

THAT the jurisdiction of the AFPS adjudicatory hearing be broadened to include all allegations that arise out of the context of subordinate-supervisory academic relationships (e.g., teaching, advising, research, thesis, or dissertation
The history of this is that about three weeks ago, Provost Randel was good enough to share with the AFPS a proposed draft of the Sexual Harassment Policy. That draft in our judgment made one quite substantial change. In the policy that the Senate passed last year, every case in which faculty were charged with sexual harassment came before the AFPS for adjudication. Under the proposed cases, only those cases involving issues of academic freedom would come before the AFPS Committee. That is a fairly significant change considering the following three kinds of cases. One might be a case where a faculty member is accused of sexual harassment because of something that a faculty member says in a class where a faculty member is in the academic line of duty that is a quite controversial issue. Case two, might be a case where a faculty member is accused of harassing a student in the faculty member’s office. Case three might be the case where a faculty member is accused of harassing a secretary or other employee.

"Under the procedure the Senate passed last year, all three of those cases would end up before the AFPS Committee. Under the proposed policy, only the first of those would come before AFPS for adjudication. It is important to remember the alternative to coming before the AFPS Committee is that the adjudication of the event is conducted by the OEO. The procedure for the AFPS has a very high level of due process, whereas the OEO has a very low level of due process. The AFPS response to that which is the essence of the initial resolution was to ask for two things: first, we ask that cases involving what is referred to as subordinate-supervisory academic relationships come before the AFPS Committee. The second thing we ask is that the OEO procedures, which apply to everyone, be expanded to include three things: 1) the right to confront one’s accusers; 2) the right to know and rebut the evidence with respect to the charges brought; and 3) the right to present evidence on one’s behalf. None of those things was clearly provided for by the procedure at the OEO.

"Having introduced that resolution on May 8, a Sexual Harassment Procedure was promulgated by the University which includes two changes from the proposed policy. The first is that the adjudicatory jurisdiction of the AFPS Committee is expanded to include subordinate-supervisory academic relationships. The second change was that the OEO process was expanded to include the right to present evidence. We now have two changes that were made as a result of discussions that occurred between the proposed policy and the May 8 policy. However, there are two things that we asked for that we did not get. The first is the right to confront one’s accusers and the second is the right to know and rebut the evidence against one. After some discussion, the AFPS Committee is not of a single mind about the right to confront. We have included it in the resolution because we have a motion to amend and that will give the Senate the opportunity to discuss and decide. We are of a single mind about the right to know and rebut evidence presented against one. We believe that is a significant omission in the May 8 policy."

Speaker Pollak: "We have motion on the floor and an amendment and we will begin discussion of that."

Dean Stein: "I was just wondering if we could ask the body for unanimous consent to substitute the amended motion for the original motion since the situation has changed."

Speaker Pollak: "Is there any objection to that? Seeing none, so be it. Now we will discuss the motion."

Associate Professor David Wippman, Law School: "I have several concerns about the proposal and the policy we are being asked to follow. First, the policy was just issued on Friday and most people have not had a chance to read it, never mind even see it. Nonetheless, we are being asked to vote on a resolution that would change a policy that we haven’t even seen. That leads me to think that what maybe we ought to do is table this, but before I recommend that, I want to ask a clarification on two points. One is with respect to what you described about the inclusion of case two back into the jurisdiction of the AFPS Committee. That depends on how you read the language, ‘arising out of the nature of the supervisory relationship’. If you read that literally, no sexual harassment arises out of the nature of the relationship; it may arise out of the context, but not out of the nature. If you read it narrowly, nothing is included. If you read it broadly, it is not clear what is explicit. So I have a question about how it is likely to be
interpreted, what procedure is to be followed and what the understanding of the Committee is as to what the meaning of that phrase is. My third set of concerns relates to the OEO process. It seems to me that that process, or anything that does not fall within the jurisdiction of your Committee, is deficient in a number of respects, but perhaps the most important one is that it is entirely up to the discretion of the dean what the final outcome is. If the dean is a friend of the accused faculty member, he can go against the accused on that ground alone. Conversely, if the dean is hostile to that faculty member, I wouldn't be very comforted that the dean would make these decisions. There are no guidelines, no standards, no review of the dean's decision. It seems to be entirely up to the dean. I have a problem with the policy as a whole and with the procedure."

Professor Strike: "The first time I saw this, I believe, Monday, so none of us had a great deal of time to consider this. With respect to the language concerning the supervisory relationship, the original motion that the AFPS Committee proposed had, I believe, 'context,' and that was changed to 'nature.' We had a debate over what that meant, whether that was any clearer than 'context' and produced a reasonable range of possible interpretations. A view that was commonly voiced was that the word 'nature' was neither any more nor any less clear than the word 'context' was. What seemed to be significant was that it is the AFPS committee that gets to decide the meaning of the phrase. Because AFPS is first asked to decide whether or not the charged behavior falls under either academic freedom or an academic supervisory relationship, it seems that an essential principle is that the judgment of these matters belongs to the faculty. It seems that bringing this matter before the Academic Freedom Committee in a way that allows us to decide what this means preserves the essence of faculty control over this matter. Since both academic freedom and the phrase 'the nature of' is interpretable by the AFPS Committee. It is certainly possible that a subsequent Committee would define either of these phrases narrower than this Committee intended. That is certainly a possibility.

"On your third concern, I will speak only for myself, because we did not have extensive discussions about this as a Committee. But, we feel that this is a compromise. It is no one's ideal Sexual Harassment Policy, and in my view, we are reasonably close to a compromise that nobody likes but everybody can accept."

Speaker Pollak: "Before we go on with this discussion, we have an amendment to this resolution that needs to be discussed before we discuss the resolution.

"Professor Norton has asked for unanimous consent to apply this amendment to the new resolution. We had a resolution and the AFPS Committee proposed an amendment which the body unanimously consented to amend and replace the original resolution with the amended resolution. Professor Norton is now asking for unanimous consent to apply her amendment, which applies to the original resolution, to the new amended resolution."

Professor Mary Beth Norton: "If you look at the second motion, my amendment will remove the words, 'the right to confront his or her accusers' from essentially the penultimate line."

Speaker Pollak: "Is there a second to this amendment? The amendment is seconded."

Professor Norton: "As I considered this issue of confrontation in the light of my own experience with sexual harassment procedures, I thought to myself that the idea of a right to confront his or her accusers sounds pretty good, but is probably not going to be too good in practice. I move to delete those words from the resolution. Now I remind you that as Professor Strike just said, the language in this resolution only applies to the OEO procedure. It does not apply to the AFPS procedures, but rather to the earlier phase of sexual harassment investigations that happen at the OEO. The way that that is conducted is through the OEO with a faculty co-investigator that is appointed by the Nominations and Elections Committee.

"I think that the goal of a Sexual Harassment Procedure is to ultimately reduce the number of sexual harassments that occur at Cornell. In order to accomplish that goal, we need to have fair procedures, but we don't have to act like a court of law in order to be fair. I agree with the AFPS Committee that the charged party should be able to see a statement prepared by his or her accuser and should have the right to respond to whatever is said by the accuser. But, that does not necessarily mean that you have to respond in person. I think that the demands of fairness can be fulfilled by following a procedure that occurs in writing rather than a face-to-face confrontation. A confrontation would seem to me to require a mini-hearing, not just an inquiry by the OEO with a faculty co-investigator. The accused faculty member, in the academic setting as Professor Strike has just described, will indeed have the right to a full hearing before AFPS with lawyers, which is a part of this process that I oppose.

"What is to be gained by a confrontation at the level of the OEO investigation? My perception is that there is nothing to be gained and there is a lot to be lost. For one thing, one of the things that can be lost is the ability to resolve simple misunderstandings in a low-key fashion without the possibility of either side taking a position or saying things that they might later regret. If all of the exchanges take place in writing or through the vehicle of an OEO investigator, then you don’t have the possibility of things escalating out of control at an early stage. Also, without possibility of a face-to-face confrontation, this makes the process of filing a complaint far less emotionally fraught for a potential complainant. It does us no good and lays us open to multiple law suits if we design a procedure that appears to be designed to prevent complaints. I think that if we say that you can't file a complaint without a..."
face-to-face complaint, a lot of young people may be intimidated. I think that there is a prospect, with use of the OEO procedure, of complaints being successfully resolved confidentially and without publicity. Confrontation, to me, implies not only the presence of the accused and accuser, a hearing office, but also witnesses. In at least one of the sexual harassment cases that occurred under the Arts College procedures, multiple witnesses create a greater possibility of the charges being publicized because there are so many people involved.

"I arrived at this conclusion from my own personal experiences. As many of you know, I was involved in the Arts College procedures in a variety of ways. In one instance, a friend of mine was accused of racial harassment by a student and was very nervous about this and asked me to attend the interview by the OEO. In fact, the charge was based on a series of misunderstandings with a particular student. The OEO sorted it all out and cleared my friend. There was absolutely no confrontation necessary, and I think in that case, a confrontation would have detracted from resolving that issue.

"I would also like to say something about my own personal experience with sexual harassment. When I was an assistant professor, one of my senior colleagues in my department created what we today call a ‘hostile-working environment’ for me. There was no definition of sexual harassment at that time, there was no such term, and there was no procedure. I had no way to deal with this experience, except, to confront him directly, which is something I never did. I was in a position where I had a department chair whom I thought would be unsympathetic to any complaint that I raised about this senior colleague of mine. Eventually he stopped harassing me and then started on the second woman who was hired in the department, and he did the same thing. He created a hostile working environment for her, and subjected her to continuous sexual innuendo in her presence. She consulted me about what to do. I didn’t have a clue because I didn’t successfully deal with it either. Had this procedure, without a confrontation, been available to me, I might well have taken advantage of such a procedure. I know that I would not have wanted to confront him directly. To this day, I have not confronted him directly. He is still in the department, he is still my colleague, but he doesn’t do this to me anymore."

Dean Stein: "I don’t see how we can resolve this issue today in any kind of a sensible way. I don’t see any reason why this needs to be settled today. We can settle this next September, there is something more urgent, namely the resolution on the Division of Biological Sciences."

Speaker Pollak: "There is a motion to postpone this discussion until the September meeting. Is there any discussion on postponement."

Professor Rabkin: "I just want to say that I believe that the Provost has deliberately put this off so that it will die a thousand deaths. By next fall, everyone will be saying, ‘wait a minute, what was that sexual harassment issue three years ago, four years ago?’ At this point, we just have to accept it; there is nothing we can do about it now. I think it is really outrageous to have these continuous delaying tactics."

Professor Earle: "What about the possibility of having a special meeting next week?"

Dean Stein: "There are many options. I have given you one. This is a very complex issue. People are going to want to think about this and many other things. In my mind the best thing to do is to postpone it until September."

Speaker Pollak: "We have had a motion to call the question on postponement, and the motion has been seconded. We will now vote on calling the question. All those in favor, raise your hand. All those opposed. The question has been called. All those in favor of the postponement, signify by raising your hand. All those opposed. The motion has carried and we will resume this discussion in September.

"The next resolution will be presented by Professor Wilson. Professor Howland is unable to attend today."

6. RESOLUTION ON THE DIVISION OF BIOLOGICAL SCIENCES

Professor David Wilson, Biochemistry, Molecular and Cell Biology: "The resolution is very straightforward and short. It is very simple and I don’t even think I need to speak about it. If anyone objects to it, I would like to know."

Professor Peter Schwartz, Textiles and Apparel: "I actually don’t oppose it. I find it extremely vague as to when enough is enough. Having spent a year on the Senate where enough never seems to be enough, I’d like to try to get some specificity about when enough is enough or when a decision is made, whichever way it goes, you’ll consider it a final decision."

Professor Wilson: "A process has started where we have outside experts coming in to review the Division. We’d like to make sure that is completed before a decision is made and that is the main impetus behind this motion. The Provost has already committed to that. So, in some ways, this is unnecessary, but I think it would still be useful and important to have the Senate’s endorsement of
6. CONTINUED DISCUSSION OF SEXUAL HARASSMENT PROCEDURES

Assistant Professor Melissa Hines, Chemistry and Chemical Biology, and Chair, Academic Freedom and Professional Status Committee: "I've been asked to review with you what's going on with the Sexual Harassment Policy. And as
many of you know, the Sexual Harassment Policy has a long and sordid history. But what we're interested in today is a
tale that starts in the middle of last semester, when the Provost shared with the AFPS his draft policy on sexual
harrassment. And let me just focus on what this policy is so that you know what we're talking about (Appendix C).
When a charge of sexual harassment is brought forth, the first step is to try to get both the parties involved in
mediation. And if they agree to that, that's obviously the best thing to happen. If either one of the parties does not
agree to mediation, then the charges are brought to the Office of Equal Opportunity, the OEO. At that point, the OEO
starts an investigation that is designed to be a relatively informal proceeding and relatively non-confrontational. After
this investigation, the OEO determines whether or not there was sexual harassment and recommends a sanction if
there was a problem.

"At the end of this investigation, there are four possible things that can happen. First, the OEO can find that there is no
cause, and the problem goes away, hopefully. Second, the OEO can find that there was sexual harassment, and he or
she can recommend sanctions, and if the finding is uncontested, this goes to the Dean of the college, who will then
impose the sanctions. If the finding is contested, things get a little more complicated. If the finding is contested and
the allegations were brought against a faculty member, and the allegation involves a matter of academic freedom, then
the matter is referred to the AFPS committee for a completely new investigation. This investigation in not informal
proceeding and has a high level of due process built into it, although it can be a little less informal if everyone agrees.
And at the end of this investigation, there may be a new ruling to determine guilt or innocence. In all other cases, if
the charges do not involve faculty or academic freedom, and the finding of the OEO is contested, the finding goes to
the Dean of the college who will then review the evidence, review the determination, and review the sanctions and
make a judgment and possibly modify either the sanctions or the findings.

"So this policy was given to the AFPS for review and upon reviewing it, we determined that this policy has
insufficient due process and there is a significant potential for an unfair hearing for someone who is accused of sexual
harassment. And the problem, we find, lies in this center step, the investigation by the OEO. In making this a very
informal proceeding, we find that there is not enough due process and that the accused will not necessarily be heard.
Because of this, the AFPS decided to bring to you a motion to amend this proposed sexual harassment policy. So we
proposed a motion to you at the end of last term (Appendix D). The original motion asked, really, two things. First we
asked for expanded due process for all individuals, this will be in the OEO investigation. And we said this should
minimally include three things: the right to present evidence, the right to know and rebut evidence for the charges brought,
and the right to confront your accuser. Now the last one was a little bit contentious, but let me give you an idea of
why we thought it was important to be able to confront your accusers. One place where this could be important is if
the person making the accusations makes statements that are factually correct, but deliberately misleading. It will be
very hard to defend against those types of accusations unless you can directly confront the person or actually talk to
them. And so because of that, we thought it was important to be able to confront your accuser to set things straight.
And this will also help the accused if someone is giving deliberately misleading statements. The other thing we asked
is that the AFPS have expanded jurisdiction in matters of sexual harassment and that all allegations that arise out of
the context of subordinate/superior academic relationships go to the AFPS for the appeal. In the time between when
we proposed this motion to the Senate and the Senate actually met, the Provost modified his recommendation/policy.
So there is now a right to present evidence and he also expanded the AFPS jurisdiction. So the only thing that is left
before the Senate now is the right to rebut evidence and the right to confront your accuser, which brings us to the
proposal that the AFPS has made. We are requesting that the policy be redrafted to expand the fairness and process
afforded to both academic and non-academic staff and these changes made should provide every charged individual
with the right confront his or her accusers and the right to rebut the evidence for the charges brought. So that is what is
facing the Senate today.

Speaker Pollak: "Before we discuss this component, we do have an amendment that is on the floor, it was postponed
from the last meeting. If you go to page five on the handout, there is an amendment by Professor Norton, and if you
have the handout, it is to remove the words 'right to confront his or her accuser.' Okay? Would Professor Norton
please repeat it?"

Mary Beth Norton, Mary Donlon Alger Professor of American History: "I'm not going to bore the Senate by repeating
my speech from the spring, because you can read it in the minutes. The amendment, which simply strikes the words,
'with a right to confront his or her accusers and', so that the resolution would read, 'The changes made should provide
every individual with a right to know and rebut evidence for the charges brought.' Since the minutes were put up on
the web, a lot has happened in connection with this meeting, and I'm not going to repeat my impassioned speech that I
gave in the spring, I merely will reiterate the two main points I made at that time. The first is that, in my opinion, fairness does not require confrontation. I do think that fairness does require the right to see and rebut the evidence, but it seems to me that that can entirely well be done in writing. It does not have to be done with physical confrontation because the purpose that Professor Hines said in reintroducing this amendment can fully be met by exchanges in writing. It does not have to be met by exchanges in person, and secondly, it strikes me that confrontation can, in fact, especially at the stage of the proceedings that we're talking about, that is still at the time of the OEO investigation, actually work against fairness, in particular work against the fairness on behalf of the accusing party since the notion that someone, let's say a student, the classic case that we're talking about an undergraduate student, charging a senior professor with sexual harassment, such a student might very well be put off from filing a complaint knowing that a personal confrontation would have to occur at an early stage, that is if the professor rejected the idea of mediation, which is entirely possible. I think that, as everyone who was in this body knows, I'm also opposed to the very high level of due process in the presence of gazillions of lawyers in the final stage of the AFPS proceedings. However, the body voted me down when I proposed we remove that, and that's fine. But I do not think that we do have to have a physical or in person confrontation of an accused party and an accuser at the stage of the OEO investigation. I think fairness can be completely met by doing everything in writing."

Speaker Pollak: "Okay, just so we're clear, it's this section right here. The change in the amendment is to remove it from the motion. We have to resolve this before we can go on. So are there any discussion relative to this. I'd like to point out one thing that I've been asked to do and that it to as we go to each new amendment, to give each of you an opportunity to speak once, and if there are others who need to speak again, we'll have to come back to you if, in fact, you have facts being requested. So remember that, that when you get up to speak, to say what you mean to say."

Professor Rabkin: "I just want to say that this would be fine if the Provost had done what we asked him to do. In that context that would be fine if the OEO had just a screening role, but since for some unknown proportion of the cases, the OEO will effectively be making the final decision here, I think it is wrong for us to say that someone can be convicted without ever having the chance to confront the accuser. And in particular, I want to say that reducing this to writing is not a very reliable safeguard, because you are talking about an informal procedure in which the accuser may write it in the most cursory way, just a few lines, the OEO then has an interview in which the OEO gathers a lot of impressions and details, and that is not given to the accused. The accused is just told, 'well, you've just been accused in a general way.' How can you respond to that if you don't have any kind of detail down? If you strike this line here about confronting the accuser, what you'll be left with is that the OEO should just say something and that you make any response you can and that is surely not an adequate due process."

Speaker Pollak: "Any comments? Yes."

Professor Katherine Stone, Law: "I just want to clear up what might be a little misleading in the presentation of last spring that Mary Beth gave and a little bit of what I heard today in the notion of what it means to have the right to confront, because last spring there was the notion that the right to confront was an adversarial thing, that there would be anger involved, that it would be an aggressive thing. I just want to say that the notion of the right to confront is more like a term of art, it has nothing to do with anger or raised voices. It has to do with the right to hear what someone has to say and to ask questions about it. And I think that if you understand the right to confront that way, it takes away some of the intimidation."

Speaker Pollak: "Yes."

Professor Richard Galik, Physics: "I also would like to say that when you do things by writing, back and forth, back and forth, it is going to take a long period of time, someone who has been accused, perhaps unjustly, in some cases, can have this hanging over their heads for, perhaps, an entire semester. Where meeting face-to-face with the person and asking questions can resolve the matter in perhaps one session. I think that it would be more appropriate and better for the parties involved to have it done with in a meeting rather than by letter."

Professor Judith Reppy, Science & Technology Studies: "I'd just like to ask a question. Has this procedure been tried? Have people had experience with it? Or have we been debating and that's it?"

Speaker Pollak: "This is a resolution that we're going to be voting on, do you mean in other institutions?"
Professor Reppy: "Yeah, I mean what is the current situation?"

Professor Hines: "The current policy was adopted on May 8th, so I don't know if there has been any. . ." 

Professor Reppy: "Is this formally Cornell's policy or has it yet to be invoked?"

Professor Hines: "I don't know if there has been sexual harassment since May 8th. There could have been."

Speaker Pollak: "Peter?"

Professor Peter Stein, Physics: "This is a little complicated, but this part of the policy has been Cornell's policy for three years and it has not been Cornell's policy involving faculty members, but it's been Cornell's policy involving staff members, and my understanding is that there have been a slew of cases involving staff members that have come before this committee and that the right to confront was not a part of that procedure. I have no knowledge as to how satisfactorily is has worked, but I think there have been a lot of cases in that three-year period that did not have this right to confront. Not involving faculty."

Speaker Pollak: "Other comments?"

Professor Peter Schwartz, Textiles and Apparel: "I have a question about the right to confront. Your point was taken. Who determines in what format the right to confront is? Can you confront by writing back and forth? Can the OEO say that the confrontation shall be by writing back and forth? It doesn't have to be face to face? It seems to me that if 'confrontation' is broadly defined as asking questions and getting responses to questions, then it can go either way in whatever format is up to whom?"

Professor Hines: "I don't actually know what the legal definition of 'confront' is but. . ."

Professor Stone: "Yes, the right to confront means the right to be in the room, hear what the person says, and ask questions. So that I think is what the amendment raises is do we want to have that as part of the process or not? And I'm suggesting that, although some may think that it is automatically intimidating, I don't think that it necessarily is and often, it's not intimidating it just simply saying to someone, 'You said such and such happened, when did it happen?' or something like that. Just a simple questioning of what the accusation is in a face-to-face setting."

Speaker Pollak: "Yes?"

Professor Risa Lieberwitz, Industrial and Labor Relations: "I think that the point about the problem with those who don't get a hearing is a good one. That if there were full hearings for all faculty and all staff, at a later time, then the right to confront would not be an issue in the investigation. I think that's correct, but it raises another issue, which is does one correct that problem by including a right to confront in an investigation. And that's where I have a problem with it because most investigations don't include a right to confront in an investigatory process. So it seems to me that that's the problem with putting it in here. That we get to a hearing for everybody, not the right to confront in an investigation. Also I have a question. Now this says nothing about the OEO procedures, so I was wondering if that's clear to everyone. I mean it is in the minutes, certainly, but those who drafted the resolution didn't include that and was it intended to be only in the OEO procedures?"

Speaker Pollak: "Peter?"

Professor Stein: "Yeah, the right to confront is well-established in the Academic Freedom Committee procedures. But this refers to the OEO hearings. I mean most of us non-lawyers didn't know about these things, but we've all had an education in the past six months and we know that President Clinton did not have the right to confront Monica Lewinsky because that was a grand jury proceeding and in a grand jury proceeding, you don't have the right to confront, but if there were to be a trial, if he was indicted, then he would have the right to confront. And the problem with this is that the OEO hearing is sort of like a grand jury in some cases and in other cases, it's sort of like a hearing. And that's what makes the confusion."

Speaker Pollak: "Do you have another question?"
Professor Lieberwitz: "Well, it sort of follows that. If I could read this as a general resolution that says that the procedures should include for everybody these rights, then I can support it as it is without it being specific to the OEO; it says nothing about the OEO investigation. It's been spoken about that way, but I certainly think that the staff who are not going to be given a hearing should have a hearing and that it could be worded that way."

Professor Hines: "Let me respond to this. When the AFPS was given the Provost's draft policy, it was decided at that point that we would not try to rewrite paragraph-by-paragraph but instead to make some statement about the policy that we thought had to be taken care of. So that's why we didn't say, 'In the OEO investigation, we want to have these three rights.' But the AFPS thinks that in some form, everyone needs to have these three rights at some point in either the initial investigation or later on, and the only place to put it the way things stand now is to put it in the OEO investigation, because the Dean does not make a new investigation, the Dean just reviews evidence. And so the only place it can go the way it is now is to put it there, but the AFPS did not say that's the only place we can live with, as long as everyone gets this."

Speaker Pollak: "Any other comments on this?"

Professor Subrata Mukherjee, Theoretical and Applied Mechanics: "As a non-lawyer I feel it's a good idea. I mean sometimes they will be in that position based on some misunderstanding, and face-to-face seems better than written."

Speaker Pollak: "Very briefly, does anyone have a response?"

Professor Rabkin: "I'm in complete agreement with Professor Lieberwitz. I don't read this as saying that it has to be in the OEO proceeding and my hope is that the Provost retains this and say, 'Okay let's have, if not the Academic Freedom Committee, then some other committee conduct an adjudication if it comes to that. I don't think there's anything that says the OEO investigation has to have it, just somewhere it should be done."

Speaker Pollak: "Okay, are you ready for the question? Okay, all those in favor of the amendment signify. . .the amendment to delete this sentence, 'the right to confront his or her accuser and.' All those in favor of that deletion should signify by raising their hand. All of those opposed. Okay, the amendment is defeated. We do have a second amendment that was circulated by two of the Senators and Peter will discuss this was. This was on a handout you should have picked up from the front."

Professor Stein: "I wonder if I can get Melissa's transparencies? I fear you will think this the equivalent of angels dancing in the head of a pin, but I'd like to convince you that this amendment that I am proposing along with Professor Schwab from the Law School is, in fact, necessary to correct what I think is a serious problem in this procedure. Let me give you a little bit more of the history. The Provost's original draft policy on sexual harassment came from something that was adopted by this body a long time ago -- a year an a half or two years ago -- and the Provost did not take the whole policy that was presented to him by this body. He made a number of changes in it, but to my mind there was really only one significant change. One important change, and that important change was to put in this particular path here. That the way this body drafted its recommendation to him is that all investigations against the faculty member would be heard by the Academic Freedom Committee. But the Provost added a sentence which put a switch in here and the switch was that some charges would get heard by AFPS and some charges would not get heard by AFPS. And that was a contentious decision. I'm not talking about the wisdom or lack of wisdom in putting in a switch.

"What I want to talk about is the way the switch is defined, the words that are used to define the switch. So let me tell you what, from the point of the Provost, he was trying to do. One can divide the charges of sexual harassment that are made against a faculty member into three broad categories and the three broad categories are this, first is the academic freedom category where a professor like the professor at the University of New Hampshire who made an unfortunate simile about what writing a term paper was like and was accused of sexual harassment. He was fired, he then came back and sued the university, and it was decided that that fell within his Academic Freedom. That a professor has the right to make a simile in a classroom without being charged with sexual harassment. So that's that case. Then there's a second case, and the second case is that a professor does something personal against one student and is accused of sexual harassment and, presumably, the professor says, 'No, I didn't do that; it wasn't sexual harassment.' The student says, 'Yes, it was sexual harassment.' That's the second class. And the third class is something that has essentially nothing to do with the University where we not only have relationships
with students, we have relationships with staff, just like any other corporation in America, and the question that the Provost asked was, 'Well, if a professor hits on a secretary, should that professor be treated differently than a vice president who hits on a secretary? Are those really not the same thing?' So what he said he wanted to do was to make the professor that hits on the secretary follow the same procedures as any other staff member that hits on another staff member. So the idea was that this, the cases that involve either academic freedom, or that arise out of the interaction with a student, would be diverted to this new Academic Freedom Committee procedure, which has, as Mary Beth pointed out, oodles and oodles of process on it. On the other hand, if it was the hitting on the secretary, it would go to this procedure which has considerably less due process than the famous Arts College procedures which has brought us to talk about this for 2 1/2 years. Is that clear to everyone?

"Now the question that I want to raise is how to write the words. The Provost in writing these words used the following phrase, he said that if the conduct arose out of the 'nature of the subordinate/supervisory academic relationship, or was protected by academic freedom,' then it went over here and everything else went over there. Now it was curious that in writing that particular phrase, the Provost took a phrase from another part of the document and transposed it except he changed a word. In the other part of the document, the word was 'context', and he changed it to 'nature'. And in the day that this was brought up people wondered if there was a difference between nature and context. Wasn't nature the same as context? The committee decided that it was okay, that nature and context meant the same thing. I was personally uncomfortable with that word, but I didn't know why, and then at the Senate meeting, with a great laser light of insight, Professor Whitman of the Law School, and this was in the minutes, if you read it, said something that I found very convincing. He said, 'Well you can't have sexual harassment arising out of the nature of the academic supervisory relationship, because the nature of the academic supervisory relationship is such that you must not sexually harass a student.' Now can you make the same argument about context? The answer is no, you can do bad things in the context of something. You can say the President's actions against Monica Lewinsky might have been in the context of his being the President, but they certainly didn't arise out of the nature of the responsibilities as President.

"So then I started to think about this after the last meeting and I realized that part of my concern was answered by the fact that the Academic Freedom Committee will decide for itself whether it has this jurisdiction or not. But I don't think that the Academic Freedom Committee with whom I worked with for 5 years would be sloppy. They would look at the words and they would say, 'What do they mean?' And they would try to interpret them. Now to explain the problem, let me take a case, and it's a case that affected my thinking a lot. The case is one that happened to an assistant professor of mathematics at Yale. He was a very promising young mathematician, who was an excellent teacher at Yale and he either did or didn't have an affair with a student in his elementary calculus class. And he said that he didn't and she said that he did. And it was investigated by an administrator, because they don't have these investigation proceedings at Yale. And the administrator looked at it, and heard both sides, and decided that he really didn't know, but he rather thought that the evidence favored the fact that the professor did have a relationship with this female student and that he was modestly guilty of sexual harassment and he gave him a very minor penalty. But this very minor penalty totally destroyed this person's career. He couldn't get a job any place, but he went on to make a million dollars in the stock market writing up new instruments or something like that.

"Anyway, let's rerun that case through the Cornell procedure. So it comes up and the Academic Freedom Committee, the first thing they have to decide is do they have jurisdiction? So they have to ask themselves if this rises out of the nature of the supervisory academic relationship and they think about this and they say that it depends on what the facts are. If the facts are as the female student says that they are, namely that he abused this relationship and seduced her, then surely that is contrary to what we think is the nature of the supervisory academic relationship. If, on the other hand, if it went on like he said, namely that he wasn't doing that, he was just explaining how to differentiate to her, he was just a professor trying as hard as he could to establish a personal, caring relationship with a student, like we're all told we're supposed to do, then this entirely arose out of the nature. So it's clear to me that the question of jurisdiction is precisely the same as the question of guilt or innocence. If he's guilty, then they have no jurisdiction, if he's innocent then they have jurisdiction. But how can they establish jurisdiction without deciding the guilt? It's like a Catch-22 because they can't decide if they'll hear the case unless they hear the case and hear the evidence. So what does the committee do? You make a tentative judgment. So here is the OEO who is investigating this case, and they are professionals and the director is faculty member of the Law School, but the OEO decides that it did not arise out of the nature because they think that he is guilty of sexual harassment. The OEO has presented an indictment and the Committee says, 'Well, what do we know? I mean we have to take someone's version of the facts in order to find out whether we have jurisdiction, so let's take the OEO's version because they looked into it.' Now as soon as they take
OEO's version, it's a self-fulfilling prophecy because they have no jurisdiction whereupon this OEO charge immediately becomes a charge of guilt. So that if the committee were to always take tentatively the OEO's charge as indicating that sexual harassment took place, they would never have jurisdiction. Now, therefore, it seems to me that the only thing one could possibly do was to have the committee say, for the purpose of establishing jurisdiction, they should take, as given, the version of the facts as presented by the charged party. Only to decide whether to hear the case or not, not to decide guilt or innocence. Otherwise, it's like a flip of the coin, or worse yet, a self-fulfilling prophecy. So the purpose of the motion is to establish, in the calm of the day, before we are in the midst of a high profile case, a procedure. . ."  

Professor Rabkin: "How is this germane to the main motion? The main motion is giving advice to the Provost this is giving advice to somebody altogether unrelated."  

Professor Stein: "The germaness, I believe is sexual harassment, it is germane certainly by the rules of the house of representatives it is germane."  

Dean Cooke: "This question was asked of the University Faculty Committee and it was decided that it was relevant and it would be an appropriate amendment. The thing that was distributed did not say where it would be intended to the motion before us, but the UFC did decide that it was relevant, and it will be treated as an amendment."  

Professor Stein: "Let's just say 'Be it resolved' in front..."  

Dean Cooke: "You need to say where you're going to attach it."  

Professor Stein: "At the end of it, 'Be it further resolved."  

Speaker Pollak: "Yes?"  

Professor Elizabeth D. Earle, Plant Breeding: "I would just like to ask the question of whether the problem that Peter has identified could also be solved by changing the word 'nature' to 'context'? Since the context would cover many of these problematic cases, whereas having the word 'nature' does lead to the Catch-22 argument that Peter was presenting?"  

Speaker Pollak: "Okay, the question is whether or not the change of that word has the same intent?"  

Professor Stein: "Yes, it would, except that this body can advise the Academic Freedom Committee without going through the Provost. We don't have the power to change the word 'nature' to 'context.' I believe it would have the same effect, and this is something we can do and changing that word is something we cannot do. I've raised this with the Provost, and he doesn't agree. Now that's on the word 'nature.'"  

Professor Rabkin: "I'm somewhat sympathetic to this."  

Professor Stein: "I have won a great victory."  

Professor Rabkin: "If we're working with the Provost's plan, then this is a sensible improvement. The two things that bother me are: First, I don't understand why the former Dean of the Faculty is rushing forth to accommodate the Provost to say 'let me help you clean up your plan,' instead of saying, 'why did you put in this plan all of a sudden?' And I don't understand why we still use this obsequious language of, 'we respectfully recommend...'. I mean, it's our committee why can't we direct them? I mean, could you at least accept as a friendly amendment, call upon, rather than respectfully recommend?"  

Professor Keith Dennis, Mathematics: "Unfortunately I haven't had the pleasure of hearing earlier discussions of this, so I'd like to ask a question. Who, I don't understand on the original plan, who determines the switch? Who picks which place things go?"  

Professor Stein: "The Committee."  

Professor Dennis: "Which committee?"
Professor Hines: "I believe the people who decide this are the AFPS Committee. This was discussed in the AFPS and we decided that, in all likelihood, it looked like we got to decide what was going on. . ."

Professor Dennis: "When do you do that?"

Professor Hines: "Whether we would hear the appeal or not and since we got to decide whether we would hear the appeal or not, we would act as reasonable people and make this determination. So, personally, I don't see the problem that Peter does, because I think that we would all say, 'We really should hear this case from Mathematics,' but there's no harm in clearing it up either."

Speaker Pollak: "Okay, if there's, okay?"

Associate Professor Walter Mebane, Government: "I just have one question so that I can understand exactly what this amendment is going to do. There's language quoted on one of these handouts, Relevant Provisions of the Sexual Harassment Policy. Do I understand correctly that the changes would be of the nature, sorry, in the second paragraph it says, 'The committee must make a determination of whether the complaint presents an issue of academic freedom.' ‘Faculty’ expanded to include, ‘arising out of the nature or academic freedom’ and in the next paragraph you would take away the discretion of the committee by meaning that a majority vote does not longer occur to determine, but if that the charged party asserted that this was the defense, the committee would be obliged to proceed regardless of having discretion over that? Is that what this change would do?"

Speaker Pollak: "Okay, you want to answer that?"

Professor Stein: "This change, we cannot change this language, this is the Provost's language and this body by itself cannot change that language. So the Provost gave to the Committee the discretion to make the jurisdiction decision for itself, so this motion advises that Committee, respectfully -- I'm sorry -- advises this Committee how to -- a procedure to use in order to make that jurisdictional decision on whether or not they will hear the case."

Speaker Pollak: "Okay?"

Assistant Professor Rebecca Schneider, Theatre, Film and Dance, Senator-at-Large: "This is a question for Peter, I mean, it happens that I was not here last spring when this was being discussed. Is there any reason why the Senate couldn't recommend to the Provost, as a whole, not a specific person, but everybody to change the language, or even simpler would be to take out the whole thing and say, as obvious subordinates, remove nature and context altogether?"

Speaker Pollak: "Do you want to answer that?"

Professor Stein: "Yeah, well, the Senate can do whatever it wants, I mean the Senate can tell the Provost that it wants to drop the whole thing, but if you want to know what I think, I think that this will engage in a rather lengthy discussion back and forth, and that passing this amendment, this amendment that I suggest to you, will accomplish the same goal with less friction than it will to ask the Provost to change the wording once again."

Speaker Pollak: "Are you ready to vote? Okay, all those in favor of the amendment signify by raising your hand, all of those opposed? The amendment carries.

The Senate respectfully recommends to the Committee on Academic Freedom and Professional Status of the Faculty that, in carrying out its responsibilities under the Sexual Harassment Policy in those cases where matters of fact are in dispute, it follow the following procedures:

- a. The Committee has jurisdiction of a case when, in the judgment of the Committee based on the charged party’s written request, the charged party’s version of the facts leads to a reasonable conclusion that the charged party’s conduct arose out of the nature of a subordinate-supervisory academic relationship (e.g., teaching, advising, research, thesis or dissertation supervision) or that an issue of academic freedom was involved.
b. Once the Committee accepts jurisdiction under (a), it shall exercise jurisdiction until the case is fully resolved on its merits, even if the Committee ultimately concludes that the faculty member's conduct was not appropriate to a subordinate-supervisory academic relationship or protected by academic freedom.

"Now we've worked our way back to . . . Is there any discussion on this? Yes?"

Professor Rabkin: "Let's just get this on record, is it our expectation that we will receive a response to this this year? Whoever else could tell us, will we have a response to this this year?"

Speaker Pollak: "We will optimistically go forward this year, other discussion?"

Professor David Wilson, Biochemistry, Molecular and Cell Biology: "I'd like to speak against the motion. I just find it really distressing that this faculty finds it so essential to preserve the right to harass, and quite honestly I really think that's we are doing by setting up these procedures that are so discomforting to someone who brings up charges and to have to face a senior professor with all the faculty falling behind. We know that many, many women are not prepared to do this and I really think that there's plenty of action in the proposal the Provost has made, he's bent over backwards to do things for this body, change after change after change, and then we always come back and say its not enough and I personally think that this should be called the Harasser Protector Act and I definitely oppose it."

Speaker Pollak: "Other comments? Seeing none, we'll go head and move to the vote. All of those in favor of the resolution signify by raising your hand, all of those opposed. The resolution carries."

WHEREAS, a just and well-governed community must strive to eliminate all forms of unlawful discrimination and at the same time provide adjudicatory procedures that satisfy reasonable standards of process and fairness,

THEREFORE, BE IT RESOLVED THAT THE SENATE RESPECTFULLY REQUESTS THAT the procedures in the policy be redrafted to expand the fairness and process afforded to both academic and non-academic staff. The changes made should provide every charged individual with a right to confront his or her accuser(s) and a right to know and rebut the evidence for the charges brought.