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Minutes of the Regular Meeting of the Academic Council

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April 27, 2000

Corrections to the Minutes of March 23, 2000; due to the poor quality of the tape recording of the proceedings the following corrections need to be made:

p. 11 (Barbara Shaw): replace lines 4, 5 with ". . . and what financial commitments are made by the Provost and Trinity College . . . ; And are there "specific funds or faculty positions that the Med. School and Provost are committing?" p. 22, line 1 (Jim Clack): add "[We are]" describing alcohol. . ." ; p. 24, line 3 (Joanne Wilson): change text to read "and because of my interaction with them I have some knowledge about college students. . ." ". . . a lot of the students is that in order to have a good time ..." line 10: "Both of my kids talk about students coming to college, this isn't ..." p. 25, line 10 (Denman- Vitale) : change "that don't end" to read "that can end ..."

The Academic Council met in regular monthly session on April 27, 2000 from 3:45 p.m. to 5:30 p.m. in 139 Social Science Building with Professor **Robert Mosteller** (Law) presiding.

MINUTES, ANNOUNCEMENTS

With the above corrections, the Minutes of the meeting of March 23, 2000 were **approved** by acclamation as submitted.

Before turning to the agenda proper, Chairman **Mosteller** invited all present to a reception following the meeting for the newly elected Council members in the Rare Book Room of Perkins Library. He then announced that there would be several items on the day's agenda to be voted on, first among them the replacement of the following individuals who are going off the Executive Committee (ECAC) who have completed terms: Craig **Henriquez** of Biomedical Engineering, Randy **Kramer**, Nicholas School of the Environment, Steve **Nowicki**, Zoology, and Ann Marie **Rasmussen**, Germanic Languages and Literature. The bylaws require ECAC to prepare two slates of candidates. The bylaws also indicate that additional slates can be nominated from the floor. There being none, the Chair introduced pairs of candidates for each position: Ann Marie Rasmussen, just completing a one year term and thus eligible to be reelected and Louise **Roth** of Zoology and Biological Anthropology. Robert **Clark** of Mechanical Engineering and Materials Science and then Robert **Hochmuth** of Mechanical Engineering and Materials Science and Biomedical Engineering; Craufurd **Goodwin** of Economics and Sunny **Ladd** of Public Policy and finally John **McCann** of the Fuqua School

and Richard **Schmalbeck** of the Law School.

Next, in a small departure from the order shown on the agenda, Professor **Mosteller** took up the issue of the ombudsman appointment. He informed Council that Carl **Anderson**, who has been our Ombudsman for the past twelve years, wished not to be reelected. ECAC went through a process of soliciting names and received several nominations. Two excellent candidates were interviewed. Dr. Paul **Killenberg** was selected. Dr. Killenberg is a member of the Division of Gastroenterology in the Department of Medicine. He has served in the Medical Center on the Institutional Review Board, Second Year Curriculum Committee, and Clinical Chemistry Advisory Committee. Within the Department of Medicine, he's served on the Grading Committee, and the Appointment and Tenure committee. The **Chair** thanked Dr. Killenberg for being present. The bylaws indicate that the Academic Council is to appoint this individual. ECAC interviewed two candidates, Mel Shimm (Law), and Paul Killenberg (Medicine). We agreed that the university would be well served by either. After careful consideration we are bringing forward the name of Dr. Killenberg for Council's approval. Although the bylaws do not specify an election, the chair asked for formal acceptance of ECAC's candidate. Although the bylaws do not specify an election, he entertained a motion for acceptance of ECAC's candidate. Dr. Killenberg was **approved** unanimously by voice vote for an initial two-year period. The Chair predicted that he will serve the institution well. He's going to remain active as a doctor, but on a part-time schedule, so he will remain an active member of the community.

CREATION OF A DEPARTMENT OF BIOSTATISTICS AND BIOINFORMATICS

The matter which, in accordance with Council procedures had been deemed a two-meeting item because of its importance, was now ready to be voted on. The Chair read out the following Resolution:

WHEREAS, the School of Medicine, through its Executive Committee and through Dean Edward W. Holmes, has proposed the establishment of a new Department of Biostatistics and Bioinformatics; and

WHEREAS, the proposal has the endorsement of the Academic Priorities Committee and the support of the Provost Peter Lange; and

WHEREAS, the Academic Council Executive Committee, finding the review process to be sound and the proposal well-documented, recommends approval;

BE IT RESOLVED, that the Academic Council endorses the establishment of a Department of Biostatistics and Bioinformatics.

The Resolution was **approved** by acclamation.

VOTE ON SELECTIONS IN FACULTY SCHOLARS COMMITTEE REPORT

After reminding his audience that the Faculty Scholar Awards are among the highest honors the faculty can bestow on selected undergraduate students, the Chair announced that Professor Benjamin **Ward**, the Chair of the Faculty Scholars Committee, could not be present. The Chair then introduced the names of the honorees and asked for members' approval.

The undergraduates and their respective majors are David Matthew **Baugh** (Program II, International Health and Development), Heather Lynn **Hartig** (Biology), Brian Gary **Skotko** (Biological Anthropology and Anatomy), Anil Someswar **Vedula** (Physics and Mathematics). Those are the four proposed winners. For honorable mention, the nominees are Michael James **Colsher**, Mathematics and Environmental Science and Policy, David Henning **Plylar** Program II, Music Composition and Performance. Ben Ward has also asked him to thank his committee members, Carol **Eckerman**, Psychology (Experimental), Jan **Ewald**, History, and George **Truskey**, Biomedical Engineering.

Before voting on the list of candidates, the Chair alerted members to an issue that had arisen this year and in past years about whether there is a way for someone who is out of the country to be able to stand for this award without an on campus interview. EACAC is working to find a resolution and hopes to report to the Council; early in the fall. In answer to a question by Professor **Rowe** concerning honorable mentions, he explained that there is a certificate given to the honorable mentions. They are photographed and honored with the winners. Hence 'honorable mention' is an award, at least in theory. The amount of the Award itself is \$ 500 and also the recognition of being a Faculty Scholar. A motion to accept the list of nominees was made and seconded and **approved** by voice vote.

PROPOSAL TO CREATE A GRADUATE PROGRAM IN BIOLOGY

Because of a time conflict, item 8 of the agenda was taken up ahead of item 7. The Chair called on the Dean of the Graduate School Lew **Siegel** and William **Morris**, Professor of Zoology to introduce the matter for discussion at this meeting. A vote on a resolution to establish such a program will be taken at the next Council session.

Dean **Siegel** explained the background to the proposal as follows: As you know earlier this year a proposal came before you to merge the departments of Botany and Zoology into a single department of Biology in the School of Arts and Sciences. That was done and approved by the trustees. And then it followed that there would be considerations of how to merge their educational programs. There then followed several months of discussions led by the Executive Committee of the Graduate Faculty on how to merge the Ph.D. programs of Botany and Zoology into a single Ph.D. program in Biology. This is not an issue that seems to be terribly

controversial at all. There were issues though of how to merge two very good Ph.D. training programs with excellent records of placement and training students, but somewhat different ways of doing it and how to get the faculty to agree on common mechanism so that when students came in they would know that there was an administrative structure and a set of rules they can go by. The Executive Committee worked with Bill Morris and Jim Clark, Directors of Graduate Studies in Zoology and Botany respectively and their faculty. Having agreed upon a structure to the program you see that in front of you, there are still some issues of administration that remain to be decided, but we felt that it was appropriate at this time to approve the degree. The Graduate School brings forward to you the recommendation that there be now a merged Ph.D. program in Biology to replace the existing Ph.D. program in Botany and Zoology. That means that current students in Botany and Zoology will have the choice of getting their Ph.D. degrees either in the program that they entered or the Ph.D. in Biology. But the administrative structure and the rules will quickly move to a common structure so that we can manage the program that will have between 100 and 120 Ph.D. students. So to talk about the program in more detail and answer any questions I give you Bill Morris.

Professor **Morris** stressed that the main challenge in melding the two departments was to create a graduate program that would serve all biology students well, even though biology students' interests are wide ranging. It was thought that it was not possible to meet the needs of all the students by creating a core curriculum or core course. None of the competing departments of similar biology departments that they could identify at leading institutions are able to do that. So, instead, students will be allowed to design their own programs with the input of their committees. To counteract certain centrifugal forces pulling on biology from different sides they have tried to create other mechanisms to unify the biology departments such as requiring broader committees with five faculty members instead of the four required by the Graduate School. So there will be more breadth on committees. There still are things to be worked out in the new department such as the structure of internal minors which is another mechanism being looked at as a possible way to unite the department by allowing students in ecology and evolution to choose developmental cellular and molecular biology as a minor so that they will get exposure.

The **Chair** thanked the presenters and said that although the matter was non-controversial and could be voted on today, he saw no reason to break with the two-meeting rule and vote on the resolution at the May meeting.

He now turned to the next item on the agenda which concerned the "interesting and significant" issue of a new proposed policy on Intellectual Property Rights. He recalled that this was probably the first item that he had concentrated on as chair of the Academic

Council. He did so because two people told him that this was a major issue, that Duke should get ahead of the curve, and that Duke should basically work to establish a policy in this new area. And so for the past two years work has been going on with the formation of a policy. He then called on Profs. Hadley **Cocks** (Engineering and Chair, Intell. Property Committee) and David **Lange** (Law) to introduce the issue.

ECAC ELECTION RESULTS

Before that could happen, however, the ballots for the ECAC election had been counted and the **Chair** proceeded to announce the names of the four winners: Ann Marie **Rasmussen** (Germanic Languages), Robert **Clark** (Engineering), Sunny **Ladd** (Public Policy) and Richard **Schmalbeck** (Law).

REVISION OF INTELLECTUAL PROPERTY POLICY

Prof Hadley **Cocks** began by referring the members of the audience to the document in front of them detailing the provisions of the Duke University Policy on Intellectual Property Rights. He proceeded to relate some of the background to the revisions. In 1979, The Bayh-Dole Act was passed by Congress and was signed into law, gave back to the University control of patents made under federal contract. As part of that Bayh-Dole Act Duke had to have a policy dealing with those rights. That forced the whole matter, and a policy was produced in 1979. It had to be modified several times - 1980, 1982 and 1986. It has worked very well and a Patent Policy Committee is in place to oversee it. Several issues brought the copyright policy about. Because software at could not be patented at that time, the committee was forced to look at software issues in 1996. The law has changed and software can now be patented. The whole issue had to be revisited again, because technology forced it upon the institution. This time because of the Internet. The Internet has become a major academic issue that affects not just our university but others as well. There are ten Articles to the policy. The first article is perhaps the most important because it sets the stage for what needed to be kept in place. No fundamental changes have been made, and everything traditional goes on the way it is. This policy tries to address, especially in Articles II, III and IV, those issues forced by technology. The recurring and categorical exceptions cover items that one may not think of as intellectual property, but which in fact are. One example is medical data base information collected basically out of hospital records. It is being treated as a recurring exemption. The Committee addressed especially the question of Duke courses, including students taking notes and selling them over the Internet, which indeed happened last year. The instructor now must approve the sale of those course notes. Students may make notes as they wish, but they can't just go out and sell them for money. Other major categorical exceptions deal specifically with the Internet. This was a difficult matter because the Internet is an emerging

medium and one which is changing. Article V, therefore, provides a mechanism whereby, with the concurrence of ECAC, the Provost can make adjustments as needed. As is clear from the history, adjustments were needed several times with respect to patents. Finally, the question of attribution is addressed, i.e. when things are used on the Internet they must be properly attributed. The University name and identity is also intellectual property in the form of a trademark. Universities haven't in the past paid full attention to this and Harvard.com, for example, does not belong to Harvard University. To oversee this policy, the Committee calls for a University Intellectual Property Board. This will be primarily a faculty group dealing with questions that arise from questions concerning the administration of this policy. Its function would be the same as that of the Patent Committee. Finally, Article IX provides a mechanism for appeals and binding arbitration in the case of a dispute. Article X deals with effective dates and other formal matters.

Professor David **Lange** said that he did not wish to speak at length but would take questions and see what needed more detailed explanation. He stressed that the Committee had tried to adopt a middle ground whereby the document can be read with a little effort by almost everyone though in the end with an effort that will inevitably yield some questions. He also thought that this is the most generous and most flexible policy that any major university in this country has proposed and that is due to the very considerable tractability and generosity and creativity of the administrators who have considered the policy and who have on the one hand contributed very much to its development, but at the same time have resisted what has happened at many of the universities which is in one way or another an effort at wholesale appropriation of this quality or that class of rights. This policy actually begins by leaving almost everything that faculty has grown accustomed to in its work here as academics in much the way that it always has been. All that has been done is offer a framework that can be understood from an intellectual property point of view technically – that explains what it is that academics have been accustomed to. So that for example as individual academics working as creators faculty will continue in the main to enjoy the fruits of their creativity as they always have. There is nothing in the policy that should fairly seem threatening to anyone who reads the policy and understands it. The university is on the one hand protecting its very natural wish to be sure that it has access to its own curriculum and that it may develop the curriculum still further as Internet distance education projects present themselves. The policy makes it possible to do that. The policy also makes it possible for individual faculty members who are otherwise engaged in university projects of that kind, distance education projects on the Internet, to consider doing something on their own or with some other consortium or with some other group. But the policy does propose a mechanism by which the two sides can find a middle ground

in which to reconcile whatever conflicts of interest might otherwise arise.

In the subsequent discussion, several concerns emerged that Professor **Lange** was asked to elaborate upon.

Aside from a question about identifying a key issue applicable to all faculty (which is impossible to do) , David Lange had to explain at some greater length a point raised by Professor **Board** regarding licenses.

He pointed out that licenses is a difficult subject. There are basically four ways to deal with courses and to talk about ownership of courses. This license in the courses is specific to the university setting and is meant to be sure that a professor doesn't leave the university thinking that he or she takes that course with them leaving Duke with a hole in its curriculum for example. Also it means that your colleagues can build courses on the course that you teach or that others could come along and teach the course as well or that your students can take notes and make conventional uses of those notes. That's the nature of the license. It's a non-exclusive license as opposed to a license that gives a T-shirt manufacturer the exclusive right to market someone's company logo.

In answer to a follow-up question on Duke's right to market a given course, Prof. **Lange** replied that Duke has that right. The professor has a prior right, a kind of first draw on dibs on the teaching of the course, though that is subject to ordinary administrative considerations of many kinds. The intent of the policy and the way he expects that it would be applied in practice is that if Duke wants to use someone's course then it will approach that faculty member and ask to do so. But if he/she refuses permission to use the course it doesn't mean that the course can't be made the subject of a derivative course separately contrived by Duke. He/she can go on and use the course him or herself. They may in circumstances that meet the conflict of interest provisions separately market it themselves. But Duke certainly has a right to market the courses that are part of the Duke catalog.

Moreover, while Duke cannot compel anyone to turn over materials developed in anticipation of a course, it is expected that the teacher will make available what he/she teaches as part of the offering that is made.

Prof. Craig **Pox** (Fuqua) posited a case whereby a computer simulation is created to be used in anticipation of a course. Would Duke have the right to appropriate that?

The response was that that would not be subject to the license. There is no obligation to turn over separate materials created

outside the classroom.

Prof. **Hochmuth** (Engineering) asked whether the following scenario would constitute a conflict of interest: expertise developed at Duke while teaching certain courses have made him attractive to an Internet company that wants to pay him a lot of money to market that skill or expertise.

Prof. **Lange** explained that there are four circumstances which require faculty to disclose the prospect of them joining a distance education venture. One arises when being asked by the outside company to teach a course that is equivalent to a course that the member is now teaching here. A second conflict of interest arises under the policy when Duke asks the faculty member to teach the course in a distance education program that it proposes or has in place and that person says 'no, I'd rather do it with this outside company.' With respect to both of those cases, however, the conflict arises only if the intention is to do this in a recurring way. To teach once here or once there doesn't really raise the conflict mechanism, only if it's done on a regular basis. The third arises when faculty engage in activities for the outside company, the non-Duke enterprise, in ways that may lead people to imagine that his/her primary loyalty is toward the outside company or that the primary affiliation is with the outside company. That's a conflict of interest fairly looked at from Duke but also, in decency, from the faculty member's point of view when that full-time member is benefitting at the same time from being a Duke employee. The fourth arises when a member proposes to give so much time to whatever it is that he/she is going to participate in that there really isn't any time left to do what it is that they are primarily supposed to do here. I think they do not raise a seriously objectionable problem. They seem, at least to me and members of the committee, to be a fair and reasonable response to very realistic concerns on part of the administration; but beyond the administration all of us at large have stakes in how it is that we individually deal with outsiders. In every instance where a conflict appears on the face of the situation to require resolution, it may in fact be resolved if the relevant dean after consultation within the prescribed period of time decides it really isn't as serious as it appears to be at first. These conflicts are not beyond clearing with one's dean; the main thing is disclosure.

Another question dealt with the definition of a database as mentioned in Article II. Prof. **Lange** explained that the reference is to those data bases that are gathered for medical purposes. That it is an effort to preserve privacy on the one hand as a policy matter, particularly medical practices and on the other an effort to acknowledge that when a department has itself collectively engaged and gathered data, it's fair for the department to own it.

A further point was raised by a fellow lawyer (Tom **Rowe**) regarding

Article V ("Extraordinary Exceptions") allowing someone to be let out from under a restriction retrospectively as opposed to imposing one retrospectively.

The response was that while there's nothing in the way this policy is drafted that forbids the university to contract out from positions that it enjoys, it should be kept in mind that the Article is primarily meant to address situations arising in the context of digital technologies and distance education where the need to move flexibly may present itself from time to time as the future unfolds and where it's sensible without having to go back through a committee and an entire elaborate revisitation of the problem at large in Academic Council meeting. The Provost has the authority to make changes. To make them prospectively is a sensible thing to do. It's not, he thought, unduly limiting, but one that one could be of two minds about.

In response to a concern expressed by Prof. John **McCann** (Fuqua) regarding the development of multimedia material as a kind of equivalent to writing a textbook while someone else is actually teaching the course and hence there could be confusion about which factors separate the course from the textbook, David **Lange** said that a course is articulated as something that carries Duke credit. What the questioner proposes to do is write something like a textbook or its equivalent, and the general policy distinguishes between courses and writing textbooks. Textbooks belong to people who write them. Courses belong to people who teach them unless they themselves in either case have been created in some kind of joint undertaking.

President **Keohane** thought that down the line the definition of what a course is may be much less clear than it seems now, and that's the world for which this institution must somehow plan.

David **Lange** defended his committee's work by saying that the policy is sufficiently flexible to obviate the need of having to go through a formal process every time to make adjustments. The policy empowers the Provost to institute changes the need for which cannot be foreseen.

In answer to a question about privacy on the net, i.e. whether, if the instructor doesn't wish to be videotaped, Duke owns the course, since it can do so without the instructor's consent, Prof. **Lange** stressed that Duke does not have the right to market the material if the instructor does not wish to be videotaped. At least that's the way the policy works now. While many think that intellectual property is the devil's work, a kind of metaphysics of the law, it is clear that the policy provides a method for changing it if it is deemed to be inadequate later on.

Prof. John **Board** (Engineering) elaborated on a course currently

being offered on the Internet by MIT and he wanted to know what he needed to do to in terms of the Duke policy to make that course available here at Duke.

David **Lange** responded by saying that if the course didn't carry Duke credit, it would be an elaborate way of communicating by e-mail, something that is outside the bounds of the policy on intellectual property. If, on the other hand, this is offered as a Duke course under the Duke imprimatur then he needed permission to use the Duke imprimatur. Also, if he spent a lot of time doing this, there might be a conflict of interest even though the Duke name would not enter into it.

As a final point of clarification, Prof. **Pox** asked if one could use the Duke name in representing oneself as a Duke professor. The answer was that one could but not as a Duke [Web or distance learning] site. It must be clear, that the intent is merely for identification purposes with no suggestion of an endorsement or sponsorship.

The **Chair** thanked the presenters and asked members to direct e-mail questions to them if they had more points to raise or make. He also offered to assemble the question in order of importance and make them available with the agenda at the May meeting. On the other hand, he felt that there was a certain urgency to the matter in that this was a fast moving area. He, therefore, hoped that the matter could be brought to closure at the May meeting. His preference was to be ahead of a conflict, to have a policy that is in place before people are in specific ventures that one can pick sides on. While compromises had to be made, the **Chair** thought that it was a good policy that protects the faculty and he was certain that David **Lange** had not sold the faculty out.

By way of an introduction, the **Chair** then turned to the issue of the Campus Master Plan. He reminded Council that the Draft Resolution in their hands was intended for the Buildings and Grounds Committee of the Board of Trustees. The last 'whereas' says that the faculty endorses this planning effort. The position of the faculty under the Christie Rule is to be able to comment. Council has an ability to comment, to weigh in, to persuade. It does not have the ability to veto. There isn't much time to work on this, only until May 11. It was a good document and the intent is to illustrate and to present options to pursue rather than seeking approval for of any specific details. Prof. **Mosteller** assured the Council that there was adequate faculty representation as could be seen from the second to last 'whereas.' He then called on Executive Vice President **Trask** to present the Master Plan to Council. He said that the draft plan was unwieldy and hence it wasn't practical to endorse it in detail; rather, he meant to set a framework of the basic principles and asked the Academic Council and then the Trustees to say that 'we have looked at your Master Plan and it looks like one to us and its underlying principles seem

reasonable. We reserve the right to comment further when we try to invoke on our particular projects.'

The issue of the document's accessibility was raised. Four copies could be made available at Perkins Library and the Council office. Since the maps can't be posted on the Web that method was excluded. Tallman **Trask** also said that there was a summary including an illustrative map that could be made available to as many people as requested copies. The **Chair** asked for comments by e-mail to help ECAC draft a document for the May meeting. In response to a question about changes to the Draft since the three public meetings on it in the fall of '99, EVP **Trask** said that 85% of the original document was still intact and that the changes were relatively minor.

Accessibility by car was raised as a final point and Prof. **Shaw** (Chemistry) was reassured that the Plan had moved away from an overemphasis on 'walkability' toward greater stress on transportation and parking. Wannamaker Drive in the Plan was an immediate project unlike the general principle of accessibility by car. Wannamaker Drive would be closed permanently because of the construction of a new dormitory there. This decision was irreversible and is expected to be endorsed by the Trustees at their May meeting. The University Architect John **Pearce** said that the language of the Master Plan recognizes the need for enough access and parking in the professional school area and the research portion of the campus. That concept was reflected in the actual diagrams in the Plan.

With that the **Chair** asked for and received a motion to adjourn and invited Council to a reception in Perkins Library.

Submitted for consideration by the Academic Council,

A. Tilo Alt Faculty
Secretary