PROBLEMS WITH THE PROPOSED SEXUAL HARASSMENT CODE OF THE GEORGE WASHINGTON UNIVERSITY

Because of the complexity of the proposed sexual harassment code and the number of different times it has been revised, it may be difficult to see how a faculty member could be found guilty without even learning the precise charges against him (or her), without any right to a hearing of any kind at any point in the proceeding, etc.

To try to illustrate how could happen, Law Professor John Banzhaf has constructed a number of hypothetical situations. Please read this document carefully — this could happen to you or to a colleague!

1A. VERY LOW THRESHOLD TO TRIGGER SECRET DOSSIER: A student complains to a Coordinator that a professor used rather graphic sexual language in a classroom discussion with her of a rape case, and she felt that the language was "inappropriate" and made her feel "uncomfortable."

It should be noted that, although the formal definition of "sexual harassment" is detailed, a complaint may be filed by any person who feels that any one statement of a sexual nature "may be inappropriate" and makes him (or her) feel "uncomfortable." [p3]

Since the consequences of the filing of such a complaint can be very serious (as hereinafter demonstrated), the standard for filing the complaint -- and not just the formal definition of "sexual harassment" -- must be considered.

As examples, the following classroom statements have all been the basis not only for sexual harassment complaints, but also for discipline resulting from such statements. Since the proposed sexual harassment code – unlike the temporary one now in effect at GWU – expressly includes speech in the classroom, the need for procedural protections to help assure that academic freedom is not threatened is even greater:

"Men, like basketball players, dribble before they shoot."

"Belly dancing is like jello on a plate with a vibrator under the plate."

1B. SECRET DOSSIERS: The Coordinator writes up a report of the complaint which is never revealed to the respondent, but is then used as an unstated reason to deny tenure, promotion, a travel request, or other benefits.

The Faculty Senate version of this section provided that "IF THE RECORD INCLUDES THE NAME OF A PERSON AGAINST WHOM AN ALLEGATION OF SEXUAL HARASSMENT HAS BEEN MADE, THE OFFICE OF THE UNIVERSITY COUNSEL SHALL ADVISE THAT PERSON OF THE EXISTENCE OF THE RECORD." This protection provided by the Faculty Senate has been stricken from the new proposed code. As a result, a person against whom a complaint has been filed by name may never know that the complaint has been filed, much less that a (possibly one-sided) report has been prepared.

The Faculty Senate version of this section also provided that "THE FILE WILL NOT BE REVEALED OR RELEASED TO ANY UNIVERSITY AUTHORITY OUTSIDE THE GENERAL COUNSEL'S

OFFICE, NOT WILL IT BE USED IN OR OTHERWISE AFFECT ANY DECISIONS REGARDING PROMOTION, TENURE, COMPENSATION, OR OTHER CONDITIONS OF EMPLOYMENT FOR FACULTY OR STAFF, OR THE ENROLLMENT STATUS AND ACADEMIC PRIVILEGES OF A STUDENT, UNLESS A FINDING OF SEXUAL HARASSMENT HAS BEEN MADE IN ACCORDANCE WITH THESE PROCEDURES." Thus, since this Faculty Senate language was expressly stricken, this secret report may be used to affect "promotion, tenure, compensation, or other conditions of employment for faculty." Apparently, the faculty member may never learn that his (or her) compensation, etc. was affected by the existence of a one-side secret report.

2A. NO NOTICE OF SPECIFICS OF COMPLAINT: The same classroom scenario but a different procedure. Although the student declined to provide a signed statement, the Coordinator nevertheless investigates. To prevent the respondent from guessing who the student is, but still trying to "inform the respondent of the allegation in sufficient detail to permit an informed response", [p7] the Coordinator tells the professor only that "one or more students have complained about your use of graphic language regarding the discussion of a rape case."

It must be noted that the Faculty Senate version provided that "THE COORDINATOR WILL FURNISH THE RESPONDENT WITH A COPY OF THE SIGNED STATEMENT OR THE WRITTEN SUMMARY IF THERE IS NO SIGNED STATEMENT." Since this protection was stricken, there is no requirement that the respondent receive adequate notice of the specifics of the charges.

Since, in this hypothetical, the topic of rape occupied four class hours and almost a dozen cases, the professor is unable to learn which discussion triggered the investigation; to point out that the graphic language of which the student complained was in fact printed in the judicial opinion being analyzed; and to explain why the detail was necessary to understand a basic legal principle illustrated by the judicial opinion.

2B. PUNISHMENT BASED UPON SECRET ONE-SIDED INVESTIGATION: The Coordinator's report finding a violation is turned over to a "responsible University official" who imposes discipline. [p7]

Please note that the Faculty Senate version provided that "THE RESOLUTION OF THE MATTER MAY INCLUDE CORRECTIVE OR DISCIPLINARY ACTION PROVIDED THE RESPONDENT CONSENTS." Since the requirement of consent was removed, the discipline can be imposed based solely upon an investigation where the respondent might not have enough information to refute the charges.

Thus the respondent need not consent, nor is he (or she) entitled to learn the precise nature of the charges or the finding, to obtain a copy of the report or decision, etc. Therefore, unless the faculty member is willing to go forward with a formal complaint procedure -- and risk adverse publicity and other possible consequences -- he (or she) has no other resort.

2C. PUNISHMENT IMPOSED BASED SOLELY ON ONE-SIDED REPORT: The proposed code provides that, “if the Coordinator is unable to resolve the matter informally, the responsible University official shall determine, based on the report obtained from the Coordinator, whether or not to impose corrective or disciplinary action.” [p7]

This would seem to require the University official to decide whether or not to impose discipline based solely upon the contents of the report: e.g., without any consultation with the accused, any witnesses the accused might have to support his (or her) position, other persons who might have relevant knowledge or information about the incident; others who might be able to provide general arguments for not imposing discipline in this general type of situation, etc.

3. BURDEN OF CONTESTING A UNKNOWN FINDING: If the faculty member wishes to contest the above result by initiating the formal complaint procedure, he (or she) has the affirmative burden of stating "why the disposition of the matter should be modified or overturned." [p9]

As a practical matter, this may be difficult or even impossible to do effectively since he (or she) has never learned at this point the precise nature of the charges, who brought and/or supported them, the basis for the adverse finding by the Coordinator as a result of the informal investigation, etc. This is crucial because the hearing panel may decline to "request clarification or additional information from the Coordinator or the parties," [p9] and thus may deny the faculty member's request for a hearing based solely upon the respondent's pleading.

4. NO RIGHT TO A HEARING: In any event, the hearing panel may refuse to permit any evidentiary hearing at all -- or even to permit an oral argument -- if it believes (based solely on whatever information is then before it) that the respondent's written request "lack[s] substantial merit," [p11] whatever that phrase may mean.

5A. DECISION REMAINS SECRET: Even if it denies the faculty member an evidentiary hearing or even an opportunity to be heard in argument orally, the written decision of the panel need not be turned over to the faculty member. Instead, the proposed code provides that the University official may "provide copies to parties" only "to the extent" he or she "deems appropriate." [p11] Yet, if the faculty member wishes to contest this determination to deny him or her the basic right to a hearing, he (or she) must state in writing why the decision – which he (or she) may never have received – should be overturned.

5B. INNOCENCE MAY BE IRRELEVANT: Moreover, even if those reasons for granting the appeal seem persuasive, the Associate Vice President for Human Resources "must" deny the appeal if "the special panel substantially complied with applicable procedures for summary denial of the request for a hearing." [p11]

In other words, even if the Associate Vice President for Human Resources is convinced that the Respondent is clearly not guilty of the charges; that the charges, even if sustained, could not amount as a matter of law to sexual harassment, or that providing a hearing would be the only fair thing to do under all the circumstances, the policy tells him that he must uphold the denial of the hearing if there has been some but not all ("substantial") compliance with the minimal procedural requirements.

6. JUROR TAMPERING: If, in the alternative, the special panel does decide to grant the faculty member a hearing, any member of the hearing panel may be removed at any time, even once he (or she) has been seated, [p9] even once substantial evidence has been heard and the panel member may have

made his (or her) views known to some extent through the questions asked, and even once deliberations have begun and the member's views are clearly known.

No reason for such a dismissal need exist or be stated, since the removal can occur "at the discretion of the appointing official" "at any time." [p9] This can occur only because language added by the Faculty Senate to prevent just such an injustice was stricken: the Faculty Senate version provided that a person could not be removed once he (or she) had been appointed to a hearing panel.

Moreover, the Associate Vice President for Human Resources may also remove any panel member, even once they have made some of their views known, provided that he (or she) can articulate "sound reasons," [p10] a standard apparently unknown to the law. In both cases this seems to be akin to removing a juror in the middle or a trial or even during deliberation.

7. INABILITY TO PREPARE: The faculty member has no right to see or have copies of "written statements that may be introduced against him." Instead, he has only the right to know "the contents of and the name of the author" of such statements – a careful lawyer-like phrasing which could mean that the respondent is only told in a general way what the contents are.

This is especially serious because neither the complainant nor any witnesses adverse to the faculty member need even testify -- it appears that their written statements may be introduced , and the faculty member will not be able to cross examine witnesses who may have given written statements considered by the panel but who refuse to testify. Such evidence may nevertheless provide the basis for the panel's decision.

8. DENIAL OF WITNESSES: On top of that procedural burden, the accused faculty member has no right to require witnesses who might support his (or her) version of the facts (e.g., about his classroom statements) to appear if they do not want to. Moreover, even if a student is willing to testify in favor of the faculty member, he can be blocked from doing so if another professor denies permission for the student to be absent from class.

In this connection it should be noted that the new proposed code omits the following protections included by the Faculty Senate: no witness may be "DIRECTED TO TESTIFY OTHER THAN THE COMPLAINANT AND ANY OTHER PERSON WHO GAVE EVIDENCE THAT HAS BEEN CONSIDERED BY THE PANEL. INFORMATION FROM PERSONS ABLE BUT UNWILLING TO APPEAR SHALL NOT BE CONSIDERED BY THE PANEL. INFORMATION FROM PERSONS WHO CANNOT APPEAR SHALL BE SUBJECT TO A RULING OF ADMISSIBILITY BY THE CHAIR. THE CHAIR MAY TAKE REASONABLE STEPS TO PROTECT THE WITNESSES AGAINST ABUSE OR HARASSMENT, SHORT OF EXCUSING THEIR APPEARANCES."

9. NO JURY OF PEERS: In a case in which a student complains about the conduct of a faculty member, including statements made by the faculty member in the classroom, the hearing panel will consist of only two faculty members (none from his or her department), two students, and one employee.

Yet all decisions -- including decisions to refuse to provide any evidentiary hearing, to find against the faculty member, to recommend a very severe sanction, or as to whether a statement made in a classroom "is reasonably designed or reasonably intended to contribute to academic inquiry"[p2] – can be made by three persons with no training or experience as teachers.

In other words, an accused faculty member can be denied any hearing, and can be found guilty, even if

both faculty members on the panel strongly disagree, and no faculty member concurs.

10. NO PRESUMPTION OF INNOCENSE: It is not at all clear who has the burden of proof (i.e., if the faculty member is presumed innocent). This occurs because, if the Coordinator found against the faculty member after only an informal investigation, the faculty member must affirmatively state in his (or her) complaint why the disposition of the matter should be modified or overturned." [p9] The panel then makes "a decision on the complaint, consistent with the substantial weight of the evidence."

This is not a clearly defined or well known legal standard, and appears to suggest that the burden may be upon the faculty member to present evidence of such substantial weight as to overcome the finding (which was never revealed to the faculty member) of the Coordinator's informal investigation.

11. NO NOTICE OF SANCTIONS: When an adverse finding of a hearing panel is sent to a university official responsible for imposing discipline, the faculty member will have no right to notice of the proposed sanction nor to review the finding of the special panel upon which it is based [p16]. This is possible only because the administration is now proposing to eliminate the following language the Faculty Senate inserted:

"BEFORE ISSUING A FINAL DECISION, THE RESPONSIBLE UNIVERSITY OFFICIAL WILL ADVISE THE RESPONDENT OF THE PROPOSED SANCTION, WILL PERMIT THE RESPONDENT TO REVIEW ALL PARTS OF THE SPECIAL PANEL REPORT ON WHICH THE SANCTION IS BASED, AND WILL GIVE THE RESPONDENT A REASONABLE OPPORTUNITY TO REPLY BEFORE THE SANCTION IS IMPOSED. A RESPONSIBLE UNIVERSITY OFFICIAL WILL NOTIFY THE PARTIES OF THE DISPOSITION, TO THE EXTENT CONSISTENT WITH UNIVERSITY POLICIES, APPROPRIATE CONSIDERATIONS OF PRIVACY AND CONFIDENTIALITY, AND APPLICABLE LAW." This protective language has now been omitted

The Faculty Senate approved version stated that the University "WILL SEND A COPY OF THE SPECIAL PANEL REPORT TO THE PARTIES." The amended version now reads that: "A responsible University official may, in his or her discretion, send a copy of the special panel report to the parties." In other words, providing a copy of the finding is entirely up to the people who are disciplining the respondent, and who may be reluctant to provide any documents which might assist the facilty member is seeking to review that finding in court.

In short, two important protections added by the Faculty Senate have been omitted.

12. LEGALLY IMPERMISSIBLE RESULTS: One final scenario illustrates still another different result possible under the proposed guidelines: Suppose a female Psychology professor states in class that a recent study showed that men listen with only half of their brains (in contrast to women when use both hemispheres). A man complains that this remark constitutes sexual harassment of male students.

Even though the Coordinator finds no basis whatsoever for the charge, the student may nevertheless file a formal complaint; e.g. especially if he is bullheaded and/or vindictive.

Moreover, even if an impartial university official — the Associate Vice President for Human Resources — finds (after consultation with the Office of the Vice President and General Counsel) that "the action alleged could not reasonably be found to constitute sexual harassment under applicable law even if true," the complaint will not be dismissed. Rather it will still have to be sent to the special panel for whatever disposition the panel ultimately deems appropriate, even though this would put a totally

needless burden of anxiety and time pressure on the faculty member.

This occurs only because the revised proposed procedure deliberately omitted the following language inserted by the Faculty Senate: "THE RESPONDENT WILL BE GIVEN SUFFICIENT PARTICULARITIES AS TO THE ALLEGED FACTS THAT THE RESPONDENT MAY REASONABLY INVESTIGATE THE CHARGE AND PREPARE HIS OR HER DEFENSE, WITH REASONABLE AND APPROPRIATE RECESSES AND CONTINUANCES BEING PROVIDED TO ALL PARTIES. IF, AFTER PROVIDING THE RESPONDING PARTY WITH A REASONABLE OPPORTUNITY TO RESPOND, THE ASSOCIATE VICE PRESIDENT FOR HUMAN RESOURCES (OR DESIGNEE), AFTER CONSULTATION WITH THE OFFICE OF THE VICE PRESIDENT AND GENERAL COUNSEL, FINDS THAT THE ACTION(S) ALLEGED COULD NOT REASONABLY BE FOUND TO CONSTITUTE SEXUAL HARASSMENT UNDER APPLICABLE LAW EVEN IF TRUE, THE COMPLAINT SHALL BE DISMISSED IF THE RESPONDENT CONSENTS TO SUCH DISMISSAL. OTHERWISE THE FORMAL COMPLAINT PROCEDURE AS OUTLINED HEREIN WILL CONTINUE."

Even more surprising, the special panel could decide to go ahead and hold a complete evidentiary hearing, and even make a finding of guilty, even though under law no such verdict is possible. Needless to say, any faculty member who was subjected to that kind of abuse would have a very strong legal case against the University!

One may argue as to how likely any of these results may be, but it is clear that each is permitted to occur, and to occur precisely because of changes made in the version of the sexual harassment code adopted by the Faculty Senate after debate and compromise. There have also been enough sexual harassment cases at a variety of universities to demonstrate that denial of fundamental procedural protections can lead to results which are not only unfair but bizarre, and can constitute a serious threat to academic freedom and free speech on campus. Only the Faculty Senate can prevent this from happening.