

CROSSING THE CULTURAL CHASM AND THE POWER OF LISTENING: HOW WE WROTE A NEW TENURE CODE

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I. INTRODUCTION

Revising the Tenure Code of an institution of higher learning may be among the most challenging of the processes it undertakes, especially when there is a commitment to shared governance by its Board of Trustees and Faculty. At Mitchell Hamline School of Law, we recently experienced this process—both difficult and ultimately satisfying—following the combination of two law schools.

In 2016, Mitchell Hamline School of Law became an independent institution formed through the combination of independent William Mitchell College of Law and Hamline School of Law, a school of Hamline University, both based in St. Paul, Minnesota. In the early years, implementing the combination agreement consumed trustee and faculty attention, requiring significant work that included integrating faculty from each school, organizing administrative structure, filling staff positions, adding staff where necessary, and creating annual and capital budgets.

Combining the cultures of each school at an appropriate location was the most immediate challenge facing the new school. Fortunately, faculty had frequently taught at both schools over the years, especially in areas that filled course requirements, allowing each school to expand offerings without adding full-time contracts. Additionally, the perspective, quality of teaching, and commitment to student success were similar at both schools, paving the way for the combination to occur. Because William Mitchell Law had a larger building and faculty than Hamline Law, and the combined law school would be larger than either of the two law schools alone, it made sense for the Hamline faculty to move to the William Mitchell campus.

Still, despite these favorable conditions, there were numerous logistical challenges that had to be addressed immediately following the combination. A particularly critical one was determining the Tenure Code to be used for the new school. At the time of the combination, each school had its own Tenure Code, but neither one was seen as appropriate for the new law school. In particular, there was a strong belief that the William Mitchell Tenure Code created a severe imbalance of governance and authority between the Faculty and Trustees. But because of the new law school's location in the William Mitchell building, we thought we could use the William Mitchell Tenure Code temporarily, merely as a placeholder.

No one imagined it would be in place for the next six and a half years. In hindsight, however, no one should have been surprised that the shortcomings of the original William Mitchell Tenure Code would become increasingly obvious and frustrating for the faculty of the new Mitchell Hamline School of Law.

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II. THE PROCESS IN A VIRTUAL WORLD

The process to review the Tenure Code started at the beginning of the 2021–2022 academic year after the Faculty and the Shared Governance Committee of the Board of Trustees asked the Board’s Executive Committee to move forward with the review. For many trustees with backgrounds in legal practice, corporations, and the judiciary, the principle of “shared governance” that would be fundamental to the revised code was a new concept. Introducing that concept and explaining why it was considered so important for colleges and universities required significant effort, including a Board retreat facilitated by the Association of Governing Boards. That retreat helped trustees understand and embrace shared governance as an institutional value. The time was right to put the principle to work.

On behalf of the Executive Committee, the Board chair charged the Academic and Student Affairs Committee (ASAC) of the Board to conduct a comprehensive review that would:

1. Establish a working group to review the Tenure Code and seek broad input from faculty, administration, and trustees in the spirit of shared governance;
2. Conduct the review within the work plan of ASAC;
3. Engage an equal number of trustees and faculty in the working group;
4. Address substantive issues to meet standards of best practice in legal education;
5. Improve the organization, written form, and clarity of the document to meet standards of best practice;
6. Develop and use an iterative process for faculty input and ASAC review;
7. Conduct the work in a transparent and timely way; and
8. Recommend adoption of the revised Tenure Code by approval of the Faculty Tenure Committee and the Board of Trustees.

Although a broad charge of this nature was needed, it would require significant effort to implement. As noted, it had been anticipated that a new tenure code would be written and adopted shortly after Hamline Law combined with William Mitchell Law at the beginning of 2016. Several short-lived attempts to begin drafting a tenure code had seen little progress. Faculty emotions regarding the failure to adopt a new tenure code included impatience, disappointment, frustration, and even anger. The William Mitchell Tenure Code simply did not work well for the new law school. Its inconsistencies and

fixed timelines made application difficult, creating problems and confusion for the faculty, the law school administration, and even for some of the trustees.

Two separate law schools had combined and, although progress had been made, differences of opinion still existed regarding how a law school should be operated. The challenge was not only to find language that a law school faculty, administration, and Board of Trustees would accept; it was also to learn and appreciate the two similar but still unique cultures that had combined to create a new institution, and then to draft a code that recognized and facilitated the full integration of those two cultures. Under these circumstances, the working group formed to review the Tenure Code—the Tenure Code Review Task Force (TCRTF)—was asked to complete a task that was daunting, to say the least.

III. FORMATION OF THE TENURE CODE REVIEW TASK FORCE (TCRTF)

The composition of the TCRTF was critical to its success. The TCRTF had to include recognized leaders who were sensitive to the cultural concerns and understood the academic and administrative issues. The faculty, administration, and trustees needed to know that the legacy interests of both institutions would not be lost. Furthermore, the new Mitchell Hamline School of Law had pledged to be an anti-racist law school and had passed a resolution to “identify and eliminate racism that exists at our school, in the legal profession, and in the judicial system.” The TCRTF needed to be created with that pledge in mind. The TCRTF members, it should be noted, were diverse in terms of gender, race, religion, and disability.

The first decision was to appoint the ASAC Chair to be the Board of Trustees representative to the TCRTF, a wise choice because, as president emerita of Hamline University, she brought valuable experience and insight to the TCRTF. After receiving the Executive Committee’s charge, the ASAC Chair invited a tenured, well-respected faculty leader at Mitchell Hamline School of Law to co-chair the TCRTF. Each Co-chair then recruited two others to form a committee of six, achieving an equal number of trustees and faculty.

One of the three TCRTF faculty members had been a tenured faculty member at Hamline Law. After the law schools combined, she accepted an appointment to be the Provost at Hamline University. When her term as Provost ended, she joined the Mitchell Hamline School of Law faculty. Her experience as a tenured law school faculty member and as a university provost brought valuable perspectives to the TCRTF. The second TCRTF faculty member had been a faculty member at William Mitchell Law since 2007 and had been the Associate Dean at that school prior to the combination. He is a

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full-time professor at Mitchell Hamline School of Law. His tenure as a faculty member and experience as Associate Dean ensured that the legacy William Mitchell perspective would be represented. The third faculty member was one of the TCRTF Co-Chairs and is one of the co-authors of this article. He has taught at five different colleges and universities, including Hamline Law, and was tenured at four of those institutions. He was able to bring a helpful comparative perspective to the TCRTF. He has national leadership experience, and, while the TCRTF was doing its work, he was serving as Chair of the American Bar Association Section of Dispute Resolution.

For the Board of Trustees membership, as explained above, one of the TCRTF Co-Chairs was the ASAC Chair of the Board of Trustees. As ASAC Chair, she had a leadership platform within the Board of Trustees that allowed her to effectively communicate the progress of the TCRTF and explain why the TCRTF was including the language and provisions that it did. The second Board of Trustees member was a federal magistrate judge, with a long history in private practice and service to the law school prior to her appointment. Her legal experience and focus on procedure and process proved invaluable, especially at one point when the TCRTF was struggling to explain the contingencies that might confront a faculty tenure applicant. The third Board of Trustees member had a variety of prior legal experience, including the position of Senior Vice President and General Counsel of a Minnesota-based health insurance company. His substantial corporate legal experience allowed him to clearly explain how and when the Board of Trustees fiduciary responsibilities might be implicated by proposed Tenure Code provisions.

The individuals chosen as members of the TCRTF had leadership experience, policy creation skills, and respect from the relevant constituents. Just as importantly, everyone worked extraordinarily collaboratively. Although the six members of the TCRTF had different previous experiences, everyone was willing to be educated and flexible when it came to making final decisions and choices. And the fact that all the members on the TCRTF were kind, patient, and had well-developed senses of humor made our weekly meetings the second semester actually enjoyable.

We initially decided to meet as a full task force bi-weekly in the fall, and in between we worked in teams of two on discrete assignments. The full task force meetings became weekly meetings in the spring. This proved to be an efficient way to compose drafts of code sections. Task force members then worked together online to finalize specific language and reach consensus on the recommended changes. We engaged an expert legal writing editor who had been the Director of the Legal Writing Program at Hamline Law as our consultant. She was extremely helpful. By attending the meetings and turning drafts around promptly, our editor accelerated the pace of review considerably.

In the spring of 2020, higher education institutions responded to the lockdowns caused by the COVID-19 public health emergency by moving much, if not all, courses to virtual teaching and learning. Mitchell Hamline School of Law was especially well prepared for this mode of curriculum delivery due to its existing hybrid offerings of classes in person and online. The American Bar Association Council of the Section of Legal Education and Admissions to the Bar had approved the William Mitchell College of Law plan to offer an online-hybrid Juris Doctor degree beginning in 2015, the first ever approval granted for this type of program. After the COVID pandemic struck, the law school quickly and successfully began offering all its courses in a virtual environment. The TCRTF seamlessly followed suit and did all the Tenure Code work online from the spring of 2021–2022.

IV. GOALS FOR THE TENURE CODE REVIEW

The TCRTF accepted the charge of the Executive Committee and began to set goals for the Tenure Code review that were straightforward and attainable. After a six-and-a-half-year delay, both the Trustees and the Faculty were more than ready to support and complete this project. Initial goals and steps in the process were quickly identified and the TCRTF expected that additional goals would continue to arise as the process unfolded. Reviewing tenure codes from other law schools was one of the first tasks, with a focus on identifying common features, determining what was missing from the placeholder Mitchell Hamline Tenure Code, and highlighting topics that should be avoided. The careful attention devoted to this review process was the beginning of the disciplined approach the TCRTF took throughout the review process.

The TCRTF agreed on several primary goals: The roles of the Board of Trustees and Faculty Tenure Committee (which included all tenured faculty members) would be clearly stated in the revised Tenure Code as well as the decisionmaking authority of each. The revised Code would be developed collaboratively and inclusively with Faculty, and it would define the standards of teaching, scholarship, service, and professional conduct. The Code would lay out a step-by-step description of the way a tenure candidate gains tenure, what is required to keep tenure, and under what circumstances one would lose tenure. The document would be streamlined so that only tenure-track and tenured faculty matters were included. Organization and clarity would be improved. All other provisions unrelated to tenure in the current document would be assigned to the Faculty Tenure Committee to be further developed in Faculty Bylaws and other governance documents. Detailed procedures regarding removal of tenure would be attached as an appendix.

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V. OBSERVATIONS ABOUT KNOWN ISSUES AND CONCERNS

Faculty were dissatisfied with several provisions of the placeholder Mitchell Hamline Tenure Code and frequently called out objectionable sections. These issues and concerns helped the TCRTF sort through priority issues and develop a framework for reviewing the code. Complaints and criticisms of the placeholder code included:

1. The Tenure Code was a binding document that did not adequately cover the responsibilities of Faculty or their governing bodies and documents, such as Bylaws and Handbooks.
2. A process for Faculty participation to amend the Tenure Code was not included. The Board of Trustees' ability to unilaterally amend the Code was antithetical to the concept of shared governance. Placed near the beginning of the Tenure Code, section I. Scope (C) declared: "This Tenure Code may be amended at any time, following reasonable notice to and consultation with the faculty, by majority vote of the Board of Trustees."
3. Similarly objectionable to section I. Scope (C), the Board was empowered to make final decisions whether to appoint, promote, retain, or grant tenure, and it could act independently. Tenure Code section IV.G.4(a) stated, "should the Board choose to act contrary to the Faculty Tenure Committee's recommendation, it will so advise the Faculty Tenure Committee, the Dean, and the affected persons in a writing that includes a statement of the specific reasons that led it to do so." Thus, the Board could grant and rescind tenure by majority vote with only reasonable notice to and consultation with the faculty.
4. The Tenure Code did not clearly set forth steps to be taken toward earning tenure, including achievement of the standards, what groups or individuals are a part of the tenure process, and under what circumstances tenure is granted or denied.
5. While the Tenure Code included a preamble about academic freedom and cited the AAUP 1940 Statement, there was no reference to shared governance, conditions for improving faculty performance, provisions for dismissal of faculty due to misconduct, or how to address fairly the situation of financial exigency.

6. Each of the standards for teaching, scholarship, service, and professional conduct was quite prescriptive and limited to interpretation that likely would not evolve over time. For example, the Tenure Code listed over fifteen discrete identifiers of good teaching, along with an overly broad description of what activities count toward service. It was unclear whether scholarship included only traditionally accepted scholarship or technology-circulated material such as podcasts and blogs. By moving detailed descriptions of what tenure candidates must achieve from the Tenure Code to Faculty Bylaws, the Faculty could be empowered to support tenure-track faculty and improve their performance year over year.
7. The circumstances, time frame, and rationale for a deferral of tenure needed to be broadened beyond the Tenure Code to be more inclusive and make clear that a deferral would not have any prejudicial impact on tenure consideration.
8. The Board apparently had authority to hire a faculty member who had not been vetted through the tenure process. The Tenure Code needed to address the fact that someone could be hired with tenure without having satisfied the performance and length-of-service requirements of the Code. Section IV.A.3(a) confusingly stated that someone would be eligible to be considered for tenure if “[t]hat person is hired by the Board of Trustees as a tenured professor.”
9. Faculty evaluations, promotions, and composition of the Faculty Tenure Committee were detailed in the Tenure Code. It was important to decide whether the Code should govern these issues or whether they were better addressed in Faculty Bylaws. Not only was there a question regarding whether these matters belonged in the Code, there also were concerns regarding how specifically these issues had been addressed. There were strict requirements in the Tenure Code that sometimes were impossible to satisfy. For example, section IV.H and IV.H.3(b) together required that review subcommittees be appointed for every tenure-track faculty member by January 15th. The tenure-track faculty member was given ten days to make a peremptory challenge regarding any member of that person’s subcommittee. This created a problem for faculty members hired in the spring or summer who begin teaching in the fall. They may not have met many of the tenured faculty members in January and would be in no

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position to make a peremptory challenge within ten days after January 15th.

10. There was a widespread concern that the current removal of tenure process was inadequate and did not provide adequate protection for tenured faculty members.

VI. RESEARCH

By researching the tenure codes of other, similar law schools, the TCRTF gained an understanding of policies common to law school tenure codes and best practices, as well as insight into how the placeholder William Mitchell Tenure Code differed and could be improved. The TCRTF worked in pairs to research the tenure codes of five law schools located in Florida, New York, and California. These law schools were selected based on features similar to those of Mitchell Hamline School of Law concerning number of enrolled students, LSAT and GPA scores, demographic mix of students, diversity balance, full and part-time programs, specialty clinics and institutes, experiential learning, and externships. Like Mitchell Hamline School of Law, several were independent law schools.

The research revealed that teaching, scholarship, service, and professional conduct standards for achieving tenure were consistently stated as a requirement. Yet each school had additional provisions that were uniquely tailored to align with each school's values and practice. Some standards appeared in exhaustive detail that were hardwired into the code. Others were overly broad and open to inconsistent application. The research helped the TCRTF conclude that only the key features of the four standards should be described, and that the details of the standards' interpretation belonged to the faculty's authority and its governance documents such as the Bylaws.

All the tenure codes the TCRTF reviewed included a commitment to academic freedom, some quite broadly and others quite prescriptive. Each tenure code stressed the importance of evaluation of tenure-track faculty by senior colleagues who could provide advice, support, and assistance annually in positive terms rather than critical or evaluative terms. Categories of faculty, such as legal writing professors or librarians, were inconsistently eligible for tenure status.

All five law schools permitted tenure code amendments, yet not all emphasized the importance of a shared governance responsibility of Faculty and Trustees. Mitchell Hamline School of Law had adopted a shared governance model that laid the foundation for the adoption of the revised Tenure Code by the Faculty and the Board. The revised Mitchell Hamline School of Law Tenure Code ultimately addressed the importance of shared governance in the Preamble/Purpose section.

The research confirmed our thoughts about what truly belongs in a Tenure Code and helped strengthen our resolve to move items such as professional leave, sabbatical policy, student evaluations of teaching, and promotions to the governance of the Faculty and its Faculty Bylaws.

The TCRTF also engaged in a careful review of Hamline Law's Tenure Code as compared with the placeholder Mitchell Hamline Tenure Code. Neither satisfied the goal of providing clear steps in the process for tenure-track candidates to follow.

At one point during the TCRTF's deliberations there were so many issues under consideration that it was becoming confusing. One of the Task Force members created a visual representation of the chronological tenure process—a flow chart for the task force's own use—that brought it all into focus.

VII. LISTENING SESSIONS

The TCRTF realized that during the second semester we would need to crystalize our concepts. The decision to host several listening sessions with the faculty was critical to the success of our Tenure Code revision process. The TCRTF believed it would not be productive to share the complete, successive versions of the draft code as we worked through the revision process. The concern was that we would get mired in "wordsmithing" and would find it difficult to move forward with the broad conceptual reforms that were necessary. Yet we also knew that unless the faculty was involved and invested in the revision process, the new code might not be approved. Accordingly, either in advance or during the listening sessions, we provided general descriptions of the code sections on which we were working and what we were trying to accomplish.

We were committed to ensuring that the listening sessions were just that—an opportunity for the faculty to articulate its concerns about the existing code and explain what it felt should be in the new code. Although we were not sharing full drafts of the new code, the faculty needed assurance that fundamental changes were not being made without their knowledge or approval. They also needed to know that their ideas were heard. The listening sessions gave the faculty an ownership interest in the new code and made it more likely the new code would ultimately be approved.

We scheduled the first listening session on February 16th, approximately one week after the second semester began. As helpful as the listening sessions were for the faculty, they also were helpful for the TCRTF. We were required to pause and review our progress holistically rather than simply continue to focus on each discrete section of the code.

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Scheduling the faculty listening sessions reminded us that we also needed to keep the Board of Trustees advised regarding our progress. Before the February 16th faculty listening session, the TCRTF Co-Chair from the Board of Trustees and the two Trustee members of the TCRTF met with the Board of Trustees Chair to bring him up to date, solicit his input and suggestions, and learn his perspective concerning our proposed changes. During that meeting, the Board of Trustees Chair made a valuable suggestion regarding the fiduciary duty of the Board of Trustees. The meeting went well and confirmed the importance of keeping both faculty and the Board of Trustees advised of our progress.

VIII. THE SPRING SEMESTER

The spring semester brought a greater sense of urgency to the TCRTF. The dates for voting whether to approve the revised code had been scheduled long in advance—and were approaching all too soon. The TCRTF was primarily driven at this point by its commitment to engage constituent groups within the scheduled time remaining to complete the Tenure Code review. The Academic and Student Affairs Committee of the Board (ASAC); Faculty Tenure Committee (FTC); Faculty Steering Committee (FSC of five members) and administration (Associate Dean for Academic Affairs) all needed to be involved. This is when the TCRTF began meeting weekly, usually for two hours. It continued its approach of assigning groups of two members to work on sections of the document between meetings. Our legal writing consultant met weekly with the Task Force and captured the revisions as the work continued. We also had administrative support for scheduling meetings and distribution of materials to the Task Force.

During this time of Tenure Code review, a working group of Faculty began drafting Faculty Bylaws. As might be expected, that working group began to inquire about the contents of the revised Tenure Code and how it related to completion of the Faculty Bylaws. The concerns ranged from possible duplication to what content belonged in each. To address these issues and, importantly, to engage in an iterative process with the entire faculty, meetings were held in April and May. Frequent informal discussions with individual faculty members and board members also were very important.

The listening session on May 11th was the most important of the semester. The completion date for the Task Force's Tenure Code revision assignment was rapidly approaching. In this final week of our academic year project, we decided it was time to release the entire draft. We provided the faculty with the full proposed new Tenure Code in advance of this meeting, and we received substantial feedback. If the faculty had been asked to vote to approve the revised Code this day, it might not have been approved. But,

guided by the feedback, the Task Force then spent a nine-hour day on May 13th discussing the concerns that had been identified and working diligently to address those concerns. That very long day was exhausting, but it was tremendously beneficial.

The Task Force met again with the faculty the following week on May 17th, the day before the scheduled final vote for approval of the Tenure Code. On the same day, ASAC received the proposed Tenure Code and voted unanimously to approve it. This step was essential given that the project had been assigned to ASAC's work plan for the year, and the approval was required before it could move forward to the full Board meeting.

At the May 17th faculty meeting, the Task Force was able to slowly go through the revisions made to the Tenure Code on May 13th that responded to all the concerns that had been raised on May 11th. The faculty was extremely appreciative and on May 18th voted unanimously to adopt the revised Tenure Code. Later the same day, the Executive Committee of the Board of Trustees unanimously approved the new Tenure Code. On May 24th, at their last meeting of the academic year, the MHSL Board of Trustees adopted the Tenure Code. Having dates for approval scheduled long in advance proved helpful: those dates required the TCRTF to complete its work and integrate feedback before the end of the academic year.

IX. WHAT WE LEARNED

From the start of the Tenure Code revision in spring of 2021 to the unanimous adoption of a new Tenure Code by the Faculty and Board of Trustees on May 24, 2022, several factors contributed to the success of the project. As we reflect on them, the following had significant impact:

1. Shared Governance, although a new concept to many trustees, was universally embraced by faculty and was the foundation of the combined constituencies' commitment to revising the Code.
2. Involving existing bodies such as the Executive Committee, Academic and Student Affairs Committee of the Board, and Faculty Tenure Committee in the Code review process sent a powerful and reliable message to all that this work was being taken seriously and that this project would be completed. We wanted everyone's involvement to ensure it would be a tangible and enduring achievement.
3. Balancing the number of trustees and faculty members on the Tenure Code Review Task Force and appointing a

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trustee and faculty member as co-chairs set up the expectation of shared responsibility for the process and outcome. The leadership experience, policy experience skills, work ethic, and respect from the relevant constituents led to a mindset of collaboration and commitment.

4. Communication with trustee and faculty groups that would ultimately approve the Code took place through listening sessions, information sharing sessions, feedback opportunities that solicited comments and questions, and an ongoing loop of formal and informal conversations to ensure that stakeholders were heard. The iterative process of folding in this information was critical to improving the Code and addressing concerns.
5. Early in the fall, the Task Force made the decision that would guide us throughout our work: The revised Tenure Code would only include content that related to tenure-track and tenured faculty. Following this rubric enabled us to set aside existing provisions that did not fall into this category, and the material was saved and forwarded to the Faculty Committee working on Bylaws.
6. Structuring the Tenure Code process as a time-bound project was an advantage for completing the project, although it was stressful at times and was particularly so late in the spring semester. The TCRTF's schedule of meetings was carefully aligned with existing time slots available for interaction with trustee and faculty groups. At no point did the prospect of deferring the work to another year arise. (The thought, frankly, would have been unbearable.) It was simply too important and too intense to extend beyond the allotted time period.
7. The legal writing consultant was invaluable. While the Task Force developed the content, our consultant captured the results and worked diligently alongside us, right through our May 13th marathon day when the Task Force integrated faculty feedback into the Code.
8. Trust among faculty colleagues, trust between trustees and faculty, and trust that grew substantially within the TCRTF over a year of intense collaboration was an essential component of our success. This trust resulted in a new MHSU Tenure Code that is an example of genuine shared governance in action.

X. CONCLUSION

For law schools and other institutions of higher learning, revising a tenure code can be a daunting task. It is more likely that the project will be successful if shared governance between the tenured faculty and governing board is the guiding principle for both the drafting process and the content of the code itself. The success of Mitchell Hamline School of Law's Tenure Code revision in fiscal year 2021–2022 can be attributed to several factors:

- A highly motivated task force consisting of an equal number of trustees and faculty, co-chaired by a knowledgeable trustee and a highly respected tenured faculty member who led the revision process.
- Trusting relationships that were developed within a schedule of listening sessions, sharing documents, revising drafts, and working within existing committees such as Faculty Tenure Committee and Academic and Student Affairs Committee of the Board. Reliable communication channels were built to address priority issues.
- A disciplined approach that ensured that the task force would only address issues that concerned tenure-track and tenured faculty and that all other content would be delegated to a Faculty Bylaws Committee.

While each school considering a tenure code revision will face issues that are uniquely its own, the Mitchell Hamline School of Law experience confirms that when shared governance is the foundation of the tenure code review process, trust can be built, issues can be resolved, and a new tenure code can be unanimously adopted by the Faculty and the Board of Trustees.