Remarks on the Proposed Tenure and Promotion Grievance Policy

I wish to thank the Executive Committee of the Senate for inviting me to appear here this afternoon to address the proposed Grievance Policy. My desire has been to direct my comments to the T P & G Committee, as I did last spring in a letter for that committee only, and as I did this fall in a phone conversation with Dianna. I did not seek to air those concerns in public.

Part of my hesitation springs from my desire to be supportive of the hard work of the committee, of Stu Youngblood and all of those involved in this process. Stu, Dianna, and Greg Stephens met with me on Tuesday and I told them that I consider them to be not only respected colleagues, but also my personal friends. I have co-mediated disputes with all of them, and I wish to make clear my respect and positive regard for them. Moreover, the fact that Stu sought to meet with me, to understand my concerns, and to invite me here is an abundant demonstration of his openness and fairness.

I am the last person you would expect to oppose a new Grievance Policy. Many of you have heard me speak in the past concerning the need for a new policy. But let me be clear. The proposed policy is a significant step backward, removing checks and balances that guarantee fair treatment to both the grievant and the academic unit.

I have three major concerns. First, the proposed policy is more cumbersome and difficult than the current policy. Second, the policy removes the protection of an independent Hearing, or Appeals committee, and by so doing undercuts the opportunity for mediation to be successful. Finally, the policy removes historically important protections for academic units and transfers that authority to upper level administrators.

I have distributed a marked-up copy of the proposal along with other material so that I can document the following comments. I'd like to begin with the committee's statement regarding the reasons this proposal is needed, found on page 9 of the mark up. First, the current policy is cumbersome and hard to understand. I agree, however, in my opinion, the proposed policy is more cumbersome and more difficult to understand than the current policy.

As a social scientist, my first reaction is always to count things, and when I ran both the current policy in our handbook and the proposed policy through a word count, I found that the proposed policy was around 350 words longer than the current policy.

Let's consider the structure. Look at the flow chart I've attached on page 14 showing our current policy. Now, many of us have long advocated eliminating the grievance committee (which is a pseudonym for the Faculty Senate Executive Committee) from the process. That's a duplication and complication in current policy.

But the confusion of the current policy pales in comparison with the structure of the proposed policy. You will find a flow chart of the proposed policy on page 15. If all steps are taken then the proposal can involve an informal facilitated discussion (the new term for describing mediation that I have been told is less irritating to the Deans) on either 3 or 6 separate occasions, depending upon your interpretation of the policy. Then, the first level of appeal is right back to the same person, department chair, dean or provost and the same advisory committee that made the decision in the first place. *Yes, you heard me right.* So, the complaint proceeds to the next level with the added weight of a negative decision and an appeal denied despite the fact that both decisions were made by the same administrator only a few days apart. This convoluted structure can then be thrust up to the next level and the whole procedure can be repeated a maximum of three times at three administrative levels, resulting in many facilitated discussions, several appeals hearings, **but no opportunity to present the argument to anyone outside of the administrative chain of command.** More on that in a minute.

Stu told me on Tuesday that we need to replace the current policy because it is cumbersome and "justice delayed is justice denied." So, how speedy is the new policy if the grievant chooses to take the case from the Department level all of the way to the top? Page 9 of the markup asserts that "…worst of all, [the current policy is] not timely in addressing the appeals of faculty denied tenure and/or promotion. See pages 16-18 for the breakdown on timing in the proposed policy. You will be amazed. I have only included the steps in the policy that have a time lapse given.

The entire procedure would require from 87 to 102 working days to work through. Adding weekends, that would be about 122 to 143 total days and could be longer. That

does not include fall break, spring break, holidays, etc. **If justice delayed is justice denied then this policy is less just than our current policy.**

The proposed policy requires that important reviews have only 5 days to be held. Because of the sheer number of steps in the process, each individual step must be rushed. **If justice delayed is justice denied, then surely it must also be true that a rush to justice is an equal harm. The proposed policy achieves both harms by giving little time for important appeals but taking more time overall than current policy.**

Please look through the timeline I constructed on pages 16-18. Read it carefully. Compare it to the proposed policy. See if it is **clear** to you. Trust no one, including me, regarding whether the proposal is user friendly. It is your obligation as a Senator to read it for yourself and make an informed judgment. Ambiguity is an open invitation to all forms of mischief and creates legal exposure for TCU.

Page 9 of the mark up copy states "The current policy relies on a formalistic approach with heavy reliance on the faculty senate for resolving tenure/promotion disputes without the benefit of informal dispute resolution procedures." I have no idea what the committee means by a formalistic approach or why such an approach is evil.

If the committee truly felt that the presence of the Faculty Senate in the policy was harmful, then why would they reinsert the Chair of the Senate onto the Provost's Review Committee in the proposed policy? **You cannot claim that something is a current harm and then remedy the harm by repeating the error.** It is more important for the Chair of the Senate to be neutral and not be pulled into taking sides in faculty disputes than anyone else on campus.

But as for the claim that the current policy goes without benefit of informal dispute resolution procedures, this claim is demonstrably false. Are the authors of this new proposal unaware of the faculty mediator's committee? Are they unaware that the current policy includes mediation and is actually unafraid of calling it by its right name? Just last spring Dianna and I, as mediators working through our current grievance policy, successfully mediated a grievance dispute through informal dispute resolution procedures with the result that it never had to go forward to a grievance committee.

But if this were all—if the concerns I have shared with you thus far were my only reservations, I would not be speaking to you this afternoon. In my view, there are two fatal flaws in the proposal.

My second main point: no independent appeal is permitted. The proposed policy requires that appeals work their way up through the chain of command and allows no independent review of a grievance by disinterested, independent faculty. This peer review process, as it is called in our faculty and staff mediation policies, or hearing committee, as it is called in our current grievance policy, is essential and leaving it out undercuts our guarantee of fair treatment to the aggrieved faculty member.

I served as a Department Chair for a couple of terms and recognized on day 1 that I must communicate fully and openly with my Academic Dean. If there was a big problem on the horizon, I had to fully inform my Dean. It would have been professional suicide for me to deny tenure or promotion to a faculty member without consulting very, very closely with the Dean, and I assume that would also be true of Deans and Provosts.

I have absolutely no problem with that structure **unless you try to pretend that the same structure is a valid mechanism for an appeal**. It is not. The Dean is not a disinterested neutral party.

What faith can a nontenured faculty member have in the equity of such an appeal structure? And this procedure **protects all parties**. Tenure disputes often wind up as court cases. Currently, we can demonstrate in court, that we have a process for redress of grievances that is completely unbiased and independent. Should the Chancellor and the Board really desire to lose that protection?

Most importantly, elimination of a hearing committee seriously erodes the opportunity for mediation—at least that's the theory that I was taught by Stu Youngblood. In my training session, he and the other mediation experts informed me in no uncertain terms that mediation itself was not threatening because mediators do not make decisions—decision-making is entirely in the hands of the parties involved, through mutual consent. But the desire to use mediation and the willingness to show flexibility and reach accommodation is a direct result of the fact that the next stage in the process involves an independent hearing where the outcome cannot be known. You may believe

you have a very strong case, but it is always best not to test it. This proposal eliminates that motivation for mediation—excuse me, informal facilitated discussion, by eliminating the danger of an independent hearing.

In the proposed policy, the first appeal of the Chair's decision is to the Chair him/herself. Now, unless the Chair is schizophrenic, we assume that the Chair is confident in the outcome of that appeal. The second possible appeal is to the Academic Dean. If the Dean has been kept completely in the loop, *as should occur*, there will be confidence in the outcome of that review.

Now, it has been argued that faculty members are still involved in this review process because they are on various advisory committees. This is an invalid argument. First, **these committees are purely advisory.** Administrators may, and often have, disregarded that advice. Also, while the majority of the Advisory Committee is, by requirement elected (2 out of 3 or 3 out of 5), the proposed grievance policy would change that (see markup, page 4) by allowing the Dean to replace faculty from the grievant's own unit, possibly elected faculty, by an immediate **appointment**.

My final point concerns the fact that the policy removes authority from the unit level and moves it up the chain of command. At TCU, like at other first-rate institutions, we observe a policy of faculty governance. Nowhere is that more important than regarding tenure decisions. Please note that in our current grievance policy, only procedural violations can be appealed—substantive claims cannot. This is often reflected in the words, "we guarantee the applicant for tenure a fair and just process, but not a favorable outcome." I believe this practice is in place at almost all first rate Universities.

This approach is used commonly in all appeals procedures. If you lose a court case, you cannot simply try it all over again at higher and higher levels. You must show that there was a problem with the judgment: an error, a denial of precedent, an inconsistency, a bias, something other than simply saying to the judge "you were wrong." **This is more important in the academy than in the court system since the experts are all located at the department level.**

Can departments sometimes be wrong? Yes. But we have procedures in place to act as a counterweight to this possibility. Even if it were not so, there are many ways that

the decision could still be appealed through our current policy. Denial of academic freedom, inconsistent evaluations, and personal bias are all grievable under our current policy.

Return now to my earlier point that reviews at the College and University levels are afforded, in the proposed policy, only 5 days to complete. If we now make this a substantive review, the reviewers should be considering the entire case for tenure on merit—reading all of the research, pouring over the teaching evaluations, discussing observations with each other, and taking the time to think about their decision. Deans and advisory committee members may have prior obligations, be out of town at conferences. It is easy to see that this proposed policy is simply unworkable unless the candidate for tenure or promotion is simply given short shrift.

There is a history to our current policy. Years ago administrators were able to make substantive decisions and there were cases where those powers were used to award tenure to faculty who were judged by their peers, fairly and without procedural error, to not merit tenure. The decisions were made on the basis of friendships and politics. As a reaction to this capriciousness, the rights of the individual department to make the ultimate judgment on issues of substance were placed in TCU policy. I learned of the specifics of these cases through Bill Koehler. It seemed credible to me since it was one of the very few instances in which Koehler advocated a policy of faculty power over administrative power.

Let me be clear. I do not believe that such problems would happen today. I know most of our Deans and I believe that they are of good character, and Nowell Donovan has earned my respect and my trust over a twenty year period. But we are crafting policy that could be in place in another twenty years. Who will be in those offices at that time? Believe it or not, politics are often in play in many Universities.

Only academic units have the disciplinary expertise to make decisions on such issues as the quality of research. Chemists should not be placed in positions of determining whether musicians have sufficient technical skills to merit tenure. And while we currently allow the College and Provost level to say, “no,” it is altogether another thing to impose a “yes” on an academic unit with the result of conflict occurring for

decades to come. The recognition that faculty are content experts, in theory and in methodology, is the cornerstone of faculty governance. Remove that stone and we have become blue-collar faculty--easily replaceable units. We no longer have a community of scholars model. It has become a corporate model.

In summary, the effect (though I do not claim the intent) of the proposal before you is to remove an independent appeal and harm the opportunity for mediation. The effect of the policy is to give Deans the power to overturn denials of tenure and promotion made on substance and without error at the Department level, and it is to remove the threat that an independent appeals committee might then overturn Deans' decisions.

Read the policy for yourself very carefully. There is no issue more central or important to faculty than tenure policy, including appeal. It is the central issue in faculty governance and the primary safeguard of our academic freedom.

Departments are not perfect, but for every department that is off track, there are many that are on track. Administrators also are not perfect. They can make good decisions or bad ones. The question I put to you is **whom do you represent?** I hope that you will recognize that you were elected by faculty, to serve the interests of faculty and of *appropriate* faculty governance on a Faculty Senate. The Deans do not need your help. Our current grievance policy already has an administrative appeal process in place.

While I have provided examples of potential abuses of the proposed policy, I don't doubt the good will and good judgment of our Deans and Provost. **But this policy demonstrates a doubt of the good will and good judgment of our faculty—by undermining their academic units decision-making processes and by removing an independent faculty hearing committee.**

I promised to at least say a few words regarding what could be done to repair our current grievance policy. I say to you, remove the Executive Committee from the process. It should not be politicized. The resulting process would be cleaner and faster than the one shown on page 14. Mediators should not be asked to mediate and then to act as advisors, as in our current policy. I like the idea of an ombud taking over this roll. But please keep the ombud position entirely separate from the mediators. Finally, rewrite and

simplify the policy. The current policy was written in an era when mediation was thought of as a form of shuttle diplomacy and the time intervals can be much shortened. Removing the Executive Committee step will already go far in this regard. There are some good things in the T, P & G proposal—I just don't have the time to address everything this afternoon.

I have been told that the proposed policy is a clean slate and that our current policy is bad. But do not create more problems than you solve. Just because Osama Bin Laden attacks you, don't conclude that you must therefore invade Iraq!

This proposal throws out the baby with the bath water. That baby is an independent review process. That baby is faculty ownership of tenure policy. That baby is your child because you are members of the Faculty Senate.