Dear Senators:

I write with the thought that the Policy 6.4 rewrite deserves your close attention. See http://theuniversityfaculty.cornell.edu/news/x-revisions/).

It is a complete outrage. The University’s Summary, appended below, is a complete misrepresentation. Indeed, the outrage and misrepresentation are so severe as to make me think that they must result from oversight rather than malevolence—even if, as I recently learned, lawyers were deeply involved in the rewrite.

I. Current Situation

Here is the situation. Currently the faculty are treated by this version of 6.4: https://hr.cornell.edu/sites/default/files/documents/faculty_policy6.4procedures.pdf. It has two parts: (1) In case of, say, stranger assault, a complaint against a faculty member is handled administratively. Workforce Policy and Labor Relations (“WPLR”) investigates, and then writes a report and recommendation, which gets reviewed by the appropriate dean. The accused faculty member can also file a grievance under University Policy 6.2.10, Establishment of College-Level Academic Grievance Procedures. (2) If “a complaint arises out of the nature of a subordinate-supervisory relationship between a faculty member and the student (such as while engaged in teaching, advising, research, and thesis or dissertation supervision), or that could have involved an issue of academic freedom,” all the procedures of a full adversary hearing before the Committee on Academic Freedom and Professional Status of the Faculty apply. In essence, they provide for a hearing on the merits under a clear-and-convincing standard. For example:

- The respondent will be entitled to be accompanied and represented by an advisor or attorney of his or her own choice.
- The respondent will be entitled to be present throughout the hearings and, either personally or through his or her advisor or attorney, will be entitled to give evidence and to present witnesses on his or her own behalf, to hear the evidence against him or her, and to confront and cross-examine adverse witnesses (including the complainant or parties) who appear before the Committee.
- The Committee will encourage WPLR to turn over to the respondent all exculpatory evidence in their investigatory files.
- The Committee will not find the respondent responsible unless the Committee, after evaluating all of the evidence, is satisfied that the charge has been proven by clear and convincing evidence.
- The Committee will base its findings of fact and conclusions solely on the evidence presented at the hearings.
The Committee will decide by a majority vote of the members present and voting whether there is clear and convincing evidence to find that the respondent is responsible for each of the charges specified in the investigation report.

The Committee will make a written report setting forth the Committee's findings of fact, conclusions, and recommendations.

The respondent, a complainant, or WPLR may appeal the Committee's findings of fact and conclusions to the University Faculty Committee, as provided for in Cornell University Policy 6.4. Following the conclusion of an appeal, the respondent, a complainant, or WPLR may rebut the Committee's recommendations concerning sanctions to the appropriate dean or equivalent unit head, as provided in Cornell University Policy 6.4.

(Incidentally, in 2015 I complained to the higher-ups that these procedures were inappropriately too favorable to the faculty, at least compared to the treatment of student accuseds. I was told by the University Counsel that these procedures were untouchable, as being virtually the product of collective bargaining. However, he was willing to submit a proposal for change from clear-and-convincing to preponderance-of-the-evidence if he could call it the “Clermont Amendment.”)

II. Proposed Rewrite

The new proposal is to eliminate part (2) and all its protections. See https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/3/6798/files/2018/10/Policy-6.4-Emp-Procedures-1e2qmls.pdf. So, all complaints would be subject to part (1)'s investigatory-administrative Star Chamber procedure, with some changes such as the apparent loss of the right to grieve. Does the University's Summary capture that change? I think not.

In all cases, the faculty would get an investigator as judge, jury, and executioner. THERE IS NO HEARING WHATSOEVER. Indeed, the draft gives no real procedures at all for how the investigation is to proceed.

III. Where Are We?

This is an astounding change, especially when described by the University as “improving the basic clarity and completeness of procedures, primarily by drawing on the key successful features of the 2016 student procedures. The table below summarizes those parts that specifically relate to faculty. As will be noted, in almost all cases, the new Policy 6.4 enforcement procedures represent either no change from existing practice or constitute an appropriate improvement in the support and protection afforded to faculty while also offering corresponding enhancements for complainants. The one arguable exception is that the procedures extend the general statute of limitations for filing of complaints from six months to
two years . . . .” Anyone relying on the University’s Summary hasn’t the slightest idea of what is on the table. In particular, the critical change from hearing to investigation is obfuscated at [http://theuniversityfaculty.cornell.edu/news/x-revisions/academic-freedom-for-faculty/](http://theuniversityfaculty.cornell.edu/news/x-revisions/academic-freedom-for-faculty/).

What is most astounding, however, is that the change reflects a total ignorance of local history. In the afterglow of the “Dear Colleague Letter” in 2011, Cornell rewrote its Campus Code to substitute an investigatory-administrative Star Chamber procedure for students under 6.4. It was a universally decried disaster. In 2016, Cornell threw it out and instituted a system for hearing before a neutral adjudicator. Why is the current student system not the model for the faculty proposal? Why are we going to the rejected pre-2016 Star Chamber?

A catalyst for the 2016 reform was a 2015 letter from 51 law faculty members to the University President. We listed seven basic requirements of a fair process for students. The new faculty procedures fail all seven:

Such a system would ensure the following seven features of minimally fair procedure:

- the investigation and prosecution functions must be vested in an office with safeguards to ensure its neutrality and fairness to both parties;
- the investigation and prosecution processes must be appropriately open and transparent, so that both sides have prompt access to all important developments in the case as it evolves;
- the adjudication function must be separated from the investigation and prosecution functions, with both parties having a right to a hearing before a neutral multi-person faculty panel that hears all the evidence (similar to faculty rights under Policy 6.4 app. [A]);
- both sides must have a full right to counsel in the investigation phase and in preparation for and conduct of the hearing;
- if the proceeding cannot await the outcome of criminal proceedings, the accused has the right not to incriminate himself or herself (just as under the Campus Code), and no one should draw an inference against the accused for consequently remaining silent;
- both parties must have the right to present evidence at the hearing and to question witnesses, subject to reasonable limitations designed to protect the complainant, such as arranging for questions to be posed to that party out of the physical presence of the other party, who may watch from a separate room via closed-circuit television; and
- both sides must have a right to appeal, on a restricted set of grounds, the hearing’s outcome.
Do you see why I am calling this new draft an outrage? The University faculty should fight this with everything they have. Demand that the drafters go back to the drawing board. The faculty should have at least the protections that the students have.

Now, I may be misreading all this, but I am still awaiting someone explaining to me my mistakes.

Kevin M. Clermont
Ziff Professor of Law

<table>
<thead>
<tr>
<th>Provision Details</th>
<th>Current Procedures</th>
<th>Proposed Procedures</th>
</tr>
</thead>
<tbody>
<tr>
<td>Definitions-Sexual and Related Misconduct</td>
<td>Outdated definitions of prohibited conduct in the Title IX/ NY 129-b areas</td>
<td>Adopted current or required definitions from student procedures</td>
</tr>
<tr>
<td>Definition-other forms of Prohibited Discrimination</td>
<td>Covers other forms of prohibited discrimination (gender, age, disability, veteran status, etc.)</td>
<td>No change</td>
</tr>
<tr>
<td>Academic Freedom for Faculty</td>
<td>Provides for review of academic freedom issues only as form of appeal after finding of responsibility</td>
<td>Provides for up-front review when complaint under Policy 6.4 is submitted; determination by faculty panel that matter is protected by academic freedom cannot be appealed; uses definition of academic freedom adopted by University Faculty (May 11, 1960.)</td>
</tr>
<tr>
<td>Statute of Limitations</td>
<td>6 months</td>
<td>2 years</td>
</tr>
<tr>
<td>Right to Support and Advisors</td>
<td>Either party can have a support person and/or advisor</td>
<td>No change</td>
</tr>
<tr>
<td>Investigation</td>
<td>No specific provision for exchange of information collected during investigation; practice of providing supporting information with final report</td>
<td>Adopted procedures from student procedures; complete transparency of information collected; opportunity to review during course of investigation and propose questions and topics for investigation; provision for commenting</td>
</tr>
<tr>
<td><strong>Reviewer (Dean)</strong></td>
<td>Final report provided to Dean with recommended finding</td>
<td>Final report provided to Dean with recommended finding together with all supporting evidence</td>
</tr>
<tr>
<td>---------------------</td>
<td>------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------</td>
</tr>
<tr>
<td><strong>Opportunity to Comment</strong></td>
<td>Parties have opportunity to comment on final report before Dean issues decision.</td>
<td>No change.</td>
</tr>
<tr>
<td><strong>Right of Appeal of Dean’s Decision</strong></td>
<td>The Dean’s decision may be appealed to Provost</td>
<td>The Dean’s decision may be appealed to faculty panel who have received training on prohibited conduct under Policy 6.4</td>
</tr>
<tr>
<td><strong>Additional Appeal of Sanction under University procedures</strong></td>
<td>Faculty may challenge a sanction issued in the process under college and University procedures</td>
<td>No change.</td>
</tr>
</tbody>
</table>