

June 15, 2009

PROFESSOR ROSS FRANK
Department of Ethnic Studies

SUBJECT: Senate Council's Discussion Regarding NAGPRA Issue

Dear Professor Frank:

Thank you so much for agreeing to appear before the Senate Council at its meeting on April 13, 2009 and participate in a discussion of NAGPRA issues at UC San Diego. I am attaching a copy of the portion of our Senate Council minutes from that meeting, which have been approved by the Senate Council and available to all members of the San Diego Division. While I know you may or may not agree with all of the Council's recommendations, at least you may be assured that your viewpoints were represented in our discussion.

With best wishes,



Daniel J. Donoghue, Chair
Academic Senate, San Diego Division

Attachment

cc: W. Hodgkiss

SENATE COUNCIL MEETING
APRIL 13, 2009
MINUTES (excerpt)

Chair Donoghue announced that a quorum was present and called the meeting to order at 3:40 p.m.

4. NAGPRA Issue

Chair Donoghue thanked Council members for their flexibility in rescheduling the April Council meeting so that the Native American Graves Protection and Repatriation Act (NAGPRA) issue could be fully considered. He also thanked Ms. Sherwood in advance for her note taking and meeting minutes, which will serve as the basis of a letter to Chancellor Fox summarizing the collective views of the Council. This issue arises from the 1976 discovery of two sets of well preserved human remains on the University House property. During the past few years, the final disposition of these remains has engendered much discussion and some furor. The public nature of this controversy is evidenced by recent articles in *Nature*, *Science*, and the *San Diego Union-Tribune* (agenda enclosures 16, 17, 18). Chair Donoghue informed Council that he and Vice Chair Hodgkiss had met with former Senate Chairs Jean-Bernard Minster, James Posakony, and Jan Talbot on March 31 to discuss various aspects of the NAGPRA issue.

Chair Donoghue outlined the schedule for presentations by Professor Margaret Schoeninger, Vice Chancellor Art Ellis, and Professor Ross Frank, and for the subsequent Council discussion, noting that he hoped to frame the discussion around the main points contained in the letter from the Committee on Research (agenda enclosure 13). He stated that Senior Vice Chancellor Paul Drake, Vice Chancellor Gary Matthews, and Campus Counsel Daniel Park had all declined his invitation to attend and provide administrative perspectives. He said that he had received a request from a Senate member who wished to be present as an observer and who raised the question of whether Divisional Bylaw 150 provides such a privilege. Chair Donoghue consulted with Professor Mackie, Divisional Parliamentarian, who was kind enough to render an opinion on this subject; Professor Mackie's letter will be attached to the minutes of the meeting to become part of the Council's permanent record (attachment 2).

Professor Margaret Schoeninger then joined the Council, and Chair Donoghue welcomed and introduced her. Professor Schoeninger is a faculty member in the Department of Anthropology, is a current member of the Divisional Committee on Research, chaired the UCSD NAGPRA Working Group, and is a member of the UC NAGPRA Advisory Committee. Professor Schoeninger thanked Chair Donoghue and the Council for the opportunity to give a presentation on the human remains found on the University House property in 1976 (attachment 3 and agenda enclosure 5).

Professor Schoeninger pointed out the importance of the archaeological material from a scientific standpoint, noting that she had conducted a study using these remains a number of years before she arrived at UCSD. She explained the similarities in age and morphology of these remains with those of Kennewick Man, the morphological and dietary dissimilarities with modern Native Americans, and how this information influenced changes to theories about the peopling of the new world. Professor Schoeninger gave a brief overview of the archaeological excavations that had uncovered the remains. She noted that dietary reconstructions based on stable isotope analysis indicate a reliance on ocean resources; the ability to navigate the open ocean would be consistent with current information from similar materials found along the coasts of South America. In this respect, this is not a just a local issue about ancestral remains; these remains represent information about the history of peoples in all of the Americas. Professor Schoeninger said that much information could be gained using current scientific techniques to study these bones; other useful techniques are under development.

In response to a question, Professor Schoeninger agreed that the human remains need to be treated with respect, and noted that there are two Native American graduate students who have been accepted

to the Department of Anthropology graduate program who are interested in studying these remains. It is possible that there are generational differences in Native American approaches to these issues. She stated that while the federal NAGPRA law was put in place to provide protections to Native American groups, scholarship also needed to remain a priority.

A member asked why the scholarly interest in these remains had only recently surfaced at UCSD. Professor Schoeninger replied that she was the first biological anthropologist working on non-human primates in the department; the department had not hired archaeologists until the 1980s. Advanced three-dimensional imaging and DNA studies were not possible before, and the radical changes in theoretical explanations of the peopling of the new world had prompted renewed interest. Professor Schoeninger expressed her dismay at the seeming lack of scholarly discussions about, and an overarching research agenda for, these remains. In response to another question, she said that the current issue was partly a result of a repatriation request made by the Kumeyaay Cultural and Repatriation Committee (KCRC) in 2006; that request had been brought about by the University House expansion/remodeling project.

Chair Donoghue thanked Professor Schoeninger for her presentation; she then left the meeting. [Subsequent to the meeting, Chair Donoghue contacted Professor Schoeninger via email and asked for permission to append her presentation to the meeting minutes; she agreed.]

Chair Donoghue then welcomed Vice Chancellor for Research Affairs Art Ellis, who joined the Council as a representative of Academic Affairs (agenda enclosure 14). VC Ellis said that the University wishes to treat the remains respectfully while balancing the wishes of University researchers, compliance with federal laws, and relationships with the Native Americans. He noted that if the discovery had happened a few years later, California law would have required that the remains be turned over to the KCRC immediately; this happened recently at the University House site when human skeletal fragments were found during ground testing.

VC Ellis explained that UC policy provides a process for UC's implementation of NAGPRA requirements (agenda enclosure 15). UC policy calls for a campus liaison with local Native Americans, and Chancellor Fox has appointed VC Matthews as the campus liaison. UC policy also requires that a campus working group make a recommendation regarding cultural affiliation; this is the Working Group that was chaired by Professor Schoeninger. The majority opinion of the UCSD Working Group was that the remains were "culturally unidentifiable" (agenda enclosure 6); a minority opinion disagreed. The UC NAGPRA Advisory Committee received this report and supported the majority opinion in its advice to President Yudof and Vice President Beckwith (agenda enclosure 7). The KCRC requested that the remains be given to the Kumeyaay (agenda enclosure 9); this could not be done given the UC NAGPRA Advisory Committee's recommendation. Chancellor Fox, after consultation with President Yudof, submitted via VC Matthews a request to the national NAGPRA Review Committee to transfer ownership of the "culturally unidentifiable" remains to the KCRC (agenda enclosure 8). Because the KCRC declined to accept a transfer of ownership, objecting to the "culturally unidentifiable" designation, the request was withdrawn before the national NAGPRA Review Committee could consider it (agenda enclosure 12).

VC Ellis stated that he has been charged with setting up a process for considering requests to conduct research on these remains. Some other UC campuses have anthropological museums and curatorial staff that manage collections and provide the stewardship necessary for considering research requests, but UCSD does not. Currently, the remains are housed at the San Diego Archaeological Center. It is possible, however, that the remains will need to be moved to the campus in the future, especially if research requests are received. In that case, proper storage and treatment of the remains on campus would need to be addressed.

VC Ellis suggested that the Committee on Research might play a role in the consideration of research requests and asked for comments. Council members recommended that the processes used by other

UC campuses be used as a basis for developing a UCSD process. A member asked if another UC museum could take custody of the remains. VC Ellis thought this might be possible and noted that at none of the other campuses are decisions about research requests made by only one person; a group or committee is always involved. In response to another question, VC Ellis said that since the responsibility for these remains currently resides with President Yudof, he thought the remains belong to UC, rather than UCSD. He noted, however, that this is an issue under discussion; Vice President Beckwith favors devolving this responsibility to the individual campuses.

A member asked about next steps, and VC Ellis explained that the cultural affiliation and repatriation aspects would not be revisited by UC; the policy's process had been followed and completed. The KCRC could, however, make its own request to the national NAGPRA Advisory Committee to determine that the remains were culturally affiliated. If the Secretary of the Interior made such a determination, UC would have to give the remains to the KCRC.

A member said that, in a perfect world, research could be conducted in ways that would not violate Native American principles. VC Ellis noted that both sides are passionate in their positions. Another member asked whether having different aspects of this matter vested in two different administrators, VC Ellis and VC Matthews, was appropriate. VC Ellis replied that this was partly due to historic circumstances and that effective communication was always important.

Chair Donoghue thanked VC Ellis; he then left the meeting.

Professor Ross Frank then joined the Council, and Chair Donoghue welcomed and introduced him. Professor Frank is a faculty member in the Department of Ethnic Studies and was the member of the UCSD NAGPRA Working Group who authored the minority report. Professor Frank thanked Chair Donoghue for the opportunity to address the Council and present his position (attachment 4).

Professor Frank explained his view that the UCSD Working Group had approached the issue incorrectly by evaluating the strength of the individual types of evidence rather than examining all the types of evidence as a whole from an interdisciplinary perspective. The former approach precludes looking at the larger, cultural argument and was used to eliminate any possible connection between the Kumeyaay and the human remains. The law does not require there to be a scientific certainty; rather, the standard is "preponderance of the evidence". In addition, the majority of the Working Group discounted the Kumeyaay perspective that they have a cultural connection to these human remains. The Kumeyaay have occupied this geographic area for thousands of years, and they have taken on the responsibility for this area and all human remains here.

In response to a question, Professor Frank explained that state law requires that any human remains found now on the University House property be automatically turned over to the Kumeyaay because of geographic proximity. He said that, for the Kumeyaay, this is an issue of sovereignty. A member asked if the KCRC is the body empowered to speak for the entire Kumeyaay Nation. Professor Frank replied that it is. When NAGPRA was passed, the ten Kumeyaay bands formed the KCRC as a mechanism to act for all ten bands in matters of repatriation. After material is turned over to the KCRC, they then decide which band is the appropriate responsible party.

A member asked Professor Frank if there was any doubt in his mind that these human remains are affiliated with the Kumeyaay Nation. Professor Frank replied that he does not doubt that they are affiliated and, given the law does not require an argument of scientific certainty, the remains should be given to the Kumeyaay. He also voiced his opinion that the national NAGPRA Review Committee would have not found the UCSD Working Group's report adequate.

Another member asked if the lack of repatriation of these remains would affect Professor Frank's ability to conduct research among the Kumeyaay. Professor Frank replied that relationships with the Kumeyaay have already been affected. The campus is viewed as not hospitable to Native Americans.

Chair Donoghue thanked Professor Frank for his presentation and asked for permission to append it to the meeting minutes. Professor Frank agreed and then left the meeting.

Chair Donoghue asked the Council to consider the points in COR's report (agenda enclosure 13).

- *“That the Chancellor withdraw her request to the DOI for the waiver to give the remains to the KCRC”*

Chair Donoghue noted that this point may now be irrelevant, as the request was withdrawn on April 1 (agenda enclosure 12). However, he asked Council members to consider endorsing the concept that the Senate should have been consulted before the request was submitted. Similarly, he asked Council members whether the Senate should have been consulted before the request to the national NAGPRA Review Committee of the Department of the Interior was withdrawn.

In the discussion that followed, a variety of opinions were voiced. One member thought that the University should try to get agreement from the Kumeyaay regarding a respectful way to conduct research. Because of all of the ramifications, it is important to handle this situation carefully. Another member found the COR letter flawed because of conflicts of interest, particularly with the participation in COR's discussion of a faculty member with direct research interests. A Council member said that Council had just seen two faculty members who are very passionate about this issue and whose research would be tremendously impacted by whatever action was taken. He suggested that these faculty members recuse themselves from future decisions on this matter and that another UC campus or faculty members from other UC campuses be asked to participate in the decisions instead. Some Council members expressed discomfort with the idea of endorsing COR's recommendations. Upon the request of a member, Chair Donoghue declared a brief executive session. [No minutes are recorded during an executive session.]

After the executive session ended, discussion continued. A member said that the original failure on the part of the administration was not a failure to involve the Senate; this matter was not automatically a Senate issue. The administration followed UC policy and formed the UCSD Working Group, an administrative body; the faculty members served because of their expertise, not as Senate representatives. Before making a decision that set aside the Working Group's majority recommendation and the effort it represented, however, the administration should have consulted with and informed the Working Group. Again, before the administration made the decision to withdraw the request, they should have consulted with the Working Group. There was a serious failure in communication, but not necessarily a breakdown of shared governance. Other Council members agreed, noting that these were questions of law and politics, not necessarily academics. Chair Donoghue asked whether this represented the consensus viewpoint of the Council. Without taking a formal vote, Council members indicated that they endorsed this view with no objections.

- *If #1 is not done, “then the Academic Senate and/or Campus appoint Professor Schoeninger to represent the Academic Senate Committee on Research at the May Federal NAGPRA panel meeting in Seattle and provide the necessary travel funds”*

Chair Donoghue pointed out that, strictly speaking, this recommendation is also irrelevant since the request has been withdrawn. However, since the University still possesses the remains, the question may arise in the future. He asked Council to comment on a slightly different question: *Does Council wish to consider endorsing the concept that the **Administration** would pay for Professor Schoeninger and/or other interested parties to attend a future national NAGPRA Advisory Committee meeting to express their **individual** views?*

Council members expressed high regard for Professor Schoeninger's academic and professional expertise; however, without exception, they noted that this very expertise created an inherent conflict of interest. Other members questioned the appropriateness of any faculty member representing the Committee on Research in this matter; these members were reluctant to endorse the concept that this was truly a Senate issue. After more discussion, the Council arrived at a consensus: if the administration wished to send faculty members to a future national NAGPRA Advisory Committee

meeting, the administration could, of course, do so, but those faculty members would be representing themselves as individuals and should not be construed as Senate representatives. Further, the Council declined to take a position on whether or not to recommend this course of action to the administration because doing so would imply Senate involvement where Council thought there should be none. Chair Donoghue asked whether these represented the consensus viewpoints of the Council. Without taking a formal vote, Council members indicated that they endorsed these views with no objections.

- *“That attention and discussion be devoted to fully exploring the scientific and historical value of the Paleo-Indian burial remains, including the potential significance of research and what forms that research might take. These include discussions of the balance and consideration given to the scientific and Native American communities, the terms and responsibilities mandated by NAGPRA, questions regarding the cultural affiliation of the remains, ethical considerations in the nature of the research, and recommendations by the UCSD and UC NAGPRA representatives”*

Chair Donoghue said that although the administration had followed UC policy regarding the remains, this point represents an important issue nonetheless because it was the lack of forthright communication that helped elevate this matter to the Council’s agenda. VC Matthews has been designated by Chancellor Fox as the Native American liaison and with many responsibilities relative to the NAGPRA issue. Yet, VC Ellis is a member of the Committee on Research and, therefore, has a direct consultative relationship with the Senate.

As additional background information, Chair Donoghue noted that Director Hamann had consulted with other Divisional Directors about how their campuses handle NAGPRA matters. Santa Barbara has a UCSB Committee on Repatriation of Human Remains and Cultural Items that advises the Chancellor and his/her designee. Repatriation requests are submitted to the Vice Chancellor for Research. Neither the Senate nor the Committee on Research is mentioned in Santa Barbara’s campus policy. At Berkeley, the Divisional Senate recently reaffirmed the responsibility of the Vice Chancellor for Research in NAGPRA matters; the Committee on Research has no oversight or advisory responsibilities.

Chair Donoghue asked Council members to consider what might be the most appropriate mechanism for notification, with whom in the Senate the notification/discussion should occur (e.g., COR, Senate Council, Senate Chair and Vice Chair), and which administration official should be charged with notification. Would it be appropriate for the Senate to expect this of VC Ellis, who could appoint an administrative committee composed of faculty with appropriate technical expertise to advise him?

In the discussion that followed, Council members again drew a fine line between the administration and its authority and the Senate’s purview. A member suggested that consultation should include COR. COR should not set policy or resolve any such conflicts, but at least the consultation could occur. One Council member noted that Senate-Administration Council meetings provided opportunities for both the Senate and the administration to share concerns. Discussions in the monthly Chancellor’s Council meetings might be another mechanism. The Chancellor could not be expected to know and understand the extent of every faculty member’s research.

Another member pointed out that many administrative decisions affect faculty research efforts, but not all are automatically Senate issues. The Council cannot anticipate all the ways in which things might go wrong and put contingency plans in place for each. This member maintained that the process worked exactly as it should: the administration took an action, and then the faculty member complained to the Senate. Another member thought that the Senate Chair should be informed so that he or she could then decide whether the matter should be considered by the normal Senate review process. This would also leave the flexibility for the Senate Chair to decline to consider the matter.

The Council agreed that better communications might have helped the current situation, but some thought that a certain amount of furor and public criticism could not have been prevented. Rather than recommend a course of action and set an expectation as to who would be responsible, the

consensus arrived at by the Council was to point out to the administration that the current system had not worked well in this situation and that steps needed to be taken to improve the course of events in future situations. Because many of the current problems arose from a lack of communication, improved consultation with the appropriate faculty members could be one such step.

- *“That further discussion on issues of shared governance and openness of communication concerning the remains and the University’s actions on repatriation be continued and that the Academic Senate Council and other relevant Senate committees engage in a broad and deep inquiry into the apparent breakdown of communication and consultation required by the principle of shared governance that occurred in the formulation of and ultimate decision by the Chancellor to request the waiver for the disposition of the human remains.”*

Chair Donoghue noted that the administrative decision-making process had operated within its authority in this matter, and that there was no shared governance issue, strictly speaking (agenda enclosures 10, 14, 15). Yet, those administrative actions have angered faculty members, angered the Native American community, and left the Senate with justifiable concerns about communication and the process. He asked the Council to consider what its expectations would be regarding consultation about such situations in the future.

The Council expressed its regret that those members of the Administration who had been invited (with the exception of VC Ellis) declined to attend the Council’s discussion; their attendance would have helped further communication on this complicated issue. Some Council members were concerned that the administration may have considered that all the issues were resolved once the request to the national NAGPRA Advisory Committee had been withdrawn.

A member reiterated that initially this was a communication failure and not a shared governance issue, although it evolved into one. The failure on the part of the administration occurred when it did not communicate with the Working Group when the decision to set aside that Group’s recommendation was made, and when the administration did not realize that such a decision would upset the faculty members involved. This is a complex issue that involves different areas of the campus; once the matter had come formally to the attention of the Senate, however, the administration should have kept Chair Donoghue apprised of all developments in a timely fashion.

A Council member wondered what would happen to these remains. No one who is disinterested has looked at this issue. Another member pointed out that since UCSD is the custodian of the remains, a process needs to be established to consider research requests. Even if such consideration is respectful, it may be harmful to the University’s relationship with the Kumeyaay. The consensus of the Council was that consideration or adjudication of any forthcoming research requests is not a Senate issue nor COR’s responsibility. Council’s recommendation is that the administration should form a committee for the purpose of considering any future research requests and, further, that the members should be an independent advisory group, consisting of faculty who are not on COR and who do not have any conflicts of interest. Without taking a formal vote, Council members indicated that they endorsed these views with no objections.

Chair Donoghue said that he would summarize the Council’s comments and circulate the letter before relaying it to Chancellor Fox.