

# Faculty Senate Agenda & Minutes

## March 20, 2020, @ 2:30pm

### Meeting Via Zoom Only

Present: Monty Abbas, Masoud Agah, Diane Agud, Robin Allnutt, Susan Anderson, Richard Ashley, Michael Borowski, Charles Calderwood, Leandro Castello, Virgilio Centeno, Benjamin Corl, Sam Doak, Harry Dorn, Matt Eick, Matthew Gabriele, John Galbraith, William Galloway, Ellen Gilliland, Nicolin Girmes-Grieco, Roie Hauser, James Hawdon, Dana Hawley, Bob Hicok, Christine Kaestle, Eric Kaufman, Bradley Klein, Jake Lahne, Margarita McGrath, Polly Middleton, Cayce Myers, Amy Nelson, Marie Paretti, Robin Queen, Susanna Rinehart, Todd Schenk, Yang Shao, Ashley Shew, Richard Shryock, Ryan Speer, Tess Thompson, Jim Tokuhisa, Diego Troya, Mark Van Dyke, Robert Weiss, Cynthia Wood, Anthony Wright de Hernandez, Liqing Zhang

Guests: Hani Awani (GSA), Karen DePauw, Michele Deramo, Cameron Donaldson, Jack Finney, Guru Gish, Dave Guerin, Phillip Hernandez de Wright, John Hole, Rachel Holloway, Kayla McNabb, April Myers, Ellen Plummer, Coogan Thompson (GSA)

Prior to the start of the meeting, Senators had an opportunity to join pre-meeting instruction on Zoom tools and etiquette, provided by Kayla McNabb. That video is available at <https://bit.ly/2Utrrog>

#### **Approval of Agenda**

The agenda was approved by unanimous consent.

#### **Approval of Minutes**

Minutes of the March 6th meeting were approved by unanimous consent.

#### **Announcements**

- Eric Kaufman provided an overview of Zoom functions and the roll call/ voting tool.
- Bob Hicok shared updated plans for the Commission on Faculty Affairs (CFA). They have proposed that the three pending resolutions be pushed to next semester. With the remaining time with CFA, there will be Town Hall meetings held via Zoom.
- Eric Kaufman shared plans for identifying 2020-21 Faculty Representatives on Commissions and Committees. Senators can expect a related survey in the coming week.

#### **Topic 1: Responses to [COVID-19 Pandemic](#)**

- Rachel Holloway addressed the changes happening with regards to undergraduate and international educational experiences.
  - A proposal has been sent to the Provost regarding grading. More information will go out once/ if that is finalized.
  - About 1,000 students are planning on returning to on-campus housing. However, those students that can go home have been encouraged to do so. There is very little information about students staying off-campus but still in Blacksburg.
- Rachel Holloway addressed the questions posed in advance by Faculty Senators.
  - SPOT assessment is still beneficial to understand how the university is responding to the pandemic. Low ratings or lack of ratings will not penalize faculty members due to the difficult circumstances.
  - VT is asking those who are self-quarantining to report their status. This is through VT's Emergency Management site.

- Breaking recorded lectures up into smaller pieces will be easier from a technology standpoint.
- Question from a Senator: Can that travel poll for students be required to open Canvas?
  - The poll cannot be required, but encouraged for students.
- The Blacksburg Chief of Police released a statement that if they are called out for partying there will be a conduct referral, based on expectations for social distancing.
- Question from a Senator: Is it possible for Blacksburg and Radford to introduce a curfew to discourage partying?
  - Although VT can control the campus, it is very difficult to know what is going on in an apartment complex.
- There are resources for students with limited internet access at home. These are located on the VT COVID-19 website.
- Guru Ghosh gave updates on students studying abroad (Global Travel Oversight Committee).
  - Over 200 students were studying abroad during this Spring semester. 205 have returned to the US, 13 have chosen to stay in Europe, 12 have chosen to stay somewhere besides Europe.
  - Students in Japan, China, and Italy were contacted first. The university worked with them to ensure that any financial limits would not be an issue for getting them back to the US.
  - Three waves of students and faculty came from Switzerland. All were able to return to the US with the help of an immigration lawyer and the VT group working around the clock.
  - All summer study abroad programs have been suspended. Decisions about Fall programs have not been made.
  - The Global Education Office will create more links to the travel form.
  - Local medical professionals are concerned about the limited number of COVID-19 test kits and general resources. VT may want to consider further collaborating with those professionals.
- Jack Finney gave an overview of how to apply for a tenure extension as a result of COVID-19.
  - FAQs for faculty will be released in the near future.
- Karen Depauw addressed student assistantship continuation into the summer.
  - This will likely depend on funding; however faculty are welcome to make it happen.

## **Topic 2: President's Committee on Governance Update (Appendix A)**

- Bob Hicok covered the changes that would be made by the proposal (Appendix A). This topic will be brought up one more time before the end of the semester.
  - Mattew Gabriele asked what the timeline would look like.
    - The proposal will be submitted by the end of the semester; however the response time is not clear due to current events.
  - Question from Marie Paretti: Are the senates independent of one another, or are there cases when issues arising through one senate will be voted on by other senates based on relevance.
    - All of the senates would have territory that is considered theirs. Tasks that fall under different senates would eventually be voted on by University Council.

- Question from Todd Schenk: Can you speak further to the role of College Faculty Associations in this new model?
  - The intent is so that individuals have bodies that they can report to and connect with others, more than is currently done.

**Topic 3: Q&A on [Chosen Names and Personal Pronouns](#)**

- Michele Deramo gave an overview of the recent announcement regarding chosen names and personal pronouns. Students will be able to indicate their personal pronouns and the chosen name that professors will see on their rosters.
  - Question from Christine Kaestle: Can we get it to appear in canvas?
    - It should appear there based on the roster.
    - There seems to be interest for students to be able to see this information as well.
  - Question from Todd Schenk: Is it OK to say ‘introduce your pronouns if you wish’?
    - Yes, as long as students understand that this is voluntary—as is listing them in Canvas or HokieSpa.
  - Additional follow-up is available through [InclusiveVT](#).

**Topic 4: CGPSP Resolution 2019-2020A-1 (Appendix B)**

- William Galloway summarized the resolution: One of the penalties for an honor violation to be added is revoking a graduate degree. Such a penalty could result from plagiarism, academic sabotage, falsification, etc. A very high bar would be set in order for this to happen.
  - Previous suggestions included a statute of limitations of two years, which would be consistent with fraud cases in the state of Virginia.
    - Grandfathering is another consideration. John Hole mentioned that the current Graduate Honor Council is enforcing the current Honor Code in all cases. Legal counsel may need to look at this issue; it could be a case by case basis.
- The Faculty Senate voted to wave the right to comment on this resolution.

**Other business**

No other business was presented.

**Adjourn**

The meeting formally adjourned at 4:21pm.

*Note: Minutes captured by Cameron Donaldson, with additional editing by Eric Kaufman.*

## [March 20, 2020 Faculty Senate Meeting Appendix A]

### Overview of the “President’s Committee on Governance” proposal (for consideration by FS)

Our “council and commission” system of shared governance limits faculty say in academic matters in two key ways: individual faculty members, whether they participate in shared governance or not, are often treated as representative of the entire faculty, which dilutes faculty authority and voice; and the work groups and committees that do the formative work on large academic changes – think Pathways and DAs – tend to have little faculty participation and are not constituted and operated within our system of shared governance.

The President’s Committee on Governance (PCG) proposal that will go to President Sands at the end of the semester would address both of these issues and others as well:

“Faculty Senate shall be representative of the entire faculty and have the authority and responsibility to act on their behalf through legislative recommendations concerning academic policies and regulations, educational standards, curricula, and the working conditions of faculty.” (See *Faculty Senate*, page 5).

In addition to the authority/responsibility outlined above, many of the existing commissions would operate under and report to FS (see diagram, page 4). This would give FS greater control over the work the commissions take up and allow us to vote on the resolutions they generate. If FS didn’t agree with a resolution from one of its commissions, it would not go forward to University Council (UC).

More importantly, the PCG will propose that the formative work on all large changes (University Initiatives) must take place within our system of shared governance. The work groups that take up these tasks would be formed through a steering/charging process in UC that would place FS representatives (and those of the other constituent groups) on the work group in numbers proportional to the nature of the task. They would not be independent “faculty stakeholders,” as they’re referred to now, but representatives of FS who are obligated to report on the progress of the work group to FS and take feedback from FS to the work group. Likewise, the work group leaders would periodically report their progress to University Council and take input from that body as well. Through FS, faculty would be deeply involved in the academic changes and direction of the university.

Some smaller but important aspects of the proposal.

- 1) All constituency groups would be referred to as senates and have specific areas of legislative (in the form of resolutions) authority.
- 2) UC would have a cabinet, a subset of UC made up of leaders from the administration and the various senates, which would put faculty in closer contact with upper administration in an ongoing manner. The UC cabinet would also steer/charge the University Initiative work groups and oversee the movement of topics and resolutions through governance.
- 3) The Office for Policy and Governance (OPG) would be given an augmented communication and oversight role as well. From a communication and workflow perspective, it would serve as the hub of governance. You can get a sense of how it would function by looking at the “Actual and proposed workflow of current CFA resolutions” (page 9).
- 4) The college reps on UC would be from the college associations, thereby linking college governance to UC. Currently, most college reps on UC do not have a means for ascertaining the views of the faculty they represent and are not required to do so.

5) The Deans' Council and Department Heads Council Executive Committee would be added to University Council as consultative bodies.

6) While the PCG has not finished the discussion on voting, we agreed at the last meeting that approval of University Initiatives would require a 2/3 vote in UC.

7) Financial support for shared governance would be increased.

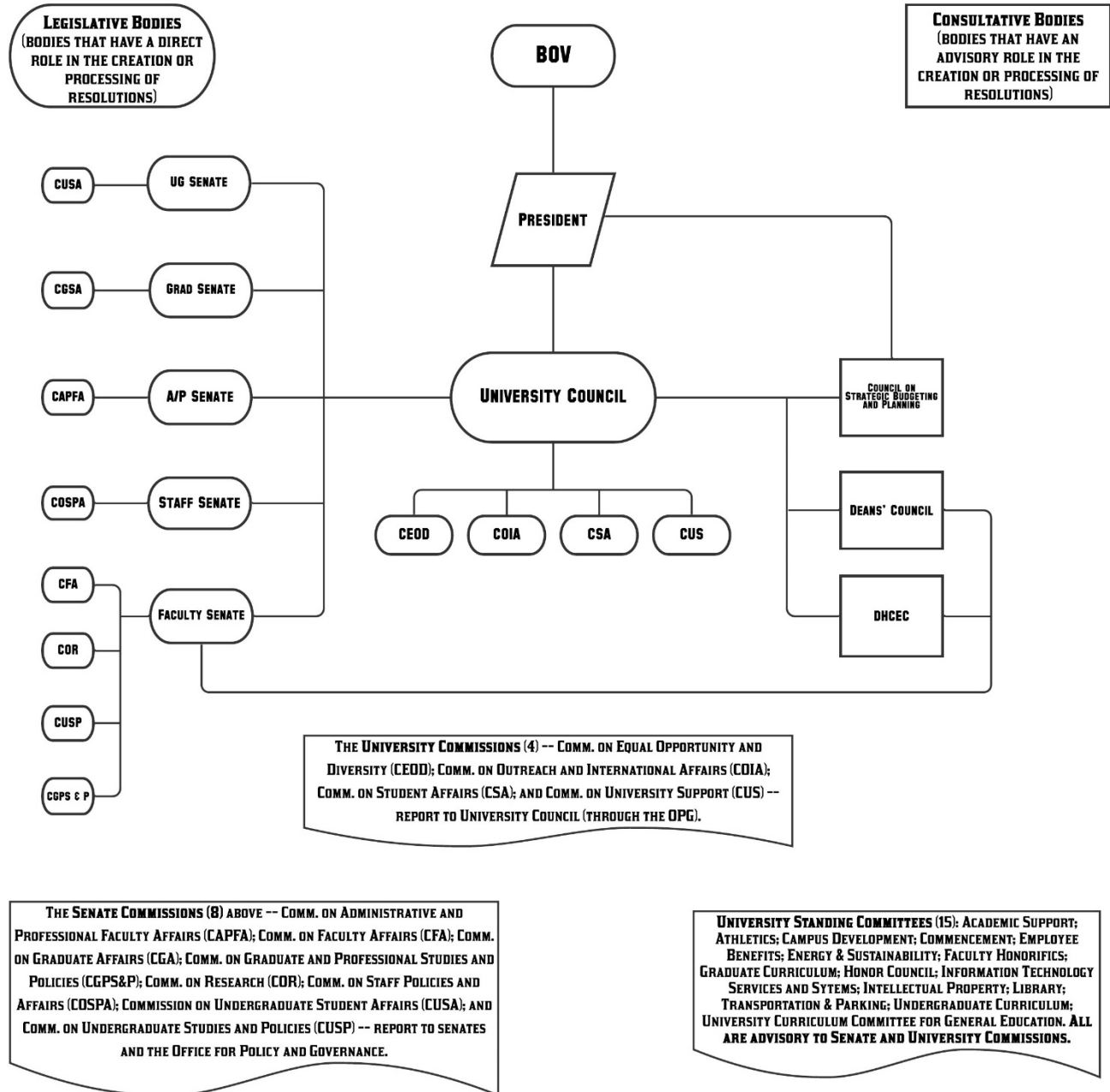
One last thing: other than this intro, this is a working document that the PCG has been using the past few meetings to give some shape to our proposal. Think of it as a rough draft in which the broad strokes are ready but not the details.

**Basic elements of the “President’s Committee on Governance” proposal (after 3/13/20 meeting)**

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## PROPOSED REVISION TO VT SHARED GOVERNANCE STRUCTURE



## **The legislative bodies of shared governance**

The legislative bodies of shared governance are the Board of Visitors, University Council, Faculty Senate, Staff Senate, A/P Faculty Senate, Graduate Student Senate, and Undergraduate Student Senate; the senate commissions; and university commissions that report to University Council through the Office for Policy and Governance (OPG).

University Council and the senates each have an executive council or cabinet that coordinates its activities, communicates with the other components of governance through the OPG, and provides a venue for deliberation among leaders of each group.

As outlined below, each senate has purview over legislative recommendations (in the form of resolutions) relating to the academic and/or employment conditions of its constituency and at least one commission responsible for the creation of resolutions. Resolutions approved by senates are advanced to University Council for consideration.

No matter their source, all resolutions are recommendations to the President and BOV.

The Office for Policy and Governance coordinates the activities of shared governance and all legislative bodies report to it.

### University Council

University Council is the central deliberative and legislative body of shared governance. Its primary functions are to finalize legislative recommendations to the president that originate in the senates, deliberate on issues of broad concern to the university, and coordinate the legislative activities of shared governance. Comprised of faculty, staff, students, and administrators, it also has the authority to create work groups charged with developing new university initiatives and to propose resolutions. The Commission on Equal Opportunity and Diversity (CEOD), the Commission on Outreach and International Affairs (COIA), the Commission on Student Affairs (CSA), and the Commission on University Support (CUS) are the university commissions.

### The Senates

In addition to their legislative activities, all senates appoint or recommend members to University Council, commissions, advisory councils, and committees; facilitate the exchange of information between constituencies; provide referral for individual concerns and problems to appropriate organizations or personnel; and accept and share responsibility with the administration, faculty, staff, and students in all efforts to attain the shared goals of the university.

### *Faculty Senate*

Faculty Senate shall be representative of the entire faculty and have the authority and responsibility to act on their behalf through legislative recommendations concerning academic policies and regulations, educational standards, curricula, and the working conditions of faculty. Comprised of tenure-track, non-tenure-track, and research faculty, it also provides an avenue for the consideration of any matter of general interest to the faculty. Commissions: Faculty Affairs (CFA), Graduate and Professional Studies and Policies (CGPS&P), Research (COR), and Undergraduate Studies and Policies (CUSP).



### *Staff Senate*

Staff Senate shall be representative of the entire staff and shall have the authority and responsibility to act on their behalf through legislative recommendations concerning the employment and working conditions of staff employees. Areas for consideration include: staff morale; procedures for hiring, evaluating, disciplining, recognizing, and promoting staff; benefits, educational and personal leave, and participation in governance; and matters of equity and diversity that affect the university's staff environment.

Commission: Staff Policies and Affairs (COSPA).

### *A/P Faculty Senate*

A/P Faculty Senate shall be representative of the entire A/P faculty and have the authority and responsibility to act on their behalf through legislative recommendations concerning the employment and working conditions of administrative and professional faculty. Areas of consideration include: procedures for hiring, evaluating, disciplining, recognizing, and promoting administrative and professional faculty; benefits, educational and personal leave, and extra-university professional activity; and matters of equity and diversity that affect the university's professional environment. Commission: Administrative and Professional Faculty Affairs (CAPFA).

### *Graduate Student Senate*

The Graduate Student Senate shall be representative of all graduate students and have the authority and responsibility to act on their behalf through legislative recommendations concerning the quality of graduate student life and morale. The mission of the Graduate Student Senate is to facilitate the exchange of information between the university and graduate students; to solicit, compile, and promote graduate student opinions and concerns; to develop and recommend policies concerning graduate students to the university; to cooperate and communicate with the Graduate School of Virginia Tech and other appropriate university administrative bodies to improve the quality of graduate educational programs, graduate academic activities including research, and graduate teaching programs; and to provide and develop relevant programs for the augmentation of graduate student life and welfare. Commission: Graduate Student Affairs (CGSA).

### *Undergraduate Student Senate*

The Undergraduate Student Senate shall be representative of all undergraduate students and have the authority and responsibility to act on their behalf through legislative recommendations concerning the quality of undergraduate student life and morale. The mission of the Undergraduate Student Senate is to administer student activities, to promote academic freedom and academic responsibility, to establish and protect student rights, to foster awareness of the student's position in the campus, local, state, and national communities, and to provide a liaison between the student body, faculty, and administration.

Commission: Undergraduate Student Affairs (CUSA).

## University Council

Given the other changes we will propose – bringing most commissions under senates and giving senates authority/responsibility over distinct areas of academics, employment issues, and student life – we will recommend that University Council be a gathering of the leaders who shape academic policies and direction. In addition to the president, provost, a group of VPs, and the deans, UC would bring together leaders from the DHC and all of the senates. Chairs of the University Commissions would be included, as would one representative of each college faculty association. For the purposes of our discussion, the remaining current membership of UC would be maintained. (See table on page 7).

At the 3/13/20 PCG meeting, we agreed that a 2/3 vote would be required in UC for the passage of University Initiatives. It was further proposed that passage of all resolution in UC would require that threshold.

In addition to discussing the composition, we need to look at the numbers. Do we want to maintain the current balance between admin/faculty/staff/AP faculty/students or alter it? (You can see the current breakdown at the bottom of the next page.) And what of the overall size of UC? Going back to 1990, the “Task Force on University Council, Commissions, and Committees” recommended reducing the size of UC to allow for “more in-depth discussions” and “more effective interaction among the members.” At the time, UC had 43 members. It now has 75 voting members and 81 total.

Another issue we should take up is efficiency. Most of the work of University Council is first and second readings of resolutions, an average of 27 per year over the last 7 years. Of these, almost half – 12 per year – have been CUSP resolutions for the creation/discontinuation of programs/degrees or changes in existing programs/degrees. (The second most common type of resolution has to do with changes in governance itself. CGPS&P and CFA are usually the 2<sup>nd</sup> and 3<sup>rd</sup> most active commissions in terms of resolutions.) Should our proposal to the president include a recommendation for the creation of a process by which we could more efficiently handle routine curricular (and other) resolutions in UC?

We also have not considered how we would bring our other campuses into our system of governance.

University Council	Non-voting	Admin voting	Dept. Heads	Faculty	Staff	A/P Fac	G/UG Students	Total voting members	Total
President (non-voting)									
Provost									
VPs									
College Deans									
Dean of the Grad. Sch.									
Dean of U. Libraries									
Dept. Heads Council Reps.									
FS Reps. (Officers +)									
Staff Sen. Reps. (Officers +)									
A/P Sen. Reps. (Officers +)									
Grad. Sen. Reps. (Officers +)									
Ugrad. Sen. Reps.(Officers +)									
Coll. Fac. Reps. (Fac. Assns.)									
CEOD, COIA, CSA, and CUS									
Library Fac. Ass. Rep.									
A/P Coop. Ext. Rep.									
Black Org. Cncl. Stud. Rep.									
CEOD Fac. Rep.									
CEOD Stud. Rep.									
Other non-voting									
<b>Totals</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>	<b>0</b>
<b>Percentage</b>		<b>#DIV/0!</b>	<b>#DIV/0!</b>	<b>#DIV/0!</b>	<b>#DIV/0!</b>	<b>#DIV/0!</b>	<b>#DIV/0!</b>	<b>#DIV/0!</b>	
Existing	6	26	0	21	10	7	11	75	81
Percentage		35%	0%	28%	13%	9%	15%	100%	

## **Actual and proposed workflow of current CFA resolutions**

### CFA2019-20A: Resolution on Religious Accommodations

#### *Actual workflow*

The idea for the resolution bubbled up several years ago among students and was presented to Faculty Senate in the spring of 2019 as a draft resolution. Based on the poor reception in FS, a group of students and faculty began working on a new version of the resolution, work that included discussion with the compliance office and eventually the Dean of Students. In the fall of 2019, the resolution was reintroduced as a CFA resolution and discussed several times in Faculty Senate, which also voted (straw vote) in favor of the resolution. From CFA it went to University Council, and after more discussion with the DoS and input from the provost, was edited and approved by UC.

#### *Proposed workflow*

Once students realize they want to draft a resolution concerning the accommodation of religious absences, they convey this intention to the Office of Policy and Governance (OPG). The OPG confirms the student's choice of CFA as the source for the resolution, offers an alternative, or forwards the topic to University Council Cabinet (UCC) as an agenda item for a steering discussion. If OPG confirms the students' choice or suggests an alternate source for the resolution, this is conveyed to the UCC as part of a consent agenda, affording the UCC an opportunity to discuss the proposed work or suggest that others be involved. Assuming CFA is the source of the resolution in this scenario, the only other difference in process is that the straw vote of FS is an actual vote.

#### *Comparison*

It is likely that the resolution would have been approved sooner and with less fuss because either the OPG or the UCC would have realized straight away that the Dean of Students needed to be part of any changes in how absences are handled, and that faculty needed to be on board from the start. The time taken up by OPG and the UCC would be minimal.

### CFA2019-20B: Resolution to revise the P & T Chapter of the Faculty Handbook

#### *Actual workflow*

This one goes back to the fall of 2016 and came about through discussion of various P & T cases in CFA and elsewhere. Both faculty and administrators kept noting that parts of the P & T guidelines needed to be changed, so we agreed to create a working group under CFA to do this. After that group completed its task -- which included several presentations to FS -- and handed the revision over to CFA, CFA continued work on the revision and presented it several times to heads and chairs and eventually deans. The resolution is now ready for a 1<sup>st</sup> reading in UC.

#### *Proposed workflow*

Once it seems likely that a working group will be formed under CFA to revise the P & T guidelines in the Faculty Handbook, the chair of CFA lets the OPG know about this pending work. The OPG confirms that CFA is the appropriate body for this work, suggests an alternative, or forwards the topic to the UCC as an agenda item for a steering discussion. If OPG confirms the choice or suggests an alternate body for the work, this is conveyed to the UCC as part of a consent agenda. Assuming CFA is the source of the resolution in this scenario, the only other difference is that the FS votes on the resolution.

### *Comparison*

The OPG would likely confirm the choice of CFA, given the charge of that commission and the nature of the work. It is possible that members of the UCC – I'm thinking the provost and deans – might highlight concerns about the P & T process that otherwise would not be expressed until the resolution arrives in UC. The time taken up by OPG and the UCC would be minimal.

### CFA2019-20C: Resolution to revise Chapter Five of the Faculty Handbook

See CFA2019-20B. The actual and proposed workflows are the same.

### **A comparison of how University Initiatives have been handled in the past to how they would be in the future**

#### Experiential Learning: A University Initiative

##### *Actual workflow*

This is a bit of fiction since it's early days with experiential learning, but we can look at how university initiatives of this sort are typically handled at Tech.

The president and BOV have decided that experiential learning will be a facet of every undergrad's education. A committee (or work group) is formed outside of governance and charged to determine how to implement this goal. Faculty, students, and staff are likely unaware of the creation of the committee and do not select, through governance, those from their ranks who serve on it. Consequently, most members of the committee have no obligation to represent the views of, or report to, a constituency. Once the work of the committee is well advanced, the chair of the committee gives presentations to a multitude of groups and gathers feedback. Sometimes these presentations occur at several stages in the development of the initiative, though not always. There may or may not be a means within governance to vote on the work of the committee. The process is not transparent or democratic. I'll speak for faculty here, but a great deal of the apathy we feel toward governance stems from this process.

##### *Proposed workflow*

The president and BOV have decided that experiential learning will be a facet of every undergrad's education. While there have been some discussions within governance about this change – for instance, the provost and Kim Filer met with the Faculty Senate Cabinet – and some work has been done on advancing the initiative, especially by Kim, so far that work is taking place outside of governance. To bring it into governance, UCC holds an open conversation about the initiative in preparation for a presentation and discussion in UC. The discussion in UC is followed by a steering process in UCC that focuses on the composition of the work group that will oversee development of this initiative, as well as its charge. Each constituent group, through its senate, has the opportunity to place at least one member on the work group and more depending on their likely role in relation to experiential learning. Other members are chosen by the work group chair and the administration.

The work group operates much the same as these work groups do now, except that members selected by senates are required to report to their senates and convey the feedback of their senates to the committee. The work group is also required to give periodic updates in UC and participate in open discussions about the work. Eventually the output of the work group is brought to UC for a vote.

### *Comparison*

The approach we are suggesting is more transparent and democratic. It embeds the work on university initiatives within governance and gives constituencies a voice in the direction of the university in a manner and to a degree that does not now exist.

[March 20, 2020 Faculty Senate Meeting Appendix B]

**Resolution to Edit Constitution of the Graduate Honor System to  
Add Revoking Graduate Degree to Penalty Options**

**Commission on Graduate and Professional Studies and Policies  
Resolution 2019-20A**

Approved, Commission on Graduate Studies and Policies	[3/4/2020]
Faculty Senate Review	[date]
Staff Senate Review	[date]
Graduate Student Assembly Review	[date]
Student Government Association Review	[date]
Approved, University Council	[date]
Approved, President	[date]
Approved, Board of Visitors (only required for new degrees; otherwise, delete)	[date]
Effective Date	[date]

**WHEREAS**, academic standards preserve the integrity of the degrees granted by Virginia Tech;  
and

**WHEREAS**, the Graduate Honor Code “establishes a standard of academic integrity and  
demands a firm adherence to a set of values with respect to the intellectual efforts of oneself and  
others,” and

**WHEREAS**, compliance with the Graduate Honor Code “requires that all graduate students  
exercise honesty and ethical behavior in all their academic pursuits, including but not limited to  
study, course work, research, extension, or teaching,” and

**WHEREAS**, incidents have previously been reported of graduate students fraudulently  
obtaining a degree by serious misconduct such as plagiarism, falsification, or academic sabotage  
while enrolled in their degree program, and

**WHEREAS**, these violations of the Graduate Honor Code are sometimes discovered after the  
degree is conferred,

**WHEREAS**, the revocation of a degree is considered an appropriate best practice specifically in  
cases where a degree was fraudulently obtained, and

**WHEREAS**, the ability to revoke a degree is notably absent from the currently listed options for  
penalties in the Constitution of the Graduate Honor System and addressed in Article XI Section 6  
to which should be added the statement, “The penalties available to this committee include those  
from Article VII Section 1 as well as the additional option of revoking the degree.”

**WHEREAS**, the current Constitution of the Graduate Honor System process provides a  
framework for adjudication of these cases from reporting an alleged violation through appeal;

**NOW, THEREFORE LET IT BE RESOLVED**, that a revocation of a degree determined to be fraudulently obtained through review and consideration of work done for the culmination of that degree (e.g. thesis, dissertation, project, portfolio, coursework) with a violation that is identified as having occurred prior to the award of the degree and that would have resulted in that degree not being awarded had it been known, be included as an available penalty for violations of the Constitution of the Graduate Honor System in cases that warrant its use.

**BE IT FURTHER RESOLVED** that the Constitution of the Graduate Honor System be amended to reflect the inclusion of the revocation of a degree as an available penalty.