Report of the Manoa Faculty Senate Ad Hoc Committee On Proprietary and Classified Research

This report is intended to provide background for the Committee's recommended resolution. It sets out many of the considerations that marked our inquiry. Omitted are all references to the intense disagreements that were, without question, the most salient features of our collaboration. It is remarkable that we are able to report consensus.

On Proprietary Research

By "proprietary research" the Committee refers to research activities that are undertaken pursuant to a contract between the University and an outside sponsor with commercial interests, which research is carried out under the auspices of the University. Specifically excluded is research done under contracts to which the University is not a party and which do not require the use of University resources. These agreements come under the consultation provisions of the collective bargaining contract.

It is common for researchers (and others with oversight responsibilities) to have to sign confidentiality agreements prior to receiving pertinent proprietary information from the sponsor. There can be civil liability in the event that these obligations are breached. Sponsors may also ask for a right of first refusal for discoveries made in the course of such research and for the right to prevent or delay publication for commercial reasons.

The problems with proprietary research largely arise out of provisions in its associated contracts that can conflict with some important aspects of university life. Sponsors have occasionally claimed a right to approve personnel involved in the research. More importantly, cases have notoriously occurred in medical research where sponsors have exercised a contractually conferred veto power, preventing the publication of research findings that suggest ineffectiveness or undue risks in therapeutic modalities. The practice of selective publication (suppressing reports suggesting ineffectiveness and risk) can result in a dangerously misleading medical literature. Moreover researchers can find themselves caught between a duty to warn colleagues and patients of potential risks and the duty to adhere to contractual agreements. No scholar or university should commit itself to stand by in silence while people are placed at undue risk.

On Classified Research

There are two important features of classified research.

First, it is research that requires all individuals with access to have a security clearance issued by the Federal Government. Those who are involved are expected to come into contact with government secrets and, accordingly, criminal penalties can apply when classified information is disseminated. While all classified research requires a security clearance, some classified research is such that the work product itself is expected to be classified. Researchers who may need security clearance to do certain work are often free to publish their research findings (but not any classified information learned about in the course of doing their research).

Accordingly there are two aspects of classified research that are, in different ways, problematic. First, there is the universal requirement of an externally conferred security clearance on all with access. And second, there are sometimes severe restrictions on disseminating one's discoveries. While the Committee's resolution does not find fault with classified research of the first type (where timely publication is expected), we have grave
reservations about publication-restricted (secret) classified research.

**Common Problems and Solutions**

We are aware that the Federal Government can summarily deem as classified certain privately undertaken research projects, peremptorily barring the dissemination of findings that a scholar had produced with the goal of publication. We are also aware of burdensome Federal restrictions on research using certain select agents. We do not address either of these two areas. Instead our focus is upon the contracts entered into by the University and to provisions within them that can adversely affect academic life. Our primary concerns are with the openness and accessibility of our scholarly work and with the quality of the University's academic environment. In brief, we are in agreement that funded research should not go forward if its sponsors -- corporations or Federal agencies -- insist that the findings either may not be disclosed or can only be disclosed with the approval of the sponsor. The resolution we have given to the Senate provides that research should only move forward if there is a reasonable expectation that the findings can be published without sponsor impediment. We have additional reservations about outside agencies being allowed to vet and/or approve student/research assistants as a condition for their participation in proprietary or classified research: the creation of an externally constituted two-tier student body is contrary to the ideal of academic merit.

Our resolution entails that the University not enter into arrangements where a sponsor has the power to impair the ability of a faculty member to publish findings made during the course of the funded research. This provision does not permit faculty to disclose classified, proprietary or confidential information conveyed by the sponsor to researchers in the course the research. Nor does it prohibit limited-duration publication embargoes imposed in the interests of patent protection.

**Managing Publication-Restricted Research**

We are urging the Senate to support a resolution that places a strict and common limit on both classified and proprietary research at Manoa.

We were mindful that the Administration could decide to approve classified and/or proprietary research that falls outside that limit. Accordingly we considered whether protective measures could reliably be implemented prior to entering into any contractual agreement to fund such research. Our deliberations may help to explain the justification for our resolution.

As background, we agreed that all agreements to do proprietary and/or classified research under University auspices should involve only the University and the funding source. In particular, faculty researchers should not be permitted to enter into side agreements on their own with any source of UH funding. (Of course faculty are free to contract privately with commercial sponsors to do various types of independent research not requiring University resources and under such provisions for consultation as apply in the collective bargaining agreement.)

We supported the idea that the University of Hawaii should not enter into any contractual agreement with a commercial sponsor that granted the sponsor any authority to vet who is to work, in any capacity, on proprietary research, nor should students be permitted to work on any classified research project requiring them to obtain security clearance.
The Committee spent much of its time arguing about whether there could possibly be regulation and oversight of publication-limited classified research that would suffice to prevent the most egregious effects. We considered what might have to be done if, contrary to a Senate resolution, the administration chose to authorize publication-restricted classified research, to obtain results that could not be disseminated. A review of the Committee's thinking about seven problem areas may help to clarify the reasons for our current recommendation.

1. Because we were concerned about the effects on the academic atmosphere, we considered that publication-restricted classified research should never be carried out on campus, including any locations used for student research and academic instruction.

2. We also worried that restrictions on the publication of research could stifle essential communication, especially when research activities were found to impose undue risks upon research subjects, the community or the environment. Certain contracts to conduct such research would have to permit immediate discontinuation as soon as these risks become apparent, notwithstanding any contractual provision to the contrary. And where risk-imposing research interventions had already been underway prior to their discovery and cessation, both the risks and the UH role in their imposition would have to be disclosed to alert those potentially affected. No research failing to comply with these restrictions should ever be carried out.

3. Promotion and tenure decisions for UH faculty should never be based on research that -- for any reason -- cannot be disclosed to the candidate's colleagues.

4. We were particularly concerned that any classified research involving the handling of hazardous materials, allegations of research misconduct, lab animal care, environmental degradation and human studies would have to be subject to University review procedures that are substantially equivalent to those governing other UH research. Faculty with oversight responsibility would have to obtain security clearance.

5. There was consensus that classified research would have to be funded and governed in ways that were expected to create on-balance benefits for the University as a whole and for the communities of which we are a part. There would have to be faculty and perhaps community involvement in this review process.

6. We considered that, as much as possible, classified research should be carried out under a policy of maximum disclosure, consistent with legal requirements. Faculty would have to be involved both in the initial vetting of proposals and on oversight panels. The administration would have to report annually to the Senate on classified research undertaken by the University and on the consequent benefits that have accrued to it and to its communities.

7. There was a concern that some types of research might have to be barred under a policy acceptable to the Senate: that the University of Hawaii might not be permitted, for example, to be involved in research intended to contribute to the development of certain lethal devices.

In the end, we were broadly dubious about the administration's ability to implement protections that could reliably manage each of these seven problem areas. But there was an eighth issue that, it seemed to us, could not be satisfactorily addressed by institutional mechanisms.

It became clear that the most intense argument against "secret" classified research has nothing to do with the absence of protective institutional arrangements. Rather, its premises are deeply entangled in Hawaii's knotted history. The University faces a broad distrust of "outsiders" -- especially a distrust of the military -- that is unlikely to be resolved in the near term. Secrecy -- particularly an organization's ability to conceal damage -- evokes a strident political response. This political ambience requires the University to learn to dialog with its...
communities and to proceed with consummate respect and caution.

Even if the first seven problematic areas could be handled (and we are not sure this is so), it may be some time before the eighth ceases to be an insuperable obstacle.

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