

Academic Freedom and the Power of University Donors: Dogs That Don't Bark and Other Reflections on the Cromwell Report at the University of Toronto

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Executive Summary

Academic freedom depends in crucial respects on limiting how power is exercised and by whom. Donors to universities should not have the power to block administrative or academic appointments within universities, but sometimes they succeed in doing so. This sort of power is sometimes exercised indirectly by inducing university actors not to take otherwise reasonable steps to pursue a qualified candidate whom the donors oppose.

One instructive example of this disturbing reality occurred recently at the University of Toronto Faculty of Law. The basic narrative is this: The law school was searching for someone to fill the position of director of the school's International Human Rights Program (IHRP). The search committee unanimously agreed on their choice of the top candidate, a non-citizen. In mid-August, an oral offer was made and tentatively accepted, pending acquisition of a Canadian work permit, although no written contract had yet been sent or signed. On September 4, the Friday of Labour Day weekend, the Dean of the law school learned that a judge who was an important donor to the university had contacted university officials to express concern "that the appointment would be controversial with the Jewish community and cause reputational harm to the University." (Cromwell report, p. 48) (The candidate had published scholarship about the international law of occupation, especially in the context of Israel/Palestine. Her academic references, who included Israeli and Jewish professors of international law, affirmed that her work was excellent and fell squarely within the mainstream of international legal scholarship.) The Dean had previously delegated responsibility for this search. Now, he became involved. Over the weekend he contacted two senior university officials about the issue. Within two days he notified the faculty chair of the search that he planned to terminate negotiations with the committee's chosen candidate. The subsequent public justification offered by the Dean for this decision was that "legal constraints on cross-border hiring ... meant that a candidate could not meet the Faculty's timing needs." (p. 6)

On September 11, the faculty member resigned from the search committee and from her position as academic chair of the IHRP. On September 14, the Dean informed the faculty of the law school that he was shutting down the search for a new director of the IHRP this year. On September 16, the three remaining members of the faculty advisory council for the IHRP resigned as did an IHRP Research Associate who had also been a member of the search committee and who sacrificed a paid position by resigning.

These developments led to public debate and criticism. In response, the university hired Thomas Cromwell, a former justice of the Canadian Supreme Court, to review what had happened and to determine if there had been any improper influence. Cromwell issued a lengthy report providing a detailed narrative account and analysis of the case. His key conclusion was "I would not draw the inference that external influence played any role in the decision to discontinue the recruitment of the Preferred Candidate." (p. 6) This essay is a critical response to the Cromwell report.

Cromwell says at the outset of his report that he accepts two premises in his discussion. The first is that the candidate chosen by the search committee was highly qualified and that no one within the university had argued otherwise. The second is that both the university and he accepted “the view that terminating a candidacy of a qualified candidate for this position on the basis of outside pressure would be improper.” (p. 6) My discussion also adopts these premises.

Cromwell’s justification for his conclusion of no improper influence relies almost exclusively on what the Dean says he thought and what the Dean presents as the reasons for his actions. On Cromwell’s account, it seems, if the Dean did not deliberately lie about why he did what he did, there was no improper influence.

This is far too narrow a framework of analysis. The Dean (and other university officials) did not do things that one would expect people in their positions to do if they really wanted to hire the (highly qualified) candidate chosen by the search committee. From September 4 onward, the Dean and other university officials knew that hiring the candidate whom the search committee had chosen would make important donors unhappy. From that point on, the trajectory of the effort to hire the candidate changed radically. Minor problems became seen as major obstacles, and the Dean and senior officials failed to explore ways that administrators typically use to address these problems, rushing precipitously to the conclusion that the problems could not be solved. Cromwell appears not to have asked the Dean and other university officials why they failed to pursue alternatives that would be obvious and desirable in the absence of concerns about donor reactions, and he offers no reflection on these failures. Thus, he fails to explore the evidence in his own account that points to improper influence.

Here are the key points. None of them depends upon the claim that the Dean or anyone else consciously and deliberately yielded to external pressure, but they do show that improper external influence played an important role in the outcome of the process.

1) The Dean learned of the donor concerns on September 4. He then interrupted the holiday weekends of two senior university officials to discuss the case with them. There is no indication in the Cromwell report that these senior officials criticized the donor’s intervention or offered the Dean advice about how to overcome any obstacles to hiring the committee’s chosen candidate or alerted the Dean to the dangers of the appearance of improper influence. The Cromwell report does not ask why.

2) The timing of the Dean’s decision is a key issue, and Cromwell misrepresents it. Cromwell gives the impression that the Dean acted when he did only because that was when he learned about problems with the independent contractor route. The donor’s intervention, Cromwell says, was irrelevant to the timing of the Dean’s actions. In fact, the Dean paid almost no attention to this recruitment effort prior to the donor’s intervention. He began to treat the case as a matter of concern only after that intervention and only then learned that there were unresolved questions about the independent contractor approach.

3) The Dean exaggerated the problems with the independent contractor approach and made no effort to explore alternatives. Cromwell simply accepts at face value the Dean’s implausible account of the independent contractor problems and the limitations on alternatives, ignoring evidence that his own narrative reveals about both.

4) The “timing needs” in the Dean’s public justification for his decision amount to the claim that it was necessary to have a new director in place by September 30. This claim does not stand up to scrutiny. It is clear from Cromwell’s report that having the candidate in Canada with a work permit by January 1 was a hard deadline, and that the immigration lawyer was confident that candidate would meet that deadline. There is no comparable support in the report for the claim that September 30 was a hard deadline for the new director to be at work. Cromwell’s effort to show that it was is unpersuasive, as a careful examination of his report makes clear. In fact, the idea that the Dean himself saw September 30 as a strict deadline is contradicted by Cromwell’s own conclusion of what the Dean thought at the time: “Based on the information that the Dean had, it was not inconceivable that a new Director could be in place in the fall.” (p. 54) The qualifiers “not inconceivable” and “in the fall” are not compatible with a strict September 30 deadline. Moreover, the Dean was proposing to interview candidates whom the search committee had previously interviewed and rejected.

5) The Cromwell report fails even to mention the September 16 resignations or to discuss the significance of these resignations in protest together with the earlier one by the faculty chair. The report spends a great deal of time discussing the importance of confidentiality and criticizing leaks of information about the search process. It fails entirely to discuss the possibility that confidentiality might be used to conceal improper influence and the need for norms and mechanisms to protect against that risk. President Gertler’s response to the Cromwell report reflects the same omission.

6) The Dean told the faculty on September 14, before this issue had appeared in public media, that he was terminating the search for a director for the IHRP this year. This action eliminated the only justification that had been offered for terminating negotiations with the committee’s chosen candidate, i.e., the need to have an IHRP director in place in the early fall. Why did not the Dean then resume the effort to recruit that excellent candidate? The Cromwell report does not ask this obvious and important question.

That final question is still relevant for the law school today. The Cromwell report does not dispute the excellence of the committee’s chosen candidate, and the position of director is open. If the committee’s candidate were offered the position, however, those who have been seeking to exercise improper influence would be very unhappy. If the university and the law school really want reconciliation, as the Cromwell report urges, the path is clear. Hire Valentina Azarova.

The full essay provides evidence to support these questions and challenges, drawing on the Cromwell report itself.