ROOT GORELICK

Gag Orders in Council
Carleton University's Board of Governors and the silencing of dissent

> *Active and fractious disagreement is a sign of health in a traditional system: it means that people are engaging their leaders and challenging them to prove the righteousness of their position. It means they are making them accountable…. In any culture deeply respectful of rationale thought, the only real political power consists of the ability to persuade.*
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> *~ Taiaiake Alfred (1999)*

Introduction

I am a duly elected governor on Carleton University's Board of Governors, one of the very few who was elected by the faculty. Since my election, I have been silenced or suffered attempts to be gagged by the university's upper administration and the board's executive simply because, in raising concerns and posing questions about due process and blogging about open sessions of board meetings, I represent a "dissenting" voice.

Since fall 2008, Carleton's Board of Governors has had a 'Statement of Duties' that governors had the option of signing. This statement was substantially revised in fall 2015, with far more mandatory

requirements on governors, including making signing the statement of duties mandatory. In January 2016, the Statement of Duties was replaced by an even more demanding Code of Conduct. In March 2016, the board passed a new set of bylaws, which largely codified the Code of Conduct and centralized powers in the chair of the board. These unprecedented changes were largely implemented to stifle dissent by members of the board and to exclude the public from attending board meetings. While dissent was not exactly embraced in 2013 when my term as governor began, this situation has drastically eroded, with ever more layers of rules promulgated each month to further silence criticism.

Background

I have served on the Carleton Board of Governors since July 1, 2013, after being elected by my peers to fill one of the two board seats designated for academic staff (i.e. faculty and librarians). There are 30 other governors on this board, two of whom are also faculty members, but are elected by the university senate.

While I express myself verbally, I am not particularly vocal at board meetings and certainly am not verbally disruptive in any fashion. But I do blog (see https://carletonbogblog.wordpress.com/) in order to — in a timely manner — inform constituents, faculty and librarians, and the overall Carleton community of important decisions that either have affected or will affect the university and its stakeholders. My blog only contains information gleaned from open sessions and open documents therein. I continually reiterate that it only represents my opinions — not the views of anybody else (let alone the official party line) — is not meant as a surrogate for the official minutes of open sessions. That said, official minutes provide only a skeletal reporting of events and are made public so many months after meetings as to be useless, except for archival purposes.

My blog has largely focused on due process issues, with less emphasis on equal protection and academic freedom (although all three topics are related, with the U.S. Supreme Court virtually equating freedom with the combination of due process and equal protection in their opinion legalizing same sex marriage). The most important due process issues that I reported on — and the ones that have gotten

me in the most trouble — were how the executive committee of the Board of Governors violated their own procedures and bylaws. (I was also reprimanded for blogging about the board completely forbidding guests to observe open session following a peaceful student protest at the March 30, 2015 board meeting, which is again a due process matter.)

The key details about the subject of the 'controversial' blog post regarding process violations are as follows: in late June 2015, the university's upper administration and the board's executive committee tried to enact a suite of bylaw changes that would have precluded union officers (student, staff or faculty) at Carleton from sitting as governors. Had these bylaw changes been enacted, they would also have made it harder for internal governors to call a special meeting of the board. Concomitantly, the university's upper administration and the members of the board's executive committee tried to enact a number of procedural changes that would have codified the already enacted closure of so-called 'open sessions' to the community and the press, and removed the requirement for the board to hold open sessions at all.

The problem was that the board meeting to enact these changes occurred on June 25, 2015 and, because of the early summer timing, was attended by an insufficient number of external members of the board; external members of the board did not have a two-thirds supermajority needed to pass bylaw changes, even though they nominally constitute two-thirds of the members of the board. To "remedy" this situation, that same day (June 25th) the board's executive introduced motions to change the bylaws, had those motions seconded, and held debate on the bylaw changes, but then introduced a motion to conduct voting via e-mail before that year's session of the board ended five days later, on June 30, 2015, in lieu of voting in-person at the June 25, 2015 meeting. An electronic vote meant that absent governors could vote, and undoubtedly would have garnered a two-thirds supermajority.

However, board bylaws required all changes to the bylaws to be voted on by those present at the meeting (including teleconference attendees). In other words, the existing bylaws *precluded* electronic voting. Further, the motion to allow e-mail votes was itself a change to the bylaws, which required a two-thirds supermajority and a five-day

notice of motion requirement; neither of these two conditions were met.

In the remainder of this article, I describe multiple ways in which Carleton University has gagged (or attempted to silence) me for expressing my personal views while performing service to the university and to the larger community. I also provide some ideas on how to improve matters, while upholding academic freedom, due process, equal protection, and collegiality.

1. Code of Conduct

At the open session of January 26, 2016, the Carleton Board of Governors passed a new Code of Conduct stipulating that governors must:

> Support all actions taken by the Board of Governors even when in a minority position on such actions. Respect the principle of Board collegiality, meaning an issue may be debated vigorously, but once a decision is made it is the decision of the entire Board, and is to be supported.

Most would understand "collegial" to mean that all board members have equal power and authority. But the above excerpt from the new Code of Conduct doesn't just quash free speech and/or academic freedom, it goes further by compelling public endorsement of speech and/or decisions with which one disagrees. This provision to compel speech forces dissenting individuals to parrot the majority views in public. As Henry David Thoreau (1849) assiduously noted in *Civil Disobedience*, "A minority is powerless while it conforms to the majority."

This new Code of Conduct also stipulates that:

> Governors are not permitted to photograph, record, broadcast, tweet, post on social media or film meetings, or any parts thereof, during Board or Committee meetings, without prior permission of the Board.

These bylaw changes (§7.02(c)) were formally approved by the Board of Governors on March 21, 2016, stipulating that "The Chair shall be the spokesperson for the Board and shall be the only individual

entitled to speak on behalf of the Board unless otherwise determined by Ordinary Resolution of the Board". This has been used as a threat to shut down my blog. Board minutes further reflect this:

> Case law dictates that once a decision is arrived at through mutually respectful deliberation, Governors have a legal obligation to support and further the best interests of the University. It was suggested that if there are Governors who are not comfortable with the roles and responsibilities as outlined, or who might experience issues of conscience, that it might be in their best interest to resign their seat on the Board.

2. Eligibility to serve as a governor

The recently passed bylaws provide new policing powers to keep faculty, senate, staff, and students from serving on the board. These groups previously could choose their own representatives to serve as governors, who then had to be approved by the full board (which only sometimes happened). The new bylaws specify that the university secretary will conduct the elections. The first such election just occurred for students and it included a new proviso that any candidates had to promise to sign the new (and much more draconian) Code of Conduct if elected to the board. Without that promise to sign, the university secretary, not the individual's constituents, can deem the candidate ineligible. Furthermore, with the new bylaws, determination of eligibility of candidates by the university secretary is final and not appealable.

Even though the newly passed bylaws did not take effect until July 1, 2016, the university secretary began exercising those powers as soon as the bylaws were passed on March 21, 2016. Candidates for student seats on the Board of Governors were told in late March 2016 that platform issues — including, for example, any mention of trying to limit tuition fee increases — were not allowed in campaigning.

3. Threats from the Board of Governors

The executive of Carleton University Board of Governors has repeatedly threatened me in writing, often with sanctions, including removal

from the board. On October 2, 2015, the board's executive threatened my removal for not signing the "Statement of Duties" (now called the "Code of Conduct") even though the requirement for signing the statement had not been approved by the board when it was being considered at the end of June 2015. According to some documents, the Board of Governors did eventually require individual governors to sign that Statement of Duties starting on November 24, 2015. The board then drew a line in the sand, threatening to remove me from the board if I did not sign that Statement by December 14, 2015. I still refused to sign.

Several meetings of the board's executive committee and several meetings of the full board in both open and closed session have since passed with no formal motions to remove me from the board. I have, however, been informed at open sessions of the board that, due to my disagreement with board policy and procedures, my only course of action is to resign (as per minutes of the board's January 26, 2016 open session). I can deal with official removal from the Board of Governors — at least if they consistently follow their rules — but these repeated threats of removal are growing old.

4. The physical closing of open sessions

At the direction of the board's executive committee, the April 28, 2015 and June 25, 2015 open sessions of Carleton's Board of Governors were closed to all spectators, even though the full board had never approved such action. On June 25, 2015, I tested this situation by trying to bring a reporter from the school newspaper, the *Charlatan*, into the open session as my invited guest, but the board's executive and university president would not allow them to enter the open session…or rather, did not give approval to the special constables stationed outside the door to allow the reporter into the boardroom, for reasons I can only speculate on (see the next section for details). Since September 2015, the board has allowed a limited number of members of the public to attend open sessions, but only if those individuals have obtained prior written permission from the university secretary (a gatekeeping role never approved by the full board) The board's executive instituted an alternative plan of live-streaming open sessions to a remote site on campus, but this does not capture the nuance of watching people's

faces at the real meeting and — again — was never approved by the full board. Furthermore, not all open sessions have been live-streamed, such as the one on September 29 2015 that was held off-campus. Inexplicably, live-streamed open sessions are never archived nor made accessible via web link, even though the digital files exist. These actions make open sessions of the board far less transparent than they should be.

In addition, Carleton's Board of Governors has gradually reduced the physical number of seats open to the public and press at open sessions. Until 2012, open sessions were held in a room that had seats for about 30 to 40 spectators. Later that year, the board moved to a new room with enough seats for only eight spectators.

5. The psychological closing of open sessions

Since April 2015, anybody wishing to attend an open session of Carleton Board of Governors has had to run a gauntlet of special constables who guard the parking lot, staircase, elevator, and boardroom door. Special constables are Peace Officers who have been sworn in by Ottawa Police Services, but do not carry guns. Instead, at board meetings, these officers carry sheets of paper with names and photos of those allowed in the boardroom. This undoubtedly creates a psychological barrier by intimidating the public from attending open sessions. Curiously, the rationale for posting special constables at board meetings was that members of the board's executive committee "felt threatened"…but I still have seen no relevant reports of such threats from the Department of University Safety nor the Ottawa Police.

Even more curious: for some open sessions, special constables were also posted at the remote room with the live-streaming coverage of open sessions. I can think of no good reason for that, other than to intimidate those wishing to observe and comment in open sessions of the board.

6. Closing of open sessions by over-classification

Too many Carleton Board of Governor decisions are obscured by being over-classified into closed sessions. The executive of the board has deemed that all of its committees (not just auditing and finance

committees, which might have) will meet *in camera*, even if there is no obvious need for this. Minutes of most board committee meetings eventually appear as open session documents, often about a half-year or more after the committee meeting occurred. Given that the minutes are promulgated and posted as open documents, why aren't the committee meetings themselves open?

There is, however, one huge exception: minutes of the board's executive committee are *automatically* deemed closed documents and are *never* posted to the board's website. The executive committee is by far the most powerful board committee and the one committee that forbids membership by any internal governors.

We tested for needless secrecy of the board's executive committee minutes by requesting these minutes via a Freedom of Information (FOI) request. Virtually nothing was redacted from these minutes obtained by FOI request. Such small-scale redaction could (but has not) become a regular occurrence, thereby allowing for redacted executive committee minutes to be routinely posted to the board's public website after every full board meeting.

Compounding this, the executive committee takes actions that, according to the board's bylaws, belong to the full board. The executive committee approved a revised Statement of Duties (now Code of Conduct), even though board procedures stipulated that only the full board had cognizance over such changes. Further, on August 24, 2015, the board's executive committee approved all new members nominated and elected to the board, despite board bylaws saying that new members must be approved by old members. When I protested this procedural gaffe, I was told that the executive committee can take *any* action in lieu of the full board. This is a great way to gag rank-and-file governors.

Finally, the new Code of Conduct demands that governors are required *for their entire natural lifetimes* to not disclose closed session documents or information. This is more extreme of an expiration date than most militaries have on declassifying information.

7. Silencing debate via electronic voting

On March 21, 2016, when the board passed a new set of bylaws that codified the Code of Conduct, it also stipulated that electronic

votes can occur regarding any motion, including special resolutions that could include bylaw changes. The previous bylaws at least required governors to be physically present in-person or dialed in via teleconference in order to cast votes. In other words, governors had to listen to discussion and debate before voting.

While the new bylaws do not specify who can call for an electronic vote, electronic voting will almost certainly limit discussion and debate: governors can avoid attending board meetings, but still vote so long as they check their e-mail once or twice a week. What incentive is there for a governor to attend board meetings if they know that it is still possible to later vote electronically on important matters? At that meeting on March 21, 2016, I proposed that the new bylaws be amended so that electronic votes could only be taken by members of the board who had been present for discussion and debate, but my motion was defeated.

8. Intimidating those who second motions

The day after the March 21, 2016 board meeting, the university issued a press release declaring victory in passing of new more draconian bylaws, stating in part:

> Deliberations over the General Operating Bylaw No. 1 included requests for 24 amendments. The majority of proposed amendments failed to get a seconder during the votes, including a motion that would result in half of the Board members who are community volunteers being removed from the board.

Unfortunately, the university press release failed to mention how that particular proposed amendment lost its seconder. For the record, and to the best of my recollection, here is what transpired immediately after I proposed the motion to roughly halve the number of community governors:

Board Chair: Is there a seconder?
Seconder: [raises their hand]
Board Chair: Are you serious? Do you understand what you seconded?
Seconder: Yes.

Board Chair: Let me make sure you understand what you just seconded. Do you understand the amendment?
Seconder: Yes.
Board Chair: Then could you please repeat the amendment?
Seconder: The proposal is to reduce the number of at-large community governors from 18 to 8.

This exchange was then interrupted by a governor on the phone, who said that the amendment violated democratic principles and that it would mean the only individuals left serving on the board would be those with their own interests. After being needlessly subjected to such a harangue from the board chair and the board member on the phone, the seconder reluctantly withdrew their second of the motion to reduce the number of external board members. There was thus no further discussion.

As an aside: I could understand the chair's incredulity if the seconder at been an at-large community governor, who therefore would have been unlikely to support an amendment that might eliminate their position. But the seconder happened to be a student governor, who held their ground fairly well under the chair's extra-parliamentary interrogation.

At my insistence, the board chair apologized to the seconder after the board meeting was over. But the damage was already done. An amendment that should have been debated and discussed was browbeaten from the floor. This was one of my first few proposed amendments, so you can imagine what a chilling effect the above dialogue may have had on others who contemplated seconding motions.

9. Human Resources threatened my job

In July 2015, the human resources office, by and through the university president's office, threatened disciplinary action against me for blogging. The primary purported problem in my blog, for which I apologized, was that I had quoted an acerbic three-word phrase from a member of the board's executive committee, failed to attribute that phrase to the executive committee member, and failed to put those three words in quotes. I retracted the statements from my blog and posted a public apology, which remains there to this day.

This is the how events unfolded: On March 30, 2015, seven students (eventually eight) protested tuition fee increases at an open session of Carleton's Board of Governors. This was classic peaceful civil disobedience, with the protestors chanting and thereby disrupting the proceedings of the board meeting. The following day, six members of the Board of Governors made a written call for a special meeting of the board to discuss tuition fee increases, allowing student organizations to present their arguments. Bylaws of the board specify that a special session will be held if called by any six sitting governors, yet this properly-called special session was glibly dismissed by the board's executive. Furthermore, one member of the board's executive committee added fuel to the fire by responding in an open e-mail that peaceful student protest "had no place in a lawful democratic society — it is the tactics of Brownshirts and Maoists."

I do not know precisely what my esteemed colleague meant by the phrase 'tactics of Brownshirts and Maoists'. Not only was the accusation a form of shaming, the person who originally uttered that phrase has apparently never been asked to apologize nor been censured by the board's executive despite the offense that was taken by many.

By contrast, I was threatened with disciplinary action by human resources and threatened with removal from the board for using that quoted phrase without properly citing the member of the executive committee who had coined it. I should have attributed the quote properly.

It was also alleged that I was making defamatory statements regarding voting. On June 25, 2015, the board's agenda included a series of bylaw changes, all of which required a two-thirds supermajority of those present at the meeting. After an informal head count showed that these bylaw changes would probably not garner the votes of two-thirds of those present, the board's executive introduced the motions, seconded the motions, held debates (albeit needlessly limited ones), but then deferred voting to e-mail over the next several days. Given the composition of the board, this would virtually guarantee passage of the bylaw changes: the board has 20 external members, 10 internal members, and the university president and chancellor; the 20 external members plus the president provides a two-thirds voting block, given that the chancellor has never attended a board meeting since I have been on the board.

However, until July 1, 2016, the board's bylaws and procedures have never allowed for electronic voting on items that require two-thirds supermajorities. The motion from the floor on June 25, 2015 to hold the electronic vote did not itself garner a two-thirds supermajority, nor did it have the requisite five-day notice requirement for bylaw changes. Yet the board's executive still opened electronic voting on June 26, 2015.

In the end, the electronic voting was cancelled midway through the voting process and the bylaws remained unchanged until July 1, 2016. Nonetheless, my job was threatened for having publicly flagged this due process matter regarding voting on bylaw changes in late June 2015.

10. Carleton University shut down my teaching and research website

Before July 15, 2015, my teaching and research website was hosted on a Carleton University server (my Board of Governors blog has always intentionally been hosted on WordPress servers). On July 15, 2015, after I apologized, Carleton University locked me out of the server that hosted my teaching and research website, upon direct order of the university's Chief Information Officer with approval of the university president. Even though I apologized after I was asked to, the university ignored the servers hosting my Board of Governors blog, and instead seized my legitimate teaching and research website.

Eventually, my teaching and research website as purportedly to be restored by Carleton's computing services staff, although difficulties kept this from ever occurring. Eventually I asked Carleton to delete my teaching and research materials from their server; I had hired someone to move the teaching and research portions of my website over to WordPress before this website lockout occurred, and was therefore able to make the final move to the WordPress server the day after I was locked off the Carleton server (although it took me over another month to fully clean up all aspects of the new website). But even then, for some unspecified copyright reason, the university mandated that I remove all links to Carleton URLs from my new WordPress teaching and research website, including links to my department's homepage and links to collaborators at Carleton.

Universities should not punish political dissent by taking away teaching and research resources. Universities should not impose punishment before investigating wrongdoing.

Safe spaces and free speech at universities

In discussing political action on university campuses — from Black Lives Matter, to sexual assault and consent, to the putative cultural appropriation of yoga at University of Ottawa — *Slate* legal correspondent Dahlia Lithwick wrote:

> Real [ ] change rarely comes from within the confines [of] safe spaces. And there is not much to be said for creating more and more space on campus exclusively for those who agree. There is also not much to be said for those who think that the only valuable discourse is brutal [ ] shaming and silencing. Both sides of this debate risk abandoning the project of real dialogue and real empathy.

The problem with the Carleton University Board of Governors is that they are trying to do both: create a safe space for external governors (also known as 'at large' members), while shaming and silencing those who disagree with those external governors on important issues and allow only external governors to sit on the Board's executive committee. Why do external members of the Carleton Board of Governors need to create a safe space for themselves? They already have sufficient power in university affairs, including police protection by special constables. They have sufficient power to unilaterally ignore, silence, marginalize, and shame dissenters.

Several members of the board's executive committee have blamed my dissent, especially my blogging about the board not adhering to its own bylaws, for the board's subsequent failure to adequately govern. However, this neglects that I have a fiduciary responsibility to raise due process concerns, especially when those due process violations result in substantial changes to university governance and when the board ignores my properly raised points of order on these procedural matters. And, of course, dissent is almost always inconvenient to those in power and slows down process, but in so doing paves the way for genuine consensus and progress. Until it emerges from its corporate

cocoon and starts listening to the community's concerns, Carleton University's Board of Governors can do little more than obfuscate and rubber-stamp.

Lessons learned: Framing the future

The best way to counter speech is with more speech, not less speech. Remove the barricades and obstacles for people to witness and hear members of the Board of Governors discuss important issues. Open should mean open.

In my three years on Carleton's Board of Governors, silencing tactics have gone from relatively benign to draconian. These tactics were codified, and then made into a constitutional requirement by being incorporated into new bylaws, bylaws that also gave the chair exclusive policing powers to enforce violations of the controlling mandate.

I want the board to provide more equal protection and less hypocrisy. The so-called Code of Conduct that the Board of Governors approved on January 26, 2016 was an important case in point. This was a chilling change. But, at the exact same time, the board issued a press release stating, "individual Governors are free to discuss matters from the open session". On March 21, 2016, I moved that those quoted words about governors' freedom to speak be added to the board's bylaws, but my motion was defeated.

The Board of Governors also needs to institute equal protection in its membership. Consider the proposed bylaw changes in late June 2015 that did not pass only because of severe procedural defects. Those proposed bylaw changes included mandating that union officers could not serve as governors because they had an inherent conflict of interest. Let's assume that this is true, even though it is not (union officers are internal members of the board, so are *not* allowed on the executive committee of the Carleton Board of Governors; and the executive committee — not the full board — ratifies all collective agreements). If inherent conflicts of interest are sufficient reason to preclude membership on the board in lieu of recusal in specific votes, then Carleton's board also needs to automatically preclude members of the university's management team from being governors and automatically preclude anybody who bids for or holds a university contract from being governors. If you look closely enough at any

group, there could always be a reason to preclude members. The point is not to do so. Let governors responsibly approach each situation and recuse themselves as necessary, just like it was at Carleton University until summer 2015.

The board of any public university should reflect democratic principles, not corporatization of universities. Power imbalances could be easily eliminated. Currently, external board members comprise roughly two-thirds of board, while internal members comprise one-third. Several groups on campus have suggested that composition of the Board of Governors be changed so that internal members would hold 50% + one of the seats on the board. This would work beautifully because the university president holds a voting seat on the board. Giving either external or internal members of the board two-thirds of the seats makes it too easy to pass bylaw changes and other special resolutions. A more equal distribution of internal and external governors along with these two-third supermajorities, therefore, would effectively prevent tyranny of the majority.

Equity on the board forces discussion and consensus. How could that be bad, especially when the board is supposed to serve the entire Carleton University community, which should include alumni, future students, community members who hear talks on campus, and even neighbours who just go to see university athletic events? However, my proposal to have the Carleton board be composed of half internal governors plus half external governors, which is a 50% *minus* one proposal, was defeated on March 21, 2016 by browbeating the someone into retracting their seconding of the motion. The board of any public university should reflect democratic principles, not simply corporatization of universities.

All that said, despite my academic freedom being quashed, due process being trampled, equal protection ignored, and my job being threatened, these events have shown me an amazing side of Carleton. Never before have I seen such support from so many corners of the university and community. Regardless of what actions the university's upper administration and the board's executive committee have taken and will likely continue to take, I have become much more enamoured of and welcomed by the vibrant Carleton community.

Let me therefore end by thanking my hundreds of supporters, including my faculty association (Carleton University Academic Staff

Association), academic staff, non-academic staff, students, alumni, Canadian Association of University Teachers, numerous faculty associations across North America, student associations across the province, and colleagues far and wide. While I may be writing this article, it is becoming clear that this is truly a group effort for which I have simply stumbled into being a clumsy spokesperson. Thank you!

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.
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> ~ Louis Brandeis (1913)

ROOT GORELICK is an altruist anarchist feminist evolutionary theorist who also works in other disciplines (such as, for example, the Department of Biology in the School of Mathematics and Statistics, and Institute of Interdisciplinary Studies at Carleton University). He is also a due process geek. Some of his work may be found at his Carleton University Board of Governors blog: https://carletonbogblog.wordpress.com/ and his Carleton University Senate blog: https://carletonsenateblog.wordpress.com/. He can also be reached at Root.Gorelick@carleton.ca and www.rootgorelick.com.

Any questions about the (unfolding) events described in this article should be directed to the author.