

PUBLIC COMMENT OF HENRY REICHMAN
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to the

U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON THE CONSTITUTION AND CIVIL JUSTICE

in response to the June 2, 2015 Hearing on

First Amendment Protections on Public College and University Campuses

June 9, 2015

Chairman Franks, Vice-Chairman DeSantis and Members of the Subcommittee:

My name is Henry Reichman. I am Professor Emeritus of History at California State University, East Bay, located in the San Francisco Bay Area, and have taught at a variety of public colleges and universities in several states for over forty years. I write on behalf of the American Association of University Professors (AAUP), which I currently serve as First Vice-President and Chair of the Association's Committee A on Academic Freedom and Tenure.

Founded in 1915, the AAUP has for a century played a leading role in ensuring the rights of college and university faculty and has defined and defended the standards and principles of academic freedom that have helped make the American higher education system the envy of the world. In 1915, the AAUP issued its "Declaration of Principles on Academic Freedom and Academic Tenure," which first elaborated the principles of academic freedom that have subsequently been accepted by both the academic community and in important aspects the American judiciary. Our 1940 "[Joint Statement of Principles on Academic Freedom and Tenure](#)," formulated in cooperation with the Association of American Colleges (now the Association of American Colleges and Universities), along with its 1970 interpretive comments, has been endorsed by more than 240 scholarly organizations and institutions. The principles elaborated in the Joint Statement remain widely accepted throughout American higher education and continue today to provide the standard by which the academy measures academic freedom. The AAUP's principles have been adopted in whole or part by the great majority of American institutions of higher education, and may be found in hundreds of faculty handbooks, university policy manuals, and collective bargaining agreements. A copy of the Joint Statement is appended to these comments.

In 1967, the AAUP joined with the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors to formulate a "Joint Statement on Rights and Freedoms of Students." This important statement remains the best and most thorough description of students' freedom to learn and to exercise the rights of citizenship, including those rights guaranteed by the First Amendment, on and off campus. A copy of this Statement is also appended to these comments.

The 1940 Joint Statement defines academic freedom as comprising three elements: 1) "full freedom in research and in the publication of the results;" 2) freedom of classroom instructors to discuss their subject matter and define curriculum and standards without political or other extraneous constraint; and 3

On the Written Testimony

The written testimony provided by Greg Lukianoff of FIRE raises a number of issues that are also of concern to the AAUP. We largely agree with Mr. Lukianoff and Professor Jamin Raskin that impermissibly restrictive speech codes, overly broad harassment policies, and "free speech zone" policies imperil free expression, especially of students.¹ With respect to speech codes, our 1994 report "On Freedom of Expression and Campus Speech Codes," raised some of the same issues that rightfully trouble Mr. Lukianoff and FIRE, arguing that

Freedom of thought and expression is essential to any institution of higher learning. Universities

Then, last summer we issued an influential statement "[On Trigger Warnings](#)," which declared:

A current threat to academic freedom in the classroom comes from a demand that teachers provide warnings in advance if assigned material

Perhaps the most dramatic example of how financial conditions may negatively impact the academic freedom of faculty is currently transpiring in Wisconsin. On May 29, the Joint Finance Committee of the Wisconsin legislature approved an omnibus higher education funding bill that would, if approved by the Legislature as a whole, cut funding for the University of Wisconsin system by \$250 million over two years. In addition to this draconian cut, the committee also approved provisions to remove the protections of tenure from Wisconsin law, increase the power of administrators and degrade the longstanding system of shared governance, and lastly authorize the Board of Regents to terminate faculty appointments for reasons of "program discontinuance, curtailment, modification, or redirection." This is a profound departure from current policy, which allows termination of faculty appointments only for just cause after due notice and hearing, or in the event of a fiscal emergency.

As a group of 459 award-winning research scholars at the University of Wisconsin-Madison [wrote](#), "this provision would greatly weaken any guarantees of tenure provided by the Board of Regents. In essence, state statute would say that tenure at the University of Wisconsin does not mean what it means at every other institution: a guarantee that university administrators cannot arbitrarily dismiss faculty who have earned tenure through research, teaching, and service." Or, as [a statement by PROFS](#), an organization of UW-Madison faculty members, put it:

Given legal cover by the vague terms "modification" and "redirection", there could be no meaningful limit on the power of the Regents to dismiss faculty and/or to close programs or research centers that fell out of favor with administrators or political leaders.

It is above all the promise of academic freedom directly afforded by tenure that provides the fertile ground for independent scholarly inquiry. That promise would be rendered hollow by the provision in the omnibus motion on faculty and staff dismissals. The "fearless sifting and winnowing" central to the Wisconsin Idea would be no more.

Contingent and Adjunct Faculty

Our country's long-term disinvestment in higher education has also created another obstacle to academic freedom and free expression at public colleges and universities. Increasingly these institutions have, rightly or wrongly, felt compelled to respond to funding cuts in part by hiring fewer tenure-track and full-time faculty and ever more adjuncts, many of them part-time. At this point we estimate that only about one-fourth of all faculty teaching in American higher education are tenured or on the tenure track, down from nearly half in 1975.⁴ And about half of all faculty are hired on a part-time basis, although many of these actually work full-time, sometimes at multiple institutions. While the AAUP and other organizations have won protections for such faculty members at some institutions where collective bargaining is permitted and the faculty have organized into unions, the overwhelming majority of such faculty members enjoy no job security; they may more often than not be dismissed without cause and without explanation, even after many years of service; and they frequently have diminished access to support systems, even office space, available to those on the tenure track.⁵ It is little wonder

⁴ AAUP, "[Trends in Instructional Staff Employment Status, 1975-2011](#)."

⁵ After public hearings in late 2013, in January 2014 the Democratic staff of the House Committee on Education and the Work Force produced a report, "[The Just-in-Time Professor](#)," which examined the working conditions of 0 0 1 281.21 86.TBT

then that many of these faculty members have decided that they cannot afford to exercise their rights to teach in accordance with their understanding of their disciplines, challenge students to think independently, engage in original but potentially controversial research, advocate unpopular or innovative ideas, or speak out on issues of institutional or public concern.

Throughout its 100-year history the AAUP has believed and argued that a system of tenure based on a reasonable probationary period is the strongest protection for academic freedom and that institutions whose faculty enjoy academic freedom are most likely to create an environment that supports the First Amendment rights of students. Unfortunately, the extraordinary expansion of what some have called the academic "precariat" calls this into question. I fervently hope that the abuse of adjunct and part-time faculty will be recognized not only as the terrible injustice it is, but also as a major threat to academic freedom and to educational quality. Should this trend not soon be reversed, I fear that free expression on campus will be meaningless in an environment in which teachers are perpetually fearful of retaliation and even dismissal should they ruffle the wrong feathers.

Lastly, it may be asked what might the Congress do about these problems? At this time the AAUP does not support any specific legislative remedies. We are cognizant of the country's long tradition of decentralized state and local control of public education, including higher education. But the Congress can do much by allocating federal funds to reverse the lamentable national trend to disinvest in public higher education. And the members can use their positions to help us educate the public about the important role that academic freedom and free expression have played in building the finest and most democratic system of higher education yet known and in ensuring that our campuses are havens for the robust exchange of ideas that is essential both for genuine quality education and the preservation of our democracy.

retains a reputation as a middle -class job, the reality is that a growing number of people working in this profession fill positions not intended to provide the stability, pay, or benefits necessary for a family's long-term economic security. Whether some adjunct professors piece together a living from their teaching job or only use it to supplement a more stable primary ca Tm[5(m)4(e)4(n)-4(t)-4(a)-5(m)4(-3(')4(s l)10(o)5(n)3(g)4(t)-3([(to))3(g)4(t)-3

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APPENDIX 1

1940 Statement of Principles on Academic Freedom and Tenure

In 1915 the Committee on Academic Freedom and Academic Tenure of the American Association of University Professors formulated a statement of principles on academic freedom and academic tenure known as the 1915 Declaration of Principles, which was officially endorsed by the Association at its Second Annual Meeting held in Washington, D.C., December 31, 1915, and January 1, 1916.

In 1925 the American Council on Education called a conference of representatives of a number of its constituent members, among them the American Association of University Professors, for the purpose of formulating a shorter statement of principles on academic freedom and tenure. The statement formulated at this conference, known as the 1925 Conference Statement on Academic Freedom and Tenure, was endorsed by the Association of American Colleges (now the Association of American Colleges and Universities) in 1925 and by the American Association of University Professors in 1926.

In 1940, following a series of joint conferences begun in 1934, representatives of the American Association of University Professors and of the Association of American Colleges (now the Association of American Colleges and Universities) agreed upon a restatement of principles set forth in the 1925 Conference Statement on Academic Freedom and Tenure. This restatement is known to the profession as the 1940 Statement of Principles on Academic Freedom and Tenure.

Following extensive discussions on the 1940 Statement of Principles on Academic Freedom and Tenure with leading educational associations and with individual faculty members and administrators, a joint committee of the AAUP and the Association of American Colleges met during 1969 to reevaluate this key policy statement. On the basis of the comments received, and the discussions that ensued, the joint committee felt the preferable approach was to formulate interpretations of the 1940 Statement from the experience gained in implementing and applying it for over thirty years and of adapting it to current needs.

The committee submitted to the two associations for their consideration Interpretive Comments that are included below as footnotes to the 1940 Statement.¹ These interpretations were adopted by the Council of the American Association of University Professor

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and

(AAUP, *Policy Documents and Reports*, 11th ed. [Baltimore: Johns Hopkins University Press, 2015], 145–46).

4. Second 1970 comment: The intent of this statement is not to discourage what is “controversial.” Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to their subject. Back to text.

5. Third 1970 comment: Most church-related institutions no longer need or desire the departure from the principle of academic freedom implied in the 1940 “Statement,” and we do not now endorse such a departure.

6. Fourth 1970 comment: This paragraph is the subject of an interpretation adopted by the sponsors of the 1940 “Statement” immediately following its endorsement:

If the administration of a college or university feels that a teacher has not observed the admonitions of paragraph 3 of the section on Academic Freedom and believes that the extramural

8. Sixth 1970 comment: In calling for an agreement "in writing" on the amount of credit given for a faculty member's prior service at other institutions, the "Statement" furthers the general policy of full understanding by the professor of the terms and conditions of the appointment. It does not necessarily follow that a professor's tenure rights have been violated because of the absence of a written agreement on this matter. Nonetheless, especially because of the variation in permissible institutional practices, a written understanding concerning these matters at the time of appointment is particularly appropriate and advantageous to both the individual and the institution. [For a more detailed statement on this question, see "On Crediting Prior Service Elsewhere as Part of the Probationary Period," *Policy Documents and Reports*, 167- 68.]

9. Seventh 1970 comment: The effect of this subparagraph is that a decision on tenure, favorable or unfavorable, must be made at least twelve months prior to the completion of the probationary period. If the decision is negative, the appointment for the following year becomes a terminal one. If the decision is affirmative, the provisions in the 1940 "Statement" with respect to the termination of service of teachers or investigators after the expiration of a probationary period should apply from the date when the favorable decision is made.

The general principle of notice contained in this paragraph is developed with greater specificity in the "Standards for Notice of Nonreappointment," endorsed by the Fiftieth Annual Meeting of the American Association of University Professors (1964) (*Policy Documents and Reports*, 99). These standards are:

Notice of nonreappointment, or of intention not to recommend reappointment to the governing board, should be given in writing in accordance with the following standards:

1. Not later than March 1 of the first academic year of service, if the appointment expires at the

The "Statement on Procedural Standards in Faculty Dismissal Proceedings" provides: "Suspension of the faculty member during the proceedings is justified only if immediate harm to the faculty member or others is threatened by the faculty member's continuance. Unless legal considerations forbid, any such suspension should be with pay." A suspension which is not followed by either reinstatement or the opportunity for a hearing is in effect a summary dismissal in violation of academic due process.

The concept of "moral turpitude" identifies the exceptional case in which the professor may be denied a year's teaching or pay in whole or in part. The statement applies to that kind of behavior which goes beyond simply warranting discharge and is so utterly blameworthy as to make it inappropriate to require the offering of a year's teaching or pay. The standard is not that the moral sensibilities of persons in the particular community have been affronted. The standard is behavior that would evoke condemnation by the academic community generally

APPENDIX 2

Joint Statement on the Rights and Freedoms of Students

In June 1967, a committee composed of representatives from the American Association of University Professors, the United States National Student Association (now the United States Student Association), the Association of American Colleges (now the Association of American Colleges and Universities), the National Association of Student Personnel Administrators, and the National Association of Women Deans and Counselors formulated the joint statement. The document was endorsed by each of its five national sponsors, as well as by a number of other professional bodies. The governing bodies of the Association of American Colleges and the American Association of University Professors acted in January and April 1990, respectively, to remove gender-specific references from the original text; references were updated in 2006.

In September 1990, September 1991, and November 1992, an inter-association task force met to study, interpret, update, and affirm (or reaffirm) the Joint Statement. Members of the task force agreed that the document had stood the test of time quite well and continued to provide an excellent set of principles for institutions of higher education. The task force developed a set of interpretive endnotes to incorporate changes in law and higher education which had occurred since 1967. A list of associations endorsing the annotations appears as an appendix.

Preamble

Academic institutions exist for the transmission of knowledge, the pursuit of truth, the development of

The admissions policies of each college and university are a matter of institutional choice, provided that each college and university makes clear the characteristics and expectations of students that it considers relevant to success in the institution's program.² While church-related institutions may give admission preference to students of their own persuasion, such a preference should be clearly and publicly stated. Under no circumstances should a student be barred from admission to a particular institution on the basis of race.³ Thus, within the limits of its facilities, each college and university should be open to all students who are qualified according to its admissions standards. The facilities and services of a college or university should be open to all of its enrolled students, and institutions should use their influence to secure equal access for all students to public facilities in the local community.

In the Classroom

The professor in the classroom and in conference should encourage free discussion, inquiry, and expression. Student performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards.

1. Protection of Freedom of Expression

Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled.

2. Protection against Improper Academic Evaluation

Students should have protection through orderly procedures against prejudiced or capricious academic evaluation. ⁴ At the same time, they are responsible for maintaining standards of academic performance established for each course in which they are enrolled.

3. Protection against Improper Disclosure

Information about student views, beliefs, and political associations that professors acquire in the course of their work as instructors, advisers, and counselors should be considered confidential. Protection against improper disclosure is a serious professional obligation. Judgments0 1 349.75 678.82E1pligerlyl respofid6894(cl)1

students. Provision should also be made for periodic routine destruction of non-current disciplinary records. Administrative staff and faculty members should respect confidential information about students which they acquire in the course of their work.⁵

Student Affairs

In student affairs, certain standards must be maintained if the freedom of students is to be preserved.⁶

1. Freedom of Association

c. All institutionally published and financed student publications should explicitly state on the editorial page that the opinions there expressed are not necessarily those of the college, university, or student body.

Off-Campus Freedom of Students

1. Exercise of Rights of Citizenship

College and university students are both citizens and members of the academic community. As citizens, students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy and, as members of the academic community, they are subject to the obligations that accrue to them by virtue of this membership. Faculty members and administration officials should ensure that institutional powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus.

2. Institutional Authority and Civil Penalties

Activities of students may upon occasion result in violation of law. In such cases, institutional officials should be prepared to apprise students of sources of legal counsel and may offer other assistance. Students who violate the law may incur penalties prescribed by civil authorities, but institutional authority should never be used merely to duplicate the function of general laws. Only where the institution's interests as an academic community are distinct and clearly involved should the special authority of the institution be asserted. Students who incidentally violate institutional regulations in the course of their off-campus activity, such as those relating to class attendance, should be subject to no greater penalty than would normally be imposed. Institutional action should be independent of community pressure.

Procedural Standards in Disciplinary Proceedings

In developing responsible student conduct, disciplinary proceedings play a role substantially secondary to example, counseling, guidance, and admonition.¹¹ At the same time, educational institutions have a duty and the corollary disciplinary powers to protect their educational purpose through the setting of standards of scholarship and conduct for the students who attend them and through the regulation of the use of institutional facilities. In the exceptional circum

When the misconduct may result in serious penalties, and if a penalized student questions the fairness of disciplinary action, that student should be granted, on request, the privilege of a hearing before a regularly constituted hearing committee. The following suggested hearing committee procedures satisfy the requirements of procedural due process in situations requiring a high degree of formality.

- a. The hearing committee should include faculty members or students, or, if regularly included or requested by the accused, both faculty and student members. No member of the hearing committee who is otherwise interested in the particular case should sit in judgment during the proceeding.
- b. The student should be informed, in writing, of the reasons for the proposed disciplinary action with sufficient particularity, and in sufficient time, to ensure opportunity to prepare for the hearing.¹⁶
- c. The student appearing before the hearing committee should have the right to be assisted in his or her defense by an adviser of the student's choice.
- d. The burden of proof should rest upon the officials bringing the charge.
- e. The student should be given an opportunity to testify, to present evidence and witnesses, and to hear and question adverse witnesses. In no case should the committee consider statements against the student unless he or she has been advised of their content and of the names of those who made them and has been given an opportunity to rebut unfavorable inferences that might otherwise be drawn.
- f. All matters upon which the decision may be based must be introduced into evidence at the proceeding before the hearing committee. The decision should be based solely upon such matters. Improperly acquired evidence should not be admitted.
- g. In the absence of a transcript, there should be both a digest and a verbatim record, such as a tape recording, of the hearing.
- h. The decision of the hearing committee should be final and not subject to appeal.

Notes

