

Ad Hoc Faculty Senate Committee  
to Study Academic Freedom and Tenure

Faculty Senate  
University of Arkansas at Little Rock

Dear Senators:

In fulfillment of its mission, the ad hoc Faculty Senate Committee to Study Academic Freedom and Tenure is pleased to submit the following work product to the Faculty Senate.

In the spring of 2007, the Faculty Senate instructed the ad hoc Committee:

- (1) to study the adequacy of the University tenure contract to protect academic freedom;
- (2) to determine the process by which the tenure contract can be revised; and
- (3) to make recommendations accordingly to protect academic freedom.

As to point (1), the Committee has concluded its study of the adequacy of the University tenure contract to protect academic freedom. As to point (2), the Committee has concluded that it is not immediately necessary to revise the tenure contract if instead the University and the Faculty agree on an effective interpretation of the existing contract language, specifically Board Policy 405.1. Accordingly, and as to point (3), the Committee recommends principally:

- (a) that the following Report, Proposed Interpretation, and Illustrations be referred to the standing Faculty Committee on Tenure for consideration in anticipation of formal proposal for adoption by the University and the Faculty;

The Committee furthermore recommends:

- (b) that the Faculty further study the scope of Board Policy 405.1, insofar as it may be limited by its terms, to assess its adequacy as a sole safeguard of academic freedom in the theoretical absence of complementary constitutional safeguards; and
- (c) that the Faculty in the future study the system of tenure, including issues such as the range of personnel who are eligible for tenure and the process by which tenure is awarded, to ensure that tenure itself is not diminished as an institution and that the fundamental principles of academic freedom are observed throughout the university community as part of a consistent philosophy and not reserved for application among a fortunate elite.

In support of these recommendations, the Committee offers the following documents:

- (i) the Report of the Committee;
- (ii) the Proposed Interpretation Concerning Closely Related Activities; and
- (iii) Illustrations in Support of the Proposed Interpretation.

The Committee thanks the Senate for this opportunity to serve the Faculty.

Sincerely,

Ad Hoc Faculty Senate Committee  
to Study Academic Freedom and Tenure

Richard J. Peltz, chairman, Law  
Carlton M. "Sonny" Rhodes, Mass Communication  
Roby D. Robertson, Institute of Government  
Olga Tarasenko, Biology  
C.F. Williams, History

## Report of the Faculty Senate Ad Hoc Committee to Study Academic Freedom and Tenure in Support of the Proposed Interpretation Concerning Closely Related Activities

The university is the quintessential marketplace of ideas.<sup>1</sup> Academic freedom is the legal and theoretical guarantee that ensures the proper functioning of the marketplace.<sup>2</sup> Accordingly, “[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.”<sup>3</sup>

In recent decades, however, courts and scholars have doubted the viability of academic freedom as a zone of liberty protected in constitutional law.<sup>4</sup> At a 2007 panel of the annual conference of the American Association of Law Schools,<sup>5</sup> Professor Van Alstyne, a renowned constitutional scholar, described three threads of First Amendment law that cast serious doubt on the future viability of academic freedom as a constitutional concept.<sup>6</sup> First, the U.S. Supreme Court’s jurisprudence on employee speech suggests that a public employee acting within the scope of employment enjoys no First Amendment protection vis-à-vis the government employer.<sup>7</sup> Second, the Court’s jurisprudence in government funding suggests that a recipient of government funds may be constrained to speak only in accordance with the terms of the funding.<sup>8</sup> Third, the Court’s jurisprudence in government speech suggests that public institutions themselves enjoy a prerogative to speak their own institutional viewpoints,<sup>9</sup> and federal courts have elevated First Amendment protection for institutions over the liberty of individuals within institutions.<sup>10</sup>

If academic freedom as a constitutional concept is endangered, then it becomes critically important that academics and academic institutions well define their understanding of academic freedom as expressed through their contractual relationships.<sup>11</sup> Fortunately in this vein, the American Association of University Professors has done considerable work in articulating the commonly understood scope of academic freedom, and the norms of the AAUP have been widely adopted by institutions of higher education. The academic freedom policy of UALR

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<sup>1</sup> See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>2</sup> See, e.g., *id.*

<sup>3</sup> *Id.*

<sup>4</sup> See generally, e.g., R. George Wright, *The Emergence of First Amendment Academic Freedom*, 85 NEB. L. REV. 793 (2007).

<sup>5</sup> Academic Freedom, Plenary Program, AALS, Washington, D.C., Jan. 4, 2007; see Elia Powers, *A Freewheeling Academic Freedom Debate*, INSIDE HIGHER ED, Jan. 5, 2007.

<sup>6</sup> William W. Van Alstyne, Academic Freedom, Plenary Program, AALS, Washington, D.C., Jan. 4, 2007.

<sup>7</sup> *Id.* (discussing *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006)). The *Garcetti* Court expressly reserved the question of employee-speech doctrine in the academic context. *Garcetti*, 126 S. Ct. at 1962; see also *id.* at 1963, 1969-70 (Souter, J., dissenting).

<sup>8</sup> Van Alstyne, *supra* note 6 (discussing *Rust v. Sullivan*, 500 U.S. 173 (1991)).

<sup>9</sup> *Id.* (discussing *Johanns v. Livestock Marketing Ass’n*, 544 U.S. 550 (2005)).

<sup>10</sup> E.g., *Urofsky v. Gilmore*, 216 F.3d 401 (4th Cir. 2000). See generally Richard H. Hiers, *Institutional Academic Freedom or Autonomy Grounded Upon the First Amendment: A Jurisprudential Mirage*, 30 HAMLINE L. REV. 1 (2007).

<sup>11</sup> Cf. Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the “College Hazelwood” Case*, 68 TENN. L. REV. 481, 542 (2001) (urging college student media to clarify contractual protection for intellectual freedom in anticipation of loss of constitutional safeguards).

articulated in Board Policy 405.1 is derived directly from the landmark AAUP 1940 Statement of Principles on Academic Freedom and Tenure.<sup>12</sup>

Still, the AAUP articulation of academic freedom focuses on the core functions of research, teaching, and service, and is sparse on detail. Due process is the touchstone of academic freedom protection in the AAUP framework. As a matter of substantive due process, “cause” is a sine qua non of adverse job action against a protected individual, and ample procedural due process also is required. There is no doubt in the AAUP vision that faculty autonomy as against a “for cause” determination embraces a wide range of activities, exceeding the strict, core constructs of research, teaching, and service.<sup>13</sup> For example, an AAUP statement *On the Relationship of Faculty Governance to Academic Freedom* maintains that “[t]he academic freedom of faculty members includes the freedom to express their views . . . on matters having to do with their institutions and its policies, and . . . on issues of public interest generally, and to do so even if their views are in conflict with one or another received wisdom,” even if the expression does not fall squarely within the traditional cores of published research, classroom teaching, and public service activities.<sup>14</sup> But the AAUP framework offers little more specific articulation of protected faculty activity outside these traditional cores.

At the same time, academic freedom, like other civil liberties, faces vigorous perils in our present era of grave concern for public security. This state of affairs has been studied by the AAUP Special Committee on Academic Freedom and National Security in a Time of Crisis. In the weeks after September 11, 2001, an Orange County (California) Community College professor was suspended for remarks deemed insensitive to Muslim students, and board members of the City University of New York called for the censure of faculty who criticized U.S. foreign policy.<sup>15</sup> At Irvine Valley College in California in 2003, the academic vice president issued a memo admonishing faculty not to discuss the war in Iraq “unless it can be demonstrated, to the satisfaction of this office, that such discussions are directly related to the approved instructional requirements and materials associated with those classes.”<sup>16</sup> Officials of the State University of New York at New Paltz, citing “the best interests of the university,” denied funds to a women’s studies program conference on Islam after off-campus groups alleged unbalanced criticism of Israel.<sup>17</sup> Rutgers University in 2003 denied use of university facilities for a student-organized conference on Palestinian solidarity after pro-Israeli politicians objected, though the university pointed to defective paperwork to support its decision and disclaimed any content or viewpoint bias.<sup>18</sup> In all of these instances, faculty involvement in the activities

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<sup>12</sup> AAUP, *AAUP Policy Documents & Reports* 3 (10th ed. 2006).

<sup>13</sup> See generally NEIL W. HAMILTON, *ACADEMIC ETHICS: PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE* (2002).

<sup>14</sup> AAUP, *supra* note 12, at 142. Shared institutional governance is an established aspect of academic freedom even though it is not squarely within any of the core functions of research, teaching, or service. See, e.g., Paula Wasley, *AAUP Criticizes Rennsalaer Polytechnic Institute Over Faculty Governance*, CHRON. OF HIGHER EDUC. NEWS BLOG, Sept. 24, 2007.

<sup>15</sup> Robert O’Neil, AAUP, For the Record: Academic Freedom and National Security, <http://www.aaup.org/-AAUP/issues/AF/oneilFTR.htm> (2004) (last visited Dec. 21, 2007) (speech delivered June 12, 2004, in Washington, D.C., to AAUP annual meeting).

<sup>16</sup> AAUP, *Academic Freedom and National Security in a Time of Crisis*, <http://www.aaup.org/AAUP/comm/-rep/crisistime.htm> (2003) (last visited Dec. 21, 2007).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

deemed objectionable might be challenged if academic freedom were misconstrued as strictly limited to the core functions of research, teaching, and service. But academic freedom is a broader concept, protecting faculty autonomy in commenting on public affairs<sup>19</sup> and in organizing conferences on matters of public interest, even when those activities are not tightly bound to a classroom lecture or a publication of research.

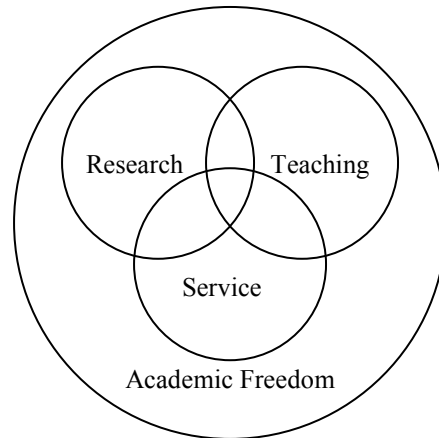


Figure 1

It is therefore at this time appropriate, and in the interest of all members of the university community, to elaborate a common understanding of the academic freedom that is guaranteed by Board Policy 405.1. This Interpretation offers that elaboration by supplementing the Policy's non-exhaustive, exemplary list of faculty activities with examples of activities that are closely related to, but not plainly within, the core academic functions. *See* Figure 1. The committee also has drafted a series of Illustrations to guide understanding of the Interpretation. The Illustrations similarly are exemplary and non-exhaustive; they derive from anecdotal experiences reported by and to members of the committee, from questions asked of the committee, and from hypothetical problems considered by the committee.

Neither the Interpretation nor the accompanying Illustrations mean to change or counter Board Policy; to the contrary, both mean to elaborate on the scope of present Board Policy. The Interpretation furthers the guarantee of Board Policy of a zone of academic freedom that is steadfast and consistent, and not subject to erosion upon the vagaries of constitutional interpretation over time. In this vein, the Interpretation eschews any impact of the devolution of academic freedom as a constitutional concept, as described by Professor Van Alstyne.<sup>20</sup> Ultimately, the Interpretation and Illustrations mean to bolster the evident intention of the Board Policy to facilitate a thriving marketplace of ideas in the university and thereby to ensure that the leaders of our communities, states, and nation are “trained through wide exposure to that robust

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<sup>19</sup> Post-9/11 fear is a highly visible threat to academic freedom, but certainly the traditional threat of partisan sniping is ever-present. *See, e.g.,* Robin Wilson, *AAUP Goes to Bat for “Freedom in the Classroom,”* CHRON. OF HIGHER EDUC., Sept. 12, 2007 (citing AAUP, *Freedom in the Classroom* (2007)).

<sup>20</sup> For example, Interpretation paragraph 2 maintains the application of free expression norms to faculty speech despite the case-law development described by Professor Van Alstyne, *see supra* note 7.

exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritarian selection.”<sup>21</sup>

Finally, the committee reports the following recommendations for further inquiry. First, the committee recommends that the Faculty in the future study the scope of Board Policy 405.1, not as it may be construed through appropriate interpretation, but indeed as it may be limited on its own terms, to assess its adequacy as a sole safeguard of academic freedom in the theoretical absence of complementary constitutional safeguards. Second, observing that Board Policy 405.1 concerns itself with the protection of tenured faculty, the committee recommends that the Faculty in the future study the system of tenure, including issues such as the range of personnel who are eligible for tenure and the process by which tenure is awarded, to ensure that tenure itself is not diminished as an institution and that the fundamental principles of academic freedom are observed throughout the university community as part of a consistent philosophy and not reserved for application among a fortunate elite.<sup>22</sup>

In fulfillment of its mandate from the Faculty Senate, the ad hoc Committee to Study Academic Freedom and Tenure recommends that the Senate refer this proposal and materials to the standing Committee on Tenure. The ad hoc Committee does not anticipate that amendment will be required to Board Policy itself. A standing committee ultimately may recommend that Senate officers enter discussion with the University Administration with the objective of effecting a joint adoption of the Board Policy 401.5 Interpretation Concerning Closely Related Activities and Illustrations in Support, to be reflected in the UALR Faculty Handbook.

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<sup>21</sup> *Keyishian*, 385 U.S. at 603 (internal quotation marks, marks of prior alteration, and citations omitted).

<sup>22</sup> See generally, e.g., John Gravois, *Labor Union Plants a Flag for Academic Freedom in an Era of Fewer Tenured Positions*, CHRON. OF HIGHER EDUC., Oct. 29, 2007 (citing American Federation of Teachers, *Academic Freedom in the 21st-Century College and University*); John Gravois, *Tracking the Invisible Faculty*, CHRON. OF HIGHER EDUC., Dec. 15, 2006 (citing AAUP, *Contingent Faculty Index*); Donna Euben, *Legal Contingencies for Contingent Professors*, CHRON. OF HIGHER EDUC., June 15, 2006; Donna R. Euben, AAUP, *Tenure: Perspectives and Challenges*, <http://www.aaup.org/AAUP/protect/legal/topics/tenure-perspectives.htm> (2002) (last visited Dec. 21, 2007).

## Proposed Interpretation Concerning Closely Related Activities

(1) As faculty responsibilities evolve, a need arises to elaborate a common understanding of the academic freedom that is guaranteed by Board Policy 405.1. Section 2(4)(1)(13) of Board Policy 405.1 is clear in that the core functions described in subsections (1), (2), and (3) are exemplary and neither limit nor exhaust the scope of academic freedom. In addition to the core functions of research, teaching, and service, faculty conduct activities that are closely related to those core functions. Accordingly, the broad conception of academic freedom expressed in Board Policy 405.1 protects faculty engaged in those closely related activities. The following statements therefore further exemplify, while still neither limiting nor exhausting, the scope of academic freedom that is protected by Board Policy 405.1.

(a) Faculty members are entitled to freedom in the selection of classroom instructional materials, regardless of medium or source.

(b) Faculty members are entitled to freedom in advising students.

(c) Faculty members are entitled to freedom in their involvement with campus organizations.

(d) Faculty members are entitled to freedom in the course of faculty governance.

(e) Faculty members are entitled to freedom of expression both within and outside the institution.

(f) Faculty members are entitled to freedom of participation in scientific, research, or educational meetings, and in the organization of conferences.

(2) As has always been the case under Board Policy 405.1, acts which interfere with the freedom of faculty to pursue these activities, as well as acts which, in effect, deny the freedom to speak, to be heard, to study, and to administer, are the antithesis of academic freedom. Moreover, for purposes of legal analysis under the First Amendment, faculty engaged in research, teaching, service, and closely related activities are presumed to be speaking on matters of public concern, regardless of whether the matter affects the interests of the speaker.

(3) As has always been the case under Board Policy 405.1, academic freedom does not mean absolute discretion to pursue any agenda without regard for the pedagogical mission of the university. Individual academic choices may be limited by policies that are reasonable and viewpoint neutral, and adopted by duly authorized bodies of the faculty for pedagogical reasons. In matters of alleged interference with academic freedom, due process remains the analytical touchstone such that interference may never be sanctioned when not “for cause” or when lacking the provision of ample procedural safeguards.

## Illustrations in Support of the Proposed Interpretation Concerning Closely Related Activities

The following Illustrations mean to demonstrate principles embodied in Board Policy 405.1, as articulated specifically through the Interpretation Concerning Closely Related Activities. The Illustrations are in no way limiting or exhaustive of the scope of academic freedom described by Board Policy 405.1 and the Interpretation Concerning Closely Related Activities.

(1) Selection of Classroom Instructional Materials. Professor X in the English Department chooses a controversial novel for an introductory literature course. She believes as a pedagogical matter that the novel is appropriate to the course. The head of the Department objects to the choice, deeming the book unsuitable as insufficiently challenging. Professor X's adoption decision is protected by academic freedom, because the selection of classroom instructional materials is an activity closely related to teaching. Subsequently, for viewpoint-neutral and pedagogical reasons, the faculty of the English Department duly and reasonably adopts a uniform reading list for all introductory literature courses. Professor X's previous selection is not on the list. Professor X subsequently must abide by the decision of the faculty.

(2) Student Academic Advising. Professor Y in the Political Science Department advises a student who wishes to study historical Soviet politics to consider transfer to another institution, because the University offers limited resources in that area. The student has not taken any classes from Professor Y. University student retention policy disallows advising students to transfer. Professor Y's advising of the student is protected by academic freedom, because even informal student advising is an activity closely related to teaching and service. The University student retention policy may not be enforced against Professor Y, because it unreasonably burdens Professor Y's discretion in student advising.

(3) Student Conduct Advising. Upon a student's request and with the permission of the head of the Business Department, Professor X in the Business Department sits in a meeting between the student and the head of the Department to discuss allegations of plagiarism against the student. The student has not taken any classes from Professor X, but the student trusts Professor X as a neutral observer who is not involved in the matter under consideration. Subsequently, the student is disciplined upon the authority of the head of the Department. Believing that the student has grounds for appeal, Professor X advises the student as to established University procedures for the appeal of disciplinary matters, as well as the student's right, consistent with University procedures, to seek professional outside counsel. Professor X's advising of the student is protected by academic freedom, because student advising is a function closely related to teaching and service. Whether Professor X and the head of the Department differ on the appropriate outcome of the matter has no bearing on the scope of protected activity.

(4) Campus Organization Participation. Upon invitation, Professor Y in the Religion Department participates in a debate sponsored by the Lesbian, Gay, Bisexual and Transgender Student Association. Professor Y vehemently asserts the position that homosexuality is a sin. Professor Y's participation in the debate is protected by academic freedom, both because participation in a campus organization is closely related to teaching and service, and because the expression, however vehemently, of an opinion, however controversial, may not constitute cause for adverse employment action.

(5) Internal Policy Statement, Distinterested Speaker. Professor X in the French Department writes a memo to her departmental colleagues asserting that the placement testing of incoming students is inadequate. Professor X's position is at odds with the conclusion of the French Department Assessment Committee, which just concluded a study of the adequacy of incoming placement testing. Professor X's expression is protected by academic freedom, both because her expression is closely related to service through faculty governance and to teaching, and because the expression of an opinion, however controversial, may not constitute cause for adverse employment action.

(6) Internal Policy Statement, Interested Speaker. Professor Y in the Business Department writes a memo to the departmental faculty stating that the head of the Business Department has shown poor judgment by placing resources in student placement, rather than in faculty research, and that the head should be removed. Because of the Department's fiscal priorities, Professor Y suffers a reduction in funding. Professor Y is accused of acting in self-interest and in not being a "team player." Professor Y's expression is protected by academic freedom, because Professor Y's expression is closely related to service through faculty governance, and to teaching and research, and Professor Y is presumptively commenting on a matter of public concern, even though the matter affects him. Professor Y's expression is also protected because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Whether a faculty member is regarded as a "team player" has no bearing on the scope of protected activity.

(7) External Policy Statement, Public Affairs. Professor X in the Sociology Department is quoted in the newspaper as an expert stating that government entitlement programs hurt the poor more than help the poor. Professor X did not tell the reporter that she was not speaking on behalf of the University, but she did not affirmatively purport to speak on behalf of the University. Professor X's expression is protected by academic freedom, both because her expression as an expert is closely related to service and research, and because the expression of an opinion may not constitute cause for adverse employment action. Because Professor X was consulted in her capacity as an expert, it was not necessary to disclaim his affiliation with the University. It was evident under the circumstances that Professor X was not purporting to espouse an official position of the University.

(8) External Policy Statement, Institutional Affairs. Professor Y in the Law Department is quoted in the newspaper stating that the University places too much emphasis on recruitment and insufficient emphasis on placement. Professor Y told the reporter that he was not speaking on behalf of the University, but that disclaimer does not appear in the story. Professor Y's expression is protected by academic freedom, both because his assessment of University policy is closely related to service through faculty governance and to teaching, and because the expression of an opinion, however controversial, may not constitute cause for adverse employment action. Professor Y properly disclaimed that he was not speaking on behalf of the institution, and he is not responsible for the subsequent failure of a third party to perpetuate the disclaimer.

(9) External Policy Statement, Whistleblower to Private Entity. Professor X in the Journalism Department urges a regional accrediting agency of journalism departments to determine whether the department awards more credits than permitted in certain subjects, according to accreditation standards, for students pursuing degrees in the Department. Professor X does not know whether the Department is or is not at fault, because she does not have access to records that would demonstrate the Department's culpability. But she is not reckless in urging the agency to make inquiry. The Department's accreditation is consequently jeopardized. Professor X's communication is protected by academic freedom, because the communication is closely related to service through faculty governance, and to teaching, and because Professor X has not asserted a fact she knows to be false, nor asserted a fact with reckless disregard of its truth or falsity. The Department may prefer that Professor X first have worked internally to correct any misunderstanding, but Professor X's failure to do so is not cause for adverse employment action.

(10) External Policy Statement, Whistleblower to Public Entity. Professor Y in the Political Science Department reports to the Department of Education that the Department has disclosed student information in a manner contrary to the Family Educational Rights and Privacy Act. Professor Y's communication is protected by academic freedom, both because the communication is closely related to service through faculty governance, and because the communication is protected by the First Amendment right to petition, regardless of whether the matter concerns Professor Y personally. The Department may prefer that Professor Y first have worked internally to correct any misunderstanding, but Professor Y's failure to do so is not cause for adverse employment action.

(11) Exercise of Public Right. Professor X in the German Department files a request under the state freedom of information act (FOIA) to obtain public records revealing the expenditures of the Department. The Department previously denied access to Professor X on grounds that she had no authority over or responsibility for the financial disposition of the Department. The FOIA does not condition access on the purpose of the request or identity of the requester. Professor X's FOIA request is protected by academic freedom, because Professor X's supervision of departmental expenditures is closely related to service through faculty governance. Moreover, Professor X's request is protected because the exercise of a statutory or constitutional right cannot be cause for adverse employment action.

(12) Organization of Conference. Professor Y in the History Department organizes a conference of academic professionals on the subject of teaching evolutionary biology. The History Department asks Professor Y, an avowed atheist, to cancel the conference for fear that protests organized by a student organization espousing creationist theology will be disruptive to the campus. Professor Y refuses to cancel the conference. Professor Y's decision to go forward with the conference is protected by academic freedom, because Professor Y's conference activity is closely related to teaching, research, and service. The History Department may not upon mere fear of disruption override Professor Y's decision, and the History Department must endeavor to thwart unlawful disruptive conduct before resorting to censorship of academic activity. The History Department may override Professor X's discretion only upon circumstances demonstrating an imminent threat of substantial campus disruption that cannot be averted by alternatives less restrictive than the curtailment of academic freedom.