Report on Conclusion of Preliminary Review in the Matter of Professor Ward Churchill* - March 24, 2005

Introduction

On February 3, 2005, the University of Colorado Board of Regents convened a special meeting to consider recently publicized comments of Professor Ward Churchill of the Department of Ethnic Studies at CU - Boulder. At the meeting, Chancellor DiStefano announced that he had commenced a review of allegations concerning the statements and conduct of Professor Churchill. Chancellor DiStefano further advised that he intended to request the assistance of Dean of the College of Arts and Sciences Todd Gleeson, and Dean of the School of Law David H. Getches, and that at conclusion of the review, he would decide whether to issue a notice of intent to dismiss, take other appropriate action, or take no action. The Board resolved to endorse the Chancellor's conduct of a review.

Scope of Review

The review by the Chancellor focused initially on allegations concerning certain conduct, speeches, and writings of Professor Churchill and related to the nature of his statements. During the course of the review the Chancellor received additional allegations, primarily in the area of research misconduct. Principles of academic freedom and minimum standards of professional integrity require that these allegations be given due consideration.1 However, the Chancellor reviewed only those additional allegations related to Professor Churchill's performance of University responsibilities. Allegations related to conduct outside the scope of his University duties were not considered.2 With the assistance of Deans Getches and Gleeson, the Chancellor undertook an examination of certain of Professor Churchill's writings, speeches, tape recordings, and other works as well as additional information provided by individuals within and outside the University, including Professors John LaVelle, Thomas Brown, Fay Cohen, and Russell Thornton, and G. William Rice and Principal Chief George G. Wickliffe, Keetowah Band of Cherokee.

The purpose of the review was to determine whether Professor Churchill's scholarship or conduct warrants further action under University policies. This report describes the bases for actions taken by the Chancellor. The specific allegations regarding Professor Churchill are described in the body of this report. The allegations relate to two questions:

- Did certain statements by Professor Churchill, made in his writings and speeches, exceed the boundaries of a public employee's constitutionally protected speech?
- Is there evidence that Professor Churchill engaged in other conduct in the performance of his University responsibilities that warrants further action by the University, namely, research misconduct, teaching misconduct, or fraudulent misrepresentation?

Analysis and Bases for Action

1. Did certain statements by Professor Churchill, made in his writings and speeches, exceed the boundaries of a public employee's constitutionally protected speech?

This review of Professor Churchill's work was sparked by an essay purportedly written on September 12, 2001, the day after terrorists attacked the World Trade Center, (the "9/11 Essay") and particularly his use of the term "little Eichmanns" in the 9/11 Essay to refer to

Public employees have a right to express themselves so long as their speech does not unduly disrupt the operation of the workplace or impede the performance of the speaker's duties.14 In such circumstances, the government employer's interest in "promoting the efficiency of the public services it performs through its employees" may outweigh the employee's First Amendment rights.15 Professor Churchill's statements and the outcry against them have sorely embarrassed the University. However, the reviewers found no evidence that he has failed to maintain his faculty responsibilities. Courts have upheld adverse employment action based on disruptions only where the speaking employee has a special duty to an outside constituency.16

In such cases, courts have focused on the employee's responsibilities in the workplace.17 For example, a University administrator, such as the chair of a department, has a greater responsibility to external constituencies than does a professor.18 Where, as here, a professor's offensive statements in matters of political belief do not entail a non-performance of his professorial duties, the First Amendment forbids the government from disciplining the professor for making the statements.

In Jeffries v. Harleston, a tenured professor and department chair outraged the community, alumni, donors, and prospective students over an anti-Semitic speech. He was subsequently removed from his chairmanship, a position in which he could be viewed as speaking for the institution. However, he was not removed from his appointment as a tenured professor. In upholding his removal as chair, the court noted that the professor still had access to the "'marketplace of ideas' in the classroom."19 This is in keeping with the constitutional principle that the First Amendment does not allow the public, with the government's help, to shout down unpopular ideas because they stir anger.20

Similarly, in this case, the outrage Professor Churchill has generated among state and federal elected officials, commentators, and citizens across the country most likely would have warranted his removal as Chair of the Ethnic Studies Department had he not stepped down. However, his faculty position does not impose the same responsibilities to those external constituencies. Professor Churchill appears to have continued in his faculty responsibilities and the content of his speech has not disrupted the University's provision of services to its students or the ability of other faculty members to perform their responsibilities. His political expression is, therefore, constitutionally protected against government sanction on the grounds of disruption, in spite of the damage it may have caused.

In addition to the limitations on speech specifically applicable to

public employees, the Supreme Court has held that advocacy of the use of force or violation of the law is not protected when it is directed to inciting or producing imminent lawless action and is likely to produce such action.21 However, this exception to the exceedingly broad protection otherwise afforded by the First Amendment applies only to advocacy of concrete or imminent violent action, as opposed to political hyperbole or advocacy and teaching of illegal violent action as an abstract principle.22 There is no evidence that the statements that precipitated this review or any of Professor Churchill's other referenced statements meet this standard. While some of his statements advocate violence as a means to a political end in an abstract way, they do not rise to the level of inciting imminent and concrete violence as that line has been drawn by the United States Supreme Court.23 Therefore, the nature and content of Professor Churchill's speech does not exceed

may be constitutionally protected does not insulate it from conforming to minimum standards of professional integrity, including standards for academic research. The University should address misconduct uncovered in the course of a review such as this one just as it should address alleged sexual harassment, sanctionable criminal activity, or other wrongdoing within its purview.

a. Is there evidence that Professor Churchill engaged in research misconduct?

In the course of this review, the University received information from scholars, expert in the fields in which Professor Churchill writes, who tendered allegations of research misconduct which, if true, could violate standards of professional integrity. The following information was considered:

• Professor John LaVelle of the University of New Mexico forwarded allegations to the reviewers that Professor Churchill's work is "sorely lacking in historical/factual veracity and scholarly integrity."29 One of Professor LaVelle's most serious allegations is that Professor Churchill has misrepresented an important statute in the field of federal Indian law, the General Allotment Act of 1887,30 and that this misrepresentation is a central premise of one of Professor Churchill's scholarly theories. According to Professor Churchill, the General Allotment Act "imposed a formal eugenics code" that tribes themselves adopted by making blood quantum a requirement of membership.31 Professor LaVelle has asserted that Professor Churchill's criticisms of Indian tribes for using blood quantum standards as part of their tribal enrollment criteria rests on false information about the Act.32 Professor LaVelle asserts that "[t]he main flaw of this federal/tribal conspiracy theory is that it rests on — and propagates — demonstrably false information concerning the contents and impact of the General Allotment Act."_ftn33 Professor Churchill continued to maintain the theory subsequent to publication of Professor LaVelle's articles.34 Other scholars have relied in their work on Professor Churchill's assertion that the General Allotment Act contained a blood quantum requirement.35

• Professor LaVelle makes a similar allegation about an assertion Professor Churchill has advanced concerning the Indian Arts and Crafts Act of 1990.36 The Indian Arts and Crafts Act is aimed at preventing non-Indians from marketing their art as Indian-produced.37 Professor Churchill says the following about the Arts and Crafts Act:

The government "standard" involved — usually called "blood quantum" within the lexicon of "scientific" racism — is that a person can be an "American Indian artist" only if he or she is

“certifiably” of “one-quarter or more degree of Indian blood by birth.” Alternatively, the artist may be enrolled as a member of one or another of the federally-sanctioned “tribes” currently existing within the U.S. . . .38

• Professor LaVelle refers to Professor Churchill’s description of the Act as a “false characterization” and states further that Professor Churchill’s description is “erroneous — and egregiously so.”39

• Professor Thomas Brown of Lamar University forwarded information alleging that a theory Professor Churchill has published as fact-that the U.S. Army perpetuated genocide—is clearly contrary to the source Professor Churchill cites.40 Professor Churchill has asserted that the U.S. Army deliberately distributed smallpox-infested blankets to Mandan Indians in 1837, causing an epidemic in which over 100,000 people died.41 However, the source he cites is contrary to both the number of dead and his version of the story.42 Indeed, his source, Professor Russell Thornton of UCLA and other experts agree that the story is without historical basis.43 Professor Brown states:

Situating Churchill’s rendition of the epidemic in a broader historiographical analysis, one must reluctantly conclude that Churchill fabricated the most crucial details of his genocide story. Churchill radically misrepresented the sources he cites in support of his genocide charges, sources which say essentially the opposite of what Churchill attributes to them.44

• Professor Fay G. Cohen of Dalhousie University in Canada told the University of Colorado during this review that Professor Churchill plagiarized her work by publishing a chapter entitled “In Usual and Accustomed Places” in a book entitled The State of Native America.45 The chapter was nearly the same as an article entitled “Implementing Indian Treaty Fishing Rights: Conflict and Cooperation” that she had published in a volume edited by Professor Churchill.46 The book chapter showed the author to be “Institute for Natural Progress,” and the “About the Contributors” section of the book, in turn, attributed the work of the Institute of Natural Progress to Ward Churchill. In 1997 the Dalhousie University legal counsel rendered an opinion concluding that the chapter was plagiarized.”47Professor Cohen alleged that she did not communicate the allegations of plagiarism discussed above to the University of Colorado until March 2005 because she was intimidated by Professor Churchill based on past dealings. She recounted that when she withdrew her work from The State of Native America, a book edited by, which Professor Churchill was closely involved with, due to substantive editorial disagreements, he telephoned her late at night and said in a menacing voice: “I’ll

get you for this." While the threat and resulting intimidation described by Professor Cohen did not directly relate to the research misconduct allegation, they would be relevant to a question which may be raised during the course of the research misconduct inquiry, that is, why Professor Cohen did not pursue the plagiarism claim sooner.

• Rhonda Kelly, the sister of Professor Churchill's late wife, Leah Renae Kelly, has made allegations to the reviewers concerning a fifty-page "biographical preface" written by Professor Churchill for a book of essays by Leah Kelly entitled In My Own Voice. The essays were posthumously published in 2001 in a book edited by Professor Churchill. Rhonda Kelly denounces the preface as "inaccurate and defaming" because, in her view, the preface

allegations.

b. Is there evidence that Professor Churchill engaged in teaching misconduct?

During the course of the review, the Chancellor received information about complaints made by several of Professor Churchill's former students. According to the information, two students complained that their grades had been lowered by Professor Churchill because of positions they took. The Regent Law on academic freedom provides that students must have freedom of study and discussion. Undergraduate students who have concerns about faculty behavior, performance or grades may seek resolution as outlined in the "Student Appeals, Complaints, and Grievances: A Brief Guide," published by the Office of Undergraduate

American Indian to gain credibility, authority, and an audience by using an Indian voice for his scholarly writings and speeches. Other issues brought to the attention of the reviewers, such as teaching misconduct, were not found to warrant action.

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law . . . abridging the freedom of speech . . . .” However, the Fourteenth Amendment extends the protections of the First Amendment to actions by the States, including the University of Colorado as an arm of the state. It is immaterial how much or little funding the University receives from the State; it was created and exists under the Colorado Constitution and is a public institution. 11 Waters v. Churchill, 511 U.S. 661, 668 (1994); Connick v. Myers, 461 U.S. 138, 142 (1983); Mt. Healthy City Board of Ed.

even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action").

23 See, e.g., NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) (the following statements by Charles Evers in public speeches over an NAACP boycott were protected: you [audience members] will be watched and blacks who trade with white merchants will be answerable to me; any "uncle toms" who break the boycott will "have their necks broken" by their own people; boycott violators will be "disciplined" by their own people and the Sheriff can not sleep with boycott violators at night; and "[i]f we catch any of you going in any of them racist stores, we're gonna break your damn neck."); Hess v. Indiana, 414 U.S. 105 (1973) (the statement, "We'll take the fucking street later (or again),"spoken directly to a crowd while the sheriff and deputies were attempting to clear the street was protected because it did not have a tendency to lead to violence); Watts, 394 U.S. 705 (the following statement made at an anti-war rally was protected: "[I]f they ever make me carry a rifle the first man I want in my sights is L.B.J."); Brandenburg, 395 U.S. at 446 (the following statement by a Ku Klux Klan leader was protected: "We're not a revengent [sic] organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance [sic] taken.").

24 The same right of free expression exists for tenured and untenured professors but untenured faculty members are subject to periodic reappointment and ultimately tenure review. Once tenure is awarded, a professor has additional contractual security so long as the position exists. The U.S. Supreme Court has held that tenure, though a contract right created through university policy, is a protected property interest that, under the Fourteenth Amendment, cannot be taken away without due process of law. See, e.g., Perry v. Sindermann, 408 U.S. 593, 602-603 (1972). Due process includes the requirement that there be cause for dismissal as well as notice and opportunity to be heard. The grounds for dismissal under University policy are set forth in Article 5 , Laws of the Regents, Part C.1: professional incompetence, neglect of duty, insubordination, conviction of a felony or any offense involving moral turpitude upon a plea or verdict of guilty or following a plea of nolo contendere, or sexual harassment or other conduct that falls below minimum standards of professional integrity.

25 Edmund L. Pincoffs, The Concept of Academic Freedom 3 (1972). Since Pincoffs' book was written freedom of academic thought and speech has been invoked to protect some scholars from the "fundamentalism of the radical academic left." See Neil

Hamilton, Zealotry and Academic Freedom (1995). Leading scholars believe that the same freedom should protect a professor from being sanctioned for failing a current test of political correctness as embodied in “speech codes” adopted by some schools. See Lee C. Bollinger, “The Open-Minded Soldier and the University,” inUnfettered Expression: Freedom in American Intellectual Life (Peggie J. Hollingsworth, ed. 2000).
26 See Article 5, Laws of the Regents, Part D.1.B: “academic freedom” is defined as the freedom to inquire, discover, publish and teach truth as the faculty member sees it, subject to no control or authority save the control and authority of the rational methods by which truth is established.”
27 See Article 5, Laws of the Regents, Parts C.1 and D.2.
28 Robert M. O’Neil, Free Speech in the College Community x-xi, 48-49 (1997).
29 John LaVelle, “Review Essay,” 20 American Indian Quarterly 109 (Winter 1996).
30 Act of Feb. 8, 1887, ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, 381).
31 Ward Churchill, “Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America,” inStruggle for the Land: Indigenous Resistance to Genocide, Ecocide and Expropriation in Contemporary North America 49 (1993).
32 LaVelle, “Review Essay,” supra, at 110; John P. LaVelle, “The General Allotment Act ‘Eligibility’ Hoax: Distortions of Law, Policy, and History in Derogation of Indian Tribes,” 14 Wicazo Sa Review 251 (Spring 1999). In his Wicazo Sa Review article LaVelle expands his analysis and links Churchill’s alleged fabrications to a collaborator, M. Annette Jaimes. See id.
33 LaVelle, “Review Essay,” supra, at 110.
34 See Ward Churchill, “Like Sand in the Wind: The Making of an American Indian Diaspora in the United States,” inStruggle for the Land: Native North American Resistance to Genocide, Ecocide and Colonization 341 (2002) (”Under provision of the [General Allotment Act], each Indian identified as such by demonstrating ‘one-half or more degree of Indian blood’ was to be issued an individual deed to a specified parcel of land . . . within existing reservation boundaries.”).
35 See, e.g., Matthew Atkinson, “Red Tape: How American Laws Ensnare Native American Lands, Resources, and People, 23 Okla. City U. L. Rev. 379, 394 (1998); Kathryn R.L. Rand and Steven A. Light, “Virtue or Vice? How IGRA Shapes the Politics of Native American Gaming, Sovereignty, and Identity,” 4 Va. J. Soc. & L. 381, 434 n.302 (1997); Mark Neath, Comment, “American Indian Gaming Enterprises and Tribal Membership: Race, Exclusivity, and a

Perilous Future, ” 2 U. Chi. L. Sch. Roundtable 689, 696 n.63 (1995).
36 Pub. L. No. 101-644, 104 Stat. 4662 (codified at 25 U.S.C.A. §§ 305d, 305e, amendments to § 305a, and 18 U.S.C.A. §§ 1158, 1159, and provisions in notes at 25 U.S.C.A.§§ 305 and 305e).
37 See H.R. Rep. No. 101-400(I), at 3 (1990), reprinted in 1990 U.S. C.C.A.N. 6382.
38 Ward Churchill, “Nobody’s Pet Poodle,” inIndians Are Us? Culture and Genocide in Native North America 89, 92 (1994).
39 LaVelle, “The General Allotment Act ‘Eligibility’ Hoax,” supra, at 274.
40 Thomas Brown,”Assessing Ward Churchill’s Version of the 1837 Smallpox Epidemic,” (Updated February 13, 2005), at http://hal.lamar.edu/~browntf/Churchill1.htm#_ftnref22.
41 See, e.g., Ward Churchill, “Bringing the Law Back Home: Application of the Genocide Convention in the United States,” inIndians Are Us?, supra, at 11, 35 (1994); Ward Churchill, A Little Matter of Genocide 155-56 (1998). The accounts, including facts like the number who died, vary between Churchill’s two books.
42 See Russell Thornton, American Indian Holocaust and Survival, 94-96 (1987).
43 Professor Thornton was recently reported to have said that the information is wrong. David Kelly, “Colorado Professor Faces Claims of Academic Fraud,” Los Angeles Times (Feb. 12, 2005). Thornton was also quoted by Inside Higher Ed acknowledging that Churchill has “misrepresented my work” and saying “[i]ssues like Ward Churchill cast aspersions on legitimate Indian scholars” at http://www.insidehighered.com/insider/a_new_ward_churchill_controversy. See also Guenter Lewy, “Were American Indians the Victims of Genocide?” Commentary (Nov. 22, 2004). Professor Thornton communicated with the University during the course of this review and confirmed his belief that Professor Churchill has misrepresented his work.
44 Brown, supra.
45 The State of Native America: Genocide, Colonization and Resistance (Annette Jaimes ed. 1992). The matter is described in LaVelle, “The General Allotment Act ‘Eligibility ‘ Hoax”, supra at 283-86, n.8.
46 Critical Issues in Native North America, vol. 2, Document No. 68 (Ward Churchill ed. 1991) at 154-173.
47 Letter to The Social Sciences and Humanities Research Council from Brian C. Crocker, University Secretary and Legal Counsel, Dalhousie University, dated February 19, 1997.
48 Assembly of First Nations, Annual General Assembly Resolution no. 56, July 20-22, 2004, action recommended October 3, 2004.

49 Compare Rebecca L. Robbins, “Self-Determination and Subordination: The Past, Present and Future of American Indian Governance,” inThe State of Native North America: Genocide, Colonization and Resistance 93 (M. Annette Jaimes ed., 1992), with Ward Churchill, “Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America,” inStruggle for the Land: Indigenous Resistance to Genocide, Ecocide and Expropriation in Contemporary North America 50-51 (1993); see also LaVelle, “The General Allotment Act ‘Eligibility ‘ Hoax”, supra, at 283-84 n.8 (comparing passages).

50 See Ward Churchill, “Perversions of Justice: Examining the Doctrine of U. S. Rights to Occupancy in North America” inPerversions of Justice: Indigenous Peoples and Angloamerican Law 14 (2003).

51 University of Colorado Administrative Policy Statement on