

EXECUTIVE SUMMARY

PROTECTING AN INDEPENDENT FACULTY VOICE: ACADEMIC FREEDOM AFTER *GARCETTI V. CEBALLOS*

Most faculty may be unaware that a recent Supreme Court decision, *Garcetti v. Ceballos* (2006), and several subsequent lower-court rulings applying that decision to higher education pose a serious threat to academic freedom and the ability of faculty in public institutions to participate freely in academic governance. The seriousness of this threat led the AAUP's Committee A on Academic Freedom and Tenure to form a subcommittee to examine the potential impact of the *Garcetti* decision and to suggest actions to be taken in both public and private colleges and universities to preserve academic freedom even in the face of judicial hostility or indifference. Because of the length and detailed legal analysis of its report, the subcommittee has also prepared this executive summary to make its general findings more readily accessible and to highlight its call for action outside the limited confines of the courts. The full report begins with an overview of the historical development of the principle of academic freedom in the United States. It then provides a substantial analysis of the legal precedents concerning both academic freedom, in particular, and the more general limits on the free speech rights of public employees, the issue addressed in the *Garcetti* case, before concluding with a series of recommended steps that faculty and administrators should take to safeguard academic freedom.

In *Garcetti v. Ceballos*, the Supreme Court allowed a Los Angeles district attorney's office to discipline a deputy district attorney for having criticized his supervisors' actions; the Court ruled that when public employees speak "pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Although the majority expressly left open whether its ruling should apply to "speech related to scholarship and teaching" in public colleges and universities, subsequent decisions in the lower federal courts concerning faculty speech have disregarded this reservation and now threaten to diminish severely the constitutional protection of the academic freedom of professors whose engagement in governance, as well as their teaching and research, is considered part of their "official duties."

The drafters of the AAUP's 1915 *Declaration of Principles on Academic Freedom and Academic Tenure*, which has provided a basis for the American understanding of academic freedom, did not rely upon the Constitution or statutes to make their case. At the time, faculty members at both private and public institutions were largely governed by the common law of master and servant—that is, the institution had authority and control over the faculty. Hence, most governing boards and presidents had the legal power to dismiss faculty members, who were at-will employees, for their economic, political, social, or religious views and for their criticisms of the institution. The authors of the *Declaration* argued that, for universities to advance knowledge and train students to think for themselves, faculty not only had to possess disciplinary expertise but also needed to be free from the control of their governing board and administration. The *Declaration's* authors explained that "[u]niversity teachers should be understood to be, with respect to the conclusions reached and expressed by them, no more subject to the control of the trustees than are judges subject to the control of the president." The assertion and exercise of these liberties confronted the master-servant model head on. As the 1915 *Declaration* put it, faculty members are "appointees" of the governing boards "but not in any proper sense the employees."

By the late 1930s, the principles of academic freedom in teaching, research, and publication had become generally accepted in most of public and nondenominational private higher education, and they were codified in the 1940 *Statement of Principles on Academic Freedom and Tenure*, the joint formulation of the AAUP and the Association of American Colleges (now the Association of American Colleges and Universities). This development occurred outside the context of the law and the constitutional right to free speech.

One aspect of academic freedom asserted in the 1940 *Statement* is the role of the faculty member in institutional life as a citizen or an "officer" of the institution. The academic freedom of a faculty member pertains to both (1) speech or action taken as part of the institution's governing and decision-making processes (for

example, within a faculty committee or as part of a grievance filing) and (2) speech or action that is critical of institutional policies and of those in authority and takes place outside an institution's formal governance mechanisms (such as e-mail messages sent to other faculty members). In its 1994 statement *On the Relationship of Faculty Governance to Academic Freedom*, the AAUP affirmed the inextricable connection between academic freedom in teaching and research and the free and effective participation of faculty in institutional governance.

Although the principle of academic freedom developed outside the law, beginning in the 1950s the Supreme Court began to interpret the First Amendment to include some protections for academic freedom for faculty at public institutions. In *Keyishian v. Board of Regents* (1967), a majority of the Court recognized academic freedom as a First Amendment interest. The subcommittee report emphasizes, however, that such protection did not extend to private institutions, since First Amendment protections apply only to restrictions on speech by arms of government. Moreover, the First Amendment protections provided to faculty at public institutions, while often quite helpful, never fully incorporated the AAUP's understanding of the scope of academic freedom.

Soon after the *Keyishian* ruling, the Supreme Court began to hand down a series of decisions addressing public employee speech more broadly. In *Pickering v. Board of Education* (1968), the Court strengthened the free speech rights of public employees by qualifying the long-standing legal doctrine that the First Amendment did not restrain the government when it functioned as an employer. That doctrine had been encapsulated by Oliver Wendell Holmes in 1892, when he stated that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." In *Pickering*, a case decided in favor of a public employee's free speech rights, the Supreme Court balanced the interests of a public employee "as a citizen, in commenting upon matters of public concern," against "the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." In subsequent decisions regarding public employee speech prior to *Garcetti*, the Court began to limit employee speech protection to a more restricted definition of matters of "public concern," so *Garcetti* ought not to have been a total surprise.

The threat to academic freedom implicit in *Garcetti*'s pinched reading of public employees' free speech rights became explicit in three subsequent lower-court deci-

sions. In *Hong v. Grant* (2007), a district judge, citing *Garcetti* and ignoring the Supreme Court's reservation for speech related to teaching and research, ruled that the University of California "is entitled to unfettered discretion when it restricts statements an employee makes on the job and according to his professional responsibilities." Such responsibilities included participation in institutional governance. Appeals courts in both *Renken v. Gregory* (2008) and *Gorum v. Sessoms* (2009) adopted similarly restrictive interpretations of faculty free speech rights. As of this writing, the *Hong* decision is on appeal, and the AAUP has filed an amicus brief.

The subcommittee report notes the irony that, based on the broad definition of "official duties" employed in these post-*Garcetti* rulings, only faculty speech on topics beyond the speaker's expertise may be constitutionally protected and that there now may exist a "negative or inverse correlation between the scope of a professor's (or a faculty's) role in shared governance and the breadth of potential protection for expressive activity. . . . In brief, as the cases stand now, one could argue that the less of a stake you have in your institution's shared governance, the freer you are (as a First Amendment matter) to criticize how it is governed, and vice versa."

Based on its review of relevant cases, the subcommittee report reiterates the imperative of making the case for academic freedom at both public and private institutions, not as a matter of law, but as a principle vital to the effective functioning of institutions of higher learning. While supporting efforts to shape the law through amicus curiae briefs, the report focuses on how the academic community can best preserve and protect academic freedom in light of the threat posed by the post-*Garcetti* legal context. The report urges faculty groups to minimize the dangers of recent court rulings and avert their recurrence, including through efforts to make administrators and governing boards aware of the risks to institutional health and to higher education generally if they use the *Hong-Renken-Gorum* doctrine to curtail intramural faculty speech.

The subcommittee also calls upon AAUP chapters and faculty senates at both public and private colleges and universities to develop policy statements at the institutional level that will explicitly incorporate protections for faculty speech on institutional academic matters and governance, such as the amendments recently adopted by the Board of Regents of the University of Minnesota. At the moment, most institutions have policy statements that recognize academic freedom as it pertains to teaching, research, and publication, but typically, such statements do not refer to speech relating to

governance. The report concludes by providing the Minnesota language and two other draft policy statements as examples of language that might be incorporated into faculty handbooks or other institutional regulations to clarify that academic freedom protects faculty speech about institutional academic matters and governance as well as teaching, research, and extramural statements:

1. Academic Freedom and Academic Responsibility sections of the Academic Freedom and Responsibility policy of the University of Minnesota, as amended by the board of regents on June 12, 2009:

Academic freedom is the freedom to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties and the functioning of the University.

Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest, one is not speaking for the institution.

2. Subcommittee proposal option 1:

Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and to publish the results of those investigations, and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. Professors should also have the freedom to address the larger community with regard to any matter of social, political, economic, or other interest, without institutional discipline or restraint, save in response to fundamental violations of professional ethics or statements that suggest disciplinary incompetence.

3. Subcommittee proposal option 2:

Academic freedom is the freedom to teach, both in and outside the classroom, to research and to publish the results of those investigations, and to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. Professors should also have the freedom to speak to any matter of social, political, economic, or other interest to the larger community, subject to the academic standard of conduct applicable to each. ■