

UI PRESIDENT VETOES FACULTY FREE SPEECH RIGHTS

By Nick Gier

We strongly support the right of faculty to exercise an independent voice in shared governance, without fear of discipline or punishment by the institution

—Gary Rhoades, Former President, American Association of University Professors

On April 29 the University of Idaho (UI) general faculty voted 176-0 to support their right “to speak or write freely without institutional discipline or restraint on matters pertaining to faculty governance and university programs and policies.” Appealing to precedents at North Idaho College, Boise State University, the University of Minnesota, and the University of California, I proposed, drawing on their policies, this new language to a faculty committee in November 2012. I want to thank UI faculty leaders who helped make this unprecedented unanimous vote possible.

California and Minnesota Regents Support Free Speech Rights

In 2013 the Regents of the University of California allowed their faculty to “address any matter of institutional policy or action when acting as a member of the faculty [or] as a member of an agency of institutional governance.” Susan Carlson, UC vice provost for academic personnel, reported that “we took the new language to the UC Regents to strengthen policy and shared governance by preserving faculty rights to critique institutional matters.”

In 2011 the Regents of the University of Minnesota also recognized the full scope of academic freedom, by adding the right “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.”

The Democratic Medieval University vs. Its American Counterpart

If UI faculty had been at a medieval university or its contemporary European fully democratic equivalent, this vote would have been the end of the matter. Quite different from administrative appointments from above, European professors elect their own deans and presidents. There is a hint of this tradition of full faculty self-governance in the UI Constitution, where the faculty is entrusted with “the immediate government of the University.” Far too many times UI faculty have been reminded how short lived this “immediate” self-government is.

At American universities there is veto power at every administrative level with no option of overrides. The governing policies of the Idaho State Board of Education, which serves as the UI Board of Regents, begin with a section entitled “Reservations of Powers,” in which the Board “reserves to itself the power to act on its own initiative in all matters affecting the institutions and agencies.” I ask you to savor the irony of an autocratic board overseeing faculty who are entrusted to prepare students for life in a democratic society.

When collective bargaining for Idaho faculty became an issue in the 1970s and a bargaining bill lost on a 4-4 vote in the Senate HEW Committee in 1976, one critic warned that Communists would take over our campuses. My retort was that the State Board of Education, acting as the UI Board of Regents, was already, with its absolute power, a Soviet-like Politburo.

President Staben Worries about Slanderous Speech

Back to the April 29 vote: we could not celebrate our free speech rights until we heard from our new President and the Board of Regents. At its June 18 meeting the Regents voted 7-0 to express “concern” about the new language, and they returned it to President Staben for his decision. Relying on the UI Counsel’s opinion, Staben vetoed the proposals, primarily because these changes “could result in slanderous or libelous speech or writing going without remedy within the institution.” He was advised that the new language undermined the Regents’ “plenary powers,” presumably the power to discipline professors who have been perceived to be uncivil in their speech.

The UI Counsel also referred to the AAUP’s 1940 statement on tenure and academic freedom, and he pointed out that there academic freedom applies only to the classroom and the laboratory, not faculty governance. No attempt was made to discover the AAUP’s current position on the issue 74 years later. As former AAUP president Gary Rhoades states: “We strongly support the right of faculty to exercise an independent voice in shared governance, without fear of discipline or punishment by the institution.” The AAUP’s full statement “Defending an Independent Faculty” can be found at www.NickGier.com/AAUPGarcetti.pdf.

Citizens libel their public officials every day, but campus collegiality keeps uncivil comments to a bare minimum. I believe that Staben’s fears are unfounded, and these are obviously not sufficient grounds to deny faculty basic First Amendment rights. If UI administrators believe they have been libeled, then they can sue for damages in state court.

***Garcetti v. Ceballos* and Limits to Public Employee Speech**

In its 2006 decision *Garcetti v. Ceballos*, the Supreme Court ruled that public employers can limit their employee’s constitutional right to free speech in the performance of their official duties. Richard Ceballos was a deputy district attorney in Los Angeles who claimed that he was demoted because of a dispute with his supervisor Gil Garcetti.

Many lower court judges have cited *Garcetti* against faculty who were fired for speaking out against their administrators. These judges, however, have ignored Justice Anthony Kennedy’s significant exception. Writing for the majority, he stated that the decision would not “apply in the same manner to a case involving speech related” to university professors.

In his dissent Anthony Souter concurred: “I have to hope that today’s majority does not mean to imperil the First Amendment protection of academic freedom in public colleges and

universities, whose teachers necessarily speak and write ‘pursuant to official duties.’” UI faculty have a duty to participate in the “immediate government of the University,” but there are no structures of self-governance in a county prosecutor’s office.

The Habib Sadid Case at Idaho State University

On March 28, 2013, federal judge Lynn Winmill, even after quoting Justices Kennedy and Souter, ruled that former ISU professor Habib Sadid had “no First Amendment right to comment on faculty administrative matters without retaliation.” Even though a faculty appeal committee and the ISU Faculty Senate voted overwhelming for Sadid’s reinstatement, ISU President Arthur Vailas terminated him for insubordination at the end of October, 2009.

In his decision Winmill limited academic freedom to research and teaching, and that allowed him to conclude that “at no point did Dr. Sadid tie his grievances to his research, scholarship, or teaching.” If the new language for UI had been in place at ISU, Sadid, an award winning teacher and researcher, would still be serving Idaho’s students.

Faculty Protected at North Idaho College and Boise State University

North Idaho College would have been the only Idaho campus where Sadid would have been free from retaliation for his criticisms. The language in the policy manual is explicit: “As a member of the college community, freedom to propose controversial or unpopular policies or practices to college bodies such as standing and ad hoc committees, supervisors, governing boards, and other groups and individuals; and freedom to question, criticize, and seek revision of NIC policies and practices in accordance with the normal review process in effect at the college.”

In December 2010, over one year after Sadid was fired, the BSU faculty amended their constitution to provide protection against the misapplication of *Garcetti*. The new language reads: “Faculty are entitled to speak or write freely without institutional discipline or restraint on matters pertaining to faculty governance and development of educational programs and policies.” One wonders if the State Board of Education will now revisit this language that they previously approved, and find that it violates their “plenary powers” to discipline professors they find out of line.

ISU Faculty Senate Abolished over Sadid and New Constitution

After the ISU faculty voted 80 percent against his leadership in February 2011, President Arthur Vailas abolished the Faculty Senate. The senators had voted overwhelmingly to support Professor Sadid, and it had also adopted a new Constitution modeled on BSU’s, including the freedom to speak on faculty governance matters. Vailas vetoed a constitution essentially identical to the one that the SBOE had approved for BSU.

In June of the same year the AAUP, whose policies on tenure and academic freedom have long been supported by ISU and nearly every other American college and university,

sanctioned ISU for violating basic principles of faculty governance. There are only four other colleges and universities that have this dubious distinction.

Two Federal Appeal Courts Exempt Faculty from *Garcetti*

In 2011 the Fourth Circuit Court of Appeals ruled, for the first time, that public university faculty are exempt from *Garcetti*'s limitations on free speech at public colleges and universities. The case involved a professor at University of North Carolina at Wilmington who had been denied a promotion for expressing conservative political beliefs. The judges ruled that he had full rights under the First Amendment.

On September 4, 2013, the Ninth Circuit Court of Appeals ruled in favor of David Demers, a former professor at Washington State University. In 2010 Demers filed suit alleging that he had been disciplined by WSU administrators for criticizing plans to restructure academic programs in the Murrow College of Communication. WSU had argued that Demers' critique was "professional speech"—not related to scholarship or teaching—and as such it did not deserve constitutional protection. The judges disagreed, ruling that Demers was exercising his First Amendment rights.

Interestingly and significantly, the Third, Sixth, and Seventh Circuit Courts of Appeal have upheld *Garcetti*'s restrictions, leaving all faculty in these jurisdictions vulnerable to retaliation from their administrations. This issue will not be resolved for all public institutions of higher education until the Supreme Court is asked to revisit and clarify *Garcetti*.

The UI Counsel appears unaware of either campus or legal advances on this issue, and the fact that UI faculty reside in the Ninth Circuit. So it is still imperative that UI faculty, as well as those across the nation, insist on campus policies that protect their free speech rights and obviate the necessity of unnecessary legal action.

Nick Gier of Moscow is President of the Idaho Federation of Teachers, AFT/AFL-CIO, and he taught philosophy at the University of Idaho for 31 years. Read about the Sadid case at www.idaho-aft.org/Sadid.htm. Read all of his columns on higher education at www.idaho-aft.org/HighEdColumns.htm