

**COLORADO CONFERENCE OF THE
AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS**

REPORT ON THE TERMINATION OF PHIL MITCHELL

November 1, 2011

This report is issued by the Colorado Committee to Protect Faculty Rights (CCPFR), a standing committee of the Colorado Conference of the AAUP. The CCPFR is part of the Colorado Conference and is not affiliated with Committee A of the national AAUP.

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EXECUTIVE SUMMARY

Phil Mitchell, a senior instructor in the Sewall Residence Academic Program (RAP) at the University of Colorado, Boulder, was terminated by non-renewal of his contract in the spring of 2007. Mitchell, arguably the most honored teacher in the history of the University, had previously been terminated in 2005, he claims, because of hostility by the History Department toward his conservative religious and political convictions. Mitchell publicly spoke out against his 2005 firing, an endeavor that he believes temporarily saved his job. Mitchell considers his 2007 firing an act of retaliation against his speaking out in 2005.

The Colorado Conference of the American Association of University Professors finds substantial evidence that:

- A history of antipathy toward Dr. Mitchell's political and religious convictions existed within the CU History Department.
- CU backed off Dr. Mitchell's 2005 termination because, when challenged by media inquiries, the administration and tenured faculty could not document cause for his firing. Their stories changed several times, as each story proved untrue.
- The 2007 documentation against Dr. Mitchell was orchestrated to justify his firing.
- A dual employment structure exists at the University of Colorado, wherein most of the faculty can be fired at any time for any reason, or for no reason, thus allowing the administration and sometimes tenured faculty to suppress the academic freedom of the majority.
- Dr. Mitchell's termination violates numerous AAUP protections of due process, shared governance, and academic freedom.

CONCLUSION

At least as represented by faculty in the humanities, Phil Mitchell is unusual from the standpoint of his religious and political convictions, as well as his access to national media. Nonetheless, his case personifies the vulnerability of all faculty who teach without the protections of tenure and due process. As a contingent member of the faculty, Mitchell was fortunate, at least on paper; he worked for a university where, according to published policy (but not state law) his academic freedom protections during the time of his contract were equivalent to those of his tenured colleagues. In fact, many of the University's violations of AAUP standards were also violations of published University policy.

When academic freedom is protected by policy rather than by law, it is essential that policy be followed scrupulously by administrators, both in letter and in spirit. In the culture of academia today, such adherence is increasingly unlikely. Institutional imperatives are often in competition. Participation in university governance, due process, and academic freedom for all faculty is important, but so is efficiency and flexibility. Priorities have to be established. In such an environment, when administrators are legally free to dispense with certain imperatives in favor of other, more convenient, imperatives, abuses of academic freedom are inevitable. But the ramifications of choosing their own convenience over academic freedom for their faculty are calamitous to a free society. At the University of Colorado, administrators disregarded Phil Mitchell's academic freedom and access to due process because they could.

Abuses of academic freedom are even more likely when administrators are permitted to draw distinctions between faculty being fired and faculty simply not being re-hired at the completion of their contract, particularly in circumstances when their employment would continue if these faculty were adjudged to pass muster by their "supervisors." Many faculty, unprotected by tenure and due process, choose to abdicate their responsibilities to their profession and to society by not voicing their opinions for fear of risking offense to their supervisors. When the considerable majority of faculty at our colleges and universities learn to be risk-averse as their best strategy for job security, the damage to a free society is obvious. Phil Mitchell—perhaps feeling that he was protected by his long service to the University, record of extraordinary student evaluations, history of near-fawning peer evaluations, numerous teaching awards, and the published policies of the university—was terminated for behaving as if his academic freedom existed not only on paper, but in practice.

If Ann Carlos and the History Department at CU had merely said, "We recommend Mitchell not be re-hired because we don't like his opinions," it is doubtful that Dean Gleeson would have concurred. What they did instead was contrive a case against him, as documented in this report. Anyone who values the free exchange of ideas should be disturbed.

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REPORT ON THE TERMINATION OF WARD CHURCHILL

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Executive Summary

Ward Churchill was dismissed from the University of Colorado (CU) in 2007, having been convicted of plagiarism as well as fabrication and falsification of evidence for his claims that the United States government had been complicit in the genocide of Native Americans. It was Churchill's essay of September 12, 2001, that drew attention to him—an essay that called victims of the attack on the World Trade Center “little Eichmanns.” For four years the essay, titled “Some People Push Back,” went unnoticed, but in 2005 it caught the attention of faculty and administrators at Hamilton College in New York, and from there it went viral, becoming the topic of nonstop media commentary that lasted for months.

Beginning in February 2005, a firestorm of public opinion raged. Politicians, media commentators, and citizens clamored for Churchill's dismissal from the University, threatening to withhold both state funds and private donations. Realizing that Churchill's right to express an opinion was protected by the First Amendment and that therefore they could not dismiss him for publishing what they felt to be a vile remark about innocent Americans, the University sought other reasons to dismiss Churchill.

During his employment at CU, Churchill had published more and won more recognition for his scholarship, teaching, and service than, perhaps, any other member of the faculty. He had also become a controversial figure in the field of American Indian Studies—incurring both the admiration and the wrath of other Indian activists and scholars. One antagonist—John LaVelle—had complained to CU officials about some of Churchill's scholarly claims several years earlier, but his concerns had been dismissed as not worth pursuing. But now that the University needed to find a means to fire Churchill, it sought LaVelle's help in constructing a case against him for research misconduct. Several charges were lodged against Churchill for falsification and fabrication of evidence as well as plagiarism.

It is obvious that the University would never have begun its investigation of Ward Churchill were it not for his “little Eichmanns” comment, which he made as a citizen, not as a scholar or as a representative of the University. It is also obvious that dismissing Churchill from his position as a professor at the University violated his First Amendment rights. Most U.S. citizens will agree that what keeps America vital are the freedoms enjoyed by its citizens, foremost of which is speech. Without free speech, the U.S. is just another totalitarian state. This is why citizens must jealously guard the rights of their fellow citizens to express opinions, even opinions with which they disagree or that anger them. If Churchill is not allowed to speak freely, none of us are.

In its prosecution of Churchill, the University violated many of its own rules as well as the most basic principles of academic freedom it purports to uphold. The following is from the University of Colorado's own highest laws:

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Faculty members can meet their responsibilities only when they have confidence that their work will be judged on its merits alone. For this reason the appointment, reappointment, promotion, and tenure of faculty members should be based primarily on the individual's ability in teaching, research/creative work, and service and should not be influenced by such extrinsic considerations as political, social, or religious views, or views concerning departmental or university operation or administration. A disciplinary action against a faculty member, including dismissal for cause of faculty, should not be influenced by such extrinsic consideration. (Laws of the Regents V.D.2.b.)

There is no doubt that Churchill's dismissal was influenced by an extrinsic consideration—his political views.

Following are other violations of CU's own rules for guaranteeing Churchill a right to a fair hearing:

- The University convened an Investigative Committee (IC) that contained no experts in the field of American Indian Studies. This became a crucial obstacle to justice, since several of the allegations against Churchill involved matters of historical interpretation that the members of the IC were unqualified to judge.
- The University declined to appoint to the IC any member of the faculty who had expressed support for Churchill's right to academic freedom, while appointing a faculty member who had expressed a strong personal bias against him to chair the committee.
- The number and timing of the allegations made it difficult for Churchill to defend himself. The IC refused to extend its 120-day time frame explicitly because doing so might work in his favor.
- Since "established standards" of research conduct vary, and since the field of American Indian Studies is cross-disciplinary, it was incumbent on the IC to set out the standards they would apply. Yet the IC was obstinately vague about which standards it would apply. Where no standards existed that would fault Churchill, the IC created its own.
- The IC proceedings were supposed to be "nonadversarial," yet they were expressly conducted as a prosecution with Churchill as the defendant.
- In its final report, the IC suppressed and misrepresented evidence that worked in Churchill's favor, and it contrived evidence against him.

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- The University repeatedly violated the rules of confidentiality by conducting press conferences, releasing statements to the press, and posting statements and documents on its website during the investigation.
- The University swept people who might have impeded progress toward Churchill's termination out of the way—CU President Elizabeth Hoffman and Indian scholar Michael Yellow Bird, as examples—and brought in people who would ensure Churchill's termination—former U.S. Senator Hank Brown, for example, a member of the neoconservative American Council of Trustees and Alumni (ACTA), which was overtly committed to the destruction of Churchill's career and reputation because he was an outspoken critic of American foreign and domestic policy.
- Hoffman's successor as President of CU, Hank Brown, disregarded the fact that the Committee for Privilege and Tenure (P&T) had dismissed several of the charges. Brown unilaterally reinstated them with his recommendation to the Board of Regents that Churchill be terminated.

As this report will demonstrate, the allegations against Churchill for fabrication, falsification, and plagiarism are almost entirely false or misleading; the slivers that remain standing are trivial in the extreme, given the volume of Churchill's work and the high regard in which it is held by other experts in the field. Few scholars' work would survive under the microscope held to Churchill's work. In our opinion, the members of the IC would be condemned as academic frauds if their report were subjected to the scrutiny that they applied to Churchill's work—and if they had said “little Eichmanns.”

According to experts in the field of American Indian Studies, the IC report, upon which disciplinary recommendations against Churchill were based, is an extended series of falsifications and fabrications offered in the name of correcting the scholarly record.

The seven allegations against Churchill can be broken into three parts: matters of historical interpretation, plagiarism, and use of sources.

Matters of Historical Interpretation

- The allegations that Churchill misrepresented the General Allotment Act of 1887 and the Indian Arts and Crafts Act disappear when one understands that Churchill was interpreting the Acts' meaning by taking into account their implementation and effects, a normative approach to historical interpretation practiced by numerous scholars.
- Churchill's accounts of the smallpox epidemics of 1616 and 1837 are defensible, based on the evidence he presents, according to experts in Churchill's field.

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- The strength of the circumstantial evidence regarding Captain John Smith's complicity in the spread of smallpox is debatable, and it should be debated—among historians, not in disciplinary hearings.
- All of the allegations regarding matters of historical interpretation focus on minor details offered in support of Churchill's much broader themes; these details are supported by reputable sources that the IC either disregarded or rejected. None of the allegations tarnish Churchill's broader themes, all of which are supported by thousands more details and examples with which the University found no fault.

Plagiarism

- None of the authors whom Churchill is accused of plagiarizing have ever accused him publicly.
- The Dam the Dams group asked Churchill to publicize their issue, and Churchill cited the group as his source numerous times. There was clearly no attempt on Churchill's part to steal their work.
- The IC was unable to prove that it was Churchill who plagiarized Fay Cohen. Indeed, the preponderance of evidence points elsewhere.

Use of Sources

- Where the IC cannot substantiate its allegations of plagiarism, it substitutes them with other allegations, primarily a failure "to comply with established standards regarding author names on publications." The failures in this regard are not Churchill's, but the authors who neglected to credit him as co-author.
- The University's charge that Churchill had plagiarized the Robbins essay, which was easily disproven, morphed into a complaint that he had committed an act of academic dishonesty by citing a source that he himself had written in order to support his claims that were otherwise unsupported. However, many sources besides Robbins corroborate Churchill's claims. The choice to cite one essay over another was not made to deceive the reader.
- The IC claims to respect Indian oral traditions and that Churchill disrespects them. In fact, the IC suppressed evidence that Churchill had fairly and accurately represented oral traditions in his publications.
- Churchill is accused of misrepresenting the contents of works by Russell Thornton, Patricia Limerick, and Neal Salisbury. According to experts in the field, such an accusation amounts to falsification of evidence against Churchill.

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- The IC faults Churchill for citing books without including page numbers; they claim he does this in order to conceal the “fact” that the book does not support his claims. In Churchill’s case, the books he cites do support his claims. Furthermore, citing books without page numbers is accepted practice when one is referring to the book as a whole and not to any specific passage within the book. In fact, one of the members of the IC has employed this very practice on at least 92 occasions.
- Both the IC and P&T have claimed that the practice of ghostwriting violates accepted academic practice. Both committees disregarded evidence that it is widely accepted practice in certain fields.

Besides contriving their evidence against Churchill, the IC also takes him task for refusing to defer to their findings.

Finally, the Colorado Conference of the AAUP recommends that faculty in search of employment consider a position at the University of Colorado only as a last resort because of the University of Colorado’s indifference to the ideals of academic freedom.

Conclusion

“Our nation is deeply committed to safe-guarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.”

*Supreme Court, in Keyishian v. Board of Regents, 385 U.S. 589 (1957)
as quoted in AAUP Policy Documents and Reports, 10th ed., p.5.*

“A college or university is a marketplace of ideas, and it cannot fulfill its purposes of transmitting, evaluating, and extending knowledge if it requires conformity with any orthodoxy of content and method. In the words of the United States Supreme Court, ‘Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.’”

AAUP Policy Documents and Reports, 10th ed., p22.

“No matter how cynical you are, it’s not enough. ”

Joan Rivers

The University of Colorado’s prosecution of Ward Churchill represents a betrayal of society on numerous levels. The failures of those who demanded the prosecution—the press, who gained ratings for condemning Churchill’s opinions, and the politicians, who gained votes for demanding that Churchill be fired—are obvious. We do not mean to suggest that there was anything inauthentic about their outrage over Churchill’s opinions. Perhaps, for many in the press as well as the politicians who threatened the University if they did not fire Churchill, their outrage was the most authentic thing about them. Perhaps we should not expect that they would understand the function of a university.

The failure of the Board of Regents was equally predictable. It is a body of elected officials. Few appear to have much knowledge about the University other than what they glean from the newspapers, are told by the administration, or hear from their constituents back home. This, along with their passions, is most of what they bring to the table when exercising their authority over the University. We do not doubt the high seriousness with which the Regents engaged their responsibilities in the prosecution of Ward Churchill, but, although many may have hoped for better, few who follow developments in higher education can have been surprised by their behavior.

Similarly, there is little about the actions of the CU administration that does not speak for itself. Spearheaded by Chancellor Phil DiStefano, the University apologized to the nation for Ward Churchill’s “repugnant” opinions and then conducted an investigation to ascertain whether Churchill’s comment about “little Eichmanns” was protected by the

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First Amendment. When they found that it was protected, they conducted an investigation into all of Churchill's publications, actively seeking other grounds on which to fire him. They then put him on trial for academic fraud and convicted him of offenses that he did not commit, as this report demonstrates. The University of Colorado's ultimate triumph over academic freedom, however, may prove to be the argument that the University's lawyers successfully advanced in District Court: that the University's Board of Regents is the equivalent of a judicial authority and thus enjoys legal immunity when it fires a tenured faculty member because it does not like his opinions.

As this report also demonstrates, the investigation into the charges against Ward Churchill played out in part as a clash of scholarly methodologies. Some of the members of the IC, in promoting their own methods in the face of competing, equally valid, methods, presumably understood that the opposing view was not represented on their side of the table. That should not have been the case, nor was it originally the case. Two distinguished faculty from outside the University were appointed to the IC but resigned from the Committee in the wake of repeated personal attacks upon their integrity in the press. One of these professors, Robert Williams, a legal expert and distinguished scholar in American Indian Studies at the University of Arizona, wrote a letter of resignation to the University arguing that CU should have taken measures to protect his reputation, as well as those of others on the IC. We agree that the University should have taken measures to protect his reputation, but we also see his resignation from the IC as a failure. If his perspective had been represented on the IC, one imagines that the outcome might have been much different. With Williams, they likely would not have produced such an intellectually dishonest report.

In our introduction, we mentioned that John Dewey, the most prominent of the founders of the AAUP in the early twentieth century, believed that the greatest threat to academic freedom came from forces outside our colleges and universities (such as the press or politicians) or from the trustees of our universities who were responding to political pressure. Dewey advanced the philosophy known as pragmatism, considered to be America's contribution to the discipline of philosophy. According to Dewey and other pragmatists, ideas are instruments, or strategies, that people use in order to solve their problems.

One of America's enduring problems involves the balancing of rights: How can we construct a more humane and sane world, one in which individuals can achieve their dreams without destroying each other? People may have profoundly different ideas on how to achieve those ends, but the more ideas to which we have access, the better our chances of solving our problems. A society that is denied, or denies itself, access to ideas for solving problems, is not a society that is likely to survive. The purpose of all scholarship is the survival of society. Thus, in the 20th century, behind the protections of tenure as advanced by the AAUP, universities became our best incubatories for the nurturing of ideas.

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If Dewey felt that the need for academic freedom was better understood by the professoriate than by political forces outside the university, or by trustees or administrators who may be influenced by political or economic forces, he might have been surprised by the behavior of the IC. These are, after all, faculty, who would presumably have some familiarity with the contours of academic debate, or some awareness of, or intellectual curiosity about, methodological trends in fields that lie outside their own specialties. Nor can their behavior be dismissed as the inevitable outcome of a disciplinary process that applies legal standards (the preponderance of evidence) to academic disputes (rational methods). At every step of the process, the IC presumed Churchill either guilty as charged or a liar.

As we demonstrate in this report, two of the charges for which the IC found Churchill guilty required the IC to disregard, judge as irrational, or simply appear ignorant of a normative practice of historical and statutory interpretation. One of the convictions was based on obvious errors claimed to be fact by the IC; another required the IC to pretend to an expertise they did not possess in disqualifying Churchill's sources (considered reputable within his field); some of the charges the IC found particularly offensive because, as they claimed, Churchill cited essays he had written himself to give the false appearance of third-party substantiation for unsupportable claims, when Churchill's claims were widely accepted in the field. When they could not convict Churchill of the charges, they created new charges and found Churchill in violation of rules that were clearly designed to protect scholars in Churchill's position. In another instance, they found Churchill guilty of plagiarism for an essay on which his name does not appear as author. And so on.

The University of Colorado's prosecution of Ward Churchill represents a failure of the CU faculty to protect with vigilance the marketplace of ideas. If faculty will not respect such principles, we cannot expect anyone else to. The price that society will pay for our cowardice is a steep one. And so it is the failure of the IC to produce an honest decision regarding Ward Churchill that should be most troubling to anyone who is interested in the importance of academic freedom to a vital society.

Human nature being what it is, an administration almost always finds faculty who are compliant with its wishes, even if that complicity requires violation of bedrock principles such as academic freedom. It is perplexing why there are so many compliant faculty. Perhaps it is the child in some who seek approval of a parent figure such as an administrator. Perhaps it is the belief that a "greater good" (such as continued donations) only can be accomplished through inappropriate means. Perhaps most of us are simply unable to withstand the pressure to conform. Most charitably, perhaps the compliant faculty member operates in good faith but does not have the expertise to make rigorous, academically valid decisions. In any event, academia as a whole will fail our society if it does not give more emphasis to academic freedom as a principle in the training and education of the next generation of scholars and researchers.