



**UNIVERSITY SENATE
Faculty and Personnel Affairs Committee**

**Report and Recommendation on Academic Freedom and Faculty Participation
in University Governance**

1. THE CHARGE

S-1016 Academic Freedom and Faculty Participation in University Governance: Review current recognition and protection of academic freedom in University policies, traditions and practices, with particular emphasis on the relationship between academic freedom and faculty participation in University governance. Respond to Senate Executive Committee by March 2012.

Links to relevant documents may be found below:

Rutgers Policy 60.5.1 on Academic Freedom (includes Statement on Professional Ethics)

<http://policies.rutgers.edu/PDF/Section60/60.5.1-current.pdf>

Supreme Court of the United States decision *Garcetti et al. v. Ceballos* (2006)

<http://www.supremecourt.gov/opinions/05pdf/04-473.pdf>

Protecting an independent faculty voice: academic freedom after *Garcetti v. Ceballos*

<http://www.aaup.org/NR/rdonlyres/B3991F98-98D5-4CC0-9102-ED26A7AA2892/0/Garcetti.pdf>

2. SUMMARY

In light of lower court interpretations of the Supreme Court decision in *Garcetti v. Ceballos* (2006) that restricts the First Amendment protections of faculty speech, the Faculty and Personnel Affairs Committee (FPAC) was asked in a charge suggested by the Rutgers University Senate Faculty Caucus to review current protections of academic freedom in University policies, traditions, and practices. Particular emphasis was placed on the relationship between academic freedom and faculty participation in University governance. Following substantial deliberations, the committee agreed that Rutgers University must reaffirm the right of its faculty members to speak on matters pursuant to their official duties, without fear of retaliation. By unanimous vote, the FPAC recommends to the Board of Governors a change in Regulation 60.5.1 that makes this explicit.

3. **BACKGROUND**

3.1 **Academic freedom¹**

The concept of academic freedom dates to the middle ages, and in the United States, the notion is comprised not only of the freedoms enjoyed by academics (in scholarly inquiry, teaching, and extramural speech and action), but also the responsibilities of academics to teach and conduct research with integrity and fairness.

In defining the concept of “academic freedom,” The AAUP’s 1940 Statement of Principles on Academic Freedom and Tenure states that:

“Institutions of higher education are conducted for the common good and not to further the interest of either the individual teacher or the institution as a whole. The common good depends upon the free search for truth and its free exposition.

Academic freedom is essential to these purposes and applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the student to freedom in learning.”

Protections of academic freedom are often included in faculty handbooks, collective bargaining agreements, and policy statements at both public and private institutions. Whether or not such policy is clearly stated in official documentation, implied protections of academic freedom may also be afforded by “academic customs,” which are defined as practices and expectations peculiar to an institution that may serve to supplement contractual understandings between the institution and its faculty. In addition, the First Amendment to the U.S. Constitution limits the right of the government (including public institutions) to interfere in a variety of public expression.

For many years, faculty employed by public colleges and universities have relied on the free speech language of the First Amendment to the U.S. Constitution (as applied to the states under the 14th amendment) as a source of protection for academic freedom in addition to the rules, by-laws, contract provisions, customs, and traditions of their employing institution. Further, it was assumed that such first amendment protection covered speech related to institutional governance as well as to teaching, research, and public debate and discussion. However, a decision by the U.S. Supreme Court in 2006 in *Garcetti v. Ceballos* may have removed the U.S. Constitution as a source of protection of academic freedom when it ruled that speech of a public employee related to his or her official duties was not covered by the first amendment.

3.2 ***Garcetti v. Cellabos***

In the Supreme Court case *Garcetti v. Ceballos* (2006), the plaintiff was a deputy district attorney in the Los Angeles County District Attorney’s Office who, after criticizing the legitimacy of a search warrant, claimed that he was subject to retaliation by his supervisor and passed by for promotion. The

¹Source: Lee, B. A. 2010. Academic Freedom Reconsidered. Presented at the National Conference on Law and Higher Education, The Center for Excellence in Higher Education Law and Policy, Stetson University College of Law.

Court ruled in a 5 to 4 decision that when public employees speak “pursuant to their official duties, the employees are not speaking as citizens for the First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”

The case did not involve University personnel. Indeed, in dissent, Justice Souter wrote that “I have to hope that today’s majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write ‘pursuant to official duties.’” None-the-less, in the majority opinion, Justice Kennedy set aside the question of whether or not the ruling should apply to speech related to academic scholarship and teaching:

“There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court’s customary employee-speech jurisprudence. We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”

Subsequent decisions by lower federal courts concerning faculty speech have disregarded this concern. *Hong v. Grant* (2007) 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, including participation in institution governance. Two other decisions, *Renken v. Gregory* and *Gorum v. Sessoms*, adopted similarly restrictive interpretations of faculty free speech rights. The result is that the protection of academic freedom of faculty members engaged in research, teaching, and governance, all considered part of their “official duties,” is severely diminished. Ironically, only speech on topics outside the expertise of the faculty member may be constitutionally protected; there exists an inverse relationship between the scope of a faculty member’s role in shared governance and the breadth of protection for speech.

3.3 Academic freedom policies at institutions of higher learning

In response to the Garcetti decision, the AAUP has called upon institutions of higher learning to provide formal contract language and justification for protecting faculty from the limitations of the Garcetti decision. In particular, the definition of academic freedom must clearly extend not only to speech associated with research and teaching, but also to governance and the other many responsibilities faculty have to their colleagues, departments, institutions, and disciplines. Such changes have been made to policy statements, handbooks, and collective bargaining agreements at other universities, including fellow AAUs, to strengthen academic freedom policies or to put such policies in place where they did not before exist¹.

At Rutgers, the University Policy Statement 60.5.1 on academic freedom reflects both the rights and responsibilities of individual faculty:

Since the very nature of a university and its value to society depend upon the free pursuit and dissemination of knowledge and free artistic expression, all members of the faculty of this University are expected, in the classroom, laboratory, and studio, in research and professional publication, freely to discuss subjects with which they are competent to deal, to pursue inquiry therein, and to present and endeavor to maintain their opinions and conclusions relevant thereto. In expressing those ideas which seem

to them justified by the facts, they are expected to maintain standards of sound scholarship and competent teaching.

The statement continues with a statement on Professional Ethics, which outlines the responsibilities professors have to uphold the concepts of academic freedom. These include the principal responsibilities to “seek and state the truth as they see it” and to uphold the “best scholarly and ethical standards of their disciplines.” In addition, “as colleagues, professors have obligations that derive from common membership in the community of scholars...professors accept their share of faculty responsibilities for the governance of their institution.” Furthermore, when professors “speak or act as private persons they avoid creating the impression of speaking or acting for their college or university.”

What is lacking in the Rutgers policy statement, however, is specific language that protects the speech of faculty *as it pertains to faculty governance*. As a result of the *Garcetti* decision, it is prudent for Rutgers’ faculty to seek express coverage of speech related to institutional governance in our University regulations on academic freedom which currently cover teaching and research. Clearly one could argue that speech related to institutional governance is presently covered by implication under current University regulations, however the Committee recommends that such protection be made express by adding language to the existing Rutgers Policy Statement 60.5.1 B.

4. **RECOMMENDATION**

The FPAC met and discussed the charge in nine sessions from February 2011 to March 2012. During these meetings, the committee heard from Barbara Lee, Professor and former Dean, Human Resource Management, School of Management and Labor Relations, Rutgers University. National AAUP Counsel Kathi Westcott provided background on similar considerations of this issue by other U.S. universities and colleges.²

Recommendation

Specifically, the FPAC wishes to add the sentence “*As faculty members, they are free to discuss any matter of institutional policy or action, including but not limited to those related to professional duties and university governance, without threat of sanction*” to section B of Rutgers Policy Statement 60.5.1, which will now read (addition is underlined):

“Outside the fields of instruction, artistic expression, research, and professional publication, faculty members, as private citizens, enjoy the same freedoms of speech and expression as any private citizen and shall be free from institutional discipline in the exercise of these rights. As faculty members, they are free to discuss any matter of institutional policy or action, including but not limited to those related to professional duties and university governance, without threat of sanction. The conduct of the faculty member shall be in accordance with standards dictated by law.

The remainder of the regulation remains unchanged.

² Institutional Academic Freedom Policies – Passed in Response to *Garcetti v. Ceballos*. Last revision 12/6/2011. <http://www.aaup.org/NR/rdonlyres/9225C37B-4AC9-4199-B18A-7972164CA05A/0/ChartpostGarcettipolicies.pdf>

5. **RESOLUTION**

In Support of the University Senate's Faculty and Personnel Affairs Committee's Report and Recommendations:

Whereas, the University Senate Faculty and Personnel Affairs Committee has examined and reported on the Academic Freedom and Faculty Participation in University Governance; and

Whereas, the University Senate has reviewed the Committee's report and its Recommendations, finding those recommendations to be sound and in the best interests of Rutgers University;

Therefore, Be It Resolved, that the Rutgers University Senate endorses the "Report and Recommendation on Academic Freedom and Faculty Participation in University Governance" and urges the administration to endorse the report and the Board of Governors to implement its recommendations.

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ⁱ Examples of changes to academic freedom policies as a result of the Garcetti decision (see footnote 2):

- University of Delaware added the following language to their current bargaining contract: "Academic freedom is the freedom to teach, both in and outside the classroom, to conduct research and other scholarly or creative activities,

and to publish or otherwise disseminate the results. Academic freedom also encompasses the freedom to address any matter of institutional policy or action whether or not as a member of any agency of institutional governance. Faculty have the freedom to address the larger community with regard to any social, political, economic, or other interest.” <http://www.udel.edu/aaup/CBA%2010-13%20FINAL.pdf>.

- University of Wisconsin amended the Faculty Policies and Procedures to define academic freedom as: “...the freedom to discuss and present scholarly opinions and conclusions regarding all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to reach conclusions according to one’s scholarly discernment. It also includes the right to speak or write—as a private citizen or within the context of one’s activities as an employee of the university—without institutional discipline or restraint on matters of public concern as well as on matters related to professional duties, the functioning of the university, and university positions and policies.” <http://www.secfac.wisc.edu/senate/2010/0301/2186.pdf>
- University of Minnesota changed the Board of Regents policy on Academic Freedom and Responsibility to read: “Academic freedom is the freedom, without institutional discipline or restraint, to discuss all relevant matters in the classroom, to explore all avenues of scholarship, research, and creative expression, and to speak or write on matters related to professional duties and the functioning of the University.” http://www1.umn.edu/regents/policies/academic/Academic_Freedom.pdf
- University of Florida new collective bargaining policy prohibits the administration from interpreting any provision of the collective bargaining agreement in a manner that would violate a faculty member’s academic freedom or punish him/her for exercising it; adds service and shared governance to what is protected by academic freedom; prohibits reprisals for extramural exercise of academic freedom/free speech (e.g., letters to the editor); and neutralizes adverse national court cases that stripped faculty of free-speech rights by defining academic freedom as a separate right in addition to constitutionally protected freedom of expression. http://www.uffacultycontract.org/new/archive/2010-2013_UFF-UFBOT_PROPOSED_CBA.pdf
- University of California: currently under systemwide review are revisions to General University Policy Regarding Academic Employees, APM 010 Academic Freedom, to include within the protections of academic freedom the freedom to speak out on matters of institutional policy. The new policy would read: The University of California is committed to upholding and preserving principles of academic freedom. These principles reflect the University’s fundamental mission, which is to discover knowledge and to disseminate it to its students and to society at large. The principles of academic freedom protect freedom of inquiry and research, freedom of teaching, and freedom of expression and publication, and freedom to address any matter of institutional policy or action whether or not as a member of an agency of institutional governance. <http://www.ucop.edu/acadpersonnel/apm/documents/apm-010.pdf>
- Penn State University policy adopted by the University Senate and awaiting approval by the President, expands the definition of academic freedom and removes language prohibiting faculty members from discussing controversial issues in the classroom that are outside the faculty member’s field of study. With respect to shared governance, new language states that “Faculty members are free to discuss governance issues of their respective departments, colleges, units, libraries, and of the University as a whole, and are free to speak and write on all matters related to their professional duties without institutional discipline or restraint. Similarly, faculty members recognize that academic freedom is inherent to the institutional environment and therefore they are expected to exercise professional responsibility in their service roles. Faculty members are responsible for respecting confidentiality and the privacy rights of others.” <http://www.senate.psu.edu/agenda/2010-2011/dec2010/appd.pdf>.