BALANCE OF POWER

Professors' Freedoms Under Assault in the Courts

By PETER SCHMIDT

Balance of Power is a series examining new challenges to faculty influence.

Kevin J. Renken learned the limits of his academic freedom the hard way.

As an associate professor of mechanical engineering at the University of Wisconsin at Milwaukee, Mr. Renken says he felt obliged to speak out about his belief that administrators there were mishandling a National Science Foundation grant to him and several colleagues. When the university subsequently reduced his pay and returned the grant, he sued, alleging illegal retaliation.

Because he is a tenured faculty member, and he viewed the public university's use of public funds as a matter of clear public interest, Mr. Renken figured his complaints qualified as legally protected free speech.

Not so, the U.S. Court of Appeals for the Seventh Circuit declared last September, in one of several recent court decisions that have raised doubts about the status of academic freedom at public colleges and universities.

Ruling against Mr. Renken in his lawsuit, a three-judge panel of the Seventh Circuit used logic that stood his assumptions about his speech rights and academic freedom on their head.

Mr. Renken's statements about the grants were not legally protected speech, the court held, precisely because he made them as a public-college professor and they related to his job. "In order for a public employee to raise a successful First Amendment claim, he must have spoken in his capacity as a private citizen and not as an employee," the court said.

At issue in the case was whether public-college professors should be treated any differently from other public employees. Did the professor — given the traditions of academic freedom and shared governance — have more freedom to speak about the running of his academic department than the tax collector does when complaining about his boss?

Mr. Renken says the outcome of his legal battle "has put a bitter taste in my mouth as a professor." It also, he says, has left him convinced "this can happen to anybody" working for a public college.
Several faculty advocates and legal analysts think he is right. Fearing that the federal courts may be disowning the idea that academic freedom offers the nation's professoriate a distinct set of First Amendment protections, they have begun sounding the alarm in articles in law journals and have mounted efforts to try to dissuade judges elsewhere from issuing similar decisions.

The American Association of University Professors has begun aggressively monitoring — and looking to wade into — legal battles over faculty speech. The rulings, says Rachel Levinson, senior counsel at the AAUP, are "narrowing the universe of things that faculty members can speak about and what they will be protected for."

Robert M. O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia, says such rulings threaten to stifle faculty members' speech in virtually any area connected to their jobs, including the faculty governance of their institutions. The federal courts, he says, are beginning to treat tenured professors "indistinguishably from run-of-the-mill public employees."

Mounting Defenses

Not everyone shares these concerns. Ada Meloy, general counsel at the American Council on Education — an umbrella organization for colleges and higher-education associations — says that "the cases, to date, have not created any apparent injustices. ... Public-college employees do enjoy First Amendment rights, but that should not turn every case of employee discipline or discharge into a retaliation lawsuit."

The AAUP, not nearly as content with the rulings as Ms. Meloy, has established a panel of prominent First Amendment scholars to come up with new ways to defend academic freedom at public colleges. They are looking at innovative legal arguments, as well as institutional policies or contractual agreements offering speech rights beyond those the courts might currently recognize. The panel is headed by Mr. O'Neil and includes among its members Judith C. Areen, a professor of law at Georgetown University; Robert C. Post, a professor of law at Yale University; and William W. Van Alstyne, a professor of law at the College of William and Mary. (The panel's efforts are focused almost entirely on public colleges because private colleges have never been bound by the First Amendment, which limits actions of government, in dealing with their employees.)

In a move that the AAUP is citing as pointing the way for other public colleges, faculty leaders and administrators in the University of Minnesota system are working to revise its policies to broadly protect speech related to faculty jobs. Their proposed policy change, which has yet to be approved by Minnesota's Board of Regents, expands the system's definition of academic freedom to cover speech "on matters of public concern as well as on matters related to professional duties and the functioning of the university."

"We feel that faculty governance, which is very important in the running of this university, requires this protection," says Tom Clayton, a professor of English at the Twin Cities campus and chairman of the systemwide Faculty Senate's Committee on Academic Freedom and Tenure. He argues that the recent federal court decisions "make it difficult for employees to speak frankly without imperiling their position."

Tom Sullivan, the system's provost, says he favors the proposed policy change out of a belief that "a very important part of our universities — particularly our public universities — should be transparency," which is lacking where employees do not feel free to speak their minds.

Picking Precedents
In fighting for his right to speak his mind, Mr. Renken of Wisconsin — without knowing it — had wandered into an exceptionally unsettled area of constitutional law.

The Supreme Court has held for more than half a century that the First Amendment's restrictions of government infringement on speech protect academic freedom at public education institutions. But it has left unanswered a host of key questions like what types of activities "academic freedom" covers, or whether it affords individual faculty members speech rights beyond those of other citizens.

"I think the court is actually torn itself about where academic freedom fits," says Alan K. Chen, a professor of law at the University of Denver. "They have been dancing around the academic-freedom issue for 50 years and never really have addressed it head-on."

Remarking on the lack of Supreme Court guidance on the matter in a November ruling upholding the Bush administration's restrictions on academic travel to Cuba, Judge Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit said it remains unclear "whether academic freedom is a constitutional right at all."

A separate thread of Supreme Court decisions has undermined the speech rights of public colleges' professors in their roles as public employees, by chipping away at whatever protections the First Amendment affords public workers in disputes with their managers over speech. It began with a 1968 ruling, in *Pickering v. Board of Education*, calling for the speech rights of public employees to be balanced against the government's need to operate efficiently and provide needed services. In 1983, in *Connick v. Myers*, the high court said their speech was only protected when it dealt with matters of public concern. In a 2006 ruling, *Garcetti v. Ceballos*, the court said public agencies can discipline their employees for any speech made in connection with their jobs. (See timeline on Page A10.)

In the absence of clear guidance as to what speech protections academic freedom provides, lower courts have been turning to these Supreme Court public-employment rulings in handling faculty members' claims that public colleges violated their First Amendment rights. The result has been a spate of decisions letting public colleges penalize faculty members for statements made in connection with shared governance, personnel decisions, and other activities related to their jobs.

**Threats on the Horizon**

Public-college professors received some indication of how little they could count on academic-freedom protections with a 2000 ruling by the U.S. Court of Appeals for the Fourth Circuit, in *Urofsky v. Gilmore*.

The case involved a lawsuit by Virginia public-college professors challenging, as an infringement on academic freedom, a state law prohibiting public employees from using state-owned computers to view sexually explicit material over the Internet. The lead plaintiff, Melvin I. Urofsky, was a constitutional historian at Virginia Commonwealth University who argued that the law hindered his ability to teach students about the Communications Decency Act.

In their opinion upholding Virginia's law, a majority of Fourth Circuit judges said they had extensively reviewed the history of academic freedom and concluded that, to the extent the Supreme Court "has constitutionalized a right of academic freedom at all," it is only a right possessed by higher-education institutions, not by individuals. The ruling said professors at public colleges do not have any speech rights beyond those of other public employees.
No other federal circuit's appeals court has issued a similar decision. Nevertheless, William E. Thro, a former Virginia solicitor general who is now a lawyer at Christopher Newport University, argues that *Urofsky* has the potential to influence courts beyond the Fourth Circuit, partly because it may represent the lengthiest and most detailed discussion of individual academic freedom to emerge from a federal appeals court.

Of far greater immediate concern to faculty and free-speech advocates is the fallout from the Supreme Court's 2006 *Garcetti* ruling. That case involved a deputy district attorney in Los Angeles, Richard Ceballos, who challenged disciplinary actions taken against him for questioning an affidavit issued by his office. Writing for a five-member court majority, Associate Justice Anthony M. Kennedy said "when public employees make statements pursuant to their official duties, the employees are not speaking out as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."

In a dissenting opinion, Associate Justice David H. Souter expressed hope the decision would not jeopardize the speech rights of public-college faculty members who "necessarily speak and write pursuant to official duties." The majority responded to his concern by sidestepping the issue and putting aside the question of whether its logic "would apply in the same manner to a case involving speech related to scholarship or teaching."

**Drawing the Line**

But despite its language explicitly placing speech by academics out of its reach, the *Garcetti* decision has been cited by lower courts in three recent decisions involving public-college professors: the Seventh Circuit's ruling against Mr. Renken; a U.S. District Court's ruling against a retired professor at the University of California at Irvine, Juan Hong; and a U.S. District Court's denial of a Delaware State University professor's claim that he was protected for speech related to a presidential search, student advising, and a campus event he helped organize.

"The potential harm coming out of that can't be overstated," argues Greg Lukianoff, president of the Foundation for Individual Rights in Education, a Philadelphia-based speech advocacy group.

Leonard M. Niehoff, an adjunct professor at the University of Michigan's law school and a higher-education lawyer for the Michigan-based firm Butzel Long, says he fears that more such rulings will have the effect of creating "a serious body of precedent" influencing how courts around the nation regard academic freedom. He says "the advocates of academic freedom have not always done a very good job of picking their fights," and may be hurting their own cause by invoking it too often. "It is possible," he says, "to argue that the right is so broad that it becomes no right at all."

Lawrence Rosenthal, a professor of law at Chapman University School of Law, says "most academics are extremely protective of virtually unfettered rights of academics to say almost anything," which can lead them to defend scholarship that is not just controversial, but shoddy as well. "I see that as a threat to the university," he says.

But Mr. Post, the Yale law professor who is on the AAUP's academic-freedom panel, argues in the book *Knowledge, Democracy, and the First Amendment*, slated for publication by Yale University Press next year, that the application of *Garcetti* to public-college classroom instruction and scholarship would seriously harm
academe and society as a whole. Professors "would be responsible in their 'official duties' merely for promulgating the opinions of the governors of the university" and "could no longer serve the function of identifying and advancing knowledge."

The AAUP has decided to draw a line in the sand in the case of Mr. Hong, an emeritus professor of chemical engineering and materials science who claims he was denied a merit salary increase in 2004 because he criticized the hiring and promotion decisions within his department at Irvine and voiced concern about its reliance on part-time lecturers to teach lower-division classes. Together with the Thomas Jefferson Center, the AAUP has filed a friend-of-the-court brief on Mr. Hong's behalf and is seeking, with his consent, to present oral arguments in his behalf in the U.S. Court of Appeals for the Ninth Circuit.

The friend-of-the-court brief argues that the application of the *Garcetti* ruling to the speech of college faculty members has the absurd effect of leaving them least protected in speaking about those subjects that are most central to their jobs, on which they have the most expertise and are most likely to make statements that benefit society.

The brief says: "Both in practice and in constitutional law, the actual duties of state university professors implicate — indeed, demand — a broad range of discretion and autonomy that find no parallel elsewhere in public service."

*Next in this series: The Rise of Adjunct Professors*