Background Memo on the Council’s Ward Churchill Resolution

Both the general secretary and the chair of Committee A suggested that it would be useful to provide the committee with a fuller account of and context for the Council’s April 7th resolution. The president and two other Council members who have studied the Ward Churchill case in detail agreed to do so. This memo has been reviewed by the chair of Committee A, the general secretary, the head of the Department of Academic Freedom and Tenure, and those Council members who are also members of Committee A. The authors are, of course, responsible for its contents.

1. SUMMARY OF DEVELOPMENTS SURROUNDING THE COUNCIL RESOLUTION

In April 2009, the AAUP’s National Council approved a brief resolution about the Ward Churchill case at the University of Colorado. The resolution, in its entirety, reads as follows: "We believe the disputes over Ward Churchill's publications should have been allowed to work themselves out in traditional scholarly venues, not referred to disciplinary hearings. We believe Churchill should be reinstated to his faculty position at the University of Colorado." The Council’s action followed Cary Nelson’s earlier decision to issue the statement in a first-person version. After that first-person version was distributed to the Council, a member offered a motion to adopt it as a group resolution. The motion was seconded, and endorsed by both the AAUP president and the general secretary. A discussion and vote followed by email. Both the Council and the executive committee regularly vote by email when they are not in session. Indeed, it would be otherwise difficult for the Association to conduct its business. Although Committee A was informed that the Council was considering the matter, it was not made sufficiently clear that a vote was imminent. Indeed, some Committee A members or consultants apparently were operating under the assumption that the Council only acts when it meets in June and November. All this—plus the special time pressures (detailed below) that obtained—suggest an exceptional situation not likely to recur.

2. THE COUNCIL AND COMMITTEE A ON ACADEMIC FREEDOM

None of the current or former Committee A members or consultants on the Council raised procedural or jurisdictional concerns about the Council’s vote. Nor did the president or the general secretary. A Council member asked whether there were concerns about Committee A’s primary role in matters of academic freedom and tenure, and some background was provided. It was noted that, while detailed reports about academic freedom and tenure matters are typically a Committee A project, the Council had occasionally issued very brief resolutions. When Committee A was divided about whether to censure the University of Maryland over the Bertell Ollman case, the Council read the Committee A report and voted to recommend censure to the annual meeting. When Committee A declined to recommend censure of the University of South Florida over the Sami Al-Arian case, the Council, which was in receipt of the Committee’s detailed and compelling report, recommended “condemnation” instead. The Council has
also sometimes issued statements protesting violations of faculty rights or statements endorsing fundamental rights for higher education employees, as when it endorsed collective bargaining rights for graduate student employees. As the AAUP constitution specifies, the Council is also, of course, the policy-making body of the organization.

Committee A’s role in academic freedom matters, while primary, is not absolute. Cases that include academic freedom violations but also centrally involve governance matters can be referred to the Committee on College and University Governance for adjudication. The line between academic freedom, tenure, and governance issues is indeed not hard and fast. Unfortunately, it is all too common in the last generation for a case to involve elements of all three areas. It is thus sometimes an option to give a case either to Committee A or the Governance Committee. The decision is at once substantive, procedural, administrative, tactical, and political. It is not a matter of absolute principle and jurisdiction.

Some of our Redbook documents dealing with academic freedom issues have also originated in other committees, and some have come out of collaborations between Committee A and other committees.

In February and March of 2005 the staff issued two statements about the Churchill case. Committee A subsequently discussed the case in both 2006 and 2007, though it was not formally before the committee as an investigation. Nonetheless, between face-to-face discussion and email the Committee’s discussion of the case was exceptionally full. On August 15, 2007, Jonathan Knight, at the committee’s request, distributed a summary memo about the case. Twice over the last year or so the AAUP president suggested that the committee take up the long-term implications of the case in a special report, rather than initiate a formal investigation. Committee A had discussed the Churchill case both face-to-face and by email several times over a period of four years. The Council understood that the committee’s members and consultants, though fundamentally divided, had not elected to act on the case beyond the two letters issued by staff in 2005.

Given this background, the Committee A members or consultants on the Council, along with the general secretary and the president, certainly felt Committee A had had ample opportunity to review the case. In the absence of any Committee A action, the Council felt free to act. They were reinforced in that conviction by all the individuals in the Council discussion with Committee A experience (Halpern, Reed, and Nelson). However, it would have been preferable for additional Committee A members to have had the opportunity to comment on the Council’s action. Given sufficient time, which we felt we did not have in this unusual case, it would also have been preferable to provide Committee A with a detailed background memo contextualizing the Council’s potential resolution. The three signatories to the present document might have been assigned that task.

The circumstances in the Churchill case, to be sure, were unusual. Only a relatively small number of academic freedom and tenure cases receive such widespread and continuing public commentary. A Colorado jury in a civil suit brought by Churchill had recently rendered a verdict in his favor, suggesting that the motivation for firing him had been political; that too is unusual. The AAUP president had remained silent about the
case in public for several years, in view of the possibility that the committee might choose to investigate. He felt free to make a personal statement in the spring of 2009 not only because Committee A was apparently not going to investigate, but also because the jury decision prompted press inquiries, and—in the view of the president—it was not in the political interests of the association for him to remain silent any longer. While the members of a citizen jury cannot be counted as experts on academic freedom, their view of the matter carries some weight in the American system and in the court of public opinion.

The other unusual element of the case was that the April 2, 2009, jury verdict was only the first half of the civil suit decision. The second half was the judge’s need to address the issue of whether Churchill should be reinstated. There was no firm information forthcoming about the timing of that decision, but it was possible it might occur rather soon. Along with the general secretary and the president, a strong majority of the Council felt it desirable to be on the public record with a recommendation in enough time to weigh in on an important issue of academic freedom before the judge acted. A request by some Committee A members or consultants to wait, say, until Committee A and the Council were to meet in June would have risked the organization’s not having a timely voice or any impact on an important matter that a number of its leaders believed it needed to address. Of course the Council was operating by a vote, not by seeking universal agreement or full consensus. Neither Council nor Committee A could easily have brought all the people in the room on board. Council’s resolution was endorsed by thirty-one of its thirty-eight members. The rest of the responses included one negative vote and two people who offered no opinion.

3. THE DOCUMENTS AND REASONING UNDERLYING THE COUNCIL’S ACTION
The Council had before it not only the documents long available—including the links to the Colorado faculty committee reports—but also, like Committee A, a number of more recent texts. Certainly prominent among these was an unpublished—but forthcoming—essay about the Churchill case by Council member and long-term academic freedom scholar Ellen Schrecker. Like the Colorado jury, Schrecker believes the case was political at its core. Her essay will be published in the AAUP Journal of Academic Freedom, a new online journal due to be published for the first time late this year. For the Council, a detailed overview of the case by one of its own members no doubt carried some weight. Other recent essays included Churchill’s elaborate 2009 review of the events and self-defense, along with Cornell University Professor Eric Cheyfitz’s 2009 analysis of the case and a 2009 New York Times column by Stanley Fish. And of course the Council received emails from other members who had studied the case for years.

The Council is now aware—as were several participants in the discussion—that one element in Committee A’s decision not to act in 2007 may have been the information it received that Churchill never actually asked for an investigation. Churchill’s own belief is that he did. Certainly his wife Natsu Saito—a lawyer and law professor who was acting as his legal representative in dealing with the AAUP—repeatedly wrote exactly that. Thus a September 5, 2006, letter from Saito to General Secretary Roger Bowen and
Department of Academic Freedom and Tenure Director Jonathan Knight, quoted here with her permission, concludes, “As noted in our previous communication, we appreciate the statement issued by the AAUP early in this process, as well as your longstanding defense of academic freedom, and hope that you will be willing to investigate the many breaches of faculty rights, due process, and academic freedom involved in this case.” The national office never requested anything more explicit from the Churchills. And the request came up in a phone conversation between Churchill, Saito, Knight, Bowen, and Alan Jones, vice president and dean of faculty at Pitzer College in California, who was also assisting Churchill with his case. Cary Nelson recently asked Knight about this discrepancy; he replied that he could no longer remember the details after this much time has passed. Roger Bowen acknowledged his contacts with Saito in an April 1, 2009, letter to the Wall Street Journal. He also offered his opinion that “portions of Mr. Churchill’s scholarship were dishonest,” thereby (since Bowen had been general secretary from 2004 to [2007]) implicitly implicating the AAUP in a stand it did not take.

In voting on the resolution, Council members did not formally list their reasons in order of priority, but the readings and discussion point to several key concerns which, as a subcommittee, we would like to emphasize:

(1) that the investigation was triggered by political outrage following upon the belated disclosure of Churchill’s remarks about the 9/11 victims and that the process never entirely freed itself of that political taint; that even if some faculty evaluators managed to remain neutral, the president’s final decision to dismiss Churchill has a political taint. As Ellen Schrecker reminds us, “Catapulted into notoriety by right-wing bloggers and talk-show hosts, Churchill then came under attack by Colorado politicians who forced the university to investigate and then dismiss its controversial faculty member . . . Since Churchill would not have been fired had Colorado’s politicians not called for his scalp, it is clear that he did not face an ordinary inquest into research misconduct. Despite all the trappings of academic due process, politics drove the investigation.” Such a situation violates the basic principles of academic freedom, as expressed in key AAUP documents. Committee A’s Statement on Extramural Utterances holds that “the controlling principle is that a faculty member’s expression of opinion as a citizen cannot constitute grounds for dismissal unless it clearly demonstrates the faculty member’s unfitness to serve”; and Regulation 5 of the Recommended Institutional Regulations on Academic Freedom and Tenure states that “dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens.” The Council’s resolution is premised in part on the belief that the dismissal hearings were a pretext for an abridgement of his academic freedom and that the timing and context of the unfitness-to-serve charges, which were based on research not part of his 9/11 essay, emanate from attacks on Churchill for his extramural utterances. As Schrecker concludes, “It is only by construing academic freedom in the very narrowest of procedural terms that we can conclude it was not violated.” It may be relevant for Committee A to address and provide more specific guidance than presently exists for dismissal hearings triggered by political events that bear on academic freedom.

(2) that the objectivity of the process at Colorado was compromised in multiple ways. In contrast to what is called for in the joint 1958 Statement on Procedural Standards in
Faculty Dismissal Proceedings, the initial faculty review committee was not elected by the faculty. Moreover, it was compromised by the university president’s decision not to allow any faculty members to serve who had signed a petition in support of Churchill, while at the same time appointing as its chair a Colorado faculty member who had repeatedly disparaged WC by email. (One email was produced in evidence, but she acknowledged there were other comparable ones that she could no longer find.) As the local AAUP chapter added in its November 7, 2006, statement, “It appears to be a violation of due process that the Interim Chancellor acted both as plaintiff, in bringing the charges against Churchill, and, as judge, recommending dismissal.” As Schrecker points out, the committee that later heard Churchill’s appeal “noted several irregularities in the investigation such as the committee’s inability to provide Churchill with a clear explanation of the standards it was applying to his work and its failure to alert him to the committee chair’s hostile email.” The combined weight of these less-than-ideal circumstances leaves the objectivity of the process in doubt.

(3) that the administration’s decision to dismiss Churchill had not been endorsed by a majority of Colorado faculty members involved in the review process. Of the five faculty members on the appeals panel, only two recommended dismissal. As Schrecker concludes, “It would be up to the president and board of regents to make the final decision. That decision was never in doubt.”

(4) that the charges against WC had fundamental problems, including the claim that citation of work WC had ghost-written constituted plagiarism. Some Council members believe that what Churchill did do, if properly named, is still unacceptable and would merit a sanction less than dismissal. There is, however, concern that, in contrast to a university promotion and tenure review, the research quality of Churchill’s work was not judged in the hearings by peers in the field, although some peers in the field defended Churchill’s work. It would be useful for Committee A, or a subcommittee thereof, to examine the specific issue of research misconduct hearings to provide more specific guidance in such matters. There is some language in current policy, but it is not, in our view, sufficiently detailed. Thus the 1958 Statement, in referring to the hearing committee, indicates that “the choice of members of the hearing committee should be on the basis of their objectivity and competence. . . .” The chair’s objectivity was demonstrably compromised, and the word “competence” could be read to mean experts in the field in question, but the reference is not sufficiently clear.

(5) that the penalty was disproportionate to the alleged offences, given that faculty who have committed far more serious breaches of academic integrity have either received mild penalties or no penalties at all. As Schrecker points out, “A few years ago an eminent historian at the University of Chicago published a graduate student’s paper under his own name. His punishment: no graduate teaching for five years. After historian Joseph Ellis was exposed for having lied to his classes about serving in Vietnam, Holyoke College put him on unpaid leave for a year, revoked his chair, and barred him from teaching about the Vietnam War.” The possibility of a sanction less than loss of tenure, recognized by a number of the faculty involved in the process, is of special note in view of the caution in the AAUP’s 2/4/05 statement on the Churchill case against
“applying harsher standards in such a case”; indeed, it indicated that “special care must be taken” to avoid such an eventuality, and closed with the sentences “We must resist the temptation to judge such statements more harshly because they evoke special anguish among survivors and families of the September 11 victims. The critical test of academic freedom is its capacity to meet even the most painful and offending statements. A college or university campus is, of all places in our society, the most appropriate forum for the widest range of viewpoints.”

The thinking that underlies the Council resolution does not suggest that breaches of academic integrity do not merit investigation. It suggests that some scholarly lapses merit debate, rather than disciplinary action, and that some awareness of national norms for punishment may be useful in deciding what action is justified. Nor does the resolution suggest that any faculty member who makes controversial statements should be immune from investigation in perpetuity. Rather, it suggests that, in this case, the dismissal hearing was a pretext for violating Professor Churchill’s academic freedom.

No more than would Committee A did the Council consider itself competent to retry the more specialized elements of the case, such as the debate over whether the army supplied blankets tainted with smallpox to a particular Native American tribe. We will not rehearse these issues in detail, as they are thoroughly debated in the growing body of commentary about the case. However, we do believe it is important to underscore the view that academic judgments rendered through due process are not necessarily inviolable. That is not to impugn the integrity of those involved. It is, however, to raise the possibility that Committee A should provide clearer guidance about situations in which concerns about substantive judgments might be raised.

American faculty members in recent years have seen numerous organized political attacks on tenured, tenure-track, and contingent faculty. Those events raise larger issues that only Committee A is well positioned to address.

Submitted by Cary Nelson, Ellen Schrecker, and Michael Bérubé.