

(As adopted by the Faculty Senate at its meeting on 12 April 2010)

RECOMMENDATION TO AMEND FACULTY POLICIES AND PROCEDURES 8.01.

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The Basic Issue

We ask that the Faculty Senate consider an important issue regarding academic freedom that has arisen in the wake of a 2006 U.S. Supreme Court decision, *Garcetti v. Ceballos*. The issue has gained national attention, and many academic freedom organizations have called for appropriate remedial action. The issue pertains to the right of faculty members to criticize or question policies and actions undertaken by their respective institutions. Our intention is to amend *Faculty Policies and Procedures* in order to address this problem.

Background

In 2006, the U.S. Supreme Court rendered an opinion that poses a threat to the academic freedom of faculty members who make statements that challenge institutional authority and/or positions. In *Garcetti v. Ceballos*, the court held that an assistant district attorney could be punished by his office for complaining in a memorandum that the office had been submitting too many affidavits for warrants that were unsupported by probable cause.

Even though Ceballos' comments raised important questions about an important public office, the court concluded that he was not speaking as a private citizen, but rather was speaking pursuant to his official duties as an employee. Consequently, his speech did not merit First Amendment protection. In order for employee speech to be protected by the First Amendment, the person must be speaking as a "private citizen" about a "matter of public interest." Ceballos fell short because he was speaking pursuant to his official duties.

Garcetti v. Ceballos narrowed the First Amendment protection of public employees who make statements critical of their employers. The issue is not that Ceballos and similarly situated individuals should always prevail in their First Amendment claims, but rather that the court ruled that the First Amendment provides no protection whatsoever when it comes to speech made as part of one's official duties. In the past, the court applied a First Amendment balancing test to public employee speech that addressed a "matter of public concern." *Garcetti v. Ceballos* withdraws this protection if an employee is speaking as part of his or her official duty—a term that is broadly defined for most faculty members.

In a dissent in *Garcetti v. Ceballos*, Justice Souter worried that the new doctrine could harm the academic freedom of faculty members, whose jobs often involve vigorous debate concerning university matters. Our campus has witnessed vigorous debates in recent decades over such matters as free speech, academic freedom, the Athletic Board, the Madison Plan, sexual orientation and the military, and the Graduate School. These and other issues have often led to the formation of policy, yet such policy has seldom ended the debate.

Judicial events since *Garcetti v. Ceballos* indicate that Justice Souter's concerns were well founded. In *Renken v. Gregory* (2008), an engineering professor was punished for internally criticizing how the University of Wisconsin-Milwaukee was handling a grant he had received from the NSF; and in *Hong v. Grant* (2007), a professor at the University of California at Irvine was denied a merit raise because he had criticized the engineering school's actions regarding hiring, promotions, and staff. And in *Gorum v. Sessoms* (2007), a professor was terminated after several public clashes with the president of Delaware State University. In each of these cases the courts refused to apply a First Amendment balancing test on the basis of the *Garcetti v. Ceballos* decision.

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The impact of *Garcetti v. Ceballos* has garnered much commentary, including: reforms enacted by the Faculty Senate of the University of Minnesota; an article by Peter Schmidt in the *Chronicle of Higher Education* (“Balancing of Power: Professors’ Freedoms Under Assault in the Courts,” 27 February 2009: <http://chronicle.com/free/v55/i25/25a00103.htm>); and extensive coverage by the AAUP (see the AAUP’s website: <http://www.aaup.org/AAUP/protectvoice/Legal/> “Legal Cases Affecting Free Speech.”

Conclusion

State law (Wisconsin Administrative Code UWS 4.01(2)) says that faculty members enjoy “all the rights and privileges of a United States citizen, and the rights and privileges of academic freedom as they are generally understood in the academic community. This policy shall be observed in determining whether or not just cause for dismissal exists. The burden of proof of the existence of just cause for a dismissal is on the administration.”

Faculty must be free “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” (AAUP 1994 statement “On the Relationship of Faculty Governance to Academic Freedom”). The proposed amendment to *Faculty Policies and Procedures* 8.01. would provide principled protection for faculty engaged in speech pursuant to their official duties. It would also provide a concrete definition of academic freedom that has been missing from *FPP* while also providing the university with appropriate power to punish true insubordination.

8.01. FACULTY RIGHTS.

- A. Members of the faculty individually enjoy and exercise all rights secured to them by the Constitutions of the United States and the State of Wisconsin, and by the principles of academic freedom as they are generally understood in higher education, including professional behavior standards and the expectation of academic due process and just cause, as well as rights specifically granted to them by: regent action, University of Wisconsin System rules, these policies and procedures, and relevant practices or established custom of their colleges or schools and departments.
- B. Academic freedom is 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.

Academic responsibility implies the faithful performance of professional duties and obligations, the recognition of the demands of the scholarly enterprise, and the candor to make it clear that when one is speaking on matters of public interest or concern, one is speaking on behalf of oneself, not the institution.

- C. In any consideration of matters of tenure and academic freedom, the following statement of policy is relevant. It was enunciated at the time of the previous codification of the Laws and Regulations of the University of Wisconsin by the Regents of the University of Wisconsin on January 10, 1964. “In adopting this codification of the rules and regulations of the University of Wisconsin relating to tenure, the Regents reaffirm their historic commitment to security of professorial tenure and to the academic

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freedom it is designed to protect. These rules and regulations are promulgated in the conviction that in serving a free society the scholar must himself be free. Only thus can he seek the truth, develop wisdom and contribute to society those expressions of the intellect that ennoble mankind. The security of the scholar protects him not only against those who would enslave the mind but also against anxieties which divert him from his role as scholar and teacher. The concept of intellectual freedom is based upon confidence in man's capacity for growth in comprehending the universe and on faith in unshackled intelligence. The university is not partisan to any party or ideology, but it is devoted to the discovery of truth and to understanding the world in which we live. The Regents take this opportunity to rededicate themselves to maintaining in this university those conditions which are indispensable for the flowering of the human mind.”