



Foundation for Individual Rights in Education

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February 9, 2005

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Interim Chancellor Philip P. DiStefano
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Dear Chancellor DiStefano,

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Before discussing the position of the Foundation for Individual Rights in Education (FIRE) on the recent controversy involving University of Colorado at Boulder Professor Ward Churchill, I would like to say that FIRE is fully aware of the difficulties you face. FIRE has not seen a controversy involving political speech on campus provoke such passionate and often angry public response since the controversies that arose directly in the wake of the September 11, 2001, attacks.

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In the aftermath of that horrible day, FIRE was stalwart in its defense of professors and students from across the political spectrum, regardless of their opinions. We did not do this because we agreed with the opinions that were expressed; indeed, the individuals who make up FIRE's politically diverse staff and leadership take for granted that each one of us must often defend speech with which we personally and passionately disagree. Yet FIRE defends free speech for *all* students and faculty members because we understand that the U.S. Constitution's guarantee of freedom of speech is more than simply a legal doctrine—it represents the belief that open discourse is critical to democratic society and that the merits of ideas are best decided in a free marketplace of expression rather than by government officials. History has decisively and repeatedly demonstrated that attempts by public officials to regulate or punish opinions are fraught with far greater peril than even the most offensive words.

FIRE is a non-profit civil liberties organization dedicated to the promotion of academic freedom, free speech, and fair procedures in American higher education. As you can see from our Board of Advisors, FIRE is non-partisan and enjoys the advice, support, and respect of public intellectuals, academics, journalists, and others who have a common concern for these vital areas of American public life. Please see our website, www.thefire.org, to gain a further sense of our identity, activities, and resonance.

By now, many are aware of the statements that ignited this controversy. Professor Ward Churchill is the author of an article called “‘Some People Push Back’: On the Justice of Roosting Chickens.” The article compares the civilians who died in the World Trade Center attacks to an infamous Nazi bureaucrat, Adolf Eichmann, one of the primary architects of the Holocaust. The article also commends the “gallant sacrifices” of the September 11 hijackers. In recent days, Churchill has followed up these statements by declaring that America “needs” more attacks like September 11. Unsurprisingly, these statements have caused a strong reaction. In response to the controversy, Churchill stepped down from his position as chair of CU-Boulder’s ethnic studies department. And on February 3, you issued a statement on behalf of the CU Board of Regents that stated: “Within the next 30 days, the Office of the Chancellor will launch and oversee a thorough examination of Professor Churchill’s writings, speeches, tape recordings and other works.”

In that statement, you wrote that CU will be asking two questions during this evaluation: “(1) Does Professor Churchill’s conduct, including his speech, provide any grounds for dismissal for cause, as described in the Regents’ Laws? And (2) if so, is this conduct or speech protected by the First Amendment against University action?”

While FIRE recognizes that there are allegations that Churchill has committed acts of academic fraud, we will deal primarily with the controversial political expression that has been at the center of this controversy. With regard to the accusations of wrongdoing unrelated to Churchill’s political expression, we wish only to note that Professor Churchill is entitled to due process and should be given sufficient notice and an opportunity to defend himself from these charges. We would further like to emphasize that accusations of unrelated wrongdoing should not be used as excuses to justify punishment of the professor for his political expression.

From a legal standpoint, there can be little doubt that even Churchill’s most controversial political statements are protected by the First Amendment. Supreme Court case law makes it quite clear that “[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v. Johnson*, 491 U.S. 397 (1989). The Supreme Court has been unwavering in this stance and has protected many highly offensive forms of expression. In *Terminiello v. Chicago*, 337 U.S. 1 (1949), the Court reversed a disturbing-the-peace conviction of a notorious racist and anti-Semite. Justice Douglas wrote in that case that speech is protected even when its purpose is to “induce a condition of unrest, create dissatisfaction with conditions as they are, or even stir people to anger.” In another important civil rights case, *Gooding v. Wilson*, 405 U.S. 518 (1972), the Court reversed the conviction of a citizen who called a police officer a “white son of a bitch” and added, “I’ll kill you.” In *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667 (1973), the Court ordered the reinstatement of a journalism student who had distributed a cartoon depicting policemen raping the Statue of Liberty and the Goddess of Justice. The Court held that “conventions of decency” did not dictate what speech was protected on a public college campus.

Some commentators have argued that the Supreme Court decision in *Waters v. Churchill*, 511 U.S. 661 (1993), gives the university the right to punish Churchill for the content of his expression. *Waters* is a case that limits the free speech rights of public employees when those

employees are not addressing matters of “public concern.” Yet, as there are few issues of greater public concern than the September 11 attacks, the decision in *Waters* does not apply in this case and cannot be interpreted to allow a public university to punish the expression of viewpoints on matters of public concern by its professors. Professor Churchill’s speech is therefore protected. See also *Pickering v. Board of Education*, 391 U.S. 563 (1968). Furthermore, since he spoke as a university professor offering his academic perspective to the national debate, Professor Churchill’s speech is fully protected by every traditional understanding of academic freedom. The Supreme Court has long understood the importance of academic freedom to our democratic society. In *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), the Court stated:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. ***To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.*** No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made.... Scholarship cannot flourish in an atmosphere of suspicion and distrust. 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. [Emphasis added.]

This case presents CU with an important opportunity to reaffirm its commitment to the First Amendment, as CU has a record of favoring censorship over the U.S. Constitution. One year ago, the university tried to prevent the College Republicans from holding an “affirmative action bake sale” on campus to protest racial preferences in admissions and hiring. Affirmative action bake sales are a fully constitutionally protected form of political parody directed against affirmative action and were held at colleges across the country in 2003 and 2004. Facing public pressure from FIRE and the threat of a legal challenge, CU permitted a watered-down version of the protest to go forward, but it also allowed an angry mob of students to physically assault the Republican protestors and destroy their literature. **This previous demonstration of CU’s lack of respect for free speech must not be repeated.**

FIRE requests that CU immediately and publicly declare that the university will fully and consistently protect the free speech rights of *all* students and professors. FIRE also requests that if the university initiates academic fraud investigations against Professor Churchill, those proceedings be conducted in accordance with longstanding university policy, providing Churchill with the same level of protection afforded to professors who are not as controversial or reviled. In other words, all students and professors at CU, including Professor Churchill, are entitled to and must be granted the full range of constitutional protections.

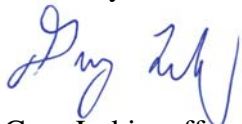
On a personal note, I would like to mention that I am a New Yorker. My parents made New York their home when they first came to this country. I was born in New York, and I live here today. My sister, in fact, worked in the World Trade Center up until a few months before the attacks. When I watched the first tower collapse, I was unsure if she had indeed changed jobs, and I believed I might have just witnessed her death. Fortunately, she was not in the building at the time, but the horror that I felt in the aftermath of the attacks will never leave me. You can imagine how I might feel about reading an essay comparing my family and my fellow New Yorkers to Nazis, particularly since my father grew up in Nazi-occupied Yugoslavia and

experienced the horrors of Nazism firsthand. But whatever contempt I may have for Professor Churchill's opinions, I believe it would be tragic if this incident were allowed to erode one of the most beautiful and fundamental principles of American society: free speech.

Thomas Jefferson once said, "Error of opinion may be tolerated where reason is left free to combat it." Professor Churchill's opinions regarding September 11 have been utterly rejected by the public at large, have caused public figures from across the political spectrum to unite in their outrage against him, and have led many of his own colleagues to condemn his statements. If he intended to generate sympathy for terrorists, the effect has been the opposite. We need not fear his words, and we must not allow our anger to cause us to betray our deepest moral and legal principles. Indeed, it is most important that at times like these we defend our fundamental liberties. Liberty faces a far greater threat from a rejection of the First Amendment than it does from the opinions of Ward Churchill.

The University of Colorado must respect Professor Churchill's constitutional rights—and the rights of all students and professors.

Sincerely,

A handwritten signature in blue ink, appearing to read "Greg Lukianoff".

Greg Lukianoff

Director of Legal and Public Advocacy

cc:

Todd Gleason, Dean of the College of Arts and Sciences, University of Colorado at Boulder

Jerry G. Rutledge, Chair, University of Colorado Board of Regents

Gail Schwartz, Vice Chair, University of Colorado Board of Regents

Thomas J. Lucero, Jr., University of Colorado Board of Regents

Michael Carrigan, University of Colorado Board of Regents

Bill Owens, Governor, State of Colorado

Ward Churchill, Professor, University of Colorado at Boulder