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11-16-2009

### Faculty Senate - November 16, 2009 Meeting Agenda

Faculty Senate

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**SENATE MEETING  
MONDAY, NOVEMBER 16, 2009  
3:30 P.M. UNIVERSITY CENTER  
SHILOH ROOM**

**Agenda**

Toby Boulet, President  
Joan Heminway, President-Elect  
Suzanne Kurth, Secretary to the Senate

Becky Jacobs, Parliamentarian  
Stefanie Ohnesorg, Information Officer

**ANNOUNCEMENTS**

Establishment of Quorum (S. Kurth)  
Senate President's Report (T. Boulet)  
Provost's Report (S. Martin)

**MINUTES**

Faculty Senate Meeting, October 19, 2009 (for approval)  
Faculty Senate Executive Council Meeting, November 2, 2009 (information item)

**MINUTES POSTED ELECTRONICALLY**

Minutes from the Undergraduate Council meeting of October 20, 2009, were distributed to Senators electronically prior to the meeting and are available at (<http://web.utk.edu/~ugcouncil/docs/minutes/UGCouncilMinutes10-20-09.pdf>).  
Minutes from the Graduate Council of October 22, 2009, were distributed to Senators electronically prior to the meeting and are available at (<http://gradschool.utk.edu/GraduateCouncil/Minutes/20091022-GC-Minutes.pdf>).

Implementation of these minutes takes place after approval of the Faculty Senate.

**PREVIOUS BUSINESS**

**REPORTS OF STANDING COMMITTEES**

Graduate Council (M. Essington)  
Undergraduate Council (D. Thompson)

**NEW BUSINESS AND ANNOUNCEMENTS**

**ADJOURNMENT**

**ATTACHMENTS:**

Faculty Senate Meeting Minutes, October 19, 2009 (for approval)  
Faculty Senate Executive Council Meeting Minutes, November 2, 2009 (information item; will be distributed by email)  
Faculty Senate President's Report  
Report from Scott Simmons on Representation of Contingent Faculty  
Report from Scott Simmons on the Status of "Academic Freedom" at UTK

**DISTRIBUTED BY:** Sharonne L. Winston, Administrative Assistant for the Faculty Senate  
812 Volunteer Boulevard  
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**PRESIDENT'S OFFICE:** Toby Boulet  
Department of Mechanical, Aerospace & Biomedical Engineering  
974-8376; [boulet@utk.edu](mailto:boulet@utk.edu)

The University of Tennessee Faculty Senate  
MINUTES  
October 19, 2009

Absent: Brian Ambroziak, Lt. Col. Michael Angle, David Atkins\*, Roberto Benson, Caula Beyl, Bill Blass, Doug Blaze, Bill Bradshaw, Cathy Cochran\*, Linden Craig, Paul Crilly, Steven Dandaneau, Jim Drake, Jerzy Dydak, Russel Hirst, Roxanne Hovland, Robert Jones, Yuri Kamychkov, Jeff Kovac, Norman Magden, Mary McAlpin, Lane Morris, Trena Paulus, Jay Pfaffman, W. Tim Rogers, Rupy Sawhney, Montgomery Smith, Edgar Stach, Marlys Staudt, Carrie Stephens, Sam Swan, Patricia Tithof, Klaus van den Berg, Scott Wall, Peiling Wang, Pia Wood, Yang Zhong, Svetlana Zivanovic

\*Alternate Senators: Jeanine Williamson for David Atkins, Carol Collins for Cathy Cochran

T. Boulet called the meeting to order at 3:32 p.m.

### **ANNOUNCEMENTS**

#### Establishment of a Quorum (S. Kurth)

S. Kurth reported a quorum was present.

#### Senate President's Report (T. Boulet)

T. Boulet announced that he had distributed his report electronically. There were no questions about it.

#### Provost's Report (S. Martin)

Provost Martin reported that the Chancellor was out of town. She said Boulet had asked about the SACS accreditation process. Martin reported that a mini evaluation was scheduled for late 2010 or early 2011. M. Albrecht is chairing the committee. An elaborate website on campus compliance is being developed. It will certify institutional progress on the Quality Enhancement Program, Ready for the World, which is focusing more on curricular integration. She noted Boulet also asked about the Academic Efficiency and Effectiveness Task Force. The Chancellor is interested in improving the 4-year graduation rate, e.g., by removing bottlenecks. Among the issues being explored:

- Computerized prerequisite checking.
- The impact of the current course drop policy on student persistence and planning.
- Use of a tracking system similar to the one at the University of Florida that guides students to courses that move them to degree completion.
- Availability of Hope scholarships for summer courses.

Lyons said that S. Gardial had brought Fullbright awardees to a meeting. During that meeting there was a broader discussion that he asked Martin to comment on. Martin said the group met to discuss faculty that had achieved honors. A document was produced that was subsequently reviewed by the Council of Deans. She said she would share the document with the Senate. T. Wang said the College of Engineering wanted to work with area high schools to increase the readiness of entering students, as one-third of entering first year engineering students were not prepared for the first math course (lack adequate calculus preparation). She proposed perhaps having summer coursework for them.

### **MINUTES**

#### Faculty Senate Meeting

The minutes of the September 14, 2009, Faculty Senate meeting were amended to delete "Mertz called the question" on p. 7. Boulet said S. Winston would be asked to add the names of alternates who attended the meeting. B. Lyons moved approval of the amended minutes and D. Bruce seconded the motion. Minutes approved as amended.

### Faculty Senate Executive Council Meeting

The minutes of the October 5, 2009, meeting of the Executive Council were not yet available.

### **MINUTES POSTED ELECTRONICALLY**

#### Graduate Council Minutes (V. Anfara)

V. Anfara highlighted the minutes of the September 10, 2009 meeting, of the Graduate Council. The Curriculum Committee approved changes for the College of Arts and Sciences (e.g., course titles). The Credentials Committee approved people for doctoral direction status. The Graduate Deans developed a template for all departmental graduate student manuals. After the manuals are revised, they would be submitted to the Graduate School. Minutes approved.

#### Undergraduate Council Minutes (D. Thompson)

D. Thompson noted the committee reports in the September 8, 2009, minutes. The Advising Committee report describes Student Success initiatives. She mentioned the process for documentation of online catalog revisions, a process for moving revisions to the Undergraduate Council for approval and providing written confirmation. Previously the collegiate membership of the Council was based on the number of degrees granted by a college in the previous year. To stabilize the 3-year terms on the Council, the 3-year average of degrees granted by a college will be used. Boulet commented that the electronic catalog does not have page numbers. He asked whether all references to pages had been removed from the electronic catalog. Thompson said she did not know. Minutes approved.

### **PREVIOUS BUSINESS**

#### Resolution for Carl Pierce

C. Pierce expressed his regrets at not being at the September meeting and his thanks for the recognition the Senate gave him at that meeting. He noted that service on the Senate provided the opportunity to work with faculty across the campus.

### **NEW BUSINESS AND ANNOUNCEMENTS**

#### Faculty Senate Calendar 2009-2010 (J. Heminway)

J. Heminway distributed a proposed calendar for Senate meetings. There was no discussion. The proposed calendar was moved and seconded. Motion approved.

#### Presentation of Banner (L. Painter)

L. Painter reviewed the background of the Banner system on the campus. Financial Aid went on Banner in 1999. In October 2006 the University of Tennessee system (UT) decreed that all campuses move to Banner. Banner was to be adopted with no baseline modifications; instead practices would have to be changed to fit the software.

She noted that the SIS system involved, for example, curriculum, recruiting, accounts receivable and room scheduling. She briefly discussed the integration of systems. A tentative timeline for switching systems has been established, e.g., admissions in June 2010 and financial aid in January 2011. The UT system agreed to provide funding for common core costs.

Information is available at <http://tennessee.edu/banner>. One of the issues is conversion of student records. The records of any student with a term record from fall 1998 forward will be converted. Other records in SIS will be imaged rather than converted. They are looking at policies that may be problematic, e.g., readmissions, repeated courses, and 400 level courses taken for graduate credit.

She summarized various benefits:

- Money will be saved by moving off SIS mainframe.
- Risk reduction.
- Greater commonality/uniformity

- Additional functions: prerequisite and co-requisite checking.
- Enhanced reporting capabilities.

Lyons asked whether there would be any price break as Banner had been implemented at the Martin and Chattanooga campuses. Painter replied that there were advantages. She suggested C. Cimino was the best person to answer the question.

Lyons asked whether departments would receive electronic letters of recommendation for graduate program applicants. Painter said currently imaging was through college net and does not include letters of recommendation. In phase two they perhaps could be included. K. Reed said they were working on college net. D. Birdwell asked what was the compatibility experience with the Mac platform. Painter said she would check. Birdwell commented that the "world" would be on Banner. He asked what was being done about integrity and continuity.

### **Announcements (T. Boulet)**

Boulet reported that the Appeals Committee was shorthanded, so he would be contacting those who indicated it was their 2<sup>nd</sup> or 3<sup>rd</sup> choice to ask them to serve. He also noted that he had asked for the Senate Listserv to be set as a discussion forum, i.e., replies would go to everyone. He received comments from two people expressing a preference for having it set so that replies would not go to everyone. Based on a show of hands it was agreed that it would be reset so that replies would only go to the person who sent a message.

### **ADJOURNMENT**

Motion to adjourn made by Birdwell, seconded by J. Grant, was approved. Meeting adjourned at 4:48 p.m.

Respectfully submitted,  
Suzanne Kurth, Secretary

## **UTK Faculty Senate President's Report**

November 16, 2009

1. In keeping with the sense of the Senate as expressed at our meeting in October, the format of the Senate list server has changed. For a (temporarily, at least) private conversation, use "Reply" to reply only to the sender of the original message. For an open discussion with all members of the list server, use "Reply to all."
2. At the meeting of the Executive Council on November 2, the Provost and the Vice Chancellor for Finance and Administration discussed planning for the end of the federal stimulus funds. This year's planning process will involve an additional series of meetings, some of which have already begun.
3. Contingent faculty (those who are neither tenured nor on a tenure track) have no representation in the Faculty Senate. The attached report from Scott Simmons describes representation of contingent faculty in the senates of many other institutions. Such faculty are roughly 20% of the faculty at UTK. This issue was discussed at the meeting of the Executive Council on November 2. While some felt that the Senate should somehow address this issue, the lack of input from UTK's contingent faculty makes the urgency of the issue unclear.
4. On November 3, several members of the Executive Council met with Hank Dye, Vice President for Public and Government Relations, and Anthony Haynes, who lobbies the Tennessee General Assembly on behalf of the UT System. Several legislative actions that may be of concern to UT will probably come before the General Assembly in the next session, which begins in January. Both Mr. Dye and Mr. Haynes expressed their desire to maintain communication with the Senate. There may be times when it would help to have an expression of the Senate's position regarding pending legislation.
5. On November 7, President Simek announced the establishment of a committee to study the question of the optimum reporting line for the athletics departments. Five members of the committee are UTK faculty.
6. At a recent meeting of the SEC Associated Faculty Leaders, a presentation on the judicial status of the concept of academic freedom indicated that in recent years the courts have significantly changed their position. A report from Scott Simmons on the status of academic freedom at UTK is attached. The Executive Council will discuss this report at its next meeting, on January 11, 2010.
7. On November 12, at a meeting of the Chancellor's Advisory Council, the status of smoke-free entrances was discussed. (Some years ago, the Faculty Senate passed a resolution supporting the establishment of these.) There was also discussion of the concept of a tobacco-free campus.
8. Interviews of three candidates for the position of Vice Provost for Academic Affairs have been completed.

TO: Dr. Toby Boulet

FROM: Scott E. Simmons

RE: Senate Representation: Non Full-Time Faculty

DATE: October 12, 2009

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This memorandum outlines the various ways faculty senates at universities within the Southern Universities Group address representation by non full-time faculty members. With that in mind, the relevant language from each of the 31 faculty senate bylaws and /or constitutions has been included. Several faculty senates have neglected to address such a situation; these universities have been removed from this analysis.

Tennessee's Faculty Senate bylaws, meanwhile, provide the following:

“Elected members of the Faculty Senate shall be chosen from those members of the Faculty meeting the following criteria at the time of the election: (1) the holding of full-time or continuing part-time appointment with the rank, or equivalent rank, of assistant professor or higher; and (2) the performance of academic duties totaling at least half-time teaching, research, service, or departmental administration.”

Each of the remaining senate bylaw and/or constitution provisions are outlined in turn below.

#### **Auburn University**

“To be eligible for selection as a senator from a unit, a person must be a member of the **University Faculty** who has served on the **University Faculty** for at least three academic semesters prior to election. The **University Faculty** shall consist of all positions of professorial status and other positions that have a primary academic function associated with Auburn University, main campus.”

The “other position” within the **University Faculty** definition appears to allow representation by lecturers or instructors, so long as they have been employed for three semesters prior to election.

#### **Clemson University**

“Any member of the Faculty may be eligible for membership on the Faculty Senate, except department chairs, school directors, deans, the provost, vice provosts, vice presidents, the president, and others with primarily administrative duties.”

#### **Florida State University**

“Only full-time Instructors, Assistant Professors, Associate Professors, and Professors shall be eligible for representation in and election to the Faculty Senate.”

#### **Mississippi State University**

“Senators of the Robert Holland Faculty Senate, referred to elsewhere in this document as the Faculty Senate, shall be elected from the members of the **General Faculty** who have had at least one year of service.”

**General Faculty** includes the following ranks: Instructor, Assistant Professor, Associate Professor, Professor, Assistant Research Professor, Associate Research Professor, Research Professor, Clinical Instructor, Assistant Clinical Professor, Associate Clinical Professor, and Clinical Professor.

### **North Carolina State University**

“Eligibility for membership in the Faculty Senate is the same as for voting membership in the **General Faculty** except that those holding titles above the head of department shall not be eligible.”

“Persons eligible for voting membership in the **General Faculty** of North Carolina State University are those full-time regular faculty (i.e., tenured and tenure track; full time special faculty, except field faculty; faculty in the Phased Retirement Program; and Emeritus faculty).”

### **Texas A&M University**

“For purposes of the Faculty Senate, individuals eligible for election shall be anyone employed by Texas A&M University whose appointment was approved by the Provost of Texas A&M University, and who (a) is tenured or on the tenure-track, (b) holds the rank of Professor, Associate Professor, or Assistant Professor, or (c) holds the title of Distinguished Lecturer, Senior Lecturer, Lecturer, or Librarian I-IV and teaches on the College Station campus.”

### **Texas Tech University**

“Qualification for election to the Faculty Senate shall be membership in the **voting faculty**, except that administrators serving one-half time or more in administrative position shall not be eligible. Department chairpersons may be elected to the Faculty Senate if they are otherwise qualified.”

“The voting faculty consists of all persons under full-time contract who have completed a residence of one year at this University and who are tenured or, in the case of librarians and archivists are on continuing appointment or who hold appointments that make them eligible for tenure or continuing appointment.”

### **University of Alabama**

“Only regular faculty members as defined in Article III are eligible for election to the Senate.”

“Each division of the University, including colleges, schools, and the University Libraries, is represented in the Faculty Senate by one senator for each twenty persons, or fraction thereof, serving on the date of the election under a regular appointment as an instructor, assistant professor, associate professor, or professor engaged in teaching or research at least half of a normal load during the regular year, or a librarian having corresponding rank and professional engagement.” (*Article III*)

### **University of Alabama at Birmingham**

“A **faculty member**, hereinafter referred to as faculty, is defined in the UAB Faculty Handbook (Section 2.3) as one who holds a primary academic appointment (on nine or twelve month contract) in one of the constituent units of the university and is eligible to participate in the



Alabama State Teacher's Retirement Program through the University of Alabama at Birmingham. Only faculty may vote and hold offices as defined in this constitution."

The Faculty Handbook section mentioned above includes the following ranks: (i) Instructor; (ii) Assistant Professor; (iii) Associate Professor; (iv) Professor; and (v) Distinguished Professor.

### **University of Delaware**

"For the purpose of determining representation on the University of Delaware Faculty Senate (hereinafter called the Senate), the relevant members shall be the full-time members of the Unit whose primary or secondary appointments are listed as faculty or professionals who have been granted active **voting** status by the Unit."

"The voting membership of the University Faculty shall consist of the following: Professors, Associate Professors, Assistant Professors, full-time Instructors and Lecturers. All part-time instructors shall be non-voting members of the University Faculty."

### **University of Florida**

"Only faculty as defined in Article III, Section 1, of this Constitution are eligible to be counted in determining the proportional representation of Academic Units within the Faculty Senate, to be elected to the Faculty Senate, and to vote for members of the Faculty Senate."

"The faculty of the University of Florida are those persons employed by the University of Florida during the regular academic year whose primary assignment is to carry out the academic mission of the University, namely, teaching, research and academic service. Titles of these persons shall be set forth in the Senate Bylaws." (*Article III, Section 1*)

"Persons employed by the University of Florida during the regular academic year are members of the faculty if they hold one of the following academic titles: (i) Graduate Research Professor; (ii) Distinguished Service Professor; (iii) Distinguished Professor; (iv) Professor, Associate Professor, or Assistant Professor; (v) Master Lecturer, Senior Lecturer, or Lecturer; (vi) any of the above titles modified only by clinical, research, or extension." (*Senate Bylaws*)

### **University of Georgia**

"Any member of the faculty is eligible for election to the University Council. Where specified, membership on certain committees is limited to faculty with academic rank (i.e. Professor, Assistant Professor, Associate Professor and Instructor)."

### **University of Houston**

"University of Houston faculty members who meet the eligibility criteria described in the bylaws may serve as members of the Faculty Senate."

"An eligible faculty member is a full-time, tenured or tenure-track faculty member or a full-time Library faculty member of the University of Houston." (*Bylaws*)

### **University of Kentucky**

“All of the following shall be considered “faculty” for purposes of this Rule: (i) full-time tenure/tenure track faculty (Regular, Special, Extension, Librarian Title Series) with the rank of assistant professor or higher; (ii) full-time non-tenure track faculty (Clinical, Research Title Series) with the rank of assistant professor or higher; and (iii) full-time lecturers and instructors.”

### **University of Mississippi**

“The Senate of the Faculty membership shall be limited to faculty who qualify as Eligible Faculty. Eligible Faculty as used in this Constitution shall mean budget-listed, full-time, tenured or tenure-track employees of the University of Mississippi (Oxford campus) who hold the rank of Professor, Associate Professor, or Assistant Professor.”

### **University of North Carolina**

“All members of the **voting faculty** are eligible for election to the Council.”

“Except as otherwise provided in this Code, the voting faculty comprises (i) all members of the **General Faculty** having tenured or probationary-term appointments; and (ii) fixed-term faculty whose positions satisfy the following criteria:

1. The position is for not less than 75% of an equivalent full-time position and is not a visiting appointment; and
2. The duties of the position include teaching, research, or both; and
3. The actual or anticipated length of service in the position is at least three years. This criterion is satisfied if: (i) the current term of appointment is for three years or more; or (ii) the appointment is a renewal appointment to the same position and the combined length of the current term and the immediately preceding terms is three years or more.”

“The **General Faculty** consists of all persons holding faculty appointments to the ranks of professor, associate professor, assistant professor, instructor, lecturer, or any of the formally authorized lecturer-equivalent ranks.”

### **University of Oklahoma**

“The Regular Faculty of the University is composed of all faculty members with tenure track, tenured, and renewable term appointments at the rank of assistant professor, associate professor, and professor. The Regular Faculty does not include faculty members with temporary appointments.”

### **University of Texas**

“Voting members of the General Faculty shall consist of the following:

- a. All professors, associate professors, and assistant professors.
- b. All instructors and lecturers who have had a total of four or more long session semesters of service at these ranks at The University of Texas at Austin.

“A faculty member shall have voting status only on the basis of half-time employment or more at the University.”

### **University of Virginia**

“Those persons shall be eligible for election to the Faculty Senate who have been elected by the Rector and Board of Visitors to a full-time position as either academic faculty or academic general faculty in the rank of Acting Assistant Professor, Assistant Professor, Associate Professor, or Professor.”

### **Virginia Tech**

“A Faculty member is eligible for election to the Faculty Senate and to vote in the election of Faculty Senators if the Faculty member holds:

- The rank of Professor, Associate Professor, Assistant Professor, or Instructor.
- A full-time and CONTINUING appointment to the University.”

TO: Dr. Toby Boulet

FROM: Scott E. Simmons

RE: Current State of Academic Freedom

DATE: November 11, 2009

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The purpose of this memorandum is to review and analyze the current state of academic freedom as it applies to public university professors. More specifically, academic freedom shall be viewed under (1) the scope of academic scholars and the Association of University Professors (“AAUP”), as well as (2) the scrutiny of the United States Supreme Court.

Furthermore, in light of the Supreme Court’s recent decision in *Garcetti v. Ceballos*,<sup>1</sup> this memorandum discusses the potential necessity of including protective language safeguarding academic freedom within any document that governs the university-faculty employment relationship. Finally, in light of this prospective need, this memo outlines and analyzes the current documents structuring academic freedom at the University of Tennessee.

Each issue shall be discussed in turn.

#### **A. Academic Freedom – its Necessity and Role**

The roots of academic freedom date as far back as 13<sup>th</sup>-century Medieval Europe; even in the dark ages, educators were granted certain forms of liberty to seek the teaching of truth.<sup>2</sup> Since that time, this theory has survived, and has grown to include not only teaching in the classroom, but also integration into tenure and research.

##### **1. Historical Role of Academic Freedom**

It is no secret that tenure is the Holy Grail for a professor employed at any institute of higher education. Several scholars have advocated, however, that tenure is a hollow concept without the ready availability of academic freedom. Professor Mark Adams argues that “[t]enure is designed to protect a faculty member by safeguarding academic freedom, ensuring a fair process prior to dismissal, and providing job security.”<sup>3</sup> The AAUP takes this notion a step further, opining that:

Tenure is a means to certain ends; specifically: (1) freedom of teaching and research and of extramural activities, and (2) a sufficient degree of economic security to make the profession attractive to men and women of ability. Freedom and economic security, hence, tenure, are indispensable to the success of an institution in fulfilling its obligations to students and to society.<sup>4</sup>

Furthermore, Professor Adams advocates that “tenure protects faculty members from retribution for the results of their research, *for what they say and teach in class*, for their actions in fulfilling their duties in university governance, and for their extramural utterances.”<sup>5</sup> Stated differently,

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<sup>1</sup> 547 U.S. 410 (2006).

<sup>2</sup> See generally RICHARD HOESTADTER & WALTER P. MEITZGER, *THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES* (John Wiley 1955).

<sup>3</sup> Mark L. Adams, *The Quest for Tenure: Job Security and Academic Freedom*, 56 CATH. U. L. REV. 67, 67 (FALL 2006).

<sup>4</sup> AM. ASS’N OF UNIV PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE (1940), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 3, 3 (9th ed. 2001).

<sup>5</sup> Adams, *supra* note 3, at 70 (emphasis added).

the job security provided to academics by tenure is designed to serve principally as a *guarantee* of academic freedom.<sup>6</sup>

Academic freedom itself – standing alone – protects three key aspects of a professor’s work, mainly:

1. Freedom of inquiry and research;
2. Freedom of teaching within the university or college; and
3. Freedom of extramural utterance and action (e.g., publication and opinions regarding governance of the institution).<sup>7</sup>

As a result, the goals of academic freedom risen to an elevated platform, characterized by the “pursuit of disinterested scholarship and teaching, reviewed by one’s peers according to the particular discipline’s professional norms of competence rather than by the political, social, or ideological views of administrators, trustees, legislators, or the community, free from the threat of discipline or discharge, protect[ing] both the individual faculty member and the integrity of the university.”<sup>8</sup>

Even so from a historical perspective, and contrary to common notions of academic freedom, academic freedom is based “in professional autonomy and collegial self-governance,” rather than free speech.<sup>9</sup> That is not to say, however, that the courts have not been willing to provide their input on the free-speech issue.

## 2. Role of the Courts

In his article, Professor Adams argues that professors at *public* universities enjoy additional protections that their colleagues at private institutions do not have – mainly the constitutional protections of the rights to privacy and free speech.<sup>10</sup> These rights, however, have purportedly been called into question in light of the *Garcetti* decision. Before the impact of *Garcetti* is discussed, however, a precursor history of the Court’s treatment of academic freedom is required.

Academic freedom was first supported in a constitutional context in 1957 in Justice Frankfurter’s concurring opinion in *Sweezy v. New Hampshire*.<sup>11</sup> Sweezy, a Marxist economist, was investigated by the Attorney General of New Hampshire on suspicion of being a subversive. When the prosecution sought to obtain the contents of a lecture Sweezy had given at the University of New Hampshire, the Court held that the investigation was a violation of due process.<sup>12</sup>

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<sup>6</sup> See James J. Fishman, *Tenure and Its Discontents: The Worst Form of Employment Relationship Save All of the Others*, 21 PACE L. REV. 159, 175 (2000).

<sup>7</sup> AM. ASS’N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), reprinted in AAUP POLICY DOCUMENTS AND REPORTS 291, 298 (9th ed. 2001).

<sup>8</sup> J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 278-79 (1989).

<sup>9</sup> Thomas L. Haskell, *Justifying the Rights of Academics in the Era of “Power/Knowledge,”* in THE FUTURE OF ACADEMIC FREEDOM 43, 54 (Louis Menand ed., 1996).

<sup>10</sup> Adams, *supra* note 3, at 74.

<sup>11</sup> 354 U.S. 234.

<sup>12</sup> *Id.* at 254.

Justice Frankfurter, however, took the analysis a step further, reasoning that the First Amendment created a right of academic freedom that prohibited any investigation by the state.<sup>13</sup> More specifically, a “free society” depends on “free universities,” and “[t]his means the exclusion of governmental intervention in the intellectual life of a university.”<sup>14</sup> Further, Justice Frankfurter reasoned that:

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail the four essential freedoms of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.<sup>15</sup>

Ten years later the Supreme Court affirmed Justice Frankfurter’s reasoning in *Keyishian v. Board of Regents*, recognizing that “academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment.”<sup>16</sup> After *Keyishian*, the Court skirted this sensitive issue for nearly a quarter century until Justice Stevens revived the discussion in 1985, providing a reminder that the Court is “reluctan[t] to trench on the prerogatives of state and local educational institutions[,] and our responsibility [is] to safeguard their academic freedom.”<sup>17</sup>

Most recently, in *Garcetti v. Ceballos*,<sup>18</sup> the Supreme Court addressed the issue of whether a government employee’s comments are protected under the first amendment. Ceballos, an assistant district attorney, claimed he had been passed up for a promotion after publicly testifying and criticizing the legitimacy of an arrest warrant.<sup>19</sup> In a 5-to-4 opinion authored by Justice Kennedy, the court held that when public employees make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employee discipline.<sup>20</sup>

In a dissenting opinion, Justice Souter argued that the decision could be analyzed to be far-reaching enough to “imperil First Amendment protection of *academic freedom* in public colleges and universities, whose teachers necessarily speak and write pursuant to official duties.”<sup>21</sup> Based upon Souter’s dissent, Professor Neal Hutchens has argued that if the Supreme Court eventually elects to extend the reach of *Garcetti* to include public university faculty members, then these

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<sup>13</sup> See *id.* at 256-67 (Frankfurter, J., concurring).

<sup>14</sup> *Id.* at 262.

<sup>15</sup> *Id.* at 263.

<sup>16</sup> 385 U.S. 589, 603 (1967).

<sup>17</sup> *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 (1985).

<sup>18</sup> 547 U.S. 410 (2006).

<sup>19</sup> *Id.* at 414-15.

<sup>20</sup> *Id.* at 424.

<sup>21</sup> *Id.* at 438 (Souter, J., dissenting) (emphasis added).

faculty members' speech will not be protected in areas including (1) scholarship; (2) teaching/classroom; and (3) intramural speech (e.g., departmental meetings).<sup>22</sup>

The issue Professor Hutchens skirts, however, is that Justice Kennedy specifically addressed the concerns outlined in the dissent, noting that:

Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value. 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.<sup>23</sup>

In essence, the Court dismissed Justice Souter's objections under the *Ashwander* rules, a set of seven oft-used principles articulated by former Justice Brandeis applied by the Supreme Court to avoid making unnecessary constitutional rulings.<sup>24</sup> More specifically, the second of the *Ashwander* rules stipulates that the Court will not "anticipate a question of constitutional law in advance of the necessity of deciding it."<sup>25</sup> Furthermore, the third *Ashwander* factor requires that the Court not "formulate a rule of constitutional law *broad*er than is required by the [p]recise facts to which it is to be applied."<sup>26</sup>

As a result, the *Garcetti* majority neglected to address Justice Souter's concerns not because it wished to restrict academic freedom, but rather because that simply was not the issue that had been brought before the Court to decide. Professor Hutchens' argument that the next logical step in light of *Garcetti* will be to eradicate academic freedom is thus unfounded. Moreover, Professor Adams' article was published *subsequent* to the decision in *Garcetti*, and he did not mention the *Garcetti* opinion a single time in his analysis of academic freedom.<sup>27</sup>

### **B. Formally Adopting the Right to Academic Freedom**

Even if *Garcetti* is interpreted to limit a professor's right to academic freedom, or if the Court subsequently addresses this issue head-on, a university can independently provide for such freedom in its documents governing the faculty-university employment relationship. More specifically, "by including [a] provision in the faculty handbook, these standards [of academic freedom] become enforceable contract provisions in the faculty member's employment relationship with the university."<sup>28</sup>

Likewise, Professor Hutchens urges that "academic freedom statements [should be] sufficiently connected to faculty contracts to provide legal protections through contractual rights."<sup>29</sup>

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<sup>22</sup> Neal H. Hutchens, *How Free is Academic Freedom? A Dialogue Considering the Increasingly Precarious Status of First Amendment Protection for Faculty Speech*, Address at the Southeastern Conference Association of Faculty Senates (Oct. 2009).

<sup>23</sup> *Garcetti*, 547 U.S. at 425 (emphasis added).

<sup>24</sup> See *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288 (1936) (Brandeis, J., concurring).

<sup>25</sup> *Id.* at 347.

<sup>26</sup> *Id.* (emphasis added).

<sup>27</sup> Professor Adams is a Professor of Law and the Associate Dean for Academic Affairs at Valparaiso University School of Law, where he focuses his research in the areas of labor and employment law.

<sup>28</sup> Adams, *supra* note 3, at 73.

<sup>29</sup> See Hutchens, *supra* note 22.

### **C. The University of Tennessee and its Faculty Handbook**

The faculty-university employment relationship at the University of Tennessee is officially governed by the Faculty Handbook (“Handbook”).<sup>30</sup> The Handbook provides several specific protections for academic freedom. For example, the opening paragraph of the first chapter, which outlines the general, broad purpose of the Handbook’s existence, stipulates that:

[a]s the state’s leading comprehensive research and land-grant institution, UT’s primary purpose is to move forward the frontiers of human knowledge and enrich and elevate society. . . . The institution . . . values intellectual curiosity, pursuit of knowledge, and *academic freedom* and integrity.<sup>31</sup>

In addition to the introduction, the Handbook devotes an entire section to the rights of faculty members, which covers such topics as tenure, academic freedom, and “freedom as a citizen.”<sup>32</sup> Within this section is the following language:

Board of Trustees’ *Policies Governing Academic Freedom, Responsibility, and Tenure*, adopted in 1998, and all subsequent amendments, govern faculty rights and responsibilities. The following sections are intended as a general summary of those rights and responsibilities. In the event of any conflict or inconsistency between the board’s policy and this handbook, the board’s policy will control.<sup>33</sup>

The subsequent sections of the Handbook summarize the Board of Trustees’ Policy Statement regarding academic freedom. The Board’s actual policy statement, which is *not* included in its entirety in the Handbook, is rather lengthy, and notes in pertinent part that:

[A] healthy tradition of academic freedom . . . is essential to the proper functioning of a University. At the same time, membership in a society of scholars enjoin[s] upon a faculty member certain obligations to colleagues, to the University and to the State that guarantees [sic] academic freedom.

1. The primary responsibility of a faculty member is to use the freedom of his or her office in an honest, courageous, and persistent effort to search out and communicate the truth that lies in the area of his or her competence.
2. A faculty member is entitled to full freedom in research and in publication of the results, subject to the adequate performance of his or her academic duties.
3. Academic freedom does not exempt a faculty member from an evaluation by colleagues and administration of his or her qualifications for continued membership in their society.
4. A faculty member is entitled to freedom in the classroom in discussing the subject, but the faculty member should use care in expressing personal views in the classroom and should be careful not to introduce controversial matters that have no relation to the subject taught, and especially matters in which he or she has no special competence or training and in which, therefore, the

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<sup>30</sup> UNIV. OF TENN., FACULTY HANDBOOK (2009).

<sup>31</sup> *Id.* at § 1.1 (Governance and Organization: Nature and Purpose) (emphasis added).

<sup>32</sup> *See id.* at § 2.1 (Faculty Rights and Responsibilities: Rights).

<sup>33</sup> *Id.* at § 2.0 (Faculty Rights and Responsibilities: Board of Trustees’ Policy).



faculty member's view cannot claim the authority accorded his or her professional statements.

5. A faculty member should recognize that the right of academic freedom is enjoyed by all members of the academic community. He or she should be prepared at all times to support actively the right of the individual to freedom of research and communication.
7. When, as a citizen, a faculty member speaks outside the classroom or writes for publication, he or she should be free, as a citizen, to express his or her opinions.”<sup>34</sup>

Because the Handbook refers directly to the Board's policy statement regarding academic freedom, UT faculty members are governed by that statement. Even so, it may be easier if the policy statement is incorporated (rather than merely referenced) into the Handbook. Not only would this prevent any possibility of future conflict between the two documents, but it would also allow a faculty member to have full access to the policy without having to reference two separate documents.

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<sup>34</sup>UT BD. OF TRUSTEES POLICY GOVERNING ACADEMIC FREEDOM, RESPONSIBILITY AND TENURE (Mar. 16, 2006).

THE UNIVERSITY OF TENNESSEE  
KNOXVILLE

**FACULTY SENATE AGENDA  
NOVEMBER 16, 2009, 3:30 P.M.  
UNIVERSITY CENTER  
SHILOH ROOM  
President's Office: 607 Dougherty Engineering Building  
Knoxville, Tennessee 37996-2210 (865) 974-8376**