

# UNIVERSITY OF WYOMING

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## GARCETTI V. CEBALLOS AND ITS IMPLICATIONS FOR UW'S ACADEMIC FREEDOM POLICY January 2013

Embedded in University of Wyoming regulations is an explicit policy on academic freedom,<sup>1</sup> appended to this memo. The policy incorporates, verbatim, a key passage from the American Association of University Professors' 1940 statement on academic freedom.<sup>2</sup> Although the AAUP excerpt has long represented a gold standard for academic freedom policies, a 2006 decision of the U.S. Supreme Court, known as *Garcetti v. Ceballos*,<sup>3</sup> provides an impetus for reviewing UW's policy, to clarify issues that the case may have muddied. This memo reviews issues raised in *Garcetti* and proposes some considerations that bear on any review or proposal for revision.

Because the central issue in this memo arises from a U.S. Supreme Court decision, the memo refers to several other Supreme Court decisions that bear on academic freedom. It is worth remembering, though, that the Court's rulings in these cases focus on the First Amendment to the U.S. Constitution, while academic freedom — a different principle — is mainly a matter of institutional policy.

### Issues raised in *Garcetti v. Ceballos*

Richard Ceballos was a deputy district attorney for Los Angeles County, California. Gil Garcetti headed the DA's Office. In 2000, Ceballos wrote a memo to his superiors recommending dismissal of a case, because of concerns regarding an affidavit filed to obtain a search warrant. The case proceeded anyway. Ceballos later filed suit in federal district court, claiming (1) that he was reassigned, transferred, and denied a promotion because of the memo and (2) that these were retaliatory actions violating First Amendment protections.

The district court granted summary judgment in favor of the defendant Garcetti. The Ninth Circuit Court of Appeals reversed the decision, in favor of Ceballos. The U.S. Supreme Court then ruled 5-4 in favor of Garcetti. At the heart of the high court's decision is the argument that Ceballos wrote his memo not as a private citizen but "pursuant to his official duties" as a public employee. In his majority opinion, Justice Anthony Kennedy wrote,

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 employer discipline.

He reasoned (1) that Ceballos was speaking on a matter of public interest, a necessary condition for First Amendment protection, but (2) that government employers "need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public

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<sup>1</sup> UW Regulation 5-1. See [http://www.uwyo.edu/generalcounsel/\\_files/docs/uw-reg-5-1.pdf](http://www.uwyo.edu/generalcounsel/_files/docs/uw-reg-5-1.pdf), retrieved 15 December 2012.

<sup>2</sup> American Association of University Professors, "Statement of principles on academic freedom and tenure," 1940. See <http://www.aaup.org/aaup/pubsres/policydocs/contents/1940statement.htm>, retrieved 15 December 2012.

<sup>3</sup> *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

services.” In weighing First Amendment protections against the employer’s responsibility to ensure effective operations, Kennedy argued that the latter tips the balance.

In a dissenting opinion, Justice David Souter cited delicate issues that this reasoning raises for public universities, “whose teachers necessarily speak and write ‘pursuant to official duties.’” In response, Kennedy wrote,

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.

This passage has led to a confusing legal landscape for academia. In a 2009 report,<sup>4</sup> the American Association of University Professors reviewed several post-*Garcetti* cases in which courts have upheld universities’ restrictions on faculty speech, notwithstanding Kennedy’s “*Garcetti* reservation.”

### Considerations for policy changes

Confusion surrounding the “*Garcetti* reservation” suggests the need for a review and possible refinement of UW’s policy on academic freedom. I believe the confusion arises from attempts to use the First Amendment for an inappropriate task, namely to safeguard academic freedom. I read support for this view in a 2010 essay by Professor Joan DelFattore:<sup>5</sup>

Rather than focusing on the First Amendment, public institutions would do better to expand, update, and revitalize campus policies in recognition of their crucial role in defining and protecting academic freedom. Indeed, *Garcetti* itself encourages government-run institutions to establish their own free-speech regulations.

Many models exist for such policies. The AAUP article cited above includes several templates. The policy in place at DelFattore’s own institution, the University of Delaware, offers another model.<sup>6</sup>

Any review of UW’s policy on academic freedom should acknowledge certain fine points. The following is a summary.

1. **Two forms of academic freedom.** Academic freedom takes several forms, including *individual academic freedom* and *institutional academic freedom*. UW Regulation 5-1 deals exclusively with individual academic freedom. The U.S. Supreme Court referred to institutional academic freedom in *Sweezy v. New Hampshire*,<sup>7</sup> citing the “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.” Although this concept can serve to circumscribe professors’ individual academic freedom, professors may also have an interest in institutional academic freedom, given the political pressures that their employers sometimes confront.
2. **Distinction between academic freedom and freedom of speech.** Neither individual nor institutional academic freedom is identical to freedom of speech as guaranteed by the First

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<sup>4</sup> AAUP, “Executive Summary: Protecting an Independent Faculty Voice: Academic Freedom after *Garcetti v. Ceballos* (2009),” posted at <http://www.aaup.org/aaup/comm/rep/A/postgarcettireport.htm>, retrieved 14 December 2012.

<sup>5</sup> J. DelFattore, “To Protect Academic Freedom, Look Beyond the First Amendment,” *Chronicle of Higher Education*, 31 October 2010, posted at <http://chronicle.com/article/To-Protect-Academic-Freedom/125178/>, retrieved 14 December 2012.

<sup>6</sup> University of Delaware Faculty Handbook, <http://www.udel.edu/provost/fachb/IV-B-1-acadfreedom.html>, retrieved 15 December 2012

<sup>7</sup> *Sweezy v. New Hampshire*, 354 U.S. 234 (1957). In the excerpt cited, Justice Felix Frankfurter, in a concurring opinion, was referring to a statement formulated for the Open Universities of South Africa.

Amendment. Academic freedom specifically refers to teaching and scholarly dissemination conducted pursuant to professors' job duties. It rests on arguments for the social utility of institutions where exploration of ideas remains unfettered by threat of adverse action by those who run universities or those who fund them. According to the 1940 AAUP statement, academic freedom entails a set of concomitant professional responsibilities that the First Amendment does not require of citizens exercising freedom of speech. Among these are the duty to take appropriate care in introducing controversial material into one's teaching, the duty to be accurate, the duty to show respect for the opinions of others, and the duty to make clear that one is not speaking for the institution. That said, Justice William Brennan's majority opinion in *Keyishian v. Board of Regents* (1967)<sup>8</sup> suggests a common utilitarian rationale underlying both First Amendment freedoms and academic freedom.

3. **Applicability to matters of public concern.** First Amendment protections of free speech, though broader in scope and application than academic freedom, are far from absolute. In circumstances involving public employees, they have long required that the speech in question address "matters of public concern."<sup>9</sup> Based on the common utilitarian rationale just mentioned, one can argue that the narrower concept of academic freedom applies only to matters of public concern, not to personal matters such as a professor's salary, academic rank, space allocation, individual teaching assignments, or work schedule. The distinction between public and private concerns is especially important in speech that involves issues of university governance.
4. **Protections for professors acting as private citizens.** First Amendment protections for employees have held reliably only when the speaker acted as a private citizen<sup>10</sup> — a caveat that the AAUP's 1940 statement also raises explicitly in reference to academic freedom: "[w]hen professors speak or write as citizens, they should be free from institutional censorship or discipline." Refinements of policy developed in response to *Garcetti* — a case that explicitly concerns statements made pursuant to official duties — should leave intact the 1940 statement's protections and admonitions for professors acting as private citizens.
5. **The central role of expert peer review.** One of the starkest distinctions between academic freedom and First Amendment freedoms is the principle of expert peer review. Under this principle, teachers and scholars may well be subject to adverse institutional action — such as denial of salary raises, reappointment, tenure, or promotion — based on peer assessments of the content of speech and written work developed pursuant to official duties. The faculty has an essential interest in promoting discipline-based standards of excellence in teaching and scholarship, via peer-review mechanisms that lie at the heart of the academic enterprise. Conflating academic freedom with First Amendment protections can thwart this interest.
6. **Openness to reasoned, civil disagreement.** Although the notion may be implicit in UW's current policies, in my opinion it would be a good idea to state explicitly that the university welcomes reasoned, civil disagreement to any expression. This stance reminds the public that teaching and research differ from dogma and thought control. But it does not relieve students of the responsibility to learn material with which they disagree, nor does it shield students or professors from the expectation that they be prepared to justify their ideas if challenged.

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<sup>8</sup> *Keyishian v. Board of Regents*, 385 U.S. 589 (1967). Brennan wrote, "The classroom is peculiarly the `marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth `out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

<sup>9</sup> *Pickering v. Board of Education*, 391 U.S. 563 (1968). Justice Thurgood Marshall's majority opinion referred to a "balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."

<sup>10</sup> In *Pickering*, the balance mentioned in the previous footnote favored the employee, who, speaking as a private citizen, had written a letter to the editor. Later, in *Connick v. Myers*, 461 US 138 (1983), the Court sided with the employer. Justice Byron White, writing for the majority, argued that the fired public employee (Myers) had engaged in speech (an in-house questionnaire about Connick's management practices) that was of personal, not public, concern

Finally, I believe that any discussion of academic freedom in a research, land-grant university must respect a broader teaching mission: one that encompasses the public as well as the students who enroll in our courses. I've argued elsewhere that "with the university's larger audience, the public, teaching is a harder and riskier enterprise, with more pitfalls."<sup>11</sup> Thanks to the First Amendment, what we have a right to say *as private citizens* constitutes a large universe. Academic freedom creates a smaller universe, namely, one that honors the core responsibility of our profession: to explore ideas using refined methods, tempered with civility and reasoned skepticism, and to share the results with our public. To succeed in this endeavor, we must convince that audience, often in the face of recurrent misgivings, that free and open inquiry using these methods is the most reliable path to knowledge.

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<sup>11</sup> M. Allen, "The University as Forum: Aspects of Free Expression in the Academy," transcript of a lecture in Jackson, WY, 13 November 2010, [http://www.uwyo.edu/acadaffairs/\\_files/docs/pythian\\_freedomofexpression.pdf](http://www.uwyo.edu/acadaffairs/_files/docs/pythian_freedomofexpression.pdf), retrieved 16 December 2012.

UNIVERSITY OF WYOMING POLICY ON ACADEMIC FREEDOM  
EXCERPTED FROM UW REGULATION 5-1

A. ACADEMIC FREEDOM

The faculty and academic professionals are the educational body of the University and in recognition of the fact that true education may flourish only when they are both free and responsible, the Trustees subscribe to the following statement on academic freedom and their responsibilities as adopted in 1990 by the American Association of University Professors:

Academic freedom....applies to both teaching and research. Freedom in research is fundamental to the advancement of truth. Academic freedom in its teaching aspect is fundamental for the protection of the rights of the teacher in teaching and of the students to freedom in learning. It carries with it duties correlative with rights.

Teachers are entitled to full freedom in research and in the publication of the results, subject to the adequate performance of their other academic duties; but research for pecuniary return should be based upon an understanding with the authorities of the institution.

Teachers are entitled to freedom in the classroom in discussing their subject, but they should be careful not to introduce into their teaching controversial matter which has no relation to their subject....

College and university teachers are citizens, members of a learned profession, and officers of an educational institution. When they speak or write as citizens, they should be free from institutional censorship or discipline, but their special position in the community imposes special obligations. As scholars and educational officers, they should remember that the public may judge their profession and their institution by their utterances. Hence they should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that they are not speaking for the institution.