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Ward Churchill Fired: What's Next?

Posted July 25, 2007 | 03:53 PM (EST)

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To the surprise of virtually no one, the University of Colorado's (CU's) Board of Regents voted to fire [controversial professor Ward Churchill](#) late yesterday. The Regents cited the extensive findings of academic misconduct against Churchill as the reason for the dismissal. Anyone following the case, however, will remember that Ward Churchill initially came to national attention because of an article in which he compared the victims of 9/11 to Nazi bureaucrat Adolf Eichmann. After a student newspaper at Hamilton College drew attention to that article in 2005, a national uproar ensued, prompting the university to announce an investigation to determine whether the professor "overstepped his bounds."

In 2005, the Foundation for Individual Rights in Education (FIRE, where I serve as president) quickly contacted Churchill to see if he needed our assistance, but he never responded. Realizing, however, how this case might have a serious affect on perceptions of academic free speech and freedom, we decided to [send a letter to the university explaining that "\[f\]rom a legal standpoint, there can be little doubt that even Churchill's most controversial political statements are protected by the First Amendment,"](#) and that "[l]iberty faces a far greater threat from a rejection of the First Amendment than it does from the opinions of Ward Churchill."

The university's first investigation subsequently found that Ward Churchill's speech was, in fact, constitutionally protected. That would not be the end of the inquiry, however. The investigation had apparently also turned up numerous, longstanding claims of academic misconduct against Churchill. A follow-up investigation focused on these claims, and in May of 2006, a committee of three professors from CU and two outside professors released a 124-page report finding significant academic misconduct, including plagiarism, fabrication, improper citation, and falsification. In yesterday's decision, the Regents based their 8-1 vote against Churchill on these findings.

FIRE's position on the case is best summarized [by the analysis we issued](#) the day after the first investigative committee found that Churchill's speech was protected. In that brief analysis, we emphasized that Churchill's speech was "almost certainly protected" and if he were later found guilty of other charges, the committee "should not recommend...any greater punishment than that suffered by other members of the Colorado faculty guilty of similar violations...Put simply, Churchill's constitutionally protected speech must have no bearing on any termination proceedings."

We were not willing, however, to go so far as to say that the previous improper investigation of Churchill for protected speech would insulate him against further inquiries into academic misconduct. Our position remains unchanged since the analysis, and comports with both the law and common sense.

What is perhaps more interesting to ponder is the fate of the lawsuit Churchill's attorney has promised to bring. At one level, it seems very straightforward: A committee of professors came to the conclusion that Churchill had engaged in serious academic misconduct. Further, according to a [CU statement on the case](#): "More than 20 tenured faculty members from CU and other institutions served on three separate panels. Each panel conducted a thorough review of his work and faculty involved found evidence showing Professor Churchill engaged in research misconduct, and that it required serious sanction."

Courts are generally loath to second-guess university decisions in academic misconduct cases, for the very commonsense reason that unlike courts, universities are uniquely qualified to adjudicate such cases. (California state courts have provided the most dramatic examples of this deferential reasoning, as seen in cases like [Gupta v. Stanford University](#), 124 Cal. App. 4th 407 (2004).) Viewing the second Churchill investigation in isolation, therefore, would seem to indicate an easy win for the university.

But Churchill's lawyer will almost certainly base his case on the argument that the dismissal on academic misconduct charges was merely a thin excuse for firing Churchill due to his controversial public statements. Here the university has a problem. As I told [The Chronicle of Higher Education](#): "Given that this [investigation] was initially launched because of his public opinions, he's going to have an argument that this was all pretextual." The close relationship between the two investigations and the appearance that Churchill's speech was the reason for the investigations in the first place mean that Churchill's lawsuit will be no cakewalk for the university.

While I usually try to avoid speculating on the actual outcome of a given case, here I find it impossible to resist. My guess would be that Churchill will file numerous state and federal claims, alleging civil rights and due process violations, breach of contract, wrongful termination, and even defamation. Given the genuine question as to whether or not this was a pretextual termination, I believe at least some of these claims would likely survive the university's initial attempts to dismiss the case and even summary judgment. Once that first hurdle is passed, however, settlement seems to be the most likely outcome.

Both sides are likely to fear the public dissemination of the information that stands to be revealed in the discovery process, as "smoking guns" may abound. (For example, I could imagine that internal university communications exist indicating the desire of university administrators to be rid of Churchill by any means available. Meanwhile, who knows what discovery could reveal about Churchill). Furthermore, given that the Regents appear to have based their decision on serious allegations of academic misconduct with wide professional support for this conclusion, Churchill's lawyer cannot be too confident that he would actually win in court.

These factors all militate toward settlement. But in a situation this charged, you really never know. To my surprise, Churchill's lawyer has already indicated an intention to file in state rather than federal court because he believes he might be able to get a friendlier jury in the state system. (And he's on to something: a friendly judge or jury could make all the difference in this case.)

Of course, any attempts to analyze the case rationally run into the fact that Churchill may simply want a high-profile case, even if ultimately unsuccessful. If the goal of litigation is to garner national attention rather than to win, the outcome becomes far harder to predict.

From my perspective, I would hate to see this case actually generate a legal opinion. There is an old saying in the legal profession that "bad facts make bad law," and a complicated case like this has the potential to further muddy the jurisprudential waters with regards to academic freedom and campus free speech. I have seen far too many poorly reasoned opinions in the past few years to have confidence in a court's ability to parse through this fact pattern and issue a narrow ruling that leaves constitutional rights on campus intact. But no matter what the outcome of the forthcoming lawsuit, one thing seems clear: We have not heard the last of Ward Churchill.

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