THE UNIVERSITY OF MICHIGAN
REGENTS COMMUNICATION
ITEM FOR INFORMATION

Subject: First Amendment/Academic Freedom

Most Michigan faculty members have long assumed that when they criticize the University's administration or its policies, such statements are protected from reprisal in large part because they constitute free speech with respect to a public institution. Recently, however, this assumption has been called into question by a series of judicial decisions.

The decisions begin especially with *Garcetti v. Ceballos*, 547 U.S. 410 (2006), in which the U.S. Supreme Court held that a district attorney, who claimed that he had been passed over for promotion because he criticized a warrant's legitimacy, had no free speech defense because his statements were made pursuant to his position as a public employee, rather than as a private citizen.

Although the Supreme Court expressly noted that this reasoning might not be applicable to teachers in public higher education, a number of Circuit Courts have, since *Garcetti*, not hesitated to extend its doctrine to professors. For example, in *Renken v Gregory*, 541 F.3rd 769 (C.A.7, 2008), the Seventh Circuit recently considered a case in which Kevin Renken, a professor at the University of Wisconsin-Milwaukee, criticized the university's alleged mishandling of a federal grant. When his employer then disciplined Renken by reducing his pay and returning the grant, he sued in Federal Court claiming that he had been exercising his First Amendment rights.

The District Court granted summary judgment to the defendants, and this judgment was affirmed by the Seventh Circuit panel, which reasoned that: "In order for a public employee to raise a successful First Amendment claim, he must have spoken in his capacity as a private citizen and not as an employee." Renken's criticism of the University, the Court argued, was clearly part of his employment duties because administering the grant as a principal investigator fell within the teaching and service responsibilities that he was employed to perform. In the words of the court, "Reporting alleged misconduct against an agency over which one has general supervisory responsibility is part of the duties of such an office."

Because Renken had raised his criticism within the University (and not, say, in a local newspaper), the Seventh Circuit felt it did not need to consider "whether his speech addressed a matter of public concern to determine whether it [is] not protected by the First Amendment."

Decisions like *Renken* have raised considerable alarm in higher education circles because they undermine traditional mechanisms of internal debate and self-criticism in public universities; the subject has been featured by the AAUP and in recent *Chronicle of Higher Education* articles. (E.g., Peter Schmidt, "Professors' Freedoms under Assault in the Courts," Feb. 27, 2009; also Leonard M. Niehoff, "Peculiar Marketplace: Applying *Garcetti v. Cabellos* in the Public Higher Education Context," *Journal of College and University Law* 35 (2008) 76.) On the other hand, federal courts are apparently disinclined to become more deeply involved, via the First Amendment, in employment squabbles within public institutions.

This law is all very recent, and the questions it raises will probably ultimately require a Supreme Court decision. In the meantime, however, it seems unlikely that Federal Courts will soon back down from applying *Garcetti* to public universities, although the AAUP is still pressing vigorously in a closely related case from the University of California at Irvine, *Hong v. Grant*, currently before the Ninth Circuit.

SACUA has raised this issue with the President, the Provost, and the General Counsel, and we also discussed the issue last October at the meeting of the faculty Committee on Institutional Cooperation in Ann Arbor, where Robert M. O'Neil of the University of Virginia described the danger posed by current legal developments. We have come to believe quite strongly that the Michigan needs to preempt these developments by shifting away from the First Amendment to a reassertion of academic freedom within the institution.

In particular we recommend that the University follow the example of a proposed policy change at the University of Minnesota, which would expand the definition of academic freedom to cover speech "on matters of public concern as well as on matters related to professional duties and the functioning of the university."
Such a change would have the benefit of discouraging routine use of administrative discipline against professors who raise internal criticisms against this university's policies and their implementation.

(Submitted March, 2009)

Regents' Bylaw 4.04. The Senate Assembly shall serve as the legislative arm of the senate…The assembly shall have power to consider and advise regarding all matters within the jurisdiction of the University Senate which affect the functioning of the University as an institution of higher learning, which concern its obligations to the state and to the community at large, and which relate to its internal organization insofar as such matters of internal organization involve general questions of educational policy.