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NO LICENSE TO LIE Standards for Impartial Judgment In the Churchill Tenure Investigation At CU-Boulder

**A Legal Review Ahead of the Regents' Report
By Jessica Peck Corry and Robert J. Corry, Jr.
March 4, 2005**

- Is there valid cause for the University of Colorado to terminate Ward Churchill, its tenured professor of ethnic studies?
- Would such an action withstand legal scrutiny in court?
- Is the university's current investigation of the Churchill matter, leading up to a March 7 report to the Board of Regents by a committee of three administrators, structured so as to warrant public confidence in its findings and recommendations?

To answer these three questions, Claremont Institute / Colorado asked the authors for a comprehensive review of factual evidence and relevant law. Our review, provided in the following pages, concludes that the first two answers are Yes, but the third answer is No.

We demonstrate that CU not only has the legal right, but also the legal responsibility, to terminate Mr. Churchill's contract. We also show that the ongoing internal investigation is fatally flawed by giving a disproportionate voice in the process to officials who have a personal history with Mr. Churchill.

In order for this important matter to be resolved in the best interest of Colorado citizens and taxpayers, as well as those of CU faculty, staff, and students, the public dialogue ought to include an objective, unbiased inquiry without governmental ties. Such is the aim of the present report.

Its premises are simple: Education is about honoring truth, always and everywhere. Tenure is about keeping your word, a two-way contractual obligation. Hence academic freedom confers no license to lie. By this standard, and nothing less, must all our universities and all their professors be judged.

EXECUTIVE SUMMARY

To maintain its professional integrity and academic legitimacy, both in the eyes of taxpayers and the eyes of its peer institutions, the University of Colorado should terminate Ward Churchill's position as a tenured faculty member.

There are grounds and processes for the university to accomplish this while respecting both the professor's First Amendment rights and its own legal obligation to honor truth and serve the public interest.

The Laws of the Regents provide that tenured faculty can be dismissed for cause, including:

- “demonstrable professional incompetence,
- “neglect of duty,
- “insubordination,
- “conviction of a felony offense or crime involving moral turpitude, or
- “sexual harassment or other conduct which falls below the minimum standards of professional integrity.”

Mr. Churchill's termination is warranted for three of the above five reasons: his demonstrable professional incompetence, his neglect of duty, and his flagrant, persistent failure to meet minimum standards of professional integrity.

It need not and cannot be based on his well-documented disdain for the United States of America – as offensive as that is.

This report highlights specific, egregious, and in some cases, potentially illegal offenses including:

- resume fraud,
- research fraud tied to plagiarism and distortion of historical facts, and
- grade retaliation against students.

There is widespread speculation that upon termination, Mr. Churchill would likely respond with litigation. This report documents ample legal precedent in each of the categories of offenses above, sufficient to provide the university a strong defense in court, should litigation arise.

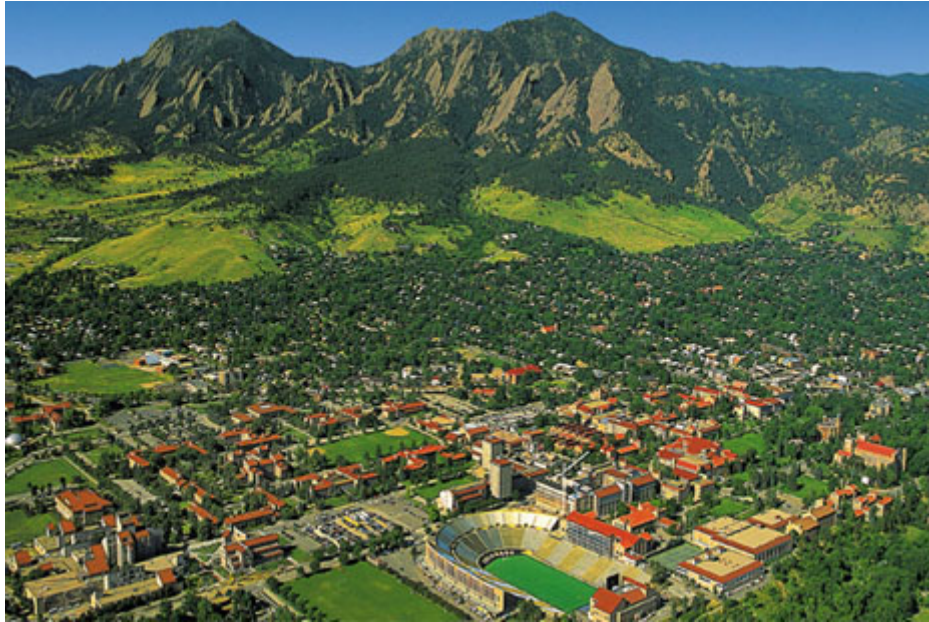
Finally, this report identifies grave flaws in the structure and personnel of the investigation now being conducted by the University of Colorado in this matter.

The Churchill review committee, comprised of three university administrators, not only has the appearance of a strong bias in favor of Mr. Churchill. It also makes a self-defeating refusal to evaluate his actions on any basis other than First Amendment grounds.

Two members of the three-person panel, Todd Gleeson, dean of CU's college of arts and sciences, and CU Chancellor Phil DiStefano, have both previously offered approval of the quality of Mr. Churchill's scholarship.

Notwithstanding any protestations of objectivity by Gleeson and DiStefano toward Prof. Churchill, they should resign or be replaced, in order to remove the appearance of bias and strengthen public confidence.

The panel's investigative charter should also be broadened to include the full range of potential termination causes as outlined here.



The University of Colorado at Boulder Campus

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I. BACKGROUND

The University of Colorado Board of Regents, nine individuals elected by Colorado voters to govern the University of Colorado system, faced a public firestorm in January 2005 following the discovery of an essay written by CU ethnic studies professor Ward Churchill on the afternoon of September 11, 2001. The essay, written just hours after terrorist attacks on Washington, D.C. and New York City, was titled “Some People Push Back: On The Justice of Roosting Chickens” and argued that the attacks were in retaliation for U.S. military actions in 1991 that, according to Churchill, left hundreds of thousands of Iraqi children dead.

The essay, which referred to victims of the attacks as “little Eichmanns,” a comparison to the notorious Nazi who sent thousands to their deaths, raised eyebrows across the country with statements including the following: “The most that can honestly be said about those involved on Sept. 11 (the hijackers) is that they finally responded in kind to some of what this country has dispensed to their people as a matter of course.” It identified individuals killed inside the Pentagon as “military targets” adding “as for those in the World Trade Center, well really, let’s get a grip here, shall we? True enough, they were civilians of a sort. But innocent? Gimme a break.”¹

Understandable calls to terminate Churchill based on the content of this essay quickly gave way to a more logical debate concerning Churchill’s questionable scholarship; plagiarism, resume fraud, ethnic deception, and fraudulent research practices quickly surfaced.

On February 3, 2005, CU Chancellor Phil DiStefano addressed a special meeting of the CU Board of Regents to discuss the university’s response to widespread public outcry about Churchill’s remarks, and questions about the quality of the professor’s scholarship. DiStefano announced that the university would respond by conducting its own internal investigation. “The purpose of this internal review is to determine whether Professor Churchill may have overstepped his bounds as a faculty member, showing cause for dismissal as outlined in the Laws of the Regents,” DiStefano said.

The “primary questions” to be examined, according to DiStefano, included the following: “Does Professor Churchill’s conduct, including his speech, provide any grounds for dismissal for cause, as described in the Regents’ Laws? And if so, is this conduct or speech protected by the First Amendment against University action?” With the investigation constrained to these false parameters, an outcome in Churchill’s favor seemed preordained.

DiStefano announced that he would personally conduct the review, with the aid of two CU deans joining him, including CU Arts and Sciences Dean Todd Gleeson and Law Dean David Getches. Upon completion of the review, DiStefano would determine

¹ Churchill, Ward. “*Some People Push Back: On the Justice of Roosting Chickens.*” Complete text available via the Dark Night Press online at <http://www.darknightpress.org/index.php?i=news&c=recent&view=9>. 11 September 2001 (later amended).

whether to issue a notice of intent to dismiss for cause, other action as appropriate, or no action.² At the time of publication of this report, findings from the review are expected shortly.

In the meantime, legitimate questions have been raised about the ability of DiStefano and Gleeson to objectively evaluate Churchill. In 1998, DiStefano, then a CU vice chancellor, “signed off on glowing evaluations and approved raises for Churchill” according to University documents obtained by *The Denver Post*. Under DiStefano’s supervision, Churchill’s salary exploded from \$56,086 to \$94,242 in few short years.

Gleeson also signed off on the raises and several evaluations saying Churchill “exceeded” or “far exceeded” expectations, offering him the chairmanship of the ethnic studies department, which Churchill accepted in 2003 but subsequently resigned from following recent events. “We are pleased to recognize your outstanding contribution to scholarship and teaching in the area of Native American studies,” Gleeson wrote on May 4, 2003, according to the documents obtained by the *Post*. “Retaining you as a valued member of our faculty is a high priority for both the Department and College,” he added.³

Neither Gleeson nor DiStefano have publicly addressed potential conflicts of interest that arise given their previous interactions with Churchill in light of their current assigned task of investigating him and his actions.

II. THE CASE AGAINST CHURCHILL

Grounds For Dismissal

To maintain its professional integrity and academic legitimacy, both in the eyes of taxpayers and the eyes of its peer institutions, the University of Colorado must fire Ward Churchill. This termination must—and can—be made on grounds other than his often controversial and inflammatory writings.⁴

As the governing body of the University of Colorado, the Board of Regents is empowered to enact laws for the government of the university.⁵ The Laws of the Regents provide that tenured faculty can be dismissed for cause, including “demonstrable

² DiStefano, Phil. “Remarks By Chancellor Phil DiStefano At The CU Board of Regents Special Meeting.” University of Colorado at Boulder News Center. www.colorado.edu/news/. 3 February 2005.

³ Kane, Arthur. “*CU Inquisitors Praised Prof.*” *The Denver Post*. 19 February 2005.

⁴ *Mt. Healthy City Sch. Dist. Board of Educ. v. Doyle*, 429 U.S. 274 (1977). An untenured teacher was not rehired based in substantial part on protected conduct, proper inquiry was whether school district would have reached the same decision in the absence of the protected conduct.

⁵ Colorado statute provides that the Board of Regents “shall appoint the requisite number of professors, tutors, and all other officers; and determine the salaries of such officers,” and “shall remove any officer connected with the university when in its judgment the good of the institution requires it.” C.R.S. 23-10-112 (emphasis added). Professors are included in the definition of “officers,” and the power to hire and fire professors is vested in the Board of Regents, separately elected officials under the Colorado Constitution, Art. IX, 12

professional incompetence, neglect of duty, insubordination, conviction of a felony offense or crime involving moral turpitude, or sexual harassment or other conduct which falls below the minimum standards of professional integrity.”⁶

CU has set a clear precedent of firing professors who have failed to meet at least one of these standards, with two tenured faculty being dismissed for cause from CU in recent years; Igor Gamow for sexual harassment in April 2004, and Mahinder Uberoi in 2000 for unspecified reasons (he had filed numerous lawsuits against CU claiming it had hindered his teaching).⁷

While Churchill’s viewpoint is constitutionally protected, his lack of scholarly methodology and competence is not. In Churchill’s case, dismissal for cause would involve “demonstrable professional incompetence,” “neglect of duty,” or “other conduct which falls below minimum standards of professional integrity.”

The U.S. Supreme Court’s opinion in Sweezy v. New Hampshire expresses the difficulty of demonstrating professional incompetence in the social sciences, where few if any principles are accepted as absolutes, whereas a math professor who maintains that $2 + 2 = 5$ or an astronomy professor who teaches that the earth is flat, would be more easily disproved as spreading absolute falsehoods. As the Sweezy 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 that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. 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.⁸

Despite obstacles to determining such absolutes in Churchill’s field of ethnic studies, it is disturbingly easy to find “demonstrable” professional incompetence, including plagiarism and research fraud. These offenses are not protected under the First Amendment. The offenses are laid out and cited below.

Plagiarism & Research Fraud

Several instances of plagiarism and research fraud on the part of Churchill have recently come to light. According to Dr. Thomas Brown, a Johns Hopkins PhD and assistant professor of sociology at Lamar University in Beaumont, Texas, Churchill’s scholarship is riddled with inaccuracies, falsehoods, and outright fabrications.

⁶ CRS 23-20-112.

⁷ Dodge, Jefferson. “*Fired Professor Challenges Recent Dismissal in Lawsuit*,” Silver & Gold Record, April 10, 2004.

⁸ Sweezy v. New Hampshire, 354 U.S. at 250.

In Dr. Brown's essay, "The Genocide That Wasn't: Ward Churchill's Research Fraud," Dr. Brown specifically calls into question Churchill's use of citations in regard to his theory that the U.S. committed genocide against American Indians.⁹

According to Dr. Brown, Churchill intentionally misused footnotes to bolster his own undocumented analysis. In one example, Churchill cited UCLA scholar Russell Thorton in his contention that U.S. Army doctors knowingly spread smallpox to American Indians, resulting in the loss of at least 125,000 lives.

Churchill's analysis falls apart, however, because the work of Thorton's that Churchill cites makes no reference of the U.S. Army, and furthermore, offers no discussion of the cause of any smallpox outbreak in the Plains Indian nations. Dr. Brown notes that in fact, Thorton's stated views on the smallpox epidemic do not mirror Churchill's, identifying the outbreak not as a conscious effort to exterminate a particular group of people, but rather as an accident.

"One has only to read the sources that Churchill cites to realize the magnitude of his fraudulent claims for them. We are not dealing with a few minor errors here. We are dealing with a story that Churchill has fabricated almost entirely from scratch. The lack of rationality on Churchill's part is mind-boggling," Brown wrote.

This specific instance of research fraud is of particular interest, Brown adds, because Churchill submitted it as part of a trial brief, in which case, he may have committed perjury, a felony under Colorado law.

Churchill first advanced his tale of the Mandan genocide in 1992, in the context of a 'brief supporting a motion to dismiss charges' against Churchill and other activists, who were being tried for having disrupted a Columbus Day parade in Denver the year before. In Churchill's trial brief, he claimed immunity from the state laws under which he was being prosecuted. Churchill made the argument that protesting the parade was tantamount to combating genocide, and was thus his legal duty under international law. Towards that end, in his trial brief, Churchill described several historical examples of genocide against Indians....the only source that Churchill cites in support (of this contention) is Russell Thorton.

Brown is not alone in his outspoken analysis of Churchill's poor scholarship. John LaVelle, a University of New Mexico law professor and member of the Santee Sioux Tribe, has twice taken Churchill to task publicly for inaccuracies in his scholarship.

In a 1996 article appearing in *The American Indian Review*, LaVelle reviewed Churchill's "Indians Are Us: Culture And Genocide In Native North America," dissecting Churchill's written assertion that an 1877 federal law defined Indians by their percentage of Indian blood, and that today's tribes perpetuate similar standards by maintaining stringent membership criteria. LaVelle writes:

⁹ Brown, Thomas. "The Genocide That Wasn't: Ward Churchill's Research Fraud." Lamar University. Beaumont, Texas. Available online at <http://hal.lamar.edu/~browntf/Churchill1.htm>. Last edited 13 February 2005.

The main flaw in this federal/tribal conspiracy theory is that it rests on—and propagates—demonstrably false information concerning the contents and impact of the General Allotment Act. Contrary to Churchill's claims, the General Allotment Act did not require Indians to be "one-half or more degree of Indian blood" in order to be eligible for land allotments. Churchill's asserted General Allotment Act "standard" does not exist anywhere in the Act. This, in turn, explains why Churchill never once provides a citation to any provision of the General Allotment Act (25 U.S. C 331 et seq.) wherein that dubious "standard" can be found.¹⁰

In a 1999 essay published in *Wicazo Sa Review*, an Indian Studies journal, LaVelle identified three instances in the early 1990's where Churchill's work closely mimicked that of other writers. A February 11, 2005 *Rocky Mountain News* article references this essay by LaVelle, providing a side-by-side comparison of a 1993 essay written by Churchill to one written by his ex-wife M. Annette Jaimes in 1993. According to the paper, Churchill cites Jaimes "in a footnote, but made no reference to the similarity of wording nor put the paragraph in quotes."¹¹

CHURCHILL: The Indian Citizenship Act greatly confused the circumstances even of many of the blooded and federally-certified Indians, and imposed legal obligations of citizenship upon them. As for the non-certified, mixed-blood people, their status was finally "clarified": they had been absorbed into the American mainstream at the stroke of a congressional pen. Despite the act having technically left certified Indians occupying the status of citizenship within their own indigenous nation as well as the U.S. (a "dual form" of citizenship so awkward as to be sublime), the juridical door had been opened by which the weight of Indian obligations would begin to accrue more to the U.S. than to themselves. (Struggle For the Land, a volume of essays by Ward Churchill, 1993).

JAIMES: The Indian Citizenship Act greatly confused the circumstances even of many of the blooded and federally certified Indians insofar as it was held to bear legal force, and to carry legal obligations, whether or not any given Indian or group of Indians wished to be a U.S. citizen. As for the host of non-certified, mixed-blood people residing in the U.S., their status was finally "clarified": they had been definitely absorbed into the American mainstream at the stroke of the congressional pen. And, despite the fact that the act technically left certified Indians occupying the status of citizenship in their own indigenous nation as well as in the U.S. (a "dual form" of citizenship so awkward as to be sublime), the juridical door had been opened by which the weight of Indian obligations would begin to accrues to the U.S. than to themselves. (Jaimes' essay was included in *The State of Native America*, 1992).

Other scholars have regularly questioned Churchill's work on the basis of accuracy. "He just makes things up," said Guenter Lewy, a University of Massachusetts professor, in the *Rocky Mountain News*. Like Brown, Lewy specifically disputed Churchill's contention that the Army intentionally spread small pox among American Indians in 1837.¹²

¹⁰ LaVelle, John. "Review Essay: *Indians R Us?*" *The American Indian Quarterly*, Volume 20, Number 1, Winter 1996. Editor, Morris W. Foster, Department of Anthropology, University of Oklahoma. Published by the University of Nebraska Press, pages 109-118.

¹¹ Morson, Berny. "Churchill's Essays Lack Originality, Says N.M. Law Professor." *Rocky Mountain News*. 11 February 2005.

¹² Morrison, Berny. "Churchill's Essays Lack Originality, Says N.M. Law Professor." *Rocky Mountain News*. 11 February 2005.

While both academia and the courts have a strong tradition of protecting the First Amendment, there is no tolerance by either for plagiarism and research fraud committed by faculty.

- In 2004, a Pennsylvania State University math professor was fired for using another professor's work at a 2001 conference, for plagiarizing the work of two of his undergraduate students, for copying a manuscript from two articles published by other scholars, and for plagiarism in a book he was working on at the time of dismissal.¹³
- Yu v. Peterson, 13 F. 3d 1413 (10th Cir. 1993) specifically sets a precedent for dismissal for offenses very similar to Churchill's. In this case, a tenured faculty member of the University of Utah was dismissed after it was determined that he failed to give credit to his co-author in a joint research project. The termination was also based on proof that he claimed authorship for two written works that were produced almost entirely by students.
- Numerous other cases, including King v. University of Minnesota, 774 F. 2d 224 (8th Cir. 1985); Chronopoulos v. University of Minnesota, 520 N.W.2d 437 (Minn App. 1994); and Riggin v. Board of Trustees of Ball State University, 489 N.E. 2d 616 (Ind. Ct. App 1986), uphold the dismissal of a tenured faculty member for professional incompetence as determined on the basis of peer faculty evaluations similar to those above.

Grade Retaliation

Since January 2005, at least two former CU students have come forward to accuse Churchill of grade retaliation. The most widely reported allegation comes from Jodi Rave, a Native American journalist and member of the Mandan-Hidatsa-Arikara Three Affiliated Tribes. While as a student enrolled in one of Churchill's classes, Rave investigated Churchill's tribal membership and ethnic identity, concluding that he offered misleading evidence into his status as a Native American. Rave, who was also enrolled in a journalism class, wrote about her discovery in the student newspaper. When her article came out, she alleges, Churchill dropped her grade from an "A" to a "C-".¹⁴

Another former Churchill student, Kimberly Hickel, also stands behind her allegation that she was a victim of grade retaliation. In a recent on-air interview with radio hosts Dan Caplis and Craig Silverman on 630 KHOW AM Denver, Hickel discussed her experience with Churchill, who was her professor on the day of the Oklahoma City bombing in April 1995. According to Hickel, Churchill professed that in being attacked, that the FBI had "finally gotten what it deserved."

Offended by the remarks, Hickel wrote a letter expressing her disapproval of the remarks to Churchill. For this, she alleges, her grade dropped from what had been an

¹³ Ward, Paula Reed. "PSU Math Professor Fired For Plagiarism." Pittsburgh Post-Gazette. Available online at www.post-gazette.com/pg/04107/301586.stm. 16 April 2004.

¹⁴ Adams, Jim. "Ward Churchill's No Indian." Indian Country Today. 7 February 2005.

“A” mid-semester to her final grade of an “F”. She subsequently complained to the dean of the ethnic studies department and her grade was changed to a “D-”. Hickel adds that she tried further to resolve the situation with Churchill by accepting his offer to re-write her final paper over the summer. After re-writing the paper and submitting it to Churchill, she says he never responded to her phone calls, and that she never received a grade on the revised paper. The “D-”, according to Hickel, remains on her official transcript ten years later. “He’s standing behind free speech, but doesn’t allow his students have free speech,” Hickel told Caplis and Silverman.¹⁵

If these claims can be substantiated, Churchill is in clear violation of CU’s principles of academic freedom, as well as its own recently re-affirmed commitment to protecting ideological diversity in the classroom.¹⁶ On March 19, 2004, CU President Elizabeth Hoffman, on behalf of the CU administration, joined with three other university presidents in Colorado in signing a memorandum of understanding geared toward protecting the academic freedom of students and faculty. Statements affirmed included the following: “No student should be penalized because of political opinions that differ from a professor’s. Every student should feel comfortable in the right to listen critically, and take issue with a professor’s opinions.”¹⁷

Resume Fraud

On multiple occasions in the past, Churchill has publicly proclaimed Native American lineage. He refers to his given name of Ward Churchill as his “colonial name” contrasting it with his “Native American name”, Keezjunnahbeh, which according to Churchill translates into “kind-hearted man.”¹⁸ Churchill’s entire scholarship revolves around his professed ethnicity, which he has defined at some points as Creek and at other times Cherokee, an identity that he is today unable and unwilling to verify or even discuss.

Churchill’s claims to American Indian ethnicity were recently uncovered by Dan Caplis, a KHOW radio show host. They include Churchill’s 1978 original application to CU for a position as a lecturer in Native American studies. As part of this application, he completed a federal affirmative action form, on which he claimed “American Indian” ethnicity. In 1990, according to the documents obtained by Caplis, Churchill again professed American Indian ethnicity when applying for the position of associate professor of American Indian Studies.

“If he is not Native American, if he lied about his ethnicity to get a job in the Equal Opportunity program, I think they could fire him on those grounds alone,” Caplis

¹⁵ Comments made by Kimberly Hickel, former CU student, in on-air interview with Craig Silverman and Dan Caplis. Available online at www.khow.com/hosts/caplis-silverman.html, as of 1 March 2005.

¹⁶ Regents Laws, Article 5, Section D: “Faculty & Academic Freedom.” Available online at www.cu.edu/regents/Laws/Article%205D.htm.

¹⁷ Memorandum of Understanding, signed 19 March 2004, appears as part of SJR 33, which was passed unanimously by the Colorado House and Senate in May 2004.

¹⁸ Brennan, Charlie. “Churchill A Lighting Rod.” [Rocky Mountain News](http://www.rockymountainnews.com). 28 January 2005.

told the *Rocky Mountain News* in a February 11 article.¹⁹ Denver lawyer Craig Skinner concurred with Caplis in the article. “If it a material and international misrepresentation, then the university would be justified in terminating his employment. Within the law, ethnicity is not a subjective determination. If you can determine that you have a relative that was an Indian at the time of the William the Conqueror, that probably doesn’t cut it.”

While Churchill has remained silent on his ethnicity in the last several weeks, he has stated as recently as February 2, 2005, in a *Denver Post* article, that he is three-sixteenths Cherokee. In this same article, he also conceded that his membership in the Keetoowah Cherokee Band was not tied to his ethnicity, but was actually an “associate” membership granted to several non-Keetoowahs, including former President Bill Clinton.

In February, a representative of the Keetowah Bank of Cherokee Indians verified to a *Denver Post* reporter that Churchill was not a full-member of the tribe, which requires one-fourth Cherokee blood, but indeed had been granted “associate” membership. “Mr. Churchill started coming around in 1992 or 1993, said he wrote some books and was a big-time author, and convinced us he could help our people,” Ernestine Berry, a former member of the tribe’s enrollment committee, told *The Denver Post*. Berry added that Churchill never fulfilled his promises to help the tribe. “After he received his associate card, we never heard from him again,” Berry told the *Post*.²⁰

For others questioning Churchill’s identity, the response has been crisp. According to Suzan Shown Harjo, a columnist for Indian Country Today, Churchill said she could “kiss my ---” after Harjo discussed her longstanding claim against Churchill’s alleged “Cherokee/Creek/Cree/Metis ancestry” with a *Rocky Mountain News* reporter. According to Harjo, Churchill also added “Susan Harjo is no more entitled to interrogate me on that score than your average fellow bureaucrat.”²¹

Churchill’s claims to Indian heritage have also been called into question by the American Indian Movement Grand Governing Council, a leading voice for Indian activists. The following statement was written and distributed on February 4, 2005 by council members Dennis J. Banks and Clyde H. Bellecourt of the Ojibwa Tribe:

The sorry part of this (controversy) is Ward Churchill has fraudulently represented himself as an Indian, and a member of the American Indian Movement, a situation that has lifted him into the position of a lecturer on Indian activism. He has used the American Indian Movement's chapter in Denver to attack the leadership of the official American Indian Movement with his misinformation and propaganda campaigns.

Ward Churchill has been masquerading as an Indian for years behind his dark glasses and beaded headband. He waves around an honorary membership card that at one time was issued to anyone by the Keetoowah Tribe of Oklahoma. Former President Bill Clinton and many others received

¹⁹ Brennan, Charlie and Laura Frank. “Churchill met with Gadhafi.” *Rocky Mountain News*, 11 February 2005.

²⁰ Pankratz, Howard. “CU Prof Affirms Indian Heritage,” *The Denver Post*, 3 February 2005.

²¹ Harjo, Suzan Shown. “Churchill Tells Susan Shown Harjo: Kiss My ---.” Available online at www.Indianz.com. 17 February 2005.

these cards, but these cards do not qualify the holder a member of any tribe. He has deceitfully and treacherously fooled innocent and naive Indian community members in Denver, Colo., as well as many other people worldwide. Churchill does not represent, nor does he speak on behalf of the American Indian Movement.²²

University documents confirm that Churchill's professed Native American ethnicity played a key role in the decision to grant him tenure at the University of Colorado. In 1991, despite not having a PhD—a credential considered standard for tenured faculty, Churchill was granted tenure by the CU communications department. According to a February 19 *Rocky Mountain News* article, Michael Pacanowsky, who was in line to become chair of the department at the time, was uncomfortable with the move, but agreed to move forward as part of a larger effort to increase faculty diversity.

According to the article, Pacanowsky noted in documents obtained by the paper that Churchill's work was not "mainstream in our discipline," but that in appointing Churchill, the department would be "making our own contribution to increasing the cultural diversity on campus (Ward is a Native American)."²³

The move was made, according to Pacanowsky, under pressure from CU administrators and because of a fear that Churchill would leave CU for a full professorship he said he had been offered at California State University at Northridge. According to Pacanowsky and three other members of the communications faculty, as reported in the article, "increasing campus diversity" was a factor in granting tenure to Churchill.

Charles Middleton, dean at the time of the College of Arts and Sciences praised the decision, wrote to the faculty: "I think the decision will both enable the department to contribute to the broad agendas of the college and campus with respect to the study of ethnicity and race in America."

According to George Wayne, a former vice president for student academic services at California State University, however, Churchill was never considered a serious candidate in the California system. "He wasn't really a serious candidate because of his lack of credentials," Wayne stated in a February 22 *Rocky Mountain News* article. "They (CU administrators) thought Churchill was a hot prospect. He wasn't hot. The only place he was hot was at CU."²⁴

On the larger issue of falsifying ethnicity as a standard for resume fraud, CU Professor Paul Campos slammed Churchill for using his professed ethnicity to gain professionally. "Churchill has constructed his entire academic career around the claim that he is Native America, yet it turns out that there is no evidence, other than his own statements, that this is the case," wrote Campos in his regular *Rocky Mountain News*

²² Banks, Dennis J. and Clyde H. Bellecourt. "A Statement From the American Indian Movement Grand Governing Council." Available online at www.indiancountry.com/content.cfm?id=109410305. 4 February 2005.

²³ Steers, Stuart and Berney Morson. "Two Departments at CU Rejected Churchill." *Rocky Mountain News*. 19 February 2005.

²⁴ Steers, Stuart. "Ex-Official: No Tenure For Churchill." *Rocky Mountain News*. February 22, 2005.

column. “Why should we care one way or another? We should care because Churchill has used his supposed Indian heritage to bully his way into academia. Indeed Churchill lacks what are normally considered the minimum requirements for a tenure track job at a research university: he never earned a doctorate, and his only degrees are a bachelor’s and master’s from a then-obscure Illinois college.”²⁵

Churchill’s inability or refusal to verify his ethnicity, a key component of his research, and thus his academic resume, could be viewed as resume fraud, for which the Courts have had little tolerance.

- In San Filippo v. Bongiovanni, 30 F. 3d 424 (3rd Cir. 1994), a professor’s termination was upheld due to fraud in submitting applications for scholarly positions. 30 F. 3d. at 430.
- In Bonger v. American Water Works, 789 F. Supp. 1102 (D. Colo. 1992), the court determined that an employee was properly dismissed for resume fraud discovered after she had already been employed. In its decision, the court upheld the validity of her employer’s long-standing policy to dismiss employees found to have committed resume fraud. 789 F. Supp. at 1106.
- In McKennon v. Nashville Banner Publishing Co., (93-1543), 513 U.S. 352 (1995), the U.S. Supreme Court upheld the termination of an employee who argued that she was discriminated against, but who committed wrongdoing that legally justified her termination even if she was discriminated against (the “after-acquired evidence doctrine”).

III. WHY FREE SPEECH IS NOT ABSOLUTE

While Churchill’s speech is protected, its negative effects on others may not be. CU records indicated that Churchill’s out-of-class behavior has been a source of concern for many at the university over the last several years.

According to retired university administrator and journalism professor Joanne Easley Arnold, she butted heads with Churchill in 1989 over a controversy over the naming of a residence hall on campus. She sought to have the building named after a former director of student housing. Churchill, who was not a professor at the time, was seeking to have it named after the Cheyenne and Arapaho tribes, which ultimately it was. “He suggested I should back off my proposal and if I didn’t, I would get hurt,” Arnold told *The Denver Post*. “I was shocked, and that’s why my dean heard about it.” The incident, while reported to the dean of the journalism school, does not appear in Churchill’s official CU record.²⁶

²⁵ Campos, Paul. “*Truth Tricky For Churchill.*” Rocky Mountain News. 8 February 2005.

²⁶ Kane, Arthur. “*Clashes With Churchill Found: CU Records Show Several Complaints About Prof’s Behavior.*” The Denver Post. 17 February 2005.

University documents also indicate that in 1994, two women contacted CU about a March 1994 incident outside the San Francisco Press Club, where Churchill allegedly spit on them after Marie Jaimes, Churchill's wife at the time, attacked them. Churchill has remained silent on the allegation, but his attorney, David Lane, told The Denver Post, "Maybe she needed to be physically attacked. Maybe his wife acted in self-defense. Maybe she needed to be spit on."

The following cases have established limits to free speech of faculty members on America's college campuses.

- In Pickering v. Board of Education, 391 U.S. 563 (1968), the Court set forth a test for identifying the scope of First Amendment protection afforded teachers' out-of-class speech. The Court held that a balance must be struck "between the interest of the (employee), 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." Id. at 568.
- In Scallett v. Rosenblum, 911 F. Supp. 999 (W.D.Va. 1996), a professor was a high profile advocate of "diversity" and "multiculturalism" who alleged he was terminated as a pretext for his speech advocating diversity and hiring more minorities. The Court held that he was properly terminated because of his inability to work with other faculty, his profanity in class, using his classroom for political activism rather than teaching, and creating an atmosphere of fear and distrust among other faculty, and that those reasons were well-documented and none a pretext. 911 F. Supp. at 1007-1008.
- Thorton v. Kaplan, 937 F. Supp. 1441 (D. Colorado 1996), upheld a non-tenured full-time faculty member's firing from Metropolitan State College, a public institution, and rejected all of his First Amendment and civil rights claims, dismissing the case on summary judgment. The Court found that the professor had created a "disastrous rift" among faculty at Metro State, and that this justified his firing despite the fact that the rift was created entirely by his speech. 937 F. Supp. at 1457. He had injected himself into a hiring dispute involving a different candidate and was alleged to have made controversial statements about religion, homosexuality, and women, statements found by the court to be unprotected by the First Amendment. 937 F. Supp. at 1445.

IV. HOW HONEST IS THE CHURCHILL REVIEW?

A Flawed Investigation

The University's internal review of Ward Churchill's scholarship and conduct is flawed in two major ways. First, CU has publicly stated that it will not consider potential misstatements made by Churchill with regard to his ethnicity. On February 8, DiStefano stated that the internal investigation will focus on writings, recorded speeches and interviews "to determine whether there are grounds for his dismissal." Pauline Hale, a CU spokeswoman, told *The Boulder Daily Camera* on the same day, "this investigation is on his scholarly body of work," adding that while officials could decide to examine Churchill's resume later, the issue of "ethnicity strays from the crux of the investigation and can be difficult to determine."²⁷

Refusing to consider falsifications made on federal affirmative action forms and other applications for positions at the university is a significant mistake on the part of the university, considering officials have publicly conceded that Churchill's purported ethnicity played an important -- perhaps the primary -- role in obtaining tenure at CU, since by all objective measurements of qualifications, Churchill was a weak candidate at best.

Second, the investigation is flawed in that at least two members of the three-person panel investigating Churchill have personally endorsed the professor's behavior. The panel is comprised of CU Chancellor Phil DiStefano, CU Arts and Sciences Dean Todd Gleeson, and Law Dean David Getches.²⁸ Both DiStefano and Gleeson are questionable members of the panel given that they have both been intricately involved with Churchill's promotion and tenure at CU. In 1998, DiStefano, then a CU vice chancellor, "signed off on glowing evaluations and approved raises for Churchill" according to documents obtained by *The Denver Post*. Under DiStefano's supervision, Churchill's salary rose from \$56,086 to \$94,242.

Gleeson also signed off on the raises and several evaluations saying Churchill exceeded or far exceeded expectations, offering him the chairmanship of the ethnic studies department, which Churchill accepted in 2003 but subsequently resigned from following recent events. "We are pleased to recognize your outstanding contribution to scholarship and teaching in the area of Native American studies," Gleeson wrote on May 4, 2003, according to the documents obtained by the *Post*. "Retaining you as a valued member of our faculty is a high priority for both the Department and College," he added.²⁹

²⁷ Miller, Vanessa. "CU Says Ethnicity Not Part of Probe." *The Boulder Daily Camera*, 8 February 2005.

²⁸ DiStefano, Phil. "Remarks By Chancellor Phil DiStefano At The CU Board of Regents Special Meeting." University of Colorado at Boulder News Center. www.colorado.edu/news/. 3 February 2005.

²⁹ Kane, Arthur. "CU Inquisitors Praised Prof." *The Denver Post*, 19 February 2005.

Regardless of the review committee's actions regarding Churchill, both DiStefano and Gleeson should be required by the Board of Regents to step down from the committee. Churchill, along with Colorado taxpayers, deserves to have a fair and impartial review of his conduct.

V. CONCLUSION

This report lays out a conclusive legal framework establishing that the University of Colorado can justifiably terminate Churchill from his position as a tenured member of its faculty, while still respecting standards for tenure, the First Amendment, and other constitutionally protected freedoms. Specifically, this determination should not be tied to the content of Churchill's speech, but rather to offenses documented in this report, including plagiarism, research fraud, and other unprofessional conduct.

In terminating Churchill, the University must do so without reference to his protected speech. There are ample other valid reasons to terminate him, and it does not matter that elected officials and others have exercised their own First Amendment rights to condemn Churchill's offensive speech and questionable career. Although "protected conduct closely followed by adverse action may justify an inference of retaliatory motive," Marx v. Schnuck Mkts., 76 F.3d 324, 329 (10th Cir. 1996), "[t]he mere temporal proximity of Plaintiff's protected speech to [the adverse action] is insufficient, without more, to establish retaliatory motive." Butler v. City of Prairie Village, 172 F.3d 736, 746 (10th Cir. 1999); Baca v. Sklar, 04-0210 (10th Cir. 2005).

To prevail in Court, Churchill would need to show a jury of citizens that there was no valid legal reason for his termination, that his plagiarism, grade retaliation, falsified scholarship, and resume fraud were mere pretexts, and that the true reason for his firing was in retaliation for his First Amendment-protected statements. It would be difficult for Churchill to accomplish this.

The internal review currently being undertaken by the University of Colorado into Ward Churchill's scholarship and conduct is flawed; changes must be made to ensure that Churchill receives a fair and impartial investigation. Specifically, the University must consider Churchill's potential falsification of ethnic status on federal affirmative action forms as a form of resume fraud, and ultimately an indicator of his professional incompetence.

In addition, CU Arts and Sciences Dean Todd Gleeson and CU Chancellor Phil DiStefano, both of whom have previously endorsed Churchill's scholarship, should step down from the review committee to ensure that perceptions of bias in favor of the professor are absent.

Ultimately, by terminating Churchill, the University of Colorado will take a strong stand for protecting the academic standards and professionalism that have long defined the University of Colorado. In doing so, administrators will send an essential message to faculty, students, administrators, and taxpayers that quality and legitimate scholarship are demanded by all those who enter the university's gates in the pursuit of knowledge.

The Claremont Institute for the Study of Statesmanship and Political Philosophy was established in Claremont, California in 1979 as a 501(c)(3) nonprofit organization governed by a national board of directors. Its president is Brian T. Kennedy. It publishes the *Claremont Review of Books* and the *Precepts* editorial series, operates several centers on constitutional government, and sponsors the Lincoln Fellowships and Publius Fellowships for the study of law, journalism, and public policy. It opened a Washington DC office in 2003, headed by Washington Fellow William J. Bennett, and a Western states office in 2005, headed by Colorado Fellow John Andrews.

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