

UNIVERSITY OF ILLINOIS URBANA-CHAMPAIGN SENATE
COMMITTEE ON ACADEMIC FREEDOM AND TENURE
(Final; Information)

AF.22.04 Analysis of the Senate Committee on General University Policy Guidelines on Departmental Statements

Several University of Illinois Urbana-Champaign departments have stated a departmental position on contentious issues. The Senate Committee on Academic Freedom and Tenure (AF) was asked to comment on this practice. While AF was formulating a response, the Senate Committee on General University Policy (GP) produced a set of recommendations intended to regulate such statements. The Senate has referred that policy to AF for comment.

Summary

AF finds that:

- Article X.2.a of the *Statutes* states the policy of the University, and protects “all members of the academic staff against influences, from within or without the University of Illinois System, which would restrict the member’s exercise of these freedoms in the member’s area of scholarly interest” and so protects individual members of academic staff from departmental statements if those statements would restrict their exercise of those freedoms.
- Article X.2.a does not protect departments.
- Departmental statements could violate Article X.2.a protections.
- The procedures proposed by GP are not sufficient to prevent departmental statements that will violate Article X.2.a protections.
- The Chancellor may not have any power of prior restraint on departmental statements, and should not attempt to exercise such a power.
- The Chancellor has the power to withdraw and disclaim departmental statements that violate Article X.2.a protections.
- The Chancellor must exercise this power under appropriate circumstances. Failure so to do would represent a violation of University policy, and an important threat to academic freedom.

No part of AF’s opinion should be read as a constraint on individual scholars, who are explicitly protected by Article X.2.a of the *Statutes*.

Reasoning

1. Who has academic freedom

There is considerable literature on what academic freedom is, and the extent to which it is supported in law. AF is in no position to interpret this literature, but does not need to, as the *Statutes* are clear. Article X.2.a states:

It is the policy of the University of Illinois System to maintain and encourage full freedom within the law of inquiry, discourse, teaching, research, and publication and to protect all members of the academic staff against influences, from within or without the University of Illinois System, which would restrict the member's exercise of these freedoms in the member's area of scholarly interest. Academic freedom includes the right to discuss and present scholarly opinions and conclusions both in and outside the classroom. The right to the protection of the University of Illinois System shall not, however, include any right to the services of the University of Illinois System counsel or the counsel's assistants in any governmental or judicial proceedings in which the academic freedom of the staff member may be in issue.

These protections are very strong, and protect a broad set of rights ("full freedom within the law of inquiry, discourse, teaching, research, and publication") of a broad class ("members of academic staff") from a wide range of phenomena ("influences, from within or without the University of Illinois System"). The term "members" means that protections extend to individuals. They exist because the mission of the University is severely harmed if scholars are prevented from pursuing inquiry, discourse, teaching, research and publication freely.

Article IX.4.a, together with Article IX.3.a, give an explicit definition of "members of academic staff". Article IX.4.a states:

The academic staff which conducts the educational program shall consist of the teaching, research, scientific, counseling, and extension staffs; deans and directors of colleges, schools, institutes, and similar university units; editors, librarians, and such other members of the staff as are designated by the president and the chancellors/vice presidents.

Article IX.3.a states:

Other academic ranks recognized within the academic staff are: (1) instructor, senior instructor, lecturer, and senior lecturer, which may be modified by "adjunct," "clinical," or "visiting"; (2) clinical associate, research associate (which may be modified by "postdoctoral"), and teaching associate, each of which may be modified by "adjunct" or "visiting"; (3) clinical assistant, research assistant, teaching assistant, and other graduate assistants.

These lists are long, explicit and detailed. AF concludes that individuals of a kind not identified in these lists are not included in the definition of academic staff. Departments cannot be a “member” and are not included in the list, and so are not protected. A statement by a department is clearly an influence from within the University of Illinois System, and is clearly capable of restricting “the member’s exercise of those freedoms in the members scholarly interest”.

AF notes the AAUP 1940 statement of principles (<https://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>), which asserts that scholars exercising their academic freedom “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.” This makes quite clear that academic freedom extends to scholars individually, but does not allow them to represent themselves as “speaking for the institution.”

2. The threat to academic freedom

AF is not aware of any individual alleging that they have been harmed directly by departmental statements at Illinois. Likely effects are analogous to chilling effects (“[a] chilling effect occurs when individuals seeking to engage in activity protected by the first amendment are deterred from doing so by governmental regulation not specifically directed at that protected activity.” Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the “Chilling Effect,”* 58 B.U. L. REV. 685, 693 (1978) (emphasis omitted);).

AF finds that statements by departments could present a threat to academic freedom of members of the department by chilling. Anyone who might expect benefits — promotion, continued employment, mentoring relationships, recommendation letters and the like — may feel constrained to express only views consistent with the expressed position of the department. A collective commitment by an academic unit to a particular point of view may strongly and improperly constrain the instructional activities of that unit. Students may feel that their academic career will be harmed by a University unless they engage in, regurgitate, or at least simulate, orthodox thinking as expounded by departmental statements. Statements by one department may affect the academic freedom of members of other departments. For example, a graduate student in one department might act as a teaching assistant in another, and so be affected by that department's statements.

The extent to which a departmental statement has chilling effects may depend on the department. For example, a statement to the effect that the only true history is social history may very likely chill if produced by a history department, but is very unlikely to chill if produced by a computer science department.

3. The Chancellor is entitled to act

The Dean and executive committee of the department's college or the Chancellor/Vice President may prevent departments acting in various ways. Article IV.1.b states:

The department has the fullest measure of autonomy consistent with the maintenance of general college and university educational policy and correct academic and administrative relations with other divisions of the university. Should a dispute arise between the department and another unit of the university concerning the proper limits of this autonomy, the department may appeal for a ruling directly to the dean and the executive committee of the college and, when the chancellor/vice president considers it proper, to the chancellor/vice president, who shall make a decision after appropriate consultation.

This section implies that the Dean and executive committee of the college, or, when proper, the Chancellor or Vice President can bind the department to act or not act in some way, because the "decision after appropriate consultation" resolves the "dispute". There is no mention of academic freedom because departments are not protected. The administration is thus empowered to act.

4. Prior restraint

The *Statutes* and analysis above could be read to offer the Chancellor the power to restrain departmental statements before they are issued ("protect ... against influences). AF does not adopt this position, and argues that "maintain and encourage full freedom" suggests that there is no such power. AF advises that, if such a power were demonstrated to exist, it should not be exercised. Relatively few statements should be a source of concern, and the damage caused by prior restraint on statements likely exceeds that caused by disclaiming and withdrawing statements once they have been made.

5. The administration has a duty to act

AF finds that University policy, as expressed by *Statutes*, requires the administration to:

- disclaim departmental statements that threaten academic freedom;
- and can cause such statements to be withdrawn.

This is required even if departmental review asserted that the statement did not threaten academic freedom. This follows because:

- the administration is entitled to act,

- Article X.2.a of the *Statutes* makes it the policy of the university to protect all members of staff from influences within the university that would restrict freedom of inquiry, discourse, teaching, research and publications, and because departmental statements threaten to restrict these freedoms.

Failure of the administration to act is a substantial threat to academic freedom, and a failure of the administration to implement policy as expressed in the *Statutes*.

One might argue that the harm caused by withdrawing and disclaiming departmental statements might outweigh the harm caused by allowing them. AF does not accept this argument. It is the policy of the University of Illinois System that members of academic staff are protected against influences -- in this case, the departmental statements -- within the University that would restrict their academic freedom. This protection is not waived by a department's urgent wish to make such a statement. A department is not so protected, so no balancing is required or even allowed.

One might argue that preventing departments from making statements harms the academic freedom of department members. AF does not accept this argument. Statements that would be unexceptionable if they had come from an individual scholar could pose a serious problem when they come from a department.

6. Procedures recommended by GP

GP.22.04 – GP asked that the Senate adopt policies, given in detail in the appendix, that regulate departmental statements. These recommendations are that departments should not make statements that: do not represent the department (1.1); falsely imply unanimity (1.2); lack a disclaimer (2.1); or are not related to the unit's scope and mission (3.1).

AF believes these recommendations are insufficient to protect academic freedom, and may result in avoidable disputes about academic freedom. The recommendations are necessary — departments really should not make statements that do not meet these tests.

However, the recommendations are not sufficient — there are statements that meet the tests that departments cannot and should not make. A departmental statement “which would restrict the member's exercise of these freedoms in the member's area of scholarly interest” violates the policy of the University as set out in *Statutes* X.2.a, whether it “truly does represent the full membership of the unit (including staff and students)” or not. The department has no academic freedom to make such a statement, and it is the duty of the administration to implement the policy of the University and prevent such statements from being made or withdraw them, whether they “truly ... represent the full membership of the unit (including staff and students)” or not.

The chilling effects described in section would not be prevented by a disclaimer (GP's recommendations). Benefits like promotion, continued employment, mentoring relationships, or recommendation letters largely flow from, and are administered by, the department. Anyone who might expect such benefits is unlikely to be reassured that a department's statement is not the official position of the University of Illinois.

AF recommends that the Senate not adopt GP's recommendations, but notes that they do not present any direct threat to academic freedom. AF is concerned by the risk that departments may feel empowered to make statements that meet the recommendations and in doing so will not take into account the constraints imposed by Article X.2.a. If departments do make such statements, the administration is required to disclaim them and prevent them from recurring, whether they are consistent with GP's recommendations or not.

7. The duty of the Senate

The Senate does not need to act. A department is, among other things, a unit of administration. A department has no academic freedom, and the Dean, executive committee of the college, or Chancellor or Vice President can cause a department to act or not act in some way. This means the administration is empowered to prevent statements that contravene Article X.2.a. The administration is required to do so, because Article X.2.a describes protecting members of academic staff from influences within the University that would restrict their academic freedom as the policy of the University. An administration that knows, but refuses to follow, the policy of the University is a nonsense, and should be robustly criticized and corrected by the Senate, students, and trustees.

The Senate should notify the administration that failing to withdraw, disclaim and prevent statements that violate Article X.2(a) represents a substantial threat to academic freedom.

8. What departmental statements are acceptable

Article X.2.a does not mean that departments cannot make statements. There are statements that departments make and should be able to make as a routine part of everyday business (for example, "A Ph.D. final exam for J. Doe will be held on this date. The examiners are..."). There are also statements that clearly violate Article X.2.a freedoms. But determining whether a departmental statement violates Article X.2.a freedoms can be difficult.

Scholars can and do disagree, but not every disagreement is a scholarly disagreement. Some positions are simply not scholarly, so that a department deprecating those positions is not a violation of academic freedom. For example, a plaintiff cannot claim that a departmental statement violates Article X.2.a because it restricts the freedom of a biologist to explore the view that the earth was created with fossils *in situ*. This view has been expounded at length (*Omphalos*, P.H. Gosse, 1857 and by a competent biologist and naturalist — Gosse was the first

popularizer of the aquarium hobby, and an able observer) but the view that the earth was created with fossils *in situ* is simply not a scholarly position.

Distinguishing between statements that do and do not restrict academic freedom might involve considerable subject matter expertise. AF is unable to offer a crisp rule for identifying problematic statements. Statements that are likely to engage a broad audience or that are intended to support one side in a public controversy, are more likely to present a problem than obscure statements.

Appendix: GP.22.04 Policies in detail

What follows is the text of GP.22.04 offered to AF:

The faculty of the unit should consider carefully whether or not the statement truly does represent the full membership of the unit (including staff and students). In every case, the “we” needs to be identified in relation to who is actually making the decision to put forth the statement, and who is or is not authorized to speak on behalf of others.

Recommendation: Unit bylaws should clearly set out a process to be followed before issuing any such statements as the position of the unit. This process should follow shared governance principles of consultation and participation, and aim to determine the extent to which the statement does represent the position of unit members. (*Referred to as Recommendation 1.1 in the main text*)

Recommendation: In order to avoid giving any false impression of unanimity, in many cases it would be better to issue a statement with a list of signatories rather than to issue a statement purporting to represent the entire department or unit. For example, the statement might say, “We, the undersigned, believe X, Y, Z. We are speaking as individuals and are not representing or speaking for our department (unit, etc).” (*Recommendation 1.2*)

Units should be mindful that any statement on matters of public controversy might be interpreted by some audiences as an official University position. News coverage or other portrayals of a unit’s statement, or when several units post similar statements, may be taken as representative of the wider institution. Moreover, units should carefully consider the potential impact of their statements on current students, who may feel that their views are not represented; and on some prospective students, who might feel that the University would not be a welcoming place for them. For all these reasons, a statement by a unit as such has serious potential consequences that need to be taken into consideration in how it is formulated and expressed.

Recommendation: In order to prevent any misunderstanding, the unit should always add an explicit disclaimer that its statement or position does not represent the University as a whole.

For example, “This departmental (or unit) statement should not be taken as an official position of the University of Illinois Urbana-Champaign.” (*Recommendation 2.1*)

It could be detrimental to the well-being of the unit, and to the University as a whole, if units are seen as taking positions gratuitously on a range of state, national, or international policy matters that have no overt relationship with their academic missions. That could easily become a slippery slope, since there are many, many issues (across the political spectrum) about which faculty might have strong opinions. As individuals, they always have a right to express those views; but committing a department or other unit to such positions must meet a higher bar of relevance.

Recommendation: In cases where a unit, as such, is taking a position on what the AAUP calls “extramural” issues it is strongly recommended that such a statement clarify how the position is directly related to the unit’s academic scope and mission. (*Recommendation 3.1*)

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