

District Court City and County of Denver, Colorado 1437 Bannock Street Denver, Colorado 80202	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
Plaintiff: Ward Churchill v. Defendant(s): University of Colorado, Regents of the University of Colorado, a Colorado body corporate	
Attorneys for Plaintiff: David A. Lane, Atty. Reg. No. 16422 Darold Killmer, Atty. Reg. No. 16056 Qusair Mohamedbhai, Atty. Reg. No. 35390 KILLMER, LANE & NEWMAN, L.L.P. 1543 Champa Street, Suite 400 The Odd Fellows' Hall Denver, CO 80202 Phone Number: (303) 571-1000 Fax Number: (303) 571-1001 E-mail: dlane@killmerlane.com Robert J. Bruce, Atty. Reg. No. 17742 LAWLIS & BRUCE, L.L.C. 1875 Lawrence Street, Suite 750 Denver, CO 80202 Phone Number: (303) 573-5498 Fax Number: (303) 573-5537 E-mail: robertbruce@lawlisbruce.com	Case Number: 06 CV 11473 Division: 6
PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION FOR REINSTATEMENT OF EMPLOYMENT	

Plaintiff, Ward Churchill, by and through his attorneys, David A. Lane and Qusair Mohamedbhai, of the law firm Killmer, Lane & Newman, LLP, and Robert J. Bruce of the law

firm Lawlis & Bruce, LLC, hereby files the following PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION FOR REINSTATEMENT OF EMPLOYMENT:

INTRODUCTION

In reading the Defendants' response to Plaintiff's Motion for Reinstatement, one not familiar with this case would believe that it was *Defendants* who prevailed in this litigation. Indeed, the Defendants are still in a state of denial that a jury found that the University used the alleged defects in Professor Churchill's scholarship as a pretext for firing him when, in reality the actual reason for his termination was unlawful, unconstitutional retaliation for his exercise of free speech in his 9-11 essay. This fact as found by a jury after a month-long trial seems to be completely lost on the Defendants, based both upon the body of their responsive pleading as well as the attached affidavits in support thereof. While arguing that this Court should grant *no* further relief of any kind to Professor Churchill even though a jury found that he had been unlawfully terminated in violation of the Constitution, the Defendants do not cite *even a single case* in support of that novel legal theory. This is simply because no such case exists in the law.

THE LAW MANDATES EQUITABLE RELIEF¹

42 U.S.C. § 2000e, *et seq.*, armed the courts with equitable power to make persons whole for injuries suffered on account of unlawful employment discrimination, *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975), including reinstatement or hiring and back pay. *Id.* at 419 n.11.

Griffith v. Colorado, Div. of Youth Servs., 17 F.3d 1323, 1327 (10th Cir. 1994).

Clearly, this is not a novel proposition of law. The notion that nominal damages vindicate critical constitutional rights which "the law recognizes ... [must] be scrupulously

¹ The notion that reinstatement is virtually the only remedy available to this Court under the law has been extensively briefed in Plaintiff's Motion for Reinstatement and will not be repeated herein.

observed..."*Carey v. Phipus*, 435 U.S. 247, 267 (1978), both damages (nominal or otherwise) and equitable relief are both available to an aggrieved party.

The University argues that the nominal damage award is "a complete repudiation of Professor Churchill's scholarship..." (*Response*, p. 2). The Defendants go on for pages reading (or mis-reading) the jury's collective mind and concluding that CU essentially won the case, thus neither reinstatement nor front pay should be given to Professor Churchill. Somehow missing in the CU response is any reference to the jury's finding that "when it terminated Professor Churchill's employment...a majority of the Board of Regents of the University of Colorado use[ed] Plaintiff's protected speech activity as a substantial or motivating factor in the decision to discharge the Plaintiff from employment."² (Question 2 on the jury form). Defendants also ignore the next inconvenient finding by the jury that "Defendants [have not] shown by a preponderance of the evidence that the Plaintiff would have been dismissed for other reasons even in the absence of the protected speech activity..." (Question 3 on the Jury form). Despite these unequivocal pronouncements by the jury, CU continues recycle to this Court the same losing trial arguments. What is entirely overlooked by CU, however, is that whether Churchill is the best or worst scholar in the world is entirely beside the point given that the only relevant inquiry from this Court's perspective was resolved by the jury when it found that a) CU violated the Constitution of the United States and; b) Churchill would not have been fired but-for this Constitutional violation. This Court must now fashion an equitable remedy tailored to remedy the violation.

² It is thus supremely ironic to read the affidavits by Gleeson and DiStefano in support of the University's position against reinstatement, wherein they are virtually shedding tears about how CU will be unable to teach students "ethical scholarship" when a fraud like Churchill is on campus, after the jury has found that a majority of the Regents lied when they testified under oath that the 9-11 essay played no motivating role (or any role) in the termination decision and this false testimony was backed by Gleeson and DiStefano, and virtually every other CU witness.

Defendants persist in arguing that there is no equitable remedy available when only nominal damages are awarded by a jury. Citing no authority for this novel proposition, Defendants note that each of the cases cited by Plaintiff involved a jury awarding more than nominal damages before invoking equitable relief. This point is completely irrelevant, however, as Defendants can cite *no cases* in support of their proposition. Indeed, in *Fyfe v. Curlee*, 902 F.2d 401, 406 (5th Cir. 1990) in awarding nominal damages and equitable relief, the court held:

We remand this case to the district court for a trial on the appropriate remedy to which Mrs. Fyfe is entitled. Nominal damages of \$1 will be awarded. Mrs. Fyfe is entitled to pursue her case in the district court for reinstatement to her original position, damages for mental anguish and for constructive discharge. Because she is the prevailing party, the district court must also consider her claim for attorneys' fees under 42 U.S.C. § 1988.

This reasoning was cited with approval by the Tenth Circuit in *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248, 1268 (10th Cir. 2004). Not a court in the land has said one word about any legal requirement that more than nominal damages must be awarded for equity to be invoked. Following Defendants' argument to its logical end, a prevailing plaintiff who fully mitigated his damages, yet was the victim of intentional First Amendment retaliation, would not be entitled to equitable relief. This 'CU Doctrine' is made up by CU out of whole cloth.

Conflating damages and equity, CU argues that when damages are nominal, equity plays no role in redressing any wrong suffered.³ Defendants demonstrate no understanding of the distinction between remedies at law – i.e. damages – and equitable remedies such as reinstatement. Their Response ignored the fact that the purpose of equitable relief is to restore

³ The Defendants' Response brief is replete with statements to the effect of "Nominal damages means no reinstatement should occur. The verdict means that he suffered no economic damages which need to be compensated through reinstatement." (response p. 2); "Equity will not compensate non-existent injuries" (p. 2); The jury had the "exclusive power" to decide whether he had a compensable injury. (p. 3); "Reinstatement or other equitable relief in the absence of actual damages is not only unnecessary but unwarranted." (p. 3).

victims of discrimination to a position where they would have been were it not for the unlawful discrimination. *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976). Equitable relief is also referred to as make-whole relief; relief that "is reasonably clear that, had it not been for the discriminatory behavior, the plaintiff would have got (or retained) the job or other employment benefit in issue, and where making the plaintiff whole would not unduly injure innocent third parties." *Evans v. City of Evanston*, 881 F.2d 382, 386 (7th Cir. 1989). "The purpose of equitable relief is to adapt judicial power to the particular set of circumstances before the court." *Alabama v. United States*, 304 F.2d 583, 591 (5th Cir. 1963), *aff'd.*, *mem.*, 371 U.S. 37 (1962).

**EQUITY DOES NOT PERMIT A WRONGDOER TO CONTINUE TO REAP THE
BENEFIT OF ITS WRONGDOING**

CU wrongly terminated Professor Churchill and now it argues that it should be permitted by this Court to continue its wrongdoing. "Rather than merely prohibiting the continuation of unlawful conduct, an equitable decree may be affirmative in nature, compelling defendants to take corrective or remedial action necessary to offset the harmful effects of such conduct." *Id.* at 590; *see also United States v. Texas*, 342 F. Supp. 24 (E.D.Tex.1971), *aff'd.* 466 F.2d 518 (5th Cir. 1972) (*per curiam*) (ordering bilingual-bicultural instruction in the public schools of San Felipe Del Rio Consolidated Independent School District, to remedy *de jure* discrimination against Mexican-American students).

In order to fulfill its basic purposes, equitable relief must be carefully tailored to the violation which has been found...Instead, the remedy invoked must discretely remedy the specific consequences of the defendants' illegal actions...In recapitulation, the scope of the injury determines the substance and extent of the appropriate remedy. *Swann*, 402 U.S. at 16, 91 S. Ct. at 1276.

United States v. Texas, 506 F. Supp. 405, 435 (E.D. Tex. 1981).

These concepts are hardly novel propositions of law. “We are dealing here with the requirements of equity practice with a background of several hundred years of history.” *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944). The Supreme Court has held that equitable “...relief is not punitive but remedial, and it is measured not by the defendant's transgressions but by the plaintiff's needs. Thus, to protect a trade secret, equity will enjoin third persons to whom the secret has been divulged if they have notice of the breach of trust.” *Cleary v. Bolger*, 371 U.S. 392, 410 (1963)(Goldberg, J., concurring). The Court has further stated:

The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.

Hecht Co. v. Bowles, 321 U.S. 321, 329-330 (1944).

There is no case law cited by Defendants for the proposition that there can be no equity absent extensive damages because there is no such case law. Indeed, time and again every court in the land has affirmed precisely the opposite rule.

When all of the elements of a § 1983 liberty claim are shown, a constitutional violation ... is established. An appropriate remedy must then be fashioned. At a minimum, nominal damages would be available.... See *Carey v. Phipps*, 435 U.S. 247, 266 (1978)...In addition, compensatory and equitable relief might be appropriate...

McGhee v. Draper, 639 F.2d 639, 644 (10th Cir.1981).

Specifically in the context of a § 1983 case, as cited in Plaintiff's Motion for

Reinstatement:

Regarding the denial of reinstatement, we agree with plaintiff that reinstatement usually will be granted when a plaintiff prevails in a wrongful discharge case brought under Section 1983. See, e.g., *Reeves v. Claiborne County Bd. of Education*, 828 F.2d 1096, 1101 (5th Cir. 1987) ("Reinstatement is also normally

an integral part of the remedy for a constitutionally impermissible employment action."); *Allen v. Autauga County Bd. of Education*, 685 F.2d 1302, 1305 (11th Cir. 1982) ("Reinstatement is a basic element of the appropriate remedy in wrongful employee discharge cases and, except in extraordinary cases, is required").

Jackson v. Albuquerque, 890 F.2d 225, 233 (10th Cir. 1989). There can be no clearer statement of what the law requires in this case.

It is in fact a *non sequitor* that CU argues at length that the amount of damages awarded somehow shapes the equitable remedy fashioned by this Court. As has been previously stated, the law does not so hold.

In yet another *non sequitor*, perplexingly, Defendants argue that this case has always been about the money. As has previously been stated, equity does not concern itself with damages. This Court heard all argument and testimony, including undersigned counsel's closing arguments. Undersigned counsel told the jury that a nominal damages award was fine because:

What does all this mean? Churchill didn't ask you for a nickel from the witness stand. He said, All I want's my job back. You'll see those verdict forms. You, the jury, don't have the power to give him his job back, because as good as the American justice system is, in my opinion, it's not perfect. Because in America, the dollar solves all problems, okay? If you give -- if you find for Churchill, the Judge has the power to do things. You don't have that power.

(Lane closing arg. P. 29).

Further underscoring the fact that Churchill would be fine with nominal damages

Your job is to figure out the justice of that. I don't know. Is that \$1.50? Is that \$25 million? I don't know what that is. That's your call. 'Cause Ward Churchill did not get on the witness stand and ask you for a penny. But the jury instructions say all you can do is give money, all right?

(Lane closing arg. P. 30). This was a correct statement of the law. Of course had the jury awarded more than nominal damages, Professor Churchill would have been delighted, and of

course he suffered some actual damages in this case, but his own testimony as well as closing argument clearly illustrated that fact that this case ‘is not about the money.’⁴

**THE DEFENDANTS’ EXHIBITS UNDERSCORE THE IMPORTANCE OF
REINSTATEMENT IN THIS CASE**

The affidavits submitted by the Defendants allegedly in support of their novel legal argument that equity does not apply in this case, in reality, underscore the critical importance of this Court reinstating Professor Churchill. Each of the affiants has either testified against Churchill’s position in his 9-11 essay at the trial, or evince in their affidavits and/or trial testimony substantive disputes with him ranging from personal dislikes to professional disagreements. Indeed, the Defendants’ affidavits make the point Churchill seeks to make – that academic discourse involving controversial issues engenders strong passions among all parties, however because this is precisely what the market place of ideas envisions, it is therefore essential that this Court keep the market place open for business through reinstatement. To permit the Defendants to win this case by keeping Churchill off campus sends a powerfully dangerous and wrong message across this nation – speak at your own risk because when you’re fired because of your “protected speech” the courts of the United States won’t make sure you get your job back.

Nowhere in any pleading or affidavit is there *any* acknowledgement of any kind that the Defendants admit that they are now ‘convicted’ civil rights violators who broke the law and lied about it in court. Defendants continue to argue that Churchill is a fraud and guilty of misconduct, thus he should not be reinstated. This completely ignores the fact that the P & T

⁴ Indeed, in another irony, Churchill and his attorneys made a strategic decision in this case not to put on the testimony of an economics expert, even though one had been retained and a final report produced in discovery to CU and used in its response brief, because we did not want the jury to conclude this case was in fact, ‘all about the money.’

committee did not recommend termination for Churchill, and the jury explicitly found that any such research misconduct, if it even exists, would not have warranted his termination.

Philip DiSteffano and Todd Gleeson have proffered affidavits, Exhibits I and J, questioning their ability to work with Professor Churchill in the future. They speculate that they might not be able to give Professor Churchill negative evaluations, assign Professor Churchill to service projects, and that he may fail to teach according to acceptable standards. Indeed, given the facts of this case proving that the University has a history of making up allegations against Churchill and using them as a pretext for terminating him, it is Churchill who has a right to be concerned. Notably, at no point in the time do they state that they will not retaliate against Professor Churchill. Further, they have never acknowledged their critical role in the pretextual witch-hunt which led to Professor Churchill's wrongful termination. Their continued insistence that the University was not at fault demonstrates the need to reinstate Professor Churchill as the only effective remedy to their misconduct. Indeed, the University's reputation for being a bastion of academic freedom has suffered as a result of this affair, however it is a self-inflicted wound. The University is now perceived as having completely abandoned the First Amendment of the United States Constitution at the expense of Professor Churchill and the reputation of a fine institution.

**THE COURT SHOULD NOT RELY ON THE SPECULATION OF TODD GLEESON
AND PHILIP DISTEFFANO REGARDING THE FUTURE**

Unsubstantiated speculation and conjuncture do not justify legal findings. *See Nevin v. Bates*, 141 Colo. 253, 347 P. 2d, 776, 777-78 (1960); *Wark v. McClellan*, 68 P. 2d 574, 578 (Colo. App. 2003). The wild speculation in the affidavits of Todd Gleeson and Philip DiSteffano (who the jury found to be not credible) flies in the face of Churchill's history at CU which

includes: several awards for outstanding performance; Faculty Performance Ratings demonstrating academic qualification; Performance Reviews including approvals of performance by Todd Gleeson; Philip DiSteffano's prior contrary testimony at the P & T hearing; and many others as well as abundant other evidence received at trial extolling Churchill's talents and abilities.

The self-serving affidavits of Philip DiSteffano and Todd Gleeson are of little significance. *See, e.g., Stone v. Union Fire Ins. Co.*, 106 Colo. 522, 107 P. 2d 741, 744 (1940). Their prior praise for Professor Churchill combined with remarkable references which all predate the University's wrongful conduct, however, speak the real truth and only further justify the reinstatement of Professor Churchill to his position as full professor.

The Gleeson and DiStefano affidavits typify CU's attitude about this case. Gleeson cites the fact that a majority of those in ethnic studies did not sign a petition for reinstatement while ignoring the fact that none signed any petition against. He worries that any future negative evaluations would be deemed retaliatory, even though Churchill has never received any negative evaluations. Given CU's history, it is Churchill who should worry that future evaluations will be retaliatory. Showing an utter lack of understanding that CU engaged in constitutional violations, Gleeson and DiStefano opine that because Churchill is a fraud, he cannot evaluate others which would be part of his job, never addressing the fact that Churchill has been evaluating others without comment or concern for decades. They opine that if he comes back, it is "likely" that some junior faculty would leave CU, of course never naming names or submitting any such evidence.

Perhaps the most astonishing aspect of the affidavits is the statement that Churchill's poor reputation would drag down the University as a whole. Given the fact that it was CU which

engaged in the destruction of Churchill's reputation as a pretext for terminating him, it is rich that they now complain that they did too good a job in their illegal mission and therefore should not have to suffer his reinstatement.⁵ Gleeson wrings his hands essentially crying that CU may get sued yet again if they retaliate against Churchill. The solution is simple – don't retaliate. In the most glaring disavowal of wrongdoing, and a supreme irony, he writes that bringing Churchill back will "undermine our efforts to teach students ethical scholarship..." Perhaps Gleeson and DiStefano would benefit from a class on how to follow the law of the land as embodied in the Constitution of the United States. Perhaps a class on the value of academic freedom, or telling the truth in court, or tolerating dissent would have some meaning. The simple fact of the matter, as found by a jury after a month of testimony, is that the *only* wrongdoers in this scenario are the administrators and Regents of the University of Colorado who are now desperately trying to avoid responsibility for their actions.

**CU'S ATTEMPT TO OPPOSE REINSTATEMENT WITH ARGUMENTS REJECTED
BY THE JURY HIGHLIGHTS THE LEGALLY UNTENABLE AND PRECARIOUS
BASIS OF CU'S OPPOSITION**

The Brown and Lavelle affidavits are recycled testimony from the trial. Interestingly, Brown essentially calls Churchill an un-collegial fraud, even though he's never worked with him. In its response to the Motion for Reinstatement, the University continues to assert that Professor Churchill engaged in research misconduct. Its response even goes beyond the basis for termination and inserts issues which the CU's administration had previously deemed irrelevant.

⁵ This is akin to defendants in murder cases who are, by law, hard-pressed to complain that bloody photos depicting their own handiwork are too prejudicial to admit into evidence. *See, e.g. Dodd v. State*, 2004 OK CR 31, 66 (Okla. Crim. App. 2004); *State v. Wade*, 2007 Ohio 1060, P35 (Ohio Ct. App., Montgomery County Mar. 9, 2007); *People v. Goree*, 132 Mich. App. 693, 706 (Mich. Ct. App. 1984); *Jalowiec v. Bradshaw*, 2008 U.S. Dist. LEXIS 18855 (N.D. Ohio Jan. 31, 2008).

Irrelevant evidence cannot be used to defeat Professor Churchill's entitlement to reinstatement. *Palmer v. A.H. Robbins*, 684 P. 2d, 187, 204 (Colo. 1984) (evidence must meet a relevancy threshold); *Olson v. State Farm Mutual Auto Ins., Co.*, 176 P. 3d, 849, 858 (Colo. App. 2007) (mere conclusions not sufficient to suggest material fact); C.R.E. 401 and C.R.E. 403. As a result, their conclusions have no meaningful relevance to the Court's obligation to remedy CU's disregard of the First Amendment to the United States Constitution.

For almost three full weeks, Plaintiff presented abundant expert testimony (for example, Chavitz, Williams, Lombardo, Mann, Cho, Yellowbird, Tinker to name a few) and cross-examined the entire Wessen Committee, contradicting the false allegations that Professor Churchill engaged in academic misconduct. CU's failed to prove to the jury that Churchill was a "falsifier, fabricator, plagiarist" etc., because the jury outright rejected CU's *Mount Healthy* affirmative defense. The jury also rejected claims that Professor Churchill's discussion of the Allotment Act was a basis for discharge. As a result, Elizabeth Cook-Lynne's affidavit has no value. Similarly, the jury rejected claims that Professor Churchill's scholarship concerning the Indian Arts & Crafts Act of 1991 was a legitimate basis for discharge. As a result, the affidavits of Patricia J. King and David Bradley have no value deciding the current motion. The debate over these issues should be in the academic journals, not CU's response in opposition to the preferred remedy of reinstatement. The jury's rejection of CU's *Mount Healthy* defense may preclude this Court from even entertaining the decided issue of fact that Churchill did not engage in academic misconduct, and but for his protected political speech, Churchill would still be employed as a tenured professor.

CU'S INSERTION OF THE ETHNICITY ARGUMENT DEMONSTRATES ONGOING RETALIATION AGAINST CHURCHILL FOR SUCCESSFULLY VINDICATING HIS FEDERALLY PROTECTED RIGHTS.

CU goes on to insert Professor Churchill's ethnicity and alleged prior confrontations into the mix yet again, having previously concluded that it was not relevant to any issues in this case. Despite the fact the previous assertions of the kind made by Chadwick Smith and Susan Shawn Harjo were rejected as irrelevant by the University and conceded to at trial by Philip DiSteffano and dismissed by the University's investigatory committee⁶ the University sees fit to re-sling this mud at Professor Churchill.⁷

Sadly, CU does not stop with a challenge to Professor's Churchill's ethnicity, and the University again inserts a previously rejected claim that Professor Churchill exploited the death of his former wife.⁸ Rhonda Lynne Kelly's assumptions and conclusions about Professor Churchill and his writings only reignite a debate the University rejected years before. Again, the Court should place no weight on affidavits which serve only to distract the Court from the real issue of reinstatement being the preferred remedy for the University's violation of the United States Constitution.

These efforts to fling mud at Professor Churchill can be seen only as a desperate attempt

⁶ See Exhibit 1, Letter from Rosse to DiSteffano dated August 30, 2005. The University already rejected claims of ethnicity as a basis for discipline. Chadwick Smith's affidavit is a smear of Professor Churchill's ethnicity. Professor Churchill could respond by reciting his enrollment number in the Keetoowah Band of Cherokee Indians or introduce his enrollment card into evidence or play the video of his induction ceremony, but that is not necessary because the issues raised by Chadwick Smith are efforts to publically smear Professor Churchill and not relevant to the appropriate remedy for the University's violation of the First Amendment to the United States Constitution.

⁷ The University also suggests that Professor Churchill has a history of disruptive conduct. In support of this claim, the University uses the statements of Susan Shawn Harjo, all of which the University rejected as early as 1994. Those statements were previously rejected as "scurrilous" by the University when they were rejected as false. See Exhibit 2, Memo from Hu-DeHart to Middleton dated October 10, 1994. Despite previously rejecting Ms Harjo as incredible, the University now suggests that her false statements should be relied upon by this Court to deny Professor Churchill the preferred remedy of reinstatement. Its argument is disingenuous in light of its prior conclusion that Professor Churchill did not engage in disruptive conduct as suggested by Ms. Harjo.

⁸ The University was faced with claims of misconduct as alleged by Ms. Kelly before. They were found not to have merit. The University should not now, having lost the case, insert additional trumped up charges to avoid reinstating Professor Churchill.

to avoid two realities: (i) CU fired Professor Churchill in violation of the United States Constitution, and (ii) the jury found that CU would not have fired him for the multiple reasons advanced by CU to justify its illegal conduct. Use of irrelevant and conclusory opinions inserted into affidavits do not change the jury's verdict or modify this Court's obligation to remedy the misconduct.

CONCLUSION

The University relies on the opinion of but one of its 7000-8000 faculty members: R.L. Widman⁹, professors outside the University¹⁰, political activists¹¹, and private parties¹² who express views they claim to oppose the view of Professor Churchill. The opposition to the motion for reinstatement and its emphasis on affidavits from people who oppose Professor Churchill and his views not only disregards CU's own policy statement which encourages exposure to conflicting opinions, but it reveals that the pressures to stifle Academic Freedom from within and from without the University. CU's arguments opposing reinstatement are contrary to the Laws of the Regents¹³, and used to avoid responsibility for the proven violation of the First Amendment to the United States Constitution.

WHEREFORE, the Plaintiff respectfully requests that this Court GRANT his Motion for Reinstatement of Employment.

⁹ Professor Widman states that she has not encountered any member of the faculty who concluded that the P & T panel was "unfair or reached an inaccurate judgment." She fails to mention that a majority of the panel did not recommend dismissal. However, former University President Hank Brown disagreed with the P & T Panel as did the regents when they terminated Professor Churchill from his tenured position. They did so illegally and in violation of the First Amendment of the United States Constitution as determined by a jury in this case. This fact is conveniently omitted by Professor Widman in her support of the University. Professor Widman's conclusion that reinstatement is wrong is, in and of itself, an indictment of the majority vote of the P & T Panel. This one faculty member's unsubstantiated opinions and conclusions cannot be the basis for rejecting the preferred remedy to the University's violation of the United States Constitution.

¹⁰ See Response to Motion for Reinstatement, Exhibits K, M and P.

¹¹ See Response to Motion for Reinstatement, Exhibits N, R and T.

¹² See Response to Motion for Reinstatement, Exhibits S and CC.

¹³ See Exhibit 3, Laws of the Regents, Art 5, Part D, Principles of Academic Freedom

Respectfully submitted this 1st day of June 2009.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing REPLY IN SUPPORT OF HIS MOTION FOR REINSTATEMENT was filed with the Court and served via *LexisNexis File and Serve* on June 1, 2009 to the following:

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August 30, 2005

Via Hand Delivery

Interim Chancellor Philip DiStefano
University of Colorado at Boulder
17 UCB
Boulder, CO 80309

Dear Chancellor DiStefano:

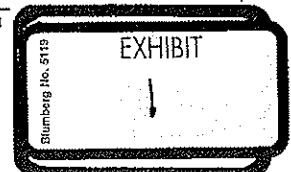
On August 10, 2005 I received from you additional supplemental allegations against Professor Ward Churchill, pertaining to complaints that you received from the family of his deceased wife, Leah Kelly. These allegations include various inaccuracies in the preface of *In My Own Voice*, written by Professor Churchill:

- (1) incorrectly describing the Cherokee and Ojibwe tribes as being matrilineal societies
- (2) inaccurately describing the hospital at which Leah Kelly died, in one case referring to it as Saint Joseph's and in another Saint John's.
- (3) Incorrectly stating that Leah Kelly's parents had attended Indian residential schools.

In accordance with the Standing Committee on Research Misconduct (SCRM) rules and procedures, I have reviewed these allegations to determine whether they should be presented to the SCRM for consideration. After reading the Preface material, the correspondence with the Kelly family that you provided, and the brief reference to these allegations in the report of the your ad hoc committee, I have concluded that these allegations, even if true, do not represent research misconduct.

The rationale for that conclusion has to do with the basis on which the Standing Committee on Research Misconduct (and similar committees in universities nationwide) was created. Fundamentally, the function of the committee as it relates to fabrication, falsification or misrepresentation is to maintain the integrity of the research record on which other scholars build, so that science/research can be cumulative. It is not the function of the committee to address any inaccuracies that may exist in a faculty member's writings

With that in mind, the first issue I considered---as did your ad hoc committee---was whether *In My Voice*, or at least Churchill's preface to this book, is a scholarly book. That is, would other scholars rely on the material in this book to reach their own conclusions, or as a basis for their own research? Or is it primarily a personal biography, or collection of readings, of Leah Kelly? This is somewhat difficult to determine, but I noted that Professor Churchill lists the book on his curriculum vita under "edited books," suggested that he felt it was part of his scholarly record. Moreover, the book is subtitled "Explorations in the Sociopolitical Context of Art and Cinema," and the Kelly family provided some information that suggests that Churchill's intent was to frame the book in the larger context that this subtitle implies.



On the other hand, the cover of the book indicates that in addition to editing the book, Churchill provided a "Biographical Preface." Given that terminology, and considering that the material in question all appeared in the preface rather than in one of the chapters, there is reason to think that the intent of the material in question may not have been scholarly. This conclusion is further supported by the structure and tone of the preface. From pages 9 to 27, and again from pages 53-58, the writing is similar to much of Churchill's writing that I have reviewed in the context of the other allegations. In these pages, Churchill lays out a thesis regarding the effects of colonialism and cultural genocide on Indians, with a particular emphasis on alcoholism, drug abuse, and other dysfunctional consequences. But for the middle section of the chapter, from pages 28 to 53, there is a distinct change in the content, style, and footnoting of the chapter. In these pages he provides a biography of Leah Kelly, from her childhood through her death in 2000. At the end of this material (p. 53) he writes:

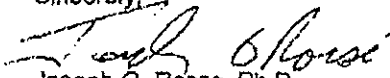
"Notwithstanding my early disclaimer, this essay has been written as it has, partly from my personal need to express the profundity of the sorrow I've incurred in the destruction of Leah. It follows that I've sought somehow to draw readers into sharing in some facet of my sense of loss, to find and feel it for themselves, ultimately and inescapably embracing it as their own. For this I make no apology. None at all. Misery, as they say, loves company (or perhaps demands it)."

In my analysis, it is important to note that each of the specific allegations arose in this more biographical section of the preface. Even if the remainder of the preface has scholarly intent (which I believe it does), errors in the material in the section from pages 28 to 53 seem less likely to represent research misconduct. More specifically:

- The allegation that Churchill inaccurately named the hospital at which Leah Kelly died seems to be accurate on the face of it. In text (p. 49) he describes her being airlifted to St. Joseph's Hospital and in footnote 230 he refers to it as St. Johns, whereas the accident report and death certificate provided by the Kelly family indicates that the hospital was in fact St. Anthony's. While it is easy to understand how her family could be troubled by this carelessness, it does not seem germane in any way to the thesis Churchill was developing in the preface. Thus it does not seem to represent research misconduct.
- The allegation that Churchill incorrectly described Cherokee and Ojibwe society as matrilineal similarly does not seem to be central to the scholarly thesis of the preface. Moreover, it appears quite tangentially, as one sentence in one of 257 footnotes to the preface, and is therefore not especially likely to be noticed by most readers. Even if inaccurate, given its context, it seems unlikely to misguide future research.
- The allegation that Churchill inaccurately described Leah Kelly's parents' schooling seems to have little bearing on Churchill's thesis that these schools represented important (dysfunctional) socializing forces for Indian children. The reference to Leah's parents' schooling seems to comprise less than a paragraph (on page 27) and is not subject to much analysis, whereas Churchill earlier devotes several pages and numerous footnotes to the topic more generally. Once again, the passing reference seems unlikely to significantly affect subsequent scholarship. If another scholar was to rely on this preface to bolster an argument about the effects of Indian residential schools, it seems far more likely that the scholar would cite the earlier, footnoted material than the relatively passing reference to Leah Kelly's parents.

In sum, taken at face value, the allegations suggest carelessness rather than research misconduct. I do not believe they warrant referral to the Standing Committee on Research Misconduct. Consistent with the SCRM rules on confidentiality, I am informing only you and Professor Churchill of this determination; I will leave it your judgment whether you wish to inform the Regents and President Brown, both of whom were copied on your letter to me.

Sincerely,



Joseph G. Rosse, Ph.D.
Chair, Standing Committee on Research Misconduct

Via Campus Mail
() Professor Ward Churchill, Department of Ethnic Studies

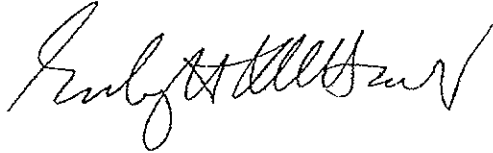
Center for Studies of Ethnicity and Race in America (CSERA)
Afroamerican • American Indian • Asian American • Chicano Studies

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October 10, 1994

To: Charles Middleton, Dean
College of Arts and Sciences

From: Evelyn Hu-DeHart
Professor and Director



Re: Assoc. Prof. Ward Churchill

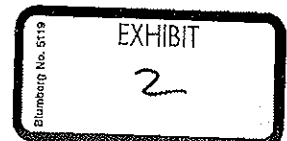
I have read through the material sent to me by the University Counsel's office regarding charges lodged against Associate Professor Ward Churchill.

Prof. Churchill's main detractor is Ms Carole J. Standing Elk of Concord, California, who identifies herself in one of her letters as "Founding Board Member for National AIM [American Indian Movement] & AIM Coordinator for Northern California." In a letter addressed to Marilyn Dacala [sic] of CU, dated December 27, 1993, she enclosed 18 items-- letters and memos, newspaper clippings, unpublished documents--which she annotated and offered as supporting material for her charges against Prof. Churchill. Many of the items were written by Ms Standing Elk herself or issued by the organizations she is closely associated with, i.e. National AIM, California AIM. Several items are copies of letters written by Prof. Churchill to various persons, but none directly to Ms Standing Elk herself. (In these cases, she did not indicate how she obtained copies of such letters.)

A second person to write with charges against Prof. Churchill is Ms Suzan Shown Harjo of the Morning Star Institute, Washington D.C. Her letter was dated March 9, 1994.

After scrutinizing Standing Elk and Harjo's letters and the supporting material forwarded by Standing Elk, I discern three distinct but related charges against Prof. Churchill. I have summarized the charges below, and offer my findings on each.

1. The major charge, from which others stem, is that Prof. Churchill is not a real Indian, and therefore cannot speak for Indian peoples, speak on Indian issues, or teach American Indian studies. The charge is of misrepresentation and fraud.



On the question of Indian identity, Prof. Churchill's detractors claim that what determines who is a "real Indian" hinges on whether one is recognized, i.e. enrolled, by a tribe, preferably a federally recognized tribe. This position is supported by the editors of Indian Country Today, which carried a series on "Indian Writers: Real or Imagined." Among those Indian writers the series profiled was Prof. Churchill.

Prof. Churchill is in fact an enrolled member of the Keetoowah Band of Cherokees (Roll no. R7627), and the Keetoowahs are a federally recognized tribe. This fact should put to rest all the myriad charges against Prof. Churchill stemming from the erroneous perception that he is not a "real Indian."

2. A corollary of charge no. 1 is that, if Prof. Churchill is not a real Indian, he must have obtained his position as professor of American Indian studies by fraud.

The Chancellor responded to this charge in his letter to me of June 24, 1994. He concluded that "there is no basis upon which to pursue the claim that Professor Churchill obtained his tenured faculty position through fraud or false pretense."

3. Another charge, this one lodged by Ms Harjo, is that she "feared for [her] safety" should she step foot on our campus. The suggestion is that somehow Prof. Churchill would assault her. She alleges that she turned down a speaking invitation on our campus due to this fear. Unfortunately, she gave no particulars regarding who issued the invitation and for when, so I was unable to verify the invitation and exactly how she responded. Nor did she provide even one name of a speaker who has been physically assaulted by Prof. Churchill because they disagree on certain issues. As far as I know, no one has ever filed charges against Prof. Churchill for assault on this campus.

As best I can determine, it seems that Ms Harjo has chosen to interpret an exchange of words (harsh though the words may be, and from both sides, I may add) over clearly a major difference of opinion on identity issues as a threat against her personal safety. Unfortunately, it is not possible to investigate this charge since nothing has been perpetrated. I do know, however, that in 1992, before she sent her letter to the university, she attended two conferences on our campus organized by Prof. Vine Deloria. This information was given to me by Prof. Deloria himself. Prof. Churchill was present at one of the conferences, which took place in November. Prof. Deward Walker of CSERA was present at the same conference and saw Prof. Churchill there. Prof. Churchill and Ms. Harjo were in the same room for hours and

encountered each other on the sidewalk, but apparently exchanged no words and had no physical contact. Hence, the last time Ms Harjo stepped foot on our campus and was in close physical proximity to Prof. Churchill, nothing of consequence happened to her.

As an extension of her own alleged fears, Ms Harjo expressed concern for the wellbeing of students at CU who come into contact with Prof. Churchill and are taught by him. She claims to be especially concerned about American Indian students.

To this, I can answer that Prof. Churchill is one of the most honored teachers and mentors on our campus in recent years, recognized by both Indian and non-Indian students as one of the best. His teaching evaluations are consistently in the A to A+ range, even in large classes of 75 or more students. This is an achievement rivaled by few of his more than 1000 full time colleagues on our campus. This year, he was one of only 3 recipients of the coveted Boulder Faculty Assembly teaching awards, given to him by his peers. As for Indian students, the Oyate Indian Student Organization has chosen to award him not one, but three certificates of appreciation during the past decade or so, beginning with his tenure as director of the University Learning Center in Student Services, to his current position as professor of American Indian Studies in CSERA.

4. One final charge, which I was unable to locate in any of the written documents submitted against Prof. Churchill, but which I understand had been conveyed by his detractors verbally to the university, and which the Chancellor in his letter to me of June 24, 1994, instructed me to investigate, is his "alleged misuse of university resources." I find no evidence to support this charge. Since joining the CSERA faculty, Ward Churchill uses only plain white paper, his home address, and his name without his university title or affiliation in any non-university related business. He has not traveled at university expense. He has the lowest xerox charge of any faculty member in CSERA, the lowest phone charge, and practically never uses the university's long distance line. He uses his office at CSERA only to conduct university business, such as meet with students.

Conclusion and Comments:

There is no doubt that Prof. Churchill is a prolific scholar and an unconventional one. In many ways, he is the very definition of a "public intellectual." Given the nature of the issues he chooses to investigate and write on, he is often and by necessity controversial. In some of his writings, there is clearly an edge and a polemical tone. He also writes in different styles for different venues--

journalistic, polemical, academic--and his analysis is always sharp, incisive, and, where research is concerned, meticulously documented. He has been honored locally and nationally for his scholarship and his writings, including winning the Dean's Social Science Writing award two years ago.

In addition, Prof. Churchill has been honored numerous times and in numerous ways as a good citizen of the university. He is the recipient of the President's University Service Award, the Thomas Jefferson Award, and the Robert L. Stearns Award.

In sum, had Prof. Churchill been an abusive person, an unproductive scholar, a non-effective teacher, he would not have received all the above awards from practically every group and every corner of this university and this campus. It is my finding that he has fully and conscientiously discharged his functions and fulfilled his obligations to the University of Colorado at Boulder in his capacity as a tenured professor, and he has done so with distinction in teaching, research and service.

It is also clear that Prof. Churchill maintains an active political life outside his career as a scholar and teacher in the academy. Since his association with CSERA as a faculty member, he has kept these two lives scrupulously distinct. For example, when writing as Ward Churchill, Indian activist and at times, as co-director of Colorado AIM, he uses plain paper and his home address, and never uses his university title below his signature. It is in his political life that Mr. Ward Churchill has incurred the wrath of other activists in the Indian world--Ms Standing Elk, Ms Harjo, Mr. David Bradley, and most especially Mr. Vernon Bellecourt--who disagree with him and his allies on a number of very important issues in the American Indian world, such as the American Indian Movement (AIM), the Leonard Peltier Defense movement, the question of American Indian identity, the Federal Indian Art Law.

As is often the nature of such intense political conflicts, personalities and personal issues are inevitably drawn in. However, I do not believe that the University has any business, nor any need, to become a party to this internecine political war in the Indian world. Yet, it seems to me that is precisely what Prof. Churchill's political opponents wish to happen.

It is also significant to note that the local Indian community has not joined in the attack on Ward Churchill; in fact, in 1993, the Denver/Boulder chapter of Colorado AIM, which is not allied with the Standing Elk/Bellecourt National AIM, reaffirmed by unanimous vote of the entire

5

membership both Ward Churchill and Glenn Morris (tenured professor at CU-Denver and Presidential Teaching Scholar) as co-directors. By contrast, all Churchill's leading detractors are from out of state, although one brief letter attacking him has been received from one Cahuilla Red Elk (Margaret Martinez), who identifies herself as a student at CU Colorado Springs and "Director of the Colorado American Indian Movement" (the group allied with Bellecourt's National AIM), and one critical article was published in the Colorado Daily by a Boulder campus Journalism student named Jodi Rave.

In the final analysis, once Ward Churchill's political detractors are apprised of the fact that he is an enrolled member of a federally recognized tribe, they would have to withdraw their major charges against him. They would then have to deal more squarely with what many suspect is the real underlying motive for the attacks, which is control over certain political organizations and issues of the American Indian world, as well as accept the fact that Ward Churchill has every right as they do to the constitutionally guaranteed exercise of free speech and association.

My recommendation to you, the Dean, is to clear Prof. Churchill of these scurrilous charges. As Prof. Churchill's direct supervisor, I will remind him to continue to clearly separate his university responsibilities and functions from his outside and private political activities, and avoid at all possible costs even the appearance of conflict of interest, misuse of public resources or abuse of the public trust that is vested in him as a tenured professor.

EHD/



ARTICLE 5: FACULTY

PART D: PRINCIPLES OF ACADEMIC FREEDOM

5.D.1 Intent and Definition

(A) The University of Colorado was created and is maintained to afford men and women a liberal education in the several branches of literature, arts, sciences and the professions. These aims can be achieved only in that atmosphere of free inquiry and discussion which has become a tradition of universities and is called "academic freedom"

(B) For this purpose, 'academic freedom' is defined as the freedom to inquire, discover, publish and teach truth as the faculty member sees it, subject to no control or authority save the control and authority of the rational methods by which truth is established.

(C) Within the bounds of this definition, academic freedom requires that members of the faculty must have complete freedom to study, to learn, to do research, and to communicate the results of these pursuits to others. The students likewise must have freedom of study and discussion. The fullest exposure to conflicting opinions is the best insurance against error.

(D) Academic freedom does not give either faculty or students the right to disregard the standards of conduct outlined in part B of article 7 of these Laws.

(E) All members of the academic community have a responsibility to protect the university as a forum for the free expression of ideas.

5.D.2 Faculty Responsibility

(A) Faculty members have the responsibility to maintain competence, exert themselves to the limit of their intellectual capacities in scholarship, research, writing and speaking; and to act on and off the campus with integrity and in accordance with the highest standards of their profession. While they fulfill this responsibility, their efforts should not be subjected to direct or indirect pressures or interference from within the university, and the university will resist to the utmost such pressures or interference when exerted from without.

(B) Faculty members can meet their responsibilities only when they have confidence that their work will be judged on its merits alone. For this reason the appointment, reappointment, promotion, and tenure of faculty members should be based primarily on the individual's ability in teaching, research/creative work and service and should not be influenced by such extrinsic considerations as political, social, or religious views, or views concerning departmental or university operation or administration. A disciplinary action against a faculty member, including dismissal for cause of faculty, should not be influenced by such extrinsic consideration.

(C) The faculty member is entitled to freedom in the classroom in discussing the subject, but should be careful not to introduce into teaching controversial matter that has no relation to the subject.

(D) Faculty members are citizens, members of learned professions, and members of the academic leadership of an educational institution. When speaking or writing as citizens, they should be free from university censorship or discipline, but their special position in the community imposes special obligations. As faculty members however, they should remember that the public may judge their profession and institution by their utterances. Hence faculty members should be accurate at all times, should exercise appropriate restraint and show respect for the opinions of others, and when speaking or writing as private citizens should make every effort to indicate that they are not speaking for the institution.

(Amended 10/26/90, 5/6/93, 8/7/97, 10/16/97, 02/19/98, 03/19/98, 08/03/00, and 10/10/02. Appendix A Standards, Processes and Procedures Document shall remain in effect until rewritten as a regent policy.)

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No calendar event scheduled

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Division: 6 - Division 6

Judge: Naves, Larry J

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