

## The University vs. Academic Freedom

David R. Legates

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In November 2009, approximately 61 MB of computer files, including 1,079 e-mails and 72 electronic documents from the servers at the Climatic Research Unit at the University of East Anglia (UEA) in Norwich, UK, were anonymously uploaded to the Internet. These files confirmed what many suspected—that climate scientists at UEA had colluded with other scientists and editors to deny scientists who dissent from anthropogenic global warming alarmism the right to publish their ideas.<sup>1</sup>

The e-mails made clear, for example, that an attack on the journal *Climate Research* was orchestrated because it had published a paper criticizing an aspect of climate science.<sup>2</sup> Phil Jones, director of the Climatic Research Unit and professor of environmental sciences at UEA, wrote in one of his e-mails:

I will be emailing the journal [*Climate Research*] to tell them I'm having nothing more to do with it until they rid themselves of this troublesome editor....The responsible one for this is a well-known skeptic in [New Zealand]. He has let a few papers through by Michaels and Gray [scientists

<sup>1</sup>For background, see “Global Warming With the Lid Off,” *Wall Street Journal*, November 24, 2009, <http://on.wsj.com/12iJaBJ>, and Steven F. Hayward, “Scientists Behaving Badly,” *Weekly Standard*, December 14, 2009, <http://www.weeklystandard.com/article/272305>.

<sup>2</sup>See *Climate History and the Science Underlying Fate, Transport, and Health Effects of Mercury Emissions: Hearing before the Committee on Environment and Public Works*, 108th Cong. (July 29, 2003) (statement of Professor David R. Legates, Director, Center for Climatic Research, University of Delaware), <http://www.gpo.gov/fdsys/pkg/CHRG-108shrg92381/pdf/CHRG-108shrg92381.pdf>.

**David R. Legates** is professor of climatology in the College of Earth, Ocean, and Environment, University of Delaware, Newark, DE 19716; [legates@udel.edu](mailto:legates@udel.edu). He has been invited to speak to the U.S. Senate Committee on the Environment and Public Works on three separate occasions; one included a discussion of academic freedom.

who expressed dissent with anthropogenic global warming alarmism] in the past.<sup>3</sup>

To which Michael E. Mann, a climate scientist from the University of Virginia, responded:

I think we have to stop considering *Climate Research* as a legitimate peer-reviewed journal. Perhaps we should encourage our colleagues in the climate research community to no longer submit to, or cite papers in, this journal. We would also need to consider what we tell or request of our more reasonable colleagues who currently sit on the editorial board....What do others think?<sup>4</sup>

My own research was not immune. A colleague and I had written a paper published in *Geophysical Research Letters* in 1997 that was critical of the research methods employed by Thomas Wigley, University of Adelaide climate scientist who'd served as UEA Climatic Research Unit director from 1978 to 1993, and Benjamin Santer, Lawrence Livermore National Laboratory climate researcher and former UEA Climatic Research Unit researcher.<sup>5</sup> Their research had been used to justify the phrase "the balance of evidence suggests a discernible human influence on global climate," which was inserted into the *Second Assessment Report* of the Intergovernmental Panel on Climate Change (IPCC) by Santer, who was the section's lead author.<sup>6</sup>

Wigley noted in an e-mail to a group of scientists that after he complained to the journal, the senior editor agreed that "poor judgment" was used in not asking either of them to review our article for publication.<sup>7</sup> Although the journal subsequently published Wigley and Santer's rejoinder to our paper, it refused to publish our rebuttal, claiming that it added nothing new to the discussion. Wigley's e-mail reveals, however, that the authors colluded to prevent me from

<sup>3</sup>Phil Jones, e-mail message to Michael E. Mann et al., March 11, 2003, Climategate FOIA Grepper, EcoWho: Your Guide to Being Eco Friendly & Sustainable, <http://www.ecowho.com/foia.php?file=1047390562.txt>

<sup>4</sup>Michael Mann, response to e-mail message of Phil Jones, March 11, 2003, Climategate FOIA Grepper, EcoWho: Your Guide to Being Eco Friendly & Sustainable, <http://www.ecowho.com/foia.php?file=1047388489.txt>.

<sup>5</sup>David R. Legates and Robert E. Davis, "The Continuing Search for an Anthropogenic Climate Change Signal: Limitations of Correlation-Based Approaches," *Geophysical Research Letters* 24 no. 18 (1997): 2319–22.

<sup>6</sup>J.T. Houghton et al., eds., *Climate Change 1995: The Science of Climate Change: Contribution of Working Group I to the Second Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge: Cambridge University Press, 1996), 4–5.

<sup>7</sup>Tom Wigley, e-mail message to Phil Jones et al., April 3, 2003, Climategate FOIA Grepper, EcoWho: Your Guide to Being Eco Friendly & Sustainable, <http://www.ecowho.com/foia.php?file=1051156418.txt>.

publishing our response, in the expectation that the absence of a rebuttal would help strengthen the case for the IPCC authors in the next assessment report.

In response to these uploaded data, two Greenpeace research fellows, Kert Davies and James Towbridge, sent a FOIA (Freedom of Information Act)<sup>8</sup> request in December 2009 to four universities targeting seven climate scientists. I was one. My request read, in part:

In light of the recent *illegal* revelation of e-mails from climate scientists at the University of East Anglia in England and the historical interactions of Dr. David Legates with the authors of those e-mails, Greenpeace endeavors to bring greater transparency to the climate science discussion of the past decade through this *legal* FOIA request for the e-mail correspondence and financial and conflict-of-interest disclosures of Dr. Legates.<sup>9</sup> (emphasis in original)

The State of Delaware statute exempts the University of Delaware (UD) from FOIA disclosure except for items relating to the operation and meetings of the board of trustees and documents relating to the expenditure of public funds.<sup>10</sup> UD had no legal obligation to provide any documents and Greenpeace had no legal right to conduct a fishing expedition for e-mail correspondence and financial/conflict of interest disclosures of university faculty.

FOIA statutes were enacted to provide government transparency. Consequently, the State of Delaware FOIA statute regarding UD is wholly appropriate. The public has the right to know that their funds are spent properly and how the university conducts business that affects the welfare of the state. But beyond specific research projects funded by the state, faculty e-mails and other materials are and should be off limits, unless a valid question of research misconduct is raised.

But if a state partially funds faculty salaries, do activists have the right to examine their e-mails and research documents? For more than a century, academic freedom and tenure have been among the basic foundations of academia. As the American Association of University Professors (AAUP) stated in its 1940 Statement of Principles on Academic Freedom and Tenure, higher education focuses on the common good, which depends upon an honest search

<sup>8</sup>Freedom of Information Act, <http://www.foia.gov/>.

<sup>9</sup>Kert Davies and James Towbridge, Greenpeace, Washington, DC, letter to the Office of the Delaware State Climatologist, December 16, 2009.

<sup>10</sup>State of Delaware, "Title 29, State Government General Regulations for State Agencies, Chapter 100, Freedom of Information Act," The Delaware Code Online, <http://delcode.delaware.gov/title29/c100/>.

for truth.<sup>11</sup> Scientists should expect to be free to conduct their research and to publish the results. This right is protected by tenure, which grants faculty the assurance that they can take positions or pursue avenues of research that diverge from the mainstream and can disagree openly with the majority or the reigning authority without fear of reprisal. Moreover, tenure protects faculty from both external and internal pressures, thereby facilitating a more open flow of ideas by allowing the pursuit of controversial ideas and topics to create a diversity of opinions.

Subjecting faculty to FOIA investigations necessarily infringes upon academic freedom, especially for faculty who take controversial positions. Activists will continue to misuse the information they obtain to harass and ridicule their opponents publicly. The potential for abuse is endless.

But might a university use FOIA requests to bully its own faculty—even if that violates the university’s academic freedom policy?

Consider the University of Virginia (UVA), where retired research professor of environmental sciences Patrick J. Michaels was another target of the December 2009 Greenpeace FOIAs.<sup>12</sup> After receiving the Greenpeace request, UVA began to comply. But when Virginia Delegate Bob Marshall requested identical materials from the above-mentioned Michael E. Mann, who had been a member of the same UVA environmental sciences department from 1999 to 2005, a public outcry ensued. Although UVA purportedly destroys all e-mails when a professor leaves the university, it still held both Michaels’s and Mann’s e-mails. Consequently, the university itself, the AAUP, the American Meteorological Society, and the American Geophysical Union launched a public campaign to prevent the release of Mann’s e-mails. By contrast, none of these institutions or organizations objected to the release of Michaels’s e-mails.

A similar scenario played out with my Greenpeace FOIA at UD.<sup>13</sup> Shortly after receiving the FOIA from Greenpeace, I met with then-UD vice president and general counsel Lawrence White. White informed me that although Greenpeace had only requested information relating to my position as the Delaware State

<sup>11</sup>American Association of University Professors, 1940 Statement on Principles on Academic Freedom and Tenure, <http://aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

<sup>12</sup>Amanda Carey, “Is the University of Virginia Biased against Professors That Challenge the Idea of Global Warming?” *Daily Caller*, February 1, 2011, <http://dailycaller.com/2011/02/01/is-the-university-of-virginia-biased-against-professors-that-challenge-the-idea-of-global-warming/>.

<sup>13</sup>Jan H. Blits, “Climate-Change Shenanigans at the U. of Delaware,” Short Takes, *Minding the Campus*, May 19, 2014, [http://www.mindingthecampus.org/2014/05/climate-change\\_shenanigans\\_at\\_/](http://www.mindingthecampus.org/2014/05/climate-change_shenanigans_at_/); Paul Driessen, “Just Who Is Waging the ‘War on Science’?” *Townhall.com*, July 26, 2014, <http://townhall.com/columnists/pauldriessen/2014/07/26/just-who-is-waging-the-war-on-science-n1866559>.

Climatologist (for which I received no state funding), I was required to turn over *all* documents in my possession—whether they were produced through the State Climate Office or elsewhere, whether created on university time or through extramural consulting work, whether generated on university computers or my personal computer, whether transmitted via university e-mail or personal e-mail, or whether stored in hardcopy files or on computer disks. I was informed that as a faculty member I was required to comply with this demand by a senior university official.

Before White had even seen any of my documents, he informed Greenpeace that many e-mails and boxes of documents existed and would be sent to them as soon as they could be processed. But subsequent to the Greenpeace FOIA request, the Competitive Enterprise Institute (CEI)—a public policy organization dedicated to limited government, free enterprise, and individual liberty—made the same all-encompassing request of three other UD faculty, two of whom were members (one retired) of my home department. Although White told CEI that “because the information you seek does not relate to the expenditure of public funds, the University respectfully declines your records request,” he nevertheless proceeded to comply with the Greenpeace FOIA request focused on me.<sup>14</sup>

I subsequently met with White to obtain an explanation of the unequal treatment. He explained that I did not understand the law. Although the law may not *require* the university to produce e-mails and documents, White stated, it does not *prohibit* him, as general counsel, from requiring me to produce them for his perusal and potential release to Greenpeace. Again, White exhorted me to turn over all the documentation he requested immediately or risk termination for adequate cause (i.e., gross irresponsibility).

I hired legal counsel. After discussion with my attorney, White wrote to CEI that he wished to retract his former statement and “reconsider the substance of [their] FOIA request” because his initial response “did not take sufficient account of the legal analysis required under the Act.”<sup>15</sup> White assured me that the CEI FOIA request would be handled in the same way as my Greenpeace FOIA request, but that I must provide him access to my e-mails and materials immediately. Since I had hired an attorney, the dean of my college, Nancy Targett, told me that I would no longer be supported by my college—and I was terminated as Delaware State Climatologist.

<sup>14</sup>Lawrence White, vice president and general counsel, University of Delaware, e-mail message to Chris Horner, Competitive Enterprise Institute, copy to author, February 3, 2010.

<sup>15</sup>Lawrence White, vice president and general counsel, University of Delaware, e-mail message to Chris Horner, Competitive Enterprise Institute, copy to author, February 9, 2010.

While this unfolded, White published an article in the *Chronicle of Higher Education* regarding academic freedom in which he stated:

Could a speaker conceivably utter words so hurtful and so malicious that college officials could justifiably prohibit those words or punish the speaker for uttering them? Unless and until the Supreme Court changes the law, the answer pretty clearly will be no.<sup>16</sup>

Two months later, White was one of three panelists heading a special AAUP workshop to address possible threats to academia raised by the 2006 *Garcetti v. Ceballos* Supreme Court decision.<sup>17</sup> In the subsequent report, an AAUP subcommittee concluded that academic freedom “was a principle vital to the effective functioning of institutions of higher learning,” and “urge[d] faculty groups to minimize the dangers of recent court rulings and avert their recurrence” by making “administrators and governing boards aware of the risks to institutional health and to higher education generally” if doctrines “to curtail intramural faculty speech” are employed.<sup>18</sup> Ironically, the danger White warned against was exactly the tactic he used against me.

As a result of the *Garcetti* decision, the UD faculty senate passed an amendment to the faculty handbook to protect faculty speech. Then-provost Tom Apple proclaimed,

The University of Delaware is taking a leadership position on academic freedom....I strongly support the recent action by the Faculty Senate which ensures that faculty are free to speak their mind without fear of reprisal unless their statements or actions are unethical or incompetent. Academic freedom is essential to lively and open debate and discussion.<sup>19</sup>

The limiting phrase here is “unethical or incompetent.” Only if speech is truly unethical or incompetent may the university justifiably burden it, but the

<sup>16</sup>Lawrence White, “Free-Speech Ruling’s Impact on Colleges” Opinions & Ideas, Commentary, *Chronicle of Higher Education*, April 27, 2010, <http://chronicle.com/article/Free-Speech-Rulings-Impact-on/65266/>.

<sup>17</sup>*Garcetti v. Ceballos* (No. 04-473) 361 F. 3d 1168, reversed and remanded, available at <https://www.law.cornell.edu/supct/html/04-473.ZS.html>. In this decision, the Supreme Court ruled 5 to 4 that since remarks made by a district attorney were pursuant to his position as a public employee, and not as a private citizen, they were therefore not protected by the First Amendment.

<sup>18</sup>Robert M. O’Neil et al., executive summary, *Protecting an Independent Faculty Voice: Academic Freedom after Garcetti v. Ceballos* (Washington, DC: American Association of University Professors, 2009), <http://www.aaup.org/AAUP/comm/rep/A/postgarcettireport.htm>.

<sup>19</sup>Chris Meidanis, “Professors’ Free Speech Protected,” *Review*, November 16, 2010, 1, 11, [http://issuu.com/udreview/docs/issue\\_12/1](http://issuu.com/udreview/docs/issue_12/1).

university does not have the right to make that determination solely because it disagrees with what is said or written.

At UVA, the AAUP and several professional organizations urged the university to “use every legal avenue at your disposal to resist providing the information demanded.” They argued that “documents and email communications that were part of an ongoing scientific discussion might be taken out of that context, and used to create an impression of wrongdoing.” And concluded that “it is the University’s obligation to protect academic freedom by seeing that legal tools such as this...are not used to intimidate scientists whose methods or conclusions are controversial.”<sup>20</sup>

During my interactions with White regarding the Greenpeace FOIA request, I sent an e-mail to Joan DelFattore, then-president of the UD chapter of the AAUP. DelFattore had written on academic freedom and later published an article in which she warned that “once an administration silences any speech, it may be assumed that the university is endorsing whatever speech it fails to suppress.”<sup>21</sup> Citing the early AAUP leaders’ hard fight for academic freedom, she wrote that “If [*Garcetti v. Ceballos*] reinvigorates faculty nationwide to take an activist approach to academic freedom once again, the effect will be to strengthen the free exchange of views that is essential to the quality and integrity of American higher education.”<sup>22</sup>

While her published comments seem laudable, DelFattore’s response to my concerns parroted the administration’s line. FOIA matters, she said dismissively, “would not fall within the scope of the AAUP.”<sup>23</sup>

This, of course, is in direct contrast to the stance taken by the AAUP in *Cuccinelli v. University of Virginia*, where AAUP national president Cary Nelson wrote:

We are urging the University of Virginia to...publicly [resist] the threat to scholarly communication and academic freedom represented by the concerted effort to obtain faculty emails....Whatever people may think of climate research, the climate for academic freedom must not be allowed to deteriorate. If scientists think every e-mail they send may be subject to a

<sup>20</sup>Martha S. West, general counsel, AAUP, and Rebecca K. Glenberg, legal director, ACLU of Virginia, letter to the Rector and Visitors of the University of Virginia, May 6, 2010, <http://www.acluva.org/publications/20100506ACLUAAPUVALtr.pdf>.

<sup>21</sup>Joan DelFattore, “Defending Academic Freedom in the Age of *Garcetti*,” *Academe* 97, no. 1 (January–February 2011): 20, <http://www.udel.edu/aaup/academicfreedom.pdf>.

<sup>22</sup>*Ibid.*, 21.

<sup>23</sup>Joan DelFattore, e-mail message to author, February 23, 2010.

politically motivated attack, it will create a chilling effect on their discourse and hurt scientific research.<sup>24</sup>

Indeed, the AAUP defended Mann (but not Michaels) at UVA, but the UD chapter refused to become involved in my similar case, firmly supporting White's actions. Moreover, the national AAUP as well as the American Meteorological Society and the American Geophysical Union (both of which I was a member) remained silent about my plight.<sup>25</sup>

Perhaps unsurprisingly, White ultimately decided not to examine my colleagues' e-mails and documents. To justify his unequal treatment of me, he argued:

We have interpreted [FOIA] language to mean that we are obliged to produce records, otherwise nonprivileged, that pertain to work by Dr. Legates that is supported through grants from state agencies; and classroom-related work such as syllabi, instructional materials, and class postings (because a small portion of his salary was paid out of state-appropriated funds). We have also elected to produce copies of speeches, papers, presentations and other materials that were created by Professor Legates and subsequently published, delivered in lecture form, or otherwise made public.<sup>26</sup>

White's conclusion seems bizarre. Why does he not apply his interpretation to other faculty on whom a similar FOIA request was filed? Moreover, why should UD be "obliged" to turn over public speeches, papers, etc., that were not supported by state funds? Indeed, nearly all of what White identified for release to Greenpeace was *not* produced by state funds. His conclusion violates his premise.

White further wrote to my attorney: "If you object to the release of any of these documents, then I would inform the groups requesting this information that there are some documents in Dr. Legates' custody that we have not produced and that they should direct further questions about the documents to you."<sup>27</sup> If White's interpretation of FOIA is correct, why should I be allowed to

<sup>24</sup>American Association of University Professors, "UVA Should Defend Academic Freedom," media release, April 14, 2011, <http://www.aaup.org/media-release/uva-should-defend-academic-freedom>.

<sup>25</sup>White also served as the deputy general counsel at the University of Virginia and as assistant secretary and associate counsel at the AAUP before coming to UD.

<sup>26</sup>Lawrence White, e-mail message to Noel J. Francisco, author's attorney, July 22, 2011.

<sup>27</sup>Ibid.



object to their release? May my protest trump the law? And if it does, then how was White's decision to release my materials—despite my objection—not a violation of my academic freedom? If I have the right to block their release, what gives him the right to override my right?

The purpose of state FOIA laws is to provide transparency to government and its employees and agents. In this regard, FOIA requests have their place in exposing documents that inform the public. But left-wing activists have succeeded in using this law as a weapon against those with whom they disagree by searching for whatever they can find to manufacture claims of misfeasance where none exists and bind them with time-consuming and expensive efforts to comply.

Recent events, however, have illustrated that while universities should be champions of academic freedom, and thus would be expected to support their faculty against activists' attempts to abridge these freedoms, such is not always the case. Faculty must be protected from both external and internal pressures to allow for a more open flow of ideas and facilitate a diversity of opinions. However, university administrators who facilitate FOIA requests to assist in smearing scientists and attack their credibility act in a manner counter to the tenets of academic freedom; university faculty *must* be protected from harassment by the very university they represent. When universities play the role of activist and use FOIA requests to harass and intimidate their own faculty, they become an obstruction to academic freedom. As Prof. Nelson wrote for the AAUP, "academic freedom must not be allowed to deteriorate. If scientists think every e-mail they send may be subject to a politically motivated attack, it will create a chilling effect on their discourse and hurt scientific research." But the AAUP and the university must *also* recognize that they cannot choose what speech to defend: academic freedom applies to all forms of academic inquiry. Such actions must end if academic freedom is to thrive.