

# An Assessment of Academic Freedom

## How anti-terrorism measures have impacted the higher education community

By Robert M. O'Neil

**A**FTER A HALF CENTURY of secrecy, the U.S. Senate Government Operations Committee released, in May 2003, sealed transcripts of interviews with people who had been targeted as potential witnesses before Senator Joseph McCarthy's subversive activities panel, but none of whom was ever publicly interrogated. The toll on such putative victims of Senate red-baiting was incalculable; at least one prospective witness took his own life before learning of his eventual reprieve. When the transcripts were finally unveiled, a year and a half after the September 11, 2001 terrorist attacks, Congressional reactions were predictably mixed.

Michigan Senator Carl Levin, the first committee member to comment, insisted that a recurrence of such excesses was inconceivable in the 21st century. "There's a greater awareness," he reflected, "of McCarthyism and what tactics can be used by people who are trying to quiet dissenters." And, he added on a hopeful note, "there's greater resistance against those who would try to still voices that they disagree with." Next to speak (and in a quite different vein) was Wisconsin's Russ Feingold, who had cast the only Senate vote against the USA PATRIOT Act. "What I'm hearing from constituents," he cautioned, "what I'm hearing from Muslim Americans, Arab Americans and others suggests a climate of fear toward our government that is unprecedented, at least in my memory."

Each of these usually like-minded liberal lawmakers knew whereof he spoke. Levin had been an undergraduate in Ann

**During the immediate post-9/11 period, when one would have anticipated that outspoken professors would be vilified as unpatriotic or worse, the actual response was surprisingly mild.**

Arbor at the very time the University of Michigan callously purged three senior professors for refusing to identify colleagues as suspected subversives. Feingold, meanwhile, placed his warning in context by reminding his listeners that he too had some appreciation for the legacy of McCarthyism: "Don't forget that I am today the junior senator from Wisconsin."

Several years later, as we mark the sixth anniversary of the terrorist attacks, the jury is still very much out on which appraisal—Levin's rather sanguine view or Feingold's more ominous insight—is closer to the truth.

When it comes to specific issues of academic freedom, a similar paradox prevails. During the immediate post-9/11

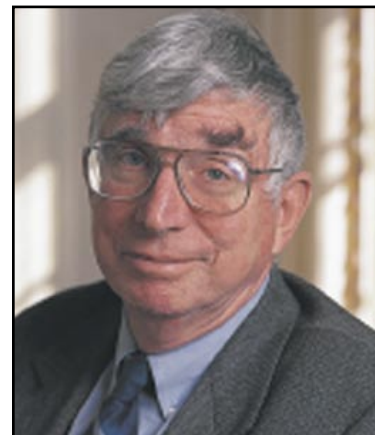
period, when one would have anticipated that outspoken professors would be vilified as unpatriotic or worse, the actual response was surprisingly mild. The New Mexico historian who told his freshman class, on the afternoon of the very day of the attacks, "anyone who can blow up the Pentagon gets my vote," received only a reprimand after a lengthy investigation. The Columbia anthropologist who later called for "a million Mogadishus" at a teach-in also received only a mild rebuke. Most recently, in the summer of 2006, a Wisconsin political scientist and a New Hampshire psychologist were fully protected from any formal sanction after they joined other "revisionists" in suggesting that the attacks on the World Trade Center and the Pentagon had been essentially an "inside job," orchestrated by, or in collusion with, the Bush administration. So far, so good, a close observer of academic freedom might have observed as recently as a year ago.

As memories of the horrors of that dreadful day in September 2001 blur and fade, the actual impact upon the academic world of the hijackings and of the War Against Terrorism also becomes increasingly elusive. Three recent observations illustrate the complexity of the current landscape:

- Although the American Association of University Professors (AAUP) has formally censured eleven institutions since the summer of 2001, none of the cited transgressions related in any way to the events of September 11. (Four derived from the way New Orleans institutions handled the aftermath of Hurricane Katrina, while the others were equally remote from current political tensions.)
- Equally elliptical is the revelation from surveys conducted in the spring of 2007 that the trauma of September 11 may have had a curiously positive impact upon the curricula of many colleges and universities—not only in the growth of student interest in Middle Eastern Studies and Arabic language and literature, but more broadly through heightened interest in religious studies, international relations and foreign policy, and even on the expansion of liberal arts and general education requirements.
- Finally, the number of foreign graduate students headed for U.S. campuses has steadily increased for the past three years, though it has not yet quite regained the international levels of the last year unaffected by anti-terrorism.

Given such trends and crosscurrents, a broader assessment of the condition of academic freedom seems most appropriate.

The state of faculty personnel matters—previously one of the bright spots on this mixed canvas—has become a bit cloudier, and for reasons that may curiously reflect our steadily



receding memories of the Twin Towers ablaze. Although two prominent September 11 “revisionists” safely dodged the bullet in Wisconsin and New Hampshire, a colleague in Utah fared less well. Brigham Young physicist Steven Jones, a long-tenured senior professor, was placed on leave pending a formal review of his recent scholarship when his university became aware of his controversial published views about the causes of the attacks and possible Bush administration complicity. The official announcement declared BYU’s concern that “Dr.

Jones’ work has not been published in scientific venues”—a desideratum not normally imposed on scholars’ extracurricular writings.

The matter became moot in late fall 2006, when professor Jones opted for early retirement, partly to enable him to pursue without institutional constraint his unorthodox theories about the terrorist attacks. But Jones’ departure from the faculty left unresolved a host of intriguing and difficult issues; other “Patriots Question 911” members within the academic community (such as University of Massachusetts, Amherst geoscientist Lynn Margulies, a longtime member of the National Academy of Sciences) could be deterred by Professor Jones’ plight, even though the ranks of such skeptics and revisionists continues to grow as doubts about Iraq and Afghanistan as

well as the 2001 attacks remain unresolved.

Also within the past year, two long-running faculty personnel cases have taken new and tortuous turns, making it more difficult for academic freedom champions to declare victory. University of Colorado Ethnic Studies professor Ward Churchill has been the most visibly controversial member of a burgeoning group of outspoken faculty. His troubles began early in 2005 with the discovery of a long dormant essay on an obscure website, in which he excused the September 11 hijackers because they “manifested the courage of their convictions,” and charged that some victims of the World Trade Center attacks were “little Eichmanns” who deserved their fate. The Colorado Board of Regents met a few days later and, after promptly rejecting gubernatorial demands for harsher action (including dismissal), directed the administration to undertake a careful inquiry. Because the chosen standard for that investigation was the scope of a public employee’s First Amendment freedom of speech, Boulder campus officials concluded that Churchill’s deeply offensive outburst was nonetheless constitutionally protected expression for which he could not be punished.

The saga did not end there, however. In mid summer 2007 The Colorado Regents accepted a recommendation from University President (and former U.S. Senator) Hank Brown to dismiss Churchill from his long-tenured faculty post—not because of his politically volatile statements (more than just the “little Eichmanns” reference), but because of a proven record of persistent and grave research misconduct. That issue soon became the focus of a completely separate inquiry by a faculty committee that played no part in reviewing the free-speech issues, but grew out of a pre-existing concern about Churchill’s published scholarship.

Yet Churchill and some of his supporters claimed that his research record would have escaped such intense scrutiny but for the “little Eichmanns” furor. Thus, ran the argument, Churchill had been punished through the back door for his political outbursts, even though the front door had been barred by academic freedom and free-speech principles. An analogy to the criminal law doctrine of “fruit of the poisonous tree” did not elude Churchillian defenders. The cogent response of the administration and the regents was that even a suspect path to the unmasking of egregious research abuses should not blind the institution to their gravity, nor should it bar the university from enforcing standards of academic integrity. Since Churchill’s lawyers immediately vowed to take the regents to court, final resolution seems unlikely in the near future.

The other long-running faculty personnel matter that turned sour in 2007 involved professor Sami al-Arian, a Palestinian born computer scientist at the University of South Florida who had organized and led a highly controversial Islamic group. When he admitted on Fox News, just days after September 11, 2001, that he had urged (in Arabic) “Death to Israel” and had raised funds for radical Muslim causes, al-Arian was at first suspended from teaching and barred from campus. His dismissal from a tenured faculty position some months later reflected his indictment by a federal grand jury on charges of aiding terrorist activities. The jury eventually acquitted al-Arian on several of the most serious charges, but deadlocked on others. After spending three years in solitary confinement, with no convictions, he pleaded guilty to a relatively minor charge in return for the government’s promise that he would soon be freed and deported.

Yet, as the summer of 2007 progressed, the deportation did not materialize. Al-Arian remained inexplicably in a Virginia jail on civil contempt charges, while his wife and children (having abandoned any hope for early redemption) prepared to move to Egypt. Al-Arian’s faculty status at South Florida, which had been the focus of an internal campus appeal which the federal indictment aborted, remains unresolved nearly six years after the first adverse personnel action.

Here it should be noted that, while the AAUP’s recent censure list includes no politically volatile cases, the same cannot be said of its formal investigations. An extensive inquiry was undertaken at the University of South Florida soon after al-Arian’s initial suspension, and the resulting report was published, though any prospect of censure or even condemnation of the administration was rendered moot by the criminal charges and incarceration. The beleaguered professor’s deportation would only confirm the mootness of one of the few genuinely troubling personnel actions of the post-9/11 period. (AAUP also investigated the case of an instructor at York College of the City University of New York, whose professional collaboration with an attorney for accused terrorists placed his continuing appointment in jeopardy.)

Thus the record on the vital academic freedom dimension of faculty personnel matters remains, on the whole, fairly benign, if increasingly mixed—still closer to Senator Levin’s sanguine view than to Senator Feingold’s skepticism. Most professors who have evoked official wrath by speaking out on Middle East or other foreign policy issues have incurred only

**Two long-running faculty personnel cases have taken new and tortuous turns, making it more difficult for academic freedom champions to declare victory.**

mild sanctions, if any. In that sense, to this day there has not been a recurrence of McCarthyism—no witch-hunting or red-baiting designed to expose or humiliate unpopular political or social organizations. Indeed, a plea for tolerance of professorial outbursts has come from a wholly unexpected quarter. On three widely separate occasions, no less improbable a champion than Fox News' Bill O'Reilly has defended academic freedom principles in dealing with such matters. Days after Columbia anthropologist Nicholas De Genova issued his call for "a million Mogadishus," O'Reilly told his heavily conservative audience: "If I were [Columbia's president], I wouldn't fire this guy... because you've got to tolerate this kind of speech."

Several years later, lest his earlier comment seem an aberration, O'Reilly reaffirmed his position. Though he could easily have avoided the issue of Ward Churchill's faculty status during a segment on the "little Eichmanns" essay and its aftermath, the Fox News host relished an opportunity to declare his position: "I don't think he should be fired. That would send the wrong message to the rest of the world. America's a strong enough country to put up with the likes of professor Churchill. Punishing him further would just make him a martyr."

Finally, to remove any lingering doubt, Bill O'Reilly early in 2006 insisted on protecting Northwestern's Holocaust-denying engineering professor Arthur Butz, after Butz had praised the virulently anti-Israel statements of Iran's new president. When a renowned Holocaust scholar on his program suggested that maybe "the guy (Butz) shouldn't be allowed in the classroom and... shouldn't be near the students," O'Reilly challenged her: "Wouldn't that be a violation of some kind of academic freedom?" When his guest demurred, O'Reilly pressed on to remind her that "you teach at a university and you know what the university is—that it's a place where all views, even abhorrent views, are tolerated for the sake of expression. You don't want to inhibit anybody."

A skeptic or cynic might point out that all three of these controversial professors who evoked O'Reilly's sympathy had spoken out on one side of the Middle East and U.S. policy debate; the critical test would be whether he would have been equally forceful in defense of an extreme Holocaust affirmer or ardent defender of Israel. Yet for the moment, lacking such a counterweight, so persistent a defense of academic freedom from an unlikely quarter is notable.

Thus, while the picture on campus remains somewhat mixed—the Joneses, al-Arians and a few others have fared less well than they and their supporters would have wished—the current state of public opinion differs dramatically from that which in the late 1940s and early '50s served to energize and even legitimize vicious attacks on liberal academics by Senator McCarthy and his allies. If one contrasts the recent O'Reilly statements with those of Walter Winchell, Westbrook Pegler and Dorothy Kilgallen (among other pundits of red-baiting days), the preference for Senator Levin's benign view gains further credibility. The current situation is certainly not all good, but it could be far worse.

The experience of politically controversial foreign scholars seeking to enter the U.S. has, however, been substantially more troubling. Some academic invitees have been barred

altogether on inescapably ideological grounds; others have encountered protracted delays and bureaucratic hurdles that have effectively denied them admission; while a few prospective visitors have waited patiently and have eventually prevailed. The latter path brought about the belated issuance, in July 2007, of a long-sought visa to professor Waskar Ari, an internationally acclaimed Bolivian scholar who for more than two years found himself unable to accept a faculty position at the University of Nebraska-Lincoln because he was apparently persona non grata to the Department of Homeland Security.

Despite intense pressure from U.S. academic groups, and the university's lawsuit against the federal government, Homeland Security persistently refused to reveal its objections to Ari's entry, though continuing to order the State Department to deny him a visa. Eventually, though again without an explanation, federal officials relented, making it possible for Nebraska students finally to benefit from Ari's wisdom in fall 2007. The protracted delay has never been explained, nor has there been any redress or even apology for the heavy burden imposed on the University of Nebraska. And the ultimately favorable outcome does not reassure scholars who might be bound for campuses less aggressive than were the Cornhuskers in going to court to vindicate the rights of valued foreign visitors.

The case of Tariq Ramadan exemplifies the darker side of the access issue. Perhaps Europe's best-known scholar of Islam, Ramadan eagerly accepted a position as Henry Luce Professor in the University of Notre Dame's Joan Kroc Institute—hardly a place where, as a *Chicago Tribune* editorial quipped, one would expect to find a dangerous radical. Yet Ramadan's grandfather had founded an organization some considered "terrorist," and he had published some thoughtful anti-American and anti-Israeli views.

At the eleventh hour, with his furniture already in South Bend and his children enrolled in local public schools, Ramadan learned he would not receive the promised visa, even though he had lectured frequently and without incident on many U.S. campuses. Despite persistent pleas from Notre Dame's administration and many others, neither State nor Homeland Security would offer even a hint of the reason why Ramadan was deemed a person who "endorses or espouses terrorist activity"—the basis for the visa denial. Several U.S. academic groups supported Ramadan in federal court, seeking either access or an explanation.

In response to an impatient federal judge's order, at the end of 2006 the State Department offered—on the very last day for such a filing—the barely credible rationale that Ramadan had contributed roughly \$800 to two European nonprofit groups that provide humanitarian aid to Palestinians. The irony of Ramadan's treatment was highlighted by the scathing rebuke of an incredulous federal judge: "While the United States has not granted Ramadan a visa to enter the country, Great Britain, its one staunch ally in the battle against terrorism, has not only admitted him into England so that he may teach at

**Most professors who have evoked official wrath by speaking out on Middle East or other foreign policy issues have incurred only mild sanctions, if any.**

Oxford, but has enlisted him in the fight against terrorism.” (That reference bears elaboration. The government of outgoing Prime Minister Tony Blair had officially sought Ramadan’s counsel by appointing him to a high-level committee established to root out extremism in the United Kingdom. His continued exclusion from the United States has thus become all the more perplexing by stark contrast.)

Official lack of hospitality toward visiting scholars in the U.S. seems, if anything, to have stiffened during the past couple of years. In the spring of 2006, all 55 Cuban scholars who were registered at a Latin American studies conference in Puerto Rico were denied the visas they had informally been assured, without any official explanation. In June of that year a noted Greek scholar, John Milios, who had already received a visa to attend an academic conference in the U.S., was detained at Kennedy airport on his arrival and sent back to Greece—apparently because he belonged to what was described as “a pro-reform communist party.”

Similar treatment was inflicted a few months later on South African scholar Adam Habib, who was detained upon arrival in the U.S. for visits at Columbia and City College of New York, as well as for meetings with NIH and CDC government officials. Informed that his visa had been summarily revoked, he was sent back to South Africa. And in April 2007 Riyadh Lafta, a prominent Iraqi academic physician, was barred from attending a conference at the University of Washington, apparently because he had co-authored an article in a British journal which estimated that some 650,000 of his countrymen had died as a result of the U.S.-led invasion.

When it comes to foreign graduate students seeking U.S. programs, however, the climate seems to have improved markedly. The responsible federal agencies have sought to expedite the processing of visa applications from such

students, and have relaxed requirements that academic visitors must return to their home countries during U.S. study. These more benign policies, reinforced by more vigorous university recruitment programs abroad and expanded joint degree programs with foreign institutions, have brought about a steady recovery in the enrollment of international students, which had so precipitously declined right after September 11, 2001. A survey of graduate schools in 2007 reported a healthy eight percent gain in the most recent year, following a twelve percent increase the previous year—positive signs of steady improvement, though still below levels in the last year unaffected by anti-terrorism pressures.

Meanwhile, outbound American scholars have encountered surprising barriers to academic travel. A group of more than 400 Latin American experts brought suit in 2006

to challenge the constitutionality of a Treasury Department ruling that had markedly tightened already cumbersome restrictions on U.S. participation in academic programs offered in Cuba by U.S. universities. In August 2007 a federal judge in Miami upheld the restrictions, despite the conceded absence

of any compelling or critical national security interest in barring such travel. There need exist only, ruled the judge, “an important or substantial government interest.” In this case it sufficed that the government sought, by banning all scholarly exchanges, to “deny the Castro government hard currency” and to “hasten Cuba’s transition to a free and open society.”

The judgment also rejected the scholars’ academic freedom claims, since the challenged restrictions were, in the view of the court, “content-neutral” and constrained only the location of classes, not the subject matter of study. A few months earlier a state court had sustained, against a comparable challenge, a Florida law that barred students, professors and researchers at public universities from using state or federal funds—or even private foundation grants administered by the institution—for travel to Cuba or any of the several other “embargoed” nations, however meritorious (or even valuable to national security) the planned research might be.

At least one other state has entered an arena that has been primarily the focus of federal legislation. In the spring of 2006 the Ohio General Assembly enacted its own Patriot Act, which imposed (among other unfamiliar burdens) a unique requirement that every applicant for public employment—including new faculty and even graduate teaching assistants at the state’s public universities—must satisfactorily answer six questions the likes of which had not been seen since the McCarthy era. Applicants must declare that they have never “solicited any individual for membership in an organization on the U.S. Department of State Terrorist Exclusion List (citing some 53 groups, many of which lack any Middle Eastern connection);” that they have not “used any position of prominence...to persuade others to support” such an organization; and that they have never “committed an act that [they] knew, or should have known, affords material support or resources to any such organization.”

Given the undefined nature of most of the law’s key terms, and uncertainty about the consequence of a conscientious refusal to respond, the wonder is that more potential Ohio college teachers have not been deterred by this apparently unique exaction. (California lawmakers considered, but have not adopted, a strikingly similar law, also evocative of McCarthy days.)

In at least one important respect the past couple of years seem to have brought about a more hopeful prospect for U.S. scholars and their universities. Although legislation that would mandate “balance” in curricula and faculty hiring, and would target political “bias” in the classroom, has been introduced in nearly twenty states, no such proposal has actually become law. Indeed, legislative hearings that addressed such proposals have typically highlighted the frailty of the case offered in support of these extreme measures.

Pennsylvania, probing more deeply than other states, created a special legislative committee on “Academic Freedom in Higher Education,” designed to determine whether students on public campuses were subject to unacceptable bias or imbalance in courses or curricula. After extensive hearings around the state, the committee concluded late in 2006 that few such problems existed, that most institutions had well publicized channels through which students could raise

**The record on the vital academic freedom dimension of faculty personnel matters remains, on the whole, fairly benign. There has not been a recurrence of McCarthyism.**

**Some politically controversial foreign scholars seeking to enter the U.S. have been barred on inescapably ideological grounds. Others have encountered protracted delays and bureaucratic hurdles that have effectively denied them admission.**

concerns, and that no legislative response was warranted. This conclusion was a stunning defeat for David Horowitz and other proponents of such intervention, and undoubtedly explains the much slower pace of such initiatives in the latter half of 2007. The conservative “Academic Bill of Rights” may not be dead as an issue, but it has surely been muted since its heyday several years ago.

Finally, brief note should be taken of the effect of changing national policy on academic research after September 11, 2001. Specific provisions of the USA PATRIOT Act and laws regulating such sensitive matters as the laboratory handling of biohazardous materials have hampered or complicated the research process, though perhaps less than might have been feared in the fall of 2001. Expanded use of the elusive label of “sensitive but unclassified” has undoubtedly complicated the grants and government-funded research of many laboratory scientists, but such problems were not previously unknown. Indeed, there have been two rather striking victories in the ongoing struggle between protecting national security and protecting the academic research agenda. Under threat of litigation, the Treasury Department substantially modified regulations of the Office of Foreign Assets Control which at one point virtually barred either publication by a U.S. journal of an article by a scientist from any of the five trade-embargoed nations, or collaboration leading to publication between a U.S. researcher and a colleague from any of those suspect countries.

Equally heartening was the scrapping by federal officials of the dreaded “deemed export” plan, which would have forced research institutions to obtain export licenses before foreign graduate students and visiting scholars could work on certain sensitive laboratory projects in the U.S. The license requirement would have been tied not to a scholar’s place of residence, but rather to the place of birth, and would have greatly expanded the scope of potentially regulable technologies and programs. In response to a chorus of protests from the U.S. academic community, by spring 2006 federal officials conceded that vital security interests could be protected through less intrusive measures, and they effectively abandoned the now-vilified proposal.

For once, a unified protest from the affected academic and research communities had found receptive ears in Washington. Given such partial (and admittedly occasional) victories, the impact of the anti-terrorism campaign on the nation’s academic research community has been undeniably

substantial, though far less onerous than many observers initially feared.

That assessment invites three concluding observations: First, it is easy to blame all intrusive security-related measures on the terrorist attacks of 2001, when in fact many sources of concern have far earlier and deeper roots. The Foreign Intelligence Surveillance Court, for example, dates back to the 1970s. The principal “aiding and abetting terrorism” laws were adopted in the mid 1990s, along with the Clipper Chip, bans on export of encryption software, and other unwelcome measures which, like the 11 AAUP censure actions since 2001 that bear no tie to terrorism or the Middle East, remind us that not everything that troubles us—or imperils academic freedom—can be blamed on Osama bin Laden.

Second, it is also easy to overreact, even to laws and regulations that are concededly burdensome but might not be quite as bad as they seem. One recalls the major national professional organization which advised its members that, should they receive a demand for sensitive files under the PATRIOT Act’s Business Records provision, they not only could not inform the target of the inquiry (which is correct) but that they were also barred from contacting an attorney (which is clearly incorrect and reflects an understandable overreaction).

Finally, to complete this sobering assessment, it is important to note that in the event of another terrorist attack on U.S. soil, all bets are off. Senator Levin would presumably be the first to recognize how much his benign assessment of current conditions depends on at least a stable level of national security, and the absence of any further domestic trauma. Another September 11—perish the thought—and life would surely be very different. ♦

---

Robert M. O’Neil is director of the Thomas Jefferson Center for the Protection of Free Expression, director of the Ford Foundation Difficult Dialogues Initiative, and visiting professor of law, University of Texas at Austin.