

**RESPONSE OF PROFESSOR WARD CHURCHILL
TO THE UNIVERSITY OF COLORADO'S PRIVILEGE AND TENURE COMMITTEE
PANEL REPORT REGARDING DISMISSAL FOR CAUSE**

APRIL 23, 2007

I. Summary

This is University of Colorado (CU) Professor Ward Churchill's Response to the April 11, 2007 Report of the Dismissal for Cause Panel of the Faculty Senate Privilege and Tenure (P&T) Committee, the Panel charged with reviewing former Interim Chancellor Philip DiStefano's recommendation to fire Professor Churchill.

Then-Chancellor DiStefano's recommendation relied upon a May 2006 Report issued by an Investigative Committee appointed by the Standing Committee on Research Misconduct (SCRM), and the SCRM's endorsement of that Report. Despite the fact that only one of the five members of the Investigative Committee actually advocated that Professor Churchill be dismissed, DiStefano, who had taken on the role of "complainant" in the investigation, chose to recommend the most severe sanction available.

This Panel heard testimony concerning political motivation in the initiation of the "research misconduct" investigation, as well as the composition and conduct of the Investigative Committee. It has concluded that *but for* Professor Churchill's constitutionally protected speech, the research misconduct investigation and recommendation to dismiss would not have occurred. Nonetheless, it fails to reprimand the University for its conduct or to recommend dismissal of the charges against Professor Churchill, thereby affirming the dangerous precedent that "research misconduct" investigations can be used to retaliate against academics who dissent politically.

The pretextual nature of the investigation was further illustrated by evidence presented to this Panel which established that the University had received *no* formal or written complaints about research misconduct when it initiated the investigation, and that all of the allegations investigated were either solicited or brought directly by University administrators.

This Panel's Report acknowledges that the standards by which Professor Churchill's work were to be judged were not made explicit while he was engaging in the scholarship, nor even during the investigation. It finds *no* evidence that ghostwriting is explicitly prohibited by *any* standards in any discipline. It concludes that "mistakes" were or may have been made in (i) the SCRM's failure to abide by its rules on confidentiality, (ii) its not informing Professor Churchill about bias exhibited by Investigative Committee chair Mimi Wesson, and (iii) its failure to grant an extension of time to Professor Churchill to respond to new allegations.

This Panel *rejects* the Investigative Committee's conclusions that Professor Churchill "fabricated or falsified evidence" concerning (i) the General Allotment Act, (ii) the Indian Arts and Crafts Act, (iii) John Smith's role in spreading smallpox among the Wampanoags, (iv) the Army's intentional spreading of smallpox at Fort Clark, and (v) the Army's storing, rather than

distributing, of smallpox vaccine. It also finds that the Investigative Committee “exceeded its charge” in two instances.

Given the evidence concerning bias in the investigatory process and the University’s failure to produce sufficient evidence to support the major allegations used by the SCRM to recommend sanctions against Professor Churchill, this Panel erred in failing to recommend that the charges be dismissed and Professor Churchill reinstated. Instead, three members of the Panel recommend that Professor Churchill be demoted and suspended without pay for one year, and two that he be dismissed, based solely on their findings that Professor Churchill:

- (1) failed to provide evidence sufficient to convince them that
 - (a) the place from which smallpox blankets were obtained was an *infirmary*;
 - (b) *an Army doctor or post surgeon* was the one who told the Mandans to scatter; and
 - (c) *400,000*, as opposed to possibly 300,000, people ultimately died as a result of the 1837 epidemic in question;
- (2) cited to material he has consistently acknowledged to have ghostwritten;
- (3) published an article in *Z Magazine* in which the editors deleted his insertion of “Dam the Dams” as a co-author; and
- (4) copyedited a piece (in a book edited by a third party) which, unbeknownst to him, plagiarized Fay Cohen.

These, according to the Panel, constitute falsification and fabrication of evidence, failure to meet established standards of author attribution, and plagiarism, i.e., conduct falling below minimum standards of professional integrity. This characterization is not supported by the evidence concerning Professor Churchill’s specific actions, and it deviates wildly from the standards to which similarly situated scholars are held, both by this University and by comparable institutions.

Professor Churchill has published approximately 4,000 pages of text (not counting reprints or translations) containing approximately 12,000 footnotes. Significant evidence has been produced (some of it misrepresented in this Panel’s Report) which contradicts the Panel’s conclusions of wrongdoing. Nonetheless, *even if* their findings were factually accurate, it is apparent that no scholar who publishes regularly could withstand this sort of fine-tooth combing of his or her work.

Given the paucity of the allegations on which this Panel concluded that the University had met its burden of proof, its failure to properly allocate the burden of proof and weigh the evidence on those charges, and the context in which the charges were brought, Professor Churchill urges this Panel to reconsider its recommendations. To say that a prolific scholar can be dismissed, demoted or suspended for minor factual disagreements between an investigative Panel and an author, for citing to admittedly ghostwritten material, and for the errors of other editors – especially in a “research misconduct” investigation that is acknowledged to have only occurred as a result of the scholar’s First Amendment-protected speech, and in which confidentiality rules were deliberately violated – completely eviscerates the principle of Academic Freedom and the Constitution’s guarantees of equal protection and due process. The message conveyed is that scholars who exercise their First Amendment rights relinquish all other rights and protections.

II. The Panel Erred in Failing to Recognize Selective/Pretextual Enforcement

The Panel acknowledges that “*but for his exercise of his First Amendment rights, Professor Churchill would not have been subjected to the Research Misconduct and Enforcement Process or have received the Notice of Intent to Dismiss.*”(p. 6) Yet it dismisses Professor Churchill’s claim regarding selective enforcement on the basis that he failed to prove “motivation.” For the following reasons, Professor Churchill requests the Panel to reconsider its conclusions and find that there was selective or pretextual enforcement in this case.

A. The Panel Erred in Allocating the Burden of Proof

Once Professor Churchill established that his speech was constitutionally protected, something this Panel readily concedes (p. 5) and that it was *a* motivating factor in the investigation, the burden of proof should have shifted to the University to prove that it had a legitimate motive *other than* Professor Churchill’s protected speech (*Mt. Healthy v. Doyle*, 492 U.S. 274).

This is significant because the Panel admits that “if *the University* had had the burden of proving by a preponderance of evidence that it was *not* motivated inappropriately, we would have found that it had not met its burden either.”(p. 11)

B. The Panel Erred in Disregarding the Preponderance of the Evidence Demonstrating Selective Enforcement

In addition to incorrectly allocating the burden of proof, the Panel erred by disregarding the preponderance of the evidence which established that the University’s conducted its “research misconduct” investigation in retaliation for Professor Churchill’s protected speech. That evidence established that:

- 1. There were *no* independent allegations of research misconduct requiring investigation; all of the investigated charges were solicited by the University after Professor Churchill’s protected speech became a political issue.**
 - a. The University failed to produce *any* written allegations of research misconduct received prior to initiating the “research misconduct” investigation. Even now, it has only one, written six months after the investigation was commenced by a self-proclaimed political adversary of Professor Churchill.
 - b. The Panel acknowledges that the Fay Cohen allegations “may have been solicited” (pp. 8-9), but erred in disregarding that evidence that *all* of the remaining allegations at issue were
 - (i) solicited by University administrators;
 - (ii) created out of existing critiques (not complaints) in the scholarly literature or blogosphere; and/or
 - (iii) based upon newspaper articles forwarded to the SCRM by then-Interim Chancellor DiStefano as “complainant.”

None of the allegations came directly from the allegedly affected parties.

2. Professor DiStefano abused his power as then-Interim Chancellor to retaliate against Professor Churchill.

The evidence established that, as acting Chancellor, Professor DiStefano

- (i) convened the initial investigation into *all* of Professor Churchill's writings and public speeches;
- (ii) initiated the research misconduct investigation; acted as "complainant" when there were no independent complaints;
- (iii) served as sentencing judge; and
- (iv) recommended dismissal even though only one member of the Investigative Committee advocated dismissal.

In the hearings before this Panel, despite being a witness himself, he insisted upon and was allowed to sit in on *all* of the testimony despite Professor Churchill's objections.

3. The SCRM appointed an Investigative Committee biased against Professor Churchill.

Evidence produced to this Panel showed that

- a. SCRM Chair Joseph Rosse arbitrarily excluded all of the 200 tenured CU professors who signed a petition supporting Academic Freedom (*not* Professor Churchill specifically).
- b. Professor Rosse disregarded Professor Churchill's requests that an external committee be appointed in light of the CU administration's hostility and the negative publicity which had been fueled by the administration's violations of its rules on confidentiality.
- c. Long before the research misconduct investigation was initiated, law professor Mimi Wesson had circulated an e-mail describing Professor Churchill as "unpleasant (to say the least)," and analogizing him to "other charismatic celebrity male wrongdoers" such as O.J. Simpson, Bill Clinton, and Michael Jackson.

SCRM Chair Rosse was aware of Professor Wesson's e-mail and did not inform Professor Churchill, despite Professor Churchill's request that *no* law faculty be included on the committee due to the animus exhibited by Law Dean Getches as well as law professor Paul Campos. Instead, Professor Wesson requested to be and was appointed committee chair over Professor Churchill's objection. This Panel justifies this after the fact by relying exclusively on testimony *from other committee members* that Professor Wesson appeared "fair."

- d. Despite Professor Churchill's insistence on the importance of his work being judged by qualified experts in his field, the Investigative Committee included no American Indian scholars or experts in American Indian Studies.

The Panel heard testimony that Professor Robert Clinton, the "federal Indian law" scholar on the committee was *not* an American Indian *Studies* expert. (p. 24) There was testimony that the two members of the original committee who were American Indian Studies experts, Robert Williams and Bruce Johansen, were favorably inclined toward Professor Churchill but resigned under pressure.

Professor Robert Williams (Lumbee) testified that he resigned when University officials refused to respond to the media harassment he encountered, and that Professor Wesson appeared to be relieved by his resignation. His testimony to this Panel affirmed Professor Churchill's interpretations of the historical matters at issue.

The SCRM knew that Professor Michael Yellow Bird (Arikara/Hidatsa and expert on the 1837 smallpox epidemic) was asked to serve on the committee and agreed to do so, but was not included. His testimony to the Investigative Committee and this Panel also affirmed Professor Churchill's interpretations of American Indian history.

- e. Testimony established that Critical Race Theory scholar Richard Delgado was willing to serve on the Investigative Committee, but was allegedly excluded because of a possible scheduling conflict. The evidence established that Professor Jose Limon, however, who was decidedly hostile to Professor Churchill, was appointed despite the fact he could only be present at one session of the committee.

4. Bias was demonstrated by the Investigative Committee's violations of the University's rules on confidentiality.

This Panel fails to acknowledge the bias exhibited by the Investigative Committee when, rather than abiding by the SCRM rule to "keep all details of the investigation confidential" the Committee "*demand*ed" to make its report public, and did so (pp. 9-10), compounding the University's blatant violations of Professor Churchill's right to confidentiality and further undermining his ability to have the charges assessed in any reasonable context.

5. Bias was demonstrated by the Investigative Committee's conclusions regarding Professor Churchill's use of American Indian oral history.

This Panel fails to acknowledge the bias exhibited by the Investigative Committee when that body concluded that Professor Churchill "disrespected" American Indian traditions in his reliance upon oral history, despite the fact that *all* of the witnesses presented by Professor Churchill to the Investigative Committee were American Indians, all but one were professors of American Indian studies, and all affirmed and supported his interpretations of American Indian history and use of oral history in the matters at issue.

This Panel erred in failing to find that the Investigative Committee, which included no American Indians, exceeded its charge in reaching this conclusion (a conclusion described by one witness before this Panel as obscene), just as the Panel acknowledged such overreaching in the Investigative Committee's decision to independently assess the credibility of Professor Churchill's sources.

6. The Panel disregarded evidence of political and financial motivation to fire Professor Churchill

The only legitimate motivation claimed by the University for the investigation was its claim that "academic integrity" required it to investigate allegations of research misconduct. However, the evidence established that *none* of the allegations were received independently of solicitation, direct or indirect, by the University and, indeed, that many of them came directly from the administration.

There was, however, testimony that the University was under significant political and financial pressure to fire Professor Churchill. Thus, the preponderance of the evidence supported a finding that the research misconduct investigation was both pretextual and selective.

7. The Panel disregarded expert legal testimony on selective enforcement.

There was extensive testimony, barely mentioned in the Report, by law professors Derrick Bell and Richard Delgado, as well as King Downing, Director of the ACLU's National Campaign Against Racial Profiling – that the University engaged in selective or pretextual enforcement in conducting this investigation of Professor Churchill.

The only evidence countering this expert testimony consisted of self-serving statements by University administrators that they "had to" investigate the allegations in the interests of "academic integrity." This was belied the evidence that (i) the administration had actively solicited or created the allegations at issue, (ii) charges brought by Ernesto Vigil were kept pending for a year but ultimately ignored when the administration decided that it did not "need" them, and (iii) the administration's failure to notify Professor LaVelle's institution that the Investigative Committee had found significant errors in his scholarship critiquing Professor Churchill. None of this evinces an actual concern for academic integrity.

By failing to take into account the testimony and evidence outlined above, the Panel erred in deciding that there was insufficient evidence that the University engaged in selective enforcement in this case. Professor Churchill therefore asks the Panel to reconsider its recommendation regarding selective enforcement.

III. The Panel Erred in Its Handling of Due Process Issues

The Panel never notified Professor Churchill that it was making a decision on the constitutional issue of due process and, thus, denied him the opportunity to present any evidence directly addressing this issue. The irony is striking, as the essence of due process is the right to notice and an opportunity to be heard.

Rather than hearing testimony on the matter, this Panel simply took it upon itself to decide that “the proper and fairest manner to proceed is through the placement of the burden of proof upon Professor Churchill.” (p. 12). Again, this is significant because the Panel concludes that “if the University had had the burden of proving by a preponderance of the evidence that it had *not* violated Due Process requirements, we would not be completely convinced that the University had met *its* burden, either...” (p. 32)

The Panel erroneously decided that Professor Churchill bore the burden of proof to establish that his rights to due process had been violated. It also failed to explicitly solicit evidence on the issue, and wrongly concluded that his rights to due process had not been violated despite its acknowledgment of evidence that

- (i) Professor Churchill was not informed in advance of the standards being applied.
- (ii) There were no clearly stated standards employed in the Ethnic Studies Department or the discipline of American Indian Studies more generally.
- (iii) There are no articulated standards prohibiting ghostwriting, or citation to ghostwritten material; and no evidence of any consensus regarding its acceptability in academia.
- (iv) There were improprieties in the appointment of the committee and in the processes it employed.

The Report acknowledges that it is “ambiguous” as to “whether these mistakes so damaged the process that Professor Churchill was fundamentally unable to make his case and was denied his right to Due Process.” (p. 31) Nonetheless, it provides no remedy for this “ambiguity” regarding the most basic of constitutional rights.

Professor Churchill requests that this Panel rescind its findings on the due process issue, acknowledging that the issue was not properly before it or, in the alternative, to acknowledge that his due process rights have been violated by the University’s conduct throughout these proceedings.

IV. The Evidence Does Not Support the Panel's Findings of Research Misconduct

Research misconduct which rises to the level of “falling below accepted minimal standards of professional integrity” must be deliberate, i.e., intentional. One cannot legitimately be stripped of tenure and fired for scholarly mistakes made in good faith. All parties agreed that the University had the burden of proving the charges by “clear and convincing evidence.”

The Panel erroneously found that there was sufficient evidence that Professor Churchill engaged in such deliberate misconduct for the reasons outlined below.

A. The Panel erred concluding that ghostwriting is sanctionable misconduct.

Three of the instances of misconduct cited by the Panel to justify sanctions against Professor Churchill involve his citation to ghostwritten materials. However, there was no evidence presented that this practice “falls below minimum standards” in *any* discipline, and the Panel supports its conclusions only by erroneously shifting the burden of proof to Professor Churchill.

1. The Panel acknowledges that “the University’s guidelines for Research Misconduct do not specifically mention ghostwriting.” Further, it found that the AHA guidelines, which the Investigative Committee claimed to have been using, “are apparently silent on this specific issue, and no specific written prohibition” had been produced (p. 17).

In other words, the Panel found *no* evidence of *any* written standards prohibiting ghostwriting or the practice of citing to materials ghostwritten by the author.

2. There was *no* empirical evidence presented that there is a “consensus” that ghostwriting is a violation of academic standards in any discipline. Considerable testimony was introduced by Professor Churchill that it is a common practice. There was conflicting testimony by individual scholars regarding their *personal beliefs* as to whether it was “acceptable,” but it was acknowledged that such conduct occurs more often than academics wish to admit.

3. The Panel conceded that ghostwriting may be acceptable in the discipline of law. However, despite the fact that two law professors were judging Professor Churchill’s writing on legal issues by their own standards, the Panel unilaterally declares that with respect to ghostwriting only the (unstated) standards of other disciplines apply.

4. It was uncontested that the named authors of the ghostwritten pieces had consented to publishing materials authored by Professor Churchill, had taken credit for the material, and had refused to testify against Professor Churchill.

5. It was likewise uncontested that that Professor Churchill consistently acknowledged writing the pieces at issue, indicating that he did not believe ghostwriting or citing to ghostwritten material constituted misconduct. Therefore, there was *no* evidence that he had the requisite intent to engage in misconduct.

The evidence does not support the Panel's conclusion that the University met its burden of proving by clear and convincing evidence that Professor Churchill engaged in research misconduct on the ghostwriting charges.

Indeed, the Panel could only reach this conclusion by erroneously shifting the burden of proof from the University to Professor Churchill. This can be seen in its conclusion that because "there is no credible evidence provided that it *is* an accepted practice" (p. 64, emphasis added) Professor Churchill was guilty of misconduct. In other words, despite considerable evidence that ghostwriting or citing to ghostwriting material is common practice, and no evidence other than contested personal opinion that is prohibited, the Panel required Professor Churchill to prove that it was *not* academic misconduct.

Professor Churchill thus asks this Panel to rescind its recommendations concerning ghostwriting, acknowledging both the lack of evidence that it is prohibited and the fact that, if it is to be considered sanctionable misconduct in the future, faculty must be given notice of this fact.

B. The Panel erred in finding that three disputed statements concerning the 1837 smallpox epidemic constituted "fabrication of evidence."

The Panel finds falsification or fabrication of evidence with respect to three details of Professor Churchill's descriptions of the 1837 smallpox epidemic at Fort Clark. The Panel concludes that Professor Churchill did not provide sufficient evidence that

- (1) the location from which blankets were shipped was an *infirmary*, as opposed to some other facility;
- (2) the person who instructed the Mandans to "scatter" was an *Army doctor or post surgeon*, as opposed to a different individual; and
- (3) the number of victims may have been as high as *400,000*, rather than 300,000.

This Panel does not include anyone from the disciplines of American Indian Studies, Ethnic Studies, or even History, or purport to have any expertise in these fields. On each of these three points, the Panel fails to acknowledge, or perhaps recognize, the significance of the evidence presented supporting Professor Churchill's historical interpretation of the available sources on each of these points.

In some instances, this Report affirmatively misrepresents or disregards the evidence presented to the Panel. The evidence presented to this Panel indicated that at best the University established that there is some dispute regarding Professor Churchill's use of particular sources to support these statements. It did *not* present clear and convincing evidence the Professor Churchill deliberately falsified evidence concerning these matters.

Furthermore, the Panel fails to take into consideration that Professor Churchill was simply summarizing the 1837 smallpox epidemic briefly (never in more than two paragraphs) as but one of many illustrations of a much broader analysis of trends in American Indian history, and that he never purported to engage in an in-depth analysis of the 1837 smallpox epidemic or to provide

all of the sources upon which he based his summary statements. It is thus imposing standards inapplicable to the kind of scholarly work at issue.

Professor Churchill thus asks this Panel to reconsider and rescind its recommendations on these three points, in light both of the evidence presented on the specific matters and because of the dangerous precedent set by a recommendation to demote, suspend or dismiss a tenured professor on the basis of the parsing of three footnotes chosen from some 4,000 pages of text.

C. The Panel erred by stretching the definition of “plagiarism” beyond recognition.

The final charges upon which this Panel bases its recommended sanctions are framed as “plagiarism.” However, the University failed to present clear and convincing evidence that the conduct engaged in by Professor Churchill actually constituted plagiarism. Instead, it relies on evidence that Professor Churchill

- (i) published an article in *Z Magazine* in which the editors deleted his insertion of the Dam the Dams organization as a co-author; and
- (ii) copyedited a piece in a book edited by a third party which, unbeknownst to him, plagiarized Fay Cohen.

1. “Dam the Dams” Material

This charge concerns Professor Churchill’s use of material from a 1972 pamphlet by an environmental organization called “Dam the Dams.” The evidence clearly established that:

- a. Professor Churchill received the information from John Hummel, whom he believed represented Dam the Dams, who has confirmed that he was glad Professor Churchill publicized it and is skeptical that it constituted plagiarism.
- b. Dam the Dams was long defunct by 1989, when Professor Churchill first used the material, and no one connected with the organization has *ever* lodged any complaint about misuse of its material.
- c. Professor Churchill credited the organization in *all* iterations of the material, but that the reference to Dam the Dams as co-author was excised by the editors of *Z Magazine* without Professor Churchill’s consent.
- d. The Report erroneously states that Professor Churchill repeatedly cited to the *Z Magazine* article over a period of years, whereas he *never* cited to it.
- e. Professor Churchill, in fact, included frequent citations to Dam the Dams, illustrating that he had no intent to deceive anyone or deny credit to the organization.
- f. Even Professor Wesson, chair of the Investigative Committee, testified that “by itself, this allegation is not that serious.” (p. 58)

In light of the lack of an actual complaint or an injured party, the fact that any failure of attribution was not due to Professor Churchill's conduct, and the lack of evidence of any intent to deceive, Professor Churchill urges this Panel to reconsider both its finding of "plagiarism" and its conclusion that the conduct at issue warranted sanction.

2. Fay Cohen Material

This Panel concludes that Professor Churchill is "at least an accomplice" in the plagiarism of work by Dalhousie University Professor Fay Cohen in an essay authored by the Institute of Natural Progress, published in 1992 in a book edited by a third party, Professor Annette Jaimes. The evidence before this Panel established that

- a. Officials at Dalhousie University concluded that the material was plagiarized, but did *not* attribute this plagiarism to Professor Churchill.
- b. For 13 years after its publication, Professor Cohen did not lodge any complaints against Professor Churchill for possible misuse of her material, and she still has not filed *any* written objection with CU or the book's publisher.
- c. Professor Cohen testified to the Investigative Committee that she was *solicited* to make an allegation against Professor Churchill by CU law school dean David Getches, through New Mexico law professor John LaVelle. (Apparently being an accomplice to solicitation of allegations is irrelevant to selective enforcement, but one can be fired for being an unwitting accomplice to plagiarism.)
- d. The accusation against Professor Churchill is based solely upon Dean Getches' memorandum, reconstructing a telephone conversation he allegedly had with Professor Cohen, more than a year after the fact.
- e. Professor Churchill's undisputed testimony is that he merely copyedited the essay at issue, and was unaware that any material therein may have been plagiarized.
- f. Professor Jaimes who edited the volume refused to testify to the SCRM. Because the University bears the burden of proving plagiarism by clear and convincing evidence, this should be construed against the University. However, the Panel again reverses the burden of proof, claiming that it constitutes a failure to substantiate Professor Churchill's testimony that he was not responsible for writing it. (p. 69)

If Professor Churchill's conduct as established by the evidence constitutes plagiarism, anyone who copyedits work, much less edits it, must be held responsible for checking the author's text as well as footnotes for any possible research misconduct. Clearly this is not a standard which is applied in any academic discipline. Professor Churchill thus urges this Panel to reconsider the use of these allegations as the basis for any recommended sanctions.

V. The Report Grossly Exaggerated the Nature of the “Misconduct” at Issue

The Panel concluded that the University met its burden of proof *only* with respect to the matters discussed in the previous section IV. With respect to these charges, the Panel’s Report contains numerous errors concerning the factual evidence it received as well as its allocation of the burden of proof on these issues. Furthermore, it fails to address procedural problems in the appeal process itself, including misrepresentations made to Professor Churchill.

Nonetheless, even if one were to take this Panel’s conclusions on those eight charges at face value, they simply do not constitute conduct for which a tenured full professor can be demoted and suspended without pay, much less stripped of tenure and fired.

These conclusions must be assessed in context. This Panel has conceded that “but for” Professor Churchill’s exercise of his constitutional rights, none of this would have occurred. It has heard extensive testimony regarding selective enforcement and concluded that had it placed the burden of proof on the University, the University would not have been able to show that it did not engage in pretextual or at least selective enforcement and in fundamental violations of Due Process.

The Panel heard extensive testimony concerning bias in the appointment of the SCRM’s Investigative Committee, and concluded that the Committee made numerous “mistakes” in its handling of the case. This evidence that the Committee did not function, as it was mandated to do, as a nonadversarial, fact-finding body but as an inquisitorial entity is buttressed by the Panel’s findings that the Committee “exceeded its charge” in two instances by assessing the credibility of Professor Churchill’s sources, and that the University *failed* to meet its burden of proof with respect to the Investigative Committee’s conclusions that Professor Churchill fabricated or falsified evidence concerning (i) the General Allotment Act, (ii) the Indian Arts and Crafts Act, (iii) John Smith’s role in spreading smallpox among the Wampanoags, (iv) the Army’s intentional spreading of smallpox at Fort Clark, and (v) the Army’s storing, rather than distributing, of smallpox vaccine.

The record has established that after months of scouring “every word” of Professor Churchill’s voluminous scholarship, as well as active solicitation and, indeed creation, of allegations, University administrators could only “convict” Professor Churchill of (a) violating a nonexistent standard concerning citation to ghostwritten materials; (b) three extremely specific questions of historical fact; and (c) a tangential relationship to “plagiarism” under a definition never before utilized. Under these circumstances, the paucity of these findings should be read as evidence that Professor Churchill is an extraordinarily careful and accurate scholar. In light of the totality of the evidence presented, this Panel should be reprimanding the University for its handling of this case rather than recommending sanctions against Professor Churchill.

VI. Due Process Violations in the Conduct of this Appeal Hearing

In addition to the problems noted above with respect to this Panel's Report, numerous violations of Professor Churchill's rights to due process and fundamental fairness occurred in the process of the appeal hearings before this Panel, including:

A. The University claims that under its published rules it is justified in dismissing Professor Churchill. Those same rules, however, explicitly stated that where a professor requests a formal appeal of a notice of intent to dismiss, as Professor Churchill did in this case, he or she is entitled to be represented by counsel, and that said counsel will be paid \$20,000 for such representation. All parties appeared to believe this to be the case, the provision was widely publicized in the media, it was posted in the By-Laws of the Faculty Senate on the CU-Boulder website when the hearing took place, and both Professor Churchill and his attorney relied upon this provision.

Nonetheless, the University refused to pay Professor Churchill's attorney, and Professor Churchill was forced to proceed without counsel in order to avoid waiving his right to the appeal. This significantly hindered his ability to prosecute the appeal.

B. Shortly before the hearing commenced, Professor Churchill was notified that this Panel would hear not only his appeal of the notice of intent to dismiss, but also would conduct a Level 2 hearing on the selective enforcement claims he brought in a separate grievance. He was not given an opportunity to contest the combination of the two processes in this manner. Further, he was not notified that this Panel did not have access to the Level 1 grievance committee's findings on the selective enforcement question.

Given the addition of the constitutional issues at the eleventh hour, Professor Churchill's attorney David Lane agreed to participate in the hearing specifically with respect to the selective enforcement question, but the schedule had already been set and, due to his trial schedule, was not able to attend even all of the portions of the hearing on that issue.

C. Neither Professor Churchill nor his attorney were ever notified that the panel was to make a determination on constitutional issues of due process and, therefore, did not present evidence addressing that issue. For the same reason, they were precluded from making arguments concerning the appropriate allocation of the burden of proof.

D. Professor Churchill was notified that another aspect of his grievance, that concerning the University's violations of its own rules on confidentiality, would be heard by a Level 2 grievance panel. He was informed by this Panel's chair, Professor Langer, that this Panel's findings would not be reported until the confidentiality panel had convened, heard testimony, and reached its conclusions. However, hearings on the confidentiality question had not even been scheduled when this Panel submitted its Report.

E. Professor Churchill was also informed by Professor Langer that this Panel would either vote the Investigative Committee's findings "up or down," i.e., that this Panel would simply determine whether or not it agreed with the Investigative Committee's recommendations, not arrive at a split decision regarding those findings or its recommended sanctions. Professor

Churchill focused his presentations of evidence in reliance upon this information. Had it followed the procedure stated by the chair, based on this Report, the Panel would have voted down the Chancellor's recommendation to fire. Instead, however, this Panel issued a split decision both with respect to the Investigative Committee's findings and the Chancellor's recommended sanctions.

F. Both Professor Churchill and the University submitted and agreed upon witness lists prior to the hearings before this Panel. However, the hearings were arbitrarily cut short before several of Professor Churchill's listed witnesses could be called.

VII. Conclusion

This Panel's Report acknowledges numerous flaws in the SCRM Investigative Committee's Report and a majority of the Panel finds that the University has *not* met the burden of proof required to support former Interim Chancellor DiStefano's recommendation to dismiss Professor Churchill.

Nonetheless, its limited findings of research misconduct and recommendations of much more limited sanctions support the proposition that a tenured full professor can be demoted, suspended without pay, and/or fired for admittedly First Amendment protected speech as long as the University

- (i) generates a great deal of adverse publicity in direct violation of its own rules on the confidentiality of personnel processes;
- (ii) directly solicits/creates allegations based on the publicity;
- (iii) uses those allegations as the basis for a "research misconduct" investigation;
- (iv) disregards substantial evidence of bias, as well as falsification of evidence in the investigation itself; and
- (v) applies admittedly unarticulated "standards" to create the appearance that a prolific scholar has engaged in research misconduct in a miniscule fraction of his footnotes.

The predictable effect of this process is the chilling of constitutionally protected speech and the creation of a climate in which faculty will simply regurgitate "safe" mainstream views and students will not be taught to think critically.

For these reasons, as well as those enumerated above, both the recommendation of the majority of this Panel that Professor Churchill should be demoted and suspended without pay for one year, as well as the minority's recommendation that he be dismissed, violate the principle of Academic Freedom, fundamental rights guaranteed by the Constitutions of the United States and the State of Colorado, and the rules of the University of Colorado. Professor Churchill thus requests that the Panel reconsider and reverse its findings with respect to selective enforcement, due process, and the instances of alleged research misconduct discussed in Section IV.
