

PETITION
to the
INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

submitted on behalf of
WARD CHURCHILL

against
the UNITED STATES OF AMERICA

by representatives of the Petitioner:

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Opinion vacating jury verdict, District Court, City and County of Denver,
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Jury Verdict, District Court, City and County of Denver, Colorado, April 2, 2009
(at App. 170)

Churchill v. University of Colorado, Certiorari Denied, United States Supreme Court,
April 1, 2013

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In my opinion, as a traditional indigenous person, Mr. Churchill writes with the highest caliber of honesty and truth when speaking of indigenous oral histories and culture. I have often said that if I could hold a pen and write books I would write exactly what Mr. Churchill has written

– Carrie Dann, Western Shoshone

I. INTRODUCTION

1. WARD CHURCHILL, represented by the Human Rights Research Fund (“HRRF”), hereby submits this Petition to the Inter-American Commission on Human Rights (the “IACHR” or the “Commission”) against the UNITED STATES OF AMERICA (the “United States,” or the “U.S.”).

2. Ward Churchill (or “Professor Churchill”), is an indigenous human rights defender whose political activism, teaching, and extensive body of scholarship have been dedicated to the struggle for self-determination for all peoples, and in particular for indigenous peoples. His work has largely focused on the genocidal effect of the United States’ relationship with indigenous peoples in North America as well as internationally.

3. As a leading indigenous human rights defender, Professor Churchill’s outspoken assertions of indigenous sovereignty and his critiques of U.S. policy have made him a controversial figure. Professor Churchill’s many volumes of meticulously documented historical exposés on topics such as indigenous boarding schools and U.S. domestic surveillance, his confrontational teaching style which has won him numerous awards, and his political activism including his involvement in the American Indian Movement, have made him not only an internationally recognized human rights defender but also a prime target for those who would preserve the status quo.

4. Although Professor Churchill’s work as a scholar and activist has always made him a controversial figure, the well-established principles of freedom of expression and academic freedom protected his ability to teach and write the truth as he saw it for most of his nearly 30 years of employment by the University of Colorado, a state institution of higher education. At a

time when institutions of higher education were largely embracing social movements for the inclusion of the histories and cultures of communities of color, the University of Colorado at Boulder (“UCB”) hired and promoted Professor Churchill. He became a leading figure in American Indian Studies and a tenured professor who helped establish and eventually became the Chair of the Department of Ethnic Studies.

5. However, the right to freedom of expression and association has been dramatically curtailed in the United States in the wake of the attacks of September 11, 2001 and then-President George W. Bush’s initiation of the “war on terror.” A long-lasting climate of xenophobic nationalism has fueled attacks on individuals and organizations deemed unpatriotic. This climate has been reflected in ongoing efforts to pass anti-immigrant legislation, increases in domestic surveillance, and social and political attacks on groups perceived as having an “outsider” status. As part of this change in political climate, conservative organizations have gained ground in attacking affirmative action programs and Ethnic Studies curricula, both of which were implemented as remedial measures to address the on-going effects of the United States’ long history of discrimination on the basis of race.

6. On September 12, 2001, Professor Churchill posted an expression of editorial opinion, or an op-ed piece, about the September 11 attacks (his “9/11 op-ed”) in an obscure online journal. Professor Churchill’s opinion piece was provoked by his reaction to the media coverage surrounding the attacks, in which there was virtually no public discussion of why people might carry out armed attacks on the most visible symbols of U.S. military and economic power and, therefore, no discussion of how such attacks might be avoided in the future. Professor Churchill discussed, in deliberately provocative terms, instances of U.S. atrocities committed abroad that could have had a hand in motivating attacks on the United States.

7. Years later, in January 2005, Professor Churchill’s op-ed piece became the focus of a national media campaign, generating intense political pressure on the University of Colorado to fire him. Professor Churchill’s 9/11 op-ed was acknowledged by University officials as speech that was protected by the right to freedom of expression found in the First Amendment to the United States Constitution. Nonetheless, the political furor over the piece, in the post-September 11 atmosphere, gave University officials an excuse to initiate a retaliatory investigation into all of Professor Churchill’s publications and public speeches. University officials then claimed, over the objection of indigenous scholars and persons with competence in Ethnic Studies, that they had found evidence of a handful of instances of “research misconduct” culled from some 4,000 pages of historical analysis, which was in turn supported by approximately 12,000 footnotes.

8. At the time when University officials should have been most vigilant about protecting freedom of expression and, more generally, the rights of a prominent indigenous human rights defender, they instead joined the attacks on Professor Churchill. University officials solicited allegations of misconduct, made public statements denouncing Professor Churchill’s personal integrity and scholarship, and perverted their internal investigative processes to reach conclusions that provided the Regents of the University with a pretext to fire Professor Churchill.

9. In an attempt to pursue judicial remedies, Professor Churchill filed suit against the University of Colorado and its Regents. In 2009, after a month long trial, a jury unanimously determined that (a) state officials had terminated his employment in retaliation for his 9/11 op-

ed, in violation of the First Amendment’s guarantee of freedom of expression; (b) he was harmed by the termination; and (c) but for his politically controversial speech, he would not have been fired for research misconduct. Rather than ordering the University to reinstate Professor Churchill, the trial judge vacated the jury verdict on the ground that the University Regents were—retroactively—absolutely immune from suit. This ruling was upheld by the state of Colorado’s appellate and supreme courts, and in April 2013 the U.S. Supreme Court denied Professor Churchill’s petition for review.

10. The implications of this case reach far beyond Ward Churchill’s reputation or employment. The acts and omissions of state officials and the courts’ decisions leave more than 8,000 faculty members at public universities in Colorado with no effective remedy for unconstitutional terminations. Thus, university officials may terminate employees based on their exercise of freedom of expression, their race or gender, or any other impermissible or discriminatory grounds. The consequences will be even farther reaching should other state courts follow this precedent. Even more significantly, the efforts to discredit Professor Churchill’s historical analysis, particularly with respect to genocidal policies of the United States government, have been and continue to be used to expunge indigenous perspectives on history and culture from the curriculum taught in public schools and universities and to bolster attacks on American Indian Studies and Ethnic Studies programs throughout the country.

11. The acts and omissions of the United States of America described in this Petition evidence not only a failure to protect the rights of Ward Churchill as a human rights defender, but state participation and complicity in attacks directed at him because of his work to defend human rights. These acts and omissions constitute violations of American Declaration on the Rights and Duties of Man (the “American Declaration”) Article I (life and personal integrity), Article II (equality), Article IV (freedom of expression), Article V (honor and reputation), Article XIII (culture), Article XIV (employment), Article XVII (basic civil rights), Article XVIII (judicial protection), Article XXIII (property), and Article XXVI (due process).

II. JURISDICTION

12. The Inter-American Commission on Human Rights has competence to receive and act on this Petition in accordance with Articles 1(2)(b), 18, 20(b), and 24 of the Statute of the Inter-American Commission on Human Rights.

III. VICTIM AND PETITIONER

Victim and Petitioner

13. The Victim and Petitioner in this case is Ward Churchill,¹ an indigenous human rights defender and scholar whose rights to freedom of expression, due process and judicial protection, employment, culture, and property under conditions of equality have been violated by the United

¹ See Professor Ward Churchill Curriculum Vita, Annex 1.

States, resulting in threats to his physical integrity and reputation, and attempting to preclude his ability to defend indigenous rights to culture, history, and education.

14. Ward Churchill is of Cherokee descent.² For more than 40 years he has been an outspoken critic of U.S. foreign and domestic policy. An indigenous political activist, teacher, scholar, public intellectual, and defender of human rights, Professor Churchill has been identified as one of the most cited scholars in the fields of American Indian Studies and Ethnic Studies. He is regarded as a leading authority on genocidal policies implemented by United States against indigenous peoples. He has also led the way in documenting the repressive measures taken by the United States, particularly in its counter-intelligence or “COINTELPRO” operations, to suppress domestic political dissent and perceived threats to the status quo.

15. In retaliation for his criticisms of U.S. policy in the wake of the attacks of September 11, 2001, Professor Churchill’s employment by a state university was terminated and his physical integrity, reputation, and scholarship have been the subject of attack either directly by, or with the complicity of, state officials. He has also been threatened with prosecution by federal authorities. These attacks have been recognized by many, including indigenous scholars and activists, as part of national campaigns to discredit the history documented by Professor Churchill and to remove American Indian Studies, and Ethnic Studies more generally, from the curriculum of public high schools, colleges, and universities.

Representatives of the Petitioner

16. This Petition is submitted by the Human Rights Research Fund, through its duly authorized representatives, on behalf of Ward Churchill and with his authorization. The HRRF is a non-governmental organization established as a partnership under the laws of the state of Connecticut. Founded in 2000, it is dedicated to investigating, documenting, raising awareness, and obtaining redress for abuses of international and domestic human rights resulting from the suppression of political dissent in the United States.

17. Natsu Taylor Saito is an attorney and law professor based in Atlanta, Georgia, and a partner and co-director of the HRRF. Akilah Jenga Kinnison holds a J.D. as well as an LL.M. in Indigenous Peoples Law and Policy.³ David A. Lane and Robert J. Bruce, attorneys based in Denver, Colorado, represented Ward Churchill in his lawsuit claiming wrongful termination by the University of Colorado. Natsu Taylor Saito, Akilah Jenga Kinnison, David A. Lane, and Robert J. Bruce are authorized by the HRRF to act as its representatives in all matters related to the present case and all proceedings before the Inter-American Commission.

² According to the United Nations Permanent Forum on Indigenous Issues, the UN system’s understanding of “indigenous” is based on a number of factors, the first is “[s]elf-identification as indigenous peoples at the individual level and accepted by the community as their member.” It states, further, that “[a]ccording to the UN the most fruitful approach is to identify, rather than define indigenous peoples. This is based on the fundamental criterion of self-identification as underlined in a number of human rights documents. Factsheet, “Who are indigenous peoples?” http://www.un.org/esa/socdev/unpfi/documents/5session_factsheet1.pdf. Prof. Churchill self-identifies as indigenous and has been accepted as indigenous by indigenous communities. He is also an enrolled associate member of the United Keetoowah Band of Cherokee (Roll No. R7627), a status requiring confirmation of Cherokee descent by the Band’s genealogist.

³ Ms. Kinnison is not a lawyer, as she is currently awaiting the results of her bar examination.

State Authorities Responsible & Judicial Proceedings

18. The United States is responsible for violations of Professor Churchill's human rights based on the actions of its agents, the Regents and administrators of the University of Colorado. The University of Colorado is a government institution of higher education in the political subdivision of the state of Colorado. The Regents of the University of Colorado are elected public officials.

19. The United States is also responsible for violations of Professor Churchill's human rights based on the actions of its judiciary. Professor Churchill sued the University and its Regents in the district court of the state of Colorado. A jury found in his favor, determining that Professor Churchill had been terminated in violation of his constitutional right to freedom of expression. The district court then vacated the jury verdict, retroactively ruling that the Regents, and thus the University, were immune from suit. The court of appeals for the state of Colorado and the Colorado Supreme Court upheld the Regents' immunization. The United States Supreme Court refused to hear the matter, denying Professor Churchill's petition for a writ of certiorari on April 1, 2013.

IV. FACTS

A. The Situation of Indigenous Peoples in the United States

20. Indigenous peoples have lived on the North American continent since time immemorial. Until the mid-1960s, mainstream U.S. history posited the "pre-contact" indigenous population of what is now the United States and Canada at about 1 to 1.5 million, and this is a figure still taught and believed by many. More reputable historians now put estimate the figure at perhaps 15 to 18 million, based on a wide range of evidence.⁴ Nonetheless, the myth persists that the continent was sparsely populated by wandering ("savage") peoples who failed to make productive use of its resources and lived at rudimentary levels of social and political organization.⁵ It is a convenient narrative that minimizes the genocidal policies and practices of the European colonial powers as well as U.S. settler society, justifies the appropriation of indigenous territories and natural resources for the "greater good," and depicts the "disappearance" of "the Indian" as an inevitable result of contact with a more advanced civilization.

21. In fact, the founders of the United States were well aware that indigenous peoples were not only cultivating the land and engaging in trade that spanned the continent, but had highly sophisticated systems of political governance and international relations.⁶ In its early years, the

⁴ See, e.g., David E. Stannard, *American Holocaust: Columbus and the Conquest of the New World* 267-268 (1992); Kirkpatrick Sale, *The Conquest of Paradise: Christopher Columbus and the Columbian Legacy* 315-316 (1990).

⁵ See Robert A. Williams, Jr., *Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America* xiv-xvii (2005). For a thorough analysis on the language of savagery as a justification for conquest, see Robert A. Williams, Jr., *Savage Anxieties: The Invention of Western Civilization* (2012).

⁶ Indeed, the council system of the Haudenosaunee (Iroquois) Six Nations was used as a model for the system of government implemented under the United States Constitution. See generally Bruce E. Johansen, *Forgotten Founders: How the American Indian Helped Shape Democracy* (1982).

United States was anxious to enter into treaties that, by definition, acknowledged the sovereignty of Indian nations because these not only protected the settlers but gave the newly established republic legitimacy in the eyes of the established European powers. At the same time, U.S. leaders continued their incursions into indigenous lands, engaging in military campaigns that annihilated entire communities. As the United States became more militarily and economically powerful, its leaders' plans for continental expansion were facilitated not only by the indiscriminate use of military power but also by official sanction of vigilante actions seen, for example, in scalp bounties—the payment to individual settlers for the scalps of Indian men, women, and children.⁷

22. The United States government imposed its will on the hundreds of indigenous nations it encountered, violating both its own treaties and more generally applicable international law. Domestic jurisprudence evolved to justify and facilitate these practices. John Marshall, Chief Justice of the U.S. Supreme Court, acknowledged in 1832 that federal statutes then in force “manifestly consider the several Indian nations as distinct political communities, having territorial boundaries within which their authority is exclusive, and having a right to all the lands within those boundaries.”⁸ Nonetheless, he also consigned Indian nations to the legal status of “domestic dependent nations” whose “relation to the United States resembles that of a ward to his guardian.”⁹ This premise, although discredited under international law, remains the basis of U.S. federal policy with respect to indigenous peoples today. According to a long line of U.S. Supreme Court decisions, the U.S. government may exercise plenary (i.e., full and absolute) power in Indian affairs.¹⁰

23. Exercising this claimed plenary authority, the United States government forcibly removed indigenous peoples from their homelands and onto increasingly restricted and inhospitable reservation lands, under conditions that often resulted in the deaths of more than half of the peoples being relocated and interned.¹¹ Under the 1887 Allotment Act, the United States extinguished collective rights to reservation lands and allotted parcels to individual Indians, facilitating the alienation of indigenous lands.¹² Between 1887 and 1934, as a result of these policies, indigenous peoples lost more than two-thirds (90 million acres) of reservation lands.¹³ By the beginning of the 20th century, the indigenous peoples within the United States'

⁷ See Edward Lazarus, *Black Hills/White Justice: The Sioux Nations Versus the United States: 1775 to the Present* 29 (1991).

⁸ *Worcester v. Georgia*, 31 U.S. 515, 556-57 (1832).

⁹ *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831).

¹⁰ See, e.g., *Lone Wolf v. Hitchcock* 187 U.S. 553, 565 (1903) (“plenary authority over the tribal relations of the Indians . . . [is a] power that has always been deemed a political one, not subject to be controlled by the judicial department of the government.”).

¹¹ For examples, see generally, William L. Anderson, ed., *Cherokee Removal, Before and After* (1991); Lynn R. Bailey, *Bosque Redondo: The Navajo Internment at Fort Sumner, New Mexico, 1863-1868* (1998).

¹² General Allotment Act, 24 Stat. 388 (1887). See also Report of the Special Rapporteur on the rights of indigenous peoples: The situation of indigenous peoples in the United States of America, A/HRC/21/47/Add.1, August 20, 2012, para. 22, http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47-Add1_en.pdf. [hereinafter “The situation of indigenous peoples in the United States of America”].

¹³ See David H. Getches, Charles F. Wilkinson, and Robert A. Williams Jr., *Cases and Materials on Federal Indian Law* 171-173 (1979) (reproducing memorandum of Commissioner of Indian Affairs John Collier); see generally Blue Clark, *Lone Wolf v. Hitchcock: Treaty Rights and Indian Law at the End of the Nineteenth Century* (1994).

boundaries had been reduced to about 2.5% of their pre-colonization population, and had nominal control of about 2.5% of their original land base.¹⁴

24. In 1934, the U.S. Congress passed the Indian Reorganization Act,¹⁵ which provided federal recognition of indigenous “tribes” if they conformed to certain conditions required of them by the Department of the Interior, through its Bureau of Indian Affairs. The policy, designed as a transition to the full assimilation of indigenous peoples, provisionally protected the land base while facilitating the lease of tribally held lands and natural resources to non-indigenous ranchers and mining corporations, often for a small percentage of their market value.¹⁶ Another major shift occurred in the 1950s, when Congress ushered in a formal policy of “termination,”¹⁷ during which it ended its recognition of hundreds of tribes, extended state jurisdiction onto some indigenous lands, and promoted policies designed to encourage or, in some cases, force the relocation of indigenous individuals from reservation lands into urban areas. As a result, well over half of all indigenous peoples in the United States no longer live on reserved lands.¹⁸

25. The United States government has maintained control not only over tribal lands and resources, but also over the revenues from leases of land held by indigenous peoples. In 1996 Blackfoot tribal member Elouise Cobell sued the Department of the Interior on behalf of some 300,000-400,000 individuals for the government’s failure to manage, account for, or provide benefits based on perhaps as much as \$140 billion that should have been placed in individual trust accounts.¹⁹ Thirteen years later, a settlement was reached for a fraction of that amount. In the meantime, Royce Lamberth, a conservative federal judge who had by then managed the case for almost a decade, made the following observation:

After all these years, our government still treats Native American Indians as if they were somehow less deserving of the respect that should be afforded to everyone in a society where all people are supposed to be equal.

For those harboring hope that the stories of murder, dispossession, forced marches, assimilationist policy programs, and other incidents of cultural genocide against the Indians are merely the echoes of a horrible, bigoted government-past that has been sanitized by the good deeds of more recent history, this case serves as an appalling reminder of the evils that result when large numbers of the

¹⁴ Professor Churchill discusses elaborates on this statistic in great detail in his essay “‘Nits Make Lice’: The Extermination of North American Indians, 1607-1996,” in *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* 129-288 (1997) (statistics at 129).

¹⁵ Indian Reorganization Act, 48 Stat. 984 (1934). See also The situation of indigenous peoples in the United States of America, supra note 12, at para. 23.

¹⁶ See generally Marjane Ambler, *Breaking the Iron Bonds: Indian Control of Energy Development* (1990).

¹⁷ See The situation of indigenous peoples in the United States of America, supra note 12, at para. 24.

¹⁸ Timothy Williams, “Quietly, Indians Reshape Cities and Reservations,” *New York Times*, April 13, 2013, http://www.nytimes.com/2013/04/14/us/as-american-indians-move-to-cities-old-and-new-challenges-follow.html?pagewanted=all&_r=0.

¹⁹ *Cobell v. Babbitt*, Complaint to Compel Performance of Trust Obligations (D.D.C. June 10, 1996); T.S. Twibell, “Rethinking Johnson v. M’Intosh (1823): The Root of the Continued Forced Displacement of American Indians Despite Cobell v. Norton (2001),” 23 *Geo. Immig. L.J.* 129, 131 (2008).

politically powerless are placed at the mercy of institutions engendered and controlled by a politically powerful few.²⁰

Illustrating the judiciary's unwillingness to come to terms with indigenous realities in the United States, Judge Lamberth was removed from the case shortly thereafter based on, among other factors, the judge's "apparent belief that racism at [the Department of the] Interior is not just a thing of the past."²¹

26. Today, according to the U.S. government's 2010 Census, over 6 million indigenous peoples inhabit the United States if one includes Native Hawaiians and Pacific Islanders.²² Indigenous peoples in the United States must constantly contend with the mistaken beliefs of non-indigenous peoples that their more than 500 nations constitute a homogenous group; that indigenous peoples "used to live here" but have conveniently "disappeared"; and that those Indians who have survived either live off of special governmental welfare subsidies (not treaty-derivative rights) or are rich as a result of casinos. Appropriation of indigenous cultures and spiritual traditions, often for profit, and racially offensive stereotypes are so commonplace that most non-indigenous U.S. citizens fail to comprehend why indigenous peoples find these practices offensive and degrading. Even indigenous identity is constantly under assault by non-indigenous persons who presume the right to declare who does or does not "look" or "act like an Indian."

27. The reality is that indigenous peoples remain the poorest subgroup in the U.S. population. "Incomes on [indigenous] reservations after adjusting for inflation actually declined during the decade of the 1980s. . . . Average Indian household incomes grew over the 1990s . . . but by the end of the decade the average on-reservation Indian citizen still had per capita income of less than \$8,000, compared to more than \$21,500 for the average U.S. resident. On-reservation Native American residents remained, on average, the economically poorest identifiable group in America."²³ As of 2010, over 28% of all American Indians and Alaska Natives live in poverty, compared to 15% of the U.S. population as a whole.²⁴ Approximately 30% of American Indians are without health insurance, as compared to about 12% of white Americans.²⁵ Indigenous peoples also have disproportionate rates of incarceration²⁶ and suffer higher rates of violent

²⁰ *Cobell v. Norton*, 229 F.R.D. 5, 7 (D.D.C., 2007).

²¹ *Cobell v. Kempthorne*, 455 F.3d 317, 333 (D.C. Cir. 2006), *cert. denied* 549 U.S. 1317 (2007).

²² U.S. Census Bureau, "The American Indian and Alaska Native Population: 2010," January 2012, <http://www.census.gov/prod/cen2010/briefs/c2010br-10.pdf>; U. S. Census Bureau, "The Native Hawaiian and Other Pacific Islander Population: 2010," May 2012, <http://www.census.gov/prod/cen2010/briefs/c2010br-12.pdf>.

²³ Rob Capriccioso, "The State of Indian Economic Development," *News from Indian Country*, April 26, 2012, http://indiancountrynews.net/index.php?option=com_content&task=view&id=1615&Itemid=84.

²⁴ Facts for Features: American Indian and Alaska Native Heritage Month: November 2011, http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html.

²⁵ US Census Bureau, "Facts for Features," Nov. 1, 2011, http://www.census.gov/newsroom/releases/archives/facts_for_features_special_editions/cb11-ff22.html.

²⁶ Margaret Severson and Christine Wilson Duclos, "American Indian Suicides in Jail: Can Risk Screening Be Culturally Sensitive?" U.S. Department of Justice (2005), <https://www.ncjrs.gov/pdffiles1/nij/207326.pdf> (stating indigenous peoples have the highest incarceration rate of any racial or ethnic group).

crime, including an epidemic of violence against indigenous women by non-indigenous perpetrators.²⁷

28. The state of South Dakota provides a striking example of the ongoing subjugation of indigenous peoples in the United States. In 2005, before the recent recession, the unemployment rate for indigenous peoples on or near reservations in South Dakota was a stunning 83%, with 65% of those who were employed earning less than poverty level wages.²⁸ According to ABC News, in 2011 the life expectancy on the Pine Ridge Reservation was 58 years for men and 66 for women, about 20 years less than the rest of the U.S. population.²⁹ Other sources indicate the life expectancy on the reservation is much lower, and linked to extremely high rates of diabetes, tuberculosis, cancer, and alcoholism. In the early-to-mid 2000s, more than one-third of homes on Pine Ridge lacked basic water, sewage, and electricity, and almost 60% were not only substandard but infected with black mold.³⁰

29. The United Nations (“UN”) Special Rapporteur on the rights of indigenous peoples stated in his 2012 report on the United States of America: “The conditions of disadvantage of indigenous peoples undoubtedly are not mere happenstance. Rather, they stem from the well-documented history of the vast taking of indigenous lands with abundant resources, along with the active suppression of indigenous peoples’ culture and political institutions, entrenched patterns of discrimination against them and outright brutality, all of which figured in the history of the settlement of the country and the building of its economy.”³¹ In the face of this long history of oppression and continued human rights violations, indigenous communities in the United States of America have persisted in fighting for their physical and cultural survival.

B. Indigenous Efforts to Maintain Culture, Identity, and History

American Indian Activism

30. The struggles of American Indians—as well as Native Hawaiians and Alaska Natives—to exercise their rights to self-determination and to maintain their cultures, identities, and histories have been critical to their survival as indigenous peoples. Since the late 1960s, the American Indian Movement (“AIM”) has played a central role in defending indigenous peoples’ rights, as recognized in international law. AIM has been active in efforts to restore treaty-based rights to land and to economic resources and activities, the establishment of community centers and schools for the education of indigenous youth, and the promotion and defense of traditional cultural and spiritual practices. It has defended indigenous persons against vigilante attacks and police brutality and provided support for incarcerated indigenous persons and their families. AIM leaders, acting on the instruction of traditional elders, established the International Indian

²⁷ See U.S. Department of Justice, “Full Report of the Prevalence, Incidence, and Consequences of Violence Against Women, November 2000, p. 22 & 60, <https://www.ncjrs.gov/pdffiles1/nij/183781.pdf>.

²⁸ U.S. Department of the Interior, Bureau of Indian Affairs, 2005 American Indian Population and Labor Report, p. 1, <http://www.bia.gov/cs/groups/public/documents/text/idc-001719.pdf>.

²⁹ Astrid Rodrigues, “Stuck in a ‘Food Desert,’ Pine Ridge Locals Look to Subway to Meet Nutrition Needs,” *ABC News*, October 14, 2011, <http://abcnews.go.com/US/stuck-food-desert-pine-ridge-locals-subway-meet/story?id=14732285>.

³⁰ See “Backpacks for Pine Ridge: Providing school supplies to the Lakota Sioux children on Pine Ridge Reservation,” http://www.backpacksforpineridge.com/Stats_About_Pine_Ridge.html.

³¹ The situation of indigenous peoples in the United States of America, para. 37.

Treaty Council (“IITC”) in 1974 and organized the gathering of indigenous peoples in Geneva in 1977. This led to the establishment of the United Nations Working Group on Indigenous Populations (“Working Group”) which, in turn, drafted the UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly in 2007.

31. Since the 1970s, Ward Churchill has been active in the American Indian Movement and other organizations dedicated to defending the human rights of indigenous peoples. He was a national spokesperson for the Leonard Peltier Defense Committee, served for decades on the Leadership Council of the American Indian Movement of Colorado (“Colorado AIM”),³² and worked closely with the prominent Oglala Lakota activist Russell Means from the early 1980s until Means’ passing in 2012. Ward Churchill helped author several interventions submitted by the IITC to the Working Group and served as an IITC delegate to the Working Group from 1982-1985.

32. Colorado AIM has been active in defending the internationally recognized human rights of indigenous peoples locally as well as nationally and internationally. Colorado, like the rest of the United States, has a history of virulent racism against American Indians. A prominent example is the U.S. Army’s 1864 Sand Creek Massacre, which killed perhaps 150 Cheyenne, mostly women and children. The Sand Creek Massacre was led by a Captain David Nichols who, like many under his command, “enthusiastically took part in [this] massacre in which Indians’ brains were knocked out, children’s ears were cut off, and men’s and women’s privates were cut out and used as tobacco pouches or saddle ornaments.”³³ Following that action, a celebratory parade was held in downtown Denver, with soldiers prominently displaying Cheyenne body parts, including genitalia.

33. Captain Nichols subsequently became a successful business man and the first Regent of the University of Colorado.³⁴ The Colorado Chapter of AIM has consistently insisted, in the face of great resistance, that this history be acknowledged and redressed. Thus, in the 1970s and 1980s Colorado AIM members were involved in actions to repatriate Indian scalps collected as “trophies” during the Sand Creek Massacre and maintained on public display at a tourist resort; to remove a Bible cover made from human (Indian) skin from a Denver seminary; and to have Captain Nichols’ name removed from a prominent building on the UCB campus.

34. As a result of the United States’ “termination” and “relocation” policies of the 1950s and 1960s, Denver now has a large population of urban indigenous people from numerous nations. Denver was also the first municipality in the U.S. to institute a Columbus Day holiday, before it became a national holiday. In anticipation of the 1992 quincentennial celebration of Columbus’ purported discovery of the Americas, attempts were made, beginning in 1989, to reinstitute an

³² Since 1985, when there was a split within AIM over the Colorado chapter’s support for the indigenous peoples of Nicaragua, Colorado AIM has been one of several autonomous chapters not affiliated with “National AIM of AIM, Inc.,” which is based in Minneapolis, Minnesota. This split also led to the severance of the previously close relationship between Colorado AIM leaders and the IITC. See <http://www.coloradoaim.org/history/1983to1989aimhistory.htm>. A detailed explanation may be found in Faith Attaguile’s “Why do you think we call it struggle?” <http://www.coloradoaim.org/why.html>.

³³ M. Annette Jaimes, “Introduction,” in M. Annette Jaimes, ed., *The State of Native America: Genocide, Colonization, and Resistance* 2 (1992) (quoting historian Patricia Nelson Limerick).

³⁴ *Id.* at 1.

annual Columbus Day Parade overtly celebrating the genocidal conquest of indigenous peoples in this hemisphere. Concerned particularly with the detrimental effects on indigenous children already suffering from high rates of suicide and other self-destructive responses to the poverty, disease, and violence imposed upon their communities, Colorado AIM organized political and educational efforts to counter this celebration. Professor Churchill was prominent in efforts by Colorado AIM, in coalition with up to sixty other organizations, designed to stop the Columbus Day parade. He, along with others, was arrested in 1991, 2000, and 2004 for participating in these efforts. On each occasion the defendants invoked their right and responsibility to counter the celebration of genocide and were acquitted by a jury. These protests and acquittals were widely and publicly attacked by the local media,³⁵ as well as state and local political figures.

Political Repression of Indigenous Activists

35. In response to indigenous activism, the United States has, at various points and in various manners, suppressed struggles for indigenous civil and human rights. For instance, U.S. courts continue to rely on the doctrine of discovery to uphold exertions of plenary power over indigenous nations.³⁶ The exertion of plenary power has meant the removal of indigenous peoples from their traditional territories, their mass internment, the abduction of their children and their placement in boarding schools or with non-indigenous families, and the involuntary sterilization of some forty percent of Native women of childbearing age as of the 1970s.

36. The United States has also employed its military power to enforce compliance. It was not until 1909 that a U.S. court held that American Indians could not be classified and treated as prisoners of war merely because they were Indian.³⁷ More recently, the U.S. government has generally responded to movements for racial justice with civilian police power. However, it has also employed military and paramilitary forces to repress indigenous movements for self-determination. Thus, for example, in 1973 federal personnel surrounded AIM members and Lakota residents assembled at the site of the 1890 Wounded Knee massacre on the Pine Ridge Reservation in South Dakota. During the ensuing 71-day standoff, the U.S. government brought in Army and National Guard officers and troops and deployed military aircraft, armored personnel carriers, automatic weapons, and armor-piercing ammunition to try to force a “surrender.”³⁸

37. Part of the struggle against oppressive government policies has been the effort to make accessible information about government actions and indigenous resistance. A major theme of Ward Churchill’s scholarship has been the documentation of efforts by the U.S. government to quash American Indian self-determination using means that violate domestic as well as international law. Some of his most popular work illuminates the U.S. Federal Bureau of Investigation (FBI)’s COINTELPRO operations, whose stated purpose was to “neutralize” individuals, organizations, and movements considered threats to the status quo, and whose tactics

³⁵ The *Rocky Mountain News*, founded in 1859, had praised the events at Sand Creek when they occurred in 1864. It also heavily criticized the Columbus Day protests and was instrumental in attacking Professor Churchill in 2005.

³⁶ The doctrine of discovery was cited as recently as 2005 by the United States Supreme Court by Justice Ginsberg. *Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 203 n.1 (2005).

³⁷ *United States v. By-a-lil-le*, 12 Arizona 150 (1909).

³⁸ Professor Churchill discusses Wounded Knee in *Agents of Repression: The FBI’s Secret Wars Against the Black Panther Party and the American Indian Movement* 159-170 (2002).

had been deemed illegal and unconstitutional by a U.S. Senate investigatory committee. Two co-authored books have been particularly influential: *Agents of Repression: The FBI's Secret Wars Against the Black Panther Party and the American Indian Movement* (1988, 2002) and *The COINTELPRO Papers: Documents from the FBI's Secret Wars Against Dissent in the United States*, (1990, 2002). The documentation of these histories and the dissemination of this information has formed part of the larger struggle to make alternative and critical histories available to indigenous communities and other communities of color in the United States.

American Indian Studies

38. American Indians and other peoples of color in the United States have engaged in protracted struggles to have accurate versions of their histories and appropriate descriptions of their cultures accessible to their children and included more generally in public school and university curricula. Despite strong opposition, these movements, often tied to broader civil rights movements, succeeded in establishing American Indian, African American, Mexican American or Chicano, and Asian American Studies programs, often collectively referred to as Ethnic Studies programs.

39. Ward Churchill was very active in these efforts to promote education for indigenous youth and to educate students generally about the often disturbing truths of American Indian history and contemporary realities. From 1977 to 1990, he was employed in American Indian Education and Educational Opportunity Programs in the local school district and the University of Colorado. In this capacity, he traveled to reservations throughout the northern plains and the southwest, working with Indian youth and encouraging them to attend college. From 1978-1990 Ward Churchill was also a Lecturer in American Indian Studies, and in 1990 was a Distinguished Scholar in American Indian Studies at Alfred University in New York state. In 1990 he received the University of Colorado at Boulder's Thomas Jefferson Award for Outstanding Service and Achievement "for his outstanding contributions to the University of Colorado at Boulder from 1978-1990 in the University Learning Center, the American Indian Studies Program, Educational Development Program, and the American Indian Educational Opportunity Program, and for his magnificent public service with the American Indian Movement of Colorado, the Native American Rights Fund, the Colorado Indian Education Association, as a delegate to working groups of the United Nations Commission on Human Rights, and with numerous other worthy causes."

40. In 1992 Professor Evelyn Hu-DeHart, now Director of Brown University's Center for the Study of Race and Ethnicity in America, noted that despite the increase in Ethnic Studies programs across the country,

American Indian Studies lingers far behind, with few established programs, hampered by an extreme shortage of Native American scholars able to find a place in academe. In short, the state of American Indian Studies reflects the state of Native North America, its poverty, marginalization, and continuously colonized condition.³⁹

³⁹ Evelyn Hu-DeHart, "Preface," *The State of Native America*, supra note 33, at ix.

41. Professor Churchill was instrumental in the establishment of an Ethnic Studies Department at the University of Colorado. In 1991 he was hired as a tenured associate professor of American Indian Studies at UCB and was promoted to full professor in 1997. From 1995-2001 he served as Associate Chair of the Ethnic Studies Department, and as its Chair from 2001-2005. Professor Churchill was well known as an outstanding teacher. Students appreciated his straightforward, often confrontational style, which forced them to critically assess not only the treatment of American Indians in the United States, but the stereotypes and biases they had absorbed from mainstream culture and education as well. Professor Churchill's classes were always oversubscribed, even when "capped" at 125 students; he was frequently asked by his deans to teach additional courses; and he won all of the University's highest teaching awards.⁴⁰

42. While employed by the University of Colorado, Professor Churchill (co-)authored or (co-)edited more than twenty books and 120 articles and/or book chapters, leading his department chair to conclude in 2001 that he was the most cited scholar in the United States in the field of Ethnic Studies. These works are extraordinarily well-documented—not counting reprints, they contain some 12,000 footnotes—and they have been frequently reprinted and/or translated into various other languages.⁴¹ Robert A. Williams, Jr., Lumbee attorney and E. Thomas Sullivan Professor of Law and American Indian Studies at the University of Arizona, has written:

[A]nyone who's followed the field of American Indian Studies for the past three decades would immediately recognize Ward Churchill as an important scholar, writer and advocate, whose published works are widely cited and relied upon. His body of written work and teaching has inspired a generation of younger Native students and activists to unashamedly assert indigenous sovereignty and Indian rights over a broad domain of intellectual and cultural life in American society. In many ways and in many forums, he has helped to shape the discourse of the modern Indian rights movement.⁴²

43. The primary focus of Professor Churchill's scholarly work has been the detailed documentation of genocidal policies pursued by the U.S. government. Perhaps best known is *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present*. Published in 1997, over 20,000 copies were sold in next 7 years. In 2003, he followed up with *Kill the Indian, Save the Man: The Genocidal Impact of American Indian Residential Schools*, a book that has had great influence on the movement to redress the abuses suffered by more than five generations of American Indian children forced into boarding schools.

44. American Studies professor David E. Stannard of the University of Hawai'i noted that Professor Churchill was "looking for trouble" by framing the history of American Indians in terms of genocide. Professor Stannard concludes his preface to *A Little Matter of Genocide* by noting that only a few genocides are officially acknowledged in the United States, but that

⁴⁰ See Professor Ward Churchill Curriculum Vita, Annex 1.

⁴¹ *Id.*

⁴² Statement of Robert A. Williams, Jr. in support of Professor Churchill, <http://archived.wardchurchill.net/s25-RobertWilliams.pdf>.

. . . the victims of other genocides suffer [as well]. Genocides long past—and officially denied—whose few survivors huddle in poverty and broken health . . . on reservations and in ghettos in the forgotten backwaters of American life. And genocides ongoing—also officially denied—where American client states liquidate inconvenient indigenous people with impunity. . . .

So it is a good thing that Ward Churchill . . . has decided once again to go looking for trouble. He will get plenty of it. But it is only because of trouble-makers like him that the deadened conscience of this nation might some day begin to stir.⁴³

45. Professor Churchill's writings have addressed indigenous struggles for treaty-based land rights; the environmental destruction of indigenous land, for example by uranium mining; the perpetuation of the myths and images of "savage" Indians in popular culture; and the cultural appropriation of indigenous spiritual practices. In 1993, the 100th anniversary of the United States' overthrow of the Kingdom of Hawai'i, Professor Churchill served as a jurist/rapporteur on a People's International Tribunal addressing the rights of Native Hawaiians. Subsequently, with Cree attorney Sharon H. Venne, he compiled and edited a record of that Tribunal, *Islands in Captivity: The International Tribunal on the Rights of Indigenous Hawaiians* (2004).

46. As described in more detail below, several other books written by Professor Churchill indigenous history and indigenous resistance to colonization and cultural appropriation have been nationally recognized for their contributions to the defense of human rights.⁴⁴ In 2008, Carrie Dann, Western Shoshone elder and human rights defender, summarized Professor Churchill's work as follows:

In my opinion, as a traditional indigenous person, Mr. Churchill writes with the highest caliber of honesty and truth when speaking of indigenous oral histories and culture. I have often said that if I could hold a pen and write books I would write exactly what Mr. Churchill has written. . . .

My family, the Western Shoshone people and all indigenous peoples across this country have lived for too many years with governmental lies and cover-ups. It is individuals like Mr. Churchill who are heroes to our struggle to have the truth told, finally.⁴⁵

47. Professor Churchill's political activism and scholarship as an indigenous human rights defender placed him in the public spotlight. Between 1990 and 2005, he served on 12 editorial boards, gave several thousand public lectures, and participated in numerous grassroots international tribunals. He received the University of Colorado's highest awards, including a teaching excellence award, one for excellence in social science writing, an award for the "Promotion of Cultural Diversity in Higher Education," and an alumni award for outstanding

⁴³ David E. Stannard, "Preface," in Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas, 1492 to the Present* xviii (1997).

⁴⁴ See *infra* paras. 145-149.

⁴⁵ Statement by Carrie Dann in support of Professor Churchill, <http://wardchurchill.net/academic/> and <http://wardchurchill.net/wardspeaks/>.

service and achievement. In 2004, Professor Churchill was inducted into the Martin Luther King Colloquium of Scholars, based at Morehouse University in Atlanta, Georgia.⁴⁶

48. Although the significance of Professor Churchill's work on behalf of indigenous peoples has been widely recognized, his high profile and reputation as an uncompromising defender of indigenous rights and political freedom have also made him a convenient target for those who would prefer to deny or suppress inconvenient historical truths and the harsh realities of daily life for many indigenous peoples in North America.

C. Suppression of Indigenous History and Critical Scholarship

49. The prohibition on discrimination based on race or ethnicity is widely accepted as a fundamental norm of international law and as guaranteed by the equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution. In practice, however, the desegregation of U.S. institutions, including schools and workplaces, continues to be contested, as can be seen in the on-going attempts to eliminate affirmative action and Ethnic Studies programs.

50. For several decades, the backlash to the full incorporation of people of color into civil society in the United States has included resistance to the notion of cultural pluralism or "diversity"; attacks on the inclusion of the histories of indigenous peoples, as well as peoples of African, Asian, and Latin American descent, into public education; and attempts to discredit Ethnic Studies scholars and dismantle Ethnic Studies programs. These efforts are often cloaked in the rhetoric of promoting Western civilization or American values, eliminating "reverse discrimination" or liberal bias, and even academic freedom.

Attempts to Eliminate Ethnic Studies

51. In the United States, the curriculum taught in public elementary and high schools, as well as state colleges and universities, is generally regulated at the state rather than federal level. As part of the broader social and political backlash against acknowledgment of genocide, slavery, and inequality in United States history, many state legislatures have been attempting to undermine the expansion of the educational curriculum that resulted from the struggles for civil and political as well as economic, social and cultural rights waged in the 1960s and 1970s. Although the struggles to eliminate Ethnic Studies and similar programs predated the attacks on Professor Churchill, they have since continued. The termination of Professor Churchill's employment can thus be seen as one point in an ongoing struggle over the future of state-run institutions of higher education in the United States of America.

52. Thus, for example in 2010, shortly after passing unprecedentedly harsh anti-immigration laws, the state of Arizona enacted legislation prohibiting any public school courses that "promote resentment toward a race or class of people," "are designed primarily for pupils of a particular ethnic group," or "advocate ethnic solidarity."⁴⁷ Although using purportedly neutral language,

⁴⁶ See Professor Churchill's curriculum vita, Annex 1.

⁴⁷ Arizona H.B. 2281 (2010), <http://www.azleg.gov/legtext/49leg/2r/bills/hb2281s.pdf>. See also Tamar Lewin, "Citing Individualism, Arizona Tries to Rein in Ethnic Studies in School," *New York Times*, May 13, 2010, <http://www.nytimes.com/2010/05/14/education/14arizona.html>.

the legislative history made it clear that its primary purpose was to eliminate the city of Tucson's Mexican American Studies ("MAS") program. The MAS program was eliminated and has, to date, been the only program in the state of Arizona affected by the legislation.⁴⁸ In conjunction with this measure, the city school board also banned specific books, including *Chicano!: The History of the Mexican American Civil Rights Movement*, Rodolfo Acuña's *Occupied America: A History of Chicanos*, and Paulo Freire's *Pedagogy of the Oppressed*.⁴⁹ Orchestrators of the attack on Mexican American Studies at the high school level also considered attempting to eliminate it from university curricula.⁵⁰ After a federal court struck down parts of the law applying to Tucson's MAS program, the city is in the process of restoring a version of the program, but thus far has not approved any books by Mexican American authors as part of the restored curriculum.⁵¹

53. In 2010, the Texas school board mandated changes to the public school social studies curriculum that, among other things, minimized the histories of peoples of color.⁵² Texas' policies are particularly significant because, based on volume, Texas' choices have a large impact on textbook publishers throughout the country. In 2013, a committee of the Texas legislature reviewed draft legislation similar to Arizona's, but affecting higher education as well. The legislature has not, thus far, moved forward with the bill.⁵³ Among other things, the proposed law would remove Ethnic Studies courses from the core curriculum in Texas universities.

54. In March 2012, the state of Ohio enacted a law requiring that high school students receive instruction in United States and Ohio history and government before they "may participate in courses involving the study of social problems, economics, foreign affairs, United Nations, world history and government...."⁵⁴

55. The Tennessee Tea Party has called on state lawmakers to amend school curricula and textbooks so that "[n]o portrayal of minority experience in the history which actually occurred shall obscure the experience of contributions of the Founding Fathers, or the majority of citizens, including those who reached positions of leadership."⁵⁵ According to their spokesperson, an

⁴⁸ See Marc Lacey, "Rift in Arizona as Latino Class is Found Illegal," *New York Times*, January 7, 2011.

⁴⁹ See Roberto Cintli Rodriguez, "Arizona's 'banned' Mexican American books," *The Guardian*, January 18, 2012, <http://www.theguardian.com/commentisfree/cifamerica/2012/jan/18/arizona-banned-mexican-american-books>.

⁵⁰ Roque Planas, "Arizona Official Considers Targeting Mexican American Studies in University," *Fox News Latino*, <http://latino.foxnews.com/latino/politics/2012/03/28/arizona-official-considers-targeting-mexican-american-studies-in-university/>.

⁵¹ See Ted Robbins, "Tucson Revives Mexican-American Studies Program," *National Public Radio*, <http://www.npr.org/blogs/codeswitch/2013/07/24/205058168/Tucson-Revives-Mexican-American-Studies-Program>; Roque Planas, "No Mexican American Studies Books for Tucson's 'Culturally Relevant' Courses," *Huffington Post*, August 28, 2013, http://www.huffingtonpost.com/2013/08/28/mexican-american-studies-books-tucson_n_3832397.html.

⁵² See James C. McKinley, Jr., "Texas Conservatives Win Curriculum Change," *New York Times*, March 12, 2010, <http://www.nytimes.com/2010/03/13/education/13texas.html>.

⁵³ See Roque Planas, "Latino Activists Declare Victory Over Texas Ethnic Studies Law," *Huffington Post*, May 13, 2013, http://www.huffingtonpost.com/2013/05/13/texas-ethnic-studies-law_n_3268594.html.

⁵⁴ Ohio H.B. 461 § 3313.306(B)(7), http://www.legislature.state.oh.us/bills.cfm?ID=124_HB_461.

⁵⁵ See Richard Locker, "Tea parties issue demands to Tennessee legislators," *The Commercial Appeal*, January 13, 2011, <http://www.commercialappeal.com/news/2011/jan/13/tea-parties-cite-legislative-demands/>.

attorney, this provision is intended to address “made-up criticism about, for instance the founders intruding on the Indians or having slaves or being hypocrites...”⁵⁶

National Campaigns against Multiculturalism

56. Ethnic Studies, gender studies, social justice programs, environmental studies, and a wide range of educational programs intended to incorporate the perspectives of historically subordinated groups have come under attack across the United States. Funded by powerful corporate interests, these attacks are often framed in terms of “reverse discrimination,” the need to protect the academic freedom of conservative students and professors, and the importance of emphasizing Western civilization in the curriculum.

57. Reacting, perhaps, to widespread protests of the Vietnam War on college campuses, Lewis Powell, Jr., who would later become a U.S. Supreme Court justice, issued an influential memorandum in 1971 criticizing U.S. universities for not employing enough “conservative” professors.⁵⁷ Since then, powerful foundations backed by right-wing donors such as the Koch brothers, John Olin, and Joseph Coors (of Denver), have provided approximately \$3 billion of funding to establish some 500 think tanks devoted to eliminating what they portray as the “liberal bias” of colleges and universities.⁵⁸

58. A powerful spokesperson for this movement is David Horowitz, president of the David Horowitz Freedom Center⁵⁹ and founder of Students for Academic Freedom,⁶⁰ which monitors what professors say in the classroom. In 2006 he published *The Professors: The 101 Most Dangerous Academics in America*, a list which disproportionately focuses on African American, Chicano, or American Indian Studies professors. Thus, for example, he criticizes a leading African existential philosopher for including materials from “Africana and Eastern thought” in a course on existential philosophy. Ward Churchill and Cornell West, a professor of African American studies at Harvard and Princeton, are highlighted by Horowitz as the exemplars of “dangerous” academics.

59. In 1987, several powerful right-wing foundations helped establish the National Association of Scholars (NAS), an organization dedicated to preserving the “Western intellectual heritage” and opposing multiculturalism, diversity, and what it terms the “cultivation of ethnic and group grievances.”⁶¹ NAS claims credit for helping to draft California’s Proposition 209, eliminating affirmative action and has successfully lobbied for federal funding for programs emphasizing “traditional American history” and “Western civilization” at the expense of other traditions.⁶² NAS has also been instrumental in the pending legislation to eliminate Ethnic Studies from the core curriculum in Texas college and universities. In January 2013 it published a Report, “Recasting History: Are Race, Class, and Gender Dominating American History? A

⁵⁶ *Id.*

⁵⁷ Memo from Lewis F. Powell, Jr. to Eugene B. Sydnor, Jr., Chairman of the Education Committee, August 23, 1971, <http://law.wlu.edu/deptimages/Powell%20Archives/PowellMemorandumPrinted.pdf>.

⁵⁸ Henry A. Giroux, “Academic Unfreedom in America: Rethinking the University as a Democratic Public Sphere,” in Edward J. Carvalho and David B. Downing, eds. *Academic Freedom in the Post-9/11 Era* (2010), p. 22.

⁵⁹ See Horowitz Freedom Center, <http://www.horowitzfreedomcenter.org/>.

⁶⁰ See Students for Academic Freedom, <http://www.studentsforacademicfreedom.org/>.

⁶¹ See National Association of Scholars, “Issues and Ideals,” http://www.nas.org/about/issues_and_ideals.

⁶² See National Association of Scholars, “History of NAS,” <http://www.nas.org/about/history>.

Study of U.S. History Courses at the University of Texas and Texas A&M University.”⁶³ The Report concludes that issues of race, class, and gender have been disproportionately emphasized, particularly at the University of Texas and recommended, among other things, that textbook publishers should emphasize “depoliticized” history.⁶⁴

60. In 1995, NAS and the Intercollegiate Studies Institute, dedicated to promoting the “values, customs, conventions and norms of the Judeo-Christian tradition,” helped Lynne Cheney, wife of former U.S. Secretary of Defense Dick Cheney, establish what became the American Council of Trustees and Alumni (ACTA). ACTA enlists university regents and trustees, as well as state and federal elected officials to further its aims of “defending civilization” and promoting “American values” in higher education. As described in more detail below, ACTA has longstanding ties to politicians and University officials in Colorado and played a prominent role in the attacks on Professor Churchill.⁶⁵

61. Despite claims by predominantly white neoconservative organizations about “reverse racism,” people of color continue to be underrepresented on the faculties of U.S. colleges and universities. The U.S. government’s 2010 Census reported that over 13% of the population identified as Black or African American; about 13% as “Hispanic” (of any race); and 1.7% as American Indian or Alaska Native.⁶⁶ According to the U.S. Department of Education, the percentages of Black and Hispanic students in higher education in 2010 were approximately the same as their percentage in the population.⁶⁷ By contrast, according to the University of Maryland’s Consortium on Race, Gender and Ethnicity, in 2009 only 3.4% of the tenured college and university professors in the United States were African American, 2.6% were Hispanic, and 0.5% were American Indian or Alaska Native.⁶⁸

Attacks on Critical Scholars after September 11, 2001

62. Freedom of political expression in the United States has been demonstrably chilled since the September 11, 2001 attacks on the Pentagon and World Trade Center and the Bush administration’s immediate initiation of its “war on terror.” In the immediate aftermath of the attacks, the United States arbitrarily detained over 1200 persons of Arab descent and instituted “security” protocols condemned by many civil rights organizations as simply another form of racial (or religious) profiling. The use of secret courts, employing evidence not disclosed to defendants, increased dramatically and the surveillance and interception of phone calls, text date, and emails became increasingly pervasive. Vigilante attacks on persons thought to be Muslim or

⁶³ Ashley Thorne, Peter Wood, Richard W. Fonte, *Recasting History: Are Race, Class, and Gender Dominating American History*, January 10, 2013, http://www.nas.org/images/documents/Recasting_History.pdf

⁶⁴ National Association of Scholars, “Recasting History: Are Race, Class, and Gender Dominating American History? A Study of U.S. History Courses at the University of Texas and Texas A&M University,” http://www.nas.org/images/documents/Recasting_History.pdf.

⁶⁵ See *infra* para. 98.

⁶⁶ U.S. Census Bureau, “Overview of Race and Hispanic Origin: 2010,” <http://www.census.gov/prod/cen2010/briefs/c2010br-02.pdf>.

⁶⁷ National Center for Education Statistics, “Fast Facts,” <http://nces.ed.gov/fastfacts/display.asp?id=98>.

⁶⁸ Consortium on Race, Gender, and Ethnicity, “Historically Underrepresented Minority (URM) Faculty in Academia,” <http://www.cрге.umd.edu/urm.html>.

of Middle Eastern origin became commonplace. In one incident, a young American Indian woman was killed by white youth who demanded that she “go back to where she came from.”⁶⁹

63. In this climate, many scholars and teachers, particularly those critical of U.S. policy in the Middle East, were targeted. Some of the best known academic freedom cases involve professors Joseph Massad of Columbia University, Norman Finkelstein of DePaul University, and Nadia Abu El-Haj of Barnard College and Columbia University, each of whom has taken positions supporting the rights of Palestinians and criticizing Israeli policies.⁷⁰ Non-citizen scholars have been refused visas to enter the United States on the basis of their political views. Thus, for example, Iraqi Professor Riyadh Lafta, was prevented from entering the U.S. to present his research on high rates of cancer among Iraqi children, probably because of a study he had published in a prominent British medical journal estimating that over 650,000 Iraqis had died as a consequence of the U.S.-led invasion of Iraq. Islamic scholar Tariq Ramadan, a Swiss citizen, had his visa revoked, preventing him from accepting a prestigious professorship at Notre Dame University, apparently because of his criticisms of U.S. policies in the Middle East.⁷¹

64. The climate of fear and suspicion generated by the United States’ response to the attacks of September 11 fostered xenophobic sentiment, fueled extant movements to rollback measures implemented to address racial disparities in U.S. society, and encouraged the undermining of Ethnic Studies in the name of promoting a homogeneous concept of “American values.” “American exceptionalism”—the belief that the United States represents the highest stage in the evolution of European civilization and, therefore, is entitled to engage in otherwise globally unacceptable conduct—was, and continues to be, widely promoted by political leaders and the mainstream media. Illustrating these developments, in November 2001, ACTA issued a lengthy report, *Defending Civilization: How Our Universities Are Failing America and What Can Be Done about It*.⁷² The report accuses college and university professors of being the “weak link in America’s response” to terrorist attacks, primarily because of their unwillingness to defend American “civilization.” The confluence of the post-9/11 political climate and neo-conservative attempts to purge academia of critical histories and professors made Professor Churchill a clear target for those who wished to eliminate uncomfortable truths from public discourse and silence critics of the triumphalist narrative of U.S. hegemony.

⁶⁹ See Vijay Prashad, “The Green Menace: McCarthyism After 9/11,” 1 *The Subcontinental* 65, 65-66 (2003).

⁷⁰ Henry Giroux, “Higher Education after September 11th: The Crisis of Academic Freedom and Democracy,” in Anthony J. Nocella, II, Steven Best, and Peter McLaren, eds. *Academic Repression: Reflections from The Academic Industrial Complex*, AK Press (2010), p.102.

⁷¹ *Id.* at 100-101.

⁷² ACTA, *Defending Civilization: How Our Universities Are Failing America and What Can Be Done about It*, https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&cad=rja&ved=0CD8QFjAD&url=https%3A%2F%2Fportfolio.du.edu%2FdownloadItem%2F85865&ei=9PdIUqPcC6e32wX8toGgCA&usq=AFQjCNFsTJs8Jpv64SR-0bxp_MOLoys50A&sig2=dCDkdmAPvZA77glMfl_QNQ&bvm=bv.53217764,d.b2l.

D. The Targeting of Ward Churchill

Furor over Professor Churchill's Commentary on the 9/11 Attacks

65. On September 12, 2001, Ward Churchill wrote an op-ed piece about the September 11 attacks that was published in an obscure online journal.⁷³ Professor Churchill was troubled by the media coverage surrounding the attacks, in which there was virtually no public discussion of why people might carry out armed attacks on the most visible symbols of U.S. military and economic power and, therefore, no discussion of how such attacks might be avoided in the future. In response to the U.S. media's consistent reference to the attacks as "senseless," i.e., without cause, he argued that U.S. foreign and domestic policies and practices could have been the provocation. One example he highlighted was the estimate that some 500,000 Iraqi children had died as a result of U.S. economic sanctions and former U.S. Secretary of State Madeline Albright's public statement that it was "worth" the "price." Thus, in deliberately provocative terms, Professor Churchill urged readers to consider instances of U.S. atrocities committed abroad and the role they may have played in motivating attacks on the United States.

66. For several years, this online commentary received little attention. In 2003, Professor Churchill published an expanded version of the op-ed piece, with extensive documentation of U.S. acts of war and violations of international law, as a book entitled *On the Justice of Roosting Chickens: Reflections on the Consequences of U.S. Imperial Arrogance and Criminality*. It subsequently received honorable mention for the prestigious Gustavus Myers Award for Outstanding Books on Human Rights.

67. In January 2005, Professor Churchill's 9/11 op-ed was catapulted into the national spotlight. Initially, Professor Churchill became the subject of significant media scrutiny due to his testimony at the trial of a group of defendants who were among the more 240 persons arrested in October 2004 for protesting Denver's Columbus Day Parade. Professor Churchill's moving testimony about the on-going effects of genocidal policies reflected in the celebration of Columbus' "discovery" of the Americas had a visible impact on the members of the jury. The jury not only acquitted the defendants but inquired about how they could join the protests the following year. On January 25, 2005, Professor Churchill participated in a Colorado AIM press conference addressing the City's dismissal of all charges against the remaining 230 protestors. Elected officials and the media in Colorado reacted extremely negatively to the acquittals and, shortly thereafter, the City of Denver changed its ordinances to make it easier to obtain convictions in subsequent protests.

68. On January 26, a Syracuse, New York, newspaper criticized Professor Churchill's 2011 commentary on the attacks of September 11 in an ultimately successful attempt to force the cancellation of a lecture scheduled at Hamilton College. Quotations taken out of context from the op-ed piece were immediately highlighted and denounced by the Denver media and soon became the focus of virulent criticism in the national media. For the next several months, the "Churchill controversy" was highlighted by neoconservative national media personalities. Fox News' *The O'Reilly Factor*, for example, attacked Professor Churchill and his work on 41 consecutive

⁷³ Ward Churchill, "Some People Push Back?: On the Justice of Roosting Chickens," Dark Night Press, September 11, 2001, <http://www.darknightpress.org/articles/some-people-push-back-on-the-justice-of-roosting-chickens/>.

nights. Professor Churchill appeared on the cover of the *Weekly Standard* magazine as the subject of an article subtitled “The Worst Professor in America.” For the better part of a year, a Denver-based talk show radio station devoted more than six hours per day to the subject, and in two months the four major Denver and Boulder newspapers published approximately 400 stories, many front-page spreads, all disparaging Professor Churchill’s character, his 9/11 op-ed piece, and his scholarship more generally. The Governors of the states of Colorado and New York demanded that Professor Churchill be fired and three state legislatures denounced Professor Churchill’s views. The Colorado General Assembly passed a resolution condemning Professor Churchill’s statements and threatened to cut off funding for Ethnic Studies if he was not terminated. A Colorado Congressman demanded Professor Churchill’s resignation and boasted on the radio that he had discussed the Churchill case with President George W. Bush aboard Air Force One.

Retaliatory Investigation of Professor Churchill’s Work

69. The University of Colorado is internally governed by “Laws” promulgated by its Board of Regents. These state that a liberal education can only be provided in an atmosphere that provides academic freedom, defined as “the freedom to inquire, discover, publish and teach truth as the faculty member sees it, subject to no control or authority save the control and authority of the rational methods by which truth is established.” Recognizing the dangers of political pressure, they also state that the efforts of faculty member to fulfill their responsibilities “should not be subject to direct or indirect pressures or interference from within the university, and the university will resist to the utmost such pressures or interference when exerted from without.”⁷⁴

70. In complete disregard of these provisions, on January 27, 2005, just two days into the “controversy,” the University’s Interim Chancellor Philip DiStefano publicly denounced Professor Churchill’s 2001 statements as “abhorrent” and repugnant.” On January 28, Law School Dean David Getches responded to the political pressure by urging Chancellor DiStefano to remove Professor Churchill as Chair of Ethnic Studies. Dean Getches advised suspending Professor Churchill “with pay pending review by committee of his competence and fitness to continue as a faculty member at CU” and questioned his “competence and integrity as a scholar.” Unaware of these discussions, Professor Churchill voluntarily stepped down as Chair of the Ethnic Studies Department in an attempt to insulate the department from the ensuing political attack.⁷⁵

71. On February 3, 2005, the Regents of the University convened an emergency meeting and issued a blanket apology for Professor Churchill’s comments concerning 9/11. Several Regents had expressed their desire to fire Professor Churchill and one read a letter from Governor Owens condemning Professor Churchill. Hundreds of students supportive of Professor Churchill attended the meeting. Although it had been convened as a public meeting, students and community members who attempted to speak were forcibly ejected and at least one was arrested.

⁷⁴ *Laws of the Regents*, 5.D.1(A), 1(B), and 2(B), <https://www.cu.edu/regents/Laws/article-05.html>.

⁷⁵ *Churchill v. University of Colorado*, Petition for a Writ of Certiorari, submitted to the United State Supreme Court, December 12, 2012, Annex 14.

72. The Regents realized that terminating Professor Churchill for controversial political speech would constitute a blatant violation of his right to freedom of expression. As one Regent had stated to the *New York Times* on February 2, “We can fire Churchill. We just can’t fire him tomorrow.” Attempting to accomplish this purpose, the Regents formed an *ad hoc* committee consisting of Interim Chancellor DiStefano, Law Dean Getches, and Todd Gleeson, Dean of Arts and Sciences, to investigate Professor Churchill’s speech in order to see if there was “cause for dismissal.” This *ad hoc* committee investigated all of Professor Churchill’s publications, including works published long before he had become a faculty member and those previously reviewed in the University’s hiring, tenure, and promotion processes. Professor Churchill was never formally notified of the inquiry nor consulted by the *ad hoc* committee, whose investigation was conducted entirely outside the University’s established committee structure and faculty disciplinary procedures.

73. On February 8, 2005, UCB students sponsored a speech by Professor Churchill. Chancellor DiStefano attempted to cancel it, but the threat of a federal court injunction forced the administration to allow the event to proceed. More than 1500 people attended, responding to Professor Churchill with numerous standing ovations. On February 25, 2005, nearly 200 tenured UCB professors sponsored an advertisement demanding that the University officials halt their investigation of Professor Churchill’s work. Thousands of individuals and scholarly organizations sent letters and signed petitions, urging the University halt its attempts to force Professor Churchill out of the academy.

74. The significance of the University’s attacks to indigenous rights was immediately recognized by American Indian scholars and activists. The American Indian Movement of Colorado and its allies in the community provided security and visible support for Professor Churchill at all of his public events, and Colorado AIM sponsored a petition condemning the University’s attempt to suppress freedom of expression. Many indigenous scholars wrote letters highlighting Professor Churchill’s work as a defender of indigenous rights. For example, Anishinaabe author/activist Winona LaDuke stated in a letter to the Regents and the Governor:

I have known Ward Churchill as a colleague, a co-author, and an intellectual peer for twenty-five years. During that time, I have seen Churchill nurture a number of Native writers, provide expert witness testimony to numerous cases, review international cases of human rights concerns as a judge, as well as write an incredible number of essays and books illuminating a wide range of issues. Churchill’s work as a Native intellectual is incredibly significant to the Native American community as well as world political and intellectual traditions.

75. Soon thereafter, the University claimed that it could not locate a “loyalty oath” signed by Professor Churchill and demanded that he sign another one. Noting his belief that this requirement was unconstitutional, Professor Churchill nonetheless complied, stating in a letter of February 19, 2005:

. . . I have done so voluntarily because I believe adamantly in upholding the Constitutions of both the United States and of Colorado.

Indeed, the most basic argument made in my speeches and writings recently deemed to be so “controversial” is that we have a clear legal/moral responsibility to ensure that the U.S. government and all of its representatives uphold the Constitution and comply with the rule of law.⁷⁶

76. On March 3, 2005, University President Elizabeth Hoffman warned the Boulder Faculty Assembly of a “new McCarthyism,” referring to the anti-communist blacklists and campaigns, sponsored by then-Senator Joseph McCarthy, which stifled freedom of expression and association in the United States during the 1950s.⁷⁷ President Hoffman pointed out that there was “no question that there’s a real danger that the group of people [who] went after Churchill now feel empowered.”⁷⁸ Under pressure from Governor Owens, she announced her resignation five days later. She would be replaced by Hank Brown, a former Colorado Senator and a founding member of ACTA.

University’s Fueling of Virulent Hate Speech and Threats of Violence

77. During this period, Professor Churchill, his family, and the faculty, staff and students of the Ethnic Studies Department were subjected to a constant barrage of hate mail and phone calls, as well as threats of violence. University officials encouraged the media to unearth all possible allegations of misconduct against Professor Churchill. In violation of its own rules on confidentiality, the University used its website and frequent press conferences to disseminate information intended to impugn Professor Churchill’s character and scholarship. In turn, the local and national media “feeding frenzy” unleashed a tidal wave of racism and anti-Indian sentiment, as well as sexist, homophobic, and xenophobic attacks.

78. Professor Churchill’s home and vehicle were vandalized, and he received a numerous death threats. At one point Professor Churchill had a backlog of more than 8,000 emails, most of them derogatory and many of them either posing direct threats or making comments such as “we should have killed all of you [Indians].” Colorado AIM provided almost constant security for Professor Churchill in the first few months, and he was obliged to make special arrangements for security at virtually all of his public engagements for the next five years. Students of color were subjected to a heightened level of racist attacks, both verbal and physical. Students known to be supportive of Professor Churchill received threatening messages and, on one occasion, the brakes on a student’s car may have been tampered with.

79. University officials were well aware of these threats and did nothing in response. In contrast to their immediate condemnation of Professor Churchill’s speech, they issued no statements condemning the virulent racism being encountered by students of color and the faculty, staff or students of the Ethnic Studies Department. They provided no extra security for those being threatened. Instead, they continued to publicize their attacks on Ward Churchill’s

⁷⁶ Letter from Ward Churchill to Dean Todd Gleeson, February 19, 2005.

⁷⁷ Kirk Johnson, “University President Resigns at Colorado Amid Turmoil,” *New York Times*, March 8, 2005, <http://www.nytimes.com/2005/03/08/national/08colorado.html>.

⁷⁸ John Ensslin, “Hoffman warns CU faculty of ‘new McCarthyism’: But president notes obligation to probe Churchill’s record,” *Rocky Mountain News*, March 4, 2005.

scholarship, personal integrity, and even his identity, thereby encouraging anyone who was unstable or felt threatened by people of color to take action.

80. According to an Open Letter sent from the Department of Ethnic Studies to the Board of Regents, President Hoffman, and Chancellor DiStefano:

Ethnic Studies is the only department on campus with a truly racially and ethnically diverse faculty. We offer the only institutionalized alternative to an overwhelmingly eurocentric curriculum, and have provided a safe haven for many students in what they perceive to be an otherwise hostile environment. . . .

Since late January, the Ethnic Studies Department and individuals within it have been publicly and personally denigrated. At the height of the media frenzy, the Department received about 1000 e-mails and dozens of phone calls *each day*, many explicitly racist and/or threatening. . . .

Despite repeated requests, the University has offered no public defense of the Department, given no support to our already overworked staff, and provided no additional security in the face of threats to students, staff and faculty. . . .

Our students have been subjected to racist communications and threats, as have our faculty. After some incidents targeting students received widespread media coverage, the Regents and the Administration claimed “outrage,” yet an actively hostile environment which encourages such attacks has been fostered by the institution’s own conduct. . . .

The University is well aware that Ward Churchill and other members of the Department have been subjected to death threats, threats of violence and overtly racist attacks. It *could* have publicly condemned these threats of violence and expressions of racial hostility. Instead, its stunning silence has effectively empowered the attackers to continue.

As the Regents and the top administrators of this University, you have tremendous influence over the future of this institution. If you want Ethnic Studies to disappear, intend to chill the speech of all professors, and wish to actively discourage the recruitment of students and faculty of color, you need only continue on your current path. . . .⁷⁹

The letter included a small sampling of racist, sexist, and homophobic e-mails directed at Ward Churchill, other faculty members, and the discipline of Ethnic Studies that demonstrated the virulent nature of the attacks and, the Department believed, highlighted the need for Ethnic Studies programs. The Department received no response, not even an acknowledgement of receipt, from University officials.

⁷⁹ Open Letter from the Department of Ethnic Studies, University of Colorado, April 25, 2005, Annex 2.

E. Allegations Regarding Ward Churchill's Scholarship

81. On March 24, 2005, Chancellor DiStefano reported to the Regents and the press—although not to Professor Churchill—that all of Professor Churchill's writings and public speeches, including his op-ed piece concerning the September 11 attacks, were protected by the First Amendment to the U.S. Constitution, which guarantees freedom of expression. Simultaneously and in furtherance of his previously declared purpose of finding grounds for termination, the Chancellor announced he was personally lodging a series of complaints against Professor Churchill for alleged research misconduct.

82. Professor Churchill was never notified by any University official of (a) the Regents' meeting called to discuss his case; (b) the creation of the ad hoc committee; or (c) the "investigation" conducted by that committee. He learned of these events only by virtue of the media coverage; on occasion he learned of new developments only when contacted by the press, which had been directly informed by the University. The ad hoc committee's Report was announced and copies distributed at a public news conference on March 24. The Committee did not even provide him with a copy of the report until after he informed Dean Gleeson's office that he would no longer provide information they requested until someone communicated with him about the investigation. Several days later, on March 31, 2005, he received a copy of the Report. This was Professor Churchill's first official communication from the University in the entire process.

Misconduct Charges Invented or Solicited by University Officials

83. The initial—and crucial—stage of the "investigation," which led to the ad hoc committee's publicly disseminated Report, was conducted entirely in secret. Professor Churchill was not informed of the allegations being made against him or the sources of those allegations. Based on what was appearing in the media, he knew that there were numerous false accusations coming from sources entirely lacking in credibility. However, he was given no opportunity to know which of these charges were being taken seriously by the ad hoc committee, and no opportunity to respond.

84. Prior to this investigation, no allegations of research misconduct by Professor Churchill had been submitted to the University, although one complaint was subsequently solicited by Law Dean Getches, a member of the committee. Instead, the *ad hoc* committee's allegations of research misconduct were derived from the media frenzy that occurred between late January and late March 2005, when reporters were scouring Professor Churchill's background, work, family, and personal history in a blatant attempt to unearth accusations of virtually any kind of misconduct.

Attempts to Discredit Professor Churchill's Historical Analysis

85. The primary "academic fraud" allegations derived from other scholars' disagreements with Professor Churchill's historical analysis concerning the U.S. Army's role in the spreading of smallpox to American Indians and his tracing of the use of "blood quantum" requirements to the 1887 Allotment Act that authorized federal agents to create "rolls" of American Indians eligible to receive land allotments, and application of such standards to enforcement of the 1990

Indian Arts and Crafts Act. Noting that these were “disputes well within the range of ‘normal’ scholarly disagreement, Professor Churchill made the following observations in a grievance filed with the University:

Re-examination of facts and the consequent development of new/different interpretations of their meaning, constitutes the very heart of the academic enterprise. It is our *responsibility* as scholars to engage in such activity. If doing so is to render one subject to charges of “research fraud” at the whim of those who might for whatever reason disagree with the results, challenges to orthodoxy would be nullified before they commenced and the assurances of Academic Freedom reduced to meaningless platitudes.

My case embodies a specific and dangerous trajectory of this broader threat to Academic Freedom. What is being criticized is my contention that the U.S. government was directly involved in both the intentional spread of disease and the implementation of a eugenics-based system of identifying American Indians by “blood quantum.” The attempt to discredit my scholarship on these matters cannot be separated from the attempt to neutralize to my broader critique of U.S. policy vis-à-vis American Indian nations. And since I am widely viewed as being among the foundational scholars in my field ... the current effort to impugn the integrity of my research is intended to simultaneously discredit the entire mode of interpretative discourse I’ve come to represent, thereby deterring others from engaging in it. . . .⁸⁰

Attempts to Discredit Professor Churchill’s Integrity and Identity

86. The *ad hoc* committee also claimed that Professor Churchill had engaged in “plagiarism” which, under University rules, was defined as “the use of another’s ideas or words without appropriate acknowledgment.” In fact, Professor Churchill was not accused of plagiarism, but of (1) improper citations in an essay that Professor Churchill did not author, published in a book he did not edit, and (2) allowing essays he had written to be published under other authors’ names, a practice commonly referred to as “ghostwriting.” Nonetheless, the University’s use of the term “plagiarism” predictably generated a great deal of media coverage and caused lasting harm to Professor Churchill’s reputation as a scholar.

87. Finally, the committee accused Professor Churchill of “ethnic fraud” and demanded that he “prove” his American Indian identity.⁸¹ Although his identity should have no bearing on the substance of his scholarly analyses, this was another attempt to undermine the credibility of Professor Churchill’s work. There are over 80 definitions of “Indian” in federal law, each tailored to a specific purpose. Professor Churchill’s attorney requested clarification of which

⁸⁰ Ward Churchill, Privilege and Tenure Grievance, August 15, 2006. See also Ward Churchill, “The Myth of Academic Freedom: Experiencing the Application of Liberal Principle in a Neoconservative Era,” *Works and Days* 51/52, 53/54: Vols 26 & 27 (2008-2009) at 139-230, Annex 8.

⁸¹ Terry Smith, "Speaking Against Norms: Public Discourse and the Economy of Racialization in the Workplace," 57 Am. U. L. Rev. 523, 550-558 (2008) (describing the research misconduct investigation as contestation for control of the historical narrative, infused with racial hegemony).

standard was being applied to Professor Churchill, but received no response. In the meantime, the small and understaffed office of the United Keetoowah Band of Cherokee, where Professor Churchill is an enrolled associate member, was overwhelmed with media inquiries. Ultimately this allegation was dropped, but not before causing further damage to Professor Churchill's professional and personal reputation.

88. Chancellor DiStefano referred his *ad hoc* committee's charges to the University's Standing Committee on Research Misconduct (the "SCRM"). The initiation of a "research misconduct investigation" spurred the Denver *Rocky Mountain News* to assign five reporters to spend two months delving into all possible aspects of Professor Churchill's life. This resulted in a five-part series published June 3-6, 2005, depicting Ward Churchill in the most negative possible light. In a clear attempt to influence the process, the series was explicitly tailored to the allegations being investigated and included the newspaper's conclusions that he was "guilty" on all counts. Under University rules, research misconduct is to be investigated when alleged in a formal complaint lodged by an individual. As confirmed publicly by the University spokesperson, news stories do not constitute complaints. Nonetheless, in June 2005, the Chancellor forwarded the *Rocky Mountain News* series to the SCRM as a second set of "allegations." Professor Churchill was instructed to provide "a written response to the supplemental allegations within 14 days," but was not told what the allegations were. Instead, the SCRM chairperson simply attached 59 pages of *Rocky Mountain News* articles downloaded from the internet.

Additional Punitive Measures

89. In August 2005 and again in 2006 Chancellor DiStefano attempted to add even more charges to the investigation. While these attempts were ultimately unsuccessful, they illustrated the determination of state officials to discredit Professor Churchill, preempt his ability to continue his research and writing and, more significantly, call his documentation and analyses of indigenous history into question. The substantive allegations against Professor Churchill devolved upon fewer than 10 of his approximately 12,000 published footnotes. Nonetheless, during this period Ethnic Studies students reported that they were being told not to cite to any of Professor Churchill's work, and one reported being told by an instructor not to write a paper on the subject of smallpox among American Indians because Professor Churchill's work on smallpox was under scrutiny.

90. Other punitive measures were taken, including the denial of an already-approved sabbatical and failure to give Professor Churchill credit for extra courses taught at the request of University administrators. Without notifying Professor Churchill, Dean Gleeson—the third member of the *ad hoc* committee—notified students in Professor Churchill's classes that they could transfer out of them without penalty. Despite the overwhelming surge of attacks on Professor Churchill's scholarship and personal integrity, UCB students voted for him to receive a teaching award at the conclusion of the 2005 school year. The Alumni Association, which sponsored the award, refused to grant it to Professor Churchill.

91. University rules require that the Standing Committee on Research Misconduct "make every reasonable effort . . . , from receipt of an allegation, through the inquiry and investigation

stages, to keep all information confidential.” In Professor Churchill’s case, however, University officials consistently made public statements denouncing Professor Churchill’s views, announcing their investigations and allegations at press conferences, and posting their results on the University’s website. After the internal investigation had been concluded, a grievance review panel belatedly confirmed that the University had violated its own rules on confidentiality and provided for remedial measures. In 2009 Chancellor DiStefano testified in court that he had entirely disregarded these findings and had taken no steps to comply with the grievance panel’s recommendations.

F. University Investigation Attempting to Discredit Churchill

92. The allegations against Professor Churchill originated with Chancellor DiStefano and other administrative officials, rather than independent sources. They were referred to the University’s Standing Committee on Research Misconduct by Chancellor DiStefano. In turn, the SCRM reports its findings to the Chancellor, who recommends disciplinary action. Thus, Chancellor DiStefano functioned as both the complainant and the person who would determine whether sanctions should be recommended to the University President.

Composition of the Investigative Committee

93. Professor Churchill spent the next year defending his work before a SCRM Investigative Committee composed of three UCB faculty members and two outside academics. Initially, two American Indian Studies scholars had been appointed to the subcommittee, but they immediately came under intense scrutiny and attack by the local media. The University made no effort to defend their integrity and, within 48 hours, both had resigned in the face of what one described as a “toxic” atmosphere. They were replaced by scholars with no competence in American Indian Studies who were demonstrably hostile to Professor Churchill. There were no indigenous persons on the Investigative Committee and its only person of color, a Chicano professor from Texas, had been accused at his home university of attempts to undermine its Chicano Studies program.

94. The Investigative Committee was chaired by a law school professor, Mimi Wesson. The University rules describe a SCRM investigation as “non-adversarial” but Professor Wesson was appointed because of her previous experience as a prosecutor, and she informed Professor Churchill that he should proceed as if he were a defendant in a criminal trial. Prior to her appointment as committee chair, Professor Wesson had circulated e-mails comparing Professor Churchill to “male celebrity wrongdoers” such as O.J. Simpson (accused of murder), Michael Jackson (accused of pedophilia) and former President Bill Clinton (accused of sexual predation). University officials knew of these communications when they appointed her, but did not inform Professor Churchill.

Procedural Constraints and Political Influence

95. The Investigative Committee held hearings in which Professor Churchill was expected to present a defense without knowing clearly *which* allegations were at issue, and during the course of the investigation, the committee expanded the scope of certain allegations without providing giving him notice or an adequate opportunity to respond. Further, Professor Churchill, an

interdisciplinary scholar, was required to defend his work without so much as being informed of which of several possible sets of articulated scholarly standards the committee intended to apply. Ultimately, the committee did not adhere to any of the standards for reviewing scholarly work in reaching its findings and condemning Professor Churchill.

96. Professor Churchill was prevented from speaking directly to expert witnesses, even his own, and was required to e-mail his questions across the room to the committee chair. This caused considerable confusion; allowed the chair to “interpret” what he was asking, sometimes fundamentally changing his meaning; and generally impaired his ability to elicit information.

97. The committee rules were designed for limited investigations involving a clearly tailored allegation or small set of related allegations, and they allow for extensions of time. Nonetheless, the committee denied Professor Churchill’s repeated requests for an additional 30 days in which to complete his written responses, rigidly insisting on a 120-day time frame. He was forced to spend considerable time trying to determine which charges and standards were at issue, and even more time attempting to introduce committee members to the foundational concepts of American Indian Studies and, more generally, the discipline of Ethnic Studies.

98. The political atmosphere in which the University of Colorado’s investigation of Ward Churchill took place was permeated by the national attacks on Professor Churchill and, more generally, on Ethnic Studies programs around the country. In May 2006, just a week before the Investigative Committee was scheduled to release its findings, ACTA published and widely disseminated an 84-page report entitled *How Many Ward Churchills?* Describing Professor Churchill as “the consummate academic activist,” the ACTA report claimed that “the kinds of politically extreme opinions for which he has become justly infamous are not only quite common in academe, but enthusiastically embraced and rewarded by it.” Under the heading “Ward Churchill Is Everywhere,” ACTA warned that “indoctrination is replacing education” in universities, using women’s studies, Africana studies, and global studies as examples. It then specifically targeted courses at universities around the country, including as one illustration the fact that “[a]n Indiana University course on Native American culture promises to ‘undo stereotypes.’”⁸² ACTA had enormous influence at the University of Colorado: the first president of ACTA was the chair of the Philosophy Department at UCB; President Hank Brown, who had replaced Elizabeth Hoffman, was a founding member of ACTA; and several members of the Board of Regents were closely affiliated with ACTA.

Investigative Committee Findings

99. In May 2006, the SCRM Investigative Committee issued—and the University promptly made public—a 124-page report that charged Professor Churchill with seven violations of vaguely defined academic standards.

100. Despite the fact that the Investigative Committee was not composed of scholars in the field of American Indian Studies, much of the Report was devoted to the committee’s own conclusions about contested issues in American Indian history. Thus, for example, it devotes

⁸² ACTA, *How Many Ward Churchills?: A Study by the American Council of Trustees and Alumni* (2006), pp. 1, 2, 3, & 10, Annex 7, also available at http://www.goacta.org/images/download/how_many_ward_churchills.pdf.

more than 40 pages criticizing two paragraphs written by Professor Churchill about an 1837 smallpox epidemic.

101. Professor Churchill's summary of the Investigative Committee's conclusions illustrates the extent to which the University was attempting to undermine his perspective—and, thereby, an entire trajectory of historical analysis—concerning indigenous history in the United States. In a statement issued on May 20, 2006, he stated:

The first two allegations address my summaries of the impact on native peoples of two federal laws, the Allotment Act and the Indian Arts and Crafts Act. In its 20-page analysis, the committee acknowledges that my conclusions may be right but criticizes the nature of my citations and faults me for having failed to publish a response to a particular critic. On the Allotment Act the committee acknowledges that I was essentially correct and my accuser generally incorrect. However, the report accuses me of getting the details wrong, despite the fact that I wrote only a few paragraphs on the subject and, thus, did not address any details. For this I am charged with falsification.

The third charge concerns my statement that there is “strong circumstantial evidence” that John Smith introduced smallpox among the Wampanoags in the early 1600s. The committee took it upon itself to decide that this was an “implausible” conclusion and that, therefore, I had not cited to *enough* circumstantial evidence. This is characterized as both falsification and fabrication.

My two paragraph statement that in 1837 the army deliberately spread smallpox among the Mandans at Fort Clark generated 44 pages of analysis on the fourth allegation. While basically confirming my conclusions, the committee expresses displeasure with the nature, thoroughness and, in some cases, the sources of my citations. Although numerous scholars have made the same general point without any citation, I am charged with falsification, fabrication, and deviation from accepted reporting practices.

In this connection, it should be noted that *all* of the indigenous witnesses confirmed that my work conforms to the expectations of native tradition concerning scholarship. An expert from the affected nations confirmed my assertions concerning the oral traditions on the deliberate infection of the Mandan, Arikara and Hidatsa peoples. Nonetheless, this entirely non-Indian committee took it upon itself to declare that I “was disrespectful of Indian oral traditions when dealing with the Mandan/Fort Clark smallpox epidemic of 1837.”⁸³

102. The Investigative Committee's remaining findings demonstrate the extent to which it went to discredit Professor Churchill's integrity as a scholar. Quoting again from Professor Churchill:

⁸³ Ward Churchill, Summary of Fallacies in the University of Colorado Investigative Committee Report of May 9, 2006, May 20, 2006, available at <http://archived.wardchurchill.net/documents.html>.

The fifth charge involves the use of material from a pamphlet circulated by a long-defunct environmental group called Dam the Dams, whose representative stated he was happy to have the article used. In my initial use, I gave Dam the Dams co-authorship credit and the evidence I presented that this credit was removed by the publisher is uncontested. In all subsequent use of the material, I gave credited Dam the Dams in my footnotes. For this I am charged with plagiarism.

The sixth allegation asserted that I plagiarized an article I had ghostwritten for Rebecca Robbins. The committee concluded that I had not plagiarized it, but that having allowed a junior scholar to take credit for the original piece was a failure to comply with established standards of authorship attribution. This despite the fact that ghostwriting is common practice and the committee could point to no rule or standard that I had actually violated.

With respect to the seventh allegation, the committee concluded that I had committed plagiarism by allowing portions of an essay written by Fay Cohen to be published under the name of an Institute of which I was a co-founder, in a volume edited by a third person. The fact that my role consisted only of copy-editing the volume, that Cohen never complained to the publisher, and that she acknowledged having been solicited by the University to make this complaint were deemed irrelevant. Neither Cohen nor [her University's] report on the matter accused me of plagiarism; the committee received no evidence (much less a preponderance) that I plagiarized her material. On the record, my denial that I did so stands uncontested.⁸⁴

National Criticism of the Investigative Report

103. The SCRM Investigative Committee's Report was, and remains, the basis upon which the state university officials justified firing Professor Churchill. It remained on the University's website for years, despite unrelenting criticism from scholars and indigenous activists for its substantive findings and its ideological bias.

104. On April 23, 2007 nine professors, seven of them from the University of Colorado, called for the University to rescind the Report. They stated that after "a process of careful investigation guided by two experts in the field of American Indian Studies who did not know Churchill before 2006—Professor Eric Cheyfitz, Ernest I. White Professor of American Studies and Human Letters at Cornell University, and Professor Michael Yellow Bird, Associate Professor, Center for Indigenous Nations Studies at Kansas University—we have found the Report to contain violations of standard scholarly practice that are so serious that we are now considering the additional step of filing charges of research misconduct against the authors of the Report."⁸⁵

105. On May 10, 2007, this group, which now consisted of eleven professors, formally filed research misconduct charges against the Investigative Committee. They noted that the

⁸⁴ *Id.*

⁸⁵ Open Letter from the Department of Ethnic Studies, University of Colorado, April 25, 2005, Annex 2.

University's decision not to retract the Report "came from the new Vice President for Academic Affairs, Michael Poliakoff, whose office has a conflict of interest in this case" because of his public affiliation with the American Council of Trustees and Alumni. The professors provided evidence that the Investigative Committee relied upon biased and flawed sources, suppressed relevant text, and excluded independent sources and valid scholarly interpretations that contradicted their conclusions.⁸⁶

106. On May 28, 2007 five professors and two attorneys filed additional allegations of research misconduct against the Investigative Committee. These allegations were signed by James M. Craven (Blackfoot), Jennifer Harbury, Ruth Hsu, David E. Stannard, Haunani-Kay Trask (Kanaka Maoli), Sharon H. Venne (Cree), and Michael Yellow Bird (Arikara/Hidatsa). They stated:

The five allegations filed today address the Investigative Committee's findings regarding the smallpox epidemics of 1616 and 1837. Like many others, this group believes the "investigation" and resulting Report were a pretext intended to silence Professor Churchill and discredit the Indigenous perspectives he articulates.⁸⁷

107. Neither of these formal complaints were investigated by the University, which claimed that the Investigative Report was not a "scholarly" work, despite its reliance upon it to discredit Professor Churchill's scholarship. Professor Churchill himself filed three formal and thoroughly documented complaints against members of the Investigative Committee for misrepresentation of sources, falsification and fabrication of evidence, and plagiarism contained in their Report. These were similarly disregarded by the University.

108. The most thorough critique of the SCRM's Investigative Report is a 136-page "Report on the Termination of Ward Churchill," disseminated on November 1, 2011 by the Colorado Conference of the American Association of University Professors and published in 2012 in the National AAUP's online *Journal of Academic Freedom*. This Report explains the context of the attacks on Professor Churchill's work and why the University's actions violated of his freedom of expression. It highlights many of the due process and equal protection violations evidenced throughout the University's investigatory processes. Finally, it thoroughly analyzes the SCRM's findings on each of the allegations against Professor Churchill.

109. According to the Colorado Conference of the AAUP, "the allegations against Churchill for fabrication, falsification, and plagiarism are almost entirely false or misleading. . . . In our opinion, the members of the [Investigative Committee] would be condemned as academic frauds if their report were subjected to the scrutiny that they applied to Churchill's work." Relying on American Indian Studies experts, it concludes that the Investigative Committee's Report, "upon which disciplinary recommendations against Churchill were based, is an extended series of

⁸⁶ Research Misconduct Complaint against Investigative Committee, May 10, 2007, http://archived.wardchurchill.net/41-c_may_10_2007_rm_complaint.pdf.

⁸⁷ Research Misconduct Complaint against Investigative Committee, May 28, 2007, http://archived.wardchurchill.net/43-d_may_28_2007_rm_complaint.pdf.

falsifications and fabrications.”⁸⁸ “Finally, the Colorado Conference of the AAUP recommends that faculty in search of employment consider a position at the University of Colorado only as a last resort because of the University of Colorado’s indifference to the ideals of academic freedom.”⁸⁹

Indigenous Perspectives on the Investigative Report

110. Indigenous human rights defenders and American Indian Studies scholars have consistently recognized that the attacks on Professor Churchill have been designed to discredit his scholarship and integrity; the discipline of American Indian Studies, and Ethnic Studies more broadly; and, most significantly, indigenous peoples’ understandings and ability to transmit their own cultures and histories. Some of these critiques went to the Investigative Committee’s complete lack of expertise in American Indian Studies and indigenous methodologies. Thus, for example, American Indian Studies Professor Eric Cheyfitz published a critique of the Report in “Framing Ward Churchill: The Political Construction of Research Misconduct,” an article published in the scholarly journal *Works and Days*. In addition to his substantive critiques of the entire process as well as the Investigative Committee’s findings, Professor Cheyfitz states:

It should be noted that there were no Native scholars on the [Investigative Committee] and yet the committee took it upon itself to note Churchill’s disrespect for Indian oral traditions, even in the face of outspoken support in these proceedings for Churchill’s work by prominent Native scholars and activists. Speaking for the “Other” who is not present to speak for him/herself is, of course, at the very heart of the structure of colonialism.⁹⁰

111. Moana Jackson, Director of the Maori Law Commission in Wellington, New Zealand, wrote, “As a Maori lawyer and academic . . . I have been aware for many years of the high regard within which Professor Churchill is held by indigenous peoples around the world. . . . [I]t would be of concern to Maori and, I am sure, to other indigenous peoples around the world that the committee investigating the work of Professor Churchill contained no American Indians or members with expertise in either indigenous history or intellectual methodologies.” Noting that “the western intellectual tradition has not, and still does not, adequately acknowledge or respect any indigenous critique or interrogation which conflicts with its received wisdom,” Mr. Jackson concluded that “[i]t will be of concern to the international indigenous academic community that the University is unaware of, or has deliberately chosen to ignore, the standards demanded within an indigenous intellectual tradition which Professor Churchill has endeavored to reflect and adhere to over the years.”⁹¹

⁸⁸ Colorado Conference of the American Association of University Professors, Report on the Termination of Ward Churchill, November 1, 2011, Annex 9.

⁸⁹ *Id.*

⁹⁰ Eric Cheyfitz, “Framing Ward Churchill: The Political Construction of Research Misconduct,” *Works and Days* 51/52, 53/54: Vols 26 & 27 (2008-2009) at 231-252 (quote at 241, citation omitted).

⁹¹ Statement of Moana Jackson in support of Ward Churchill, May 16, 2006, <http://archived.wardchurchill.net/s12-MoanaJackson.pdf>.

112. Barbara Alice Mann, a Seneca author, lecturer, and expert on the United States' early use of smallpox to eliminate American Indian communities produced a thoughtful and detailed critique of the Investigative Committee's attempt to discredit Professor Churchill's historical analyses. After noting numerous problems with the entire investigative process, she observed:

[S]tripped of any kind of outside review or accountability, the committee was free to commit one of its most stunning blunders: to ignore any ways of knowing, standards of scholarship, or sources other than those of Euro-Americans. In the process, it somehow convinced itself that it was defending oral tradition from disrespect by Churchill.

At first, as I read the report, I thought that the committee was deliberately ignoring Ethnic Studies' methodology, standards, evidence, and proofs. As I continued, however, the incredible struck me: that committee members were genuinely oblivious of anything but dated Western orthodoxy regarding scholarship. It remained grandly ignorant of the large, respected, worldwide field of scholarship called post-colonial studies. In the U.S., post-colonial studies tends to be known as Ethnic Studies. . . .

. . . [I]n a move that would be funny if the stakes were not so high, the committee claimed that Churchill's work was disrespectful of Native American tradition, when his work is, in fact, held in high esteem by both Native Americans and indigenous peoples around the world.

Clearly unaware of the wealth, depth, and complexity of Ethnic Studies' work on the issue of disease-spreading, the committee proceeded to approach the question like a puppy innocently running under the wheels of a moving car. Using relentlessly Western standards that do not fit Ethnic Studies protocols, the committee looked, separately, at two instances where it found but "vague" traditions of deliberate disease-spreading before insisting that no such thing had occurred in fact. Based on its flawed method, the committee then decided that Churchill had fabricated a "myth" of disease-spreading⁹²

113. In September 2006, an Emergency Summit of Scholars and Activists Defending Critical Thinking and Indigenous Studies was held in Lawrence, Kansas. This resulted in a Resolution signed by an extraordinarily diverse group of scholars and public intellectuals, which aptly summarizes the University's efforts not only to discredit Professor Churchill, but to undermine indigenous perspectives:

WHEREAS Indigenous Peoples . . . recognize that access to, and promotion of, historical truths and analyses that challenge the oppressive aspects of the status quo are essential to the survival of all of all Indigenous and non-Indigenous communities and youth; and

⁹² Barbara Alice Mann, Response to the University of Colorado's Investigative Committee Report on Ward Churchill, June 1, 2006, pp. 4-5, Annex 3.

WHEREAS the University of Colorado has expanded its attacks on Professor Ward Churchill . . . to undermine his analysis of the history and lived realities of Indigenous Peoples; and

WHEREAS the University of Colorado is attempting to fire Ward Churchill based upon pretextual charges of research misconduct which have been “investigated” by a committee of non-Indigenous academics, none of whom are experts in American Indian Studies; and

WHEREAS the University of Colorado’s investigative committee has chosen to reinforce mainstream “truths” concerning the 1837 smallpox epidemic and other matters while accusing Ward Churchill of “disrespecting American Indian oral traditions” despite extensive testimony by Indigenous scholars supporting Professor Churchill’s historical interpretations; and . . .

WHEREAS the University of Colorado’s investigative committee has justified the severity of its recommended sanctions on the basis of Professor Churchill’s “bad attitude,” i.e., his refusal to recant his understandings of historical truth; and

WHEREAS the attacks on Ward Churchill, one of the most prolific scholars in the field of American Indian Studies, are being used to chill the expression of counterhegemonic truths, to re-impose a “consensus” history dictated by the perspective of the colonizers, and to fuel racist attacks on students and scholars of color; and

WHEREAS we recognize that the attacks on Ward Churchill are part of a national and international movement to undermine the disciplines of Indigenous, Ethnic, and Gender studies which emerged as a result of protracted community-based struggles in response to the failures of mainstream disciplines to accurately reflect our collective histories and realities;

NOW, THEREFORE, BE IT RESOLVED that we, the undersigned Indigenous and non-Indigenous scholars and activists, call upon those who value academic freedom, the unconstrained pursuit of truth, and true diversity in education to join us in urging the University of Colorado to: (1) acknowledge that its investigation was deeply flawed, (2) rescind the report of the investigative committee, (3) fully reinstate Professor Churchill, and (4) acknowledge the value and necessity of perspectives which challenge orthodoxy in the pursuit of truth.⁹³

G. Termination of Ward Churchill’s Employment

114. Based on the Report discussed above, one member of the SCRM Investigative Committee recommended dismissal and the remaining four members recommended suspension. The full SCRM—composed entirely of University faculty members—overrode the Investigative Committee’s recommendation and, based on the same Report, recommended dismissal. This

⁹³ Resolution of the Emergency Summit of Scholars and Activists Defending Critical Thinking and Indigenous Studies, September 29-30, 2006, Annex 4.

finding went to Chancellor DiStefano. The Chancellor—who had brought the charges—then recommended to University President Hank Brown that Professor Churchill be fired.

115. Professor Churchill then exercised his administrative option to request a review by the University’s Privilege and Tenure (“P&T”) Committee. The P&T Committee conducted another round of evidentiary hearings. It acknowledged that the SCRM Investigative Committee had exceeded its charge. This review body dismissed some of the SCRM’s findings for lack of sufficient evidence, and upheld others. A majority of the P&T Committee recommended sanctions less severe than termination. These recommendations were sent to the University President.

116. University President Brown refused Ward Churchill’s request that he recuse himself based on his status as a founding member of ACTA, and his continuing affiliation with this organization which had consistently and publicly denounced Professor Churchill. Instead, President Brown, who had not participated in any evidentiary hearings, unilaterally reinstated charges dismissed by the P&T Committee, overrode its recommendations, and urged the Regents of the University to fire Professor Churchill.

117. The Regents are elected officials with the sole authority to terminate tenured faculty members, which they may do only for cause. They are not bound by the results of faculty review processes or the President’s recommendations, and there is no provision for appealing their decisions. Despite the fact that several Regents were on record as being determined to find some ground to fire Professor Churchill even before any issues of research misconduct were raised, and despite the close affiliation of several Regents to ACTA, none of the Regents recused themselves from the process.

118. The Regents held a closed door meeting on July 24, 2007, at which Professor Churchill, his attorney, and university counsel were permitted to make short presentations, but could not present witnesses. At no point did the Regents independently hear evidence concerning the allegations of research misconduct. Not surprisingly, at this meeting the Regents—most of whom had called for Professor Churchill’s firing in early 2005, voted 8-to-1 to terminate his employment. The following day Professor Churchill’s attorney filed a lawsuit alleging that Professor Churchill had been fired in retaliation for his exercise of speech protected by the First Amendment to the U.S. Constitution.

H. Confirmation of Constitutional Violations and Retroactive Immunization of State Officials

119. Ward Churchill’s lawsuit was brought against the University of Colorado and its Regents under a federal statute, 42 U.S.C. § 1983, which provides a cause of action for violations of the federal Constitution by state or local officials. § 1983 actions, as they are known, may be brought in state or federal court. Professor Churchill’s suit was filed in the Colorado state court for the City and County of Denver.

120. In March 2009, Professor Churchill’s case was presented to a jury in Denver. Witnesses on his behalf included former students, both indigenous and non-indigenous; the former and current chairs of UCB’s Department of Ethnic Studies; Ethnic Studies and Critical Race Theory scholars, including the late Derrick A. Bell, Jr.; an expert in eugenics, who addressed the “blood

quantum” issue; and American Indian Studies experts who pointed out numerous flaws in the Investigative Committee’s Report. Testimony on smallpox epidemics and other legal/historical issues was provided by indigenous scholars and activists, including Robert A. Williams, Jr. (Lumbee), George “Tink” Tinker (Osage), Michael Yellow Bird (Arikara/Hidatsa), Barbara Alice Mann (Seneca), and the late Russell Means (Oglala Lakota).

121. On April 2, 2009, after a month of trial, the jury decided unanimously that (1) Professor Churchill was fired by the UCB Regents in retaliation for speech protected by the U.S. Constitution; (2) he was harmed by the termination of employment; and (3) the University would not have fired him for other reasons (i.e., the alleged research misconduct) in the absence of his protected speech activity.

122. Professor Churchill informed the jury that he was not concerned with financial recovery, but wished to be reinstated as a full tenured professor of American Indian Studies. Reinstatement and front pay are equitable remedies that only a judge may provide. The jury granted Professor Churchill nominal monetary damages and a hearing on the issue of reinstatement was scheduled for July 2009.

123. In the meantime, in June 2009, a federal agent of the United States Fish and Wildlife Service contacted Professor Churchill’s attorney. The U.S. Fish and Wildlife Service is an agency within the Department of the Interior, as is the Bureau of Indian Affairs. The Fish and Wildlife agent asked to meet with Professor Churchill concerning unsubstantiated allegations from a source he would not disclose that Ward Churchill had possessed eagle feathers in violation of a federal law that only allows their possession in connection with American Indian religious practices. This turned out to be yet another attempt to force Professor Churchill to “prove” his identity. Professor Churchill’s band card establishing his enrollment in the United Keetowah Band of Cherokee was not deemed sufficient, and the agent did not stop pursuing this matter until he was shown several hours of videotape of the Band Council meeting at which Professor Churchill’s enrollment was approved.

124. On July 7, 2009, after a hearing which included testimony from the current Chair of the UCB Department of Ethnic Studies that Professor Churchill would not only be welcomed back, but was needed by the Department, District Court Judge Larry Naves denied Ward Churchill’s motion for reinstatement and also refused to award front pay in lieu of reinstatement. In Judge Naves’ opinion, he reiterated almost verbatim the University’s brief, including its arguments against reinstatement. Significantly, Judge Naves also reiterated the University’s allegations of research misconduct, completely disregarding the plethora of evidence to the contrary that was presented at trial and relied upon by the jury in their verdict in favor of Professor Churchill. This, however, was not the most shocking aspect of his decision. Judge Naves also vacated the jury verdict, retroactively ruling that officials of the University of Colorado, including the Regents, had absolute, “quasi-judicial” immunity from being sued, despite the fact that Professor Churchill had sued the Regents in their official capacity.⁹⁴ This decision contradicted the longstanding line of federal cases recognizing that immunity is a personal defense, intended to

⁹⁴ Opinion vacating jury verdict, District Court, City and County of Denver, Colorado, July 7, 2009, Annex 14.

ensure that government officials are free to fulfill their responsibilities without fear of being sued personally, and granting only qualified, not absolute immunity to most officials.⁹⁵

125. Professor Churchill appealed these rulings. The National Lawyers Guild, the Center for Constitutional Rights, the Society of American Law Teachers, Latina/o Critical Legal Theory, and 35 law professors and constitutional rights attorneys filed an amicus brief noting that “[f]idelity to the rule of law requires a remedy for those deprived of their constitutional rights by state officials,” and urging that this dangerous precedent be overturned.⁹⁶ A second amicus brief was filed by the American Civil Liberties Union (ACLU), the ACLU of Colorado, the American Association of University Professors (AAUP), and the National Coalition Against Censorship. Emphasizing the importance of freedom of expression, these organizations argued that denying reinstatement to a professor fired in violation of the First Amendment and granting immunity to state officials for such violations renders freedom of expression “illusory for the over 8,000 professors in the University of Colorado system.”⁹⁷

126. On November 23, 2010 the Colorado Court of Appeals upheld the trial court’s order, holding that the University and its Regents have absolute immunity for the firing of a tenured professor in violation of the U.S. Constitution’s guarantee of freedom of expression. Professor Churchill appealed this ruling, and the Colorado Supreme Court granted review. An amicus brief supporting Professor Churchill was filed by the National Lawyers Guild, the Colorado Conference of the American Association of University Professors, Latina/o Critical Legal Theory, the National Conference of Black Lawyers, the Society of American Law Teachers, and 24 law professors and civil rights attorneys; a second amicus brief was submitted by the American Civil Liberties Union (ACLU) and the ACLU of Colorado. The Colorado Supreme Court affirmed the denial of reinstatement and the absolute immunity of the University officials. Professor Churchill’s petition for a grant of certiorari was denied by the United States Supreme Court on April 1, 2013.⁹⁸

127. In this case, after a month-long trial, a jury unanimously decided that Ward Churchill, a tenured full professor of American Indian Studies, had been fired in violation of his constitutionally protected right to freedom of expression, and that the allegations of research misconduct relied upon by state officials were simply a pretext to accomplish that end. The courts’ subsequent decisions to deny Professor Churchill reinstatement and to grant absolute, unconditional immunity to the University Regents have dangerous implications far beyond Professor Churchill.

⁹⁵ See *Churchill v. University of Colorado*, Petition for a Writ of Certiorari, submitted to the United State Supreme Court, December 12, 2012, Annex 14.

⁹⁶ Brief of *Amici Curiae* National Lawyers Guild, Center for Constitutional Rights, Society of American Law Teachers, Latina/o Critical Legal Theory, and Law Professors and Attorneys, February 18, 2010, Annex 10.

⁹⁷ *Amici Curiae* Brief of the American Civil Liberties Union (ACLU), ACLU of Colorado, American Association of University Professors, and National Coalition Against Censorship, February 18, 2010, p. 10, Annex 11.

⁹⁸ Brief of *Amici Curiae* National Lawyers Guild, Center for Constitutional Rights, Colorado Conference of the American Association of University Professors, Latina/o Critical Legal Theory, National Conference of Black Lawyers, Society of American Law Teachers, and Law Professors and Attorneys, September 12, 2011, Annex 12; *Amici Curiae* Brief of the American Civil Liberties Union (ACLU) and ACLU of Colorado, September 12, 2011, Annex 13; Opinion, Supreme Court of Colorado, September 10, 2012, Annex 14; *Churchill v. University of Colorado*, Certiorari Denied, United States Supreme Court, April 1, 2013, Annex 14.

128. The University's actions and the judicial determinations in this case establish that state officials may retaliate, with impunity, against professors who express "unpopular" views or teach subjects that are viewed as threatening American orthodoxy. They may undertake *ad hoc* investigations of every word published or publicly spoken by professors to find grounds for termination. They may employ their internal disciplinary processes pretextually, manipulating them to generate excuses to fire professors. The actions may be taken in blatant violation of the rights to due process and freedom of expression, and they may just as easily be taken to purge the university of professors on the basis of their race, ethnicity, or gender, in violation of the right to equal protection.

V. EXHAUSTION OF DOMESTIC REMEDIES

A. Exhaustion of Administrative Remedies

129. Beginning in January 2005, Ward Churchill spent over two years exhausting the administrative remedies available to him, responding in good faith to attacks on his personal and scholarly integrity. In addition to providing extensive testimony and written responses, including that of indigenous experts, to the University committees investigating allegations brought by University officials, he utilized all internal avenues of appeal. Nonetheless his employment was terminated by the University on July 24, 2007.

130. Ward Churchill also filed administrative grievances and allegations of research misconduct concerning the report issued and publicly disseminated by the University. His administrative grievances were not considered until after the process had concluded, and the University failed to take any measures to address the violations of Professor Churchill's rights documented by the grievance process. His allegations of research misconduct by University in its investigation of his work, as well as similar allegations filed by numerous outside scholars and experts in American Indian Studies were disregarded by University officials.

B. Exhaustion of Judicial Remedies

131. Immediately following his termination, Ward Churchill, through his attorney, filed a lawsuit in the state court for the City and County of Denver, Colorado. This suit was brought under a federal statute, 42 U.S.C. § 1983, alleging retaliatory termination in violation of his right to freedom of expression, as articulated in the First Amendment to the Constitution of the United States.

132. The case proceeded to trial and in April 2009 a jury found, unanimously, that the University of Colorado had violated the U.S. Constitution by firing Professor Churchill in retaliation for speech protected by the First Amendment, and that it would not have fired him but for that speech. Because Ward Churchill had emphasized that he wished to be reinstated, an equitable remedy that only the trial judge could award, the jury awarded nominal damages and Professor Churchill filed a motion for reinstatement.

133. In July 2009, the trial judge denied Ward Churchill's motion for reinstatement and, further, vacated the jury verdict on the ground that the University and its Regents were retroactively protected from suit by virtue of absolute, quasi-judicial immunity.

134. On appeal, the Colorado Court of Appeals upheld the trial court's actions in a ruling issued in November, 2009.⁹⁹ In September 2012 the Colorado Supreme Court granted Ward Churchill's petition for review and affirmed the decision of the appellate court.¹⁰⁰

135. On April 1, 2013 the United States Supreme Court denied Ward Churchill's petition for a writ of certiorari.¹⁰¹ Thus, Ward Churchill has exhausted all available domestic remedies and this Petition is filed within six months of the date of exhaustion.

C. Remedies are Inadequate and Ineffective

136. Professor Churchill has clearly exhausted his domestic remedies in this case. It is worth noting, however, that remedies in the United States have proved to be inadequate and ineffective. Article 31(1) of the Rules of Procedure of the Inter-American Commission states: "In order to decide on the admissibility of a matter, the Commission shall verify whether the remedies of the domestic legal system have been pursued and exhausted in accordance with the generally recognized principles of international law." Article 31(2)(a)-(b), however, provides that exhaustion of domestic remedies is not required when "the domestic legislation of the State concerned does not afford due process of law for protection of the right or rights that have allegedly been violated," or when "the party alleging violation of his or her rights has been denied access to the remedies under domestic law or has been prevented from exhausting them."

137. Article 31 has been interpreted to prevent States from avoiding international responsibility for human rights violations when domestic remedies are either inadequate or ineffective.¹⁰² Remedies are considered inadequate when they are unavailable in a particular case,¹⁰³ and they are ineffective when they are technically or formally available but do not, in actual operation, provide redress for the harm.¹⁰⁴ In Professor Churchill's case, the State has clearly established that when a professor at a Colorado state university is fired in violation of his constitutional rights, there is no adequate remedy because the University Regents are immune from suit. Additionally, in ruling that Professor Churchill could not sue the Regents, both the trial court and the appellate court went out of their way to state that Professor Churchill would not, in any case, be entitled to reinstatement. Thus, even if the jury verdict obtained by Professor Churchill had not been vacated on the basis of the Regents' immunity from suit, the courts have made clear the remedy would have been ineffective because it would have failed to redress Professor Churchill's termination.

⁹⁹ Opinion, Colorado Court of Appeals, November 24, 2010, Annex 14.

¹⁰⁰ Order granting *certiorari*, Supreme Court of Colorado, May 31, 2011, Annex 14; Opinion, Supreme Court of Colorado, September 10, 2012, Annex 14.

¹⁰¹ *Churchill v. University of Colorado*, Certiorari Denied, United States Supreme Court, April 1, 2013, Annex 14.

¹⁰² Inter-Am. Ct. H.R., *Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para. 63.

¹⁰³ *Id.* at para. 64.

¹⁰⁴ *Id.* at para. 66.

VI. ABSENCE OF PARALLEL PROCEEDINGS

138. The subject of this Petition is not pending in any other international proceeding for settlement.

VII. STATE RESPONSIBILITY

A. Responsibility for Protecting the Rights of Human Rights Defenders

139. As the Inter-American Commission has acknowledged, “[t]he human rights instruments enshrine rights that the States must respect and guarantee for all persons under their jurisdiction. The work of human rights defenders is fundamental for the universal implementation of those rights, and for the full existence of democracy and the rule of law.”¹⁰⁵

140. In 1998, the United Nations General Assembly passed the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (“Declaration on Defenders”), which clearly established that the defense of human rights is itself a right.¹⁰⁶ The right to defend human rights has since been incorporated by other international human rights mechanisms, including those of the inter-American system.¹⁰⁷

141. The Commission, relying on the Declaration on Defenders,¹⁰⁸ has stated that “every person who in any way promotes or seeks the realization of human rights and fundamental freedoms, nationally or internationally, must be considered a human rights defender.”¹⁰⁹ The work of human rights defenders is so critical because of the essential role they play in protecting vulnerable populations and working toward the full realization of international human rights standards. As the Commission has observed, “when efforts are made to silence and inhibit the human rights defenders, thousands are denied the opportunity to obtain justice for their human rights.”¹¹⁰ Thus, “[h]uman rights defenders, from different sectors of civil society ... make fundamental contributions to the existence and strengthening of democratic societies.”¹¹¹

¹⁰⁵ IACHR, Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II.124, Doc. 5 rev. 1, March 7, 2006, para. 1 [hereinafter “First Report on the Situation of Human Rights Defenders”].

¹⁰⁶ UN General Assembly, Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, A/RES/53/144, March 8, 1999 [hereinafter “Declaration on Defenders”]; see also IACHR, Second Report on the Situation of Human Rights Defenders in the Americas, OEA/Ser.L/V/II. Doc. 66, December 31, 2011, paras. 14-15 [hereinafter “Second Report on the Situation of Human Rights Defenders”].

¹⁰⁷ IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 15.

¹⁰⁸ Article 1 of the Declaration on Defenders states: “Everyone has the right, individually and in association with others, to promote and strive for the protection and realization of human rights and fundamental freedoms at the national and international levels.” UN General Assembly, Declaration on Defenders, *supra* note 106.

¹⁰⁹ IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 13. See also IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 12.

¹¹⁰ IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 4.

¹¹¹ *Id.* at para. 20.

142. Because of the importance of human rights defenders to domestic democracies, international human rights regimes, and the rule of law generally, the Commission has stated that “respect for human rights in a democratic state largely depends on the human rights defenders enjoying effective and adequate guarantees for freely carrying out their activities.”¹¹² Thus, as the Inter-American Court has mandated, States “have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity.”¹¹³

Professor Churchill is an Indigenous Human Rights Defender

143. The Commission has stated that human rights defenders have the “right to publish, make known, and disseminate publicly to third persons their opinions and knowledge with respect to human rights, and to debate and develop principles and ideas in this respect, and promote their acceptance.”¹¹⁴ Additionally, they have the “right to protest rules, policies, and practices of public officials and private actors who violate human rights.”¹¹⁵ The Commission has also specifically expressed its concern for indigenous human rights defenders.¹¹⁶

144. Ward Churchill’s activism, teaching, and extensive body of literature solidly establish him as one of the leading human rights defenders for indigenous peoples in the United States of America. Ward Churchill has, since the early days of his activism, worked toward the full realization of human rights for indigenous peoples. Professor Churchill’s work in this arena predated the UN Declaration on the Rights of Indigenous Peoples and the many international mechanisms now dedicated to the fulfillment of indigenous peoples human rights, and it is in many ways because of the relentless and difficult work of people such as Ward Churchill that the broader society both within the United States and internationally has taken significant steps toward recognizing and protecting the human rights of indigenous peoples.

145. In addition to the numerous teaching awards Professor Churchill received, four of his books received awards from the Gustavus Myers Center for the Study of Human Rights and Bigotry (“Myers Center”) and one book received an honorable mention. The Myers Center was dedicated to the review and identification of outstanding books on the topics of discrimination and bigotry and the winners of the awards were announced each year on Human Rights Day, December 10th.¹¹⁷ Professor Churchill’s first book to receive a Myers Award, for Outstanding Books on the Subject of Intolerance, was *Agents of Repression: The FBI’s Secret Wars Against the Black Panther Party and the American Indian Movement* (1988, classics ed. 2002), co-authored by Jim VanderWall. The book details domestic surveillance and disruption tactics employed by the United States government against its own African American and indigenous

¹¹² *Id.* at para. 20.

¹¹³ Inter-Am. Ct. H.R., *Case of Kawas-Fernández v. Honduras*, Merits, Reparations and Costs. Judgment of April 3, 2009, Series C No 196, para. 45 (quoted in IACHR, Second Report on the Situation of Human Rights Defenders, para. 26).

¹¹⁴ IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 39.

¹¹⁵ *Id.* at para. 38.

¹¹⁶ *Id.* at paras. 220-222.

¹¹⁷ The Myers Center closed its doors in 2009 due to lack of funding.

citizens during the 1960s and 1970s. *Agents of Repression* was instrumental in making this history known to audiences in the United States. This history and Professor Churchill's analysis remain critically salient as the United States is once again facing an era in which government surveillance is a hotly contested topic of public discourse.¹¹⁸

146. Professor Churchill received a second Myers Award for Outstanding Books on the Subject of Intolerance for *Fantasies of the Master Race: Literature, Cinema, and the Colonization of American Indians* (1992). This collection of essays explained the ways in which art and literature propagate racist images and stereotypes of indigenous peoples, facilitating and perpetuating their colonization. Again, this discourse remains part of a current and ongoing debate about indigenous imagery and mascots in the United States' culture.¹¹⁹

147. *Struggle for the Land: Indigenous Resistance to Genocide, Ecocide and Expropriation in Contemporary North America*, with a preface by Winona LaDuke (1993; rev'd ed. 1998), was Professor Churchill's third Myers Award recipient, this time for Outstanding Books on Human Rights. *Struggle for the Land* focuses on indigenous peoples' rights to their traditional and treaty-recognized territories, and highlighting the environmental destruction caused by the appropriation of their natural resources. Thus, years before the IACHR or others would formally enshrine the connection between indigenous land rights and cultural survival in international law, Professor Churchill was prominently arguing that respecting indigenous land rights was critical to the survival not only of indigenous peoples but of all peoples.

148. Professor Churchill again received a Myers Award for Outstanding Books on Human Rights for *From a Native Son: Selected Essays on Indigenism, 1985-1995* (1996). Introduced by renowned historian Howard Zinn, this sweeping anthology discusses colonization of indigenous peoples; genocidal policies of the United States government toward indigenous peoples; indigenous resistance to oppression; and numerous other topics central to indigenous peoples' struggles for human rights.

149. Finally, Professor Churchill also received an honorable mention for the Gustavus Myers Award for Outstanding Books on Human Rights for *On the Justice of Roosting Chickens: Reflections on the Consequences of U.S. Imperial Arrogance and Criminality* (2003). This book was the final product of the op-ed piece Professor Churchill wrote on September 12, 2001, criticizing the United States for its genocidal policies abroad. In writing this book, Professor Churchill sought to further human rights not only by detailing U.S. interventions in Iraq,

¹¹⁸ See, e.g., James Risen, "Bipartisan Backlash Grows Against Domestic Surveillance," *New York Times*, July 17, 2013, <http://www.nytimes.com/2013/07/18/us/politics/bipartisan-backlash-grows-against-domestic-surveillance.html?pagewanted=all>; Amy Goodman with Denis Moynihan, "America's Real Subversives: FBI Spying Then, NSA Surveillance Now," *Democracy Now*, July 25, 2013, http://www.democracynow.org/blog/2013/7/25/americas_real_subversives_fbi_spying_then_nsa_surveillance_now; James Risen, "NSA Gathers Data on Social Connections of U.S. Citizens," *New York Times*, September 28, 2013, <http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html?pagewanted=all>;

¹¹⁹ See, e.g., "Pull the Plug on D.C.! New Anti-Redskins 'Change the Mascot' Campaign," *Indian Country Today Media Network*, September 5, 2013, <http://indiancountrytodaymedianetwork.com/2013/09/05/get-involved-anti-redskins-change-mascot-campaign-launches-151165>; "NBC's 'Today' Spurs National Debate Over Redskins' Name Change," *Indian Country Today Media Network*, September 17, 2013, <http://indiancountrytodaymedianetwork.com/2013/09/17/nbc-today-spurs-national-debate-over-redskins-name-change-151324>.

Cambodia, Palestine, East Timor, and other places, but also by encouraging readers to take a responsible and critical approach to analyzing global backlash against the United States. Included in the book are annotated chronologies of U.S. military actions from 1776 through mid-2003, as well as a compilation of international laws violated by the United States. For Professor Churchill, advocating for human rights has always meant taking a long and critical look at oneself. *On the Justice of Roosting Chickens* thus pushes readers, particularly audiences in the United States, to view their role in national and global political affairs critically. It is through this critical analysis, Professor Churchill's works suggest, that we may begin to take steps toward the full implementation of fundamental human rights.

150. Professor Churchill's books, including those that have received awards based on their contribution to defending human rights,¹²⁰ are merely one aspect of his unflagging efforts to realize human rights for indigenous peoples. As mentioned previously, Professor Churchill's voluminous writings have been complemented, throughout his career, by his dedication to political activism and to teaching. The four books honored by the Gustavus Myers Center merely exemplify his unwavering commitment to justice at home and abroad. They also embody exactly the type of honest, though sometimes uncomfortable, political discourse that is required for the functioning of a democratic society. As the UN Secretary General has previously noted, human rights defenders "form the base that regional and international human rights organizations and mechanisms ... build upon in the promotion and protection of human rights."¹²¹

Failure to Protect Ward Churchill's Rights as a Human Rights Defender

151. The Commission has asserted that States are required to "guarantee that they will not obstruct, in any guise, the work carried out by human rights defenders" and "bear the responsibility of protecting the defenders from third persons who seek to impede their work."¹²² Thus, the Commission has articulated a three-dimensional framework for State protection of human rights defenders.¹²³

152. First, States must guarantee that human rights defenders receive all of the individual protections universally recognized as human rights.¹²⁴ Second, the State must protect the collective rights associated with defending human rights, including rights of association, assembly, and expression.¹²⁵ The third is a social dimension, which refers to the State obligation to "seek positive changes in the attainment of the rights for society in general."¹²⁶

153. Based on this overarching framework, the Commission has stressed the State responsibility to protect core human rights that are necessary for human rights defenders to continue their human rights work. Included among these core rights are the rights to life and

¹²⁰ Another book, *Since Predator Came: Notes from the Struggle for American Indian Liberation* (1995, 2005), with a preface by Native Hawaiian activist and scholar Haunani-Kay Trask, was nominated for the Colorado Book Award.

¹²¹ IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 26.

¹²² *Id.* at para. 31.

¹²³ *Id.* at para. 32.

¹²⁴ *Id.* at para. 32.

¹²⁵ *Id.* at para. 33.

¹²⁶ *Id.* at para. 34.

personal integrity;¹²⁷ privacy and protection of honor and dignity;¹²⁸ freedom of expression;¹²⁹ and due process and judicial guarantees.¹³⁰ Further, States have a general obligation to guarantee and protect rights and to reform domestic law as necessary.¹³¹ The Commission has particularly stressed the importance of State fulfillment of these duties in the context of indigenous human rights defenders, expressing concern that indigenous human rights defenders are among the groups of human rights defenders most at risk of having their rights violated.¹³²

Failure to Protect Rights to Life and Personal Integrity

154. Article I of the American Declaration states that “every human being has the right to life, liberty and the security of his person.” Included in the Article I protections are the right to personal integrity, which involves the right to be free from “physical or psychological attacks, threats, and harassment used for the purpose of diminishing the physical and mental capacity of human rights defenders.”¹³³

155. Because the rights to life as well as physical and personal integrity are necessary for the exercise of other activities, including the defense of human rights, the Commission has stated that the State’s obligation to protect the right to life is two-fold.¹³⁴ States, of course, have negative obligations to refrain from arbitrary executions and forced disappearances, but they also have the affirmative obligations “to carry out positive actions that translate into doing away with environments that are incompatible with or dangerous for the protection of human rights and bringing about the conditions for eradicating violations by State agents or private persons, so that human rights defenders can freely carry out their activities.”¹³⁵ The Inter-American Court has, therefore, explained that “the States have the duty to provide the necessary means for human rights defenders to conduct their activities freely; to protect them when they are subject to threats in order to ward off any attempt on their life or safety; to refrain from placing restrictions that would hinder the performance of their work, and to conduct serious and effective investigations of any violations against them, thus preventing impunity.”¹³⁶

156. Critical to fulfilling the State’s affirmative obligations in this area is the prompt and thorough investigation of threats to the lives of human rights defenders.¹³⁷ In the landmark case of *Velásquez-Rodríguez v. Honduras*, the Inter-American Court established that the State has an affirmative duty to guarantee rights.¹³⁸ Included in this obligation is the duty to perform prompt,

¹²⁷ *Id.* at paras. 42-49

¹²⁸ *Id.* at paras. 94-100.

¹²⁹ *Id.* at paras. 78-82.

¹³⁰ *Id.* at paras. 106-121.

¹³¹ *Id.* at paras. 122-136.

¹³² See IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 253.

¹³³ *Id.* at para. 41.

¹³⁴ Inter-Am. Ct. H.R., *Case of Kawas-Fernández*, *supra* note 113, at para. 74. See also IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at paras. 23-24.

¹³⁵ IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 24 (internal citations omitted).

¹³⁶ Inter-Am. Ct. H.R., *Case of Kawas-Fernández*, *supra* note 113, at para. 145.

¹³⁷ The IACHR has called this the “obligation to address the structural causes that affect the security of the persons threatened.” IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, para. 45.

¹³⁸ Inter-Am. Ct. H.R., *Velásquez-Rodríguez*, *supra* note 102, at para. 174.

impartial, and effective investigations when private parties threaten the right to life.¹³⁹ Investigations must be carried out with diligence, meaning that the State must use “all available legal means.”¹⁴⁰ The Commission has observed that “an important aspect of the state’s duty to prevent violations of the right to life is investigating immediately, exhaustively, seriously, and impartially where ... threats come from, and punishing, as the case may be, those responsible, with the aim of trying to prevent the threats from being carried out.”¹⁴¹

157. The Commission, therefore, has recognized that “[t]he defense of human rights can be exercised freely only when the persons engaged in it are not victims of physical, psychological, or moral aggression, or other forms of harassment.”¹⁴² Thus, violent acts or threats “constitute violations of the right to personal integrity” and may also “constitute indirect violations of other rights protected by inter-American instruments.”¹⁴³ As the Inter-American Court has noted, the threat of subjecting someone to physical harm can bring great psychological anguish, and States have a responsibility to take actions to end such threats.¹⁴⁴

158. As noted above, following the attacks on Professor Churchill in 2005, both he and his wife received numerous death threats and other hate mail.¹⁴⁵ Additionally, vandals came to his home at night and painted the Nazi swastika symbol on his truck. Professor Churchill and the Department of Ethnic Studies informed the University of Colorado of the extraordinary volume of racist e-mails, letters, and phone calls, as well as threats of violence and death targeting Professor Churchill and his supporters, many of which were received at university e-mail accounts. Despite being notified of these threats, the University took no action and, in fact, provided no response whatsoever. Because of this failure, Professor Churchill had to arrange for his own security personnel to accompany him to campus and other public events. Fortunately Professor Churchill’s life was not taken by vigilante actors. However, the State clearly failed to fulfill its obligation to take affirmative actions to protect his right to life or to act with due diligence in preventing private parties from violating Professor Churchill’s rights to personal integrity and security.

159. In fact, rather than taking steps to protect Professor Churchill’s rights, the State did exactly the opposite. State officials attacked Professor Churchill publicly themselves, violating his rights to personal integrity and security by making him the subject of repeated harassment. Additionally, these statements by government officials fueled the threats made on his life.¹⁴⁶

¹³⁹ See Inter-Am. Ct. H.R., *Case of Kawas-Fernández*, supra note 113, at para. 74.

¹⁴⁰ Inter-Am. Ct. H.R., *Case of the Moiwana Community v. Suriname*. Preliminary Objections, Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 203. See also IACHR, Second Report on the Situation of Human Rights Defenders, supra note 106, at para. 236.

¹⁴¹ IACHR, First Report on the Situation of Human Rights Defenders, supra note 105, at para. 45 (citing Inter-Am. Ct. H.R., *Giraldo Cardona Case*, Provisional Measures, Resolution of June 19, 1998, Operative para. 4).

¹⁴² *Id.* at para. 46; IACHR, Second Report on the Situation of Human Rights Defenders, supra note 106, at para. 46.

¹⁴³ IACHR, First Report on the Situation of Human Rights Defenders, supra note 105, at para. 46.

¹⁴⁴ See Inter-Am. Ct. H.R., *Maritza Urrutia Case*, Judgment of November 27, 2003, para. 92.

¹⁴⁵ See Open Letter from the Department of Ethnic Studies, University of Colorado, April 25, 2005, Annex 2 for a few examples of the death threats received by Professor Churchill and his family.

¹⁴⁶ In other cases, the Inter-American Court has found that official comments increased the vulnerability of victims. See Inter-Am. Ct. H.R., *Case of Rios et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs.

Failure to Protect the Rights to Privacy and Protection of Honor and Dignity

160. The duty of the State to refrain from engaging in public statements that foster a climate conducive to attacks on or harassment of human rights defenders is closely related to the State obligation to protect human rights defenders' rights to honor and dignity. Article V of the American Declaration states: "Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life." The Commission has noted that attacks on human rights defenders can be "accompanied by smear campaigns against them personally and against their work, which undermine the credibility and integrity of human rights work in the public eye."¹⁴⁷

161. One method of violating human rights defenders' right to be free from abusive attacks occurs when the State uses its criminal justice system to harass human rights defenders.¹⁴⁸ A second method of violating human rights defenders' Article V rights is to subject them to smear campaigns. In protecting human rights defenders from attack, the State has the obligation to publicly recognize the legitimacy of human rights defenders' work and to refrain from making public comments that would foster an environment conducive to attacks. The Commission has recognized that "statements by state agents put human rights defenders and their organizations at risk and make them vulnerable,"¹⁴⁹ and that "one of the first steps for providing effective protection to human rights defenders is publicly recognizing the legitimacy of their work, and protecting them from the moment the public authority learns that they are being threatened because of their [work] as human rights defenders."¹⁵⁰ Thus, States have an obligation to ensure that public officials "refrain from making statements that stigmatize human rights defenders" and to "give[] precise instructions to their officials in this respect," including "imposing disciplinary sanctions on those who do not comply with such instructions."¹⁵¹

162. As mentioned above, the State, through its agents the Regents and administrators of the University of Colorado, not only failed to protect Professor Churchill from attack but also directly engaged in a campaign to smear and discredit Professor Churchill and his work. Thus, the State violated its duty to ensure that public officials refrained from making comments stigmatizing Professor Churchill or fraudulently calling into question the legitimacy of his work. Statements by the Regents and University officials attacking Professor Churchill and his scholarship were motivated by Professor Churchill's work as a human rights defender, in particular his speech critical of the United States government. However, the attacks on Professor Churchill went far beyond a response to his critique of U.S. government actions. Instead, the attacks on Professor Churchill attempted to discredit his entire body of scholarship. Thus the State failed to fulfill its obligation to instruct its officials to refrain from making public attacks on Professor Churchill as well as to discipline any breach of such instructions, in violation of his rights to protection of honor and dignity.

Judgment of January 28, 2009. Series C No. 194, para. 143; Inter-Am. Ct. H.R., *Case of Perozo et al. v. Venezuela*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 28, 2009. Series C No. 195, para. 155.

¹⁴⁷ IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 122.

¹⁴⁸ See IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 96.

¹⁴⁹ *Id.* at para. 334.

¹⁵⁰ *Id.* at para. 339.

¹⁵¹ *Id.* at para. 342(10).

Failure to Protect Right to Freedom of Expression

163. Although Professor Churchill's Article IV rights to freedom of expression are discussed in greater detail below,¹⁵² they are also relevant to his rights as a human rights defender. The Commission has noted that "freedom of expression is another of the rights essential to the work of human rights defenders."¹⁵³ The right to freedom of expression is two-fold, encompassing both the right to disseminate information and to receive information. As the Commission has stated, "[i]n the case of human rights defenders, it is possible for the exercise of this right to be restricted not only in its individual aspect, but also in its social or collective aspect."¹⁵⁴

164. The United States, through its agents the Regents and administrators of the University of Colorado violated Professor Churchill's rights to freedom of expression by making derogatory public statements about Professor Churchill and his work, launching retaliatory investigations into his scholarship, and terminating him in retaliation for his speech. This attack on Professor Churchill is particularly significant because of his work as a human rights defender. Professor Churchill was targeted for his work as a human rights defender, in violation of his rights to express his opinions and disseminate information. Thus, the State is responsible for violating his Article IV rights in their individual aspect. Further, by attempting to discredit his scholarship and by removing him from his teaching position, the State directly interfered with the social and collective aspect of freedom of expression and limited Professor Churchill's ability to speak out against human rights violations.

165. Professor Churchill's right to freedom of expression also had the corollary effect of violations of his rights to employment (Article XIV) and property (XXIII)¹⁵⁵ as well as his right to cultural integrity (Article XIII).¹⁵⁶

Failure to Protect Rights to Due Process and Judicial Guarantees

166. Violations of Professor Churchill's rights to due process and judicial guarantees, protected by Articles XVII, XVIII and XXVI, are also discussed in further detail below.¹⁵⁷ Again, however, these violations take on particular significance in light of Professor Churchill's work as a human rights defender.

167. The State's obligation to prevent, investigate, and punish violations of human rights defenders' human rights¹⁵⁸ implicate the rights to due process, including the right to a remedy for violations of human rights.¹⁵⁹ Most fundamentally this includes ending impunity by holding human rights violators responsible.¹⁶⁰ Thus, the State has a duty to provide redress,¹⁶¹ which

¹⁵² See *infra* paras. 171 *et seq.*

¹⁵³ IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 79.

¹⁵⁴ IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 99. See also IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 79.

¹⁵⁵ See *infra* paras. 190, 201.

¹⁵⁶ See *infra* paras. 203-207.

¹⁵⁷ See *infra* paras. 214 *et seq.*

¹⁵⁸ IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 234.

¹⁵⁹ See IACHR, First Report on the Situation of Human Rights Defenders, *supra* note 105, at para. 106.

¹⁶⁰ See IACHR, Second Report on the Situation of Human Rights Defenders, *supra* note 106, at para. 107.

¹⁶¹ *Id.* at para. 234.

involves ensuring judicial guarantees. As the Commission has stated, “[t]he right to effective judicial protection requires that the judges direct the proceeding in such a way as to avoid undue delays and obstructions that lead to impunity, thus frustrating due judicial protection of human rights.”¹⁶²

168. As the Commission has stated, “impunity helps hamper the work of human rights defenders and has an impact on society whereby intimidation prevents it from denouncing any violations it might suffer.”¹⁶³ In the context of human rights defenders, impunity not only violates an individual’s rights to due process and an effective remedy but also can produce a chilling effect that threatens the protection of human rights more generally.¹⁶⁴ As the Inter-American Court has stated, “the State has the obligation to combat impunity by all available legal means, because it encourages the chronic repetition of the human rights violations.”¹⁶⁵ The Commission has stated that it “believes that an important step toward ending impunity would be for officials responsible for investigating crimes and administering justice, from the highest levels, [to be] made aware of the leading role human rights defenders play in democratic systems, in order to act with diligence in cases in which violations are alleged against defenders.”¹⁶⁶

169. Professor Churchill’s rights to due process and an effective judicial remedy have been violated in several respects. First, the University’s failure to investigate and follow-up on complaints of death threats constituted a failure of the state to prevent, investigate, and punish violations of human rights. Second, the University’s repeated violations of its own administrative procedures in terminating Professor Churchill violated his rights to due process. Finally, the courts’ failure to hold the University responsible even after a jury found that the University had violated Professor Churchill’s constitutional right to freedom of expression constitutes a flagrant violation of Professor Churchill’s rights to an effective remedy and judicial protection. By holding that University Regents are immune from suit even when they violate fundamental rights, Colorado courts have sanctioned a situation of ongoing impunity that not only affects Professor Churchill, depriving him of a remedy, but also affects scores of other human rights defenders in the university context. In fact, it is hard to imagine a situation in which a state of impunity could be more effectively fostered by a State than when its own judicial system finds that a violation of the rights of a human right defender has occurred and the courts determine, post-hoc and not without significant controversy, that the perpetrators are immune from suit as a matter of law.

170. By failing to protect Professor Churchill’s rights as a human rights defender, the United States has violated Articles I, IV, V, XIII, XIV, XVII, XVIII, XXIII, and XXVI of the American Declaration.

¹⁶² *Id.* at para. 239

¹⁶³ *Id.* at para. 108.

¹⁶⁴ See Inter-Am. Ct. H.R., *Case of Kawas-Fernández*, supra note 113, at para. 153.

¹⁶⁵ Inter-Am. Ct. H.R., *Case of the Ituango Massacres v. Colombia*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 1, 2006. Series C No. 148, para. 299; Inter-Am. Ct. H.R., *Case of the Moiwana Community*, supra note 165, at para. 203.

¹⁶⁶ IACHR, Second Report on the Situation of Human Rights Defenders, supra note 106, at para. 244.

B. Responsibility for Protecting Academic Freedom and Freedom of Expression

171. The United States has violated Professor Churchill's rights to freedom of expression under the American Declaration. Article IV states: "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever." The right to freedom of expression is a foundational right, necessary for the protection of other human rights and central to the establishment and preservation of democratic governance.

172. The right to freedom of expression is a bedrock principle of international human rights law. The Universal Declaration of Human Rights states in Article 19 that "[e]veryone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which the United States ratified in 1992, codifies this same principle, stating:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

173. The Human Rights Committee considered ICCPR Article 19 protections in General Comment No. 34 (2011). The Committee stated: "Freedom of opinion and expression are indispensable conditions for the full development of the person. They are essential for any society. They constitute the foundation stone for every free and democratic society."¹⁶⁷ The Committee further recognized that the human right to freedom of expression is necessary for the exercise of other human rights, stating that "[f]reedom of expression is ... essential for the promotion and protection of human rights"¹⁶⁸ and that the right forms "a basis for the full enjoyment of a wide range of other human rights."¹⁶⁹

174. Further, the Committee in its Comment clarifies that freedom of opinion should be considered a non-derogable right.¹⁷⁰ The Human Rights Committee stressed the importance of freedom of opinion, stating that "[n]o person may be subject to the impairment of any rights under the Covenant on the basis of his or her actual, perceived or supposed opinions. All opinions are protected..."¹⁷¹ The Committee stated that "[t]he harassment, intimidation or stigmatization of a person ... for reasons of the opinions they may hold, constitutes a violation of article 19, paragraph 1." With respect to limitations on the right to freedom of expression in paragraph 2, the Committee observed that "any restriction on freedom of expression constitutes a

¹⁶⁷ Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, CCPR/C/GC/34, September 12, 2011, para. 2, available at <http://www2.ohchr.org/english/bodies/hrc/comments.htm>.

¹⁶⁸ *Id.* at para. 3.

¹⁶⁹ *Id.* at para. 4.

¹⁷⁰ *Id.* at para. 5.

¹⁷¹ *Id.* at para. 9.

serious curtailment of human rights.”¹⁷² Thus, restrictions must be provided by law,¹⁷³ must not confer unfettered discretion,¹⁷⁴ and must not violate the ICCPR’s non-discrimination provisions.¹⁷⁵

175. The right to freedom of expression has also been enshrined by regional human rights systems. For instance, the right is articulated by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms¹⁷⁶ and Article 9 of the African Charter on Human and Peoples’ Rights.¹⁷⁷ The foundational texts of the inter-American system, including the American Declaration, provide even more rigorous protections for the right to freedom of expression. In the opinion of the Inter-American Commission, the inter-American system “is probably the international framework that provides the greatest scope and the broadest guarantees of protection to the right to freedom of thought and expression.”¹⁷⁸

176. The importance of the right to freedom of expression in the inter-American system has also been confirmed by inter-American case law. As the Commission has confirmed:

[i]nter-American case law has explained that freedom of expression is a key instrument for the exercise of all other fundamental rights. Indeed, it is an essential mechanism for the exercise of the rights to participation, religious freedom, education, ethnic or cultural identity and, needless to say, equality, understood not only as the right to be free from discrimination, but as the right to enjoy certain basic social rights. Given the important instrumental role it fulfils [*sic*], freedom of expression is located at the heart of the human rights protection system in the Americas.¹⁷⁹

¹⁷² *Id.* at para. 24.

¹⁷³ *Id.* at para. 23.

¹⁷⁴ *Id.* at para. 25.

¹⁷⁵ *Id.* at para. 26.

¹⁷⁶ Convention for the Protection of Human Rights and Fundamental Freedoms, <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

¹⁷⁷ African Charter on Human and Peoples Rights (1981), <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>.

¹⁷⁸ IACHR, The Inter-American Legal Framework regarding the Right to Freedom of Expression, OEA/Ser.L/V/II CIDH/RELE/INF. 2/09, December 30, 2009, para. 3 [hereinafter “Inter-American Legal Framework”]. In fact, the Commission stated:

From a comparative perspective, when the texts of Article 13 of the American Convention, Article IV of the American Declaration, and Article 4 of the Inter-American Democratic Charter are contrasted with the relevant provisions of other international human rights treaties – specifically with Article 19 of the International Covenant on Civil and Political Rights or with Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms – it is clear that the Inter-American framework was designed by the American States to be more generous and to reduce to a minimum the restrictions to the free circulation of information, opinions and ideas. This has been interpreted by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights as a clear indication of the importance ascribed to free expression by the hemisphere’s societies.

Id. at para. 4.

¹⁷⁹ *Id.* at para. 9.

Thus, freedom of expression is considered critical to the protection of human rights and the functioning of democracy.¹⁸⁰

Academic Freedom Is a Critical Aspect of Freedom of Expression

177. Freedom of expression, as protected by Article IV of the American Declaration, has both individual and collective dimensions. The right involves not only “the right to seek, receive, and disseminate ideas and information of any kind, but also to receive information and be informed about the ideas and information disseminated by others.”¹⁸¹ Acts of expression involve both elements simultaneously and both dimensions are of equal importance.¹⁸²

178. This dual nature of expression is what makes the right to freedom of expression not only critical to individuals but to the protection of human rights more generally. The Inter-American Court has stated that:

Freedom of expression is a cornerstone upon which the very existence of a democratic society rests. It is indispensable for the formation of public opinion. It is also a condition sine qua non for the development of political parties, trade unions, scientific and cultural societies and, in general, those who wish to influence the public. It represents, in short, the means that enable the community, when exercising its opinions, to be sufficiently informed. Consequently, it can be said that a society that is not well informed is not a society that is truly free.¹⁸³

Thus, the right to disseminate information and the right to receive information are considered equally critical to the functioning of societies within the inter-American human rights system.¹⁸⁴

179. The public’s right to receive information has been one of the elements that the inter-American system has found significant in developing its extensive jurisprudence on the rights of journalists. The Commission has stated that “[t]he work of journalists and the activities of the press are fundamental elements for the functioning of democracies, as journalists and the communications media keep society informed of events and their varied interpretations – a necessary condition for public debate to be robust, informed and vigorous.”¹⁸⁵

¹⁸⁰ *Id.* at paras. 9-10.

¹⁸¹ Inter-Am. Ct. H.R., *Case of Kimel v. Argentina*. Merits, Reparations and Costs. Judgment of May 3, 2008. Series C No. 177, para. 53. See also Inter-Am. Ct. H.R., *Case of Claude-Reyes et al. v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006, paras. 75-76; IACHR, Inter-American Legal Framework, supra note 178, at paras. 13-17.

¹⁸² IACHR, Inter-American Legal Framework, supra note 178, at paras. 15-16.

¹⁸³ Inter-Am. Ct. H.R., *Case of Claude-Reyes et al.*, supra note 181, at para. 85 (quoting Inter-Am. Ct. H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004, Series C No. 111, para. 82).

¹⁸⁴ Inter-Am. Ct. H.R., *Case of “The Last Temptation of Christ” (Olmedo-Bustos et al.) v. Chile*. Merits, Reparations and Costs. Judgment of February 5, 2001. Series C No. 73, paras. 66-67 (“For the ordinary citizen, the knowledge of other people’s opinions and information is as important as the right to impart their own. The Court considers that both dimensions are of equal importance and should be guaranteed simultaneously in order to give total effect to the right to freedom of thought and expression...”).

¹⁸⁵ IACHR, Inter-American Legal Framework, supra note 178, at para. 165. See also Inter-Am. Ct. H.R., *Case of Herrera-Ulloa v. Costa Rica*. Preliminary Objections, Merits, Reparations and Costs. Judgment of July 2, 2004. Series C No. 107, paras. 117-118.

180. Because of the critical role journalists play, the inter-American system has recognized the importance of their independence. The Inter-American Court in an Advisory Opinion stated that “the free circulation of ideas and news is only possible through a plurality of sources of information” and therefore “it is not enough to guarantee the right to establish and manage organs of mass media; it is also necessary that journalists and, in general, all those who dedicate themselves professionally to the mass media are able to work with sufficient protection for the freedom and independence that the occupation requires.”¹⁸⁶ Critical to this independence is the ability to be free from both direct and indirect restrictions on freedom of expression.¹⁸⁷ The Commission has recognized that indirect restrictions on freedom of expression may occur through the statements of public officials.¹⁸⁸

181. Journalists’ “direct nexus to freedom of expression” makes the profession of journalism particularly noteworthy in the jurisprudence of the inter-American system.¹⁸⁹ However, the Inter-American Court has specified that this right “should not be limited to a given profession or group of individuals.”¹⁹⁰ As observed by the Commission, “the professional journalist is simply a person who exercises his freedom of expression continuously, steadily and for pay.”¹⁹¹

182. In the freedom of expression context, academics are much like journalists and have a similar direct nexus to the right. Like journalists, college professors exercise their right to freedom of expression continuously, steadily, and for pay. Like journalists, academics seek to gather and disseminate information to their students as well as to society at large, informing and educating the populace and thus playing a critical role in the maintenance of democracy. Although freedom of expression is, of course, a right of everyone regardless of occupation, we urge the Commission to acknowledge the special role that academics, like journalists, play in creating and maintaining dialogue and an informed populace in a free and open society.

183. The importance of academic freedom is well-established both domestically and internationally.¹⁹² In the domestic context in the United States, the American Association of University Professors (“AAUP”) and the Association of American Colleges (“AAC”) issued the 1940 Statement of Principles on Academic Freedom and Tenure (“1940 Statement”), which has since been endorsed by over 200 scholarly and educational groups and was adopted by the University of Colorado.¹⁹³ The purpose of the 1940 Statement was “to promote public understanding and support of academic freedom and tenure and agreement upon procedures to

¹⁸⁶ Inter-Am. Ct. H.R., *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism* (Arts. 13 and 29 American Convention on Human Rights). Advisory Opinion OC-6/86 of November 13, 1985. Series A. NO. 6, para. 34 [hereinafter “*Compulsory Membership*”].

¹⁸⁷ See IACHR, Inter-American Legal Framework, *supra* note 178, at paras. 156-159.

¹⁸⁸ *Id.* at para. 158. See also Inter-Am. Ct. H.R., *Case of Rios et al.*, *supra* note 146, at para. 139.

¹⁸⁹ IACHR, Inter-American Legal Framework, *supra* note 178, at para. 168.

¹⁹⁰ Inter-Am. Ct. H.R., *Case of Tristán Donoso v. Panama*. Preliminary Objections, Merits, Reparations and Costs. Judgment of January 27, 2009. Series C No. 193, para. 114.

¹⁹¹ IACHR, Inter-American Legal Framework, *supra* note 178, at para. 168.

¹⁹² For excellent resources on the right to academic freedom in international law, see the Scholars at Risk Network at New York University, <http://scholarsatrisk.nyu.edu/>.

¹⁹³ American Association of University Professors and Association of American Colleges, 1940 Statement of Principles on Academic Freedom and Tenure, Annex 6, also available at <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

ensure them in colleges and universities” because “[t]he common good depends upon the free search for truth and its free expression.”¹⁹⁴ The 1940 Statement clarifies that academic freedom entails the “full freedom” of teachers in the areas of research and publication, classroom teaching, and speaking and writing.¹⁹⁵ This includes freedom from institutional censorship when teachers are speaking or writing as public citizens.¹⁹⁶

184. The principle of academic freedom is also recognized worldwide. In 1997 the General Conference of the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) passed a resolution entitled “Recommendation concerning the Status of Higher-Education Teaching Personnel.”¹⁹⁷ The resolution referred to both the need to fulfill the right to education for all articulated by Article 26 of the Universal Declaration of Human Rights, as well as the right to freedom of expression found in Article 13 of the ICCPR.¹⁹⁸ The resolution’s preamble “[e]xpress[ed] concern regarding the vulnerability of the academic community to untoward political pressures which would undermine academic freedom.”

185. Stressing the critical function of academic freedom in serving the “global objectives of international peace, understanding, co-operation and sustainable development,”¹⁹⁹ UNESCO recommended that academic freedom be “scrupulously observed.”²⁰⁰ Thus, higher-education teaching personnel, “like all other groups and individuals,” should enjoy the full range of civil and human rights including rights to “freedom of thought, conscience ... [and] expression.”²⁰¹ Professors “should not be hindered or impeded in exercising their civil rights as citizens, including the right to contribute to social change through freely expressing their opinion of state policies and of policies affecting higher education. They should not suffer any penalties simply because of the exercise of such rights.”²⁰²

186. In listing a range of rights and freedoms to which higher-education teaching personnel are entitled, UNESCO stated:

Higher-education teaching personnel are entitled to the maintaining of academic freedom, that is to say, the right, without constriction by prescribed doctrine, to freedom of teaching and discussion, freedom in carrying out research and disseminating and publishing the results thereof, freedom to express freely their opinion about the institution or system in which they work, [and] freedom from institutional censorship.... All higher-education teaching personnel should

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ UNESCO, Recommendation concerning the Status of Higher-Education Teaching Personnel, November 11, 1997, attached as Annex 5 and also available at http://portal.unesco.org/en/ev.php-URL_ID=13144&URL_DO=DO_TOPIC&URL_SECTION=201.html.

¹⁹⁸ *Id.* at Preamble.

¹⁹⁹ *Id.* at para. 3.

²⁰⁰ *Id.* at para. 27.

²⁰¹ *Id.* at para. 26.

²⁰² *Id.* at para. 26.

have the right to fulfill their functions without discrimination of any kind and without fear of repression by the state or any other source.²⁰³

The recommendation also stressed the importance of safeguarding tenure, which helps protect the above-mentioned rights by serving as a “major procedural safeguard of academic freedom and against arbitrary decisions.”²⁰⁴

187. The importance of academic freedom has been recognized in several other international settings. The Lima Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (1988) was approved by the General Assembly of the World University Service (“WUS”) and dealt specifically with academic freedom in “Third World” countries.²⁰⁵ In 1990, a coalition of academic staff associations adopted the Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics.²⁰⁶ The same year, participants at a conference organized by the Council for the Development of Social Science Research (“CODERISA”) adopted the Kampala Declaration on Intellectual Freedom and Social Responsibility, which addresses academic freedom in Africa.²⁰⁷ In 2006, the Parliamentary Assembly of the Council of Europe adopted Recommendation 1762, entitled Academic Freedom and University Autonomy.²⁰⁸

188. The European Union’s Charter of Fundamental Rights enshrines the right to academic freedom in Article 13, which states: “The arts and scientific research shall be free of constraint. Academic research shall be respected.”²⁰⁹ Several countries also explicitly articulate the right to academic freedom in their domestic constitutions.²¹⁰ The constitutions of thirteen European Union countries specifically mention the right to academic freedom,²¹¹ as do the constitutions of South Africa,²¹² the Philippines,²¹³ and Japan.²¹⁴ Additionally, many countries have statutory

²⁰³ *Id.* at para. 97.

²⁰⁴ *Id.* at para. 45.

²⁰⁵ General Assembly of World University Service, Declaration on Academic Freedom and Autonomy of Institutions of Higher Education (Lima, September 10, 1988), <http://www.ace.ucv.ro/pdf/lima.pdf>.

²⁰⁶ The Dar es Salaam Declaration on Academic Freedom and Social Responsibility of Academics (Dar es Salaam, Tanzania, April 19, 1990) was adopted by the Ardhi Institute Staff Assembly (“ARISA”), Cooperative College Staff Association (“COCOSA”), Institute of Development Management Staff Association (“IDMASA”), Institute of Finance Management Staff Assembly (“IFMASA”), Sokoine University of Agriculture Staff Association (“SUASA”), and University of Dar es Salaam Academic Staff Assembly (“UDASA”) and is available at <http://www.codesria.org/spip.php?article351&lang=en>.

²⁰⁷ CODESRIA, The Kampala Declaration on Intellectual Freedom and Social Responsibility (Kampala, Uganda, November 29, 1990), <http://www.codesria.org/spip.php?article350&lang=en>. For more information on the current struggle for academic freedom in Africa, see <http://www.codesria.org/spip.php?article213>.

²⁰⁸ Council of Europe Parliamentary Assembly, Recommendation 1762 (2006) Academic Freedom and University Autonomy, <http://assembly.coe.int/main.asp?Link=/documents/adoptedtext/ta06/erec1762.htm>.

²⁰⁹ Charter of Fundamental Rights of the European Union (2000/C 364/01), http://www.europarl.europa.eu/charter/pdf/text_en.pdf.

²¹⁰ See Scholars at Risk, “Academic Freedom Workshops: Advocacy Curriculum, Section B: Standards and Instruments,” [hereinafter “Academic Freedom Workshops: Advocacy Curriculum, Section B”], http://scholarsatrisk.nyu.edu/Workshop/b_standards.php#natconstitutions.

²¹¹ Terence Karran, *Academic Freedom in Europe: A Preliminary Comparative Analysis*, 20 Higher Education 289, 293 (2007), http://www.universityworldnews.com/filemgmt_data/files/Terence%20Karran%20article.pdf.

²¹² Constitution of the Republic of South Africa (1996), Chapter 2, Section 16(1)(d) (“Everyone has the right to freedom of expression, which includes ... academic freedom and freedom....”), <http://www.info.gov.za/documents/constitution/1996/a108-96.pdf>.

provisions that make explicit that freedom of expression encompasses academic freedom.²¹⁵ All European Union nations except Greece and Malta have statutes protecting academic freedom.²¹⁶ Rwanda, Indonesia, and New Zealand also have similar legislation.²¹⁷

189. The breadth of domestic and international affirmations of the importance of academic freedom indicates that it is a critical subset of freedom of expression. Academic freedom implicates both the professor's right to gather and disseminate information as well as the right of students and the public to receive information from various points of view. Like journalists, academics have a unique and direct nexus to the right to freedom of expression and play an essential role in democracy by providing information to the citizenry. Article IV's protection of freedom of expression is, therefore, particularly necessary in the context of academic freedom, and violations of the right to academic freedom can, in turn, violate the rights to education (Article XII) and employment (Article XIV), as they did in this case.

190. By depriving Prof. Churchill of his employment, the United States has also violated his right to property under American Declaration Article XXIII. The United States Supreme Court has recognized that a tenured university professor has a property interest in his or her continued employment.²¹⁸ Thus, by violating Professor Churchill's rights to academic freedom and terminating his employment, the United States has also deprived Professor Churchill of his property interest in his continued employment and has done so without just cause and in the absence of due process.

Duty to Protect Political Speech and Controversial Speech

191. Rights to freedom of expression, including academic freedom, are particularly important in the context of political speech and controversial speech. The Commission has recognized that "there are certain types of speech that receive special protection because of their importance to the exercise of human rights, or to the consolidation, proper functioning and preservation of democracy."²¹⁹ Included in the category of specially protected speech are political speech and speech involving matters of public interest.²²⁰ Thus, "the expression of statements, information and opinion regarding matters of public interest, the State and its institutions enjoy greater protection" in the inter-American system.²²¹

²¹³ The 1987 Constitution of the Republic of the Philippines, Article XIV, Sec. 5(2) ("Academic freedom shall be enjoyed in all institutions of higher learning), <http://www.gov.ph/the-philippine-constitutions/the-1987-constitution-of-the-republic-of-the-philippines/the-1987-constitution-of-the-republic-of-the-philippines-article-xiv/>.

²¹⁴ The Constitution of Japan (1946), Article 23 ("Academic freedom is guaranteed"), http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html.

²¹⁵ See Scholars at Risk, "Academic Freedom Workshops: Advocacy Curriculum, Section B," supra note 210.

²¹⁶ Karran, *Academic Freedom in Europe*, supra note 211.

²¹⁷ See Scholars at Risk, "Academic Freedom Workshops: Advocacy Curriculum, Section B," supra note 210.

²¹⁸ *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) ("A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown.").

²¹⁹ IACHR, Inter-American Legal Framework, supra note 178, at para. 32.

²²⁰ *Id.* at paras. 33-38.

²²¹ *Id.* at para. 35.

192. Political speech is specially protected in the inter-American system because it exemplifies what is most important about the right to freedom of expression – fostering an environment of robust debate about matters of common concern in order to build a vibrant and accountable democracy.²²² This special protection for political speech extends to controversial speech. The Inter-American Court in *Case of Kimel v. Argentina* stated: “In the domain of political debate on issues of great public interest, not only is the expression of statements which are well seen by the public opinion and those which are deemed to be harmless protected, but also the expression of statements which shock, irritate or disturb public officials or any sector of society.”²²³ The voice of dissenters is critical because, as the Court has recognized, “[w]ithout effective freedom of expression, *exercised in all its forms*, democracy is enervated, pluralism and tolerance start to deteriorate, the mechanisms for control and complaint by the individual become ineffectual and, above all, a fertile ground is created for authoritarian systems to take root in society.”²²⁴

193. This special protection is particularly significant when political speech involves allegations of human rights abuses. The Commission has stated that “[t]he case law of the inter-American system has also held that freedom of expression includes the right to denounce human rights violations committed by public officials [and] that the obstruction or silencing of this type of complaint is in violation of freedom of expression in both its individual and collective dimensions....”²²⁵

194. Thus, the State has an obligation to vigorously protect speech that is political in nature, even when it is controversial, and particularly when it relates to human rights violations. This duty involves the obligation to refrain from imposing direct or indirect restraints on freedom of expression.²²⁶ Prior censorship is an example of direct restriction of freedom of expression.²²⁷ There are, however, many means of indirect restriction of the right to freedom of expression. Because of the chilling effect that State acts may have on the exercise of the right to freedom of

²²² See *id.* at para. 33.

²²³ Inter-Am. Ct. H.R., *Case of Kimel*, supra note 181, at para. 88. See also Inter-Am. Ct. H.R., *Case of “The Last Temptation of Christ”*, supra note 184, at para. 69 (quoting the European Court of Human Rights on this point); Inter-Am. Ct. H.R., *Case of Ricardo Canese v. Paraguay*. Judgment of August 31, 2004, Series C No. 111, para. 83-84 (stating that the UN Human Rights Committee and African Commission on Human and Peoples’ Rights have also stressed this point).

²²⁴ Inter-Am. Ct. H.R., *Case of Ricardo Canese*, supra note 223, at para. 86 (emphasis added).

²²⁵ IACHR, Inter-American Legal Framework, supra note 178, at para. 42. The Commission has stated:

...the exercise of the right of freedom of thought and expression within a democratic society includes the right not to be prosecuted or harassed for one’s opinions or for one’s allegations about or criticisms of public officials. ... This protection is broader, however, when the statements made by a person deal with alleged violations of human rights. In such a case, not only is a person’s individual right to transmit or disseminate information being violated, the right of the entire community to receive information is also being undermined.

Inter-Am. C.H.R., *Rodolfo Robles Espinoza and Sons v. Peru*, Report No. 20/99, Case 11.317, February 23, 1999, para. 148.

²²⁶ See Inter-Am. Ct. H.R., *Compulsory Membership*, supra note 186, at paras. 53-57; IACHR, Inter-American Legal Framework, supra note 178, at paras. 152-159.

²²⁷ Inter-Am. Ct. H.R., *Case of Palamara-Iribarne v. Chile*. Merits, Reparations and Costs. Judgment of November 22, 2005. Series C No. 135, para. 68.

expression, the Commission has pointed out that a single State act may constitute both direct and indirect restraint on expression.²²⁸

195. Indirect restraints include statements by public officials. The Inter-American Court in *Case of Rios et al. v. Venezuela* stated that “public officials ... have a position of guarantor of the fundamental rights of peoples and, therefore, their statements cannot ignore those rights or constitute forms of direct or indirect interference or harmful pressure on the rights of those who seek to contribute with public deliberation through the expression and diffusion of their thoughts.”²²⁹ Thus, the State not only has an obligation to protect political speech from direct restraints but also to ensure that indirect restraints, including those embodied in statements of public officials, are not imposed, duties that are heightened in the context of political speech.

Failure to Protect Professor Churchill’s Right to Freedom of Expression

196. As discussed above, Professor Churchill’s entire career has been dedicated to the defense of human rights. The lectures in his classes, the many he has written or edited, and his innumerable public lectures have all involved bringing to light the United States’ human rights violations. Thus, Professor Churchill has been an important voice of dissent in the United States and his speech should be specially protected because it is not only political speech on matters of public concern but also because it involves human rights.

197. Professor Churchill’s entire body of work been related to the protection of human rights, and his controversial online commentary addressing the events of September 11, 2001 was also a matter of political speech concerning the United States’ human rights violations abroad. From Professor Churchill’s perspective, the attacks on the United States that day were directly related to the country’s human rights violations in Iraq and elsewhere. Professor Churchill challenged Americans to look beyond the day’s media portrayal of the attacks in order to understand the atrocities the United States has committed abroad and the possible motivations of the terrorists. Thus, Professor Churchill challenged Americans, in admittedly provocative terms, to make themselves more secure and to end violence such as the violence they witnessed that day by taking a long, hard look at their own country’s foreign policies rather than turning a blind eye to human rights violations committed in their name.

198. Professor Churchill’s 9/11 op-ed piece is exactly the type of controversial speech that the inter-American system has dedicated itself to protecting. Although offensive to some, and perhaps exactly because it was offensive, the piece was designed to provoke thought and open up dialogue on important issues of national security, U.S. foreign policy, and the value of all lives – not just American lives. It is this type of critique of government, and particularly of government human rights abuses, that is critical to a functioning democracy and that, in the long run, can produce a more peaceful and just global society.

199. Rather than providing special protection for Professor Churchill’s rights to academic freedom and freedom of expression, however, the United States has engaged in repeated violations of Professor Churchill’s rights. The retaliatory investigations into Professor

²²⁸ IACHR, Inter-American Legal Framework, *supra* note 178, at para. 157.

²²⁹ Inter-Am. Ct. H.R., *Case of Rios et al.*, *supra* note 146, at para. 139.

Churchill's work and his eventual termination violated his rights. As mentioned previously, the jury in *Churchill v. University of Colorado* found that Professor Churchill was terminated because of his constitutionally protected speech and that were it not for this exercise of his right to freedom of expression he would not have been fired. Retaliatory termination for political speech concerning human rights violations could certainly be considered a direct restraint on the right to freedom of expression. Additionally, Professor Churchill suffered indirect restraints on his rights, including the numerous public statements of University officials designed to interfere with or place pressure on Professor Churchill's exercise of his rights.

200. Moreover, the attack on Professor Churchill was broader than simply an attack on his 9/11 op-ed piece. As explained above, Professor Churchill was targeted for his work as a human rights defender, in violation of his rights to express his opinions and disseminate information. By attempting to discredit Professor Churchill's scholarship and remove him from his teaching position, the State also failed to protect the social and collective aspects of freedom of expression by limiting Professor Churchill's ability to call attention to the United States' human rights violations.

201. The failure to respect Professor Churchill's rights to academic freedom and freedom of expression under Article IV led to other violations of the American Declaration. Under Article XIV, "[e]very person has the right to work, under proper conditions, and to follow his vocation freely, insofar as existing conditions of employment permit." By launching a retaliatory investigation into Professor Churchill's work, the University violated his right to work under proper conditions, forcing him to spend significant amounts of time responding to unfounded allegations assailing his scholarship. Because of the extensive time spent in the University's administrative process, several books of Professor Churchill's were delayed. Further, the public and very hostile statements by University Regents and administrators created a hostile working environment for Professor Churchill. Finally, his retaliatory termination ended his employment on unconstitutional grounds and in violation of his internationally recognized human rights, in violation of Article XIV. By depriving Prof. Churchill of his employment, the United States has also violated his right to property under American Declaration Article XXIII. The United States Supreme Court has recognized that a tenured university professor has a property interest in his or her continued employment.²³⁰ Thus, by violating Professor Churchill's rights to academic freedom and terminating his employment, the United States has also deprived Professor Churchill of his property interest in his continued employment. Also, as detailed below, the administrative process stripping Professor Churchill of his employment violated his rights to due process under Articles XVII, XVIII and XXVI as well.

202. In sum, Professor Churchill's work, including his 9/11 op-ed piece, qualified as political speech concerning human rights and should, therefore, have been entitled to special protection. Rather than providing such protection, the State did exactly the opposite, undertaking to punish Professor Churchill for his controversial speech. By engaging in retaliatory investigations and termination and allowing public officials to attempt to shame Professor Churchill in the media,

²³⁰ *Perry v. Sindermann*, supra note 218, 601 ("A written contract with an explicit tenure provision clearly is evidence of a formal understanding that supports a teacher's claim of entitlement to continued employment unless sufficient 'cause' is shown.").

the United States violated Professor Churchill's rights under American Declaration Articles IV, XIV, XVII, XVIII, XXIII, and XXVI.

C. Responsibility for Protecting Indigenous Peoples' Rights to Cultural Integrity

203. The State's failure to protect Professor Churchill's rights to freedom of opinion and expression, including academic freedom, also implicates indigenous rights to culture and education. As discussed above, the attack on Professor Churchill was broader than simply retaliation for his 9/11 op-ed piece. Professor Churchill's extensive work as an indigenous human rights defender, the University's attacks on his scholarship related to indigenous peoples, and the larger context of attacks on Ethnic Studies programs throughout the country indicate that more than a right to speak out against U.S. foreign policy is at stake. Rather, the State's violation of Professor Churchill's rights is intimately tied to his work as an indigenous scholar and activist.

204. American Declaration Article XIII protects the right to the benefits of culture. With respect to indigenous peoples, the right to culture should be interpreted in light of other rights necessary to exercise the right to cultural survival, including the Article XII right to education. With respect to indigenous peoples, the United Nations Declaration on the Rights of Indigenous Peoples enshrines rights to education in Articles 13, 14, and 21 and protects the right to culture in Articles 8, 11, 14, and 31.²³¹ Central to the protection of indigenous peoples' rights to cultural survival is the ability to transmit indigenous histories. As the UN Declaration on the Rights of Indigenous Peoples states in Article 13, "[i]ndigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories...."

205. Additionally, Article 15 of the UN Declaration on the Rights of Indigenous Peoples protects indigenous peoples' "right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information" and charges States with the duty to "take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society." The ability to articulate indigenous histories, including the histories of colonization and genocide, is essential to enabling indigenous peoples' effective exercise of their rights to land, territories, and preservation of culture, as well as society's ability to understand the oppression indigenous peoples have faced in order to eliminate discrimination.

206. The condemnation of Professor Churchill's scholarship related to indigenous peoples violates Professor Churchill's rights to express essential elements of his "personal identity or dignity."²³² In the inter-American system, expressions of personal identity or dignity are, along with political speech, a specially protected category of speech.²³³ Inter-American case law has applied this concept particularly to the use of indigenous languages, but it also applies to

²³¹ United Nations Declaration on the Rights of Indigenous Peoples, http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.

²³² IACHR, Inter-American Legal Framework, *supra* note 178, at paras. 53-56.

²³³ *Id.* at paras. 53-56.

expressions of religion or sexual orientation.²³⁴ This concept should equally apply to expressions of culture and history. Given the struggles of indigenous peoples to maintain their cultural identity in the United States, including ongoing attempts to prevent their histories from being wholly eradicated, the expression of indigenous history is inextricably linked to the expression of personal identity or dignity. Attempts to silence this history are attempts to prevent indigenous peoples' cultural survival and should be viewed as equivalent to attempts to silence indigenous languages.

207. Even outside the context of specially protected categories of speech, however, the State's attempt to discredit Professor Churchill's scholarship clearly violated his rights to freedom of expression under Article IV. Further, this attempt to suppress indigenous histories also violated his rights to culture and education. As an indigenous person, Professor Churchill has a right to communicate indigenous history and thus participate in the education of both indigenous and non-indigenous peoples. Professor Churchill's significant contributions to the study of colonization and genocide in North America are not only part of his work as a human rights defender and protected by his right to free expression, they are also an exercise of his rights as an indigenous person to culture and to the education of indigenous peoples.

208. The attempt to discredit Professor Churchill's scholarship also implicates the State's responsibility to allow indigenous peoples to receive information about their histories. As mentioned above, freedom of expression involves both the act of disseminating and the act of receiving information. In this case, both acts are inextricably tied to the struggle of indigenous peoples to learn, preserve, and disseminate their own histories. Thus, when the State fails to protect indigenous rights of freedom of expression with regard to indigenous histories, it also violates indigenous rights to culture under American Declaration Article XIII and, in turn, impairs indigenous peoples' rights to be educated about their own histories.

D. Responsibility to Ensure Rights are Protected under Conditions of Equality

209. The United States has violated American Declaration Article II by failing to protect Professor Churchill's rights under conditions of equality. The context in which Professor Churchill's rights were violated indicate that the United States is failing to protect indigenous scholars, such as Professor Churchill, from human rights violations, including violations of rights to freedom of expression, life and personal integrity, honor and dignity, due process and judicial protection, employment, property, and culture.

210. Article II states: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." The principle of equality undergirds the entire international human rights system. The Universal Declaration of Human Rights ("UDHR") states in its preamble that the "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."²³⁵ The UDHR goes on to affirm in Article 1 that "[a]ll human beings are born free and equal in dignity and rights," and Article 2 states that "[e]veryone is entitled to all the rights and freedoms set forth ... without distinction of

²³⁴ *Id.* at paras. 53-56.

²³⁵ This language is repeated in the preamble to the ICCPR as well.

any kind, such as race, colour, sex, language, religion, political or other opinion” Likewise, Article 2 of the ICCPR protects all individuals in the exercise of all rights under conditions of equality.²³⁶ ICCPR Article 26 further states that “[a]ll persons are equal before the law and are entitled without discrimination to the equal protection of the law.”

211. With regard to indigenous peoples, the Commission has stated that “[e]ach state must ensure that the members of indigenous and tribal peoples effectively enjoy all human rights in equality with other persons.”²³⁷ The Commission has additionally recognized that “[t]he State’s general obligation” to ensure effective exercise of rights under conditions of equality “acquires additional content in the case of indigenous and tribal peoples and their members.”²³⁸ States, therefore, have an affirmative obligation to “adopt special and specific measures aimed at protecting, favoring and improving the exercise of human rights” by indigenous peoples.²³⁹ The Commission has stated that this special duty “arises from the greater vulnerability of these populations, their historical conditions of marginalization and discrimination, and the deeper impact on them of human rights violations.”²⁴⁰

212. Professor Churchill’s work at the University of Colorado was part of a larger effort to break down the barriers between academic institutions and communities of color. The fight for Ethnic Studies, American Indian studies, and similar programs in the United States was part of the larger recognition that the State, through its institutions of higher education, had a responsibility to take steps to counter the historic marginalization of indigenous peoples and other communities of color. As one of the most prolific scholars in the field of indigenous studies, Professor Churchill’s voice was, and continues to be, critical to challenging mainstream histories that contribute to the continued subjugation of indigenous peoples.

213. As detailed above, the University’s attacks on Professor Churchill went far beyond criticism for this commentary about September 11 or his positions on U.S. foreign policy. Rather, University officials took steps to undermine Professor Churchill’s work regarding indigenous peoples’ histories, all the while depriving him of due process by violating their own procedures.²⁴¹ The efforts to push Professor Churchill out of the university and to discredit his work can only be understood in the context of ongoing efforts by both private and state actors to eliminate Ethnic Studies programs and purge the academy of critical scholars.²⁴² Additionally, the University’s attacks on Professor Churchill’s identity, accusing him of “ethnic fraud,” were blatantly racist and discriminatory.²⁴³

²³⁶ ICCPR Article 2 states: “Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

²³⁷ IACHR, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, December 30, 2009, para. 48 [hereinafter “IACHR, Ancestral Lands Report”].

²³⁸ *Id.* at para. 49.

²³⁹ *Id.* at para. 49. See also Inter-Am. C.H.R., *Case of Mary and Carrie Dann v. United States*, Report No. 75/02, Case 11.140, December 27, 2002, paras. 126-127.

²⁴⁰ IACHR, Ancestral Lands Report, *supra* note 229, at para. 49.

²⁴¹ See *infra* paras. 69-118.

²⁴² See *infra* paras. 49-64.

²⁴³ Smith, “Speaking Against Norms,” *supra* note 81.

214. The State has, therefore, failed to protect Professor Churchill's rights under conditions of equality, including but not limited to rights to freedom of expression, employment, and due process. Rather than fulfilling its duty to take special measures to protect indigenous rights, the State has removed one of the country's most prominent indigenous scholars from his position at a state university and has attempted to undermine the legitimacy of his scholarship on indigenous peoples.

E. Responsibility to Provide Due Process, Judicial Protection, and Effective Remedies

215. In addition to failing to take adequate measures to protect Professor Churchill's rights to life and personal integrity, honor and dignity, freedom of expression, employment, cultural integrity, and equality, the United States violated Professor Churchill's rights to due process and effective judicial remedies. Article XVII of the American Declaration states: "Every person has the right . . . to enjoy the basic civil rights." According to Article XVIII: "Every person may resort to the courts to ensure respect for his legal rights. There should likewise be available to him a simple, brief procedure whereby the courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights." Under Article XXVI: "Every accused person is presumed to be innocent until proven guilty. Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws...." Together, Articles XVII, XVIII and XXVI provide a right to due process and judicial protection.

Failure to Provide Due Process

216. Within the inter-American system, individuals have a right to due process not only in courts of law but in administrative proceedings as well. The Commission has stated that the inter-American human rights system "has established the obligation for states to have clear rules governing the behavior of their agents in order to avoid inappropriate levels of discretionality in the administrative sphere that might encourage arbitrary or discriminatory practices."²⁴⁴

217. The Inter-American Court has specifically applied this principle to administrative procedures governing the termination of employment.²⁴⁵ In the *Baena Ricardo et al. Case*, the Court rejected government dismissal of 270 employees when the "dismissals were carried out in open violation of the rules governing the procedures to be observed for the dismissal of employees of these entities."²⁴⁶ The Court made clear that the right to a fair trial "is not limited to judicial remedies in a strict sense," but rather, "the due process of law must be respected in any act or omission on the part of the State bodies in a proceeding, whether of a punitive administrative, or of a judicial nature."²⁴⁷ The Court stressed that the right to due process is required "in order for all persons to be able to defend their rights vis-à-vis any type of State

²⁴⁴ IACHR, Access to Justice as a Guarantee of Economic, Social, and Cultural Rights: A Review of the Standards Adopted by the Inter-American System of Human Rights, OEA/Ser.L/V/II. 129 Doc. 4, September 7, 2007, para. 97 [hereinafter "IACHR, Access to Justice"].

²⁴⁵ Inter-Am. Ct. H.R., *Baena Ricardo et al. Case*. Judgment of February 2, 2001. Series C No. 72.

²⁴⁶ *Id.* at para. 88(m) (cited in IACHR, Access to Justice, supra note 244, at para. 100).

²⁴⁷ *Id.* at para. 124.

action that could affect them.”²⁴⁸ Thus, according to the Court, “[j]ustice, done through the due process of law, as a legally protected true value, must be ensured in all disciplinary proceedings,”²⁴⁹ and the “minimum guarantees must be observed in the administrative process.”²⁵⁰

218. In summarizing the Inter-American Court’s jurisprudence on the right to due process in the administrative context, the Commission has stated:

The standards established and consistently confirmed in the different cases ... denote the broad scope that the Inter American Court believes should be accorded to observance of the guarantee of due process of law, which underscores the full applicability of said guarantee in administrative proceedings.²⁵¹

The Inter-American Commission has come to the same conclusion in its own cases, stating that administrative proceedings should apply “a reasonable interpretation, as broad as possible, of the right to due process.”²⁵² The Inter-American Court and the Inter-American Commission have both noted that this application of due process standards to administrative procedures is commensurate with the approach of other systems, most notably the European Court of Human Rights and the European Commission on Human Rights.²⁵³

219. The University of Colorado violated its own internal procedures at every stage of the investigation and termination of Professor Churchill, in violation of his rights to due process. The University repeatedly violated its own rules on confidentiality by disseminating to the media information and allegations intended to impugn Professor Churchill’s character and scholarship.²⁵⁴ The University failed to notify Professor Churchill of the Regents’ meeting called to discuss his case, the creation of an ad hoc committee, or the investigation launched by the ad hoc committee.²⁵⁵ Initial stages of the investigation were conducted in secret and Professor Churchill was not informed of the allegations against him or the sources of those allegations.²⁵⁶ Allegations were solicited by the University.²⁵⁷ A non-adversarial process was deliberately turned into an adversarial process by the SCRM Investigative Committee.²⁵⁸ The SCRM Investigative Committee was not composed of scholars competent to review Professor Churchill’s work and disregarded the testimony of indigenous peoples and scholars.²⁵⁹ The

²⁴⁸ *Id.* at para. 124.

²⁴⁹ *Id.* at para. 129.

²⁵⁰ *Id.* at para. 127.

²⁵¹ IACHR, Access to Justice, *supra* note 244, at para. 115.

²⁵² Inter-Am. C.H.R., *Case of Loren Laroye Riebe Star, Jorge Barón and Rodolfo Izal Elorz*, Report No. 49/99, Case 11.610, April 13, 1999, para. 70.

²⁵³ Inter-Am. Ct. H.R., *Baena Ricardo et al.*, *supra* note 245, at para. 128 (citing Eur.Court. H.R., *Albert and Le Compte*, Judgment of February 10, 1983, Series A No. 58, para. 39); Inter-Am. C.H.R., *Case of Loren Laroye Riebe Star, Jorge Barón and Rodolfo Izal Elorz*, *supra* note 252, at para. 66 (citing European Commission of Human Rights, *Huber v. Austria*, 1975 Yearbook of the European Convention on Human Rights, Martinus Nijhoff, The Hague 1976, paras. 69-71).

²⁵⁴ See *supra* para. 77.

²⁵⁵ See *supra* para. 82.

²⁵⁶ See *supra* para. 83.

²⁵⁷ See *supra* paras. 83-84.

²⁵⁸ See *supra* para. 94.

²⁵⁹ See *supra* para. 93.

proceedings of the SCRM Investigative Committee failed to allow Professor Churchill to properly question witnesses.²⁶⁰ The University president refused to recuse himself despite an obvious conflict of interest and reinstated allegations that had been dismissed by the Privilege and Tenure Committee.²⁶¹ And finally, the Regents who had explicitly called for Professor Churchill's termination two years prior did not recuse themselves or allow independent evidence to be presented – rather, the very persons who had been instrumental in launching the attack on Professor Churchill were tasked with the vote to terminate his employment.²⁶²

Failure to Provide Judicial Protection

220. In addition to being deprived of his right to due process in an administrative proceeding, Professor Churchill was deprived of his right to judicial protection during his subsequent court case against the University of Colorado.

221. As the Commission has stated: “Recognition of rights imposes the obligation to create judicial or other remedies that enable their holders to invoke their protection in court or before another similarly independent authority when a person required to observe them fails to do so.”²⁶³ Therefore, States “not only have a negative obligation not to obstruct access to [judicial] remedies but, in particular, a positive duty to organize their institutional apparatus so that all individuals can access those remedies. To that end, States are required to remove any regulatory, social, or economic obstacles that prevent or hinder the possibility of access to justice.”²⁶⁴ The inter-American system requires States to “provide a simple, prompt, and effective recourse for the protection and assurance of rights.”²⁶⁵

222. The Commission has stated: “The *right to a reasoned decision on the merits of a matter* has ... been recognized by the IACHR and the Court as an integral element of due process of law in judicial proceedings.”²⁶⁶ In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* the Inter-American Commission, in its arguments to the Court, stated that a violation of the right to effective judicial protection had occurred because of the State's failure to give a reasoned decision on the merits in a domestic action for constitutional relief.²⁶⁷ In *Yakye Axa v. Paraguay*, the Commission concluded that Paraguay had violated rights to a fair trial and judicial protection by failing to provide a remedy for violations of indigenous rights based on procedural matters rather than reaching a reasoned decision on the merits.²⁶⁸ Likewise, in the case of *Gustavo Carranza v. Argentina*, the Commission found Argentina violated the petitioner's rights to

²⁶⁰ See supra para. 96.

²⁶¹ See supra para. 116.

²⁶² See supra para. 117.

²⁶³ IACHR, Access to Justice, supra note 244, at para. 236.

²⁶⁴ *Id.* at para. 1.

²⁶⁵ *Id.* at para. 28.

²⁶⁶ *Id.* at para. 21 (emphasis in original).

²⁶⁷ Inter-Am. Ct. H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgment of August 31, 2001. Series C No. 79, para. 104(b) (cited in IACHR, Access to Justice, supra note 244, at para. 197).

²⁶⁸ Inter-Am. C.H.R., Application to the Inter-American Court in the *Case of the Indigenous Community Yakye Axa v. Paraguay*, paras. 106-107 (cited in IACHR, Access to Justice, supra note 244, at para. 198).

judicial protection for dismissing a case as “non-justiciable” and thus avoiding a determination of the petitioner’s rights.²⁶⁹

223. In Professor Churchill’s case, a jury trial was the first step in providing judicial protection and domestic remedies. Professor Churchill received his day in court, and a jury found that the University of Colorado had, in fact, violated his rights under the United States Constitution. However, after allowing the jury to hear the case, the court decided to change the outcome by determining, after the fact, that the Regents of the University of Colorado were absolutely immune from suit. Thus, the courts of the United States stripped Professor Churchill of the judicial protection to which he was entitled and deprived him of the benefit of a reasoned decision on the merits and an effective remedy.

224. In determining that the Regents of the University of Colorado were absolutely immune from suit, the courts of the United States have sanctioned the worst kind of impunity. They have determined that even when there is conclusive evidence of civil rights violations under domestic law, the courts may insulate the perpetrators from accountability. Based on this ruling, universities may fire professors based on their political opinions, their race, their gender, or any other reason and the university’s governing authorities may be granted absolutely immune from suit. The courts of the United States have effectively given universities a green light to commit civil and human rights abuses because victims of such abuse have been stripped of judicial protection by the courts.

Failure to Provide an Effective Remedy

225. In addition to depriving Professor Churchill of judicial protection, the courts have barred Professor Churchill from seeking the reinstatement to which he is entitled. The right to reparation is a “basic principle of international human rights law.”²⁷⁰ As the Commission has stated, States “cannot invoke domestic legal provisions to justify a failure to comply with their obligation to provide reparations” for violations of international human rights.²⁷¹ Reparations are “measures that tend to make the effects of the violation and the pecuniary and non-pecuniary damage caused disappear.”²⁷²

226. Remedies must be both adequate and effective. As the Court made clear in the foundational *Velásquez-Rodríguez* case, the principle that States must provide remedies for violations of human rights refers “not only to the formal existence of such remedies, but also to their adequacy and effectiveness.”²⁷³ The court further clarified that “[a]dequate domestic

²⁶⁹ Inter-Am. C.H.R., *Gustavo Carranza v. Argentina*, Report No. 30/97, Case 10.087, September 30, 1997, para. 77.

²⁷⁰ IACHR, Reparations for the Violation of the Right to Freedom of Expression in the Inter-American System, OEA/SER.L/V/II. CIDH/RELE/INF.5/12, December 30, 2011, para. 5 [hereinafter “IACHR, Reparations for the Violation of the Right to Freedom of Expression”].

²⁷¹ *Id.* at para. 5.

²⁷² Inter-Am. Ct. H.R., *Case of Goiburú et al. v. Paraguay*. Merits, Reparations and Costs. Judgment of September 22, 2006. Series C No. 153, para. 143; see also IACHR, Reparations for the Violation of the Right to Freedom of Expression, *supra* note 270, at para. 7.

²⁷³ Inter-Am. Ct. H.R., *Velásquez-Rodríguez*, *supra* note 102, at para. 63.

remedies are those which are suitable to address infringement of a legal right,” and effective remedies are those “capable of producing the result for which it was designed.”²⁷⁴

227. The remedy of restitution “impl[ies] the reestablishment, as far as possible, of the situation that prevailed before the violation took place.”²⁷⁵ When restitution is inadequate, measures of compensation are appropriate.²⁷⁶ Persons whose rights have been violated may also be entitled to satisfaction through “non-monetary measures aimed at redressing moral damages” and restoring dignity, such as public apologies.²⁷⁷ Guarantees of non-repetition may also be required and are designed to implement “administrative, legislative or judicial measures intended to correct the conditions that allowed the victims to be affected,” such as adoption of domestic legal measures or proper training of public officials to prevent future human rights violations.²⁷⁸

228. By determining that the Regents of the University of Colorado were absolutely immune from suit, the courts of the United States have deprived Professor Churchill of the remedy he is entitled to for the violation of his constitutional rights. Additionally, the courts have made clear that even had they not vacated the jury verdict in Professor Churchill’s case, they would not have returned him to his position at the University of Colorado. However, based on the jury verdict that Professor Churchill was terminated for his constitutionally protected speech and that he would not have been terminated but for this speech, Professor Churchill was entitled to restitution in the form of reinstatement. Additionally, the court should have ordered satisfaction measures to rehabilitate any damage done to Professor Churchill’s reputation as well as insisted the University take steps to reform its policies and train its administrators to the extent required to prevent future violations of professors’ constitutional rights.

VIII. REQUEST FOR RELIEF

By reason of the foregoing, Ward Churchill respectfully requests that the Commission prepare a report setting forth the relevant facts and applicable law, declaring that the United States is internationally responsible for violations of rights affirmed in the American Declaration of the Rights and Duties of Man and in other instruments of international law, and recommending that the United States take steps to:

- (a) Reinstate Professor Churchill to his former position as a tenured professor of Ethnic Studies at the University of Colorado-Boulder;
- (b) Provide compensation for any damages left unremedied by reinstatement, including provision of attorneys’ fees;

²⁷⁴ *Id.* at paras. 64-66. Although the Court analyzed the adequacy and effectiveness of remedies in the exhaustion context, this reasoning equally applies to the State duty to provide effective remedies based on the right to judicial protection articulated in Article XVIII.

²⁷⁵ IACHR, Reparations for the Violation of the Right to Freedom of Expression, *supra* note 270, at para. 10.

²⁷⁶ *Id.* at para. 11.

²⁷⁷ *Id.* at para. 13-14.

²⁷⁸ *Id.* at, para. 15.

