

2355 Dwight Way
Berkeley 4, California
December 14, 1964

Dear Regent

It appears undeniably certain that the next several days constitute what is clearly the most critical period in the history of the University and its community. In the past, it could be said that our relationship--as impersonal as it has been--was precisely that expressed in a dialogue between King Henry and Thomas Becket in the play, Becket, by Jean Anouilh. That is, your task has been to steer the ship of the University on the best course you could plot; on the other hand, my task has been to be a faithful and enthusiastic member of the crew, but when I felt that you were steering against the wind, it has been my duty to resist you with all my might. Over the past three months, this may have been particularly true.

At this juncture, however, we are both confronted with an unpredictable, but treacherous, wind. Therefore, our mutual task must be to steer this University safely into port before it founders in the tremulous sea through which we are passing.

To depart from the analogy, what we are faced with in the next week is the fundamental question of the survival of the University as we know it. Ultimately, the resolution of this question is in your hands; I would only hope that, in its modest way, this letter and its enclosures may aid you in making a wise decision.



Please do not regard any of what is to follow as any type of attempt to threaten or pressure you. If anything, that is not my intent. I am not writing to you as a Free Speech Movement partisan or as one who is trying to paint a particular slanted picture; but rather, I am writing to you as a member of the university community who is sincerely dedicated to the furtherance of the University's ideals and the preservation of its existence as a meaningful center of learning.

I believe that the situation as I see it is both accurate and without embellishment or exaggeration; your trust in this averment is essential if we are to communicate with one another. I think we are in accord that the pressures around us make this a period of extreme tension and high emotion, but the criticality of our circumstance makes obsolete the luxuries of recriminations and accusations. We must now act decisively to save the University; anything less on our part will constitute an abdication of the public trust with which we are both invested at the present time.

As a final word of introduction, please accept my apologies for the fact that this letter is identical to that which each of your colleagues is receiving. Yet, I hope you understand that if there were more time and if the situation were less critical, you could expect me to express my thoughts to each of you, individually. However, the time of command decision is at hand.

Enclosed with this letter, you will find two items. The first is a statement written by me to the Executive Committee of the Free Speech Movement, to appear in revised form sometime this week in the Daily Californian as an open letter to the university community. I hope that in reading this statement on the imperatives of the acceptance of the Faculty Resolution you will keep in mind my opening remarks (Forgive me for referring to you in the third person, in the statement).

I have attempted to set forth our mutual problem as simply, cogently, and articulately as possible. To have done otherwise would have meant betrayal on my part of our mutual and public trust.

The second item which I have enclosed is a copy of a form letter, numerous copies of which you have undoubtedly received already. My purpose in conveying this to you is twofold. First, the form letter contains numerous distortions, inaccuracies, and falsifications. I should like to devote a considerable part of the remainder of this discussion in refutation of this document on both factual and legal grounds. Second, by means of this format, I should attempt to demonstrate, in a manner different from my first enclosure, the desirability of accepting the Faculty Resolution and, perhaps simultaneously, the necessity and desirability of saving the University by means of the faculty proposal.

Any attempt at systematic refutation is never an easy task. As one who has been involved in controversy at one time or another during his career, you are probably aware of this fact. Therefore, I would implore you to stay with me throughout the rest of our discussion, however intricate and involved it may have to become. If, at this point, we are in agreement on nothing else, we must concur that an ominous Angel of Death is stalking our campuses and deliberations; let us not ignore his presence, as to do so would be to walk right into his grasp.

The form letter would appear to be a patent attempt to panic its reader into believing that, at best, the faculty proposal is an expedient measure to quiet the Berkeley campus, or, at worst, a blank check for anarchy and political terrorism. At no point does the letter attempt to evaluate the Faculty Resolution on its merits, but it concentrates on conveying the non sequitur rhetoric of the self-named "Frightened observers."

To have done it, if one were to listen to the debates of the Academic Senate of last Tuesday, one would clearly see that California's most distinguished faculty was not "intimidated," nor "in a position where a fair and rational decision could not be reached," nor "more concerned with appeasing student agitators than actually considering the true validity of the 'free' speech objectives." In fact, as opposed to a substantial number of previous Senate meetings, it is clear that the faculty present at last Tuesday's meeting reached a decision on the basis of autonomous and rational discussion, and on no other basis; their debates were certainly most reasoned and sober; and concerned exclusively with the principled issues at hand. It would appear that the imputations of the form letter in this regard are totally without foundation and constitute distortions of a most insidious nature.

It is also most unclear how the form letter would substantiate the assertion that your acceptance of the Faculty Resolution would be "a violation of the public trust granted to keep the University autonomous in nature." This charge would seem to be an attempt to detract from your integrity more than anything else; the letter clearly implies that you are incapable of interpreting the State Constitution, Article XIX, and acting accordingly as a Regent. The form letter seems to be saying that regardless of your sincerity, honesty, and ability, you, as a Regent, are unable to distinguish between your task of being amenable to reasoned argument and your task of being free from sectarian or political influence in administering the University. On my part, if I felt that this were the case, I would not be expressing my faith in your capability by means of this letter. It is because I believe that you can depended upon to faithfully execute your public trust that I am writing to you.

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It is regrettable, that for the sake of their argument, the writers of the form letter should have need to resort to a subtle form of insult and intimidation. Yet, perhaps the reason for this is that the writers have nothing worthwhile to say. This is certainly substantiated in the implied charge that the Faculty Resolution leaves the University "without power to regulate on-campus advocacy (sic.) and organization of off-campus political activity." This is simply not true.

The essential guidelines in this area were set forth most perceptively by Associate Justice Jackson of the U.S. Supreme Court when he said that Boards of Education and, we might add, Boards of Regents "have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill Of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms. . . if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." West Virginia Board of Education v. Barnette, 319 US 671. Nothing in the Faculty Resolution is incompatible with this principle.

It is most certainly true that the State and its agencies must, in certain most legitimate areas, limit the procedural aspects of First Amendment freedoms. For example, the University must have regulations to avoid disruption of classes and offices, destruction of property, and the use of University facilities for fraudulent practices. The Faculty Resolution most explicitly recognizes this need and calls for effective regulation in these areas.

However, it may be the case that in order to attain its educational objectives, the University may find itself in a position where more than mere procedural questions are involved. At this point, we are confronted with the essential bones of contention of the current dispute, that is to what extent may the University control the content of political activity in order to

secure its goals. Once again, the U.S. Supreme Court has maintained that when a public agency deems it necessary to restrict political activity, it must demonstrate that there are no means for reaching its legitimate goals other than or alternative to those which infringe upon the substance of First Amendment freedoms. Moreover, the need which would justify that single alternative must be so great that it may be deemed "compelling"--the need must carry compulsion of the character created by a "clear and present danger." Schneider v. State, 308 US 147.

It does not follow, as the writers of the form letter would have us believe, that the faculty proposal, that the content of advocacy be beyond the pale of University authority, would cause the University to succumb to "external forces from the State Legislature, law enforcement, and the public in general." This is a gross inaccuracy and non sequitur, for it is by virtue of having a Board of Regents, whose own autonomy is constitutionally guaranteed, that the University is protected from those outside forces which would appear so ominous to some. Moreover, the strength of the walls of the University is dependent upon the willingness of those inside to hold up those walls, not upon the pressures that are around the University all the time.

The more realistic problem, however, is how to control abuses of seemingly unlimited advocacy, as put forward by the faculty proposal. Specifically, we have the regulatory safeguards against abuses such as disruption of University functions, malicious destruction of property, and fraud. Moreover, we have an extensive body of criminal law to deal with these problems as they apply to illegal activities on or off campus, regardless of where they are organized, e.g. subversion, incitement, slander. It is possible that abuses may arise from the freest exercise of any right. The possibility, or even probability, of these abuses, however, has

been held by the courts not to be the "compelling" need necessary for the curtailment of First Amendment rights. As Chief Justice Hughes put it in a landmark decision: "The people through their legislatures may protect themselves against. . .abuse(s). But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed. (Emphasis added) De Jonge v. Oregon, 299 US 353, 364-365. See Also, Sherbart v. Verner, 10 L ed 2d 965; NAACP v. Button, 9 L ed 2d 405.

Thus, the University is legally and constitutionally bound not to infringe the content of political advocacy when there is the possibility of limiting the abuses arising therefrom. The control of the content of advocacy, either by means of the threat of discipline or by means of licensing, constitutes what is known as "prior restraint" and is unconstitutional. Near v. Minnesota, 283 US 697; Staub v. City of Baxley, 78 S.Ct. 277. Regulations on the campus which serve to limit abuses are certainly legitimate, and welcomed by the Faculty Resolution, as long as they do not infringe upon the substantive First Amendment right.

It is clear that, as pertains to the foregoing, the writers of the form letter will not confront the issues in this matter. It is also clear that the Faculty Resolution would not sacrifice legitimate University authority for a licentious exercise of political activity. Moreover, as reasonable people, we cannot put any stock, whatsoever, in what follows in the form letter; the histrionic "argument of horrors" is a complete and utter fabrication. To even the most innocuous of onlookers, and certainly the Board of Regents could not be said to be of this category, there is nothing in the Faculty Resolution, or even the FSM demands for that matter, which assert any kind of entitlement to gain "control of administrative and academic affairs."

Further, those examples of what would purportedly follow acceptance of the Faculty Resolution are completely fallacious in their speculation and obviously preposterous on their face.

However, these types of panic tactics are not isolated incidents in the form letter; rather, the pervasiveness of the distortions, the falsifications, and the insults are such as to render the entire document worse than useless, to render this form letter a patent piece of fraud and libel. I don't believe that my language is too severe, for, at best, the form letter is a bungling attempt to obscure the issues involved, and, at worst, it speaks as a deliberate attempt to seduce its reader with fraudulent allegations.

I do find myself in agreement with the letter on its single honest point; I, too, would like to see you implement "a policy designed to accommodate maximum freedom and proper regulation." I hope that in the foregoing I have been able to indicate to you some of the legal guidelines that should be followed in that policy. Of course, the ultimate decision is yours; my only intent has been to indicate the necessity and desirability of a principled acceptance of the Faculty Resolution.

I think that in reading the Resolution you will see that it constitutes not a "capitulation" or a "complete victory," but a well-reasoned and equitable settlement for all parties concerned; it is totally compatible with, and legitimized by, the legal and moral framework of our democratic ideals and traditions.

The Resolution contains very little that has not been put into effect, or endorsed, before. The amnesty provisions of the first article have already been put into effect by President Kerr, and the provisions of section two have been basically endorsed and implemented by your Board. I hope that I have been able to give you the essential rationale for part three.

The fourth part I cannot resolve quite as readily, but I would hope that you would provisionally accept the principles therein and resolve to work out the detailed arrangements with the faculty committee formed pursuant to Resolution "B."

There remains very little for me to say. I endorse the Faculty Resolution not out of expediency but out of belief in its principles and validity. Also, I hope that my enclosed statement will aid you in seeing the current crisis in its true perspective. Although there is little time until Friday, I am enclosing a reference bibliography of legal materials which substantiate the advocacy provisions of the Faculty Resolution; I hope they may be of use to you in the immediate days ahead.

In closing, I can only say that I wish you Godspeed in making your decision and that I look forward to being of assistance to you in the future.

Respectfully yours,

Michael R. Eisen
University of California, Berkeley

FREE SPEECH ON CAMPUS AND THE LAW

I. Statutory Provisions

A. Autonomy of the University of California: Constitution of the State of California, Article XIX.

B. Public Schools and the University: Education Code: Sects. 8454, 18305.

C. Political Activity and University Personnel: Government Code: Sects. 19730-19732, 3032-3033. Constitution of the State of California, Article XXIV.

II. Judicial Precedent

A. Political Activity and Democracy: Fort v. Civil Service Commission, 61 AC 329, 332.

B. Political Rights and Property Rights: Grossjean v. American Press Co., 297 US 233; NAACP v. Button, 371 US 405; Hague v. CIO, 307 US 496; March v. Alabama, 326 US 501; Schwartz-Torrance Investment Co. v. Bakery and Confectionery Worker*s Union, 61 AC 832; Edwards v. South Carolina, 83 S.Ct 680.

C. Political Rights and Public Agencies: Schneider v. State, 308 US 147; Lovell v. Griffith, 58 S.Ct. 666; West Virginia Board of Education v. Barnette, 319 US 624; Speiser v. Randall, 357 US 513; Sherbert v. Verner, 10 L ed 2d 965; Torcaso v. Watkins, 367 US 488; De Jonge v. Oregon, 299 US 353; Oklahoma Press Co. v. Walling; Near v. Minnesota, 283 US 697; Staub v. City of Baxley, 78 S.Ct. 277.