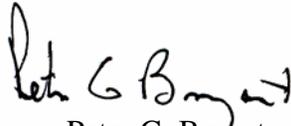


UNIVERSITY OF COLORADO
FACULTY SENATE COMMITTEE ON PRIVILEGE AND TENURE
CONFIDENTIAL PERSONNEL MATTER
PANEL REPORT REGARDING DISMISSAL FOR CAUSE
OF WARD CHURCHILL AND THE ISSUE OF SELECTIVE
ENFORCEMENT

April 11, 2007

Respectfully Submitted by the Dismissal for Cause Panel
(Members listed in alphabetical order)



Peter G. Bryant

Professor of Management Science and Information Systems,
The Business School, UCDHSC/DDC



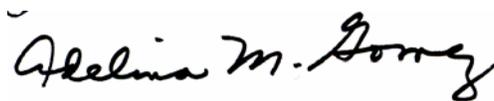
Mary Ann Cutter

Professor of Philosophy,
College of Letters, Arts, and Sciences, UCCS



Richard Deitrich

Professor Emeritus of Pharmacology,
School of Medicine, UCDHSC/HSC



Adelina M. Gomez

Associate Professor, Communication,
College of Letters, Arts, and Sciences, UCCS



Donald D. Morley

Professor of Communication, UCCS
College of Letters, Arts, and Sciences, UCC

Executive Summary

Background

On June 26, 2006, UCB Interim Chancellor Philip P. DiStefano issued a notice of intent to dismiss to Professor Ward Churchill, of the UCB Department of Ethnic Studies, citing conduct which falls below minimum standards of professional integrity. As permitted by the Laws of the Regents, Professor Churchill appealed this proposed dismissal to the Faculty Senate Committee on Privilege and Tenure, which convened this panel to hear his appeal. Professor Churchill also alleges that the University engaged in Selective Enforcement in response to his exercise of First Amendment rights to free speech, in particular an essay written in response to attacks on the World Trade Center in New York City on September 11, 2001. The issue of possible Selective Enforcement has been included in the charge to this panel.

The Charge to the Panel

The panel is charged with reaching findings and conclusions in three general areas:

- Did Professor Churchill show by a preponderance of the evidence that the University engaged in Selective Enforcement of its rules concerning Research Misconduct?
- Did Professor Churchill show by a preponderance of the evidence that investigation of allegations of Research Misconduct denied him his right to Due Process?
- Did the University show by clear and convincing evidence that Professor Churchill engaged in “conduct which falls below minimum standards of professional integrity” (which is one of several stated causes in the Laws of the Regents for which a faculty member may be dismissed)? Such conduct need not be exactly the same as “Research Misconduct.” Note also that previous hearings and processes were required to use the less stringent “preponderance of the evidence” standard of proof in investigating allegations of Research Misconduct.

The panel is also charged with making recommendations.

Summary of Conclusions

The panel has reviewed the evidence admitted before our panel in the light of our specific charge. We have reviewed the testimony of the witnesses at the Dismissal for Cause Hearing, and the evidence admitted at that hearing and after it. We have also, as individuals, reviewed video recordings of any parts of the Dismissal for Cause Hearing for those few situations for which an individual could not be physically present. Our review has been limited to the evidence actually admitted through the hearing process. Our conclusions, described in more detail in following sections, are:

- *We find that Professor Churchill did not show by a preponderance of the evidence that the University engaged in Selective Enforcement of its rules concerning Research Misconduct.* While we did find a preponderance of the evidence of one element of Selective Enforcement (“but for” causation), we found that Professor Churchill had not met his burden of proof in showing the second required element of motivation.
- *We find that Professor Churchill did not show by a preponderance of the evidence that the investigation of allegations of Research Misconduct denied him his right to Due Process.* While specific mistakes were made, as described more fully in subsequent sections, we find that Professor Churchill has not met his burden of proof in showing that the process was so fundamentally flawed as to deprive him of his constitutional right to Due Process, noting in particular that he has now had subsequent opportunity to provide additional information and clarification, which this panel has taken into account.
- *We find that the University showed by clear and convincing evidence that Professor Churchill engaged in “conduct which falls below minimum standards of professional integrity” in several specific instances, though in fewer such instances than those in which Research Misconduct was previously found.*

Summary of Recommendations

Recommendations

Is dismissal an appropriate sanction? Does the good of the University require it?

We have found that the University showed by clear and convincing evidence that Professor Churchill engaged in “conduct which falls below minimum standards of professional integrity” in several specific instances, though in fewer such instances than those in which Research Misconduct was previously found. The Laws of the Regents provide that a faculty member who engages in such conduct may be dismissed, if the good of the university requires it.

Accordingly, the panel has considered various arguments for and against dismissal.

Arguments Favoring Dismissal

- Professor Churchill has repeatedly plagiarized, as well as, fabricated and falsified information to support his views on American Indian history. Plagiarism is a serious offense as it constitutes the theft of others’ ideas and work. Fabrication and falsification of information are simply wrong, and antithetical to the Academy’s attempt to gain a veridical understanding of the world. Although fabrication and falsification of information in such areas as medical research would likely have far more dire (direct) consequences than the same behaviors in Ethnic Studies, when it comes to standards of conduct the University must treat faculty equally in different disciplines. Therefore, the significance of Professor Churchill’s Research Misconduct cannot be minimized based on such reasoning as nobody died, or millions of dollars in grants were not lost. Finally, the repeated nature of his behavior renders it highly improbable that it was accidental or inadvertent.
- The nature of the offenses here involving plagiarism, fabrication, and falsification goes to the heart of the academic enterprise and undermines public faith in the University of Colorado and in universities more generally.
- Both the Investigative Committee of the Standing Committee on Research Misconduct and the Privilege and Tenure Panel Regarding Dismissal for Cause found that Professor Churchill had committed multiple acts of plagiarism, fabrication, and falsification. Furthermore, the Privilege and Tenure Panel found by a “clear and convincing” standard

that multiple instances of Professor Churchill's behavior fell ". . .below minimum standards of professional integrity." In the event of conduct which falls below minimum standards of professional integrity, Article 5, Part C, Section 5.C.1 of the Laws of the Regents permits dismissal when the Board of Regents judge dismissal to be for ". . .the good of the university. . . ."

- Such dismissal is for the good of the University as it communicates in the strongest terms possible to faculty, staff, and students, as well as external constituents that CU will not tolerate unethical conduct.
- The apparent fact that Professor Churchill is either unwilling or unable to acknowledge his errors renders it likely that his Research Misconduct will continue.
- This kind of behavior would almost certainly lead to some sort of sanction against a *student* who was found guilty of these offenses. Within the University of Colorado, the exact processes for evaluating academic dishonesty are delegated by the Regents to individual schools and colleges, so it is difficult to say exactly how a student found guilty of these offenses would be punished – that would depend on various factors and influences – but we should clearly hold our faculty to standards at least as high as the standards to which we hold our students and punish transgressions at least as severely.
- If the protections afforded faculty by “academic freedom” are left limitless and without definition, and thereby used to effectively permit the Research Misconduct documented in these investigations and hearing, the concept of academic freedom is in danger of being abandoned by society and effectively removed from those academicians who would use academic freedom to pursue the improvement of the human condition. Therefore, dismissal of Professor Churchill clearly communicates that “academic freedom” does not include the right to plagiarize, fabricate, and falsify. However, the panel is in unanimous agreement that Professor Churchill's now-well-known 9-11 essay is constitutionally protected free speech.
- Ignorance of Regental Policy and Standards regarding plagiarism and other evidence of Research Misconduct cannot and should not be considered valid excuses.
- The issues here include allegations that Professor Churchill plagiarized, fabricated, and falsified facts related to Indian (Native American) history. This area of study is still in its infancy as compared to numerous disciplines and programs. The Academy is finally

beginning to recognize Ethnic Studies and has started to legitimize and given credence to research in this area. For many scholars in Ethnic Studies, publishing meant work appearing in what would be considered non-mainstream journals; today, evaluation of that type of scholarly work is beginning to be considered as valid research. Some scholars in Ethnic Studies may focus on rewriting existing historical ethnological data in search for “truth,” but this does not support nor does it grant anyone the right to plagiarize, falsify, or fabricate evidence.

Arguments Against Dismissal

- *Proportionality.* Dismissal is the ultimate penalty in the direct power of the University to administer. The Laws of the Regents specify that a faculty member *may* be dismissed for conduct which falls below minimum standards of professional behavior, but they wisely do not *require* it. It should obviously be reserved for the most serious cases, particularly when considering the dismissal of a tenured faculty member. The misconduct in this case is serious and requires some sort of sanctions, but it does not, for example, sink to the level of fabricating laboratory data in an effort to obtain government money, ignoring human subjects research guidelines and endangering the lives or health of subjects, or situations where the misconduct effectively and clearly sets back progress or research in an important field. That is, the case shows misbehavior, but not the worst possible misbehavior.
- *The Nature of American Indian Studies.* This case has included substantial testimony about the nature of this field and allied fields. The field has been characterized by its newness as a discipline, by the lack of formally established standards, its concern with advocacy for groups who have been historically marginalized or excluded, and the need to confront and to challenge orthodox methods and conclusions that in their views have contributed to misrepresentation and exclusion of their cultures and history. Challenging existing approaches, putting uncomfortable things on the table for discussion – these are legitimate core activities for some in this field, and they view any attempt to force their challenge into the standards of the existing academy as harmful to their mission. The University need not, of course, accept conduct that is inherently dishonest or deceitful. It is important to the continued vibrancy of the University, though, that the debate on these challenges continue and *continue within the University*. Dismissal in this case will be

seen by some in this community as an overly harsh reaction to the mistakes and failings of the research at issue in this case.

- Previous committees examining this case were *not* unanimous in recommending dismissal.
- Other scholars found guilty of this kind of misbehavior (and perhaps worse) have not always been punished as severely as the proposed dismissal. Several examples were provided in testimony.
- *The chilling effect of dismissal.* Dismissal in this case will be widely interpreted (inside the University as well as outside) as indicating that challenges to existing methods, attitudes, and values may be met in the University of Colorado by disciplinary proceedings rather than left to the admittedly chaotic, turbulent, sometimes inefficient processes of academic debate. Academic debate is *not* streamlined or efficient, but it is better suited than discipline to sorting out many, probably most, of these conflicting issues. By invoking the most extreme possible sanction, the University will be effectively (though perhaps unintentionally) telling a number of important constituencies to pull their punches, rather than debate the issues.
- *Potential perceived abuse of the University's disciplinary proceedings.* Evidence admitted in this case suggests strong differences of opinion among academicians involved in Indian Studies. Some of the charges against Professor Churchill may have come from people in factions opposed to his views. The University has a legitimate need to maintain its standards visibly, and impose sanctions for inadmissible behavior, subject to due process requirements, but it must also be aware of the danger that lurks in the perception of inadvertently allowing its own disciplinary proceedings to be used as a way of “settling old scores” or of deciding issues better left to the marketplace of ideas. Invoking dismissal will fuel this fire, not quench it. As former CU Professor Evelyn Hu-DeHart remarked in evaluating a 1994 allegation concerning Professor Churchill:

As is often the nature of such intense political conflicts, personalities and personal issues are inevitably drawn in. However, I do not believe that the University has any business, nor any need, to become a party to this internecine political war in the Indian world. Yet, it seems to me that is precisely what Prof. Churchill's political opponents wish to happen.¹

¹ Hu-DeHart letter of October 10, 1994, in *Churchill Exhibits, Volume 2, Tab 24, page 4.*

We should still beware of getting into such situations, and keep this in mind as we choose our sanctions in this case.

Specific Recommendations on Sanctions

The panel is unanimous in finding that Professor Churchill has demonstrated conduct which falls below minimum standards of professional integrity, and that this conduct requires severe sanctions. The panel is, however, split on recommended specific sanctions.

- Two panel members found the arguments in favor of dismissal stronger than those opposing dismissal. These two panel members recommend that Professor Churchill be dismissed.
- Three panel members found the arguments against dismissal to be more persuasive than the arguments for dismissal. These three panel members recommend that Professor Churchill be suspended without pay for one year, and that his rank be reduced to Associate Professor. This will recognize:
 - That Professor Churchill's misconduct is viewed as serious, though not the worst possible;
 - The University has a legitimate concern that the kinds of behavior at issue here not be repeated by a faculty member at the University, and some sort of monitoring or oversight is appropriate, as would be provided by regular Post-Tenure Reviews; and
 - The good of the University requires sensitivity to external constituencies, concerns, and changes in *all* parts of society, as well as firmness in enforcing its standards. This recommendation is offered in the spirit of weighing the complex, and at times competing, interests involved in this case.

Recommendations on Standards

Some substantial part of the disagreement in this case has concerned the issues of the appropriate standards to select in evaluating Professor Churchill's behavior in the light of his membership in the Ethnic Studies Department. The panel feels that (at least in retrospect) much of this disagreement could have been better managed, had the appropriate standards been previously articulated. Accordingly, the panel recommends:

- That the administration and faculty of the University review the recommendations regarding the enforcement of standards already proposed by the UCB Standing Committee on Research Misconduct in its report on this case dated June 13, 2006, and devise appropriate methods of implementing these ideas; and
- In particular, that as part of regular review of Primary Unit criteria and processes for Hiring, Retention, Tenure, and Promotion, each Primary Unit specify the particular external set of standards to which it holds itself accountable, and if no such external set of standards exists, that it develop its own for inclusion in its own criteria and processes.

Recommendation to the President and Board of Regents

We urge the President and the Board of Regents, regardless of their decision in this case, to reaffirm publicly that academic freedom at the University of Colorado remains a guiding principle.

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1. Background

On June 26, 2006, UCB Interim Chancellor Philip P. DiStefano issued a notice of intent to dismiss to Professor Ward Churchill, of the UCB Department of Ethnic Studies. In that notice, he cited the reports of an investigation by the UCB Standing Committee on Research Misconduct (SCRM) and its Investigative Committee. He referred specifically to findings that Professor Churchill, in the Chancellor's words, "engaged in a pattern of serious, repeated and deliberate research misconduct" and that "your actions were not the result of careless or ordinary mistakes." He also says "[b]oth the pattern of your misconduct and your repeated unwillingness to acknowledge any misconduct or to modify your methods of scholarship lead me to the conclusion that other sanctions, such as suspension, are not likely to prevent similar misconduct in the future."

Pursuant to the University's Dismissal for Cause and Grievances process in the Laws of the Regents, Article 5, Part C, Section 5.C.2, Professor Churchill appealed this proposed dismissal to the Faculty Senate Committee on Privilege and Tenure, which convened this panel to hear the appeal. Professor Churchill also alleges that the University engaged in Selective Enforcement in response to his exercise of First Amendment protected rights to free speech, in particular an essay written in response to attacks on the World Trade Center in New York City on September 11, 2001. The issue of assessing possible Selective Enforcement has been included in the charge to this panel.

SCRM's Investigative Committee returned findings of Research Misconduct by Professor Churchill in the specific situations discussed below, and SCRM itself accepted their report. In its report, SCRM also said "...the members of the SCRM were unanimous in concluding that the severity of the infractions, their repeated and deliberate nature, their impact on the scholarly enterprise, and the apparent unwillingness of Professor Churchill to acknowledge the violations combine to exhibit conduct which falls below minimum standards of professional integrity."

The Dismissal for Cause Panel ("the panel" in what follows) understands its job not as to second-guess SCRM or its Investigative Committee, but as somewhat different from the prior committees, and because of this, we are required to review much of the evidence they have already considered.

- First, SCRM and its Investigative Committee were charged with deciding whether there had been Research Misconduct, as defined in University rules. We

are charged with assessing whether there is proof of “conduct which falls below minimum standards of professional integrity,” which is cause for dismissal in the Laws of the Regents, and need not be exactly the same as Research Misconduct. As noted above, SCRM found such conduct, but its report makes no mention of what standard of proof it was using (see the next point).

- Second, SCRM and its Investigative Committee were required by University rules to use “a preponderance of the evidence” as their standard of proof. We, on the other hand, are required to use the more stringent standard of “clear and convincing evidence” in assessing whether the University has proven “conduct which falls below minimum standards of professional integrity.”²
- Third, we are obliged to consider any new evidence admitted before our panel, even if not available to previous investigations.

Accordingly, we have reviewed all of the evidence admitted before our panel in the light of our charge. We have reviewed the testimony of the witnesses at the Dismissal for Cause Hearing and the evidence admitted at that hearing and after it. We have also, as individuals, reviewed video recordings of any parts of the Dismissal for Cause Hearing for those few situations that an individual could not be physically present. We are not an investigative panel, and our review has been limited to the evidence actually admitted through the hearing process.

While the Rules of the Regents lack clarity to some degree on the issues of burden and standards of proof, our interpretation of the proper and fairest application of those Rules is that:

- The *University* bears the burden of proving the existence of “conduct which falls below minimum standards of professional integrity” (Regent Policy 5.C.1) *by clear and convincing evidence* irrespective of any prior findings or conclusions by the SCRM under a lower burden of proof, while
- *Professor Churchill* bears the burden of proving that he was deprived of procedural Due Process through the SCRM investigation and/or that he was or is being subjected to improper Selective Enforcement *by a preponderance of the evidence* (consistent with grievance processes under Regent Policy 5-H).

² Professor Radelet testified that while he personally would be comfortable in saying they had proved their case “beyond a reasonable doubt,” the Investigative Committee as a whole discussed only the criterion of preponderance of the evidence. *Panel Testimony*, 1/21/2007, page 2126.

As the allocation and selection of levels of burdens of proof are critical underpinnings to a review and evaluation of the Findings and Conclusions in this Report, the panel wishes to be clear with regard to the manner in which it proceeded.

The remainder of this report discusses:

- The Record in this case,
- The Issue of Selective Enforcement,
- The Issue of Due Process in the Research Misconduct Investigation,
- Issues of Research Misconduct and Conduct Which Falls Below Minimum Standards of Professional Integrity,
- General Conclusions, and
- Recommendations.

2. A Note on the Record of the Case

The evidence admitted in the Dismissal for Cause Hearing in this case consists of:

- Ten binders provided by the University at the beginning of the dismissal for cause hearing, numbered 1 through 10, and a separate binder containing evidence admitted during the hearing, informally numbered 11. We refer to these below as *University's Exhibits*, with the appropriate Notebook number. Several of these are referred to multiple times in the references that follow in this report.
 - *Notebook 2* contains the transcript of hearings before the SCRM Investigative Committee. We refer to this below as *Investigative Committee Testimony*.
 - *Notebook 1*, Tab H contains the *Report of the Investigative Committee of the Standing Committee on Research Misconduct at the University of Colorado at Boulder Concerning Allegations of Academic Misconduct against Professor Ward Churchill*, dated May 9, 2006. We refer to this below as the *Investigative Report*.
 - *Notebook 1*, Tab K contains the *Report and Recommendations of the Standing Committee on Research Misconduct Concerning Allegations of Research*

Misconduct by Professor Ward Churchill, dated June 13, 2006. We refer to this below as the *SCRM Report*.

- Two binders of materials from Professor Churchill containing materials on allegations of Research Misconduct and on Issues of Selective Enforcement, respectively. We refer to these as *Churchill Exhibits, Volume 1* and *Churchill Exhibits, Volume 2*, respectively.
- Video recordings of the Dismissal for Cause Hearing testimony.
- A transcript of the testimony admitted during the Dismissal for Cause Hearing, referred to as *Panel Testimony* (with date and page numbers).
- Closing statements from the University and Professor Churchill.

3. The Issue of Selective Enforcement

3.1. *Standard and Burden of Proof.*

In assessing the allegations of Selective Enforcement, we have - - as noted above - - concluded that the proper and fairest manner to proceed is through the placement of the burden of proof upon Professor Churchill, though at the lower “preponderance of the evidence” (i.e., “more likely than not”) standard. Thus, Professor Churchill must prove by a preponderance of the evidence that:

- “But for” his exercise of his rights protected by the First Amendment, Professor Churchill would not have been subjected to the Research Misconduct and Enforcement Process or have received the Notice of Intent to Dismiss presently at issue; and
- The issuance of the Notice of Intent to Dismiss or the initiation and/or pursuit of the Research Misconduct inquiry by the University were motivated to a material degree by a wish to retaliate for Professor Churchill's exercise of rights protected by the First Amendment.

3.2. *“But for” Causation*

3.2.1. Summary of the Evidence

The case supporting a conclusion of “but for” causation seems convincing to the panel. It stands uncontested that:

- Professor Churchill’s right to write his essay about 9/11 was protected by the First Amendment to the United States Constitution.
- The announcement of the Chancellor’s Ad Hoc Committee to review all or nearly all of Professor Churchill’s work to see if it “crossed the line” was in direct response to publicity and public furor over that essay, including concerns expressed by state officials, the press, and the Regents.
- The existence of the Ad Hoc Committee and its task were publicly known.
- The allegations of misconduct that are the subject of these proceedings were submitted in the context of such public knowledge:

- The allegations submitted by Professor LaVelle had been previously published, but no action had previously been taken in response to them, either in the University or, so far as we know, elsewhere.
 - Shortly after the announcement of the Ad Hoc Committee, Professor LaVelle called Dean Getches³, with whom he was previously acquainted, and reminded him of those earlier allegations.
 - During those conversations, Professor LaVelle also made Dean Getches aware of a potential allegation by Professor Fay G. Cohen.
 - Allegations provided by Professor Thomas Brown appeared on a web site in December 2004, according to Professor Churchill⁴, but were apparently not brought to the University's attention until shortly after the public furor and the creation of the Ad Hoc Committee.
- These allegations form the base of these proceedings, and were started when the allegations were referred to SCRM. The Notice of Dismissal for Cause received by Professor Churchill was a direct result of those proceedings, and those proceedings formed the basis for the Chancellor's decision to issue the notice.
 - We know of no reason to believe that these allegations would otherwise have been brought to the University's attention, though clearly such eventuality can never be completely ruled out. It seems clear that the particular processes to which Professor Churchill is and has been subjected were specifically triggered by his exercise of his First Amendment rights.

3.2.2. Findings on "But for" Causation

The panel finds by a preponderance of the evidence that but for his exercise of his First Amendment rights, Professor Churchill would not have been subjected to the Research Misconduct and Enforcement Process or have received the Notice of Intent to Dismiss presently at issue.

³ In his Closing Statement on Selective Enforcement, *Churchill Exhibits, Volume 2*, first section, page 14, note 53, Professor Churchill says Professor Lavelle and Dean Getches had over 20 conversations. In *Panel Testimony*, 1/20/2007, page 1823, Dean Getches admits to "many."

⁴ "On the Matter of Motive," *Churchill Exhibits, Volume 1*, Tab B, page 1, note 3.

The panel would reach the same finding under the standard of clear and convincing evidence. Under either standard of evidence, the panel would reach the same finding if the University had borne the burden of proof.

3.3. Motivation

3.3.1. Summary of Evidence

3.3.1.1. Issues Relating to Referral of Allegations to SCRM

The University's rules for Research Misconduct state that "[a]ll persons having knowledge of misconduct in research as defined in the University of Colorado Administrative Policy Statement on Misconduct in Research or having reason to believe that such allegations may have occurred, are encouraged to submit allegations of research misconduct to the Chair of the Standing Committee."⁵

Professor Churchill suggests that the Ad Hoc Committee's choice to review allegations and select the ones to forward to SCRM allowed it to effectively choose and shape the allegations that SCRM considered, and do so in a way that was detrimental to him.

Whether or not referral to SCRM is strictly required, it seems to us that such referral is not unreasonable, given that the University's rules encourage it. We find no particular evidence that the allegations were tailored or shaped in a manner detrimental to Professor Churchill, and our reading of various transcripts and evidence suggests that the various committees were careful to evaluate the specific allegations on what they took to be their merits.

We are not persuaded by the evidence admitted to us that the mere referral of allegations of misconduct to SCRM shows any inappropriate motive.

3.3.1.2. Issues Related to Motivation of the Chancellor of the Ad Hoc Committee

Upon receipt of the SCRM reports, Chancellor DiStefano held discussions and decided that dismissal was the appropriate sanction. In support of this decision, he referred specifically to findings that Professor Churchill, in the Chancellor's words, "engaged in a pattern of serious, repeated, and deliberate research misconduct" and that "your actions were not the results of careless or ordinary mistakes." He also says "[b]oth the pattern of your misconduct and your repeated unwillingness to acknowledge any misconduct or to modify your methods of scholarship

⁵ Research Misconduct Rules, *University's Exhibits, Notebook 1*, Tab D, pages CU 005182-005183

lead me to the conclusion that other sanctions, such as suspension, are not likely to prevent similar misconduct in the future.”

Was the Chancellor motivated in any material way in this discussion or in his conduct of his inquiry by Professor Churchill’s First-Amendment protected activities? In the conduct of his investigation we find a few suggestions that the Chancellor might have been, but nothing that in our view is persuasive. In his report on his investigation, the Chancellor stated

Professor Churchill has outraged the Colorado and national communities as a result of profoundly offensive, abusive, and misguided statements relating to the victims of the horrific 9/11 attacks on America.

As repugnant as his statements are to many in the University community, however, they are protected by the First Amendment.⁶

The first section of this quote might suggest that the Chancellor was concerned about the content of the protected speech, rather than Due Process. Even in the context of the times, there might be questions about how such a public statement satisfied the Regents’ requirement to protect faculty “to the utmost” from outside pressure, particularly since at this time, Professor Churchill had not been found guilty of anything. In his panel testimony, though, the Chancellor made the point that without such an inquiry, the results for Professor Churchill might have been worse, and he thought he was protecting him to the utmost.⁷

When the second paragraph is added to the quote, it suggests a rather different focus, though, namely that the first paragraph was to acknowledge the public concerns and lead to the second paragraph. We are not persuaded that this quote demonstrates improper motives on the part of the Chancellor.

3.3.1.3. Issues Related to Solicitation of Allegations

In one situation, we find evidence that could be interpreted as indicating that the University solicited an allegation of misconduct by Professor Churchill. This relates to the allegation that he plagiarized a work by Professor Fay G. Cohen (Allegation G in what follows).

Describing a conversation with Professor LaVelle, Dean Getches said

LaVelle originally suggested that I call her, and I didn’t want to do that, but I said “You can have her call me if you want, but I’m not going to do that.” And I didn’t expect to return her phone call.⁸

⁶ Report on Conclusion of Preliminary Review in the Matter of Professor Ward Churchill, *University’s Exhibits, Notebook I*, Tab B, page 12 (CU 000937).

⁷ *Panel Testimony*, 1/10/2007, pages 1111-1115.

⁸ *Panel Testimony*, 1/20/2007, page 1795.

Following that, Dean Getches received a phone call from Professor Cohen, who said that Professor LaVelle had suggested she call him. On a subsequent call, she explained the nature of her plagiarism allegation.⁹

In her later submissions to the Investigative Committee, Professor Cohen made clear that she interpreted this as a solicitation from the University, stating “[c]ontact with the University of Colorado was initiated in February 2005 by Dean David Getches, through John LaVelle. In late February, I was contacted by University Counsel Louise Romero.”¹⁰

In his closing statement, the University’s attorney stated that “all the evidence before the Hearings Panel is that information about Professor Churchill’s research misconduct came unsolicited to the University from third parties” with the possible exception of the allegations concerning Professor Cohen.¹¹

This chain could reasonably be interpreted as a solicitation, but it is not clear to us that it *necessarily* was. Whether Dean Getches was specifically motivated by the opportunity to solicit another allegation, as opposed to something else is not clear to us from the evidence we have. Clearly he could have intended this as a way of obtaining a new allegation even though he knew he wasn’t supposed to solicit one, but there are other interpretations of this, too. We are not persuaded by the evidence that Dean Getches *was* so motivated in this case, nor has the University persuaded us that he *wasn’t*.

3.3.1.4. Other Issues

In a number of situations, the University’s rules appear to have been interpreted flexibly. For example, various confidentiality rules applied to the various SCRM processes:

- “Institutional actions engaged in pursuant to this policy shall be conducted in a way that preserves confidentiality to the maximum extent possible, unless this would be inconsistent with protecting public health and safety.”¹²
- “The Investigative Committee shall take precautions to keep all details of the investigation confidential.”¹³

⁹ See Getches memo, *University’s Exhibits, Volume 10*, Tab D, pages 1-2

¹⁰ Cohen memo, *University’s Exhibits, Volume 10*, Tab E, page 3.

¹¹ *University’s Posthearing Brief*, page 21, note 37 in particular.

¹² Administrative Policy Statement on Misconduct in Research and Authorship, *University’s Exhibits, Notebook 1*, Tab E, page 2.

As things turned out, matters were *not* uniformly kept confidential. Indeed, Professor Radelet said the members of the Investigative Committee all had a commitment to and demanded that they present the report, as it needed to be a faculty report,¹⁴ and Professor McIntosh said they insisted on their report being made public, as they “didn’t want to be participating in any kind of behind-the-door operation.”¹⁵

Whether or not Professor Churchill may have been damaged by those choices is the subject of a separate investigation and is not a matter before this panel. We cite it here as an example of the more general notion that the rules apparently could be modified. Similarly, the treatment of the complaint by Ernesto Vigil suggests some flexibility in determining how much to investigate (in this case, this appears to us to be consistent with SCRM rules).

We have not found persuasive evidence suggesting that such flexibility was used detrimentally to Professor Churchill, though.

Professor Churchill also notes that in a letter to Dean Middleton in December 1988, he complained about a colleague’s publication and inquired about possible punishments.¹⁶ He stated that in that case, nothing came of his protest, apparently suggesting a possible instance of Selective Enforcement (in the sense of providing an example of a situation in which a complaint was *not* pursued). On the other hand, it was stipulated by both Professor Churchill and University Counsel that this occurred before development of the regulations and processes establishing SCRM, so it is not clear how strong this evidence might be.

Professor Churchill provided several examples of senior academicians who committed similar “academic fraud” and were not punished by their respective universities,¹⁷ or not punished severely. We discuss this a bit in our recommendations, but we are not persuaded that the Chancellor’s decision to request dismissal was inappropriately motivated. Indeed some members of both SCRM and its Investigative Committee recommended dismissal.

¹³ Administrative Policy Statement on Misconduct in Research and Authorship, *University’s Exhibits, Notebook 1*, Tab E, page 5.

¹⁴ *Panel Testimony*, 1/21/2007, pages 2124-2125.

¹⁵ *Panel Testimony*, 1/10/2007, page 1009.

¹⁶ The letter is in *Churchill Exhibits, Volume 2*, Tab 31.

¹⁷ See, for example, “Allegations of Academic Fraud,” *University Exhibits, Notebook 1*, Tab G, Section I, pages 9034-9036.

Professor Churchill quotes Chancellor DeStefano as saying that the Ad Hoc Committee would investigate everything he had ever written.¹⁸ There was no provision in the Laws of the Regents for such an investigation, and concerns were expressed that it was rooted in a desire to “get” Professor Churchill for exercising his First Amendment rights, and that no one could survive that kind of audit without mistakes being found. It seems clear that the investigation *was* started in response to the “firestorm” over his 9/11 essay, as described in the “but for” causation section above. The situation itself was arguably unprecedented. The administration argues that by convening this investigation, it brought a rational process to the whole affair, and was better able to guarantee Due Process to Professor Churchill. There seems to be no specific prohibition of such an inquiry in the Regents’ Laws, either, unless it were to violate other guaranteed rights. Possible violation of other rights are examined elsewhere. While the investigation was perhaps unorthodox, its stated goal was to examine possible violations of free speech, and we are not persuaded that it was motivated by a desire to “get” Professor Churchill. Even if it *had* been so motivated, its conclusion was that his speech was protected, so no violation occurred on those grounds. Furthermore, we know of no evidence suggesting that when the investigation was convened, anyone was motivated by the hope or desire of uncovering Research Misconduct allegations. Those appeared later (see also the discussion of possible solicitation above).

3.3.2. Findings on Motivation

We find that Professor Churchill has not met his burden of proving by a preponderance of the evidence that the issuance of the Notice of Intent to Dismiss or the initiation and/or pursuit of the Research Misconduct inquiry by the University were motivated to a material degree by a wish to retaliate for Professor Churchill's exercise of rights protected by the First Amendment.

In view of the ambiguity surrounding the possible solicitation of an allegation from Professor Fay Cohen, we also remark that if the *University* had had the burden of proving by a preponderance of evidence that it was *not* motivated inappropriately, we would have found that it had not met its burden either.

3.4. Findings

We find that Professor Churchill has not met his burden of proving Selective Enforcement by a preponderance of the evidence. He has shown “but for” causation by a

¹⁸ “The Fort Clark Smallpox Pandemic Revisited,” *University’s Exhibits, Notebook I*, Tab G, Section VIII, page CU 4709, including note 101.

preponderance of the evidence, but has not shown inappropriate motivation by a preponderance of the evidence. Accordingly, we must find he has not proven all the elements of Selective Enforcement.

4. The Issue of Due Process in the Research Misconduct Investigation

4.1. Standard and Burden of Proof.

In assessing the allegations of deprivation of procedural Due Process in the Research Misconduct investigation, we have -- as noted above -- concluded that the proper and fairest manner to proceed is through the placement of the burden of proof upon Professor Churchill, though again at the lower “preponderance of the evidence” (i.e., “more likely than not”) standard. Thus, Professor Churchill must prove by a preponderance of the evidence that the process was so flawed that it was fundamentally unfair.

4.2. Summary of Evidence Related to Issues of Due Process

In assessing the evidence on possible violations of Due Process, we have summarized the evidence in the categories indicated below. In the following sections, we give our interpretations, findings, and conclusions.

4.2.1. Issues Related to Choice of Standards to Use.

The issue of the appropriate ethical and professional standards that would be appropriate for a scholar (such as Professor Churchill) in Ethnic or American Indian studies pervades many aspects of the SCRM and Dismissal for Cause processes.

- There is no uniformly accepted set of standards for either Ethnic Studies or American Indian Studies, judging by the evidence admitted here.
- Professor Limon testified that Ethnic Studies is a combination of disciplines¹⁹
- Professor Yellow Bird said that standards are still developing.²⁰

¹⁹ *Panel Testimony*, 1/9/2007, pages 511-513.

²⁰ *Panel Testimony*, 1/12/2007, page 1473.

4.2.1.1. Use of American Historical Association (AHA) Standards

The Investigative Committee chose to use the University's own definition of Research Misconduct augmented by the standards of the American Historical Association (AHA). Professor McIntosh said it used AHA standards since Ethnic Studies had none and AHA seemed closest.²¹

That choice remained disputed, though:

- In his closing statement to the Dismissal for Cause panel, the University's attorney described as bait and switch Churchill's initial agreement with those standards that was then followed by a subsequent disagreement.²²
- Professor Churchill points out (apparently correctly) that he accepted the AHA guidelines, but not as a "binding standard."²³
- One of the recurring issues here is the issue of intent.
 - "Fabricated evidence" is defined in *Black's Law Dictionary* as "with deceitful intent."²⁴ On the other hand, the definitions of falsification and plagiarism involve intent implicitly rather than explicitly.
 - The University's definitions of Research Misconduct specify clearly that "honest error" does not constitute misconduct, which seems to suggest that intent is important, for judging the honesty of an alleged error would seem to require assessment of intent.
 - Professor Churchill suggests that plagiarism requires intent, mentioning AAUP and AHA²⁵ as possible sources. He also suggests, for example, that there is no evidence demonstrating any intent to deceive anyone in Allegation A.²⁶ Professor Clinton suggests that you can conclude intent from the patterns you find, though.²⁷

²¹ *Panel Testimony*, 1/10/2007, pages 784-786, with more general discussion of those standards on pages 786-795.

²² *Panel Testimony*, 1/21/2007 pages 2194-2195.

²³ *Investigative Testimony*, Tab A, pages CU 6290-6291. See also *Panel Testimony*, 1/21/2007 pages 2276.

²⁴ *University's Exhibits, Volume 3*, Tab F, page 590.

²⁵ *Panel Testimony*, 1/21/2007, page 2287.

²⁶ *Panel Testimony*, 1/21/2007, pages 2296-2297.

²⁷ *Panel Testimony*, 1/9/2007, page 429.

- Various witnesses suggested similar themes. Professor Cheyfitz testified that you have to look at intent.²⁸ Professor Williams expressed concern that AHA standards don't mention intent.²⁹ Professor Yellow Bird testified that one has to look at intent when evaluating references.³⁰
- More generally, various participants expressed themselves in various ways.
 - Professor Tinker said standards get applied more to us (Indians) than to white scholars writing about Indians.³¹
 - Professors Churchill and McIntosh debated standards and their application at some length in the Dismissal for Cause Hearing.³²
 - According to Professor Churchill, his attorney asked for the definitions of standards to be applied in January 2005, but was told that they [the members of the Investigative Committee] "don't know."³³
 - Professor Churchill said that the committee can believe what it likes, but that doesn't make it a standard he must obey.³⁴
 - Professor Williams testified that the use of AHA standards was obtuse, clueless, and he'd never seen it imposed on anyone in Indian Studies before.³⁵ He said "[t]his report reflects absolutely no sensitivity at all to the history of this discipline, to its distinctiveness, to the types of scholarship that are regarded as legitimate."³⁶
- The theme that Ethnic Studies and/or American Indian Studies has a mission that differs from many other departments also received substantial attention .
 - Professor Churchill explained to Professor Wesson his views on the context of the creation of Ethnic Studies as a backlash to existing methods that don't do

²⁸ *Panel Testimony*, 1/12/2007, pages 1641-1642.

²⁹ *Panel Testimony*, 1/11/2007, pages 1411-1413.

³⁰ *Panel Testimony*, 1/12/2007, pages 1491, 1494.

³¹ *Panel Testimony*, 1/11/2007, pages 1150-1152, 1202-1204.

³² *Panel Testimony*, 1/10/2007, page 904-915.

³³ *Panel Testimony*, 1/21/2007, pages 2275-2276

³⁴ Ward Churchill, Closing Argument to the P&T Committee, *Churchill Exhibits, Volume 1*, (first section) page 31, note 181.

³⁵ *Panel Testimony*, 1/11/2007, page 1315.

³⁶ *Panel Testimony*, 1/11/2007, page 1317.

justice to American Indian history.³⁷ Professors Clinton³⁸ and Yellow Bird³⁹ testified about similar themes.

- Professor Churchill suggested that part of what he's doing is to "confront the conclusions that were being drawn with the over-fetishization of method."⁴⁰
- Professor Tinker points out that in Ethnic Studies, the work must make sense to the people being studied,⁴¹ not just to other scholars. Some wish to "return" Ethnic Studies to the "proper" disciplines, but in his view, Ethnic Studies wants to *counter* scholarship about our community (mostly by whites).⁴² [Emphasis added.]
- Professor Limon also said he identified as a member of the group he studies, and that resonance in the community being studied is an important test of validity.⁴³
- Professor McIntosh testified in a similar vein, but also said that such a distinction doesn't change the expectations of scholars.⁴⁴
- Professor Clinton also testified along these lines.⁴⁵

As the Investigative Committee process unfolded, the process seems to have been guided mainly by the University's Research Misconduct policy, which specifically prohibits fabrication, falsification, and plagiarism, which are defined in that policy,⁴⁶ augmented by general ideas about these concepts and occasional use of AHA standards. Some other related sets of issues are discussed below.

4.2.1.2. Issues on Dealing with Oral History

In American Indian studies, oral histories are an important, often critical, resource. The appropriate ways of referring to such histories were a recurrent topic of debate, in particular whether the conventional standards of the scholarly world (to the extent these may be well defined) were appropriate when dealing with oral history. Sample views included:

³⁷ Ward Churchill, letter to Wesson dated 4/16/06, *University's Exhibits, Volume 7*, Tab J, page CU 2612.

³⁸ *Panel Testimony*, 1/9/2007, page 500.

³⁹ *Panel Testimony*, 1/11/2007, pages 1278-1282.

⁴⁰ *Investigative Testimony*, Tab C, page CU 3276

⁴¹ *Panel Testimony*, 1/11/2007, pages 1128-1129.

⁴² *Panel Testimony*, 1/11/2007, pages 1132-1136.

⁴³ *Panel Testimony*, 1/9/2007, pages 532-534

⁴⁴ *Panel Testimony*, 1/10/2007, pages 969-974.

⁴⁵ *Panel Testimony*, 1/9/2007, page 498.

⁴⁶ *University's Post Hearing Brief*, pages 3-4.

- Professor Clinton testified that there are accepted practices for dealing with oral tradition,⁴⁷ some evidence supporting one's views is always required,⁴⁸ but that we don't necessarily need a written code to explain those standards.⁴⁹
- Professor Limon testified that when citing oral traditions, one should describe the details in the text or in a footnote.⁵⁰
- Professor Churchill suggests that sometimes interviews have to be informal⁵¹ in order to respect the sources who provide the information, and that occasionally only the most general kinds of references or citations are appropriate.

4.2.1.3. Issues on Footnotes

The purpose and content of footnotes were debated over the course of the various hearings in this case.

- Professor Churchill says, for example, that the Investigative Committee report claims that if your account agrees with established sources, detailed references are not necessary.⁵²
- Against that, though, Professor Radelet says misleading footnotes are worse than no footnotes.⁵³ Professors Clinton⁵⁴ and McIntosh⁵⁵ also gave their respective views on footnotes, their roles, and when and why they are required.
- Derek Bell, on the other hand, says "the committee's view of the role of footnotes is very narrow...."⁵⁶ Professor Churchill cites Peter Novik's *That Noble Dream*⁵⁷ to similar effect.
- The *Investigative Report* expresses frustration that Professor Churchill sometimes refers to entire books or articles for support of specific ideas, without giving the specific page numbers that would facilitate checking those citations for details. In response, Professor

⁴⁷ *Panel Testimony*, 1/9/2007, pages 408-409.

⁴⁸ *Panel Testimony*, 1/9/2007, pages 457-458

⁴⁹ *Panel Testimony*, 1/9/2007, pages 446-448.

⁵⁰ *Panel Testimony*, 1/9/2007, pages 518-520.

⁵¹ *Investigative Testimony*, Tab B, pages CU 4980-4081.

⁵² Ward Churchill, *Closing Argument to P&T Committee, Churchill Exhibits, Volume 1*, Tab A, note 32.

⁵³ *Panel Testimony*, 1/21/2007, page 2175.

⁵⁴ *Panel Testimony*, 1/9/2007, pages 500-501.

⁵⁵ *Panel Testimony*, 1/10/2007, pages 795-798, 802-806.

⁵⁶ Bell letter to P&T Committee date 1-18-07, *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab 2.

⁵⁷ A copy of the relevant page (220) from *That Noble Dream* is in *University Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab N.

Churchill pointed out that Professor McIntosh used footnotes without page numbers, too,⁵⁸ in one of her books.

- Professor Tinker says work must make sense to the people being studied.⁵⁹

4.2.1.4. Issues Related to Ghostwriting and Self-citation

In several allegations investigated, there is uncontested testimony that Professor Churchill wrote articles that were published under the name of another author, and that Professor Churchill then cited those articles as support for propositions he advanced in later articles of his own. The Investigative Committee concluded he did this in an attempt to create the (largely false) appearance that there was independent third-party support for his views.

This, in turn, raises the issue of the acceptability of the practice. The University's guidelines for Research Misconduct do not specifically mention ghostwriting, though they do refer to "established practices regarding author names on publications."⁶⁰ Professor Churchill suggests that if ghostwriting and self-citation of the ghostwritten work violates "established" practice, then in the interests of preserving Due Process, the committee should point out how and where such a practice or prohibition was "established" and where it is written down.

The AHA guidelines are apparently silent on this specific issue, and no specific written prohibition has been admitted before this hearing. On the other hand, Professor Clinton testified, "I think, in the scholarly community, there are generally accepted standards of practice that don't have to be written down,"⁶¹ and he,⁶² Professor Limon,⁶³ and Professor McCabe⁶⁴ testified that ghostwriting and citing it as third-party evidence are not acceptable.

Several witnesses suggested that in the context of Indian Studies, the source of the material was of little importance compared to its content. For example:

- In testimony before the panel, the following exchange occurred:

Professor Churchill: "...would it fundamentally alter your impression if you were aware that I had ghostwritten Robbins' piece?"

⁵⁸ *Panel Testimony*, 1/10/2007, page 937. A copy of pages 96-97 (some of the allegedly offending pages) of Professor McIntosh's *Working Women in English Society* appears in *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, behind Tab K.

⁵⁹ *Panel Testimony*, 1/11/2007, pages 1128-1129.

⁶⁰ Research Misconduct Rules, *University's Exhibits, Notebook 1*, Tab D, page CU 005179.

⁶¹ *Panel Testimony*, 1/9/2007, pages 446-447.

⁶² *Panel Testimony*, 1/9/2007, pages 431-435, 585-586.

⁶³ *Panel Testimony*, 1/9/2007, pages 513-515.

⁶⁴ *Panel Testimony*, 1/8/2007, pages 351-352.

Professor Williams: “No, absolutely not. Doesn’t matter. I mean, it says what it says. As a scholar, I don’t—you know, anyway, it’s just quoting that language, and it’s absolutely true, and it doesn’t matter if Mickey Mouse wrote it...It’s nothing—it’s not even a misrepresentation. Any scholar would say, of course. And so I’m reading through that again, understanding the general background and context. No problem.”⁶⁵

- Later, Professor Williams goes on to say about a similar allegation:

It doesn’t matter. It doesn’t—and rudimentarily—anybody with a rudimentary understanding of the field and the literature in it has absolutely no problem with anything you said there. It’s clearly within sort of a public intellectual sort of approach.⁶⁶

- Professor Williams is a bit less emphatic in his views on the apparent independence of the scholars so cited:

Professor Churchill: “Would you consider people whose names are on ghostwritten material to be independent third parties...or what extent would you consider?”

Professor Williams: “I don’t know—again, I don’t know what your intentions were...I mean anybody who reads anything in post-colonial theory knows that the idea of the pose is absolutely necessary for the minority scholar to say certain things. But as far as I’m concerned, it’s clearly, clearly within the accepted realm of discursive stances of Indian Studies scholars.”⁶⁷

- Professor Cheyfitz argues that ghostwriting is “not my cup of tea, but not a significant problem,”⁶⁸ and says further “... I could make the argument that indeed it is third-party evidence, because two reputable scholars signed off on it as well and lent their names to it.”⁶⁹ He also says that “in Indian oral history and in traditional Indian practices, authorship is of no importance whatsoever. What is important is what is said.”⁷⁰
- Professor Cheyfitz also says “I don’t know of any codified example of the question of ghostwriting and then attributing ghostwriting as your own work...You know I can see people being uneasy about it, but I don’t know of a codified standard.”⁷¹

No clean resolution of this debate seems to have emerged thus far in the various processes in this case.

⁶⁵ *Panel Testimony*, 1/11/2007, pages 1335-1336.

⁶⁶ *Panel Testimony*, 1/11/2007, page 1340.

⁶⁷ *Panel Testimony*, 1/11/2007, pages 1340-1341.

⁶⁸ *Panel Testimony*, 1/12/2007, page 1604.

⁶⁹ *Panel Testimony*, 1/12/2007, page 1606.

⁷⁰ *Panel Testimony*, 1/12/2007, page 1606.

⁷¹ *Panel Testimony*, 1/12/2007, page 1609.

4.2.2. Issues Related to Not Letting Professor Churchill Know What Those Standards Were to Be.

The difficulty in identifying specific standards to be applied in Professor Churchill's case led (in our view, more or less inevitably) to difficulties in informing Professor Churchill of what those standards were to be, so that he could prepare a defense. For example:

- On January 25, 2006, Professor Churchill's attorney asked Professor Wesson to provide information such as an indictment or its equivalent, whether the proceedings were to be adversarial, emphasizing fact-finding as opposed to prosecuting, what standards were to be used, burden of proof, etc.⁷²
- This request was repeated in modified form on March 24, 2006, in a letter to the Committee's attorney.⁷³
- Professor Churchill says the Investigative Committee never gave him its standards.⁷⁴ He also suggests that Professor Williams resigned from the Investigative Committee in part because the committee never did identify its standards.⁷⁵

On the other side of this issue, Professor Clinton testified that "I think, in the scholarly community, there are generally accepted standards of practice that don't have to be written down."⁷⁶ It is also clear (as indicated in the previous subsection) that the subject of standards was a continuing theme in discussion throughout the processes.

4.2.3. Issues Related to the Selection of the Investigative Committee

4.2.3.1. Issues Related to Selection of Professor Wesson as Chair

Professor Churchill has raised two potential issues related to the selection of Professor Wesson as chair of the Investigative Committee:

⁷² Lane letter to Wesson, 1-25-06, *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab D.

⁷³ Lane letter to Eliff, 3-24-06, *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab Q.

⁷⁴ Ward Churchill, Closing Argument on Selective Enforcement, *Churchill Exhibits, Volume 2 (first section)*, pages 3, 23-24.

⁷⁵ Ward Churchill, Closing Argument to the P&T Committee, *Churchill Exhibits, Volume 1, (first section)*, page 30 and note 175.

⁷⁶ *Panel Testimony*, 1/9/2007, pages 446-448.

- Professor Wesson was a former prosecutor and a member of the CU law faculty, where she reported to Dean Getches, who was advising the Chancellor on his investigation of Professor Churchill's speech and was one of the people active in referring allegations of misconduct to SCRM. Evidence related to this set of concerns includes:
 - Professor Getches says he had no involvement in Professor Wesson's selection as Chair, though he tried to talk her out of it because she'd have to stop some work she was doing for the Law School, and suggested she'd be under pressure. She never gave him any indication she was out to get Ward Churchill.⁷⁷
 - Churchill claims Professor Wesson was selected because she was a prosecutor,⁷⁸ while the Investigative Committee was supposed to be a neutral fact-finding body. Professor Rosse says Professor Wesson was selected because of her background in law, and her understanding of the administration of such processes. In his view her experience as a former prosecutor was important for this general understanding, not specifically because it was as a prosecutor as opposed to some other kind of participant.⁷⁹
- Professor Wesson made unflattering remarks about Professor Churchill in an email sent before she was appointed to chair the Investigative Committee, remarks that Professor Churchill claims should have disqualified her. Evidence on this set of concerns includes:
 - Professor Wesson sent an email to acquaintances before she was approached to be Chair of the Investigative Committee. This email⁸⁰ said, among other things, that Professor Churchill was "unpleasant (to say the least)" and added "But the rallying around Churchill reminds me unhappily of the rallying around O.J. Simpson and Bill Clinton and now Michael Jackson and other charismatic celebrity male wrongdoers (well, okay, I don't really know that Jackson is a wrongdoer)."

⁷⁷ *Panel Testimony*, 1/20/2007, pages 1799-1802.

⁷⁸ *Panel Testimony*, 1/21/2007, page 2261.

⁷⁹ *Panel Testimony*, 1/20/2007 pages 1896-1897.

⁸⁰ *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab E.

- Professor Wesson testified that in the interests of full disclosure, she sent the email to Professor Rosse, the chair of SCRM, and that she expected it would be turned over to Professor Churchill.⁸¹
- In his testimony, Professor Rosse didn't remember receiving the email from Professor Wesson, but did remember a conversation about it, and remembers mentioning it to the Standing Committee.⁸² He didn't think he reported it to Professor Churchill.⁸³
- Professor Churchill says he never had a chance to argue before the committee that Wesson's email should have disqualified her.⁸⁴ (Indeed, if he had not been informed of its existence, as appears to be the case, how *could* he?) In an email to Professor Rosse dated October 2005, Professor Churchill does object to Professor Wesson, and anyone else from the law school,⁸⁵ but, obviously, not on the grounds of the email, of which he was presumably unaware.
- Opinions differed on the effect of this omission,
 - Professor Churchill's feeling, summarized above, was that the email indicated bias toward him on the part of Professor Wesson, and that it should have disqualified her—or at least he should have been permitted to argue such.
 - Professor Clinton says one would need to know the context before deciding if she should have been disqualified.⁸⁶
 - Others point out that, as it turned out, Professor Wesson appeared fair and impartial in the conduct of the Investigative Committee's process:
 - Professor McIntosh says she saw no sign of personal animus, whatever the email might have been,⁸⁷ and testified that Wesson was not unfair or biased and had no "predetermination."⁸⁸

⁸¹ *Panel Testimony*, 1/8/2007, page 139-156.

⁸² *Panel Testimony*, 1/20/2007, pages 1898-1900. See also pages 1937-1938.

⁸³ *Panel Testimony*, 1/20/2007, page 1962.

⁸⁴ *Panel Testimony*, 1/21/2007, pages 2259-2260, 2266.

⁸⁵ *Professor Churchill's Summary and Exhibits, Volume 2*, Tab 26, page 010593.

⁸⁶ *Panel Testimony*, 1/9/2007, pages 465-487.

⁸⁷ *Panel Testimony*, 1/10/2007, pages 772-773.

⁸⁸ *Panel Testimony*, 1/10/2007, pages 770-773.

- Professor Radelet testified that Professor Wesson wouldn't bend the rules, was very fair, and he knows of no examples at all of her being unfair. In his view, she was unbiased.⁸⁹
- Professor Clinton testified that Professor Wesson was fair in "every aspect of behavior that I saw."⁹⁰
- We note that the Investigative Committee hearing transcripts suggest a generally cooperative approach to getting the job done. e.g., Professors Wesson and Churchill agree on the delivery of some documents⁹¹ and work around the clumsy procedure required for questioning witnesses, which we discuss elsewhere.

4.2.3.2. Issues Related to Selection of Other Investigative Committee Members

Professor Churchill expressed the following general concerns about the composition of the Investigative Committee:

- The Committee lacked ethnic diversity and had no Indians.⁹²
- The selection of Committee members was biased.⁹³
- In selecting members of the Committee, Professor Rosse excluded those who had signed a petition in favor of Churchill, at least at first.⁹⁴

Professor Churchill also expressed concern that some people he suggested were not included:

- Professor Delgado testified he was willing to serve but never heard from the Investigative Committee, that he recommended others (not actually included) to the Investigative Committee, and that attitude (presumably Churchill's) should play no role.⁹⁵

⁸⁹ *Panel Testimony*, 1/21/2007 pages 2100-2101.

⁹⁰ *Panel Testimony*, 1/9/2007, pages 683-684.

⁹¹ *Investigative Hearing*, page CU 4860.

⁹² Ward Churchill, email to Joe Rosse dated 11/11/05, *University's Exhibits*, Notebook 11(*Exhibits Admitted at the Hearing*), Tab 1, pages CU 3633-3635.

⁹³ Closing Argument on Selective Enforcement, *Churchill Exhibits, Volume 2*, (first section), page 2.

⁹⁴ Closing Argument on Selective Enforcement, *Churchill Exhibits, Volume 2 (first section)*, page 22, note 89, also an email exchange between him and Rosse dated October 12, 2005 in *Churchill Exhibits, Volume 2*, Tab 26. Related testimony from Rosse is in *Panel Testimony*, 1/20/2007 page 1945.

⁹⁵ *Panel Testimony*, 1/12/2007, pages 1726-1728.

- Professor Rosse testified that Professor Delgado had had scheduling conflicts in a prior visit to CU, and that he (Rosse) felt Professor Delgado had a “chip on his shoulder towards CU.”⁹⁶
- Professor Yellow Bird testified that he volunteered to serve, but never heard back. When he followed up, he was told that the Committee was already formed.⁹⁷
 - Professor Rosse testified that Professor Yellow Bird was not chosen because of his rank (associate professor rather than full professor).⁹⁸ Professor Churchill questioned this.⁹⁹
- Professor Williams was selected for the Committee, but resigned before the Committee’s process began.
 - Professor Rosse testified that he felt Professor Williams was an admirer of Churchill.¹⁰⁰
 - Professor Williams says “The original committee would have been a good committee. If they’d had Johansen and myself in there, these points [about the desirability or expectation of having people who practice in that area] would have gotten out of there.”¹⁰¹

On the other members of the committee:

- Professor Churchill says that Professor McIntosh had no qualifications, that she had a hobbyist approach to oral history, and that she said “I can learn in 60 days.”¹⁰² Professor McIntosh said she had no knowledge of whether Professor Wesson was involved in her selection to the committee.¹⁰³ She also said she felt qualified and that she had an obligation to serve.

⁹⁶ *Panel Testimony*, 1/20/2007, pages 1893-1895.

⁹⁷ *Panel Testimony*, 1/11/2007, pages 1261-1262.

⁹⁸ *Panel Testimony*, 1/20/2007, page 1893.

⁹⁹ *Panel Testimony*, 1/21/2007, pages 2271-2273.

¹⁰⁰ *Panel Testimony*, 1/20/2007, page 1889.

¹⁰¹ *Panel Testimony*, 1/11/2007, page 1319.

¹⁰² The “learn in 60 days” reference may be to a question Churchill asked at the dismissal for cause hearing. See *Panel Testimony*, 1/10/2007, pages 944-945. In her response, McIntosh says she “would qualify that statement” and doesn’t specifically confirm or deny it.

¹⁰³ *Panel Testimony*, 1/10/2007, page 901.

- Professor Churchill objects that Professor Limon's field was English, not Ethnic Studies.¹⁰⁴
- Professor Churchill said he could agree to Clinton.¹⁰⁵ Professor Williams, on the other hand, remarks that Professor Clinton is a top scholar in Indian law, but "would I rely on him for Indian studies? Absolutely not."¹⁰⁶
- Professor Churchill suggested Professor Radelet as a member.¹⁰⁷

4.2.3.3. Issues Related to Resignations of Williams and Johansen

Shortly after their selection as committee members, Professors Bruce Johansen and Robert Williams resigned from the committee.¹⁰⁸ Professor Churchill maintains that Johansen seems to have been excluded for supporting him (Churchill), even though he criticized Churchill, too. He further suggests that Professor Williams seems to have been excluded for liking him (Churchill).¹⁰⁹ In both cases, Rocky Mountain News articles about them¹¹⁰ seem to have played a role.

According to Professor Churchill, Professor Williams resigned in part because the University never *did* identify the standards to be used.¹¹¹ Williams also mentions that he thought Professor Wesson "would have been happy to have me leave,"¹¹² that it took too long to get answers to his legitimate questions about potential conflicts of interest, and that the University had not vigorously defended the integrity of its process.¹¹³

¹⁰⁴ *Panel Testimony*, 1/21/2007, page 2273.

¹⁰⁵ Ward Churchill, email to Joe Rosse dated 11/11/05, *University's Exhibits*, Notebook 11 (*Exhibits Admitted at the Hearing*), Tab 1, pages CU 3633-335.

¹⁰⁶ *Panel Testimony*, 1/11/2007, page 1321.

¹⁰⁷ *Professor Churchill's Summary and Exhibits, Volume 2*, Tab 26, page 010593.

¹⁰⁸ See *University's Exhibits, Volume 11 (Exhibits Admitted at the Hearing)*, Tab J for Williams's email on this topic.

¹⁰⁹ See also *Panel Testimony*, 1/20/2007, page 1889 for Rosse's views on this.

¹¹⁰ Ward Churchill, email to Joe Rosse dated 11/11/05, *University's Exhibits*, Notebook 11 (*Exhibits Admitted at the Hearing*), Tab 1, pages CU 3633-335.

¹¹¹ See Williams testimony, *Panel Testimony*, 1/11/2007, pages 1309-1310.

¹¹² *Panel Testimony*, 1/11/2007, page 1308.

¹¹³ Williams email dated 11/7/05, *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab J.

4.2.4. Issues Related to SCRM Processes (Not Including Investigative Committee Process)

4.2.4.1. Treatment of Charge by Ernesto Vigil

This issue concerns a complaint by Ernesto Vigil submitted to SCRM. According to Professor Rosse, the complaint was received on May 3, 2005. The complaint was put on hold, then sent on to an inquiry committee, which recommended that it be sent to an Investigative Committee. SCRM did not do that, though, and after several months, simply voted to drop the charge without further proceedings.¹¹⁴ Professor Rosse notified Professor Churchill of this decision saying, “As the attached letter indicates, the Inquiry Subcommittee recommended an investigation into certain of those allegations, but the Standing Committee voted not to proceed to an investigation due to the sanctions it already recommended against Professor Churchill.”¹¹⁵

Professor Churchill’s interprets this to mean that the Vigil investigation was closed because they didn’t need it any more, having already found him guilty.¹¹⁶ Professor Rosse indirectly sort of confirmed this to Professor Churchill’s attorney.¹¹⁷ Professor Churchill also says this shows that SCRM had more discretion to choose what it investigated and what it didn’t than the University has maintained.¹¹⁸

4.2.4.2. Other Possible SCRM Issues (Not Including the Investigative Committee Process)

In most ways, SCRM seems to have followed its own processes. Such requirements as seeking Professor Churchill’s comments on the inquiry committee report¹¹⁹ and his response to additional allegations¹²⁰ all seem substantially correct.

Professor Churchill does assert¹²¹ that the plagiarism issue described in Allegation E was not properly submitted to SCRM and should have been a separate issue, if one at all.

¹¹⁴ *Panel Testimony*, 1/20/2007, page 1919-1926.

¹¹⁵ *Churchill Exhibits, Volume 2*, Tab 30, page 1. The “attached letter” referred to does not appear at this Tab, and we have not thus far located it.

¹¹⁶ *Panel Testimony*, 1/21/2007, pages 2245-2248.

¹¹⁷ *Panel Testimony*, 1/20/2007, pages 1920-1925.

¹¹⁸ SCRM’s procedures (*University’s Exhibits, Volume 1*, Tab D, page 7 (CU 005185)) say that “ 6. The Standing Committee shall review the report of the Inquiry Committee, and determine if more information is needed. If the Standing Committee is satisfied with the report, it shall determine by a simple majority vote whether or not a full investigation of any allegation appears to be warranted.” Thus it appears that under its rules, SCRM has discretion about whether to refer a matter to an Investigative Committee, even if an Inquiry Committee has so recommended.

¹¹⁹ Rosse letter to Churchill dated 8-19-05, *University’s Exhibits*, Vol. 11, Tab 7, page CU 1876.

¹²⁰ Rosse letter to Churchill dated 6/15/2005, *Churchill Exhibits, Volume 2*, Tab 27.

Finally, it appears that SCRM was not influenced by anything other than the evidence and the specific charges. In particular, Professor Rosse testified that SCRM did not feel Professor Churchill's 9/11 essay was part of its job and it was not influenced by it,¹²² and that copyright infringement was not part of its job (and in this case, the authors didn't seem to care, anyway).¹²³

4.2.5. Issues Related to the Investigative Committee Process

Several issues are addressed in subsections below. Two issues mentioned don't fit into these categories. One is the issue of attendance (Professor Limon was physically present only once, for committee meetings and by phone at all other meetings¹²⁴). The other was Professor Morris's concern that the Committee's decision not to consider the motives of those bringing the allegations (but only to evaluate them on their merits) unfairly ignored the animosity between Professor LaVelle (the source for several complaints) and Professor Churchill.¹²⁵

4.2.5.1. Was It Really Neutral and Investigative Rather than Adversarial?

The Committee's attorney informed Professor Churchill's attorney on February 22, 2006, that the investigation would be information-seeking, non-adversarial, and designed to explore the allegations.¹²⁶ Professor Clinton says that Committee members maintained an open mind and were not out to "get" Professor Churchill.¹²⁷ Professor Churchill, though, expresses concerns about the prosecutorial attitude of Professor Wesson.¹²⁸ The *Investigative Report* shows, though, that in some cases, the Committee went out looking for evidence that might support Professor Churchill's case.

4.2.5.2. Questioning Procedure Used (Required Written/Emailed Questions from Professor Churchill)

The specified process for asking questions of witnesses required that questions be submitted in writing to the Committee Chair, who would then ask those questions of the witness.

¹²¹ Closing Argument on Selective Enforcement, *Churchill Exhibits, Volume 2*, (first section), pages 16-17, and especially note 69.

¹²² *Panel Testimony*, 1/20/2007, pages 1879-1880.

¹²³ *Panel Testimony*, 1/20/2007, pages 1881-1882.

¹²⁴ *Panel Testimony*, 1/9/2007, pages 530-531.

¹²⁵ *Investigative Transcript*, April 15, 2006, Tab C, pages 23-24.

¹²⁶ *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab P.

¹²⁷ *Panel Testimony*, 1/9/2007, pages 411-412.

¹²⁸ *University Exhibits, Notebook 8*, Tab F, page CU 10110.

While this process was basically required by the rules,¹²⁹ many involved, both witnesses and Committee members, felt it was clumsy:

- Churchill and others objected to the process on multiple occasions, e.g., in an interview with Professor Morris.¹³⁰
- Professor Wesson herself explained that it was awkward.¹³¹
- Other Committee members felt the same way, apparently.¹³²

Among the witnesses,

- Professor Yellow Bird said that these rules impaired him, effectively denying him a chance to explain.¹³³
- Professor Tinker thought this procedure impaired Professor Churchill's ability to follow up.¹³⁴

There is evidence in the *Investigative Transcript* that, at least occasionally, follow-up questions, etc. were permitted. For example, various kinds of follow-up questions and comments appear in the transcript of the Timbrook interview.¹³⁵ See also the Trimble interview¹³⁶ and the Yellow Bird testimony.¹³⁷

4.2.5.3. Committee Choice that the Burden on an Author is Higher When the Author Challenges Conventional Thinking.

The Committee on several occasions, mostly in the context of considering whether appropriate citations and references were required, suggested that if an author is putting forth a proposition that challenges conventional or established thinking, that the author bears a higher burden of proof or evidence than when he or she is not. Opinions differed on the fairness of this choice. For example:

¹²⁹ *University's Exhibits, Notebook 1*, Tab D, page CU 005188.

¹³⁰ *Investigative Transcript*, Tab C, pages CU 3176-3177.

¹³¹ *Investigative Transcript*, Tab A, page CU 6306.

¹³² See, for example, the Tinker testimony at *Panel Testimony*, 1/11/2007, pages 1145-1146.

¹³³ *Panel Testimony*, 1/11/2007, pages 1262-1270, also 1/12/2007, pages 1501-1503.

¹³⁴ *Panel Testimony*, 1/11/2007, pages 1144-1147.

¹³⁵ *Investigative Transcript*, Tab A, page 6386.

¹³⁶ *Investigative Transcript*, Tab A, pages 6237, 6267, 6273. On page CU 6280, Professor Churchill's attorney says "fair enough" in response to a discussion of part of the process.

¹³⁷ *Panel Testimony*, 1/11/2007, pages 1263-1271.

- Professor Radelet testified that when the probability of what you say is low, the evidence must be greater.¹³⁸
- Professor Yellow Bird acknowledged that those in Indian studies who challenge orthodoxy do bear a higher burden of precision (though it is perhaps not clear whether he thought this was a good thing).¹³⁹
- Professor Churchill says that the Investigative Committee report claims that if your account agrees with established sources, detailed references are not necessary.¹⁴⁰

On the other hand, Professor Delgado testified as indicated in this exchange:

Professor Churchill: “So if I understood you correctly, the more critical of orthodoxy in actually the political status quo, et. cetera, you are, the greater the latitude interpretively you are to be allowed?”

Professor Delgado: “Well, that’s true in First Amendment theory. And academic freedom, of course, bears a close relation to that body of law.”¹⁴¹

As a general rule, it is probably true that in order to persuade an audience of unorthodox views, you will need to provide more evidence than if you were advocating conventional ideas. On the other hand, it is less clear that failure to observe this rule constitutes a *disciplinary* infraction.

4.2.5.4. Did the Committee Really Seek the Truth Rather than Just See if Professor Churchill had a Reasonable Basis?

The Investigative Committee’s stated intention was not to examine the ultimate truth of Professor Churchill’s claims, but rather whether the claims were based on legitimate, rational methods of inquiry. For example,

- Professor MacIntosh said they were not trying to find the truth.¹⁴²
- The *Investigative Report* says “the Committee understands its role as limited to determining academic misconduct under scholarly norms of research and does not

¹³⁸ *Panel Testimony*, 1/21/2007, pages 2160-2161.

¹³⁹ *Panel Testimony*, 1/12/2007, pages 1507-1510.

¹⁴⁰ Ward Churchill, Closing Argument to P&T Committee, *Churchill Exhibits, Volume 1*, (first section) page 8, note 32.

¹⁴¹ *Panel testimony*, 1/12/2007, pages 1736-1737.

¹⁴² *Panel Testimony*, 1/10/2007, page 777-778.

conceive itself as an ultimate arbiter of the truth or falsity of the claims made by Professor Churchill that sparked some of these charges.”¹⁴³

In Allegation D, on the other hand, the Investigative Committee dismissed some references Professor Churchill claimed to be relying on for its own reasons. For example, a reference to Connell was considered not supportive of Professor Churchill’s claim because “Connell, who is not an expert on smallpox, provides no notes to his book at all, one cannot determine where his number came from,”¹⁴⁴ thus apparently deciding for themselves the faith to be placed in this reference.

4.2.5.5. Choice to Not Extend Deadlines

Professor Churchill claims he was not given adequate time to respond to the allegations against him, particularly when new allegations were added to the list, and several allegations which started as allegations of plagiarism were converted to allegations of ghostwriting and self-citation. Some relevant items include:

- On March 22, 2006, the Committee said written submissions must be received by 4/3/06.¹⁴⁵
- On March 24, 2006, Professor Churchill’s attorney said that Professor Churchill needed more time, since the charges had been broadened.¹⁴⁶
- Professor Wesson acknowledged that the Committee originally sought an extension and could have asked again, but chose not to.¹⁴⁷
- Professor McIntosh acknowledged that Professor Churchill requested extensions,¹⁴⁸ but that the Committee had a deadline to meet.¹⁴⁹
- According to Professor Churchill, Professor Radelet said the Committee decided that Churchill had had enough time.¹⁵⁰ Professor Radelet said that, indeed, Professor Churchill’s requests for extensions were refused.¹⁵¹

¹⁴³ *Investigative Report*, page 3.

¹⁴⁴ *Investigative Report*, page 79.

¹⁴⁵ Eliff letter to Lane dated 3-22-06, *University’s Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab D.

¹⁴⁶ Lane letter to Eliff dated 3-24-06, *University’s Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, Tab D.

¹⁴⁷ *Panel Testimony*, 1/8/2007, pages 271-277.

¹⁴⁸ *Panel Testimony*, 1/10/2007, pages 902-903.

¹⁴⁹ *Panel Testimony*, 1/10/2007, page 931.

- Professor Clinton testified that “we had a deadline” and thus couldn’t review Professor Churchill’s last submission.¹⁵²
- Professor Churchill claims the Committee made arbitrary deadlines.¹⁵³
- On the issues of ghostwriting in particular, Professor Churchill apparently wrote in May 2005 to the Inquiry Committee of SCRM that he had in fact ghostwritten the “Robbins” chapter he was alleged to have plagiarized.¹⁵⁴

4.2.5.6. Was the Investigative Committee Influenced by Anything Other Than the Evidence and the Charges?

The Committee says not. Professor Wesson said the Committee members were not biased,¹⁵⁵ and that the Committee was charged specifically with looking at SCRM-reported allegations of violations.¹⁵⁶

According to Churchill, though, the Committee distorted evidence,¹⁵⁷ and he says Professors Williams and Cheyfitz both say the *Investigative Report* findings were arbitrary and capricious.¹⁵⁸

4.3. Discussion by Panel.

In the panel’s view, there are several aspects of this process in which we think mistakes either were or may have been made, none of which can reasonably be said to have done Professor Churchill any good:

- Professor Wesson’s email should have been disclosed to Professor Churchill before her selection as Chair of the Investigative Committee.

¹⁵⁰ Ward Churchill, Closing Argument to P&T Committee, *Churchill Exhibits, Volume 1*, (first section) page 7, note 28.

¹⁵¹ *Panel Testimony*, 1/21/2007, pages 2152-2157.

¹⁵² *Panel Testimony*, 1/11/2007, pages 587-592.

¹⁵³ Ward Churchill, Closing Argument on Selective Enforcement, *Churchill Exhibits, Volume 2*, (first section) page 24

¹⁵⁴ Cited in *A Report of the SCRM-Inquiry Subcommittee*, dated August 19, 2005, page 11 (CU page number 006818), *University’s Exhibits, Notebook 1*, Tab F.

¹⁵⁵ *Panel Testimony*, 1/08/2007, page 56.

¹⁵⁶ *Panel Testimony*, 1/08/2007, page 57.

¹⁵⁷ Ward Churchill, Closing Argument on Selective Enforcement, *Churchill Exhibits, Volume 2*, (first section), page 3.

¹⁵⁸ Ward Churchill, Closing Argument to P&T Committee, *Churchill Exhibits, Volume 1*, (first section), page 2. Williams says something like this in response to a hypothetical reference to an unsupported number: Churchill: “If that was construed as falsification, the specific that I just brought out, would this represent to you a reference to the AHA guidelines, guidance from the AHA standards, or a very, very strict application of AHA standards?” Williams: “I would call it an arbitrary and capricious application.” *Panel Testimony*, 1/11/2007 page 1409-1410. We have not found thus far a specific reference to this by Cheyfitz.

- The Committee could have asked for an extension of its deadline after additional charges were brought in. This may have been a mistake.
- In deciding that certain references relied upon by Professor Churchill should not be included as legitimate sources, we think the Committee exceeded its charge.

In addition, the controversy surrounding the appropriate standards to be applied is a concern, though given the ambiguities inherent in the situation, we do not specifically call this a mistake.

The next question, then, is whether these mistakes so damaged the process that Professor Churchill was fundamentally unable to make his case and was denied his right to Due Process. Here the evidence strikes us as ambiguous.

- With regard to Professor Wesson's selection as Committee Chair, we agree that Professor Churchill should have been notified of the offending email. On the other hand, except for some assertions from Professor Churchill, the evidence suggests that Professor Wesson's conduct of the process as it actually unfolded was generally fair.
- With regard to the selection of other Committee members, there is dispute, but we are not persuaded that the reasons given for including or excluding potential members were inappropriate or beyond the realm of discretion appropriate to the situation.¹⁵⁹
- With regard to the Committee's choice not to extend its deadlines, the evidence is similarly ambiguous as to what specific harm may have been done to Professor Churchill. In particular, his concern that he was not given adequate time to prepare a defense to the plagiarism-turned-ghostwriting allegations seems exaggerated to us, since he had brought his ghostwriting to the attention of SCRM almost a year previously, and presumably had reason to believe even then that he would probably need to be prepared to respond to such charges. He has, in any event, been given a subsequent opportunity in the Dismissal for Cause Hearing to provide any additional information he desired, and we have

¹⁵⁹ The alleged defense (or lack thereof) of the committee and its processes on the part of the University may have played a role, at least in Professor Williams's case, but issues related to the University's public release of information are specifically excluded from the charge to this panel.

considered all that information in making our findings and conclusions with respect to the individual allegations of misconduct.

- With regard to the Committee's dismissal of certain of Professor Churchill's references, we have taken account of our concern about this in making findings and conclusions on the individual allegations involved.

In the other issues mentioned, we generally find no persuasive evidence that actual harm was done to Professor Churchill.

In our view a finding of a Due Process violation (particularly since Professor Churchill now has had a chance to submit additional evidence to us) must be driven by evidence of serious failing and likely damage to Professor Churchill, which we do not find here.

4.4. Findings

The panel finds that Professor Churchill has not met his burden to prove lack of Due Process by a preponderance of the evidence. The evidence presented is in our view ambiguous enough to preclude such a finding. Indeed, if the University had had the burden of proving by a preponderance of the evidence that it had *not* violated Due Process requirements, we would not be completely convinced that the University had met *its* burden, either, though it would be a closer "call" for us in that case.

5. Issues Related to Research Misconduct and Conduct Which Falls Below Minimum Standards of Professional Integrity

After discussing the standard and burden of proof below, we proceed through each allegation considered by SCRM's Investigative Committee. We focus on those in which the Investigative Committee and SCRM found Research Misconduct, as these are the basis for the proposed dismissal whose appeal we are considering. In each allegation, we break the discussion into six components:

- Summary of the Allegation,
- Summary of Previous Findings and Arguments,
- Summary of Professor Churchill's Rebuttal,
- Comments by the Panel,

- Findings, and
- Conclusions

In the case of Allegation D, we follow the approach taken by the Investigative Committee, and consider five separate subquestions. In view of the sheer volume of evidence in this case, we cannot list all pieces of evidence that could conceivably apply, but we have tried to indicate the issues and items that we have found helpful in reaching our findings and conclusions.

5.1. Standard and Burden of Proof.

As given in the Laws of the Regents, Article 5, Part C, Section 5.C.1 and 2, and by Regent Policy 5-I, the University has the burden of showing by clear and convincing evidence that Professor Churchill engaged in “conduct which falls below minimum standards of professional integrity.”

5.2. Allegation A: Misrepresentation of General Allotment Act of 1887¹⁶⁰

5.2.1. Summary of the Allegation

This allegation says that Professor Churchill misrepresented the General Allotment Act of 1887 when he wrote that the Act imposed a federally created “eugenics code” on Indian tribes that mandated half-blood Indian blood quantum requirements for allotments. The complaint accuses Churchill of “formulating a hoax,” and indicates that the claims of a eugenics code are repeated in at least 11 separate works by Churchill. SCRM found more than 11 such references. The use of “eugenics code” and “blood quantum” appear in many of Churchill’s claims regarding the Allotment Act. SCRM found that the alleged misstated claims, “like other allegations of research misconduct, are not entirely consistent.”

Churchill also attributed eligibility criteria to the enactment and provisions of the General Allotment Act of 1887 rather than to its implementation during the “allotment period.” The complaint accuses Professor Churchill of using invented historical information related to an eligibility standard of one-half or more degree of Indian blood, and refers to Professor Churchill’s work as “false propaganda.”

5.2.2. Summary of Previous Findings and Arguments.

The Investigative Committee found by a preponderance of the evidence:

¹⁶⁰ See *Investigative Report*, pages 13-27. Some of our descriptive language here comes more or less directly from that report.

- Falsification: Professor Churchill cited the General Allotment Act and a book by McDonnell in support of his claims, but actually the cited sources contradict his claim.
- Fabrication: Professor Churchill presented details and embellishments to his arguments that had no basis in fact; and
- Evidentiary fabrication: Professor Churchill cited papers by Jaimes and by Robbins in support of his accounts, and in so doing he misrepresented the independence of those sources, since he admits that he actually wrote those papers himself “from the ground up.”

In arriving at these findings, the Investigative Committee makes these points;

- The allegation raised separate issues: (a) Is there any basis for questioning Professor Churchill’s research techniques? (b) Whether the erroneous claim resulted from research misconduct or some other forms of errors. (c) Did Professor Churchill employ rational techniques for finding the truth in these instances, and not merely whether he is correct or incorrect?
- The Investigative Committee concluded that Professor Churchill’s descriptions of the General Allotment Act of 1887 were slightly more accurate than the complaint suggests, but are literally incorrect. However, in the debate of origins of a blood quantum requirement in tribal membership rolls, Professor Churchill appears to have the stronger side.
- A computer search of the text of the General Allotment Act of 1887 found that the words “blood,” “quantum,” “half,” and “50 percent” are not found in the original text of the statute. Therefore, what Professor Churchill claimed is not literally true. As originally enacted, the General Allotment Act of 1887 merely applied to “Indian[s]” and contained no definition of “Indian.” Churchill conceded that the blood quantum or fifty-percent blood quantum requirement is not expressly contained in the text of the Act. His belief is that it somehow implied it given that the Act limited tribal eligibility for allotments to those of Indian blood. It was not literally the Act of 1887 that required Indian blood as a prerequisite for eligibility, but rather the requirement constituted the general assumptions among legislative and executive officials in the late 19th century regarding who was Indian. Later statutes did reference blood quantum.

- An aspect of the issue of blood quantum which Professor Churchill did not discuss is that 40 years before the enactment of the General Allotment Act, a case before the U.S. Supreme Court, *United States v Rogers*, had adopted a racial definition of Indian based literally on Indian ancestry for certain purposes. Therefore, Churchill is correct when he suggests that the requirement of Indian blood “originated in the prevailing federal racial criteria of the late 19th century.” He is incorrect in that he credits the General Allotment Act with the definition. It had been accomplished almost 40 years before.
- According to SCRM, the distinctions between Professor Churchill’s claims and the actual historic facts are:
 - The half-blood Indian distinction arose from executive declaration of policy, and not as Churchill claims, from the provisions of the General Allotment Act of 1887.
 - It was the Burke Act of 1906 which helped implement the allotment policy, not the General Allotment Act of 1887.
 - The half-blood distinction was in use for three years and first arose in 1917, not in 1887, as Professor Churchill has claimed at times.
 - The half-blood distinction was not a test of who constituted an Indian, as Professor Churchill claims, but a test of the competency of Indians to be freed from trust restrictions.
 - The half-blood test was a test for the removal of pre-existing trust restraints on allotments, not the test for entitlement to an allotment as Professor Churchill claims.
 - Although true that those under a half-blood ended up with fee patents, and those of one-half or more Indian blood not otherwise deemed competent retained trust allotted lands, these differences in land title did not result from the nature of the allotments the Indians originally received, as Professor Churchill claims when he treats it as an allotment eligibility criterion.¹⁶¹
- Professor Churchill’s suggests that late 19th century racism by federal officials in implementing the General Allotment Act of 1887, rather than traditional Indian cultural

¹⁶¹ *Investigative Report*, pages 21-22.

practices based on community citizenship, accounts for the predominance of current blood quantum requirements in tribal membership rules. Although the argument is grounded in historical fact, Churchill has erred on details of that part of history. The issue of racism dates back to the 1840s as the *United States v Rogers* shows. It was not imposed here for “the first time” as Professor Churchill claims. There never was a half-blood quantum requirement for eligibility for an allotment under the General Allotment Act.

- His label of “eugenics code” “falsely implies enforced legal racial separation such as prohibitions on miscegenation or residential segregation by race.”¹⁶² Other findings:
 - Most of the details and embellishments by Professor Churchill are inaccurate or literally incorrect as they apply to the General Allotment Act of 1887. Professor Churchill has gotten the general point correct, but almost all of the historical details wrong is not the “level of careful professional work expected of a scholar writing on important historical events in Indian studies.”
- SCRM believes that reaching incorrect scholarly conclusions does not constitute Research Misconduct unless some clear deviation from generally accepted scholarly practices produced such errors.
- In his work, “Perversions of Justice,” Professor Churchill’s source does not support his statements, nor did he follow the appropriate method of referencing that is expected in scholarly work. His referencing style is described as unconventional, which seems to create the appearance of independent support for his claims, making it more difficult to check his claims by failing to indicate the precise location of what he claims in his works.
- SCRM claims, by a preponderance of the evidence, that there was a deliberate research stratagem to create the appearance of independent verifiable support for claims that could not be supported through existing primary and secondary sources.
- Other apparently independent third-party sources cited in footnotes 63 and 64 are essays published in the same volume, *The State of Native America*, under the names Rebecca Robbins and M. Annette Jaimes, the editor of the volume. Both essays contain statements of the type that Professor Churchill claims. The previous claims may have not constituted Research Misconduct except that Professor Churchill said in his submission E

¹⁶² *Investigative Report*, page 22 (CU 003783)

that he had ghostwritten both the Robbins and Jaimes essays. (It should be noted that Professor Churchill had been accused of plagiarizing the Robbins' essay.) Professor Lavelle, in a 1999, article noted similarities in the writing style among several of the essays in the previously named volume. It appears that Professor Churchill may have written several of the essays in his name or others. That he personally authored the Robbins and Jaimes essays in their entirety constitutes a serious problem of Research Misconduct. Professor Churchill's independent third sources become one source, the General Allotment Act. He also misrepresented the "independent" nature of his sources to firm up the details of his conclusions.

- Professor Churchill has fabricated the underlying data used to support the details used to enhance his conclusions. In another example, he has misstated the contents of the McDonnell book, *The Dispossession of the American Indian, 1887-1934*. By a preponderance of evidence, SCRM found that he fabricated conclusions resulting in Research Misconduct. There is no evidence that he included citations from other authors who wrote on the same topic.
- Professor Churchill's published claims about the Act seem to have ceased after Professor Lavelle's critique was published in 1996, but he has continued to defend them.
- By a preponderance of evidence, SCRM found that Professor Churchill has engaged in Research Misconduct with respect to Allegation A regarding the General Allotment Act of 1887, and that such Research Misconduct was deliberate.
- Also by a preponderance of the evidence, SCRM found that Professor Churchill repeatedly and deliberately cited the General Allotment Act of 1887, and once cited the McDowell book for the details of historical and legal propositions that he advances. Since both sources contradict his claims, this is a form of falsification of evidence.
- Regarding the two essays by Jaimes and Robbins (which he cited as independent sources of support for the details of his claims regarding the General Allotment Act of 1887, he later stated that he actually authored the essays "from the ground up"). He did not disclose the information either at the time of publication or at the time he cited them in other later works. SCRM considered this a form of both evidentiary fabrication and failure to comply with established standards regarding author names on publications.

- Churchill deliberately embellished his broad, but otherwise accurate or reasonable historic claims regarding the General Allotment Act of 1887 with details for which he offered no reliable independent support of any kind in his publications. Nor did he offer it up in his defense during the initial investigation and for which the Committee was unable to find that any reasonable and reliable support exists. This is a form of fabrication of such details and embellishments.

5.2.3. Summary of Professor Churchill's Rebuttal

- Many scholars refer to the period of the history of Indian policy between 1887 to 1934 as the Allotment Period. The emphasis of this historical period was the forced assimilation of American Indians by destroying their cultures in various ways. This "period" stemmed from the General Allotment Act. It was also during this time that federally sponsored schools for Indians were established; the schools emphasized that the Indians neither be taught in their native tongue nor about Indian ways. They were immersed in western ways and in the English language.
- Churchill's claim made to SCRM, though not clearly stated in his publications, was that an eligibility requirement of Indian blood quantum could be implied in the Act and might be true.

5.2.4. Comments by Panel.

The panel accepts SCRM's conclusion of research misconduct with respect to Professor Churchill's characterization of the General Allotment Act. We note, though, that the mistakes here basically amount to saying that the Act did something as opposed to saying that the Act, *as implemented*, did something. While we do not make light of the distinction between these, we do not feel that failure to be precise about this distinction falls below minimum standards of professional integrity. Indeed, academic debate seems a more appropriate method for deciding the question than disciplinary proceedings.

With respect to SCRM's finding of evidentiary fabrication, citing as an independent authority a paper really written by himself "from the ground up," we do feel that this falls below minimum standards of professional integrity. Our reasons for this are given at length in our discussion of Allegation F, below, and will not be repeated here.

5.2.5. Findings

We find clear and convincing evidence of evidentiary fabrication with respect to ghostwriting.

5.2.6. Panel Conclusions

In the matters of falsification and fabrication in this allegation, as noted above, we do *not* conclude that this is conduct which falls below minimum standards of professional integrity.

In the matter of evidentiary fabrication in this allegation, involving ghostwriting and self-citation, we conclude that this is conduct which falls below minimum standards of professional integrity.

5.3. Allegation B: Misrepresentation of the Indian Arts and Crafts Act of 1990¹⁶³

5.3.1. Summary of the Allegation

This allegation stems from a complaint, similar to Allegation A, which addresses Professor Churchill's alleged misrepresentation of a U.S. government law, the Indian Arts and Crafts Act of 1990, in his book, *Indians are Us?*, specifically section titled, "Nobody's Pet Poodle,"

The allegation also says that Professor Churchill claims that the Act of 1990 specifies blood quantum requirements for a Native American for the purpose of sale of "Indian arts and crafts," a requirement Professor Churchill contended was made by the Federal Government. A review of the Indian Arts and Crafts Act by the members of SCRM found that there is no blood quantum requirement as specified by Professor Churchill in the Act itself.

5.3.2. Summary of Previous Findings and Arguments

The Investigative Committee found by a preponderance of the evidence:

- Falsification: Professor Churchill misrepresented the specification of a blood quantum requirement of one-quarter Indian blood in the Indian Arts and Crafts Act of 1990.

¹⁶³ See *Investigative Report*, pages 28-32. Some of the descriptive language here is taken more or less directly from the description there.

- Evidentiary fabrication: Professor Churchill compounded this misrepresentation by citing his own writings as if they were independent third-party sources written by others, in particular by citing a paper nominally by Jaimes, though Professor Churchill wrote it himself, much as he did for the corresponding issue addressed in Allegation A.
- Falsification: Professor Churchill distorted the scholarship of distinguished scholars to his own ends, in particular Russell Thornton and Patricia Limerick, and (to a partial extent) Gail K. Sheffield.

In its analysis, the Investigative Committee makes these points:

Supporting the claim of serious misrepresentation are the statements and the contradictions in the statements that Professor Churchill wrote about the Indian Arts and Crafts Act of 1990. He wrote that the Act

- “makes it a crime for any for anyone federally recognized as being a Native American to offer for display for sale or to sell any good, with or without a Government trademark....”
- “For galleries, museums, and other ‘private concerns’ which might elect to market or display as ‘Indian arts and crafts’ the work of any person not meeting the federal definition of Indianness, a fine of up to \$5 million is imposed.”
- In another passage he wrote that “[t]he government standard involved-usually called ‘blood quantum’ within the lexicon of ‘scientific racism-is that a person can be an ‘American Indian artist’ only if he or she is ‘certifiably’ of one quarter or more degree of Indian blood by birth. Alternatively, the artist may be enrolled as a member of one or another of the federally-sanctioned Indian ‘tribes’ currently existing within the U.S.”

These quotes are found in Professor Churchill’s *Indians are Us? Culture and Genocide in Native North America*. In one passage he wrote “the federal definition of Indianness” while in the next this became became “government standard,” which according to Professor Churchill, required a one-quarter blood quantum. His use of the word “alternatively” suggests he did recognize something different such as enrollment in a federally-sanctioned tribe. SCRM argues that his essay and/or footnotes do not cite any part of the Indian Arts and Crafts of 1990 that would provide evidence of his claims. The Act does not contain anything remotely suggesting a federal recognition/definition of “Indianness” and clearly not blood quantum of any kind, according to

SCRM. Only one citation by Professor Churchill can be found in the Act, that being the “alternative” of recognition of the artist by a federally-sanctioned tribe.

Over the years, the federal government and many Indian tribes have used blood quantum to determine Indian identity and tribal membership. There are tribes that make no such requirements; those tribes with requirements vary from one-eighth to one-quarter blood quantum amounts. Professor Churchill has claimed in his essay that all are fixed at one-quarter. When a tribe determines the Indian identity of an artist, it may be relying on some historically and varying measure of blood quantum, hence the emphasis today of the blood requirement may be a consequence of the Act. In submission D, Professor Churchill suggests that reference to the Act or to the implementation of the Act is “to say the same thing.” Additionally, it appears that, in a publication, Professor Churchill implicitly acknowledges the absence of a blood quantum requirement in the Act.¹⁶⁴

In “Nobody’s Pet Poodle,” he offers no citations of other scholars in support of his claims of the Act. He does eventually offer three citations, one of which is by M. Annette Jaimes, which raises a red flag since he, Professor Churchill, has admitted ghostwriting the essay by Jaimes. The other two references cited are works by Patricia Limerick and Robert Thornton. The allegation accuses Professor Churchill of distorting the scholarship of both authors to support his claims concerning Indian statistical extermination. The authors’ works do not support Professor Churchill’s claims as he has suggested.

SCRM concluded, by a preponderance of the evidence, that Professor Churchill seriously and deliberately misrepresented the specification of a blood quantum requirement of one-quarter Indian blood in the Indian Arts and Crafts Act of 1990. Additionally, he compounded the misrepresentation by citing his own writings as if they were independent third-party sources written by others. He distorted the scholarship of distinguished scholars to support his claim.

SCRM concluded that the misrepresentation is not a scholarly error but serious research misconduct and part of a general pattern of such misconduct in support of his political views.

SCRM points out that Professor Churchill appears to have modified his position in an article, “Nullification of North America” (2003) and in his submissions to the investigative team.

¹⁶⁴ *Investigative Report*, page 30

5.3.3. Summary of Professor Churchill's Rebuttal

Professor Churchill provided several witnesses who testified to parts of this allegation, generally along the same lines as his rebuttal in Allegation A.

5.3.4. Comments by Panel

Although there were concessions and modifications regarding the Act, the panel believes that many readers of the essay "Nobody's Pet Poodle" will conclude that a major act of the federal government requires that Indians demonstrate to federal authorities that they have one-quarter Indian blood before being certified as Indian artists. No such federal requirement exists. Professor Churchill knowingly evaded the truth in his essay. In a later essay, he modified his initial and incorrect statements, but does not offer an explicit retraction of them.

The panel accepts SCRM's conclusion of Research Misconduct with respect to Professor Churchill's characterization of the Indian Arts and crafts Act of 1990. We note, though, that as with Allegation A, the mistakes here basically amount to saying that the Act did something as opposed to saying that the Act, *as implemented*, did something. While we do not make light of the distinction between these, we do not feel that failure to be precise about this distinction falls below minimum standards of professional integrity. Indeed, academic debate seems a more appropriate method for deciding the question than disciplinary proceedings.

With respect to SCRM's finding of evidentiary fabrication, citing as an independent authority a paper really written by himself "from the ground up," we do feel that this falls below minimum standards of professional integrity. Our reasons for this are given in our discussion of Allegation F, below, and will not be repeated here.

5.3.5. Findings

We find clear and convincing evidence of evidentiary fabrication in this allegation.

5.3.6. Panel Conclusions

In the matters of falsification and fabrication in this allegation, as noted above, we do *not* conclude that this is conduct which falls below minimum standards of professional integrity.

In the matter of evidentiary fabrication in this allegation, involving ghostwriting and self-citation, we conclude that this is conduct which falls below minimum standards of professional integrity.

5.4. Allegation C: Captain John Smith and Smallpox in New England, 1614-1618.¹⁶⁵

5.4.1. Summary of the Allegation

Allegation C focuses on a statement made by Professor Churchill in an essay published in 2003: “An American Holocaust? The Structure of Denial.” The essay argues, among other things, that Europeans and Euroamericans intentionally introduced the smallpox virus to Native American tribes as part of a larger effort that Professor Churchill contends should be called “genocide.” After discussing the actions of British General Jeffery Amherst and others at Fort Pitt in the Ohio River Valley in 1763, Professor Churchill writes, “It’s important not to view what Amherst did as an isolated matter. It wasn’t. It’s simply the best documented.” Allegation C refers specifically to the next sentences:

There are several earlier cases, one involving Captain John Smith of Pocahontas fame. There's some pretty strong circumstantial evidence that Smith introduced smallpox among the Wampanoags as a means of clearing the way for the invaders. [140]¹⁶⁶

5.4.2. Summary of Previous Findings and Arguments

The Investigative Committee found, by a preponderance of the evidence:

- *Falsification*: Professor Churchill misrepresented his sources in two essays when describing Captain John Smith and smallpox, a form of falsification.
- *Fabrication*: Churchill fabricated his account, because no evidence—not even circumstantial evidence—supports his claim.

This allegation is broken down in to three separate questions:

- Is there any evidence (circumstantial or otherwise) that Smith introduced any disease among the Wampanoags that appeared in the immediate aftermath of his 1614 visit?
- Was smallpox the disease that caused the epidemic among the Wampanoags in 1616-1618?
- Did Smith introduce “a” or “the” disease intentionally (“as a means of clearing the way for the invaders”)?

¹⁶⁵ See *Investigative Report*, pages 33-38. Some of the descriptive language here is taken more or less directly from the description there.

¹⁶⁶ See *University’s Exhibits, Notebook 6*, Tab A, page 54, (CU 011552). [140] refers to Neal Salisbury, *Manitou and Providence: Europeans Indians and the Making of New England 1500-1643*, pages 96-101. Excerpts from the Salisbury reference are in *University’s Exhibits, Volume 6*, Tab C.

The Investigative Committee found that:

- “The cited source offers no support for any of the three claims outlined above. This is not a matter of incomplete footnoting or lack of footnoting but of misleading footnoting. It is simply false to assert that the pages cited from Salisbury’s work support the claims made in the relevant passages by Professor Churchill.”¹⁶⁷
- The possibility that Smith was responsible for the smallpox outbreak in 1616, when he left in 1614 and never returned, is unlikely, in their view.
- “The Committee’s reading of relevant literature indicates that there is no clear evidence about the exact nature of the epidemic and nothing points specifically to smallpox.”¹⁶⁸
- “The evidence that Smith wanted to use Indians as a labor force contradicts Professor Churchill’s contention that he wanted to see them wiped out.”¹⁶⁹

The committee found no scholars who claim that the epidemic of 1616-1618 was introduced by John Smith, and reached the findings listed above by a preponderance of the evidence.

5.4.3. Summary of Professor Churchill’s Rebuttal

In his rebuttal:

- Professor Churchill now claims that “[o]n my passing observation(s) that ‘circumstantial evidence’ might be seen as linking John Smith to an epidemic....”¹⁷⁰ This is a considerably weaker statement than what is found in the original report.
- He thus makes no assertion of fact but merely raises the suspicion that Smith might have introduced smallpox.¹⁷¹ In support of his circumstantial case, he points out that Smith returned to England and began soliciting his countrymen to immigrate to Plymouth where they would find vacant land. The land would not be vacant unless the Indians had died off.¹⁷²

¹⁶⁷ *Investigative Report*, page 34.

¹⁶⁸ *Investigative Report*, page 37.

¹⁶⁹ *Investigative Report*, page 37.

¹⁷⁰ *Churchill Exhibits, Volume 1*, first section, page 6 (Closing statement)

¹⁷¹ *University’s Exhibits, Notebook 1*, Tab G-XI, page 005655.

¹⁷² *University’s Exhibits, Notebook 6*, Tab E, page 007417.

- He also says that he erroneously copied in a reference to Salisbury, when he should have cited another source. However, he does not specify what that source was except to say that he should have cited Steele but does not give a reference to Steele.¹⁷³
- He now gives a number of references that apparently indicate that the disease was in fact smallpox and not the plague, or chicken pox or any other possible disease.¹⁷⁴
- He cites a source for his statement: “Experts agree that the virus can survive for years in textiles.”¹⁷⁵
- He says, “It would not have to be Smith however. I simply pointed to him as a likely candidate (in my mind, at least at the time I brought it up, the most likely). There are no shortage of other prospects, most conspicuously the earlier-mentioned Captain Dermer...”¹⁷⁶

5.4.4. Comments by the Panel

More information from Professor Churchill was admitted to the panel than was available to the SCRM committee. He also pointed out that he was not asserting as a fact that Smith did all of these things, only that there was circumstantial evidence that he did.

The panel accepts the finding of the Investigative Committee that there is a preponderance of evidence of fabrication and falsification. We note, though, that Churchill claims “circumstantial” evidence that John Smith started the small pox epidemic of 1616-1618. Given the somewhat ambiguous nature of what constitutes circumstantial evidence, as well as the ambiguities in historical record, and considering the new information admitted at the hearing, we do not find that the evidence for their conclusions rises to the “clear and convincing” level that we require.

5.4.5. Findings

We do *not* find clear and convincing evidence of fabrication or falsification in this allegation.

¹⁷³ *University's Exhibits, Notebook 1*, Tab G-XI, page 005655. The Steele reference may be Ian K. Steele, *Warpaths: Invasions of North America* (New York: Oxford University Press, 1994) *University's Exhibits, Notebook 6*, Tab E, page 007419.

¹⁷⁴ *University's Exhibits Notebook 6*, Tab E, page 007416 and *Professor Churchill Exhibits, Volume 1*, Tab A in “Full Notes from Closing Arguments” note 26.

¹⁷⁵ *University's Exhibits, Notebook 6*, Tab E, page 008523. Here an experiment is quoted which showed that it was active in cotton for 17 months.

¹⁷⁶ *University's Exhibits, Notebook 1*, Tab G-XI, page 005655.

5.4.6. Panel Conclusions

Since we did not find clear and convincing evidence of the behavior that is the subject of this allegation (fabrication or falsification), we do *not* find clear and convincing evidence that this conduct falls below minimum standards of professional integrity.

5.5. Allegation D: The Smallpox Pandemic at Fort Clark¹⁷⁷

5.5.1. Summary of the Allegation

This allegation concerns Professor Churchill's claims that among other things, the U.S. Army deliberately spread smallpox to Mandan Indians living near Fort Clark in what is now North Dakota in 1837, using infected blankets taken from a military infirmary in St. Louis.

5.5.2. Summary of Previous Findings and Arguments

The Investigative Committee found, by a preponderance of the evidence, that:

- Professor Churchill misrepresented some of the published sources he cites, which do not in fact support his accounts.
- Because neither his own statements nor our investigation produced evidence to support some of his more detailed claims, we conclude that Professor Churchill has created myths under the banner of academic scholarship. Those points are:
 - That infected blankets were taken from a military infirmary in St. Louis.
 - That an army doctor or post surgeon advised the Indians to scatter once smallpox broke out among them, thereby spreading the disease.
 - That the army had stored rather than administered a smallpox vaccine distributed for the purpose of inoculating Indians.
 - Professor Churchill provided insufficient evidence in his essays to support his assertions that as many as 100,000, 125,000, 250,000, or 400,000 Western American Indians died in the smallpox pandemic of 1837-1840 (different numbers appear in different essays). Nor did he provide further information when requested by the Committee.

¹⁷⁷ *Investigative Report*, pages 39-82. Much of the description of the findings here is taken more or less directly from these pages.

The Investigative Committee divided this allegation into 5 subquestions, considered individually here.

5.5.3. Subquestion 1. Is there any reasonable basis for Professor Churchill's claim that smallpox was spread intentionally by the U. S. Army to Mandan Indians at Fort Clark in 1837, using infected blankets?

5.5.3.1. Summary of Previous Findings and Arguments

The Investigative Committee concludes that "...there is some evidence in written accounts or Indian reactions in 1837 and in native oral traditions that would allow a reasonable scholar who relies heavily on such source to reach Professor Churchill's interpretation that smallpox was introduced deliberately....We therefore do not conclude that he fabricated his account."¹⁷⁸

The committee did find fault with other aspects of this material in that he had not originally claimed that he was drawing upon Indian oral traditions. He subsequently raised the possibility that it was the fur company that wanted to kill off the Indians and that James Beckwourth may have been the source of the smallpox,¹⁷⁹ thus tacitly admitting that his original statement was not necessarily the only possibility.¹⁸⁰

5.5.3.2. Summary of Professor Churchill's Rebuttal

The Investigative Committee did not find Research Misconduct with respect to this subquestion, so the rebuttal is unnecessary here.

5.5.3.3. Comments by Panel

In light of evidence provided by Professor Churchill during the Investigative Hearing, the panel agrees that there is oral and written history that would support the assertion that at various times and places, smallpox infected material was distributed to Indians. The other conclusions of the SCRM committee on this subquestion relate to poor scholarship but do not find fabrication, falsification or plagiarism.

¹⁷⁸ *Investigative Report*, page 67-68.

¹⁷⁹ *Investigative Report*, page 66.

¹⁸⁰ *University's Exhibits, Notebook 1*, Tab G-II, page 8, and *Investigative Report*, page 69.

5.5.3.4. Findings

We do not find clear and convincing evidence of falsification or fabrication with respect to this subquestion.

5.5.3.5. Panel Conclusions

Since we did not find clear and convincing evidence for the conduct alleged, we do not conclude that there was conduct which falls below minimum standards of professional integrity with regard to this subquestion.

5.5.4. Subquestion 2. Is there any reasonable basis for Professor Churchill's claim that those blankets had been taken from a smallpox infirmary in St. Louis?

5.5.4.1. Summary of Previous findings and Arguments

The Committee concluded

- “1. Professor Churchill provides no reference for this claim in his published essays.
2. Professor Churchill's own submission...did not find any sources that refer to blankets from a military infirmary in St. Louis.
3. Professor Churchill fabricated this aspect of his account.
4. Professor Churchill appeared to retract this claim, but in a latter submission he expressed his intent to re-publish with no substantive changes in the essay”¹⁸¹

5.5.4.2. Summary of Professor Churchill's rebuttal

Professor Churchill's main general response to this allegation is that in this situation, context is crucial. This is reiterated in various forms by several witnesses at the panel hearings,¹⁸² and is perhaps best captured by this quote:

The argument that methodological responsibility requires conclusive documentary evidence to establish intentionality in each and every instance where it is to be presumed to have played a role holds no water at all. If the historical profession actually adhered to such rarified standards, it would not even be able to demonstrate that Adolf Hitler played a role in exterminating the Jews and Gypsies [citations omitted]. Presumption in historical analysis is based, not on excruciatingly detailed evidence

¹⁸¹ These conclusions are at pages 69-70 of the *Investigative Report*.

¹⁸² See, e.g., Robert Williams's testimony: "...that's the whole point of the discipline of AIS, is that we don't trust anything that's out there. And so why – it was the message of the AHA that got us to where we're at now with the stereotypes and fundamental misunderstandings about Indian people. It's those damn methods that are the problem, thin ideas of objective neutral inquiry.” *Panel Testimony*, 1/11/2007, page 1353.

in every instance, but upon assessment of phenomena within the overall context in which they occurred.¹⁸³

He also suggests that there's no evidence that the infirmary *couldn't* have been there, and suggests that evidence may yet turn up.¹⁸⁴

5.5.4.3. Comments by Panel

The panel feels that the statement just quoted makes valid points, but in an extreme form. The passage at issue in this subquestion asserts directly that the Army ordered the blankets shipped from a military infirmary in St. Louis, and it seems clear that this is intended to provide specific and detailed evidence in support of malicious intent on their part. It is one thing to say that not everything can be demonstrated by detailed evidence, and, particularly in cases of asserting general motive, this has some force. It seems to us, though, that providing such specific details with no cited basis or explanation, not even in oral tradition,¹⁸⁵ goes beyond a reasonable allowance for the difficulty of providing specific evidence.

In fact, Professor Churchill stated that "...[t]he reality---that the infirmary was situated aboard the St. Peter's itself--is much worse,"¹⁸⁶ effectively acknowledging that his previous version required change. Given the evidence and this admission, the panel agrees with the SCRM committee that Professor Churchill fabricated this material.

5.5.4.4. Findings

We find clear and convincing evidence that Professor Churchill fabricated this material.

5.5.4.5. Panel Conclusions

As described in the comments above, this seems to us to go beyond reasonable allowances for ambiguity, and attributes bad conduct to the Army with no evidence in support of

¹⁸³ "Nits Make Lice," in Ward Churchill, *A Little Matter of Genocide* (1997), footnote on page 156. The relevant pages are in *University's Exhibits*, Notebook 7, Tab D.

¹⁸⁴ *Closing Arguments to P&T Appeal Panel, Churchill Exhibits Volume 1 (first section)*, page 18

¹⁸⁵ Professor Yellow Bird, for example, testified that the oral history we have says nothing about an infirmary in St. Louis. *Panel Testimony*, January 12, 2007, page 1457. According to the Investigative Committee, "Mark Timbrook has searched the St. Louis newspapers for 3 years on either side of 1837 looking for mentions of smallpox at the military base there ('Jefferson Barracks')," *Investigative Report*, page 69. The original testimony was to the Investigative Committee on February 18, 2006, and is found in *University's Exhibits*, Volume 2. Professor Churchill says in rejoinder that Mark Timbrook "considered this was the most likely source of the disease, still does, and is *still searching* for confirming documents." [emphasis in the original]. Ward Churchill, Closing Statement to the P&T Appeal Panel, *Churchill Exhibits, Volume 1, (first section)*, page 18 (including note 99).

¹⁸⁶ *University's Exhibits, Notebook 1*, Tab G, Section II, page 002096. Also cited in *Investigative Report*, page 69 (CU page 003830).

it. We conclude that this is conduct which falls below minimum standards of professional integrity.

5.5.5. Subquestion 3. Is there any reasonable basis for Professor Churchill's claim that Army doctors or the post surgeon advised the Indians to scatter after smallpox broke out among them?

5.5.5.1. Summary of Previous Findings and Arguments¹⁸⁷

In assessing this subquestion, the Investigative Committee mentions:

- Professor Churchill has listed works that appear by their titles to be legitimate sources but do not in fact support his statements. He has, therefore, falsified his sources.
- He provided an insufficient reference by citing a book without giving specific page numbers. This is a minor matter in itself unless it forms part of a pattern.
- We have found no evidence to support his claims that:
 - There was a military doctor/surgeon (or indeed anyone with medical training) at Fort Clark or Fort Union.
 - Someone advised the Indians to scatter.
- We therefore conclude that Professor Churchill has fabricated this element of his account.
- Professor Churchill's statements in his published essays become more extreme over time, moving further from the sources he cites, without supplying any further references.

5.5.5.2. Summary of Professor Churchill's Rebuttal

In rebuttal, Professor Churchill mentions:

- It was Chardon (a representative at Fort Clark) "rather than the post surgeon who sent those exposed to the pox to an as yet uninfected Hidatsa village".¹⁸⁸

¹⁸⁷ *Investigative Report*, pages 72-73. Some of the descriptive language here is taken more or less directly from that report.

¹⁸⁸ *University's Exhibits, Notebook 1*, Tab G, Exhibit II, page 9 (CU page 002097). He references Robertson, *Rotting Face*, pages 230-231 and pages 304-305 for this in note 75 on page 18 (CU page

- “I should have said ‘War Department’ rather than ‘Army’”.¹⁸⁹
- He used the military term “post surgeon” rather than the more conventional civilian “doctor” because he was basing his account in part on Connell who says that soldiers were stationed at Fort Union.¹⁹⁰

5.5.5.3. Comments by Panel

The panel is persuaded by the evidence that Professor Churchill fabricated part of his material. In mitigation Professor Churchill does bring out new material that tends to lessen some of the charges. However, these should have been part of the original writings. It does little good to the reading public to have these qualifying statements presented months or years after the fact.

5.5.5.4. Findings

We find clear and convincing evidence of fabrication in this subquestion.

5.5.5.5. Panel Conclusions

As with the previous subquestion, the use of such detail to support a position without appropriate evidence strikes us as serious, and we conclude that this is conduct which falls below minimum standards of professional integrity.

5.5.6. Subquestion 4. Is there any reasonable basis for Professor Churchill's claim that the Army had stored rather than administered a smallpox vaccine distributed for the purpose of inoculating Indians?

5.5.6.1. Summary of Previous Findings and Arguments

The Investigative Committee concluded:

1. Our investigation found no evidence that supports Professor Churchill's claims that:
 - a) At Fort Union in 1837, the army had stored rather than administered vaccine that was intended for Indians.

number 2106). We have not found those particular pages of Robertson in the materials admitted to the hearing, though we do have other pages.

¹⁸⁹ *University's Exhibits, Notebook 1, Tab G-II, page 7 (CU page 002095).*

¹⁹⁰ *University's Exhibits, Notebook 1, Tab G-II, page 7 (CU page 002095) and note 59 of page 17 (CU page 2105)*

- b) At Fort Clark, a whole supply of vaccine, designated for inoculating Indians, had been sitting in the surgeon's store-room for several months when the disease broke out in 1837.

2. We therefore conclude that Professor Churchill has fabricated those statements. In so doing he has undermined the importance of the broader point that the U.S. Secretary of War deliberately and reprehensibly excluded the Mandan and all other tribes of the upper Missouri River from the Indian vaccination program of 1832.¹⁹¹

5.5.6.2. Comments by the Panel

To the Investigative Committee, the evidence seems clear that Professor Churchill did fabricate the statements.

We are concerned, though, that SCRM finds that the statement of Robertson “that in the summer of 1832 an Army major and some troops escorted a physician and some cowpox vaccine as far as Fort Union” was incorrect, since the order was not to take vaccine above the Lower Missouri.¹⁹² This was to punish the Mandan who lived further up the Missouri River. It seems to us this goes beyond the Investigative Committee’s charge. Professor Churchill is bound by the “control and authority of the rational methods by which truth is established”¹⁹³ and while this or any other choice of reference may doubtless be criticized, we are not convinced by the evidence that reliance on Robertson here is so inappropriate as to be irrational. We think this strays into evaluating Professor Churchill’s references, rather than seeing if he had a rational basis for his conclusions. We think it would be more appropriate to accept Professor Churchill’s reliance on Robertson here.

5.5.6.3. Findings

We do not disagree with the SCRM finding of fabrication at the preponderance of the evidence level, but given our concerns mentioned above, we do not find clear and convincing evidence of the fabrication.

5.5.6.4. Panel Conclusions

We do not find clear and convincing evidence of the conduct alleged, and therefore do not find conduct which falls below minimum standards of professional integrity in this subquestion.

¹⁹¹ *Investigative Report*, page 78.

¹⁹² See *Investigative Report*, pages 77-78

¹⁹³ *Regents Laws, 5.D.1 (B)*. See *University’s Exhibits, Notebook 1*, Tab A.

5.5.7. Sub-Question 5. Did Professor Churchill misuse the sources he cites when describing how many Indians died in the pandemic that followed the Fort Clark situation?

5.5.7.1. Summary of Previous Findings and Arguments

The Investigative Committee concluded:

In his earlier essays, Professor Churchill cites Thornton's work in what is at least a misleading manner, in "An American Holocaust" he actively misrepresents Thornton, a form of falsification.

His reference to Connell in "Nits Make Lice" is technically accurate. Connell is not, however, an authority on the topic and does not indicate the source of his own figure.

Professor Churchill offers no source for his "Smithsonian" numbers.

Because he provides no references for his numbers larger than 100,000 other than the incorrect citation of Thornton, Professor Churchill has proposed figures that are not supported by the evidence he cites.

When asked by this Committee to explain how he reached his larger figures, Professor Churchill did not furnish information. Nor did he indicate that he will clarify his approach when his "An American Holocaust?" essay is re-published. We therefore find that he has seriously deviated from accepted research practices.

In submission B Prof. Churchill provided a fuller account of how he arrived at his numbers moving from specific estimates provided by Thornton to the way he produced figures for all the other Western tribes. SCRM acknowledges that it is possible that the figures of 100,000-125,000 are warranted.¹⁹⁴

5.5.7.2. Summary of Professor Churchill's Rebuttal.

In addition to the responses mentioned above, Professor Churchill also points out that Diamond gives numbers of 100,000 to 300,000 dead.¹⁹⁵

5.5.7.3. Discussion by the Panel:

The panel notes the Investigative Committee's decision to discount the value of Connell as a reference. As with Subquestion 4, the panel is concerned that this goes beyond the Committee's charge:

- (2) Note 138 cites Connell, *Son of the Morning Star*, p. 16. Connell says: "How many Indians from the Missouri tribes died of smallpox within the next few years can hardly be estimated. Possibly one hundred thousand." Because Connell, who is not an expert on smallpox, provides no notes to his book at all, one cannot determine where his number came from.¹⁹⁶

¹⁹⁴ *Investigative Report*, page 80.

¹⁹⁵ *University's Exhibits, Notebook 1*, Tab G, Section XI, page 10 (CU page 005643).

¹⁹⁶ *Investigative Report*, page 79.

This doesn't alter the conclusion in this situation, though, for SCRM already acknowledges that estimates as high as 100,000 could be justified. It is the higher estimates that they feel are unjustified. Diamond's numbers, if accepted, would extend the range to perhaps 300,000, but still not to the 400,000 that Professor Churchill claims on one occasion.

We feel this is more than just sloppy research. There is no evidence provided of a "Smithsonian" estimate. Professor Churchill published numbers vary widely without particular explanation. Thornton states that Churchill misrepresented him.¹⁹⁷ His refusal to change the figures when he republishes goes against typical research practices.

5.5.7.4. Findings

We find clear and convincing evidence of falsification in regard to this subquestion.

5.5.7.5. Panel Conclusion

As indicated in our comments above, we feel this violation is serious and conclude that this is conduct which falls below minimum standards of professional integrity.

5.6. Allegation E: Dam the Dams¹⁹⁸

5.6.1. Summary of the Allegation

It is claimed in this allegation that Professor Churchill plagiarized original work by a group called the Dam the Dams Campaign, a Canadian environmental organization. The plagiarized source (according to the allegation) is a pamphlet called "The Water Plot" published in 1972 by the Dam the Dams Campaign.

5.6.2. Summary of Previous Findings and Arguments

The Investigative Committee found (and SCRM accepted) this finding.¹⁹⁹

by a preponderance of the evidence that Professor Churchill's misappropriation of the contents of the Dam the Dams pamphlet was academic misconduct in the form of plagiarism. The steps that must have been taken to appropriate language from the pamphlet and incorporate it in the later works lead us to find that the misconduct was not accidental, but deliberate.²⁰⁰

The evidence presented included:

¹⁹⁷ See, for example, *Panel Testimony*, 1/20/2007, by Professor Getches, page 1867.

¹⁹⁸ *Investigative Report*, pages 83-87. Some of the descriptions here are taken more or less directly from that report.

¹⁹⁹ *SCRM Report*, pages 3, 7.

²⁰⁰ *Investigative Report*, page 87.

- It seems undisputed that some of the ideas and words in the 1989 Churchill publication are, indeed, similar or identical to those in the original pamphlet.²⁰¹
- In the first article, the authors are listed as “Dam the Dams Campaign and the Institute for Natural Progress”²⁰² and 23 members of the original Dam the Dams team creating the pamphlet are listed by name in the acknowledgments, which include the statement that “Rewriting/updating for this volume was accomplished by Ward Churchill of the Institute for Natural Progress.” The article thus offers at least some credit and the Investigative Committee more or less concedes this:

“Good practice in a co-authorship situation calls for the obtaining of written permission, and an explicit effort to negotiate the language of the entire work with the co-author, rather than the informal and questionably authorized transaction Professor Churchill describes. Possibly a failure in this regard might not be regarded as the grave offense of plagiarism. Plagiarism is defined in the “Statement on Standards of Professional Conduct” of the American Historical Association as “the expropriation of another author’s work, and the presentation of it as one’s own.”²⁰³ But even if the first use of the language from the pamphlet did not constitute plagiarism, the later uses did.²⁰⁴

- The next article (in *Z Magazine*) uses much the same material, but the author is Ward Churchill as sole author, and the only reference to Dam the Dams is a note at the end of the article, giving a contact address for those wishing further information.²⁰⁵
- The next two articles make use of the same material, but add more of Professor Churchill’s own thoughts and expansions. These articles refer to the *Z* magazine article, but make no specific reference to the Dam the Dams organization. They also contain various references to the first article of the sequence, but, as the Investigative Report²⁰⁶ points out, not in a manner that credits Dam the Dams with specific language or ideas that were taken from the original Dam the Dams pamphlet.

²⁰¹ See *Investigative Report*, pages 84-86.

²⁰² Professor Churchill describes The Institute for Natural Progress as “a research entity I was then attempting to establish in collaboration with other activists.” See Ward Churchill, Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1*, first section, page 26.

²⁰³ Here the report cites “<http://www.historians.org/pubs/Free/ProfessionalStandards.cfm>, accessed 01/30/2006.”

²⁰⁴ *Investigative Report*, page 86.

²⁰⁵ *University’s Exhibits, Volume 8*, Tab C, page 92. It is also discussed in the Laura Frank article referred to later. See *University’s Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, at Tab 3, beginning at page 4 of the print out of the article.

²⁰⁶ See *Investigative Report*, pages 86-87.

A *Rocky Mountain News* article by Laura Frank²⁰⁷ (one of the sources for this allegation):

- Quotes a former member of Dam the Dams to the effect that Dam the Dams had long ceased to exist by 1989;
- Quotes unnamed “former members” of Dam the Dams to the effect that Dam the Dams “didn’t give him permission to take credit for its work”;
- Says that no one contacted for the article remembered the person named as the Dam the Dams contact; and
- Says that no one contacted for the article who worked on the pamphlet recalled any request from Churchill for permission to use their work.

In response to Professor Churchill’s statement that he was angry with the editor of *Z Magazine*, the *Investigative Report* suggests that such anger apparently didn’t stop Churchill from citing that *Z* article in subsequent publications while not crediting Dam the Dams.²⁰⁸

- “...the occasional citation of The Water Plot coauthored piece in some other place is not a substitute or is not a purging of the plagiary of precise language.”²⁰⁹
- Professor Wesson testified that even if you had someone’s permission to use material more than once, that wouldn’t excuse not giving proper attribution in the later uses. It might mean that it was no longer a copyright violation, but it would still be plagiarism, even if the original author agreed to let you do it without attribution.²¹⁰
- “The original pamphlet was a paper publication, not available electronically; the near-verbatim repetition of its language must have resulted from something more intentional than an electronic cut-and-paste of the sort that might possibly lead to inadvertent plagiarism.”²¹¹

5.6.3. Summary of Professor Churchill’s Rebuttal

Professor Churchill explains:

²⁰⁷ See *University’s Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, at Tab 3, pages 2, 4, and 5 of the print out of the article.

²⁰⁸ See *Investigative Report*, pages 86-87. Professor Wesson testifies to much the same thing at *Panel Testimony*, 1/8/2007, page 265.

²⁰⁹ *Panel Testimony*, 1/8/2007, Professor Wesson’s testimony, pages 302-303.

²¹⁰ *Panel Testimony*, 1/8/2007, Professor Wesson’s testimony, pages 311-313.

²¹¹ *Investigative Report*, page 87

- The editors of Z Magazine took his original manuscript, which he says he submitted as a joint author with the Dam the Dams Campaign, but before publishing the article, and without his permission, removed Dam the Dams as an author, published the article with Ward Churchill as the sole author, and reduced the reference to Dam the Dams to the “further information” address at the end of the article.²¹² The Investigative Committee feels it “is the responsibility of an author working with a publisher to ensure that proper credit is given to coauthors and sources,”²¹³ and that Professor Churchill is thus fundamentally responsible.
- Professor Churchill testified further:

There is contact made with a representative of Dam the Dams, the individual with whom I interacted back whenever the interaction occurred, would be 1987 or '88, when an individual in Toronto, as is reported in the predicating news story here, by the name of John Hummel has received permission to try to revive the group which was essentially dormant, get it active again.

And while I was in Toronto on other business regarding an economic summit, he approached me and asked if I would assist the organization in getting its information back out before the public, giving me an – well, ultimately, shipping me an entire rather large box of documents. That’s the origin of this.

The original iteration of it, which I was asked by the organization – or who I had every reason to believe was a representative of the organization – to prepare, not only lists of the group as coauthor, but lists all 27 individuals²¹⁴ initially involved in preparing the famous 1972 pamphlet by name and provides contact information on the organization. That contact information is included in the famous 1991 thing.

But here’s the point with Dam the Dams, John Hummel is quoted as saying he’s quite skeptical of the idea that what’s at issue here is plagiarism, and irrespective of that, he’s quite glad that I managed to keep the issues that they were concerned with before the public, ‘cause they were unable to do so themselves.

As you can imagine – this is originally a little group, an environmental activist in Thunder Bay, Ontario, who asked me to do a service, which I did, in collaboration with them....²¹⁵

- The Laura Frank article²¹⁶ quotes Hummel in a manner generally consistent with Professor Churchill’s testimony, specifically including statements from Hummel to the effect that:

²¹² *Investigative Report*, pages 86-87. See also a published interview with Joshua Frank (*University’s Exhibits, Volume 7, Tab S, page 16.*

²¹³ *Investigative Report*, page 86.

²¹⁴ The actual number appears to be 23 individuals.

²¹⁵ *Panel Testimony*, 1/21/2007, pages 2239-2240.

²¹⁶ *University’s Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, at Tab 3.

- Churchill probably shouldn't have listed the address he did for Dam the Dams, as he (Hummel) wasn't really Dam the Dams, and that the address was really Hummel's parents' address, not that of Dam the Dams.
- He (Hummel) received permission to "try to form a new Dam the Dams group from someone he thought was a founding member of the original group."²¹⁷
- He (Hummel) is still glad that Churchill wrote about the water-diversion plan, even if the threat described is no longer imminent, and that that issue is far more important than the plagiarism issue. "It's not viable, but common sense says that if the U. S. is running out of water, something is going to happen...He did with it what he did with it. If it's plagiarism, it's plagiarism. I don't like plagiarism ...(but) it might have been an oversight."²¹⁸
- According to Professor Wesson, the Investigative Committee accepted Professor Churchill's account of receiving materials from Mr. Hummel.²¹⁹
- According to Professor Churchill and confirmed by Professor Wesson,²²⁰ the Investigative team never contacted the editor of Z Magazine to check on Churchill's statement that Dam the Dams had been omitted from the Water Plot article by the magazine (not by Professor Churchill), even though the name of the editor had been provided to the Investigative Committee.
- Professor Wesson testified:

Yeah, I just wanted to say, I'm afraid you may be getting the impression from the way I'm talking about this that we thought this was, like, some terrible act of misconduct. And if this had been the only allegation against Professor Churchill, although I think we were compelled by the definition of plagiarism to find there was plagiarism here, by itself, this allegation is not that serious.

I think we said, toward the end of the [Investigative Committee] report, that in some cases, the allegations, if they had been isolated, if they had not been accompanied by others, we would not have viewed them as serious. And this, in my opinion, is one of those....²²¹

²¹⁷ See *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, at Tab 3, page 5 of the print out of the article.

²¹⁸ See *University's Exhibits, Notebook 11 (Exhibits Admitted During Hearing)*, at Tab 3, page 5 of the print out of the article.

²¹⁹ *Panel Testimony*, 1/8/2007, testimony of Professor Wesson, pages 261-264.

²²⁰ Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1* (first section), page 27, note 156. Professor Wesson's testimony is at *Panel Testimony*, January 8, 2007, pages 264-265.

²²¹ *Panel Testimony*, 1/8/2007, pages 101-102. See also similar testimony on pages 237-238.

- Professor Wesson also testified that the Investigative Committee could not locate John Hummel and did not interview him.²²² She didn't remember the Committee's making any efforts to find him other than asking Professor Churchill if he could help locate Hummel, and that the Committee's attorney might have tried a Google search to find him.²²³ In response to a reminder from Professor Churchill that Laura Frank (of the *Rocky Mountain News*) had been able to find Hummel, she acknowledged that that might be true.²²⁴
- The Z magazine article appeared in 1991. Presumably it was written before then, which may be before Churchill had a full faculty appointment.²²⁵
- References to the Z Magazine article might have been more convenient for the reader, because it was more readily available to the reader (at least than the original pamphlet). In Professor Churchill's words, "I'm crediting the group and the people who did it in a way that the people who receive the citation can actually access the material in some reasonable way."²²⁶

5.6.4. Comments by the Panel

The frequent repetition of text and ideas makes it unlikely that the plagiarism would be inadvertent. Professor Churchill's claim that the editor of the Z article left his Dam the Dams coauthor off seems inconsistent with the fact that he continues to cite that piece. The language and ideas are either substantially the same or identical to that of the original pamphlet. Even excluding the 1991 Z magazine article from consideration, the finding by SCRM of the highly similar first four pages in the 1989 and 2002 articles constitute plagiarism. The connection to the original authors (Dam the Dams) gets more and more indirect over time. As Professor Wesson put it, "...the occasional citation of The Water Plot coauthored piece in some other place is not a substitute or is not a purging of the plagiary of precise language."²²⁷

On the other side:

²²² *Panel Testimony*, 1/8/2007, testimony of Professor Wesson, page 235.

²²³ *Panel Testimony*, 1/8/2007, testimony of Professor Wesson, pages 260-262.

²²⁴ *Panel Testimony*, 1/8/2007, testimony of Professor Wesson, pages 261-262.

²²⁵ See testimony by Professor Wesson, *Panel Testimony*, January 8, 2007, page 263.

²²⁶ *Panel Testimony*, 1/21/2007, Churchill testimony, page 2287.

²²⁷ *Panel Testimony*, 1/8/2007, Professor Wesson's testimony, pages 302-303.

- Professor Churchill's maintains that his 1989 and 2002 pieces were sufficiently different to warrant sole authorship.²²⁸
- While there's an identified source, there scarcely seems to be anyone complaining, and the source is a no-longer-extant group whose only recorded reaction at this point is some combination of thanks and derision.
- Churchill's statement that Dam the Dams was omitted in the Z article by the publisher is uncontradicted, and the committee didn't inquire further. One could conclude that his version is plausible, and if so, that the break in the reference chain at Z magazine was not his fault. References to the Z article would be less of a problem under that interpretation.
- Is there any real evidence of intent to deceive anyone? Churchill says not, given all the other citations to Dam the Dams (not related to specific language)—how could he be trying to deceive anyone or deny them credit?²²⁹
- The *Investigative Report* did not find that Professor Churchill had plagiarized the 1989 essay "The Water Plot: Hydrological Rape in Northern Canada." It did, however, find a lack of proper attribution in the 1991, "The Water Plot" *Z Magazine*, as well as in the 1993, "The Water Plot: Hydrological Rape in Northern Canada," and in the 2002 manuscript, "The Water Plot: Hydrological Rape in Northern Canada." Professor Churchill defends the *Z Magazine* manuscript by asserting that the editor took his coauthors off the essay without his consent. However, the Investigative Committee also points out that Professor Churchill was editor of the volumes that contained the 1993 and 2002 manuscripts and therefore could not invoke such a defense in those instances.²³⁰

All in all, we conclude that this satisfies the definition of plagiarism.

5.6.5. Findings

The panel finds clear and convincing evidence of plagiarism with respect to this allegation.

²²⁸ *A Report of the SCRM – Inquiry Subcommittee*, August 19, 2005, page16, in *University's Exhibits, Notebook 1*, Tab F.

²²⁹ See, e.g., his testimony in *Panel Testimony*, 1/21/2007, pages 2285-2288.

²³⁰ *Investigative Report*, page 86.

5.6.6. Panel Conclusions

We conclude that this conduct falls below minimum standards of professional integrity. While it is perhaps true that the damage to the original authors in this case is minimal, it seems clear that it satisfies the definition of plagiarism, and the conduct was repeated.

5.7. Allegation F: Plagiarism of Rebecca Robbins²³¹

5.7.1. Summary of the Allegation

In this allegation it is claimed that Professor Churchill plagiarized original work authored by Professor Rebecca Robbins. The plagiarized source, according to the allegation, is Rebecca Robbins, “Self-Determination and Subordination: The Past, Present, and Future of American Indian Governance,” in *The State of Native America: Genocide, Colonization, and Resistance*, edited by M. Annette Jaimes and published in 1992.

The plagiarizing works are claimed to be the following essays by Professor Churchill: “Perversions of Justice: Examining the Doctrine of U.S. Rights to Occupancy in North America” (printed in the 1993 but not the 2002 edition of his *Struggle for the Land: Indigenous Resistance to Genocide, Ecocide, and Expropriation in Contemporary North America*, published in 1993), and in his 2003 collection, *Perversions of Justice: Indigenous People and Angloamerican Law*; “Genocide in Arizona: The ‘Navajo-Hopi Land Dispute’ in Perspective” (in both editions of *Struggle for the Land*); and “American Indian Self-Governance: Fact, Fantasy, and Prospects for the Future” (in the 1993 edition of *Struggle for the Land*, but not the 2002 edition).²³²

5.7.2. Summary of Previous Findings and Arguments

SCRM found that Professor Churchill’s behavior was *not* plagiarism, but rather accepted his testimony that he had ghostwritten the manuscript. They made five particular points:

- “What these comparisons do suggest, rather than plagiarism, is common authorship.”²³³ “[T]hat is precisely what Professor Churchill has claimed: he says that he is the original author of the work published as that of Rebecca Robbins.”²³⁴

²³¹ *Investigative Report*, pages 88-90. Some of the descriptions here are taken more or less directly from that report.

²³² We have omitted the footnotes from this section of the *Investigative Report* here.

²³³ *Investigative Report*, page 88.

²³⁴ *Investigative Report*, page 88.

- “Professor Churchill said in his Submission E [Exhibit G: X. Ghostwriting²³⁵] that from time to time he publishes written work under ‘pseudonyms,’ which may sometimes be the names of actual living people. In this case, he claimed that he actually wrote (‘from the ground up,’ as he put it)” five of the essays attributed to others in *The State of North America...* (i.e., Robbins, Jaimes, Jaimes and Halsey, Stiffarm and Lane, and Noriega.)²³⁶ “He represents that he engaged in this practice intentionally and repeatedly.”²³⁷
- “We find that the publication of one’s own scholarly work (as distinct from creative work or fiction) under another name constitutes such a failure”²³⁸ to comply with established standards regarding author names on publications.
- “The failure is aggravated when the name used belongs to another actual person, especially working in the same field, whether or not the other person consents to this use of his or her name.”²³⁹
- “The failure is particularly egregious when a misattribution of one’s own writings to another actual person is then exploited by the author by using the misattributed work as apparently independent authority for claims that he makes in his own scholarship...”²⁴⁰ “This sequence of events permits the author to create the false appearance that his claims are supported by other scholars when, in fact, he is the only source for such claims.”²⁴¹

5.7.3. Summary of Professor Churchill’s Rebuttal

Professor Churchill offered in part the following:

- “[I]t must be stated, first of all, that ghostwriting violates no articulated standard whatsoever.”²⁴² The American Historical Association does not single ghostwriting out as an breach of ethical practice.²⁴³

²³⁵ *University’s Exhibits, Volume 1, Tab G, Section X.*

²³⁶ *Investigative Report, page 89.*

²³⁷ *Investigative Report, page 90.*

²³⁸ *Investigative Report, page 89.*

²³⁹ *Investigative Report, page 89.*

²⁴⁰ *Investigative Report, page 89.*

²⁴¹ *Investigative Report, page 90.*

²⁴² Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1 (first section)*, page 29. [citations deleted here].

²⁴³ Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1 (first section)*, page 2.

- Professor Churchill claims that there are respectable precedents for such practices.²⁴⁴
- “There are, moreover, numerous examples of it [ghostwriting] being common knowledge that some or many publications listed in professors’ professional vitas have been ghostwritten, without said professor incurring the least consequence” (e.g., C.L.R. James, Laurence Tribe).²⁴⁵
- According to Professor Churchill, the practice occurs in the discipline of his training, namely, Communications.²⁴⁶
- “Every speech and communication department should have a course on ghostwriting.”²⁴⁷
- The practice is important in “the communally-interactive and sharing context of the indigenous societies—markedly different from that of the generally individuated and competitive ‘mainstream’”²⁴⁸
- “[T]he third parties do in fact exist, and each of them voluntarily affixed their names to what I’d written.”²⁴⁹
- “[I]n the matters at issue, I’ve been the ghostwriter. The onus of misconduct, if any, thus resides with those who’ve put *their* names to *my* work.”²⁵⁰
- “The only complaint—if it may be called that—about the entire process I’ve encountered since it came to light last spring was registered by Larry Estrada, professor of Ethnic Studies at Western Washington University and current chair of the National Ethnic Studies Association, who was quoted as saying that he should know who actually wrote the material he relies upon in his scholarship. My response is that Professor Estrada’s response is itself suspect, at least in scholarly terms. After all, one does not refrain from quoting or citing anonymously-written material, or material written under an obvious

²⁴⁴ See, for example, his remarks in *University’s Exhibits, Notebook 1*, Tab G-X, pages 2-4.

²⁴⁵ *University’s Exhibits, Volume 1*, Tab G, Section X, pages 3 and see 10ff.

²⁴⁶ Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1 (first section)*, page 29

²⁴⁷ Lois Einhorn, “Ghostwriting: Two Famous Ghosts Speak on Its Nature and Its Ethical Implications,” in *Ethical Dimensions of Political Communication*, Robert E. Denton, Jr. (editor), p. 133, quoting Craig E. Smith. Available in *Churchill Exhibits, Volume 1*, Tab 21)

²⁴⁸ Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1 (first section)*, page 29

²⁴⁹ Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1 (first section)*, page 30.

²⁵⁰ *University’s Exhibits, Volume 1*, Tab G, Section X, page 5. [citations deleted here]

pseudonym, simply because one cannot ‘properly identify’ the author. One quotes or cites such material on the basis of its substance.”²⁵¹

- “...I don’t think there is anything unethical about ghostwriting.”²⁵² “Personally I don’t care who did the writing because I’m interested in an historical situation, a problem that has to be solved, available solutions, why the speaker accepts a particular solution, how the speaker sells the idea to the audience that needs to be influenced, and to what extent it seems he succeeds. When the primary concern is the influence of a speech given by a speaker who represents an institution, it doesn’t really matter who did the writing.”²⁵³
- “Plagiarism is conventionally seen as a serious breach of scholarly ethics, being a theft of credit for ideas in a competitive intellectual marketplace. This emphasis overlooks the vast amount of institutionalized plagiarism, including ghostwriting and attribution of authorship to bureaucratic elites. There is a case for reducing the stigma for competitive plagiarism while exposing and challenging the institutionalized varieties.”²⁵⁴

5.7.4. Comments by the Panel

While ghostwriting may be seen to be acceptable practices in politics (e.g., speechwriting) and in some law schools,²⁵⁵ there is no credible evidence provided that it is an accepted practice for academic research in Communications Departments and/or Ethnic Studies programs. In this way, ghostwriting is a failure to comply with established standards regarding author names on publications.²⁵⁶

The misattribution of authorship to another actual person working in the same field misrepresents the credentials of the person being attributed to the employing university. Given that publication records are generally significant in making hiring and tenure decisions, such behavior permits the fraudulent depiction of scholarly accomplishment.

²⁵¹ Closing Argument to the P&T Appeal Panel, *Churchill Exhibits, Volume 1 (first section)*, page 5. See also *University’s Exhibits, Volume 1*, Tab G, Section X, page 5

²⁵² Lois Einhorn, “Ghostwriting: Two Famous Ghosts Speak on Its Nature and Its Ethical Implications,” in *Ethical Dimensions of Political Communication*, Robert E. Denton, Jr. (editor), p. 127, quoting Robert T. Oliver. Available in *Churchill Exhibits, Volume 1*, Tab 21).

²⁵³ Lois Einhorn, “Ghostwriting: Two Famous Ghosts Speak on Its Nature and Its Ethical Implications,” in *Ethical Dimensions of Political Communication*, Robert E. Denton, Jr. (editor), pages 130-131, quoting Robert T. Oliver. Available in *Churchill Exhibits, Volume 1*, Tab 21).

²⁵⁴ Brian Martin, “Plagiarism: A Misplaced Emphasis,” *Journal of Information Ethics*, available in *Churchill Exhibits, Volume 1*, Tab 23).

²⁵⁵ See articles provided in *Churchill Exhibits, Volume 1*, Tabs 24 & 25.

²⁵⁶ Copies of the rules prohibiting such failure are at *University’s Exhibits, Notebook 1*, Tabs D and E.

Because Professor Churchill engaged in this practice “intentionally and repeatedly” (as he indicates, five times), the conclusion that he intentionally violated a standard of practice regarding author names on publications expected in the academic setting seems hard to avoid.

Because Professor Churchill then cites the ghostwritten work in his writings, Professor Churchill gives the impression that “his claims are supported by other scholars when, in fact, he is the only source for such claims.”²⁵⁷ This contributes to his failure to comply with established standards regarding author names on publications.

We also note some evidence to the contrary:

- The University “Research Misconduct Rules” and the American Historical Association’s guidelines are silent on this issue.
- Some suggest that the repeated acts of ghostwriting and citing of the essays are not the issues. These practices happen more than scholars want to admit. The important thing is the message that the speaker seeks to advance, not its author. See our discussion in the section on appropriate standards for ghostwriting, where samples of such views are reported. Advocates of these views might not find the evidence in favor of a finding of misconduct as persuasive as we do.

We feel that several examples and ideas raised are not relevant to our finding here:

- Examples drawn from politics seem irrelevant because the ghostwriter is paid specifically to perform this job for a speaker who neither has the time nor inclination to write his or her own speech.
- The issues of whether or not the author indicated on the essay consented to the practice is irrelevant because it is the practice of presenting information erroneously that is at stake, and not the consent of the stated author (although there may be other issues of importance in the academic setting such as imbalanced power relations, etc.). We have no evidence of *lack* of consent here (which would be a different issue).
- The claim that there is really only one complaint is irrelevant. Only one complaint is required to begin a research misconduct complaint.

²⁵⁷ *Investigative Report*, page 90

- The general discussion of the ethicality of ghostwriting is an important topic, but not the central concern here. Our concern is a practice that may (or may not) violate an already stated University policy.

5.7.5. Findings

We find clear and convincing evidence of a failure to comply with established standards on the use of author names on publications.

5.7.6. Panel Conclusions

The panel acknowledges the difficulty in finding specific guidelines related to ghostwriting, and acknowledges that other communities might be more oriented to collective approaches and less concerned about taking individual credit for ideas. But then, why put *anyone's* name (your own or someone else's) on an article at all? In the light of what we take to be accepted standards by large components of the academic world, this conduct seems inherently deceptive. Accordingly, we conclude that such conduct falls below minimum standards of professional integrity.

5.8. Allegation G: Plagiarism of Professor Fay G. Cohen²⁵⁸

5.8.1. Summary of the Allegation

In this allegation, it is claimed that Professor Churchill plagiarized original work by Professor Fay G. Cohen of Dalhousie University. The plagiarized source, according to the allegation, is Fay G. Cohen, "Implementing Indian Treaty Fishing Rights: Conflict and Cooperation," in *Critical Issues in Native North America*, edited by Ward Churchill, Vol. II (1991). The plagiarizing work is claimed to be an essay called "In Usual and Accustomed Places," credited to the Institute of Natural Progress, in *The State of Native America: Genocide, Colonization, and Resistance*, edited by M. Annette Jaimes and published in 1992.

5.8.2. Summary of Previous Findings and Arguments

SCRM concluded:

"There can be little doubt that large portions of the 1992 essay credited to the Institute for Natural Progress plagiarize the earlier essay by Professor Fay G. Cohen published in the 1991 volume edited by Professor Churchill."²⁵⁹

²⁵⁸ *Investigative Report*, pages 91-93. Some of the descriptive material here is taken more or less directly from those pages.

²⁵⁹ *Investigative Report*, page 91.

“...[W]e are convinced and find by a preponderance of evidence that Professor Churchill was at least an accomplice, if not a principal, in an act of academic misconduct.”²⁶⁰

SCRM provided the following reasons for its conclusion:

- “This is the well-documented conclusion reached by an investigation conducted in 1997 by the University Secretary and Legal Counsel at Dalhousie University where Professor Cohen is a faculty member.”²⁶¹
- This conclusion “is not disputed by Professor Churchill...”²⁶²
- SCRM finds independent evidence for plagiarism.²⁶³ Although there are three citations to the Cohen essay in the essay, “[t]he systematic employment elsewhere in the INP essay, without attribution, of phrases, sequences, and sentences from the Cohen essay satisfies the definition of plagiarism.”²⁶⁴
- In his 1991 CU Faculty Report for Professional Activity (an administrative documentation of a faculty member’s yearly activities), Professor Churchill lists “In Usual and Accustomed Places” as a work written (not edited) by him. Further, “...Professor Churchill signed the document and is responsible for the contents.”²⁶⁵
- Professor Cohen “gives an account of her transactions with Professor Churchill that is entirely incompatible with his claimed lack of participation in the misappropriation of her work.”²⁶⁶
 - She claims Professor Churchill “was her contact for both” volumes in which her article was scheduled to appear.
 - “Disputes with Professor Churchill over the editing and production of her essay led Professor Cohen to withdraw it from inclusion in the second volume.”²⁶⁷
 - “Shortly thereafter...it appeared in that volume, somewhat altered and credited to the Institute for Natural Progress.”²⁶⁸

²⁶⁰ *Investigative Report*, page 93.

²⁶¹ *Investigative Report*, page 91. The report on the investigation at Dalhousie University is in *University’s Exhibits, Notebook 10*, Tab C.

²⁶² *Investigative Report*, page 91.

²⁶³ *Investigative Report*, page 91.

²⁶⁴ *Investigative Report*, page 91.

²⁶⁵ *Investigative Report*, page 92.

²⁶⁶ *Investigative Report*, page 93.

²⁶⁷ *Investigative Report*, page 93.

²⁶⁸ *Investigative Report*, page 93.

5.8.3. Summary of Professor Churchill's Rebuttal

Professor Churchill responds that

- “[W]hatever plagiarism might be found in the INP essay, he was not responsible for it.”²⁶⁹
- “He [Professor Churchill] stated that he did not rewrite the article and that he did not recognize the paper as the Cohen work....”²⁷⁰
- “The authorship of the paper that appeared in as “In Usual and Accustomed Places” is not attributed to Prof. Churchill but to ‘The Institute of Natural Progress,’ Professor Ward Churchill and Winona LaDuke founders.”²⁷¹

Professor Churchill also points out that

- “[H]e did not personally prepare his Faculty Report for Professional Activity that year [1991], and that some assistant, or possibly Professor Jaimes, prepared it and erroneously included the essay.”²⁷²
- Given that Professor Jaimes “through her attorney” declined to speak with SCRM, there is no refutation of Professor Churchill’s claim that others were responsible for the alleged plagiarism²⁷³.
- “The problem of basing something so serious as a finding of plagiarism on things of this sort became manifestly obvious when, during his appearance at the appeals hearing on Jan. 9, it was pointed out to Prof. Clinton that in the ‘Biographical Summary’ he’d appended to the [SCRM] Report he had misrepresented himself as ‘coauthor’ of Felix Cohen’s Handbook on Federal Indian Law (from which Cohen’s name was mysteriously deleted). His explanation, it was recalled, was that ‘someone else’ had prepared the Summary. He did, however, acknowledge that he’d signed off on the document. It follows, applying the ‘same logic’ the Prof. Wesson applied to me—with Prof. Clinton’s endorsement—that he is ipso facto guilty of a form of fraud. A far more reasonable

²⁶⁹ *Investigative Report*, page 92.

²⁷⁰ *A Report of the SCRM-Inquiry Subcommittee*, dated August 19, 2005, in *University’s Exhibits, Notebook I*, Tab F, page 9).

²⁷¹ *A Report of the SCRM-Inquiry Subcommittee*, dated August 19, 2005, in *University’s Exhibits, Notebook I*, Tab F, page 10).

²⁷² *Investigative Report*, page 92.

²⁷³ *Investigative Report*, page 92.

conclusion would be that there is no clear and convincing evidence that I plagiarized Prof. Cohen”²⁷⁴).

5.8.4. Comments by the Panel

In reviewing SCRM’s findings and arguments, we find several points in support of a finding of plagiarism:

- The University Secretary and Legal Counsel at Dalhousie University has provided a “well-documented conclusion”²⁷⁵ that Professor Churchill plagiarized Professor Cohen.
- The plagiarism charge is not disputed by Professor Churchill.
- Professor Churchill signed his 1991 Faculty Report claiming that the essay was his.²⁷⁶

Reasons against such a finding include:

- There’s testimony that Professor Churchill was not responsible for preparing the essays for publication in the book. Therefore, he cannot be held responsible for the plagiarized piece.
- There is no corroborating evidence from Professor Jaimes to substantiate or challenge Professor Churchill’s claim that he did not prepare the final book.
- Professor Churchill claims that he did not prepare his 1991 Faculty Report.

Reasons that are irrelevant to our finding include:

- The situation involving Professor Clinton is not analogous. Indicating something false in a biographical summary might be considered falsification, but not plagiarism. Plagiarism involves using the same words as another without giving the other credit. The finding in this allegation concerns plagiarism.

5.8.5. Findings

We find that the article is clearly plagiarized. The question remains whether Professor Churchill was responsible for the plagiarism. We acknowledge his claim that he played only a minor role in publishing the article the second time, but there is evidence that he knew about

²⁷⁴ Closing Argument to the P&T Appeals Panel, *Churchill Exhibits, Volume 1* (first section), page 28. The dialog with Professor Clinton that Professor Churchill refers to is in *Panel Testimony*, 1/29/2007, pages 689-692.

²⁷⁵ See the report on the investigation at Dalhousie University in *University’s Exhibits, Notebook 10*, Tab C.

²⁷⁶ *University’s Exhibits, Notebook 10*, Tab F.

Professor Cohen's withdrawal of the article, he claimed authorship on his annual report, and the "About the Authors" section of the book indicates his involvement with the article to a rather larger extent than he suggests. We agree with SCRM that he was at least an accomplice in this plagiarism, and we so find by clear and convincing evidence.

5.8.6. Panel Conclusions

We conclude that this was conduct which falls below minimum standards of professional integrity. The plagiarism is clear, and we are satisfied that Professor Churchill was involved in it.

6. Conclusions and Recommendations

Article 5, Part C, Section 5.C.1 (Dismissal) provides that "[a] faculty member may be dismissed when, in the judgment of the Board of Regents and subject to the Board of Regents constitutional and statutory authority, the good of the university requires such action. The grounds for dismissal shall be conduct which falls below minimum standards of professional integrity." In the first subsection, we consider the questions:

- Has the University engaged in Selective Enforcement?
- Did the SCRM process violate Professor Churchill's right to Due Process?
- Has the University shown by clear and convincing evidence that Professor Churchill engaged in "conduct which falls below minimum standards of professional integrity?"

In the second subsection we address the broader question of recommendations

- Is dismissal an appropriate sanction? That is, does "the good of the university require such action?"
- Other recommendations

6.1. Summary of Conclusions

6.1.1. Has the University engaged in Selective Enforcement?

As discussed above, we find that Professor Churchill did *not* show by a preponderance of the evidence that the University engaged in Selective Enforcement of its rules concerning Research Misconduct. While we did find a preponderance of the evidence showing one element of Selective Enforcement ("but for" causation), we found that Professor Churchill had not met his burden of proof in showing the second required element (motivation).

6.1.2. Did the SCRM process provide Professor Churchill with Due Process?

We find that Professor Churchill did *not* show by a preponderance of the evidence that investigation of allegations of Research Misconduct denied him his right to Due Process. While specific mistakes were made, as described more fully above, we find that Professor Churchill has not met his burden of proof in showing that the process was so fundamentally flawed as to deprive him of his constitutional right to Due Process, noting in particular that he has now had subsequent opportunity to provide additional information and clarification to this panel.

6.1.3. Has the University shown by clear and convincing evidence that Professor Churchill engaged in “conduct which falls below minimum standards of professional integrity?”

We find above that the University showed by clear and convincing evidence that Professor Churchill engaged in “conduct which falls below minimum standards of professional integrity” in several specific instances and *only* in these instances:

- In Allegation A, by ghostwriting an article published under someone else’s name and citing it as though it were an independent third-party corroboration of his statements.
- In Allegation B, by ghostwriting an article published under someone else’s name and citing it as though it were an independent third-party corroboration of his statements.
- In Allegation D, Subquestion 2, by fabricating details about a smallpox infirmary in St. Louis for which no evidence was provided.
- In Allegation D, Subquestion 3, by fabricating part of his material on Indians being told to scatter in response to the outbreak of smallpox.
- In Allegation D, Subquestion 5, by falsifying a work of Thornton in support of an estimate of the number of Indians who died as a result of the smallpox pandemic of 1837.
- In Allegation E, by plagiarizing a pamphlet originally produced by the Dam the Dams organization.
- In Allegation F, by ghostwriting an article published under someone else’s name and citing it as though it were an independent third-party corroboration of his statements.
- In Allegation G, by plagiarizing a work by Professor Fay G. Cohen.

The Laws of the Regents provide that a faculty member who engages in such conduct may be dismissed.

6.2. Recommendations

6.2.1. Is dismissal an appropriate sanction? Does the good of the University require it?

We find above that the University showed by clear and convincing evidence that Professor Churchill engaged in “conduct which falls below minimum standards of professional integrity” in several specific instances, though in fewer such instances than those in which Research Misconduct was previously found. The Laws of the Regents provide that a faculty member who engages in such conduct may be dismissed, if the good of the university requires it.

Accordingly, the panel has considered various arguments for and against dismissal.

6.2.1.1. Arguments Favoring Dismissal

- Professor Churchill has repeatedly plagiarized, as well as, fabricated and falsified information to support his views on American Indian history. Plagiarism is a serious offense as it constitutes the theft of others’ ideas and work. Fabrication and falsification of information are simply wrong, and antithetical to the Academy’s attempt to gain a veridical understanding of the world. Although fabrication and falsification of information in such areas as medical research would likely have far more dire (direct) consequences than the same behaviors in Ethnic Studies, when it comes to standards of conduct the University must treat faculty equally in different disciplines. Therefore, the significance of Professor Churchill’s Research Misconduct cannot be minimized based on such reasoning as nobody died, or millions of dollars in grants were not lost. Finally, the repeated nature of his behavior renders it highly improbable that it was accidental or inadvertent.
- The nature of the offenses here involving plagiarism, fabrication, and falsification goes to the heart of the academic enterprise and undermines public faith in the University of Colorado and in universities more generally.
- Both the Investigative Committee of the Standing Committee on Research Misconduct and the Privilege and Tenure Panel Regarding Dismissal for Cause found that Professor Churchill had committed multiple acts of plagiarism, fabrication, and falsification.

Furthermore, the Privilege and Tenure Panel found by a “clear and convincing” standard that multiple instances of Professor Churchill’s behavior fell “. . .below minimum standards of professional integrity.” In the event of conduct which falls below minimum standards of professional integrity, Article 5, Part C, Section 5.C.1 of the Laws of the Regents permits dismissal when the Board of Regents judge dismissal to be for “. . .the good of the university. . . .”

- Such dismissal is for the good of the University as it communicates in the strongest terms possible to faculty, staff, and students, as well as external constituents that CU will not tolerate unethical conduct.
- The apparent fact that Professor Churchill is either unwilling or unable to acknowledge his errors renders it likely that his Research Misconduct will continue.
- This kind of behavior would almost certainly lead to some sort of sanction against a *student* who was found guilty of these offenses. Within the University of Colorado, the exact processes for evaluating academic dishonesty are delegated by the Regents to individual schools and colleges, so it is difficult to say exactly how a student found guilty of these offenses would be punished – that would depend on various factors and influences – but we should clearly hold our faculty to standards at least as high as the standards to which we hold our students and punish transgressions at least as severely.
- If the protections afforded faculty by “academic freedom” are left limitless and without definition, and thereby used to effectively permit the Research Misconduct documented in these investigations and hearing, the concept of academic freedom is in danger of being abandoned by society and effectively removed from those academicians who would use academic freedom to pursue the improvement of the human condition. Therefore, dismissal of Professor Churchill clearly communicates that “academic freedom” does not include the right to plagiarize, fabricate, and falsify. However, the panel is in unanimous agreement that Professor Churchill’s now-well-known 9-11 essay is constitutionally protected free speech.
- Ignorance of Regental Policy and Standards regarding plagiarism and other evidence of Research Misconduct cannot and should not be considered valid excuses.
- The issues here include allegations that Professor Churchill plagiarized, fabricated, and falsified facts related to Indian (Native American) history. This area of study is still in its

infancy as compared to numerous disciplines and programs. The Academy is finally beginning to recognize Ethnic Studies and has started to legitimize and give credence to research in this area. For many scholars in Ethnic Studies, publishing meant work appearing in what would be considered non-mainstream journals; today, evaluation of that type of scholarly work is beginning to be considered as valid research. Some scholars in Ethnic Studies may focus on rewriting existing historical ethnological data in search for “truth,” but this does not support nor does it grant anyone the right to plagiarize, falsify, or fabricate evidence.

6.2.1.2. Arguments Against Dismissal

- *Proportionality.* Dismissal is the ultimate penalty in the direct power of the University to administer. The Laws of the Regents specify that a faculty member *may* be dismissed for conduct which falls below minimum standards of professional behavior, but they wisely do not *require* it. It should obviously be reserved for the most serious cases, particularly when considering the dismissal of a tenured faculty member. The misconduct in this case is serious and requires some sort of sanctions, but it does not, for example, sink to the level of fabricating laboratory data in an effort to obtain government money, ignoring human subjects research guidelines and endangering the lives or health of subjects, or situations where the misconduct effectively and clearly sets back progress or research in an important field. That is, the case shows misbehavior, but not the worst possible misbehavior.
- *The Nature of American Indian Studies.* This case has included substantial testimony about the nature of this field and allied fields. The field has been characterized by its newness as a discipline, by the lack of formally established standards, its concern with advocacy for groups who have been historically marginalized or excluded, and the need to confront and to challenge orthodox methods and conclusions that (in the views of at least some) have contributed to misrepresentation and exclusion of their cultures and history. Challenging existing approaches, putting uncomfortable things on the table for discussion – these are legitimate core activities for some in this field, and they view any attempt to force their challenge into the standards of the existing academy as harmful to their mission. The University need not, of course, accept conduct that is inherently dishonest or deceitful. It is important to the continued vibrancy of the University, though, that the debate on these challenges continue and *continue within the University.*

Dismissal in this case will be seen by some in this community as an overly harsh reaction to the mistakes and failings of the research at issue in this case.

- Previous committees examining this case were *not* unanimous in recommending dismissal.
- Other scholars found guilty of this kind of misbehavior (and perhaps worse) have not always been punished as severely as the proposed dismissal. Several examples were provided in testimony.
- *The chilling effect of dismissal.* Dismissal in this case will be widely interpreted (inside the University as well as outside) as indicating that challenges to existing methods, attitudes, and values may be met in the University of Colorado by disciplinary proceedings rather than left to the admittedly chaotic, turbulent, sometimes inefficient processes of academic debate. Academic debate is *not* streamlined or efficient, but it is better suited than discipline to sorting out many, probably most, of these conflicting issues. By invoking the most extreme possible sanction, the University will be effectively (though perhaps unintentionally) telling a number of important constituencies to pull their punches, rather than debate the issues.
- *Potential perceived abuse of the University's disciplinary proceedings.* Evidence admitted in this case suggests strong differences of opinion among academicians involved in Indian Studies. Some of the charges against Professor Churchill may have come from people in factions opposed to his views. The University has a legitimate need to maintain its standards visibly, and impose sanctions for inadmissible behavior, subject to due process requirements, but it must also be aware of the danger that lurks in the perception of inadvertently allowing its own disciplinary proceedings to be used as a way of “settling old scores” or of deciding issues better left to the marketplace of ideas. Invoking dismissal will fuel this fire, not quench it. As former CU Professor Evelyn Hu-DeHart remarked in evaluating a 1994 allegation concerning Professor Churchill:

As is often the nature of such intense political conflicts, personalities and personal issues are inevitably drawn in. However, I do not believe that the University has any business, nor any need, to become a party to this internecine political war in the Indian world. Yet, it seems to me that is precisely what Prof. Churchill's political opponents wish to happen.²⁷⁷

²⁷⁷ Hu-DeHart letter of October 10, 1994, in *Churchill Exhibits, Volume 2*, Tab 24, page 4.

We should still beware of getting into such situations, and keep this in mind as we choose our sanctions in this case.

6.2.2. Specific Recommendations on Sanctions

The panel is unanimous in the finding that Professor Churchill has demonstrated conduct which falls below minimum standards of professional integrity, and that this conduct requires severe sanctions. The panel is, however, split on recommended specific sanctions:

- Two panel members found the arguments in favor of dismissal stronger than those opposing dismissal. These two members recommend that dismissal is the appropriate sanction.
- Three panel members found the arguments against dismissal to be more persuasive than the arguments for dismissal. These three panel members recommend that Professor Churchill be suspended without pay for one year, and that that his rank be reduced to Associate Professor. This will recognize:

(a) That Professor Churchill's misconduct is viewed as serious, though not the worst possible;

(b) The University has a legitimate concern that the kinds of behavior at issue here not be repeated by a faculty member at the University, and some sort of monitoring or oversight is appropriate, as would be provided by regular Post-Tenure Reviews; and

(c) The good of the University requires sensitivity to external constituencies, concerns, and changes in *all* parts of society, as well as firmness in enforcing its standards. This recommendation is offered in the spirit of weighing the complex, and at times competing, interests involved in this case.

6.2.3. Recommendations on Standards

Some substantial part of the disagreement in this case has concerned the issues of the appropriate standards to select in evaluating Professor Churchill's behavior in the light of his membership in the Ethnic Studies Department. The panel feels that (at least in retrospect) much of this disagreement could have been better managed, had the appropriate standards been previously articulated. Accordingly, the panel recommends:

- That the administration and faculty of the University review the recommendations regarding the enforcement of standards already proposed by the UCB Standing

Committee on Research Misconduct in its report on this case dated June 13, 2006, and devise appropriate methods of implementing these ideas; and

- In particular, that as part of regular review of Primary Unit criteria and processes for Hiring, Retention, Tenure, and Promotion, each Primary Unit specify the particular external set of standards to which it holds itself accountable, and if no such external set of standards exists, that it develop its own for inclusion in its own criteria and processes.

6.2.4. Recommendation to the President and Board of Regents

We urge the President and the Board of Regents, regardless of their decision in this case, to reaffirm publicly that academic freedom at the University of Colorado remains a guiding principle.