

August 15, 2014

Dr. Phyllis M. Wise  
Chancellor  
University of Illinois at Urbana-Champaign  
Swanlund Administration Building  
601 John Street  
Champaign, IL 61820

Dear Dr. Wise:

As scholars of free speech and constitutional law, we write to express alarm at your decision to revoke a tenured offer of appointment to Professor Steven Salaita to join the American Indian Studies program at the University of Illinois at Urbana-Champaign on account of his statements on social media criticizing Israel's conduct of military operations in Gaza.

In our view, the decision to withdraw an appointment to a prospective faculty member because of his statements on a matter of public concern raises serious concerns under established principles of academic freedom. Those principles are enshrined in Illinois law, in the U.S. Constitution, and in the written principles of the American Association of University Professors. Ironically, less than a year ago, you reaffirmed the university's commitment to academic freedom as a "core principle" in touting "the critical importance of the ability of faculty to pursue learning, discovery and engagement without regard to political considerations."<sup>1</sup>

American universities have been the home of vigorous political debate and disagreement for many decades on issues such as racial justice, the Vietnam War, pornography, nuclear power and nuclear weapons, South African apartheid, U.S. foreign policy and intervention in Central America, Iraq, and Afghanistan, rights of religious minorities, the rights of lesbians and gay men to serve openly in the U.S. military, and the relations between Israel and Palestine. In connection with these and other issues faculty, students and staff have engaged a range of tactics and strategies to express their political views including demonstrations and sit-ins, taking over university buildings, calling for divestment or boycott, and condemning public policies and laws. More recently, with the rise of social media, faculty and student expression on matters of public concern have taken place on Twitter, Facebook, and other internet fora. As a national community of engaged scholars we treasure the rich climate in which we teach, learn and exchange ideas – often disagreeing with one another vehemently both inside and outside the walls of the university.

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<sup>1</sup> *Statement from Chancellor Phyllis Wise regarding the proposed boycott by U.S. universities of Israeli academic institutions*, December 27, 2013, available at: <http://illinois.edu/lb/article/1303/80478>.

Retaliation by public universities against educators who participate in debate of matters of public concern has long been condemned by the U.S. Supreme Court as an affront to the free speech rights of academics, and even more, as an affront to the very essence of democratic self-rule in a free society. In fact, a great many of the Supreme Court's free speech cases have involved threats to the free speech rights of educators.<sup>2</sup> These cases establish a fundamental and unwavering principle: "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government."<sup>3</sup> The Court has frequently reaffirmed that speech on public issues occupies the "highest rung of the hierarchy of First Amendment values," and is entitled to special protection.<sup>4</sup>

In few other precincts of society are First Amendment values more important than in the academy. As the Court has noted: "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."<sup>5</sup> Without question, the withdrawal of a promised offer of employment to Professor Salaita on account of his opinions on the Middle East patently violates this well-established Constitutional principle, imposing a particular orthodoxy with respect to a complex matter of public concern and punishing a prospective faculty member who refuses to comply with that orthodoxy.

Beyond general professional principle, the First Amendment limits the ability of public employers to make hiring decisions based on hostility to a particular viewpoint. As the Supreme Court explained in the 1990 case of *Rutan v. Republican Party of Illinois*,<sup>6</sup> "conditioning hiring decisions on political belief and association plainly constitutes an unconstitutional condition, unless the government has a vital interest in doing so." A university may not choose to deny a job to a professor based on political disagreements, as the Supreme Court ruled in the 1972 case of *Perry v. Sindermann*.<sup>7</sup>

What is more, the constitutional problem underlying the withdrawal of an offer of employment to Professor Salaita on account of his opinions on the Middle East affects not only him individually, but all current and prospective faculty at the University of Illinois insofar as it will have the predictable and inevitable effect of chilling speech – both inside and outside the classroom – by other academics. The University of Illinois at Urbana-Champaign's website currently lists 27 open academic searches.<sup>8</sup> It is reasonable to conclude that any person considering applying for any of those positions would be very concerned about any opinions they might have expressed, either in their scholarship or in their private capacity, on the conflict in the Middle East or on other controversial questions. The University has sent a clear message to all prospective job

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<sup>2</sup> See e.g.: *Adler v. Board of Education*, 342 U.S. 485 (1952); *Cramp v. Board of Public Instruction*, 368 U.S. 278 (1961); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977).

<sup>3</sup> *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964).

<sup>4</sup> *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982).

<sup>5</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 684 (1967).

<sup>6</sup> 497 U.S. 62 (1990), <http://supreme.justia.com/cases/federal/us/497/62/case.html>.

<sup>7</sup> 408 U.S. 593 (1972), <http://supreme.justia.com/cases/federal/us/408/593/case.html>.

<sup>8</sup> <https://jobs.illinois.edu/faculty-positions>.

candidates that their suitability for employment at the University of Illinois may turn on the views they have voiced on this or some other complex matter of public concern.

Tragically, the University of Illinois's decision to rescind a job offer to Professor Salaita on account of his views on the Middle East evokes similarly unconstitutional litmus tests applied to educators in Illinois in the past when public officials sought to impose upon the academy a particular orthodoxy on a matter of public concern. As a website set up by the University of Illinois at Urbana-Champaign's Student Life and Cultural Archival Program Illinois well documents,<sup>9</sup> Illinois has unfortunately distinguished itself in its efforts over the years to purge from its teaching ranks faculty who held views that were deemed un-American or otherwise controversial. In 1947 Illinois State Senator Paul Broyles issued a call for a commission to investigate communism in Illinois. According to Broyles, "The increasing menace of communism is now widely recognized and we must take steps to keep un-Americanism under control." The legislature created the Seditious Activities Investigation Commission, or Broyles Commission, and in 1949 it requested a series of measures to rid Illinois of communists, including requiring "non-Communist oaths" from public employees, including professors at the University of Illinois, making the support of communism a felony, and prohibiting communists from holding office or teaching in public schools. Students and faculty at the University of Illinois were actively engaged in resisting this anti-communist wave, arguing that these laws violated, among other things, the right to academic freedom.<sup>10</sup>

University of Illinois archives also document a similarly troubling threat to academic freedom in the case of Professor Leo F. Koch: In 1960, Professor Koch, a professor in the biology department at the University of Illinois, entered into a campus debate on human sexuality by writing a letter which was published in the Daily Illini. In it, Koch defended premarital sex and trial marriages among mature adults.<sup>11</sup> The resulting storm over the letter led to Koch's suspension and eventual firing by university President David Dodds Henry, who called the letter "offensive and repugnant." Despite protests from groups arguing for academic freedom, the board of trustees upheld Koch's dismissal and the Illinois Supreme Court refused to intervene.<sup>12</sup> The University was censured by the American Association of University Professors for the ouster.<sup>13</sup> The controversy surrounding Professor Koch's termination figured prominently in both local and national media.<sup>14</sup>

Your university's website summarizes the history of campus activism quite well:

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<sup>9</sup> *Conflict over Academic Freedom and Free Speech at U of I: Overview*, <http://archives.library.illinois.edu/slc/researchguides/coldwar/freespeech/>

<sup>10</sup> See *The Broyles' Bills*, <http://archives.library.illinois.edu/slc/researchguides/coldwar/freespeech/broyles.php>.

<sup>11</sup> <http://archives.library.illinois.edu/slc/researchguides/coldwar/freespeech/koch.php>.

<sup>12</sup> *Top Court Voids Race On Ballots*, The Pittsburgh Press, January 13, 1964.

<sup>13</sup> *Universities: Marxmanship at Illinois*, Time Magazine, March 27, 1964, p. 74.

<sup>14</sup> See e.g. *Chicago Tribune*, "Affirm U. of I. Dismissal: Trustees Act on Academic Freedom Plea," Sept. 22, 1960, p. N1; J.R. Goddard, *Dr. Koch Seeks Reappointment: Sex on Campus? 'You Can't Shrug Off Biological Needs'*, The Village Voice, November 17, 1960, available at:

<http://news.google.com/newspapers?id=L2oQAAAAIBAJ&sjid=3osDAAAAIBAJ&pg=6469,308955&dq=leo-koch&hl=en>.

Academic and social freedoms in Illinois educational institutions had been curtailed in the Cold War era by initiatives such as the Clabaugh Act and Broyles Bills. Students began to challenge these directives through organizations like the Student Committee on Political Expression and the DuBois Club as well as setting up a “Free Speech Area” near the Illini Union. However, their activities were frequently met with charges of subversion and Communism, and violence erupted over the University’s decision to bar Chicago 7 lawyer William Kunstler from speaking on campus.<sup>15</sup>

The illegality of threats to the academic freedom of faculty because of their controversial speech have been well established by the U.S Supreme Court. For instance, a 1949 amendment to New York’s Education Law, known as “the Feinberg Law,” disqualified from employment in the educational system any person who advocated the overthrow of government by force, violence, or any unlawful means, or published material advocating such overthrow or organized or joined any society or group of persons advocating such doctrine. The law was largely aimed at removing members of the Communist party from the profession of teaching, and required prospective teachers to sign loyalty oaths and disavow membership in the Communist party. Several prospective teachers who refused to sign the Feinberg Law oaths were denied teaching posts under the law and they challenged the law claiming that their First Amendment Rights had been abridged. The Supreme Court agreed and held that the Feinberg Law was unconstitutional insofar as it abridged the First Amendment rights of educators. The Court observed the following about the Feinberg Law, in terms that are of equal relevance in condemning the actions taken in Professor Salaita’s case:

The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.<sup>16</sup>

The principles and cases protecting a broad right of free expression for educators apply outside the bounds of either conventional scholarship or the four walls of a classroom. Consider the American Association of University Professors (AAUP) 1940 Statement of Principles of Academic Freedom and Tenure,<sup>17</sup> which sets out the general understanding of academic freedom that the Supreme Court has applied and to which American universities like the University of Illinois adhere. It proclaims that when professors “speak or write as citizens, they should be free from institutional censorship or

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<sup>15</sup> *The Fight for Freedom of Speech and Expression in the 1960s*,  
<http://archives.library.illinois.edu/slc/researchguides/coldwar/freespeech/freespeech.php>.

<sup>16</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 684 (1967), quoting *Sweezy v. State of New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>17</sup> <http://www.aaup.org/report/1940-statement-principles-academic-freedom-and-tenure>.

discipline.” And for good reason. As the Illinois AAUP recently noted in connection with the Salaita controversy, “the virtual classroom today has no limits.”<sup>18</sup> Universities benefit from their faculty playing the role of public intellectuals, which now frequently means using social media like Twitter.

The withdrawal of the offer of employment to Professor Salaita threatens to punish a colleague who has participated in a rich, and at times heated, climate of debate on the issue of justice in the Middle East, and it will surely chill debate by other scholars in the future. For this reason we take particular offense at the notion that the University of Illinois at Urbana-Champaign would succumb to pressure by those who disagreed with Professor Salaita’s viewpoint on current Israeli policy and withdrawing an offer of employment on the University of Illinois faculty, as we would take offense at any university’s bowing to external pressure regarding a professor’s outspoken views on other issues.

We recognize that universities may consider a wider range of factors in deciding whether to hire a potential faculty member than in deciding whether to dismiss a current faculty member. However, that principle is irrelevant here. Even as a technical legal matter, Professor Salaita was already a de facto member of the University of Illinois faculty under the principle of promissory estoppel as articulated by the Illinois Supreme Court.<sup>19</sup> Moreover, the timing and manner of Professor Salaita’s dismissal strongly indicate the sort of viewpoint discrimination that would violate the First Amendment even at the hiring stage.

It should go without saying that the signatories to this letter join this statement not because they necessarily endorse the statements Professor Salaita has made on the Israeli/Palestinian conflict; in fact we reflect a broad spectrum of views on how, if at all, academics and others in the U.S. ought to respond to that conflict. These differences are simply irrelevant here, however. Regardless of whether one supports or opposes the cause to which this particular advocacy is responding, we all firmly believe that academics have a right to express their political views through a wide range of protected speech, including through social media, without negative reprisal from current or future employers.

We urge you in the strongest of terms to submit to the University’s board of trustees the appointment of Professor Salaita to the University of Illinois at Urbana-Champaign’s American Indian Studies program.

Sincerely,

Katherine Franke, Sulzbacher Professor of Law, Columbia University

Michael C. Dorf, Robert S. Stevens Professor of Law, Cornell University Law School

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<sup>18</sup> <http://academeblog.org/2014/08/06/illinois-aaup-committee-a-statement-on-steven-salaita-and-uiuc/>.

<sup>19</sup> *Newton Tractor Sales, Inc. v. Kubota Tractor Corp.*, 906 N.E.2d 520 (Ill. 2009).