

DATE: February 14, 2022
TO: Prof. Arthur Wilson, Chair, Executive Committee
CC: Members of the Faculty Senate
FROM: Public Interest Law Professor John Banzhaf emeritus
RE: Suggestion That Faculty Senate Consider BOTH Violations

The only thing necessary for the triumph of evil is for good men to do nothing,
The only thing necessary for rights to continue to be violated at GWU is for the faculty to do nothing.

I write to most respectfully suggest that the Faculty Senate consider BOTH serious violations of important rights guaranteed by GWU which were very recently reported, and not just one, especially since potential violations of the right of free speech - unlike the right of privacy - apparently continue here at GWU, are at least as important and central to any university as any other right, and its violation is more likely to lead to legal liability for GWU and its officials. **{1}**

According to the posted [agenda](#), only the reported violations of privacy will be considered this week, and not the equally if not even more serious violation of free speech rights.

This most recent violation of free speech rights guaranteed by GWU is also generating far more adverse publicity, and degrading our public image, than the privacy rights violation: SEE EXCERPTS BELOW.

Indeed, GWU has a history of violating free speech rights which seem not to have been addressed by the Faculty Senate, and which likewise gave rise to adverse publicity for our name and public image. See, e.g.:

GWU drops its ignorant attack on student who posted Hindu symbol : *"All it took was international condemnation and threats of legal action!"* **See also:**

Removal of posters criticizing Chinese government gains national attention: *"Interim University President Mark Wrighton's decision to remove posters criticizing the Chinese government – which he has since called a mistake – has attracted national attention this week, with the incident eliciting broader concerns over Chinese censorship at U.S. colleges. The removal of the posters, which denounced the Chinese Communist Party's human rights abuses against the Uyghur people, has led to a five-minute segment on CNN, extensive coverage in conservative media outlets [and the **Washington Post**] and a speech on the floor of the U.S. House of Representatives."*

The most recent violation of free speech at GWU occurred when the President reported that certain posters were removed by GWU, and an investigation into which students put up the posters had begun - all apparently because the poster *"offends people"* and/or because it *"alarmed some members of our community."* **GWU Statement**

However, as many commentators pointed out, identifying the students responsible for putting up the posters could put any Chinese students who might be involved at serious risk. See, e.g.: **George Washington University Backpedals After Agreeing To Investigate Critics of China** : *"If the students who posted this artwork were from China or Hong Kong, they and their families could have been placed in real peril if their involvement were investigated—a fate that has awaited other international students who have been uncovered as critics of China at U.S. campuses."*

To his credit, the President backtracked and admitted that the action was a "mistake." By way of explaining why this reversal occurred, and why the posters were now protected as free speech, he said: *"Upon full understanding, I do not view these posters as racist; they are political statements. There is no university investigation underway, and the university will not take any action against the students who displayed the posters."* [emphasis added]

This appears to state a new GWU policy regarding speech which "offends": posters and other communications which are viewed by the administration as not being "racist," and/or if the administration views them as "political statements," enjoy protection as protected free speech. Apparently, posters which might be considered "racist" and/or are not viewed as "political statement," may be removed, and those responsible may be investigated and possibly punished.

In other words, in the future there might be a *"university investigation underway,"* and the university might take action against students whose posters or other speech *"offends people,"* and/or if it *"alarmed some members of our community."* (according to the official **GWU Statement**) if some brand them as "racist," If so, this would be directly contradictory to the free speech rights GWU has granted to students and published on its official Internet site,

[GWU] Statement on Student Rights and Responsibilities: *Student organizations and individual students shall be free to examine and to discuss all questions of interest to them and to express opinions publicly and privately. They shall be free to support causes by orderly means that do not disrupt the regular and essential operation of the institution. At the same time, it shall be made clear to the academic and the larger community that students and student organizations speak only for themselves in their public expressions or demonstrations. GW students have the rights and responsibilities of a free academic community. They shall respect not only their fellow students' rights but also the rights of other members of the academic community to free expression of views based on pursuit of the truth and the right to function as citizens independent of the university.* [emphasis added]

In view of the above, it would appear to be appropriate and necessary for GWU to clarify its public policy to more clearly recognize that students may "express opinions publicly and privately" on "all questions of interest to them," even if an opinion "offends people" and/or "alarmed some members of our community" and/or is viewed by many as "racist" and not a "political statement,"

Thus, this protection applies even if the posters or other speech is believed by the administration to be "racist," since the protection applies to "all questions."

Our university should recognize and accept that students have a right guaranteed in writing by GWU to express views and opinions which some may find to be "offensive" or even "racist," whether or not they are regarded a "political statements" - i.e. refer directly or indirectly to some political issue.

As the U.S. Supreme Court and others have frequently reminded us, the best remedy for bad or objectionable speech - and the only remedy which guarantees of free speech on campus - is speech in opposition. In the instant situation, students, faculty, and others could have posted responding comments in **The Hatchet**, on other posters, on social media, with discussions in classes where appropriate, and by many other means.

If, to be permitted on campus, posters or other speech which "offends people" and/or "alarmed some members of the community," must be ruled to be not "racist" and/or must be seen as "political statements" to be protected, many statements regarding important current public issues - e.g. affirmative action, abortions, M2F transgender students competing as females, conflicts involving Israel, disruptive street protests, etc. - would put students at serious risk.

Moreover, the new policy of testing speech to see if appears to be "racist" or a "political statement" might well be applied also to GWU's faculty members. This is a real concern since investigations (and sometimes punishment) of faculty for statements which clearly should be protected as free speech are occurring with growing frequency; see, e.g., reports in **Chronicle of Higher Education**, **Inside Higher Ed**, and elsewhere.

{1} In **JOHN DOE v. GEORGE WASHINGTON UNIVERSITY**, a federal judge held in August of 2018 that George Washington University was legally bound by its published codes and procedures - specifically its Code of Student Conduct - in a Title IX proceeding involving an alleged sexual assault. The court held for the male student on the basis of what it ruled was a "contract," even though GWU argued vigorously that it was not bound by its own words, and that there was no contract. EXCERPTS

Over GW's objections, this Court has followed precedent from the District of Columbia Court of Appeals and found that the Code forms a contract between the University and its students, despite the fact that the Code is written and can be changed unilaterally by the school.; and finding that the relationship between Mr. Doe and GW is contractual and that the Code provisions at issue in this case are contract terms. The University offers an education on certain terms—tuition, attendance, behavior under the Code, etc.—and a student accepts and performs his part of the contract accordingly.

GW protests that the University did not intend to be bound by the Code and that there is no mutuality of obligation, so that the Code cannot be interpreted as a contract.. GW's argument is based on the University's explicit reservation of a "unilateral right to modify the Code without notice to, or the consent of, students."

*Under D.C. law, the contract between a university and its students can include disciplinary codes and other communications from a university to its students. In *Pride v Howard*, for example, the D.C. Court of Appeals found that provisions from Howard University's code of conduct, parts of which had been distributed to students in a manual, constituted contract terms. The fact that a university reserves the right to modify "requirements, rules, and fees," as does GW, does not mean that no bargain exists.*

The Court finds that the Code sections at issue here are binding on the University, and failure to follow them, as alleged, would constitute a breach of contract. [emphasis added]