



Foundation for Individual Rights in Education

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May 12, 2010

Attorney General Kenneth T. Cuccinelli, II
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219

Sent via U.S. Mail and Facsimile (804-786-1991)

Dear Attorney General Cuccinelli:

As you can see from our list of Directors and Board of Advisors, FIRE unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, due process, legal equality, voluntary association, freedom of speech, religious liberty, and academic freedom on America's college campuses. Our website, www.thefire.org, will give you a greater sense of our identity and activities.

FIRE is gravely concerned about the threat to academic freedom posed by your decision to issue a Civil Investigative Demand (CID) to the Rector and Visitors of the University of Virginia (UVa) pursuant to your authority under the Virginia Fraud Against Taxpayers Act (FATA). By requesting production of the "data, materials and communications" created by former UVa professor Dr. Michael Mann in conjunction with five research grants he and others obtained during his employment at UVa, among other documents, your office has put academic freedom in jeopardy.

The Supreme Court has held that academic freedom is a "special concern of the First Amendment" and that "[o]ur nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to teachers concerned." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (internal citations omitted). This and other longstanding precedents from our nation's highest court weigh heavily against the course of action you have chosen in this matter. Further, the Supreme Court has made clear "that legislative investigations, whether on a federal or state level, are capable of encroaching upon the constitutional liberties of individuals." *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957). When the New Hampshire state legislature questioned a professor from a state college about his views, the Court found the investigation unconstitutional, holding that it "unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." *Id.* at 250. *See also*

Baird v. State Bar of Arizona, 401 U.S. 1, 7 (1971) (observing that “[b]road and sweeping state inquiries” into protected speech “discourage citizens from exercising rights protected by the Constitution”); *De Gregory v. Attorney General of New Hampshire*, 383 U.S. 825, 829 (1966) (holding that “[t]he First Amendment prevents use of the power to investigate enforced by the contempt power to probe at will and without relation to existing need”).

As a nonpartisan civil liberties organization, FIRE takes no position on the merits of Dr. Mann’s research, methods, or conclusions; nor are we qualified to do so. Rather, the worth of Dr. Mann’s contributions to his field is properly assessed by his peers. As you likely know, all previous investigations of Dr. Mann’s research conducted by those best equipped to determine the reliability and soundness of his work—his fellow scientists—have failed to find any evidence of fraudulent conduct or the intent to engage in such conduct.

By undertaking an investigation of Dr. Mann’s research in search of evidence of fraud and by demanding cooperation from UVa, you have confused the standard processes of academic inquiry with unlawful conduct. We agree with the UVa Faculty Senate Executive Council statement of May 5, 2010, that

peer review by the scientific community is the appropriate means by which to identify error in the generation, presentation and interpretation of scientific data. The Attorney General’s use of his power to issue a CID under the provisions of Virginia’s FATA is an inappropriate way to engage with the process of scientific inquiry. His action and the potential threat of legal prosecution of scientific endeavor that has satisfied peer-review standards send a chilling message to scientists engaged in basic research involving Earth’s climate and indeed to scholars in any discipline. Such actions directly threaten academic freedom and, thus, our ability to generate the knowledge upon which informed public policy relies. [*Available at* <http://www.virginia.edu/facultysenate/documents/PositionStatementonMannInvestigation.pdf>.]

Indeed, in our liberal democracy, scientific research into unpopular, controversial, or simply uncertain subjects must not be burdened by the threat of government investigation and the possibility of punishment. We ask that you recall the Supreme Court’s eloquent expression of the essentiality of free inquiry at our nation’s universities in *Sweezy*:

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 ... 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.

Sweezy, 354 U.S. at 250. Public officials are prohibited from imposing upon Dr. Mann the “strait jacket” that our nation’s highest court warned against in *Sweezy*. Launching a civil investigation into academic research directly contradicts the Supreme Court’s wise counsel and creates precisely the “atmosphere of suspicion and distrust” in the academy that the Court feared would prove fatal to our country’s future.

The chilling effect engendered by a formal investigation into Dr. Mann’s scientific research threatens academic freedom beyond Dr. Mann alone. As the UVa Faculty Senate Executive Council stated:

The funding he received for his research resulted from impartial, stringent peer review by respected independent scientists under the auspices of national scientific research organizations. His research findings, including many of those involved in this investigation, have been reported in leading scientific journals, which are themselves subject to additional exacting review by the scientific community prior to publication.

Your issuance of a CID in order to examine Dr. Mann’s research for evidence of “fraud,” without having provided any evidence that such an investigation is legitimately warranted, is likely to chill academic inquiry at the University of Virginia and at other state colleges and universities for years to come.

This investigation provides a dangerous opening for politically motivated attacks on the academy from elected officials. Once the precedent of using FATA to investigate academic research has been set, no professor studying anything controversial at a Virginia public institution of higher education will be safe. Professors in academic fields of study such as nuclear energy, evolution, sociology, and genetics, in which research conclusions are often highly controversial, will have reason to fear that publishing results unpopular with the elected officials currently in power in Virginia will lead to time-consuming, expensive, and intrusive investigations. Ultimately, scientists and researchers will feel political pressure to alter their peer-reviewed research agendas or hide their peer-reviewed results in order to avoid investigations, which would retard the progress of science in Virginia and cause a “brain drain” as the best and most independent scientists leave for institutions in other states. Worse yet, such a precedent could lead Virginia universities themselves to discourage research into controversial fields of study lest any unpopular conclusions attract politically motivated and unfair investigations by elected officials.

Therefore, we write you to condemn the threat to academic freedom presented by this investigation. In so doing, we join the American Association of University Professors, the American Civil Liberties Union of Virginia, and even climate change skeptic Thomas Fuller, author of a book sharply critical of Dr. Mann’s research (*Climategate: The CRUtape Letters*). As Fuller wrote your office in a May 2 open letter:

No matter what has prompted your investigation, there is no doubt that it will be interpreted as a witch hunt. If you are in fact investigating a credentialed scientist for results that do not suit your political opinion, that interpretation is correct.

Unless you can reveal to the public prima facie evidence that shows cause for this investigation, I beg you to reconsider. There are ample avenues of professional and academic recourse for people like me who think he has done something wrong. But being wrong is not a crime, and intimidating scientists is not a path that this country, including I presume Virginians, should ever pursue. You may consult with colleagues in Salem to determine how long it takes to live this type of thing down. [Emphasis added.]

We urge you to consider the threat to open discourse and academic freedom posed by your present actions, and to consider the dangerous precedent those actions set. The academic enterprise thrives on transparency; if your investigation is to be taken as more than a witch hunt, the academy awaits your justification for such an unprecedented intrusion into the peer-reviewed work of a faculty member at Thomas Jefferson's university. We ask that you rescind your CID, close the investigation, and make clear to faculty at Virginia's public universities that they are free to engage in the research of their choice without fear of political, legal, or civil punishment if their results do not please the state's elected officials.

Sincerely,



Will Creeley
 Director of Legal and Public Advocacy
 Foundation for Individual Rights in Education

cc:

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