

Report

Academic Freedom and Tenure: University of the Cumberland (Kentucky)¹

(formerly Cumberland College)

I. Introduction

This report concerns the actions taken by the administration of Cumberland College that led to the separation of Professor Robert J. Day from the faculty early in his fourth year of service. It is also concerned with the administration's nonrenewal of Professor James W. Bailey's appointment after two years of service on the faculty.

Cumberland College is a private liberal arts college affiliated with the Kentucky Baptist Convention and is located on a forty-acre campus in Williamsburg, Kentucky, a small town in the southeastern part of the state, a hundred miles south of Lexington and seventy miles north of Knoxville, Tennessee. The college was established in 1889 as the Williamsburg Institute by the Mount Zion Association, which represented eighteen Baptist churches in eastern Kentucky. Assuming its present name in 1913, Cumberland College has provided opportunities for thousands of young people from the surrounding region who otherwise would not have had a college education. The institution currently offers three dozen majors in fifteen academic departments and has a student body of approximately 1,700, served by some ninety-five full-time faculty. It has been accredited since 1964 by the Southern Association of Colleges and Schools to award bachelor's degrees and the master of arts in education. On January 7, 2005, the institution was renamed the University of the Cumberlands, composed of Cumberland College (the under-

1. The text of this report was written in the first instance by the members of the investigating committee. In accordance with Association practice, the text was then edited by the Association's staff, and, as revised, with the concurrence of the investigating committee, was submitted to Committee A on Academic Freedom and Tenure. With the approval of Committee A, the report was subsequently sent to the faculty members at whose request the investigation was conducted, to the administration of the University of the Cumberlands (whose name was Cumberland College at the time this report was written), and to other persons directly concerned in the report. In light of the responses received, and with the editorial assistance of the staff, this final report has been prepared for publication.

graduate liberal arts program), the Hutton School of Business/Management, the Center for Leadership Studies, and the Graduate and Professional Education Program.

James H. Taylor has been the president of Cumberland College, his alma mater, since 1980, having previously been the institution's chief development officer. President Taylor, who has two Ed.D. degrees (from Nova University and Peabody College of Vanderbilt University), has held the office of president of the American Association of Presidents of Independent Colleges and Universities, of the Association of Church-Related Colleges and Schools, and of the Association of Southern Baptist Colleges and Schools. The college is governed by a twenty-six-member board of trustees, elected by the Kentucky Baptist Convention.

II. Background

The system of academic governance at Cumberland College and the practice of issuing annual contracts that contain no specific figures about salary and benefits are important background for the cases to be discussed in this report. The institution's *Policies and Procedures for All Employees* (revised and adopted September 1, 2003) contains an addendum for faculty with a section on the organization of the faculty. The addendum makes no mention of faculty officers except for a secretary appointed by the president and charged with "[keeping] a record of all regular or called faculty meetings." It states that the president "shall appoint all standing and special committees of the faculty," and that he "shall present to the faculty such matters as he deems appropriate for their consideration and action." There are faculty meetings over which the president presides, but, according to those interviewed by the undersigned investigating committee, little business is actually conducted in these meetings. For example, proposals for new or modified courses are acted upon by a Catalog and Curriculum Committee, consisting of faculty members and administrators appointed by the president, and the committee's actions do not require approval of the whole faculty. The Cumberland

College faculty therefore seems not to be afforded even the minimal responsibility for academic matters that is found at most other institutions of higher education. The college's regulations provide for faculty tenure but, as will be explained later in this report, they do not provide the procedural safeguards normally associated with tenure.

As noted above, annual contracts at Cumberland College, usually issued in February or March for the following academic year, have differed from faculty contracts at most other colleges and universities by not specifying salary or benefits for the coming year. Professor Day's contract for 2003–04, for example, included the following paragraph:

Compensation for this period will be determined during the first month of this contract period and will be defined by prevailing economic conditions and the current responsibilities of the above-named employee. The character of the employee's responsibilities during the period covered by this contract shall be at the discretion of the College.²

While the investigating committee is unaware of any case in which salaries had been reduced from what they had been the prior year, faculty members (and other employees) plainly have little recourse if they are dissatisfied with the salary and benefits designated once the term has begun.

The more immediate background for the cases to be discussed begins in August 2003, with rumors of staff layoffs, of deep cuts in benefits and programs, and of an increase in faculty workload. Many of the rumors were confirmed by President Taylor at a faculty meeting on August 22. Declaring a financial emergency and the need for "right-sizing," President Taylor presented a series of slides detailing the financial situation of the institution, including revenue streams, assets, and liabilities. The most troubling financial setback for faculty was the announcement of a substantial increase in health-insurance premiums for family coverage. The investigating committee was told that the premiums increased from \$82 a month in 2002–03 to \$380 a month in 2003–04, thus reducing total compensation for most faculty by almost \$3,600 for the year. The administration also carried out layoffs throughout the year, reportedly thirty or more, among the administrative and custodial staffs. No immediate cuts were made in the faculty, but some faculty members were not to be reappointed for the 2004–05 academic year. The athletic trainers program was to be abolished, with two persons who had taught in that program not reappointed. There was also the revelation that the college's loans and liabilities had increased by \$5 million (to \$35 million) over the previous year, but the faculty was appar-

ently not provided with an explanation of the reasons for those increases. These developments, and the concerns that they occasioned, prompted Professor Robert Day to create a committee and a personal Web site to address these issues.

III. The Case of Professor Robert J. Day

Robert Day graduated from Cumberland College in 1984, earning a B.A. degree in religion. His arrival at Cumberland as a first-year student in 1980 coincided with the appointment of James Taylor as the college's president. In fact, President Taylor had been instrumental in securing the funding that enabled Professor Day to enroll at Cumberland. "While a student at Cumberland," according to a posting (since withdrawn) on the college's official Web site, "Mr. Day co-founded the Mountain Outreach program, which draws on student volunteers to build homes and provide services for needy area families. In honor of his efforts, he received the T. J. Roberts Campus Leadership Award, given each year to the man of the junior class who manifests the greatest promise of service to society." In the words of a faculty colleague, Robert Day had been since his student days the "poster child" of Cumberland College, and Mountain Outreach has been a showcase service project.

After graduating from Cumberland, Professor Day earned two degrees from the Southern Baptist Theological Seminary in Louisville: the master of social work (1988) and the master of divinity (1999). He returned to Cumberland as an adjunct faculty member in 1999, and a year later he was appointed to a full-time position as assistant professor of social work. The return to Cumberland was, in Professor Day's words, a dream come true. By all measures he was successful as a teacher, adviser, and colleague. His department chair, Professor James Bailey, commended his work in teaching, professional activity, and institutional and community service. In 2002, he was one of two Cumberland faculty members chosen by the Student Government Association to receive the annual Honored Professor Award for "devot[ing] their time and energy to improving the quality of education and student life at the college." According to the account published in the college's student newspaper, Professor Day and his colleague had "displayed high levels of Christian values as well as a genuine interest in working with students on a personal level. They have worked diligently and selflessly to ensure that each student receives the best education possible."

As noted above, Professor Day reports that he and others were deeply concerned by the announcement of staff layoffs in fall 2003 and by the deep cuts in benefits and programs. He states that the lack of any significant structures of faculty governance and a general fear of pressing President Taylor for changes in benefits or for clearer explanations of the college's financial situation inhibited most faculty members from addressing the problems openly. He and some colleagues (who

2. Faculty contracts for 2004–05 have been revised, with an addition of the following phrase: "Your salary shall be no less than that paid to you under the terms of any present contract you have with the College."

have remained anonymous) established the Committee for Accountability and Reform in Education (known by its acronym, CARE). In early October, Professor Day, with the knowledge of his department chair, Professor Bailey, created an off-campus Web site (www.wecareforcumberland.com), not linked to the college's server, which called upon the administration to act on a series of "ten initiatives" advanced by CARE. "We present this material," Professor Day wrote, "in the hope that it will somehow help to restore Cumberland College to its historical roots. It is presented by those who care for Cumberland."

The ten initiatives were divided into two groups of five each, with the respective headings of "accountability" and "reform." The initiatives under accountability included calls for (1) a faculty-staff senate with representation on the board of trustees and in meetings of the college's vice presidents; (2) "a full financial disclosure of all income and expenditures, including all salaries, to be presented annually to the Faculty/Staff Senate"; (3) a separate "[b]udget for each department"; (4) annual contracts that include "a good-faith estimate of salary and benefits for the coming academic year, with any changes anticipated in the employee's job description"; and (5) a "published pay scale for all employees based on qualifications, experience, and tenure with increments for promotion."

The initiatives under the "reform" heading focused on Cumberland College's Christian heritage and called upon the administration to halt an alleged drift toward secularization. These initiatives, for example, pressed the administration to establish "a clear and undiluted Mission Statement establishing Christian faith, principles, values, and behavior as central to Cumberland's purpose," and a commitment to "hiring faculty and staff [who] profess a faith in Jesus Christ."

The initial Web site also included a list of twenty-one questions, mostly serious (for example, Why is Cumberland College \$35 million in debt? How was that money spent?), but some humorous or sarcastic (for example, Why are there so many clocks on campus? What is the obsession with traffic round-a-bouts?). At least three focused on President Taylor himself: Could President Taylor get a vote of confidence from his faculty? How did a man who had no experience in academia get to be president of the college? Why does the president of a Christian college belong to a secret society?³ According to Professor Day, during the first week of the Web site's existence, October 6–13, 2003, it drew eighty-four visitors, with five or six of them posting messages in response.

About 12:30 p.m. on October 13, 2003, Professor Day returned to his office from lunch to find a voice-mail message from Sue Wake, vice president for institutional advancement and assistant to the president for administration, summoning him to a 4 p.m. meeting with the president. Professor Day

called Ms. Wake to confirm the appointment and asked about the purpose of the meeting. She reportedly replied, "E-mail messages and the Internet." At 12:50 p.m., Professor Day was in his office, making final preparations for his 1 p.m. class, when his department chair, Professor Bailey, stopped by with questions regarding the spring schedule of courses. Professor Day told him about the 4 p.m. meeting and asked if he knew what the meeting was about. Professor Bailey had heard nothing but promised to find out. He called Sue Weedman, associate academic dean, and she claimed to know nothing of the meeting, but a short time later she called Professor Bailey back and summoned him to a meeting in her office. When he arrived there, about 2:15 p.m., Donald Good, vice president for academic affairs and dean, was already seated.

There are conflicting reports regarding the intended purpose of the mid-afternoon meeting involving Professor Bailey, Dr. Good, and Ms. Weedman. Professor Bailey stated firmly to the investigating committee that the meeting was based on the assumption that Professor Day would be dismissed by President Taylor later that day. According to Professor Bailey, Dr. Good instructed him to make the necessary preparations to cover Professor Day's classes and his other duties after that day. He told the investigating committee that he asked Dr. Good and Ms. Weedman how likely it was that Professor Day would be dismissed; that the vice president responded, "it's all but certain"; and that Ms. Weedman gave a similar response, adding, "I've never seen [President Taylor] this mad before." Professor Bailey also told the committee that he specifically asked Dr. Good and Ms. Weedman whether President Taylor had the authority to dismiss Professor Day, and that Ms. Weedman replied, "Robert is not tenured, so he can do whatever he wants." Professor Bailey further stated to the committee that toward the end of the conversation, Dr. Good said, "I'll take a stroll down the hall later this afternoon and see how Dr. Taylor is feeling. Perhaps he has cooled off a bit." Professor Bailey said that he left the meeting virtually certain that Professor Day was to be dismissed, and that he as department chair had been instructed to make arrangements to cover his colleague's classes and other responsibilities.

Months later, Dr. Good was called to testify before the Kentucky Division of Unemployment Insurance in connection with Professor Day's subsequent application for unemployment benefits. According to the referee's decision pursuant to a hearing on January 7, 2004, Dr. Good testified "that there were no discussions of the claimant[s] being terminated, and that he did not know the possible outcome of the meeting between the claimant and the president to be held later that afternoon."

About 3:40 p.m. on October 13, 2003, Professor Day, who had been off campus doing errands following the conclusion of his 1 p.m. class, ran into Professor Bailey and asked what he

3. The "secret society" referred to here is the Masons.

had learned about the purpose of the 4 p.m. meeting. Professor Bailey responded, "They're going to fire you. I have been instructed by Good to find teaching replacements for your classes, both for the remainder of this term and for next spring." Professor Day arrived at the president's office at the appointed time. He encountered Dr. Taylor in the presence of Dr. Good, Ms. Wake, and Michael Colgrove, vice president for student affairs. Professor Day was unaccompanied. The meeting lasted less than five minutes, and, according to Professor Day's written recollections, developed roughly as follows:

Taylor: The first time I heard the name Robert Day was when Pastor Bridges called from Jellico saying, "I have this boy down here, doesn't have a penny to his name. What can you do for him?" (Pause) Didn't I let you go to school here for free for four years? Didn't you graduate without owing anything?

Day: I had about \$3,000 in student loans at the end, but that is about it.

Taylor: We have helped a lot of people, haven't we?

Day: Yes, we have.

Taylor: I guess that doesn't matter to a Pharisee like you who thinks he knows the mind of God on everything.

Day: You're the one who knows more about playing God around here.

[At this point, President Taylor became angry and started to make a move as if he were going to get out of his chair.]

Taylor (holding pages printed from the Web site): Did you start this Web site?

Day: Yes. (Pause) So are you going to fire me now?

Taylor: Is that what you want? (He may also have said, "Didn't you realize you could get fired for this?")

Day: I knew you'd find out eventually, and I assumed that is what would happen unless I am given an option.

Taylor: Do you want to resign?

Day: You mean I have a choice?

Taylor: We all have choices. Do you want to resign?

Day: Do I have that option?

Taylor (slowly and methodically, looking straight at Mr. Day): Do you want to resign?

Day: Yes.

Taylor: Leave immediately.

Day: Do I have at least to the end of the day to get my stuff from the office?

Taylor: You have to the end of the day.

Ms. Wake reportedly took notes of the meeting and provided a transcript of part of the meeting to the Kentucky Division of Unemployment Insurance. In her testimony at the January 7 hearing, she referred to an exchange of "pleasantries" at the outset but did not give details. Her transcript, provided to the

investigating committee by Professor Day, recalled the meeting as follows:

After initial conversation regarding Dr. Taylor's recollection of how Mr. Day initially came to Cumberland College as a student [the following exchange took place]:

Taylor: Are you responsible for the Web page?

Day: Yes, I knew you'd find out eventually. Are you going to fire me?

Taylor: I didn't say anything about that; you brought it up. Do you want to resign?

Day: If I have a choice.

Taylor: Sure, we all have choices.

Day: Then, I resign.

Taylor: Goodbye.

Mr. Day left the meeting and immediately returned to his department and told Professor Bailey and his other social work colleague, Professor Juanita Westerfield, what had just happened. He was already having second thoughts about the resignation. He reports having told them, "I think I made a mistake. I don't want to resign. He needs to fire me." This account was confirmed in the course of the investigating committee's interviews with Professors Bailey and Westerfield, who helped Professor Day pack his office paraphernalia into his car. When he ran out of room for his office chair, desk, and computer in the car, Professor Day asked if he could return the next day to get these items. Professor Bailey said that he could.

At 8 a.m. the next morning, Professor Day delivered to Professor Bailey the following memorandum addressed to President Taylor (with indicated copies to Professor Bailey and Dr. Good): "Per our conversation of 10/13/03, I would like to clarify my position. Under the pressure of the moment I spoke to[o] quickly. After reconsidering, I withdraw my verbal resignation." Later that day, Dr. Good responded in a brief memorandum to Professor Day as follows: "Your resignation was effective upon its receipt and acceptance by the President yesterday. Your employment terminated at that time." The vice president went on to order Professor Day "not [to] undertake to perform any further services on behalf of the College, including, but not limited to, meeting classes." Early that evening, some three hundred students held a protest rally on campus in support of Professor Day and began circulating a petition calling on the administration to reinstate him to the faculty. Professor Day attended the rally. Later that same evening, at a friend's house, Professor Day was served with a memorandum from President Taylor ordering him to stay off campus or face "prosecut[ion] for criminal trespassing." The memorandum was delivered to Professor Day by two City of Williamsburg police officers, who he says told him, "We know about your group and we don't want any trouble."

The students' petition proved unavailing, as were Professor Day's own efforts to persuade the administration to reconsider its position. In the days following his separation from the faculty, Professor Day sought to work out an agreement with the administration regarding his status at the college. A message dated October 29, 2003, that he posted to the CARE Web site, stated:

Soon you will be hearing about a lawsuit brought against the college. Some will wonder why it has taken so long while others will wonder why a man who professes to love Cumberland College is taking it to court.

I want everyone to understand that I offered President Taylor a way out of this mess for both of us. Through Dr. Good, I offered to do three things to resolve the crisis. (1) Agree not to bring any kind of legal action against the school. (2) Shut down the Web site immediately. (3) Make a public apology to Dr. Taylor in front of the student body.

These actions would have stopped the negative publicity that is still hurting the college, protected it from any financial hardship a lawsuit would bring, and started a healing process for the whole college community.

Of course, in return I asked for three things. (1) Allow me to finish out the school year (with no promise of a contract for the next). (2) Establish a committee representing a broad spectrum of faculty and staff to discuss with the administration the issues CARE has raised about accountability. (3) Another committee consisting of faculty, alumni, and students to discuss the issues CARE raised about spiritual reform. I would not be on . . . either one of those committees (although I did state my desire to be on the second one).

At the time of Professor Day's separation from the faculty, he was teaching five classes and first-year orientation. After canceling his classes for a week, the administration reassigned them to others. The administration also retained his computer, which under agreement with the college, according to Professor Day, actually belonged to him, and it copied all of the files to a DVD disk, claiming that they were the college's property. Three of those interviewed by the investigating committee also reported that at an October 21 faculty meeting President Taylor made several unmistakable references to Professor Day, without mentioning him by name, calling him a "self-appointed Ayatollah," "Mullah Omar," and the "terrorist."

In the months following his separation from Cumberland College, Professor Day continued to maintain the CARE Web site, which came to draw thousands of visitors, many of whom left postings on the message board.⁴ During the week of

October 13–20, 2003, according to Professor Day, the CARE site drew more than 7,000 visitors.

IV. The Case of Professor James W. Bailey

Professor Bailey, who received a Ph.D. in social work from the University of Tennessee in 1997, joined the Cumberland College faculty in fall 2002 as assistant professor of social work and chair of the department, and thus was Robert Day's immediate administrative superior. He was the fourth chair of the department since the 1999–2000 academic year. He reports that his predecessors had departed largely as a result of conflicts with the administration having to do with securing accreditation by the Council on Social Work Education. During the course of the 2003–04 academic year, Professor Bailey, however reluctantly, became embroiled in the conflict between Professor Day and the administration. His refusal to bow to several administrative demands led finally to his being offered a "special" contract for the following academic year that he found totally unacceptable, as will be discussed below.

As has been noted, Professor Bailey spoke with Professor Day just prior to the latter's October 13 meeting with President Taylor and revealed what he understood to be the substance of his earlier meeting with Dr. Good and Ms. Weedman—namely, that Professor Day was to be dismissed at the meeting and that he (Professor Bailey) had been instructed to find replacements to take over Professor Day's courses and his other duties for the remainder of the academic year. President Taylor apparently did not know of this conversation prior to Professor Bailey's testimony at Professor Day's hearing on January 7, 2004, appealing the denial of unemployment compensation. Shortly after October 13, according to Professor Bailey, he received "talking points" from the college's attorney by way of a note from Dr. Good, suggesting that, in speaking to the press, he say something like, "I understand [Professor Day] resigned." Then, in preparation for the hearing on the unemployment appeal, at which Professors Day and Bailey as well as President Taylor, Dr. Good, and Ms. Wake would be called to testify, the president arranged for a meeting in his office to compare notes on what the various representatives from the college would testify. Professor Bailey, who had consulted with an attorney, refused to discuss his testimony in the meeting unless he were put under oath and deposed with both parties and their counsel present. According to Professor Bailey, the college's attorney accused him of insubordination and hinted that such behavior might jeopardize his position with the college. Professor Bailey's refusal to discuss his testimony beforehand and his substantive disagreement with Dr. Good over the content of his meeting with Dr. Good and Ms. Weedman on October 13 are two of the three matters that President Taylor was to cite in a memorandum of March 11, 2004, to Professor Bailey as examples of "poor performance" on his part.

4. The investigating committee learned that in late summer 2004, Professor Day closed down the Web site.

The third example of allegedly poor performance came some weeks after the unemployment hearing. In an e-mail message dated January 21, 2004, Professor Bailey responded to a telephone message he had received the previous day from Dr. Good, "requesting that [he] contact Mr. Robert Day to obtain a list of his belongings that remain in his old office and then coordinate with the physical plant to gather those belongings and take them to his residence." Professor Bailey replied,

With all due respect, I propose that given the circumstances under which Mr. Day's alleged belongings have been retained and given the litigious nature of the dispute between [him] and Cumberland College, I do not believe it would be wise for me to become involved in such an action. . . . My position as Mr. Day's ex-department chair has already placed me in the middle of a dispute over the circumstances regarding Mr. Day's departure and I will not willingly enter another situation with a high probability for additional controversy. Thus, I respectfully decline to act on your request.

Dr. Good did not reply, but President Taylor did in a letter to Professor Bailey dated January 22:

Dr. Good has advised me that you refused to assist the College, as Dr. Good requested, in the transfer to Mr. Day of items of his personal property which he has not removed from his office. I am disappointed by this report.

I consider Dr. Good's request of you to have been reasonable and your refusal unacceptable. The College will proceed in regard to Mr. Day's personal property without your assistance. Understand that in the future I will expect you to cooperate with the administration of which you are a part.

Professor Bailey's refusal to comply with the vice president's request clearly angered both Dr. Good and President Taylor and would have serious consequences for Professor Bailey.

Enclosed with the memorandum that President Taylor sent to Professor Bailey on March 11, 2004, was a contract offer from the college for the following academic year. In his memorandum, the president described the document as "not the standard contract being offered to faculty." He added:

I ask you to sign this contract if you wish to accept this offer and return the signed contract to me within ten business days of the date the contract was signed by me on behalf of the College. If the contract is not signed by you and delivered to me by this date, the offer is revoked, and this letter shall constitute written notice that your appointment to the faculty will not be renewed, and at

the conclusion of the present term of appointment your employment will end.

I am giving you this letter in order to specifically explain the College's decision to make you this offer of a special contract. I have been dissatisfied with your performance. However, rather than simply give you notice of nonrenewal and allow your employment to end at the conclusion of the present appointment, I am willing to offer you a new contract but with the College's reserving the right to terminate it at any time without cause. It is my hope that your performance will prove to be satisfactory and the College will not decide to exercise that termination right.

Dr. Taylor went on to describe what he characterized as "three instances of poor performance," already noted above, on Professor Bailey's part during the 2003-04 academic year, all of them having to do with his conduct in relation to the Day case. With regard to one of these instances President Taylor charged Professor Bailey with "insubordination" for having refused to follow the "reasonable directive" issued by Vice President Good on arranging for Professor Day to obtain his remaining personal property. The president's memorandum concluded, "If you accept the offered contract, I will expect you to fulfill your duties to the College in good faith, with loyalty to this institution, and I will expect you to perform those duties assigned to you by me or by Dr. Good. If you cannot agree to act in accord with these expectations, I will assume you will not sign the offered contract."

As President Taylor had indicated, the first paragraph of Professor Bailey's contract read as follows:

This is a special contract, not made in the regular course of the College's faculty employment. Notwithstanding any provision in this Agreement to the contrary, or any customs, practice, or policy statement, the College may terminate this agreement at any time and without cause, by giving you written notice to that effect, and your employment shall thereupon immediately be terminated and all your rights and the College's duties under this agreement shall immediately cease.

Professor Bailey reports a bizarre twist to this affair. The contract offer and the president's cover memorandum were delivered to him by Dr. Good, who took the occasion to say that the special contract was from the college's attorney, not from President Taylor or Dr. Good. He also sought to reassure Professor Bailey that contracts are not personal matters, and that both he and President Taylor were pleased with his overall performance. In that connection, he cited a conversation he had with President Taylor the day before while the two were traveling together to and from Lexington. After reading the letter

and the contract offer, Professor Bailey responded to Dr. Good in an e-mail message sent the next morning: “Unfortunately, I do not agree with your statement that the content of the contract and cover letter are not personal matters. Nor do I agree with your assertion that the fact that the college’s attorney wrote the letter exculpates President Taylor from responsibility for its content.”

After consulting with an attorney, Professor Bailey responded sharply to the contract offer and to the president’s memorandum in a nine-page single-spaced letter of his own that sought to challenge what he termed the “baseless and spurious conclusion about my professional performance” during the past year and the “distorted and sometimes fabricated version of the facts.” He complained about the “intimidation tactics” by President Taylor and the college’s counsel in connection with his testimony at Professor Day’s unemployment hearing. “[I]t is evident,” he observed, “that Cumberland College has elected to ‘single me out’ and is discriminatorily treating me, in part because I refused to sacrifice my integrity in order to stay in your graces. On several occasions you and Dr. Good have required that I take actions that would have been unethical.” As for the “nonstandard elements of the contract” proffered to him, notably “the clause allowing [the administration] to terminate [his] employment without cause at any time,” Professor Bailey further observed that “the document is a thinly veiled attempt to dissuade me from continuing my employment at the college. I can only conclude that you have chosen this course of action because you have concluded that I represent some type of threat to you and your administration.” He ended the letter with these remarks:

In conclusion, I must emphasize that I did not willingly become involved in the dispute that may exist concerning Mr. Robert Day and you. I became involved because you chose a course of action and then gave me the job of cleaning up the mess it left in the Social Work Department. I believe that the most basic reason for the creation of the Memorandum and Contract is the realization that I will stand by my moral, ethical, and religious convictions regardless of the consequences. Moreover, I will not sit idly by and allow the truth to be manipulated in order to hide the facts or allow you to try and influence my words and my actions.

Neither President Taylor nor Dr. Good responded. With Professor Bailey’s having rejected the terms and conditions set forth in the contract offer, his affiliation with Cumberland College ceased at the end of the spring semester.

V. The Association’s Involvement

Professor Day first sought the Association’s advice and assistance in mid-November 2003. After reviewing the documents he submitted relating to his situation, the Washington office

staff wrote to the administration on December 11, setting forth the Association’s concerns about issues of academic freedom and academic due process posed by the case. That letter and a subsequent one, dated January 7, 2004, written in response to President Taylor’s reply of December 17 (to be discussed below), questioned whether Professor Day’s oral resignation had not, in effect, been coerced and also questioned the president’s refusal to accept Professor Day’s statement, submitted in writing less than twenty-four hours later, that upon further consideration he did not wish to resign. “Had you accepted the withdrawal,” the staff wrote, “and had you wished to dismiss Professor Day prior to the expiration of his existing appointment, then, under procedural standards widely adopted in the general academic community, it was incumbent upon you to assume the burden of demonstrating adequacy of cause in a hearing of record before an elected faculty body.” The letter went on to emphasize the staff’s concern over Professor Day’s allegation that his removal from the faculty was prompted by his activities—dissenting from the policies and actions of the Cumberland College administration—that warranted protection under principles of academic freedom. In his responses to the staff’s two letters (the second response was dated January 17, 2004), President Taylor rejected the position the staff had taken on the issues raised by Professor Day’s case.⁵

With the staff’s concerns relating to the case of Professor Day remaining unresolved, the general secretary authorized the appointment of an ad hoc investigating committee, and the staff so informed President Taylor by letter of April 2. In that letter the staff, having recently learned of the administration’s action against Professor Bailey, indicated that the investigating committee would be dealing with his case as well. Responding by letter of April 8, President Taylor notified the staff that his administration was not willing to cooperate with the investigation, and that the members of the committee would not be welcome on the Cumberland College campus. He wrote as follows:

Cumberland College has no relationship with your Association. Therefore, the College will not receive any committee the Association may appoint Members of any such committee or employees or agents of the Association should not understand themselves to be invitees to the College’s campus for this or any other purpose.

As President of Cumberland College, I am accountable only to the Board of Trustees of Cumberland College. . . . The College is an autonomous academic institution with no duty, and no desire, to subject its policies, practices, and judgments to the review of your Association.

Cumberland College enjoys the academic freedom to choose who will teach what to whom. Therefore, your

5. The president’s letters are discussed more fully below, especially in Section VI.

Association's opinions, counsel, and advice on the subject of the College's employment policies and practices are totally gratuitous and irrelevant.

A further letter from the staff, dated April 21, asked President Taylor to reconsider his position and informed him of the composition of the undersigned investigating committee and of the dates planned for its visit. The president reaffirmed his unwillingness to meet with the committee.

The investigating committee visited the Williamsburg, Kentucky, area on July 15 and 16, 2004. On the day prior to the visit, the chair of the committee called President Taylor to ask him once again to cooperate with the investigation. The committee chair identified himself to the president's receptionist, who stated that President Taylor was on vacation and unable to accept the call.

Interviews were conducted at a site about twenty-five miles from Williamsburg, as several of those who had indicated a willingness to meet with the committee also expressed fear of reprisals if the administration learned of their doing so. The investigating committee interviewed Professors Day and Bailey as well as several other current and former members of the faculty.

VI. Issues

The issues of concern to the investigating committee in the Day and Bailey cases are those that follow.

1. THE DAY CASE: RESIGNATION OR DISMISSAL?

As noted above, Professor Day, summoned to a meeting in the office of President Taylor at 4 p.m. on October 13, 2003, where three other senior administrative officers were also present, arrived with the understanding—conveyed to him twenty minutes earlier by his department chair—that the president apparently intended to terminate his services forthwith. During the course of his brief exchange with President Taylor, Professor Day, after reportedly having asked if he was going to be fired, was offered the opportunity to resign from the faculty instead. In his response, he indicated that he preferred to resign. Professor Day told the investigating committee that the choice of resigning instead of being dismissed caught him by surprise, and in the moment it appeared better to resign, especially if he were to seek another academic position. He said that, as he left the meeting, he thought he had made a mistake and minutes later told his immediate colleagues so, but, when he attempted the next morning to withdraw his oral resignation, the administration rejected his attempt.

In its initial letter to President Taylor, the Association's staff raised concerns about the oral resignation and the administration's refusal to accept Professor Day's attempted rescission. President Taylor conveyed his position in a letter to the staff dated December 17, 2003:

1. If one who is under contract with the College for a period of time, for example, as a result of an annual appointment to the faculty, resigns before the expiration of that time, I am satisfied that the College is within its rights to accept the resignation. I believe there would be a consensus on that proposition throughout academia.

2. When one's resignation is accepted by the College, the employment relationship is terminated, the contract being mutually rescinded. The employment relationship could only be reestablished by the agreement of both parties.

3. In the event a faculty member resigned during the term of his or her contract and subsequently sought to be reappointed to the faculty, however promptly that change in position might come on the heels of his or her resignation, and regardless of the faculty member's performance in the past, I think I would begin my evaluation of this application by questioning how steadfast the faculty member's commitment to the institution and its students appeared to be.

4. If Cumberland College were to undertake to terminate a faculty member for breach of contract prior to the expiration of the term of his or her appointment, the College would follow its procedures. . . . These procedures assure faculty fair process.

5. However, if a faculty member resigned during the term of his or her appointment, and that resignation was accepted by the College, it would be irrelevant to examine the procedures the College has or does not have when it comes to the termination of faculty prior to the expiration of the term of the appointment.

The Kentucky Division of Unemployment Insurance subsequently determined that Professor Day's resignation was voluntary and provided grounds for denying his application for unemployment benefits. He appealed the rejection of his application, asserting that his resignation was a constructive separation—that it had in fact been coerced by the threat of dismissal. The appeal was denied. The appeals referee found that President Taylor had uttered no explicit threat of dismissal, and that it was Professor Day rather than the president who first mentioned dismissal at the October 13 meeting. The referee accepted as fact that Professor Day went to the meeting believing he would be dismissed, but the referee considered this to be irrelevant, because the resignation was offered without any explicit threat of dismissal by the administration.

Professor Day, perceiving that he had a choice between being dismissed and resigning, offered his resignation in the meeting with President Taylor, and it was immediately accepted. The investigating committee questions, however, whether the resignation was in fact voluntary and uncoerced. Consider the attendant circumstances of Professor Day's resignation:

1. He was summoned to a meeting with the president without having been told its exact purpose.

2. A scant twenty minutes before the meeting, Professor Day's department chair, Professor Bailey, told him that the administration intended to dismiss him from the faculty.

3. Professor Day arrived at the meeting unaccompanied, believing that by the time the meeting was over, his service on the faculty would be at an end. He found himself face to face not only with President Taylor but also with three vice presidents. In a meeting that reportedly lasted less than five minutes, the president referred to the Web site but did not say why he objected to it.

4. In the face of a threat of immediate dismissal, President Taylor's reported question asking Professor Day if he wanted to be fired may have seemed to offer Professor Day a less unpalatable alternative. Given the intimidating situation for Professor Day, however, confronting four top administrators right after having been told by his department chair that he was going to be dismissed, the investigating committee finds untenable the proposition that Professor Day had any real options.

5. If there really were a choice that did not involve Professor Day's immediate separation, the investigating committee would find it difficult to understand the administration's refusal to accept Professor Day's rescission of his oral resignation the following morning.

It was not unreasonable for President Taylor to believe that the institution and he himself were under direct attack through the CARE Web site, to have responded sharply to what Professor Day had done, and to have criticized the latter's judgment with respect to the issues he had raised and the manner in which he had raised them. But, rather than enter into discussion with Professor Day and try to reach a possible accommodation, President Taylor, in his seeming eagerness to seize on Professor Day's resignation as final, summarily foreclosed any further discussion of the matter not only on the day that they met in his office but also some days later when (as noted above) Professor Day reports having initiated efforts to reach an agreement with the administration that would have included his shutting down the Web site and making a public apology to the president in front of the student body. The investigating committee believes that no faculty member should have to choose—as Professor Day did in this case—between resigning his position or facing immediate discharge. The committee finds that Professor Day's oral resignation was effectively coerced, and that the administration's implementation of it was tantamount to dismissing him. The committee believes that the administration should have accepted Professor Day's retraction of his oral resignation, and then, if it so chose, assumed the burden of demonstrating, before an elected faculty body, adequacy of cause for his dismissal.

2. THE DAY CASE: PROCEDURAL STANDARDS

Cumberland College's *Policies and Procedures for All Employees* (which include the faculty) states in the opening paragraph that

“the President as an agent of the College reserves the right to modify, eliminate, and add to the contents of this Document at any time. The College's interpretations of its policies shall not be affected by the interpretation of the policies of other institutions even though the policies may be similar or even identical.” The document goes on to provide, in a section headed “grievances,” that “if any employee feels that he has been unfairly treated in any way, including the terms and conditions of his employment, . . . nonrenewal of his appointment on the faculty, . . . termination of employment, . . . or in any other matter,” the employee may seek review through a series of administrative appeals, culminating with the president, who “shall review the grievance and make a final decision regarding it.” (The new standard contract issued to continuing members of the faculty in spring 2004 also refers to this grievance process.) In addition, the college's addendum for faculty in the *Policies and Procedures* provides that “the dismissal of a nontenured faculty member before the end of the academic year for which he has been appointed or of a tenured faculty member before the date of retirement is called ‘dismissal for cause’ and is taken with great and serious care.” The document is silent regarding the procedures to be followed in a dismissal for cause, but the new faculty contracts issued for the 2004–05 academic year do include provisions relating to dismissal procedures. Under paragraph six, “you may be dismissed from the faculty and all your rights under this Agreement and your employment terminated prior to the expiration of the term of this agreement . . . upon the finding by the College of ‘adequate cause.’” Paragraph eight goes on to provide that “in the event the College determines that termination shall occur, you will be advised in writing of the basis of that termination and you will be afforded the opportunity to be heard by the President or the President's designee. Dismissal for adequate cause or breach of contract shall occur after great and serious care.” Like the addendum for faculty, the contract makes no provision in a dismissal for cause for a hearing before a faculty body and is silent regarding burden of proof.

The grievance procedures set forth in Cumberland College's *Policies and Procedures for All Employees* and the addendum for faculty and also referenced in faculty contracts thus fall severely short of the standards called for by the AAUP in a dismissal proceeding: that the administration establish cause for dismissal in a hearing of record before an elected faculty body.⁶ President Taylor's insistence that Professor Day had resigned obviated the need, as the administration saw the matter, for any procedures. The investigating committee, however, finds it unconscionable that the president allowed their meeting to move so immediately and abruptly to the matter of Professor Day's resignation that the meeting ended, in less than five

6. See the 1940 *Statement of Principles on Academic Freedom and Tenure* and the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*, both jointly formulated by the AAUP and the Association of American Colleges and Universities.

minutes, without any meaningful conversation about the administration's problem with the Web site. This action was hardly consistent with the college's own policies that call for "great and serious care" in such matters.

It is all too evident that the president of Cumberland College, who "reserves the right to modify, eliminate, and add to the . . . [Policies and Procedures for All Employees] at any time," has inordinate power. The investigating committee sees the president's handling of the Day case as a reflection of the larger problem noted earlier in this report, of the absence of any effective faculty role in academic governance. The current and former faculty members interviewed by the investigating committee, including Professors Day and Bailey, knew nothing of a hearing before a faculty body, and all assumed that the only available process of appeal against a perceived wrong was the administrative chain of command from department chair to the vice president for academic affairs to the president. Those interviewed expressed some confidence about speaking with their department chair, but they conveyed a powerful reticence to file a formal appeal that would eventually go to the president.

3. THE DAY CASE: ACADEMIC FREEDOM

The Association's 1994 statement *On the Relationship of Faculty Governance to Academic Freedom* recognizes that "[t]he academic freedom of faculty members includes the freedom to express their views on matters having to do with their institution and its policies," and that academic freedom is an "essential [condition] for effective governance." According to the statement, "the protection of the academic freedom of faculty members in addressing issues of institutional governance is a prerequisite for the practice of governance unhampered by fear of retribution." The document goes on to state that "it is . . . essential that faculty members have the academic freedom to express their professional opinions without fear of reprisal." Regulation 5(a) of the Association's *Recommended Institutional Regulations on Academic Freedom and Tenure* further provides that "adequate cause for a dismissal will be related, directly and substantially, to the fitness of faculty members in their professional capacities as teachers and researchers. Dismissal will not be used to restrain faculty members in their exercise of academic freedom or other rights of American citizens."

The addendum for faculty in Cumberland College's *Policies and Procedures* includes a section on academic freedom that reproduces most of the "academic freedom" provisions in the 1940 *Statement of Principles*. The policy on dismissal for cause also includes a sentence similar to the above-cited provision in Regulation 5(a) of the *Recommended Institutional Regulations*: "Dismissal will not be used to interfere with a teacher's academic freedom as defined later in this document." More pertinent in Professor Day's case, however, are statements setting forth provisions that might, under some interpretations, violate a faculty member's academic freedom. Among the grounds for dismissal set forth

in the college's official policies and in the annual contract is one identified as "insubordination, generally defined to be disobedience of reasonable orders." The *Policies and Procedures for All Employees* demands "a sense of loyalty to the institution," and the new faculty contract requires a faculty member to agree to "work as a cooperative, collegial, and loyal member of [his or her] department, division, and the College as a whole." Judgments on whether a faculty member has breached these provisions are presumably left to the administration's discretion.

The investigating committee faced a major difficulty in addressing the question whether the administration's action in Professor Day's case resulted from considerations that violated his academic freedom. President Taylor never brought a specific charge against Professor Day, nor has he anywhere, to the committee's knowledge, stated the reasons why Professor Day's Web site incurred his hostility. Was it particular postings to the site or its mere existence that led the president to summon Professor Day to a meeting and get him to resign? Did he see the Web site itself as an instance of insubordination? As libelous? As a violation of Professor Day's pledge of collegiality and loyalty? In addressing the issue of academic freedom, the committee considered three questions: (1) Does material posted to a Web site, not connected to the college's server, come within the ambit of academic freedom as understood under AAUP standards? (2) Did the CARE Web site, established and maintained primarily by Professor Day, include inappropriate material that violated his responsibility to the institution? (3) Did the Web site or its contents demonstrate the unfitness of Professor Day for his faculty position?

If Professor Day had presented his ten initiatives and twenty-one questions in a faculty meeting or published them in a campus newsletter or posted them on an electronic discussion board accessible only on campus, his speech would have been protected under principles of academic freedom cited above. Does the same hold for the Internet, which is almost instantly accessible to millions of people worldwide? While expression in cyberspace is obviously different from print or oral expression, especially in

7. According to the Association's 2004 report *Academic Freedom and Electronic Communications*:

Whatever problems the physical environment may present for drawing lines between on- and off-campus statements become unmanageable in cyberspace. Are statements posted on a faculty member's home page "intramural" or "extramural"? And does it matter whether a particular statement was entered from the professor's home or office computer—or partly from each? Given these uncertainties, the [distinction between "intramural" and] "extramural utterances" . . . simply should not apply to electronic communications, even though the central principles of faculty responsibility to colleagues and community are no less fully applicable in a digital environment. The accident of where a professor happens to be when he or she "utters" a statement bound for the Internet should have no bearing on any judgments made about possible departure from accepted canons of responsibility.

the capacity to convey messages to a far wider audience, the difference is one of degree, not of kind. Principles of academic freedom are not diminished because of the advent of electronic communication.⁷ The crucial issue, then, is not the Web site per se, or its location, but the purpose for which it was created and the nature of the material posted to it.

Professor Day's resorting to the creation of the CARE Web site is, of course, more understandable if one bears in mind the lack of any other mechanisms whereby individual members of the Cumberland College faculty believed that they could express dissenting views. As for its actual contents, did Professor Day's Web site include inappropriate material and therefore violate his responsibility to the college? CARE's five initiatives for "accountability" called for institutional practices that are basic for sound governance: faculty participation in institutional governance (either as a body of the whole or as a faculty senate), more openness with the faculty regarding the college's income and expenses, departmental budgets, annual contracts with good-faith estimates of salary and benefits, and a published salary scale based on qualifications, experience, tenure, and rank. The five initiatives for "reform" invited a discussion about the religious identity of Cumberland College, its relationship to the institution's Baptist heritage, and the significance of its current ties to the Kentucky Baptist Convention. These are discussions that most church-related colleges have from time to time. Some of the twenty-one questions posted on the initial Web site were more controversial, especially the three questions directed at President Taylor (whether he could get a vote of confidence, whether he was really qualified to be a college president, and whether his membership in the Masons was consistent with being president of a Christian college). There may be legitimate differences of opinion as to whether all were in good taste, and whether Professor Day exercised good judgment in not at least attempting to talk with President Taylor before he posted these questions online. But virtually all of the issues raised by Professor Day are matters of policy, structure, and practice that go to the heart of the mission of the college. So far as the investigating committee has been able to determine, none of the postings was knowingly untruthful, and none seemed malicious. The committee is not aware of anything that was posted on the Web site that warranted the extreme measures taken by the Cumberland College administration.

Did the Web site somehow demonstrate Professor Day's unfitness for his faculty position? While the site showed signs of naiveté and some carelessness with spelling and syntax, nothing posted there by Professor Day would seriously challenge the positive assessment of Professor Day's teaching and service rendered by students, colleagues, and particularly his department chair, Professor Bailey. The evidence clearly suggests that the actions taken by the administration against Professor Day were based on its intense displeasure with the

views and opinions he had expressed on the Web site, which Professor Day was entitled to express under principles of academic freedom. The investigating committee finds, therefore, that Professor Day's claim that he was dismissed for reasons that violated his academic freedom is supported by prima facie evidence that has been allowed to stand unrebutted by the administration.

The investigating committee wishes to note that it found no evidence of interference with academic freedom in the classroom itself but did find an overwhelming consensus that academic freedom at Cumberland does not extend to even the slightest criticism of the administration, especially the president. As will be developed more fully below, the investigating committee was repeatedly told that the campus is permeated by a culture of fear that stifles questions about administrative decisions, policies, and practices. There is even reticence to seek a conversation with the president. It seems that loyalty to Cumberland College has come to be understood as requiring subservience to the administration. It is unfortunate, but quite understandable, that Professor Day, instead of first trying to discuss his concerns about the college with President Taylor, felt it necessary to raise his questions in an (initially) anonymous, off-campus Web site. The consequences of that action certainly appear to justify those fears.

4. THE BAILEY REAPPOINTMENT OFFER

Cumberland College uses a standard reappointment contract for all faculty, irrespective of their years of prior service at the institution. It is an annual contract that ends at the stated date "unless a new agreement for an additional term of time has been entered into." The contract includes the following paragraphs:

14. The College's policy is to provide you with notice if you will not [be] offered employment beyond the term of this Agreement. This notice is normally given in writing on or before March 15.
15. Failure to provide you with notice that you will not be offered employment shall not entitle you to further employment.
16. The decision by the College not to offer you a subsequent contract is not a "termination" or "dismissal."
17. Unless you are employed by this Agreement as a tenured faculty member, the College makes no promise or representation concerning any further offer of employment beyond the term of this Agreement, and you should not rely upon any oral or written representations to the contrary. Employment by the College in faculty positions may occur only by formal Agreement signed by the President.

Thus, the reappointment contract provides nontenured faculty with no expectation of continued service after the annual contract's expiration.

The addendum for faculty in the college's *Policies and Procedures* contains the following provisions regarding non-tenured faculty who receive notice of nonrenewal: "The faculty member may ask for an oral explanation in an informal interview with his departmental chairperson or the Vice President for Academic Affairs. A decision not to reappoint may be reviewed at any time during the current contract period." Paragraph 18 of the contract, however, states that the college's policy documents "are not contracts, except to the extent a portion of a publication is declared to be incorporated into this Agreement by specific reference." That paragraph also reserves to the college "the right to amend these publications and policies and procedures at any time and from time to time." Paragraph 9 of the contract incorporates the grievances policy included in the *Policies and Procedures for All Employees*. That document states, in part:

If any employee feels that he has been unfairly treated in any way, including . . . nonrenewal of his appointment on the faculty . . . , he shall submit a written statement of his grievance and any supporting evidence to the chairman of his department or administrative head. If the employee remains dissatisfied after discussions, then the department or administrative head shall submit the grievance, the employee's supporting evidence, and any materials developed by the department or administrative head and any recommendation he/she wishes to make to the President. The President shall review the grievance and make a final decision regarding it.

Although paragraph 20 governs an executed reappointment contract, it has implications for nonreappointment of non-tenured faculty beyond the college's normal notification date of "on or before March 15" as provided in paragraph 14. Under paragraph 20, even when a reappointment contract for a nontenured faculty member has been formally executed, it can be terminated under the following conditions: "Notwithstanding any provision in this Agreement to the contrary, . . . you, or the College if you do not have tenure, may terminate this Agreement for any reason and without cause by giving written notice to the other at any time within sixty days of your execution of this Agreement. . . . Notice to you shall be personally delivered to you or mailed to the address shown on this Agreement."

Professor Bailey's "special contract" offer for the 2004–05 academic year included all of the provisions in paragraphs 14 through 18 of the new standard Cumberland College contract quoted above, which encompass the college's policy governing notice of nonrenewal. It also included a first paragraph, however, that was not part of the contract issued to other members of the faculty. As cited earlier in full, that paragraph would have permitted the administration to terminate Professor

Bailey's services "at any time and without cause, by giving [him] written notice to that effect," at which point his employment would terminate immediately, "and all [his] rights and the College's duties under this agreement [would] immediately cease." That paragraph differs fundamentally from the college's official regulations as stated in its *Policies and Procedures for All Employees*. According to that document, "All employees of the College are terminable-at-will unless otherwise provided in a written contract of employment. *In the absence of a written employment contract*, the College may terminate any employee, with or without cause or notice." (Emphasis added.) By contrast, the written contract offered to Professor Bailey changed his status to one of a terminable-at-will employee.

In his March 17 letter responding to and rejecting the "special contract," Professor Bailey took the position "that the nonstandard elements of the Contract offer represent a different, if not discriminatory and retaliatory, standard of treatment of me as compared to other faculty members at Cumberland College." The application of the at-will provision solely to him, he wrote, "leads me to conclude that the document is a thinly veiled attempt to dissuade me from continuing my employment at the college." He further interpreted the contract, along with the president's memorandum, to be "a poorly veiled threat" to his continuance there or his employment elsewhere, and he concluded with the complaint that the nonstandard contract was also "an attempt to dissuade or limit any possible legal action in connection with my employment."

It is undisputed that Professor Bailey's "special contract" imposed standards different from those applied to other faculty. The president's own memorandum acknowledged that it was "not the standard contract being offered to [other] faculty." The substance of the differences imposed by the terminable-at-will provision, in and of itself, made it highly unlikely that Professor Bailey would have accepted such a contract. Indeed, the provisions of the "special contract" were, on their face, of such an unacceptable nature and placed his employment at so great a risk that they made it safe to predict that Professor Bailey would reject it, thereby automatically triggering the clause in the president's memorandum that specified that "this letter shall constitute written notice that your appointment to the faculty will not be renewed, and at the conclusion of the present term of your appointment your employment will end."

Employment-at-will contracts are by definition inimical to academic freedom and academic due process, because their contractual provisions permit infringements on what academic freedom is designed to protect. Since faculty members under at-will contracts serve at the administration's pleasure, their services can be terminated at any point because an administrator objects to any aspect of their academic performance, communications as a citizen, or positions on academic governance—or simply to their personalities. Should

this happen, these faculty members have no recourse, since the conditions of their appointment leave them without the procedural safeguards of academic due process. Moreover, the mere presence of at-will conditions has a chilling effect on the exercise of academic freedom. Faculty members placed at constant risk of losing their position by incurring the displeasure of the administration must always be on guard against doing so.

Professor Bailey alleged in his March 17 response to President Taylor that the president's offer denying him reappointment without unacceptable conditions was based on considerations that violated his academic freedom. He claimed that the administration's overall evaluation of his academic performance, which produced the "special contract," was not based on the actual record of his academic and administrative work and was not an accurate assessment of it. Rather, he alleged, it was based on the displeasure of President Taylor and Dr. Good with him, displeasure stemming from statements that he made or refused to make and actions that he took or declined to take in regard to Professor Day. As noted earlier, Professor Bailey alleged that the president and college counsel had used "intimidation tactics" in attempting to influence his testimony at Professor Day's unemployment hearing. He also complained that the memorandum and the "special contract" were issued "in part because I refused to sacrifice my integrity in order to stay in your graces. On several occasions you and Dr. Good have required that I take actions that would have been unethical."

The Association's *Statement on Procedural Standards in the Renewal or Nonrenewal of Faculty Appointments* provides that when faculty members "assert that they have been given notice of nonreappointment in violation of academic freedom . . . , they are entitled to an opportunity to establish their claim in accordance with Regulation 10 of the *Recommended Institutional Regulations*." Under those specific review procedures, the faculty member should be afforded a hearing before an elected body of faculty peers. As noted above, Cumberland College's policies make no provision for review of a faculty member's complaint by a faculty body. Moreover, in responding on April 8, 2004, to the AAUP's staff about the Association's concerns in the case of Professor Bailey, President Taylor wrote, "When the term of an appointment of a nontenured member of the faculty expires, the College is free to choose whether it will offer the faculty member a subsequent appointment. If the College chooses to offer a subsequent appointment, the College may attach whatever terms and conditions to that offer the College believes will best serve the academic interests of this institution."

As to Professor Bailey's claim that the decision to deny him reappointment by imposing unacceptable conditions violated his academic freedom, President Taylor, in citing the reasons for issuing Professor Bailey a "special contract," stated in his

memorandum that "I have been dissatisfied with your performance," and went on to "describe three instances of poor performance." As previously noted, these "instances" included: (1) Professor Bailey's refusal to tell the administration, in advance of a legal proceeding, what he had said to Professor Day prior to the latter's October 13 meeting in President Taylor's office; (2) the content of his testimony at the unemployment hearing and his lack of authorization to converse with Professor Day about the topic; and (3) his "insubordination" for refusing to arrange for Professor Day's personal belongings to be returned to him. Nothing in these instances related to Professor Bailey's academic performance, and the investigating committee is unaware of any questions having been raised about his professional fitness. In his response to the president, Professor Bailey took strong exception to the accuracy of each of the president's claims and to the broader allegation that his performance was "poor." He set forth a factual record of both his original faculty and department chair responsibilities for the 2003–04 academic year and enumerated nine duties, including increases in his teaching load and academic advising, which had been added by the administration after October 13 and Professor Day's dismissal. He reported that he had "successfully completed these duties and many additional tasks," and he concluded, "I believe that my actions and the quality of my work in the face of a dramatically increased workload and very difficult circumstances are clear and substantial evidence of the level of my commitment to Cumberland College and the Department of Social Work in the current academic year."

While silent on Professor Bailey's academic performance, the "instances of poor performance" cited in President Taylor's memorandum focused exclusively on Professor Bailey's speech and conduct as a department chair in the circumstances linked to the case of Professor Day. The investigating committee finds that the administration's decision to impose unacceptable terms and conditions on Professor Bailey's reappointment was based principally, if not exclusively, on its displeasure with his speech and conduct relating to the case of Professor Day. The committee construes the conditions attached to Professor Bailey's contract offer as a form of retaliation by the administration against him for his disagreement with administrative directives related to its case against Professor Day. The investigating committee accordingly finds this action to have been taken in violation of Professor Bailey's academic freedom.

5. NOTICE OR SEVERANCE SALARY

Regulation 8 of the Association's *Recommended Institutional Regulations on Academic Freedom and Tenure* addresses severance arrangements when an appointment is terminated. It states that, in all cases except those involving moral turpitude, "the faculty member will receive salary or notice in accordance with the following schedule: . . . at least one year, if the deci-

sion is reached after eighteen months of probationary service or if the faculty member has tenure." In the case of a probationary faculty member in his or her second year of service who is denied reappointment, the Association's *Standards for Notice of Nonreappointment* call for notice to be given in writing no later than December 15.

The Cumberland College regulations in effect during the 2003–04 academic year provided for notice by March 15 if an appointment is not to be renewed for an additional year. There is no provision regarding notice or severance salary in a dismissal for cause.

In the case of Professor Day, the college ceased paying him any further salary effective with his separation from the faculty. Since, in the investigating committee's judgment, Professor Day was dismissed in his fourth year of service, and since the administration did not charge him with moral turpitude, the committee finds that he was entitled to at least one year of severance salary under the Association's standards.

In the case of Professor Bailey, the administration's position is that it offered him a contract for the 2004–05 academic year, which he declined, and that he was therefore not entitled to anything further. The investigating committee disagrees. As noted above, the conditions of the "special contract" made it all but inevitable that Professor Bailey would not accept it, thus triggering the termination of his services. The committee finds that his case is essentially one of nonreappointment, and that under the Association's standards Professor Bailey, a second-year faculty member, should have been notified of nonreappointment no later than December 15 of that academic year. He was, therefore, entitled to one year of severance salary.

6. CLIMATE FOR ACADEMIC FREEDOM

Prompted by the issues raised in the cases of Professors Day and Bailey, the investigating committee inquired into the general conditions for academic freedom at Cumberland College. Since President Taylor stated that the committee was not welcome on campus, its access to faculty members was limited to those who agreed to interviews at another location. Nevertheless, the committee is confident that the interviews it conducted and the other available information provide a sufficient basis for the comments that follow.

The views of current and former faculty members with whom the committee spoke indicated that the climate for academic freedom at Cumberland College differs according to context and substance. As noted above, they told the committee that faculty enjoy academic freedom in their classes in teaching their subjects. By contrast, however, they reported that they do not feel free to address topics of college concern in any forum. They described a climate of fear about what faculty members may say and do, a fear based on what they know or have been told has happened to others. They expressed a particular fear that criticizing the administration and its opera-

tion of the college could place a faculty member's appointment in jeopardy. General meetings of the faculty, where the president presides and reports on what has been or will be happening at the college, are the faculty's only formal forum, and the committee was told that the climate is such that faculty who attend do not feel free to raise questions even there.

Another indication of the atmosphere for academic freedom appeared regarding the investigating committee's interviews. As noted above, the Association's staff had reported that some current faculty members who agreed to be interviewed requested that the interviews be conducted at an out-of-town site, apparently because of concern that the administration might retaliate against them simply for meeting with the committee. Fear that the administration might learn that a person had met with the committee also emerged during interviews, as concerns were expressed about preserving the confidentiality of their testimony.

The actions by the administration against Professors Day and Bailey, the complete absence of mechanisms for faculty review of what the administration did in these cases, and faculty fears of retaliation all appear to the investigating committee to reflect an atmosphere of intimidation that effectively forestalls the exercise of academic freedom at Cumberland College.

VII. Conclusions

1. By requiring Professor Robert Day to choose between resignation and immediate discharge under the circumstances that have been described, by failing to pursue discussions with him looking toward a mutually acceptable settlement, by refusing to accept his withdrawal of the oral resignation it effectively coerced from him, and by failing to provide for a faculty hearing, the administration of Cumberland College deprived Professor Day of academic due process as set forth in the 1940 *Statement of Principles on Academic Freedom and Tenure* and the 1958 *Statement on Procedural Standards in Faculty Dismissal Proceedings*.

2. Professor Day's claim that the administration, in acting against him because of displeasure with his Web site, thereby violated his academic freedom is supported by prima facie evidence that the administration has not rebutted.

3. The special contract that the administration proffered to Professor James Bailey can reasonably be construed as intended to force his departure from the faculty. The severity of its terms effectively denied him reappointment.

4. The administration acted against Professor Bailey because of his disagreement with its directives regarding Professor Day, thereby violating Professor Bailey's academic freedom.

5. Neither Professor Day nor Professor Bailey was given the notice or severance salary called for in the Association's recommended standards.

6. The policies of Cumberland College, including the grievance procedure, do not provide for faculty hearings of any kind. College policies and practices preclude any effective faculty

role in academic governance and contribute to an atmosphere that stifles the freedom of faculty to question and criticize administrative decisions and actions.⁸

JOHN C. SHELLEY (Religion)
Furman University, *chair*

NORMA C. COOK (Communication)
University of Tennessee, Knoxville
Investigating Committee

Committee A on Academic Freedom and Tenure has by vote authorized publication of this report in *Academe: Bulletin of the AAUP*.

JOAN WALLACH SCOTT (History), Institute for Advanced Study, *chair*

Members: JEFFREY HALPERN (Anthropology), Rider University; MARY L. HEEN (Law), University of Richmond; EVELYN BROOKS HIGGINBOTHAM (Afro-American

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8. Responding by letter dated December 2, 2004, to the draft text of this report, President Taylor wrote as follows:

Thank you for the courtesy of allowing me to review and comment on the AAUP's proposed report concerning Cumberland College.

Although there are some errors in the report, I do not think it is productive for me to address each and every one. I do want to address a few important issues.

The mission of Cumberland College is not the same as the mission of the AAUP. Consequently, the policies and procedures adopted by the College's board of trustees are not the same as those adopted by AAUP. The College applied and followed its own policies with respect to the employment of Mr. Day and Dr. Bailey, not those of AAUP or of any other institution.

Even if AAUP's standards on dismissal for cause were generally applicable to Cumberland College, they would still not be relevant to a faculty member who resigns, and Mr. Day unquestionably resigned. Mr. Day himself made reference to "my verbal resignation" when he wrote to me in hopes of withdrawing that resignation.

In twenty-five years as a College president, I have never terminated a faculty member's contract in mid-year. I had no intention of terminating Mr. Day's contract, and I did not. However, neither was I inclined to allow Mr. Day to retract his resignation and return to a position on the faculty at the same time that he was actively causing grave damage to the College and its reputation, as verified by your draft [report].

I do not believe the proposed report by AAUP does justice to Cumberland College. If AAUP publishes the report, I certainly hope it will report this letter in the interest of balance.