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Legal Options for Idaho Faculty Faced with Classroom Weapons

By Nick Gier, IFT President

Idaho college and university presidents and faculty voiced their strong opposition, but the Idaho Legislature nevertheless passed Senate Bill 1254 allowing firearms in our classrooms. The UI faculty union hired an attorney to research the legal options for Idaho teachers, and I will now summarize his legal memo on this vital matter. See the complete document at www.idaho-aft.org/GunsCampus.pdf.

Second Amendment: U. S. and Idaho

In 2008 the U. S. Supreme Court ruled in *District of Columbia v. Heller* that the Second Amendment right to bear arms may be limited in some instances. Specifically, the good justices stated that laws that prohibit firearms in schools and government buildings are constitutional. They also concluded that laws "imposing conditions and qualifications on the commercial sale of arms" may be allowed.

In 2010 the Supreme Court reaffirmed *Heller* in *MacDonald vs. City of Chicago*, ruling that *Heller* applies to state governments. The justices reiterated their exclusion of carrying weapons in schools and government buildings from Second Amendment protection. In its passionate Second Amendment absolutism, the Idaho Legislature ignored conserveative jurists on the highest court in the land.

With regard to Idaho's Constitution and the right to bear arms, our attorney noted that Idaho laws currently ban "firearms in public schools and most county courthouses, including the Latah County Courthouse. . . , and my best educated guess is that a university ban on firearms does not violate Idaho's 'Second Amendment.'"

Our attorney argues that the UI could have used its constitutional status as a means to nullify Idaho Senate Bill 1254. The UI was established in 1889, one year before the state of Idaho. The Idaho Constitution includes the UI Constitution, which entrusts the UI Regents with ultimate power to make decisions for the University. Theoretically and legally, the UI Counsel's office could have advised the UI Regents to refuse to implement Senate Bill 1254.

Our attorney cites four Idaho Supreme Court decisions that upheld the UI's status as a separate legal entity. For example, there is the 1921 case of *Black v. State Board of Education*, in which the Idaho Supreme Court ruled that the UI could not be compelled to hand over money from the sale of its property to the state. The justices' reasoning was that the UI, having its own constitution, is "not subject to the control or supervision of any other branch, board or department of the state government, but is a separate entity."

Open Carry on Our Campuses?

Idaho Senate Bill 1254 does exclude firearms from student dormitories and public entertainment facilities of over 1,000 seats. Other than these exceptions, however, our attorney states that the breath of this new law is "quite extraordinary." A person with an "enhanced concealed carry permit" does not actually have to conceal the weapon. Our attorney explains that a person "will be allowed to walk around campus and into classrooms with a gun in plain view, and the UI cannot regulate this in any way."

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While our attorney believes that Senate Bill 1254 violates the UI's own constitutional right to administer its own affairs, he does not believe that it would be advisable for any faculty member or faculty group to sue the State of Idaho.

First, as odd as it sounds, we may not have legal standing to do so. Second, even if faculty succeed in challenging the law, the UI itself has already decided to comply with the law, and there is obviously nothing illegal or unconstitutional about its doing so.

Contractual Options: Students and Faculty

Another legal alternative is to require that students attending Idaho's colleges and universities sign a contract stipulating that they may not bring firearms to class. In *George v. University of Idaho* the Idaho Supreme Court ruled that "the principal relationship between a college and its students is contractual." Our attorney, however, concedes that "not all contracts are legal or enforceable. Agreements which violate public policy or law are sometimes held to be illegal contracts."

Alternatively, Idaho faculty could argue that Senate Bill 1254 violates their own contracts with their institutions. University policy manuals are considered part of a faculty member's contract, and the UI *Faculty-Staff Handbook* states that the UI "will foster an academic environment conducive to the students' mental, physical, and social development and well-being" (Sec. 1320 E-1).

The *Handbook* also states that "certain forms of responsible conduct must be adhered to in order to ensure the physical functioning and safety or security of the [UI] community"(Sec. 2300 Art. VI, Sec. 1). Faculty members could very well argue that their contractual duties promoting student well-being and maintaining classroom security are violated by Senate Bill 1254.

Most Idaho faculty receive an annual contract stating their salary and conditions of employment. Before signing, language such as the following could be added: "I reserve the right to control what objects and materials students may bring into the classroom."

Classroom Strategies for Faculty

Asserting their own autonomy, faculty members could put up a sign "no weapons allowed" on their classroom doors, or they could offer an equivalent on-line course to arms-carrying students. They could also request that their classes be held in one of the large halls exempted under the new law.

As we are unsure about the success of any legal action against the state, we recommend that Idaho faculty, if they so desire, follow through with some of these contractual options or classroom strategies.

ISU, BSU, LCSC Presidents Get Raises
ISU Still Sanctioned by AAUP

At its most recent meeting the Idaho State Board of Education approved raises for one college and two university presidents. LCSC President Tony Fernandez received a 3 percent raise, and his salary is now $176,011. At his previous salary he was 37 percent behind his peers at the nation's bacca-laureate-granting institutions. BSU's Bob Kustra and ISU's Arthur Vailas both received 5 percent raises. Kustra's salary is now at $375,104 and Vailas now earns $357,029.

ISU is on the AAUP sanctions list because of Vailas' abolition of the ISU faculty senate and his refusal to accept a draft constitution based on BSU's. The SBOE does not appear to care about the opinions of an organization that has set the standards for the academic profession for over one hundred years. Read the following story about yet another Vailas/faculty conflict.

Do Faculty Own Their Own Ideas?

By Leonard Hitchcock, ISU Professor Emeritus

Who owns an idea? There is one clause in the U.S. Constitution that answers this question. It specifies that the Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors exclusive right to their respective Writings and Discoveries" (Article 1, Section 8).

The reasoning behind this clause is straightforward. The country benefits from fresh ideas, new discoveries and useful inventions. It is therefore in the country's interest that citizens be given an incentive

to devote their time and effort to such intellectual endeavors. The appropriate incentive is the opportunity to profit from them, and that requires that the originators of new ideas be their legal owners, at least for a period of time. Eventually, ownership of those ideas belongs to those who collectively protected them: the citizenry.

In other words, the originator of a new idea is its first, rightful owner, and it is this commonsense principle that was embodied in the first congressional legislation addressing such ownership, the Patent Act of 1790. Over time, however, this principle came to be elaborated and modified in intricate and sometimes surprising ways.

The phrase "intellectual property" is the generic term used to refer to ways of protecting different categories of original ideas. One traditional category is copyright: the right to ownership of ideas embodied in some tangible, public medium of literary or artistic creation, such as written works of fiction or non-fiction, musical scores, sculptures, paintings, films, recorded speeches, videos, computer programs, etc. Another is patent: the right to ownership of inventions, devices, new materials, plant varieties and methodologies that solve technological problems. Still others cover such creations as trademarks and the visual appearance of products.

Prior to the turn of the twentieth century in this country, when most businesses were in the hands of families and most innovators were freelance entrepreneurs, the principle that the creator of a new idea owned it, i.e. had control of its use, functioned well. But over time companies emerged as the real powerhouses in the economy, and it was their employees that increasingly produced the new ideas. Those companies argued that they were not being given sufficient incentive to invest in and direct such innovation because it was their employees, not the company itself, who acquired ownership. The congress accepted that argument and, in 1909, created the doctrine of "work-for-hire." According to that doctrine, the rightful author of inventions produced by employees engaged in activities within the scope of their assigned tasks was the employer. And companies also owned certain kinds of "specially ordered or commissioned works" that they had contracted for.

This doctrine was a legal fiction. Companies, though they may legally be "persons," don't have ideas; their employees do. But congress found this a convenient way of representing a quid pro quo arrangement between companies and regular employees: employees get salaries, a place to work, fringe benefits and a relatively secure livelihood; in return management gets ownership rights to the products of their labor.

Unfortunately, this legislation didn't define exactly how to determine who was an "employee," nor what kinds of work were within an employee's "scope of employment," nor what sorts of commissioned works qualified as works made for hire. It was left to the courts and subsequent congresses to figure that out. Unfortunately, what emerged were not clear-cut formulas for decision-making, but rather lists of factors to be considered, and no prescribed weighting of those factors. In a U.S. Supreme Court case, for example, thirteen aspects of employment are listed that must be considered in defining someone as an "employee."

Adding to the confusion, there is a fairly large class of workers that the courts have always treated as an exception to the work-for-hire rule. These workers in most respects qualify as employees, and the copyrightable or patentable products of their work are largely produced by them while going about their assigned tasks, yet courts have traditionally assigned ownership of those products to them, not to their employers. Who are these workers? Teachers. The "teacher exception" to work-for-hire law is not spelled out in current copyright law, but it has been honored by courts for many years, largely because several unique conditions of teachers' employment—especially university teachers—seem to justify it.

Last January the administration of Idaho State University proposed an intellectual property policy to the faculty and ask for comments. That policy essentially repudiated the teacher exception. It insisted on the principle that whatever teachers produce within the scope of their employment is owned by the university, including all copyrightable materials associated with teaching. It made an exception, however, for ownership of publishable articles and books. The university also claimed ownership of all patentable inventions by faculty, including those that resulted from grant-funded research.

The faculty protested this policy. At a meeting of the Faculty Senate, senators and guest faculty argued

that the policy violated their rights and was unworkable in practice. Later, at the end of the 30-day comment period the administration announced to the Faculty Senate (2/10/14) that it was modifying the policy and restoring copyright ownership to the faculty. That modified proposal didn't reach the faculty for its review until 3/27/14.

In my next column I will discuss the rationale for the teacher exception, and the apparent commitment of ISU's administration to treating faculty as work-for-hire employees, as revealed in its initial policy proposal.

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