Following fight over academic freedom

University of California, Irvine hires constitutional scholar

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Last week the University of California, Irvine (UCI), located in the heart of Orange County, abruptly rescinded its contract to hire Erwin Chemerinsky, perhaps the best known contemporary authority on United States constitutional law, because of his outspoken defense of democratic rights. Following an uproar, however, the contract was reinstated Monday.

Although it appears that Chemerinsky will become the founding dean of UCI's new law school, scheduled to begin admitting students during fall 2009, the episode highlights the increase in right-wing attacks on academic freedom, epitomized this year by DePaul University's denial of tenure to Norman Finkelstein (See "Critic of Zionism denied tenure at US university") and the University of Colorado's firing of Ward Churchill (See "The firing of Ward Churchill: Attack on academic freedom in US escalates").

Chemerinsky's case is particularly striking because of his prominence. Currently a tenured professor at Duke University after 21 years teaching law at the University of Southern California, Chemerinsky is the author of both the leading treatise and textbook on constitutional law, two other books, and more than 100 law review articles published in the nation's most prestigious journals. In 2005, he was named one of the "the top 20 legal thinkers in America" by *Legal Affairs* magazine.

Known for his ability to explain complex issues quickly and simply—as well as for his enthusiasm and personal charm—Chemerinsky is quoted regularly in the media. Major American newspapers publish his opinion pieces and he appears frequently on radio and television talk shows to discuss the latest legal developments. He is highly respected by academics across the political spectrum.

As a lawyer, Chemerinsky has represented Valerie Plame Wilson and Guantánamo Bay detainees. He has argued many times before the United States Supreme Court, including unsuccessfully for the plaintiffs in *Van Orden v. Perry*, the case challenging public displays of the Ten Commandments in Texas.

Most recently, Chemerinsky has been particularly critical of the Bush administration's antidemocratic measures and decisions of the current Supreme Court undermining individual freedoms while protecting big business from regulation. In January 2006 he testified before the Senate Judiciary Committee against the nomination of Samuel Alito as an Associate Justice of the United States Supreme Court, stating, "At this point in time, it is far too dangerous to approve someone for the Supreme Court with such a consistent record of strong deference to executive claims of authority."

Last month, after a nine-month search, UCI asked Chemerinsky to be the first dean of its new law school, the first established by the University of California in 40 years. He signed a contract on September 4, contingent only on the Board of Regents—the entity that oversees the entire University of California system—approving his salary.

On September 12, however, Chemerinsky announced that UCI Chancellor Michael V. Drake told him the deal was off because UCI "underestimated the conservatives out to get me." Drake promptly denied the charge, claiming he revoked the contract because Chemerinsky's frequent media commentaries were "polarizing."

Drake cited Chemerinsky's August 16, 2007 op-ed piece in the *Los Angeles Times*—coincidentally published the same day Drake offered him the UCI position—denouncing former Attorney General Alberto Gonzales for proposing "an unnecessary and mean-spirited regulation that will make it harder for those on

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death row to have their cases reviewed in federal court." (Chemerinsky responded that academics should "be able to stand up for people on death row.")

Drake's alleged reason was a sham. Chemerinsky's liberal views and his proclivity to express them were well known long before he was hired. "It's rather like discovering Wilt Chamberlain was tall," John Jeffries, the dean of the University of Virginia law school, told the *Los Angeles Times.*

Chemerinsky claimed Drake told him there would be "a bloody battle" if his name were submitted to the Board of Regents. Several Regents, however, when contacted by the *Los Angeles Times*, said that neither Chemerinsky's appointment nor his salary were likely to have been challenged.

"There is such a feeling of McCarthyism to it," Chemerinsky wrote in an email to the media. In response to an email from this reporter, who worked on an appeal with Chemerinsky earlier this year, he wrote, "Chancellor Michael Drake said that I had proven too politically controversial. We live in strange times."

Evidence of what was actually behind UCI's rescission of the contract first appeared in the September 15 edition of the *Los Angeles Times.* UCI psychology professor Elizabeth Loftus, a member of the search committee, quoted Drake as telling the committee that "outside forces" compelled his decision. Michael Schroeder, a leading Orange County Republican, confirmed that once the appointment became known he mobilized a group of 20 Republican activists to derail it. According to the *Times*, they distributed Drake's cell phone number and mounted an intense call-in campaign.

Ronald M. George, the conservative Chief Justice of the California Supreme Court, complained directly to Drake about the appointment, claiming that Chemerinsky's op-ed piece on the death penalty inaccurately portrayed the plight of California's 666 death row inmates. Chemerinsky was reportedly outraged when he learned of this, and defended the contents of his opinion piece. It is extraordinary for a sitting judge, especially the one presiding over the highest court in the state, to interfere behind the scenes with the hiring of a public official.

Chemerinsky's abrupt sacking ignited an immediate uproar. The *Los Angeles Times* editorialized that the original job offer was "a stroke of genius" and its revocation "an act of intellectual cowardice and self-destruction." Douglas Kmiec, a right-wing constitutional law professor at Pepperdine University in Malibu—where former Whitewater prosecutor Kenneth W. Starr is the law school dean—called UCI's decision "a forfeiture of academic freedom."

An open letter at UCI—which has not yet started fall classes—decried "the deep violation both of the integrity of the university and of the intrusion of outrageously one-sided politics and unacceptable ideological considerations." The letter was signed by hundreds of faculty and students within the first few hours of circulation.

Budget cuts dating back to Ronald Reagan's first term as governor in the mid-1960s have made the University of California more dependent on private contributions and, therefore, more susceptible to financial pressures. It is not yet known what role, if any, threats to withhold contributions or interfere with UCI fundraising might have played. Orange County billionaire Donald Bren, the chairman of the Irvine Company, announced last summer that he will be donating $20 million to establish the UCI law school, which will be named after him. Bren's spokesman claimed that he "doesn't know Erwin Chemerinsky or know enough about him to have an opinion one way or another." He claimed Bren had nothing to do with the firing.

The attack on Chemerinsky reflects a certain level of desperation. Facing slumping opinion polls fueled by the debacle in Iraq, the deepening attacks on democratic rights, and, underlying it all, the staggering growth of social inequality, the right wing is becoming increasingly dependent on a cadre of reactionary judges—most notably on the Supreme Court—to stifle dissent and maintain the political hegemony of the financial elite.

Even the prospect of an establishment liberal such as Erwin Chemerinsky encouraging his law school students and graduates to rail against injustice and defend constitutional principles is more than these elements are willing to tolerate.

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