Remarks for CAUT Council Meeting
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Ottawa, Canada

Report of the AAUP Special Committee on Academic Freedom and
National Security in a Time of Crisis

It is very good, as always, to be here. Thank you so much for inviting me. Before I speak about the special report that is the subject of my remarks, I take this opportunity to share the news that AAUP has appointed an outstanding person to succeed our esteemed General Secretary, Mary Burgan, who will retire after a decade of distinguished service. Roger Bowen, former president of the State University of New York at New Paltz, and a courageous defender of academic freedom and shared governance, will assume the position on July 1, 2004.

I understand that you have received copies of the report of the AAUP Special Committee on Academic Freedom and National Security in a Time of Crisis. The committee is chaired by Robert O Neil, Professor of Law at the University of Virginia and Director of the Jefferson Center for Free Expression. Other members of the ten-person committee include Joan Wallach Scott, Chair of the AAUP Committee on Academic Freedom and Tenure and Professor of History at the Institute for Advanced Studies at Princeton, and Gerry Turkel, Chair of our Committee on Government Relations and Professor of Sociology at the University of Delaware. Typical of our reports, it is exhaustive in its attempt to address all the pertinent issues raised by a very difficult topic. Its seven sections provide a background for the formation and functioning of the committee, analyses of the USA PATRIOT Act, of restrictions on information, of restrictions on individuals, a description of responses from within our campuses to legislation and concerns of the general public, three cautions, and a series of recommendations.

I shall not réprise the entire document, but rather focus on what I consider to be its most salient features, those that might be of greatest interest to you as the neighbor who suffers the winds from the south, and some additional details regarding specific incidents. The committee took as its primary premise that it is incumbent upon the government, when infringing upon civil or academic freedom, to satisfy three criteria:

1. The government must demonstrate the particular threat to which the measure is intended to respond, not as a matter of fear, conjecture, or supposition, but as a matter of fact.
2. The government must demonstrate how any proposed measure will effectively deal with a particular threat.
3. The government must show why the desired result could not be reached by means having a less significant impact on the exercise of our civil or academic liberties.

A second, and important, premise is that national security is enhanced, not diminished, by freedom of inquiry and the open exchange of ideas. The free exchange of scientific data, for example, might assist investigators in neutralizing threats posed by information s falling into the wrong hands. And, of course, the report reminds us that this is not the first time in history that the ostensible reason for waging war is the protection of our freedoms. During World War II, our Committee on Academic Freedom and Tenure took the position that Academic freedom is one facet of intellectual freedom; other aspects of that larger concept freedom of speech, freedom of the press, and freedom of religion are among the avowed objects for which this war is being fought. It would be folly to draw a boundary line across the area of freedom.

The USA PATRIOT Act, the full name of which is Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, was conceived in haste and enacted into law within weeks of the terror attacks of September 2001. With virtually no

deliberation, it received an overwhelming affirmative vote in the U.S. House of Representatives and only one negative vote, that of Wisconsin s Russell Feingold, in the U. S. Senate. Sweeping in its scope, it mingles the activities of law enforcement and intelligence arms of the federal government and allows for a level of surveillance of both citizens and non-citizens that threatens the very freedoms for which we claim to be fighting. The provisions that most directly affect the academic community are its amendments to three previously existing acts, the Family Educational Rights and Privacy Act (FERPA), the Electronic Communications Privacy Act
(ECPA), and the Foreign Intelligence Surveillance Act (FISA).

FERPA was enacted in 1974 and was designed to protect the confidentiality of student records. The PATRIOT Act amended FERPA in a manner that effectively gives the federal government *carte blanche* to collect student information without the knowledge or consent of the student or the student s parents. Even more troubling is the fact that colleges and universities are not required to keep records of disclosure to the Justice Department, and those that do keep such records are exempted from liability under FERPA and are granted immunity from suit by those whose privacy was violated.

The Electronics Communication Privacy Act, ECPA, was adopted in 1986 to protect the privacy of electronic communications such as e-mail and voice mail. Access to such communications required wiretap warrants, which could be obtained only by meeting more stringent standards than the standard of probable cause required for ordinary search warrants. An application for a wiretap must demonstrate the failure of other investigative methods, as well as a complete statement of the allegation, a description of those being investigated, a statement of previous applications for warrants involving those persons, and a complete statement of the time period for which the wiretap is sought. The USA PATRIOT Act amendments to the ECPA eliminate the requirement for a wiretap order and permit the use of search warrants to seize any voice mail.

The Foreign Intelligence Surveillance Act, dating back to 1978, already provided investigators with easier access to subpoenas when investigating criminal activity suspected of being conducted by a hostile foreign power. As amended by the PATRIOT Act, FISA is now one of the most troubling of the surveillance laws on the books from the viewpoint of its impact on academic freedom. Not only has the definition of records subject to search and seizure been expanded to include book sales and library lending records, there is an embedded gag order that prohibits book sellers and librarians from disclosing to their patrons that their records have been sought. Because of the gag rule, it is virtually impossible to determine the extent to which the government has employed the legislation, although one survey found that 550 libraries had received requests for the records of their patrons.

The American Library Association has been very active in protesting the gag order, and the AAUP has developed a document, available on our web site, that provides guidance for librarians and other faculty who are approached by federal law enforcement agents.

The section of the committee s report dealing with restrictions on information raises a number of complex issues regarding sensitive but unclassified information, but points out that most of the legislation concerning these issues was in place prior to September 11. The report urges the scientific community to maintain control over research that, however sensitive, is not classified.

Of special concern to the academy, both locally and globally, are restrictions on individuals. Those restrictions have a deleterious impact, not only with respect to the free exchange of ideas, but to the continued economic viability of academic programs within the U.S. Last year colleges and universities in the U.S. attracted over half a million international students. And for two decades more than half the growth in the number of Ph.D.s awarded in the U. S. can be attributed to noncitizens, many of whom were Canadian. Even Attorney General John Ashcroft, not ordinarily noted for his xenophilia, said just last year, Allowing foreign students to study here is one of the ways we convey

our love of freedom to foreign students who will one day return to their countries and take on leadership positions.

Approximately 60% of all international students are Asian, with Canadian citizens comprising the next largest group. Fewer than 5% were from the Middle East. Nonetheless, there emerged a fear, to some degree justifiable, that terrorists posing as students could cross our borders undetected. After all, one of the September 11 hijackers had entered the country on a student visa, and more astonishingly, two of the terrorists were issued visas six months after they died. The response, as is too often the case in crises situations, was out of all proportion to the threat. One senator proposed a six-month moratorium on all student visas, but quickly retreated from that position. Ultimately, the major piece of legislation, aside from the PATRIOT Act, aimed at controlling the entry of potentially dangerous international students is SEVIS, the Student and Exchange Visitor Information System. Its implementation has been repeatedly delayed by numerous practical barriers the slow pace at which the recruitment of foreign students must proceed and confusion about reporting requirement among them. Although SEVIS is still not fully functional, there have already been negative consequences probably attributable to the legislation.

A survey conducted by the Institute of International Education found that more than half of the respondent institutions reported that students were delayed in arriving for the fall semester, and a substantial number reported that many students did not arrive for the spring semester of the 2002-2003 academic year. The most frequently cited cause was visa problems. Additionally, 106 institutions reported declining international enrollments, with 13 experiencing a decline of 30% or more.

The encouraging news is that, despite the grave concerns raised by the troubling legislation, the number of serious breaches of academic freedom has been relatively small and their severity quite variable. They range from the chilling effect of administrators and governing boards public condemnation of professorial speech to the firing without due process of a tenured professor prior to his indictment on 50 counts of criminal activity. I refer, of course, to the case of Sami Al-Arian, who is being held in solitary confinement in a federal prison awaiting trial. The details of the case are convoluted and occasionally bizarre. At the risk of repeating what you might already know, here is a condensed version of the case.

On September 27, 2001, Judy Genshaft, the president of the University of South Florida, placed Al-Arian, a tenured associate professor of computer science, on paid leave one day after a television appearance that generated a storm of negative publicity. Bowing to threats to withhold financial contributions to the university, as well as fears of possible violence, Genshaft informed Al-Arian on December 19 of her intent to terminate his employment. The reason she gave for her decision was that his extramural utterances had created a situation in which the University cannot effectively provide for your safety and safety of your students and colleagues or even to carry out its mission in an efficient and productive manner. In other words, he was to be punished in anticipation of the criminal acts of those who might find his positions offensive.

AAUP staff immediately offered their services to all concerned parties in an effort to mediate and, it was hoped, reverse the decision to dismiss Al-Arian. President Genshaft indicated that she would co-operate and, in fact, appeared to welcome our counsel. Nevertheless, a new semester began, and Professor Al-Arian was still on paid leave and banned from the campus. In an unprecedented act, the General Secretary, with the advice of AAUP staff, on February 6, 2002, authorized an investigation without knowing whether Al-Arian would be dismissed. Our concern centered on the threat to academic freedom posed by the novel notion that a tenured professor might be dismissed because of threats to his safety or because potential donors might withdraw financial support if he remained on the faculty.

William Van Alstyne, former General Counsel of the Association, and noted constitutional

scholar, chaired the *ad hoc* investigating committee, which spent three days in March 2002 interviewing the concerned parties as well as student and faculty groups at the University. An interim report urged President Genshaft to return Professor Al-Arian to his duties by the beginning of the summer, but no later than the beginning of the fall semester 2002. The committee informed Genshaft that AAUP would very likely vote to censure FSU if Al-Arian were dismissed on what we perceived to be pretextual grounds.

In a bizarre twist, Genshaft re-cast the issues in two important ways. In a public statement made on August 21, in which she acknowledged both the importance of academic freedom and her reliance on advice from AAUP, she attempted to justify the possibility of firing Al-Arian by claiming that he had ties to terrorists, although a decade-long FBI investigation had, at that point, produced no evidence warranting a formal indictment. She also took the unusual step of seeking declaratory relief from a federal court, that is, asking the court to advise whether firing Al-Arian would abridge his First Amendment free speech rights. The court refused to issue a judgment, in effect dismissing the university s case.

On February 20, 2003, Al-Arian was arrested and indicted on 50 counts relating to terrorist activity. On February 26, Genshaft informed Al-Arian of his dismissal. The final paragraph of the report of Committee A on Academic Freedom and Tenure reads as follows:

> While we await further developments in Professor Al-Arian's case, two basic concerns of due process warrant emphasis. The criminal charges against him, while manifestly very serious, remain to be proven in a court of law. The facts may sustain the imposition of severe criminal sanctions, they may exonerate Professor Al-Arian of any criminal culpability, or they may substantiate academic malfeasance having no criminal liability. All that remains to be determined. With respect to his dismissal, its implementation before he had any opportunity to defend himself against the administration's charges is fundamentally at variance with Committee A's long-standing insistence on academic due process. Beyond that, the principle of "innocent until proven guilty" ought to be observed in our institutions of higher learning no less than it is in our courts.

In light of the impossibility of granting academic due process to Professor Al-Arian while he is held in confinement and of the proposed adoption by the University of South Florida of due process guarantees comporting with AAUP principles, Committee A recommended to the 2003 Annual Meeting that no action be taken with respect to the censure of the administration of US. Instead, because of the violations of academic due process prior to Al-Arian s arrest, the AAUP passed a resolution, the first in its history, condemning ...the administration of the University of South Florida for its grave departures from association-supported standards that resulted in serious professional injury to the professor. Committee A continues to monitor the case.

Another case in which the AAUP has authorized an investigation involves Mohamed Yousry, a doctoral student at New York University, and an adjunct instructor at York College, City University of New York. In April 2002 he was suspended from his teaching position at CUNY by the central administration upon his arrest on charges of participation in a terrorist conspiracy. The charges resulted from activities related to his service as a translator for Sheik Omar Abdel Rahman and his attorney, Lynne Stewart. Rahman is serving a life sentence following his conviction on charges of threatening to blow up New York landmarks. Yousry was not told that he would not be teaching in the fall 2002 semester until August, after he had already prepared teaching materials. The Professional Staff Congress, the collective bargaining agent for CUNY faculty and an AAUP affiliate, filed a grievance on his behalf. Just this past Thursday evening, while attending a function

sponsored by the Professional Staff Congress in New York, the vice president and grievance officer for part-timers informed me that new charges have been brought against both Yousry and Stewart. According to the New York Times, they are accused of conspiring to provide and conceal material support to Rahman.

Two cases involving Canadians, of which I m sure you are already very aware are those of Sudanese native Mohamed Hassan Mohamed and Maher Awar. Mohamed was detained for nine hours at the U.S. border in September 2002, as he headed from Toronto to the State University of New York, Fredonia campus to teach his weekly class. He was forced to sign a declaration attesting to his Sudanese nationality and was fingerprinted and registered. He was then left on the Canadian side of the bridge in the middle of the night and prevented from entering the United States. Two weeks later, after protests by both CAUT and United University Professions, the SUNY system s faculty union, he was allowed to enter the United States and resume his teaching duties.

The Awar case is even more egregious. A Syrian native en route to Montreal from Tunisia, he was detained during a stopover in New York and summarily extradited to Jordan and then to Syria because of alleged ties to terrorists. The U.S. State Department, after protests from the Canadian minister of foreign affairs, has given assurances that one s place of birth will no longer be an automatic trigger for registration. CAUT remains justifiably concerned because the legal provisions that gave rise to the two incidents remain in force.

But let me end on a more hopeful note. Late yesterday the AAUP posted a press release with the headline: AAUP Endorses Bill to Counter Abuses in the USA PATRIOT Act. The Association has been especially troubled by section 213, which dilutes protections against unreasonable searches and seizures, and section 215, which threatens the privacy of book buyers and library patrons. I quote pertinent portions of the press release:

> The American Association of University Professors has endorsed passage of S. 1709, the Safety and Freedom Ensured Act (SAFE Act) that would curtail certain practices allowed by the USA PATRIOT Act. The bill was introduced by a bipartisan coalition of senators led by Republican Larry Craig of Idaho and Democrat Richard Durbin of Illinois...
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> Specifically, the bill would narrow Justice Department authority to operate under national security letters, which permit the department to bypass standard grand jury procedures. It would also limit so-called sneak-and-peek warrants under Section 213 of the PATRIOT Act. These warrants allow law enforcement agencies to conduct a search without informing the subject...
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> The SAFE Act modifies Section 215, providing a special exemption for libraries to ensure patrons reading privacy.

Although we have every reason to be concerned that both civil liberties and academic freedom are at risk in the current climate, I see the introduction of the SAFE Act as one indication that our lawmakers are having second thoughts about their rush to give virtually untrammeled power to the executive.

We are not always right when we speak out, but we are always wrong when we do not.