

UNIVERSITY OF CALIFORNIA, ACADEMIC SENATE

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April 28, 2003

President Richard C. Atkinson
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Dear Dick:

Over the past year, the Academic Council, as well as its constituent committees and divisional campus Senates, have held numerous in-depth discussions of the initiative, Classification by Race, Ethnicity, Color, or National Origin (hereinafter referred to as *CRECNO*).¹ These discussions were occasioned by the concern that the State constitutional amendment that would result from the passage of this initiative could have serious implications for the scholarly, pedagogic and public service pursuits so central to the mission of the University of California. After much discussion and consultation on the matter, the Academic Council² voted unanimously on January 29, 2003, to oppose *CRECNO* and to call upon the Board of Regents to oppose it on behalf of the University of California. The formal action of Academic Council, the body authorized to act on behalf of the 13,000+ members of the University of California Academic Senate, was informed and supported by *all* Senate committees that reviewed the matter.³ We understand that *CRECNO* will appear on the next statewide ballot and that this is currently scheduled for March 2004.⁴ If the University is to take a position on the matter, and is to be able to engage in a public dialogue on it, it is important that the initiative be addressed by the Board of Regents at its next meeting. The

¹ The initiative has been popularly known as the [*Racial Privacy Initiative*](#), the name suggested by its proponents. The Office of the California Secretary of State concluded that this name did not accurately reflect its terms and entitled it "Classification by Race Ethnicity, Color and National Origin."

² The Academic Council's 17 voting members include the Chair of each campus Division of the Academic Senate and the Chairs of six of the systemwide Academic Senate committees, as well as the Chair and Vice Chair of the systemwide Academic Senate.

³ The Academic Senate, systemwide, is composed of Academic Council per footnote 2, as well as ten additional committees (not represented on Academic Council). As noted, all of the committees that reviewed *CRECNO* have communicated their opposition. These include: Committee on Planning and Budget, Committee on Academic Personnel, Committee on Educational Policy, Committee on Faculty Welfare, Coordinating Committee on Graduate Affairs, the Board of Admissions and Relations with Schools, Committee on Academic Freedom, Committee on Privilege and Tenure, Committee on Research Policy (non-voting member of Council), and the Committee on Affirmative Action and Diversity. The committees that did not review *CRECNO* have charges that do not intersect with *CRECNO*-related matters.

⁴ The measure is scheduled for the *next* statewide ballot, which will be March 2004, unless the effort to recall the Governor occasions a statewide election at an earlier date, thereby, moving up the electorate's consideration of *CRECNO*.

Senate's action is, therefore, being formally reported to you at this time with a request that you transmit this letter to the Regents for their consideration at their meeting on May 14-15, 2003.

Before I outline the nature of the concerns that weigh heavily on my colleagues, let me note that it is rather extraordinary for the faculty to take a collective position on a political matter. This resistance to entering the political fray rests on two foundations. In general, the Academic Senate relies on the UC administration to represent the institution's interests, including those of the faculty as educators and researchers, when expressing the University's positions on proposed legislative acts or administrative regulations. Second is the Senate's respect for the political independence of each of its members and a widely shared belief that we best serve our collective mission when we avoid allowing divisions over public policy to influence our relationships or undermine our mutual respect. We believe, however, that *CRECNO* represents a rare instance when our general reluctance to take a political stand must give way to our shared responsibility as a faculty to oppose a measure that we believe is injurious to UC and to the State of California.

General concerns

CRECNO directs that neither the State nor its subdivisions and instrumentalities (including public institutions of higher education) may "classify" persons on the basis of race, ethnicity, color or national origin. This proposed amendment to Article I of the State Constitution, in §32 (a) governing public education, contracting and employment, covers current and prospective students, contractors and employees, and in §32 (b) governing all other state operations, applies to all persons subject to these state operations. It is, therefore, assumed that the operations of the University of California would be covered under §32 (a) as to "classifying" students, prospective students, contractors, and employees and under (b) as to all other operations and persons.⁵

The Academic Senate's concerns about the potential impacts of *CRECNO* are of two types.⁶ As scholars and educators, the faculty believe that public policy ought to be informed in all ways that may enhance its quality and effectiveness. This commitment to the importance of knowledge pertains whether or not a particular policy affects, or has involved, the University or its employees. As scholars committed to the fundamental value of knowledge, and to the necessity of developing and analyzing empirical data, we believe that *CRECNO*, with its ban on the State collecting data on race, ethnicity, color or national origin, contravenes an essential element of good public policy. Data on race and ethnicity allow policy makers to understand the differential situations and needs of different communities as well as the potentially differential impacts of the policies that they adopt. These data also allow the state to target policy in manners most effective in meeting the needs of various population groups. While *exceptions* to this ban (discussed below and in footnotes) are included in *CRECNO*, the exceptions not only raise more concerns than they

⁵ Section 32 (b) allows for an exception to the prohibition if each house of the State legislature, by a two-thirds vote, determines in a particular instance that such classifications serve a "compelling state interest," and this is approved by the Governor. It is assumed that that route would be unlikely to be sought or used effectively by the University should this proposition pass. Racial and ethnic classifications are, therefore, herein, assumed to be subject to an equally effective prohibition under (a) and (b) with respect to the University of California, if not all governmental bodies in the State.

⁶ Due to the extraordinarily extensive discussion among UC faculty on this subject, this letter must necessarily be but a summary of those issues that are deemed emblematic and most closely tied to the University's interests. It is exhaustive of neither all matters brought to the Senate's attention, nor of additional concerns we know to be on the minds of our colleagues. It should also be noted that the goals or motivations of the proponents of *CRECNO* were specifically deemed *not* germane by the Academic Council and did not direct its discussions or decision making. Our collective concern has been with the potential consequences of this initiative.

assuage, they do not respect the value of such knowledge within policies governing public health, education, social services or the environment, as well as a vast range of other state responsibilities.

Secondly, the faculty are concerned that plausible interpretations of the terms of this initiative could seriously undermine the work and missions of the University, in the delivery of education to all communities and in the production and dissemination of knowledge.⁷ We are further concerned that this measure will not only negatively impact UC's excellent programs focused on understanding the significance of race, ethnicity, and culture in society but may also render our campuses unattractive venues for scholars and students with these interests.⁸

UC student body

With respect to data-gathering by UC about its student body, several undesirable consequences of *CRECNO* were pinpointed by the Academic Senate's committees and campus divisions. The Board of Admissions and Relations with Schools (*BOARS*) and the University Committee on Educational Policy (*UCEP*) have each noted that this constitutional proscription will restrict our ability to pursue the Regental goal of serving the broad diversity of California within our student body. The Davis campus, similarly and more specifically, noted that we would be unable to discern whether particular selection criteria *unnecessarily* depressed access to UC for identifiable demographic groups. At the Berkeley campus, the collection of such data necessary to defend the campus from (unfounded) charges of discrimination was identified as also jeopardized. In sum, these examples of the concerns expressed about the consequences of the adoption of *CRECNO* for tracking valuable information about UC students and potential students, suggest that several different diversity-related goals, all consistent with current state law, would be difficult, if not impossible, to pursue. We would lack the data necessary to measure the consequences of our policies and practices.

Research and pedagogy

By far, the most commonly expressed concerns of the faculty have been focused on our ability to engage in top-quality research and to deliver the same high level of pedagogy to our students.⁹ Every Academic Senate committee and campus division that has been involved in these discussions has highlighted these concerns. The research-related issues are complex and the answers (as per footnote 7, *supra*) not entirely clear. We perceive both obvious consequences of *CRECNO* and potential dangers. The obvious consequences of passage of this constitutional amendment are that a wide variety of State databases, which include demographic information referencing race, ethnicity, color, or national origin, and are not mandated by federal law or

⁷ The faculty have focused their attention on the terms of this initiative while recognizing that, should the measure pass, it is very likely that it will fall to the judiciary to interpret their meaning and reach. While intervening interpretive materials, such as the ballot arguments pro and con, *may* influence how judges will read *CRECNO*, as a general rule, judges turn to such external materials when they view the terms of an initiative as unclear. In sum, while the actual impacts of this proposed constitutional amendment are at this point *not entirely knowable*, a general principle of legal analysis is to look to the "plain meaning" of a document's words, whenever possible, to provide guidance to its implementation. The faculty have reviewed the initiative with these understandings.

⁸ Effecting a "competitive disadvantage" for recruiting excellent faculty and students is a major aspect of this concern. Those who will view UC (subject to the *CRECNO*-created constitutional restrictions) as less desirable than a private institution in California or an institution outside the State, will be more difficult to recruit to UC.

⁹ A not uncommon perception is that teaching and research are separate and competing enterprises at UC, but the quality of teaching is inextricably tied to the quality of our research. Research informs and improves pedagogy, and to the extent that *CRECNO* will result in restrictions on the nature and quality of the research of UC faculty members, also endangered is the excellence of our teaching.

regulation, will no longer be collectable.¹⁰ These are data bases utilized by many UC researchers in fields as diverse as public health, education, anthropology, and history. Important research which relies on these data being compiled by the state, and being available to the scholarly community for analysis, will be impossible to conduct, affecting not only academic knowledge and pedagogy but also public policy which relies on work of UC scholars. Thus, the impact of *CRECNO* on State agencies' data collection and data sharing practices seriously threatens a core mission of the University of California.

In contrast with the very apparent jeopardy into which *CRECNO* would put research which relies on state agencies for the provision of needed data, questions concerning restrictions on UC research programs which are not necessarily dependent on State data bases have less clear answers. Would UC research institutes, such as our survey research centers, which currently have State support and engage in the collection of racial and ethnic data, be denied the freedom to study the perspectives of demographic subgroups in their studies of public opinion? Would individual faculty members, as employees of the University, and with the use of its resources, be limited in their ability to conduct research involving data on race and ethnicity? While it is possible that faculty would not be defined as *personally* covered by *CRECNO*,¹¹ not only is that an open question, but external grants that faculty require in order to conduct data-based research are made not to the researcher but to the UC Board of Regents (which clearly *is* covered by *CRECNO*.) Access to funding for research involving the use of racial and ethnic data may, therefore, be limited, if not impossible, to obtain from private foundations, as well as from the federal government, for a wide range of projects.¹² For UC to retain its stature among research universities it must be a hospitable venue for research on all matters of scholarly interest. That stature is endangered if the rich and important work done by our faculty, involving the utilization of data on race and ethnicity, cannot effectively continue at UC.

Medical research exemption

Finally, it should be noted that one of the most discussed provisions of *CRECNO* is its exemption for "otherwise lawful classification of medical research subjects and patients."¹³ It has proven troubling to the faculty for two reasons. First, the exemption for *medical* research creates a presumption that *other* research undertaken by/within institutions covered by Article I §32 would

¹⁰ Reinforcing the significance of this concern is that the survey conducted by analysts at UCOP determined that most of the data bases which include the *CRECNO*-proscribed demographic characteristics, are *not* federally mandated, thus subject to discontinuance and destruction. It is also an open question whether those data collected by the because of federal mandates would be made available to other than the federal agencies to which they must be provided. If *CRECNO* passes, administrators may reasonably interpret it to prohibit other than federally required *uses* of these data. Finally, it must be remembered that federal laws and regulations may be changed at any time and what is required today may be optional tomorrow. In sum, the exception in *CRECNO* for federally mandated data collection provides uncertain protection for the research mission of UC.

¹¹ A common assumption in the civil law is that a public employee, acting within the scope of his or her employment, constitutes *state action* and therefore subject to various restrictions applicable to "the state." Whether the courts would interpret *CRECNO* to apply to the research of UC faculty is not knowable at this time.

¹² Here, again, an observation must be made about the "exception" in *CRECNO* for federally mandated data collection. While many UC faculty obtain their funding from federal agencies, it is largely only within the health sciences that such funding *mandates* the inclusion of diverse populations, thus the need to reference racial and ethnic classifications. Other federally funded grants administered by, for example, the National Science Foundation, the National Endowment for the Humanities or the National Endowment for the Arts, are available for research projects focused on race and ethnicity, or proposals with other foci which utilize such data, but they do not necessarily *mandate* such classifications to be "eligible" for federal funds. These grants may, therefore, fall outside the federal compliance/eligibility exception within *CRECNO*.

¹³ This language would appear in Article I, §32 (f) of the State Constitution.

be subject to the prohibitions in this proposed amendment. If *all* academic research were intended to be beyond the reach of *CRECNO*, the initiative should have been silent as to *medical* research or should have specifically exempted educational institutions from §32(b). Thus, the faculty believe that the *medical* exemption is especially problematic as it may provide a rationale for restricting non-medical research at UC, and in other public institutions and agencies in California. Second, there is a generalized discomfort with the proposition inherent in the *sole* exemption of medical research subjects and patients with respect to racial or ethnic classification. It suggests that biological, physiological, anatomical differences among racial and ethnic groups are what matters, and that is all that should be of concern to the State. While there are certain disease processes and treatment modalities that differentially affect different demographic groups, and these differences ought to be understood, non-medical research addresses social, economic, and cultural distinctions and experiences that are far more extensive and equally important to understand. Indeed, even “public health” research focused on the delivery of medical care to diverse populations, would be almost entirely “outside” the exemption for “medical research subjects and patients,” as such work is not predominantly patient-based. Thus, the exemption for *medical* research in *CRECNO* not only apparently allows non-medical research to fall within its prohibitions, it falls short of covering *health* as an appropriate public concern.

Conclusion

My apologies, this letter is very long. I have, however, provided herein what I believe are the bare essentials concerning the Academic Senate’s understanding of the terms of *CRECNO* and the potential consequences of its language for the University. If UC is to be able to identify, recruit and retain an excellent faculty and student body, and if we are to retain our status as the premier public research institution in the country, if not the world, it is essential that we be able to collect and analyze any data that allow us to serve these goals. Because we have concluded that the amendment that *CRECNO* would add to the California Constitution threatens the educational, research and public service missions of the University, we call upon the Regents to oppose it and to convey this opposition in all appropriate ways to the State’s electorate.

Sincerely,

Gayle Binion, Chair
Academic Senate

Copy: Provost C. Judson King
Academic Council