



February 21, 2012

Via electronic and United States mail

Police Review Board  
University of California at Berkeley  
c/o Rita Gardner  
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Dear Members of the Police Review Board,

We write in regard to your investigation of the events of November 9, 2011. We understand that your goal is to determine, among other things, who authorized the police conduct on November 9, 2011 and whether the University's response to campus protests that day was consistent with the norms of the UC Berkeley campus. We wish to share with you information we have learned through a Public Records Act request that shows that police conduct was authorized at the very highest levels of the University. We are deeply troubled, as this confirms our concerns that the University's conduct this past fall was fundamentally inconsistent with the values of a public university which purports to be a community dedicated to the free and robust exchange of ideas. We hope you will take this information into account in pressing for further answers in your investigation and urging the University to undertake systemic reforms.

### *The events of November 9, 2011*

The following sequence of events on November 9, 2011 is not in dispute. Students had organized a campuswide day of action to focus attention on budget cuts, the need for affordable higher education, and the connections between issues affecting students at the University of California, the nationwide Occupy movement, and larger trends of social and economic inequity. The days' events included a wide range of peaceful, expressive activity, ranging from teach-outs, to a noontime rally on Upper Sproul Plaza drawing over a thousand protesters, to a march along Telegraph Avenue. Protesters at the rally held banners that conveyed political messages like: "The Regents are the 1%." Speakers urged tax reform.

The days events were marred, however, by not one but two rounds of baton beatings, in which riot-clad law enforcement beat students and faculty who had peacefully assembled around tents pitched on the grassy area, just north of the Mario Savio steps in front of Sproul Hall. The first beatings occurred in the afternoon, between approximately 3 and 4 pm, followed by another later that evening.

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The next day, Chancellor Birgeneau issued a message to the campus community expressing “regret” for the injuries but stating that the protesters, by linking arms, were “not non-violent.” The following week, Chancellor Birgeneau issued yet another message to the campus community. He explained that he had been away in Asia on November 9, and that while he “remained in intermittent contact” and “kept informed, as much as possible,” he had been unable to view the videos until he returned. After viewing the videos, he acknowledged that the events of November 9 were “unworthy of us as a university community.”

### ***Chancellor Birgeneau’s role***

While Chancellor Birgeneau’s public message acknowledges that he had been in some contact from abroad, it suggests that his role was merely one of a passive recipient of information. We recently obtained in response to a Public Records Act request a copy of an email exchange between Chancellor Birgeneau and Vice-Chancellor Breslauer showing that in fact he was an active decisionmaker on November 9 and that through his Blackberry was able to engage in immediate communication with the campus. According to the email exchange, a copy of which is attached to this letter, Vice-Chancellor Breslauer wrote to the Chancellor at 4:28 pm on November 9, after the first round of baton beatings, stating:

Protesters locked arms to prevent police from getting to the tents. Police used batons to gain access to the tents. There are still 200-300 people gathered, watching, and, in some cases, screaming at the police....

Within the hour, Chancellor Birgeneau wrote back:

This is really unfortunate. However, our policies are absolutely clear. Obviously this group want[ed] exactly such a confrontation.

Chancellor Birgeneau then wrote back again, at 5:36 pm Pacific time, approximately an hour after receiving the initial email, stating:

It is critical that we do not back down on our no encampment policy. Otherwise, we will end up in Quan land.

After this email exchange, law enforcement moved in on the protesters for a second round of beatings.

This email exchange shows that Chancellor Birgeneau was informed that police “used batons” in the afternoon exchange, did not question the need for force, did not inquire whether other non-violent alternatives had or could have been explored, and instead ratified the afternoon exchange as unfortunate but necessary.<sup>1</sup> It is unclear what in the factual report he received led

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<sup>1</sup> It is possible there were other communications in which he raised these questions, but no other written communications to or from the Chancellor that day have been provided to us.

him to conclude that the group “want[ed] exactly such a confrontation.” As Vice-Chancellor Birgeneau described, protesters were merely “gathered, watching, and, in some cases, screaming at the police” – all activities that are constitutionally protected. The protesters’ most egregious offense was having pitched tents and locked arms. But tents hardly pose an immediate safety threat and the protesters were not fleeing or actively resisting arrest. Baton blows were thus completely unjustified.<sup>2</sup>

Equally troubling is Chancellor Birgeneau’s statement: “It is critical that we do not back down on our no encampment policy.” Because he knew that police had used batons to take down the tents once, this statement reads like a firm directive to take down any further tents, using batons or whatever other means might be necessary to effectuate that goal. And indeed, that is precisely what occurred later that evening.

We find this exchange deeply troubling because it underscores that the University treated the Occupy Cal protests like a dire threat that justified the use of baton-wielding riot police, and failed to assess the situation on the ground objectively and recognize it for what it was – a large assembly of students engaged in peaceful protest over critical issues of the day.

Chancellor Birgeneau was apparently afraid that the pitching of tents would lead to “Quan land,” a reference presumably to Mayor Jean Quan of Oakland. Constitutional protections for speech and assembly, however, prohibit the government from stifling peaceful protest “before demonstrators have acted illegally or before the demonstration poses a clear and present danger.”<sup>3</sup> Speculative fears that Occupy Cal might potentially lead to undesirable results do not justify a harsh or preemptive police crackdown.<sup>4</sup> One would hope that the University’s norms for speech and debate are *more* robust than those of the state and federal constitutions. Yet the University’s conduct on November 9 failed to abide by even those standards.

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<sup>2</sup> The primary factors to consider in determining whether the force used was reasonable or excessive are: “whether the suspect poses an immediate threat to the safety of the officers or others,” “the severity of the crime at issue” and “whether he is actively resisting arrest or attempting to evade arrest by flight.” *Glenn v. Washington County*, F.3d, 2011 WL 6760348 \* 6 (9<sup>th</sup> Cir. Dec. 27, 2011). Even when there is a need for some force, it is “least justified against nonviolent misdemeanants who do not flee or actively resist arrest.” *Buck v. City of Albuquerque*, 549 F.3d 1269, 1289 (10<sup>th</sup> Cir. 2008). “[A] baton is a deadly weapon that can cause deep bruising as well as blood clots capable of precipitating deadly strokes, and ... should therefore be used ‘only as a response to aggressive or combative acts.’” *Young v. County of Los Angeles*, 655 F.3d 1156, 1162 (9<sup>th</sup> Cir. 2011). Even when protesters mechanically lock themselves together, they are not engaged in “active resistance.” *Headwaters Forest Defense v. County of Humboldt*, 276 F.3d 1125, 1130 (9<sup>th</sup> Cir. 2002).

<sup>3</sup> *Collins v. Jordan*, 110 F.3d 1363, 1371 (9<sup>th</sup> Cir. 1996). An assembly can only be declared unlawful when it is “violent or ... pose[s] a clear and present danger of imminent violence.” *In re Brown*, 9 Cal.3d 612, 623 (1973); see also *Jones v. Parnley*, 465 F.3d 46, 56-57 (2d Cir. 2006) (“government officials may stop or disperse public demonstrations or protests” only “where ‘clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears’”) (quoting *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)).

<sup>4</sup> “Banning or postponing legitimate expressive activity because other First Amendment activity regarding the same subject has resulted in violence deprives citizens of their right to demonstrate in a timely and effective fashion.” *Collins*, 110 F.3d at 1372.

Equally troubling is that the mistake was made at the highest levels of the University's leadership. While individual officers were certainly involved, the decision and directive to enforce the University's "no encampment" rule whatever the cost, was made by the Chancellor himself.

The University's conduct on November 9, 2011 was deeply at odds with the norms of any academic institution, especially UC Berkeley, the home of the Free Speech Movement. We hope that in your investigation, you will press administration officials for answers to the critical question why they viewed the Occupy Cal protests as a police threat that had to be eliminated with swift and brutal police force. We are concerned that the University's fears about the Occupy Cal protests interfered with its objective assessment of the situation on the ground, and led to its refusal to exhaust non-police alternatives and its dramatically unacceptable overreaction. The University should not emerge from this episode by pointing to one or two rogue officers and calling the problem solved. In addition to substantially revising policies on free speech, protest, crowd control, and use of force,<sup>5</sup> the University must additionally take affirmative steps to bring its practice – at all levels of the institution – in line with its ideals, so that it treats protests as a vital contribution, and not a threat, to the lifeblood of the University.

Sincerely,



Linda Lye  
Staff Attorney

Enclosures

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<sup>5</sup> We have separately provided detailed recommendations to General Counsel Robinson and Dean Edley who are engaging in a systemwide review and making recommendations for best practices. A copy of that letter is also attached.