Regional

Universities need to police themselves better

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Letters from Academia

Unknown to most people, major disputes on higher education frequently end up in the U.S. Supreme Court. Further, many of the decisions made on those cases have shaped legal policies for the country as a whole.

After decades of a culture of social isolationism, we see how colleges and universities have gradually become the battleground of national issues such as race, exercise of religion, sexual assaults and gun control. Given the increasingly litigious society in which we live, we should not be surprised by this phenomenon.

In a recent book by Michael Olivas titled "Suing Alma Mater," the author presented a number of facts that are unknown not only to the general public but also to most people in academia.

For example, in the last 50 years or so more than 120 cases related in one way or another to higher education have been heard by the U.S. Supreme Court. And this is only the tip of the iceberg. Hundreds of other cases have been filed with the Court only for the justices to deny hearing them.

Part of the reason for this rather high number of cases reaching the Supreme Court is the increasing number of activist groups that provide legal counsel (most of the time for free) to people who feel adversely affected by decisions made by colleges and universities.

Mimicking the pioneering work of organizations such as the NAACP and the ACLU in cases regarding race or free speech in academia, a growing number of conservative, not-for-profit organizations have become players arguing on behalf of individuals who feel that because of their religion, family values, or for the reason of being white, have been discriminated against by postsecondary institutions.

What all this means is that there is an increasing scrutiny of the operations of colleges and universities by society in general. Experience tells us that most of those institutions may not be well prepared to deal with that kind of exposure.

For one thing institutions of higher education have had for decades a culture of what I call "academic exceptionalism" in which they believe that they are governed by a different set of rules that allow them to do virtually anything they want.

One example of this hubris is how faculty members see themselves within their institutions.

Despite the fact that faculty can be (and in many cases are) unionized, the Supreme Court decided in 1980 in NLRB v. Yeshiva University that faculty members are supervisory personnel and, therefore, part of the management of the institution.

Sometimes this culture of exceptionalism extends to the upper administration.

For example, many times one hears from public university lawyers that their institutions are largely protected from legal action by "sovereign immunity," a legal doctrine by which the sovereign or state cannot commit a legal wrong and is immune from civil suit or criminal prosecution. Without ignoring that doctrine, the Supreme Court has decided on more than one occasion that such protection is not absolute.

Another myth among faculty members is the unconditional belief in the concept of academic freedom. Again and again the Supreme Court has established that such a concept, far from absolute, is rather limited. Pretty much what the justices have said about it is that all that faculty members are vested with is in the establishment and the enforcement of standards of behavior that are reasonably and appropriately applied in evaluations of performance in and outside the classroom.

Another issue on which the justices have opined has been the very question of what is a college and what is not. And to the surprise of many, the distinction is not always clear.

Take Hacker v. Hacker, a 1987 case in which the Supreme Court decided that not all postsecondary educational institutions meet the definition of "college." In fact, there have been many cases showing that many institutions not labeled as colleges were considered to be so, while others that very much functioned as colleges were not recognized as institutions of higher education by the Supreme Court.

Although we have heard of many cases where the plaintiffs are students, the fact of the matter is that they represent only 15 percent of the cases argued before the Supreme Court. Faculty members bring about a third of all the cases.

The reason so few legal complaints by students are heard by the Court is because the justices have again and again reaffirmed the fact that colleges and universities have a highly broad authority over students' lives and affairs, keeping them under tight institutional control. This is an important point that counters a notion that in some circles has become a fad, and that is that students are "customers" and should be treated as such.

Further, despite the fact that we believe that all people have the same protection under the law, the Supreme Court has decided that rights for students in private institutions are fewer that those in public ones.

All of the above leads to a number of conclusions. One is that against popular belief, the law is highly contextual and cases dealing with a variety of other subject matters will oftentimes have bearing on higher education law.

Yet, the most important conclusion coming from recent years of Supreme Court decisions is that if colleges and universities do not police themselves – the government will.

Therefore, these institutions need to educate their members (both administrators and faculty) about the importance of being more proactive in designing their own compliance and implementation strategies by establishing clear rules of action. Most courts will not intervene in cases in which those institutions have followed their own procedures.

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