

April 28, 2020

**Submission by the Foundation for Individual Rights in Education
to the Special Rapporteur on the Promotion and Protection
of the Right to Freedom of Opinion and Expression
Regarding Academic Freedom on College Campuses**

The Foundation for Individual Rights in Education (FIRE) is pleased to offer this submission to the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression.

FIRE is a nonpartisan, nonprofit organization founded in 1999. FIRE's mission is to defend and sustain the individual rights, including freedom of expression and academic freedom, of students and faculty members at America's colleges and universities. FIRE educates students, faculty, alumni, trustees, and the public about the threats to these rights on our campuses, and provides the means to preserve them.

FIRE presents this comment to provide a fuller picture of the state of academic freedom on American college campuses. The discussion below does not address all of the numerous, multifaceted threats posed to the rights of students and faculty, but identifies two pernicious threats FIRE has combatted in recent years.

I. The rights of academic freedom and freedom of expression on American college campuses

The First Amendment to the United States Constitution is binding on public universities, offering broad protections for student and faculty speech and limiting how universities can regulate the speech of campus community members. In *Healy v. James*, the Supreme Court of the United States wrote: "[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'"¹

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When they speak as private citizens on matters of public concern, such as through social media or public commentary, the First Amendment may prevent a public university employer from punishing controversial statements. "Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech."⁶

Academic freedom allows for, and even requires, faculty to be insulated from the halls of legislatures and pressure to conform with public opinion.⁷ The interests of different political and social spheres are not always in alignment with the research, theories, and analysis of academics. If the academic's ability to speak or research is subject to the popular approval of politicians and the masses, only popular or previously approved views will be advanced.

However, the First Amendment and principles of free inquiry are

fired.⁸ Months later, despite facult

make clear.”¹⁵

- **Trinity College, 2017:** In June 2017, Professor Johnny Eric Williams shared on Facebook an anonymous author’s essay suggesting oppressed minorities should “do nothing” to help people “who practice bigotry.” Discussing the shooting of U.S. Rep. Steve Scalise, the essay suggested that, in the case of bigots, we should “let them fucking die.”¹⁶ Two days later, in response to news that police in Seattle had shot and killed a black mother armed with a knife, Williams posted on Facebook again, restating the “let them fucking die” refrain from the essay to encourage readers to “confront” white people who engage in violence against “oppressed people,” and “put an end to . . . their white supremacy system.” Trinity President Joanne Berger-Sweeney temporarily closed the campus after receiving threats related to Williams’ posts, announced an investigation into whether Williams violated Trinity’s policies,

finally obtained in January 2018. The records showed ECC greatly exaggerated its claims about negative feedback as a shield to fire an outspoken professor—for the first 13 days after Durden's appearance, only one person contacted the college to complain.²²

- **California State University, Fresno (Fresno State), 2018:** After the death of former first lady Barbara Bush, Fresno State Professor Randa Jarrar tweeted: "Barbara Bush was a generous and smart and amazing racist who, along with her husband, raised a war criminal. Fuck outta here with your nice words." Jarrar had already been on leave during that semester.²³ Fresno State President Joseph Castro responded to the outrage spurred by Jarrar's comments and announced that the university was looking into the issue and that disciplinary action was on the table.²⁴ Fresno State revoked the threat of investigation after a coalition of civil liberties organizations, including FIRE and the ACLU of Northern California, warned the university against violating the First Amendment.²⁵

Temple announced the following month that Hill would not face punishment for his comments.²⁹

- **Harvard University, 2019:** In May 2019, Dean of the College Rakesh Khurana declared that

desire to exact revenge" upon Evangelical Christians accused of homophobic actions. Speaking with the reporter, Klinzman confirmed that he considered himself a member of Antifa.³⁷ After the local reporter ran a story on Klinzman's posts, it was picked up by

forcefully to defend academic freedom and to condemn targeted harassment and intimidation of faculty members.”

While FIRE takes no position on the Israeli-Palestinian conflict, and agrees that institutions of higher education must take action to protect students from anti-Semitism and other forms of discriminatory harassment, those goals must be accomplished within a framework that protects academic freedom and free expression. Too often, as the examples of Professor Salaita and Lamont Hill demonstrate, those freedoms were not upheld.

Unfortunately, governmental attempts to address anti-Semitism on college campuses have been particularly dismissive of academic freedom and free expression.

For example, since 2016, members of Congress from both sides of the aisle have sought to secure the passage of the Anti-Semitism Awareness Act, legislation that would require the Department of Education to “take into consideration” the International Holocaust Remembrance Alliance (IHRA) definition of anti-Semitism when assessing institutional responses to alleged violations of Title VI of the Civil Rights Act.⁴⁶

The IHRA definition provides, in part: “Anti-Semitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of anti-Semitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.” This language is

Adopted by the U.S. Department of State and later in expanded form by the International Holocaust Remembrance Alliance, the definition and examples reach core political speech protected by the First Amendment. Directing federal agencies to rely on this framework in enforcing Title VI would effectively order nearly every campus in the country to censor its students and faculty on the basis of viewpoint—in this case, constitutionally protected speech that is critical of Israel. (The vast majority of American campuses, public and private, receive federal funding and would be subject to the order.) This result would be sharply at odds with our national commitment to freedom of speech and academic freedom, decades of First Amendment precedent, and the President’s stated concern for protecting free speech on campus.⁵⁰

In recent years, FIRE has joined other civil liberties groups⁵¹ and the lead author of the IHRA definition⁵² in expressing concerns about the threats posed by legislative bodies’ efforts to enforce the IHRA definition.

Unfortunately, concerns about the threat posed to the First Amendment by the Executive Order have already been borne out. Shortly after the launch of the Executive Order, the Department of Education’s Office for Civil Rights initiated two investigations into complaints filed against the University of California, Los Angeles. One of the investigations relates to the UCLA Students for Justice in Palestine chapter’s hosting of the 2018 National Students for Justice in Palestine Conference, which had faced demands for cancellation.⁵³ This investigation has again raised concerns that the federal government’s efforts to combat anti-Semitism will involve investigations and punishment of protected speech.

In February 2020, Rep. Paul Gosar of Arizona wrote to Secretary of Education Betsy DeVos requesting investigations into faculty members at the University of Arizona, citing the Executive Order. Of the two investigations Gosar sought, one centered on the views and expression of faculty at the university, citing faculty members who “openly support” the Boycott, Divestment, and Sanctions movement, which Gosar called a “hate group.”⁵⁴ Even if no punishment is ultimately enacted, any investigation into expression that is known to be protected may still violate the First Amendment and chill the speech of students and faculty.

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⁵⁰ **UPDATED: FIRE statement regarding executive order on campus anti-Semitism**, FOUND. FOR INDIVIDUAL RIGHTS IN EDUC. (Dec. 10, 2019), <https://www.thefire.org/fire-statement-regarding-executive-order->

These threats are not limited to the United States. In January, the United Kingdom's Secretary of State for Housing, Communities and Local Government, Robert Jenrick, announced that universities that failed to adopt the IHRA definition of anti-Semitism would not be eligible to receive federal funding.⁵⁵

Both the United States and the United Kingdom deserve credit for working to combat bigotry on campus. But any governmental effort to address anti-Semitism must be implemented in a manner that does not infringe upon core political speech. Rather than try to define anti-Semitism, governments should instead ensure that students are free from all religiously motivated harassment. To ensure that this approach protects academic freedom and free speech, standards for when conduct is actionable harassment should be carefully crafted.⁵⁶

IV. Protecting academic freedom and free expression on campuses

Threats to academic freedom and freedom of expression are not a new development, whether in the United States or the rest of the world. But as technology, political movements, and campuses evolve, the ways these threats present themselves change, too. For this reason, it is