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For the Hearing

First Amendment Protections on Public College and University Campuses

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I am honored by the opportunity to testify before this subcommittee on the issue of First Amendment protections at public college and university campuses. After briefly outlining the scope of the challenge to freedom of speech in today's academy, I intend to focus on three key questions. First, how is it that the condition of free speech at our college campuses continues to deteriorate so markedly, despite broad public support for freedom of speech? Second, what steps can state legislatures take to help protect freedom of speech at our public university systems? And third, what steps can Congress take to protect freedom of speech in our public university systems, and perhaps even at private secular colleges and universities as well?

By now it should be clear that freedom of speech, that cornerstone of our liberty and most fundamental constitutional right, is under siege on America's college campuses. Speakers who challenge campus orthodoxies are rarely sought out, are frequently disinvited when called, and are often shouted down while on campus. Speech codes that substantially limit First Amendment rights are widespread. New devices like "trigger warnings" and "safe spaces" shelter students from the give-and-take of discussion and debate. When protesters disrupt visiting speakers or break in on meetings to take them over and list demands, administrators often look the other way. Students have come to take it for granted that they will face no discipline for such disruptions. Administrators themselves often disinvite controversial speakers and limit the exercise of liberty to narrow "free speech zones." University boards of trustees rarely act to curb these administrative abuses. Substantial sections of the faculty have abandoned the defense of free speech. The classic advocates of liberty of thought and discussion are far less widely taught than in the past. Surveys show that student support for restrictive speech codes and speaker bans has reached disturbing levels. In short, as both a deeply held commitment and a living tradition, freedom of speech is in dying on our college campuses.

Yet how is it possible that despite broad public support for First Amendment rights, the condition of free speech on our college campuses should be so precarious? Since the rise of so-called safe spaces and

trigger warnings over the last few years, concern about campus freedom of speech has grown among liberals and conservatives alike. Especially since the demonstrations that swept across college campuses in the fall of 2015, the issue has moved back onto the front pages. Opinion leaders from numerous points along the political spectrum have energetically defended freedom of speech and condemned the many campus-based assaults on it. Organizations like the Foundation for Individual Rights in Education (FIRE), and the Alliance Defending Freedom (ADF) have actively and very often successfully defended campus freedom of speech for years, and never more so than today. I shudder to think where we would be without these organizations. Yet despite the best efforts of public writers, and despite the necessary work of groups like FIRE and ADF to defend it, the position of freedom of speech on our college campuses continues to deteriorate. How is that possible?

The Importance of Discipline

I believe that a critically important part of the answer to this question lies in the failure of administrators to discipline students who silence or disrupt visiting speakers or their fellow students. However problematic safe spaces and trigger warnings may be; however important it is to overturn campus speech codes and so-called free speech zones; so long as students are permitted to silence the speech of visiting speakers or their fellow students without disciplinary consequences, the growing threat to campus free speech will never be overcome.

The destructive effects of speaker shout downs, meeting takeovers or, say, acts like the destruction of a run of conservative student newspapers, go far beyond their statistical occurrence. A university may host numerous visiting speakers who conform to campus orthodoxies without incident. Yet even a single case in which a visiting speaker who clashes with campus orthodoxies is shouted down sends a powerful signal to students and faculty who would also challenge those orthodoxies to keep silent. And between news reports and social media, silencing incidents on a single campus that draw no disciplinary response have the potential to send a chilling and dangerous message of intimidation across the entire country.

For every widely publicized speaker shout-down, many others occur that are not nationally known yet deeply damage the condition of free expression on their campuses nevertheless. And every speaker shout-down, whether nationally publicized or not, spawns countless cases of student and faculty self-censorship that are never publicized or noted. Each silencing incident, moreover, makes it far less likely that speakers who depart from campus orthodoxies will be invited in the first place, or will accept an invitation when offered. Each act of silencing that escapes discipline also encourages students to believe that they can continue to attack and disrupt the speech of others.

In short, the failure to discipline direct attacks on the free expression of others creates a kind of low-grade anarchy on campus, a world in which intimidation rules and violence can never be far behind.

All of this means that there is no substitute for well-enforced policies of administrative discipline for incidents in which protesters go beyond legitimate bounds and silence the expression of others. Keep in mind that when a speaker is shouted down, not only are his expressive rights violated but so are the rights of all who wish to listen violated as well. And as I have just argued, even this does not begin to describe the long-term campus-wide chilling effects of the failure to discipline those who interfere with the free speech rights of others.

Friends of free speech often invoke Yale's Woodward Report of 1974, widely acknowledged as the classic defense of campus free expression. Yet many forget that the Woodward Report, issued in response to a series of speaker disinvitations and shout-downs over the previous decade, was centrally concerned with the subject of discipline for students who interfere with the free speech rights of others. The Woodward Report created a discipline policy which remains in Yale's regulations to this day, and focused as well on strategies by which administrators could deter shout-downs by warning students of disciplinary consequences. The Woodward report made it clear that however necessary it is to educate students in the core principles of freedom of speech, liberty of thought and discussion can never be

secure on campus without disciplining students who go beyond the bounds of legitimate protest to silence the speech of others.

And keep in mind that the Woodward Report was widely praised on all sides, perhaps especially by political liberals. That means liberal opinion has traditionally been completely comfortable with the need to discipline protesters who block and silence the speech of others. Of course peaceful protests are an American tradition and a fundamental expression of liberty. The right to peaceful protest must certainly be protected. But shouting down a speaker in a way that prevents him from expressing his own opinion or being heard by others is an exercise in the suppression of liberty, not free speech.

Sadly, administrators in our day are extremely reluctant to impose discipline on students who interfere with the free speech rights of others. Sometimes this may be because administrators sympathize with the views of the protesters. Perhaps more often, administrators are reluctant to impose discipline out of a fear that continued controversy will keep their school on the front pages.

What's clear, in any case, is that despite the fact that public colleges and universities are obligated to protect the First Amendment rights of their students, administrators all too often fail to enforce those rights.

This means the freedom of speech will never be secure at our public colleges and universities until counter-pressures are brought to bear upon administrators who remain reluctant to discipline those who violate the free speech rights of others. The key potential sources of such counter-pressures are public scrutiny, university system boards of trustees, state legislatures, and the federal Congress.

State Legislative Solutions

Along with James Manley and Jonathan Butcher of Arizona's Goldwater Institute, I recently co-authored a report that offers and explains model state-level legislation designed to protect First Amendment speech rights on America’s public college and university campuses. That report, entitled “Campus Free Speech: A Legislative Proposal,” is published by the Goldwater Institute. (Brief excerpts from that report

are adapted in this testimony, and the full report will be provided to the subcommittee for inclusion in the record along with this testimony.)

The Goldwater proposal does several things. 1) It creates an official University policy that strongly affirms the importance of free expression, nullifying any existing restrictive speech codes in the process. 2) It prevents administrators from dis-inviting speakers, no matter how controversial, whom members of the campus community wish to hear from. 3) It establishes a system of disciplinary sanctions for students and anyone else who interferes with the free speech rights of others. 4) It allows persons whose free-speech rights have been improperly infringed by the University to recover court costs and attorney's fees. 5) It reaffirms the principle that universities, at the official institutional level, ought to remain neutral on issues of public controversy to encourage the widest possible range of opinion and dialogue within the university itself. 6) It ensures that students will be informed of the official policy on free expression. 7) It authorizes a special subcommittee of the university board of trustees to issue a yearly report to the public, the trustees, the governor, and the legislature on the administrative handling of free-speech issues.

The full legislative proposal explains each of these provisions in detail. Here I want to focus on the way in which several of these provisions work together to address the critical problem of discipline for those who suppress the speech of others. This is particularly important because, although there are several legislative proposals in various states designed to restore and protect campus free speech, only the Goldwater proposal systematically addresses the central problem of discipline for those who interfere with the expressive rights of others.

The Goldwater proposal instructs state university system boards of trustees to devise a range of disciplinary sanctions for anyone under the jurisdiction of the institution who interferes with the free expression of others. Since it is vitally important that the free-speech rights of protesters be fully protected, not only does the Goldwater proposal strongly affirm the right to protest, it also ensures that

students subject to disciplinary hearings for interfering with the speech of others will enjoy very strong due process rights. In fact the due process rights guaranteed under the Goldwater proposal are significantly stronger than the law currently requires. This ensures that students accused of violating the expressive rights of others will be afforded very strong protection for their own expressive rights.

At the same time, students who have twice been found responsible for infringing the expressive rights of others will be subject to particularly strong penalties: suspension for a minimum of one year or expulsion. Suspension and expulsion were also prominently included as penalties in the Woodward Report, it should be noted.

Importantly, the Goldwater proposal ensures that the discipline policy and its accompanying sanctions will be fully explained to new students at freshman orientation, along with a statement articulating the fundamental principles of free speech. This educational effort is designed both to teach students about the importance of free-speech and to deter them from suppressing the speech of others.

Crucially, the Goldwater proposal also sets up an oversight system in which university system boards of trustees create a committee to issue an annual report on the administrative handling of discipline. The report is to be submitted to the public, the trustees, the governor, and the legislature. This means that administrators who might be inclined to look the other way when demonstrators suppress the speech of others will now be concerned with how their actions will sit with the public, and with those who hold authority over their jobs and the university's purse strings.

Taken together, then, the Goldwater proposal's provisions on student discipline, freshman orientation, and trustee oversight create an interlocking set of incentives designed to break the vicious cycle of speech suppression and even violence that has held the American academy in its grip of late. And again, note that of the many existing state legislative proposals dealing with campus free speech, only the Goldwater proposal creates a powerful yet fair system of disciplinary sanctions, along with a system of

education and oversight designed to create counter-pressures on administrators who might otherwise do nothing when protesters silence others.

Federal Legislative Solutions

While the Goldwater proposal offers the best legislative solution at the state level, there is much that Congress could do to safeguard freedom of speech on America's public college and university campuses, and on private secular campuses as well. I have outlined a possible federal approach to campus free speech in some detail in a piece entitled, "Federal Funding and Campus Free Speech: A Proposal," published at National Review Online. (Excerpts from this piece are adapted in this testimony.) Congress has the option of requiring public colleges and universities, and even private secular colleges and universities seeking to qualify for federal student loans under Title IV of the Higher Education Act, to file a pledge with the Department of Education to uphold student speech and association rights. This idea was first floated by the National Association of Scholars, and I have fleshed it out in some detail in my own proposal.

So, for example, colleges wishing to qualify for federal student aid could be required to: 1) Agree not to maintain any regulation or policy that prohibits expression that would be permitted by the First Amendment in society at large. (This would effectively ban restrictive "speech codes" at those schools.) 2) Agree that their campus is open to any speaker whom students, student groups, or members of the faculty have invited. (This would prevent most speaker disinvitations.) 3) Agree to establish, maintain, and utilize a system of sanctions to discipline students, or anyone else under the jurisdiction of the college or university, who interferes with the expressive rights of others. The accused could be assured of robust due process rights as well. 4) Agree to inform all students, faculty members, and employees annually of university policies on free speech and on the discipline of those who interfere with the expressive rights of others, thereby deterring shout-downs. 5) Agree not to impose excessive security fees on campus groups hosting visiting speakers as a means of censoring speech. (Subsequent guidance

from the Secretary of Education can help define “excessive.”) 6) Agree to submit an annual report on steps taken to uphold their speech and association commitments, detailing any instances in which such speech and association rights have been violated by administrative actions or policies, by students, or by faculty, and detailing steps taken to discipline intentional disruptions of speech, and to better protect the rights of speech and association in the future. This report shall be made public and its veracity subject to investigation by the Department of Education.

In such cases where the Secretary of Education found a particular college or university to be out of compliance with its pledge, that school could be put on probation for a period of two years, during which time prospective students would be notified of the finding. If, after two years, the school had not returned to compliance, the Secretary of Education could suspend its eligibility for federal student aid under Title IV of the Higher Education Act.

The two-year probation period would allow time for prospective students to be warned away from applying to a school that might lose its eligibility for federal student aid. In the meantime, federal aid to students currently enrolled in out-of-compliance schools could be grandfathered in. The result would be that no students would lose their federal aid in such cases. The consequences of lost eligibility would be felt instead by the school itself.

Just as very few schools currently fall out of compliance with Title VI of the Civil Rights Act or Title IX of the Higher Education Amendments, it is likely that only in very rare cases would a school fail to come back into compliance with its free-speech obligations within the two-year period of probation.

Private religious schools should be exempted from this scheme, just as they are from the requirements of Title IX of the Higher Education Amendments. This would be in acknowledgement of the First Amendment’s protections for religious freedom.

The first duty of a legislature is to protect the rights of its citizens. Congress already insists that colleges eligible for federal aid protect their students from discrimination by race or sex. Freedom of speech is a

comparably fundamental civil right, yet is not being properly protected on American college or university campuses, be they public or private. Yet the federal Higher Education Act already contains provisions that could serve as a foundation for the legislation I described above.

In Title I, Part B, Section 112 of the Higher Education Act, Congress affirms the importance of "student speech and association rights," while also affirming the ability of private religious colleges, under the First Amendment's guarantee of religious liberty, to impose certain limits on speech.

And while Title I, Section 112 of HEA does not directly call for disciplining students who have interfered with the free-speech rights of others, it does assume that such discipline policies will be enacted, since this section explicitly permits colleges to sanction students who willfully disrupt "a lecture, class, speech, presentation, or performance."

In an ideal world, federal protection of First Amendment rights on college campuses with not be necessary. Instead, administrators and faculty members would vigilantly enforce these rights, reaffirming their importance and defending them with necessary policies and regulations, just as Yale did with the Woodward Report of 1974.

Unfortunately, in our current circumstances, administrators regularly fail to enforce First Amendment rights, and substantial sections of the faculty have abandoned the classic liberal commitment to freedom of speech. This problem, moreover, has been festering for decades and has lately continued to worsen. With a problem this systemic and long-standing, the time for federal action may at last have arrived.

In short, the long-standing and rapidly worsening crisis of free speech on America's college campuses has reached the point where it can and should be addressed by state and federal legislation. Unless such legislation vigorously addresses not only restrictive campus speech codes and so-called free speech zones, but the problem of administrative discipline for those who silence the speech of others, the crisis of campus free speech will not be overcome.