



Via e-mail

President Janet Napolitano
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Members of the Board of Regents
University of California
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Re: First Amendment concerns with efforts to adopt a re-definition of anti-Semitism

Dear President Napolitano and the Board of Regents,

As civil and human rights organizations committed to racial justice, we support your efforts to confront racism and bigotry on campus, including through thoughtful conversations about combatting anti-Semitism and creating an environment that is welcoming for all students. However, we write to raise concerns with recent calls for the University of California to adopt a re-definition of anti-Semitism used by the United States Department of State’s Special Envoy to Monitor and Combat Anti-Semitism.¹ This re-definition conflates political criticism of Israel with anti-Semitism, infringing on constitutionally protected speech. The re-definition is especially inappropriate for a university setting.

For reasons set forth below, we urge you to drop consideration of the State Department’s re-definition of anti-Semitism. In doing so, we hope you will heed the United States Department of Education’s Office for Civil Rights’ (DOE) decisions in three recent investigations of UC campuses prompted by complaints that speech and other advocacy favoring Palestinian rights created a “hostile environment” for Jewish students.² In consistently finding that these incidents “did not constitute actionable harassment,” DOE affirmed the importance of protecting “robust and discordant expressions” on matters of public concern in the university setting. As university administrators, we urge you to do the same.

¹ Defining Anti-Semitism, Fact Sheet, Special Envoy to Monitor and Combat Anti-Semitism, U.S. Department of State, <http://www.state.gov/j/drl/rls/fs/2010/122352.htm>.

² DOE’s determination letters in these three cases, explaining its legal findings, can be downloaded at the following URLs: UC Berkeley (<http://bit.ly/doeucb>); UC Santa Cruz (<http://bit.ly/doeucsc>); UC Irvine (<http://bit.ly/doeucirvine>).

I. The State Department’s re-definition of anti-Semitism would violate the First Amendment and is not appropriate for a university setting

Recently, there have been calls for the University of California to adopt the State Department’s re-definition of anti-Semitism. Much of that re-definition is uncontroversial and aligns with a traditional understanding of the term.³ But the re-definition, which was originally drafted – and subsequently discarded – by a European Union agency,⁴ radically departs from that understanding with its listing of examples of “Anti-Semitism Related to Israel,” known as the “three D’s”: “demonizing Israel,” “applying a double standard to Israel” and “delegitimizing Israel.”⁵ This codifies the false conflation of anti-Semitism with political speech critical of Israeli policies. This approach is inappropriate especially for universities that value, and are obligated to protect, academic freedom and First Amendment-protected speech.

a. Adopting the re-definition of anti-Semitism risks violating the First Amendment

The State Department’s anti-Semitism re-definition is not binding law in the United States and is used for the limited purpose of “monitoring and combatting acts of anti-Semitism and anti-Semitic incitement *that occur in foreign countries.*”⁶ It is not used domestically by any other U.S. government agency. Adopting the re-definition on campuses or elsewhere in the U.S. risks violating the First Amendment.

If adopted, the re-definition could put University administrators in the position of violating free speech rights. Administrators, who have a duty to mitigate racially-hostile environments, would likely be called upon to respond to speech and advocacy critical of Israel that some would argue meets the criteria laid out in the re-definition. Under the mistaken illusion that it is appropriate to penalize such speech and advocacy, administrators may end up violating First Amendment rights. This could expose the University and well-intentioned administrators to liability.⁷

³ For example, the State Department’s re-definition begins: “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.” Merriam-Webster defines anti-Semitism as, “Hostility toward or discrimination against Jews as a religious, ethnic or racial group.” One might add to that the use of stereotypes about Jews – mostly negative ones but at times seemingly complimentary (e.g. that Jews are “smart” or “good at making money”).

⁴ The European Union Monitoring Centre (EUMC), where this description first appeared in 2005 as the result of lobbying efforts by Israel-aligned groups, meant it to be only a “guide for data collection.” (See Seth Berkman, “Anti-Semitism Fight Hinges on Definition,” Jewish Forward, September 25, 2012, <http://forward.com/articles/163105/anti-semitism-fight-hinges-on-definition/?p=all>). It was ultimately discarded even for that limited use due to objections from European organizations. In 2013 it was removed from the agency’s website altogether, over protests by Israeli officials and U.S.-based Israel advocacy groups. (JTA, “EU drops its ‘working definition’ of anti-Semitism,” The Times of Israel, Dec. 5, 2013, <http://www.timesofisrael.com/eu-drops-its-working-definition-of-anti-semitism/>).

⁵ Defining Anti-Semitism, supra note 1.

⁶ See 22 U.S.C. § 2731(b) (emphasis added).

⁷ Indeed, courts have held that speech addressing public issues – such as Palestine/Israel – rests on the highest rung of the hierarchy of First Amendment values. (see *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)). Attempts by a government body or a public university to silence one side of the conversation – by claiming that opposition to the state of Israel is anti-Semitic, for example – is contrary to First Amendment principles.

Further, adoption of the re-definition would almost certainly have a chilling effect on constitutionally-protected speech and academic inquiry. Students, professors, and researchers will inevitably act in ways to avoid review of their activities and avoid the specter of being officially labeled as anti-Semitic. This is especially likely given the re-definition's vagueness. What is a "double standard" with regards to criticism of Israel and how will it be judged? How many additional countries are students and professors required to criticize when they criticize Israel, and what degree or depth of criticism are they required to make in order to avoid applying a "double standard" to Israel? How would the university define "delegitimizing" or "demonization" of Israel? To enter such a morass of viewpoint-based distinctions is an invitation to restrict and chill protected speech.

b. The re-definition of anti-Semitism is not appropriate for universities that value unfettered speech

The State Department's re-definition brands critics of Israeli policies and advocates for Palestinian human rights as anti-Semitic by blurring the important distinction between criticism of Israel as a nation-state and anti-Semitism. In doing so, it denies the reality that Palestinian human rights activists' criticism of Israel is based not on its Jewish identity but on the nation-state's policies and practices.⁸

It is inappropriate for a university that values academic freedom and unfettered debate to adopt a definition of anti-Semitism that encompasses criticism of Israel, particularly at a time when Palestine activists increasingly face false accusations that their political criticisms of Israel are tantamount to anti-Semitism.⁹ Such a definition would silence legitimate opinions and perspectives, and would violate the University of California's own commitment to academic freedom, which "seeks to foster in its students a mature independence of mind [that] cannot be achieved unless students are free to express a wide range of viewpoints."¹⁰

II. U.S. Department of Education rejected similar attempts to repress Palestine human rights activism

As you know, in recent years, there have been allegations that expression criticizing the state of Israel or advocating for Palestinian human rights is identical to "harassment" or

⁸The majority of the global Jewish population does not live in Israel and 25 percent of Israelis are not Jewish. Jewish Virtual Library, "Vital Statistics: Jewish Population of the World," <https://www.jewishvirtuallibrary.org/jsource/Judaism/jewpop.html>.

⁹In the first four months of 2015 alone, Palestine Legal documented 60 incidents involving accusations of anti-Semitism made against students or faculty based solely on speech critical of Israeli policy. Thirty-seven of the incidents were from colleges and universities in California, 24 of them within the University of California system (Accusations of Anti-Semitism Used to Deter Advocacy for Palestinian Rights, Palestine Legal, <http://bit.ly/1MpCDWS>).

¹⁰ Academic Freedom, University of California Academic Personnel Manual 010, http://www.ucop.edu/academic-personnel-programs/_files/apm/apm-010.pdf (The statement goes on to note that "the faculty has the major responsibility to establish conditions that protect and encourage all students in their learning, teaching, and research activities. Such conditions include, for example: free inquiry and exchange of ideas; the right to critically examine, present, and discuss controversial material relevant to a course of instruction; enjoyment of constitutionally protected freedom of expression; and the right to be judged by faculty in accordance with fair procedures solely on the basis of the students' academic performance and conduct.").

“intimidation” that “targets” and creates a “hostile educational environment” for Jewish students on campus on the basis of race or national origin. Accordingly, UC has been accused of failing to protect these students, in violation of Title VI of the Civil Rights Act of 1964. In the context of discussion about Israel and Palestine on campus, however, DOE has emphatically rejected complaints conflating protected political speech with actionable harassment. To date, no such complaint has been sustained or found to have legal merit.¹¹

There are crucial lessons to be learned and adopted from DOE’s investigations. As DOE has affirmed in four separate cases (three on UC campuses) after conducting lengthy investigations of alleged harassment of Jewish students based on student and faculty advocacy for Palestinian rights, expression of political viewpoints does not, standing alone, give rise to actionable harassment under Title VI simply because some may find it offensive.¹²

To the contrary, a public university risks violating students’ constitutional rights if it censors or chills protected expression.¹³ DOE, in addressing the importance of diverse viewpoints and expression on college and university campuses, noted that the activities complained of in the harassment complaints “constituted expression on matters of public concern directed to the University community. In the University environment, exposure to such robust and discordant expressions, even when personally offensive and hurtful, is a circumstance that a reasonable student in higher education may experience.”¹⁴

DOE’s commitment to open and diverse debate on campuses follows a long line of well-established First Amendment case law. As university administrators, we urge you to affirm your commitment to protecting free speech on campus by embracing the DOE findings and using them as a guide to safeguard the right to criticize Israel and Israeli policies exercised by students, academics and administrators alike.

III. Conclusion

We appreciate the importance of addressing allegations of anti-Semitism on campus. But just as the University of California has an obligation to respond seriously to allegations of anti-Semitism, so too must it protect students’ constitutional rights to speak openly and freely on matters of public concern. We urge you to drop consideration of the State Department’s re-definition of anti-Semitism and any other attempt to conflate anti-Semitism with criticism of Israel.

¹¹ See Department of Education Dismisses 3 Year Old Complaint Targeting Palestine Advocacy at Rutgers, Palestine Legal, Sept. 16, 2014, <http://palestinelegal.org/news/2014/09/16/1708>.

¹² As DOE notes, “harassment must include something beyond the mere expression of views, words, symbols or thought that a student finds personally offensive. The offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment.” Letter from U.S. Department of Education to UC Berkeley, Aug. 19, 2013, re: Case No. 09-12-2259, available at <http://bit.ly/doeuch>.

¹³ DOE OCR has stated it will not, in its enforcement of anti-discrimination laws, exceed the boundaries of the First Amendment for either private or public universities. See Dear Colleague Letter from U.S. Department of Education, July 28, 2003, <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (“OCR’s regulations should not be interpreted in ways that would lead to the suppression of protected speech on public or private campuses.”).

¹⁴ See UC Santa Cruz and UC Berkeley DOE determination letters, <http://bit.ly/doeuch> (Berkeley) and <http://bit.ly/doeucsc> (Santa Cruz).

Respectfully,

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