

# ISSUE BRIEF

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## Executive Order to Protect Free Speech on Campus Recognizes Ongoing Challenge

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Last week, the White House released an executive order to protect free speech on college campuses, appropriately highlighting the issue as the parade of campus nonsense—and much worse—continues around the country. Earlier this month, Portland State University officials did not stop a protestor from using a cowbell to disrupt an event featuring an invited speaker, violating the speaker’s right to be heard and the expressive rights of the students that invited the lecturer or who were in the audience.<sup>1</sup>

Executive orders risk unlawfully expanding the scope of federal authority, and every Administration should be aware of jeopardizing more rights than it protects. The Trump Administration showed a welcome form of restraint: The provisions state that federal agencies should “take appropriate steps, in a manner consistent with applicable law, including the First Amendment” to require colleges and universities that receive federal research grants to protect free expression on campus.<sup>2</sup> Later, the order again references a need to stay within the bounds of existing laws as the agencies try to safeguard free speech on campus. Taxpayers and lawmakers should hold agencies to these provisions as the offices implement the order.

And, the task remains for state policymakers to enact state proposals that protect speech on cam-

pus. To this end, officials in Arizona, North Carolina, Georgia, and Wisconsin have adopted proposals in recent years, and lawmakers in other states should follow these provisions as they attempt to guard academic freedom and free expression.

### **President Trump’s Executive Order on Free Speech**

The executive order’s treatment of free speech on campus is brief—just three paragraphs, with only one that defines the directive. The order says that postsecondary institutions that receive federal grants must “promote free inquiry.”<sup>3</sup> Again, the order’s directives state twice that those carrying out the order should stay within the bounds of existing law, including the Constitution’s First Amendment protections.

The provisions stating that grant-awarding agencies should stay within these bounds are critical. The order serves as a reminder to schools that free speech is essential to preserving academic freedom, but it should also remind agencies to be aware of the risk of limiting academic freedom through additional regulations.

The threat of unintended consequences remains. Agencies must be aware that the order could affect faculty and students who were not part of a campus shout down or the creation of a school’s speech code. Furthermore, private institutions should not be required to adjust their mission statements or other operational practices—so long as these policies and procedures already comply with existing law.

### **States Leading the Way**

Meanwhile, states should continue to advance proposals protecting the right to be heard on public

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college campuses. Policymakers in Arizona, North Carolina, Georgia, and Wisconsin adopted proposals for public colleges and universities that make the First Amendment's protection of speech a priority.<sup>4</sup> Other state policymakers should follow these models.

First, state policymakers should require public universities and colleges in their state to adopt a mission statement in favor of free speech. The University of Chicago, the source of some of the most thoughtful position papers over the years emphasizing the importance of free speech, has adopted a statement that dozens of schools across the country are already using all or in part.<sup>5</sup> The statement is an appropriate application of the First Amendment to college campuses.

The statement says colleges should not “shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive,”<sup>6</sup> and schools must allow for civil discourse, especially “when others attempt to restrict it.”<sup>7</sup>

Second, anyone lawfully present on a public college campus should be allowed to protest or demonstrate in public areas of campus. Yet, as stated in the Arizona proposal from 2018, “Individual conduct that materially and substantially infringes on

the rights of other persons to engage in or listen to expressive activity is not allowed and is subject to sanction.”<sup>8</sup>

Third, public colleges and universities should not sanction members of the campus community for their views. Faculty and students should be free to take positions on critical issues of the day—write a column, for example, or give a speech—and not fear reprisal because the institution has adopted a different position. North Carolina's proposal says that schools should not “take action, as an institution, on the public policy controversies of the day in such a way as to require students, faculty, or administrators to publicly express a given view of social policy.”<sup>9</sup> The University of Chicago's Kalven Report, a seminal document outlining the need to protect free speech on campus, articulated this idea in 1967.<sup>10</sup>

Fourth, all public areas of a public college campus should be a free speech zone. Today, some schools are limiting the physical areas in which students may distribute literature or speak out on issues to small, hard-to-find areas of campus.<sup>11</sup> The opposition to these “free speech zones” by groups on opposing sides of other policy issues demonstrates that protecting free speech is a bipartisan—if not nonpartisan—issue. The American Civil Liberties Union, for

1. Greg Piper, “VIDEO: Portland State Officials, Police Stand By as Protestor Shuts Down Gun-Rights Talk with a Bell,” *The College Fix*, March 6, 2019, <https://www.thecollegefix.com/video-portland-state-officials-police-stand-by-as-protester-shuts-down-gun-rights-talk-with-a-bell/> (accessed March 18, 2019).
2. The White House, “Executive Orders on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities,” March 21, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities/> (accessed March 25, 2019).
3. *Ibid.*
4. Fifty-third Arizona Legislature, 2018 Second Regular Session, House Bill 2563, <https://www.azleg.gov/legtext/53leg/2R/bills/HB2563C.pdf> (accessed March 25, 2019); General Assembly of North Carolina, Session 2017, Session Law 2017-196/House Bill 527, <https://www.ncleg.net/Sessions/2017/Bills/House/PDF/H527v6.pdf> (accessed March 25, 2019); Board of Regents of the University of Wisconsin System, “Meeting Agenda,” September 28, 2017, [https://www.wisconsin.edu/regents/download/meeting\\_materials/2017/october/Board-of-Regents-Friday-Agenda-and-Materials---October-2017.pdf](https://www.wisconsin.edu/regents/download/meeting_materials/2017/october/Board-of-Regents-Friday-Agenda-and-Materials---October-2017.pdf) (accessed March 25, 2019); and Georgia General Assembly, “2017-2018 Session-SB 339,” <http://www.legis.ga.gov/Legislation/en-US/display/20172018/SB/339> (accessed March 25, 2019).
5. Tom Lindsay, “35 Universities Adopt ‘The Chicago Statement’ on Free Speech—1,600 to Go,” *Forbes*, February 28, 2018, <https://www.forbes.com/sites/tomlindsay/2018/02/28/35-universities-adopt-the-chicago-statement-on-free-speech-1590-to-go/#426d5589771b> (accessed March 18, 2019).
6. University of Chicago, “Report of the Committee on Freedom of Expression,” July 2014, <https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf> (accessed March 18, 2019).
7. *Ibid.*
8. Fifty-third Arizona Legislature, 2018 Second Regular Session, House Bill 2563.
9. General Assembly of North Carolina, Session 2017, Session Law 2017-196/House Bill 527.
10. University of Chicago, “Kalven Committee: Report on the University's Role in Political and Social Action,” November 11, 1967, <https://provost.uchicago.edu/sites/default/files/documents/reports/KalvenRprt.pdf> (accessed March 18, 2019).
11. Representative Phil Roe (R-TN) sponsored H. Res. 191, which provides examples of how schools are censoring expression with free speech zones. See 116th Congress, 1st Session, H. Res. 191, <https://www.congress.gov/bill/116th-congress/house-resolution/191/text?q=%7B%22search%22%3A%5B%22free+speech+on+campus%22%5D%7D&r=1&s=1> (accessed March 25, 2019).

example, says, “When colleges confine free speech to a ‘zone,’ it isn’t free.”<sup>12</sup>

Fifth, state policymakers should encourage schools to institute consequences for students that violate the free speech rights of others, up to and including suspension and expulsion. Criminal activity, such as assault and arson, should be left to the proper authorities, but universities can no longer look the other way when students make use of the “heckler’s veto.”

The University of Wisconsin policy adopted in 2017 includes such a provision and is already having its intended effect. Protestors who disrupted an event at a Wisconsin campus told media that they chose not to disrupt a different event after the state university system’s governing board adopted the policy of considering consequences for students who take part in a shout down.<sup>13</sup> Ideas for sanctions such as these can be found in Yale University’s “Woodward Report” from 1974, which came in response to speaker disinvitations and protests during the turbulent 1960s and 1970s.<sup>14</sup>

These potential consequences should be paired with due-process protections so that students know of the charges against them prior to a hearing and can find appropriate representation. In Arizona, students accused of violating someone else’s right to be heard or disrupting an event are entitled to disciplinary hearings that include “advanced written notice of the allegations” and “the right to review the evidence in support of the allegations,” among other protections.<sup>15</sup>

Finally, public university governing boards should oversee the writing of annual reports on the condition of free speech on campus. Such reports should be made available to the public and include a review of any administrative action concerning shout downs or speaker disinvitations. The University of North Carolina governing board released its first such report in 2018.<sup>16</sup>

## Conclusion

Last week’s executive order on free speech raises the profile of a problem that plagues higher education institutions around the country. Restrictive campus speech codes threaten academic freedom and should not be tolerated. The order directs federal agencies to consider a postsecondary grant recipient’s adherence to existing laws regarding free expression, and the agencies should themselves stay within the bounds of current laws and regulations as they implement the order.

Washington should continue its support of the First Amendment through the U.S. Department of Justice’s intervention in lawsuits to protect free speech on campus. It will be equally important for state lawmakers around the country to consider specific proposals designed to reposition public university policies back in favor of academic freedom and free speech.

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12. Emerson Sykes and Vera Eidelman, “When Colleges Confine Free Speech to a ‘Zone,’ It Isn’t Free,” ACLU Speak Freely blog, February 7, 2019, <https://www.aclu.org/blog/free-speech/student-speech-and-privacy/when-colleges-confine-free-speech-zone-it-isnt-free> (accessed March 25, 2019).
  13. Jonathan Butcher, “How the University of Wisconsin Protected Its Students and First Amendment Rights,” *Milwaukee Journal-Sentinel*, March 5, 2018, <https://www.jsonline.com/story/opinion/contributors/2018/03/05/how-university-wisconsin-protected-its-students-and-first-amendment-rights/385180002/> (accessed March 25, 2019).
  14. Yale University Yale College, “Report of the Committee on Freedom of Expression at Yale,” December 23, 1974, <http://yalecollege.yale.edu/deans-office/policies-reports/report-committee-freedom-expression-yale> (accessed March 25, 2019).
  15. Fifty-third Arizona Legislature, 2018 Second Regular Session, House Bill 2563.
  16. The University of North Carolina System, “Report: 2017-2018 Report on Free Speech and Free Expression Within the University,” September 12, 2018, [https://www.northcarolina.edu/sites/default/files/2017-18\\_report\\_on\\_free\\_speech\\_and\\_free\\_expression\\_within\\_the\\_university.pdf](https://www.northcarolina.edu/sites/default/files/2017-18_report_on_free_speech_and_free_expression_within_the_university.pdf) (accessed March 25, 2019).
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