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OPINION | COMMENTARY

A Bill to Police Campus Speech

Senate legislation aimed at anti-Semitic speech runs afoul of the First Amendment.



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By **ERWIN CHEMERINSKY** and **HOWARD GILLMAN**

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Two weeks ago the Senate passed, by unanimous consent, the Anti-Semitism Awareness Act, an unquestionably well-intentioned attempt to protect Jewish students on campus. Unfortunately the bill runs afoul of the First Amendment. If passed by the House and signed into law, it would encourage the Education Department to further punish constitutionally protected free speech at colleges and universities.

The legislation, proposed by Sens. Bob Casey (D., Penn.) and Tim Scott (R., S.C.), would require the Education Department, when deciding whether to investigate incidents on campus, to consider the State Department's definition of anti-Semitism. This definition includes "rhetorical" manifestations, such as speech to "demonize Israel," "delegitimize Israel," or apply a "double standard for Israel."

Many people have strong feelings about such views. But the First Amendment protects the expression of all ideas, even if racist and anti-Semitic. Basic principles of academic freedom require that universities do the same. Schools can prevent and punish threats, harassment and destruction of property, but never the expression of views.

Yet this bill would require the Education Department to focus on exactly that: the ideas expressed on campus. And the bill covers more than simply hateful speech toward Jewish students. It could include criticizing Israeli policies or arguing against the existence of Israel, speech that is protected by the

Constitution.

Many staunch supporters of Israel believe that Israel, like the U.S., should be held to a higher standard when it comes to human rights. Under the State Department's definition, expressing that view is deemed anti-Semitism.

It would also be a mistake to dismiss this legislation as merely a symbolic gesture of sympathy for Jewish and pro-Israel students. The Education Department, through its Office of Civil Rights, is already doing too much to encourage schools to punish speech.

The Office of Civil Rights is responsible for making sure that campuses fulfill their obligations, under Title VI and Title IX of the Civil Rights Acts, to refrain from discriminating on the basis of race and sex. That's a good mission.

But in recent years the office has launched civil-rights investigations not because of discriminatory activity, but solely based on the ideas being expressed. A lengthy federal inquiry of our campus, the University of California, Irvine, was triggered in 2012 after years of student protests against Israeli treatment of Palestinians. The administration stood accused of creating a hostile environment for Jewish students, exposing the school to fines or loss of federal funding—especially significant for a research university.

Much to the consternation of groups now supporting the Anti-Semitism Awareness Act, the university was cleared of any wrongdoing in 2013. Still, it was deeply troubling that the school could be considered in violation of federal law simply because it permitted anti-Israel protests on campus.

This pattern of launching investigations over constitutionally protected speech has intensified. Last year the Office of Civil Rights opened an investigation on the grounds that the University of Mary Washington had failed to monitor the anonymous social-media platform Yik Yak.

An investigation of sex discrimination was begun against Northwestern Professor Laura Kipnis over an article she wrote criticizing what she called the “layers of prohibition and sexual terror” governing romantic relationships between faculty and students.

In April the Education Department told the University of New Mexico that the school was obligated to punish unwelcome “verbal” conduct of a sexual nature, regardless of whether it met the legal definitions of threats or harassment.

To put the point simply: Congress should not pass legislation that requires a government agency to monitor and respond to political speech—even if that speech “demonizes” Israel or any other country.

We agree that the problem of anti-Semitism on campus, and in society generally, is real and ought to be addressed. There are many steps colleges can take. They should ensure that Jewish and pro-Zionist students are included and that the proud expression of Jewish identity on campus is welcomed. Universities should make clear that attempts to disrupt events organized by Jewish or pro-Israel students will not be tolerated. Campus leaders should speak out against hateful

speech, and they can react swiftly to any actual threats, harassment or destruction of property.

But the solution most despised by the Constitution is for Congress to pass a law that threatens universities and speakers merely because of the views being expressed. The Anti-Semitism Awareness Act is troubling because it seems to do precisely that.

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