

Report Regarding Review of November 19th Protests

Background:

President Skorton received communications from three professors who had participated in a protest rally on November 19, 2012, on Ho Plaza, (“the November 19th protests”), complaining that the University’s management of these protests was inconsistent with the Campus Code. Two university affiliated organizations orchestrated rallies that day, in which their respective members and adherents voiced their viewpoints concerning the (then) armed confrontation by Israeli and Hamas forces in Gaza: the Cornell Israel Public Affairs Committee (“CIPAC”) in support of Israeli governmental policies; and Students for Justice in Palestine (“SJP”) in support of Palestine’s stance.

In response to the communications from the three faculty members, President Skorton committed to review their comments and concerns about the November 19th protests, which focused on the following:

- (1) The permit process the University employs for major “outdoor events,” the University Use of Property Forms (“UUP”), conflicts with policy provisions in the Campus Code that govern free expression on campus, including “outdoor picketing, marches, rallies and other demonstrations.”
- (2) The University’s use of this UUP process for the November 19th protests, and the actions of University employees at the scene (including Campus police officers) in enforcing the UUP process by unfairly ushering the pro-Palestinian group off Ho Plaza, enabled the pro-Israeli group (which had applied for and received a permit) to have an undue preference for the Ho Plaza space over the pro-Palestinian group (which had not applied for a permit, believing the Campus Code “permitted” their demonstration).

- (3) The free expression rights of the SJP supporters including the faculty members were abridged as a result.¹

President Skorton asked the University Counsel to advise and assist the President's Office in conducting the review, particularly regarding the applicability and interplay of the various policy provisions and issues.

Information Reviewed:

Extensive information, including written and video materials, and interviews, was obtained and examined in the course of this review.² Several pertinent university procedures and policies were consulted as well. Key passages from the Cornell Campus Code are set forth in Appendix 1.

Findings and Observations:

We offer the following findings and observations from our review of the relevant information:

- (1) There is a real lack of clarity as to what policies govern outdoor rallies and demonstrations on university premises. The November 19th protests exposed this confusion, and provides a useful learning experience to set things straight.
- (2) The Campus Code, in Article I C, sets forth a general right of free expression. The Code also permits the University to "impose reasonable time, place, and manner restrictions" on expressive conduct. (Campus Code Article III B.1) In line with this provision, the University has used the UUP permit process for activities on Ho Plaza. The Code also states, however, that "[b]ecause outdoor picketing, marches, rallies, and other demonstrations generally pose no threat of long-lasting exclusive use of University grounds or property, there appears to be no need for a mandatory permit

¹ The faculty members also claimed that their "academic freedom" was abridged. Academic freedom principles traditionally refer to a faculty member's freedom related to classroom teaching and research inquiry (and publication of the results). A third (less known) prong protects a professor's right as a citizen to speak out on issues of public concern — a concept that is encompassed within the general right of free expression. See, Campus Code Title One, Article III A.2. ("The American conception of academic freedom includes the principle that professors may participate in political demonstrations and speak out on controversial issues without jeopardizing their employment.")

² Statements were gathered from numerous individuals on the scene (including the three faculty members, the event managers, and the campus police), as well as from employees and supervisors involved in administering and/or overseeing the UUP process.

procedure for such outdoor activities.” (Campus Code, Article III B.3)

- (3) The CIPAC student organization adhered to the UUP process and obtained a permit to orchestrate a rally on Ho Plaza with an amplifier. CIPAC thus proceeded on the understanding that it was accorded reserved (though not necessarily exclusive) use of Ho Plaza from 12:00-1:00 on November 19.
- (4) The SJP student organization did not seek a UUP permit; at the rally it proclaimed reliance on the provision in the Campus Code (Article III B.3) noted above (“Because outdoor picketing, marches, rallies, and other demonstration generally pose no threat of long-lasting exclusive use of University grounds or property, there appears to be no need for a mandatory permit procedure for such outdoor activities.”) SJP acted with the understanding that its use of Ho Plaza at the same time as CIPAC was already allowed by University policy.
- (5) In the past, counter-demonstrating groups have been allowed to co-exist and share space on Ho Plaza to engage in their expressive activities. This space sharing has typically been worked out in advance through the UUP process, where reasonable ground-rules regarding alternating use of amplifiers (e.g. megaphones) and allocating separate space on Ho Plaza were laid out and understood by the student organizations’ leaders.
- (6) Despite the fact that only one of the two student organizations had completed the UUP process, the University event managers nevertheless made good faith attempts on the scene on November 19th to work out space-sharing and alternating amplifier use; but to no avail – with each group insisting that the free expression right to broadcast its message, or to maintain moments of silence, should prevail over the other’s.
- (7) The campus police officers present stepped into the fray in a well-intentioned attempt to referee what became a very intense verbal confrontation between the pro-Israeli and pro-Palestinian groups, which were closely engaged with each other. This included efforts to enlist the assistance of the faculty members “as university officials” to prevail upon the pro-Palestinian group leader to acquiesce to the pro-Israeli group leader’s entreaty for a moment of silence (purportedly in honor of the Israeli and Palestinian bombing victims).

- (8) The faculty members refused the police request to intervene, saying that they were participating as protestors and not acting “as university officials” at the event. Their stance is in accord with the policy statement in the Campus Code which affirms the “principle that professors may participate in political demonstrations and speak out on controversial issues without jeopardizing their employment.” (see Article III A.2)
- (9) Then, as often happens when the atmosphere is highly charged and when folks “get their backs up” when perceived interests are being ignored or infringed, the situation took some untoward twists and turns. Campus police officers acted to enforce the UUP and proclaimed that the CIPAC group was permitted to demonstrate on Ho Plaza, but the SJP group (which had no permit) was not. The faculty members were pressed to produce IDs. The SJP speaker was admonished that his refusal to cooperate would be viewed as disorderly conduct if he did not cease use of the megaphone.³
- (10) All of these actions seem to stem from confusion over what ground rules are understood to govern outdoor rallies, protests and demonstrations, and serve to guide the conduct of responsible administrators on the scene as well as campus police officers who are called upon to assist. Put another way, clear ground rules regarding outdoor expressive activities might well have avoided the actions that have been assailed – and any need to review them.
- (11) Each of the “actors” can credibly point to some belief or basis anchored in a university policy to support their “actions” on the scene. As noted, CIPAC followed the UUP process, believing this was the governing policy; SJP pointed to Campus Code Article I B.3 believing that this was the governing policy. The campus police sought the assistance of the three faculty members to prevail upon the SJP speaker to curtail the megaphone, relying on the Campus Code provision that declares that “All members [of the campus community] have a duty to cooperate with University officials in this [Campus] Code’s operation and enforcement” (Article I C.2). And then, when the faculty members declined to intervene, the police pressed them to produce university identification, invoking another provision of the Campus Code that makes it a violation “to refuse to comply with any lawful order of a clearly identifiable University official acting in the performance of his or her duty . . .

³ The SJP group then left Ho Plaza and continued its demonstration in front of Day Hall.

.⁴ (Title Four Article II A.2). For their part, the faculty members believed that academic freedom principles protect their right to “participate in political demonstrations and speak out on controversial issues,” (as recognized by the Campus Code Article III A.2) – and that this was exactly what they were doing in demonstrating with the SJP group.

- (12) The chain of events created the “impression” on the part of some participants that university agents were acting at the behest of one group of protestors over another, and thus favoring that group’s speech over the other group’s speech.⁵ However, we found no evidence that any bias or content-based judgments influenced the actions of university employees on the scene on November 19th (or that university officials not on the scene somehow orchestrated the events). Nor do we believe that individuals whose actions were assailed were motivated by ill will or acted unprofessionally or beyond the scope of their university responsibilities; thus, we found no basis to advise that any disciplinary action be considered.
- (13) Fortunately, no injuries to participants or others occurred as part of the November 19th protests, which is a paramount concern of university administrators and police who were asked to be on hand.
- (14) Finally, turning to the issue that prompted and animated the protests, was free expression suppressed? There obviously were efforts on the part of some competing demonstrators to suppress the speech of the group they opposed, e.g., through heckling, shouting, and/or simultaneous use of megaphones. SJP by being ushered off Ho Plaza (due to its lack of a UUP permit) was frustrated from speaking in a venue of its choosing; but the group was still able to continue its demonstration in front of Day Hall where (as it turned out) an even larger audience ended up hearing its views. In short, the University may have diverted some speech; but it did not suppress speech because of its content, nor act to censor or discipline any participants for expressive activity.

Recommendations:

⁴ The campus police maintained that they were gathering the names of some participants in anticipation of any subsequent incident investigation.

⁵ The actions of the campus police in directing the SJP off Ho Plaza was based upon the understanding that the CIPAC had a UUP permit while the SJP did not – only after efforts to have SJP not use the amplifier to drown out the CIPAC were unavailing. If the situation were reverse, we believe that the campus police would have acted to respect and enforce SJP’s permit.

We offer the following recommendations going forward:

The portion of the UUP procedure that pertains to major “outdoor” events should be re-examined and reconciled with conflicting policy provisions of the Campus Code. The appropriate campus governance group to conduct this policy review is the University Assembly (“UA”). The UA is comprised of duly elected representatives of the faculty, students and staff; and per Trustees-approved legislation, the UA is delegated responsibility to oversee the Campus Code and to advise the President regarding appropriate revisions. In fact the Campus Code fully contemplates the UA’s involvement in this regard: “The President may consult with the Executive Committee of the University Assembly, or appoint an ad hoc committee to advise the President, concerning appropriate administrative policy in the face of protest and demonstrations.” (see Article III C.)

The fundamental “free expression” principles set out in the Campus Code includes the freedom “to assemble and to protest peacefully and lawfully” (Article I C.) Another pertinent passage of the Campus Code does not foreclose the institution from having an advance permit process; in fact it, contemplates it: “Even in regard to conduct that is intentionally expressive and perceived as such, the University may impose reasonable time, place, and manner restrictions on such conduct to preserve other important values and interests of the University community” (Article III B.) This “reasonable time, place, and manner” doctrine is a basic element of First Amendment jurisprudence; public universities (which are subject to constitutional constraints) may apply such restrictions to campus assemblies and demonstrations so long as the restrictions are “content neutral”, i.e. they are not designed or used in practice to censor or restrain speech based on its “content.”⁶

A reasonable permit process affords a “heads-up” to appropriate administrators to gauge and accommodate “when” a demonstration is to be held (a “time” restriction), “where” it may manageably be held (a “place” restriction), and whether, e.g., amplifier devices are to be used (“manner” restriction).

In undertaking this policy review, we believe that it is appropriate for the University to maintain an advance permit procedure for major “outdoor” events.⁷ A flexible heads-up process allows adequate staff and security presence

⁶ Cornell, a private university, is not a “state actor” legally subject to constitutional constraints; it has chosen to embrace free expression principles as a fundamental matter of institutional policy.

⁷ Some individuals have suggested that Ho Plaza should be designated as a so-called “free speech” precinct that should be available — without prior permit or advance approval — to university organizations and individuals to stage rallies, protests or demonstrations. There are obvious practical problems with such an unregulated approach: what if two groups show up at the same time (or three or four)? which group(s) should receive priority — as to space? use of amplifiers? What about the size of the groups; should there be

to protect those exercising public expression, as well as bystanders and audience members, from risk of injury, and to ensure that there is no disruption of education functions (as countenanced by the Campus Code).

Allowing a limited advance permit procedure for public rallies and demonstrations would of course need to be squared with the Campus Code provision (Article III B.3) stating: "Because outdoor picketing, marches, rallies, and other demonstrations generally pose no threat of long-lasting exclusive use of University grounds or property, there appears to be no need for a mandatory permit procedure for such outdoor activities." While arguably the qualifying terms "generally" and "appears to be no need" may not foreclose a limited advance permit process, in order to avoid any confusion this Campus Code passage should be modified.⁸

We suggest relaxing the current advance application deadline for "outdoor rallies, protests and demonstrations" to when the organizers start planning the event but at least two full business days before, depending upon the specific situation. This would more flexibly accommodate the quest of student organizations to orchestrate relatively spontaneous political speech rallies (aided by social media) yet allow appropriate advance planning and precautions.⁹

Thought should also be given on how to deal with competing requests for the same outdoor space at the same time. Can the "peaceful assembly" interests of both groups be accommodated by allocating separate space on Ho Plaza? Should the use of amplifiers be restricted? If the projected size of the groups are too large, should the permit for the space be based on first to apply for the UUP permit? These and other questions should be considered by the UA.

Finally, we recommend that the University employees who are responsible for administering the time, place and manner restrictions in place for rallies, protests and demonstrations, and/or who are enlisted to attend such events should convene at least annually. The purpose would be to undertake policy review and engage in refresher training, specifically: (1) to review the policies and procedures that pertain; (2) to discuss how particular events were handled over the past year; and (3) to go over the protocol for measured "intervention" on the scene of especially contentious and risky demonstrations (i.e., starting first with the event manager(s) efforts . . . then if necessary, the

limits? What if things get out of hand and injuries occur; should the sponsoring group(s) be held responsible? These (and other) considerations would have to be addressed.

⁸ For example, by adding something along these lines: ". . . except in limited circumstances that conform to the reasonable time, place, and manner restrictions allowed in this Code."

⁹ This more pliable advance notice is also consistent with the thoughtful views of campus administrators and police we interviewed.

responsible executive intervenes . . . then if unavailing, the campus police come forward to assist).

We will be happy to meet with the UA Executive Committee (or another committee the UA may impanel) to discuss these findings and recommendations.

Respectfully submitted,

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CAMPUS CODE EXCERPTS

TITLE ONE: STATEMENT OF PRINCIPLES AND POLICIES

Article I. Fundamental Principles

C. The Principle of Freedom with Responsibility

1. The principle of freedom with responsibility is central to Cornell University. Freedoms to teach and to learn, to express oneself and to be heard, and to assemble and to protest peacefully and lawfully are essential to academic freedom and the continuing function of the University as an educational institution. Responsible enjoyment and exercise of these rights mean respect for the rights of all. Infringement upon the rights of others or interference with the peaceful and lawful use and enjoyment of University premises, facilities, and programs violates this principle.

2. The Campus Code of Conduct is the University community's code, and hence is the responsibility of all community members. All members have a duty to cooperate with University officials in this Code's operation and enforcement.

Article III. Responsible Speech and Expression

A. Public Speaking Events on Campus

2. Disruption of Invited Speakers

Those who dislike what an invited speaker is saying also have rights. The rights include distributing leaflets outside the meeting room, picketing peacefully, boycotting the speech, walking out, asking pointed questions, and, within limits set by the moderator, expressing displeasure with evasive answers. Those who oppose a speaker may thus make their views known, so long as they do not thereby interfere with the speaker's ability to be heard or the right of others to listen. Name-calling and the shouting of obscenities, even when they are not carried so far as to abridge freedom of speech, are nevertheless deplorable in a community devoted to rational persuasion and articulate controversy. Civility is a fragile virtue, but one upon which a university ultimately depends.

The American conception of academic freedom includes the principle that professors may participate in political demonstrations and speak out on

controversial issues without jeopardizing their employment. In a campus setting, however, academic freedom carries with it certain responsibilities. Scholars not only should respect the professional demands of their discipline and the pedagogical requirements of the teacher-student relationship, but also should not encourage efforts to abridge the free expression of controversial viewpoints. As citizens, professors may or may not be especially solicitous about freedom of speech; as scholars, they are morally bound to defend it. Professors traduce their calling by any deliberate action demonstrating contempt for freedom of speech.

B. Protests and Demonstrations on Campus

1. Protected Expressive Conduct in General

The University will treat as within the basic protection of a right to free expression such lawful conduct as satisfies the following tests, where lawful means not in violation of state or federal law. The conduct should (a) be intended for expressive purposes, (b) be reasonably understood as such by the University community, and (c) comply with such reasonable time, place, and manner restrictions as are consistent with the other provisions of this Article and as may be authorized from time to time by the President.

Even in regard to conduct that is intentionally expressive and perceived as such, the University may impose reasonable time, place, and manner restrictions on such conduct to preserve other important values and interests of the University community. An accused charged with such conduct may assert as a defense that he or she has complied with such time, place, and manner restrictions.

All protection and regulation of expressive conduct should be content-neutral. A group's persuasion or point of view should have no bearing on the grant of permission or the conditions regulating that group's expressive conduct.

3. Demonstrations Not Involving Structures

Picketing, marches, rallies, and other demonstrations are traditional and legitimate forms of self-expression and dissent on campus. The limiting principle for such activities is that demonstrators must not disrupt other University functions, including, without limitation, regular and special curricular activities, extracurricular activities, academic processions and events, conduct of University business, and employment interviews. The right to free expression here, as in other contexts, requires respect for the rights of others.

Because outdoor picketing, marches, rallies, and other demonstrations generally

pose no threat of long-lasting exclusive use of University grounds or property, there appears to be no need for a mandatory permit procedure for such outdoor activities.

As to indoor demonstrations such as sit-ins, owners of private property, and even the administrators of public property, are not required to permit the occupation of buildings by those who are not present to transact the business or pursue the other purposes that the offices in the building are intended to serve. Classrooms, libraries, laboratories, living units, and faculty and administrative offices are dedicated to specific purposes, which the University must be free to pursue without disruption. The law of trespass and the right of free speech are not mutually exclusive and, indeed, have always coexisted in our legal system.

C. Consultation Groups

The President is authorized and encouraged to appoint a standing committee to study and report to the President on significant policy issues concerning the protection of freedom of expression on campus. The committee should study any issue presented to it by the President. It should also receive petitions or inquiries from members of the University community, but should limit its attention to issues that involve important matters of a policy nature. Thus, the committee could study an individual's charge that University officials are not adequately enforcing the policy against disrupting public speakers or that they are imposing unreasonable constraints upon the right to protest or demonstrate peacefully and lawfully on campus. The committee should not function as an adjudicatory body, or receive any complaint about or continue considering any issue arising from a campus incident after a disciplinary proceeding growing out of that incident and involving the same or similar issues has been initiated, until any such disciplinary proceeding has been completed. Any report issued by the committee should go to the President and should be available thereafter to the University community. The report would be advisory only.

The President may consult with the Executive Committee of the University Assembly, or appoint an ad hoc committee to advise the President, concerning appropriate administrative policy in the face of protest and demonstrations.

TITLE THREE: REGULATIONS FOR MAINTENANCE OF EDUCATIONAL ENVIRONMENT

Article II. Violations

A. Listing

To engage in disorderly conduct. Disorderly conduct means intentionally causing, or recklessly creating a risk of, disruption to the University community or local community, including by such acts as (1) violent, tumultuous, or threatening behavior, (2) unreasonably loud or belligerent behavior, or (3) obstruction of vehicular or pedestrian traffic.

TITLE FOUR: REGULATIONS FOR MAINTENANCE OF PUBLIC ORDER

Article I. Applicability

This Title shall apply to all persons and organizations, including visitors and other licensees and invitees, on any campus of the University, on any other property or facility used by it for educational purposes, or on the property of a University-related residential organization in the Ithaca or Geneva area, except that students, members of the University faculty, other employees of the University, and University-registered organizations of the Medical College and the Graduate School of Medical Sciences shall be governed by separate regulations with respect to property and facilities of the Medical College and the Graduate School of Medical Sciences.

Article II. Violations

A. Listing

It shall be a violation of this Title:

1. To disrupt or obstruct or attempt to disrupt or obstruct any instructional, research, service, judicial, or other University operation or function or to interfere with or attempt to interfere with the lawful exercise of freedom of speech, freedom of movement, freedom of peaceable assembly, or other right of an individual, by any action including but not limited to the following:

a. by intentionally using or threatening physical force or violence to harass, endanger, injure, abuse, intimidate, or coerce another person, or to cause damage to or loss of property;

b. by intentionally obstructing or causing to be obstructed the lawful use of, access to, or egress from University premises or portions thereof, or by making unauthorized entry upon or use of a University property or facility or by unlawfully remaining in or on the same;

c. by intentionally obstructing or restraining the lawful movement of another person or obstructing or restraining his or her lawful participation in an authorized activity or event, such as regular and special curricular activities, extracurricular activities, and employment interviews; or

d. by intentionally inciting another person toward a likely and imminent violation of this Subsection 1.

2. To refuse to comply with any lawful order of a clearly identifiable University official acting in the performance of his or her duties, or with a policy that has been duly promulgated by the University or any college, department, or unit thereof, whether or not the policy has been issued in the standardized University format.

9. To fail to comply with any time, place, and manner regulation authorized by Article III of Title One.