



The First Amendment & Palestine

PROTECTING OUR CONSTITUTIONAL RIGHT TO FREE SPEECH

The rights guaranteed in the First Amendment of the U.S. Constitution – freedom of speech, the press, association, assembly, and petition – are central to the functioning of our democracy. In the words of Supreme Court Justice Robert Jackson, “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what is orthodox in politics, nationalism, religion, or other matters of opinion.”¹ Indeed, the Supreme Court has long upheld a legal tradition that places political speech as the most protected, and perhaps most important, form of expression in our public discourse.²

According to Supreme Court jurisprudence, the First Amendment also protects the right to participate in nonviolent collective actions such as economic boycotts.³ Under something known as the Incorporation Doctrine, the First Amendment applies to states as well as the federal government.⁴ And while state governments are authorized to regulate economic activities, that does not mean states are permitted to restrict people’s right to engage in peaceful political activity characteristic to boycott movements.⁵

THREATS TO FREE SPEECH ON PALESTINE

Established in 1985, the Arab American Institute was founded at a time when Arab Americans were often excluded from the political process because of their advocacy for Palestinian human rights. At times, Arab American activists have faced discrimination, harassment, and even targeted violence. In one particularly devastating case, on October 11, 1985, an Arab American named Alex Odeh was killed in a bombing as he opened the door

of his office at the American-Arab Anti-Discrimination Committee (ADC) in Santa Ana, Calif.⁶ This tragedy and others have cast a long shadow over our community and inform AAI’s approach to a range of policy issues, including hate crime.

Today, advocates for justice in Palestine, including Arab Americans and members of the American Jewish and African American communities, continue to face harassment, intimidation, and other concerted efforts to silence debate.⁷ This issue is especially prevalent on American college campuses. Even those who simply wish to criticize U.S. policy toward Israel or the actions of the Israeli government have been subject to disingenuous smears, hollow statements of repudiation, and even borderline provocations of violence.⁸ These efforts to suppress an important conversation about human rights have a deleterious effect on our public discourse, and in some cases, could endanger human lives.

Beyond these challenges, advocates for justice in Palestine also face efforts in Congress and state legislatures to restrict their First Amendment rights. State and federal lawmakers have introduced legislation aimed at curtailing participation in the Boycott, Divestment, and Sanctions (BDS) movement, which is a nonviolent campaign designed to place economic pressure on Israel to comply with international law and respect Palestinian human rights.⁹

Aside from anti-boycott legislation that would restrict Americans’ First Amendment rights, Congress has also enacted provisions requiring U.S. trade negotiators

to prioritize commercial partnerships with Israel when considering trade deals with other countries.¹⁰ Furthermore, members of Congress and federal officials have attempted to grant Israel exceptional status within U.S. tax and immigration law.

For some, a driving force of these efforts to restrict free speech on Palestine, particularly when it comes to participating or supporting BDS, is the problematic assertion that criticism of the Israeli government is tantamount to anti-Semitism. That is not true. One can support Palestinian human rights, criticize Israel, and not only denounce, but counteract, anti-Semitism, all at the same time, without any contradictions.

HARASSMENT OF STUDENT ACTIVISTS

College campuses are a bedrock for political activism and social change. It should therefore come as no surprise that student organizers at American colleges are among the most proactive advocates for justice in Palestine. As is often the case with successful political or social movements, reactionary campaigns have formed in response to increased advocacy for Palestinian human rights on campus. The expression of diverse political views is a central tenet of our democracy. Unfortunately, some of these campaigns have resorted to indefensible tactics: they would rather silence the debate than participate.

Perhaps the greatest offender is Canary Mission, an anonymous platform that publishes detailed personal information about college students who participate in Palestinian human rights activities, practice or support BDS, or affiliate with organizations like Students for Justice in Palestine (SJP).¹¹ Other organizations, like the Louis D. Brandeis Center for Human Rights Under Law, have promoted tendentious legal arguments in the effort to shutter Middle East Studies (MES) programs at American colleges and universities.

According to the Brandeis Center, the presence of alleged anti-Israel bias in MES curricula should render the programs ineligible for funding under Title VI of the Civil Rights Act of 1964.¹² The Middle East Studies Association's Committee on Academic Freedom has cogently refuted this argument and other assertions that MES curricula promote anti-Israel bias.¹³

Developments under the Trump Administration suggest

retaliation against student advocates for Palestinian human rights, whether through public shaming, the misapplication of federal civil rights laws, or both, is becoming a matter of policy. As Assistant Secretary for Civil Rights at the Department of Education and former president of the Brandeis Center, Kenneth Marcus has used his position to further entrench the erroneous notion that equates criticism of Israel with anti-Semitism.¹⁴

News reports indicate the department's Office for Civil Rights under Marcus has attempted to adopt an overbroad definition of anti-Semitism, which includes "delegitimizing Israel, or holding it to a double standard not expected of other democratic nations," to guide its investigations.¹⁵ According to the author of this definition, which was designed for the exceedingly narrow purpose of data collection in the European Union, "it was never intended to be used to limit speech on a college campus," and its adoption for domestic civil rights investigations "could actually harm Jewish students" and set a troubling precedent for future restrictions on free speech.¹⁶

STATE ANTI-BOYCOTT LEGISLATION

Despite obvious constitutional concerns, state lawmakers and members of Congress have introduced legislation that would restrict participation in BDS at an increasing rate. Beyond the unjust curtailment of First Amendment-protected activities relating to Palestine, so-called "anti-boycott legislation" sets a precedent that threatens freedom of expression across the board.¹⁷

Following the 2019 state legislative session, over 30 states have passed or introduced legislation that either restricts or condemns participation in BDS activities.¹⁸ As of April 2019, 27 states have adopted anti-boycott laws.¹⁹ The approach ranges from non-binding resolutions condemning the BDS movement, to prohibiting states from investing in or contracting with companies that boycott Israel, to prohibiting the funding of colleges or universities that boycott or divest from Israel.²⁰

While none of these laws were written in the spirit of the First Amendment, some amount to indisputable constitutional violations.²¹ On April 25, 2019, a federal judge granted a preliminary injunction against a Texas anti-boycott law, thereby enjoining the state from enforcing its provisions.²² This was the third time a federal

court blocked an anti-boycott law on First Amendment grounds.²³

FEDERAL FREE SPEECH RESTRICTIONS

Like their state-level counterparts, members of Congress have sought legislation that would restrict First Amendment-protected activities relating to advancing justice in Palestine. Since 2016, the “Anti-Semitism Awareness Act” has been introduced in the House or Senate during each session of Congress.²⁴

According to data collected under the Hate Crime Statistics Act and published in statistics from the Federal Bureau of Investigation, reported hate crimes targeting American Jews increased 37 percent in 2017.²⁵ As painfully demonstrated through two recent fatal shootings at synagogues – Tree of Life in Pittsburgh, Pa., on Oct. 27, 2019, and Chabad of Poway in Poway, Calif., on Apr. 27, 2019 – anti-Semitism represents a burgeoning threat.²⁶ Congress can and must consider legislation that would improve the response to anti-Semitic violence and other acts of hate. The Anti-Semitism Awareness Act is not that legislation.

Rather, this bill seeks to institutionalize the same overbroad definition of anti-Semitism described on the preceding page. According to the American Civil Liberties Union, the passage of this bill, which instructs the Department of Education to utilize the definition in Title VI investigations, “will likely scare schools into suppressing speech critical of Israel.”²⁷

ANTI-BOYCOTT LEGISLATION IN CONGRESS

Congress has also taken aim at First Amendment-protected activities such as boycotting. The last session of Congress saw the introduction of the Israel Anti-Boycott Act of 2018, which would penalize American companies or organizations that boycott Israel and illegal settlement activities in the occupied territories.²⁸ In 2019, the U.S. Senate passed anti-boycott legislation as part of a larger legislative package aimed at securing U.S. interests in the Middle East.²⁹ Known as the Combating BDS Act, this legislation would encourage state governments to pass anti-boycott laws similar to those struck down by federal courts on First Amendment grounds.³⁰

Beyond the issue of boycotts, divestment, and sanctions against Israel, these efforts set a precedent for future restrictions of free speech. Indeed, ample grounds exist

for rejecting these proposals, which in effect are nothing more than attempts to silence an important conversation.

ISRAEL’S EXCEPTIONAL STATUS IN U.S. LAW

Apart from efforts to silence the debate on Israel and Palestine, the federal government has failed to close tax loopholes that benefit American hardline supporters of illegal settlement activities in the occupied territories. Members of Congress have also attempted to grant Israel undeserved exceptional status in U.S. immigration law.

Israel’s far-right supporters in the United States have benefitted from inconsistent determinations the Internal Revenue Service (IRS) has made to the tax code. The IRS continues to grant tax-exempt status to charitable organizations that contribute to illegal Israeli settlements built in contravention of international law. Numerous individuals and 501(c)(3) organizations, including the family foundation of senior advisor to the president Jared Kushner,³¹ have received tax benefits for donations that support increased settlement construction.³² These donations support Israeli settlement activities that violate international law and create additional barriers to peace, and therefore should not be tax-exempt.

Israel has also been pushing for exceptional status in U.S. immigration law, such as inclusion in the Visa Waiver Program administered by the U.S. Department of State and the U.S. Customs and Border Protection’s (CBP) Global Entry program. The Global Entry program allows expedited clearance for certain travelers upon arrival in the United States.³³ A country’s admittance to the Visa Waiver Program, which allows citizens of specific foreign countries to travel to the United States for certain reasons without obtaining a visa, requires reciprocal treatment of U.S. citizens.³⁴ For decades, Arab Americans have been systematically targeted and subjected to unjust screening, harassment, detention, and deportation when attempting to enter Israel or Palestine.³⁵

In 2015, the U.S. Department of State expressed concern regarding the “unequal treatment that Palestinian-Americans and other Arab-Americans receive at Israel’s borders and checkpoints.”³⁶ The State Department has also noted that Israel has “continued to deny entry into the country some foreign nationals [including U.S. citizens] affiliated with certain [non-government organizations] that the government stated called for a boycott of the state of Israel, one of its institutions, or

entities in areas under its control.³⁷

Israel has had limited membership in the Global Entry program since 2012. In a resumption of previous efforts, in March 2019, all 100 members of the U.S. Senate sent a letter to the Department of Homeland Security urging the federal government to grant Israel full membership in the Global Entry program.³⁸ This most recent attempt was made in clear disregard for the discriminatory treatment at Israeli ports of entry of U.S. citizens, including Arab Americans and fellow advocates for justice in Palestine.

ADDITIONAL THREATS TO ACTIVISM ON PALESTINE

Recent developments suggest federal authorities have taken additional steps to constrain advocates for justice in Palestine and silence conversations relating to the Israeli-Palestinian conflict. In April 2019, the U.S. government denied entry to the Palestinian activist and co-founder of the BDS movement Omar Barghouti.³⁹

Barghouti was slated to attend a series of conversations and debates about Palestinian human rights and the BDS movement, including an event organized by the Arab American Institute, not to mention his daughter's wedding.⁴⁰ Contemporaneous reports of other Palestinian activists denied entry to the U.S. after being invited for speaking engagements suggest a trend.⁴¹

RECOMMENDATIONS

Freedom of speech, the press, association, assembly, and petition – these rights are enshrined in the First Amendment and central to our democracy. In recent years, however, these freedoms have come under threat by those who wish to silence an important debate. While these efforts are directed at advocates for Palestinian human rights and critics of Israel, the implications are vast.

Supporters of free speech and First Amendment rights should oppose restrictions on nonviolent political expression relating to the Israel-Palestinian conflict. These restrictions include efforts to harass and intimidate student advocates and the misapplication of federal civil rights laws to silence criticism of Israel on campus. Furthermore, as federal court decisions in three separate cases have already demonstrated, laws that prohibit state government entities from investing in or contracting with supporters of the Boycott, Divestment, and

Sanctions (BDS) movements are unconstitutional on First Amendment Grounds. As such, supporters of free speech and First Amendment rights should reject these laws and other anti-boycott legislation aimed at silencing debate.

Unfortunately, members of Congress have endorsed state-level campaigns to violate the Constitution through legislation like the Combating BDS Act. While the bill has passed through the Senate, supporters of free speech and first amendment rights should work to oppose its passage in the House. At the same time, principled opponents of anti-boycott legislation should preempt the introduction of other bills in Congress that target free speech on Palestine. Furthermore, while Congress can and must consider legislation to address the burgeoning threat of anti-Semitic violence and other acts of hate, the Anti-Semitism Awareness Act is not the answer.

Lastly, the Trump Administration must lift the ban on Palestinian human rights activists like Omar Barghouti. State suppression of political speech is intolerable and contravenes democratic norms. Recent actions of the federal government aimed at curbing expression undermine our institutions and portend future abuses. We must counteract these efforts and defend constitutional rights.

ENDNOTES

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- 14 Letter from the Leadership Conference for Civil and Human Rights and Signatories to Members of Congress Requesting They Oppose the Confirmation of Kenneth Marcus for Assistant Secretary for Civil Rights (Jan. 11, 2018), available at <https://civilrights.org/resource/oppose-confirmation-kenneth-marcus-assistant-secretary-civil-rights>. *See also* Letter from the Arab American Institute to the Senate Committee on Health, Education, Labor, and Pensions Opposing the Nomination of Kenneth Marcus to Lead the Department of Education's Office for Civil Rights (Dec. 8, 2017), available at <https://www.aaiusa.org/reject-kenneth-marcus-nomination-to-the-office-of-civil-rights-at-the-department-of-education>.
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