

HOUSE OF REPRESENTATIVES  
COMMONWEALTH OF PENNSYLVANIA

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House Resolution 177

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House Select Committee  
On Student Academic Freedom  
Pursuant to H.R. 177

Main Capitol Building  
Room 140, Majority Caucus Room  
Harrisburg, Pennsylvania

Monday ,September 19, 2005 - 3:00 p.m.

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BEFORE:

Honorable Tom Stevenson, Majority Chairperson  
Honorable Gibson Armstrong  
Honorable Patrick Fleagle  
Honorable Lynn Herman  
Honorable Thomas Quigley  
Honorable Lawrence Curry, Minority Chairperson  
Honorable Richard Grucela  
Honorable John Pallone  
Honorable Dan Surra  
Honorable Peter Zug

ALSO PRESENT:

Honorable James Roebuck

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ALSO PRESENT:

David Dumeyer

Majority Executive Director, House Education  
Committee

Eleanor Romano

Majority Administrative Assistant, House  
Education Committee

Chris Wakeley

Minority Executive Director, House Education  
Committee

Tracey McLaughlin

Minority Research Analyst, House Education  
Committee

Kristen Urso, Intern, House Education Committee

Representative Tom Stevenson's Staff

Terri Boyer

Jamie Getty

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1           CHAIRPERSON STEVENSON:  If people could  
2 take their seats, I'd like to start the hearing.  
3 I'd just like to welcome everybody to this first  
4 of at least five hearings, including this hearing,  
5 that we're going to hold on the topic.

6           This really is designed -- this first  
7 hearing is designed to educate the members and  
8 hopefully the members of the audience as to what  
9 academic freedom and intellectual diversity mean.

10           Before I go any further, because I tend  
11 to forget to do this, I'd like the members to go  
12 around and introduce themselves.  Why don't we  
13 start with Rich in the back?

14           REPRESENTATIVE GRUCELA:  Thank you,  
15 Mr. Chairman.  Rich Grucela from the 137th  
16 Legislative District, Northampton County.

17           REPRESENTATIVE FLEAGLE:  Pat Fleagle  
18 from Franklin County.

19           REPRESENTATIVE QUIGLEY:  Tom Quigley  
20 from Montgomery County.

21           REPRESENTATIVE ARMSTRONG:  Gibson  
22 Armstrong, Lancaster County.

23           REPRESENTATIVE CURRY:  Lawrence Curry,  
24 Montgomery County.

25           CHAIRPERSON STEVENSON:  And, of course,

1 I'm Tom Stevenson from Allegheny County.

2           Really, the House Resolution 177  
3 commands this Committee to study and inform the  
4 House on academic freedom issues and intellectual  
5 diversity issues at our state-owned, state-related  
6 state system community colleges in Pennsylvania.

7           I want to make it clear that our focus  
8 is going to be on the institutions, not the  
9 professors. There's been a lot of misinformation  
10 floating around out there.

11           Before the hearings are held, I just  
12 felt that this Committee needed to hear from an  
13 expert on First Amendment rights to get us off on  
14 the right foot. And I could think of no one  
15 better than David French from The Foundation for  
16 Individual Rights in Education, for short, FIRE,  
17 as it's called.

18           If you want to go on their web site,  
19 it's thefire, dot, org. I pulled David's bio off  
20 that web site. And David is a native Kentuckian,  
21 graduated with honors from Harvard Law School. He  
22 has been a lecturer in Cornell Law School and was  
23 a partner at a 200-lawyer firm with offices in  
24 Ohio, Kentucky, and Tennessee.

25           David also has written a book, FIRE's

1 Guide to Free Speech on Campus. I'm not trying to  
2 plug the sale of this thing, but I just started to  
3 read it and am getting into it.

4           And the way I'd like this hearing to  
5 run is, David's going to speak and tell us a  
6 little bit about his organization and himself and  
7 really the issues in hand and then we're gonna  
8 open it up for questions of just the subcommittee  
9 members only.

10           So David, without further adieu, you're  
11 on.

12           MR. FRENCH: Mr. Chairman, members of  
13 the Committee, thank you very much for this  
14 opportunity to address you.

15           Let me begin with a quote from the  
16 Supreme Court of the United States. It is not the  
17 quote that begins the report that has been issued.  
18 It is a different one. It's from the case of  
19 Sweezy versus New Hampshire.

20           And that begins, The essentiality of  
21 freedom in the community of American universities  
22 is almost self-evident. No one should  
23 underestimate the vital role in a democracy that  
24 is played by those who guide and train our youth.  
25 To impose any straightjacket upon the intellectual

1 leaders in our --

2 CHAIRPERSON STEVENSON: David, let me  
3 stop you just there for a minute. Can you pull  
4 the mike a little closer?

5 MR. FRENCH: Oh, I'm sorry.

6 CHAIRPERSON STEVENSON: You almost have  
7 to put your mouth up to it.

8 MR. FRENCH: Now I can hear myself.

9 All right.

10 To impose any straightjacket upon the  
11 intellectual leaders in our colleges and  
12 universities would imperil the future of our  
13 nation.

14 Teachers and students must always  
15 remain free to inquire, to study, to evaluate, to  
16 gain new maturity and understanding; otherwise,  
17 our civilization will stagnate and die.

18 Those are very powerful words from the  
19 Supreme Court. And, in fact, those words were, in  
20 part, the inspiration for the founding of FIRE,  
21 the Foundation for Individual Rights in Education.

22 Very briefly, what we are is a  
23 nonpartisan, secular, civil liberties organization  
24 that defends free speech, religious liberty,  
25 freedom of conscience and due process on campuses

1 across the country.

2           We are based in Philadelphia. We have  
3 offices in the Curtis Center overlooking  
4 Independence Hall, which is appropriate for the  
5 defense of free speech.

6           Our agenda is very simple. Our agenda  
7 is to preserve the marketplace of ideas on campus  
8 and, where the marketplace of ideas has been  
9 destroyed for whatever reason, to restore the  
10 marketplace of ideas on campus.

11           To that end, the investigation of this  
12 Committee is central because the Committee  
13 obviously plays a central role in defining how  
14 higher education is run in this state and has a  
15 central role in defining what is and is not  
16 academic freedom in this state.

17           So my goal here is really quite simple.  
18 I want to discuss what academic freedom is and,  
19 importantly, what it is not, what the  
20 constitutional rights of students and professors  
21 are and are not; and what are the institutional  
22 responsibilities of Pennsylvania public  
23 universities.

24           What are the responsibilities that  
25 these arms of the state have towards their

1 citizens: The students who attend; the professors  
2 who teach.

3           Quite simply, the best place to begin  
4 is with the First Amendment. The First Amendment  
5 -- this comes sometimes as a, unfortunately, as a  
6 surprise to  
7 administrators -- it applies to students and it  
8 applies to faculty.

9           There's a very good short rule of thumb  
10 that if speech is constitutionally protected  
11 outside of the academy, it's generally  
12 constitutional protected inside of the academy.

13           There is no zone in the academy -- or  
14 the academy is not a unfree zone and it's not an  
15 area where those who have responsibility for the  
16 academy have a greater latitude to restrict  
17 speech.

18           In fact, the Supreme Court has long  
19 recognized that our school -- our institutions of  
20 higher education, as distinct from secondary  
21 schools or elementary schools, are supposed to be  
22 marketplaces of ideas.

23           They're supposed to be places where the  
24 uncomfortable questions are asked; where  
25 traditional notions of truth are challenged; where

1 students can expect to sometimes be offended,  
2 sometimes be encouraged by the things that they  
3 hear and see on campus.

4           The goal of the university is to be a  
5 place where truth can be discovered through  
6 inquiry, through debate, through exchange, not  
7 just scientific truth, but also historical truth,  
8 arguments about political truth -- I'm not sure  
9 it's accurate to use the phrase political truth.

10           But in the -- the goal of the  
11 university is to create a place, a marketplace  
12 where you can debate and you can discuss, you can  
13 disagree, and you can even offend in the goal of  
14 exchanging ideas and the goal of advancing human  
15 knowledge and the goal of advancing our culture.

16           Unfortunately, our universities across  
17 this country -- and, unfortunately, Pennsylvania  
18 is no exception -- have to a large degree  
19 abdicated that responsibility.

20           For the interest of larger goals, or  
21 presumed larger goals, there are now speech codes  
22 that govern student conduct on campus. A speech  
23 code, if you would like a definition, is any  
24 policy or practice that prohibits speech that the  
25 First Amendment would otherwise protect.

1            Pennsylvania's public universities have  
2 several speech codes: Prohibitions against speech  
3 that one or another group would find subjectively  
4 offensive.

5            Speech codes have been struck down in  
6 every single court in the United States where they  
7 have been challenged, including a federal district  
8 court in this state at Shippensburg University  
9 where a Shippensburg University speech code was  
10 struck down -- or the enforcement of it was  
11 enjoined in late 2003.

12            Unfortunately, despite this judicial  
13 decision, speech codes still exist.

14            Students, professors, and institutions  
15 have academic freedom. Students, professors, and  
16 institutions have certain rights of expression.  
17 I'll begin with the students.

18            Students have a right -- enjoy the  
19 fullest First Amendment rights. They have a right  
20 to dissent from the mainstream in politics. They  
21 have a right to protest peacefully and lawfully.  
22 They have a right to disagree with teachers. They  
23 have a right to disagree with administrators.  
24 They have a right to publish and publicize their  
25 disagreements.

1           When you talk about the First Amendment  
2 rights of students, you are talking about the  
3 First Amendment rights of citizens of the United  
4 States.

5           Their rights are extremely broad,  
6 extremely broad, limited only by lawful  
7 prohibitions and certain very small categories of  
8 speech such as fighting words; such as obscenity,  
9 as that term has been constitutionally defined;  
10 such as certain kinds of speech that rises  
11 actually to the level of harassment.

12           But outside of these narrowly-defined  
13 exceptions, the speech of students is widely  
14 protected. Now, to be clear -- and I know that  
15 this has been an issue in public  
16 discussions -- students do not have a  
17 right -- their broad rights do not include a right  
18 to be taught what they want to hear.

19           Their broad rights do not include a  
20 right not to be offended. Their rights do not  
21 include a right to have a teacher tell all sides  
22 of the story as they see all sides of the story.

23           But their rights do include the ability  
24 to criticize a teacher into dissent even in class  
25 so long as dissenting or disagreeing is done in a

1 way that's not disruptive and doesn't prevent the  
2 ability of the teacher from conducting the class.  
3 So students have very broad First Amendment  
4 rights.

5           Teachers do as well; although, there  
6 are some limits that have been defined  
7 traditionally and have been defined by the  
8 American Association of University Professors.

9           On page 3 of our report, the AAUP  
10 has -- we quote from the AAUP statement, which I  
11 think, stands to this day. It was written in 1940  
12 and stands to this day. It's still the single  
13 best statement of professors' academic freedom.

14           College and university teachers are  
15 citizens, members of a learned profession, and  
16 officers of an educational institution.

17           When they speak or write as citizens,  
18 they should be free from institutional censorship  
19 or discipline; but they should at all times be  
20 accurate, should exercise appropriate restraint,  
21 and should show respect for the opinions of others  
22 and should make every effort to indicate that they  
23 are not speaking for the institution.

24           Moreover, teachers are entitled to  
25 freedom in the classroom in discussing their

1 subject; but they should be careful not to  
2 introduce into their teaching controversial matter  
3 which has no relation to their subject.

4           What does this mean? What it means is  
5 that a teacher who is teaching, for example,  
6 sociology or political science or history has an  
7 enormous amount of latitude in determining the  
8 curriculum, the readings of the class, the precise  
9 topics covered within the subject of the class;  
10 they have an enormous amount of freedom in the  
11 classroom discussion so long as the classroom  
12 discussion remains germane to the topic of the  
13 class; and that they in truth should be free from  
14 state oversight into those kinds of decisions.  
15 Because that is the core academic freedom function  
16 of a professor.

17           What is a professor not free to do? A  
18 professor is not free to use a class, for example,  
19 let's say a mathematics class for -- to advance a  
20 particular political agenda.

21           That is something that a university, an  
22 institution, can properly restrict without  
23 interfering with that professor's First Amendment  
24 rights.

25           Their First Amendment rights do not

1 extend to the ability to use the state-provided  
2 platform to advocate for personal political goals  
3 if those personal political goals are not -- the  
4 subject are germane to the topic of the class.

5           This is a source of enormous  
6 controversy on campus. But we need to be clear:  
7 There is a difference between a teacher teaching  
8 something that a student gets upset at, that a  
9 student is offended by.

10           A student does not have a right not to  
11 be upset or not to be offended in the teacher  
12 misappropriating the use of a classroom for a  
13 partisan political end. Those are different  
14 things.

15           Now, institutionally, a university has  
16 an ability to shape its own message and curriculum  
17 to a large degree. In fact, federal courts - if  
18 there's one kind of academic freedom that the  
19 federal courts have been virtually unanimous on  
20 finding is that there is institutional academic  
21 freedom.

22           Private universities have an enormous  
23 amount of institutional academic freedom. If you  
24 want to in this country, you have a constitutional  
25 right to set up a religious college where you only

1 allow people to attend that college who agree with  
2 the statement of faith of the religion and then  
3 can actually exclude teachers and fire teachers  
4 who don't agree with the basis of faith of the  
5 college. That's for a private university.

6           Secular private universities have an  
7 equivalent level of freedom. They can decide to  
8 define themselves in a particular -- according to  
9 a particular agenda.

10           Public universities are different.  
11 They do have a degree of academic freedom,  
12 certainly, to advocate for certain kinds of ideas;  
13 but that is strictly limited by the Constitution  
14 of the United States.

15           For example, a state university can't  
16 advocate for or against religion. A state  
17 university's academic freedom doesn't extend to  
18 endorsing or condemning any particular religious  
19 point of view, whereas a private academic  
20 university does extend that far.

21           State universities can put forward  
22 things like mission statements. State  
23 universities can advocate for particular cultural  
24 solutions to societal problems.

25           However, in furtherance of their

1 mission, they cannot, they cannot impose litmus  
2 tests on employees, on students. In other words,  
3 it is unconstitutional for a state university to  
4 condition the receipt of a state benefit, such as  
5 employment or a degree from the school, on the  
6 abandonment of certain constitutional rights such  
7 as free speech or freedom of association.

8           Now, with that very broad  
9 overview -- and I'm going to welcome any  
10 questions -- we get to two fundamental issues that  
11 I think are being addressed by the Committee.

12           One is free speech: Mostly free speech  
13 by students, but also free speech from professors.  
14 Free speech has two -- there's two primary sources  
15 of censorship.

16           One is censorship by policy. Those are  
17 written policies in university handbooks, in  
18 student catalogs, in faculty handbooks that  
19 actually on their face restrict free speech.

20           On their face, they say to students,  
21 your free speech rights are contingent upon, for  
22 example -- contingent, for example, to the extent  
23 to which another individual is offended or they  
24 are contingent upon the subjective feelings of  
25 another person.

1           There's two primary ways that speech  
2 codes work. One is by being overbroad. An  
3 overbroad speech code is one that prohibits -- it  
4 does actually prohibit unlawful behavior. But it  
5 prohibits more than just the unlawful behavior, it  
6 prohibits lawful behavior as well.

7           An example of a overbroad speech code,  
8 here's one from the Indiana University of  
9 Pennsylvania which prohibits behavior of a sexual  
10 nature that is directed toward another individual,  
11 based on their gender, which is demeaning or  
12 diminishing to their character.

13           The fact of the matter is that no one  
14 has a right not to feel demeaned. Because what  
15 does it mean to feel demeaned? I may say  
16 something to one person and it doesn't feel  
17 demeaning to them. And I may say the exact same  
18 thing to another individual and it feels demeaning  
19 to them.

20           Have I in the one instance committed a  
21 lawful act and in the other instance committed an  
22 unlawful act in spite of the fact that I did the  
23 same thing both times?

24           This kind of subjective uncertainty is  
25 absolutely unconstitutional. It is absolutely and

1 has long been the case that you cannot test, you  
2 cannot test free speech based on subjective  
3 listener reaction.

4           Now, does that mean that there are some  
5 demeaning things that I could say that could  
6 constitute harassment? Certainly there are some  
7 demeaning things that one could say that could  
8 constitute harassment. But that term is  
9 overbroad.

10           Millersville University of Pennsylvania  
11 prohibits the transmission of electronic messages  
12 and materials deemed offensive by university  
13 policy and by local, state, and federal laws.

14           Now, who is deeming what offensive?  
15 Does any state official have the right to deem  
16 written material or communicated material  
17 offensive? No, absolutely not. The state does  
18 not have the ability to deem words offensive and,  
19 therefore, completely out of bounds.

20           Further, codes can be vague; not just  
21 overbroad, but vague. It's a constitutional rule  
22 that a policy or a code has to be clear enough  
23 that a person of average intelligence and  
24 understanding can know what's prohibited and what  
25 isn't.

1           If you don't know what's prohibited, it  
2 begins to have a chilling effect on speech as  
3 you -- to go on the safe side, say less than what  
4 you might think so as to not run afoul of the  
5 vague rule.

6           For example -- a classic example and  
7 one from this state that was found to be  
8 unconstitutional as vague, is a prohibition on  
9 acts of intolerance.

10           Shippensburg University had a speech  
11 code which, among other things, prohibited acts of  
12 intolerance on campus. The problem was, that's a  
13 term that's virtually impossible to define.

14           If you ask a hundred people what is an  
15 act of intolerance, you may get a hundred  
16 different answers.

17           And, in fact, at the oral argument when  
18 the judge on the case, when the judge directly  
19 asked the attorney representing Shippensburg, What  
20 is intolerance, there was no good answer  
21 forthcoming because, quite simply, there's no good  
22 answer. Nobody knows really what it is.

23           And so that phrase, act of intolerance,  
24 has been struck down; but it still lives in some  
25 speech codes in this state.

1           Edinborough University of Pennsylvania  
2 prohibits offensive or inappropriate sexual  
3 behavior. What is inappropriate sexual behavior?  
4 That's an excellent question.

5           I mean, I have my own moral sense of  
6 what would be inappropriate sexual behavior. I'm  
7 sure it differs with many people in this room.  
8 Everyone has their own moral sense regarding what  
9 is or is not inappropriate.

10           But what this does is it delegates the  
11 decision of what is not inappropriate to state  
12 officials; and state officials, using their own  
13 subjective terms and their own subjective beliefs,  
14 then decide for members of the community.

15           That's vague. If you asked a hundred  
16 people, What is an inappropriate -- what  
17 are -- list all the examples you can think of, of  
18 inappropriate sexual behavior, you would get quite  
19 a few different answers.

20           Further, public universities, in  
21 addition to enacting rules that are overbroad and  
22 vague, tend to also enact rules that prohibit free  
23 exercise of religion on campus. And they do it in  
24 a very subtle way, but in a way that dramatically  
25 restricts free expression of religious ideas.

1           It is very typical now for large  
2 universities to have expansive nondiscrimination  
3 rules that they apply to their student  
4 organizations.

5           Now, in the abstract, there's nothing  
6 wrong with applying a nondiscrimination rule to a  
7 student organization to say that you shouldn't  
8 discriminate on the basis of race or gender, for  
9 example.

10           But some of these nondiscrimination  
11 rules include nondiscrimination on the basis of  
12 religion and they ask religious organizations to  
13 sign on to that.

14           The upshot of that is that religious  
15 organizations are no longer able to use religious  
16 principles when making their decisions if they  
17 expect to be a student organization on a public  
18 campus.

19           Religion -- nondiscrimination on the  
20 basis of religion or creed ironically, although is  
21 undoubtedly designed to protect religious  
22 individuals, ends up restricting religious  
23 freedom.

24           For example, at Penn State, no  
25 organization can obtain or maintain university

1 recognition if it discriminates on the basis of,  
2 amongst other things, religious creed.

3           Innumerable groups, from the Muslim  
4 Student Association to Campus Crusade for Christ  
5 to, you name it, make religious decisions. That's  
6 their reason for being; yet they face the  
7 possibility of expulsion from campus just by being  
8 religious.

9           Across the United States, there have  
10 been at least 60, 60 instances where this exact  
11 kind of policy has been used to restrict religious  
12 expression on campus or to evict from campus  
13 religious organizations.

14           Currently, such policies are enjoined  
15 by federal courts in North Carolina and in the 7th  
16 Circuit Court of Appeals; yet Pennsylvania's  
17 public universities have some of these very  
18 policies on their books.

19           Another way that students' freedom is  
20 restricted is not just by policy, but by practice;  
21 in other words, someone -- there may be no speech  
22 code in place, but in spite of the lack of speech  
23 code, the university will take action anyway.

24           Now, this is -- this is a category that  
25 nationally is quite prevalent. Nationally, it's

1 quite common for students to be punished for their  
2 speech even when they haven't violated any  
3 university rule.

4           But I would suggest for this Committee  
5 it would be an interesting line of inquiry to  
6 determine whether that is, in fact, happening  
7 here; although, Pennsylvania is so laden with  
8 speech codes that you can almost always find a  
9 policy restricting free speech to punish a student  
10 in this state.

11           But by practice, the problem with  
12 determining the extent of that -- there's a  
13 difficulty with determining the extent of that  
14 problem in that it relies on self-reporting.

15           Students who are censored must, (A),  
16 know that they can complain; and, (B), know who  
17 they can complain to. At FIRE, we receive  
18 hundreds of complaints per year; but all the  
19 information that we've received indicates  
20 nationally that that's a drop in the bucket.

21           We have not received extensive  
22 complaints from Pennsylvania. There have been  
23 some specific incidents at Pennsylvania public  
24 universities, but not in the numbers that we have  
25 seen in the other states.

1           Whether that is a function that  
2 Pennsylvania public universities are protecting  
3 free speech in reality or just that students don't  
4 know to complain, we don't know the answer to  
5 that.

6           Moving from student free speech to  
7 professors' free speech -- moving from student  
8 free speech to intellectual diversity-- I'm  
9 sorry -- there is a powerful and almost  
10 self-evident argument that a broad range of ideas  
11 on campus is a desirable thing; that, in fact, a  
12 university that's supposed to be a marketplace of  
13 ideas can and should have a broad range of ideas  
14 on campus to foster debate, to test hypotheses, to  
15 test theories, to challenge historical assertions.

16           A broad range of viewpoints is a good  
17 thing. It's a noncontroversial statement. The  
18 American Association of University Professors, in  
19 fact, made that clear in its own arguments to the  
20 Supreme Court of the United States when arguing to  
21 preserve race-based Affirmative Action policies in  
22 the University of Michigan, declaring in their own  
23 brief that universities should provide a broad  
24 range of ideas and a broad range of viewpoints,  
25 that that is part of the function of the

1 university and the university is enhanced by that.

2           So it's really not controversial to say  
3 that there should be a broader range of ideas in  
4 the university. What is controversial is the  
5 answer to this question: Does a broad range of  
6 ideas exist?

7           There are national studies that would  
8 tend to indicate that universities are rather  
9 ideologically monolithic. There are a variety of  
10 studies indicating that those who self-identify on  
11 the left side of the political spectrum outnumber  
12 those who self-identify on the right side of the  
13 political spectrum by a substantial margin; in  
14 some cases, 9-to-1, 10-to-1, 30-to-1 in some  
15 departments, according to recent studies.

16           Now, the question is, Does that matter  
17 from a standpoint of intellectual diversity? And,  
18 more importantly for this Committee's purposes,  
19 does such -- if such disparities are real, are  
20 they real because of misconduct? Are they real  
21 because of actually unconstitutional activities?

22           Bear in mind that earlier I said that  
23 you may not condition the receipt of a state  
24 benefit on the surrender of some basic First  
25 Amendment rights.

1           There's a case called Perry versus  
2 Sinderman that involved an at-will, untenured  
3 professor at a university who was terminated; and  
4 he, allegedly, has been terminated as a result of  
5 his free speech rights.

6           The university said, Well, he was an  
7 at-will employee. We can terminate him for any  
8 reason or no reason at all.

9           In response, the Supreme Court said  
10 very clearly that you cannot condition the receipt  
11 of a state benefit on the abandonment of basic  
12 free speech or free association rights.

13           There exists a very real and very live  
14 question now based on multiple recent studies is,  
15 Is that happening in university hiring, firing,  
16 promotion, and retention? The answer is hotly  
17 disputed and I would say not -- not firmly  
18 established at this point.

19           So from the standpoint of intellectual  
20 diversity, it's critical to -- the state's  
21 responsibility with regards to intellectual  
22 diversity is I think important to define.

23           One is, the state has -- in this case,  
24 the State of Pennsylvania has an institutional  
25 academic freedom itself running its school system.

1           And the State of Pennsylvania, if it  
2 believes that intellectual diversity is a good  
3 thing in the university and helps to foster the  
4 marketplace of ideas, may have -- would certainly  
5 have an interest in making sure that intellectual  
6 diversity exists and discovering the reasons why  
7 it may not.

8           However, what the State of Pennsylvania  
9 should not and cannot do is to go to individual  
10 professors in individual departments around the  
11 state and say to -- just take a name -- pick a  
12 name out of the hat -- Professor Jones or  
13 Professor Smith, what we want you to do is to  
14 teach your class in a different way so as to be  
15 more diverse.

16           That violates that individual  
17 professor's academic freedom and should not be  
18 done. But what a state can do is say, in an  
19 economics department, Do we have a broad range of  
20 ideas present here? And if we do not, should we  
21 be seeking a broad range of ideas?

22           If we do not have a broad range of  
23 ideas present, is it because of any actual  
24 unconstitutional or illegal activity; for example,  
25 prohibitions on discrimination on the basis of sex

1 or race or religion?

2           State universities violate those  
3 prohibitions on occasion. Is that happening here?  
4 Or are there de facto ideological litmus tests  
5 being applied to candidates for a particular job?  
6 Are they being forced to adhere to a particular  
7 ideology?

8           So what I would suggest as the true  
9 constitutional obligation of a university going  
10 forward is to, No. 1 -- this is very  
11 basic -- protect the constitutional rights of your  
12 students. Make sure they have a right to free  
13 speech, the same right they'd have to free speech  
14 if they stepped off the university campus;

15           Number 2, in addressing any perceived  
16 constitutional violations against the students, do  
17 not violate the constitutional rights of  
18 professors, who do have a right to challenge  
19 students, who do have a right to even offend  
20 students on occasion;

21           And No. 3, in the quest for  
22 intellectual diversity on campus, since I would  
23 presume that intellectual diversity in a  
24 broad -- differing viewpoints on campus is a good  
25 thing and the quest for intellectual diversity on

1 campus, do not violate the academic freedom rights  
2 of any individual.

3           And look hard at the reasons for the  
4 disparity. Is self-selection at play? Are there  
5 actual unconstitutional actions being taken? Take  
6 a close look at not just what exists, but why it  
7 exists.

8           With that, I'll open the floor to any  
9 and all questions.

10           CHAIRPERSON STEVENSON: Thank you.

11           We have one person that I'm going to  
12 ask to go first because he has to leave; but  
13 before I do, there are a number of people here  
14 that came in after you started.

15           First and foremost, I'd like to  
16 recognize the Chairman of the Education Committee  
17 Jim -- Jim, just raise your hand.

18           Who else came in? Dan, do you want  
19 to...

20           REPRESENTATIVE SURRA: Representative  
21 Surra from Elk and Clearfield County.

22           CHAIRPERSON STEVENSON: John.

23           REPRESENTATIVE PALLONE: Representative  
24 John Pallone. I represent northern Westmoreland  
25 County and southern Armstrong County.

1                   REPRESENTATIVE HERMAN: State  
2 Representative Lynn Herman from Centre County.

3                   CHAIRPERSON STEVENSON: Great. Thank  
4 you.

5                   Representative Grucela has another  
6 appointment, so he has to leave. I'd like him to  
7 go first. Rich.

8                   REPRESENTATIVE GRUCELA: Thank you,  
9 Mr. Chairman. I appreciate you giving me the  
10 opportunity to go first due to the other  
11 commitment.

12                  I sort of have two questions. One I'm  
13 really -- what's the relationship to the Patriot  
14 Act in the Federal Patriot Act? Is there any  
15 relationship, I guess is my question, given the  
16 current climate, shall we say, in the United  
17 States versus free speech, does the Patriot Act  
18 apply in any way to any of these things?

19                  MR. FRENCH: It is my belief that the  
20 Patriot Act, in practice, should not have any  
21 bearing on the academic freedom dispute.

22                  Now, saying that, I will tell you that  
23 there have been circumstances where professors who  
24 have made what many would deem to be very  
25 inflammatory remarks about the war on terror,

1 there have been individuals who have tried to  
2 creatively think of ways to apply various national  
3 security statutes to restrict that speech.

4           But to the extent they've -- I have  
5 never seen any actual application of Patriot Act  
6 provisions or any other national security-based  
7 provision to -- to restrict an individual person's  
8 speech that would otherwise be constitutionally  
9 protected.

10           Because, bear in mind, the First  
11 Amendment would trump even the Patriot Act. If  
12 there was any sort of speech that was  
13 constitutionally protected but somehow prohibited  
14 by a provision in the Patriot Act or by  
15 implication from the Patriot Act, the First  
16 Amendment would be supreme.

17           REPRESENTATIVE GRUCELA: And,  
18 secondly -- and I'm going to bring up a couple  
19 sensitive areas here and they are by no means  
20 meant to be facetious in any way, shape, or form,  
21 because they truly exist.

22           I'm curious about that statement that  
23 says Penn State cannot -- or can prevent any  
24 organization that -- you listed a whole bunch of  
25 things and emphasized religious creed.

1           So my question is, If I belong to a  
2 religious group that believes in torturing  
3 animals, if I belonged to a religious group that  
4 believes as part of an initiation or part of my  
5 tribal, whatever, believes in smoking marijuana or  
6 the use of any illegal drugs, or if I belong to a  
7 religious group that believes in polygamy or same  
8 sex marriage, you're telling me that I can  
9 start -- Penn State can't stop me from starting a  
10 group like that on their campus?

11           MR. FRENCH: A lot of the specific  
12 examples you mentioned such as torturing animals  
13 or polygamy or same-sex marriage are acts that are  
14 prohibited by statute and by constitutional -- I  
15 mean, to this point, constitutional statute.

16           So the answer is, somebody could start  
17 a club that advocated, based on religious beliefs,  
18 the torturing of animals; but the actual torturing  
19 of animals would be prohibited by statute, and  
20 lawfully prohibited by statute.

21           Someone could start a religious club  
22 that advocated for polygamy and stated as part of  
23 its beliefs that polygamy was acceptable, but to  
24 actually engage in polygamy is prohibited by  
25 constitutional statute.

1           So it's not an anything-goes scenario.  
2 The argument is that an organization that's formed  
3 around a certain belief, whether that belief is  
4 political or religious or cultural, has a right to  
5 advocate for that belief and to have members and  
6 leaders who share that belief.

7           You know, the Democratic Party has  
8 every right to exclude individuals who advocate  
9 for every plank in their public and party platform  
10 or to exclude self-identified Republicans and  
11 vice-versa.

12           So what this provision does is say to  
13 religious organizations, you cannot use your  
14 religious beliefs when you're determining who your  
15 members and your leaders are, even though you are  
16 a religious organization.

17           It's nonsensical. It would be like  
18 prohibiting political ideology discrimination on  
19 the part of political parties. It strikes to the  
20 core of what they are and what they do.

21           Now, there's one thing I want to be  
22 very, very, very clear about. There's a  
23 difference between status and belief. For  
24 example, there's nothing about a person being  
25 white that says that they -- there's nothing about

1 a person's status as a white person that says they  
2 couldn't agree with every single part of the  
3 NAACP's platform. But if they were a White  
4 Supremacist, then the NAACP could certainly  
5 exclude them.

6           There's nothing about, say for example,  
7 a person's gender that says they couldn't enjoy  
8 the game of chess. But if they hated chess, the  
9 chess club could rightfully exclude them.

10           What these provisions do is they  
11 basically say to religious organizations, On those  
12 core principals that matter the most to you, you  
13 may not utilize them in determining leadership and  
14 membership and stay on this campus.

15           REPRESENTATIVE GRUCELA: Could Penn  
16 State or any other state institutions prohibit the  
17 Ku Klux Klan?

18           MR. FRENCH: Almost certainly they  
19 could not prohibit any particular organization on  
20 the basis of its perceived ideology. They could  
21 prohibit an organization that was engaged in  
22 otherwise unlawful activity.

23           So if the Ku Klux Klan was engaged in  
24 terrorism or violating existing state and federal  
25 laws, certainly it could exclude them; but they

1 could not exclude the Klan on the basis that it  
2 has a point of view that is horrific.

3           REPRESENTATIVE GRUCELA: One last  
4 thing: What if my group had the -- this is  
5 probably not in existence, at least I hope not.  
6 But what if the religion advocated the overthrow  
7 of the government? As long as we didn't do it  
8 inside the group?

9           MR. FRENCH: Actually, that's pretty  
10 well-established constitutionally. It used to be,  
11 in fact, that you couldn't even get a driver's  
12 license in some states without swearing an oath of  
13 allegiance to the United States Government.

14           All these loyalty oaths have been  
15 struck down. They're gone. So you cannot say to  
16 a student organization, You can -- you must swear  
17 off any advocacy of, you know, any advocacy of  
18 violent overthrow of the U.S. government as a  
19 condition for being on campus.

20           Although, I haven't seen that situation  
21 come up. There's some case law dating from the  
22 Vietnam War relevant to that. But in recent  
23 years, I have not seen circumstances like that  
24 student chapter of the Klan or student chapter of  
25 the group that was seeking the violent overthrow

1 of the government.

2                   REPRESENTATIVE GRUCELA: Thank you very  
3 much. Thank you, Mr. Chairman.

4                   CHAIRPERSON STEVENSON: Thank you.  
5 Representative Herman.

6                   REPRESENTATIVE HERMAN: Thank you very  
7 much.

8                   I have just two questions, Mr. French.  
9 If either a faculty member of a university or  
10 student felt that their constitutional rights were  
11 abridged or offended or academic freedom  
12 suppressed, what should they do?

13                   MR. FRENCH: That's a very good  
14 question. Unfortunately, most universities do not  
15 explain to students either what their rights are  
16 or what they can do in the event that they're  
17 violated.

18                   So a student has to come at that  
19 knowledge through outside sources. And the vast  
20 majority of students, quite frankly, you know,  
21 don't get that knowledge.

22                   So I think institutionally what a  
23 university should do is do a better job of  
24 informing students their constitutional rights and  
25 providing them for an avenue, a formal avenue of

1 complaint in the event that they perceive that  
2 their constitutional rights are violated, short of  
3 running to a lawyer and filing a lawsuit.

4           With respect to the students, at the  
5 present time, FIRE has an enormous education  
6 effort. We tried to reach the students and  
7 explain to them what their rights are. But what  
8 they should do if their rights are violated, one  
9 thing is -- to put in a plug for FIRE -- is  
10 contact FIRE.

11           Another thing is, if they feel like  
12 their rights are being violated by a professor or  
13 by a member of the administration, they should  
14 closely look their school's own policies, because  
15 hidden within some of these policies will be  
16 sometimes some procedures that can give them  
17 protection.

18           So they should take a look at their own  
19 student handbook, take a look at the catalog.  
20 But, unfortunately right now, students are in a  
21 vast sea of ignorance regarding their rights and  
22 often have a tendency when someone tells them that  
23 they can't do something, to believe it, to believe  
24 that, if you read this policy, that prohibits acts  
25 of intolerance to think, well, I better not commit

1 an act of intolerance because that's unlawful;  
2 instead of going back and thinking, Hum, is that  
3 unconstitutional? I don't even know what that is.

4           So what should they do I think is  
5 contact appropriate officials as outlined in the  
6 student handbook or catalog; but, unfortunately,  
7 that's not often an avenue available to them.

8           CHAIRPERSON STEVENSON: Representative  
9 Fleagle.

10           REPRESENTATIVE FLEAGLE: Thank you,  
11 Mr. Chairman.

12           You had mentioned that Pennsylvania did  
13 not -- I guess the numbers were not as great as in  
14 other states for contacts for FIRE?

15           MR. FRENCH: Correct.

16           REPRESENTATIVE FLEAGLE: And I know you  
17 backed it up by saying that that's not really  
18 indicative of the fact that there may not be  
19 abuses of academic freedom.

20           Have you seen in your travels  
21 throughout the country -- and I always try  
22 to -- when they say the states are the  
23 laboratories of democracy, have you seen any state  
24 universities or public universities in a  
25 particular state who seem to have their act

1 together?

2           I know you probably only see the  
3 downside of the question, but surely you've seen  
4 some examples of a good policy?

5           MR. FRENCH: I have seen examples of  
6 good policies. As far as any individual  
7 university that stands out as better than the  
8 others or any individual university system that  
9 stands out as better than the others, none are  
10 coming to mind.

11           You're right; we receive complaints. I  
12 do know of universities that have been very  
13 responsive once we have made the complaints known  
14 to the universities.

15           But as far as a specific policy that  
16 stands out nationally, there is -- there is not a  
17 university policy that I'm aware of that I would  
18 say is better than all the others and worth  
19 emulating.

20           In fact, I would say that the AAUP's  
21 1940 statement on academic freedom, which has been  
22 around for a long time, is still one of the best,  
23 if not the best, articulations of academic  
24 freedom, particularly from the professor's level.

25           And universities have adopted this

1 1940's statement as a rule; however, they also  
2 adopt speech codes often. So they contradict some  
3 of their own policies.

4           You mentioned the states as a  
5 laboratory of democracy. One of the things that  
6 we have found is universities are often like small  
7 European countries: They tend to be very  
8 bureaucratic. Often the right hand doesn't know  
9 what the left hand is doing. Policy documents can  
10 be extremely confusing and labyrinthine.

11           So there -- at Pennsylvania schools  
12 there are some very good academic freedom  
13 statements, but you go to a policy book and you'll  
14 find a speech code.

15           So at FIRE we have -- to give you an  
16 understanding of the extent of the problem, we  
17 have rated the speech policies of approximately  
18 350 leading universities in the United States.

19           70 percent have at least one policy  
20 that is constitutionally problematic. The ones  
21 that do not have constitutionally problematic  
22 policies tend to have a statement like the AAUP  
23 statement and then nothing else. They tend not to  
24 have a affirmative free speech statement so much  
25 as they just don't have prohibitions.

1           REPRESENTATIVE FLEAGLE: The complaints  
2 that you get from other states versus  
3 Pennsylvania, do they tend to be a homogeneous  
4 type or does one state have -- does Texas have  
5 more of a problem?

6           MR. FRENCH: It's the same type of  
7 complaint we get all over. When there's one case  
8 publicized in one state, what tends to happen is  
9 that there are several other complaints that will  
10 come because of the publicity and the awareness.

11           But they tend to involve -- I would say  
12 the most -- the most common type of complaint is  
13 the misunderstanding of what discrimination and  
14 harassment is.

15           Universities have been for a very long  
16 time telling their students that discrimination or  
17 harassment is an act that offends you or that  
18 makes you upset on the basis of race, gender,  
19 sexual orientation.

20           So many of our cases involve  
21 individuals who are upset on the basis of one of  
22 these factors and believe that, because they're  
23 upset, someone needs to be punished. And they get  
24 a lot of comfort in that from of their policies.

25           So one of our efforts is to try to

1 educate people as to what harassment actually is.

2 It's not actually a state of just being upset.

3           In fact, in our materials that we  
4 distributed, there is federal law that says that  
5 for something to be harassment in a  
6 student-on-student circumstance, the pattern of  
7 behavior must be so severe, pervasive, and  
8 objectively offensive that it effectively bars the  
9 victim's access to the educational opportunity or  
10 benefit.

11           So, in other words, it has to be so bad  
12 the person can't get an education, not that it's  
13 so bad that I feel really mad about it.

14           And, in fact, in July of 2003, the  
15 Department of Education's Office for Civil Rights  
16 issued a letter, a "dear colleague" letter, and  
17 said that some colleges and universities have  
18 interpreted OCR's prohibition of harassment as  
19 encompassing all offensive speech regarding sex,  
20 disability, race, or other classifications.

21           Harassment, however, to be prohibited  
22 by the statutes within OCR's jurisdiction -- these  
23 are the antidiscrimination statutes -- must  
24 include something beyond the mere expression of  
25 views, words, symbols, or thoughts that some

1 person finds offensive.

2           To give you two concrete  
3 examples -- again, this is not from -- these are  
4 not Pennsylvania examples, but very recent  
5 examples.

6           In a public community college in  
7 Florida, an individual was prohibited from handing  
8 out fliers protesting the treatment of animals in  
9 slaughter houses because the administrator was  
10 offended by the content of those fliers.

11           So because the administrator was  
12 offended, it obviously violated policy banning  
13 offensive speech and, therefore, could be  
14 suppressed.

15           Other examples would include  
16 conservative protests of Affirmative Action,  
17 usually done through something called an  
18 Affirmative Action bake sale where they sell baked  
19 goods at different prices based on race or gender  
20 of the purchaser as a protest against Affirmative  
21 Action.

22           In many schools, those protests have  
23 been suppressed or prevented or punished because  
24 they made people angry. Not because the speech  
25 wasn't protected, but because they made people

1 angry.

2           So if there's one category that trumps  
3 all others, it's a misunderstanding regarding what  
4 is or is not harassment and the misinterpretation  
5 of anything that offends me, that makes me upset,  
6 is harassing.

7           REPRESENTATIVE GRUCELA: Thank you,  
8 Mr. French. Thank you, Mr. Chairman.

9           CHAIRPERSON STEVENSON: Thank you.  
10          John.

11          REPRESENTATIVE PALLONE: Thank you,  
12 Mr. Chairman.

13          In the materials that you provided, you  
14 cited a number of examples of what you're claiming  
15 to be constitutionally-protected or  
16 unconstitutional, overbroad, vague, whatever.  
17 Have these policies been litigated?

18          MR. FRENCH: These specific policies  
19 have not. If they had been litigated, they most  
20 likely wouldn't be on the books anymore.

21          The policies -- there have been  
22 multiple policies with either exact same language  
23 or strikingly similar language that had been  
24 struck down nationwide.

25          Speech codes have been struck down at

1 Shippensburg here in Pennsylvania, at the  
2 University of Wisconsin, at the University of  
3 Michigan, at Stanford University, Northern  
4 Kentucky University, Texas Tech University -- the  
5 list could go on.

6           And if there's -- they have language  
7 that is either identical to this or tracks very  
8 closely to this.

9           REPRESENTATIVE PALLONE: So only the  
10 Shippensburg --

11           MR. FRENCH: Pardon?

12           REPRESENTATIVE PALLONE: Only the one  
13 Pennsylvania school had the speech code struck,  
14 right?

15           MR. FRENCH: To my knowledge, there's  
16 only been one speech code lawsuit filed in  
17 Pennsylvania, and that was the Shippensburg, yes.

18           REPRESENTATIVE PALLONE: And there have  
19 been no others, to the best of your knowledge?

20           MR. FRENCH: To the best of my  
21 knowledge, there have been no others.

22           REPRESENTATIVE PALLONE: And this only  
23 involves the public universities, correct?

24           MR. FRENCH: Public universities,  
25 right.

1           REPRESENTATIVE PALLONE:  And does that  
2 include the, for lack of any other term,  
3 semi-public universities?  There are a number of  
4 universities in Pennsylvania that have that --

5           MR. FRENCH:  We evaluated the public  
6 universities in Pennsylvania that have been held  
7 by courts to be state actors.  So that would  
8 include Temple and Pitt.

9           REPRESENTATIVE PALLONE:  Penn State?

10          MR. FRENCH:  Penn State as well.

11          Any school that where a court has held  
12 that, for example, section 1938 applies, which  
13 allows an individual to sue for a civil rights  
14 violation committed under color of state law, we  
15 have evaluated.

16          The private universities, although  
17 we've evaluated some of them, we have not  
18 presented that to the Committee, because my  
19 understanding is the Committee is not looking at  
20 the private universities.

21          REPRESENTATIVE PALLONE:  Your  
22 organization, FIRE, is it based in Pennsylvania?  
23 Or where is it based?

24          MR. FRENCH:  Philadelphia.

25          CHAIRPERSON STEVENSON:  In

1 Philadelphia, Pennsylvania --

2 MR. FRENCH: Yes.

3 REPRESENTATIVE PALLONE: -- agency?

4 When you're contacted by a student,  
5 presumably who feels offended or whatever, do you  
6 generally -- what's your process? Do you instruct  
7 them to go back to the university and follow the  
8 procedure? Or do you --

9 MR. FRENCH: What we do is, when a  
10 student contacts us claiming that their rights are  
11 violated, we first ask for a complete account of  
12 the events, including any and all supporting  
13 evidence such as emails, documents, etc.

14 We then also simultaneously research  
15 the school's own policies: Was this done under a  
16 speech code? Is there an academic freedom policy  
17 that applies? At that point, what we will do is  
18 we will advise the student to pursue any and all  
19 remedies they have in the school, whether it's a  
20 complaint process or a grievance procedure in the  
21 school.

22 But at the same time, if we're  
23 satisfied that a violation did, in fact, occur by  
24 use of documentary evidence -- we do not take "he  
25 said/she said" cases. If the evidence is only one

1 person's word against another, we don't take that  
2 case.

3           Once the evidence is documented, we  
4 will write the university and give the university  
5 an opportunity to respond with its side of the  
6 story. We tell the university, These are the  
7 facts as we understand them. Please correct any  
8 errors in our account.

9           And, on occasion, universities will  
10 correct us and bring additional facts to our  
11 attention. More frequently, we've got the facts  
12 correct.

13           And at that point the question is, Will  
14 the university protect the student's rights or  
15 not? And, if not, then we will publicize the  
16 abuse and, on occasion, refer the issue to a  
17 network of pro bono legal attorneys.

18           REPRESENTATIVE PALLONE: And how long  
19 has your organization been in existence?

20           MR. FRENCH: The organization began in  
21 October of 1999.

22           REPRESENTATIVE PALLONE: In  
23 Philadelphia?

24           MR. FRENCH: In Philadelphia.

25           REPRESENTATIVE PALLONE: And where do

1 you derive your funding from?

2 MR. FRENCH: It is about -- in 2004, we  
3 had about 55 percent of our funding from almost  
4 4,000 individual donors and 45 percent of our  
5 funding from multiple private foundations.

6 REPRESENTATIVE PALLONE: Do the  
7 complainants have to provide any kind of funding  
8 or fee-for-service to you?

9 MR. FRENCH: No. No. Anything we do  
10 for any professor or student or administrator, who  
11 under particular circumstances we -- there's never  
12 any request for payment. It's all pro bono.

13 REPRESENTATIVE PALLONE: Okay. Thank  
14 you, Mr. Chairman. I defer future questions, if  
15 you don't mind?

16 CHAIRPERSON STEVENSON: Sure.

17 Representative Curry.

18 REPRESENTATIVE CURRY: Thank you,  
19 Mr. Chairman.

20 How many times have you gone to court?  
21 I mean, sometimes you resolve these outside of  
22 court?

23 MR. FRENCH: Vast majority of  
24 circumstances the case is resolved outside of  
25 court. However, we refer to litigation, on

1 average, I would say five to six times per year  
2 that we refer a case to litigation.

3           Now, we do have a project called our  
4 Speech Codes Litigation Project in which we are  
5 systematically challenging speech codes in  
6 jurisdictions across the country.

7           Thus far we've challenged speech codes  
8 at California, Texas, Pennsylvania, New York.  
9 There will be another challenge coming any day now  
10 in the southeast.

11           So we have only one affirmative  
12 litigation project, and that is the Speech Codes  
13 Project where we refer -- we seek pro bono  
14 attorneys to challenge speech codes across the  
15 country so that there's a uniform level of  
16 precedent across the country.

17           REPRESENTATIVE CURRY: So you've been  
18 in court about 25 times?

19           MR. FRENCH: FIRE does not litigate.  
20 FIRE has not been in court. People who are pro  
21 bono attorneys for other law firms or other  
22 organizations have been in court about 25 times on  
23 cases we've referred them.

24           But I do not -- before I came to FIRE  
25 as FIRE's president, I was an attorney who would

1 sometimes litigate cases that FIRE referred to me.  
2 But I do not, nor do the other attorneys on the  
3 FIRE staff, actually litigate cases.

4 REPRESENTATIVE CURRY: Do you have a  
5 list of the studies you referred to on  
6 intellectual diversity lacking on college  
7 campuses?

8 MR. FRENCH: I do not have a written  
9 list. There have been recent studies by Rothman  
10 and Lichter and printed in Forum Magazine, Daniel  
11 Kline (phonetic) from UC Santa Clara -- these are  
12 two of the most --

13 REPRESENTATIVE CURRY: Can you provide  
14 these to the Committee --

15 MR. FRENCH: I can certainly provide  
16 them.

17 REPRESENTATIVE CURRY: Are there any  
18 institutions that you know of that do not explain  
19 to students how they can proceed if they feel  
20 their rights are abused?

21 MR. FRENCH: I know that institutions  
22 have typically been good about explaining to  
23 students how they can proceed if they feel they've  
24 been abused in certain contexts, certainly if they  
25 feel like they've been harassed.

1           So universities have been very good  
2 about telling students, Well, you have a right not  
3 to be harassed.

4           What they have not done a good job of  
5 explaining is, (A), what harassment is; or, (B),  
6 what you can do if you feel like your actual First  
7 Amendment rights are being violated, such as your  
8 right to free speech or right to free association.

9           So with part of the spectrum of student  
10 rights there has been massive and comprehensive  
11 educational efforts undertaken.

12           With regards to the First Amendment and  
13 to free speech and to free association, which goes  
14 to the heart of the very purpose of the university  
15 itself, the amount of effort undertaken to educate  
16 students on their full spectrum of free speech  
17 rights is absolutely minimal to nonexistent.

18           In fact, I don't know of any program in  
19 the State of Pennsylvania -- now, there may be  
20 some that we have not found or discovered -- where  
21 students are, for example, oriented into  
22 understanding what their free speech rights are,  
23 what their free association rights are.

24           REPRESENTATIVE CURRY: So you have not  
25 found in any of the handbooks that are given out

1 to students -- you have to understand, students  
2 may very well not read it.

3           They very well may get the instruction  
4 and it goes like this (indicating) because they're  
5 not confronted with that at their first exam or  
6 first --

7           MR. FRENCH: Right.

8           REPRESENTATIVE CURRY: -- and then  
9 they're afloat and go for help.

10           MR. FRENCH: There are in some of  
11 the -- there are on occasion some rather vague  
12 assurances of academic freedom and free speech.

13           But the contrast between the level of  
14 information and the detail of that information  
15 regarding preventing harassment or reporting on  
16 incidents that are allegedly harassment, compared  
17 to the free speech side, it's truly a massive  
18 disparity.

19           But that is not to say that there isn't  
20 some language in a few of the student handbooks  
21 that say, you know, or perhaps we welcome the  
22 diversity of ideas, we welcome free speech, we  
23 welcome debate. In fact, that's a common  
24 statement the universities will make; but they're  
25 often then contradicted by the speech code.

1           So if a student is going by university  
2 policy, the natural implication is, well, there's  
3 free speech except for these acts of intolerance,  
4 which is to say there's not truly free speech.

5           REPRESENTATIVE CURRY: But in the  
6 orientation sessions for the freshmen or students  
7 coming in, they generally are exposed to what the  
8 university policy is?

9           MR. FRENCH: I would not say that  
10 they're generally exposed to university policies  
11 on free speech and free association.

12           I would say they probably get quite a  
13 few laudatory comments regarding diversity and  
14 differences; but concretely about free speech,  
15 concretely about free association, free exercise  
16 of religion, no.

17           Now, the reason why I mentioned  
18 distinctly diversity as opposed to free speech,  
19 although diversity would, I would think, include a  
20 variety of different ideas, is that often  
21 diversity is used as a justification for limiting  
22 free speech or limiting free speech on the basis  
23 of protecting diversity.

24           So I think the Committee's resources  
25 could be -- one good use, to be incredibly

1 presumptuous, would be to discover what exactly  
2 are the Pennsylvania public universities teaching  
3 the students about the First Amendment?

4           We have limited resources. We can get  
5 what we can get from the Internet and other  
6 publicly-available documents. But as far as  
7 actually going to the university and experiencing  
8 a freshman orientation, experiencing what it's  
9 like to be introduced to life at Penn State,  
10 unfortunately, I don't get to do that.

11           REPRESENTATIVE CURRY: Do you find that  
12 most of the free speech issues come up in  
13 connection with a grade and sometimes a lower  
14 grade than expected?

15           MR. FRENCH: I would say that's  
16 infrequent.

17           REPRESENTATIVE CURRY: Infrequent?

18           MR. FRENCH: Infrequent, from our  
19 perspective. We do not frequently receive  
20 grade-based complaints, in part because we're very  
21 clear about this threshold and standard of proof  
22 that we seek.

23           Grade-based disputes can be very  
24 subjective. It's not uncommon for students and  
25 professors to believe they're far more brilliant

1 than they actually are.

2           And to attribute lower grades to  
3 something else, whether it's personal animosity,  
4 whether it's ideology -- the only time that FIRE  
5 gets involved in a grade dispute is if the  
6 evidence is unmistakable that the grade is based  
7 on ideology; in other words, something to the  
8 virtual equivalent of, Great paper, but since  
9 you're a liberal, F.

10           But you just don't see that. Grading,  
11 again, is very subjective. And we try to avoid  
12 those disputes unless there's incontrovertible  
13 evidence.

14           REPRESENTATIVE CURRY: Every student  
15 that was interviewed in the press in connection  
16 with this made reference to a lower grade because  
17 of the issue, and there's no exception for that.

18           MR. FRENCH: There is a widespread  
19 student perception that they're not graded  
20 objectively. And there is undoubtedly a  
21 widespread student perception that they receive  
22 lower grades based on ideology, or being out of  
23 step with the ideology of the professor.

24           I do not deny that is a widespread  
25 student perception; but very few students take the

1 step of contacting us on that basis, perhaps  
2 because our mission is much more clearly in the  
3 civil liberties area whereas the grading disputes,  
4 as I said, the evidence is often very difficult.

5           If you look at our Submit a Case form  
6 on our web site, you'll see that we ask for a lot  
7 of information. And I think that can sometimes  
8 turn away people who's -- the sum total of the  
9 information is I got a B and I really deserved an  
10 A.

11           So I do not deny that there is, in  
12 fact, a widespread perception that grades are  
13 based on ideology, at least in part.

14           The ironclad evidence to back up that  
15 perception, FIRE does not have.

16           REPRESENTATIVE CURRY: Okay. Thank  
17 you.

18           CHAIRPERSON STEVENSON: Representative  
19 Armstrong.

20           REPRESENTATIVE ARMSTRONG: Thank you,  
21 Mr. Chairman.

22           Mr. French, shouldn't students be  
23 responsible for themselves if those rights are  
24 supposedly violated in the class? Isn't it up to  
25 them to know their rights and to stick up for

1 themselves?

2           As a citizen outside of a university, I  
3 don't rely on my township, you know, citizen  
4 handbook to know what I should be -- what I should  
5 do. I mean, are we coddling them by having to go  
6 back and educate them on their basic rights?

7           MR. FRENCH: Well, I think the  
8 education regarding your basic rights is what a  
9 civil society should be doing, period.

10           A democracy that thrives on free  
11 speech, free association, and open debate should  
12 be educating its elementary school students, the  
13 secondary students and, yes, its college students  
14 on what these rights are. They're central to a  
15 function of a civil society.

16           So I think the university should be  
17 educating students regarding their rights as part  
18 of its educational mission and function.

19           Now, do you go beyond the basic  
20 educational mission and function to provide, for  
21 lack of a better term, a super education on  
22 rights?

23           Well, I would say in a circumstance  
24 where student rights are systematically deprived  
25 and where speech codes exist on a systematic basis

1 there may be a need for additional education of  
2 students regarding their rights to challenge these  
3 unconstitutional policies.

4           Ideally, the universities would simply  
5 eliminate their unconstitutional policies and you  
6 wouldn't have to -- you wouldn't -- you wouldn't  
7 face quite the challenge.

8           But, students should be educated on  
9 their First Amendment rights. I mean, these are  
10 the basic foundations of our civil society.

11           REPRESENTATIVE ARMSTRONG: So you're  
12 saying that it should be part of -- necessary  
13 orientation that some freshman class or  
14 maybe -- should it be part of orientation?

15           MR. FRENCH: I'm not going to make any  
16 curriculum suggestions regarding what precise form  
17 the individual university's education should take.

18           I think the -- I think, though, it's  
19 safe to say that students who graduate from high  
20 school, who graduate from college barely conscious  
21 of the First Amendment are not getting the  
22 education they need.

23           How a university goes about providing  
24 the education that is needed, including one that  
25 encompasses this basic culture-defining right is

1 up to them; but I think it should happen.

2           REPRESENTATIVE ARMSTRONG: Thank you.

3           My second question is, You mentioned  
4 balance in some of our faculty makeup. If faculty  
5 representation in a certain department is  
6 two-to-one or ten-to-one, I mean, so what? Is  
7 that necessarily a problem? Or why does it  
8 necessarily say there's some kind of lack of  
9 diversity or free speech?

10           MR. FRENCH: It's a potential problem  
11 constitutionally and legally if that imbalance was  
12 accomplished through illegal; in other words, if  
13 there was actual discrimination employed to create  
14 the imbalance, that's a problem from a  
15 constitutional or legal standpoint.

16           From the academic standpoint, the  
17 utility and the value of a wide range of ideas has  
18 long been taken for granted, that the wide range  
19 of ideas is supposedly part of the goal of the  
20 university so that you can learn economics from  
21 people who vehemently disagree with each other;  
22 you can learn English from people who have widely  
23 different readings of various classics, both new  
24 and old; that the value of the marketplace of  
25 ideas and differing viewpoints has heretofore not

1 been terribly controversial.

2           But it's actually something that is  
3 valued. The AAUP itself has said to the Supreme  
4 Court of the United States that this is valued,  
5 that this is something that should exist.

6           So the question isn't, I think, really  
7 is intellectual diversity a good thing. I think  
8 all sides of the debate would say that  
9 intellectual diversity is a good thing. But as  
10 with so many things, the devil is in the details.

11           Many people would say that in  
12 spite of -- these have been crude measurements  
13 undertaken so far and that there really is  
14 intellectual diversity beyond that, that could be  
15 measured by some of these surveys.

16           Others would say, Well, this  
17 intellectual -- this ideological uniformity  
18 doesn't imply anything regarding what's happening  
19 in the classroom because teachers can teach  
20 however they want to teach, regardless of what  
21 their ideology is.

22           And others would say, however you want  
23 to phrase this, this is the natural state of  
24 things, that people on one side of the political  
25 spectrum tend to like the academy more than people

1 on the other side of the political spectrum and  
2 that's just the way it is.

3           So any measures to address that, you're  
4 addressing something that's not a problem. This  
5 is the marketplace in action. This is people  
6 choosing their professions and that's how it's  
7 shaken out.

8           However, I would submit that in the  
9 event of demonstrated dramatic -- dramatically  
10 demonstrated differences between the composition  
11 of the academy and the composition of the wider  
12 culture, it leads to a question, Why, and leads to  
13 a question of, Is it possible that this exists  
14 because of unconstitutional or illegal actions?

15           It's a reasonable question and a  
16 question worth knowing the answer to.

17           REPRESENTATIVE ARMSTRONG: But how  
18 would we as a Committee try to answer that  
19 question?

20           MR. FRENCH: Well, I think -- first, I  
21 think as a Committee it might be worth  
22 knowing -- I don't know if there's any studies  
23 done in Pennsylvania specific to Pennsylvania. It  
24 might be worth knowing what is the intellectual  
25 diversity of our Pennsylvania public institutions.

1           Once you know the answer to that  
2 question -- and at that point we don't really  
3 know, there's no particular reason to believe it's  
4 terribly different from the rest of country; but,  
5 again, these are institutions who do their own  
6 hiring. They don't take hiring orders from the  
7 state university system in New York or California  
8 or anywhere else.

9           So these are independent institutions.  
10 I think it might be worth determining is there an  
11 issue. And then, if there is an issue, there are  
12 quite a few ideas about what to do about it.

13           I don't have the time to go into all of  
14 them, but there are quite a few different ideas,  
15 some of which I think are constitutionally sound,  
16 some of them not, to deal with the issue.

17           REPRESENTATIVE ARMSTRONG: Okay. And  
18 finally, do you have any advice for this Committee  
19 in general as to how to proceed?

20           MR. FRENCH: Well, it sounds -- you're  
21 asking me to be presumptuous with the Committee.  
22 But since you asked --

23           REPRESENTATIVE ARMSTRONG: If this were  
24 your committee.

25           MR. FRENCH: If this were my committee,

1 I think it is critically important that any state  
2 investigation be an investigation of potentially  
3 unconstitutional or unlawful acts as opposed to an  
4 investigation into the exercise -- into lawful  
5 acts that are done in a way that is not  
6 politically popular.

7           The question here is not whether any  
8 individual professor is a radical or not in their  
9 classroom. The question isn't whether any  
10 individual professor is teaching English or  
11 history or geography or whatever subjects in a way  
12 that irritates students or makes some students  
13 angry.

14           It strikes me that the question here in  
15 an academic freedom investigation, Are the public  
16 institutions in the State of Pennsylvania which  
17 are supported by the taxpayers and responsible to  
18 the citizens discharging their constitutional  
19 responsibilities? And is there evidence that they  
20 are not?

21           Well, I can tell you from the speech  
22 code example, they are not in that respect. In  
23 the some of the other areas, I do not have those  
24 answers. I don't have that information.

25           So investigations can be quite chilling

1 if what you're investigating is a lawful activity.  
2 I know there's been cries of McCarthyism regarding  
3 this investigation. I've read 'em in the paper  
4 and even answered questions about them on the  
5 radio.

6           And the thing that I've told anyone  
7 who's asked is that an investigation into  
8 potentially unlawful behavior is what legislative  
9 committees do all the time. Investigations into  
10 lawful behavior that is being done,  
11 behavior -- lawful speech done in a way that is  
12 politically unpopular or unpalatable, now, that's  
13 chilling.

14           So there are -- if I could summarize it  
15 basically, it would be to keep the focus on the  
16 constitutional and statutory responsibilities of  
17 the public institutions of higher education in  
18 this state.

19           REPRESENTATIVE ARMSTRONG: Thank you  
20 very much. Thank you, Mr. Chairman.

21           CHAIRPERSON STEVENSON: Representative  
22 Surra.

23           REPRESENTATIVE SURRA: Thank you,  
24 Mr. Chairman.

25           Mr. French, I really enjoyed your

1 testimony. And just so you know, I am vehemently  
2 opposed to the formation of this select committee;  
3 and your testimony pretty much verifies what my  
4 concerns were. This is a colossal waste of time,  
5 of staff, members.

6           As I heard your testimony, it basically  
7 sounded, what FIRE does is two things: Make sure  
8 there are -- free speech rights are protected and  
9 dealing a little bit with intellectual diversity.

10           And throughout your statement, you've  
11 mentioned a couple of times that the State should  
12 not dictate what is appropriate as free  
13 expression. And I think that's tantamount in our  
14 First Amendment rights, from not only students,  
15 but also professors should be free from state  
16 oversight; is that correct?

17           MR. FRENCH: Certainly. You are --

18           REPRESENTATIVE SURRA: It protects  
19 both?

20           MR. FRENCH: Professors who are  
21 behaving in a lawful manner. If professors  
22 violate the law, then, of course, they're not free  
23 from oversight and shouldn't be.

24           REPRESENTATIVE SURRA: What would be an  
25 example of a professor violating a law then? I'm

1 not sure -- today I was speaking with my  
2 colleagues, We're having a hearing on something  
3 with academic freedom. What is this? If you  
4 think we should investigate professors, what are  
5 these law breaking professors doing?

6 MR. FRENCH: I'm not saying we should  
7 investigate individual professors. You asked me  
8 if professors should be immune from any oversight.  
9 And I was saying --

10 REPRESENTATIVE SURRA: They can't break  
11 the law, okay.

12 MR. FRENCH: I'm just saying that  
13 professors don't have a free hand to do whatever  
14 they want.

15 But I've been very clear in saying that  
16 my advice is the Committee should not focus on  
17 what individual professors are doing in the  
18 classroom.

19 I think that that has a potential to be  
20 chilling and that that has a potential to cause  
21 people to moderate or change their behavior on the  
22 thinking that the hammer of the state is to come  
23 upon them.

24 Whether that's a reasonable or  
25 unreasonable belief, you know, a legislative

1 committee that focuses on individual professors  
2 engaging in lawful activities is quite chilling.

3           REPRESENTATIVE SURRA: Your  
4 organization is national, which are located in  
5 Philadelphia?

6           MR. FRENCH: We work nationally. We  
7 don't have offices all over the country.

8           REPRESENTATIVE SURRA: But this huge  
9 problem that we have to have a standing committee  
10 from, your organization nationally deals with five  
11 or six cases that actually go to trial and only  
12 one ever in Pennsylvania; is that correct?

13           MR. FRENCH: You have to understand, we  
14 do not receive all information regarding issues on  
15 campus. What we receive is the unknown percentage  
16 of actual reports of violations from across the  
17 country, which number in the hundreds every year  
18 and that we are very successful at resolving short  
19 of litigation.

20           Because often what we've found is that  
21 universities cannot justify in public the things  
22 they do in private. So a university that says,  
23 for example, to a religious student group in  
24 Florida, you cannot show the passion of the Christ  
25 but we are going to permit a university employee

1 to put on a play where she masturbates to pictures  
2 of Jesus Christ, that kind of thing doesn't go to  
3 litigation; but it's so absurd the university  
4 can't justify it.

5 REPRESENTATIVE SURRA: I would agree.

6 MR. FRENCH: So we don't have to  
7 litigate that.

8 Whereas there are cases where the  
9 university will dig in its heels and we have to  
10 litigate.

11 But -- I don't want to say that we get  
12 all of the complaints that are out there and all  
13 of the meritorious complaints. We get a lot of  
14 them. We get a number that is far  
15 exceeding -- far exceeds the threshold to declare  
16 a national crisis in other areas.

17 For example, if you look at Tolerance,  
18 dot, Org's list of alleged racial incidents on  
19 campus for a multiyear span -- and these are just,  
20 for example, allegations. And sometimes they  
21 involve -- sometimes they're proved; sometimes  
22 they're not; sometimes they're just an incident  
23 involving a college student, whether it happened  
24 on campus or not -- our cases far outnumber these  
25 incidents and, yet, universities in response to

1 many of these incidents have poured millions upon  
2 millions upon millions of dollars into the  
3 creation of offices that are designed to prevent  
4 such abuses from happening.

5           I'm not saying there are not abuses.  
6 I'm not saying there are not terrible things that  
7 have occurred. But to say that there is no  
8 problem because we're only getting a few hundred  
9 complaints nationally and are successful enough  
10 that we don't have to litigate all of them -- and  
11 also, I'll tell you the truth, it is hard to find  
12 a lawyer willing to take a case for a student for  
13 free.

14           And so, unfortunately, there are cases  
15 we can't litigate because we really don't have  
16 talented lawyers willing to engage in multiyear  
17 litigation for no money. And so that makes it  
18 more difficult.

19           REPRESENTATIVE SURRA: Sure. As a  
20 state Representative representing rural districts  
21 whose constituents call me for every time they  
22 have any bump in the road with state-related  
23 school or state university, I can tell you that I  
24 have never once in 15 years had somebody call me  
25 about their academic freedoms being abused.

1           Interesting is you mentioned  
2 intellectual diversity where the majority of  
3 college professors are more left leaning than  
4 right.

5           I don't frankly find that as a  
6 surprise, because I think people who are right  
7 leaning go in the business world and make money.  
8 How would you deal with that? Would you suggest  
9 some Affirmative Action hiring practice for  
10 college professors?

11           MR. FRENCH: Oh, goodness no.

12           REPRESENTATIVE SURRA: I didn't think  
13 you would.

14           MR. FRENCH: Goodness, no. My view is  
15 you're making a ideology-based hiring decision; in  
16 other words, we're hiring someone because they are  
17 or they are not liberal or because they are or  
18 they are not --

19           REPRESENTATIVE SURRA: Do you think  
20 that occurs?

21           MR. FRENCH: I do believe that occurs.  
22 The extent to which it occurs explicitly  
23 is -- explicit ideologically-based hiring  
24 decisions do occur. When they do occur, they are  
25 sometimes litigated, though not typically.

1           The question is -- there's really two  
2 issues here: (1), how often are explicitly  
3 ideologically based hiring decisions being made?  
4 There's a couple of pieces of evidence that you  
5 can look to, to see whether that happens.

6           One is, is there any testimony  
7 that -- for example, I relate my own experience.  
8 I interviewed to teach at Cornell Law School and I  
9 was asked in the interview, I notice from your  
10 background that you have -- you have a Christian  
11 background. Do you think you can teach gay  
12 students?

13           Which was an unlawful question, to  
14 bring up my religion specifically in the context  
15 of my fitness for the job. I answered the  
16 question and didn't make a complaint. And I  
17 think -- hopefully, I think, I actually won the  
18 interviewer over in the process. But that was not  
19 a lawful question.

20           We receive numerous reports like that.  
21 The unfortunate thing is that teachers frequently  
22 want to be anonymous when they make reports like  
23 that because they're concerned about their future  
24 teaching prospects.

25           If I raise a stink, will I have an

1 opportunity to go apply somewhere else? is a  
2 concern.

3           The other issues is, Has the job been  
4 redefined so much that it essentially excludes  
5 other points of view? You will often see in  
6 faculty hiring announcements a call for a  
7 particular kind of scholar with the use of  
8 particular words that are heavily laden with  
9 ideological meaning.

10           You will also find that university  
11 officials -- Roger Bowen (phonetic), who's the  
12 president AAUP, recently at a forum said, Well,  
13 it's obvious that conservatives -- and I'm  
14 paraphrasing.

15           But he said, much like what you said,  
16 conservatives wouldn't be interested in these  
17 subjects. For example, what is history but the  
18 study of inequality over time? What is  
19 anthropology but the study of the role of  
20 religious and cultural myth and the myth of  
21 cultural superiority?

22           Well, that's not the traditional  
23 definition of anthropology or history or, in  
24 sociology, says it's the study of inequality in  
25 our society.

1           Those are certainly things that are  
2 encompassed within sociology or history or  
3 anthropology and should be studied; but to say,  
4 that is, the discipline does exclude -- and, as I  
5 say, you can often see this in job announcements.

6           REPRESENTATIVE SURRA: You raise a  
7 great point. If a gay student was in a classroom  
8 and a professor refused to teach him, would not  
9 his academic freedoms be violated?

10          MR. FRENCH: Absolutely. Absolutely.  
11 If the teacher refused to teach someone because  
12 they're gay, because they're black, because  
13 they're white, because they're conservative,  
14 because they're liberal -- for any reason other  
15 than the student has given independent legitimate  
16 justification such as disrupting class --

17          REPRESENTATIVE SURRA: I really want to  
18 thank you for your testimony, although it really  
19 doesn't make me feel like I want to go out and  
20 travel the state to do this; but I will, believe  
21 me.

22          I find it interesting that throughout  
23 your statement how you talked about they should be  
24 free from state oversight, the state should not  
25 dictate what's appropriate, and here we are with a

1 standing committee talking about what's  
2 appropriate.

3 MR. FRENCH: What I was saying was that  
4 the content of your language, what you say, my  
5 political positions, my position on gay rights, on  
6 abortion, on the war, on economics should be free  
7 from oversight.

8 Unfortunately, what the universities  
9 have done is by policy -- and I can provide the  
10 Committee with the policies and discussion of why  
11 each one of them is unconstitutional -- by policy,  
12 the state universities, which are arms of the  
13 state, which are part of the government, have done  
14 this.

15 They have said there are classes and  
16 categories of speech for which we're going to have  
17 extra scrutiny that is beyond the constitution.  
18 You know what that does?

19 That means that every single student  
20 that attends that university is having their  
21 constitutional rights violated at this moment in a  
22 place that is supposed to be a marketplace of  
23 ideas.

24 There's a couple of ways to deal with  
25 that: Run around and file a lawsuit every time

1 something like this comes up hoping you can find a  
2 lawyer willing to do it for free, hoping you can  
3 find a student who's willing to stick their neck  
4 out;

5           Or you can say, Well, wait a minute.  
6 There's other parts of the government that have  
7 responsibility for this that should say to a  
8 subordinate part, in essence, behave in a  
9 constitutional manner.

10           And when it comes to something as vital  
11 as the marketplace of ideas, as vital as a free  
12 exchange of ideas, I think it's worth maybe a few  
13 days at least.

14           REPRESENTATIVE SURRA: Interestingly, I  
15 agree with you. However, just a few years ago  
16 Penn State had some type of a student function  
17 dealing with sex and this General Assembly got  
18 their britches real tight about it. So I guess it  
19 depends on where you're coming from and whose  
20 rights are being violated.

21           Again, I want to thank you.

22           And thank you, Mr. Chairman.

23           CHAIRPERSON STEVENSON: Thank you.

24           Representative Quigley.

25           REPRESENTATIVE QUIGLEY: Thank you,

1 Mr. Chairman.

2           Mr. French, based on the criteria that  
3 you -- a wish list, I guess, that Representative  
4 Armstrong asked what you think this Committee  
5 should focus on, the constitutionality and are  
6 laws being broken now, do you suspect that that  
7 activity is taking place in Pennsylvania?

8           MR. FRENCH: From the speech policy  
9 standpoint, absolutely. It's absolutely happening  
10 and it's widespread. An interesting question is  
11 how much are these speech policies being enforced?

12           So the policy existing by itself is a  
13 constitutional violation. The frequent  
14 enforcement of the policy just magnifies the  
15 violation.

16           So from the standpoint of speech  
17 protected policies, we already know that the  
18 universities are no doing what they should be  
19 doing.

20           With regard to the other arenas,  
21 because of the importance of free speech, of  
22 intellectual freedom, of the marketplace of ideas,  
23 it's worth finding out if, in fact, the  
24 Pennsylvania public universities are meeting their  
25 constitutional and statutory obligations.

1           I suggest that the inquiry should be  
2 narrowly focused so that there is not the chilling  
3 effect that many fear.

4           But on the point regarding intellectual  
5 diversity, if this is a value that the university  
6 believes in and the State of Pennsylvania -- or  
7 the Commonwealth of Pennsylvania is tasked with  
8 putting together a first-class state university  
9 system, these are questions that are worth asking.

10           From the FIRE standpoint, what we would  
11 ask is that the search go primarily for  
12 constitutional and statutory responsibilities, not  
13 something, like many have feared, that a professor  
14 who's a radical professor on either side of the  
15 spectrum will now not feel as free to teach  
16 because, if they share their ideas, then there's  
17 going to be a legislature that's calling for their  
18 heads. That's not the scenario that I think is  
19 optimal.

20           And I'm familiar with the Penn State  
21 sex controversy because what was interesting is,  
22 around the same time that the sex controversy was  
23 occurring and there was calls for sanctions or  
24 action against Penn State for allowing a  
25 controversial sex forum, the Penn State

1 administration had denied recognition to a  
2 conservative student group on the grounds that  
3 their statement in the constitution that rights  
4 come from God was considered to be religiously  
5 discriminatory.

6           So what FIRE is did is we approached  
7 Penn State and said, Okay, we believe you have a  
8 right to put on this sex forum; but you also have  
9 a right to have a student group that says that  
10 rights come from God. The marketplace of ideas.  
11 It's really quite simple.

12           Unfortunately -- and I want to be very  
13 clear on one thing. When I say that these  
14 universities have failed in some of their  
15 responsibilities, I'm not saying that their  
16 administrators who are out there rubbing their  
17 hands together because they cannot wait to  
18 indoctrinate tomorrow's youth and they cannot wait  
19 to silence all the sin.

20           Often, censorship comes from the best  
21 intentions. For example, the speech code. Often  
22 the intention is, Well, we want people who have  
23 been historically disadvantaged and left out of  
24 community to feel welcome; and so we don't want  
25 people saying things and doing things that are

1 going to make them feel like they're on the  
2 outside looking in.

3           That's a virtuous and good motivation.  
4 But the fact of the matter is you don't violate  
5 the Constitution to further that interest, to  
6 advance that good and virtuous motivation.

7           And that, in fact, violations of the  
8 Constitution often have unintentional  
9 consequences.

10           One of the stories from the University  
11 of Wisconsin when they enacted their speech code,  
12 which was designed to make Wisconsin a more  
13 hospitable place for women and minorities, one of  
14 the first complaints was made by someone who  
15 complained of being called a redneck.

16           I know the code wasn't enacted to  
17 protect rednecks. The code was enacted to protect  
18 other people. But there's unintended consequences  
19 when you begin to -- when you begin to regulate  
20 speech on subjective listener offense, it isn't  
21 free anymore. And if there's one place it should  
22 be free, it's in the academy.

23           So I took your question and --

24           REPRESENTATIVE QUIGLEY: That's okay.

25           Based on the way -- the criteria that,

1 your wish list for this Committee, how they would  
2 conduct themselves, there's three or four  
3 hearings, what would you hope that would come out  
4 of -- as a result, what would you think that the  
5 Legislature should do, if anything?

6 MR. FRENCH: That's a very good  
7 question. So much of it depends on what is  
8 discovered.

9 But with respect to what we know, for  
10 example, the speech codes, I don't see any -- we  
11 know for a fact that the Pennsylvania -- the  
12 nondiscrimination rules enacted by the  
13 Pennsylvania Legislature that apply, for example,  
14 to the workplace are constitutionally appropriate.

15 What's the impediment to making sure  
16 that the nondiscrimination rules of the State  
17 university system mirror, for example, the  
18 constitutional nondiscrimination rules that apply  
19 to everyone else in the state?

20 That would by itself eliminate  
21 virtually every speech code. So, you know, that's  
22 just one thing that I think would be of enormous  
23 value, a way to end the violation of the  
24 constitutional rights for thousands of  
25 Pennsylvania citizens.

1           Regarding the other issues, so much of  
2 it depends on what is discovered. Is it, in fact,  
3 that job descriptions or job performance  
4 evaluations are ideologically tinged in any way?  
5 You know, not knowing what exactly will be  
6 discovered if anything, it's hard to project  
7 beyond that.

8           REPRESENTATIVE QUIGLEY: Thank you,  
9 Mr. Chairman.

10           CHAIRPERSON STEVENSON: Representative  
11 Curry.

12           REPRESENTATIVE CURRY: Thank you,  
13 Mr. Chairman.

14           You know, we have something in the  
15 speech code on the floor of the House in our  
16 debate; so you may want to look at our rules and  
17 maybe even make some suggestions.

18           In response to a question on rights  
19 violated in the class, you were primarily talking  
20 about speech codes though, weren't you? You  
21 weren't talking about a student not being able to  
22 speak in class or...

23           MR. FRENCH: I believe -- if I'm  
24 recalling the question, I'm -- I think in that  
25 response I was primarily talking about speech

1 codes.

2           REPRESENTATIVE CURRY: And your whole  
3 approach is about speech codes on campus, not on  
4 an instructor/student dialogue in class?

5           MR. FRENCH: That is not the focus of  
6 what we do. Because I think, in fact, that absent  
7 evidence that the instructor/student dialogue is  
8 being actually restricted in an unconstitutional  
9 manner by the instructor -- for example, if a  
10 professor's talking about the Israeli-Palestinian  
11 issue, to take an example from a recent  
12 controversy at Columbia University, and make some  
13 assertions regarding what did or did not happen in  
14 Zanine (phonetic), and a proIsraeli student raises  
15 their hand to dispute the assertion and the  
16 professor says, I will not allow anyone to dispute  
17 evidence of Israeli atrocities in my class, that's  
18 an unconstitutional act.

19           The reports that we get of things like  
20 that are a tiny fraction of the reports that we  
21 get. Much more of what we get is regarding  
22 application of a complaint by a student that  
23 another student has offended them, which results  
24 in a process at the school that punishes the  
25 offending student, the student engaged in the

1 initial offending speech.

2           That is what we face quite a bit, as  
3 well as the religious liberty issue of religious  
4 student organizations being rejected from campus  
5 because they discriminate on the basis of religion  
6 or creed or ideology.

7           REPRESENTATIVE CURRY: Although schools  
8 I think do have some sense that they need to  
9 maintain an atmosphere of civility on campus, and  
10 that's a real challenge sometimes.

11           MR. FRENCH: It certainly is. And we  
12 do not say that a school can't consistently preach  
13 civility. The problem is when the civility  
14 advocacy turns into a civility code.

15           REPRESENTATIVE CURRY: You don't know  
16 of any college or university in the interview  
17 process or on the application form asks for a  
18 individual's political registration or --

19           MR. FRENCH: No.

20           REPRESENTATIVE CURRY: -- who they  
21 voted for in the last election?

22           MR. FRENCH: No.

23           REPRESENTATIVE CURRY: You  
24 answered -- you were asked in an interview if you  
25 would teach gay students. When I was interviewed,

1 I was asked if I could teach art students. Were  
2 my constitutional rights violated?

3 MR. FRENCH: Depends on the context.  
4 If they said --

5 REPRESENTATIVE CURRY: I got to go back  
6 45 years.

7 MR. FRENCH: If they said, I see that  
8 you're a white male, can you teach art students,  
9 because it would implicate your race, that's an  
10 unfounded assumption based on race, that would  
11 implicate your rights.

12 If you were applying for a math  
13 position and they said we also would like you to  
14 teach art students, can you do that? That's  
15 certainly not -- it's all depends on the context.

16 REPRESENTATIVE CURRY: All right.  
17 Thank you.

18 CHAIRPERSON STEVENSON: Thank you. Any  
19 other questions from the members of the Committee?

20 (No audible response.)

21 CHAIRPERSON STEVENSON: Mr. French, I  
22 want to thank you. You've been very patient with  
23 us and, you know, I know you volunteer your  
24 services too.

25 If we need you when our hearings do

1 start, I just -- as a housekeeping matter, we're  
2 going to be holding possibly four hearings. One  
3 will be in the west, one will be in the east, one  
4 will be in the central part of the state, and one  
5 somewhere else in the Commonwealth.

6           Representative Curry and I will be  
7 getting together next week to start laying out the  
8 plans for these hearings.

9           It, I think, will be beneficial for all  
10 in attendance to just contact either  
11 Representative Curry's office or my office if you  
12 want an update. But, really, the first hearing  
13 which I hope to hold out west won't be probably  
14 now till the end of October, beginning of November  
15 at the earliest.

16           And if you all remember, through the  
17 resolution, we have to have our report done and  
18 into the House by the end of November of 2006. So  
19 once we start the hearings, hopefully they'll get  
20 rolling, because it will take some time to  
21 assimilate the data and put it into report form.

22           Can you, Mr. French, stick around after  
23 the hearing -- actually, it's really not a  
24 hearing. It's an informational meeting. I'm not  
25 referring to it correctly. Maybe some of the

1 members of the audience have some questions for  
2 you too, and I'd appreciate it if you've had stick  
3 around.

4 MR. FRENCH: I'll stick around and  
5 answer questions as long as they exist.

6 CHAIRPERSON STEVENSON: Great. Thank  
7 you. And thank you all for attending.

8 REPRESENTATIVE PALLONE: Mr. Chairman,  
9 real quick question for the Chair in terms of  
10 housekeeping for the Committee. Are we ever going  
11 to be a body to discuss the direction we're going  
12 with this or what information we're going to have  
13 provided to us and things to that effect?

14 CHAIRPERSON STEVENSON: That is one of  
15 the purposes of our meeting next week.

16 REPRESENTATIVE PALLONE: Okay. Thank  
17 you.

18 (Proceedings adjourned at 4:40 p.m.)

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C E R T I F I C A T E

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Dated this 19th day of September, 2005.

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