



Foundation for Individual Rights in Education

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September 26, 2008

President David L. Boren
University of Oklahoma
Office of the President
Evans Hall, Room 110
660 Parrington Oval
Norman, Oklahoma 73019

Sent via U.S. Mail and Facsimile (405-325-7605)

Dear President Boren:

As you know, the Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our last dealings with the University of Oklahoma occurred in 2004, when we exposed the university's unjust treatment of Professor David Deming.

This fall, FIRE is gravely concerned about the threat to freedom of expression posed by the University of Oklahoma's prohibition against political or partisan speech by students and faculty on the university's e-mail and network systems. What follows is our understanding of the facts; please inform us if you believe we are in error.

On September 12, 2008, Nicholas S. Hathaway, Executive Vice President and Vice President of Administration and Finance, sent an e-mail to all University of Oklahoma students, faculty, and staff addressing the issue of political speech on campus. In the e-mail, Hathaway wrote that "[a]s a state agency...the University may not endorse or oppose a particular candidate for office," and that this prohibition "includes the use by its faculty, staff and students of its email and network systems." Hathaway stipulated that the university's e-mail and network systems "may not be used to endorse or oppose a candidate, including the forwarding of political humor/commentary," because the systems are "a state resource and must be used for educational and business purposes, recognizing a limited personal use." Hathaway added that such personal use "may not include political issues outside of the educational context as it places the University at risk of losing its tax exempt status."

If what the university intended to do was to prevent state university employees from creating the appearance that the university endorses a particular political candidate, it has wildly overshot. While it is true that colleges are required because of their tax-exempt status or status as government agencies not to, for example, endorse a candidate, it is simply absurd to argue that any partisan political speech in which employees or students engage using their e-mail accounts can be banned. Indeed, by placing such a blanket restriction on political speech, the University of Oklahoma is in clear violation of its legal obligation to uphold the First Amendment on campus. As a public university, Oklahoma is legally bound by the United States Constitution's guarantee of freedom of speech. Students and faculty at Oklahoma enjoy this right in full. As the Supreme Court famously stated, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969). Indeed, the Court has declared that "[t]he college classroom with its surrounding environs is peculiarly the 'marketplace of ideas.'" *Healy v. James*, 408 U.S. 169, 180 (1972).

The overwhelming swath of political speech that Hathaway seeks to regulate falls under the First Amendment's guarantee of freedom of speech; indeed, the protection of such political speech was arguably the core motivation for the First Amendment. In particular, the Supreme Court has indicated that "speech concerning public affairs is more than self-expression; it is the essence of self-government," reflecting "our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964) (internal quotations omitted). Elsewhere, the Court has declared, "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966).

Given these declarations, it is plainly untenable for a public university such as Oklahoma to deny its students and faculty the right to engage in *any* political speech using the university's e-mail and network systems. When a student or faculty member writes a private e-mail and uses university e-mail and network systems to transmit the message, there is little chance that any reasonable person would assume that the sender is speaking on behalf of the university. The content of private e-mail, whether or not political in nature, reflects the personal opinions and views of that individual, not the university as an institution. The university cannot credibly argue that allowing students and faculty to use university e-mail accounts and network systems to express themselves in private conversation on political issues in any way endangers the university's obligation of political neutrality or its tax-exempt status.

Second, Hathaway's assertion that the university's e-mail and network systems may be used solely for educational and business purposes, allowing for limited personal use, is equally perplexing. Is the university to be understood as arguing that a student's education does not involve engaging in political discussion and debate? Is the university somehow arguing that political topics can and must be excised from discussions of related topics such as economics, social trends, and religion? Is it at all possible to distinguish educating one another about political candidates and their political positions from the endorsement of or opposition to a candidate?

Similarly, is the university to be understood as arguing that students and faculty are not free to use their e-mail accounts for any number of personal reasons unrelated to their academic and professional endeavors? This would be unprecedented in FIRE's experience, as it is common knowledge and practice that students and faculty use their university e-mail accounts for the widest possible range of expression. It does not even seem possible that the university could begin to enforce such an overbroad and vague rule—and certainly, if it did, the policy could only be enforced selectively.

The general use of one's e-mail account or network resources for teaching, research, creative activity, and service to the state and to society (the activities featured in Oklahoma's mission statement) *requires* the ability of students and faculty to freely engage as citizens in political commentary and debate. Hathaway's restriction against entire categories of protected speech, including such activity as "the forwarding of political humor/commentary," contradicts the university's mission as well as Oklahoma's legal obligations and general common sense.

The university's prohibition serves only to chill protected expression. In particular, the university's ban on forwarding "political humor/commentary" threatens clearly protected forms of expression such as satire. The Supreme Court has long held that political satire is entitled to constitutional protection, as demonstrated by its decision in *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988). In that case, the Court upheld the right of satirists and cartoonists to parody public figures even in a deeply offensive or distasteful manner. Oklahoma may not ban its students and faculty from simply forwarding political humor and commentary that might seem to favor one candidate over another—including even the most innocuous political cartoons. Under Hathaway's prohibition, students and faculty must constantly second-guess their e-mails, wondering whether or not expressing their political interests might cross the policy. Much speech that is entirely protected and in no way prohibited will simply disappear from the campus.

The university must clarify to its students and faculty, in no uncertain terms, that they are free to engage in political speech when using university e-mail accounts and network systems. FIRE hopes to resolve this situation amicably and swiftly. We will continue to pursue this matter, however, until the University of Oklahoma reaffirms the First Amendment rights of its students and faculty.

We request a response to this letter no later than 5:00 p.m. EDT on October 10, 2008.

Sincerely,



Adam Kissel
Director, Individual Rights Defense Program

cc:

Nancy L. Mergler, Senior Vice President and Provost, Norman Campus
Nicholas S. Hathaway, Executive Vice President and Vice President of Administration and Finance

Anil Gollahalli, Interim General Counsel of the University of Oklahoma, Cameron University
and Rogers State University; University Vice President for Technology Development
Chris A. Purcell, Executive Secretary of the University of Oklahoma Board of Regents, Vice
President for University Governance, and Secretary of the University of Oklahoma
Dennis Aebersold, Chief Information Officer and University Vice President for Information
Technology