Congressional Research Service
Informing the legislative debate since 1914

Legal Sidebar

Campus Protests, Federal Funding, and the First Amendment

June 28, 2024

Recent protests at college campuses regarding the Israel-Hamas conflict have gained nationwide attention, raising questions as to when authorities may, within the bounds of the First Amendment, take action to regulate speech or expressive conduct during campus demonstrations. According to at least one report, many protests have largely remained peaceful, but there have been some reports of incidents involving violence and destruction of property. Some Jewish students have also reported feeling "unsafe on campus" because of allegedly antisemitic messages on campus, while other media outlets reported that pro-Israel counterprotestors engaged in violent altercations with pro-Palestinian demonstrators.

Since Hamas led attacks against Israel on October 7, 2023, Congress has focused significant attention on reactions to the conflict from America's institutions of higher education, holding numerous congressional hearings and introducing legislation, for example, to combat antisemitic discrimination. With the recent rise of campus demonstrations over the conflict, some Members of Congress have announced investigations into antisemitism on college campuses and have held additional hearings on the issue. Some lawmakers have also expressed interest in legislative options to address the protest activity on campuses, with some proposals involving placing conditions on federal funding such as student financial aid. Other lawmakers have been more supportive of the protest activity, emphasizing "a long history" of students leading protests to demand change.

Although Congress has wide discretion to place conditions on the receipt of federal funds, the Supreme Court has held that funding conditions must respect constitutional limitations, and some constitutional provisions may act as an "independent bar to the conditional grant of federal funds." This concept means generally that a funding condition may not require or encourage the recipient to violate the Constitution. This Legal Sidebar provides an overview of this "unconstitutional conditions" doctrine and more specifically addresses when the First Amendment may invalidate a funding condition. This Sidebar also provides more information about the application of the First Amendment to campus protests, and highlights some considerations for Congress.

Unconstitutional Conditions Doctrine

The unconstitutional conditions doctrine "examines the extent to which government benefits may be conditioned or distributed in ways that burden constitutional rights or principles." A core principle of this

Congressional Research Service
https://crsreports.congress.gov
LSB11187

doctrine is that once the government has established a benefit, "[i]t may not deny [that] benefit to a person on a basis that infringes his constitutionally protected interests." The Supreme Court has reasoned that if the government could deny a person a benefit because of the person's exercise of constitutional rights, doing so would allow the government to "produce a result which [it] could not command directly." Courts have applied this principle in cases involving denials of tax exemptions, unemployment benefits, welfare payments, and public employment.

The Court has also applied the unconstitutional conditions doctrine to Congress's Spending Clause authority. The Court has recognized Congress's "broad discretion" in spending federal funds and has acknowledged that Congress may "further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives." As mentioned above, however, the Court has imposed limitations on funding conditions, holding that funding conditions may not violate an "independent constitutional bar." This limitation generally prohibits Congress from conditioning funds in a way that would require or encourage the recipient to violate the Constitution. For example, according to the Court, "a grant of federal funds conditioned on invidiously discriminatory state action or the infliction of cruel and unusual punishment would be an illegitimate exercise of the Congress' broad spending power." In these examples, the Eighth and Fourteenth Amendments would impose an "independent constitutional bar" to the funding condition.

Unconstitutional Conditions Doctrine and the First Amendment

The unconstitutional conditions doctrine is often invoked in cases involving funding conditions that restrict or compel expression. In these circumstances, the Supreme Court has generally upheld conditions that "define the limits of the government spending program—those that specify the activities Congress wants to subsidize," but it has invalidated conditions that "seek to leverage funding" to control speech "outside the contours of the [federal] program itself."

While this line is "hardly clear," decisions addressing the constitutionality of funding conditions may help illustrate the distinction. In *Rust v. Sullivan*, for example, the Court upheld regulations prohibiting family planning projects under Title X of the Public Health Service Act from engaging in certain expression regarding abortion. In the Court's view, the regulations did not amount to "suppress[ion]" of abortion-related expression, but instead prohibited grantees from "engaging in activities outside of the project's scope." The Court reiterated that the government may choose what speech it wants to subsidize when conditioning federal funds—at least within the contours of its own program.

By contrast, the Court held it unconstitutional for Congress to require the recipients of funding for global HIV/AIDs programs to have "a policy explicitly opposing prostitution and sex trafficking." The Court reasoned that the condition exceeded the program's scope because it forced grantees to "adopt—as their own—the Government's view on an issue of public concern," which necessarily required fidelity to that view inside and outside of the program.

Thus, when Congress attempts to generally regulate the expression of a recipient of federal funding rather than placing speech-related conditions on a particular program funded by the government, its condition is more likely to raise constitutional issues. Conditions that define the contours of a federal program may still violate the First Amendment, however, depending on the type or purpose of the program Congress is subsidizing. For example, *Legal Services Corp. v. Velazquez* involved a condition on federal funds appropriated to provide free legal assistance for indigent litigants in noncriminal proceedings. The condition prohibited the use of funds if the legal representation involved an effort to amend or otherwise challenge existing welfare law. Although the government argued the condition was an attempt to "define" the federal program, the Court held it unconstitutional because the funding program was "designed to facilitate private speech, not to promote a governmental message," and the condition at issue effectively allowed Congress to "define the scope of the litigation it funds to exclude certain vital theories and ideas."

Putting restrictions on the types of arguments lawyers could make, according to the Court, would undermine the traditional purpose of legal advocacy.

Campus Protests and the First Amendment

For the reasons discussed above, speech-related spending conditions proposed in response to the Israel-Hamas conflict demonstrations that are directed at college policies or federal student financial aid eligibility may trigger First Amendment scrutiny. In evaluating the constitutionality of a funding condition that restricts expression, a court may look to whether the condition "defines the limits" of the spending program, or whether it seeks to leverage speech outside the bounds of the federal program.

Conditions that define a federal funding program are more likely to comport with the Constitution. As *Velazquez* shows, however, there still may be limits on the government's ability to impose speech-related conditions that define the scope of a government program. Courts may strike down those conditions if, for example, they interfere with a medium that typically hosts the expression of many viewpoints.

Conditions outside the scope of a funding program may be more vulnerable to a constitutional challenge. One consideration in determining if a funding condition violates the First Amendment is whether Congress could impose the condition directly, that is, without attaching it to federal funds. In these instances, Congress may want to take into account the following principles when considering whether a funding condition complies with the First Amendment.

Conduct Versus Speech

An initial consideration in evaluating whether a law or regulation comports with the First Amendment is whether the law regulates conduct or speech, as the First Amendment only protects speech and some forms of expressive conduct. The Supreme Court has explained that restrictions on protected expression "are distinct from restrictions on economic activity or, more generally, nonexpressive conduct," and that the government may have more leeway in regulating commercial or nonexpressive conduct even if the conduct incidentally burdens speech.

The distinction between speech and conduct is sometimes hard to define because speech may occur during a course of conduct, and actions can sometimes be expressive or "symbolic." Courts look at whether a challenged law targets what a person must *do*, not what they may or may not *say*, and evaluate whether the intent of the law is to target expression. For example, in *Rumsfeld v. Forum for Academic and Institutional Rights*, the Court held that a condition requiring schools to provide equal access to military recruiters did not violate the First Amendment because it regulated conduct, not speech.

Questions about the speech versus conduct distinction may arise when crafting funding conditions that seek to regulate protest activity. While most protests are inherently expressive, the First Amendment generally does not protect unlawful conduct such as, for example, violence, assault, or vandalism. Moreover, there may be instances where speech may be considered discriminatory harassment in violation of federal antidiscrimination laws such as Title VI of the Civil Rights Act of 1964. (Potential applications of Title VI to allegations of antisemitism at schools are addressed in a separate Legal Sidebar.) In these instances, harassment must be so severe, pervasive, and objectively offensive that it deprives students of access to educational benefits or opportunities. Some courts have reasoned that laws that regulate harassment are, in general, laws that target conduct. The Supreme Court, however, has never clarified the boundary between protected speech and harassment that involves speech.

Forum Analysis and Time, Place, or Manner Regulations

The Supreme Court has emphasized the importance of free speech in college settings, considering it necessary to encourage a "marketplace of ideas" and to "safeguard[] academic freedom." As such, the

Supreme Court has recognized that a college campus resembles a "public forum," meaning that many areas on campus are open, at least to students, for expressive activity. In public forums, a public school's ability to restrict speech is significantly limited. Content-based (i.e., subject matter) restrictions on speech are generally unconstitutional unless they satisfy strict scrutiny, which requires the government to show the restriction serves a compelling state interest and is narrowly drawn to achieve that interest.

Due to the "special characteristics of the school environment," however, a public university may impose certain regulations on speech that are "reasonable" in light of the school's educational mission. According to the Court, a public school is not required to grant free access to its facilities, such as classrooms, nor does it have to make its facilities equally available to students and nonstudents. A public school may also reasonably regulate speech on portions of the campus deemed to be nonpublic forums (i.e., forums that have not traditionally been designed for or intentionally opened up for public speech), so long as the regulation is viewpoint neutral. In other words, a public school may exclude certain categories of speech within the forum it has created, but it may not discriminate on the basis of the "specific motivating ideology or opinion or perspective of the speaker" for the speech it has allowed within the forum.

The government may also impose "reasonable" time, place, or manner regulations in both public and nonpublic forums. These restrictions on when, where, and how speech is exercised are subject to intermediate scrutiny, which requires such regulations to be "narrowly tailored to serve a significant government interest" and leave open "ample alternative channels for communication of the information." Time, place, or manner regulations also must serve a purpose "unrelated to the content of expression," even if they have an incidental effect on some speakers or messages but not on others.

Public universities may use time, place, or manner regulations that are neutral toward the substance of speech to maintain public safety and to prevent disruption to the educational environment. Funding conditions that, for example, require institutions to institute reasonable time, place, or manner restrictions regarding campus demonstrations may pass constitutional muster so long as they do not target specific content or viewpoints and are not phrased using overbroad or vague terms (discussed below).

Unprotected Speech

As mentioned above, content-based regulations generally must pass strict scrutiny. In limited instances, however, content-based regulation is permissible, including regulations involving so-called "unprotected" speech. Unprotected speech includes incitement, fighting words, true threats, and speech integral to criminal conduct. The contours of these categories have changed over time, with many having been significantly narrowed by the Supreme Court. Although the speech within these categories is generally considered unprotected, it is not "invisible" to the First Amendment, which still places some limits on how the government may regulate in these areas.

By contrast, political and ideological speech are at the "core" of the First Amendment, and governmental interference with an "open marketplace" of ideas about political, economic, and social issues may frustrate the historical motivations for the First Amendment's protections. Thus, "hate speech," or speech that demeans a person because of a defining characteristic such as race or religion, is generally protected under the First Amendment unless it otherwise falls under one of the categories of unprotected speech (for example, if it includes a threat).

When considering funding conditions aimed at regulating "offensive" or "hateful" speech to address allegations of, for example, antisemitism on campus, Congress may want to consider limiting regulation to only areas of unprotected speech as defined by the Supreme Court. As mentioned above, while some speech may, in limited circumstances, rise to the level of harassment under federal antidiscrimination laws, speech directed toward others because of, for example, their race or religion, is generally protected under the First Amendment. Further, the Supreme Court has held that even when regulating unprotected speech, any restrictions may not be based on hostility or favoritism toward specific content or viewpoints. For example, a restriction on only antisemitic fighting words might not pass constitutional muster.

Vagueness and Overbreadth

The First Amendment also prohibits overbroad or vague regulations of speech, which may have the effect of inhibiting protected speech. A policy is overbroad if it permissibly regulates some speech, but also substantially restricts protected speech. The government, therefore, may regulate unprotected speech only by enacting policies that are sufficiently narrow and targeted toward the validly prohibited speech or expressive conduct. In addition, a policy is unconstitutionally vague when it is unclear what is prohibited or when it invites arbitrary or discriminatory enforcement. To avoid vagueness, policies must give clear warning as to what is prohibited. Overbroad or vague laws may "chill" protected speech, meaning people, out of caution, may choose not to speak because of a law's scope or lack of clarity.

For example, one federal court struck down a state law that sought to revoke state scholarship funds if a student participated in a "disorderly disturbance or coercive conduct directed against the administration or policies" of the state institution using means not protected by the state or federal constitution. The court viewed the law as unconstitutionally vague, observing that "substantial" deterrent effects of the statute's prohibitions could lead to chilling speech. Vagueness and overbreadth issues may also be relevant when considering funding conditions that require, for example, colleges to impose policies restricting protest activity or prohibiting "discriminatory conduct," discussed in this Legal Sidebar.

Considerations for Congress

In response to reports of protests on college campuses regarding the Israel-Hamas conflict, some Members of Congress have expressed an interest in developing legislation that could involve placing conditions on federal funds and benefits. A major source of federal funding for American colleges and college students comes from the Higher Education Act of 1965 (HEA), making this statute a potential avenue for conditioning federal funds in response to campus demonstration activity.

Several bills have been introduced in the 118th Congress that condition HEA funds in response to campus protest activity. For example, H.R. 8389 would amend the HEA to require institutions of higher education to report to the Secretary of Education each incident of antisemitism reported to campus security authorities. Another bill, S. 4295, would, among other things, make an institution ineligible for certain HEA funds if the institution failed to "disestablish" any permanent encampment on the campus where the occupants of the encampment attempted to interfere with a core function of the institution or obstructed students' ability to access the campus.

Other legislative proposals would condition financial aid or loan forgiveness eligibility based on conduct related to campus protests. For example, H.R. 8549 would prohibit any person convicted of an unlawful activity on or after October 7, 2023, on a college campus from being eligible for public service loan forgiveness, and S. 4302 would make students ineligible for financial aid if convicted of certain crimes.

Author Information

Whitney K. Novak
Legislative Attorney

Disclaimer