



Foundation for Individual Rights in Education

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January 5, 2012

Professor Michael D. Smith
Dean and Chief Academic Officer of the Faculty of Arts and Sciences
Harvard University
University Hall, Second Floor
Cambridge, Massachusetts 02138

Sent via U.S. Mail and Facsimile (617-495-8208)

Dear Dean Smith:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE; thefire.org) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of liberty, legal equality, freedom of religion, due process, freedom of speech, and academic freedom on America's college campuses.

FIRE is gravely concerned about the threat to freedom of expression posed by the decision of Harvard University's Faculty of Arts and Sciences (FAS) to remove from its course offerings all courses taught by a professor who had published an opinion piece in an Indian newspaper. Not only was the professor offered no opportunity to defend himself, face his accusers, or respond to the evidence brought against him, but he also was subjected to unique academic scrutiny simply because his political opinions brought him to the attention of FAS critics.

This is our understanding of the facts; please inform us if you believe we are in error.

On July 16, 2011, longtime Harvard Summer School economics professor Subramanian Swamy published an opinion piece in the Indian newspaper *Daily News & Analysis* in response to the July 13 terrorist bombings in Mumbai. The column makes several suggestions about how to "negate the political goals of Islamic terrorism in India," advocating that India "[e]nact a national law prohibiting conversion from Hinduism to any other religion," "[r]emove the masjid [mosque] in Kashi Vishwanath temple and the 300 masjids at other temple sites," and "declare India a Hindu Rashtra [nation] in which non-Hindus can vote only if they proudly acknowledge that their ancestors were Hindus."

In response, on August 12, 2011, led by Harvard professors Diana Eck and Ajantha Subramanian, about 40 people (almost all of them Harvard professors)

emailed a letter to Harvard Summer School Dean Donald H. Pfister, claiming incorrectly that “Swamy’s op-ed clearly crosses the line into incitement” and expressing concern twice about “the reputation of the university” due to Swamy’s employment by Harvard. The letter strongly implied that Harvard should fire Swamy because of the expression of his political views. In particular, the letter argued that Harvard should “review its appointment procedures” by holding “public figures” to a special standard, by eschewing appointments of people whose “reputation ... undermines Harvard’s own commitment to pluralism and civic equality,” and by privileging appointments that “enhance, rather than detract from, the reputation of the university.”

Pfister responded to the letter on August 19, 2011, repeating the following public statement, in relevant part as follows:

It is central to the mission of a university to protect free speech, including that of Dr. Swamy and of those who disagree with him. We are ultimately stronger as a university when we maintain our commitment to the most basic freedoms that enable the robust exchange of ideas.

Pfister added that “all decisions about course offerings are made in consultation with the Faculty.” Accordingly, at an FAS meeting on December 6, 2011, Eck proposed to remove Swamy’s courses from the summer school offerings for 2012. According to a *Harvard Magazine* article on December 7, Eck acknowledged that “it was unprecedented for the faculty even to discuss the course listing,” but nevertheless concluded that Harvard should have no relationship with Swamy because his speech had “commend[ed] an abrogation of human rights.”

As *Harvard Magazine* reported, Professor Sugata Bose argued in favor of Eck’s proposal at the FAS meeting, noting that “Swamy had not published in an economics journal for decades.” In response, Department of Economics Chairman John Y. Campbell replied that the department had acted correctly in approving Swamy’s courses:

Swamy had been at Harvard in the 1960s; was a legitimate, published economist; and received satisfactory ratings for his summer courses. Only one student even mentioned the op-ed article in reviewing Swamy’s course, and that student rated it favorably. The department had concluded that Swamy was a competent summer teacher, even if a younger and more academically current alternative might be preferable. The department, Campbell said, expressed its view that it would not take a collective position on academic freedom or on matters of speech, hate speech, or Harvard’s reputation—issues on which there were a wide range of views, in this case, within the department.

Speaking for the Faculty Council, which also had approved Swamy’s courses, Department of Philosophy Chair Sean Kelly stated at the FAS meeting that “We must balance the University’s identity as a protector of free speech, especially in a political context, with the University’s identity as a protector and promoter of diversity and tolerance.”

No other Summer School faculty members were scrutinized by FAS with regard to their publication record or their other academic and political appointments. Nor was any other faculty

member scrutinized by means of the odd balancing test stated by Kelly. Nevertheless, Eck's proposal passed, and Swamy's courses were removed from the Summer School offerings for 2012.

This action violates Swamy's free speech rights under FAS's strong and extensive promises of free expression to the Harvard community given in its "Free Speech Guidelines," adopted by FAS in 1990:

Curtailed free speech undercuts the intellectual freedom that defines our purpose. It also deprives some individuals of the right to express unpopular views and others of the right to listen to unpopular views.

Because no other community defines itself so much in terms of knowledge, few others place such a high priority on freedom of speech. As a community, we take certain risks by assigning such a high priority to free speech. We assume that the long-term benefits to our community will outweigh the short-term unpleasant effects of sometimes-noxious views. Because we are a community united by a commitment to rational processes, we do not permit censorship of noxious ideas. We are committed to maintaining a climate in which reason and speech provide the correct response to a disagreeable idea.

Members of the University do not share similar political or philosophical views, nor would such agreement be desirable. They do share, however, a concern for the community defined in terms of free inquiry and dissemination of ideas. Thus, they share a commitment to policies that allow diverse opinions to flourish and to be heard.

The action against Swamy stands in sharp and unflattering contrast to this admirable and appropriate understanding of the importance of freedom of expression in the academic community. If members of the Harvard community are given to understand that Harvard will fire them for the views they express—taking a side in any armed conflict, for example, or supporting a political figure or country that others believe has "abrogate[ed] human rights"—they likely will self-censor. Ultimately, Harvard will come to be seen as a place that people in important or influential positions must avoid. *These are precisely the results that a university dedicated to excellence and intellectual freedom must discourage.*

Further, the op-ed comes nowhere near the careful definition of unprotected "incitement" announced by the Supreme Court. According to the Supreme Court, for speech to be considered "incitement," it must be "directed to inciting or producing *imminent* lawless action and [be] likely to incite or produce such action" (emphasis added). *Brandenburg v. Ohio*, 395 U.S. 444 (1969). See also *Hess v. Indiana*, 414 U.S. 105 (1973) (holding that a protestor who shouted, "We'll take the fucking street later" was not guilty of incitement because his "threat" "amounted to nothing more than advocacy of illegal action at some indefinite future time.>").

While Harvard is not directly bound by First Amendment jurisprudence, such tolerant patience has much wisdom behind it. For example, former Supreme Court Justice Louis D. Brandeis, in

his concurring opinion in *Whitney v. California*, 274 U.S. 357, 375–76 (1927), described the appropriate response to “dangerous” speech:

Those who won our independence believed ... that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine ...

They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that *the fitting remedy for evil counsels is good ones*.

Fear of serious injury cannot alone justify suppression of free speech and assembly ... To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced ... [N]o danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehoods and fallacies, to avert the evil by the process of education, the remedy to be applied is more speech, not enforced silence. *Only an emergency can justify repression*. [Emphases added.]

Furthermore, FAS’s action violates Harvard’s policy against discrimination on the basis of “political beliefs.” Redefining Swamy’s stated political beliefs as “incitement,” and holding political figures such as Swamy to a special level of scrutiny in order to ensure that their political beliefs do not harm Harvard’s “reputation” or moral commitments, are impermissible and discriminatory actions.

In addition, FAS violated Swamy’s reasonable expectation of due process. FAS offered Swamy no opportunity to defend himself, face his accusers, or respond to the evidence brought against him. FAS members also subjected him to unique academic scrutiny because of his stated political views. If Harvard faculty members have sincere concerns about the demonstrated ability of the Summer School and the Department of Economics—over the course of decades—to hire appropriately qualified faculty, this action was a poor and impermissible way to encourage higher standards.

Finally, non-tenured faculty members do not have diminished free speech rights because of their employment status. Adverse employment action against a non-tenured faculty member, when that action is due to the faculty member’s protected expression, violates the faculty member’s rights. This includes, as here, decisions not to rehire perennial faculty members who have a reasonable expectation of being rehired. See *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*,

429 U.S. 274, 283 (“[A teacher’s] claims under the First and Fourteenth Amendments are not defeated by the fact that he [does] not have tenure.”); *Mabey v. Reagan*, 537 F.2d 1036, 1045 (9th Cir. 1976) (“Initially, our concern is to guard the rights of the terminated instructor. But, more importantly, we examine alleged First Amendment violations because of their potential chill on others, especially those situated like the complainant. Although a person’s tenure status is irrelevant to the First Amendment inquiry (*Perry v. Sindermann* (1972) 408 U.S. 593, 597–98, 33 L. Ed. 2d 570, 92 S. Ct. 2694), our close examination is particularly appropriate where, as here, **a complex of reasons may as well mask an unlawful motive as legitimately motivate a refusal to rehire ...**”) (emphasis added). Again, while Harvard is not a public institution and thus is not directly bound by the First Amendment, Harvard’s promises of free speech rest squarely on the reasoning underlying this jurisprudence. Indeed, it would no doubt come as a great shock and disappointment for Harvard faculty members to realize that their expression enjoyed far less protection than that of their peers at Bunker Hill Community College.

FIRE requests that Harvard University reinstate Swamy’s courses and reinstate Swamy as their instructor. To preserve academic freedom and freedom of expression, to mitigate the severe chilling effect on faculty expression caused by FAS, and to uphold Harvard’s commitment to nondiscrimination, no less is required. Should FAS fail to do so, senior Harvard administrators need to balance Harvard’s interest in faculty governance against its moral and legal obligations and may well need to intervene.

We ask for a response to this letter by January 19, 2012. Thank you for your prompt attention to this matter.

Sincerely,



Adam Kissel '94

Vice President of Programs

cc:

Robert D. Reischauer, Senior Fellow, President and Fellows of Harvard College

Drew Gilpin Faust, President, Harvard University

Nina Zipser, Dean for Faculty Affairs, Faculty of Arts and Sciences, Harvard University

Donald H. Pfister, Dean, Harvard Summer School, Harvard University

Michael Shinagel, Dean of Continuing Education and University Extension, Harvard University

Harvey A. Silverglate L'67, Chairman of the Board, FIRE

Subramanian Swamy