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Gentlemen:

This is in response to a request by the Board of Visitors that this Office review the resolution passed last week, imposing new restrictions on speech and assembly at Virginia Tech, but making those restrictions contingent upon a decision by the Attorney General that they comply with the law.[1] It is our opinion that the new regulation violates fundamental rights to assembly and speech as protected by the First Amendment.

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1 The resolution in question reads as follows:

> Be it resolved: No person, persons or organizations will be allowed to meet on campus or any facility owned or leased by the university if it can be determined that such persons or organizations advocate or have participated in illegal acts of domestic violence and/or terrorism. All requests for meetings will be submitted for approval to the President of the university at least 30 days in advance. The President will have final decision-making power to determine who can meet on university property.
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> The resolution was passed "contingent upon receiving a written ruling by the Attorney General of the Commonwealth of Virginia as to whether the proposed policy complies with existing law."

There are several reasons why this regulation is constitutionally flawed. Among them are the following:[2]

First, while the sweep of the new regulation may be broader than intended, its .text is nevertheless clear. The regulation is not limited to outside speakers or even to the use of meeting rooms. It also applies to faculty and students and to the use of all locations on campus, including common areas where members of the university community often gather for informal discussions. This goes too far. *See, e.g., Widmar v. Vincent,* 454 U.S. 263, 268 n.5 (1981) ("students enjoy First Amendment rights of speech and association on the campus...[and] denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes must be subjected to the level of scrutiny appropriate to any form of prior restraint.").

Virginia Tech may, of course, establish reasonable time, place, and manner regulations governing the use of its facilities. *Id.* at 276. However, the kind of regulations that are reasonable must be determined by examining "[t]he nature of a place [and] the pattern of its normal activities." *Id.* at n.19 (internal quotation marks and citations omitted). A regulation that imposes such a sweeping limitation on the ability of students and faculty to gather in the common places of a public university cannot be considered reasonable. By requiring advance approval for such meetings, the regulation constitutes an unconstitutional prior restraint. *See, e.g, Near v. Minnesota,* 283 U.S. 697 (1931) (discussing historical origins of constitutional prohibition against prior restraints).

Second, even if the new regulation were limited to outside speakers, it would still be invalid. The regulation does not simply ban those wishing to advocate illegal acts of domestic violence or terrorism. It also prohibits use of university facilities by those who "have participated" in such acts in the past, regardless of whether the proposed meeting is intended to condone or condemn such activity or to talk about some entirely different topic. While the university has authority to impose reasonable limits on access to its facilities by outside speakers, the sweeping limitation contained in the regulation seems unrelated to any legitimate interest the university might assert.

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[2] While the regulation may also be subject to other constitutional objections, the problems discussed here should be sufficient to demonstrate that it may not be implemented.

Third, even if the new regulation were limited to outside speakers wishing to advocate illegal acts of domestic violence or terrorism, the regulation would still run afoul of current Supreme Court jurisprudence. In *Brandenburg v. Ohio,* 395 U.S. 444 (1969) (*per curiam*), the Supreme Court ruled that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action," *Id* at 447. The Court went on to say,

> [T]he mere abstract teaching ... of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action …. A statute which fails to draw this distinction impermissibly intrudes upon the freedoms guaranteed by the First and Fourteenth Amendments. It sweeps within its condemnation speech which our Constitution has immunized from governmental control.

Id. at 448.

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