

“The University, the Constitution, and the Ends of Academic Excellence”

Phi Beta Kappa Society Oration

MIT

June 8, 2017

Initiates, parents, colleagues, students: I am immensely honored to be able to address you today, all the more so as I am an outsider to this august Society. August and, I must also say, somewhat mysterious. It was only quite recently that I learned of the origins of Phi Beta Kappa (PBK) as a secret society. And though many aspects of that clandestine tradition were allowed to fade away over the course of the nineteenth century, there is at least one PBK custom that remains shrouded in mystery. I am no Sherlock Holmes, but I made a number of efforts to discover the nature of the traditional handshake employed in your initiation ceremony. I began by asking an esteemed colleague of mine on the MIT faculty who is very familiar with PBK customs to reveal the secret gesture to me: he somewhat politely refused to do so. I then became even more curious, and eventually took to the Internet to conduct a Google search, using the query “What is the secret Phi Beta Kappa handshake?” The most promising search result was the University of Richmond (Virginia) PBK website, which has a page

that features a link to “a brief description” of “the (not so) secret handshake” known as the “ancient grip of the fraternity.”¹ “Ah hah!” I exclaimed with smug self-satisfaction. But when I clicked on the link, I arrived only at an “HTTP 404” error message indicating that the page was no longer (if it had ever been) operational. Not one to give up easily, I then searched the online manual for PBK faculty and staff volunteers, but the suggested “Form of Initiation” that appears there describes only one of the two “secret” signs that are shared with initiates, and it is not the handshake.² There are some online photos of the 2016 MIT PBK initiation ceremony that show my colleague Anne McCants and one of last year’s initiates engaging in a mysterious gesture with their hands, but I can’t quite make out the details.³

So something of this clandestine legacy survives in 2017, and if you poke around a little in the history of the Society, going all the way back to 1776, you learn that this was not secrecy for its own sake, but secrecy for a purpose, a higher calling: it was so that you, the members of PBK, would have the freedom to

¹ See <https://urphibetakappa.wordpress.com/2013/04/15/the-not-so-secret-handshake/>.

² Phi Beta Kappa, “Manual for Chapter Officers,” sect. III-B, pp. 9-10, at https://www.pbk.org/web/PBKDocs/Officers+Manual_09.pdf.

³ See <https://www.flickr.com/photos/great-ideas/sets/72157667091217103>.

discuss any topic you choose.⁴ In other words, it was a kind of libertarian vision, first developed in a time of revolution.

With or without the security of a clandestine retreat, most of us in the United States, and perhaps especially those of us who live and work in American university communities, feel, correctly, that we do indeed have the freedom to discuss any topic we choose. But one of the great constitutional controversies of the moment involves whether we, the citizens of the university, also have the freedom to discuss those topics with anyone we choose. It is the topic I want to discuss with you today, and I want to do so with reference to the much-contested travel ban that our new President imposed earlier this year, and whose constitutionality is now being tested in the federal courts, with a much-anticipated showdown before the Supreme Court expected sometime later this year.

Rather than litigate before you the pros and cons of this policy, however, I want to use the storm over the travel ban as a way of thinking about what the university is, what it tries to do, and what it might be in the process of becoming – and I hope that in thinking about the university in this way we might also,

⁴ Richard Nelson Current, *Phi Beta Kappa in American Life: The First Two Hundred Years* (New York: Oxford University Press, 1990), 84.

indirectly, be able to learn something about what societies like PBK are, what they try to do, and what they might become. The answer has something to do with what we call academic excellence, but what academic excellence is, why we value it, and what conditions are conducive to its flourishing are questions that seem increasingly difficult to answer even as the conventional metrics of academic excellence tell us that we have more and more of it with every passing year (as in the number of high school seniors with stellar SAT scores and GPAs, for example).

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Let me set out by having another look at our opening question: do you have the freedom to discuss whichever topic you choose with anyone you choose? Where PBK itself is concerned, we don't need to invoke the current political climate in order to see that the answer to this question is an emphatic no! By the very nature of PBK as an honor society, you are constrained both in what you can say and with whom you say it.

Consider the "who" dimension of this first. Membership in PBK is determined not by the democratic vote of its members but by a faculty committee that assesses your academic standing in the liberal arts and sciences (with a special emphasis at MIT's chapter on the liberal arts). You are chosen from among a subset (roughly 10%) of the graduates of this university, which is, in

turn, part of an exclusive subset (roughly 10%) of all colleges and universities in the United States. So, already, on this day of your initiation, a number of boundaries have been drawn around you. You belong now to a group that is defined by its apartness from the rest of the world. You are an “honor” society, committed to academic excellence, and governed by a distinctive charter and a set of rules.

In itself, this is nothing unusual or even particularly problematic, for all groups have membership rules of one kind or another, and as membership policies go, yours is an admirable one. The contemporary American university, particularly our more elite universities, such as MIT, are themselves predicated on a similar set of boundaries: they invite into their midst persons who have already attained rarified levels of academic excellence by the age of 16, and they have, since their birth in the High Middle Ages, organized themselves as corporations, just as PBK is a corporation, a federally registered 501(c)(3) that has operated under Internal Revenue Service rules since 1951.

The 501(c)(3) part is important, for it imposes a second, more substantive limit on your freedom to discuss: this is the “what” part. 501(c)(3) status means that, contrary to the terms of its charter, PBK as an organization may not engage in certain forms of speech. In exchange for federal tax exemption, a 501(c)(3)

must be a “religious, educational, scientific, literary” or similar organization, may not allow any earnings to inure to any private individual, and may not engage in either lobbying or political campaigning. These restrictions may not sound like much of a burden in the PBK context, but as I learned some years ago while litigating a federal tax fraud case on behalf of a Boston-based Muslim charity, they can have some very sharp teeth where national security concerns are at issue.

National security and free speech have had a very close, if generally antagonistic, relationship since at least the time of the initial development of modern First Amendment law in the crucible of the First World War (indeed the conflict begins as early as the Alien and Sedition Acts of 1798).⁵ The ongoing controversy over the Trump administration’s travel ban is the latest chapter of this story, which has however taken two important, if not entirely novel, turns in recent months. One is that the terrain of constitutional resistance to executive action in 2017 has shifted from free speech to the religion clauses of the First Amendment. (As you know, the First Amendment contains several different and not always harmonious clauses: a clause barring Congress from making a law

⁵ See generally Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime, from the Sedition Act of 1798 to the War on Terrorism* (New York: W.W. Norton, 2004).

respecting an establishment of religion, or prohibiting the free exercise thereof; another guaranteeing the freedom of speech and the press; and another protecting the people's right to assemble and petition the Government for a redress of grievances.) Thus the plaintiffs in the various federal cases brought against the travel ban have invoked the establishment clause to argue that barring travel from six or seven countries identified with Islam – Iran, Libya, Somalia, Sudan, Syria, Yemen, and (in the first version of the order) Iraq – amounts to an act of religious intolerance and discrimination. Both sides to the dispute seem to be positively spoiling for a fight over this establishment clause claim, which the Trump administration argues must fail in the face of the President's authority under the Immigration and Nationality Act to exclude from the country any class of persons that he deems a risk to the national security.

A second relatively novel development is what we might call academic standing, by which I mean not your GPA but the ability of an institution of higher learning to pursue claims about the public good in a court of law.⁶ The litigation over the travel ban has expanded beyond the usual parties – the Government on the one side, individuals and civil liberties organizations on the other – to include

⁶ Cf. Adam MacLeod, "Universities as Constitutional Law Makers (And Other Hidden Actors in Our Constitutional Orders)," *Journal of Constitutional Law Online* 17, no. 1 (Oct. 2014): 1-15, at http://scholarship.law.upenn.edu/jcl_online/vol17/iss1/1.

a set of institutions not typically found at the forefront of constitutional struggle: universities and colleges. As the various lawsuits filed around the country have unfolded, a number of state university systems have taken the lead, including the University of Massachusetts, the University of Washington, and the University of Hawaii. There is no reason why only public (as opposed to private) universities should be playing this role; a number of private universities, including MIT, have filed *amici* (or friend of the court) briefs in almost all of the cases. What makes the state university systems especially visible is that several states, through their attorneys general, have either brought their own complaints in the federal courts or have moved to intervene in one of the existing cases. As they have done so, the very first question these states have had to confront, long before they can say anything about the establishment clause or any other substantive claim, is the issue of standing.

So it turns out that standing is a key part of the answer to why American universities are taking an unusually proactive role in the fight over Executive Order 13780. A common stumbling block in the way of civil rights and civil liberties litigation, standing is the question of who is entitled to bring suit. And who can sue in American courts is basically a matter of who has a concrete injury that is particular or specific to her and that can be remedied by a court order of

some kind. In one of the earliest rulings on the travel ban, Judge Robart of federal court in Washington state held that “the States themselves are harmed by virtue of the damage that implementation of the Executive Order has inflicted upon the operations and missions of their public universities and other institutions of higher learning.”⁷ Upholding Judge Robart’s temporary restraining order, the 9th Circuit Court of Appeals ruled in February of this year that under the so-called third party standing doctrine, the injuries to the teaching and research missions of the state universities “give the States standing to assert the rights of the students, scholars, and faculty affected by the Executive Order.”⁸ This endorsement of academic standing to challenge a federal policy has undergirded the recent litigation in the 9th Circuit, which has since come to center on a Hawaii federal court’s order blocking the two principal provisions of the revised travel ban (the 90-day moratorium on travel to the U.S. by the nationals of six Muslim-majority countries, and the 120-day suspension of new refugee resettlement).

So important is the academic standing issue that a group of environmental law professors has filed a somewhat unusual *amicus* brief “in support of neither

⁷ Temporary Restraining Order, *Washington v. Donald J. Trump*, No. C17-0141JLR (W.D. Wash. Feb. 3, 2017), at **4-5.

⁸ Per Curiam Order, *Washington v. Donald J. Trump*, No. 17-35105 (9th Cir. Feb. 9, 2017), at **10-11.

party” with the 9th Circuit, which, although claiming to be neutral on the merits of the lawsuit, embraces Hawaii’s right to prosecute the interests of its state university.⁹ That brief makes clear that the fate of the travel ban will depend in significant part on how the Supreme Court interprets a handful of its own rulings permitting states and environmental organizations to challenge the federal government’s failure to enforce EPA regulations protective of the environment.

Now if you suspect that the federal courts sometimes nudge standing law this way or that way in order to permit or defeat substantive claims to which they are either sympathetic or opposed, you are probably not far off from the truth. Like the law more generally, standing is not a mechanical science. And a cynic might well regard the reliance on academic standing in the travel ban cases as a tenuous effort to overcome a difficult procedural hurdle. Not just in this context but more generally, the standing doctrine seems to invite litigants to manufacture claims of injury that seem contrived at worst and ethically ambiguous at best. Thus, one of the standing allegations in the 4th circuit case is that the Middle East Studies Association, a plaintiff in that case, bodes to lose \$18,000 in registration fees owing to reduced attendance by Middle Eastern scholars at its annual

⁹ Motion for Leave to File Brief of Amici Curiae Law Professors in Support of Neither Party, *Hawai’i v. Donald Trump*, No. 17-15589 (9th Cir. Apr. 21, 2017).

meeting.¹⁰ This sounds very far indeed from the lofty language of equal protection and speaking out against religious discrimination. But these kinds of assertions are baked into the technical logic of standing doctrine, which tries to weed out claims based on a “mere” sense of outrage that an injustice has been done.

The actual *amici* briefs filed by universities in the travel ban litigation makes clear, moreover, that their stake in this issue is not a matter of self-interest in the narrow sense, as in foregone conference revenues. Drafted not by academics but by lawyers in private practice, these documents assert the institutional self-interests of America’s elite universities, but they also try to ground those interests in an idealistic vision of American intellectual life. That ambiguity can itself help us to see what kind of institution the university imagines itself to be in relation to the travel ban, because the university, like the nation-state, is a kind of imagined community, to borrow the canonical phrase that Benedict Anderson coined for the title of his well-known study of nationalism.¹¹ Put differently, and more

¹⁰ *International Refugee Assistance Project v. Donald J. Trump*, No. 17-1351 (4th Cir. May 25, 2017), at **25-26.

¹¹ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, rev. ed. (London: Verso, 2016).

simply, the travel ban is helping to define what the contemporary American university is.

That imagined community is expressed in terms of two different dialects: there are numbers and there are values. We might say that the numbers correspond to the institutional self-interests, whereas the values serve to ground those interests in a larger vision – indeed a global vision – of the Republic of Letters (to use a phrase associated with the *philosophes* of the eighteenth-century Enlightenment). On the numbers side, the *amici* briefs rattle off an impressive list of demographic figures, most notably the percentage of foreign scholars and students at many of America’s top universities. MIT heads the list with more than 40% of its faculty consisting of international appointments; Princeton is 30%, Chicago 24%, Yale 10%, Cornell about 4%. The student figures are equally dramatic though there is a big difference the undergraduate and graduate populations: somewhere between 10 and 15% of undergraduate student bodies at elite American universities are foreign, and generally between 40 and 50% of graduate students come directly from abroad.¹²

¹² Brief of Amici Curiae Colleges and Universities in Support of Appellees, Donald J. Trump v. International Refugee Assistance Project, No. 07-1351 (4th Cir. Mar. 31, 2017), at **6-7.

These are indeed striking demographic facts, and they help to explain why the university briefs do not rest with a narrower statement of the numbers of students and faculty who actually come from the six countries identified in the revised executive order (in case you're curious: in MIT's case at least, 56, including both degree and non-degree students). The numbers both reflect and reinforce the values that inform the academic challenge to the travel ban, but these values do not themselves depend on how many Syrian students are enrolled at Dartmouth College or UCLA. The *amici* briefs speak a language of the global, of openness to the other, of bilateral engagement between international actors and Americans that leaves us with a revealing self-portrait of the elite American university circa 2017.

A recent book on the fate of American political culture bears the title *Are We Rome?*, and one can be forgiven for detecting a benign note of imperial identity in the descriptions of institutional mission with which the briefs open, replete as they are with references to "the world" and "the global." As one of these briefs observes, "[w]hile each amicus is located in the United States, amici's mission and reach are truly global: they educate, employ, conduct research, and

collaborate with students, faculty, and scholars from all over the world.”¹³ An early modern historian like myself might hear the echoes of a Jesuit commitment to bringing the spiritual benefits of formal education to the non-Christian world in this language, as in the statement that “by studying in the United States, these international students, faculty, and scholars gain a greater understanding of and appreciation for the values we hold dear, including democratic principles, respect for the rule of law, and the values of tolerance and human rights, which they may then bring to their home countries.”¹⁴

I don’t want to overstate that point, because the briefs also make clear that international students make important contributions of their own – intellectual, cultural, economic – to American campus communities and to the United States more generally. It is hard not to come away from these documents with a compelling sense of the importance of cross-border movement and communication to the work of the university, and all of us in this room have reason to rejoice at the vision of a cosmopolitan Republic of Letters that it entails.

¹³ Brief of Brown University et al., *Darweesh v. Donald Trump*, No. 1:17-cv-00480 (E.D. N.Y. Feb. 13, 17), at **2-5 (quotation at 5).

¹⁴ *Id.* at 5.

But it should only serve to strengthen the legal claim to note that this vision has much deeper roots in the past than the university briefs suggest.

The academic requirement of openness is in fact a very old one, and arguably defines the university as such. As Kenneth Minogue has observed, the earliest major universities of continental Europe, founded mostly in the twelfth century, were organized in terms of “‘nations’ of students, subordinate corporations within a university” that was set “apart from the intense localism of the cities ... and the feudal countryside.” The medieval university, Minogue writes, was “an entirely international society” in which students and teachers moved “with entire freedom, being marked neither in their actions nor in their writings by any very evident national or regional individuality.”¹⁵ And this medieval continental tradition, I would add, had its counterpart in the Islamic world, where learning was transmitted by means of a certificate (or *ijaza*) system that required students (in Albert Hourani’s words) “to go from one teacher to another, in one city after another,” from what is now Morocco in the West to Iraq, Iran, and Afghanistan in the East, in accordance with the hadith (or saying) of

¹⁵ Kenneth R. Minogue, *The Concept of a University* (Berkeley: University of California Press, 1973), 19.

the Prophet Muhammad that “enjoined Muslims to seek learning wherever it was to be found.”¹⁶

These traditions bring into focus the ethic of open borders that is evoked in the university briefs, which do not celebrate openness and diversity for the sake of openness and diversity, but openness and diversity for the sake of better learning and deeper knowledge. One does not undergo the risks of travel along the unpaved route from Tunis to Cairo or Baghdad in the 12th century without the promise of extraordinary intellectual and spiritual gain. For the university, the goal must always be academic excellence, and not surprisingly that is the ultimate rationale set forth in the academic case against the travel ban.

Whether the assertive stance of American universities in this controversy may translate into academic leadership in other areas of public law contestation is an important question. The environment and climate change suggest one context where such leadership may be possible and effective. But rather than speculate on how these developments may play out in the future, let me note two caveats. One is that, although most of us in the 02138 and 02139 zip codes care not a whit for which passport one carries, many Americans do care about

¹⁶ Albert Hourani, *A History of the Arab Peoples* (Cambridge, MA: Belknap Press of Harvard University Press, 1991), 164.

that issue, and their views, which reflect the nineteenth-century tradition of patriotic devotion to the sovereign nation-state, are entitled to some weight. We should acknowledge the place of that perspective, if for no other reason than the risk of a backlash against a perceived excess of university activism in the public law arena. The experience of anticommunist repression of American scientists who assumed outspoken political roles during the Cold War suggests that this risk is not an imaginary one.¹⁷ This does not mean that speaking up is a bad idea, only that it has costs as well as benefits, and that in speaking up we should always attend carefully to what an opposing perspective has to tell us.

A second and related caveat has to do with the issue of academic neutrality at the institutional level. It is one thing for an MIT professor to speak up, quite another for MIT to speak in the name of MIT. Neutrality is a corollary of the requirement of openness that defines the university. As Geoffrey Stone puts it, “[f]or universities to promote academic freedom, they cannot themselves participate in the debate.”¹⁸ Unless, of course, the debate is about the possibility and the terms of academic freedom itself, in which case, I would argue,

¹⁷ Jessica Wang, *American Science in an Age of Anxiety: Scientists, Anticommunism, and the Cold War* (Chapel Hill: University of North Carolina Press, 1999).

¹⁸ Geoffrey Stone, “A Brief History of Academic Freedom,” in *Who’s Afraid of Academic Freedom?*, ed. Akeel Bilgrami and Jonathan R. Cole (New York: Columbia University Press, 2015), 9.

universities can and must roll up their sleeves and get their hands a little dirty. Whether climate change, for example, is also an issue that strikes at the core mission of a university is a matter for another occasion, and one that may depend on the nature of the particular university in question.

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Let me close by circling back to my opening questions. Do you have the right to discuss whatever subject you choose with whomever person you choose? And just what is academic excellence, after all?

In daily life, we find that, in fact, the right to discuss any and all things with any and all persons, if it is a right, is rarely exercised in the absolute spirit with which it might be proclaimed. We live with all kind of boundaries and delimitations, we close ourselves off in all sorts of ways: yes, by way of national policies, sometimes, including membership policies like immigration and naturalization rules; yes, by virtue of the organization of our universities and our honor societies, sometimes – but, also, sometimes by the limits of our own imaginations and sense of courage, regardless of our place inside or outside the university, inside or outside the honor society. So however the travel ban is

resolved inside or outside the courts,¹⁹ let's remember that our imaginations are sovereign powers too, that the university is a special place within which to exercise those imaginations because of the constellation of minds and issues and resources that it brings together, but that you can and must continue to exercise that imagination beyond the walls of this relatively porous institution, in keeping with the mandate of this Society to champion freedom of thought, to vindicate the right to discuss any topic you choose.

What I have learned in thinking through this subject with you today is that this freedom is in fact the core of academic excellence, if only we are willing to exercise it and to exercise it wisely. More than mastery of a given subject or proficiency in a particular language, it is this quality – the willingness to raise the difficult question, the question no one has thought to raise before (perhaps because it seemed either too obvious or too challenging), and to be willing to look for answers in all corners of the world (even when they seem like dangerous or impoverished or small or remote places far from the imperial metropole), using all the available tools and disciplines (whether in the sciences or the liberal arts) – it

¹⁹ On June 26, 2017, the Supreme Court temporarily permitted enforcement of the Trump administration's travel ban against foreign nationals with "no connection to the United States at all," pending oral argument and a final decision on the merits in fall 2017. *Donald J. Trump v. International Refugee Assistance Project*, 582 U.S. ____ (2017), at *11.

is this quality that defines what we mean by academic excellence. Academic excellence, in other words, is first and foremost about keeping an open mind, being willing and able to change direction when the need arises, and retaining a sense of humility in the face of all that we do not know. How do we do that? At least in part by being willing and able to find interlocutors in unexpected places – by keeping in mind that freedom of inquiry involves both a commitment to all subjects and questions and a commitment to all interlocutors, above all those who seem different from us, different even in ways that can seem threatening or destabilizing to our sense of self.

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I congratulate you and your families on this day, and especially on tomorrow. I wish you many days, months, and years of discussing whatever topics you choose with whomever you choose. And I am grateful to you for reminding me that we will all need to do our part to bring that ethic to bear on the problems of our various communities, local, national, and global.