White House Explains to Haaretz How Its anti-Semitism Executive Order Will Work in Practice

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The White House is pushing back against criticism of its new executive order on anti-Semitism, specifically with regards to accusations that it will harm free speech on U.S. campuses.

The executive order [was signed by President Donald Trump last week](https://www.haaretz.com/us-news/.premium-hanukkah-comes-early-at-white-house-as-trump-signs-anti-semitism-executive-order-1.8259863) and has drawn strong praise from leading mainstream Jewish-American organizations, [but also criticism](https://www.haaretz.com/us-news/.premium-trump-s-anti-semitism-executive-order-draws-mixed-reactions-from-jewish-community-1.8256080) from the American Civil Liberties Union and from several progressive Jewish groups.

The first wave of criticism focused on media reports that characterized the executive order as redefining Jewishness as a nationality. That description was not based on the order’s actual text, which states that Title VI of the Civil Rights Act of 1964 – which prohibits federal funding of institutions that discriminate against a person or a group based on nationality, race or color – will also include anti-Semitism.

The main reason for the “Jewishness as nationality” interpretation was because Title VI does not apply to religious groups. However, the U.S. government has been treating [anti-Semitism](https://www.haaretz.com/misc/tags/TAG-anti-semitism-1.5598882) as a form of discrimination that falls under Title VI for more than a decade, thanks to decisions taken by government agencies during the presidencies of [George W. Bush](https://www.haaretz.com/misc/tags/TAG-george-w-bush-1.5606872) and [Barack Obama](https://www.haaretz.com/misc/tags/TAG-barack-obama-1.5599045).

[Jared Kushner](https://www.haaretz.com/misc/tags/TAG-jared-kushner-1.5606881), Trump’s son-in-law and senior adviser, played a key role in getting the president to sign the executive order. He rejected that interpretation [in a New York Times Op-Ed published last week](https://www.nytimes.com/2019/12/11/opinion/jared-kushner-trump-anti-semitism.html). “When news of the impending executive order leaked, many rushed to criticize it without understanding its purpose,” Kushner wrote. “The executive order does not define Jews as a nationality. It merely says that to the extent that Jews are discriminated against for ethnic, racial or national characteristics, they are entitled to protection by the anti-discrimination law.”

The confusion over the nationality issue wasn’t limited only to the executive order’s critics but also to some of its supporters. Brooke Goldstein, executive director of The Lawfare Project – an organization that uses lawsuits to fight the movement to boycott Israel and the settlements in the occupied territories – praised Trump for a “groundbreaking executive order that acknowledges Judaism as a nationality – not just a religion.”

The White House battled these interpretations following the initial news reports about the executive order, and the criticism lessened once the full text became available. (It was first published by journalist Jacob Kornbluh [in Jewish Insider on December 11](https://jewishinsider.com/2019/12/exclusive-a-first-look-at-the-language-of-trumps-executive-order-on-antisemitism/).)

The executive order refers to the IHRA working definition as “non-legally binding,” and says that when trying to determine whether a certain action is anti-Semitic, the U.S. Department of Education should “consider” this definition.

In addition, the executive order says the Department of Education should consider the “contemporary examples” of anti-Semitism that are part of the IHRA definition. These are what critics of the executive order are most concerned about.

The list of examples published by the IHRA includes examples that are indisputably anti-Semitic – such as denying the facts of the Holocaust or calling for the killing or harming of Jews. Several examples, however, describe criticism against Israel. One such example is “applying double standards by requiring of [Israel] a behavior not expected or demanded of any other democratic nation.” Another example is comparing “contemporary Israeli policy” to that of Nazi Germany.

These two specific examples are part of the political discourse within Israel itself, and are not limited to one side of the Israeli political divide. It is common for Israeli politicians to say that because Israel is a Jewish state, for example, it should be a “light unto the nations” and demand of itself higher standards than other countries.

As for comparisons with Nazi Germany, they have been made over the years by political figures from both the Israeli right and left, usually against each other, but also against state institutions such as the police and the military.

Haaretz asked the White House how these “contemporary examples” would, in practice, impact universities that receive federal grants from the government. Could, for example, a university lose federal grants if a student complained about a professor or guest lecturer saying in the classroom that something Israel did is reminiscent of actions taken by Nazi Germany? And could it lose funding over an event that supports an Israeli withdrawal from the occupied territories – something a right-wing Jewish organization could describe as “requiring of [Israel] a behavior not expected or demanded of any other democratic nation”?

Avi Berkowitz, a close adviser to Kushner and heavily involved in working on the executive order, says the answer is no. “A complaint against a lecture as you describe would not trigger Title VI,” he says. “In order for Title VI to apply, there has to be actionable conduct. Title VI requires a certain level of conduct, and the executive order does not change that requirement. The lecture remains protected speech.”

In other words, the Department of Education would not respond to a complaint about a statement alone. It would only respond to complaints about “actionable conduct” – meaning an action that could count as discrimination.

“The executive order is relevant if there is conduct that rises to the level of possible discriminatory action and the university needs to determine motive,” Berkowitz says. “For example, let’s say a Jewish group, like Hillel, wants to reserve rooms for meetings but the administrator repeatedly refuses, so they can’t meet and they suspect there is something underhanded about the process. They file a complaint. If during the investigative process it is discovered that the administrator has written emails saying that he/she would never reserve rooms for Jews, and that email includes anti-Semitic reasons, these emails may be relevant to show whether the conduct had a discriminatory motive, which is necessary for Title VI to apply.”

**Intimidation technique**

Prof. Kenneth Stern has been one of the executive order’s leading critics. He was previously the American Jewish Committee’s expert on anti-Semitism and is currently director of a program on hate at Bard College in New York. Following the executive order’s publication last week, [he wrote an article in The Guardian](https://www.theguardian.com/commentisfree/2019/dec/13/antisemitism-executive-order-trump-chilling-effect) warning about the threat it will pose to freedom of speech on campuses.

Stern explained that he was personally involved in writing an earlier anti-Semitism definition that was the basis for the 2016 IHRA definition. That definition, he wrote, was meant for the purpose of data collection and research. “It was never intended to be a campus hate speech code, but that’s what Donald Trump’s executive order accomplished this week. This order is an attack on academic freedom and free speech, and will harm not only pro-Palestinian advocates, but also Jewish students and faculty, and the academy itself.”

Stern also wrote: “If you think this isn’t about suppressing political speech, contemplate a parallel. There’s no definition of anti-black racism that has the force of law when evaluating a Title VI case. If you were to craft one, would you include opposition to affirmative action? Opposing removal of Confederate statues?”

Speaking with Haaretz this week, Stern says he is concerned that right-wing Jewish organizations will use the executive order to “go after people they disagree with,” using the IHRA definition to accuse people of anti-Semitism for political reasons. He compares that to a trend on the political left in the United States to “come and tell universities, ‘We need a safe space to protect us from ideas we disagree with.’ That’s not a good thing, and now the Jewish right-wing will try to do the same, basically saying: ‘Protect us too.’”

In response to the same question Haaretz presented to the White House – Could a university lose funding over something said in class by a professor? – Stern says he could not rule it out completely, but it’s not very likely.

The main problem, in his view, is that “you’re going to have groups on the right using this to try and intimidate the universities – because even if they file a complaint knowing there’s a 99 percent chance it won’t be accepted, would the university be willing to take the risk?”

Stern adds that “complaints like this – basically accusing universities of anti-Semitism – will also come with bad press coverage and public pressure. This could lead to self-censorship, just in order to avoid all the trouble. This is how you can stifle debate.”

S tern refers to a comment made in 2013 by Kenneth Marcus – a senior Department of Education official appointed by Trump – who was personally involved in several attempts to present Title VI cases against universities prior to joining the White House. Marcus wrote that while most of those cases alleging anti-Semitic discrimination didn’t lead to any federal action, the cases were still successful because of the damage they caused to those they were filed against: “Getting caught up in a civil rights complaint is not a good way to build a résumé or impress a future employer,” he wrote.

Fear of such a scenario was also mentioned [in a public letter to Trump by the Middle East Studies Association](https://mesana.org/advocacy/committee-on-academic-freedom/2019/12/12/letter-criticizing-president-trumps-executive-order-on-combating-anti-semitism) last week: “It is not difficult to imagine how this executive order could induce colleges and universities seeking to avoid investigation and possible sanction by the Department of Education to adopt measures that limit or suppress the unfettered expression of the full range of views on the Israeli-Palestinian conflict, and advocacy for particular perspectives on it,” it stated.

**‘Under siege’**

Lara Friedman of the Foundation for Middle East Peace also warned of a similar scenario, [in an article published last week on the website Responsible Statecraft](https://responsiblestatecraft.org/2019/12/12/how-donald-trump-is-saving-the-occupation-by-dismantling-the-first-amendment/): “The goal of this effort, and the ones that will certainly follow, is clear: To punish campuses that protect free speech on Israel-Palestine, and to have a chilling effect on academic institutions across the board, ensuring that campus administrators and donors choose to preemptively quash criticism and activism related to Israel rather than risk reputational harm, legal jeopardy, and potential loss of funding.”

The White House rejects these arguments, explaining that any complaint based on speech and not actual “conduct” would be rejected, and that after one or two such complaints fail to succeed, it will be clear what the executive order can actually be used for – and where it isn’t relevant.

David Bernstein, a law professor at George Mason University, believes the executive order is “mostly symbolic.” However, he notes, “Jewish students at many campuses really feel under siege, which is why it matters that groups like the [Anti-Defamation League](https://www.haaretz.com/misc/tags/TAG-adl-1.5599182), that hate Trump, are supporting it.”

After the executive order was signed, [Jesse Singal in New York magazine used the following example](http://nymag.com/intelligencer/2019/12/trump-anti-anti-semitism-order-likely-violates-constitution.html) to try to explain its potential impact: “Imagine that a pro-Palestinian student group arouses the ire of a local Hillel chapter, and the Hillel members decide they are experiencing discrimination because the pro-Palestinian group is ‘holding Israel to a double standard.’ The Department of Education agrees and threatens to yank the university in question’s funding, and the university, backed into a corner, bans the club.”

Bernstein tells Haaretz “there is nothing in the law that would allow for this. First, let’s recall that the IHRA definition only comes into play as evidence of discriminatory intent. You need to have an underlying illegal act. Holding Israel to a double standard may be anti-Semitic, but expressing anti-Semitic ideas is not illegal, under Title VI or otherwise.”

According to Bernstein, “The only plausible threat from the IHRA definition is that a university administrator will misinterpret it as applying to ‘hostile environment liability.’” In such a scenario, a pro-Israel Jewish student could claim that the university is creating a hostile environment by allowing an organization that supports boycotting Israel or the settlements to have a presence on campus. However, Bernstein says, the executive order doesn’t refer at all to the issue of hostile environment liability. In Bernstein’s view, “The ultimate problem is with the broad scope of hostile environment law, not the executive order.”

Bard College’s Stern is concerned that the executive order, regardless of its impact on free speech, will also have an adverse effect on the very issue of fighting anti-Semitism.

“I think the real way to confront this is to educate people about anti-Semitism, and about Israel and Zionism – and I say this as a Zionist,” he says. “This is what I want to see universities investing in. Suppressing speech we don’t like isn’t the solution to this problem.”