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UC Berkeley Law Dean Erwin Chemerinsky and the plight of higher education

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Nov 13, 2025



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Since taking office in January, President Donald Trump's attacks on free speech have been routine. From going after law firms to banning press organizations in the White House, Trump has attempted to silence institutions that oppose him. Higher education, and namely the University of California, has not been spared.

Across the UC system, the assault on First Amendment rights has been tangible for some — those who lost their research funding or had their name handed over to the federal government in connection with an antisemitism investigation — and loomed large for others who say they have fought the “chilling” of free speech with self-censorship.

The Daily Californian sat down with First Amendment scholar and UC Berkeley School of Law Dean Erwin Chemerinsky to discuss the sweeping ramifications of these federal policies on campus.

In 2017, Chemerinsky spoke at UC Berkeley about misconceptions students had about the protections of free speech, which he attributed to the fact that this generation of students had not “seen serious threats to free speech from ... the government.”

This is no longer the case.

“The Trump administration has recognized that universities have three major financial vulnerabilities,” Chemerinsky said. “They’re very dependent on federal money for research, they’re very dependent on foreign students and they’re very dependent on philanthropy. And the Trump administration has gone after all three.”

Now, Chemerinsky is counsel on *Thakur v. Trump*, a lawsuit brought against the federal government on behalf of eight researchers who lost federal grants as a result of executive orders that targeted DEI and environmental justice.

U.S. District Judge Rita F. Lin ordered Trump to reinstate funding — nearly half a billion dollars — in the case after agreeing that the orders violated the First Amendment by discriminating on viewpoint. For example, Chemerinsky argued that cuts to projects that had the word “diversity” in them occurred “to an astounding extent,” citing one plaintiff’s research on plant diversity.

Most lawsuits against the second Trump administration on behalf of UC system researchers have been brought by individual UC faculty or organizations such as labor unions.

But Chemerinsky believes there were three separate occasions the UC should have sued the federal government in the past six months.

“The university should have filed a lawsuit this spring challenging the cut off of grants,” Chemerinsky said.

“When UCLA had \$584 million cut off on August 1, they should have brought a lawsuit challenging that. (And) they should have litigated rather than comply with getting the letters of the 160 names.”

He added that Catherine E. Lhamon, executive director of the Edley Center on Law and Democracy and former chair of the U.S. Commission on Civil Rights, agreed that the university’s compliance was not required by law.

Chemerinsky said campus would likely have had “strong ground” to compromise or litigate and withhold individuals’ names.

Berkeley Law professor Catherine Fisk, Chemerinsky’s wife, was one of the approximately 160 notified in September that their name appeared in files or reports related to alleged antisemitism provided to the Department of Education’s Office of Civil Rights.

Campus did not provide any details as to what reports or incidents those specific individuals' were connected to — many have argued the lack of transparency could create a chilling effect on free speech. For example, professors such as Judith Butler believe they may have been included in the report for their pro-Palestinian views and fear for what that means for academic freedom.

In an interview with *The Guardian*, Butler said, “We’ve been a place where controversial public issues can be freely debated. We have different views on Israel-Palestine. We need to hear them even when they upset us.”

Though Chemerinsky said lawsuits concerning self-censorship and the chilling effect on free speech have been inconsistently accepted by courts, there are some instances where the law is clear.

For example, undocumented and international students have a First Amendment right to free speech, despite the Trump administration’s attempted suppression.

In one case, Tufts University student Rümeyşa Öztürk was detained for writing an op-ed that the federal government claimed indicated support for Hamas, according to the Foundation of Individual Rights and Expression. In

another, former Columbia University student Mahmoud Khalil was detained for more than 100 days because of his participation in “Free Palestine” protests.

Secretary of State Marco Rubio cited provisions from the Immigration and Nationality Act to revoke both students’ legal statuses. Both students have been released from detention, per judges’ orders.

The Stanford Daily — citing the aforementioned cases — sued Rubio and Secretary of Homeland Security Kristi Noem, for creating a chilling effect on speech through their usage of the Immigration and Nationality Act. It argued that reporters declined to write articles out of fear of being deported or losing their visa – creating an infringement of their First Amendment rights. The Daily Californian, along with 54 other college newspapers, signed an amicus brief in support of the Stanford Daily.

It is currently unclear how these cases will turn out. Chemerinsky said while many cases arguing free speech have seen success in federal district courts, the Supreme Court has “overwhelmingly” sided with Trump, leaving the state of free speech on campuses, including UC Berkeley’s, uncertain.

“What’s most important is that the university fight back, that the university speak out against what the Trump administration is doing, and file lawsuits when it’s harmed by it,” Chemerinsky said. “I think we all learn as kids on the playground, (if) you can give into a bully, you only make it worse.”

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