



October 7, 2013

Thomas E. Brandon
Deputy Director
Bureau of Alcohol, Tobacco, Firearms and Explosives
99 New York Avenue, N.E.
Washington, D.C. 20226

VIA U.S. MAIL

Dear Mr. Brandon:

We write to you on behalf of Agent John Dodson, special agent with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF). Agent Dodson was denied permission to publish a manuscript about the gun trafficking investigation commonly known as the “Fast and Furious” operation. We are very troubled by the unlimited scope of ATF’s written guidelines for outside employment authorizations, as well as by the specific manner in which Order 2130.2 and related forms have been applied in Agent Dodson’s case. We urge you to reconsider his publication request.

The backstory of how Border Patrol Agent Brian Terry was killed by guns under ATF surveillance ignited national debates over gun policy, border security, whistleblower protections, and the techniques deployed in Operation Fast and Furious. Agent Terry’s death and the law enforcement techniques it helped to expose attracted attention from the press, Congress, and the Justice Department Inspector General’s office. But now that one of the agents involved in the operation wishes to add his version to the public record on Fast and Furious, he has been forbidden from doing so by the very agency that sparked this national policy debate. We believe that both the procedures used to support ATF’s publication denial, as well as the prohibition on Agent Dodson’s manuscript itself, run afoul of constitutional protections for public employees.

Our understanding of the relevant facts is as follows: After drafting a manuscript setting forth his version of the Fast and Furious events and submitting it for review by ATF’s chief counsel, Agent Dodson submitted ATF E-Form 2131.1, requesting authorization to pursue commercial publication in his personal time. On August 29, 2013, he received a letter from Deputy Ethics Official Greg Serres denying his request. That letter advised Agent Dodson that any of his supervisors at any supervisory level

could disapprove outside employment “for any reason.”¹ The reasons provided to Agent Dodson were predictions of “a negative impact on morale” in his field division at Phoenix, and “a detrimental effect [*sic*] on [ATF] relationships.”² The letter did not point to any specific content or conduct that would give rise to these supposed injuries, or apprise Agent Dodson of any right of appeal.

ATF’s outside employment review lacks the standards required by law.

First and foremost, we are concerned that the outside employment guidelines grant ATF officials unfettered discretion to deny employees’ requests to “speak, write, and teach.”³ The U.S. Supreme Court has explained repeatedly that public employment does not prevent government employees from participating in public debate.⁴ Rather, government employees must be assured “of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of the misconduct of their superiors.”⁵ While courts have upheld prior approval requirements for employees’ extracurricular speech in some circumstances, these policies must be clear, specific, and narrowly tailored to protecting the organization’s interests.⁶ ATF’s outside employment guidelines do not meet those standards.

The denial letter states that ATF rules allow supervisors to refuse outside employment requests “for any reason” (emphasis in denial letter). This policy grants supervisors in the chain of command boundless discretion to censor employee speech and deprive employees of the opportunity to understand—much less challenge—acts of censorship. Nor does this policy limit the reasons for denying a publication request to legitimate employment-related injuries; it grants supervisors the discretion to censor critical speech simply because it annoys the supervisor or embarrasses the ATF. In short, this ATF policy empowers supervisors to deny employees’ requests to speak, write, or teach for “any” reason, or for no reason at all. Its unlimited scope is constitutionally impermissible.

¹ Letter from Greg Serres, Deputy Ethics Official, to John Dodson, ATF Special Agent, Re: Request for Outside Employment 1 (Aug. 29, 2013) (emphasis in original).

² Remarks, Request to Engage in Outside Employment—John W. Dodson, ATF E-Form 2131.1, 2.

³ Instructions, ATF E-Form 2131.1, 2 (revised May 2005).

⁴ *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968); *United States v. Nat’l Treasury Emp’s Union*, 513 U.S. 454, 465 (1995) [“*NTEU*”].

⁵ *Arnett v. Kennedy*, 416 U.S. 134 (1974).

⁶ *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 438 (1963) (“Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity . . . Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms.”).

ATF censored Agent Dodson's manuscript in violation of the First Amendment.

The problematic nature of the outside employment policy is further underscored by its application in Agent Dodson's case. As an initial matter, Agent Dodson was never told what aspect of his submission was considered harmful to ATF's interests as his employer. Instead, the remarks attached to the rejection letter—reproduced here in full—simply conclude:

This would have a negative impact on morale in the Phoenix FD and would have a detrimental effect [*sic*] on our relationships with DEA and FBI.⁷

This explanation not only fails to identify aspects of Agent Dodson's expressive activity that present a risk of harm to ATF; it neglects even to specify whether the source of that risk is Agent Dodson's proposed writing schedule, or his anticipated book deal, or the content of his manuscript. This failure to specify offending content or conduct cannot support line-by-line redactions, much less censorship of the *sum and total* of his manuscript.⁸

To the extent that the E-Form remarks allege harms to ATF, these allegations are speculative and appear to invoke government injuries that cannot be recognized under the First Amendment. When a government organization limits employees' requests to "speak, write or teach" in their personal time, it must show that such activities will have a "*necessary* impact on the *actual* operation" of the workplace.⁹ Operation Fast and Furious has been widely publicized and the involved agencies heavily criticized in both the media and Congress. It is difficult to imagine how further public scrutiny, even if it prolongs official embarrassment, could outweigh Agent Dodson's interest in giving his view on the controversy. Where information is already public, further discussion of that information cannot be seen as causing additional harm. "Where, as here, the government seeks to withhold information that is already in the public domain in whole or in part, it must explain how additional disclosure could damage legitimate interests."¹⁰

Nor can the fact that speech is critical of one's government employer alone amount to a recognized harm to workplace morale. Indeed, as

⁷ Remarks, *supra* note 2.

⁸ *Wright v. F.B.I.*, No. CIV.A. 02-915, 2006 WL 2587630, *1 (D.D.C. July 31, 2006). In this remarkably analogous case, two FBI agents were denied permission to publish writings critical of the high-profile counter-terrorism efforts in which they participated. The *Wright* Court ordered the FBI to identify all censored material supported by information existing in the public domain before it would consider the FBI's arguments against the "exceedingly strong" interests in favor of publication.

⁹ *NTEU*, 513 U.S. at 475 (emphasis added).

¹⁰ *Wash. Post v. U.S. Dep't of Def.*, 766 F. Supp. 1, 10-12 (D.C. Cir. 1991).

discussed more fully below, the entire firmament of case law protecting public employee speech recognizes the public value in critical speech by government employees.¹¹ As the congressional and public outcry in response to the Fast and Furious revelations shows, the alleged damage—to the extent that democratic oversight can be “damage”—has already been done.

Given the national attention to both the Fast and Furious operation and ATF practices more broadly, ATF faces an extremely high burden in demonstrating that its interests outweigh Agent Dodson’s right to speak—and the public’s right to hear—his views about Operation Fast and Furious.¹² This is because the protection of employees’ First Amendment rights is especially important where the speech concerns a matter of public policy. The story of gun surveillance techniques and the death of a federal agent prompted national debates over gun policy, border security, and whistleblower protections, as well as inquiries into internal discipline and interagency relations at ATF.¹³ These debates address paradigmatic matters of public concern.

Agent Dodson’s views are an indispensable piece of this public record. The Supreme Court has recognized that government employees are often in “the best position to know what ails the agencies for which they work.”¹⁴ Indeed, it was Agent Dodson’s disclosures that helped bring the operational failures at the Phoenix field division to public light.¹⁵ As a knowledgeable and informed “insider” who was directly involved in Operation Fast and Furious, Agent Dodson will add significantly to the

¹¹ *Pickering*, 391 U.S. at 572; *Robinson v. D.C. Gov’t*, No. CIV-A. 97-787, 1997 WL 607450 (D.D.C. July 17, 1997); *Waters v. Churchill*, 511 U.S. 661, 681–82 (1994). In addition, courts have repeatedly held that listeners’ reactions to the content of speech are an impermissible basis for decisions to censor or suppress. Government employers may not rely on “concern for how others would react to what [an employee] had said rather than any actual disruption.” *Robinson*, 1997 WL 607450, at *5 (citation and internal quotation marks omitted).

¹² *Navab-Safavi v. Broad. Bd. of Gov’s*, 650 F. Supp. 2d 40, 57 (D.D.C. 2009), *aff’d sub nom. Navab-Safavi v. Glassman*, 637 F.3d 311 (D.C. Cir. 2011) (“As the magnitude of the intrusion on employees’ interests rises, so does the Government’s burden of justification.” (quoting *NTEU*, 513 U.S. 454, 483 (1995))).

¹³ FAST AND FURIOUS: THE ANATOMY OF A FAILED OPERATION (PT. I OF III) 15, JOINT STAFF REPORT (112th Cong. July 31, 2012), available at <http://oversight.house.gov/wp-content/uploads/2012/07/7-31-12-FF-Part-I-FINAL-REPORT.pdf>.

¹⁴ *Waters*, 511 U.S. at 674.

¹⁵ Sari Horowitz, *Justice IG Criticizes Former U.S. Attorney for Leak to Fox News in ‘Fast and Furious’ Scandal*, WASH. POST, May 20, 2013, http://articles.washingtonpost.com/2013-05-20/world/39384618_1_operation-fast-fast-and-furious-inspector-general-michael-e.

national conversation about gun policy and its implementation by federal law enforcement agencies.¹⁶

Finally, Agent Dodson's thoughts and opinions on *Fast and Furious* are valuable to the public precisely because they offer a viewpoint that may differ from the official government line. When agencies actively seek to "spin" public appraisal of their own performance, "it is even more important that First Amendment freedoms are guaranteed in order to allow the dissemination of competing views in the public forum for debate and analysis."¹⁷

For all of these reasons, we believe the ATF's written guidelines for outside employment authorizations are constitutionally inadequate, and that their application to Agent Dodson's publication request resulted in impermissible censorship of the speech of a public employee. We urge ATF to grant Agent Dodson's request for outside employment so that his views may inform this important debate. We hope moreover that ATF will rewrite its pre-publication guidelines in accordance with the First Amendment.

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Sincerely,



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¹⁶ Courts specifically recognize that books and articles written by government insiders often contribute "the most illuminating insights to the public discourse." *Wright*, 2006 WL 2587630, at *7. In the FBI censorship case, the *Wright* Court observed that,

[T]he FBI, by its very nature, is not an open institution, and very few people are knowledgeable about its inner operations. For that very reason, the views of knowledgeable, informed, experienced "insiders" are of particular utility. Of course, it goes without saying that the subject matter itself—whether the FBI's efforts to counter and prevent terrorism attacks in this country have been successful—is of extraordinary public concern.

Id. at *7.

¹⁷ *Waters*, 511 U.S. at 674. It should additionally be noted that Agent Dodson's interests in speaking publicly about how ATF practices have affected his life and career should contribute to the high First Amendment value ascribed to his proposed manuscript.

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