



# FIRE

Foundation for Individual  
Rights and Expression

December 19, 2022

Sylvia M. Burwell  
Office of the President  
American University  
4400 Massachusetts Avenue NW  
Washington, District of Columbia 20016

*Sent via U.S. Mail and Electronic Mail (president@american.edu)*

Dear President Burwell:

FIRE<sup>1</sup> is concerned by the threat to freedom of expression posed by press-related practices at American University that limit or bar student journalists' access to university employees. These policies and practices restrict the free press rights of AU student journalists as well as the expressive rights of university personnel who may wish to speak with the media in their personal capacities. As an institution clearly committed to free expression and a free press, AU must correct these deficiencies.

## **I. AU's Practices Infringe Expressive and Free Press Rights on Campus**

According to *The Eagle*,<sup>2</sup> AU requires student journalists to fill out an online form for official approval of interviews with university sources, including administrators and some faculty.<sup>3</sup> Employees asked directly for interviews must direct students to the form.<sup>4</sup> University Communications and Marketing personnel then review the application and schedule the interview for journalists, who are prohibited throughout the process from communicating with potential sources directly. This process can lead to significant publishing delays, which is

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<sup>1</sup> For more than 20 years, the Foundation for Individual Rights and Expression has defended freedom of expression, conscience, and religion, and other individual rights on America's college campuses. You can learn more about our recently expanded mission and activities at [thefire.org](https://thefire.org).

<sup>2</sup> The recitation of facts here reflects our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us.

<sup>3</sup> Email from Jasmine Pelaez, Internal Comm's Manager, University Comm's and Marketing, to AU student journalists (Sept. 12, 2022) (on file with the author); *Form*, AM. UNIV., [https://american.col.qualtrics.com/jfe/form/SV\\_eu0nUpZGhHLUw2q](https://american.col.qualtrics.com/jfe/form/SV_eu0nUpZGhHLUw2q) [<https://perma.cc/GSJ8-96F4>].

<sup>4</sup> Email from Jasmine Pelaez, Internal Communications Manager, University Communications and Marketing, to Nina Heller (Sept. 27, 2021, 10:50 AM) (on file with the author).

highly problematic for news outlets, particularly when it comes to time-sensitive or breaking news.

It has also been brought to our attention that student journalists at AU face additional burdens when attempting to speak to AU student employees of Housing and Residence Life. For example, Assistant Director for Residence Life Dana Larsen reportedly instructed her department's student employees that they "should not be speaking to the media or providing comments that relate to any aspect of [their] role, or housing and residence life."<sup>5</sup>

These requirements conflict with AU's institutional commitments to free expression and a free press. While AU is a private university not bound by the First Amendment to grant students or faculty freedom of expression or to maintain an environment of transparency, it makes independent promises to the same effect, stating:<sup>6</sup>

American University is committed to protecting free expression for all members of its community. Protections for free expression play an essential role in creating space for individuals to practice the ethos of inquiry, which is fundamental to the mission of a university. Accordingly, the establishment and implementation of University policies and procedures must be guided by this spirit and informed by these values.

It also promises a free press on campus, writing:<sup>7</sup>

In keeping with this fundamental commitment to free expression, the University respects the rights of professional and student journalists and news organizations associated with the University to pursue their journalistic missions without outside interference and in accordance with recognized standards of journalistic excellence.

AU's written commitments represent both a moral obligation and a legal duty on the part of the university, which has a contractual relationship with its students.<sup>8</sup> Having been promised "free

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<sup>5</sup> E-mail from Dana Larsen, Assistant Director for Residence Life, to Housing and Residence Life staff (Sept. 28, 2021) (on file with the author).

<sup>6</sup> *University Policy: Freedom of Expression and Expressive Conduct*, AM. UNIV., <https://www.american.edu/policies/au-community/upload/university-policy-freedom-of-expression-and-expressive-conduct-final.pdf> [<https://perma.cc/9RUT-49H4>].

<sup>7</sup> *Id.*

<sup>8</sup> See e.g., *Bain v. Howard Univ.*, 968 F. Supp. 2d 294, 299 (D.D.C. 2013); *McAdams v. Marquette Univ.*, 2018 WI 88 (2018) (a private university breached its contract with a professor over a personal blog post because, by virtue of its adoption of the 1940 AAUP Statement of Principles on Academic Freedom, the post was "a contractually-disqualified basis for discipline"). Although, again, AU is not bound by the First Amendment, students and employees will reasonably interpret the university's commitment to freedom of expression to be in line with the First Amendment's protections.

expression,” it follows that students—including student journalists—would look to First Amendment jurisprudence to understand the nature and scope of these rights.

### *A. AU’s Gatekeeping Practices Constitute a Prior Restraint on the Press*

By prohibiting student journalists from contacting university sources directly, AU effects an impermissible prior restraint on student press activity, as requests for interviews are themselves a form of protected expression. Prior restraints are “the most serious and the least tolerable infringement on” freedom of expression,<sup>9</sup> presenting a risk so great that the “chief purpose” in adopting the First Amendment was to prevent their use.<sup>10</sup> They are valid only in the most demanding of circumstances,<sup>11</sup> and courts analyzing prior restraints impose a “heavy presumption against [their] constitutional validity.”<sup>12</sup> AU in turn violates its commitment to allow journalists to “to pursue their journalistic missions without outside interference and in accordance with recognized standards of journalistic excellence” by requiring permission from a third-party arbiter.<sup>13</sup>

AU’s practice also means student journalists must notify administrators of the subject matter of their reporting to secure permission to speak with sources, giving AU administrators pre-publication knowledge about reporting that they otherwise would not have. To the extent AU administrators respond to these requests with delays or denials, this becomes not only a prior restraint on *conversations* between student journalists and their sources, but also a constructive prior restraint *on the reporting itself*.

AU may limit some employee interactions with the press when, for example, those employees purport to speak on behalf of the university. However, any restrictions AU imposes on employee interactions with the press must apply to the employees themselves—not student journalists—and must respect the expressive rights the university promises to its constituents.

### *B. AU’s Practices Infringe Employees’ Expressive Rights*

These suspect practices burden not only members of the student press but also chill the speech of employees who wish to speak with the media without going through an intermediary. AU may impose some restrictions on its employees, including student employees like those in Housing and Residence Life when they speak *on behalf of* the university, but it may not issue blanket bans on their ability to speak to the media.

Both AU’s requirement that faculty, administrators, and other personnel give interviews only to student journalists who secure official permission, and its ban on residence life student employees speaking to the press, constitute prior restraints on employees themselves. Both

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<sup>9</sup> *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>10</sup> *Near v. Minnesota*, 283 U.S. 697, 713 (1931).

<sup>11</sup> *Id.* at 716.

<sup>12</sup> *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971).

<sup>13</sup> *University Policy: Freedom of Expression and Expressive Conduct*, AMERICAN UNIV., <https://www.american.edu/policies/au-community/upload/university-policy-freedom-of-expression-and-expressive-conduct-final.pdf> [https://perma.cc/9RUT-49H4].

practices prevent employees, including faculty and student employees, from choosing to speak as individual citizens to student journalists, even where the subjects of interviews may be issues of public concern. This betrays AU's commitment to the expressive rights granted to "all members of its community" and, when applied to faculty, also violates basic notions of academic freedom.<sup>14</sup> To the extent AU policies threaten subsequent punishment for speech rather than imposing a prior restraint, it may not punish employees for speaking with journalists as individuals on matters of public concern.<sup>15</sup>

AU's restrictions are also likely impermissible under the National Labor Relations Act,<sup>16</sup> which bars private institutions from imposing broad restrictions on employees' abilities to speak to the media. The National Labor Relations Board has, for example, repeatedly deemed restrictive media policies unlawful, including those which barred any employee except for "authorized company spokespersons" to speak to the media,<sup>17</sup> or limited employees from "releasing statements to the media without prior permission."<sup>18</sup>

### ***C. AU's Practices Inhibit the Student Press from Exercising Its Role as a Campus Watchdog***

The expressive rights of university employees to speak freely, including to speak freely to the media, find a close corollary in the public's right to know. Courts have recognized that members of the press act as "surrogates for the public" in keeping a watchful eye on the operations of powerful institutions.<sup>19</sup> As members of the campus community, student journalists are an important part of the process of informing the public of the undertakings of universities situated in its communities and ensuring transparency.

AU may require that *official* statements published on behalf of the institution itself come only through the University Communications and Marketing team, and it may *offer* to field requests from journalists on behalf of willing employees. It cannot, however, effect a prior restraint on

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<sup>14</sup> *University Policy: Freedom of Expression and Expressive Conduct*, AM. UNIV., <https://www.american.edu/policies/au-community/upload/university-policy-freedom-of-expression-and-expressive-conduct-final.pdf> [<https://perma.cc/9RUT-49H4>]. See, e.g., *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) ("We hold that *Garcetti* does not apply to 'speech related to scholarship or teaching'"); *Adams v. Trs. of the Univ. of N. Carolina Wilmington*, 640 F.3d 550, 564 (4th Cir. 2011) ("Applying *Garcetti* to the academic work of a public university faculty member . . . could place beyond the reach of First Amendment protection many forms of public speech or service a professor engaged in during his employment. That would not appear to be what *Garcetti* intended, nor is it consistent with our long-standing recognition that no individual loses his ability to speak as a private citizen by virtue of public employment."); see also *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006).

<sup>15</sup> *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968).

<sup>16</sup> 29 U.S.C. §§ 151–169.

<sup>17</sup> *Phillips 66*, 2014 NLRB LEXIS 921 (N.L.R.B. Nov. 25, 2014).

<sup>18</sup> See e.g., *Trump Marina Assoc., LLC v. NLRB*, No. 10-1261 (D.C. Cir. May 27, 2011); *Employees' Right to Speak to the Media: Challenging Workplace Gag Policies*, BRECHNER CTR. FOR FREEDOM OF INFO., Jan. 2019, <http://brechner.org/wp-content/uploads/2019/01/NLRB-Brechner-gag-order-white-paper.pdf> [<https://perma.cc/KJU4-UBEX>].

<sup>19</sup> *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980).

employees' interactions with student journalists and other reporters without violating its commitments to the expressive freedoms of its constituents and the press.

Finally, the form requirement targeting only student journalists improperly singles out the campus media for discriminatory treatment. To the extent that this differential treatment is based upon opposition to the content of or the views expressed by the student media in particular, including *The Eagle*, it is contrary to the commitments AU makes to its community's expressive rights and the free press.<sup>20</sup>

## **II. Conclusion**

The unique role of universities as “peculiarly the ‘marketplace of ideas,’” cannot be squared with burdens on journalists’ right to seek information and employees’ right to share it.<sup>21</sup>

To reaffirm its commitment to free expression, AU must institute policies on media relations that make clear that members of the press, including the student press, are free to speak with university personnel in their capacity as individual citizens without a requirement that university officials grant permission first. Further, AU must ensure its employees are trained in practices that comply with the university’s commitments to free expression and a free press. FIRE is more than happy to offer our assistance to ensure AU’s institutional interests can be met without burdening students’ or employees’ expressive rights.<sup>22</sup>

We respectfully request a substantive response to this letter no later than the close of business on January 9, 2023.

Sincerely,



Anne Marie Tamburro  
Program Officer, Campus Rights Advocacy

Cc: Matthew Bennett, Vice President of Communications  
Lisa Freeman, Director of Residence Life  
American University Board of Trustees

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<sup>20</sup> *Cornelius v. NAACP Legal Def. and Educ. Fund*, 473 U.S. 788, 806 (1985) (finding that in a nonpublic forum “the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses”).

<sup>21</sup> *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

<sup>22</sup> As a nonprofit, FIRE’s services are always free of charge.