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May 23, 2013

The Honorable John D. Bates  
United States District Court Judge  
U.S. District Court for the District of Columbia  
333 Constitution Avenue, Northwest  
Washington, DC 20001

**RE:    *Anderson v. Gates, et al.*, No. 12-1243: Reporters Committee for  
Freedom of the Press Letter in Support of Plaintiff**

To The Honorable John D. Bates:

The Reporters Committee for Freedom of the Press writes this letter in support of Plaintiff Wayne Anderson. The Reporters Committee is a voluntary, unincorporated association of reporters and editors working to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided representation, guidance and research in First Amendment and Freedom of Information Act litigation since 1970, and it frequently files *amicus curiae* briefs in significant media law cases.

As both a news organization and an advocate of free press issues, the Reporters Committee has a strong interest in the policies governing the rights of journalists reporting on military operations throughout the world. It is from this perspective that we write to emphasize to this court the public interests at stake in this case.

**I. Reporters need to be provided adequate notice and a meaningful opportunity to be heard on decisions to terminate their accommodated status.**

We are first concerned that Mr. Anderson’s accommodated status was terminated without providing him adequate notice of, and a meaningful opportunity to challenge, the grounds for the termination. A core tenet of our legal system is that an individual has the right to have notice and a meaningful opportunity to be heard before being deprived of a protected interest. *See, e.g., Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (“The fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’” (internal citation omitted)). Indeed, the United States Supreme Court has recognized the necessity of providing such procedural protections to members of the media when access to government proceedings is being denied. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring) (“If the constitutional right of the press and public to access [court proceedings] is to have substance, representatives of these groups must be given an opportunity to be heard on the question of their exclusion.”); *accord Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (quoting Justice Powell’s concurrence in *Gannett*). Although these cases have not specifically applied these rights in an embed context, they do analyze the important constitutional rights of the media when their attempts to report on the workings of government are restricted.

Based on his allegations, we are concerned that Mr. Anderson was not afforded a meaningful opportunity to challenge his termination. Providing such an opportunity was of particular importance here, where he has alleged that if a violation of the Media Ground Rules occurred (a conclusion that we understand is disputed), it was unknown and inadvertent. If he had been given a meaningful opportunity to present his side of the

story, Mr. Anderson could well have demonstrated that he was simply trying to carry out his role as a journalist in a manner that was ethically sound and respectful of the soldiers and the Media Ground Rules.

**II. Granting the motion to dismiss would prevent important fact finding regarding Mr. Anderson’s constitutional rights.**

Mr. Anderson argues in part that because what he published was true and accurate, the Defendants overreacted by revoking his embed privileges. He alleges enough facts in the complaint to state a case that the Defendants’ actions constituted a content-based discrimination on his speech. While we recognize that the military must have broad leeway to protect its troops and operations, that does not allow it to make content-based determinations unrelated to those concerns. Government-imposed content-based restrictions on speech are highly disfavored under the First Amendment. *See, e.g., Police Dept. v. Mosley*, 408 U.S. 92 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”). Content-based restrictions are constitutional only if they can survive strict-scrutiny analysis, which requires the law to be a narrowly tailored solution to a compelling state interest. *See, e.g., Simon & Schuster, Inc. v. Members of State Crime Victims Bd.*, 502 U.S. 105 (1991) (“[T]he government’s ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”).

On this record, it is unclear how the revocation of Mr. Anderson’s embed privileges and his summary removal from the country were narrowly tailored to serve the government’s interest in troop safety, security, and privacy. If it were to grant the motion

to dismiss, this Court would overlook significant, meaningful factual disputes that go to the heart of Mr. Anderson's constitutional claim.

For example, Mr. Anderson's complaint asserts that constitutional and federal and state law apply, whereas the Defendants claim they were operating under North Atlantic Treaty Organization ("NATO") authority in removing Mr. Anderson from his embed and from Afghanistan. The First Amendment protects speech from state action, and it is possible that the Defendants are using the NATO designation to evade the constitutional protections afforded to American news media. If the Defendants knew they were purposely punishing Mr. Anderson because of the content of his communications, then they presumably knew that was unconstitutional and in violation Mr. Anderson's clearly established rights. The motion to dismiss should be denied, so that fact finding may occur on these issues.

A copy of this letter has been served on all parties.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of this letter has been served upon the below named individuals by email.

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Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_

Bruce D. Brown