



Foundation for Individual Rights in Education

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September 22, 2013

Chancellor Bernadette Gray-Little
University of Kansas
Office of the Chancellor
230 Strong Hall
Lawrence, Kansas 66045

URGENT

Sent via U.S. Mail and Electronic Mail (Chancellor@ku.edu)

Dear Chancellor Gray-Little:

The Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on America's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

FIRE writes to you today out of concern for the free speech rights of University of Kansas (KU) journalism professor David Guth, who has been placed on indefinite suspension following a controversial post to his Twitter account. Although the comments have generated substantial controversy, they constitute protected expression. While KU is free to speak out against Guth's comments, it may not, consistent with its moral and legal obligations under the First Amendment, punish him for expressing his views. We ask KU to clarify its commitment to free expression in light of the circumstances of Guth's case.

This is our understanding of the facts. Please inform us if you believe we are in error. On Monday, September 16, a few hours following the shootings at Washington, D.C.'s Navy Yard, Guth posted to his Twitter account:

#NavyYardShooting The blood is on the hands of the #NRA. Next time, let it be YOUR sons and daughters. Shame on you. May God damn you.

Guth has since defended his right to post the tweet and refused to apologize for posting it.

KU initially defended Guth's First Amendment rights while expressing its own disagreement with his comments. KU spokesperson Jack Martin told the website *Campus Reform* in an article published September 19 that "[f]aculty have their own social media accounts and use those to express personal opinions, but those opinions do not represent the university." Also on September 19, KU released statements from Ann Brill, dean of the William Allen White School of Journalism and Mass Communications, and Vice Chancellor for Public Affairs Timothy C. Caboni. While Caboni stated that KU found Guth's comments "truly disgraceful" and stated that "[w]e expect all members of the university community to engage in civil discourse and not make inflammatory and offensive comments," he nonetheless conceded that Guth "has the right under the First Amendment to express his personal views and is protected in that regard."

On September 20, however, you released this statement:

In order to prevent disruptions to the learning environment for students, the School of Journalism and the university, I have directed Provost Jeffrey Vitter to place Associate Professor Guth on indefinite administrative leave pending a review of the entire situation. Professor Guth's classes will be taught by other faculty members.

FIRE is aware that Guth has agreed to accept his suspension and that there may be genuine concern at KU regarding possible threats to Guth's safety. FIRE does not deny KU's responsibility to keep its students and faculty safe from genuine threats. KU must not, however, allow any cloud of doubt over the protected nature of Guth's expression to linger—especially not while numerous Kansas legislators, including Kansas Senate Majority Leader Terry Bruce, are calling for Guth to be fired. Although they have caused controversy and led many to call for him to be terminated, Guth's comments constitute protected expression, and no investigation into his speech on the basis of its content is acceptable.

To be clear, Guth's remarks do not come close to constituting unprotected threats or incitement. The Supreme Court has defined "true threats," which are not protected by the First Amendment, as "those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Virginia v. Black*, 538 U.S. 343, 359 (2003). The Court further elaborated that speech may lose protection as "intimidation," a form of true threat, when "a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id.* at 360. Concerning incitement, the Court held in *Brandenburg v. Ohio* that in order to qualify as punishable incitement, speech must be "directed to inciting or producing imminent lawless action" and must be "likely to incite or produce such action." 395 U.S. 444, 447 (1969). Guth's remarks do not meet any of these standards.

In order to fall beyond the First Amendment's protections, the speech in question must be more than the simple political hyperbole at issue here. Indeed, political hyperbole similar to Guth's has been found protected by the Court before. For example, the Supreme Court has held that the statement "[i]f they ever make me carry a rifle the first man I want to get in my sights is L.B.J.," spoken by an opponent of the Vietnam War draft, was not a true threat on the President's life. Instead, it was constitutionally protected, although a "very crude offensive method of stating a

political opposition to the President.” *Watts v. United States*, 394 U.S. 705, 708 (1969). In light of this clear precedent, Guth’s remarks constitute protected speech.

Furthermore, it has long been settled law that the First Amendment is fully binding on public universities. See *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”); *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted).

While there may be legitimate safety concerns affecting KU’s actions here, FIRE is deeply troubled by Vice Chancellor Caboni’s statement that “[w]e expect all members of the university community to engage in civil discourse and not make inflammatory and offensive comments.” If this is the standard to which KU holds its faculty and students, it threatens a great deal of protected speech. We remind you that the Supreme Court has repeatedly held that speech may not be punished merely because many may find it to be offensive or disrespectful. See *Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”); *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973) (“[T]he mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (“[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”).

To be clear: Guth’s comments are fully protected statements of personal and political opinion. KU risks dramatically chilling the free expression of all members of the KU community by allowing any impression to persist that his speech did not merit the First Amendment’s protection. This is an unacceptable outcome at a public university morally and legally bound by the First Amendment, and one that puts at risk the essential characteristic of the university as a haven of free expression and inquiry. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident.... To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.”).

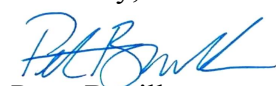
We further remind you that the investigation of protected speech is itself a danger to the rights of the person being investigated. *Id.* at 248. Respect for the First Amendment demands that in cases like these, once it is clear that the speech is protected, the investigation must end immediately.

FIRE asks that the University of Kansas clarify that it is not investigating Professor Guth’s expression on the basis of its content and promptly end his suspension if no legitimate threats are found to exist. KU must further communicate to members of its community that it will not

abandon its duty to defend the First Amendment rights of its faculty and students in the face of public controversy, and that it will not allow the most vocal and intolerant elements of the community, including those wielding political influence, to dictate what may be said on campus and who should be allowed to teach.

We request a response to this letter by September 27, 2013.

Sincerely,



Peter Bonilla

Director, Individual Rights Defense Program

cc:

Timothy C. Caboni, Vice Chancellor for Public Affairs

Ann Brill, Dean, William Allen White School of Journalism and Mass Communications

Jeffrey Vitter, Executive Vice Chancellor and Provost