

D.C. Circuit Affirms Ruling Requiring White House to Return White House Reporter’s Press Credential

On June 5, 2020, the U.S. Court of Appeals for the D.C. Circuit ruled in favor of *Playboy* magazine senior White House reporter and CNN political analyst Brian Karem in his lawsuit against President Donald Trump’s administration, which stemmed from the White House’s August 2019 suspension of Karem’s hard pass — a physical press credential granting him access to the White House. The D.C. Circuit unanimously held that Karem was “likely to succeed on his [Fifth Amendment] due process claim because, on this record, he lacked fair notice that the White House might punish his purportedly unprofessional conduct by suspending his hard pass,” affirming a September 2019 preliminary injunction issued by Judge Rudolph Contreras of the U.S. District Court for the District of Columbia.

The case arose in August 2019 when the White House suspended Karem’s press pass for 30 days. The White House cited Karem’s July 11, 2019 confrontation with conservative radio host Sebastian Gorka. While waiting for a presidential press conference in the Rose Garden, Karem called the attendees of the preceding social media summit, which observers contended was largely meant for President Donald Trump’s supporters, “a group of people eager for demonic possession.” Karem and Gorka then shouted at each other, including Gorka yelling “You’re a punk, you’re not a journalist, you’re a punk.”

In an Aug. 2, 2019 tweet, *Playboy* wrote that Gibson, Dunn & Crutcher LLP attorney Theodore J. Boutrous would represent Karem and appeal the White House’s decision. (Boutrous delivered the 33rd Annual Silha Lecture, titled “The First Amendment and #MeToo” on Oct. 17, 2018. For more on the lecture, see “33rd Annual Silha Lecture Addresses the Free Speech Implications of the #MeToo Movement” in the Fall 2018 issue of the *Silha Bulletin*. For more information on the background of Karem’s case, see “White House Revokes and Suspends Hard Press Passes Under New Rules” in the Summer 2019 issue of the *Silha Bulletin*.)

On Aug. 20, 2019, Karem filed a lawsuit against President Trump and then-White House Press Secretary Stephanie Grisham, requesting that the federal District Court for the District of Columbia “vacate the suspension and order that Karem’s hard pass be immediately restored.” The complaint argued

that the suspension violated Karem's Fifth Amendment rights, citing *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), in which the D.C. Circuit "made very clear . . . [that] the White House may deny, revoke or suspend a press pass based only on 'explicit and meaningful standards' that have been 'publish[ed]' so as to afford fair notice to reporters, and to avoid arbitrary or discriminatory punishments."

The complaint also argued that the suspension violated the First Amendment, including because the suspension was "clearly meant to punish and deter his reporting on the Administration rather than based on anything he said in the Rose Garden in July." The complaint therefore argued that the suspension was "an impermissible content-based regulation of speech, and an attempt to censor the press and exclude from the White House reporters who challenge and dispute the President's point of view."

On Sept. 3, 2019, Judge Contreras granted the motion for a temporary restraining order and preliminary injunction brought by Karem, ordering the Trump administration to restore the reporter's hard pass. *Karem v. Trump*, 404 F.Supp.3d 203 (D.D.C. 2019). Contreras held that Karem had, "at this early stage of the proceedings, shown that he is likely to succeed on this due process claim, because the present record indicates that Grisham failed to provide fair notice of the fact that a hard pass could be suspended under these circumstances."

Contreras also held that Karem had adequately demonstrated that "even the temporary suspension of his pass inflict[ed] irreparable harm on his First Amendment rights." He reasoned that Karem's "First Amendment interest depends on his ability to freely pursue 'journalistically productive conversations' with White House officials." Contreras therefore held that "the only way to remedy the injury is to return the hard pass and the access that comes with it. Under those circumstances, Karem's First Amendment injury undoubtedly constitutes a concrete, unrecoverable harm sufficient to warrant preliminary relief."

(For more information on Karem's lawsuit and Contreras' ruling, see "Federal Judge Orders White House to Reinstate Reporter's Press Credential" in the Fall 2019 issue of the *Silha Bulletin*.)

On June 5, 2020, the D.C. Circuit affirmed Contreras' ruling, holding that "Karem is likely to succeed on his due process claim because, on this record, he lacked fair notice that the White House might punish his purportedly unprofessional conduct by suspending his hard pass for a month." Judge David S. Tatel wrote for the unanimous three-judge panel and first cited *Sherill*, including the D.C. Circuit's finding that "the protection afforded newsgathering under the

[F]irst [A]mendment . . . requires that [access to White House press facilities] not be denied arbitrarily or for less than compelling reasons.” Tatel wrote that “[f]orty years on, today’s hard-pass system is little changed from the one described in Sherrill.”

Second, Tatel cited the White House’s previous attempt to revoke CNN reporter Jim Acosta’s credential in November 2018, which led to a similar ruling by the District Court for the District of Columbia. That case arose on Nov. 7, 2018, when President Trump called Acosta “a rude, terrible person” after he asked the president repeated questions during a press conference following the 2018 midterm elections. Boutros filed a lawsuit on behalf of CNN and Acosta in November 2018 against President Trump and several members of his administration, arguing that Acosta’s First and Fifth Amendment rights had been violated, and that President Trump’s administration failed to follow the proper protocols, therefore violating the Administrative Procedure Act, 5 U.S.C. § 706.

On Nov. 16, 2018, Judge Timothy J. Kelly held that the White House was wrong to revoke Acosta’s credentials, ordering the Trump administration to immediately return them. *Cable News Network, Inc. v. Trump*, No. 18 Civ. 2610 (D.D.C. 2018). Although Kelly did not rule on the underlying case regarding the First and Fifth Amendments, he found that the White House did not provide Acosta with the due process required to legally revoke his press pass, therefore causing Acosta “irreparable harm.”

On Nov. 19, 2018, the White House restored Acosta’s credential, but also sent a letter (the Acosta Letter) to the White House press corps detailing new rules at presidential press conferences, which included: “(1) a journalist called upon to ask a question will ask a single question and then will yield the floor to other journalists; (2) At the discretion of the President or other White House official . . . a follow-up question or questions may be permitted . . . (3) ‘Yielding the floor’ includes, when applicable, physically surrendering the microphone to White House staff for use by the next questioner.” Failure to abide by these rules could “result in suspension or revocation of the journalist’s hard pass.” (For more information on the White House’s attempt to revoke Acosta’s hard pass, the ensuing legal battle, and the new rules for presidential press conferences, see *President Trump Calls CNN Reporter “Rude, Terrible Person,” Revokes His Press Credentials; Federal Judge Requires Trump Administration Reinstate Credentials* in “President Trump Continues Anti-Press Rhetoric and Actions” in the Fall 2018 issue of the *Silha Bulletin*.)

Third, Tatel turned to Karem's due process claim and cited the U.S. Supreme Court's finding in *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) that "[a] fundamental principle in our legal system . . . is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." He found that this "essential . . . protection[]" of fair notice applies here."

Tatel held that "Karem's due process claim is likely to succeed because, on this record, nothing put him on notice of 'the magnitude of the sanction' — a month-long loss of his White House access, an eon in today's news business — that the White House 'might impose' for his purportedly unprofessional conduct at the non-press-conference event." He cited "the lack of formally articulated standards and sanctions" by the White House, including in the Acosta Letter. Tatel added that even if the White House had articulated such standards in the Acosta Letter, previous examples of "journalistic misbehavior . . . elicited no punishment at all, let alone a month's exile."

Tatel rejected several of the White House's arguments, including the claim that "'basic standards of professionalism' should have put Karem on notice that 'breaches of [such] standards . . . can carry consequences stricter than an admonition not to engage in that behavior again.'" Tatel contended that the White House could not "rely on unarticulated standards of professionalism or 'the adage that some things go without saying' to justify the thirty-day suspension for the conduct at issue here."

Tatel also noted that the White House, "raising the specter of the absurd, . . . argue[d] that it cannot be the case that 'the Press Secretary would be powerless to take action even were a reporter to 'moon' the President, shout racial epithets at a foreign dignitary, or sexually harass another member of the press corps.'" Tatel held that the White House could not defend the suspension of Karem's hard pass "on the ground that some other, egregious conduct might justify the same sanction." He added, "And even if the White House could impose that sanction for such egregious conduct consistent with due process, Karem's behavior as reflected in the preliminary injunction record fell below that threshold. Notions of professionalism are, after all, context-dependent."

Fourth, Tatel held that Karem stood "to suffer immediate irreparable harm absent an injunction." He cited *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013), in which the D.C. Circuit concluded that "a prospective violation of a constitutional right constitutes irreparable injury for . . . purposes [of] . . . seeking equitable relief."

Finally, Tatel affirmed the district court’s preliminary injunction, but clarified one aspect of its scope, holding that the injunction did not run to President Trump, but instead “only to the Press Secretary.” He cited the defendants’ uncontested argument that “[t]he President is not a proper defendant in this case and . . . no temporary injunctive relief can issue against him.” The full ruling is available online at: [https://www.cadc.uscourts.gov/internet/opinions.nsf/BC95D2B55151A3A18525857E00506384/\\$file/19-5255-1845846.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/BC95D2B55151A3A18525857E00506384/$file/19-5255-1845846.pdf).

In a June 5 statement following the ruling, White House Correspondents’ Association (WHCA) president Jonathan Karl praised the decision, writing, “Today the DC Circuit affirmed what we all know — the work of journalists reporting from the White House is essential to our republic. The WHCA stands ready to fend off efforts by any administration to constrain the rights of journalists or to threaten our ability to . . . exercise our First Amendment rights.”

In a June 5 tweet, the Reporters Committee for Freedom of the Press (RCFP) wrote that the D.C. Circuit’s ruling “upholds the rights of press covering the White House.”

— Scott Memmel
Postdoctoral Associate