

## **D.C. Circuit Upholds Injunction Preventing Suspension of Journalist’s White House Press Credential**

On June 5, 2020, in *Karem v. Trump*,<sup>1</sup> the Court of Appeals for the District of Columbia Circuit affirmed a district court’s injunction preventing the White House Press Secretary from suspending journalist Brian Karem’s press credential for conduct that allegedly violated “professional journalistic norms.”<sup>2</sup> The Court concluded that Karem was likely to succeed on his Fifth Amendment due process claims because “he lacked fair notice that the White House might punish his purportedly unprofessional conduct by suspending his hard pass for a month.”<sup>3</sup> The *Karem* decision suggests that due process rights should more broadly attach to press credentials issued to journalists.

### **I. Background**

The White House Press Secretary is responsible for providing journalists who cover the White House with “hard passes.” Hard passes have been issued to members of the press for over 50 years. These credentials are vital to reporters covering the President and his administration because they “provide on-demand access to the White House complex.”<sup>4</sup>

In its 1977 decision in *Sherrill v. Knight*,<sup>5</sup> the D.C. Circuit addressed the constitutional protections attached to hard passes. In *Sherrill*, the Secret Service denied reporter Robert Sherrill’s application for a White House press pass. Sherrill filed suit challenging the denial. In 1977, the White House had not promulgated any written procedures or published regulations “pertaining to the issuance of press passes.”<sup>6</sup> Instead, press passes were issued “solely on the recommendation of the Secret Service.”<sup>7</sup> Sherrill’s application was denied with no explanation from the Secret Service.

In *Sherrill*, the D.C. Circuit held that “the protection afforded newsgathering under the First Amendment requires that this access not be denied arbitrarily or for less than compelling reasons.”<sup>8</sup> Furthermore, the Court held that “the interest of a *bona fide* Washington correspondent in obtaining a White House press pass is protected by the First Amendment” and that “[t]his First Amendment interest undoubtedly qualifies as liberty which may not be denied without due process of law under the Fifth Amendment.”<sup>9</sup> The Court ordered that the Secret Service “articulate and publish an explicit and meaningful standard governing denial of White House press passes for security reasons and to afford procedural protections to those denied passes.”<sup>10</sup> Since the D.C. Circuit’s decision in *Sherrill*, the Southern District of New York has likewise recognized a “protected liberty interest in the continued

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<sup>1</sup> 2020 WL 3023052 (D.C. Cir. June 5, 2020).

<sup>2</sup> *Id.* at \*1.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at \*1.

<sup>5</sup> 569 F.2d 124 (D.C. Cir. 1977).

<sup>6</sup> *Id.* at 126.

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

<sup>8</sup> *Id.* at 129.

<sup>9</sup> *Id.* at 131.

<sup>10</sup> *Id.* (alteration omitted).

enjoyment of [a] NYPD-issued press credential” subject to due process rights.<sup>11</sup>

The system by which hard passes are distributed has remained largely unchanged since the D.C. Circuit’s decision in *Sherrill*,<sup>12</sup> and before 2018, no journalist’s hard pass had ever been revoked or suspended. However, in November of 2018, the White House suspended CNN reporter Jim Acosta’s press credentials after he dodged a White House aide’s attempt to take a microphone from his hands while he asked a follow-up question during a news conference. The Press Secretary revoked Acosta’s hard pass after deeming his conduct inappropriate and unprofessional. The Press Secretary articulated that she relied upon “a set of understood professional norms”<sup>13</sup> in determining whether a hard pass could be seized. However, those professional norms had not been publicly announced or published.

CNN filed suit, seeking a temporary restraining order and preliminary injunction against the suspension of Acosta’s press credential.<sup>14</sup> The District Court for the District of Columbia granted Acosta’s motion for a preliminary injunction, finding that, in light of *Sherrill*, he was likely to prevail on his due process claims.<sup>15</sup> The White House subsequently sent Acosta a letter outlining rules of conduct for journalists and cautioned that “[f]ailure to abide by any of [these] rules . . . may result in suspension or revocation of the journalist’s hard pass.”<sup>16</sup> The letter suggested that “a more elaborate set of rules might be devised, including . . . specific provisions for journalist conduct in the open (non-press room) areas of the White House” but declined to explicitly articulate such rules “in hopes that professional journalistic norms will suffice to regulate conduct.”<sup>17</sup> The letter (the “Acosta Letter”) was subsequently circulated to the broader White House press corps. The administration has not promulgated a more elaborate set of rules governing journalist conduct. This is particularly relevant to the *Karem* decision insofar as the conduct in question occurred in a “non-press room” setting at the White House.

## II. The D.C. Circuit’s Decision in *Karem*

Brian Karem is a journalist who serves as the White House correspondent for *Playboy* and a political analyst for CNN. On July 11, 2019, Karem covered a social media summit hosted by President Trump in the White House’s Rose Garden. The summit attendees included “various internet influencers and personalities, including former presidential advisor Sebastian Gorka.”<sup>18</sup> At the conclusion of the summit, Karem — who was standing in a roped-off press area — shouted a question at the President as he walked back into the White House. The President ignored the question, and some of the summit attendees goaded Karem. One attendee commented, “[h]e talked to us, the real news.”<sup>19</sup> In response, Karem “smiled, gestured to the attendees, and declared, ‘[t]his is a group eager for

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<sup>11</sup> *Nicholas v. Bratton*, 376 F. Supp. 3d 232, 279 (S.D.N.Y. 2019). The authors of this memorandum currently represent Plaintiff Jason B. Nicholas in this action.

<sup>12</sup> See *Karem*, 2020 WL 3023052 at \*2.

<sup>13</sup> See Letter from Bill Shine, Deputy Chief of Staff for Communications, to Jim Acosta (the “Acosta Letter”), at 1 (Nov. 19, 2018).

<sup>14</sup> *Cable News Network, Inc. v. Trump*, 18-cv-2610, ECF No. 1 (D.D.C. Nov. 13, 2018).

<sup>15</sup> See *Cable News Network, Inc. v. Trump*, 18-cv-2610, ECF No. 20, Hearing Tr. 9–10 (D.D.C. Nov. 16, 2018).

<sup>16</sup> Acosta Letter, at 1.

<sup>17</sup> *Id.*

<sup>18</sup> *Karem*, 2020 WL 3023052 at \*3.

<sup>19</sup> *Id.*

demonic possession.”<sup>20</sup> Gorka was incensed by Karem’s comment, and a verbal altercation between the two ensued.

Three weeks after the incident, then-Press Secretary Stephanie Grisham wrote Karem a letter indicating that she had decided to suspend his hard-pass for 30 days.<sup>21</sup> Grisham acknowledged that the White House “had not previously thought that a set of explicit rules was necessary to govern behavior by members of the press at White House press events” because of the “widely shared understanding” of professional conduct.<sup>22</sup> Grisham stated that Karem’s behavior at the summit “violated the basic standards governing such events” and provided a “sufficient factual basis to suspend [his] hard pass for 30 days.”<sup>23</sup> Karem responded to Grisham’s letter, disputing the White House’s characterization of the altercation that occurred at the summit. Karem also asserted that the D.C. Circuit’s holding in *Sherrill* rendered the suspension unconstitutional. Grisham responded with a second letter stating that her decision to suspend Karem’s credential for 30 days was final.

Karem then filed suit, seeking a temporary restraining order and a preliminary injunction against the suspension. The district court found that “Karem is likely to succeed on his claim that he was not provided such fair notice.”<sup>24</sup> The court was not persuaded by the administration’s argument that Karem’s conduct was “clearly proscribed under the existing ‘professionalism’ policy.”<sup>25</sup> The court also rejected the administration’s assertion that the previously-circulated Acosta Letter “should have made Karem and other reporters aware that they had to behave professionally or risk losing their hard pass.”<sup>26</sup> Eighteen days into Karem’s 30-day suspension, the court granted Karem’s motion for both a temporary restraining order and a preliminary injunction. The administration appealed.

On appeal, the D.C. Circuit likewise determined Karem was not put “on notice of the ‘magnitude of the sanction’ . . . that the White House ‘might impose’ for his purportedly unprofessional conduct at the non-press conference event.”<sup>27</sup> Recognizing the gravity of the suspension, the Court characterized 30 days as “an eon in today’s news business.”<sup>28</sup> The Court held that, although the Acosta Letter outlined expectations for behavior at press conferences, it failed to set forth standards of conduct outside of the context of formal press conferences. Focusing on the magnitude of the suspension, the Court observed that “Karem’s behavior was not so outrageous as to bring into fair contemplation the unprecedented sanctions visited on him.”<sup>29</sup> It was unconvinced by the White House’s contention that “basic standards of professionalism” put Karem on notice that his behavior might have negative consequences. The Court asserted that due process requires that “‘explicit and meaningful standards’ ‘be formally articulated or published.’”<sup>30</sup>

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<sup>20</sup> *Id.* (citing *Karem v. Trump*, 404 F. Supp. 3d 203, 206 (D.D.C. 2019)).

<sup>21</sup> Letter from Stephanie A. Grisham, White House Press Secretary, to Brian Karem (the “Grisham Letter”), at 1 (Aug. 2, 2019).

<sup>22</sup> *Karem*, 2020 WL 3023052 at \*3 (citing the Grisham Letter).

<sup>23</sup> *Id.*

<sup>24</sup> *Karem*, 404 F. Supp. 3d at 216.

<sup>25</sup> *Id.* at 215.

<sup>26</sup> *Id.* at 212.

<sup>27</sup> *Karem*, 2020 WL 3023052 at \*6.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (alterations omitted) (quoting *Sherrill*, 569 F.2d at 130-31).

The Court also was unpersuaded by the White House’s argument that the district court’s decision would render the press secretary powerless to take action against journalists who engaged egregious conduct. Specifically, it reasoned that “the White House cannot defend the thirty-day suspension here on the ground that some other, egregious conduct might justify the same sanction.”<sup>31</sup> However, due process does not limit the White House’s authority “to maintain order and decorum at White House events.”<sup>32</sup> Ultimately, the D.C. Circuit echoed its previous decision in *Sherrill*, making clear that the White House must satisfy the notice requirements of due process when revoking or suspending a journalist’s hard pass.

### III. Conclusion

The D.C. Circuit’s decision in *Karem* suggests that courts may continue to recognize a liberty interest in press credentials conferring due process rights. In a 2019 decision in *Nicholas v. Bratton*, a district court in the Southern District of New York recognized a liberty interest in a journalist’s continued enjoyment of an NYPD-issued press credential. There, a photojournalist’s press credential was confiscated by the NYPD while he was photographing the victim of a building collapse. The district court found that the city’s failure “to provide [plaintiff] with practically any notice at all regarding the status of his press credential or the remedial measures available to him . . . fell short of the requirements of due process.”<sup>33</sup> In the wake of *Karem*, additional jurisdictions are likely to recognize due process rights attached to press credentials.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Joel Kurtzberg at 212.701.3120 or [jkurtzberg@cahill.com](mailto:jkurtzberg@cahill.com); John MacGregor at 212.701.3445 or [jmacgregor@cahill.com](mailto:jmacgregor@cahill.com); or Alexandra Settlemayer at 212.701.3174 or [asettlemayer@cahill.com](mailto:asettlemayer@cahill.com); or email [marketinggroup@cahill.com](mailto:marketinggroup@cahill.com).

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<sup>31</sup> *Id.* at \*7.

<sup>32</sup> *Id.*

<sup>33</sup> *Nicholas*, 376 F. Supp. 3d at 281.