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Litigators of the Week: A First Amendment Win for CNN, Politico and MS NOW Against White House Press Ban

Accolades | October 16, 2026

The AmLaw Litigation Daily

Our Litigators of the Week [PDF] are Theodore Boutrous Jr., Katie Townsend and Connor Sullivan of Gibson, Dunn & Crutcher.

We shouted them out last month after they secured a temporary restraining order on behalf of CNN, MS NOW, POLITICO and individual reporters after the president said on Truth Social that he was "banning" the news organizations from the White House. U.S. District Judge Timothy Kelly in Washington, D.C. held at the time that the plaintiffs' constitutional due process rights were likely violated when the reporters' "hard pass" credentials were revoked.

This week, with the media plaintiffs pressing additional First Amendment arguments, Kelly granted their motion for a preliminary injunction. The judge found that they were not only likely to succeed on their due process claims but also on their First Amendment claims of retaliation and viewpoint discrimination.

Kelly wrote that the national security reasons the administration put forward for the ban appeared to be "merely a post-hoc justification." He found the plaintiffs were likely targeted because of the president's view of their coverage.

"Simply put," he wrote, "that is unlawful viewpoint discrimination."

Lit Daily: How did this matter come to you and the firm?

Ted Boutrous: We had represented CNN and its White House correspondent Jim Acosta during the first Trump administration when the White House stripped him of his "hard pass"; in that prior case, we persuaded Judge Timothy Kelly to issue a temporary restraining order requiring its immediate restoration. We have strong relationships with the "banned" news organizations and their leading in-house counsel, including David Vigilante at CNN; Erik Bierbauer and Brian Barrett at MS NOW; and Meredith Jolivert at POLITICO. And we were especially well-positioned to launch this case because we have been on the front lines fighting First Amendment battles for other news organizations in similar matters, including defeating the Executive Order defunding NPR and our ongoing litigation for The New York Times challenging restrictions on press access to the Pentagon.

Who is on your team and how have you divided the work?

Katie Townsend: I love to point out that our team on this case is led by the three co-chairs of our firm's First Amendment and free expression practice group, which was launched earlier this year. One of the goals in formalizing the practice group was to expand the firm's work defending press freedom–work that Ted, one of the country's leading First

Related People

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Amendment lawyers has long prioritized. With back-to-back temporary restraining order and preliminary injunction briefing, it has necessarily been an all-hands-on-deck situation, and Ted, Connor and I have been very fortunate to have a stellar team of associates across the country working with us on basically every aspect of this case from fact development and briefing to strategy: Patrick Fuster and Kim Mejia in Los Angeles, Connor Mui, Alex Hoyer and Ellie Schwietering in Washington, D.C., and Arjun Ogale in Dallas.

You pressed Judge Kelly for findings of First Amendment violations that went beyond the due process reasoning in his decision on your motion for a temporary restraining order. Why were those holdings so important to you and your clients?

Connor Sullivan: From the start, the government signaled that it would continue trying to fill in after the fact whatever process the court said was insufficient. It already tried once, sending unsigned letters four days after the ban that offered baseless post hoc justifications. Those letters didn't satisfy the Due Process Clause. But even if the White House had gotten the procedure right, it still couldn't exclude reporters in ways and for reasons that violate the First Amendment. The record was clear that the ban was retaliation for protected reporting and discrimination based on viewpoint, and no amount of process could make that constitutional. The First Amendment holdings foreclose the argument that a different letter would have allowed the government to ban our clients from the White House.

We also strongly believed, as we told the court, that the ban imposed a huge First Amendment cost on our clients and on free speech and the free press generally, and on the public's interest in free speech. By addressing all those issues, Judge Kelly's opinion acknowledged the harm the ban did to those First Amendment interests as well.

Was there any strategic risk in asking the judge to reach constitutional questions he didn't need to reach to give your clients the immediate relief they wanted?

Boutrous: We knew the court might decline to reach those questions and also potentially could have ruled against us, but our arguments are so strong both on the facts and First Amendment law, we thought it was important and worth any risk to seek a strong First Amendment ruling. The president's precipitous ban of 78 reporters and three major news organizations because he dislikes their independent, fact-based reporting poses an unprecedented and serious threat to freedom of the press and First Amendment values. It was up to the court to determine if it agreed with us, or if it would leave those questions unresolved. We're grateful that Judge Kelly reached them and decided them in our clients' favor.

This was an unusual retaliation case where the person who made the decision to retaliate repeatedly discussed his reasons for it publicly while the litigation was unfolding. How did you decide what use to make of the president's statements without overplaying them?

Townsend: We confronted a similar dynamic in our successful challenge, on behalf of NPR, to President Trump's executive order that attempted to cut off federal funds to public media because, in his view, it is "biased." There we pointed to Justice Scalia's famous quote from Morrison v. Olson to describe the viewpoint discriminatory intent of the order: "This wolf comes as a wolf." I think that is an even more apt description here. The president has repeatedly told anyone who will listen that he banned our clients from the White House because he dislikes the content of their coverage of him and his administration. Those statements from the president made it difficult–if not impossible–for the White House to contend that the ban was not viewpoint discriminatory and not unlawful retaliation in violation of the First Amendment; as Ted told the district court during the hearing, the president was our best witness. Even after the White House Press Office tried to back-fill and assert "national security" and "professionalism" standards as the supposed reasons for ban, President Trump gave an extraordinary interview with TIME

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Magazine that never mentioned either of those reasons and reiterated at length that he banned our clients because they do not report enough positive things about his administration. The fact that the evidence was so strong and that it came directly from the president himself, the sole decisionmaker in this instance, really resonates throughout the district court's ruling as to our First Amendment claims.

Ted, Judge Kelly pressed you at oral argument whether there is a constitutional difference between coverage the president considers unfair or negative and reporting that is demonstrably false. How did you think about where to draw that line without giving the government the power to police the truth of political reporting?

Boutrous: The law is really clear that it is not up to the government to determine what is "true" or take on the responsibility of dictating what people—much less the press—are allowed to say. Justice Robert Jackson famously wrote in the Barnette case that "if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics." And Justice Kennedy wrote in the Alvarez decision that the First Amendment does not "endorse government authority to compile a list of subjects about which false statements are punishable" and that "our constitutional tradition stands against the idea that we need Oceania's Ministry of Truth"—citing Orwell's "Nineteen Eighty-Four." As Justice Kennedy put it, the government isn't entitled to a "broad censorial power" over speech. That's exactly what the First Amendment was adopted to prohibit. Of course politicians routinely believe—maybe sometimes rightly—that reporting about them and their opponent's political speech about them is inaccurate or incomplete or not balanced or unfair or even untrue. But that is an unavoidable consequence of the constitutional protections for free speech and the free press. The Supreme Court put it exactly right in the seminal New York Times v. Sullivan case: "Erroneous statements" are "inevitable in free debate," and they "must be protected if freedoms of expression are to have the breathing space that they need to survive."

We're seeing the government invoke national security in a growing number of disputes. What did this case teach you about how a litigator can test that rationale when courts are ordinarily reluctant to second-guess the executive on national security?

Townsend: I think courts are becoming more and more willing to question blanket assertions of "national security"–and rightfully so. We've seen a pattern in recent years of "national security" being invoked by the government in litigation to justify all manner of challenged actions, as though it is a magic phrase that precludes judicial scrutiny. But as Judge Kelly noted in his ruling, quoting recent Supreme Court precedent, courts are not required to exhibit a naivete from which ordinary citizens are free.And, in this case, there was simply no evidence of any legitimate "national security" interest that was implicated; to the contrary, the evidence indicates that "national security" was being invoked after the fact in a patently pretextual way to attempt to justify an unconstitutional action that was announced and explained clearly and unambiguously by the president himself. While courts will always take legitimate national security considerations seriously, I think courts will–and should–continue to be highly skeptical of unsupported claims of "national security" like the one made by the White House in this case.

Ted, there were points at argument where Judge Kelly appeared willing to give the government considerable room on national security. How do you decide when to push back on a judge's premise and when to say, essentially, "Even accepting that, we still win"?

Boutrous: To Katie's point, courts will always take legitimate national security considerations seriously. And I wasn't surprised that Judge Kelly in his questions was testing the boundaries of the arguments and taking account of the fact that there could be hypothetical situations that could potentially implicate legitimate national security considerations. At the end of the day though, this just wasn't a close case. As Judge

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Kelly's ruling makes clear, the White House submitted no evidence to suggest any actual "national security" interest was implicated. So my goal at argument was to continue to bring the court back to what the facts and evidence of this case show: The president expressly implemented what he called a "ban on the free press" for retaliatory and viewpoint discriminatory reasons, because he did not like the way CNN, MS NOW and POLITICO have covered him and his administration.

What comes next here?

Sullivan: We will continue litigating this case as long as necessary to secure our clients' rights and protect them from retaliation and viewpoint discrimination. The government filed a notice of appeal and we will continue fighting on appeal and before the district court.

What will you remember most from reaching this milestone in this matter?

Boutrous: The preliminary injunction hearing, with a packed court room and our clients in the front row, and an intense back and forth between the judge and lawyers.

Townsend: That Judge Kelly, who had rested his temporary restraining order ruling solely on due process grounds, not only reached our First Amendment arguments in his preliminary injunction ruling but that he did so in such a powerful way. This is a consequential fight for the press and for the public–to ensure that the public can know what is happening at the White House–and it was gratifying to see the district court's ruling go to the heart of what is at stake under the First Amendment.

Sullivan: The privilege of representing these organizations and these journalists and securing their right to report the news at a time when their work is so important. And I will always remember watching on television as journalists returned to the White House after the ban was originally enjoined.

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