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Litigators of the Week: New Pentagon Press Rules Don’t Pass Constitutional Muster

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Our Litigators of the Week are Gibson, Dunn & Crutcher partners Theodore Boutrous Jr., Katie Townsend and of counsel Susan Pelletier, who have represented The New York Times and national security reporter Julian Barnes in a challenge to the Trump administration’s changes to the Pentagon’s press policy.

Changes put in place in October forced any journalist holding or applying for Pentagon press credentials to sign an acknowledgement, which provided that soliciting information not approved for release by the administration could result in revocation. That move resulted in journalists at mainstream publications, including The New York Times and The Wall Street Journal, and at more conservative-leaning outlets, including Fox News and The Daily Caller, relinquishing their credentials and leaving the Pentagon.

Last week, U.S. District Senior Judge Paul Friedman in Washington, D.C. granted summary judgment to the Times, finding the policy “fails to provide fair notice of what routine, lawful journalistic practices will result in the denial, suspension, or revocation" of credentials. Friedman ruled that the policy violated the First Amendment, as well as the Fifth Amendment right to due process.

"Those who drafted the First Amendment believed that the nation's security requires a free press and an informed people and that such security is endangered by governmental suppression of political speech,” the judge wrote. “That principle has preserved the nation's security for almost 250 years. It must not be abandoned now."

Lit Daily: What was at stake here for the Times, its journalists and others who cover the Pentagon?

Ted Boutrous: The stakes in this case are incredibly high. As a practical matter, the case will determine whether The Times, its reporters and others will be able to report from the Pentagon, gaining real-time, accurate information to better inform the public—without submitting to a regime of government censorship. And it will do so during a time of war, when, as the district court put it, “it is more important than ever that the public have access to information from a variety of perspectives about what its government is doing.” The case also poses a broader question fundamental to the concept of a free press: whether the government can choose who reports on it and what they publish.

The district court’s decision was an important win not only for The Times, its reporters and other journalists, but also, most importantly, for the American people who benefit from independent reporting on the Pentagon and the military.

How did this matter come to you and the firm?

Related People

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Katie Townsend: Even before almost all of the Pentagon press corps surrendered their press passes and walked out as a result of the Department's new credentialing policy, we were hearing from news organization clients concerned about steps the Department was taking to limit journalists' access to the Pentagon, including things like evicting news organizations, like The Times, from their workspaces in the building. And after the policy was issued, I think it was natural for The Times to turn to us given our deep experience representing news organizations in high-stakes First Amendment matters and in access cases, in particular, including important wins in press credential cases for CNN and Jim Acosta and for journalist Brian Karem during the first Trump Administration.

Who was on your team and how did you divide the work? How did the folks from Yale Law School's Media Freedom and Information Access Clinic get involved?

Susan Pelletier: Our success in this matter reflects close collaboration with an incredible team, both inside and outside of Gibson Dunn. We benefited greatly from the insights of The Times's Senior Vice President and Deputy General Counsel David McCraw and Vice President and Assistant General Counsel Dana Green. And we were fortunate that First Amendment expert David Schulz and the Yale's Media Freedom & Information Access Clinic, who represent the Pentagon Press Association, supported our position as amici.

Within Gibson, Ted Boutrous and Katie Townsend led our efforts, drawing on their extensive expertise and experience handling press access and credentialing matters. The team came from three different offices with every team member contributing to just about every aspect of the matter.In addition to building and refining our legal arguments, members of the team were able to own different parts of the record and respond in real-time to changing facts, including the military actions in Venezuela and Iran, and the Department's actions with respect to the press in response to those developments. We are grateful to partner Lee Crain, as well as associates Zachary Freund, Eric Brooks, Chase Weidner, Tamara Skinner, Raleigh Cavero, Apratim Vidyarthi and McKenzie Robinson.

The government repeatedly argued that the policy merely incorporated existing criminal prohibitions for officials within the government and pointed to its own efforts to negotiate with the Pentagon press corps about these policies before they were implemented. How did you counter their framing of the case?

Townsend: To be clear, the Department's policy did not merely incorporate existing federal criminal law. The policy, on its face, gave Department officials the uncabined discretion to suspend, revoke or not renew a journalist's press credential simply for engaging in lawful, routine newsgathering–everyday activities like asking questions of Department personnel were, under the policy, purportedly improper "solicitation" that could result in the loss of a press credential. As we argued, and as Judge Friedman expressly concluded, asking questions and "soliciting" information is what journalists do and there is nothing improper let alone unlawful about it. I think the opinion says it best: "... a journalist asking questions is not a crime!"

During oral arguments earlier this month, Judge Friedman pressed hard on hypotheticals involving routine journalism—asking questions, running tip lines, publishing stories. How important was it to ground your argument in real-world reporting practices?

Boutrous: The Department was treating the very newsgathering and reporting activities that journalists engage in every day as a basis for revoking or denying a press credential. It was vital that we show how the policy would apply to these routine reporting methods, which the Supreme Court has said are protected, to establish the severity of its incursion into reporters' First Amendment rights, and the harm to their ability to gather and report important information of public concern to the American people, especially during wartime.

The government's attempt to distinguish Laura Loomer's tip line from the

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Washington Post's clearly caught the judge's attention. How did that contrast and the government's promotion of "the next generation of the Pentagon press corps" who signed on under the new rules strengthen your viewpoint discrimination argument?

Pelletier: The Department's different treatment of the two tip lines was clear evidence that officials were enforcing the policy against only those journalists whose editorial viewpoint they disagreed with, and that the policy was specifically designed to give them unbridled discretion to do so. We were able to show that this and other examples of discriminatory treatment aligned with Department officials' statements deeming organizations whose reporting they disliked "biased" and "garbage" and calling for them to be punished, while celebrating news organizations they perceived as willing to publish only the information and perspectives that officials agreed with.

You relied on declarations from veteran national security reporters and former Pentagon officials. What role did those voices play in establishing that this policy was a break from historical norms?

Boutrous: The perspectives of veteran Pentagon reporters and press officials were at the core of our case. Through their stories, we built a strong record demonstrating the longstanding history of press access to the Pentagon—indeed, journalists were there from the very first day that the Pentagon opened its doors. Throughout that time, reporters operated independently, pressing officials with difficult questions in search of the truth, and even when they published stories critical of a given administration or the Department, there was never a threat to their credentials. These individuals' experiences established that the presence of independent journalists in the complex is entirely consistent with protecting safety and national security. That undermined the government's pretextual rationale for its policy. The declaration from veteran journalist Pete Williams—who, in addition to reporting on the Department of Justice and Supreme Court for nearly 30 years, also served as Assistant Secretary of Defense for Public Affairs when Dick Cheney was Secretary of Defense—brought into focus the benefits that this tradition provides to the Department itself in getting accurate information to the public.

Times journalists and others in the Pentagon press corps who have not signed onto the new rules lacked Pentagon access during the military's operations in Venezuela and Iran. Do you have a grasp on how this policy has affected coverage of these conflicts?

Townsend: It goes without saying that the lack of credentials hasn't stopped journalists including, especially, the incredible journalists at The Times from reporting on the Department and keeping the American public informed. They have continued to break stories and provide fulsome, fact-based coverage about the military action in Venezuela and the ongoing war in Iran. That said, as we detailed in our briefing, it is a significant detriment to those journalists and, in turn, to the American public to be shut out of the Pentagon. Having journalists regularly present on Pentagon grounds enables them to quickly gather information and provide the public with a more in-depth, nuanced understanding of military operations. As The Times's Julian Barnes told the court in his declaration, being on Pentagon grounds has been integral to his reporting over the years, and it would have been immensely valuable to the reporting efforts of him and his colleagues at The Times to have been at the Pentagon, for example, in the lead-up to and at the time the operation in Venezuela was carried out.

Since the decision, the Pentagon has announced that reporters will be moved to an annex and will require escorts to enter the building. Does the Times intend to challenge that move?

Boutrous: Yes. On Tuesday, we filed in the district court a motion to compel compliance with the court's order and, in that motion, we challenged this new and unprecedented unconstitutional restriction. The Department has, in effect, excluded all reporters from

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accessing the building with the obvious intent of retaliating against The Times and getting around the court's ruling. We've asked the court to enforce its judgment directing the Department to reinstate The Times's reporters' PFACs under the policy as it stood after the court vacated the unconstitutional provisions. The judge has scheduled a hearing on Monday morning on our motion.

What will you remember most about this matter?

Boutrous: For me, it was during the hearing on our cross-motions for summary judgment, when Judge Friedman so eloquently spoke about the role of the press over the years during wars (quoted in the opinion's conclusion), and the attorney representing the Department said that he agreed with everything the judge had said.

Townsend: Reading the district court's decision for the first time. It is such a powerful recognition of the importance of a free and independent press to democracy. It felt like a vindication not only of our legal arguments but also of the principles that The Times filed this lawsuit to defend.

Pelletier: The conversations we had with current and former Pentagon reporters while building the record will stay with me long after this case ends. Hearing them describe their work in their own words gave me a deeper understanding of the dedication and expertise they bring to bear in service of the public every day, and of what we lose every day they are shut out.

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