

August 5, 2019

Ms. Stephanie Grisham
Assistant to the President
White House Press Secretary
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Ms. Grisham,

We write on behalf of our client, Brian Karem, who serves as the White House correspondent for Playboy, in response to your August 2, 2019 letter informing him of your “preliminary decision” to suspend his hard pass for 30 days, supposedly “due to [his] conduct at the press event in the Rose Garden on July 11, 2019,” and giving him one business day to submit a response before you “make a final decision in this matter.” We object to this arbitrary and unfair procedure threatening to deprive Mr. Karem of his constitutionally protected liberty and property interests in his hard pass, which would flatly violate the First Amendment and the Due Process Clause and the principles established by the D.C. Circuit’s decision in *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977) and many other cases. Your invocation of the Rose Garden event weeks after it occurred and without any notice whatsoever that you were considering taking action against Mr. Karem is the opposite of due process, and is clearly a pretext for punishing Mr. Karem based on his viewpoint and the content of his reporting on President Trump.¹

As Press Secretary to the President of the United States, you have the privilege to be in a position to protect freedom of the press, and to ensure that our nation’s journalists have the ability to gather and report to the American people news about the President and the White House. But this Administration’s unprecedented and unconstitutional attempts to convert the hard pass system into a means of censoring and penalizing the press charts a dangerous path that we hope you will reconsider.

¹ While we are submitting this response within the unreasonable deadline you set in your letter, we also request that you provide additional information relating to the decision, including any and all communications with Sebastian Gorka. We would also appreciate the chance to meet with you to discuss these issues prior to your making a final determination.

I. Background

Mr. Karem is Playboy's senior White House correspondent, a political analyst for CNN, and the current president of the Maryland, Delaware, District of Columbia Press Association. He is a highly respected, award-winning journalist with a long history of standing up for press freedom. In 1990, he was jailed for contempt of court after refusing to disclose the name of confidential sources who helped him arrange a telephone interview with a jailed murder suspect, after which he won the National Press Club's Freedom of the Press award. He went on to work as executive editor of *The Sentinel Newspapers* in Maryland and as producer and television correspondent for *America's Most Wanted*, has served as a frequent news commentator, and authored seven books.

Playboy likewise has a long history of fighting for and advocating for First Amendment rights. For example, in 2000, Playboy convinced the Supreme Court to invalidate a section of the Telecommunications Act of 1996 limiting the transmission of sexually-oriented channels as an impermissible content-based restriction. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803 (2000). Playboy founder Hugh Hefner was also a well-known champion of free speech, publishing *Fahrenheit 451* in serialized form in Playboy in 1954, and later starting the Hugh M. Hefner Foundation, a non-profit committed to the support of First Amendment freedoms.

In your August 2 letter, you purport to base your decision to suspend Mr. Karem's hard pass on a July 11, 2019 exchange between Mr. Karem and conservative radio host and former White House advisor, Sebastian Gorka. This exchange took place following a White House Social Media Summit attended by 200 conservative social media activists, including Mr. Gorka and a person who operated under the name "Carpe Donktum," and is best known for creating a widely distributed fake video of former Vice President Joe Biden. The event "was called a Social Media Summit, but no one from the largest platforms – Twitter, Facebook and Google – was included. Instead, the guest list included far-right extremists, people with a record of creating and trying to spread false conspiracy theories and racist tropes." *White House Social Media Summit Recap*, NPR (July 13, 2019), <https://n.pr/2GLAefk>; Katie Rogers, *White House Hosts Conservative Internet Activists at a 'Social Media Summit,' N.Y. Times* (July 11, 2019), <https://nyti.ms/31lyhhw> (noting that the event featured the attendance of "200 conservative social media firebrands," to whom the President stated "[t]he crap you think of . . . is unbelievable"). To say the least, it was a colorful and boisterous crowd.

The exchange in the Rose Garden followed President Trump's post-summit remarks on Attorney General Barr's strategy to include the citizenship question on the census. Mr. Karem asked whether President Trump would stick around and answer some questions,

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which he did not. One conservative social media activist then mocked Kareem, saying “Don’t be sad, don’t be sad,” and Mr. Kareem, in good humor, made a joke doing his Rodney Dangerfield impression —“looks like a crowd eager to be demonically possessed.” As the videos you cite make clear, the joke was well received by the assembled activists, many of whom were taunting and insulting the White House reporters in attendance.

In response, Mr. Gorka, as shown in videos and according to those in attendance, began yelling at Mr. Kareem, taunting him and calling him a “journalist,” with mocking air quotes. In response to Mr. Gorka’s onslaught, Mr. Kareem stated, “Hey brother we can talk anytime you want or go outside and have a long talk,” by which he was suggesting that he and Mr. Gorka actually discuss their views outside of the Rose Garden, not that the two engage in a “physical confrontation,” as your letter falsely indicates. And although Mr. Kareem never crossed the rope line separating the press corps from the event attendees, Mr. Gorka charged across the Rose Garden to confront Mr. Kareem, yelling at Mr. Kareem, and accusing Mr. Kareem of “threatening” him and shouting “You’re not a journalist! You’re a punk!” The crowd of invited conservative activists started cheering “Gorka! Gorka!” One woman in the crowd yelled, “Hit him, Gorka! Hit him!” Fox News contributor Jim Hanson even told Mr. Kareem that “just for the record, [Mr. Gorka would] kick your punk ass.” Mr. Gorka also apparently referred to other reporters as “ass hats,” and Mr. Kareem witnessed numerous attendees of the event actively heckling reporters, including CNN’s Jim Acosta. The escalation of this situation was the result of Mr. Gorka’s actions and the crowd’s response to them. At no time did any White House staffers or the Secret Service attempt to stop *any* of the guests from heckling the press, nor did they intercede to keep Mr. Gorka or any other event attendee from engaging in harassment.

Indeed, Mr. Kareem actually approached Mr. Gorka after the confrontation in an attempt to de-escalate the situation and talk things out. Mr. Kareem offered to shake Mr. Gorka’s hand. But Mr. Gorka rebuffed these efforts and refused to engage with Mr. Kareem, other than insisting repeatedly that Mr. Kareem was “done”—which may have foreshadowed Mr. Gorka’s efforts to bring about the current suspension. Similarly, subsequent to the July 11 press event, Mr. Kareem reached out to your office multiple times to discuss the incident, but you canceled meetings you and he had scheduled, and two subsequent emails Mr. Kareem sent to your office ended with no scheduled meeting. Your office then further advised that you would be available during the week of August 5, suggesting an effort to delay meeting with Mr. Kareem until *after* you decided to suspend his hard pass.

Mr. Gorka appears to have relished the confrontation. He subsequently bragged that he took on the “fake news industrial complex,” <https://bit.ly/2KeBbyE>, and “read [Mr. Kareem] the riot act, @SebGorka, *Twitter* (Jul. 11, 2019, 3:12 P.M.), suggesting his aggression aimed at Mr. Kareem may well have been staged theatrics. He even called on

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others to follow his “example” in confronting journalists, <https://washex.am/2YANv4v>. President Trump applauded Mr. Gorka on Twitter, writing “@SebGorka Wins Big, No Contest!” The tweet is now “pinned” at the top of Mr. Gorka’s Twitter profile. The President’s tweet, in fact, demonstrates that he did not view Mr. Karem’s conduct as threatening to the administration or any of its guests, but rather thought it was humorous.

In the 22 day period between the social media summit and your August 2 “preliminary decision” to suspend Mr. Karem’s hard pass, President Trump has responded to several of Mr. Karem’s questions at press events, including answering two questions—one about potential Director of National Intelligence nominees and one about potential farm subsidies due to the China Trade War—a little less than two hours before Mr. Karem received the email telling him of your preliminary decision. On August 1, in fact—the day before you sent your letter—Mr. Karem asked the President to respond to presidential candidate Bernie Sanders’s contention that the President was a pathological liar, a question the President ignored.

The next day, despite no relevant communications since the Rose Garden event, you sent your letter advising of your “preliminary” decision to revoke Mr. Karem’s hard pass. Mr. Gorka immediately celebrated the suspension on Twitter, thanking you and the President “[o]n behalf of Americans who’ve had enough of FakeNews punks like @BrianKarem.”

II. The Preliminary Decision to Suspend Mr. Karem’s Hard Pass Violates His Due Process and First Amendment Rights

Your own letter amply demonstrates the violation of Mr. Karem’s and Playboy’s constitutional rights. *First*, you acknowledge in your letter that the White House has “*not*” issued any “explicit rules . . . to govern behavior by members of the press at White House press events,” such as the social media summit on July 11.² Instead, you cite only vague, purportedly “widely shared understanding[s]” as the basis for your decision to temporarily suspend Mr. Karem’s hard pass—a pass our client has possessed for nearly a year and in which he unquestionably has a “First Amendment liberty interest,” *Cable News Network, Inc. v. Trump*, No. 18-cv-2610, Dkt. No. 22 (D.D.C. Nov. 16, 2019) (oral ruling).

In *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), the D.C. Circuit made clear that due process in this context requires the government “*to articulate and publish* an explicit and meaningful standard” governing the denial of White House press passes, in advance of any

² You note that the White House “had not previously though that a set of explicit rules was necessary to govern behavior by members of the press at White House events.” We agree and believe that the prior practice of the White House working cooperatively with the press is preferable to using revocation and threats of revocation of hard passes as a tool to stifle journalistic activity.

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such deprivation. *Id.* at 131 (emphasis added); *see also id.* at 129 (“[T]he protection afforded newsgathering under the first amendment guarantee of freedom of the press requires that this access [to White House press facilities] not be denied arbitrarily or for less than compelling reasons.”). That is consistent with longstanding U.S. Supreme Court precedent requiring clear and objectively administrable standards, particularly where the First Amendment is concerned: “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.” *FCC v. Fox Television Studios, Inc.*, 567 U.S. 239, 253 (2012). And “[w]hen speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.” *Id.* at 253–54.

In truth, there are no so-called “widely understood understanding[s]” that would support your preliminary decision, and the standards you have concocted are so vague and subjective as to be unconstitutional on their face. Notions that the press corps has widely understood that they must maintain “decorum,” “obey instructions from White House staff,” and refrain from “taunting other members of the press” appear to be nothing more than newly-generated pretextual rationales seeking to justify the White House’s decision *post hoc* in this circumstance. Indeed, numerous attendees at the July 11 event violated the apparent no-taunting rule, yet you have singled out only Mr. Karem for punishment without explanation.

Moreover, the vague “understanding[s]” referred to in your letter plainly do not constitute the “publish[ed] . . . explicit and meaningful standards” required under *Sherrill v. Knight* and other binding case law. This is precisely what the Constitution prohibits. *See, e.g., Fox Television Stations*, 567 U.S. at 253 (finding broadcaster’s due process rights were violated and noting that the “void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way”); *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997) (“The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech.”); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (“Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.”); *Giaccio v. Pennsylvania*, 382 U.S. 399, 403 (1966) (“[O]ne of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce.”).

Second, Mr. Kareem was afforded *no* process before you reached this “preliminary decision,” which was revealed to Mr. Kareem after the fact, limiting Mr. Kareem to an “appeal” on short notice of a decision already made. *See Sherrill*, 569 F.2d at 131 (“[N]otice . . . of the factual bases for denial [of access to White House press facilities] with an opportunity to rebut is a minimum prerequisite for ensuring that the denial is . . . [not] based on arbitrary or less than compelling reasons.”). There is no indication that responding to your “preliminary” decision to revoke Mr. Kareem’s pass provides Mr. Kareem any meaningful opportunity to be heard by an objective decision-maker as due process requires, thus rendering any final decision you make to strip him of his pass constitutionally infirm. *See Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 881 (2009) (noting that due process violated not only when a “judge is actually, subjectively biased,” but also when there exists even the “potential for bias”). You even state that the President is “aware” of your decision to suspend Mr. Kareem’s pass and already “concur[s]” with it.

This retroactive application of vague, unarticulated standards to a journalist’s access to the White House through a process “shrouded in mystery” is just the type of due process violation that led the United States District Court for the District of Columbia to issue a temporary restraining order against members of the Trump Administration in November in connection with the revocation of another reporter’s hard pass. *See Cable News Network*, No. 18-cv-2610, Dkt. No. 22 (oral ruling).³

Third, while the stated rationale for the preliminary decision and the (lack of) process that led to it are by themselves fundamentally flawed, the facts and circumstances also suggest that the decision was in fact based on unconstitutional content and viewpoint-based discrimination and potentially made in coordination with Mr. Gorka. *See, e.g., Knight First Amendment Inst. at Columbia Univ. v. Trump*, 928 F.3d 226 (2d Cir. 2019) (invalidating the President’s viewpoint discrimination as unconstitutional); *cf. Cable News Network*, No. 18-cv-2610, Dkt. No. 22 at 11:7–8 (concluding that the Administration’s original justification for suspending Jim Acosta’s hard pass was based on evidence “of questionable accuracy”). Mr. Gorka attacked Mr. Kareem for being what Mr. Gorka deems a fake journalist, a term that President Trump and his supporters frequently apply to what they perceive as negative coverage of the President, and called on others to follow his “example.” <https://washex.am/2YANv4v>. And President Trump tweeted his approval of Mr. Gorka’s actions, writing “@SebGorka Wins Big, No Contest!” Further, although Mr. Gorka and the

³ The court in *CNN* also concluded that “[e]ach day that [a reporter] is deprived of” his “First Amendment liberty interest in a White House press pass” “without the process prescribed by the court in *Sherrill*, he suffers a harm that cannot be remedied.” *Cable News Network, Inc.*, No. 18-cv-2610, Dkt. No. 22 at 6:14–15, 13:8–13. To the extent you unlawfully deprive Mr. Kareem of his press pass for even one day, you will cause irreparable harm, and we reserve all legal rights to seek a concomitant remedy to that harm, including money damages for the violation of clearly established federal law.

other attendees of the summit were in fact responsible for the “gross breach of decorum” you identify in your letter, and not Mr. Karem, you decided instead to single out Mr. Karem for retaliation even while the President celebrates those, including Mr. Gorka via presidential tweet, who have behaved far worse. *See, e.g., Trump Praises Montana Congressman Who Body-Slammed Reporter*, CNBC (Oct. 19, 2018 6:19AM), <https://cnb.cx/33d1YCR> (noting the President’s praise of Greg Gianforte’s body slam of a reporter: “Any guy that can do a body slam—he’s my kind of guy He’s a great guy, tough cookie.”). This exhibits a clear and prohibited bias based on content of speech and the identity of the speaker. *See Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010) (“Speech restrictions based on the identity of the speaker are all too often simply a means to control content.”).

The fact that the suspension is content-based is also supported by the fact that the White House waited 22 days before issuing its preliminary decision to suspend Mr. Karem’s hard pass—with the President answering several of Karem’s questions during that period—suggesting that the decision is less about protecting safety or decorum than silencing a journalist known for tough questioning of the President. Indeed, the timing of the letter appears more connected to Mr. Karem’s questioning of President Trump on August 1 regarding Bernie Sanders’s contention that the President was a pathological liar, than to a press event three weeks earlier, not the first time Mr. Karem has appeared to rankle President Trump and White House officials with tough questions.⁴ The fact that you made no effort, during the three-week delay, to inquire about the incident or provide a warning regarding conduct at Rose Garden events is further evidence that the “preliminary decision” to suspend Mr. Karem’s hard pass is nothing more than a pretext for punishing Mr. Karem for the content of his questioning and a means to chill Mr. Karem and other journalists from aggressively covering the President and the White House by instilling fear of having their hard passes suspended or revoked.

Finally, you also provide no explanation as to why suspending Mr. Karem’s hard pass is a sufficiently tailored restriction of his First Amendment liberty interests where

⁴ For example, as recently as July 24, 2019, nearly two weeks after the incident in question, the President called Mr. Karem and other journalists “fake news” while pointing his finger at Mr. Karem. As another example, on June 14, 2018, Karem had a widely-reported exchange with Sarah Huckabee Sanders in the White House briefing room. In response to a question from CNN White House correspondent Jim Acosta about the detention of immigrant children, Sanders responded that it is “biblical to enforce the law.” Karem then asked Sanders whether she had empathy, given that she herself is a parent. Later that day, Fox News host Jesse Watters said that Karem and Acosta “don’t belong” in the briefing room and that the White House “need[s] to start ripping press passes away.” The President has made clear his dislike of tough questioning by Karem. On February 21, 2019, after Karem asked the President where he got his statistics about border violence, Trump told Karem: “Sit down! Sit down! Sit down!” A few weeks later, on June 11, 2019, when Karem tried to ask the President a question, Trump turned and glared at Karem and said “Quiet! Quiet! Quiet!”

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several less severe restrictions are available. *Sherrill* requires “compelling” reasons for revoking a hard pass, and your letter does not articulate any such compelling reason. Instead, it again misstates the facts and shifts the rationale.

III. Conclusion

Hard passes are not meant to be weaponized as a means of penalizing reporters for coverage with which the administration disagrees based on amorphous and subjective standards. Such actions unconstitutionally chill the free press. We thus respectfully request that you revoke your “preliminary” decision to suspend Mr. Karem’s hard pass and confirm the full restoration of his pass. In the event that you decline to do so, we request that you produce all communications between you, the President, and others in the White House or Press Office, on the one hand, and Mr. Gorka, on the other hand, regarding the July 11 “social media summit” and the incident that occurred there, and all documents relating to this preliminary decision. We further request that you meet with us prior to finalizing the decision so that Mr. Karem has a meaningful opportunity to respond to the evidence.

We reserve all rights to contest what would be an unconstitutional suspension.

Respectfully,

A handwritten signature in blue ink, appearing to read "Theodore J. Boutros Jr.", written in a cursive style.

Theodore J. Boutros Jr.