

## Litigator of the Week: Gibson Dunn's Theodore Boutrous Jr. Scores Another Win for the Fourth Estate

In persuading a federal judge to restore reporter Brian Karem's White House press credentials, the litigator applied lessons from an earlier fight for CNN White House correspondent Jim Acosta. But the White House had also upped its game, according to Boutrous, making Karem's case more complicated.

By Jenna Greene  
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*Our Litigator of the Week is Gibson, Dunn & Crutcher partner Theodore Boutrous Jr. for his high-profile win on behalf of Playboy White House reporter Brian Karem, who had his press pass yanked after an incident in the Rose Garden involving former White House aide Sebastian Gorka.*

*It might sound minor (does anyone really rely on Playboy for day-to-day White House coverage?) but the reverberations go far beyond the four corners of the case.*

*As Washington Post political reporter Aaron Blake put it, "The last four years have laid waste to many of the norms and supposedly uncrossable lines of American politics. But few scenes encapsulate how ridiculous things have gotten like the spat that got ... Karem's press pass suspended."*

*Boutrous discussed the case with Lit Daily.*

**Lit Daily: Who is your client and what was at stake—in both the immediate sense, and from a wider perspective?**

Our client is *Playboy's* senior White House correspondent, Brian Karem, an award-winning journalist who once went to jail for over two weeks to protect a confidential source and who has covered the White House under six presidents. When Press Secretary Stephanie Grisham suspended his "hard pass" on August 16, it had an immediate and irreparable impact on Brian: It deprived him of his First Amendment liberty and prevented him from doing his job covering President Trump and his administration.

But we knew this case wasn't just about Mr. Karem. It has widespread implications because the Trump White House is trying to wield the press-credentialing process as a weapon to punish reporters whose coverage they don't like and is seeking, more broadly, to chill vigilant reporting on the presidency.

**Set the stage—what happened in the Rose Garden that afternoon in July?**



Diego M. Radzinski/ALM

Theodore Boutrous Jr.

On July 11, the President had hosted a so-called Social Media Summit at the White House for around 200 conservative social activists and "influencers." After the Summit, the attendees joined the President in the Rose Garden to watch him deliver prepared remarks. As Judge Contreras explained in his opinion granting our motion for a preliminary injunction, the "atmosphere" in the Rose Garden "became, in the words of one press member, 'unusually tense'; attendees were "photographing members of the press and calling them 'fake news,'" actively taunting them in the Rose Garden. After the President spoke, Mr. Karem called out, "Mr. President, do you mind sticking around to answer a few questions?" The President ignored that question but, as Judge Contreras explained, the question "did ... draw a reaction from some of the Summit attendees," including one attendee who shouted that the President had "talked to us, the real news" and another who "said sarcastically 'Don't be sad, don't be sad.'" Mr. Karem responded by smiling and making a joke that drew laughter from several of the attendees.

Controversial radio host (and former Trump advisor) Sebastian Gorka, however, took it differently. He began yelling at and mocking Mr. Karem, who in turn responded with—in the Court’s words—an “irreverent, caustic joke”: “Come on over here and talk to me, brother, or we can go outside and have a long conversation.” Gorka then escalated. He charged across the Rose Garden to confront Mr. Karem, yelling nearly nose-to-nose “You are a punk! You’re not a journalist! You’re a punk!” and practically spitting on Mr. Karem. Gorka left shortly thereafter, though Mr. Karem tried to approach him later in order to make peace, an overture Gorka rejected.

Nothing happened for three weeks. But on August 2, out of the blue, Ms. Grisham sent Mr. Karem a letter stating that she had reached a “preliminary decision” to suspend his hard pass for 30 days, and that President Trump approved her decision. We tried to persuade her that such a suspension would violate the First Amendment and due process, but on August 16, she sent me a 13-page letter making the suspension “final” in order to “punish” Mr. Karem and “deter” him and other reporters from engaging in journalistic activity the White House finds objectionable.

**When and how did you get involved in Karem’s case?**

Mr. Karem and *Playboy’s* General Counsel Chris Riley reached out to me almost immediately after receiving the August 2 “preliminary decision,” which gave Mr. Karem just one business day to respond. We jumped in that same day to prepare the response.

**This case moved very quickly. Tell us about how you and your team worked together to build your case.**

The core team included three of my New York colleagues integral to our win in the CNN/Acosta lawsuit—partner Anne Champion and associates Brian Ascher and Lee Crain, and I asked my partner Tom Dupree in Washington to join the fight this time as well. We knew the governing law well, and our team pounded the pavement on fact development, analyzing the YouTube videos that captured the July 11 event frame-by-frame, obtaining fact-witness declarations from Mr. Karem and other journalists, and gathering expert declarations from two of our declarants from the Acosta case: former ABC News White House correspondent Sam Donaldson and Dallas Morning News Washington Bureau Chief Todd Gilman, who is an expert on the “hard pass” process and history.

We responded to Ms. Grisham’s letter on August 5 and met with her a couple days later to try to persuade her to change her mind. But it was clear that was not going to happen. The White House was simply going through the motions. So while we awaited her final decision, we were working on our complaint, the declarations and exhibits, and our motions for a temporary restraining order and preliminary injunction and supporting briefs. We were also working with potential amici curiae. That way, when Ms. Grisham issued her “final decision” on Friday, August 16, we were able to get on everything on file very quickly—on Tuesday—and we were able to get a hearing scheduled for the following week.

**This isn’t your first fight over a press pass—you also represented CNN White House correspondent Jim Acosta after he had his credentials pulled last year. What happened in that case? And how did it impact this one?**

Mr. Acosta’s case involved a November press conference in the East Room of the White House during which a White House intern tried to take Jim’s microphone away while he was asking President Trump some tough questions on immigration. That same evening, then-Press Secretary Sarah Sanders announced that she had revoked Acosta’s hard pass as a result of his conduct at the press conference, and a security guard confiscated his pass when he tried to go back to work after dinner.

We sought a TRO seeking immediate restoration of Mr. Acosta’s hard pass, arguing that the D.C. Circuit’s 1977 decision in *Sherrill v. Knight* required, before the White House revokes a hard pass, that the government must publish explicit, meaningful standards governing revocation of hard passes and give a reporter notice of the reasons for the revocation and an opportunity to be heard. Judge Timothy Kelly granted our motion, holding that the White House had not complied with *Sherrill* and these basic procedural due process requirements. He ordered the White House to restore Acosta’s hard pass.

In *Karem v. Trump*, we relied both on *Sherrill* and Judge Kelly’s opinion in the Acosta case, as did Judge Contreras when he granted our motion for a preliminary injunction here. Citing *Sherrill*, Judge Contreras held that the standards on which the White House based the suspension of Mr. Karem’s hard pass were “unnecessarily vague and subject to ambiguous interpretation.” The apparent requirement that Mr. Karem behave “professionally” and with “decorum” lacked “any contextual guideposts” and was therefore “too

murky to provide fair notice here.” As the Court explained: “What is deemed ‘professional’ behavior in the context of a state dinner may be very different from what is considered ‘professional’ behavior during a performance by James Brown.” Further citing Judge Kelly’s opinion in *Acosta*, Judge Contreras recognized that the deprivation of Mr. Karem’s hard pass was not an “abstract” or “theoretical” injury but rather was a “First Amendment injury” that “undoubtedly constitutes a concrete, unrecoverable harm sufficient to warrant preliminary relief.” As Judge Kelly had held in *CNN*—language Judge Contreras quoted here— “[e]ach day” a reporter is unconstitutionally deprived of his White House hard pass is “a harm that cannot be remedied in retrospect.”

**Bar associations have rules covering civility and decorum. What makes those workable but the White House’s “professional journalistic norms” as described in the Acosta letter untenable?**

Bar association rules are different for a variety of reasons. The role of the press in covering the White House is very different from the role of lawyers practicing law in the courts. Moreover, attorney civility and decorum standards are promulgated by authorities like State Supreme Courts or Bar Associations with clear mandates to govern the legal profession and who can be trusted to regulate legal practice. By contrast, Ms. Grisham is not competent to regulate the professionalism of the press. She’s never been a journalist. She’s hardly been a press secretary and has never even held a White House press briefing.

**What were your other primary arguments for granting the TRO?**

In addition to the fair-notice and vagueness arguments on which we prevailed, we made procedural due process arguments, challenging the failure of the government to provide us with key evidence and the bias of Ms. Grisham in “adjudicating” this matter and imposing a punishment. We also advanced First Amendment challenges, charging that the suspension was content- and viewpoint-based discrimination, that Ms. Grisham’s “standards” were being selectively enforced, and that the bases for the suspension were a pretext for punishing a journalist that President Trump dislikes based on the content of his reporting.

U.S. District Judge Rudolph Contreras during the August 27 hearing grappled with where to draw the line. For example, he said, what if a reporter “dropped his pants and moons the press secretary or something.” What recourse would the White House have?

It was a very colorful hypothetical! As I argued during the hearing, the White House always has the ability to step in and stop actual disruptions of White House events in real-time, to complain to a reporter’s employer, and issue warnings for the future.

**Judge Contreras also noted that “It’s clear that the White House got better lawyers between Acosta” and this case. Overall, was it a harder fight this time around?**

The White House did a somewhat better job of covering its tracks this time. It had so bungled Jim Acosta’s suspension that we were able to advance a very simple argument under *Sherrill*: it was undisputed that the White House had not given Jim any notice that they were planning to suspend his hard pass or any opportunity to be heard. This time, the procedural due process argument was more complicated. The White House had at least tried to create a record and the illusion of a process. It was more “process” than what they provided in the Acosta case but still did not come close to satisfying due process, and they completely ignored *Sherrill*’s mandate for clear, explicit standards.

**The case attracted multiple amicus briefs. What does that signal about the importance of these issues? Did you and your client find the support gratifying?**

It was immensely gratifying to get support from organizations like the White House Correspondents’ Association, the Reporters Committee for Freedom of the Press, and PEN America. That these organizations were willing to spend their resources and time assisting in this case speaks volumes about how important this case is for freedom of the press not just at the White House but across the whole country.

**What happens next? And what do you hope will be the legacy of this case?**

We have a conference with the district court scheduled for September 13 to discuss next steps. I hope the legacy of the case will be that President Trump and Ms. Grisham will stop attacking the press and flouting the First Amendment and start providing accurate information to journalists and the American people.