



U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave. NW
Washington, DC 20530
202-353-9018

April 5, 2020

Mr. Theodore J. Boutrous, Jr.
Gibson, Dunn & Crutcher LLP
333 South Grand Avenue
Los Angeles, CA 90071-3197

Dear Mr. Boutrous:

We write in response to your April 3, 2020 letter demanding that the White House Press Secretary allow your client, Brian Karem, “to attend today’s and future White House press conferences and briefings” in the White House’s James S. Brady Press Briefing Room (“Press Briefing Room”). Boutrous Letter 1, 2. In your letter, you allege that the White House Press Secretary has engaged in content- and viewpoint-based discrimination by limiting access to press briefings during the COVID-19 epidemic to Mr. Karem and similarly situated reporters while permitting a reporter from One America News Network (“OANN”) to attend briefings. *Id.* at 2. You contend that the Press Secretary’s conduct violates the First Amendment and the district court’s order in *Karem v. Trump*, No. 19-cv-2514 (D.D.C. Sept. 3, 2019). Boutrous Letter 3. Your letter is both factually and legally mistaken.

Based on our understanding from the White House Press Office, although the Press Briefing Room is White House property, a practice has developed under which the White House Correspondents’ Association (“WHCA”) is permitted to determine seating in the Press Briefing Room. The recent social-distancing rotation put in place to account for the current COVID-19 epidemic was adopted solely by the WHCA, not by the Press Secretary, and was not the subject of an agreement between the WHCA and the White House. Nor does the Press Secretary or any other member of the White House staff enforce these rules—they are enforced solely by the WHCA. To the extent Mr. Karem has been excluded from the seating rotations, he should direct his complaints to the WHCA, not to the Press Secretary, who has merely acquiesced in this practice.

Separate from the seating rotation determined by the WHCA, the Press Secretary personally invited the OANN reporter referenced in your letter to attend certain press briefings as the Press Secretary’s guest. It is not a violation of the First Amendment or the Due Process Clause for the White House Press Secretary to engage in the longstanding practice of providing special press access to a particular network or reporter. Indeed, that is true whether or not such an invitation is based on viewpoint. *See, e.g., Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410, 418 (4th Cir. 2006) (explaining that reporters “[h]aving access to relatively less information than other reporters on account of one’s reporting” is a “pervasive feature of journalism and of journalists’ interactions with government”); *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977) (“It would certainly be unreasonable to suggest that because the President allows interviews with some bona fide journalists, he must give this opportunity to all.”). Nothing in

the First Amendment or the Due Process Clause requires the White House Press Secretary to extend a personal invitation to Mr. Karem to be her guest.

Finally, it is clear that there has been no violation of the district court's order, which required only that "Defendants must restore Karem's White House hard pass." Order, *Karem v. Trump*, No. 19-cv-2514 (D.D.C. Sept. 3, 2019). As you acknowledge in your letter, Mr. Karem's hard pass has been restored. Boutrous Letter 3. And Mr. Karem is currently enjoying the full privileges that hard pass brings. As explained above, any current restrictions on Mr. Karem's ability to attend press briefings are based, not on the Press Secretary's actions, but instead on a policy that has been independently adopted by the WHCA.

Sincerely,

/s/ Ashley A. Cheung

Ashley A. Cheung
Attorney

April 3, 2020

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

Dear Ms. Grisham,

We write to demand that you allow hard-pass holder Brian Karem, *Playboy*'s White House correspondent, to attend today's and future White House press conferences and briefings. Mr. Karem earlier this afternoon emailed you to request permission to attend today's press briefing but has yet to receive any response.

As you know, on September 3, 2019, the United States District Court for the District of Columbia, Judge Contreras presiding, preliminarily enjoined you and President Donald J. Trump from suspending our client Brian Karem's hard pass. Order, *Karem v. Trump*, No. 19-cv-2514, Dkt. No. 32 (Sept. 3, 2019) (ordering that Defendants "must restore Karem's White House hard pass"). As the district court's thorough opinion explained, reporters like Mr. Karem have long held a "first amendment liberty interest in possessing a long-term so-called 'hard pass.'" Memorandum Opinion, *Karem v. Trump*, No. 19-cv-2514, Dkt. No. 33 (Sept. 3, 2019) ("Mem. Op.") at 1. The district court held that Mr. Karem was likely to succeed on the merits of his claim that your putative suspension of his hard pass violated due process, that suspending his hard pass for even one day constituted a "First Amendment injury" that was "undoubtedly" irreparable, and that balance of the equities and public interest weighed in favor of prohibiting you and the President from suspending Mr. Karem's hard pass. Mem. Op. at 22-24. As the district court's opinion explained, the White House has "*for decades*" "made long-term press passes available" to allow journalists covering the White House with immediate on-demand access to the White House press facilities. Mem. Op. at 1 (emphasis added). Consequently, restoration of a hard pass is restoration of the right of access such a pass represents.

As the D.C. Circuit recognized in *Sherrill v. Knight*, 569 F.2d 124 (1977), "arbitrary or content-based criteria for press pass issuance are prohibited under the first amendment." *Id.* at 129. Indeed, as the Court explained:

White House press facilities having been made publicly available as a source of information for newsmen, the protection afforded newsgathering under the first amendment guarantee of freedom of the press, requires that this access not be denied arbitrarily or for less than

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compelling reasons. Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information.

Id. The Supreme Court has also made clear that government officials like yourself cannot retain “unbridled discretion” to pick and choose which journalists get access to the White House press facilities and which do not because such “unbridled discretion” “may result in censorship” and imposes the “major First Amendment risk[]” of making it “difficult[]” to “effectively detect[], review[], and correct[] content-based censorship.” *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 759 (1988).

By prohibiting Mr. Karem and similarly situated reporters from accessing the White House briefing room pursuant to their hard passes, you and the White House are engaging in exactly the type of content- and viewpoint-based discrimination that the D.C. Circuit and Supreme Court prohibit. We are aware that you and the White House Correspondents’ Association (“WHCA”) recently agreed to limit access to the briefing room to a rotating group of reporters only, in light of the coronavirus crisis and the need for social distancing to protect the health of reporters and government officials.¹ We also understand, however, that even as you would prohibit Mr. Karem from attending press briefings, you have permitted a reporter from One America News (“OAN”)—the President’s favorite network²—to circumvent that agreed-upon system as your “guest” to attend briefings, allowing that reporter access even though she was not part of the WHCA’s designated daily rotation. And we further understand that you continue to invite this OAN correspondent to briefings even after the WHCA itself concluded that she was violating the agreement you made with the WHCA and for that reason expelled OAN from the briefing room press rotation.³ Indeed, although your agreement with the WHCA was designed to facilitate social distancing during the current pandemic, you have invited this OAN correspondent into the briefing room now multiple times even though she has blatantly ignored

¹ Scott Detrow, *Suspected Coronavirus Case Will Thin White House Press At Briefings*, NPR (March 23, 2020), <https://n.pr/2R8hk7o>.

² Paul Farhi, *OANN threatened with removal from White House press room after correspondent Chanel Rion makes unauthorized appearances*, Wash. Post (Apr. 1, 2020), <https://wapo.st/3dRJOr2> (“Trump clearly has been delighted by OANN’s participation, calling on Rion and a colleague, Jenn Pellegrino, who handles weekend shifts at the White House, several times over the past two weeks. ‘OAN. Very good,’ he said after calling on Rion in one briefing. ‘They treat me very nicely.’”); Eli Stokols, *Fox isn’t enough: Amid coronavirus crisis, Trump leans on a new media friend*, L.A. Times (Apr. 1, 2020), <https://lat.ms/2V0jqjV>.

³ Caitlin Oprysko, *White House Correspondents’ Association boots OAN from briefing rotation*, Politico (Apr. 1, 2020), <https://politi.co/2UGxY0b>.

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the very structure you and the WHCA set up to, as the WHCA explained, “ensure the safety of the White House press corps and White House staff.”⁴ Even just yesterday, you *still* allowed the OAN correspondent to attend the press briefing in the Brady Press Briefing Room and even ask the President a question.⁵

Your conduct is a plain repudiation of your agreement with the WHCA and violates the First Amendment. Prohibiting Mr. Karem and similarly situated reporters from accessing the briefing room, while allowing a favored reporter to attend and ask questions in violation of the agreement, is textbook content discrimination. While Mr. Karem has no objection to OAN or anyone else being in the briefing during press conferences, your arbitrary and content-based approach is intolerable and unconstitutional. Simply put, you have openly and notoriously excluded reporters you believe to be critics of the administration like Mr. Karem and given access to favored networks like OAN. You have also purported to construct a new regime for White House access that relies on your own discretion alone, in plain violation of *City of Lakewood* and its progeny. Although we recognize that the current pandemic requires limiting reporters’ physical presence in the briefing room at least to some degree, this crisis is not a license to ignore these bedrock First Amendment principles. In fact, the First Amendment is even more important in today’s current state of crisis, where the role of the press to cover the government and to hold it accountable for its actions is essential to the health and safety of society and democracy.

Mr. Karem has a hard pass—one ordered restored by federal court order—and that pass entitles him to access the White House press facilities and to attend press briefings, as decades of hard pass practice and history make clear. In the event you refuse access to Mr. Karem, we will have no choice but to raise this with the district court and seek an order of contempt for your unconstitutional conduct.

Sincerely,



Theodore J. Boutrous Jr.

⁴ @whca, Twitter (Apr. 1, 2020 at 7:16 PM), <https://bit.ly/2X62LoO> (announcing that the WHCA had removed OAN from “the rotation for a seat in the briefing room” because OAN failed to comply with the WHCA’s briefing room rotation policy); see Tweet, @oliverdarcy (Apr. 2, 2020 at 5:55 PM), <https://bit.ly/2w9DEX3> (“OAN’s Chanel Rion is again standing in the back of the White House briefing room, despite being expelled from the WHCA briefing rotation for violating restrictions to increase social distancing. Earlier today, Rion said that she would be a guest of @PressSec at the briefing.”); Tweet, @oliverdarcy, Twitter (Apr. 2, 2020 at 5:59 PM), <https://bit.ly/3dSWZws> (“Other news orgs are respecting WHCA’s rules, so the briefing environment remains as safe as possible for journalists. . . . OAN is breaking the rules w/ @presssec’s help.”)

⁵ @atrupar, Twitter (Apr. 2, 2020 at 7:13 PM), <https://bit.ly/2X6CYwO>.

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