

**THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CABLE NEWS NETWORK, INC. and ABILIO
JAMES ACOSTA,

Plaintiffs,

v.

DONALD J. TRUMP, in his official capacity as
President of the United States; JOHN F. KELLY, in
his official capacity as Chief of Staff to the President
of the United States; WILLIAM SHINE, in his
official capacity as Deputy Chief of Staff to the
President of the United States; SARAH HUCKABEE
SANDERS, in her official capacity as Press Secretary
to the President of the United States; the UNITED
STATES SECRET SERVICE; RANDOLPH ALLES,
in his official capacity as Director of the United
States Secret Service; and JOHN DOE, Secret
Service Agent, in his official capacity,

Defendants.

Case No. 1:18-cv-02610

**PLAINTIFFS' STATUS REPORT AND REQUEST FOR AN
EMERGENCY BRIEFING SCHEDULE AND HEARING ON PLAINTIFFS' MOTION
FOR A PRELIMINARY INJUNCTION**

Plaintiffs Cable News Network, Inc. ("CNN") and James Abilio Acosta respectfully
submit this status report on the underlying matter. Ex. 57 at 17:7-10.

Following this Court's TRO decision, Plaintiffs offered to resolve this dispute amicably
by working with Defendants and the White House Correspondents' Association to establish
protocols for White House press conferences on a going forward basis. Defendants did not
respond to this offer to cooperate; instead, after 9 p.m. on Friday, just hours after this Court's

order requiring the restoration of Acosta's White House press pass, Defendants Sarah Huckabee Sanders and William Shine sent the attached letter, stating, among other things, that they had made the "preliminary decision to suspend [Acosta's] hard pass due to [his] conduct at the President's November 7, 2018 press conference." Ex. 58 at 1. They demanded a response by 5:00 p.m. on Sunday and arbitrarily set a deadline of 3:00 p.m. Monday for their determination as to whether the "preliminary decision" becomes "final." Ex. 58 at 1.

In response, as set forth in the attached letter, Plaintiffs objected to Defendant's attempt to provide retroactive due process, and have requested that Defendants refrain from — yet again — violating the constitutional rights of CNN and Acosta. Ex. 59.

Plaintiffs remain hopeful that the parties can resolve this dispute without further court intervention. But in light of Defendants' stated intentions, Plaintiffs respectfully request that the Court enter an order requiring Defendants to file their opposition to Plaintiffs' motion for a preliminary injunction on Tuesday, November 20, 2018, as required by Local Rule 65.1(c), with Plaintiffs' reply due Tuesday, November 27, 2018, or according to an expedited schedule the Court deems appropriate. Plaintiffs further request that the Court schedule a hearing on the motion for the week of November 26, 2018, or as soon thereafter as possible. Finally, Plaintiffs respectfully suggest, in response to the Court's inquiry, that briefing on the merits and the preliminary injunction should not be combined, as discovery may be necessary to resolve Plaintiffs' claims.

Dated: November 19, 2018

Respectfully submitted,



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*Counsel for Plaintiffs Cable News Network, Inc.
and Abilio James Acosta*

EXHIBIT 57

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CABLE NEWS NETWORK, INC., et al., CA No. 1:18-cv-02610-TJK

Plaintiffs, Washington, D.C.
v. Friday, November 16, 2018
10:00 a.m.

DONALD J. TRUMP, et al.,

Defendants.

- - - - - x

TRANSCRIPT OF MOTION HEARING
HELD BEFORE THE HONORABLE TIMOTHY J. KELLY
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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Court Reporter: Timothy R. Miller, RPR, CRR, NJ-CCR
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Proceedings recorded by machine shorthand; transcript
produced by computer-aided transcription.

P R O C E E D I N G S

THE DEPUTY CLERK: Your Honor, this is civil matter 18-2610, Cable News Network, Incorporated, et al., v. Donald J. Trump, et al.

Will counsel please approach the lectern and state your appearance for the record.

MR. BOUTROUS: Good morning, Your Honor. Theodore Boutrous for Plaintiffs CNN and Jim Acosta.

THE COURT: Good morning, sir.

MS. CHAMPION: Good morning, Your Honor. Anne Champion from Gibson Dunn for Plaintiffs CNN and Jim Acosta.

MR. LIPSHUTZ: Good morning, Your Honor. Joshua Lipshutz from Gibson Dunn for Plaintiffs CNN and Jim Acosta.

THE COURT: Good morning.

MR. BURNHAM: Good morning, Your Honor. James Burnham here on behalf of the defendants, along with Michael Baer, Eric Womack and Joseph Borson.

THE COURT: All right. Good morning to you all.

We are here for an oral ruling on the plaintiffs' application for a temporary restraining order.

And I'd better get some water right away here.

(Brief pause.)

On November 7th, 2018, President Trump held a news conference at the White House. Soon after it started, he called on Plaintiff Acosta, a reporter for CNN, to take a

1 question from him. After Mr. Acosta asked several questions
2 about the caravan of migrants heading to the U.S.-Mexican
3 border, the President indicated that he wanted to move on to
4 call on another reporter but Mr. Acosta would not be seated
5 and continued trying to ask his question and then he would
6 not give up the microphone, even when approached by an
7 intern employed by the White House Press Office who
8 attempted to retrieve it from him. The President made
9 several comments toward Mr. Acosta while this happened,
10 including, You are a rude, terrible person, and, When you
11 report fake news which CNN does a lot, you are an enemy of
12 the people. Eventually, Mr. Acosta did relinquish the
13 microphone.

14 That night, his Secret -- the Secret Service asked
15 Mr. Acosta to relinquish his hard pass, his credential that
16 allows him access to the White House press facilities. That
17 same evening, the White House Press Secretary, Sarah
18 Sanders, posted a video on Twitter purporting to show the
19 exchange between Mr. Acosta, the intern and the President.
20 In a tweet, Ms. Sanders cited the conduct in the video as
21 the reason that Mr. Acosta's hard pass had been revoked. In
22 a tweet, she characterized Mr. Acosta as placing her hand --
23 his hands on the intern and she also asserted that Mr.
24 Acosta had been disrespectful to his colleagues to not allow
25 them to -- the opportunity to answer a question.

1 The next day, on November 8th, CNN sent a letter
2 to the White House requesting that Ms. -- the reporter's
3 credentials be reinstated immediately. CNN alleged that the
4 White House simply did not like the content of the questions
5 posed to the President and threatened to take legal action
6 if the revocation was not reversed.

7 The next day, on November 9th, the President
8 suggested that other reporters might have their credentials
9 revoked and that reporters must treat the White House with
10 respect and treat the presidency with respect and he also
11 conceded that Mr. Acosta's -- but he also conceded that Mr.
12 Acosta's conduct toward the Press Office intern had not been
13 overly horrible.

14 Then the long holiday weekend intervened. And on
15 the morning of Tuesday, November 13th, CNN and Mr. Acosta
16 filed this lawsuit and moved for a temporary restraining
17 order.

18 That morning, after -- the same morning, after the
19 suit was filed, Ms. Sanders issued a written statement
20 setting forth reasons for the revocation of Ms. -- Mr.
21 Acosta's hard pass. It read: We have been advised that CNN
22 has filed a complaint challenging the suspension of Jim
23 Acosta's hard pass. This is just more grandstanding from
24 CNN and we will vigorously defend against this lawsuit.
25 CNN, who has nearly 50 additional hard pass holders, and Mr.

1 Acosta is no more or less special than any other media
2 outlet or reporter with respect to the First Amendment.
3 After Mr. Acosta asked the President two questions, each of
4 which the President answered, he physically refused to
5 surrender a White House microphone to an intern so that
6 other reporters might ask their questions. This was not the
7 first time this reporter had -- has inappropriately refused
8 to yield to other reporters. The White House cannot run an
9 orderly and fair press conference when a reporter acts this
10 way which is neither appropriate nor professional. The
11 First Amendment is not served when a single reporter, of
12 more than 150 present, attempts to monopolize the floor. If
13 there is no check on this type of behavior, it impedes the
14 ability of the President, the White House staff and members
15 of the media to conduct business.

16 To obtain a temporary restraining order, the
17 plaintiffs must clearly demonstrate, one, a likelihood of
18 success on the merits of their claim; two, a likely
19 irreparable harm in the absence of preliminary relief;
20 three, a balance of the -- that the balance of the equities
21 is in their favor; and, four, that the TRO is in the public
22 interest. And where the Government is the party opposing
23 the TRO, the Court merges the latter two factors into a
24 single inquiry.

25 Much of our discussion at the hearing the other

1 day concerned the applicability or inapplicability of the
2 D.C. Circuit case Sherrill v. Knight. I'm going to first
3 talk about the likelihood of success of [sic] the merits
4 with regard to the plaintiffs' Fifth Amendment due process
5 claim.

6 Much of our discussion at the hearing concerned
7 the applicability of Sherrill v. Knight. I've read the case
8 closely and I think it's fair to conclude, as the Government
9 argued, that there are at least some portions of it that
10 plaintiffs would rely on that are fairly characterized as
11 dicta, but if Sherrill stands for anything at all, I think
12 it's unavoidable to conclude that it -- to conclude anything
13 other than it stands for the Fifth Amendment's due process
14 clause protects a reporter's First Amendment liberty
15 interest in a White House press pass. Whether that's a
16 holding I agree with or not is another thing, but that is
17 not relevant. The case has not been abrogated and, as a
18 district judge, I must apply the precedent of this circuit
19 as I see it.

20 So let me quote from Sherrill. Quote, In our
21 view, the procedural requirements of notice and the factual
22 basis for denial and opportunity for the applicant to
23 respond to these and a final written statement of the
24 reasons for denial are compelled by the foregoing
25 determination that the interest of a bona fide Washington

1 correspondent in obtaining a White House press pass is
2 protected by the First Amendment. This First Amendment
3 interest undoubtedly qualifies as liberty which may not be
4 denied without due process of law under the Fifth Amendment.

5 A few more words about Sherrill before I move on.

6 The Government argued that the holding of Sherrill
7 is limited to Secret Service restrictions based on security
8 concerns, and the Government points out there's nothing in
9 the record here that the security of the President or the
10 White House is at issue, but Sherrill, as I read it,
11 provides no reason why the court's recognition of a First
12 Amendment interest in a press pass -- in a White House press
13 pass would turn on whether that decision to limit that
14 interest was made by the White House Press Office or the
15 Secret Service or any other part of the executive branch,
16 and the case suggests no reason to me why the due process
17 required to deny someone a pass would turn on a specific
18 component of the executive branch that made that decision.
19 The court was very clear that the basis of this interest was
20 rooted in the First Amendment and not the decision of any
21 part of the executive branch to agree that Sherrill should
22 be granted the press pass.

23 The Government also made the point that there is
24 case law for the proposition that the public doesn't have a
25 general First Amendment right to enter the White House

1 grounds. I have no quarrel with that at all, but Sherrill
2 holds that once the White House opens a portion of it up to
3 reporters for their use, some kind of First Amendment
4 liberty interest protected by a due process right is
5 created, and I simply have no choice but to apply that
6 precedent here.

7 The Government also argued that some of the
8 factual underpinnings of Sherrill had changed and that
9 today, the White House routinely exercises discretion in
10 different ways, giving out hard passes to certain
11 journalists aside from whatever review the Secret Service
12 undertakes for security purposes. I can see how that might
13 be relevant in examining the nature of whatever liberty
14 interest Sherrill holds is at stake here, but even assuming
15 that was a distinction that would make a difference in terms
16 of how I apply Sherrill, I don't have any evidence in the
17 record here; I don't have any declarations or sworn
18 statements that explain how that factual landscape has
19 shifted since Sherrill was decided.

20 And, finally, the Government makes the point that
21 the First Amendment does not restrict the ability of the
22 President to dictate the terms of how he chooses to engage
23 or not engage with any particular journalist. That seems
24 entirely correct to me, but nothing in the holding of
25 Sherrill relating to the Fifth Amendment due process right

1 it recognized contradicts that. In fact, Sherrill
2 explicitly recognizes the President's right to engage with
3 whomever he pleases. Certainly, he need not ever call on
4 Mr. Acosta again. But under Sherrill, as I read it, the
5 government must provide Mr. Acosta due process if it is to
6 revoke his hard pass. Accordingly, the likelihood that the
7 plaintiffs succeed on the First -- on the Fifth Amendment
8 claim hinges on whether the government provided adequate due
9 process to Mr. Acosta. The court in Sherrill held that this
10 process must include notice, an opportunity to rebut the
11 government's reasons and a written decision. And all the
12 court -- although the court in Sherrill did not have
13 occasion to address it, when an important interest is at
14 stake and when the government is able to provide this
15 process before deprivation, it generally must do so. There
16 is no evidence that one of the few exceptions to this rule
17 would apply here such as some kind of emergency. So I do
18 hold that plaintiffs have demonstrated a likelihood of
19 success on their claim that adequate process was not
20 provided to Mr. Acosta. Indeed, whatever process occurred
21 within the government is still so shrouded in mystery that
22 the Government could not tell me at oral argument who made
23 the initial decision to revoke Mr. Acosta's press pass --
24 his hard pass.

25 On the notice, as for notice, the Government

1 points to only one statement that could possibly constitute
2 prior notice to Mr. Acosta that his pass would be revoked,
3 the President's statements to him during the exchange at the
4 press conference on November 7th, but the President's
5 statements did not revoke -- did not reference Mr. Acosta's
6 hard pass at all, let alone that it would be revoked;
7 therefore, that statement cannot have put him on notice of
8 the government's intention to revoke it.

9 Now, it is true that the public and Mr. Acosta
10 were eventually provided two things. First, explanations as
11 to why his hard pass was revoked through Ms. Sanders's
12 tweets; and a written statement of explanation, apparently
13 prompted by this litigation, but given their timing and
14 their lack of connection to Mr. Acosta's opportunity to
15 rebut -- which we'll talk about in a moment -- these belated
16 efforts were hardly sufficient to satisfy due process.

17 As for Mr. Acosta's opportunity to be heard in
18 rebuttal, the Government points to the letter CNN sent to
19 the White House the day after his hard pass was revoked, but
20 this does not reflect a meaningful opportunity to rebut the
21 government's reasons for the revocation or to challenge the
22 appropriateness of the government's action. Indeed, anyone
23 can avail themselves of the mail, and there's nothing in the
24 record that demonstrates that whoever the decisionmaker --
25 the initial decisionmaker was in this case read or

1 considered the letter. And, of course, the letter was sent
2 after the revocation, not beforehand. The need for the
3 opportunity to be heard seems especially important in this
4 case when the record strongly suggests that one of the
5 initial specific reasons for the revocation cited by the
6 government -- that Mr. Acosta laid his hands on the White
7 House intern -- was likely untrue and was at least partly
8 based on evidence that was of questionable accuracy.

9 At oral argument, the Government made the point
10 that more process would not have helped here because the
11 ultimate decisionmaker -- I believe, is how the Government
12 referred to the President -- at a minimum, ratified this
13 action. Maybe that's so, but on the record before me which,
14 at this point, is devoid of evidence concerning who, in the
15 government, first reached this decision; how they reached
16 the decision; whether they considered CNN's letter or
17 whether they considered potential other responses by the
18 government, I simply cannot assume that that would be so.

19 So in light of all the above, I find that the
20 plaintiffs are likely to succeed on the merits of their
21 Fifth Amendment due process claim.

22 I'll now talk about irreparable harm with regard
23 to that claim.

24 The plaintiffs also must demonstrate that
25 irreparable harm will result in the absence of preliminary

1 relief. That harm must be both certain and great, and it
2 must be actual and not theoretical. Here, harm to Mr.
3 Acosta has already occurred. As already explained, he's
4 demonstrated a likelihood of success on the merits of his
5 claim that his Fifth Amendment due process rights were
6 violated such that his liberty interests were deprived;
7 therefore, I don't need to speculate or theorize as to
8 whether harm will occur absent preliminary relief, but for
9 plaintiffs to satisfy their burden, the harm must be
10 irreparable. Constitutional injuries are often considered
11 irreparable due to their very nature. Indeed, the D.C.
12 Circuit has held that, quote, Suits for declaratory and
13 injunctive relief against the threatened invasion of a
14 constitutional right do not ordinarily require proof of any
15 injury other than the threatened constitutional deprivation
16 itself, closed quote.

17 On the other hand, procedural due process injuries
18 do not necessarily cause irreparable harm when, for example,
19 the thing that is deprived is tangible property, because the
20 due process violation that led to that injury might be
21 reparable with money damages. Here, the procedural due
22 process violation at issue that has led to the deprivation
23 -- to a deprivation of what Sherrill requires me to
24 recognize as a liberty interest as opposed to a property
25 interest that's grounded in, quote, The First Amendment

1 guarantee of freedom of the press, closed quote.

2 Moreover, the First Amendment interests, as
3 recognized in Sherrill, were not vested merely in
4 publications or agencies. They were liberties of the
5 individual journalists themselves. For that reason, that
6 CNN may still send another journalist or other journalist to
7 the White House does not make the harm to Mr. Acosta any
8 less irreparable. Each day that he is deprived of that
9 interest without the process prescribed by the court in
10 Sherrill, he suffers a harm that cannot be remedied in
11 retrospect. The Court cannot restore his access to press
12 briefings that have already occurred or to conversations in
13 the White House press facilities that have already been had.

14 And so on this highly, highly unusual set of facts
15 and interests at stake, I do find that the plaintiffs have
16 met their burden of establishing that irreparable harm has
17 and will continue to occur in the absence of preliminary
18 relief.

19 The next factors are the balance of the equities
20 and the public interests.

21 In balancing the equities at stake, I find that
22 the harm to Mr. Acosta from sustaining an ongoing violation
23 of his Fifth Amendment due process rights outweighs the
24 government's interest in orderly, respectful press
25 conferences. This is especially so because the government

1 can serve its stated interest in other ways during this
2 litigation or perhaps until it is back before me arguing
3 that their due process obligations had been fulfilled.
4 Obviously, the balance of the equities would not likely have
5 come out this way if Mr. Acosta had been excluded for safety
6 or security reasons, in which case, my deference to the
7 executive equities would be far, far higher. But even in
8 this circumstance, I don't take lightly the executive
9 branch's weighty general interest in control of its White
10 House press facility, but the balance here is tipped by the
11 fact that Sherrill obligates me to recognize the violation
12 of Mr. Acosta's due process rights and the resulting impact
13 on his First Amendment interests. So in finding -- also, in
14 finding that these factors favor the plaintiffs, I have also
15 considered case law that suggests that constitutional
16 violations are always contrary to the public's interest.

17 So because the plaintiffs have shown a likelihood
18 that the government has violated Mr. Acosta's Fifth
19 Amendment rights under Sherrill, because the type of injury
20 he has suffered is irreparable and because the public
21 interest in the balance of equities favor granting a
22 temporary restraining order, I will grant the application
23 for a -- for the temporary restraining order here. I will
24 order the defendants immediately restore Mr. Acosta's hard
25 pass until further order of the Court or the restraining

1 order expires. And if, at some point after restoring the
2 hard pass, the Government would like to move to vacate the
3 restraining order on the grounds that it has fulfilled its
4 due process obligations, then it may, of course, do so and I
5 will promptly address that and then the remaining bases for
6 the TRO.

7 I want to emphasize the very limited nature of
8 today's ruling. In resolving this TRO, I haven't -- because
9 I've found that it must be granted on -- as to the due
10 process claim, I haven't had to reach the plaintiffs' First
11 Amendment claim at all in which they alleged that the
12 government engaged in viewpoint or content discrimination.
13 So I want to make very clear a couple of things. I have not
14 determined that the First Amendment was violated here; I
15 have not determined what legal standard would apply to the
16 First Amendment claim here; I have not determined the
17 specific nature of the First Amendment interest that
18 Sherrill recognizes -- or that Sherrill at least doesn't
19 describe but recognizes, yes; and I haven't determined what
20 portions of Sherrill, if any, would bind me on those
21 questions.

22 So let me turn to the parties, then, and suggest
23 that as far as procedurally moving forward goes, one -- the
24 avenue I thought of is to give you all some time to consult
25 with your clients; assess your positions; and come back

1 early next week -- perhaps Tuesday afternoon -- to see how
2 you all would like to proceed from here. I trust the --
3 this litigation will continue in a rapid pace. Either
4 party?

5 MR. BOUTROUS: Thank you. Thank you very much,
6 Your Honor.

7 That sounds like a good process to us. We can
8 confer. We may be able to just confer and then report back
9 Monday with the proposal and see if we can work out either a
10 briefing schedule for the preliminary injunction or
11 something else and, if not, we can just come back and see
12 you on Tuesday.

13 THE COURT: All right. So your proposal would be
14 a written joint report for the parties --

15 MR. BOUTROUS: Would that --

16 THE COURT: -- on Monday?

17 MR. BOUTROUS: Yeah. Would that work for the
18 Court?

19 THE COURT: All right. That's fine, if that's --
20 but I'd like to hear from Mr. Burnham.

21 MR. BURNHAM: Your Honor, I'd like to talk to our
22 clients. That should be okay, but I'd just like to talk to
23 our clients and come up with a proposal before we --

24 THE COURT: Absolutely. I mean, we can't have any
25 quicker turnaround than a joint report --

1 MR. BURNHAM: Right.

2 THE COURT: -- on Monday. So --

3 MR. BURNHAM: Right.

4 THE COURT: I mean, I --

5 MR. BURNHAM: The timing certainly works for us.

6 Thank you.

7 THE COURT: Fair enough. So I'll get that report.
8 Obviously, if you can agree on something, great; if you
9 can't agree, if you would still submit it jointly but just
10 lay out your respective positions on where we go from here,
11 I'll take that under advisement, and my hope is -- well,
12 depending on what you all agree to, if we need to come back
13 to court next week, even though it's the short week -- the
14 holiday -- I will be available to do that.

15 MR. BURNHAM: Okay. Thank you, Your Honor.

16 THE COURT: All right.

17 MR. BOUTROUS: We greatly appreciate it, Your
18 Honor.

19 THE COURT: All right.

20 MR. BOUTROUS: And then just procedurally, under
21 the TRO, we'll just proceed to get the hard pass back
22 immediately and have it reactivated. Thank you very much.

23 THE COURT: Yes. Is there any other -- anything
24 further -- else from the plaintiffs that you think I need to
25 address today before I turn to Mr. Burnham?

1 MR. BOUTROUS: I think that's it, Your Honor.

2 THE COURT: All right.

3 MR. BOUTROUS: Thank you.

4 THE COURT: Sir?

5 MR. BURNHAM: So Your Honor, under the local
6 rules, our opposition to the PI is due on Tuesday.

7 THE COURT: Okay.

8 MR. BURNHAM: Would it be okay, given all that's
9 going on, to suspend that deadline until we file our joint
10 status report?

11 THE COURT: Yeah. I assume the plaintiffs --

12 MR. BURNHAM: I assume --

13 THE COURT: -- would agree to that.

14 MR. BURNHAM: We haven't spoken about it.

15 THE COURT: Yes.

16 MR. BOUTROUS: That's fine with --

17 MR. BURNHAM: Okay.

18 MR. BOUTROUS: That's fine with us, Your Honor.

19 THE COURT: Yeah. So that deadline certainly will
20 be, you know, held in abeyance --

21 MR. BURNHAM: Thank you, Your Honor.

22 THE COURT: -- vacated until I get your report and
23 we'll see where we go from there.

24 MR. BURNHAM: Thank you, Your Honor.

25 THE COURT: All right.

1 MR. BOUTROUS: Thank you.

2 THE COURT: If there's nothing further, then,
3 counsel's dismissed.

4 THE DEPUTY CLERK: All rise. This Honorable Court
5 is adjourned.

6 (Proceedings concluded at 10:28 a.m.)

7 * * * * *

8 CERTIFICATE OF OFFICIAL COURT REPORTER

9 I, TIMOTHY R. MILLER, RPR, CRR, NJ-CCR, do hereby certify
10 that the above and foregoing constitutes a true and accurate
11 transcript of my stenographic notes and is a full, true and
12 complete transcript of the proceedings to the best of my
13 ability, dated this 16th day of November 2018.

14 /s/Timothy R. Miller, RPR, CRR, NJ-CCR
15 Official Court Reporter
16 United States Courthouse
17 Room 6722
18 333 Constitution Avenue, NW
19 Washington, DC 20001
20
21
22
23
24
25

EXHIBIT 58

Champion, Anne

From: Burnham, James M. (CIV) <James.M.Burnham@usdoj.gov>
Sent: Friday, November 16, 2018 9:13 PM
To: Champion, Anne; Boutrous Jr., Theodore J.; Lipshutz, Joshua S.
Cc: Womack, Eric (CIV); Baer, Michael H. (CIV); Borson, Joseph (CIV)
Subject: Acosta Letter_11.16.2018.pdf
Attachments: Acosta Letter_11.16.2018.pdf

[External Email]
Counsel:

Please see attached letter, which I understand was sent to Mr. Acosta this evening.

All the best,

James

James Burnham
(202) 353-5049

THE WHITE HOUSE

WASHINGTON

November 16, 2018

Dear Mr. Acosta:

We are writing to give you formal written notice that we have made a preliminary decision to suspend your hard pass due to your conduct at the President's November 7, 2018 press conference. The President is aware of this preliminary decision and concurs. The factual basis for this preliminary decision to suspend your pass is as follows:

As you know, President Trump has provided an extraordinary amount of access to journalists to ask questions, while operating an extremely open and transparent White House. The White House does not have a written code of conduct for journalists participating in presidential press conferences. We had not previously thought that a set of formal rules for journalists' behavior at press conferences was necessary. That is because it had previously been a widely shared understanding that: (1) a journalist called upon to ask a question will ask a single question and, having received a response, will yield the floor unless, at the discretion of the President or other White House official answering questions, a follow-up question or questions is permitted, after which follow-up(s), the journalist will then yield the floor; and (2) when a journalist has had his or her question(s) answered, the journalist is expected to yield the floor and, when applicable, physically surrender any microphone the journalist is using to White House staff for use by the next questioner. These basic, commonsense practices are necessary for orderly press conferences that are fair to all journalists in attendance. They have served the public, the press, and the President well.

On November 7, 2018, you failed to abide by these basic, widely understood practices. At a press conference that day in the East Room, the President called on you to ask a question. You asked a question, and the President answered it. You then shouted a second question at the President on a new topic, which the President answered at the same time that he asked you to yield the floor to a new questioner. At that point, you continued shouting at the President and refused to physically surrender the microphone to an intern who had come to collect it from you for use by another questioner. No other reporter at the press conference made physical contact with our intern in that fashion or refused to yield the floor as you did.

Your behavior at the November 7 press conference violated the basic standards governing such events, and is, in our preliminary judgment, sufficient factual basis to revoke your hard pass. While this is our preliminary decision, we would be pleased to consider any material you would like to submit in response to it.

Should you wish to contest this preliminary decision or the factual basis set forth in this letter, please submit a written response to us in writing via email by 5:00 p.m. on Sunday, November 18, 2018. Should you not submit a response by that time, this preliminary decision will

final. You may submit that response by emailing it to one or both of us. We are happy to consider that response and any other materials you would like to submit before a final decision is made in this matter. Should you choose to contest this preliminary decision and submit a written response to this formal notice, we will consider your written response and will issue you a final determination in writing by 3:00 p.m. on Monday, November 19, 2018. Of course, you will continue to maintain your hard pass while the Temporary Restraining Order issued on November 16, 2018, remains in effect.

Sincerely,

Bill Shine

Assistant to the President

Deputy Chief of Staff for Communications

Sarah Huckabee Sanders

Assistant to the President

White House Press Secretary

EXHIBIT 59

Champion, Anne

From: Boutrous Jr., Theodore J.
Sent: Sunday, November 18, 2018 3:00 PM
To: James.M.Burnham@usdoj.gov; Eric.Womack@usdoj.gov; Michael.H.Baer@usdoj.gov; Joseph.Borson@usdoj.gov
Cc: Olson, Theodore B.; Lipshutz, Joshua S.; Champion, Anne
Subject: Cable News Network, Inc. v. Trump, No. 18-cv-2610-TJK
Attachments: Letter from T. Boutrous Jr. (11.18.2018).pdf

Counsel:

We have received the November 16, 2018 letter from your clients, Bill Shine and Sarah Huckabee Sanders, informing our client, Jim Acosta, of their “preliminary decision” to suspend his hard pass despite the district court’s ruling prohibiting that very action. To say the least, the letter is a disappointing response to the court’s decision and our attempts to resolve the matter amicably. More fundamentally, though, it is further evidence of your clients’ animus towards Mr. Acosta based on his work as CNN’s chief White House correspondent.

Attached is Mr. Acosta’s response to the letter. We trust that, after reviewing it, your clients will reconsider their preliminary decision and take no action against Mr. Acosta as a result of the President’s November 7 press conference. In the interim, we no longer agree to postpone your Tuesday deadline for responding to our preliminary injunction motion. Moreover, unless you can confirm to our satisfaction that no action will be taken against Mr. Acosta, we will seek expedited discovery, including depositions, from all defendants on their intentions and their conduct.

As indicated in your clients’ letter, we will expect the White House’s final decision on this matter on or before 3:00 p.m. tomorrow. For now, Plaintiffs reserve all rights.

Theodore J. Boutrous Jr.

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November 18, 2018

Bill Shine
Assistant to the President
Deputy Chief of Staff for Communications
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Sarah Huckabee Sanders
Assistant to the President
White House Press Secretary
The White House
1600 Pennsylvania Avenue NW
Washington, D.C. 20500

Dear Mr. Shine and Ms. Sanders,

Our client, Jim Acosta, has received your November 16, 2018 letter informing him of your “preliminary decision” to suspend his hard pass. In the same letter, you state that the President concurs with your decision, and you invite Mr. Acosta to direct any response to you.

In short, Mr. Acosta contests your preliminary decision and submits that any action to suspend his hard pass based on the President’s November 7, 2018 press conference would unquestionably violate his constitutional rights. Your letter, in fact, makes the point for us.

In your letter, you admit that “the White House does not have a written code of conduct for journalists participating in presidential press conferences.” And, indeed, as President Trump stated after the district court’s ruling in this very case, the Administration is “writing up rules and regulations” that will govern press conferences on a go-forward basis. Nevertheless, despite the admitted absence of such rules, you now seek to punish Mr. Acosta based on a *retroactive* application of unwritten “practices” among journalists covering the White House. This *ex post facto* application of vague, unarticulated standards to a journalist’s access to the White House is not only different from your original explanations, but it is the same sort of due process violation that led the district court to issue a temporary restraining order against you on Friday.

November 18, 2018

Page 2

In truth, there are no so-called “widely understood practices” that would support your preliminary decision. At Wednesday’s hearing, your counsel could have provided evidence of such norms, but they did not. And the vagaries referred to in your letter plainly do not constitute the “publish[ed] ... explicit and meaningful standards” required under *Sherrill v. Knight*, 569 F.2d 124 (D.C. Cir. 1977), and other binding case law. In addition to being unwritten, they are precisely the type of vague and subjective standards that are impermissible in the First Amendment context because they provide no protection against content- and viewpoint-discrimination. In this way, your attempt to concoct retroactive and amorphous standards is actually *more* evidence of viewpoint discrimination against Mr. Acosta. See Ruling Tr. 11:6-8 (recognizing government’s prior reliance on “likely untrue” justifications based on “evidence of questionable veracity”).

Moreover, the factual basis for your preliminary decision is fundamentally flawed. Not only is your description of the exchange between Mr. Acosta and President Trump inaccurate as a review of the video demonstrates (Exhibit 27 to Plaintiffs’ motion), but even a cursory review of the transcript of the November 7 conference demonstrates that *many* reporters asked multiple questions and continued to interject even after the President had moved to a new questioner, all without consequence. As far as we are aware, no reporter has ever had their hard pass taken away based on such commonplace conduct or for any other reason. Nor would a White House reporter have had any notice that violating these retroactive and concocted “practices” would result in revocation or suspension of a hard pass.

Finally, you provide no explanation as to why revoking Mr. Acosta’s hard pass is a sufficiently tailored restriction of his First Amendment liberty interests where, as noted by the district court on Friday, 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. It would be the essence of a due process violation for biased decision-makers—who previously deprived a person of his liberty interest in violation of due process and have repeatedly altered their supposed reasons for doing so—to again deprive the same citizen of his liberty interest for the same alleged conduct after applying a newly constituted yet retroactive “process” now apparently being used.

For these and other reasons, your preliminary decision is inconsistent with both the letter and the spirit of the district court’s ruling on Friday. As the court held, *Sherrill*, squarely governs this case and protects, under the Due Process Clause, Mr. Acosta’s “First Amendment liberty interest in a White House press pass.” Ruling Tr. at 6:13-14, 7:19-20. In *Sherrill*, the D.C. Circuit held 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 such deprivation. *Sherrill*, 569 F.2d at 131. That is

November 18, 2018

Page 3

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. Put simply, the White House’s illegal reaction after the November 7 press conference cannot be made legal now by applying an after-the-fact concocted process.

Separately, we wonder if you are aware that, after Friday’s hearing, CNN’s chief counsel suggested to your counsel that the parties use the 14-day TRO period to work with the White House and White House Correspondents Association to formulate agreed-upon protocols for future press conferences. To CNN and Mr. Acosta—and we suspect to most Americans—that would be a more productive path than continuing to violate Mr. Acosta’s constitutional rights with explanations that simply aren’t true.

Sincerely,

A handwritten signature in blue ink, appearing to read "Theodore J. Boutrous Jr.", written over a horizontal line.

Theodore J. Boutrous Jr.