

COURT RULES WHITE HOUSE CANNOT REVOKE EXISTING PRESS PASS WITHOUT DUE PROCESS

Media Law & First Amendment Alert
November 19, 2018

United States District Judge Timothy Kelly ruled last week that the White House violated due process when it indefinitely suspended the press pass of CNN reporter Jim Acosta. The White House suspended Acosta’s “hard pass”—which grants press access to White House grounds—after a heated exchange with President Trump during a press conference.

CNN sought a preliminary injunction restoring Acosta’s pass, claiming the suspension violated the First Amendment right to freedom of speech, because it was a content- and viewpoint-based determination made without a compelling reason. CNN also argued that the decision violated Fifth Amendment due process protections because it was imposed without notice of the factual basis for the decision, or an opportunity to rebut the facts.

To establish a constitutionally-protected interest in the press pass, CNN relied on prior precedent which held that once the White House has decided to establish press facilities, the First Amendment “requires that this access not be denied arbitrarily for less than compelling reasons.” *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977). Specifically, CNN argued that the decision to suspend Acosta’s pass was based on President Trump’s view that CNN’s coverage was unfair and overly critical. “[S]uch a concern—accurate or not—is a constitutionally infirm basis for revoking a reporter’s access to the White House,” CNN wrote. CNN analogized its case to a recent decision which held that President Trump engaged in viewpoint discrimination when he blocked Twitter users who disagreed with him. See *Knight First Amend. Inst. v. Trump*, 302 F. Supp. 3d 541, 575 (S.D.N.Y. 2018). CNN also claimed that Acosta was not provided adequate notice of the factual basis for the administration’s determination, or any opportunity to rebut that factual basis.

In opposition, the administration generally criticized Acosta for repeatedly refusing to yield to other reporters’ questions, and framed the issue as a matter of the president’s discretion to decide the journalists with whom he or she interacts. See *Sherrill*, 569 F.2d at 129. The administration also argued more generally that there is no First Amendment right of access to the White House. See *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965). Thus, the administration argued, denying a hard pass is a permissible means to scale back interactions with a particular journalist.

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The administration also argued that Acosta received the required due process. It relied on the president’s criticism of Acosta at the press conference itself, and the press secretary’s public comments later that evening. According to the administration, CNN’s written statement submitted after the revocation was a sufficient opportunity to rebut the factual basis for the administration’s decision.

In an oral decision, Judge Kelly agreed that there is no automatic right to access the White House grounds. But the judge sided with CNN to hold that once such a right is granted, it cannot be revoked arbitrarily. Kelly’s decision, however, turned on the issue of due process. He held that, for the purposes of a temporary restraining order, CNN established a likelihood of successfully demonstrating that due process was denied. The president’s statement at the press conference that Acosta is a “terrible reporter,” or the administration’s public comments following the press conference, did not satisfy the notice requirement. Judge Kelly said the White House’s decision-making was “so shrouded in mystery that the government could not tell me . . . who made the decision.” He also noted that Acosta was not given a meaningful opportunity to be heard, which was “especially important” because the administration’s post hoc justification that Acosta “put his hands” on an intern was “likely untrue.”

The decision was narrow, and uncontroversial from a First Amendment perspective. Judge Kelly explicitly did not reach the question whether the administration engaged in viewpoint or content discrimination, nor did he reach “the specific nature of the First Amendment interest that *Sherrill* recognizes[.]” The decision did not undermine the president’s discretion to determine the journalists from whom he will take questions, or to whom he will grant interviews. The real crux of the decision was the complete absence of due process. There was no clear process demonstrating the reasons for the revocation and a chance to respond. The president’s rebuke of Acosta at the press conference, the administration’s public comments later that evening, and a letter of explanation following the onset of litigation, were simply not sufficient.

The Court’s decision required the administration to reinstate Acosta’s press pass for 14 days while the parties attempted to reach a resolution. While the administration initially sent Acosta a letter advising that it had made a “preliminary decision” to revoke its pass, the parties reached an agreement to restore Acosta’s pass as long as he agreed to follow rules for press conferences provided by the White House. After the agreement, CNN announced its intention to discontinue its lawsuit.