Trump v. the NFL

Can the Players Sue the President? The Answer Isn't So Simple

By Mark A. Konkel and Diana R. Hamar

A few Sundays ago, Terry Bradshaw, the Hall of Fame quarterback, used his platform as the long-time co-host of the television program *Fox NFL Sunday* to address the growing controversy over some NFL players choosing to kneel during the playing of the national anthem, to protest racial injustice. Putting aside his usual jocular persona for a moment, he turned to the camera and sternly asked whether President Trump, who has exhorted NFL team owners to fire any "son of a bitch" who "disrespects our flag and county," understands the First Amendment's free speech protections. It's a good question, and it leads directly to another one: If the President is violating the players' civil rights, can they sue him?

The answers aren't as simple as they might seem. While free speech rights are indeed at the center of this controversy, so are other factors – government speech rights, employer rights, labor contract language. What follows is a point-counterpoint discussion of all of these factors. The purpose is not to take sides in this debate but to bring clarity to it by casting light on the legal issues involved. Much of the legal information that follows is based on our blog called LABORDAYS.

POINT: "It's possible that we've become so accustomed to the unaccustomed with President Trump that we miss what, at least from a Constitutional perspective, was happening: the President, speaking as the President (in other words, a high-level mouthpiece of the federal government) was 1) demanding that private employers fire employees on the basis of political expression; 2) urging citizens to boycott private businesses that do not fire employees who engage in political expression; and 3) undoubtedly impacting the professional viability for

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those employees who have chosen to engage in government-condemned political expression."[1]

COUNTERPOINT: Under what is known as the Government Speech Doctrine (*Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005)), "the government is free to promote a particular viewpoint – a right freely exercised by President Trump. Boiled down, the doctrine simply means that the government is allowed to have an opinion" and to express that opinion.[2]

POINT: But the players also have a right to express their opinion by engaging in a protest. The U.S. Supreme Court has held that flag burning[3] – a much more severe form of protest than taking a knee during the national anthem – is a protected form of political speech. So why can't the players who take a knee sue the government for interfering with their First Amendment rights?

COUNTERPOINT: "The federal government is largely protected from suit under the doctrine of sovereign immunity. The Federal Tort Claims Act (FTCA) is a limited waiver on sovereign immunity and allows citizens to pursue some tort claims against the government. 28 U.S.C. Section 1346(b)(1). However, the FTCA expressly excludes from its scope claims for most intentional torts including claims for 'interference with contract rights.' 28 U.S.C. Section 2680(h). Although 'interference with contract rights' is not defined under the FTCA, federal courts have broadly interpreted the exclusion. *Art Metal-USA, Inc. v. U.S.*, 753 F.2d 1151 (D.C. Cir. 1985). Therefore, claims that would arguably be applicable here, such as a claim for tortious interference with business relations, would be barred under the FTCA."[4]

POINT: But the President is attempting to silence speech by telling employers to fire somebody if they continue to protest. So while these players might not be able to sue the government under employment law, "they may well have claims that the government violated their First Amendment rights when it used its authority to attempt to silence them."[5]

COUNTERPOINT: That would depend on whether President Trump was in fact invoking his government authority, or just expressing a viewpoint when he exhorted owners to fire certain players. To date there has been no executive order or other official action by the President, although he has continued to press the issue through repeated Tweets. In a world where Trump does announce policy on Twitter and arguably uses it as a mouthpiece for government business, however, it is not clear whether his tweets amount to an exercise of governmental authority.

POINT: A player's professional and financial future could be damaged by Trump's attempt to silence him, giving him cause to sue the government.

COUNTERPOINT: Initially, there was little evidence that any player who has engaged in these protests has suffered financial repercussions as a result of Trump's tirade. The one player who seemed to have been impacted is former San Francisco 49ers quarterback Colin Kaepernick, who started the sideline protests. He has since lost his job and has yet to find another NFL team to sign him, but all this took place before Trump began his attacks on the protestors, so it would be difficult for a player to make a case that "but for" Trump's remarks he would have had a lucrative career. More recently, however, the owner of the Dallas Cowboys bowed to Trump's pressure and said he would sideline any player who kneels during the National Anthem.

Even if the immediate issue is resolved outside the courtroom with all parties in agreement, it would behoove player attorneys to pay special attention to employment contract language.

POINT: Trump has also urged fans and consumers to boycott NFL games as a way to force owners to fire players who take a knee. That is a clear and blatant attempt to silence the players who continue to protest.

COUNTERPOINT: There is some precedent on this, but not involving a call for a boycott. Instead, it is the opposite – a direct attempt by a Trump aide, Kellyanne Conway, who went on a television program and urged people to buy Ivanka Trump's merchandise. That led the Republican chairman of the House Oversight Committee to criticize Ms. Conway for abusing her public position and to ask the U.S. Office of Government Ethics to investigate whether disciplinary action should be taken. The office concluded that discipline was warranted but the White House said Ms. Conway would not be punished – thus leaving the ethical issue unresolved[6] and with it the issue of whether Trump abused his office by attempting to inflict financial harm on a private industry.

POINT: If players face a high hurdle suing the White House, they could have more success going after team owners who fire them, depending on the terms of their contract. They could also file a discrimination claim with the Equal Employment Opportunity Commission on the grounds they were discriminated against for protesting about racial injustice.[7]

COUNTERPOINT: "Under the First Amendment, the government can't ban speech except in very narrow circumstances. But that limitation only binds the govern-

ment; for the most part, private employers could tell employees what not to say (or, at least doing so doesn't implicate a Constitutional right)."[8] Thus, for example, an owner can establish a dress code for workers and discipline those employees who violate it. And it is hard to imagine any employer allowing workers to burn the American flag on the job, despite the Supreme Court ruling upholding the right to engage in such protest. While taking a knee is much less extreme than setting the flag on fire, a team owner could nonetheless follow the lead of Cowboys owner Jerry Jones and order players to stand for the anthem or be fired.

POINT: Even if the immediate issue is resolved outside the courtroom with all parties in agreement, it would behoove player attorneys to pay special attention to employment contract language. A player dismissed for First Amendment rights may have a viable claim that there was no clear contractual ground to terminate him and press a breach-of-contract claim.

COUNTERPOINT: Owners might be reluctant to sign contracts with ironclad protections for any kind of player conduct. In the end it will likely be the marketplace that resolves the controversy. If the protests impact ticket and television revenues, that will speak louder than any sideline show of player solidarity.[9] ■

1. http://www.labordaysblog.com/2017/09/trump-plays-ball-to-knee-or-not-to-knee/#more-1382.
2. *Id*.
3. *Texas v. Johnson*, 491 U.S. 397 (1989). Justice Scalia, when asked to explain his vote in favor of the majority, said, "If it were up to me I would put in jail every sandal-wearing, scruffy-bearded weirdo who burns the American flag. But I am not a king."
4. *Id*.
5. *Id*.
6. https://www.washingtonpost.com/.../white-house-rebuffs-ethics-office-recommendation-to-discipline-kellyanne-conway.
7. Labordays, *supra* note 1.
8. *Id*.
9. *Id*.

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