

Department of Justice
Washington, D.C. 20530

20 JUL 1978

cc: Files
Hull
Retrieval
Simms

Publication

MEMORANDUM FOR JOSEPH L. POWELL
Press Secretary to the President

Re: Revocation of White House Press Passes

This responds to your request, made through Walt Wurfel of your staff, for our advice regarding several legal questions associated with the potential revocation of White House press passes presently held by nine Washington-based newsmen who are employed by Soviet TV & Radio, TASS, PRAVADA and IZVESTIA. 1/ For reasons stated hereafter, we believe that the press passes of newsmen employed by foreign government-sponsored media may be revoked in furtherance of the foreign policy of the United States. 2/ We also believe that the press passes may be revoked without notice or a hearing but that the persons affected by a revocation would be entitled to a statement explaining the basis for any revocation.

I. Background

As you are aware, a recent decision of the United States Court of Appeals for the District of Columbia Circuit has imposed certain procedural requirements on the United States

1/ Those persons you have identified are as follows: Yari V. Solton and Anatoly D. Ivanov (Soviet TV & Radio); Gennadi V. Vassiliev (PRAVADA); Eugeni S. Egorov, Albert N. Bobikov, Vitaly v. Gan and Leonid L. Buz (TASS); and Melor G. Sturua and Yury V. Barsukov (IZUESTIA).

2/ We emphasize that our conclusion in this regard is limited to newsmen who are essentially employed by foreign governments as distinguished from foreign correspondents who have no business connection with the government of their country.



Mr. Larson has reviewed [unclear] at the time of request for [unclear] not [unclear]

Secret Service in connection with the processing and denial of applications for White House press passes. Sherrill v. Knight, 569 F. 2d 124 (1977). Although Sherrill did not address the issues raised by revocation of press passes and the regulations published by the Secret Service in response to that decision do not deal with revocation, 3/ there is no doubt that revocation in this context raises legal issues similar to those raised and disposed of in Sherrill.

The Sherrill decision was also confined to the denial of press passes by the Secret Service based on fulfillment of the Service's mission of protecting the President and did not directly deal with denial or revocation of press passes based on grounds other than providing security for the President. Your office has informed us that at present a correspondent, in order to secure a press pass, must establish to your satisfaction that: (1) he is a full time employee of a media organization; (2) he lives in the Washington, D.C. area; (3) he is accredited by either the Senate or House press gallery; (4) he is assigned to cover the White House on a regular basis; and (5) he is willing to undergo necessary investigation by the Secret Service. Once these criteria are met, we understand that the only barrier to issuance of a press pass is clearance by the Secret Service. We assume that revocation of a press pass or refusal by you to renew a pass would generally be based on the failure of a pass holder to meet these five criteria.

With regard to the potential revocations involved here, you have indicated that consideration would be given to revocations as a response to action taken against two American correspondents by a Soviet court in connection with a libel action brought against them by Soviet TV & Radio in Moscow. We assume that any such decision by you would be based on a determination that it would be in the interests of our foreign policy to take retaliatory action in response to action taken by a Soviet court against the American reporters.

3/ These regulations are found in 43 Fed. Reg. 26718-20 (June 22, 1978).

II. The Legal Questions

The legal questions presented by these facts may be framed as follows: first, may the press pass of a foreign correspondent employed by a government-sponsored foreign media organization be denied or revoked in furtherance of this country's foreign policy; and second, if the answer to the first question is affirmative, what process, if any, would be due an applicant or press pass holder prior or subsequent to denial or revocation.

A. Revocation Based on Foreign Policy Interests

Our starting point for analysis of this question is the Sherrill case, which found a First Amendment right for Washington-based correspondents not to be denied a press pass "arbitrarily or for less than compelling reasons" so long as any members of the press similarly situated were given regular access to the White House press facilities. 569 F. 2d, at 129. In Sherrill, the court stated explicitly that "protection of the President is a compelling, 'even an overwhelming,' interest" 4/

Applying the rationale of the Sherrill decision, denial of a White House press pass to the Soviet correspondents involved here could not be termed "arbitrary." Moreover, a decision by the President or some other official charged with implementing our official foreign policy that the revocation of the press passes of these Soviet correspondents would substantially further our foreign policy would, or at least should, qualify as that kind of a "compelling" interest identified by the Sherrill court as sufficient to support denial of a press pass. 5/ Here, unlike

4/ 569 F. 2d, at 130, quoting Watts v. United States, 394 U.S. 705, 707 (1969).

5/ Because the newsmen involved here have no diplomatic status, we think that any constitutional rights of newsmen espoused in Sherrill must probably be made equally available to them even though they are aliens. We think, however, that the classification we draw here, based not on status as an alien but on a status as employees of a government-sponsored foreign media organization, is a permissible one.

the situation in Sherrill, we also believe that under separation of powers principles a court would not undertake to review the substantiality of such a foreign policy determination. See generally United States v. Nixon, 418 U.S. 683, 706-11 (1974).

We also believe that the foreign policy interest presumably to be advanced by revocation "does not lend itself to detailed articulation of all the factors which may be taken into account in applying this standard." Sherrill v. Knight, 569 F.2d, at 130. Thus, we believe that this standard, without further explication, would constitute a sufficient basis upon which to revoke the press passes of the Soviet correspondents involved.

B. Due Process Considerations

The due process considerations bound up in this overall problem are essentially of two types. First, what process is due to a Soviet press pass holder prior or subsequent to revocation. Second, are "the public or other potential applicants" 6/ entitled to know in advance through published regulations the grounds upon which press passes may be denied or revoked?

As for the Soviet newsmen, we do not believe that the Sherrill court's requirement of notice, an opportunity to respond and a final written statement of reasons, 569 F.2d at 130, are applicable in this situation. The requirement of notice presupposes, we think, that a right to respond exists. Here, however, we do not think that a right to respond attaches because the revocation of the press passes is not based on facts which might be put in dispute by the Soviet newsmen. Rather, the revocation would be based on the fact of the newsmen's relationship to a government-sponsored foreign news organization 7/ and a foreign policy determination made by

6/ Sherrill v. Knight, 569 F.2d, at 130.

7/ This fact would be established as we understand it, from information previously submitted by the press pass holder himself. Should there be some questions regarding the relationship between an applicant for or holder of a press pass and a foreign government, then Sherrill might well require notice and an opportunity for the applicant or holder to contest a factual determination on that point.

appropriate officials. Thus, we think that the Soviet news-
ment would be entitled under Sherrill only to a written
statement that the revocation of their passes was in retali-
ation for the actions of their government-employer against
members of the American press in Moscow. 8/

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

cc: Robert J. Lipshutz
Counsel to the President

8/ We also think that this written statement would fulfill
the requirement of notice to the public imposed by Sherrill,
note 6 supra, at least in these circumstances.