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FEB 4 1972

MEMORANDUM FOR THE HONORABLE JOHN W. DEAN, III  
Counsel to the President

out 2/4/72  
@ 5:25pm

Re: Criteria for Denial of White  
House Press Passes

In the absence of Ralph Erickson, I am responding to your memorandum asking our views on a series of questions that have arisen in connection with the denial of White House Press Passes to certain applicants. In particular we understand that you are concerned about what legal arguments might be available to two applicants who have been denied passes because they were not cleared by the Secret Service for security purposes. In the limited time available we are unable to make definitive responses to the questions posed. However we believe the discussion below will be useful to you.

It is our understanding that the security check made by the Secret Service for White House Press Corps applicants is not a loyalty check but rather is a check designed to assure that the individual newsman would not be a threat to the physical security of the President. We further understand that a number of applicants have been denied passes on this ground in the past. The two individuals that precipitated this inquiry were apparently denied security clearances by the Secret Service because they had demonstrated a propensity for violence. We assume that although the Secret Service conducts the security check it is the Press Secretary who denies the pass.

A. Can an Action be Brought Against the Press Secretary  
or the Secret Service

At the outset it should be noted that there is some doubt that the newsmen in question could successfully bring an action against the Press Secretary, an assistant to the President, to compel him either to issue a press pass or to conduct a hearing.

We are not aware of any judicial authority on the question of whether an assistant to the President may be sued. Of course, an action can be instituted. The question is whether the assistant can validly take the position that he comes under the umbrella of some sort of Presidential immunity from suit. Cf. Mississippi v. Johnson, 4 Wall. 475 (1866).

An analogy may be made to the position that has sometimes, but by no means consistently, been taken by Presidents that their assistants cannot be compelled by Congress to testify. Cabinet officers have in the past refused to accept subpoenas from Congress, but have nonetheless appeared and testified voluntarily on subject matter specified in the subpoena. Cabinet officers have similarly declined to respond to judicial subpoenas, but have offered to give testimony by deposition instead. See United States v. Smith, 27 Fed. Cases 1194 (No. 16, 342) (C.C.D. N.Y. 1806). A similar ruling involving a cabinet officer was made by Attorney General Moody in 1905. 25 Ops. A.G. 326.

Of course, these precedents concern subpoenas not lawsuits. Greene v. McElroy, 360 U.S. 474 (discussed infra), itself was successfully brought against a cabinet officer, the Secretary of Defense. It is open to some question that a successful argument for immunity from suit could be made by an Assistant to the President.

It has been suggested that the Secret Service might be able to claim immunity from a similar suit. The Secret Service is in the Department of the Treasury and presumably would not benefit from any kind of Presidential immunity. We have been unable to find support for this suggestion. In any event, it is quite possible that some defendant could be found whom the courts would hold is subject to suit, perhaps even a guard who refuses to permit the reporter in question access to the White House. We are not confident in view of present judicial attitudes that a technical defense would be sustained.



## B. The Merits

If a court reaches the merits, several questions are presented. It seems clear that the President, or his assistants as his agents acting in cooperation with the Secret Service, can establish a White House security system to protect the person of the President. Although there is no statute or Executive Order, as far as we have been able to determine, that specifically authorizes establishing a security system for the White House, the President as manager of the White House and its grounds would seem clearly to have the authority to institute such a system. Two statutes can also be pointed to as authorizing the establishment of a system for the protection of the President and the White House. Section 202 of Title 3 of the United States Code establishes the Executive Protective Service. That Service is to perform such duties as the Director of the U. S. Secret Service "may prescribe in connection with the protection of the following: (1) the Executive Mansion and grounds in the District of Columbia; (2) any building in which Presidential offices are located; (3) the President and members of his immediate family . . . ." See also 18 U.S.C. § 3056. Certainly a system of passes for members of the press, issued only after the Secret Service has satisfied itself that the applicant's presence in the White House does not pose a threat to the physical security of the President, is a reasonable measure to adopt for his protection.

Assuming that some such system may be implemented, the question remains whether the one now in existence meets constitutional requirements of due process that have been applied by the Courts. We have not been informed that there are any written standards for the issuance or denial of press security clearances, and proceed on the assumption that passes are denied only on the ground that the Secret Service concludes that the individual applicant is a threat to the physical security of the President. Usually, if not always, we are told, this conclusion is reached because the applicant has demonstrated a propensity for violence.

The troublesome issue would seem to be whether an applicant who is to be denied a press pass is entitled to a hearing of some sort. So far as we know, no hearing is now provided, and any explanation of the reasons given for a denial of a security clearance is made on an informal basis.

The two leading Supreme Court cases which consider what kind of notice and hearing must be given nongovernment employees before denial of a security clearance are Greene v. McElroy, 360 U.S. 474 (1959), and Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961). See also Schneider v. Smith, 390 U.S. 17 (1968). Both Greene and Cafeteria Workers involved loyalty clearances rather than the more limited clearances involved here.

In Greene the Defense Department revoked the security clearance of an aeronautical engineer employed by a defense contractor, and as a result the engineer lost his job with the contractor. The clearance had been issued under an industrial clearance program established by the Department of Defense. Although Greene had eventually been given a hearing of sorts, he was never able to confront the informants on whose secret testimony the Department's decision was based. The Court decided the case on the ground that the Defense Department's industrial clearance program had never been authorized by the Congress or the President:

"The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination."  
(360 U.S. at 493)



Chief Justice Warren's opinion for the Court, however, discussed the due process question at length. Particularly notable is the following language (360 U.S. at 496-97):

"Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right 'to be confronted with the witnesses against him.' This Court has been zealous to protect these rights from erosion."

Two years later the Court appeared to move away from the Greene opinion in the Cafeteria Workers case. There, a short-order cook employed by a private concessionaire in the Naval Gun Factory in Washington, D. C., was required by the Factory's security officer to turn in her badge. Without the badge she could not enter the Gun Factory and consequently lost her job. The Court determined that the security badge system was authorized, and, reaching the merits, held that the cook did not have to be given a hearing and did not even have to be advised of the specific grounds for her exclusion. In reaching that conclusion the Court applied a balancing test (367 U.S. at 895):

"\* \* \* consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

The Court in its analysis emphasized that the private interest was a privilege rather than a right. It was merely the opportunity to work at one installation; she was not denied the opportunity to pursue her profession of short-order cook. Moreover, the Court pointed out that the government was acting as the proprietor of a military base, an area in which it "has traditionally exercised unfettered control". However, the Court noted (367 U.S. at 898):

"We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory--that she could not have been kept out because she was a Democrat or a Methodist."

Both the right-privilege distinction and the proprietary interest doctrine are less viable now than they were in 1961, and the outcome of this case today might seem uncertain. See, generally, K. Davis, Administrative Law Treatise § 7.12 (1970 Supp.). See also Schneider v. Smith, supra.

Several recent cases outside the security field on the right to a hearing and confrontation suggest an expansion of rights in this area. See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970), holding that a welfare recipient is entitled to a pre-termination evidentiary hearing before benefits are discontinued. See also Willner v. Committee on Character, 373 U.S. 96 (1963); Roth v. Board of Regents, 40 L.W. 2060 (7 Cir., July 27, 1971). The Court has heard argument in two cases concerning the constitutional right to a hearing this Term. See Richardson v. Wright, Nos. 70-161, 70-5211, 40 L.W. 3302 (Social Security disability benefit termination); Perry v. Sinderman, No. 70-36, 40 L.W. 3303 (non-renewal of contracts of untenured university teachers).

Two recent Court of Appeals decisions reviewing and upholding procedures under Executive Order 10865 governing industrial security clearances are Adams v. Laird, 420 F.2d 230 (D.C. Cir. 1969) and Clifford v. Shoultz, 413 F.2d 868 (9 Cir. 1969).



The only case we have been able to find involving exclusion of reporters by the government is Holden v. Minnesota, 137 U.S. 483. That case upheld a Minnesota statute which required newspaper reporters to be excluded from the execution of a death sentence. The Court held in a proceeding by the prisoner that exclusion of reporters was a regulation "which the legislature in its wisdom, and for the public good, could legally prescribe." But, of course, that case arose on the complaint of the prisoner and not that of the reporter or his employer.

The Court has continued to apply a balancing test in deciding whether a hearing is constitutionally required. See Goldberg v. Kelly, 397 U.S. 254 (1970). Applying such a test to the White House Press Pass denials in question here, we find it very difficult to predict what the courts would do. The governmental interest is a strong one--the successful protection of the physical security of the President. Undoubtedly the ability to maintain the confidentiality of informants assists the Secret Service to some extent in discovering who may be a threat to the President. Moreover, considerable discretion in assessing the information gathered is no doubt necessary. Moreover, the interest of the newsman is not as compelling as, for example, the interest of a law applicant for admission to the bar. The newsman can be assigned to another beat, and continue to practice his profession. The right-privilege distinction may be moribund, but holding a White House Press Pass certainly falls on the privilege side of the dichotomy. There is clearly no statutory right to a pass as the Court in Goldberg emphasized there was to welfare benefits.

On the other hand, there is a freedom of the press issue lurking in the background that was present in neither Greene nor Cafeteria Workers. It may even be argued that a right on the part of newspapers not to have their reporters excluded on arbitrary grounds exists under the doctrine of a free press. If abused, such a security pass system could be used to punish reporters for the publication of disfavored views. The refusal to give the specific reasons for the refusal of a clearance may be seen as too handy a device for concealing the use of impermissible criteria. Certainly if it is alleged that such criteria were used, the government's chances of success are substantially less.

Another problem here is that the issue seems purely factual: whether there was support for the conclusion that issuance of a pass to the applicant would endanger the President. A second, closely related question, is whether the denial was in good faith. The first of these issues is not only factual, but one on which a hearing would seem particularly useful. Informants may be ill-motivated, and it is hard to see why an applicant should not be able to prove that he did not get drunk and in that state hit someone on some occasion. Finally, it seems less likely that the informants in this type of investigation will be high Communist-Party sources and the like, who need continuing protection if they are to remain useful.

Our best judgment is that if a court reached the merits, it would require some intermediate version of a hearing: not a full hearing with confrontation, but notice of the specific charges and an opportunity to respond. There seems to be no compelling government interest in not providing at least this sort of opportunity for rebuttal. It would be hard to say, as the Court did in Goldberg about welfare recipients, that newsmen are unable adequately to present their cases in writing.

Leon Ulman  
Deputy Assistant Attorney General  
Office of Legal Counsel