

November 4, 1972

MEMORANDUM FOR  
THE DEPUTY ATTORNEY GENERAL

Re: Legal questions concerning restrictions on  
and arrest of demonstrators at O'Hare Field

We have examined the legal questions raised by the Secret Service with respect to the authority to restrict demonstrators at the military complex adjacent to O'Hare Field in Chicago and the responses to those questions originally furnished by Assistant United States Attorney Berman. Except for reservations concerning the correctness of the response with respect to the authority to search persons entering the complex, we concur in the responses originally furnished.

1. Whether the base commander at the military complex adjacent to O'Hare Field could prevent certain persons from attending a political rally that was open to the public?

We agree that the base commander has no such authority. While the authority of base commanders to prevent entry onto facilities under their command is great, Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 893 (1961), it is not unlimited. Once an area on a military base is opened to the public certain persons may not be excluded on the basis of their political views. Flower v. United States, 407 U.S. 197 (1972). That case involved the passing out of handbills on a street in a military base that was open to the public. In our view, if a public rally is scheduled on a military base, members of the public may not be excluded because they are suspected of being demonstrators.

2. Whether these individuals could be searched prior to their entering the base?

While there may be signs posted at the entrance to the base advising that all persons and vehicles are subject to search, we have some doubt that this would be viewed by the courts as inferring a consent to search by those persons entering the base. In Saylor v. United States, 374 F.2d 894, 899 (Ct. Cl. 1967), it was noted that a base commander does

not have authority to search the property of a civilian on the base without probable cause. This case did not involve the posting of signs, and thus is not directly in point, but it does indicate that Fourth Amendment rights continue to adhere to a civilian on a military base.

In an analogous situation, the court held that the fact that a sign in an airport indicated that all embarking passengers were subject to search did not permit the inference that those who continued past the sign consented to the search. United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). As the court noted, consent to search cannot be made a condition to the exercise of the constitutional right to travel. It should be noted that those entering the base to attend a political rally are also exercising a constitutional right, i.e. the right to assemble and express political views, and it is questionable whether such entry can be conditioned on consent to search.

This is not to suggest that there might not be circumstances under which a base commander could search all persons entering the base, if the need for security was great enough and the intrusion constituted minimum interference with the right of privacy. Without probable cause, however, we doubt that even under these circumstances only certain individuals could be singled out.

3. Whether the Chicago Police Department had arrest powers while on the base?

We are advised that O'Hare Air Force Base, the property in question, is within the exclusive jurisdiction of the United States and that no jurisdiction has been reserved to the State of Illinois or the City of Chicago. If that is correct, then the Chicago Police Department has no authority to arrest persons on the federal property for either federal or state crimes, except when acting on the request of and under the direction of federal officers. This, we understand, was the procedure followed. If federal officers request aid in making arrests on federal property, then Chicago policemen, like any other citizens, are authorized to assist. They would have no independent arrest power, however, on property in the exclusive jurisdiction of the federal government.



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