IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA

No. 76-1945

THOMAS FORCADE and
ROBERT SHERRILL,

Appellees,

v.

H. STUART KNIGHT, *et al.*,

Appellants.

On Appeal from the
United States District Court
of the District of Columbia

Brief Amici Curiae of
THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS
THE OFFICERS OF THE WHITE HOUSE CORRESPONDENTS ASSOCIATION
THE NATIONAL PRESS CLUB
in Support of Appellees

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Statement of Facts

Amici adopt the statement of facts of the Plaintiffs-Appellees and summarizes as follows:

This case arises from the denial of permanent White House press passes to Robert Sherrill and Thomas Forcade, who claim they are journalists entitled to admission to White House press facilities.

Mr. Sherrill, a reporter for THE NATION, applied for a White House press pass in 1966. Mr. Forcade, then a correspondent for the Alternative Press Syndicate, applied for a press pass on May 1, 1971.

Mr. Sherrill was informed that his application for a press pass was denied on May 3, 1966. Mr. Forcade's application was denied on November 14, 1971, although Mr. Forcade was not informed of the decision until February 11, 1972.

In a letter dated January 6, 1972, counsel for plaintiffs asked the White House Press Secretary to explain the reasons for the decisions to deny press passes to Mr. Forcade and to Mr. Sherrill. In response to this inquiry, the Assistant Director of the Secret Service replied (on February 11, 1972) that both Mr. Forcade and Mr. Sherrill had been denied accreditation "for reasons of security."[1/]

1/ Counsel for Plaintiffs-Appellees subsequently sought further explanation from the Secret Service for the denials. In reply, Mr. Eugene Rossides, Assistant Secretary of the Treasury answered, in a letter dated June 26, 1972:

> "For Mr. Sherrill's information, he was arrested and fined for physical assault in the State of Florida. For Mr. Forcade's information, please refer him to the New York Times, May 14, 1970, p. 8 [which contained an account of Mr. Forcade throwing a "cheese pie" at a member of the Commission on Obscenity and Pornography during Commission Hearings.]

No further explanation of the decision, or why these incidents lead the Service to conclude that Mr. Forcade and Mr. Sherill posed a threat "to the security of the President and the members of his immediate family, was forthcoming.

The Secret Service said it investigates each applicant for a White House press pass after the White House Press Secretary has made a determination that the applicant is a bona fide journalist. The Secret Service also indicated that it employs no published standards or administrative criteria in approving or disapproving an application, but rather bases its judgment on a discretionary determination derived from the "protective experience of and expertise of the officials of the Secret Service." The only reason which the Secret Service will advance for the denial of an application is "for reasons relating to the security of the President and/or the members of his family."

No hearing or right of appeal is afforded to a reporter whose application is denied.

After learning of the denial of their applications, plaintiffs brought suit in the District Court for the District of Columbia, challenging on constitutional grounds defendants' refusal to grant them a press pass.

Opinion Below

The District Court found that Plaintiffs' First Amendment right to gather information had been abridged by the denial of press passes in the absence of any established standards or any compelling justification which would support the denial. It also found that Plaintiffs' Fifth Amendment right to due process had been violated by the failure of the Secret Service to afford them notice and an opportunity to rebut any evidence against them.

Accordingly, the district court, on July 7, 1976, ordered the Secret Service to

> devise and publicize constitutionally narrow and specific standards for the issuance or denial of press pass applications, reconsider plaintiffs' applications within the context of the newly devised standards, and render a written decision specifying the grounds and outlining the evidence upon which they base the denial, if that be the decision, and affording plaintiff an adequate opportunity to rebut or explain any evidence or grounds upon which they base the denial."

Question Presented

The sole issue in this appeal is whether the White House may deny any person claiming to be a journalist access to White House press facilities in the absence of publicly available standards for admission which are narrow and specific, and without providing notice and opportunity to be heard to any person who is denied White House press credentials.

Introduction: The White House Press Facilities and the Press

In order to evaluate the significance of the denial of a White House press pass to a member of the press, it is important to understand the nature of the activities of the White House press corps. A White House press pass is not simply an entitlement to attend White House press conferences, but rather represents the most effective means for a journalist to cover a wide range of Presidential and administration activities. The White House press facilities represent perhaps the single most important resource in terms both of quantity and quality of news for the press in Washington.

By way of comparison, there are 3,000 persons who have press passes to Congress but they cover more than 500 individual congressmen in both houses and in more than 200 special and standing committees and sub-committees; and there are about 30 reporters who hold permanent press passes at the Supreme Court, of whom approximately a dozen can be considered there on a full-time basis.

The White House has more than 1,500 press passes outstanding, primarily to cover the activities of one person -- the President.

Scope of News Activity at the White House

Access to the White House press facilities primarily produces news about the President. But frequently the White House press office handles news which directly involves other agencies with or without direct Presidential involvement.

For example, the Attorney General may decided to launch a new anti-crime campaign which has the approval of the President. The White House Press office will schedule the release of the report and a press conference conducted by the Attorney General with little or no participation by the White House press officer. Or the White House may schedule the release of a report by a special Presidential commission and a press conference by that commission, even though the commission has not consulted with the President nor cleared its report with the President prior to its release.

Reporters who hold permanent press passes have free and immediate access to the general briefing. Reporters who do not hold regular White House passes must obtain special access which generally entails a delay of from 10 minutes to one half hour for each entry. Frequently, the White House will only give ten minutes notice that it is going to conduct a press briefing on an important issue and the reporters who have not been given prior access must wait at the gate and may find they have missed the briefing.

2. The Oval Office. Occasionally, without notice, the President will invite those in the White House Press room into the Oval Office for a quick, informal session such as picture taking with a foreign dignitary and answering a few questions. Those invited may be all persons in the press room at the time or a selected number generally picked by the White House press officer.

3. Outside the White House- Appearances in Washington. The President frequently makes spontaneous or planned appearances in Washington. On these occassions the White House will arrange for special transportation for reporters holding White House press passes. This arrangement is particularly important to the press when the President's appearance is made with little or no advance notice.

4. Outside Washington. When the President travels, generally there is a press plane, paid for by the press, often restricted to persons holding permanent White House press passes, or some members of the press may travel on the Presidential plane.

5. The Executive Office Building. White House press credentials are necessary for reporters who wish to gain access to the Executive Office Building. Access to the Executive Office Building is important because many senior Administration officials have their offices there. In addition the Executive Office Building is the site of many White House press conferences.

Thus it is apparent that members of the press who are denied a White House press pass are at a significant disadvantage in the efforts to cover the President and the Administration.

Summary of Argument

The Constitution imposes upon the executive, legislative and judicial branches of government the obligation to inform the public and the press about significant actions of government and confers upon members of the working press the right to gather and publish this information. When the White House chooses to carry out this information obligation by having special facilities and employees devoted to the press, it must make these government press resources open to all bona fide members of the press on a fair and equitable basis.

The exclusion from these press facilities of persons claiming to be members of the press must be accomplished only in conformity with published standards which are neither arbitrary on their face nor arbitrary in their enforcement. Certainly, the White House could, in its published standards, seek to exclude those persons whose presence

poses a reasonable likelihood of danger to the life of the President; or those persons whose exclusion is dictated by a "compelling state interest" because they pose a serious and imminent threat to the disruption of White House functions.

But in each case--as in any case where the government is seeking to deprive a class of citizens of substantial First Amendment privileges or benefits--it is the government which has the obligation to establish and publish standards; to justify these standards as published on the basis of a compelling state interest; to assure the fair and equitable application of these standards in an individual case; and to provide any person aggrieved with notice and an opportunity for a hearing.

Argument

I. THE FIRST AMENDMENT PROTECTS REPORTERS' RIGHTS TO GATHER NEWS CONCERNING THE PRESIDENT AND THE ADMINISTRATION.

This case presents a question of fundamental importance to the rights of the press under the First Amendment: Whether the Secret Service may, without any articulated standards, or provision for a hearing, deprive a person claiming to be a bona-fide member of the press of the right to report on the President of the United States, by the mere assertion of "reasons of security."

The Supreme Court has recognized that newsgathering is a protected First Amendment activity. Branzburg v. Hayes, 408 U.S. 665,681 (1972). The right of newspersons to gather news clearly includes the right to use government established press facilities[2/]

2/ Westinghouse Broadcasting Co. v. Dukakis, 409 F.Supp. 895 (D. Mass. 1976) (holding that a city council could not exclude some press from its meetings and admit others), Quad-City News Service v. Jebens, 334 F.Supp. 8 (S.D. Iowa 1971) (holding that a mayor could not deny an underground newspaper access to Police Department records available to other media) Consumers Union of the United States, Inc. v. Periodical Correspondence Association, 365 F.Supp. 18 (D.D.C. 1973), reversed on other grounds, 515 F.2d 1341 (D.C. Cir. 1975), cert. denied, ___ U.S. ___, 96 S.Ct 780 (1976) (holding that Congress could not condition admission to the press galleries on the financial independence of the publication), Kovach v. Maddux, 238 F.Supp. 835 (M.D. Tenn. 1965) (striking down the exclusion of a reporter from the state senate), McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir. 1951) (holding that a mayor could not accord one newspaper a right of inspection while deying it to another.)

and the right to attend government officials' press conferences[3/]. "To say . . . that attendance at such a news conference is not a legitimate news gathering activity is absurd." Borecca v. Fasi, supra, 369 F.Supp. at 910.

The protection given by the First Amendment to newsgathering is of particular importance when the activities of the press are directed toward reporting on public officials. Informed public opinion is a prerequisite to democratic self-government. As James Madison observed: "A popular Government without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy: or perhaps both. . ." 9 Writings of James Madison 103 (Hunt, ed. 1910).

The Supreme Court has continually recognized the special informing function played by the press. In Grossjean v. American Press Co., 297 U.S. 233 (1936), Justice Sutherland wrote for the Court:

> The newspapers , magazines and other journals of the country, it is safe to say, have shed and continue to shed, more light on the public and business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern. Id, at 250.

3/ Borecca v. Fasi, 369 F.Supp. 906 (D. Hawaii 1974)(holding that a mayor could not exclude a reporter from general news conferences); Lewis v. Baxley, 368 F.Supp. 768 (M.D. Ala. 1973) (striking down an ordinance which required newspersons covering the state government to file a statement of economic interest prior to being admitted to press conferences.)

The contribution of the press to informed public opinion goes beyond Justice Sutherland's historical observation. As society becomes more complex and the individual finds it more and more difficult to obtain information on his own, it becomes increasingly important to a democratic system that the press' function as the representative of the public be protected so that it may gather news and disseminate it for all to read. For "[w]ithout the information provided by the press most of us andmany of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally." Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 492 (1975).

Realization of the role that the press plays in educating our citizenry has led the Court at times to give the press a preferred position because it imposes a check on the power of the three branches by keeping the public informed of their policies and activities. Justice Stewart forcefully affirmed this role of the press in his opinion in the Pentagon Papers case:

> In the absence of the governmental checks and balances present in other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry-in an informed and critical public opinion which alone can here protect the values of democratic government. For this reason, it is perhaps here that a press that is alert, aware, and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people. New York Times v. United States, 403 U.S. 713, 728 (1971).

The Supreme Court has repeatedly emphasized the First Amendment responsibilities of the press when the press is reporting on the conduct of elected public officials, such as the President.

> The public official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant . . . The First and Fourteenth Amendments embody our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open and that may well include . . . sharp attacks on government and public officials.' Garrison v. Louisiana, 379 U.S. 64,75,77 (1964). Quoting New York Times Co. v. Sullivan, 376 U.S. 254,270 (1964).

Press coverage of the highest public official in the land, the President, and the Administration, is important because of the great discretion and power which is vested in him to determine matters of public policy, a power which is often exercised in rapidly changing situations.

In many situations, the President's decisions are reviewable by no one except the electorate. If the electorate is to exercise this right of review intelligently, it must receive information from a variety of sources for, as Justice Holmes observed:

> when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas - that the best test of truth is the power of the thought to get itself accepted in the competition of the market. Abrams v. United States, 250 U.S. 616,630 (1919) (Holmes J., dissenting).

This vital function of the press is seriously abridged by the arbitrary denial of press passes to bona-fide members of the press. The harm is not to the reporters alone, but to the American people as well, whose fundamental right to know about the operations of their government is curtailed without any showing of a valid justification.

The effective functioning of a free press in reporting on the activities of government depends in large measure on the variety and multiplicity of press perspectives. Robust debate on national issues requires active pursuit of news by alternative as well as established media sources, critics as well as supporters of the government. A system of licensing access to news which is not bounded by constitutional safeguards is open to the abuse of excluding those whose sole crime is opposition to the government. Such unchecked discretion can only imperil the vitality of the American press.

II. THE WHITE HOUSE PRESS FACILITIES AND PRESS CONFERENCES ARE A PUBLIC FORUM CREATED FOR THE USE OF THE PRESS TO WHICH ALL BONA FIDE MEMBERS OF THE PRESS HAVE A RIGHT TO FAIR AND EQUITABLE ACCESS.

The First Amendment does not give the press a special right of access to all places at all times. No one would contend that reporters are granted a license to break into the White House grounds to collect news. But the White House press conferences, briefings, and facilities, initiated solely to inform the press, and through the press, the public, of the administration's activities, constitute a public forum for newsgathering activities.

Under the decisions of the Supreme Court and lower courts, members of the press have a First Amendment right to fair and equitable access to this specialized public news forum.[4/]

As the Court observed in Borecca v. Fasi, supra, (holding that a mayor may not arbitrarily discriminate against certain members of the press by refusing them admission to his press conferences), "If [the mayor] chooses to hold a general news conference in his inner office, for that purpose and to that extent his inner office becomes a public gathering place." 369 F.Supp. at 911.

Users of public forum facilities are protected from arbitrary exclusion so long as the proposed activity is appropriate to the forum.

> The nature of the place, the pattern of its normal activities, dictate the kinds of regulations of time, place and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. The same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (citation omitted).

4/ Thus the decisions in Pell v. Procunier, 417 U.S. 817 (1974), Saxbe v. Washington Post, 417 U.S. 343 (1974) and Zemel v. Rusk, 381 U.S. 1 (1965) are distinguishable. Each case concerned requests by the press to open a forum whereas the instant case concerns a request by certain members of the press for access to a forum which is already open. Moreover the Court's ruling in both Pell and Saxbe rested heavily on the unique demands of the prison system. Pell v. Procunier, supra, 417 U.S. at 822, 831-32; Saxbe v. Washington Post, supra, 417 U.S. at 848.

Having created a public forum for the use of the press the government may not exercise unfettered discretion to decide who will be let in, and who will be kept out. The danger of such discretion is the most serious form of governmental censorship: the discrimination among members of the press solely on the basis of the content of their stories and their political beliefs. As the Supreme Court stated in Police Department of Chicago v. Mosley, 408 U.S. 92 (1972), in striking down an ordinance allowing labor picketing near "public forum" school facilities, while prohibiting any other type of picketing in the same area:

> [A]bove all else the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content. . . Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable but deny it to those wishing to express less favored or more controversial views. Id. at 95-96.

The danger of politically motivated censorship is particularly apparent in this case. One of the reporters who was excluded is a correspondent for the "alternative press", and the other was denominated an "enemy" by the White House Legal Counsel who participated in the review of his request for a press pass in 1972. See Affidavit of Robert Sherill, Addendum to Plaintiff-Appellee's brief, p. 39; Affidavit of Stuart Levine, id. at 40.

Federal courts have repeatedly held unconstitutional government discrimination in granting access to public forum press facilities.

In McCoy v. Providence Journal Co., 190 F.2d 760 (1st Cir. 1951) the court held that a mayor could not accord one newspaper a right of inspection of city records while denying it to its competitor. Thereafter in Kovach v. Maddux, 238 F.Supp. 835 (M.D. Tenn. 1965) a court struck down the Tennessee legislature's exclusion of a reporter from the state senate and in Borecca v. Fasi, supra, another court ruled that a mayor could not refuse to admit a newspaper reporter to press briefings which were open to other members to the press. In Quad-City News Service v. Jebens, 334 F.Supp. 8 (S.D. Iowa 1971), the court granted relief to an underground newspaper when it was denied access to Police Department records available to other media. Subsequently, in Westinghouse Broadcasting Co. v. Dukakis, 409 F.Supp. 895,896 (D. Mass. 1976), the court enjoined the Boston City Council from excluding one television station from meetings while admitting others.

In Consumers Union of the United States, Inc. v. Periodical Correspondent's Association, supra, the publisher of a consumer magazine sought the admission of one of its reporters to Congressional press galleries. Admission was denied pursuant to a rule denying access to media owned and operated by any industry, business association or institution. Judge Gesell explicitly recognized that a First Amendment right of access to the news had been denied:

> The Courts have a responsibility to preserve the freedom of the press by barring the imposition of limitations upon the equal access of newsmen to facts of public consequence where freedom of the press or other First Amendment rights are involved. . . While it is perfectly true that reporters do not have an unrestricted right to go where they please in search of news the elimination of some reporters from an area which has been voluntarily opened to other reporters for the purpose of news gathering presents a wholly different situation . . . Certainly the exclusion of particular reporters from the news presented each morning at on-the-record press conferences which hundreds of other reporters are eligible to attend, affects the content and quality of news that is reported as well as access to sources of news. Moreover, it is important to recognize that this is not a single, sporadic refusal of access. Exclusion from the press galleries constitutes a permanent disadvantage with regard to the gathering of news and has a significant impact where measured in terms of the First Amendment, both upon the publication excluded and others in similar situations. Id. at 25-26 (citation omitted).

The exclusion of newspersons from White House press facilities is even more serious because such conferences provide a unique source of information. Thus in Lewis v. Baxley, supra, the court struck down an ordinance which required newspersons covering the state government to file a statement of economic interest prior to being admitted to the galleries of the legislature or Congressional press conferences:

> It should be noted that exclusion in this case presents more serious threat to the First Amendment than does exclusion from Congressional press galleries in the Consumers Union case. There, even those excluded from the press galleries were allowed to sit in the public galleries. Here, the exclusion is complete. Furthermore, proceedings of the Congress are reported verbatim in the Congressional Record where they may be read by any and all interested. There is no such record of proceedings in the Alabama Legislature . . . Without press coverage, the events which transpire in the Alabama Legislature would soon be virtually

> hidden from the public . . . Loss of such press coverage would be loss of an inestimable First Amendment right in this case. 368 F. Supp. at 777. 5/

Nor are these discriminatory exclusions, based as they are on arbitrary standards, made any more excusable by the fact that presidential security is allegedly involved. In A Quaker Action Group v. Hickel (I), 421 F. 2d 1111 (D.C. Cir. 1969) five political action organizations challenged the constitutionality of regulations as applied by the National Park Service limiting demonstrations in Lafayette Park or on the sidewalk in front of the White House, on the grounds that such demonstrations posed a threat to the President. 6/

The District Court granted the plaintiff's request for a preliminary injunction and the Court of Appeals affirmed. In speaking of the government's attempt to justify the regulations on the basis of the President's safety, Judge Bazelon stated:

> This, of course, is a paramount interest . . . But we cannot agree that mere mention of the President's safety

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5/ In Watson v. Cronin, 384 F.Supp. 652 (D.Colo. 1974), the Court refused to grant relief to a newsman who was denied a press pass because he had been convicted of a felony. The validity of a presumption against convicted felons in denying a press pass is not at issue in this case, since the Secret Service has indicated that it does permit ex-felons to receive press passes. See Answer to Supplemental Interrogatory 1,Addendum to Plaintiff-Appellees Brief, p. 29. Even in denying relief in that case, the court in Watson indicated the need for written standards and procedures for the issuance of press passes. Id. at 660.

6/ This litigation was the subject of a series of decisions by the U.S. Court of Appeals for the District of Columbia. See also A Quaker Action Group v. Hickel (II), 429 F.2d 185 (1970); A Quaker Action Group v. Morton (III), 460 F.2d 854 (1971); A Quaker Action Group v. Morton (IV), 516 F.2d 717 (1975).

> must be allowed to trump any First Amendment interest. While Courts must listen with utmost respect to the conclusions of those entrusted with responsibility for safeguarding the President, we must also assure ourselves that these conclusions rest upon solid facts and a realistic appraisal of danger rather than vague fears extrapolated beyond any forseeable threat. Id. at 1117.

While considerations of the President's security, much as the interests of national security, are entitled to great weight, the mere invocation of these important governmental interests without any evidence to support them cannot alone overcome basic constitutional rights. As Justice Black stated in New York Times v. United States, 403 U.S. 714, 719 (1974), "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment." A proper balancing of these competing interests is required.

> When the executive or the administrative process abridges constitutional rights, it is subject to closer scrutiny than otherwise, and ultimately it is the court rather than the Agency that must balance competing interests A Quaker Action Group v. Morton (IV), 516 F.2d 717, 723 (1975).7/

7/ These cases establish conclusively that this case presents a justiciable controversy within the Article III powers of this court. Courts have on several occasions reviewed the actions of the Secret Service, police and military authorities taken to ensure presidential security which infringed on First Amendment rights. See Rowley v. McMillan, 502 F.2d 1326 (4th Cir. 1974) aff'g Sparrow v. Goodman, 361 F.Supp. 566 (D.N.C. 1973); Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975); Butler v. United States, 365 F.Supp 1035 (D. Hawaii 1973); Watts v. United States, 394 U.S. 705, 707 (1969); Quaker Action Group v. Hickel, (I-IV), supra; Women Strike for Peace v. Morton, 420 F.2d 597 (D.C. Cir. 1969). As the court noted in Sparrow v. Goodman, supra:

(Footnote continued from preceeding page)

> The attorneys for the federal defendants asked the court to assume, without proof, that since the President was in town everything done by the Secret Service was within the outer limits of what was necessary to protect the person of the President and, further, that none of the federal defendants should even be retained as defendants to explain their actions which, barring a valid security reason, consitute egregious violations of civil rights and liberties.
>
> Such an assumption can not be made.
>
> The authority and duty of the judiciary to inquire into deprivations of common right by government agents (even, in Lord Coke's phrase, upon authority of 'letters of the King') can not be so cavalierly dismissed. . . .
>
> They are the sorts of things which courts are created to inquire into, regardless of whether the law officials are Secret Service, local police, sheriffs, or jailers, or narcotics agents. 361 F.Supp. at 585-586.

The issues in this case are capable of judicially manageable standards (such as those established by this court in the Quaker Action Group litigation). Nor does the power claimed by the Secret Service represent a "textually demonstrable commitment" by the Constitution to the Executive branch. See Baker v. Carr, 369 U.S. 186 (1962). On the contrary, the power of the Secret Service is based on a specific congressional statutory grant of authority (18 U.S.C. §3056) which is subject to constitutional limitations and thus the decision of the Court of Appeals for the District of Columbia in Consumers Union, supra, is distinguishable.

Important national interests such as presidential security and national security are entitled to great deference from the courts. When they come into conflict with the safeguards of the Bill of Rights however, it is pre-eminently the duty of the courts to "say what the law is". Marbury v. Madison, 1 Cranch (5 U.S.) 135,177 (1803). See United States v. Nixon, 418 U.S. 683,703-707 (1974), New York Times v. United States, supra.

III. THE SECRET SERVICE MUST EMPLOY NARROW AND SPECIFIC STANDARDS IN DECIDING WHICH MEMBERS OF THE PRESS ARE TO BE GRANTED ACCESS TO WHITE HOUSE PRESS CONFERENCES.

Regulations in the area of free speech can be tolerated only when a public official's discretion is guided by narrow and specific satndards. Niemotko v. Maryland, 340 U.S. 268, 271 (1951), Southeastern Promotions v. Conrad, 420 U.S. 546, 553 (1975).

In Southeastern Promotions, supra, the producers of the rock musical "Hair" sought a six day engagement for their production in the municipal theater of the City of Chattanooga. The theater's directors turned down their application, stating that "Hair" portrayed nudity and obscenity.

The producers then asked the federal District Court for an order requiring the directors of the theater to allow the production to be shown. The Court denied relief on the basis of an advisory jury's finding that "Hair" was obscene and the Sixth Circuit affirmed.

The Supreme Court reversed, holding that the municipal auditoriums "were public forums designed for and dedicated to expressive activities," id. at 555, and that the producers were therefore entitled to the safeguards afforded by the First Amendment:

> Respondents' action here is indistinguishable in its censoring effect from the official actions consistently identified as prior restraints in a long line of this Court's decisions. [Citations omitted.] In these cases, the plaintiffs asked the courts to provide relief where public officials had forbidden the plaintiffs the use of public places to say what they wanted to say. The restraints took a variety of forms, with officials exercising control over different kinds of public places under the authority of particular statutes. All, however, had this in common: they gave public officials the power to deny use of a forum in advance of actual expression.
>
> Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abrigment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Id. at 552-553.(Emphasis supplied.)

Southeastern Promotion's basic requirement of strictly defined standards is even more important for the protection of First Amendment rights in cases involving members of the press than in cases involving the producers of plays such as "Hair". For, as the Court noted in striking down an ex parte injunction against a political rally:

> 'It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. On the other hand, the subject of sex is of constant but rarely topical interest.' Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 182 (1968). Quoting A Quantity of Books v. Kansas,378 U.S. 205, 224 (1964) (Harlan, J. dissenting).

In Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969), the defendant was convicted for engaging in a parade in violation of a local ordinance which required a permit. The ordinance authorized the denial of the permit if the local authorities concluded that "the public welfare, peace, safety, health,

decency, good order, morals or convenience require that it be refused." Id. at 149-150. On appeal, the conviction was reversed by the Supreme Court. The Court recognized that a municipality could exercise control over parades in the interest of traffic regulation and public safety and that permit ordinances narrowly directed to those ends could not be held invalid on their face. As written however, the permit ordinance was not so confined and was therefore invalid:

> '[W]e have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places.' Kunz v. New York, 340 U.S. 293-94 [further citations omitted]. Even when the use of public streets and sidewalks is involved, therefore, a municipality may not empower its licensing officials to roam essentially at will, dispensing or withholding permission to speak, assemble, picket or parade according to their own opinions of the potential effect of the activity in question on the 'welfare,' 'decency' or 'morals' of the community. Id. at 153.

See Freedman v. Maryland, 380 U.S. 51, 56 (danger of excessive delegation to censorship board in absence of standards and safeguards); Staub v. City of Baxley, 355 U.S. 313, 322 (1958), Cantwell v. Connecticut, 310 U.S. 296, 305 (1940); Hynes v. Mayor of Oradell, ___ U.S. ___, 96 S.Ct. 755, 759 (1976); Lovell v. Griffin, 303 U.S. 444, 451-52 (1938) (danger of arbitrary denial of permits in absence of standards and safeguards.)

The requirement of standards is especially important where the President is involved because the confidence of the people in the Chief Executive is at stake. Thus in Sparrow v. Goodman, 361 F.Supp. 566 (W.D. N.C. 1973) aff'd sub. nom. Rowley v. McMillan, 502 F.2d

1326 (4th Cir. 1974) the court ruled that the statutory authorization of the Secret Service to protect the President did not justify its arbitrary exclusion of persons from his presence. Judge McMillan commented:

> The attorneys for the federal defendants asked the court to assume,without proof, that since the President was in town everything done by the Secret Service was within the outer limits of what was necessary to protect the person of the President. Such an assumption cannot be made . . .
>
> Rather than arrogantly claiming freedom from inquiry and accountability those who wield force in our land should be eager to demonstrate the propriety of their actions. Secrecy in government breeds tyranny. Refusal to account to oppressed citizens for their actions is not a hallmark of democracy or freedom. . .
>
> The existence of their good faith, the absence of an illegal motive (such as suppression of dissent) and the reasonableness of the belief of the Secret Service and other law enforcement officials are questions of fact rather than occasions for the exercise of executive privilege. Id. at 585-86.

The D.C. Circuit also emphasized the need for standards in situations involving the President in its decision in Women Strike for Peace v. Hickel, 420 F.2d 597 (D.C. Cir. 1969). There, plaintiffs challenged the decision by the National Park Service to reject an application of a group to erect an antiwar display in the park area behind the White House. The Court of Appeals remanded the case for definition by the Park Service of its policies. Judge Leventhal said: "The duty of the Court is to assure our citizens that the Park Service has rules, or criteria, or guidelines. . ." Id. at 603.

Judge Wright noted in concurrence that

> Standards for granting or denying permits which affect free expression must be precise and must not be left to the discretion of administrative officials. Such standards must be announced and generally applicable so that the contols on official discretion can be quickly tested in court if the permit is denied. Id. at 605, (Wright, J., concurring) (footnote omitted).

Courts have been equally insistent on the requirement of standards in cases in which a public official has granted access to one member of the press while denying it to another. Thus, in enjoining the mayor of Honolulu from excluding a reporter whom the mayor believed to be "malicious" from general news conferences held in the mayor's office, Judge King stated:

> News conferences are not held solely or even primarily for the benefit of the news media. Structured news conferences...serve the purpose of the person holding the conference as much if not more than of the news media. Manipulation of the news is a highly developed technique, utilizing staff news specialists, self-serving handouts, programmed appearances, and positive and negative reenforcement in dealing with reporters and news media. Hand-picking those in attendance intensifies the manipulation. Borecca v. Fasi, supra, 369 F. Supp. at 910.

Similarly in Quad-City Community News Service v. Jebens, supra, an underground newspaper applied for relief when it was denied access to Police Department records available to other media. The court held that the standards which the police officials employed

in deciding whether to grant or deny access were unconstitutionally vague:

> It must be apparent that where public officials, in making decisions such as here involved, ... employ criteria or reasons that are either vague or completely unknown, the party affected has no way of knowing how to achieve compliance with the criteria nor even of challenging them as being improper. In such situations, the public officials literally have unimpeded discretion to regulate the activity in question in whatever manner they desire. 334 F. Supp. at 17.

Thus, in order to assure adequate protection for First Amendment rights the Secret Service must develop narrow and specific standards governing access to White House press facilities.

IV. THE STANDARDS MUST ADVANCE A COMPELLING STATE INTEREST.

The Supreme Court in Branzburg v. Hayes, supra, 408 U.S. at 702, decided that the First Amendment protection for newsgathering, while not an absolute privilege, could not be infringed without a showing of a compelling state interest to justify the infringement. "[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated." Id. at 681.

In his concurring opinion Justice Powell guaranteed that 'the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." Id. at 710.

Subsequent decisions have indicated that the privilege to gather news can be violated only where there is a compelling state interest[8/] and that the compelling state interest standard will be applied when a newsperson asserts the right to make use of a government established press facility, or attend government officials' press conferences.

Thus, in Lewis v. Baxley, supra, the Court noted:

> In this case, the state is asserting the right to exclude certain members of the press from public sessions of the legislature, and from press conferences and press rooms from which other members of the press are not excluded. In this instance, the state must assert a compelling governmental interest and a substantial nexus between that interest and the action taken in furtherance thereof. 368 F.Supp. at 799.

Judge Hanson reiterated the compelling state interest requirement in Quad City, supra:

8/In Baker v. F&F Investment, 470 F. 2d 778 (2d Cir. 1972), cert. denied, 411 U.S. 966 (1973), the Court refused to compel disclosure when a party during pretrial discovery sought the identity of a reporter's confidential source quoted in an investigative article on blockbusting. The Court stated:

> While we recognize that there are cases--few in number to be sure--where First Amendement rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms...
>
> Freedom of the press may be stifled by direct or, more subtly by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the previous rights of freedom of speech and the press. We find no such compelling concern in this case. Id. at 783-785 (emphasis added).

Accord Democratic National Committee v. McCord, 356 F. Supp. 1394 (D.D.C. 1973); Loadholtz v. Fields, 389 F. Supp. 1299 (M.D. Fla. 1975); Apicella v. McNeil Laboratories, Inc. 66 F.R.D. 78 (E.D.N.Y. 1975).

> No showing merely of a rational relationship to some colorable state interest suffices to justify a classification between media permitted access to the reports and others which are not so permitted. Any classification which serves to penalize or restrain the exercise of a First Amendment right unless shown to be necessary to promote a compelling state interest is unconstitutional. 334 F.Supp. at 15 (emphasis in original).

Accord Westinghouse Broadcasting v. Dukakis, supra, 409 F.Supp. at 896; Borecca v. Fasi, supra, 369 F.Supp. at 909; Lewis v. Baxley, supra, 368 F.Supp. at 778.

The same conclusion was reached by Judge Bazelon in A Quaker Action Group (I), supra, when he responded to the government's claim that the court was limited to determining whether the balance which the Secret Service had struck between presidential security and the First Amendment was "wholly irrational":

> The expertise of those entrusted with the protection of the President does not qualify them to resolve First Amendment issues, the traditional province of the judiciary. A balancing of First Amendment freedoms against the requirements of Presidential safety may be left to other agencies in the first instance. But absent a compelling showing-which has not been begun here-that courts cannot evaluate the question of fact involved in estimating danger to the President, the final judgment must rest with the courts. 421 F.2d at 1118.

See Women Strike for Peace v. Hickel, supra, 420 F.2d at 605 (Wright, J. concurring).

Clearly, then, standards governing which members of the press will be granted access to White House press conferences must advance a compelling state interest.

V. THE STANDARDS MUST BE PUBLICLY AVAILABLE AND MUST SPECIFY THAT ONLY THOSE WHO PRESENT A REASONABLE LIKELIHOOD OF DANGER TO PRESIDENTIAL OR NATIONAL SECURITY OR A CLEAR AND PRESENT DANGER TO THE ADMINISTRATION OF GOVERNMENTAL FUNCTIONS WILL BE DENIED ACCESS TO WHITE HOUSE PRESS CONFERENCES

The Standards Must Be Publicly Available

The requirement that standards be made publicly available is especially important where, as here, unpublished standards would give public officials the opportunity to discriminate on the basis of content. In such a situation it is clear that "[w]hatever standards Defendants employ to license journalists who are to be admitted to sites of newsworthy events will be narrowly drawn, reasonable and definite and they must be publicly available." Quad City, supra, 334 F. Supp. at 17. See Watson v. Cronin, supra, 384 F. Supp. at 660.

Reasonable Likelihood of Danger to Presidential or National Security

Amicus submits that, because the same considerations of presidential security are involved, the regulations governing demonstrations in front of the White House (36 C.F.R. § 50. 19) should provide some guidance to the Court in determining valid reasons for denying newspersons access to the press conferences.

The regulations provide that a demonstration permit can be denied if "[i]t reasonably appears that the proposed demonstration or special event will present a clear and present danger to the public safety, good order or health." 36 C.F.R. § 50.19 (d)(vi)(2).

This standard is mandated by the decision of the D.C. Circuit in A Quaker Action Group v. Hickel (IV), 516 F. 2d 717, 729 (1975) where that court concluded that "only the presence of a clear and present danger" would justify abridgment of plaintiffs' First Amendment rights.

Therefore, Amicus submits that proper standards in the instant case would provide that a reporter would be admitted to activities unless he or she represents a "reasonable likelihood of danger to Presidential or national security."

Serious and Imminent Threat of Interference with the Administration of Governmental Functions

Amicus believes that that the government's interest in the orderly conduct of White House administrative activities, while legitimate, is obviously not as great as its interest in suppressing conduct which interfers with Presidential or national security.

It is axiomatic that "A state statute...would be unconstitutional if under the circumstances it appeared that the State's

interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment rights." Cox v. Louisiana, 379 U.S. 536, 577 (1965).

In Kovach v. Maddux, 238 F. Supp. 835 (M.D. Tenn. 1965), the court struck down a Tennessee state Senate resolution barring representatives of the Nashville Tennesean from the Senate floor, where other members of the press were allowed. While acknowledging the power of the Tennessee legislature to "conduct its proceedings according to orderly procedures free from interference or obstruction by nonmembers" (Id. at 840), the court insisted that "a restriction upon First Amendment's privilege and freedom is not to be sanctioned unless the danger to a legitimate state interest is serious, direct and immediate." Id. at 844.

Amici therefore submit that while the Government may properly restrict access to persons who would seriously disrupt White House activities the government must establish a serious and imminent threat to the administration of governmental functions before denying press access.

The Burden Must Be on the Secret Service to Justify the Denial of a White House Press Pass

Under both these standards, the burden rests upon the government to justify a denial of a press pass, since a "heavy burden" always rests on the government to demonstrate the appropriateness of actions which would infringe on First Amendment rights. Healy v. James, 408 U.S. 169, 184 (1972). See Women Strike for Peace v. Hickel, supra, 420 F.2d at 605 (Wright, J., concurring).

While Amici support the requirement that passes may be limited to bona fide members of the press, Amici believe that the burden must be on those who would deny the pass to establish, under specific guidelines, that an applicant does not qualify. Membership in the House and Senate Press Galleries, while indicative of an individual's status as a member of the press should not be the sole grounds for this determination.

VI. THE DENIAL OF A WHITE HOUSE PRESS PASS, WITHOUT NOTICE OR AN OPPORTUNITY FOR A HEARING, VIOLATES THE FIRST AND FIFTH AMENDMENT RIGHTS OF NEWSPERSONS

The fundamental concept of "liberty' embodied in the Fifth Amendment embraces the liberties guaranteed by the First Amendment. Carroll v.

President and Commissioners of Princess Anne, 393 U.S. 175, (1968); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940). Therefore the Secret Service has violated the First and Fifth Amendments by not affording adequate due process or fundamental fairness to newspersons who are denied press passes.

The denial of a press pass in effect censors the reporter and his publication from reporting on important aspects of Administration activities. As a form of censorship the denial of a press pass "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." Freedman v. Maryland, supra, 380 U.S. at 58 (striking down a Maryland law which required films to obtain prior approval from a state censorship board before exhibition and provided inadequate procedural protections).

For over a century the fundamental meaning of due process has been clear: "'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'" Fuentes v. Shevin, 407 U.S. 67, 80 (1972). Quoting Baldwin v. Hale, 1 Wall. (68 U.S.) 223, 233 (1864).

It is these principles which led the court in Quad-City, supra, to hold that "refusal to timely inform an applicant as to the reasons for denial of a pass, that is, in what respect(s) its application is found deficient according to the standards is as void of due process as is the lack of standards in the first instance." 334 F. Supp. at 17.

Similarly, in Goss v. Lopez, 419 U.S. 565 (1975) the Supreme Court held that due process required that a student receive notice and hearing prior to suspension.

> '[F]airness can rarely be obtained by secret, one sided determination of facts decisive of rights..Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it. Id. at 580. Quoting Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 170, 172-173 (1951).

Due process was held to require notice and hearing prior to the termination of welfare benefits in Goldberg v. Kelly, 397 U.S. 254 (1970). The Court stated: "The requirement of a prior hearing doubtless involves some greater expense...[b]ut the State is not without weapons to minimize these increased costs. Much of the drain on fiscal and administrative resources can be reduced by developing procedures for prompt pre-termination hearings and by skillful use of personnel and facilities. Id. at 266.

The hearing would have only one function: to produce an initial determination of the validity of the Secret Service's grounds for denial of access in order to protect newspersons from arbitrary exclusions from the White House and to provide the newsperson an opportunity to rebut any evidence against him. Cf. Goldberg v. Kelly, supra, 397 U.S. at 267; Morrisey v. Brewer, 408 U.S. 471, 485 (1972); Sniadach v. Family Finance Corp., 395 U.S. 337, 343 (1969).

In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses. E.g. ICC v. Louisville & N.R. Co., 227 U.S. 88, 93-94 (1913); Willner v. Committee on Character and Fitness, 373 U.S. 96, 103-104 (1963). What the Court said in Greene v. McElroy, 360 U.S. 474, 496, 497(1959), is particularly pertinent here:

> 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 consist 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. . .This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases, . . . but also in all types of cases where administrative actions were under scrutiny.

In the instant case, the governmental action of the Secret Service in summarily denying newspersons admittance to the press facilities are not only abridging the rights of individual reporters but also the rights of the newspapers which employ them and the right of the public to receive as many press interpretations of White House activities as possible so that it may make informed decisions about the Presidency.

The Secret Service has failed to provide even the rudiments of due process to reporters whose applications for press passes are denied. This alone is sufficient to invalidate its exclusions.

Conclusion

WHEREFORE, Amici pray this Court to affirm in all respects the decision of the district court below.

Respectfully submitted,

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