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MEMORANDUM

THE WHITE HOUSE

WASHINGTON

April 13, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: Proposal to Charge Applicant
Fees for White House Press Passes

Larry Speakes has raised for consideration the idea of charging an application fee for White House press passes, with the proceeds being used to fund the necessary processing of the applications. Speakes believes such a fee will make "fringe" news organizations "think twice" before applying for a press pass. Speakes would like to assemble a group to discuss the issue.

The leading case on the issuance of White House press passes is Sherrill v. Knight, 569 F. 2d 124 (D.C. Cir. 1977). In its opinion in that case the court ruled that a refusal to grant bona fide Washington journalists a White House press pass must be based on a "compelling governmental interest." Id., at 130. The court recognized protection of the President as a compelling interest, but ruled that the standard used in making decisions on issuance of passes must be published and that certain procedural protections must be afforded those denied passes. Id., at 130-131.

The pertinence of Sherrill v. Knight to the proposal raised by Speakes is not immediately apparent. Charging a fee to cover the costs associated with processing press pass applications does not deny anyone a White House press pass. It is tolerably well-established that individuals and organizations can be made to bear the incidental costs associated with their exercise of First Amendment freedoms. Nothing in the Constitution requires the taxpayers to fund the exercise of free speech by anyone. If you hold a demonstration and litter the street, you can be made to pay to clean it up. By the same token it would seem that if you demand a White House press pass you can be made to pay for the cost of its issuance. See, e.g., Cox v. New Hampshire, 312 U.S. 569, 576-577 (1941) (upholding fee for policing demonstration); Murdock v. Pennsylvania, 319 U.S. 105, 113-114 (1943) (upholding "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question"). The burden will be on the government to demonstrate that any fees were necessary to cover the reasonable costs of the licensing system. See, e.g., Milwaukee, etc. v. Milwaukee County Park Commission, 477 F. Supp. 1210, 1222 (D.Wis. 1979).

The fees cannot be used as a guise for restricting First Amendment rights. In this case, the fees may not go beyond the identifiable costs of issuing the press passes and regulating their issuance as permitted by law. It is unfortunate in this respect that the Speakes memorandum refers to the fees as a means of cutting back on the number of requests for press passes. Funding the cost of the process is by itself a sufficient justification for fees; limiting requests for the passes is not.

S agree

Apart from the legal authority to impose a ~~user~~ fee on press passes, I think it would be a terrible idea. The Administration, however unfairly, is acquiring the image of being opposed to press freedoms, based on such initiatives as FOIA reform, the new classification order, and the anti-leak policy. Striking the press corps close to home as Speakes envisions would simply provide a focal point for editorials and reportage on this theme.

I have not drafted a reply to Speakes since I did not know if you wanted to give legal advice at this stage, or simply participate (or have someone else participate) in the discussion contemplated by the Speakes memorandum.

/OK

328 FS 297

315 N.Y.S. 2d 519

540 F.2d 1360, 97 S.Ct. 2173

527 F.2d 118

578 F.2d 1197

⇒ 477 F.S. 1210, ~~472~~.

450 FS 696

440 F.S. 414

575 P.2d 835, ~~439~~ 439 US 809

permit system in that it covers the staff time of those who issue permits and the person on duty in the park at the time and place of the rally or assembly who otherwise would not be so assigned." Affidavit of Robert J. Mikula. The plaintiffs contend that the defendants have not met their burden of proving that the permit fee is essential to cover reasonable and necessary expenses.

[21, 22] The law to be applied to such fees is relatively clear. On the one hand, "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution." *Murdock v. Pennsylvania*, *supra*, 319 U.S. at 113, 63 S.Ct. at 875. However, "a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question" is permissible. *Id.* at 113-14, 63 S.Ct. at 875. In determining the validity of a particular licensing fee, the burden is on the defendants "to demonstrate that the fees were necessary to cover the reasonable costs of the licensing system, and that the fees were used for no other purpose than to meet those costs." *Bayside Enterprises, Inc. v. Carson*, 450 F.Supp. 696, 705 (M.D.Fla.1978).

[23] In my opinion, the defendants have met their burden. The Mikula affidavit, fairly construed, establishes that the \$20 permit fee is necessary to meet the reasonable costs of the permit system. The fee is a nominal one, and the defendants are entitled to have that portion of the complaint alleging unconstitutionality of the \$20 permit fee dismissed.

V. LIABILITY OF DEFENDANTS

[24] The plaintiffs seek monetary relief, in the form of compensatory and punitive damages, against three governmental entities and several individual defendants. It is now clear that this court has jurisdiction under § 1983 to grant the relief sought against these defendants. See *Monell v. Department of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipalities and other local governing bodies are "persons" under § 1983); *Carey v. Piphus*, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252

(1978) (recovery of compensatory damages); *Spence v. Staras*, 507 F.2d 554, 558 (7th Cir. 1974) (recovery of punitive damages). The remaining question is whether the plaintiffs may recover damages against either class of defendants on this motion for summary judgment.

A. Liability of Individual Defendants

The liability question has two components; whether the plaintiffs' constitutional rights were violated and, if so, whether the defendants have established their good faith defense. I will answer these questions with reference to the five alleged instances of constitutional deprivation.

[25] I believe that two of the plaintiffs' allegations, the failure of the defendants to repeal old ordinance 47.02 in a more timely fashion, and the failure of the defendants to alter ordinances 47.04, 47.16, 47.28 and 63.01, are insufficient as a matter of law to support a finding of unconstitutional conduct on the part of the defendants. I believe that it is inappropriate to impose monetary liability on officials whose only alleged sin was the failure to redraft arguably unconstitutional measures.

I have described, above, my conclusion that the constitutional rights of the plaintiffs were violated by the defendants' refusal to permit the sale of political items at the plaintiffs' August 4, 1979, rally. This refusal was the subject of the second preliminary injunction which I issued in this case. I have also found in this opinion that the ordinance banning such sales is unconstitutional on its face. Of course, the fact that the defendants complied with the injunction does not vitiate the constitutional violation.

[26] The adoption of new ordinance 47.02 can be the basis of § 1983 liability if it was adopted "with full knowledge of its unconstitutionality." *Fox Valley Reproductive Health Center, Inc. v. Arft*, 454 F.Supp. 784, 787 (E.D.Wis.1978). The plaintiffs have not alleged this to be the case, and my own examination of the record persuades me that the defendants have acted in good faith. Therefore, this allegation cannot be the basis of § 1983 liability.

conserve the public convenience. The obvious advantage of requiring application for a permit was noted as giving the public authorities notice in advance so as to afford opportunity for proper policing. And the court further observed that, in fixing time and place, the license served "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of disorder." But the court held that the licensing board was not vested with arbitrary power or an unfettered discretion; that its discretion must be exercised with "uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination"; that a "systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways, is the statutory mandate." The defendants, said the court, "had a right, under the Act, to a license to march when, where and as they did, if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place and manner as would avoid disturbance."

If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.

There remains the question of license fees which, as the court said, had a permissible range from \$300 to a nominal amount. The court construed the Act as requiring "a reasonable fixing of the amount of the fee." "The

The obvious advantage of a permit was noted as being in advance so as to facilitate policing. And the court said that in time and place, the license for overlapping parades or processions, the use of the streets by the licensees, and the risk of disorder." The licensing board was not given unfettered discretion; it was required to be guided by "uniformity of facts of each application, appropriate considerations; that a "systematic, treatment, with reference to the highways, is the standard," said the court, "the license to march when, where, and for what purpose required investigation of the public in the neighborhood may be unduly disturbed, and in time, place and manner."

to control the use of the streets for processions, as it unduly interfered with authority to give the streets to other proper uses of the streets. To say that the limited provisions of the ordinance, as construed by the state court, are unconstitutional.

license fees which, as the ordinance provides, range from \$300 to a maximum of \$500. The Act as required the fee." "The

charge," said the court, "for a circus parade or a celebration procession of length, each drawing crowds of observers, would take into account the greater public expense of policing the spectacle, compared with the slight expense of a less expansive and attractive parade or procession, to which the charge would be adjusted." The fee was held to be "not a revenue tax, but one to meet the expense incident to the administration of the Act and to the maintenance of public order in the matter licensed." There is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated. The suggestion that a flat fee should have been charged fails to take account of the difficulty of framing a fair schedule to meet all circumstances, and we perceive no constitutional ground for denying to local governments that flexibility of adjustment of fees which in the light of varying conditions would tend to conserve rather than impair the liberty sought.

There is no evidence that the statute has been administered otherwise than in the fair and non-discriminatory manner which the state court has construed it to require.

The decisions upon which appellants rely are not applicable. In *Lovell v. Griffin, supra*, the ordinance prohibited the distribution of literature of any kind at any time, at any place, and in any manner without a permit from the city manager, thus striking at the very foundation of the freedom of the press by subjecting it to license and censorship. In *Hague v. Committee for Industrial Organization, supra*, the ordinance dealt with the exercise of the right of assembly for the purpose of communicating views; it did not make comfort or convenience in the use of streets the standard of official action but enabled the local official absolutely to refuse a permit on his mere opinion that such refusal would prevent "riots, disturbances or disorderly assemblage." The ordi-

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ReprintsName of Correspondent: Larry - Speakes
☐ **MI Mail Report** User Codes: (A) _____ (B) _____ (C) _____

Subject: Applicants fee to be levied on applicants
for Press Passes to help defer the cost
of this Security clearance.

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<u>WAT18</u>		Referral Note: <u>D</u>	<u>83104105</u>	<u>S</u>	<u>83104115</u>
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| D - Draft Response | 9 - For Signature |
| F - Furnish Fact Sheet
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THE WHITE HOUSE

WASHINGTON

April 5, 1983

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MEMORANDUM FOR FRED FIELDING
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CHIEF OF STAFF - WHITE HOUSE
CAROLYN WIMMER
MEDIA LIAISON OFFICE

FROM: Larry Speakes *S*

The proliferation of news media in Washington is causing new concerns on the qualifications of the applicants for White House press credentials.

As you know, court decisions have tied our hands in limiting credentials to only those who have a legitimate need to cover the President. These decisions have forced us to grant approval of credentials to virtually every applicant.

We now must grant credentials to an increasing number of "fringe" news organizations. The increasing numbers not only present serious logistical difficulty, but the quality of some applicants causes some security concern. With the number of outstanding credentials rapidly approaching 2,000, I believe a legal review of our options on this matter would be appropriate.

The increasing number of applicants, together with the renewal process, requires a considerable expense on the part of the Secret Service for security checks and processing of applications and renewals. As the number increases, the cost obviously increases.

Let's explore the feasibility and legality of an applicant's fee to be charged for news organizations applying for credentials, with the revenues to be utilized to fund the process. It is my view that this will make news organizations think twice before applying for credentials that are not needed on a regular basis.

After you have had an opportunity to review these ideas, I would like to assemble a group for discussion of them. We will be in touch with you.