IT'S MY NEWS TOO! ONLINE JOURNALISM AND DISCRIMINATORY ACCESS TO THE CONGRESSIONAL PERIODICAL PRESS GALLERY

Ryan Benjamin Witte*

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ABSTRACT

Despite its three hundred year existence, the American newspaper is being devastated as the Internet becomes the go-to source for news. Despite the rise in Internet journalism, the sharp increase in online readership, and the precipitous drop in the number of print newspapers, policymakers still have a dismissive attitude toward alternative news sources. Such attitudes must change. In particular, the government should give online-only journalists increased access to the Galleries of the House of Representatives, the Senate, and other state-owned facilities where mainstream journalists are permitted. With a world-wide audience of millions of readers, Congress and the courts can no longer afford to relegate Internet journalism to a second-class news medium.

In Consumers Union v. Periodical Correspondents' Association, the plaintiff, the non-profit organization that publishes Consumer Reports, questioned the constitutionality of certain rules governing the issuance of press credentials to the Galleries when it was denied admission on ground that it was not an independent publication. Based on separation-of-powers concerns, the United States Court of Appeals for the District of Columbia Circuit avoided the constitutional issue with the political question doctrine, deeming the matter nonjusticiable. Since then, many courts have taken a similar path when faced with the exclusion of a journalist from an established press facility, completely skirting the constitutional issue of whether denial of access violates the freedom of the press protected by the First Amendment. Given the switch from traditional print media to websites and Kindles, the question of who has access to the places where the news is made becomes extremely important. If and when a court will be forced to decide the constitutional issue, it will need a set of principles that balance the constitutional concerns of Congress with the constitutional rights of the online journalist.

This Article will attempt to set forth those principals while at the same time explaining the history, the nature of the rights, and the state of the law as it exists today.

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INTRODUCTION

On April 1, 2009, the *Guardian* announced that it would cease print publication after one hundred and eighty-eight years in business and begin publishing exclusively on Twitter via one hundred and forty character "tweets," or instant messages.[1] The newspaper cited the unprecedented challenge for all newspapers to begin harnessing the power of the Internet and social networking Web sites to maintain readership. While historical events would be condensed to the bare essentials—"OMG Hitler invades Poland, allies declare war see tinyurl.com/b5x6e for more"—the newspaper was confident that brevity would be the key to its continued success.[2]

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[1] Rio Palof, *After 188 Years of Ink, Guardian Switches to Twitter*, GUARDIAN, Apr. 1, 2009, at 5, *available at* http://www.guardian.co.uk/media/2009/apr/01/guardian-twitter-media-technology.

[2] *Id.*

With traditional print media giants going out of business over the last few years, the unobservant reader might have missed the fact that the above story was an April Fool's Day gag by the *Guardian* itself. Since March 2007, dozens of newspapers have gone out of business, and still others, like the *Seattle Post-Intelligencer*, the *Capital Times*, and the *Christian Science Monitor* have moved to the Internet to stay afloat.[3] Since 1990, a quarter of all American newspaper jobs have been lost.[4] As Eric Alterman notes, "Few believe that newspapers in their current printed form will survive. Newspaper companies are losing advertisers, readers, market value, and, in some cases, their sense of mission at a pace that would have been barely imaginable just four years ago."[5] Despite its three hundred year existence, the American newspaper is being devastated in the span of a decade.

The Internet is becoming the go-to source for news, information, weather, movie reviews, and classified advertisements.[6] A recent study by the Pew Internet and American Life Project found that the Internet is now the third most popular news platform behind television and radio, with about sixty-one percent of people turning to the Internet as a source of news, and around ninety-two percent of Americans are utilizing multiple news platforms such as Internet and print media on a typical day.[7] With websites like Craigslist allowing anyone with a computer to post free classified ads, it is no wonder that users are refusing to shell out $325 to place an employment notice in the New York Times.[8] As the money in traditional print media dries up, the same

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[3] *See* William Yardley & Richard Pérez-Peña, *In Seattle, a Newspaper Loses Its Paper Route*, N.Y. TIMES, Mar. 17, 2009, at A1, *available at* http://www.nytimes.com/2009/03/17/business/media/17paper.html. *See generally* Newspaper Death Watch, http://www.newspaperdeathwatch.com (last visited May 28, 2010) (tracking newspapers experiencing financial difficulties and noting that some papers have switched to print/Internet hybrid, while others became online-only publications).

[4] *See* Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, NEW YORKER, Mar. 31, 2008, at 48, *available at* http://www.newyorker.com/reporting/2008/03/31/080331fa_fact_alterman.

[5] *Id.*

[6] *See* Kristen Purcell et al., *Understanding the Participatory News Consumer: How Internet and Cell Phone Users Have Turned News into a Social Experience*, 2010 PEW RES. INST. 5, *available at* http://pewinternet.org/Reports/2010/Online-News.aspx (studying the rise of the Internet as source of news); *see also* PHILIP MEYER, THE VANISHING NEWSPAPER: SAVING JOURNALISM FROM THE INFORMATION AGE 37 (2009) (describing how sources of newspaper revenue have shifted over past few years).

[7] *See* Purcell et al., *supra* note 6, at 31.

[8] *See* New York Times Classified Marketplace, http://www.nytimes.com/ref/classifieds (last visited Mar. 26, 2010) (listing current advertising rates in the New York Times Classified Section).

cannot be said for the ink destined for its pages. News dissemination is just as vital to our democratic heritage as it has always been—even if the "ink" is now digital.

Despite the rise in Internet journalism, the sharp increase in online readership, and the precipitous drop in the number of print newspapers,[9] policymakers still have a dismissive attitude toward alternative news sources. Such attitudes must change. In particular, the government should give online-only journalists increased access to the Galleries of the House of Representatives, the Senate, and other state-owned facilities where mainstream journalists are permitted. With a "world-wide audience of millions of readers, viewers, researchers, and buyers," Congress and the courts can no longer afford to relegate Internet journalism to a second-class news medium.[10] In *Consumers Union v. Periodical Correspondents' Association*, the plaintiff, the non-profit organization that publishes Consumer Reports, questioned the constitutionality of certain rules governing the issuance of press credentials to the Galleries when it was denied admission on ground that it was not an independent publication.[11] Based on separation-of-powers concerns, the United States Court of Appeals for the District of Columbia Circuit avoided the constitutional issue with the political question doctrine, deeming the matter nonjusticiable where the defendant acted in good faith and "pursuant to [its] express delegation of authority as aides . . . of Congress."[12] Since then, many courts have taken a similar path when faced with the exclusion of a journalist from an established press facility, completely skirting the constitutional issue of whether denial of access violates the freedom of the press protected by the First Amendment.

Given the switch from traditional print media to websites and Kindles, the question of who has access to the places where the news is made becomes extremely important.[13] If and when a

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[9] *See* Rachel Metz, *U.S. Newspaper Circulation Sees Steeper Decline*, ASSOCIATED PRESS FIN. WIRE, Apr. 27, 2009, *available at* http://www.ksdk.com /news/local/story.aspx?storyid=173635.

[10] Reno v. Am. Civil Liberties Union, 521 U.S. 844, 853 (1997).

[11] 515 F.2d 1341, 1342 (D.C. Cir. 1975).

[12] *Id.* at 1346-47; *see also* Schreibman v. Holmes, No. 1:96CV01287, 1997 WL 527341, at *4 (D.D.C. Aug. 18, 1997).

[13] *See* Branzburg v. Hayes, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting) ("No less important to the news dissemination process is the gathering of information. News must not be unnecessarily cut off at its source, for without freedom to acquire information, the right to publish would be impermissibly compromised."); *see also id.* at 723 (Powell, J., concurring) ("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. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm

court will be forced to decide the constitutional issue, it will need a set of principles that balance the constitutional concerns of Congress with the constitutional rights of the online journalist.

It is important to note at the outset that the term "blogger" will not be found in very many places within this Article. This is because I believe there is a distinction between "bloggers" and online journalists that is rarely, if ever, clarified. For one, anyone with a computer and an Internet connection can be a blogger—online journalism requires the writer to engage in activities that are typically associated with traditional print reporting. Rather than simply posting commentary or opinion based off of someone else's work, an online journalist would attempt to gather his own news information though investigation, sources, and access. Indeed, the right to access the source of the news is at the heart of this Article. These distinctions are important not only to First Amendment press jurisprudence, but to ensure that "commentators in pajamas" are not defining the right of access to the Galleries.[14] The online journalist might be a former reporter for a major publication who decides to research, report, and publish his own news online. She might be a journalism school graduate. Lumping all online publication under the banner of "blogging" is sure to restrict protections that should be rightfully afforded to journalistic professionals who choose a "unique and wholly new medium of worldwide human communication."[15]

This Article will address several issues related to the freedom of access to the Periodical Press Gallery. Part I will briefly describe the history of the press and the history of congressional reporting leading up to the passage of the Periodical Press Gallery Rules. Part II will describe the rules that govern admission to the Gallery as they exist today. Part III will describe

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themselves with the power which knowledge gives." (citing 9 Writings of James Madison 103 (G. Hunt ed. 1910))).

[14] This is not to say that bloggers are not necessarily real journalists, an issue which is highly debated. Typing the search term "Are Bloggers Journalists" into Google will reveal dozens of differing opinions on the subject. Rather, this Article presupposes that most bloggers do not engage in original and independent newsgathering, which is one of the hallmarks of traditional print journalism. To the extent a blogger does engage in this type of activity, then the protections discussed in this Article would be appropriate.

[15] *Am. Civil Liberties Union*, 521 U.S. at 850. Further validation for Internet journalism came on April 13, 2010, when Pro-Publica became the first online entity to win a Pulitzer Prize for investigative journalism. The prize was awarded to Sheri Fink for her article *Deadly Choices at Memorial* about the choices faced by New Orleans hospital workers in the days after Hurricane Katrina. *See* Adam Goldman, *New Media Recognized in Pulitzer Competition*, ASSOCIATED PRESS, Apr. 13, 2010, *available at* http://abcnews.go.com/Business/wireStory?id=10358444.

the nature of the right afforded to journalists to access government buildings which have already been opened up to the press. Cases discussed within this Part challenge the denial of access to the White House, the Gallery, and the Guantanamo Bay detention facility. Discussion in this Part will reveal how the D.C. Circuit Court has used the political question doctrine to avoid deciding these Gallery cases on their merits, while taking a deferential approach to denials from other established press pools. The final Part will argue that *Consumers Union* was wrongly decided, and address how the courts should decide cases which stem from a denial of admission to the Galleries. If the courts still refuse to decide these cases on nonjusticiability grounds, I will argue that Congress should refine its rules to cabin the discretion of the Executive Committee and permit more online journalists to enter the Gallery. I will describe how the current Periodical Press Gallery Rules act as an unconstitutional obstacle to the First Amendment rights of online journalists, as well as a Fifth Amendment violation of due process. Lastly, I will detail a few substantive amendments to the existing Rules which would provide for a fairer review of access for online journalists.

I. THE PERIODICAL PRESS GALLERY AND ITS RULES

A. History of the Periodical Press Gallery

What constitutes the press has changed dramatically since the First Amendment was adopted in 1791. "When the First Amendment was written, journalism as we know it did not exist."[16] In the eighteenth century, the press was a trade of printers, not journalists, and "the press" meant "the printing press."[17] "Freedom of the press referred to the freedom of the people to publish their views rather than the freedom of journalists to pursue their craft."[18] At that time, the right was enjoyed by pamphleteers and individuals, rather than the media conglomerates of today.

In the later part of the nineteenth century, newspapers began hiring their own employees for the purpose of gathering news. Advances during the Industrial Revolution allowed mass production of newspapers, and years later gave rise to the titans of the newspaper industry that we know today. Industry pioneers such as Adolph Ochs, William Randolph Hearst, and Joseph Pulitzer all built their empires during the mid-to-late nineteenth century. Until

[16] David Anderson, *Freedom of the Press*, 80 TEX. L. REV. 430, 446 (2002).
[17] *Id.*
[18] *Id.* at 446-47.

recently, "own[ing] the dominant, or only, newspaper in a mid-sized American city was . . . a kind of license to print money."[19] But, as the shift to online news continues, the press is in search of new models to make money. The online journalist, just like the pamphleteer of old, is in the business of publishing his own news and opinions without the allegiances to major newspapers—something the First Amendment originally envisioned.

The first congressional reporters were stenographers who attempted to publish congressional proceeding in the form of verbatim notes of speeches.[20] These reports were often marred by incompleteness or inaccuracies leading to condemnation from lawmakers. In addition to the stenographers, a group of unaffiliated correspondents called "letter-writers" sent news and commentaries to out-of-town newspapers.[21] Letter-writers were often critical of congressional members, drawing criticism from Congress, which retaliated by attempting to limit their access to congressional activities. In 1839, Congress debated a proposal to deprive out-of-town newspapers of access to congressional proceedings. The proposal infuriated a number of newsmen, leading to biting editorials. After being denied his usual seat in the Gallery, James Gordon Bennett of the New York Herald wrote of the "most outrageous, high-handed, unconstitutional act[] ever perpetrated by any legislative assembly in a free land—an act of despotism, tyranny and usurpation against the liberty of the press which the House of Lords of England . . . would not attempt against any newspaper in England."[22]

In response to Bennett's protestations, a Whig majority in the Senate, led by Henry Clay, created the first "Reporter's Gallery" for the press in July of 1841.[23] Clay's Senate resolution created "suitable accommodations to be prepared in the eastern gallery [for all bona fide reporters certified by the Editors of the papers for which they reported]."[24] In 1879, the press itself took on the responsibility for monitoring the Galleries, drafting their regulations at the New York Times office in New York. The rules defined accreditable correspondents and barred lobbying by any member of the Gallery. The House adopted the New York Times

[19] *See* Alterman, *supra* note 4.
[20] Brief for Vigdor Schriebman at 15, Schreibman v. Holmes, 203 F.3d 53 (D.C. Cir. 1999) (No. 98-5136) (citing Frederick B. Marbut, *The Letter-Writers in the Senate*, *in* CONGRESS AND THE NEWS MEDIA 28, 35 (Robert O. Blanchard ed., 1974)).
[21] *Id.*
[22] *Id.* at 35.
[23] DONALD A. RITCHIE, PRESS GALLERY: CONGRESS AND THE WASHINGTON CORRESPONDENTS 26 (1991).
[24] *Id.*

plan in 1879, and the Senate followed in 1884.[25] This same system, drafted by the institutional press in the latter part of the nineteenth century, still controls admission to the Galleries today.

B. Rules Governing Gallery Access

The rules governing access to the Galleries come from several sources. Article I, Section 5, Clause 2 of the Constitution permits Congress to define the rules of its proceedings.[26] Pursuant to that authority, both houses of Congress passed their own rules to delegate control of the Galleries. Senate Rule XXXIII permits the Committee on Rules and Administration to make all rules and regulations "respecting the reporters' galleries of the Senate, together with the adjoining rooms and facilities, as will confine their occupancy and use to bona fide reporters of newspapers and periodicals, and of news or press associations for daily news dissemination."[27] Rule VI of the Rules of the House of Representatives provides that a "portion of the gallery over the Speaker's chair as may be necessary to accommodate the representatives of the press wishing to report debates and proceedings shall be set aside for their use."[28] The rule notes that "[r]eputable reporters and correspondents shall be admitted thereto under such regulations" and that "[t]he Standing Committee of Correspondents for the Press Gallery, and the Executive Committee of Correspondents for the Periodical Press Gallery, shall supervise such galleries, including the designation of its employees, subject to the direction and control of the Speaker."[29]

Pursuant to the authority of the rules, the Speaker of the House and the Senate Committee on Rules and Administration established Rules and Regulations which govern the Galleries.[30] The rules give control of the Galleries to the Executive Committee of the Periodical Correspondents' Association.[31] In order to qualify

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[25] *Id.*

[26] U.S. CONST. art. I, § 5, cl. 2.

[27] S.R., Rule XXXIII, 111th Cong., *available at* http://rules.senate.gov/public/index.cfm?p=RuleXXXIII.

[28] H.R. R., Rule VI, cl. 2, 110th Cong., *available at* http://frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=110_cong_house_rules_manual&docid=110hruletx-63.pdf.

[29] *Id.*

[30] Periodical Press Gallery of the House of Representatives, Rules and Regulations, http://periodical.house.gov/rules.shtml (last visited Mar. 26, 2010) [hereinafter House Press Gallery Rules].

[31] *Id.* The current Executive Committee includes: Richard Cohen, *National Journal*, Chairman; Jay Newton-Small, *Time Magazine*, Secretary; Lauren Whittington, *Roll Call*, Treasurer; Heather Rothman, *BNA News*; Meg Shreve,

for access to the Galleries, prospective members must meet two criteria. First, prospective members must be "bona fide resident correspondents of reputable standing, giving their chief attention to the gathering and reporting of news."[32] Second, the applicants "must be employed by periodicals that regularly publish a substantial volume of news material of either general, economic, industrial, technical, cultural, or trade character. . . . [which] require such Washington coverage on a continuing basis . . . ."[33] The periodical itself must be "be owned and operated independently of any government, industry, institution, association, or lobbying organization" and must be "published for profit . . . supported chiefly by advertising or by subscription, or . . . published by a nonprofit organization [if additional criteria are met]."[34] In addition, no member of the Gallery may be engaged in any form of lobbying.[35] Despite the apparent clarity of the rules, standards such as "bona fide correspondent," or "regular[] [publication of] a substantial volume of news" provide sufficient latitude for discriminatory and arbitrary interpretations. While it may seem the rules governing the admission of a journalist are clear, the manner in which the Executive Committee applies the rules is a real concern.

Members of the Periodical Correspondents' Association enjoy a variety of advantages over reporters who are unable to obtain admission. First and foremost, they are provided with a seat in the Galleries without having to contend for space in the public galleries.[36] In addition, Congress furnishes the accredited correspondents with support facilities and staff.[37] Members are also permitted access to the House Speaker's Lobby and the Senate President's Room where they may seek and conduct interviews with members of Congress.[38] Lastly, members of the Gallery are given exclusive access to attend the daily on-the-record press conferences held by the Senate leadership and the Speaker of the House.[39]

Tax Notes; Paul Bedard, *U.S. News & World Report*. Periodical Press Gallery of the House of Representatives, Executive Committee of Periodical Correspondents, http://periodical.house.gov/executive-committee.shtml (last visited Mar. 26, 2010).

[32] *See* House Press Gallery Rules, *supra* note 30, R. 1.

[33] *Id.* R. 2.

[34] *Id.*

[35] *Id.* R. 1.

[36] *See* Consumers Union v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 21-22 (D.D.C. 1973), *rev'd*, 515 F.2d 1341 (D.C. Cir. 1975).

[37] *See id.*

[38] *See id.* at 22.

[39] *See id.*

These considerable perks provide lucky members with an advantage over all non-accredited journalists. The permanent presence of journalists in the Gallery allows them to foster relationships with members and cultivate valuable news sources. The constant presence and strong relationships allow Gallery journalists the opportunity to break stories and scoop the competition. Overall, the exclusion of a reporter from the Gallery "constitutes a permanent disadvantage with regard to the gathering of news and has a significant impact . . . both upon the publication excluded and others in similar situations."[40] At this point in history, it is the online-only journalist and her counterparts who bear the disproportionate burden of these disadvantages.

II. ACCESS TO ESTABLISHED PRESS POOLS

Several court decisions have addressed the issue of access to government institutions that have already been opened up to newsmen. The first Section of this Part reviews the nature of the right of access to these governmental institutions. The second and third Sections describe how courts have addressed decisions made by the Executive Committee of the Periodical Correspondents' Association to exclude a particular journalist, analyzing decisions where access was denied and decisions where access was granted. The fourth section describes how "deference" has been shown to the legislative branch when it comes to determining access, while the executive branch has not been given the same judicial courtesy. The final section attempts to distinguish seemingly inconsistent holdings by the same court regarding access to governmental institutions.There are two lines of cases relating to the right of access involving established press facilities. In one line of cases, the courts refuse to address the First Amendment issue of access, relying instead on the nonjusticiability doctrine to determine that the issue is one not appropriate for judicial intervention. In another line of cases, courts have given protection to journalists who were excluded from access on the basis of unpublished, unclear, or arbitrary rules. The reasoning in the latter set of cases should ultimately prevail as courts will have to contend with these issues on a substantive basis and will have to give serious consideration to the rights of online-only journalists.

[40] *See id.* at 26.

A. The Nature of the Right

The courts have come to varying determinations about the nature of the constitutional right of access afforded to journalists in Washington. This Article does not discuss the right to press access where the government has denied access entirely. Rather, the cases discussed in this Article are all examples of where the government "has voluntarily decided to establish press facilities forcorrespondents who need to report therefrom."[41] The courts have treated these cases quite differently than situations where all media access is denied to a particular event. All courts which have reached the merits of these individual exclusion cases have recognized a First Amendment right for journalists to access an already open press facility.

In *Sherrill v. Knight*, the Washington correspondent for the *Nation* was denied a White House press pass after the Secret Service deemed him to be a security risk.[42] Here, the Secret Service did not publish guidelines governing the grant or denial of press credentials, did not establish procedures to appeal a denial of a press pass, and never informed the journalist of the precise reasons for his denial.[43] In fact, Sherrill did not learn why he was denied access until five years after he applied, during the discovery phase of his action.[44]

The government argued that because the White House was not open to the public and because the right of access due to the press is generally no greater than the right of access due to the public, there was no violation of the First Amendment unless the denial was arbitrary or based on the content of the journalist's speech.[45] The U.S. Court of Appeals for the District of Columbia Circuit acknowledged that arbitrary or content-based criteria are prohibited under the First Amendment, but noted that there were other considerations besides these.[46] The court noted that "the First Amendment's protection of a citizen's right to obtain information concerning 'the way the country is being run' does not extend to every conceivable avenue a citizen may wish to employ in pursuing this right."[47] In particular, the First Amendment claim at issue did not demand that the President grant an interview to every journalist, nor that the White House open its doors to the press,

[41] Sherrill v. Knight, 569 F.2d 124, 130 (D.C. Cir. 1977).
[42] *Id.* at 127.
[43] *Id.* at 126-27.
[44] *Id.* at 127.
[45] *Id.* at 129.
[46] *Id.*
[47] *Id.* (quoting Zemel v. Rusk, 381 U.S. 1, 17 (1965)).

conduct press conferences, or operate press facilities at all.[48] Rather, the court held that where the doors are already open, and where press facilities are made publically available as a source of information for newsmen, "the protection afforded to news-gathering under the First Amendment guarantee of freedom of the press, requires that access not be denied arbitrarily or for less than compelling reasons."[49] Judge McGowen also found that "notice, opportunity to rebut, and a written decision are required because the denial of a pass potentially infringes upon First Amendment guarantees . . . [which] cannot be permitted to occur in the absence of adequate procedural due process."[50] The court observed that, in addition to the newsmen, "the public at large [has] an interest protected by the first amendment in insuring that restrictions on news-gathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information."[51]

Because of the important First Amendment rights implicated in the denial of individual access, the court determined that the refusal of a press pass should be based on a "compelling governmental interest."[52] In *Sherrill*, the court had no problem determining that the physical security of the President of the United States constituted a compelling—even overwhelming—interest, but the standards and process used to deny the press-pass did not pass constitutional muster.[53] For one, the standard for denial of a press-pass was never formally articulated or published.[54] In addition, informing journalists that they were denied for "reasons of security" was unnecessarily vague and subject to ambiguous interpretation.[55] In clarifying the constitutional requirements, the court noted that while the specific interest in that case (i.e., presidential safety) did not lend itself to detailed articulation of narrow and specific standards or clear-cut factors, the standard must provide a meaningful way for journalists to be labeled a security risk and be sufficient to allow for "*meaningful judicial review*."[56] While Judge McGowen implored lower courts to be appropriately deferential, he still opined that notice, opportunity to respond, and a written statement of the

[48] *Id.*
[49] *Id.* (citations omitted).
[50] *Id.* at 128.
[51] *Id.* at 129-30.
[52] *Id.* at 130.
[53] *Id.*
[54] *Id.*
[55] *See id.*
[56] *Id.* (emphasis added).

reasons for denial were "compelled by the . . . determination that the interest of a bona fide Washington correspondent in obtaining a White House press pass is protected by the first amendment . . . [which] undoubtedly qualifies as [a] liberty which may not be denied without due process of law under the fifth amendment."[57] The court decided that at a minimum, an unsuccessful applicant must be informed of the factual basis for denial and provided an opportunity to rebut the denial. As in *Sherrill*, where applicants were only told that they were a "security risk," the Periodical Correspondents' Association often denies applications by reference only to a rule, setting forth no factual findings to be appealed. In light of the First and Fifth Amendment interests articulated in *Sherrill*, the Periodical Correspondents' Association's scheme is likely to fail constitutional review, but, unfortunately, courts have been hesitant to decide Gallery cases on their merits.

B. Access Denied

The seminal case regarding access to the Galleries is *Consumers Union of United States, Inc. v. Periodical Correspondents' Association*.[58] In 1972, Gilbert Thelen submitted an application to the Executive Committee of the Periodical Correspondents' Association for membership as a representative of Consumer Reports.[59] The Committee rejected the application on the ground that Consumer Reports was "not an independent publication," as required by Rule 2 of the Periodical Press Gallery Rules.[60] The Committee offered no factual basis for rejecting the application. Following the remedial scheme authorized by the rules, Thelen asked the Executive Committee to reconsider its decision, but the Committee again rejected the application. Thelan then appealed to the Senate Committee on Rules and Administration, and to the Speaker of the House, to no avail. While Thelan pursued administrative remedies, the basis of the rejection was later clarified. The Executive Committee contended that Consumer Reports was published by Consumers Union, a nonprofit organization "which is a self proclaimed advocate of consumer interests and, among other activities, testifies before Congressional committees on behalf of the interests of consumers."[61] Because the parent company of Consumer Reports

[57] *Id.* at 130-31.
[58] 515 F.2d 1341 (D.C. Cir. 1975).
[59] *Id.* at 1345.
[60] *Id.*
[61] Consumers Union v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 22 (D.D.C. 1973), *rev'd*, 515 F.2d 1341 (D.C. Cir. 1975).

was classified as an "advocacy group," rather than a publishing organization, Thelen was denied his credentials.

In his action for declaratory relief, the plaintiff argued that the Rules Governing Periodical Press Galleries were unconstitutional both on their face and as applied to Consumer Reports. More specifically, the plaintiff contended that Rule 2 "constituted a prior restraint upon, and otherwise abridged, its rights to gather, have full access to, and report to its readers upon, the news concerning Congress and of a public nature, in violation of . . . the First Amendment . . . ."[62] In addition, the plaintiff argued that in "denying accreditation to Consumer Reports[,] the Association acted in a discriminatory, arbitrary, capricious, and unreasonable manner, thus violating Consumers Union's rights under the Fifth Amendment."[63]

The U.S. District Court for the District of Columbia found for Consumers Union and declared the Periodical Press Gallery Rules unconstitutional on First and Fifth Amendment grounds.[64] Like the Sherrill case two years later, the court opined that where certain journalists are excluded from gaining equal access to facts of public consequence, limitations must be clearly justified by a compelling and demonstrable governmental interest.[65] In addition, "means selected for furthering [the governmental] interest must be no more restrictive of individual rights than is reasonably necessary."[66] Finally, the district court concluded that the rules may not be so vague or overbroad as to unnecessarily chill the exercise of those rights or provide insufficient guidance to those who must administer the legislation.[67] Of particular note was the finding that the Periodical Press Gallery Rules were too ambiguous, despite being unmistakably clearer than the unpublished Secret Service rules in *Sherrill*.

In applying the law, the district court held that the exclusion of some reporters from an area which had been voluntarily opened to other reporters for the purpose of news-gathering poses grave constitutional problems.[68] The district court found that when access to news sources is "unreasonably or arbitrarily denied by congressional action or publishers meeting under congressional auspices, [that denial] constitutes a direct limitation upon the content of news as recognized in *Branzburg v.*

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[62] *Consumers Union*, 515 F.2d at 1346.
[63] *Id.*
[64] *Consumers Union*, 365 F. Supp. at 26-27.
[65] *Id.* at 25.
[66] *Id.*
[67] *See id.*
[68] *Id.* at 26.

Hayes."[69] The court recognized that "[a]ll types of news compete and all types of publications are entitled to an equal freedom to hear and publish the official business of the Congress,"[70] and that "[t]he Constitution requires that congressional press galleries remain available to all members of the working press, regardless of their affiliation."[71] The court held that the broad and generalized grant from Congress to the Correspondents' Committee permits the Committee to implement arbitrary and unnecessary regulations to exclude publications they consider objectionable without any means to check the abuse of their delegated authority.[72] This, the district court held, violated the constitutional rights of Consumers Union. The court concluded that more definitive rules were needed to permit due process prior to exclusion and provide some opportunity for adequate impartial review whenever a journalist is excluded.[73]

In reversing the district court, the U.S. Court of Appeals for the District of Columbia Circuit held that the issue was nonjusticiable under the political question doctrine.[74] Refusing to address the matter on the merits, the court found that Article I, Section 5, Clause 2 permits Congress to "determine its rules of proceedings," and so long as the rule does not ignore constitutional restraints or violate fundamental rights, it is no impeachment of a rule to say that some other rule would be more just.[75] The court also noted that the rules need only have a "reasonable relation" to the results that they seek to attain.[76]

In evaluating the legislative purpose of the Periodical Press Gallery Rules, the court found that the intent was to ensure that the Galleries are only used for bona fide reporters who will not abuse the privilege by lobbying on behalf of private interests. The court found that the rules were reasonably related to the aforementioned purpose and that courts had no power to second guess Congress's exercise of its Article I powers.

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[69] *Id.*
[70] *Id.* (emphasis omitted).
[71] *Id.*
[72] *See id.*
[73] *Id.* at 26-27.
[74] Consumers Union v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1347 (D.C. Cir. 1975); *see also* Baker v. Carr, 369 U.S. 186, 217 (1962) (stating that issue may be nonjusticiable under political question doctrine if there is "textually demonstrable constitutional commitment of the issue to a coordinate political department").
[75] U.S. CONST. art. I, § 5, cl. 2; *see Consumers Union*, 515 F.2d at 1347 (quoting United States v. Ballin, 144 U.S. 1, 5 (1892)).
[76] *Consumers Union*, 515 F.2d at 1347.

Invoking the Speech and Debate Clause under Article I, Section 6, Clause 1, the court also found that the Correspondents' Association was entitled to immunity from Consumers Union's challenge.[77] The court opined that deciding the composition of the Gallery is a legislative function, as evidenced by Congress's direct and historical control over the seating of the press in the nineteenth century. Furthermore, because the function was delegated to the Correspondents' Association, the Association would be immune from suit so long as an individual member would be immune if the action was taken directly by him.[78] The court was "content to rest [its] ruling . . . upon the ground that, performed in good faith, the acts of [the Correspondents' Association] were within the spheres of legislative power committed to the Congress and the legislative immunity granted by the Constitution."[79]

The first and only case applying *Consumers Union* to an Internet journalist was *Schreibman v. Holmes*.[80] In 1997, the U.S. Court of Appeals for the District of Columbia Circuit was again confronted with the question of whether denying a journalist access to the press galleries constitutes a violation of the First and Fifth Amendments. In this case, Schreibman was the sole owner, publisher, editor, and writer for Federal Information News Syndicate (FINS), which published a biweekly Internet news letter that reported on federal legislation and governmental policies. FINS had a number of paying subscribers and even more who read the publication online for free. The Executive Committee of Correspondents denied Schreibman's request for accreditation on the grounds that his publication did not meet the requirements under Periodical Press Gallery Rules 1 and 2.[81] The Committee failed to provide factual basis for the denial, but at the plaintiff's

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[77] U.S. CONST. art. I, § 6, cl. 1; *see Consumers Union*, 515 F.2d at 1349.

[78] *See Consumers Union*, 515 F.2d at 1350 ("Appellants were acting by virtue of an express delegation of authority as aides or assistants of Congress. If their actions would have been immune from inquiry . . . had they been performed by Members of Congress, the same immunity would attach to appellants.").

[79] *Id.* at 1351. *Contra* Consumers Union v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 24 (D.D.C. 1973) ("[I]t is well established that a congressional rule which infringes upon the constitutional rights of persons other than Congressmen presents a proper question for the judiciary. . . . [The conduct of the Correspondents' Association] in barring the representatives of certain publications from the periodical press galleries and admitting others neither constitutes an integral part of nor has been shown to have a significant impact upon the proceedings on the floor of either House . . . . In the absence of such a showing, it must be concluded that the Speech and Debate Clause does not shield the defendants from a challenge to their admission policies." (citing Yellin v. United States, 374 U.S. 109, 143-44 (1963))).

[80] No. 1:96CV01287, 1997 WL 527341 (D.D.C. Aug. 18, 1997).

[81] *See* House Press Gallery Rules, *supra* note 30, Rs. 1, 2.

request, held a public hearing to reconsider the application. Again, Schreibman's request was denied. He finally appealed to the Speaker of the House and the Senate Committee on Rules and Administration, but no action was taken on the appeal.

In the U.S. District Court for the District of Columbia, the Correspondents' Committee finally asserted the factual basis for denying Schreibman's request. They contended that in contravention of the Periodical Press Gallery Rules, FINS was not published for profit, Schreibman did not receive a salary from FINS, and Schreibman did not earn his livelihood as a journalist.[82] The Committee also maintained that their interpretation of the Periodical Press Gallery Rules was immune from judicial review under the Speech or Debate Clause of the Constitution.[83] Schreibman alleged that the Periodical Press Gallery Rules were unconstitutional on their face and as applied to his publication.[84]

Relying on *Consumers Union*, Judge Urbina held that Schreibman's challenge was nonjusticiable. The court again determined that the Speech or Debate Clause barred suit against the Correspondents' Committee regarding its accreditation decisions "so long as the Committee was acting within the scope of its authority and in *good faith*."[85] Finding that Schreibman never pled that the Committee acted in bad faith, the court dismissed the suit.

C. Access Granted

Decided two years after *Consumers Union* and twenty years before *Schreibman*, the *Sherrill* court was the first court to venture into the constitutional issue underlying special access cases.[86] Because *Sherrill* is still good law, it provides considerable weight to the argument that courts should not lightly abdicate their judicial responsibilities when it comes to reviewing Gallery access cases on the merits. Luckily, the D.C. District Court is slowly showing its willingness to address the issue.

The most recent case speaking to the issue of access is *Getty Images News Services, Corp. v. Department of Defense*.[87] In this case, Getty Images alleged a violation of its First Amendment rights, due process rights, and equal protection rights when the DOD rejected the photo service from travel with certain press

[82] *See Schreibman*, 1997 WL 527341, at *2.
[83] *Id.*
[84] *Id.*
[85] *Id.* at *4 (emphasis added).
[86] Sherrill v. Knight, 569 F.2d 124, 130 (D.C. Cir. 1977).
[87] 193 F. Supp. 2d 112 (D.D.C. 2002).

pools related to Operation Enduring Freedom of the Iraq War.[88] Getty Images asserted that the DOD's method of selecting which media organizations could travel to Guantanamo Bay was arbitrary and capricious, and permitted the DOD to reject an application without any reasonable explanation, and without review. Dismissing all but one of Getty's claims, the U.S. District Court for the District of Columbia ultimately held that Getty was likely to succeed on the argument that inadequate and unpublished criteria relating to the selection of journalists for a press pool with finite space was a violation of their due process and First Amendment rights.[89]

In 2002, the DOD began permitting journalists to travel to Guantanamo Bay on a military transport plane to cover the detention facility.[90] Because there was only one way to Cuba, and one way home, the space allotted to journalists was limited, and the exclusion of some was necessary and inevitable.[91] In order to aid in the selection process, the DOD crafted a set of six internal guidelines that would inform their decision. These guidelines were not published, and selection decisions were made by a DOD Public Affairs Officer based on his or her "general knowledge and expertise."[92] On occasion, the Public Affairs Officer would elicit information from other members of the press pool to guide his or her decision.[93] In support of its decision to exclude Getty Images, the DOD argued that not only is Guantanamo Bay not a public forum, but that "review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society."[94]

The district court agreed with the DOD that heightened deference was due to the military.[95] In addition, the court found that Guantanamo Bay is a closed military base located on an island with no commercial air travel, dedicated to the housing of terrorist suspects in a military operation.[96] But despite these important

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[88] *Id.* at 114.
[89] *Id.* at 124.
[90] *Id.* at 114-15.
[91] *Id.* at 115.
[92] *Id.* at 116.
[93] *See id.*
[94] *Id.* at 119 (quoting Goldman v. Weinberger, 475 U.S. 503, 507 (1986)).
[95] *See id.* ("The Court agrees both that the Guantanamo Bay Navel Base is not a public forum and that consideration of Getty's First and Fifth Amendment claims must be undertaken through the prism of the heightened deference due to military regulations and decision-making. Nonetheless, equal access claims by the press warrant careful judicial scrutiny.").
[96] *Id.* at 120.

policy concerns, the court found that components of the DOD selection process were unreasonable. For one, the court reasoned that the standard for due process is not met where "criteria . . . are either vague or completely unknown [so that] the party affected has no way of knowing how to achieve compliance . . . nor even of challenging them as being improper."[97] The court also noted—as in the situation of the Gallery—that competing journalists were permitted to inform the DOD's decision on who is granted access. The court concluded that the "DOD must not only have some criteria to guide its determinations [about journalists], but must have a reasonable way of assessing whether the criteria are met."[98] The court also held that "equal access claims by the press warrant careful judicial scrutiny."[99]

D. Deference

The *Sherrill* and *Getty* line of cases provides a proper standard for reviewing Gallery problems, as well as the appropriate measure of deference when reviewing access decisions on the merits. In addition, *Getty* is instructive when evaluating the reasonableness of the selection criteria for journalists.

First, both lines of cases involve the issue of deference. Whereas the courts in *Consumers Union* and *Schreibman* made the decision to give the ultimate deference to the Periodical Correspondents' Association—rendering their decisions *unreviewable—Getty* and *Sherrill* carved out a more appropriate path for handling these types of cases.

Like in the Gallery cases such as Consumers Union and Schreibman, Sherrill involved the issue of deference to a coequal branch of government. The reasoning used to deny judicial review in Consumers Union was that the Constitution entrusted Congress with the authority to pass rules regulating access to the chamber, and that power was in turn delegated to the Correspondents' Association. However, access to the White House and the President of the United States is within the scope of powers reserved to the Executive Branch. In turn, the Secret Service is the agency entrusted with deciding who may access the White House.[100] But despite deference to a coequal branch of government and to the administering agency, the court still found that the constitutional concerns in *Sherrill* were within the purview of the

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[97] *Id.* at 121.
[98] Getty Images News Servs., Corp. v. Dep't of Def., 193 F. Supp. 2d 112, 121 (D.D.C. 2002).
[99] *Id.* at 119.
[100] Sherrill v. Knight, 569 F.2d 124, 127 (D.C. Cir. 1977).

court. The court rejected the government's argument that the case was "nonjusticiable . . . because protection of the President is vested within the sole discretion of the Executive."[101] The court found the argument "wholly without force," and noted that this discretion "cannot be said to authorize procedures or actions violative of the Constitution."[102] The court found that once the White House made its press facilities available as a source of information for newsmen, "the protection afforded news-gathering under the first amendment guarantee of freedom of the press require[ed] that this access not be denied arbitrarily or for less than compelling reasons."[103] The court gave some weight to the government's compelling reasons, but still found that decisions to exclude newsmen must be reasonable and guided by appropriate standards. *Sherrill* shows that courts can grant the appropriate measure of discretion to a coequal branch, while still safeguarding the rights of citizens.

If there were ever a case where public policy would counsel the courts to grant broad discretion to exclude journalists, it would be *Getty*. Unlike the Capitol in Washington, D.C., which houses the elected representatives of the people, Guantanamo Bay houses terrorist suspects and is accessible only by military transport. Unlike the Galleries, with over five hundred seats, space on the military base is much more restricted. Despite granting broad discretion to military decisions, the court in *Getty* still ruled that the decisions of the Department of Defense must be reasonable; a decision which is ultimately subject to judicial review.

There is no legitimate policy justification for holding the Department of Defense to a higher standard in excluding journalists than the Executive Committee of the Correspondents' Association. Just as *Getty* demonstrates a new willingness to tread into access cases, courts should reconsider the district court opinion in *Consumers Union* and find the decisions made by the Executive Committee outside of the scope of immunity of the Speech and Debate Clause.

E. Distinguishing Consumers Union *from* Sherrill

Arguably, the similarities between *Getty* and *Sherrill* may have led to their similar treatment, in contrast with the treatment of *Consumers Union* and *Schreibman*. In particular, the courts have

[101] *Id.* at 128 n.14.
[102] *Id.*
[103] *Id.* at 129-30 (citations omitted).

only stepped in when the selection criteria for journalists were unpublished or when no appeal procedure had been established.

First, *Getty* and *Sherrill* involved selection criteria which were not published by the Secret Service or the Department of Defense. By contrast, the Periodical Press Gallery Rules have always been made public and available to any journalist prior to filing his application with the Committee. While this major difference is instructive on the matter of due process, the Periodical Press Gallery Rules are not so clear as to avoid constitutional scrutiny. As described above, although the Periodical Press Gallery Rules are long, much of the text deals with what Gallery journalists are prohibited from doing once they are admitted into the Gallery. The selection criteria themselves are subject to amorphous and arbitrary application. For instance, could a failing newspaper be denied admission because it is no longer turning a profit?[104] As advertising dollars dry up and newspapers look toward alternative money-making schemes, can the newspaper be said to be "supported chiefly by advertising or subscription?"[105] Is an online journalist categorically excluded from being a "bona fide resident correspondent[] of reputable standing, giving [his] chief attention to the gathering and reporting of news"?[106] No matter how clear the rules are, judicial unwillingness to review decisions of the Executive Committee leaves the strong possibility of impermissible discrimination. All of these cases, including *Consumers Union*, provide that the Executive Committee is only entitled to immunity when its decisions are made in good faith. As Part III of this essay points out, the opportunity to make decisions in bad faith is too great to go unchecked.

Also important in *Sherrill* is that rejections were made without factual findings. The same is true in *Schreibman* and *Consumers Union*, where the Committee refused to give any factual basis for rejecting accreditation until after litigation commenced. This is most problematic when it comes to the appeal procedure. Although the Periodical Press Gallery Rules provide for "a right to a public hearing before the committee,"[107] the right is meaningless when the factual basis for denial is not released until after the hearing. In addition, due process typically requires an impartial decisionmaker; in this case, the same committee that

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[104] *See* House Press Gallery Rules, *supra* note 30, R. 2 ("Applicants must also be employed by a periodical that is published for profit and is supported chiefly by advertising or by subscription.").
[105] *Id.*
[106] *Id.* R. 1.
[107] *Id.* R. 5.

made the decision is given the power to review it. Although the applicant can then appeal directly to the Speaker of the House, this method has been wholly unsuccessful in the past.[108] The court in *Sherrill* made clear that the basis for rejection must be sufficient to allow for meaningful judicial review. In the absence of judicial willingness to review, the rationale for rejection may never be released.

III. PROBLEMS WITH THE CURRENT SYSTEM

A. Problems with the Rules Themselves

As seats in the Gallery begin to open up, the question of who occupies the empty chairs will become a source of contention. Because *Consumers Union* and its progeny are on shaky ground jurisprudentially, the political question doctrine and the Speech or Debate Clause should be set aside, and cases involving discriminatory access to the Gallery should be decided on the merits. Even if the courts refuse to budge, there are still substantial policy reasons for Congress to redraft the rules or provide additional oversight to the accreditation process.

First, even if the existing rules are faithfully applied and are sufficiently distinguishable from those in *Sherrill* and *Getty*, the existing requirements infringe the First Amendment rights of the entire class of online journalists.

One piece of evidence of the discriminatory nature of the rules is the subsequent denial of Gallery accreditation to a reporter who was already accredited with a different organization. In *Schreibman*, the aggrieved plaintiff was accredited as a Gallery correspondent when he worked for the Electronic Public Information Newsletter.[109] It was not until he struck out on his own and created the Federal Information News Syndicate that his accreditation was denied. This focus on the parent publication and the journalist's income as a deciding factor stifles journalistic and entrepreneurial freedom and undermines competitive journalism.

For instance, if an experienced *Washington Post* reporter decided to start his own news site, the Executive Committee could no doubt deny his application on several grounds. First, under Rule 2, the Committee could find that the journalist was not "employed" because he had yet to earn a salary. The proprietor of a new company might operate at a loss for some time, and if the owner is

[108] In both *Consumers Union* and *Schreibman* the applicants appealed but cert was not granted.
[109] Brief for Vigdor Schriebman, *supra* note 20, at 53.

also the sole employee, he might also forego a salary, choosing instead to reinvest his earnings back into the company until the business is financially secure. Rule 2 conditions accreditation on commercial viability, and allows only the instantly successful publishers—or the independently wealthy—to have access to the Gallery.

Not only is it improper to condition access to information on wealth, it ignores the underlying motivations of journalists.

> Journalism has norms that often defy conventional wisdom about rational economic behavior . . . . Historically it has not been a high-paying occupation and . . . it still is not. As a consequence journalism is staffed largely by people who have rejected economic reward as their principal motivation. The rewards they seek come from their peers and their superiors, not the audience or the market.[110]

By excluding journalists who have deeper motivations than economic concerns, the Executive Committee may be denying access to the most dedicated and altruistic reporters. While it is obviously necessary to set standards for access, money should not be the concern of the guardians of the Gallery. I do not suggest that every blogger with a website should have access, but hinging accreditation on readership rather than income might be more appropriate. In addition, the second part of Rule 2 operates as a catch-22 to prohibit newcomers from the Gallery. How does one demonstrate a necessity for "Washington coverage on a continuing basis" for an upstart publication? In the absence of a track record of congressional reporting, a new publication would likely be denied. Simply declaring its purpose would probably not be enough. While a history of congressional reporting with another publication could be instructive on this point, *Schreibman* demonstrates that the Committee might not take this fact into account. This rule favoring established media outlets further entrenches traditional media's control of the Gallery.

Next, the administrative process to change the rules is undemocratic. Rule 6 of the Senate's Rules Governing the Press Gallery states that "[t]he Standing Committee shall propose no changes in the [sic] these rules except upon petition in writing signed by not less than 100 accredited members."[111] However, the

[110] Anderson, *supra* note 16, at 475.
[111] U.S. Senate Press Gallery Rules, Rule 6, *available at* http://www.senate.gov/galleries/daily/rules2.htm.

dearth of accredited Internet-only journalists, and the strong economic motivation of traditional newsmen to maintain the status quo, ensures that the requisite number of online-only journalists to change the rules will not soon be reached. Thus, online journalists will not meet the accreditation standards until the rules change, and the rules will not change until the Executive Committee accredits a larger number of online journalists.

B. Problems with the Administration of the Rules

This is not the first time that the Correspondents' Association has felt threatened by outsiders. When the rules were originally drafted at the New York Times Company headquarters in 1879, women and minorities were excluded from the Gallery.[112] Only radio reporters who also reported for daily newspapers would be granted accreditation during the 1920s and 1930s.[113] Nonprofit organizations, the "backbone of a civic society," were excluded until 1979.[114] Accreditation standards recognizing only print media also stood as an obstacle to the development of broadcast journalism.[115] This history of discrimination demonstrates the need to address the problems faced by online-only journalists as quickly as possible.[116]

First, the lack of genuine independence in the private press demands higher scrutiny of how the Correspondents' Committee self-regulates the Galleries. Between advertisers, parent companies, and stockholders, the traditional press is constrained by market concerns that are less relevant to the independent online journalist. American newspapers, magazines, and broadcasters generate about $145 billion in revenue each year, more than double the revenue from oil and gas production or agriculture.[117] Many conventional media outlets now have online operations and many more are betting their future on a switch to the Internet. With these bet-the-company strategies, it is easy to see how self-interested business can guide the supposedly impartial decision of who

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[112] Brief for Vigdor Schriebman, *supra* note 20, at 21.
[113] *See id.*
[114] *Id.*
[115] *Id.*
[116] Although one might point to the eventual incorporation of each of the excluded populations as a testament to the Executive Committee scheme, the case of Internet journalism is quite different. Unlike the admission of minorities or women, which posed no threat to the *institution* of the press, Internet journalism could deal a significant blow to the institution itself. In addition, newspapers were not attempting to break into the television or radio market. Nowadays, they are attempting to enter the world of Internet news.
[117] *See* Anderson, *supra* note 16, at 484.

should be accredited to the Gallery. In 1880, John Swinton, the managing editor of the *New York Sun* and former chief editorialist of the *New York Times*, made clear the effects that economics played on the newspaper and its employees:

> There is no such thing in America as an independent press, unless it is in the small towns. You know it and I know it. . . . [W]hat folly is this to be toasting an 'Independent Press.' We are the tools and vassals of rich men behind the scenes. We are the jumping-jacks; they pull the strings and we dance. Out talents, our possibilities and our lives are all the property of other men. We are intellectual prostitutes.[118]

More recently, the "rich men" have become publically held conglomerates which must serve the expectations of investors, analysts, and fund managers. NBC is owned by General Electric, ABC by Walt Disney Co., and CBS by Viacom, and only a fraction of each parent company is dedicated to news gathering and news dissemination.[119] News Corp., which owns the New York Post and 175 other newspapers, also owns television stations, sports teams, a book publisher, and a movie studio. Under the existing rules, it is debatable whether these companies actually engage in lobbying activities or whether their chief attention is the gathering and dissemination of news. For instance, should Walt Disney's activities lobbying for an extension of the copyright protection period,[120] prohibit ABC from joining the Gallery? Like *Consumer Reports*, the parent companies here may be engaged in activities which should prohibit membership into the Gallery, but, unfortunately, the rulemakers tend to avoid these issues when it comes to determining the accreditation of their own. These companies seem to have a fiduciary duty to their stockholders to stifle competition, and the current process for drafting the Periodical Press Gallery Rules and the unreviewable manner in which they are administered provides a perfect cover to do just that.

It is clear that the Executive Committee has the right to promulgate and enforce the rules relating to the Gallery as delegated by Congress. It must, however, draft clear rules and

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[118] RICHARD O. BOYER & HERBERT M. MORAIS, LABOR'S UNTOLD STORY 81 (1955).
[119] Anderson, *supra* note 16, at 455.
[120] *See* Lawrence Lessig, *Copyright's First Amendment*, 48 UCLA L. REV. 1057, 1065 (2001).

administer these rules fairly.[121] Because of *Consumers Union* and its progeny, the Executive Committee has no incentive to even-handedly administer the rules of accreditation. Well aware that the courts are unwilling to disturb its decision, the Committee is in a position to discriminate against online journalists at will. While proof of discrimination in any single case might be difficult to prove, the system as a whole should be evaluated for constitutional infirmities. As even the *Schreibman* court noted, decisions of the committee could not be predicated on bad faith. The confluence of problems in the rules themselves, the selfish interests of the current Gallery members in excluding Internet journalists, and the unreviewable administration of the rules provides a strong basis for inferring bad faith.

Ever since its inception in the late 1800s, the Correspondents' Committee has been dominated by representatives of traditional print media. Of the seven members of the current Executive Committee, not a single individual represents an online-only publication.[122] Given the competitive nature of journalism, this poses a significant problem.

> The press has been, and is now more than ever, a fluid and dynamic institution, with newcomers always contending for membership . . . . [There is a] troublesome risk in today's environment [that] politically powerful media will capture the process to serve their own ends at the expense of the weaker or less politically engaged segments of the media.[123]

The Committee is also well aware of the growing preference for individualized news tailored to readers' specific interests and the advantage that smaller publications have in delivering the news to a niche market. In the area of television news, the past decade has proven that broadcast and cable networks which cater to specific interests, such as sports, finance, food, or entertainment, have outpaced the broadcast giants in terms of viewership.[124] The same is true for print media, where metropolitan daily newspapers have lost readers to alternative newspapers, business publications, and national newspapers.[125] Considering the low barriers to entry and low overhead for online journalists and publishers, the Committee's impermissible desire to

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[121] *See* Sherrill v. Knight, 569 F.2d 124, 130-31 (D.C. Cir. 1977).
[122] *Supra* note 31.
[123] Anderson, *supra* note 16, at 520-21.
[124] *Id.* at 469-70.
[125] *Id.*

hold on to a competitive advantage in congressional access can surely be inferred.

While the argument can be made that the Committee is discriminating based on the economic status of the Internet publications—a traditional rational basis category—it is the nature of the right that is most important. The court in *Sherrill* held arbitrary discrimination violated the First Amendment; the decision to discriminate based on market power is at best arbitrary. At worst, it is an example of bad faith because without access, market power is impossible to achieve.

In addition, the current accreditation scheme runs counter to the free marketplace of ideas theory of the First Amendment, in which a multiplicity of viewpoints is viewed as necessary to serve the best interests of the public. The First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[126] The value of the First Amendment provision for a free press lies in its protection of debate on public issues that should be "uninhibited, robust, and wide-open."[127]

The current scheme used by the Correspondents' Association allows members of traditional print media to decide what the public needs to know, by selecting which journalists cover the news, instead of letting market forces determine which news outlets are ultimately successful. The existence of such a "self-appointed elite" is one source of popular dissatisfaction with the press.[128]

Evidence of the failure of the free marketplace of ideas can also be seen in the rising dissatisfaction with the media, as well as the shrinking press coverage of the federal government.[129] "On the whole, mainstream journalism seems to be edging away from the public-interest ideal. Coverage of foreign affairs, government, science, and business has been cut back in favor of coverage of

[126] Associated Press v. United States, 326 U.S. 1, 20 (1945); *see also* Red Lion Broad. Co. v. Fed. Commc'ns Comm'n, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee.").

[127] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[128] *See* Anderson, *supra* note 16, at 478-79.

[129] *See* Thomas Kunkel & Gene Roberts, *Leaving Readers Behind*, AM. JOURNALISM REV., May 2001, at 38 *available at* http://www.ajr.org/Article.asp?id=363.

lifestyle, consumption, sports, entertainment, and celebrities."[130] Investigative reporting is suffering in the same way, with fewer than *one in ten* covering issues concerning education, economics, foreign affairs, the military, national security, politics, or social welfare, and over *half* focusing on lifestyle, behavior, consumerism, health, or entertainment celebrities.[131] Given the media's traditional role as a watchdog for the people, the lack of attention to matters of significance threatens that role. By allowing an injection of new blood into the Gallery, the public will have more options for finding their news; the addition of these new journalists should increase competition and lead to better coverage. Furthermore, congressional news which is important to only certain communities would benefit greatly from the increased variety of journalists in the Gallery. For example, an online publication dedicated to reporting on agricultural issues may be better suited to recognize and report on legislation like farm bills than some traditional print publications.

Currently, newspapers like the *New York Times* have dozens of seats in the Galleries. However, the marketplace of ideas theory of the First Amendment is best served by a diversified press pool. As Judge Learned Hand noted in *United States v. Associated Press*:

> [The press] serves one of the most vital of all general interests: the dissemination of news from as many different sources, and with as many different facets and colors as is possible. . . . [That interest] presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all.[132]

While some may argue that the shift in reporting to soft news is simply a product of consumer demand, evidence suggests that the public seems less inclined to trust the press than ever.[133]

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[130] *See* Anderson, *supra* note 16, at 477 (noting that only 513 reporters covered all of the state capitals in 1998, while 3000 reporters were accredited for one Super Bowl).

[131] *Id.* (citing Bill Kovach & Tom Rosenstiel, *Are Watchdogs an Endangered Species?*, COLUM. JOURNALISM REV., May-June 2001, at 50, 53).

[132] United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943), *aff'd,* 326 U.S. 1 (1945).

[133] Anderson, *supra* note 16, at 480 ("From 1985 to 1999, the number of people who thought the news media usually get the facts straight dropped from fifty-

Perhaps, with such a wide array of independent journalists covering the same story, readers get one step closer to "the truth," or at least "the truth" that they want to read. The ability of individual journalists to cover the Congress in their own way will help insure that institutional bias remains at a minimum.[134] Without the crushing overhead of the institutional press, the future of independent online journalism is at a critical impasse. Provided with appropriate access, these journalists have the potential to change the way people receive their news. If the current system is allowed to discriminate against online-only journalism, the problems in coverage will persist and consumer confidence will continue to suffer.

IV. PROPOSED AMENDMENTS TO THE RULES

Of course, every denial of a journalist's application should not turn into a federal case, but in order to ensure that the decisions of the Executive Committee are made in good faith, the existing Periodical Press Gallery Rules should be amendment. It is important to remember that once a journalist is admitted to the Gallery, his or her behavior still comes under the purview of the Executive Committee. If a journalist is ever found to no longer need access, there is nothing in the Rules which would prohibit the revocation of his or her credentials with appropriate notice and due process. The most important thing at this point, however, is to provide for the opportunity to be admitted in the first place. The proposed amendments are noted in italics.

First, Rule 1 should be amended to alter the selection criteria to permit more online-only journalists admission. The Rule should state that

> Persons eligible for admission to the Periodical Press Galleries must be bona fide resident correspondents *or independent journalists* of reputable standing, giving their chief attention to the gathering and reporting of news. They shall state in writing the names of their employers and their additional sources of earned income. *Independent journalists who are self-employed may be permitted*

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five percent to thirty-seven percent, the number who saw the press as 'immoral' rose from thirteen percent to forty percent, and the number who saw the press as lacking in professionalism tripled.").

[134] *See* Wendy S. Zeligson, *Pool Coverage, Press Access, and Presidential Debates: What's Wrong with This Picture?*, 9 CARDOZO L. REV. 1371 (1988) (discussing the problems with pooling broadcast coverage of presidential debates).

> *access to the Press Gallery as a correspondent upon a showing that his or her publication is of the type that would benefit from ongoing Press Gallery access. Additional sources of income derived from sources not explicitly prohibited below should be irrelevant to determining Press Gallery admission*.

By altering the Rule in this manner, the Executive Committee will have a textually demonstrable commitment to consider independent journalists. In addition, by allowing alternative sources of income, provided they are not from prohibited sources like lobbying activities, the proposed amendment ensures that access is never predicated on financial success.

Next, Rule 2 should be amended to provide more leniency to online journalists when evaluating their publication's success. For instance, the Rule could read

> Applicants must be employed by*, or independently operate*, periodicals that regularly publish a substantial volume of news material of either general, economic, industrial, technical, cultural, or trade character. *The periodical may be published in print, on the Internet, or a combination of both.* The *nature of the* periodical must *be such that* Washington coverage on a continuing basis *would demonstrably improve the content of the publication. The publication* must be owned and operated independently of any government, industry, institution, association, or lobbying organization.
>
> Applicants must also be employed by*, or independently own and operate*, a periodical that is published for profit and is supported chiefly by advertising or by subscription . . . . *Online only publications which are distributed free of charge and without advertising revenue shall be permitted access so long as an alternative source of income is not prohibited below . . . .*[135]

[135] Pro-Publica is a good example of an online news organization which distributes its content free to other publications and relies on philanthropic contributions and foundation support to survive. *See* Pro-Publica, About Us, http://www.propublica.org/about (last visited May 28, 2010).

In addition, a few qualifications could guide the Executive Committee in its decisions. For instance, a section could be added that directs the Committee to consider certain factors when deciding whether to grant or deny the application of an online-only publication. Those factors should include:

> *(a) The number of subscribers to the publication, or the number of "hits" that the publication's Web site receives on a daily basis;*
> *(b) Whether the type of news material published by the applicant is substantially similar to that of a print publication which would be granted access to the Press Gallery;*
> *(c) Whether the applicant has already been accredited by a different publication;*
> *(d) Whether the applicant's previous stories have contained independent research; and*
> *(e) The number of publications which maintain multiple accredited journalists in the Press Gallery.*

For the last factor, the Committee should consider the costs and benefits of allowing different publications to report the dealings of Congress rather than dozens of journalists accredited from the same institution. The Rules should also be amended to *require the Committee to detail the factual findings associated with the decision to deny an applicant's admission.* These findings shall be reviewable and subject to appeal according to the current regulations. Lastly, the Rules should make clear that federal courts have jurisdiction to review decisions denying admission to a journalist after all of the administrative remedies authorized in the statute are exhausted.

By making these changes, the Executive Committee will be forced to give due respect to the emerging medium of online news. In addition, by making the decisions of the Committee subject to judicial review, there is a much smaller likelihood that the applications will be denied based on improper motives or bad faith.

CONCLUSION

While the Rules of the Gallery will probably eventually change to incorporate more online-only journalists, the change should not be so slow as to deny business opportunities to the very reporters that foresaw the shift from print media to the Internet. Cases like *Consumers Union* ensure that the Executive Committee has no incentive to administer the Periodical Press Gallery Rules fairly, and given the motivations to stifle expanding access, the

First Amendment rights of online reporters will be subjugated without judicial or congressional action. If access to the home of the President and to suspected terrorist suspects in a militarily controlled foreign land is within judicial oversight, so too should the Gallery be reviewable. In the absence of a judicial willingness to oversee this important matter, Congress should take steps to cabin control of the Executive Committee and ensure that online journalism can succeed or fail on its own merits, rather than its lack of access to primary news.