# Equal Access and the First Amendment: The Debate Behind "Speech or Debate"

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## Introduction

The Court of Appeals for the District of Columbia held that the "speech or debate clause"[1] absolutely barred judicial review of a rule by which Congress grants press gallery accreditation to one class of journalists while denying it to another. In *Consumers Union of United States, Inc. v. Periodical Correspondents' Association*,[2] journalists for *Consumer Reports* sought admission to the periodical press galleries of Congress so that the magazine could more easily gather information on national affairs of interest to its readers. The executive committee of the Periodical Correspondents' Association, which includes all accredited correspondents as members, administers the galleries. The executive committee denied the request by *Consumer Reports* because it was owned and operated by an association, Consumers Union; rule two of the Rules Governing the Periodical Press Galleries forbids the accreditation of any periodical that is owned and operated by "any industry, business, association, or institution."[3] Consumers Union sued the correspondents' association and the federal district court granted declaratory relief. The court of appeals reversed the order, holding that any inquiry into the validity of the rule or of the committee's action was constitutionally prohibited by the doctrine of legislative immunity as embodied in the speech or debate clause.

If the decision of the court of appeals creates the precedent it appears to create, it will damage basic constitutional rights. By its holding, the court closed the door to future suits challenging even more egregious forms of discrimination by Congress against members of the press—or public. According to the appellate court in *Consumers Union*, the speech or debate clause would bar a suit challenging a patently unconstitutional policy such

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1. U.S. CONST. art. 1, § 6, cl. 1.
2. 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).
3. CONGRESSIONAL DIRECTORY 942-43, 94th Cong., 2d Sess. (1976).

as the exclusion of all black reporters,[4] or a suit contesting a more frivolous selection such as the exclusion of all reporters with red hair. The court's interpretation of the speech or debate clause would also appear to insulate from review a congressional decision to deny all members of the press access to particular congressional processes or information.

This catalogue of potential constitutional horrors suggests that the court of appeals erred in its decision in *Consumers Union*. The speech or debate clause cannot and should not be interpreted to permit Congress to grant access to the press only according to its whim. There are a number of considerations discussed in this article that might validly make a court cautious about intervening in relations between government and the press. The absence of standards may frustrate any decision whether an instance of special access violates constitutional guarantees, as may the uncertain nature and scope of a constitutional right to gather information. Furthermore, judicial review may entangle a court in the resolution of questions more appropriately decided by the legislature.

Although discretion is dictated by these important political and constitutional considerations, a court should not abdicate its responsibilities under the First Amendment by abstaining automatically in an access case. At the least, a court should assess carefully whether a political question is actually presented by the facts before it. When it is consistent with the constitutional scheme of the separation of powers, the court should render a decision that will protect both the First Amendment right of the press to equal access to government information and the interest of the public in a diversity of informed opinions about the operation of its representative government. In *Consumers Union* the arguments in favor of judicial decision were strong. The First Amendment, as it is construed to bar inhibition of speech or publication by the press because of the content of the expression, provided a standard against which to judge the government's duty in that case. Further, because a judicial decision would not have interfered significantly with the legislative process, the court would not, in making its decision, have shown any disrespect for the separation of powers among the coordinate branches of the federal government.

4. Black reporters were in fact excluded from the press galleries until 1947, ostensibly because they represented weekly rather than daily papers. Under pressure because the Senate Rules Committee had unilaterally extended accreditation to one black reporter, the governing committee of correspondents amended its rules to permit the accreditation of news services for weekly journals. *See* Marbut, *The Standing Committee of Correspondents*, in CONGRESS AND THE NEWS MEDIA 40, 45-46 (R. Blanchard ed. 1974).

## I. Consumers Union's Efforts to Gain Admission to the Periodical Press Galleries

"Periodical press gallery" designates a location in the Senate and in the House of Representatives set aside for the convenience of reporters for periodicals, and designates also the group of journalists who are accredited to use that space and to exercise associated privileges. The periodical press galleries are the most recently created of four sets of press galleries in Congress.[5] In the congressional galleries accredited correspondents enjoy not only desk space, but typewriters, telephones, radio and film studios, lounge space, and messenger and answering services. Gallery members may call upon the assistance of the gallery staff to inform them of current congressional activity and to provide them with relevant written materials. Accredited correspondents have special parking privileges as well as access to private elevators, a private dining room, and the Senate library.[6]

More important than these amenities is the superior access to governmental sources and processes to which accredited correspondents are entitled. Correspondents may enter the Senate President's room and the House Speaker's lobby, where they can arrange or hold interviews with members of Congress.[7] The Senate and House leadership hold daily on-the-record press conferences for gallery members;[8] the chairmen of various congressional committees offer weekly briefings on past and future legislation.[9] Gallery members may attend congressional committee hearings and can there receive the text of testimony to be given. Each gallery operates an information service to which members can refer to learn about floor votes and committee activity.[10]

In addition to giving correspondents access to the legislative branch, membership in one of the congressional press galleries is also a key to access to the executive branch. Such membership is sometimes required for attendance at news conferences held by federal departments and agencies.[11]

5. The four are the press galleries, the periodical press galleries, the radio and television galleries, and the photographers' galleries.

6. White, *Modern Accommodation: The New Patronage?*, in CONGRESS AND THE NEWS MEDIA 50-57 (R. Blanchard ed. 1974) [hereinafter cited as White].

7. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 21-22 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

8. *Id.* at 22.

9. N.Y. Times, July 20, 1975, at 88, col. 2.

10. White, *supra* note 6, at 53.

11. Affidavit of Gilbert Thelen, Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973).

Accreditation entitles a correspondent to "preferential access" to interviews, documents, and other sources of news.[12]

Each press gallery is governed by a standing committee of correspondents elected annually by the membership of the gallery.[13] These committees administer the galleries according to rules promulgated by the Senate Rules Committee and the Speaker of the House. The committees' decisions are subject to the approval of these authorities. Generally, the rules of the press galleries restrict admission to bona fide correspondents of "repute in their profession" who are not, and will not become, engaged in lobbying or the prosecution of claims.[14] Rule two of the periodical press galleries further restricts the number of publications that may have access to the facilities by limiting accreditation to reporters who represent

> one or more periodicals which regularly publish a substantial volume of news material of either general or of an economic, industrial, technical or trade character, published for profit and supported chiefly by advertising or by subscription,[15] and owned and operated independently of any industry, business, association, or institution . . . .[16]

In November 1972, Gilbert Thelen, newly appointed Washington editor of *Consumer Reports*, sought accreditation to the periodical press galleries as a representative of that publication. *Consumer Reports* is the monthly magazine of Consumers Union, a nonprofit organization whose purpose is to provide consumers with information about consumer goods and services. Consumers Union's primary activity is the publication of buyers' guides and *Consumer Reports*, but it does occasionally present its views on consumer issues to congressional committees and federal agencies when invited to do so.[17] Neither Consumers Union nor its employees engage

12. *Id.*

13. Congress delegated the responsibility for administration of the galleries to such committees in approximately 1877, after a period in which the House gallery was under the authority of the Speaker, and the Senate gallery was under the direction of the Senate Rules Committee. *See* F. MARBUT, NEWS FROM THE CAPITAL (1971).

14. The periodical press galleries are alone in limiting to "resident" newsgatherers the correspondents who may have access. The constitutional ramifications of this exclusion are beyond the scope of this paper, but the suspect nature of such a limitation based on residency is suggested by Memorial Hosp. v. Maricopa County, 415 U.S. 250 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972); and Shapiro v. Thompson, 394 U.S. 618 (1969). *But see* McCarthy v. Philadelphia Civil Serv. Comm'n, 424 U.S. 645 (1976); Sosna v. Iowa, 419 U.S. 393 (1975).

15. Access for journals supported chiefly by subscription was not available until 1974. The change was made to admit "legitimate newsletters" to the galleries. Letter from Samuel Shaffer, chairman of the executive committee of the Periodical Correspondents' Association to the author (undated).

16. CONGRESSIONAL DIRECTORY 942-43, 94th Cong., 2d Sess. (1976).

17. Petitioner's Brief for Certiorari at 6-7, Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 423 U.S. 1051 (1976).

in the lobbying of any legislative body, and the organization has no legislative program.[18] Accreditation to the periodical press galleries would have enabled Thelen to write articles for *Consumer Reports* about federal administrative, legislative, and judicial developments in the areas of consumer protection, product safety, and consumer costs.

On the ground that *Consumer Reports* failed to meet the criterion of being owned and operated independently of "any . . . association or institution," the executive committee of the Periodical Correspondents' Association denied Thelen's application. Consumers Union's subsequent attempt to have the committee reconsider its rejection was unsuccessful, as was the organization's effort to persuade the Senate Committee on Rules and Administration and the Speaker of the House to exercise their supervisory authority under rule five to direct that *Consumer Reports* be admitted to the galleries.[19] On July 3, 1973, Consumers Union filed suit in the District Court of the District of Columbia, naming as defendants the Periodical Correspondents' Association and the sergeants-at-arms of the House and Senate. Consumers Union sought a declaratory judgment that the executive committee's action in refusing accreditation to *Consumer Reports*, as well as the rule upon which the committee relied, abridged the organization's First and Fifth Amendment rights.[20]

District Court Judge Gesell granted Consumer Union's motion for summary judgment.[21] On his own motion Judge Gesell dealt with the preliminary matter of the justiciability of the complaint under article I, section six of the Constitution, the speech or debate clause. Applying the tests of legislative immunity articulated by the Supreme Court in *Gravel v. United States*[22] and *Doe v. McMillan*,[23] the district court held that the clause would

18. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 23 n.10 (D.D.C. 1973). Ralph Nader recently resigned from the Consumers Union board complaining that the organization did not engage enough in advocacy. *See* Nader's letter of resignation and the response of Consumers Union Executive Director Rhoda Karpatkin, 40 CONSUMER REPORTS 524-25 (1975).

19. By letter dated June 14, 1973, the chairman of the Senate Rules Committee, acting upon the recommendation of the correspondents, concurred in the rejection. The Speaker never answered Consumers Union's letter. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 22 (D.D.C. 1973).

20. After the district court's opinion, the correspondents association continued to exclude *Consumer Reports*. Consumers Union's efforts to obtain injunctive relief pending the association's appeal was denied without opinion by the district court, by the court of appeals, and by the Supreme Court. Petitioner's Brief for Certiorari at 9, Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 423 U.S. 1051 (1976).

21. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973).

22. 408 U.S. 606 (1972).

23. 412 U.S. 306 (1973).

not bar Consumers Union's claim because the conduct of the correspondents' association and the sergeants-at-arms "neither constitutes an integral part of nor has been shown to have a significant impact upon the proceedings on the floor of either house."[24]

Passing to the merits of Consumers Union's claim, the court found that rule two of the Rules Governing the Periodical Press Galleries, both on its face and as applied, infringed the plaintiff's constitutional rights. The denial to newsmen of equal access to "facts of public consequence,"[25] without a compelling justification, violated Consumers Union's First Amendment rights. The court stated:

> The Constitution requires that congressional press galleries remain available to all members of the working press, regardless of their affiliation. Exclusion of a publication from the galleries can only be sanctioned under carefully drawn definite rules developed by Congress and specifically required to protect its absolute right of speech and debate or other compelling legislative interest.[26]

The court also noted that the rules were defective because of their failure to provide for procedural due process prior to exclusion with "opportunity for adequate impartial review wherever a publication is excluded."[27]

Upon defendants' appeal, a court of appeals panel consisting of Judges McKinnon, Robb, and Christensen[28] reversed the lower court.[29] The appellate court's decision turned on a matter that had not even been pleaded by the defendants below: immunity under the speech or debate clause. Like the district court, the court of appeals applied the standards enunciated in *Gravel v. United States*[30] to determine the existence of legislative immunity. But the court of appeals found that, for several reasons, the administration of the press galleries was within the scope of the privilege. The Periodical Correspondents' Association had acted pursuant to a delegation of the House and Senate in furtherance of their authority to make rules under article I, section five of the Constitution. The operation of the press galleries "occur[red] in the regular course of the legislative process"[31] and involved no "bad faith or illegal conduct."[32] In support of its conclusion that the administration of the

24. 365 F. Supp. at 24.
25. *Id.* at 25.
26. *Id.* at 26.
27. *Id.*
28. Judge Christensen is a district court judge who was sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).
29. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).
30. 408 U.S. 606 (1972).
31. 515 F.2d at 1348.
32. *Id.*

press galleries was within the sphere of legislative immunity, the court relied on two facts: for many years Congress had itself carried out this task, and the two houses continued to supervise the decisions of the press committees. The court of appeals also suggested that adjudication would be inappropriate under the political question doctrine because there was present one of the characteristics of political questions enumerated by the Supreme Court in *Baker v. Carr*,[33] a constitutional commitment of the resolution of the issue to a coordinate branch of government.

## II. The Scope of Speech or Debate Clause Immunity

Whether legislative immunity attaches to the decision of congressional agents to deny accreditation to certain members of the press is a question not easily resolved. The court of appeals in *Consumers Union* did not come to grips with the question that makes the applicability of the speech or debate clause so difficult to assess—that is, whether, for the purposes of the clause, a process by which members of Congress communicate with the public is legislative activity. Rather, the court based its holding upon the correspondents' good faith and the fact that the correspondents were enforcing internal rules of Congress. This section will indicate that in light of the speech or debate clause and the cases the Supreme Court has decided under it, these considerations do not justify the invocation of legislative immunity. If legislative immunity is appropriate in *Consumers Union* at all, it is for a reason that the court of appeals did not articulate: that the accreditation of journalists is part of the legislative process. Although accreditation might be considered a legislative activity, the rulings of the Supreme Court support a conclusion that it should not be so considered.

### A. The Constitutional Basis of Legislative Immunity

The source of legislative immunity is article I, section six of the Constitution, which provides in part: "for any Speech or Debate in either House, [the Senators and Representatives] shall not be questioned in any Place." The Supreme Court has repeatedly held that the purpose of the clause is "to prevent intimidation by the executive and accountability before a possibly hostile judiciary."[34] If properly invoked, the clause relieves members of Congress not only from liability, but also from defending suits except to the extent of submitting this absolute defense. By the terms of the clause, legislative immunity may be invoked for "speech or debate" on the

33. 369 U.S. 186 (1962).

34. United States v. Johnson, 383 U.S. 169, 181 (1966).

floor of the chamber. To the extent that the immunity reaches other conduct, that conduct must be within the legislative sphere.[35] More precisely, to be protected, acts must be "an integral part of the deliberative and communicative process by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House."[36] Legislative immunity attaches to certain actions, rather than to particular persons. Thus, legislative immunity will shield congressional aides who engage in conduct that would be protected if performed by members of Congress.[37] Conversely, for activity not within the legislative sphere, neither Congressmen nor their aides and employees are immune from prosecution.[38]

### B. The Court of Appeals' Analysis of Legislative Activity

The court of appeals in *Consumers Union* recognized that legislative activity is the only conduct entitled to legislative immunity, and it acknowledged that the correspondents' actions did not appear to be privileged conduct at first glance because they "were not engaged in the consideration and passage or rejection of proposed legislation."[39] Nevertheless, the court found that the correspondents were involved in legislative activity and were immune from suit. The court's analysis finds little support in case law.

First, the legality and good faith of the correspondents' actions established their protected status for the court of appeals. Reasoning that their conduct was unlike that which had been held unprivileged—an unlawful arrest in *Kilbourn v. Thompson*,[40] a bribe in *United States v. Brewster*[41]—the court concluded that the correspondents' actions must be privileged. The legal foundation, as well as the logic of the court's analysis, is flawed. The question of whether a particular action enjoys immunity under the speech or

35. Gravel v. United States, 408 U.S. 606, 624 (1972).

36. *Id.* at 625.

37. *Id.* at 618.

38. The Supreme Court stated in *Gravel* that "both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So, too . . . senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they executed an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seized the property or invaded the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." *Id.* at 621.

39. 515 F.2d at 1350.

40. 103 U.S. 168 (1881).

41. 408 U.S. 501 (1972).

debate clause often arises in the context of a complaint that the action taken is illegal or in bad faith, but the presence of either characteristic does not determine whether a congressional defendant is absolutely immune from suit. Allegedly illegal conduct has been protected by speech or debate clause immunity when it has taken place on the floor of Congress or in committee.[42] Conversely, without referring to bad faith or illegality, the Supreme Court has stated that legislative immunity does not extend to other congressional activities. For example, in *Brewster* the Supreme Court observed that a variety of functions performed by congressmen, such as sending newsletters to constituents and making speeches outside Congress, are beyond the protection of the speech or debate clause.[43] There is no suggestion that these activities are unprivileged because they are illegal or done in bad faith; rather, they are unprivileged because they are not essential to legislating. Similarly, in *Doe v. McMillan*,[44] the Supreme Court held that the speech or debate clause did not bar the plaintiffs from prosecuting their suit for invasion of privacy against the noncongressional defendants to the extent that those defendants participated in the distribution of the allegedly libelous document to the public. Such distribution "beyond the reasonable bounds of the legislative task, enjoy[ed] no Speech or Debate Clause immunity."[45] The legislative task, not bad faith or illegality, defines the scope of legislative immunity.

Drawing on the reference in *Gravel* to "matters which the Constitution places within the jurisdiction of either House," the court of appeals in *Consumers Union* held that the committee of the correspondents' association was immune because it was enforcing internal rules of Congress, which had been promulgated pursuant to the constitutional power of each house to make rules for its own proceedings.[46] This justification must be based on a misreading of the case law, inasmuch as internal rules of Congress have never been held completely insulated from suit. The fact that an action touches on the internal affairs of Congress does not prohibit judicial review. For example, *Powell v. McCormack*[47] involved the internal affairs of the House; former Representative Adam Clayton Powell challenged the action of the House in refusing to seat him and in denying him his salary. The

42. *E.g.*, *Brewster* involved an allegation of bribery to perform a legislative act, 408 U.S. 501 (1972); Senator Gravel published the Pentagon Papers in possible violation of federal law, United States v. Gravel, 408 U.S. 606 (1972).

43. 408 U.S. at 512; *accord*, Dickey v. CBS, Inc., 387 F. Supp. 1332 (E.D. Pa. 1975).

44. 412 U.S. 306 (1973).

45. *Id.* at 315.

46. 515 F.2d at 1350 (quoting 408 U.S. at 625).

47. 395 U.S. 486 (1969).

Supreme Court held that Powell's suit could be maintained against the defendants other than the congressmen. Moreover, the phrase from *Gravel* upon which the court of appeals relied in *Consumers Union* was plucked from its proper context in a way that distorted its meaning. Read as a whole, the Court's opinion in *Gravel* states that an act is within the scope of legislative immunity only if it both relates to legislation or to another matter within congressional responsibility under the Constitution *and* is integral to the deliberative and communicative processes. This two part limitation coincides with and implements the Court's insistence that immunity does not extend to every activity relating to legislative affairs or to everything done by legislators. Instead, it is intended only to "protect the integrity of the legislative process."[48]

Because enforcement of rule two of the periodical press galleries related to a congressional rule but was not integral to the processes by which this rule was considered and adopted, that enforcement could be the subject of a lawsuit. This conclusion is supported by the fact that the Supreme Court has repeatedly held that actions taken to enforce a legislative mandate, by whomever taken, may be the subject of a suit testing the constitutionality of the original authorization.[49]

The court of appeals attempted to distinguish the leading cases permitting suits challenging the enforcement of congressional resolutions—*Kilbourn v. Thompson*[50] and *Powell v. McCormack*[51]—by adverting to the fact that rule two was validly enacted within the scope of specific congressional authority. It is true that in both *Kilbourn* and *Powell* the Supreme Court's opinion included a holding that Congress had exceeded its authority.[52] The Supreme Court's holdings with respect to the validity of the congressional resolutions in both cases, however, were related to the merits

48. United States v. Brewster, 408 U.S. 501, 507 (1972).

49. Kilbourn v. Thompson, 103 U.S. 168 (1881); *cf.* Stamler v. Willis, 415 F.2d 1365 (7th Cir. 1969), *cert. denied*, 399 U.S. 929 (1970) (action for declaratory and injunctive relief from enforcement of a subpoena issued pursuant to a rule chartering the House Un-American Activities Committee could be maintained against United States attorney). *See also* Doe v. McMillan, 412 U.S. 306 (1973) (suit for invasion of privacy by the printing and public distribution of a committee report could proceed against the superintendent of documents and against the public printer); Powell v. McCormack, 395 U.S. 486 (1969) (suit for declaration of the unconstitutionality of congressman's exclusion from the House could be maintained against the sergeant-at-arms, the doorkeeper, and the clerk); Dombrowski v. Eastland, 387 U.S. 82 (1967) (suit for damages could proceed to trial against subcommittee counsel).

50. 103 U.S. 168 (1881).

51. 395 U.S. 486 (1969).

52. 103 U.S. at 196; 395 U.S. at 548.

of the plaintiffs' cases, not to the issue of whether legislative immunity precluded suit in the first instance. On the contrary, in these cases, as in every other Supreme Court case under the speech or debate clause, legislative immunity was determined by the nature of the conduct, not by the constitutionality of the underlying authorization. This distinction is clear in the Supreme Court's opinion in *Powell*. The Court treated legislative immunity and the congressional power to exclude or expel its members in separate sections of the opinion and decided that Powell's complaint was justiciable without reference to the constitutionality of the order of the House excluding the representative.

Beyond its reference to illegality and congressional rulemaking authority, the court of appeals gave no more justification for its holding that legislative immunity protected the correspondents in *Consumers Union* than the unelaborated assertions that the correspondents "were engaging in a sense in acts generally done in relation to the business before Congress"[53] and that their actions "fell within 'the sphere of legislative activity.' "[54] As has been indicated above, the fact that an action is taken either by legislators or in relation to legislative affairs does not necessarily mean that such conduct is "legislative activity" for the purpose of speech or debate clause immunity. The questions then arise what the test of legislative activity is and whether the accreditation of correspondents meets this test.

### C. Relations With the Press as Legislative Activity

The inconsistency of the appellate court's reasoning with the opinions of the Supreme Court reflects a fundamental doctrinal tension; certain activities that are legislative activities as a matter of fact are not considered such by the Supreme Court as a matter of law. Relations with the press fall into precisely this category. Communications with the press are a usual and necessary part of a legislator's work. The Supreme Court, however, has never considered such communications to be privileged.

If legislative activities are defined for the purposes of the speech or debate clause immunity as any activities that are "necessary to fulfill one of the goals of representative government,"[55] then accreditation of journalists

53. 515 F.2d at 1350.

54. *Id.*

55. Reinstein & Silverglate, *Legislative Privilege and the Separation of Powers*, 86 HARV. L. REV. 1113, 1146 (1973). This article presents a full historical justification for an application of the functional approach to the determination of what activity is privileged under the speech or debate clause. The authors recommend that an exception to speech or debate immunity be carved out for cases in which an infringement of constitutional rights is alleged.

must be viewed as legislative activity. To perform their representative roles legislators require informed guidance from the electorate. To this end, legislators must perform an informing function; they must communicate to the public what they perceive to be important issues and how they, as well as the legislature and the administrative agencies, are approaching these issues. Legislators also must have a means for learning the public reaction to the information disclosed and for ascertaining their constituents' desires.

Congress itself performs an informing function by the publication of the *Congressional Record*, committee reports, and other documents. The exchange of correspondence between congressmen and their constituents serves both the informing and the expressive functions. It is the press, however, which is the primary agency by which Congress discloses its activity and obtains public guidance. As one student of the relations between Congress and the press has observed: "The American Fourth Estate operates as a *de facto*, quasi-official fourth branch of government, its institutions no less important because they have been developed informally and, indeed, haphazardly."[56] Since by this reasoning congressional communication with the public constitutes legislative activity, the choice Congress makes of the agents by which it will communicate with the public should also be considered legislative activity. This notion that by accrediting journalists Congress is selecting agents to perform its informing function would justify the holding of the court of appeals in *Consumers Union*.

Despite the important and prominent role of publicity in the legislative process, however, the Supreme Court has consistently rejected the proposition that congressional communications to the public are immunized by the speech or debate clause. Rather, the Court has held that such activities as holding a hearing[57] or giving a speech to Congress[58] are "purely legislative activities,"[59] whereas the issuance of news releases or newsletters to constituents and the delivery of speeches outside Congress are not legislative activities and are not privileged.[60] The distribution of a committee report to Congress has been protected while its distribution to the public was not.[61] In view of the Supreme Court's resistance to extending legislative immunity to congressional communications with the public, it must be concluded that

56. D. CATER, THE FOURTH BRANCH OF GOVERNMENT 13 (1959). *See also* CONGRESS AND THE NEWS MEDIA (R. Blanchard ed. 1974); L. SIGAL, REPORTERS AND OFFICIALS (1973).

57. Gravel v. United States, 408 U.S. 606 (1972).

58. United States v. Johnson, 383 U.S. 169 (1966).

59. United States v. Brewster, 408 U.S. 501, 512 (1972).

60. *Id.*

61. Doe v. McMillan, 412 U.S. 306 (1973).

congressional communications with the press and accreditation of certain members of the press are not privileged either.

The Supreme Court's decision not to rely on the actual workings of Congress as its sole guide for defining the scope of legislative immunity is supported by policy considerations relating to the preservation of constitutional rights. The Supreme Court has rejected the contention that when constitutional rights are infringed an exception to legislative immunity must be made,[62] but the salutory effect of the Court's exclusion of congressional communications with the public from the scope of legislative immunity is to permit the vindication of such rights. In its communications with the press and public, Congress is particularly likely to infringe constitutional rights without justification. The public distribution of committee hearings and reports may cause, for example, an invasion of privacy[63] or a chilling effect on speech.[64] Similarly, an official's actions in giving information to one journal or kind of journal but not to another infringes First Amendment values, both by limiting the diversity of informed opinions to which the public has access and by discouraging expressions of disapproval by the favored publications.[65]

The Supreme Court has limited speech or debate immunity to those activities "essential" to the legislative process, carefully defining "essential" in a way that has disallowed unwarranted disregard of the rights of citizens by members of Congress as they communicate with the public. Therefore, the interpretation given by the court of appeals to the speech or debate clause is inconsistent both with the policy of the clause and with the interpretation given it by the Supreme Court.

## III. Issues in the Adjudication of Equal Access Claims

How courts should adjudicate press claims of discriminatory access to government information is a more complex problem than is apparent from

62. Eastland v. United States Servicemen's Fund, 421 U.S. 491, 509-10 (1975).

63. *E.g.*, Doe v. McMillan, 412 U.S. 306 (1973).

64. Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970) (enjoining public distribution of report of House Committee on Internal Security about the sources of financing for the revolutionary movement in the United States).

65. *See Media and the First Amendment in a Free Society*, 60 GEO. L.J. 867, 913 (1972): "An outright denial of press credentials is a much more obvious means of restricting access. If this denial is politically motivated, it may have several side effects. Clearly the number of viewpoints in the news may be limited, especially since reporters who are outspokenly critical, such as those representing the underground press, are most likely to be denied credentials. Furthermore, the implicit threat of denial will not be lost on other reporters. It will undoubtedly be felt as a chilling effect."

the opinion of the court of appeals in *Consumers Union*. Two questions arise in any challenge to the constitutionality of a practice by which a government official grants or denies access to information to selected reporters. The first question relates to the justiciability of the claim. Can "the duty asserted . . . be judicially identified and its breach judicially determined and [can] protection for the right asserted . . . be judicially molded"?[66] The second inquiry relates to the propriety of adjudicating the claim. Is judicial resolution of a dispute between members of the press and government officials consistent with our political scheme? Only when both questions can be answered affirmatively is review of an access case appropriate.

### A. Finding a Constitutional Duty: First Amendment Equal Protection

An identifiable duty is breached when congressional agents deny a journalist equal access to government information because of the affiliation of his journal; the freedom of the press is thus abridged in violation of the First Amendment. Whatever the right of the press to access to a particular government source, once some members of the press are given access, others cannot be excluded for reasons relating to the content of their publications.

At the outset, it is necessary to set to one side the duties of the government under the Freedom of Information Act (FOIA).[67] Unquestionably, journalists and the public in general must be given access to information covered by that act. The FOIA does not assist a journalist seeking the information to which he would be privy as an accredited member of a congressional press gallery, however, because the act imposes a duty to disclose on administrative agencies only, not on Congress.[68] Furthermore, the FOIA gives access only to documentary materials and descriptions of the organization and functions of each agency;[69] it does not give a right of access to deliberations or other oral communications.[70]

The present articulation of a constitutional right to information provides

66. Baker v. Carr, 369 U.S. 186, 198 (1962).

67. 5 U.S.C. § 552 (1970 & Supp. V 1975), *as amended by* 5 U.S.C.A. § 552 (Supp. 4, pt. 1, Dec. 1976).

68. The act provides: "Each agency shall make available to the public information as follows: . . ." 5 U.S.C. § 552(a) (1970 & Supp. V 1975).

69. 5 U.S.C. § 552(a)(1)-(2), (b) (1970 & Supp. V 1975), *as amended by* 5 U.S.C.A. § 552 (Supp. 4, pt. 1, Dec. 1976).

70. In a pending suit, several newsmen are asserting that the Freedom of Information Act authorizes them to obtain a transcript of a background briefing given by Henry Kissinger to which they were not invited. If, as is usually the case, no transcript had been made of the briefing, the journalists' claim would have little foundation. *See* N.Y. Times, March 7, 1975, at 1, col. 8.

little more assistance to an excluded newsman than does the Freedom of Information Act. Although the Constitution nowhere expressly protects the gathering of information, the Supreme Court has acknowledged that a limited privilege to do so derives from the First Amendment protection for freedom of speech and of the press: "without some [First Amendment] protection for seeking out the news, freedom of the press could be eviscerated."[71] The Court has addressed this right only to say what it does not include, however. Recent cases suggest that the press has no right to the best means of gathering information, at least not when the barrier to the best means serves a substantial state interest and is imposed on the press and public alike.

Thus, in *Pell v. Procunier*[72] prisoners and journalists challenged as unconstitutional a regulation of the California prison system that prohibited the press from conducting face-to-face interviews with inmates. The only persons permitted to visit prisoners were members of their families, clergy, their attorneys, and friends or prior acquaintances.[73] The Court rejected the First Amendment claims of both sets of plaintiffs. The prisoners suffered no infringement of First Amendment rights of free speech, the Supreme Court held, because their speech was restricted in the interest of a substantial state policy. Furthermore, they had available alternate means of communicating with the press through the persons who were permitted to visit them. The First Amendment rights of the journalists were not abridged by the regulation because they had not been treated any differently from other members of the public, and the Constitution does not "require government to accord the press special access to information not shared by members of the public generally."[74]

The holding of *Pell* seems to make groundless a journalist's challenge of the unconstitutionality of his exclusion from a news conference or newsworthy event. The excluded journalist arguably has suffered no injury inasmuch as he has some access to government proceedings by means of both official records and the reports of journalists who were given access. Furthermore, in the absence of statute, the public has no right to demand and the government has no obligation to give information or access to government proceedings, nor does the journalist have such a right. An official's choice to grant access to some journalists is a matter of political discretion, and the benefit of access is an unenforceable privilege.

71. Branzburg v. Hayes, 408 U.S. 665, 681 (1972). *See* Note, *The Constitutional Right to Know*, 4 HASTINGS CONST. L.Q. 109 (1977).

72. 417 U.S. 817 (1974).

73. *Id.* at 824-25.

74. *Id.* at 834-35.

Sometimes, however, the press is permitted to gather information as the "necessary representative of the public's interest . . . and the instrumentality which effects the public's right."[75] In such cases the problem of lack of judicial standards is simply recast, not removed. The press has been permitted special access when, for practical or policy reasons, the public *en masse* should not have access to, but should have information about, a matter of public interest. Special access for the press is then justified as a means less drastic than total exclusion, which reconciles the state interest and the public right to know.[76] The application of this principle to any particular case requires the resolution of two threshold questions: (1) To what governmental information does the press have a right of access as the representative of the public; and (2) Who is the press? At first, it would seem that officials have as much discretion to determine who the press is under this "special right of access" theory as they have to select journalists under a "no special right of access" theory (as when a government figure gives an interview to one journalist).

In fact, defining the press to exclude a class of ostensibly undesirable journalists is exactly what the Periodical Correspondents' Association did in *Consumers Union*.[77] But in reality officials do not have complete discretion to decide who will have access to information and events of public interest. The selection or definition of the press must be valid under First Amendment standards whenever distinctions based solely on content are alleged. To assure the development of political opinion and to permit the fulfillment of each individual, the First Amendment protects the freedom of speech and press from censorship. As the Supreme Court has noted, "[t]he essence of this forbidden censorship is content control. Any restriction on expressive

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75. Saxbe v. Washington Post Co., 417 U.S. 843, 864 (1974) (Powell, J., dissenting).

76. *See* Note, *The Public's Right to Know: Pell v. Procunier and Saxbe v. Washington Post Co.*, 2 HASTINGS CONST. L.Q. 829 (1975); Comment, *The Right of the Press to Gather Information After Branzburg and Pell*, 124 U. PA. L. REV. 166, 181-82 (1975); Comment, *Bans on Interviews of Prisoners: Prisoner and Press Rights After Pell and Saxbe*, 9 U.S.F. L. REV. 718, 729-33 (1975).

77. Defining the press to exclude unwanted journalists was also the means of denying access used in Los Angeles Free Press v. City of Los Angeles, 9 Cal. App. 3d 448, 88 Cal. Rptr. 605 (1970), *cert. denied*, 410 U.S. 982 (1971). City and county officials issued press passes to reporters giving them access to areas not generally open to the public, such as the scenes of crimes, fires, and natural disasters, as well as police press conferences. The *Los Angeles Free Press* was denied a pass because it was not regularly engaged in the reporting of "spot, hard core police-beat and fire news," but rather reported such events with a focus "largely on sociological considerations." 9 Cal. App. 3d at 452-53, 88 Cal. Rptr. at 608. The California court of appeals upheld the denial against challenges based on the First and Fourteenth Amendments.

activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' "[78] The prohibition against censorship because of content establishes what may be termed a standard of "First Amendment equal protection" for speech. Every person's opinion must be treated equally; the government may neither assess a penalty nor accord an advantage to some persons because of the content of their opinions.[79] Specifically, if some persons are afforded an opportunity to present their views, other persons cannot be denied such an opportunity because of what they have to say.

The standard of First Amendment equal protection applies regardless of whether the opportunity the government gives for expression or related activity is a right or a privilege.[80] The event that triggers judicial review is permission to some persons or groups to engage in expressive activity. Thus, in *Police Department of Chicago v. Mosley*,[81] the Supreme Court struck down a city ordinance that prohibited all picketing within a certain distance of schools except for peaceful picketing relating to a labor dispute. The Court held:

> *Once a forum is opened up* to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[82]

Although giving selective access to information does not prevent excluded persons from speaking or writing, it renders their right to do so substantially less valuable. A restriction on information gathering has a direct impact on the content of the excluded person's expression by limiting the first-hand

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78. Police Dep't v. Mosley, 408 U.S. 92, 96 (1972).

79. *See id.*; Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969); New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Staub v. Baxley, 355 U.S. 313 (1958); Niemotko v. Maryland, 340 U.S. 268 (1951). *But see* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (no violation of free speech or equal protection rights in city's selling card space in public transit cars for commercial advertising but not for paid political advertising); Jewish Defense League, Inc. v. Washington, 347 F. Supp. 1300 (D.D.C. 1972) (no violation of First Amendment rights in statute precluding street demonstrations within 500 feet of embassies, except picketing in connection with labor disputes at construction sites; United States' obligation to protect the persons and property of diplomats is a compelling state interest justifying the restrictions imposed).

80. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

81. 408 U.S. 92 (1972).

82. *Id.* at 96 (emphasis added).

information available to him.[83] When a person (or journal) cannot present an informed opinion because of his exclusion from certain information as a result of selective access policies, a fundamental aim of the First Amendment is threatened; the development of American politics and culture is hampered when excluded journals cannot contribute knowledgable views to the forum of ideas. Therefore, to protect against violation of the First Amendment, the standards of First Amendment equal protection may be invoked to test the validity of selective access. This is true not only when selection is admittedly made according to content, but also when selection is made according to ostensibly objective criteria such as prestige or size or circulation. Such selection is, in effect, selection according to content because the greater the circulation of a journal and the greater its prestige, the greater the likelihood that it represents the mainstream of public opinion.

Theoretically, then, the First Amendment right to equal access might be invoked to challenge every case of selective access, but there are practical and policy reasons for stopping short of that extreme. First, havoc would be worked upon the many processes by which officials communicate with members of the press. For example, the President may choose to give an exclusive interview to a reporter from a journal whose views he favors. It would be impossible to grant a satisfactory remedy to every other journalist who claimed he had been denied a constitutional right of access. The absurdity of the situation is immediately clear; a meeting between the President and all interested journalists would lack the intimacy and informality of an exclusive interview, and imposing a duty on the President to give an equivalent interview to each complaining journalist would leave him little time to do anything else. In addition to the problem of virtual impossibility of implementation, the extension of a right of equal access in every instance in which the press meets with officials might actually impede the flow of information through the press to the public. Aside from legislative debates on the floor and committee hearings, many sources of information about government activities might simply cease operating due to the impossible burden of strict equal access.

It must be noted that many of the methods by which officials communicate with the press are entirely within the discretion of the officials. As one observer has noted, "A senior official's control of timing of press conferences has no limit: he can simply dispense with the bother altogether."[84] Although the need of officials for press coverage and opinions makes it unlikely that the enforcement of a right of equal access will result in a

83. *E.g.*, Forcade v. Knight, 416 F. Supp. 1025, 1031 (D.D.C. 1976).
84. L. SIGAL, REPORTERS AND OFFICIALS 110 (1973).

significant reduction of the opportunities for journalists to communicate with officials, the possibility that legislators and administrators may "dispense with the bother altogether" must be taken into account in defining the scope of the right. Because of the impracticality and undesirability of a right of equal access in every case, it is necessary that there be some limitation of the right. But articulating just when public representatives have a duty to give equal access to members of the press is difficult in view of the innumerable modes of communication the two groups possess. The cases involving access to a public forum, relied on to derive a right of equal access, are not useful analogues for determining precisely when the right of access to information applies. It is much easier to ascertain when the right to speak has been burdened by discrimination in providing the forum than it is to ascertain when the right to publish has been burdened by selective grants of access to governmental processes and information. In determining the boundaries of the right to equal access, it is helpful to consider the following suggested criteria: does the advantage given relate to information; what is the intent of the officials; are official policies of selection drawn narrowly and enforced uniformly; and is equal access practical and supported by justifications that outweigh those for exclusion?

The first question is whether the advantages given to some by the government relate directly to information and are therefore cognizable under the First Amendment. When particular newsmen are granted amenities, such as parking permits, or are personally consulted in policy decisions, the injury to the excluded journalists is arguably too remote to present a justiciable complaint. The difficulty with this common sense criterion is that the boundaries between information, amenities, and participation may be difficult to ascertain. A press release, for example, is an amenity to the extent that it saves the journalist the trouble of obtaining the information by investigation or interview. It is a means of enlisting journalists' participation in policy decisions to the extent that it funnels proposals through journalists to test public reaction; and it is, as well, a communication of information. Newsmen denied access to press releases should be able to challenge the constitutionality of the denial under the First Amendment, and the requirement that the privilege denied be germane to information does not suffice to define the constitutional duty in this instance.

Whether officials intend that what they say or do before a group of newsmen be made public might be a second criterion for determining when there should be a right of equal access. At times, officials present information to the press that is to be made public. On other occasions, officials' remarks are intended to be the background for, rather than the subject of, the journalists' reporting. The purpose of these sessions may be to obtain sym-

pathetic comment[85] or sympathetic silence[86] from the press. There are two significant problems, however, with the theory that an official's intent to publicize should distinguish those situations in which there is a right of equal access. Official unwillingness to have complete publicity is involved in every case of selective access and provides little guidance for distinguishing among these cases. Moreover, referring to the state of mind of an official to determine when First Amendment principles may apply seems antithetical to the First Amendment's prohibition against making a speech-related privilege conditional upon the uncontrolled will of an official.[87] Nonetheless, the intent of officials to discriminate against journalists with particular opinions is an important means by which to distinguish cases requiring equal access from those that do not. Using the standard of discriminatory intent a court may subject to constitutional scrutiny instances in which officials have established policies whose purpose is to exclude certain journalists from access to information, and may relieve from scrutiny situations, such as a casual encounter between an official and a reporter, that result in a useful tip for the journalist. Official intent to discriminate against certain views is a useful criterion, but it cannot be made the sole test of a breach of the constitutional duty to give equal access. Some situations, such as the exclusive presidential interview mentioned above, seem to contain the element of purposeful discrimination but are inappropriate subjects for judicial review.[88] On the other hand, in a case like *Consumers Union*, it may be hard to prove intentional discrimination against unpopular opinions but proper to enforce a right of equal access.

A closer examination of that troublesome example, the exclusive presidential interview, and a comparison with the *Consumers Union* situation does suggest some firm and reliable means for distinguishing cases in which officials have breached a duty to give equal access from those in which there is no duty and no breach. The exclusive interview is problematic simply because it is and must be exclusive; but it is impossible to say with certainty that unconstitutional discrimination according to content has occurred. So it may be assumed that one important characteristic of cases involving a duty

85. *See* D. CATER, THE FOURTH BRANCH OF GOVERNMENT 134 (1959); HOHENBERG, THE NEWS MEDIA 97 (1968). *See also* McCartney, *Must the Media be "Used"?*, in OUR TROUBLED PRESS 141 (A. Balk & J. Boylan eds. 1971).

86. *E.g.*, Arnold, *CIA Tried To Get Press To Hold Up Salvage Story*, N.Y. Times, Mar. 20, 1975, at 31, col. 1.

87. *E.g.*, Staub v. Baxley, 355 U.S. 313, 322 (1957); Kunz v. New York, 340 U.S. 290, 293 (1951).

88. Courts that have found a right to equal access in particular cases have been careful to note that the right is limited; it does not mean that if one reporter gets an interview, all should. *See* Lewis v. Baxley, 368 F. Supp. 768, 777 (M.D. Ala. 1973).

to give equal access is that communication to more than one journalist is feasible. Furthermore, the duty to give equal access applies only to situations in which, unlike the presidential interview, content-related discrimination can be discerned; the person or persons excluded having in common specific opinions or opinion-related characteristics, such as regional or national origin or institutional affiliation.

Unlike the selection involved in granting the more or less random, occasional exclusive interview, officials sometimes claim that it is practical to admit some but not all journalists and they devise standards for admission, such as whether the information to be provided is necessary to a journal's work,[89] or whether a journal is affiliated with persons or institutions that have business with the controlling officials.[90] When there are such standards, the First Amendment requires that they be drawn clearly and enforced uniformly, without arbitrariness. Courts have found a breach of a constitutional duty of equal access when officials have applied vague accreditation standards[91] or have arbitrarily administered their rules in a way that made distinctions according to content.[92] Therefore, where there is a justifiable state interest in systematically excluding some journalists from access to government information, there arises a definable duty to conform the methods of exclusion to standards that are constitutional insofar as they do not intentionally discriminate on the basis of content and are not so vague or arbitrarily administered as to work such a discrimination.

### B. A Question of Politics: Should the Courts Decide?

Assuming that First Amendment rights are abridged by the conduct of a public official in denying access to government information and processes to one group of correspondents based on the content of their journals, there remains the difficult question whether courts should intervene. Several aspects of the selective access issue suggest that it may be an inappropriate matter for judicial review, but the need for such review requires that it be undertaken in certain cases.

Relations between officials and the press are complex and eminently

89. *E.g.*, Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal. App. 3d 448, 88 Cal. Rptr. 605 (1970), *cert. denied*, 401 U.S. 982 (1971).

90. *E.g.*, Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973); Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18 (D.D.C. 1973), *rev'd on other grounds*, 515 F.2d 1341 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

91. Forcade v. Knight, 416 F. Supp. 1025 (D.D.C. 1976).

92. Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975).

political.[93] News correspondents are "the sources and channels of information among members of Congress and among Congress and the public and other agencies of government."[94] The press can influence the selection as well as the resolution of national issues. Aware of the political role of the press, officials choose the journalists to whom they will open their proceedings or their thoughts according to the degree of cooperation and friendship each journal and reporter has shown, the audience that the officials want to reach, and the amount of respect and credibility that each journal has demonstrated in the target audience. Courts are understandably reluctant to become involved in distinguishing among the various relations between officials and the press for the purpose of enforcing or refusing to enforce constitutional duties. Intervention in this area is likely to lead a court to the point of making arbitrary distinctions and of infringing upon the prerogatives of the other branches of government. Most suits challenging selective access therefore seem to present a "political question" by the terms of *Baker v. Carr*,[95] since resolution of the issues in such cases would seem impossible "without an initial policy determination of a kind clearly for nonjudicial discretion."[96]

Like the articulation of a constitutional duty, the development of a constitutionally acceptable remedy might encroach on the discretion of the other branches as well. A court might hazard some affirmative guidance about what the proper priorities might be for adjusting the number of correspondents to the available facilities, offering, perhaps, an analogy to the diversity standards that are applied in another limited government-regulated forum, the airwaves.[97] It would be impossible and undesirable in terms of the judicial role, however, for a court to specify how such a standard should be applied or to supervise the allocation of space or time among reporters from hundreds, perhaps thousands, of news gathering entities.

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93. *See generally* CONGRESS AND THE NEWS MEDIA (R. Blanchard ed. 1974); F. MARBUT, NEWS FROM THE CAPITAL (1971); D. MATHEWS, U.S. SENATORS AND THEIR WORLD (1960); D. NIMMO, NEWSGATHERING IN WASHINGTON (1964); D. CATER, THE FOURTH BRANCH OF GOVERNMENT (1959).

94. Blanchard, *Preface* to CONGRESS AND THE NEWS MEDIA at x (R. Blanchard ed. 1974).

95. 369 U.S. 186 (1962).

96. *Id.* at 217.

97. See 47 U.S.C.A. § 309 (West Supp. 4, 1976), and cases thereunder (suggesting that the public interest and convenience is furthered by diversity in licensing); *e.g.*, Citizens Comm. v. FCC, 506 F.2d 246 (D.C. Cir. 1974). *See also* 47 U.S.C.A. § 315 (West Supp. 4, 1976) (requiring broadcasters to afford reasonable opportunity for discussion of opposing viewpoints on questions of public interest) applied in, *e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

Furthermore, the value of seeking judicial rulings on issues of selective access is questionable. Judicial decisions are always weighed as precedent. Court-approved definitions of who constitutes the press and of situations in which equal access is required can result in unsatisfactory inflexibility. For example, one can imagine a court endorsing a definition of the press that includes only "bona fide correspondents of repute in their profession," whose income is obtained from their work as correspondents,[98] only to face the complaint of a new and serious scholar of the legislative process who has been excluded from the press gallery on the basis of these criteria.

Even if a court is willing to risk arbitrariness, judicial intervention may be neither necessary nor consistent with the constitutional scheme mandated by the First Amendment. Journalists have a weapon sometimes more potent than a court order—the power of the press. Editorial pressure has been successful several times in the past in securing modification of exclusionary policies of government officials;[99] this tool continues to be available. Consigning the press to defend itself solely through its power to expose and criticize is, Justice Stewart suggests, entirely consistent with the constitutional scheme:

> The press is free to do battle against secrecy and deception in government. But the press cannot expect from the Constitution any guarantee that it will succeed . . . . The Constitution itself is neither a Freedom of Information Act nor an official secrets act. The Constitution . . . establishes the contest, not its resolution. Congress may provide a resolution, at least in some instances, through carefully drawn legislation. For the rest, as so often in our system, we must rely on the tug and pull of the political forces in American society.[100]

The "tug and pull" of political forces will not necessarily produce a happy result in a case of selective access, however. In many cases, officials have complete control over access to information and can grant access on their own terms: "The clamor for access gives the official in demand a measure of control: 'It is impossible to grant everyone access and therefore the access that can be granted must be carefully and painstakingly deter-

98. This is the gist of the qualifications set down by other press galleries in Congress. *See* CONGRESSIONAL DIRECTORY 872-73, 912-13, 925-26, 94th Cong., 2d Sess. (1976).

99. For example, when the Senate in 1838 amended its rules to exclude out-of-town newspapers from the press gallery, the press raised a tremendous outcry against the blow to the "rights of reporters." Over a year later, the Senate bowed to the newspapers' pressure and revised the rule to permit bona fide reporters from newspapers outside Washington to have gallery privileges. F. MARBUT, NEWS FROM THE CAPITAL 55-62 (1971).

100. Stewart, *"Or of the Press,"* 26 HASTINGS L.J. 631, 636 (1975).

mined.' "[101] If there is no judicial review of the process by which officials select those journalists who will be given access, and if, as a consequence, journals representing diverse opinions do not have access to officials and official proceedings, the information and variety of opinions available to the public will be less than would otherwise be the case. And, as one journalist has noted, when officials such as the President are on friendly terms with members of the press (as could easily be the case when access is limited), there is "a potential but serious danger that improved relations between the President and the press will result in less, not more information for the public."[102] Reporters may be tempted to withhold information whose disclosure seems certain to offend the official.

Leaving equal access questions to be resolved by the political process is also unsatisfactory because the journals and journalists who are usually excluded lack political leverage. Journals denied access because of their content will most likely be those that represent minority viewpoints. Such journals are generally not in a position to influence officials to change their policies.

Despite these misgivings about allowing a selective access case to escape adjudication through use of the "political question" exception, the uncertain nature of the constitutional right to gather information and the problems created when a court dictates to the legislature or the executive how to handle its press relations suggest that the issue of a denial of access may indeed fall into that category. In fact, the court of appeals in *Consumers Union* considered that the exclusion of the journal was a political question,[103] and the district court, in granting judgment for the plaintiffs, had found it necessary to determine that no political question was involved before proceeding to a decision on the merits.[104] It is contended, however, that when a journal is denied access to government sources because of its content, the denial can and should be reviewed by a court. The First Amendment prohibition against penalizing expression solely because of its content provides a standard for review. The fact that the journals most likely to be the subject of discrimination are relatively powerless in the political arena provides the justification. Therefore the argument is only substantial,

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101. L. SIGAL, REPORTERS AND OFFICIALS 53 (1973) (quoting G. Reedy, *Speaking For the President*, in THE VOICE OF GOVERNMENT 106 (Hibert & Spitzer eds. 1968)).

102. Paper, *All the President's Friends*, N.Y. Times, July 1, 1975, at 29, col. 2.

103. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1346-47 (D.C. Cir. 1975).

104. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 23-24 (D.D.C. 1973).

but not compelling, that providing selective access to government information presents a political question that is nonjusticiable. The need to vindicate First Amendment rights outweighs the uncertain and possibly negligible damage to the separation of powers doctrine that might attend adjudication of such an issue.

## IV. Adjudication of Consumers Union's Claim

By relying incorrectly on the speech or debate clause, the court of appeals in *Consumers Union* completely avoided the difficult political and freedom of press questions the case presented, as analyzed and discussed above. In brief, the court could first have addressed the problem of finding a constitutional duty to give access. This is difficult because the press may not assert a right greater than that of the public. But the First Amendment does prohibit the government from denying a person advantages, such as access to a public forum, because of his beliefs or opinions, and a constitutional right of equal access for the press may be derived by analogy from that First Amendment command. It would then have been necessary to determine whether a court should intervene in such controversies between government and the press—the "political question" issue. Had the court of appeals reached these issues it would have determined that plaintiff's constitutional rights had been violated in *Consumers Union* and that it was entitled to a remedy. By rule two of the Rules Governing the Periodical Press Galleries, Congress has excluded from the galleries journals that are affiliated with "an industry, business, association, or institution."[105] This rule and its application to *Consumer Reports* violate the journal's First Amendment rights by denying it accreditation.

The foregoing discussion establishes that when it is practical for many journalists to have access to government information, no journalist can be excluded because of the content of his publication. The denial of access to *Consumer Reports* has all the indicia of unlawful exclusion in violation of the First Amendment. First, the advantages from which *Consumer Reports* has been excluded do relate to information. Members of the press galleries are provided special seating in the galleries so that they may have uninterrupted viewing of congressional debates.[106] Members are also granted exclusive permission to attend daily press conferences held by Senate and House leaders, and membership in the galleries facilitates access to press

105. CONGRESSIONAL DIRECTORY 942-43, 94th Cong., 2d Sess. (1976).

106. This privilege must not be dismissed as a mere amenity because only observers in the press galleries may write while sitting in the gallery and remain seated continuously.

conferences at the White House and at administrative agencies.[107] The burden on the ability of "affiliated" journals to gather information admittedly is not the most onerous conceivable; representatives of these journals still have recourse to the *Congressional Record* and other publications and documents as well as to the statements of various officials. On the other hand, undoubtedly there is information that is not accessible through these alternative channels. Moreover, although the Supreme Court has not addressed the question of equal access among publications, its cases on equal access for individuals do not consider whether there are alternative forums available, but only whether the government has acted in a discriminatory fashion with respect to the forum in dispute.[108]

Congress can accommodate many journalists and desires the publicity of its processes and deliberations. A large number of journalists are accredited to the galleries; several journals have more than one correspondent and some have as many as twenty.[109] For these journalists, the House and Senate provide extensive facilities.[110] Journals that are owned and operated by an industry, business, association, or institution are more likely to voice stronger, less popular opinions than commercially operated journals because the latter appeal to and rely on a broader spectrum of readers.[111]

The vagueness of the standard in rule two of the gallery rules permits the executive committee of the Periodical Correspondents' Association to grant or deny access according to its approval of the content of an applicant journal. The chairman of the executive committee admitted that the committee's decisions are in fact made on this basis, acknowledging that the administration of rule two involves scrutiny of "not only the content of [an applicant's] publication, but of the purpose of its parent association as well."[112] The roster of periodical press gallery members confirms that the

107. Consumers Union of United States, Inc., v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 22 (D.D.C. 1973).

108. Police Dep't v. Mosley, 408 U.S. 92 (1972); *cf.* Healy v. James, 408 U.S. 169 (1972) (struck down state college's denial of official recognition to a local chapter of the Students for a Democratic Society (SDS)). *But see* Saxbe v. Washington Post Co., 117 U.S. 843 (1974); Pell v. Procunier, 417 U.S. 817 (1974). In the latter two cases, the Court upheld flat bans on face-to-face interviews of state (*Pell*) and federal (*Washington Post*) prisoners, emphasizing that because alternative means of contacting the press were available, restrictions on face-to-face interviews did not violate prisoners' First Amendment rights.

109. *See* CONGRESSIONAL DIRECTORY 955-58, 94th Cong., 2d Sess. (1976).

110. See text accompanying notes 5-12 *supra*.

111. *See* T. PETERSON, MAGAZINES IN THE TWENTIETH CENTURY 445-48 (1964).

112. Affidavit of Donald E. Smith, *cited in* Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 23 (D.D.C. 1973). This kind

rule permits selections that are arbitrary, if not discriminatory, according to content. The thrust of rule two seems to be to give access only to those journals owned or operated by institutions whose primary business is that of publishing. Since *Consumer Reports* accounts for most of the revenues and expenditures of Consumers Union, the journal arguably fits the standard of rule two. Nevertheless, *Consumer Reports* was excluded from the galleries. At the same time, trade journals such as *Agricultural Services*, *Chain Store Age*, *Leather and Shoes Magazine*, and *Oil and Gas Journal* have accreditation because they are published by commercial printing houses.[113]

Rule two could be upheld only if the government showed that it bears a substantial relation to a compelling government interest[114] and that it is the least restrictive way to serve that interest.[115] Clearly, some definition or selection of the press must be made among the hundreds of magazines that are potential applicants to the periodical press galleries.[116] The apparent purpose of rule two is to make this selection in a way that will extend the benefits of access to those for whom it will be of most value—journals that cover some aspect of national affairs for the general public, as opposed to journals published for the benefit of a particular group of employees or

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of discretion has been censured in a number of cases; *e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Kunz v. New York, 340 U.S. 290 (1951). In addition to other arguments that rule two works an unconstitutional discrimination, there may be an argument that the very criterion of affiliation abridges the First Amendment right of free association. The basis for such an argument would be Williams v. Rhodes, 393 U.S. 23 (1968), in which the Supreme Court held unconstitutional an Ohio election law that precluded small political parties from offering presidential candidates on the ballot unless they first complied with certain conditions more onerous than those imposed on the two major parties. The Court found that the law burdened the right of members of small parties to associate and to vote effectively. The disabilities of rule two, it might be argued, similarly burden the freedom of association of the members of Consumers Union by inhibiting their pursuit of one of the main purposes for which they joined together—the collection of information relevant to their concerns.

113. CONGRESSIONAL DIRECTORY 955-59, 94th Cong., 2d Sess. (1976). The weight the executive committee gives to content is apparent, too, from the difficulties that *Hard Times* and *The Village Voice* had in securing gallery accreditation. Comment, *Has Branzburg Buried the Underground Press?*, 8 HARV. C.R.-C.L. L. REV. 181, 182 (1973).

114. Branzburg v. Hayes, 408 U.S. 665, 700 (1972); NAACP v. Button, 371 U.S. 415, 438-39 (1963); Bates v. Little Rock, 361 U.S. 516, 524 (1960); NAACP v. Alabama, 357 U.S. 449, 461 (1958); Thomas v. Collins, 323 U.S. 516, 530 (1945).

115. Procunier v. Martinez, 416 U.S. 396, 413 (1974); Shelton v. Tucker, 364 U.S. 479, 488 (1960), and cases cited therein at 488-89.

116. "Hundreds" may be a conservative estimate. There are approximately 16,000 magazines in the United States, of which 8,000 are industrial and house organs, and 2,400 are business publications sent to buyers and suppliers. J. TEBBEL, THE AMERICAN MAGAZINE: A COMPACT HISTORY 243 (1969).

students—and will deny the privilege of access to those who will use it for purposes unrelated to newsgathering, specifically, lobbying.

The weight of these goals and the substantiality of their connection to rule two is suspect because rule two is overinclusive and underinclusive as to both of them. Rule two excludes many journals of general circulation with substantial interest in the processes of government, such as *Science*[117] and the National Welfare Rights Organization's *Welfare Fighter*,[118] while permitting the accreditation of journals whose interest in national affairs is relatively insignificant, such as *Western Stamp Collector*.[119]

Similarly, rule two poorly fits the purpose of preventing abuse of access privileges by lobbyists acting under the guise of journalists. The rule is underinclusive because it allows the representatives of many interest groups to have access to the galleries. The press is itself an interest group, concerned about securing special favors in areas such as postal rates.[120] Correspondents from the trade journals represent such interests as public utilities, the lumber industry, and the oil and gas industry.[121] Rule two is overinclusive because it denies access to affiliated journals that will not abuse the privilege of access as well as those that will. The overinclusiveness of rule two suggests the availability of a less restrictive means of achieving the goal of preventing lobbying by the members of the press. Barring in advance those who might lobby is unnecessarily restrictive upon the First Amendment rights of journals affiliated with associations or institutions. A ban on lobbying by correspondents, with provisions for discipline if it is transgressed, would suffice.

Rule two is also vulnerable because of the arbitrariness with which it has been administered.[122] *Consumer Reports* has been excluded, while *National Geographic*, which is the official journal of an association, The Na-

117. Petitioner's Brief for Certiorari, at 18, Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 423 U.S. 1051 (1976).

118. Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 365 F. Supp. 18, 23 (D.D.C. 1973).

119. CONGRESSIONAL DIRECTORY 958, 94th Cong., 2d Sess. (1976).

120. Bagdikian, *First Amendment Revisionism*, COLUM. JOURNALISM REV. 39 (May-June 1974).

121. *See* CONGRESSIONAL DIRECTORY 957, 94th Cong., 2d Sess. (1976).

122. To the extent that Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), might suggest by analogy that rule two does not infringe First Amendment rights, the arbitrariness with which the rule in this case has been administered distinguishes *Consumers Union* and suggests the inapplicability of *Lehman*. Pell v. Procunier, 417 U.S. 817 (1974) and Saxbe v. Washington Post Co., 417 U.S. 843 (1974), may be distinguishable on the same grounds.

tional Geographic Society, has been accredited to the gallery.[123] There is no compelling justification for this kind of administration.

Although they are present, the considerations that might counsel against judicial review in press access cases, as discussed above, are not as strong in *Consumers Union*. The court of appeals erred in holding that the case was nonjusticiable because there had been a "textually demonstrable constitutional commitment of the issue to a coordinate political department."[124] It is true that the selective access in *Consumers Union* was governed by a congressional rule made pursuant to the rulemaking power of each house, but this power is an insufficient basis for finding the "commitment of the issue" that would be an absolute bar to suit. When a congressional rule allegedly infringes constitutional rights, a court may review the case because "Congress may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable relation between the mode or method of proceeding established by the rule and the result which is sought to be obtained."[125] Legislative prerogatives would not be seriously impaired by an adjudication of the complaint in *Consumers Union*. Congress has made the initial policy decision to establish certain relatively formal channels of communication—press conferences, press galleries—that are generally open to the press. Once this policy decision has been made, a court may enter to set the limits of legislative discretion in administering those channels. Classification according to content, which bears no substantial relationship to the end sought, is impermissible. For a court to articulate this boundary is not the assumption of a legislative task, but the execution of a judicial one.

The importance of equal access for affiliated journals may outweigh any concern that a decision in favor of *Consumers Union* would open floodgates of litigation challenging other, less reviewable, practices. Affiliated journals serve two important social functions. They contribute to public understanding of government and society by providing detailed analyses of issues from the perspective of particular political or economic groups or technical specialties; the close focus of these journals on particular aspects of national affairs complements the broad reporting of the newspapers and news magazines. Affiliated journals also express the opinions of various interest groups, a necessary task in a society in which citizens are to make

123. CONGRESSIONAL DIRECTORY 957, 94th Cong., 2d Sess. (1976).

124. Baker v. Carr, 369 U.S. 186, 217 (1962), *quoted in* Consumers Union of United States, Inc. v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1347 (D.C. Cir. 1975).

125. United States v. Ballin, 144 U.S. 1, 5 (1892).

their own determination of the truth from the comparison of different "interested" viewpoints. In order to carry out both of these functions, affiliated journals need equal access to government information. To perform their educational tasks effectively, affiliated journals must be able to choose among the primary data rather than rely on the selections that news journals, with different purposes, have made. To perform their expressive function credibly, affiliated journals must have access to government sources; otherwise, both the public and its representatives may correctly dismiss the opinions expressed as uninformed.

The theory that issues of press access to government processes and information should be left to the "tug and pull of political forces"[126] is not precisely applicable to this case. It may be reasonable to leave to political forces the question of what government information is available to the press and public. The Constitution does not clearly protect a certain level of information access, but the need of officials for publicity and response guarantees it. On the other hand, it is not practical to abandon the question of who among the press will have access to political forces. The Constitution does provide standards for treatment of the press in this regard; discrimination according to content of a speech or publication is prohibited. This protection is available because the political process requires the expression of diverse points of view but cannot be relied upon to protect them.

This dilemma is evident in *Consumers Union*. The dispute in *Consumers Union* is between government and the press and between two segments of the press, one of which Congress has deputized. This latter segment is apparently using its power to grant credentials to maintain a "news consensus"—uncontroversial reporting that does not alienate news sources within the government and that reduces competition among reporters on the beat.[127] The political force that excluded journals can exert on the Periodical Correspondents Association or on Congress is minimal. If an affiliated journal is denied access it can do little in response. Appeals by the press to the agents enforcing the rule, to the public, or to government officials are likely to be ineffectual as they were in *Consumers Union*; separately, affiliated journals simply do not have political clout, and it is unlikely that journals with such diverse allegiances would or could band together.

## Conclusion

The extent of government officials' discretion to choose which members of the press will have access to government information, and the wis-

126. See text accompanying notes 100-01 *supra*.

127. L. SIGAL, REPORTERS AND OFFICIALS 53 (1973).

dom of calling upon courts to decide this issue, are problems not susceptible of easy solution. Although judicial inquiry is not absolutely precluded by the speech or debate clause, it is impeded by a number of considerations. Absent a statutory right of access like that provided for documentary information under the Freedom of Information Act,[128] the grounds for asserting any right of access are uncertain. Under current Supreme Court decisions, it is doubtful that the press has rights of access greater than those of the public, but even if it does the question remains how the press shall be defined. First Amendment case law dealing with access to public forums suggests that the government may not define or select members of the press in an arbitrary or discriminatory fashion, but the cases provide no standards for discovering in what instances this right of equal access applies. Finally, judicial intervention might constitute an inappropriate meddling in the political process.

The court in *Consumers Union* might have refrained from adjudicating the case on the ground that it was an inappropriate subject for judicial review, in light of the above considerations. Alternatively, it could have found standards and reasons for adjudicating this case and for granting judgment for the plaintiff. The court of appeals chose neither of these alternatives. It failed to come to grips with the complexity of the equal access issue and thereby established a precedent both unfortunate and dangerous. In dismissing the suit on the ground of legislative immunity under the speech or debate clause, the court fashioned the shield of immunity into a cudgel. The provision, which was intended to encourage congressional discussion and debate, was used to allow Congress to choose who could listen to that debate. The appellate court's holding in regard to the speech or debate clause has broader implications, as well, since it suggests that if Congress were to limit access to its proceedings by members of the public or press on the basis of clearly unconstitutional distinctions, this action would also be beyond judicial review. Finally, the court's decision was doubly unfortunate because it cast a shadow on the developing body of case law guaranteeing protection against discrimination on the basis of content for members of the press who cover state government,[129] and because it overlooked the important role that affiliated journals play in interpreting American government and society. In attempting to protect the right of Congress to free speech and debate, the court of appeals stifled that of the public.

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128. 5 U.S.C.A. § 552 (West Supp. 4, pt. 1, 1976) (amending 5 U.S.C. § 552 (1970 & Supp. V 1975)).

129. Main Road v. Aytch, 522 F.2d 1080 (3d Cir. 1975) (city jail officials may not permit some interviews of prisoners while denying others on the ground of the "sensitivity of the topics to be discussed"; *Pell* and *Washington Post* distinguished because policy

in this case was not applied uniformly and nondiscriminatorily); Westinghouse Broadcasting Co. v. Dukakis, 409 F. Supp. 895 (D. Mass. 1976) (order of the Boston city council excluding plaintiff's radio and television stations from council meetings infringed the stations' constitutional rights); Borreca v. Fasi, 369 F. Supp. 906 (D. Hawaii 1974) (preliminary injunction issued against mayor's exclusion of a particular reporter from his press conferences because the reporter frequently criticized the mayor in his columns); Lewis v. Baxley, 368 F. Supp. 768 (M.D. Ala. 1973) (declaratory judgment and injunction against enforcement of section of state ethics statute that conditioned reporters' admission to galleries, press conferences, and other facilities upon submission of a statement of economic interests); Quad-City Community News Serv., Inc. v. Jebens, 334 F. Supp. 8 (S.D. Iowa 1971) (officials' policy of allowing "established" press to have press passes and access to records, while denying such passes and access to so-called underground press declared unconstitutional and enjoined). *Contra*, Los Angeles Free Press, Inc. v. City of Los Angeles, 9 Cal. App. 3d 448, 88 Cal. Rptr. 605 (1970), *cert. denied*, 401 U.S. 982 (1971) (permissible for city and county officials to deny press pass to plaintiff on the ground that it was a "specialized " journal that did not gather and distribute spot police and fire news).