I. INTRODUCTION

Journalists often say that their professional purpose is "to afflict the comfortable and comfort the afflicted." Government and its many officials have long comprised a target-rich environment of the "comfortable" for investigative reporters on the prowl for misfeasance, malfeasance, nonfeasance, waste, fraud, abuse, and the like. Many a journalism award has been won for reporting that led to the downfall of an elected or appointed public official. This historic and natural tension between the news media and the government has been an important characteristic of our democratic system. Indeed, the First Amendment of the U.S. Constitution codified that characteristic with not only

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1 Bruce D. Collins is the Corporate Vice President and General Counsel of the Cable-Satellite Public Affairs Network ("C-SPAN") and, since 1993, has frequently acted as pro bono counsel to the Executive Committee of Correspondents of the Radio and Television Correspondents Gallery and to the Radio and Television Correspondents Association. The views contained in this essay are based on the author's extensive industry experience.

1 This quotation has been attributed to several people including the humorist Finley Peter Dunne and Baltimore-based writer and editor H.L. Mencken, both of whom used it to describe journalism. The labor activist Mother Jones used it to describe her personal mission, as did First Lady Eleanor Roosevelt to describe her own.


3 See, e.g., Public Service, PULITZER PRIZES, http://commsns.org/14cwk81 (last visited Apr. 13, 2013) (chronicling journalism award winners since 1918 for uncovering public corruption at various levels of government across the nation); see also How CONGRESS WORKS, supra note 2, at 158 (providing examples of "media coverage contribut[ing] to the downfall of several powerful senators and representatives involved in congressional scandals").
a guarantee of freedom "of speech" to the people, in general, but also with a
guarantee of freedom "of the press" to the press, in particular.4

Throughout our history, journalists and government officials have cast wary
eyes upon each other. They are adversaries, even as each depends on the oth-
er—congressmen count on the power of the press to reach the people, and,
conversely, the press depends on senators, congressmen, and their staffs as
sources for their reporting.5 It is a close relationship, but definitely one held at
arms-length—certainly so from the journalists’ perspective.6 While a politician
may not lose credibility or effectiveness by seeking publicity, it is a death knell
for a reporter to be seen as a flak for any one person or institution, much less
for a government official.7

Thus, the very existence of the Executive Committee of the Radio and Tele-
vision Correspondents’ Galleries8 on Capitol Hill is puzzling. It is quite likely
the only place in American journalism where working reporters willingly agree
to serve as official government agents.9 Even as they seek each day “to afflic-
the comfortable” in Congress, the reporters who sit on the Executive Commit-
tee are, legally, a part of Congress. They have exclusive jurisdiction over how,
when, and where their fellow reporters may work on Capitol Hill, and even
who among them are authorized to do so.10 Every decision that they make can
be second-guessed by either the Speaker of the House or the Chairman of the
Senate Committee on Rules.11 For members of the Fourth Estate, it is a highly
unusual arrangement.

This article observes that neither the existence of nor the implications of this
highly unusual arrangement between journalists and Congress has always been
fully understood by the very journalists who participate in it. Some never real-
ized that they were legal agents of Congress and were, in fact, startled to dis-
cover that was the case. Some have assumed theirs was more of an advocacy

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4 U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of
speech or of the press . . .”).
5 HOW CONGRESS WORKS, supra note 2, at 156.
6 DONALD A. RITCHIE, PRESS GALLERY: CONGRESS AND THE WASHINGTON CORRE-
SPONDENTS I (1991) (describing the “symbiotic partnership” of the press and politicians in
Washington); see also Suzanna Nelson, Reporters Fret Over Control of Galleries, ROLL
CALL (June 10, 2004), http://commcnrs.org/1720K17.
8 See RULES OF THE HOUSE OF REPRESENTATIVES R. VI (2013) (adopted pursuant to
H.R. Res. 5, 113th Cong. (2013) (enacted)) [hereinafter HOUSE RULES], available at
http://commcnrs.org/19Zs5fj.
9 See Press Galleries, in S. PUB. 112-12, at 1013-14 (2011) (Official Cong. Directory,
112th Cong.) (providing that the Executive Committee has a duty to report “violation of the
privileges of the galleries” to the Speaker of the House or the Senate Committee on Rules
and Administration).
10 HOUSE RULES, supra note 8, at R. VI; see S. PUB. 112-12, at 1014.
11 HOUSE RULES, supra note 8, at R. VI; see S. PUB. 112-12, at 1014.
role, as official representatives to Congress on behalf of the press. These views have led to both confusion and conflict among the reporters themselves, and with their relationship to Congress. In addition to the varying views that journalists hold of their responsibility as Executive Committee members, their creation of a private association to help them fulfill that responsibility has also been the source of confusion among them, as they have taken actions both within and outside of their congressional mandate. This commentary purports to sort out the journalists’ acts as government agents from their acts as independent reporters, and proposes that journalists organize themselves around those two different and often conflicting roles.

II. ORIGINS OF THE PRESS GALLERIES

The various press gallery organizations in Congress today exist because congressmen were both unable and unwilling to decide who was authorized to have access to the Capitol for the purpose of gathering and reporting news. Early in the nineteenth century, both the House and Senate had set aside space, called a “gallery,” in their respective chambers for reporters. However, the decision to do so was not by any means unanimous. When the new and larger House and Senate chambers opened on the eve of the Civil War, the reporters were assigned larger gallery space outfitted to meet their needs. The demand for space from newspapers around the country exceeded the supply. The right to use those galleries was meted out to journalists by the Vice President, the House Speaker, and the Rules Committees of each body. Nonetheless, by 1877, the practice of lobbyists and other special pleaders posing as credentialed reporters was well known among the public and irksome to genuine journalists who believed that their credibility was undermined by that perception. Attempts to fix the problem stalled because congressmen simply refused to go through a process that would identify and cull the lobbyists from the journalistic ranks, and then eject the lobbyists. Such a process would be fraught, and, even if fairly conducted, would embarrass or enrage too many people of influence.

12 See Nelson, supra note 6.


14 HOW CONGRESS WORKS, supra note 2, at 157.

15 ENCYCLOPEDIA OF THE UNITED STATES CONGRESS 1621 (Simon & Schuster 1995). Until the first press gallery was created, reporters had to find places for themselves in the public galleries.

16 Id. at 1622.
Out of frustration, a group of correspondents decided to take on the problem for themselves. They proposed an accreditation system to Speaker Samuel Randall that gave access to the Capitol only to those reporters who earned their living from daily newspaper journalism and who did not engage in lobbying. The system has remained essentially unchanged, except for the addition of other galleries for the periodical press and for photographers. In 1939, the Senate changed its rule to expand the definition of reporter to include radio reporters. At that time, the Radio Correspondents’ Gallery was formed and later renamed the Radio and Television Correspondents’ Gallery when television reporters were admitted.

III. THE RADIO-TELEVISION GALLERY: ITS ELEMENTS

Understanding the operation of today’s Radio-Television Gallery—and, indeed, the premise of this article—requires an understanding that three separate entities are involved in managing the relationship between reporters and Congress. They include: (i) The Radio-Television Correspondents’ Galleries (“Galleries”); (ii) the Executive Committee of Correspondents (“Committee” or “Executive Committee”); and (iii) the Radio-Television Correspondents’ Association (“Association”). Of these three entities, only the Executive Committee of Correspondents is a legal entity expressly created by Congress.

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18 RITCHIE, supra note 6, at 109-10; see Consumers Union of U.S., Inc. v. Periodical Correspondents’ Ass’n, 515 F.2d 1341, 1343 (D.C. Cir. 1975).
19 See, e.g., HOUSE RULES, supra note 8, at R. VI (providing rules for the several different galleries in the House of Representatives).
20 In 1939, the Senate passed a resolution to amend Rule XXXIV of the Standing Rules of the Senate to extend gallery rights to “bona fide reporters for daily news dissemination through radio, wireless, and similar media of transmission.” See S. Res. 117, 76th Cong., 84 CONG. REC. 3875 (1939) (enacted). The same provision is reflected in Clause 3 of House Rule XXXIV adopted the same year. See H.R. Res. 169, 76th Cong., 84 CONG. REC. 6651 (1939) (enacted).
22 HOUSE RULES, supra note 8, at R. VI(3) (delegating authority only to the Executive Committee of the Radio and Television Correspondents’ Galleries); see also S. PUB. 112-12, at 1013.
A. The Radio-Television Correspondents’ Galleries

The Radio-Television Correspondents’ Galleries is the term used by Congress to describe the collection of accredited radio and television journalists who are allowed to gather and report news from the Capitol and who use the gallery space set aside for them for those purposes. It is not an organization—it is a description. The term also refers to the office spaces located adjacent to and overlooking the Senate and House chambers reserved for the use of the reporters. The Galleries’ “membership” is identical to that of the Association, which means that most people on Capitol Hill, including the reporters and the Congressional staff assigned to the Galleries, make no distinction between them. This perceptual conflation of the Galleries with the Association has contributed to some of the legal confusion discussed here. As of this writing, there are 3,313 journalists accredited to the Radio and Television Correspondents’ Galleries.

B. The Executive Committee of Correspondents of the Radio and Television Correspondents’ Galleries

Congress created the Executive Committee of Correspondents of the Radio and Television Correspondents’ Galleries to manage its interaction with the radio and television journalists. The rules of both the House and Senate are very specific in their delegation of authority to the Committee to administer, on behalf of the Congress, the manner in which radio and television reporters are granted access to the Capitol and the rules they must follow in their reporting. For example, the Senate rules provide that any person seeking admission to the Radio and Television Correspondents Galleries must apply to the Senate’s Committee on Rules and Administration. However, those applications are required to “be authenticated in a manner that shall be satisfactory to the Exec-

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23 A note on usage: The reference to the “Galleries” is made here in the plural, but others speak of the “Gallery” when referring to the group of electronic journalists who work in either or both the House and the Senate. The difference in usage arises because the House and Senate each have a gallery reserved for the electronic press and each body’s rules refer to a single “gallery.” However, when Congress refers to both galleries, it uses the plural. See, e.g., S. PUB. 112-12, at 1013-14.
25 See generally Heaney, supra note 13 (referring to the Radio and Television Correspondents’ Galleries as both a place and an association of reporters).
26 See S. PUB. 112-12, at 1015-41.
27 House Rules, supra note 8, at R. VI.
28 Id.; S. Doc. No. 112-1, at 59-60 (2011); S. PUB. 112-12, at 1013-14.
29 S. PUB. 112-12, at 1013.
utive Committee of the Radio and Television Correspondents Galleries.\textsuperscript{30} The House rules have the same requirement,\textsuperscript{31} and further provide that a portion of the chamber’s gallery be set aside for radio and television reporters, that reporters are to be admitted “under such regulations as the Speaker may prescribe,” and that “[t]he Executive Committee of the Radio and Television Correspondents’ Galleries shall supervise such gallery,”\textsuperscript{32} meaning, administer the admission process.

While the Committee is not a committee of Congress, nor part of the House Speaker’s Office, or the Senate Committee on Rules and Administration, its actions are subject to their authority.\textsuperscript{33} Nor is it a committee of the Association. Congress regards the Committee as a standalone entity, the members of which are drawn from the large group of journalists who have been granted permission to use the galleries in the area of the Capitol reserved for them.\textsuperscript{34}

There are seven members of the Committee who are chosen by election of the members of the Association.\textsuperscript{35} Four members are elected in odd-numbered years; three members are elected in even-numbered years.\textsuperscript{36} Each member serves for two years and may not be a candidate for a succeeding term.\textsuperscript{37} The member receiving the greatest number of committee votes in the annual election serves as the president of the Association in his or her second year.\textsuperscript{38} An unusual aspect of the selection process for this Congressional entity is that it was established in the constitution and bylaws of the Association,\textsuperscript{39} which does not have comparable status. Apparently, once Congress made the decision to create a committee of journalists to decide who among them would be credentialed, it was finished with the task. It did not specify, certainly not in its rules,

\textsuperscript{30} Id. at 1014.

\textsuperscript{31} While language is not the same, the requirement is. House Rule VI Clause 3 states “Reputable reporters and correspondents shall be admitted thereto under such regulations as the Speaker may prescribe. The Executive Committee of the Radio and Television Correspondents’ Galleries shall supervise such gallery, including the designation of its employees, subject to the direction and control of the Speaker.” See S. Pub. 112-12, at 1013. This citation is to the updated version of the original rule adopted in 1939. Subsequent changes were made to reflect the addition of television reporters, to remove gender references, and to reflect an overall recodification of House rules in the 106th Congress.

\textsuperscript{32} HOUSE RULES, supra note 8, at R. VI.

\textsuperscript{33} See S. Pub. 112-12, at 1014.


\textsuperscript{35} See id. (referring to Art. 5 § 1).

\textsuperscript{36} See id.

\textsuperscript{37} See id.

\textsuperscript{38} See id.

\textsuperscript{39} See generally id. This document, styled as a “constitution” of nine articles, also includes a set of bylaws describing the election procedures of the Association.
the means by which the members of the Committee would be chosen. There had to have been an initial Committee that was likely self-selected by the reporters for the major radio and television outlets and then legitimized by Congress in some way, but, over time, the journalists moved to a more democratic method of selecting their leaders by establishing an election process conducted by the Association.

C. Radio-Television Correspondents' Association

Without any Congressional direction, and certainly with no express authority to do so, the independent journalists serving on the Executive Committee created the Radio-Television Correspondents' Association, comprised of the reporters it credentialed to work in the Galleries. The purposes of the Association articulated in its constitution are as follows: "[T]he promotion of the radio and television news gathering fraternity and ... to protect the rights and privileges of radio and television news reporters, and assist in every way possible to maintain the high standards of reporting news by radio, television, wireless and other similar means of transmission." These purposes are laudable, but they have nothing to do with the reasons that Congress created the Executive Committee. Given the traditional tension between the press and the government, Congress would never have sought to promote the "news gathering fraternity," much less "protect [its] rights and privileges" (beyond those protected by the First Amendment) nor strive to "maintain" press standards. Indeed, the only connection between Congress and the stated aims of the Association is the phrase, "radio, television ... and similar means of transmission" taken from congressional rules setting up the Galleries and the Committee. If anything, congressional intent was to distance itself from the day-to-day concerns of the reporters. A superintendent of the Senate gallery made this point clear in a memorandum to incoming members of the Executive Committee when he wrote: "Control of the Galleries was delegated to the Executive Committee to get Congress out of the business of deciding who is qualified to receive credentials."

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40 House Rules, supra note 8, at R. VI (stating the "Executive Committee of the Radio and Television Correspondents' Galleries shall supervise such gallery, including the designation of its employees"); see also Press Galleries, in S. Pub. 112-12, at 1013 (2011) (Official Cong. Directory, 112th Cong.) (stating "[t]he applications required [for accreditation] shall be authenticated in a manner that shall be satisfactory to the Executive Committee of the Radio and Television Correspondents Gallery").
41 See RTCA Constitution, supra note 34 (outlining the election procedures).
42 Id.
43 See, e.g., House Rules, supra note 8, at R. VI.
44 Memorandum from Lawrence J. Janezich, Senate Gallery Superintendent, to Members of the Executive Committee of Correspondents of the Radio and Television Corre-
In creating the Association, the then-incumbent Executive Committee members were acting beyond their Congressional authority. Their creation amounts to a private, independent, unincorporated professional association with no legal connection to Congress. The situation is somewhat muddled by the fact that the Executive Committee relies on the Association as a mechanism through which its own membership is determined. It is further complicated by the fact that the Congressionally-mandated Executive Committee also serves as the leadership of the Association. As a result, when the members of the Executive Committee take an action, it is not always clear whether they are acting within their Congressional mandate or acting as leaders of a private organization in support of the special interests of electronic journalists.

None of the other press galleries in Congress have such a support organization, yet they manage to elect their leaders and manage their affairs satisfactorily. It might well have been the technology and equipment requirements of radio—and especially television—that drove the creation and continuation of the Association. Although Congress provides the electronic journalists office space and phones in the Capitol, it does not provide other infrastructure essential to radio and television. The Association charges its members dues to fund the purchase of equipment such as fiber links between congressional buildings and related equipment. It is the entity through which some of the news organization members assess themselves special fees to construct facilities, which are built and installed privately, then turned over to the Architect of the Cap-

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45 See S. Pub. 112-12, at 969 (granting administrative authority to the Standing or Executive Committees of Correspondents); see also Heaney, supra note 13, at 422 (explaining that “[t]hese committees have jurisdiction over the operation of journalists anywhere on the Capitol grounds”).
46 See Heaney, supra note 13, at 422.
47 See RTCA Constitution, supra note 34.
49 See Heaney, supra note 13, at 422 (noting these competing considerations, necessitating a delicate balance).
50 Janezich Memorandum, supra note 44.
52 How Congress Works, supra note 2, at 157.
53 RTCA Constitution, supra note 34.
In addition, the nature of radio and television journalism, with its bulky equipment—including lights, wires, microphones, cameras, and the like—tended to raise more significant issues of access to congressmen and senators as they moved through the Capitol Building and to press conferences and committee meetings. The Association, with its mission to “protect the rights and privileges of radio and television news reporters,” was viewed as helpful in responding to the resistance that such coverage sometimes encountered.

Although the Executive Committee has the exclusive congressional mandate to grant admission to the galleries, the Association administers part of that credentialing process. The Association, acting in a purely private capacity, also promotes and honors journalistic excellence with awards and internships, and hosts an annual dinner for its members featuring congressional leaders, celebrities and, often, the president, as featured speakers.

IV. JOURNALISTS AS CONGRESSIONAL AGENTS

Under the common law, an agent is one who manifests assent or otherwise consents to act for, and be subject to, the direction or control of another. This principle is applied here, as the journalists serving on the Executive Committee become agents of Congress when they agree to act on its behalf in managing their colleagues on Capitol Hill within the bounds set by the rulemaking entities of both chambers. In other words, they agree to act under its direction and control.

55 RTCA Constitution, supra note 34; see, e.g., Letter From Steve Chaggaris, Chairman, Exec. Comm. of Correspondents, Radio-Television Correspondents’ Galleries, to Rep. David Obey, Chairman, U.S. House of Representatives Comm. on Appropriations (Apr. 23, 2007), available at http://commcns.org/1724t8D (noting an instance in which TV cameras were not allowed in a House-Senate Appropriations conference committee meeting, in which there was no space constraint or any perceivable reason to constrain access to one group of journalists and not others).
57 See, e.g., 2012 Radio and Television Congressional Correspondents Dinner, C-SPAN (June 8, 2012), http://commcns.org/1acPfl; see also Marissa Newhall, Jokes Abound at Radio and Television Correspondents’ Association Dinner, WASH. POST (June 20, 2009), http://commcns.org/15O2Ag8. Each of the last three presidents has attended the RTCA Dinner, including President Obama, who most recently attended the event in 2009.
58 RESTATEMENT (THIRD) OF AGENCY §1.01 (2006).
59 Timothy J. Burger, Official: Press Galleries Are Arms of Congress, ROLL CALL, Dec. 14, 1989 (on file with CommLaw Conspectus) (commenting that the Executive Committee of Correspondents “acts as an arm of Congress”); see also HOUSE RULES, supra note 8, at R. VI (holding the Executive Committee subject to the direction and control of the Speaker of the House of Representatives).
control. The general principles of agency law provide that the acts of an agent, when acting within its authority, are attributable to the principal. Here, the Executive Committee serves as the agent and Congress as the principal. The indices of an agency relationship are all present: The Committee's actions and authority are determined by congressional rules, and Congress provides the Committee with paid staff, office space in the Capitol, and a variety of new, media-related facilities and services. Thus, the Committee is as much a part of Congress as is, for example, the Office of the Doorkeeper, or the Office of the Sergeant-At-Arms.

The symbiotic relationship between the Executive Committee and Congress has not always been fully appreciated by the members of the galleries, including some of those who serve on the Executive Committee. Nonetheless, this misperception is not wholly unreasonable. As of this writing, no other such legal relationship between government and association of independent journalists exists anywhere else in this country. Seasoned reporters covering other governmental beats have not encountered similar situations either at a state house, at a government agency, or even at the White House. There is no journalistic lore or tradition of reporters ceding their independent status to the government officials they cover. Indeed, the opposite is true. From the Zenger trial in old New York to the Watergate scandal in Washington, D.C., Ameri-

60 RESTATEMENT (THIRD) OF AGENCY § 2.03 (2006).
61 HOW CONGRESS WORKS, supra note 2, at 157.
63 See, e.g., Interview with Tina Tate, Dir., House Radio-TV Gallery, in Wash., D.C. (June 28, 2007), available at http://commcns.org/17tE3xb (relaying her experience working with the Executive Committee as former director of the House-Radio TV Gallery and discussing the tension between the Executive Committee and Congress over changes to procedural rules).
64 Cf. CAL. JOINT RULES OF THE SENATE & ASSEMBLY, at R. 32 (2009), available at http://commcns.org/17xY4kw (granting the Capitol Correspondents Association of California authority to recommend correspondents for accreditation by the California legislature but not authority to unilaterally make accreditations).
65 There is a White House Correspondents’ Association, but it is a private, non-profit corporation with tax-exempt status as a charity pursuant to § 501(c)(3) of the Internal Revenue Code. This organization, headquartered in Washington, D.C., has no official connection to the Executive Branch. WHITE HOUSE CORRESPONDENTS’ ASSOCIATION BY-LAWS (2005) [hereinafter WHCA BY-LAWS], available at http://commcns.org/1acQNM.
66 See Anderson, supra note 7, at 453-54 (arguing that journalists “cannot be entirely free from government control,” but should express their independence through “a decision-making process free from the control of government, political parties, or interest groups, or advertisers”).
can journalists armed with their First Amendment rights have traditionally crossed swords with the government, not gotten in bed with it.68

But on Capitol Hill, reporters have agreed to be government agents at least since the Gilded Age.69 Nonetheless, this legal status had no consequences for the reporters for most of the history of the Galleries.70 Reporters have historically perceived their involvement on the Executive Committee more as a benign mechanism to serve their own interests than as an exercise of governmental authority.71 The issue of the Galleries’ relationship to Congress was eventually raised on a rather mundane tax matter in 1989, when a new member of the Periodical Press Gallery’s Executive Committee of Correspondents realized that the Gallery had never filed tax returns for the thousands of dollars it collected in accreditation fees.72 As treasurer for the organization, he objected to fulfilling his duties under what he considered “uncertain legal circumstances.”73 The treasurer’s concern was addressed in a ruling from the House general counsel that the Periodical Gallery Executive Committee “is not a taxable entity and is, therefore, free of any obligation to file tax returns.”74

The more significant issue addressed in the same ruling, however, was the legal status of the Executive Committee.75 The general counsel ruled:

It is the firm and long-held view of the House of Representatives that the Executive Committee of Correspondents acts as an arm of Congress in administering the Periodical Press Gallery and in making decisions on matters such as credentialing. The emigrant printer, who had been charged with seditious libel by the colonial governor, established at trial that defamatory statements are not libelous if ultimately proven to be true).68

68 See U.S. DEP’T OF DEFENSE, PUBLIC AFFAIRS GUIDANCE ON EMBEDDING MEDIA DURING POSSIBLE FUTURE OPERATIONS/DEPLOYMENTS N THE U.S. CENTRAL COMMANDS AREA OF RESPONSIBILITY, at 2.A., 6.A.1-2 (2003), available at http://commcns.org/1504UDN. Even when journalists were “embedded” with U.S. military units during the Gulf War, they did not become agents of the military. Although journalists agree to certain conditions to insure their safety and to protect military strategy and tactics, they are not acting on behalf of the army and are not subject to military command.

69 See CONGRESS WORKS, supra note 2, at 157 (asserting that accredited correspondents have had access to the special press galleries in the House and Senate wings of the Capitol since they were completed in 1857); see also Burger, supra note 59.

70 See Burger, supra note 59 (reporting that despite questions about the press galleries’ legal status, House staff confirmed that the galleries have operated as an “arm of Congress” since 1877 and that gallery board members would receive Congressional support for any board decisions).

71 RITCHIE, supra note 6, at 109.

72 Burger, supra note 59.

73 Id. (responding to the treasurer’s concerns, House Counsel Steve Ross formalized the principal-agent relationship by noting that persons performing board functions “whether on a full-time, part-time, salaried or volunteer basis, are the agents of Congress while performing their delegated functions”).


75 Id.
Committee operates under the auspices of the Rules of the House and performs tasks that in former times were performed by the Members themselves. The ruling also cited Constitutional law as clearly providing that “persons performing such delegated tasks whether on a full-time, part-time, salaried or volunteer basis, are the agents of Congress while performing their delegated functions.”

The text of the ruling indirectly addressed the journalists’ hope that, because they were journalists, the Executive Committee members somehow enjoyed a special status that did not link them quite so tightly to Congress. The ruling described Congress’s creation of the Galleries and the Executive Committee as benefits given the press as a means of serving the “legitimate needs of Gallery members,” and to “insulate the press from political pressure.” It called these benefits “special arrangements made to protect the press’s independence” and not made to “remove the Committee’s action from the Congressional sphere.” In other words, the press was indeed special in Congressional eyes, but not so special that Congress would cede any control over its presence in the Capitol.

Although it was prompted by a tax question, the ruling addressed another concern raised by the journalists—that they might be held personally liable in a lawsuit brought by an applicant who was denied press credentials. The ruling assured them that the Congress would be the defendant in such lawsuits, not them personally, and that Congress would defend their decisions in court. The journalists themselves would not have to pay legal fees, nor would their employers; nor would the Association.

V. JOURNALISTS AS MANAGERS OF CONGRESSIONAL EMPLOYEES

Congress concluded that it was in its own institutional interest to make the reporters comfortable in the Capitol Building by providing them, at no cost, space to work and the necessary office equipment. Congress also assigned staff to work full-time to serve the needs of the reporters in all of the galler-

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76 Id.
77 Id. While this ruling was issued in response to questions raised by the Executive Committee of Correspondents of the Periodical Gallery, it applies with equal force to all of the press galleries in the Capitol, including the Radio and Television Correspondents Gallery and its Executive Committee.
78 Id.
79 Id.
80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
85 HOW CONGRESS WORKS, supra note 2, at 157.
This arrangement, in itself, is not at all unusual. Such arrangements exist throughout state and federal government and the corporate world where press aides devote their time exclusively to dealing with the news media. The remarkable difference between the usual press office staff arrangements elsewhere and those on Capitol Hill is that on Capitol Hill, the staff assigned to deal with the reporters is comprised of paid employees of Congress, but those employees are selected and managed by the reporters in each of the galleries.

Upon the creation of the Radio Correspondents Gallery in 1939, the House adopted Clause 3 of Rule XXXIV. Clause 3 provided, in part, that “the supervision of such gallery, including the designation of its employees, shall be vested in the standing committee of radio reporters, subject to the direction and control of the Speaker.” While the Senate’s rules are silent regarding the delegation of authority over the management of its Gallery staff, the actual practice in the Senate Gallery was to mimic the House side on this point. It is a remarkable delegation of authority and, it would seem, further evidence of the extent to which Congress desired to stay out of the day-to-day affairs of the press.

For almost all of its history, the Executive Committee seemed to deal satisfactorily with this unusual arrangement. While the Senate Sergeant-At-Arms (“SAA”) officially employed the Senate gallery staff, and the Office of the Speaker officially employed the House gallery staff, both ultimately took their

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87 How Congress Works, supra note 2, at 156.
88 H.R. Res. 169, 76th Cong., 84 Cong. Rec. 6651 (1939) (enacted). The House Rules have since been re-codified. In 1939, the Senate passed S. Res. 117, which amended Rule XXXIV of the Standing Rules of the Senate to extend gallery rights to “bona fide reporters for daily news dissemination through radio, wireless, and similar media of transmission.” 84 Cong. Rec. 3875 (1939). The same provision was reflected in Clause 3 of House Rule XXXIV adopted the same year.
89 H.R. Res. 169, 76th Cong. (enacted). The rule survives largely unchanged today. See House Rules, supra note 8, at R. VI (“The Executive Committee of the Radio and Television Correspondents’ Galleries shall supervise such gallery, including the designation of its employees, subject to the direction and control of the Speaker.”).
91 See U.S. Senate Radio-Television Gallery, http://commcns.org/19bgRDk (last visited Apr. 13, 2013) (“Under Senate Rules, the Senate Radio-Television Gallery, like the other Senate and House media galleries, is under the control of an Executive Committee of correspondents.”).
direction from the Executive Committee.\textsuperscript{93} When Executive Committee chairman held office for multiple years in a row, they tended to work closely with the gallery staff director—then referred to as the superintendent—seeking and receiving guidance on ordinary management issues.\textsuperscript{94} Later, when Executive Committee chairmen began serving for only one year, they tended to pay less attention to managing the staff.\textsuperscript{95} At all times, however, the director was the only employee who was perceived as truly managed by the journalists. To the extent that the Executive Committee understood and accepted their authority to be personnel managers, it was usually applied only to the director.

In light of the fact that Executive Committee chairmen were first and foremost journalists who had bosses of their own and with a primary responsibility to report the news on a daily basis, it is no surprise that they did not embrace their managerial responsibilities. As a general rule, they had no training for the job, they had no particular interest in it, and there did not appear to be any negative consequences for them for not abiding by these responsibilities—certainly not from their employers.\textsuperscript{96} Thus, the staff directors were left unsupervised to manage their own staff with a free hand. Their Congressional employers—the SAA and the Speaker's Office—left them alone both because the Rules and tradition ceded that responsibility to the Executive Committee, and because the political types who populated those offices were not inclined to be closely associated with the press.\textsuperscript{97} In addition, some of the political people took an us-versus-them attitude toward their fellow employees the gallery directors.\textsuperscript{98} The directors were viewed as suspect for their association with the news media. They were betwixt and between congressional staffers at large because the gallery directors and staff viewed themselves as working for the

\textsuperscript{93} See \textsc{House Rules}, supra note 8, at R. VI.

\textsuperscript{94} See Halcomb v. Office of U.S. Senate Sergeant at Arms, No. 03-SN-29, at 4 (Office Cong. Compliance Oct. 14, 2004) (hearing officer op.). At the initiation of Executive Committee chairman Brian Lockman, the superintendent title was retired in the early nineties in favor of the title director. The change was made with the approval of Congress and was applied to all the press galleries.

\textsuperscript{95} Prior to 1977, the Executive Committee chairmanship was held for multiple years at a time by a single reporter, usually from one of the major news outlets, rather than from a smaller or independent outlet. That year, the selection system, including terms of office, was changed.

\textsuperscript{96} \textsc{RTCA Constitution}, supra note 34 (providing for two-year terms for Executive Committee members and that "the candidate who receives the highest number of votes at the annual election shall become president of the Association during the second year of his term").

\textsuperscript{97} \textsc{Senate Official, Journalists Hammer out Gallery Chief Arrangements}, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Aug. 8, 2002), http://commcns.org/17271G1 (discussing journalists efforts to maintain some hiring authority—despite federal employment law—because of "longstanding tradition").

\textsuperscript{98} See \textit{id.}; see also Heaney, supra note 13, at 423.

\textsuperscript{99} See \textsc{Reporters Committee}, supra note 97.
press—and the press felt the same. Thus, they were viewed and treated as outliers by their actual congressional employers.

As a result, the gallery staffs were often managed loosely, if at all, and, as practiced, with little consistency. There were no formal performance evaluations, no standard pay scales, no formal disciplinary system, no standard vacation or sick policy. With much flexibility and little accountability, the respective House and Senate gallery directors made their own ways on these issues. Notwithstanding the directors’ efforts to be fair, it was inevitable that, over time, disparities in policies and treatment of the staff among the several press galleries emerged, not only between the House and Senate Radio and Television Correspondents’ Galleries. With no mechanism to address those disparities, they persisted. Still, the system, which was characterized at its roots by a staff with loyalties divided between its congressional employers and its news media managers, seemed to work. Actual disputes between the Executive Committee and either the SAA or the Speaker’s Office regarding the employees assigned to the Gallery simply did not arise.

Although the Executive Committee members did not always exercise the supervisory authority over the Gallery staff given them by Congress, they understood that they had it. The chairmen in particular were mindful of their authority because they were in frequent contact with the Gallery directors who, absent the SAA oversight in their day-to-day work, viewed the chairmen as their most direct supervisors. Even though the chairmen knew they had hiring, firing, and disciplinary authority over the Gallery staff, they rarely exercised it, preferring instead to leave those matters to the directors who they con-

100 Heaney, supra note 13, at 423.
102 See id. at 7 (discussing supervisors’ discretion in disciplinary policies). Although this approach to personnel management was rather casual, it was not especially unusual on Capitol Hill, particularly for the personal staffs of Senators and Congressmen.
103 See id.
104 See Press Galleries, in S. Pub. 112-12, at 1013-14 (2011) (Official Cong. Directory, 112th Cong.) (see Rule 6 explaining that oversight of the gallery is designated to the Executive Committee, thereby not enabling an appropriate forum for grievance procedures).
105 See Heaney, supra note 13, at 423.
106 My thanks to Lawrence J. Janezich for his contribution to this description of the management of the Gallery. He served on the Gallery staff from 1970 to 2005, the last twelve years as its director. Telephone Interviews with Lawrence J. Janezich, Former Director, U.S. Senate Radio-Television Correspondents’ Gallery (Jan. 2013).
107 See HOUSE RULES, supra note 8, at R. VI.
108 See Kelly McCormack, Olga’s Gallery Job Makes Her Come Back Every Day for More, THE HILL (June 14, 2007, 01:38 PM), http://commcns.org/1eSQuL2 (discussing a gallery staff hiring interview with ABC’s Charlie Gibson, a former Chairman of the House RTC Gallery Executive Committee).
ceded were in a better position to make more informed decisions about Gallery employees. Although there is no memory of any Gallery director being fired, the chairmen and their fellow Executive Committee members had no doubt of their authority should the need arise. Similarly, they believed that they had the right to select and hire the director, and they did, albeit with the approval of the SAA and the Speakers' Office.

VI. THE CONGRESSIONAL ACCOUNTABILITY ACT CHANGES ROLES

In the 1990's, when the Republicans gained power in the House after forty years of Democratic control, they sought, among other things, to be more businesslike in running the institution. An important result of that broad mandate was to give many congressional employees the same legal employment rights enjoyed by workers throughout the government and the private sector. In 1995, the Congressional Accountability Act ("CAA") was enacted. It made portions of eleven civil rights, labor, and workplace laws applicable to Congress and, for the first time, congressional employees enjoyed specific employment rights and a forum to assert those rights.

However, the passage of the CAA appears to have preempted the Executive Committee's specific supervisory authority in the House and its traditional

109 See id. (noting comments from current director Olga Ramirez Kornacki on how she is "now responsible for everyone in this office . . . for not only [gallery] staff but also the reporters that work here.").
111 My thanks to Brian Lockman for his insights into the attitude of the Executive Committee toward its management authority. Representing C-SPAN, he served on the Executive Committee and as Chairman in 1993-94. Telephone Interview with Brian Lockman, President & Chief Exec. Officer, Pa. Cable Network (Jan. 10, 2013); see also REPORTERS COMMITTEE, supra note 97.
112 E.g., Andrew Glass, Congress Runs into 'Republican Revolution' Nov. 8, 1994, POLITICO (Nov. 8, 2007, 06:00 AM), http://commcns.org/17t15KI.
This bill, which applies to the congressional employees the basic protections against discrimination, unsafe working conditions and unfair labor practices which are guaranteed to other American workers, is a long overdue reform. For many decades, Congress routinely exempted itself from laws which it passed to apply to the rest of America—a double standard which increased the contempt which most citizens have justifiably held for this institution. Capitol Hill was the last bastion of arbitrary bosses, long after the struggles of working men and women gained basic human and economic rights for workers in most of our Nation.
Id. (quoting Rep. Bernard Sanders).
115 Id. §§ 1301-1438.
supervisory authority in the Senate. Nonetheless, it also appears this was accomplished without regard to the unique status of the Executive Committee on Capitol Hill and its delegated authority. It is even likely, given the separation between the press galleries and the rest of Congress, that the CAA was passed without its drafters being aware of the statute’s effect on the authority of the Executive Committee. In a 1998 letter to the SAA regarding the legal status of press gallery employees on the Senate side, the chairman of the Senate Committee on Rules and Administration instructed him that his office “is the employing office for all work-related personnel matters, including application of the [CAA].” The letter allows that the chairman “should seek to meet the needs of the Gallery Chairs and their Directors,” but also makes clear that he is “responsible for the hiring and firing of [SAA] employees.” On the face of it, this letter asserts that although the journalists might be given some input in such decisions, the Executive Committee has no authority regarding the hiring, firing, or supervision of gallery employees, and, because it makes only an incidental reference to the three year old CAA, it implies that the Executive Committee never had such authority.

Additional evidence that the Executive Committee’s authority was overlooked in the drafting of the CAA is found in a memorandum from congressional lawyers describing how the Act applied to the Gallery employees. It provides a legal analysis of the CAA’s language that explains why Gallery employees are covered by its provisions. It also cites the Senate’s pre-CAA rules as giving the SAA jurisdiction over the gallery employees, but again, it does so without any suggestion that, until that time, the SAA had even allowed the Executive Committee to manage those employees.

See Halcomb v. Office of U.S. Senate Sergeant at Arms, No. 03-SN-29, at 7 (Office Cong. Compliance Oct. 14, 2004) (hearing officer op.) (“The Executive Committee has no authority to appoint, discharge or manage the Gallery staff.”).


Cf., e.g., 141 Cong. Rec. 649-666 (1995) (making no mention of the Press Galleries during debate in the Senate where the legislation was introduced).


Memorandum from Jean Manning & Erica A. Watkins, Office of Senate Chief Counsel for Employment, to Keith Kennedy, Deputy Sergeant at Arms, U.S. Senate (May 12, 2003) (on file with author) (regarding “Liability Under the Congressional Accountability Act with Regard to Senate Radio and Television Gallery Employees”). The memorandum’s instructions applied to all of the Senate press galleries, not just to the Radio Television Correspondents’ Gallery.
A logical conclusion can be drawn from this history: Congressional leadership now believes that, if the House or the Senate gallery committees ever had a role in the supervision of the congressional employees assigned to them, they now have none. However, it is certainly possible that this was not an intended result. For instance, in enacting the CAA, Congress did not intend to fundamentally change the unique mechanism it established as far back as 1884 to permit a committee of independent journalists to act as its agent in the management of press access to Congress.\footnote{Indeed, the House rule still contains language implying the Executive Committee has some means of control. See \textit{House Rules}, \textit{supra} note 8, at R. VI(3) ("The Executive Committee of the Radio and Television Correspondents' Galleries shall supervise such gallery, including the designation of its employees, subject to the direction and control of the Speaker.").} Regardless of intent, when the CAA became law, the Executive Committee was stripped of a significant portion of its authority.\footnote{Nelson, \textit{supra} note 6 (discussing how passage of the Congressional Accountability Act prompted the Senate Sergeant-at-Arms to wield its authority over the Executive Committee's employment decision).} The ensuing difficulties arose because nobody told them.\footnote{\textit{Id.} (noting that the Executive Committee was not confronted about the ramifications of 1995 Congressional Accountability Act until 2004).} Or, as may have been just as likely, the journalists were not listening.

\section{VII. A LAWSUIT REVEALS MUCH}

On July 9, 2003, a female Senate gallery employee sued the Executive Committee, and later the Office of the Senate Sergeant-At-Arms, under the CAA for discrimination and retaliation related to the termination of her employment.\footnote{See Halcomb v. Ass'n & Executive Bd. of the Comm. of Correspondents Radio & Television Press Gallery of the U.S. Senate, No. 03-SN-45, 2005 WL 6236946, at *2-3 (Office Cong. Compliance Apr. 20, 2005). Under the CAA, Senate employees are to be free from any discrimination based on race or gender. 2 U.S.C. §§ 1301(3)(B), 1311(a)(1) (2006). A separate provision prohibits acts of reprisal or retaliation by “employing offices” in the Legislative Branch that are subject to the CAA. 2 U.S.C. § 1317(a) (2006).} Prior to the Act, such claims were cognizable only under the now-repealed Government Employee Rights Act of 1991 ("GERA"), which provided an administrative means of redress for aggrieved Senate employees.\footnote{See Government Employee Rights Act of 1991 (GERA), 2 U.S.C. § 1202 (1994) (transferred to 42 U.S.C. § 2000e-16) (requiring that “[a]ll personnel actions affecting employees of the Senate . . . be . . . free from any discrimination based on . . . race, color, religion, sex . . . national origin[.] . . . age[,] . . . handicap or disability”). GERA further established a right of review by the United States Court of Appeals for the Federal Circuit. 2 U.S.C. § 1209(a) (repealed 1995).} This lawsuit was the first of its kind for any of the press galleries.

The reaction of the journalists to the termination that led to the retaliation
claim was immediate and strong.\textsuperscript{131} In a letter to SAA William Pickle, the chairman of the Executive Committee registered his objection "in the strongest possible terms."\textsuperscript{132} He described the employee’s termination as "a surprise," having been done without “consultation from the Committee."\textsuperscript{133} Citing Senate Rules that call for “the Executive Committee to play a role in the supervision of the Radio-Television Gallery [sic]” he noted that the “Executive Committee played no role whatsoever” in the termination which was at odds with the “collaborative relationship” between the SAA and the Executive Committee provided for in the rules.\textsuperscript{134}

A measure of panic set in when the ensuing lawsuit named the Executive Committee as a defendant.\textsuperscript{135} The journalist members feared that they could be held personally liable for the alleged sex and racial discrimination and whatever damages might be awarded. No doubt they were uncertain exactly what that meant and wondered whether their employers would be brought into the fray, perhaps to pay for a defense and an unknown amount of damages. Some were uncertain whether their employers would, or could, take on the financial and legal burden caused by their employees’ voluntary service on the Executive Committee. They knew enough about litigation to know that the discovery process could subject them to depositions about an employment decision from which they had been excluded, and that even a victory could entail large costs. Thus, their reaction was to get out of the lawsuit as quickly as possible, and they voted to retain private outside counsel to represent them.\textsuperscript{136}

The Executive Committee made three arguments in seeking dismissal of the claims against them. First, the Board asserted that the Executive Committee

\textsuperscript{131} Nelson, supra note 6.


\textsuperscript{133} Id.

\textsuperscript{134} This statement revealed the Executive Committee’s misperception. The Senate Rules do not expressly grant the Executive Committee such authority. See Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, S. Doc. No. 112-1, at 59-60 (2011) (R. XXXIII).

\textsuperscript{135} The Executive Committee was identified variously by the complainant as “Association and Executive Board of the Committee of Correspondents Radio and Television Gallery of the U.S. Senate,” and “Radio and Television Correspondents’ Association; Executive Committee of the Radio-Television Galleries.” The Senate Sergeant-At-Arms was later named as a defendant in a separate complaint. The two complaints were later joined. See Halcomb v. Ass’n & Executive Bd. of the Comm. of Correspondents Radio & Television Press Gallery of the U.S. Senate, No. 03-SN-45, at 1 (Office Cong. Compliance Apr. 20, 2005).

had no legal role in the management of the plaintiff. Second, it argued that the Executive Committee had no role in the decision to terminate the plaintiff, nor the opportunity to participate in mediation mandated by the CAA. Third, the Executive Committee claimed it is not an entity of the Congress and therefore cannot be associated with the SAA’s employment decisions regarding the plaintiff. The lawsuit was ultimately dismissed without the Executive Committee being severed from it, and without any ruling on its status as an entity of Congress or on its role in the management of gallery staff. Regardless, the Executive Committee was relieved. It then voted to pay a significant legal fee out of Association funds. A few observations come to mind about this series of events, the most important being that the Executive Committee need not have done anything. Had the members fully appreciated that they fell under the umbrella of Congress, they might not have panicked as they did. Despite their disgruntlement over the SAA’s unilateral decision to fire one of the employees assigned to them, they should have put that issue aside and let the Senate act as their counsel. Had they done this, they would not have feared personal liability, employer involvement, or the burden of defense costs. Given the particular facts of the lawsuit—notably, that the Executive Committee had no role in the decision to

139 The hearing officer never ruled on this claim. Instead, the hearing officer dismissed the case against the Executive Committee on jurisdictional grounds. See id. (noting that the Office of Compliance is limited in its jurisdiction to specified hiring offices and that the Executive Board “is not among the offices identified in the [Congressional Accountability] Act as employing offices”).
140 Halcomb v. Ass’n & Executive Bd. of the Comm. of Correspondents Radio & Television Press Gallery of the U.S. Senate, No. 03-SN-45, 2005 WL 6236946, at *2-3 (Office Cong. Compliance Apr. 20, 2005). Ultimately, the Executive Committee and Association failed to avoid the burden of litigation as the Halcomb v. Sergeant at Arms case went forward. At least six of its members testified during the seven day hearing on the merits. See id. at *3. The case was not dismissed until nearly two years after its filing. See Halcomb v. Office of the U.S. Senate Sergeant At Arms, No. 03-SN-29, 2005 WL 6236945, at *1 (Office of Compliance Mar. 18, 2005) (affirming the Hearing Officer’s determination that Complainant failed to establish CAA liability for discrimination or retaliatory termination).
141 On appeal, the Congressional Accountability Office Board of Directors vacated the Hearing Officer’s dismissal and remanded the case “to permit the Complainant an opportunity to prove her claim that [the Executive Committee] constitutes an employing office” under the CAA. Shortly thereafter, Complainant decided not to proceed with the matter. See Halcomb, 2005 WL 6236946, at *3.
142 My recollection is that as much as $50,000 in Association funds was used to pay the legal costs of the Executive Committee’s defense.
143 See supra Part IV.
fire the plaintiff—they would not likely have been subjected to the travails of discovery.\textsuperscript{144}

Inexplicably, the Committee members retained outside counsel even after they had been advised by the SAA that they need not defend themselves if the termination resulted in a lawsuit. The advice was certainly received by the Committee because then-chairman Joe Johns alluded to it in his initial letter of complaint to the SAA: “You also included . . . a legal opinion supporting your view that the Office of the Senate Sergeant at Arms is the sole entity that can be sued for violations of the Congressional Accountability Act.”\textsuperscript{146} Instead of taking comfort in that authoritative advice from its congressional overseer, the Committee saw the lawsuit as a threat to its supervisory authority over Gallery staff.\textsuperscript{147} The chairman responded to the SAA, “The Executive Committee is not prepared at this time to cede its responsibilities relating to supervision of the Gallery.”\textsuperscript{148} From this exchange, it appears the Committee held its supervisory authority in high enough regard to pick a fight with the SAA over it. Their pride also prevented them from understanding the SAA’s role in their legal defense should litigation arise.

The arguments made by the Executive Committee’s private counsel ultimately had no effect on the lawsuit’s outcome as the Complainant “voluntarily relinquished” her claim.\textsuperscript{149} However, by arguing to a congressional entity that the Committee was not an entity of Congress, they set an unfortunate—though not likely a legally significant—precedent that does not serve the Committee’s long-term interest.\textsuperscript{150} The Executive Committee is, in fact, an entity of the Congress, and the journalists serving on it should not want it to be any other way.

\textsuperscript{144} Halcomb v. Office of U.S. Senate Sergeant at Arms, No. 03-SN-29, at 5 (Office Cong. Compliance Oct. 14, 2004) (hearing officer op.).

\textsuperscript{145} See Halcomb, 2005 WL 6236946, at *3 (“We have not reached any conclusion as to whether the Respondent could constitute an employing office under the Act. We hold only that the Hearing Officer should permit limited discovery on the issue.”).

\textsuperscript{146} Johns Letter, supra note 132. Specifically, the legal opinion enclosed in the SAA’s letter stated that “the SAA is the employing office of the Radio and Television Gallery employees under the CAA and would be held liable if those employees’ CAA rights were violated.” Id.; see Congressional Accountability Act, 2 U.S.C. § 1301(9) (2006) (defining “employing office[s]” covered by the act to include enumerated offices such as the Capitol Police Board, the Congressional Budget Office, and the Office of the Architect of the Capitol, in addition to “any such other office headed by a person with final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate”) (emphasis added); see also 2 U.S.C. §§ 1405(a), 1408(b) (2006).

\textsuperscript{147} Johns Letter, supra note 132.

\textsuperscript{148} Id.

\textsuperscript{149} See Halcomb, 2005 WL 6236946, at *3.

so long as they are doing congressional bidding. The arguments made on the Committee's behalf also highlighted the extent to which the journalists serving on it had no real sense of their status as congressional agents or of its significance to them collectively and to each of them personally.

Perhaps because this was the first such case to involve any of the press galleries, the SAA also stumbled in handling it. Once the Executive Committee had been named as a defendant along with the SAA, the latter should have promptly informed the Executive Committee that it need not take any independent action and that the SAA would conduct the defense because, as a legal matter the Executive Committee was not liable under the CAA, and as a congressional entity it would be defended for any actions it took within its delegated authority. The SAA did not step in here as it should have. Its failure may have been only a matter of timing because the Executive Committee was named initially as the sole defendant in the action and acted so quickly in hiring outside counsel that the SAA may not have had time to act. Also, the complete lack of communication between the SAA and the Executive Committee from the start of the action regarding the effect of the CAA on the Executive Committee's authority to manage Gallery staff put the parties at opposite poles when the lawsuit forced each of them to act. Rancor could only ensue after those early moments when the SAA used its authority to dismiss the plaintiff and the Executive Committee objected on the grounds its own authority had been traduced. This result may have been inevitable because the arms-length relationship between the Executive Committee and the SAA had remained unchanged even after the enactment of the CAA a few years prior. Although the several press gallery directors had been briefed on the Act and had been receiving management training and guidance from a newly established human resources department for Capitol Hill employees, this fundamental shift in the supervision of press gallery staff was clearly not fully understood by the

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151 See House Rules, supra note 8, at R. VI(2); see also Rules for Electronic Media Coverage of Congress, U.S. House of Representatives Radio-Television Correspondents' Gallery, http://comcmns.org/18wteYt (last visited Apr. 13, 2013) ("The Radio-TV Correspondents Galleries were created by the Congress to act on its behalf to facilitate electronic members of the electronic media covering news events on Capitol Hill").

152 Nelson, supra note 6 ("[SAA Bill Pickle] acknowledged that the relationship between the Senate and the media galleries is an awkward one, at best. 'It's kind of a screwy deal.'").

153 Cf. Moore v. Capitol Guide Bd., 982 F. Supp. 35, 40 (D.D.C. 1997) (reasoning that sub-offices of enumerated entities subject to the CAA are not employing offices covered by the act and that the proper plaintiff is the controlling office).

154 The SAA was added as a defendant approximately five months after the suit was filed against the Executive Committee. See Halcomb, 2005 WL 6236946, at *1-2 (explaining the first complaint was filed July 9, 2003, and the second on Dec. 18, 2003).

155 I was involved in phone calls with the Executive Committee at this point in the conflict and can attest that warm feelings between the committee and the SAA were lacking.
journalists who served on the Executive Committee.\textsuperscript{156} They continued to believe that they retained supervisory authority even if they rarely exercised it, and even as they were getting hints that it no longer existed.\textsuperscript{157}

Finally, the unclear legal relationships and the tangled lines of authority revealed by the lawsuit highlighted the complications created by the Association's leadership structure. First, Association funds derived from member dues and fees were used to pay the legal expenses of a Congressional entity.\textsuperscript{158} It is certainly unusual when a nongovernmental organization, which the Association is, is asked to pay the expenses of the government. The overlapping governance of the separate entities explains the decision, but it also raises governance issues for the private, unincorporated Association. Arguably, the journalists on the Executive Committee failed to exercise their fiduciary duties on behalf of the members when they opted to tap the Association's treasury to pay the lawyers. An Association member could credibly argue that the expenditure of Association funds was unnecessary and that, given its large amount, it harmed the Association's ability to fund news media infrastructure in the Capitol, to sponsor awards and internships, and to conduct other activities benefiting members.\textsuperscript{159} The committee members may have thought that they were acting to "protect the rights and privileges of radio and television news reporters," as called for in the Association's constitution,\textsuperscript{160} but they did so clumsily and caused unnecessary expense. Second, the overlapping governance of the Association with the Executive Committee makes it impossible to discern when the Executive Committee is exercising its delegated authority from Congress and when it is acting in the interests of its radio and television reporter Association members.\textsuperscript{161} If anything is clear from the discussion thus far, it is that the purpose of the Executive Committee is not the same as—and can often be at odds with—the purpose of the Association.\textsuperscript{162} Yet, the same leadership group governs both entities, often without regard to the fundamental differences between them.\textsuperscript{163}

\textsuperscript{156} Janezich Interviews, \textit{supra} note 106.
\textsuperscript{157} \textit{Id}.
\textsuperscript{158} \textit{Cf. RTCA Constitution, supra} note 34 (art. 4).
\textsuperscript{159} \textit{But see} Levant v. Whitley, 755 A.2d 1036, 1043 (D.C. 2000) ("Courts ordinarily will not interfere with the management and internal affairs of a voluntary association.").
\textsuperscript{160} \textit{RTCA Constitution, supra} note 34.
\textsuperscript{161} \textit{See, e.g.,} Heaney, \textit{supra} note 13, at 422-23 (discussing three competing considerations of Executive Committee members: Protecting the prerogatives of Congress, maintaining journalistic standards, and maintaining freedom of the press).
\textsuperscript{162} The Association is a nongovernmental organization with the aim "to protect the rights and privileges of radio and television news reporters." \textit{RTCA Constitution, supra} note 34. The Executive Committee, on the other hand, is a governmental organization, "subject to the direction and control of the Speaker," and may have conflicting interests. \textit{House Rules, supra} note 8, at R. VI.
\textsuperscript{163} The Association is governed by the Executive Committee, which in turn is governed
The lawsuit marked a turning point in the Executive Committee’s perception of its authority over the Gallery staff. On the Senate side, after a long history of leaving the staff alone, the SAA asserted its authority to supervise them under the CAA without the complication of an existing Senate rule stating otherwise. As a legal matter, the CAA applies with equal force to the staff of the House gallery, and because the rules of the House of Representatives grant express supervisory authority to the Executive Committee, the Committee is therefore subject to the CAA. The journalists, having been confronted directly with the legal consequences of what having and exercising such authority could lead to, have gladly shied away from pursuing their earlier claims of authority. As a practical matter, the authority given to the Committee in the House Rules—and the CAA responsibilities that come with it—will likely remain a formality because the journalists are not likely to assert their supervisory authority in this area again. If the Committee wants to avoid CAA liabilities, it should ask the House to amend its rules and remove the current supervisory function bestowed upon the unwilling Committee.

VIII. ISSUING CREDENTIALS WITHOUT RISK

The Executive Committee owes its very existence to Congress’s unwillingness to make decisions on an individual basis about who may and who may not by Congress. Arguably, through that relationship, Congress governs the Association, as well. Compare RTCA Constitution, supra note 34 (providing for officers to govern the Association) with HOUSE RULES, supra note 8, at R. VI(3) (“The Executive Committee of the Radio and Television Correspondents’ Galleries shall supervise such gallery, including the designation of its employees, subject to the direction and control of the Speaker.”) (emphasis added).


Compare HOUSE RULES, supra note 8, at R. VI(3) (“The Executive Committee of the Radio and Television Correspondents’ Galleries shall supervise such gallery, including the designation of its employees . . . .”), with 2 U.S.C. §§ 1301-1438 (2006) (requiring “employing offices” defined as “any other office headed by a person with the final authority to . . . hire [or] discharge . . . an employee of the House of Representatives or the Senate” to abide by certain workplace protections and dispute resolution processes).


Arguably, the Committee does not want to deal with the costs and potential liabilities of another Halcomb-like legal dispute. However, this formality raises significant liability issues for the Committee.

The interesting question is if the Committee is not exercising its supervisory authority in the House, can it still be liable for CAA violations? If so, would the House of Representatives provide for its defense?
be allowed in the Capitol to provide news coverage. By creating the various standing committees of correspondents, Congress achieved two goals for itself: (1) It avoided the chore of making individual decisions about who in the press gets a credential, and (2) it allowed the press a measure of independence by allowing it to make those decisions on its own and to apply its own standards in doing so. In a purely legal sense, however, Congress gave up nothing because all actions taken by the press committees are subject to congressional authority. As a practical matter, the system has worked well for nearly 150 years with few challenges.

The rules of admission to the Gallery are expressed partly in the negative. For example, admission is granted only to individuals (as opposed to organizations, such as C-SPAN or the Associated Press) who do not engage in lobbying Congress or any of the executive agencies, who are not employed by any government agency or foreign government, and who do not derive more than half their earned income from the gathering or reporting of news. The more positive expression of the rules directs the Executive Committee to limit Gallery members to "bona fide news gatherers and/or reporters of reputable standing in their business who represent radio stations, television stations, systems, or news-gathering agencies engaged primarily in serving radio stations, television stations, or systems." The vast increase in news, information technologies, and distribution platforms in recent years has resulted in Gallery admission applications from entities that do not fit neatly into these rules. For example, is a non-broadcast Internet based audio service the same thing as a radio broadcast station? Should a news-based website be treated as a print outlet, albeit on a screen, or as a television outlet? The several galleries are making their way through these questions and are aware that these new players in the news media landscape often have considerable resources to challenge denials of access to the Capitol. The Committee is also aware, however, that it enjoys a powerful legal buffer

169 See Ritchie, supra note 6, at 109 ("Since Congress had been unable to bring itself to eject lobbyists from the press galleries, the correspondents proposed to take on the job themselves.").
170 See House Rules, supra note 8, at R. VI.
171 The House of Representatives adopted the foundation of the current accreditation system in 1879, the Senate in 1884. Ritchie, supra note 6, at 109-110.
172 See, e.g., Press Galleries, in S. Pub. 112-12, at 1013-14 (2011) (Official Cong. Directory, 112th Cong.) ("Applicants shall further declare that they are not engaged in the prosecution of claims or the promotion of legislation pending before Congress . . . .").
173 Id. at 1013-14.
174 Id. at 1014.
175 See, e.g., Heaney, supra note 13, at 422-24 (discussing problems posed by new technologies and admitting new-media reporters into the congressional press galleries).
against such challenges to their credentialing decisions.\textsuperscript{176} That buffer is the "Speech or Debate Clause" of the Constitution.\textsuperscript{177} Even a First Amendment challenge to the denial of credentials—usually a powerful argument for the press—would likely be rejected by courts as nonjusticiable due to Congress' immunity from liability in matters involving its own proceedings, \textit{i.e.}, its speeches and debates.\textsuperscript{178} There is legal clarity on this point because it was exhaustively litigated in \textit{Consumers Union v. Periodical Correspondents' Ass'n}.\textsuperscript{179} The case arose in 1972 when the Washington editor of \textit{Consumer Reports} magazine applied for credentials to the periodical gallery.\textsuperscript{180} The Periodical Association Executive Committee rejected the application because the magazine was deemed too closely connected to Consumers Union, an advocacy group committed to furthering the interests of consumers, and therefore did not satisfy the accreditation requirements.\textsuperscript{181} After failed appeals to the Speaker of the House and the Senate Rules Committee, the magazine sued the Periodical Association Executive Committee ("PAEC") in federal court on First and Fifth Amendment grounds and won.\textsuperscript{182} However, on appeal, the D.C.

\textsuperscript{176} See Exxon Corp. v. F.T.C., 589 F.2d 582, 590 (D.C. Cir. 1978) (reasoning that the Judiciary should not "interfere with the internal procedures of Congress"); see also Rebecca M. Kysar, \textit{Listening to Congress: Earmark Rules and Statutory Interpretation}, 94 \textit{CORNELL L. REV.} 519, 557-60 (2009) (highlighting the D.C. Circuit's repeated reluctance to review congressional rules, affording substantial deference to the Legislature).

\textsuperscript{177} U.S. CONST. art. I, § 6, cl. 1 ("[Senators and Representatives] shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.").

\textsuperscript{178} See United States v. Brewster, 408 U.S. 501, 525 (1972) ("It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts that occur in the regular course of the legislative process."); Eastland v. U.S. Servicemen's Fund, 421 U.S. 491, 506-517 (1975) (refusing to distinguish between the members of a congressional subcommittee and the subcommittee's counsel when the latter's actions were "within the sphere of legitimate legislative activity").

\textsuperscript{179} Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1346-51 (D.C. Cir. 1975) (denying justiciability of Congress' mechanism for the distribution of press passes). It is important to distinguish the Periodical Correspondents' Association from the "Association" linked to the Radio-Television Correspondents' Galleries. Although both are unincorporated membership organizations, the former enjoys formal recognition in the House and Senate Rules (cited by the D.C. Circuit in this case) and therefore acts with delegated authority. Such is not the case with the Radio-Television Correspondents' Association. See S. Pub. 112-12, at 1057-58.

\textsuperscript{180} Consumers Union, 515 F.2d at 1345.

\textsuperscript{181} Id. at 1342 & n.1, 1343, 1345; see also S. Pub. 112-12, at 1057-58 (providing that accredited publications "must be owned and operated independently of any government, industry, institution, association, or lobbying organization").

\textsuperscript{182} Consumers Union, 515 F.2d at 1346 & n.8, 1342. It is worth noting that the lead defendant in the case was the Periodical Correspondents' Association, represented by the Department of Justice. There was no issue that the Association was not an entity of Congress and therefore would have to defend itself at its own expense, as the Justice Department has
Circuit reversed the district court on grounds not even argued in the court below.\textsuperscript{183} Applying the principles of legislative immunity as articulated in \textit{Gravel v. United States},\textsuperscript{184} the court opined that the PAEC was acting under delegated authority from Congress and thus enjoyed the same legal immunity as Congress under the Speech or Debate Clause.\textsuperscript{185} To support its conclusion that the administration of the press galleries was within the scope of congressional privilege, the court relied on two significant facts: That the acts of the PAEC were historically carried out by Congress itself, and that Congress continued to oversee the PAEC’s decisions.\textsuperscript{186} The court deemed the activities of the press gallery part of the “legislative process,” and thus immune from inquiry by virtue of the Speech or Debate Clause,\textsuperscript{187} making Consumer Union’s challenge of the PAEC’s membership decision nonjusticiable.\textsuperscript{188}

Since \textit{Consumers Union}, every challenge to the credentialing procedures of Congress has fallen to the impregnable “speech or debate” argument.\textsuperscript{189} However, as technology evolves and further upsets the multi-gallery system, there are hints that the institutional status quo could change.\textsuperscript{190} The courts, with suf-

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\textsuperscript{183} \textit{Consumers Union}, 515 F.2d at 1351. It should be noted that in the district court the defendants did not argue legislative immunity, but the court sua sponte raised the issue during oral argument; nonetheless the district court rejected it. \textit{Consumers Union of United States, Inc. v. Periodical Correspondents' Association}, 365 F.Supp. 18, 24 (D.D.C. 1973), \textit{rev'd}, 515 F.2d 1341 (D.C. Cir. 1975).

\textsuperscript{184} \textit{Gravel v. United States}, 408 U.S. 606, 625 (1972) (defining the scope of legislative acts protected by the Speech or Debate Clause to include “other matters which the Constitution places within the jurisdiction of either House”).


\textsuperscript{186} \textit{Consumers Union}, 515 F.2d at 1351; Coleman, supra note 185, at 40-41.

\textsuperscript{187} \textit{Consumers Union}, 515 F.2d at 1351.

\textsuperscript{188} \textit{Id.} at 1351.


\textsuperscript{190} For example, pressure from foundation-supported and online organizations has prompted the Senate Press Gallery to review its definition of what constitutes a reporter or news agency. \textit{See Suzanne M. Kirchhoff, Cong. Research Serv., R40700 The U.S. Newspaper Industry in Transition 24 (2010).}
icient deference to Congress, might conclude that such accreditation challenges are reviewable in order to reach the compelling First Amendment and due process issues raised when journalists are denied access to the galleries.\textsuperscript{191} For the moment, however, Congress and its several committees continue to hand-pick select journalists to cover the respective chambers.\textsuperscript{192} Meanwhile, those journalists in charge of the actual credentialing can take comfort in knowing that Congress will defend them as its agents acting under its authority.\textsuperscript{193} However, some of the press committees, including the Executive Committee, have created a potential liability for themselves by voluntarily taking on credentialing duties for non-congressional entities.\textsuperscript{194} For example, since 1912, the congressional press galleries have handled press arrangements for both the Republican and Democratic parties' national nominating conventions.\textsuperscript{195} The RTCA Executive Committee has done the same, regularly issuing credentials for the independent radio and television journalists at both major party conventions.\textsuperscript{196} More recently, the Executive Committee has also agreed to be the credentialing agency for the Presidential Inauguration.\textsuperscript{197} By acting outside of its congressional mandate, the Executive Committee is exposed to liability when it makes credentialing decisions for non-congressional entities.\textsuperscript{198} There is nothing in the House or Senate rules that em-


\textsuperscript{192} See id. at 234.

\textsuperscript{193} \textit{Cf.} Consumers Union, 515 F.2d at 1350-51.


\textsuperscript{196} See Conventions Applications, supra note 194. The parties themselves issue credentials for the major television and radio networks, leaving the numerous other news outlets to seek credentials from the Executive Committee. See COMM. ON ARRANGEMENTS, supra note 195, at 5.


\textsuperscript{198} \textit{Cf.} Consumers Union, 515 F.2d at 1351 ("We are content to rest our ruling that this cause is not justiciable upon the ground that, performed in good faith, the acts of appellants were within the spheres of legislative power committed to the Congress and the legislative immunity granted by the Constitution. But the fact that they were ratified by the Senate Committee and at least acquiesced in by the Speaker of the House not only is supportive of
powers the Executive Committee to do anything for entities outside of the Congressional sphere, no matter how important, prestigious, or national in scope those entities or occasions may be. When the Executive Committee acts outside of its mandate by granting non-congressional press credentials, Congress can no longer use the Speech or Debate Clause to protect it.

It is difficult to argue that the issuance of a press credential for a political party convention, for example, is "an integral part of the deliberative and communicative process" of Congress that therefore enjoys legislative immunity from prosecution.

One can easily imagine a scenario under which a news organization challenges a denial of access to a non-congressional event for which the Executive Committee issued credentials. Congress would not be the defendant because it would have had nothing to do with the event. The Executive Committee would be alone. Without its legislative immunity, it would have to defend its decisions as consistent with the speech and due process claims of the rejected applicants. Such a defense would be difficult if in issuing the credentials it applied its gallery rules in accepting or rejecting applicants.

Courts that have heard such challenges to the press galleries' accreditation process have noted their procedures were lacking in fairness and due process.

their occurrence within the scope of the legislative process but indicative that they were of a nature which the legislative judgment regarded proper." (emphasis added); House Rules, supra note 8, at R. IV (mandating that the Executive Committee of the Radio and Television Correspondents' Galleries may only supervise "reputable reporters" for the purpose of disseminating news on Congressional debates and proceedings in the portion of the gallery in the House chamber set aside by the Speaker).

STANDING RULES, ORDERS, LAWS, AND RESOLUTIONS AFFECTING THE BUSINESS OF THE UNITED STATES SENATE, S. Doc. No. 112-1, 59-60 (2011) (R. XXXIII); House Rules, supra note 8, at R. IV.

Cf. Consumers Union, 515 F.2d at 1351 ("We are content to rest our ruling that this cause is not justiciable upon the ground that, performed in good faith, the acts of appellants were within the spheres of legislative power committed to the Congress and the legislative immunity granted by the Constitution. But the fact that they were ratified by the Senate Committee and at least acquiesced in by the Speaker of the House not only is supportive of their occurrence within the scope of the legislative process but indicative that they were of a nature which the legislative judgment regarded proper.") (emphasis added).


See Witte, supra note 191, at 232-33 (providing examples of how online journalists have been denied press credentials by the Congressional Galleries); see also Abby Rogers, Everybody's Go-To Source For Supreme Court News Still Can't Get High Court Credentials, Bus. Insider (Nov. 29, 2012, 3:16 PM), http://commcns.org/15kKDfK (reporting that SCOTUSBlog, the premier online outlet for Supreme Court news, had applied for, but still not received, press credentials to cover the high court because it failed to meet advertising access criteria).


See, e.g., Consumers Union of United States, Inc. v. Periodical Correspondents' Association, 365 F.Supp. 18, 26 (D.D.C. 1973) ("There should be no glossing over what this
Given the near ubiquitous conflation on Capitol Hill of the Executive Committee and the Association, it is difficult to determine precisely which entity is actually issuing these non-congressional credentials. In terms of the personal liability of the journalists involved, however, it makes no difference. If the journalists think the Executive Committee is issuing the credentials, they should also appreciate they are acting outside of their congressional mandate and will lose its protection. If they think the Association is issuing the credentials, they should then understand they are acting as private individuals and assume the legal risks for their private actions.

It is only natural that non-congressional entities would seek out the congressional press galleries to undertake the potentially problem-laden task of credentialing the press for individual events, or even for long-term press access. The galleries were operating long before many others groups or agencies even existed. They had the imprimatur of Congress. They had standards in place to determine who was and who was not a journalist. The standards were developed and applied by working journalists of some repute. They were willing to take on the task, which not inconsequentially, is effectively paid for by Congress. And, there was no other place to go. Rather than create its own

record discloses. . . . [A] group of established periodical correspondents have undertaken to implement arbitrary and unnecessary regulations with a view to excluding from news sources representatives of publications whose ownership or ideas they consider objectionable.


206 See John J. Patrick et. al, THE OXFORD GUIDE TO THE UNITED STATES GOVERNMENT 408 (2001) (reporting that the Senate set aside the first press gallery in 1841 and that both chambers began to seek accreditation soon thereafter).

207 See Witte, supra note 191, at 214-15 (noting that the House adopted the press's plan for monitoring the Galleries in 1879 and the Senate followed suit in 1884).

208 See RITCHIE, supra note 6, at 120-21 (reporting that a group of correspondents in 1877 worked with the Speaker of the House to draft regulations for admission to the Galleries to ensure that only “legitimate reporters” were allowed rather than the “flocks of clerks, lobbyists, and other quasi-journalists who applied for seats in the gallery”); see also Accreditation Criteria, supra note 56 (providing detail on the news organizations that can apply for admission).


210 See Hearing on the Secretary of the Senate, Sergeant at Arms, U.S. Capitol Police Budget Requests: Hearing on H.R. 5882 Before the Subcomm. on Legislative Branch of the S. Comm. on Appropriations, 112th Cong. 92-94 (2011) (statement of Terrance W. Gainer, S. Sergeant at Arms) (discussing how gallery staff, which reports the SAA, “keeps busy by providing the swelling ranks of reporters with background information; monitoring Senate floor activities and schedule changes, preparing for big events and ceremonies; [and] re-
credentialing infrastructure with the potential for inconsistency and error, each of several organizations invited the press galleries to help out.\textsuperscript{211} And they did.\textsuperscript{212}

Over time a credential from one of the congressional press galleries became the gold standard.\textsuperscript{213} It meant the holder was a journalist and deserved access to almost every other news venue in Washington, D.C., and beyond.\textsuperscript{214} This applies to the executive branch certainly, where a gallery credential allows access to news conferences at federal agencies.\textsuperscript{215} Failure to possess one meant another form of identification and evidence of being a bona fide journalist was required.\textsuperscript{216} The Supreme Court, for example, accepts a congressional press credential to verify a reporter's affiliation with a news organization, particularly for those who are local and who cover the court regularly.\textsuperscript{217} Reporters without gallery credentials have to meet other requirements.\textsuperscript{218} The White House also accepts gallery credentials as evidence of journalistic status.\textsuperscript{219} Neither the Court nor the White House requires a congressional credential, but having one eases the path to access both.\textsuperscript{220}

Although challenges to the congressional credentialing process have noted how such a credential is a key to access to the executive branch,\textsuperscript{221} that claim of searching and assessing the flood of new credential applicants in conjunction with the Standing Committee of Correspondents”.

\textsuperscript{211} See COMM. ON ARRANGEMENTS, supra note 195, at 5 (“The Committee on Arrangements . . . has delegated responsibility for handling and approving media applications for credentials, workspace and certain other functions to the four Congressional Press Galleries.”).

\textsuperscript{212} See id.

\textsuperscript{213} See David Kupelian, WND Denied Congressional Pass, WND (Feb. 13, 2002, 1:00 AM), http://commcns.org/19bopWF (“A permanent congressional press pass is an essential tool for Washington-based journalists, since it allows unfettered access to many key government offices, congressional hearings, press conferences and the like.”).

\textsuperscript{214} Coleman, supra note 185, at 37-38.

\textsuperscript{215} Id. at 37.

\textsuperscript{216} Linda Greenhouse, Press Clips, N.Y. TIMES OPINIONATOR BLOG (Nov. 28, 2012, 8:00 PM), http://commcns.org/17tTC8c.

\textsuperscript{217} Each term the Supreme Court issues on average 1,000 credentials to reporters. Only about 27 of those reporters hold "permanent" Court credentials. They are the regulars who report from the Court on a frequent, if not daily basis, and who tend to hold congressional press credentials. Interview with Kathy Arberg, Public Information Officer, U.S. Sup. Ct., in Wash., D.C. (Jan. 7, 2013).

\textsuperscript{218} Interview with Kathy Arberg, Public Information Officer, U.S. Sup. Ct., in Wash., D.C. (Jan. 7, 2013).


\textsuperscript{220} Id.; Mallory Jean Tenore, Why It’s So Hard For SCOTUSblog To Get Supreme Court Press Credentials, POYNTER (July 11, 2012, 1:10 PM), http://commcns.org/17CwVk5.

\textsuperscript{221} See Consumers Union of United States, Inc. v. Periodical Correspondents’ Association, 365 F.Supp. 18, 22 (D.C. Cir. 1973), rev’d, 515 F.2d 1341 (D.C. Cir. 1975); see also Coleman, supra note 185, at 59-60.
additional harm caused by a rejection from an executive agency for failure to qualify for a congressional credential does not expose the Executive Committee to any greater degree of liability.\textsuperscript{222} While it is flattering to be regarded by other governmental agencies as the \textit{sina qua non} of journalistic credentials, the acts of those agencies cannot be attributed to the Executive Committee. In granting or denying credentials, the Executive Committee acts only for itself at Congress’s behest.\textsuperscript{221} It does not factor into its decisions whether or not a particular reporter is also qualified to have access to the Supreme Court, the White House, or the Department of Defense.\textsuperscript{224} The House and Senate rules governing the Gallery apply only to the Congress and not to any other branch of government.\textsuperscript{225} In at least this small aspect of the risks associated with credentialing the press, the Executive Committee has none.

This assessment of the risks assumed by the Executive Committee in issuing credentials outside of its congressional mandate is, in one sense, merely a lawyer’s musings. Unlike with the issuance of credentials on behalf of Congress, there is no record of any challenges to the Executive Committee’s work on behalf of the private entities. This may be due to the temporary nature of conferences and conventions for which the credentials have been issued, and perhaps to a more forgiving standard the Executive Committee may have applied in those instances. If there is no problem, there is likely no need for a solution. Still, the absence of challenges in the past is no indication there will be none in the future. And, more importantly in the context of this article, the reporters who serve on the Executive Committee should understand their legal status as congressional agents and take actions only within their delegated authority. That status confers significant power that ought to be exercised responsibly and carefully by professionals.\textsuperscript{226}


\textsuperscript{221} See id. ("We are content to rest our ruling that this cause is not justiciable upon the ground that, performed in good faith, the acts of appellants were within the spheres of legislative power committed to Congress and the legislative immunity granted by the Constitution.").


\textsuperscript{225} See id. at 969-70, 999-1000, 1013-14, 1057-58; cf. Michael Stern, \textit{Congressional Regulation of the Press Galleries, POINT OF ORDER} (Oct. 27, 2011, 1:09 PM), http://commcns.org/1dGJdK (predicting that the Executive Committee will not act on a complaint filed by the Vice President regarding the conduct of a Periodical Press Gallery-accredited reporter).

\textsuperscript{226} See, e.g., S. PUB. 112-12, at 969-70, 999-1000, 1013-14, 1057-58 (providing rules approved by the Speaker of the House and the Chair of the Senate Committee on Rules and Administration vesting power in the respective Executive Committees to credential and admit journalists to the congressional galleries).
them or exercised casually or inconsistently. An appreciation of its status requires the Executive Committee to pay close attention to what it does in the name of Congress.

IX. A PROPOSAL

Much of the conflict and confusion identified so far regarding the Radio and Television Correspondents Gallery can simply be eliminated if the parties understand their roles. By now, the journalists appear to accept and are probably even relieved that the SAA has primacy over them in the supervision of the congressional staff assigned to the Gallery, despite the vague rule in the Senate and the conflicting rule in the House.227 The Halcomb discrimination matter amounted to a stark lesson on that point, even if in its hasty response to the litigation the Executive Committee attempted to deny its status as a congressional agent.228 That attempt seems to have been forgotten, and the journalists serving on the Executive Committee are fully aware of and accept their official status.229 Unfortunately, in my opinion, the existence of the Association alongside the Executive Committee and their overlapping leadership, continue to muddle the picture.230 Despite the journalists’ awareness of their role as congressional agents, it is still not always clear to them and others which of their activities are made on behalf of Congress and which are made on behalf of their colleagues and on behalf of their profession in general.

The solution is to draw a clear line that acknowledges the different purposes and legal statuses of the two organizations. A reimagining of both entities is necessary to achieve that clarity. The activities of the Executive Committee should be limited to only those necessary to fulfill its congressional mandate.231 It is a short list: (i) Issue press credentials for access to Congress, (ii) advise

227 See supra text accompanying notes 168-72.
229 This is due in part to formal presentations on the point I have given to the Executive Committee in the presence of House counsel.
230 Compare RTCA Constitution, supra note 34 (“It shall be the duty of the Executive Committee to take such measures as may be necessary for the efficient conduct of the Radio and Television Correspondents’ Galleries of the House of Representatives and the Senate subject to such rules as may be determined by the Speaker of the House and the Senate Committee on Rules.”), with RTCA Constitution, supra note 34 (“The [RTCA] has for its aim the promotion of radio and television news gathering fraternity and strives to protect the rights and privileges of radio and television news reports, and assist in every way possible to maintain the high standards of reporting news by radio, television, wireless and other similar means of transmission.”).
231 See S. PUB. 112-12, at 969-70, 999-1000, 1013-14, 1057-58 (providing administration of the congressional press galleries to the respective Executive Committees).
Journalists as Congressional Agents

Congress on sundry matters as they arise related to interactions with the press, and (iii) maybe, advise the SAA and the Speaker's Office on the selection and supervision of the Gallery staff. All of the other actions taken by the journalists serving on the Executive Committee in their other capacity as the leadership of the Association should be eliminated. In other words, the functions of the congressionally created Executive Committee should be completely severed, both legally and in the eyes of all observers, from those of the privately created Association. This separation can be achieved by a simple but significant alteration to the Association's governing structure.\textsuperscript{232}

The Association should adopt a new constitution that retains its existing purpose to advance the private interests of the news media, but it should include as an added and express purpose to provide and manage a process for the selection of the members of the Executive Committee. The important departure from the current practice would be to provide further that no person selected to serve on the Executive Committee would also be permitted to serve on the board of directors of the Association. The elimination of overlapping leadership would result in significant changes of both perception and operation of both organizations. It would eliminate much of the confusion about their respective roles by establishing a bright line between those journalists who are acting as agents of Congress and those who are acting as advocates for their colleagues and their profession. The new constitution should also provide longer terms for the Executive Committee so that it can develop an institutional memory and so the members can develop expertise through experience and enhanced professional standing in the eyes of Congress and their peers through the exercise of their considered judgments.\textsuperscript{233}

Given such a separation, membership on the Executive Committee becomes focused entirely on policy issues. The members would not be distracted by managing an annual dinner for which high profile entertainment, food, and VIP guests must be provided.\textsuperscript{234} They would not have to solicit and judge applicants for awards.\textsuperscript{235} They would not be involved in selecting, awarding, or managing internships. They would not be expected to be public advocates for the press to Congress; rather, they would be the forum that is the object of such advocacy and then be the advisor to Congress in response to it. Their only focus would

\textsuperscript{232} RTCA Constitution, supra note 34.

\textsuperscript{233} See id. (establishing the current system of two-year terms for Executive Committee members).

\textsuperscript{234} See 68th Radio & Television Congressional Correspondents' Dinner, C-SPAN (June 8, 2012), http://commcns.org/le61KyC.

\textsuperscript{235} Such awards include the Joan Shorenstein Barone Award for superiority in political affairs journalism, the David Bloom Award for excellence in investigative reporting and the Jerry Thompson Award for exceptional contributions to the news industry, which are awarded at the annual dinner. Id.
be to exercise the authority delegated to them by Congress. It is likely this reimagining of the Executive Committee would tend to attract a different type of person, and create a different kind of internal politics within the Association. One would hope that this reconfigured Executive Committee would attract those journalists to whom the meaning of journalism in this time of change was important and to whom the details of the Committee's relationship with Congress was important. These individuals will be the congressional agents—through membership in the Executive Committee—and will enjoy the benefits and suffer the burdens of that role.

Those motivated by the "rights and privileges" of journalists and by the professional rewards of managing an association of their peers will tend to be candidates for Association office. They will enjoy the benefits of being independent voices on behalf of journalism profession without the restraint imposed by a legal duty owed to Congress. This separation of roles eliminates the existing conflict some Executive Committee members felt and resented from time to time—that they should be the forum from which to vigorously challenge Congress on press issues when necessary. An agent cannot challenge his principal—here, Congress—but an independent Association that is not an agent is legally and publically perceived as free to do so.

This division of labor, so to speak, also clarifies the issues of risk management for the journalists. Those who serve on the Executive Committee as congressional agents are completely immune from liability for actions taken within their delegated authority. Those who become leaders of the Association, on the other hand, do not operate in a risk free environment because they are private individuals acting in the private sector. They engage in many activities, some of which present real risks. The sponsorship of the annual dinner,

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236 In fact, this is not a reimagining at all. Congress did not create the Executive Committee and the other press committees to do anything other than to assist it in its relationship with the news media.

237 RESTATEMENT (THIRD) OF AGENCY § 8.10 (2006) ("An agent has a duty, within the scope of the agency relationship, to act reasonably and to refrain from conduct that is likely to damage the principal's enterprise.").


239 However, as an unincorporated private association, the Association's board may have some lessened liabilities, as "[c]ourts ordinarily will not interfere with the management and internal affairs of a voluntary association." Levant v. Whitley, 755 A.2d 1036, 1043 (D.C. 2000). The actions of the Association may also benefit from the broad protections of the "business judgment rule" if its actions do not constitute "fraud, irregularity, or arbitrary action." See, e.g., NAACP v. Golding, 679 A.2d 554, 559-61 (Md. 1996). But clearly, the Association would not have the broad protections of Speech or Debate immunity that a congressional agent would possess. Cf. Consumers Union of U.S., Inc. v. Periodical Correspondents' Ass'n, 515 F.2d 1341, 1351 (D.C. Cir. 1975).

240 See C-SPAN, supra note 234.
for example, involves several contracts, any one of which could go wrong: The entertainer may not show up, the caterer may underperform, the hotel may impose additional fees, or a dinner attendee may be injured in the convention hall. These types of risks are common to any private organization.

The Association would also want to protect itself if it decided to assume the responsibility for offering credentials for non-congressional events or entities as the reformed Executive Committee will have dropped that role as outside of its congressionally mandated responsibilities. To the extent that the Association derives some amount of professional pride, satisfaction, and status from being a credentialing agency it might not want to give up that role, particularly if insurance provides it with the protection it believed it had from Congress.

The Association would continue to be the means through which its members pay dues for general Association activities, including occasional assessments for infrastructure projects such as the fiber optic lines installed in and around the Capitol, and the so-called hub room from which video signals are distributed. However, once those facilities are installed and operation and ownership are turned over to the Architect of the Capitol, their day-to-day management would fall under the jurisdiction of the Executive Committee, which has authority to manage these now government-owned facilities on behalf of Congress.

Under this restructuring, the Association would remain organized as an unincorporated association under District of Columbia law. There is no overriding need to change its form of business organization. Or, it could take the White House Correspondents Association as a model and become incorporated as a non-profit corporation. There are some advantages to being incorporated, including the higher comfort level other businesses such as insurers and other service providers have in dealing with a corporation and their more legally certain parameters, but it is not necessary. Either way, the Association would be characterized as an independent, private organization, supporting its journalist members in their reporting from the Capitol, one of which is to be

242 See supra text accompanying notes 230-232.
243 See Outstanding Projects, supra note 54 (discussing the jointly funded Congressional Fiber Optic Project).
244 HOUSE RULES, supra note 8, at R. VI(3) (“The Executive Committee of the Radio and television Correspondents’ Galleries shall supervise such gallery . . . .”).
245 Cf. RTCA Constitution, supra note 34.
246 WHCA BY-LAWS, supra note 65, at art. II.
247 Cf. Levant v. Whitley, 755 A.2d 1036, 1043-44 (D.C. 2000) (“The circumstances under which the courts are justified in ruling on disputes involving voluntary membership organizations are not entirely settled.”).
the mechanism by which its members select their representatives on the Executive Committee. 248

Finally, all of this can be done without congressional involvement. Congressional rules are silent about how the members of the Executive Committee are chosen. 249 History teaches that in creating the press committees, Congress was trying to stay out of internal press affairs, so it will not want to get involved now. 250 As long as the press picks its own representatives for the Executive Committee in a process that is deemed fair, Congress will accept the result. The changes proposed here do not affect the integrity of the selection process. It would still be journalists choosing journalists in an Association-wide election.

X. CONCLUSION

It is wise to heed the saying, 'if it ain’t broke, don’t fix it' but sometimes it is not obvious that the system is broken. The Executive Committee of Correspondents of the Radio and Television Galleries continues to operate without any apparent difficulties. As is the case with almost every human endeavor, things are fine until they no longer are. When the Executive Committee faced litigation ten years ago, underlying problems with its organizational structure and its members’ perception of their roles were revealed. 251 Ten years later, not all of those problems have been addressed. The continuing and rapid change in the way that news is gathered and reported, and the creation of novel business models accompanying that change will likely strain the Executive Committee’s ability to keep up. 252 The Executive Committee’s structure should be streamlined to put informed, experienced, and thoughtful journalists in charge, who are knowledgeable of these industry and technology trends and who will have the confidence and professional standing to give Congress good advice on how to respond to these changes. The rules describing journalists eligible to cover Congress are hopelessly outdated and need an overhaul. 253 Surely there is a way to keep lobbyists out of the press corps without defining journalism so archaically that new entrants are routinely excluded. 254 The Executive Committee

248 See RTCA Constitution, supra note 34.
249 See, e.g., HOUSE RULES, supra note 8, at R. VI(3) (providing that the Executive Committee shall supervise the gallery, but failing to provide any means for how the Executive Committee is to be selected).
250 See RITCHIE, supra note 6, at 109-110.
251 See supra Part VII.
252 See, e.g., Heaney, supra note 13, at 423-24.
253 See Press Galleries, in S. PUB. 112-12, at 1013-14 (2011) (Official Cong. Directory, 112th Cong.) (requiring applicants to be “engaged primarily in serving radio stations, television stations, or systems”).
254 Heaney, supra note 13, at 423-24.
needs to be up to that task by focusing its attention on the duties assigned to it by Congress, and not be distracted by other issues.

The muddle created by the existence of two legally distinct entities conducting each other’s business must be cleaned up. The proposed separation of these organizations highlights the distinctive and legally significant duties of each, and allows a clear-eyed assessment of and solution to the legal risks to which each is subject. With an appropriate separation between their congressional and private purposes and, most importantly, with an organizational structure reflecting that separation, the journalists of the Radio and Television Correspondents’ Galleries will be much better positioned to adapt and respond to the changes in the structure of the media-at large caused by advancements in technology.