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N David Bleisch

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# THE *CONGRESSIONAL RECORD* AND THE FIRST AMENDMENT: ACCURACY IS THE BEST POLICY

*N. David Bleisch\**

## I. INTRODUCTION

Under federal law, the *Congressional Record* should contain a "substantially verbatim report" of the legislative debates conducted on the floors of Congress.<sup>1</sup> Due, however, to a privilege allowing members of Congress to revise and extend their remarks made in debate before they are published in the *Congressional Record*, the accuracy of the *Record* falls far short of this statutory requirement.

President Johnson once stated: "There are few documents more important than the *Congressional Record* . . . . It is a document which affects our laws, our precedents and our judicial decisions."<sup>2</sup> The printed *Record* is used primarily for two purposes.<sup>3</sup> First, it is used by scholars and journalists as an historical account of congressional proceedings.<sup>4</sup> Second, it is utilized as an important source for discerning congressional intent by both administrative agencies and courts, the two major forums for the implementation of governmental policy.<sup>5</sup> It is this second function

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\* Staff Member, BOSTON COLLEGE ENVIRONMENTAL AFFAIRS LAW REVIEW. Solicitations, Articles and Book Review Editor, 1984-85.

<sup>1</sup> 44 U.S.C. § 901 (1980) provides: "The Joint Committee on Printing shall control the arrangement and style of the *Congressional Record*, and while providing that it shall be substantially a verbatim report of proceedings, shall take all needed action for reduction of unnecessary bulk."

<sup>2</sup> Reprinted in 121 CONG. REC. 18, 23861 (1975). Statement made by President Johnson while still the majority leader in the Senate.

<sup>3</sup> Fernsworth, *Congressional Record: Dull, Useless Appendage of Congress, or Useful?*, J.C. Press Chronicle, May 19, 1975, reprinted in 121 CONG. REC. 13, 16832 (1975).

<sup>4</sup> *Id.*

<sup>5</sup> 121 CONG. REC. 18, 23860 (1975) (remarks of Senator Packwood). See also Commentary by Senator Barry Goldwater (R-Ariz.) delivered on WAVA radio, reprinted in 122 CONG. REC. 16, 19349 (1976) (remarks of Rep. Steiger). Goldwater continued: "In this

which is of primary importance to environmental practitioners since the search for legislative intent can make critical differences in how federal statutes governing areas of environmental concern will be developed and applied in practice after their legislative promulgation. Thus, substantive revisions made in the *Congressional Record* may have substantial impact in the development of environmental law.

The *Congressional Record* is an official government publication.<sup>6</sup> It contains the transcribed debates of the House and the Senate, summaries of congressional committee activities, and an assortment of additional items submitted for publication by members of Congress. When Congress first began publishing the *Record*, members of Congress were permitted to revise and extend their speeches before they were printed.<sup>7</sup> This revision privilege was considered necessary in order to permit members of Congress to edit the verbatim transcripts to remove grammatical errors, inaccuracies and offensive content.<sup>8</sup>

The revision privilege continues today as a matter of congressional tradition.<sup>9</sup> However, the present privilege allows members of Congress to make more than merely mechanical revisions. The privilege "permits the speaker to engage in wholesale addition to or deletion from his speech [before it is printed in the *Record*]. He may omit the speech in its entirety or even substitute a new text."<sup>10</sup>

Thus, the revision privilege is sometimes used by members of Congress to make substantive alterations of their spoken remarks beyond those justified by the reasons for the privilege's existence.<sup>11</sup> Many statements that bear directly on the issue of the intent of Congress in enacting a particular bill or referendum, although never heard on the floor of the House or Senate, may be

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regard, it is important that the *Congressional Record* does not present an inaccurate and misleading picture of our debates."

<sup>6</sup> Publication of the *Congressional Record* is governed by 44 U.S.C. §§ 901-910 (1982).

<sup>7</sup> See *infra* text and notes at notes 45-50, the section discussing the history of the revision privilege. The privilege dates back at least as far as to the publication of the *Register of Debates* between 1824-1837. Editors of the *Register* invited members of Congress to revise their speeches before they were published. McPherson, *Reporting the Debates of Congress*, 28 Q.J. OF SPEECH, 141, 144 n.22 (1942).

<sup>8</sup> See *infra* text and notes at notes 83-85.

<sup>9</sup> See *infra* text and note at note 45.

<sup>10</sup> Robinson, *Are Speeches in Congress Reported Accurately?*, 28 Q.J. OF SPEECH, 9, 10 (1942).

<sup>11</sup> See *infra* text and notes at notes 67-82 for examples of abuse of the revision privilege.

found in the *Record*.<sup>12</sup> As federal law governing environmental issues continues to be consumed by statutory regulations, legislative intent becomes more crucial in the law's implementation. These inserted statements may thus have a direct impact on how federal laws are applied in areas of environmental concern, as well as in every other controverted area of statutory law.

This article discusses the role of the revision privilege in the publication of the *Congressional Record*, focusing on the potential dangers that arise in connection with the intentional and unintentional misuse of the privilege as a means of obscuring accurate legislative history. The historical development of the *Record* is presented first, including a consideration of Congress' motives for assuming responsibility over publication of its own debates. Second, the present day functions of the *Record* are discussed, focusing on the *Record's* importance as an historical document and as a record of legislative intent. Third, the privilege allowing members of Congress to revise and extend their spoken remarks before they are printed in the *Record* is explained, followed by a presentation of recent legislative attempts to limit the privilege's scope. Some examples of abuse of the privilege are then provided, followed by an examination of how these abuses can thwart the purposes of the *Congressional Record* itself. This examination emphasizes the inadequacies of the justifications offered for the privilege's existence in light of the potential provided by the privilege for corruption of the legislative process and suggests that Congress should enact a stricter policy regarding revisions. The article then considers the merits of two constitutional arguments, based upon the first amendment, which might be asserted in favor of requiring an accurate *Congressional Record*. Finally, a third argument is presented, asserting that the *Congressional Record* must contain an accurate account of the floor debates in order to comply with core first amendment principles.

## II. HISTORY OF THE *CONGRESSIONAL RECORD*

Both Houses of Congress, from their inceptions, have maintained official journals of their proceedings, as required by a provision in the United States Constitution.<sup>13</sup> Originally, the

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<sup>12</sup> 121 CONG. REC. 18, 22919 (1975) (testimony of Rep. James G. O'Hara).

<sup>13</sup> U.S. CONST. art. I, § 5, cl. 3, which provides: "Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgement require secrecy." The Supreme Court has interpreted the purpose of

official journals contained brief accounts of congressional proceedings as well as a tally of votes taken on legislative bills. It was not until the proceedings of the House of Representatives were opened to reporters in 1789,<sup>14</sup> however, that any attempt was made to keep verbatim transcripts of the floor debates.<sup>15</sup>

In 1833, with the founding of a private publication entitled the *Congressional Globe*, the proceedings of both the House and Senate were reported in a single document for the first time.<sup>16</sup> The *Globe*, however, did not provide a very accurate account of the floor debates. The *Globe's* inaccuracy was a result of several factors. Most notably, reporters for the *Globe* recorded the debates using either longhand or a personal form of shorthand—methods which resulted in frequent errors.<sup>17</sup> In addition, the *Globe's* editors were prone to dedicate relatively more space and accuracy to certain political factions than to others.<sup>18</sup>

These shortcomings in the *Globe's* accuracy prompted several members of Congress to question the credibility of the *Congressional Globe* and to demand that the *Globe* provide a more accurate account of the floor debates.<sup>19</sup> The Senate in 1848 and the

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this clause as: "insur[ing] publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents." *Field v. Clark*, 143 U.S. 649, 670-71 (1892).

<sup>14</sup> Reporters were allowed into the House beginning April 8, 1789 and into the Senate beginning December 9, 1795. McPherson, *supra* note 7, at 144.

<sup>15</sup> The *Annals of Congress*, although covering the period from March 3, 1789 to May 27, 1824, before the publication of the *Globe*, were actually published after the *Globe* began publication. The works were collected by Editors Gales and Seaton and were not published until 1834. McPherson, *supra* note 7, at 144.

The chronological record of congressional debates is printed in the following documents:

<i>Annals of Congress</i>	1789-1824
<i>Register of Debates</i>	1824-1837
<i>Congressional Globe</i>	1833-1873
<i>Congressional Record</i>	1873-present

<sup>16</sup> The *Congressional Globe* was an independent publication begun by editors Blair and Rives after their defeat as Printers to Congress in 1833. McPherson, *supra* note 7, at 145. *Daily Globe* (Wash., D.C.) Aug. 5, 1852.

<sup>17</sup> McPherson, *supra* note 7, at 146.

<sup>18</sup> *Id.* at 145. The *Globe*, for example, usually gave more space to the supporters of President Jackson. *Id.* at 145 n.33.

<sup>19</sup> *Id.* at 145. The attack was led by Reps. Edward Stanley, William J. Graves, William K. Bond, and Waddy Thompson in the House and by Sens. Robert J. Walker and Richard H. Bayard in the Senate. *Id.* Thompson referred to the reporters as "habitual falsifiers of the debates." *Id.* at 145-46, *citing* CONG. GLOBE, 26th Cong., 1st Sess., 297-98; *Daily Globe*, Apr. 1, 1840. The reporters responded by simply ignoring Thompson's participation in the debates until he apologized.

House in 1850 decided to finance independent reporters to record the debates and to supply the *Globe* with a copy of the debates for publication.<sup>20</sup> This decision elevated the *Globe* to semi-official status and initiated the temporary existence of verbatim reports of congressional proceedings.<sup>21</sup>

Verbatim reporting of the debates was short lived. In 1851, the editors of the *Globe* announced that thereafter only a "brief or sketch of the debates" would be published in the main body of the *Globe*.<sup>22</sup> Only those speeches that members felt were important enough to write out at length and submit to the *Globe's* editors were still published verbatim.<sup>23</sup> Pressed by the rapidly increasing volume of debates held during the Civil War and spurred by the continued dissatisfaction of congressional members with the accuracy of reporting in the *Globe*, Congress, on April 2, 1872, decided to assume full responsibility for the reporting and publication of its own debates.<sup>24</sup>

The *Congressional Record* was the document resulting from Congress' decision to report its own debates. The Government Printing Office published the first issue of the *Congressional Record* on March 5, 1873.<sup>25</sup> Except for the inclusion of a daily digest since the 80th Congress,<sup>26</sup> the *Record's* format has remained virtually unchanged since its original publication. Each issue of the *Record* reports the previous day's events.<sup>27</sup>

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<sup>20</sup> Contracts were made with the editors of the *National Intelligencer* and the *Union* to furnish the editors of the *Congressional Globe* with a copy of the debates for publication. McPherson, *supra* note 7, at 146. CONG. GLOBE, 29th Cong., 2d Sess., 571.

<sup>21</sup> McPherson, *supra* note 7, at 146-47. The practicality of verbatim recording was assisted by the use of phonetic shorthand which was introduced to Congress by recorder Isaac Pittman. *Id. citing* Evening Star (Wash., D.C.) Feb. 29, 1896.

<sup>22</sup> Daily Globe, (Wash., D.C.) Dec. 6, 1851.

<sup>23</sup> *Id.* These speeches were printed in the *Globe's* Appendix.

<sup>24</sup> H.R. Rep. No. 23, 42nd Cong., CONG. GLOBE, 42 Cong., 2d Sess. 1413, 1776-82. Daily Globe, (Wash., D.C.) March 3, 5, 1872.

<sup>25</sup> Authorized by United States Statutes at Large XVII, 47.

<sup>26</sup> M. COHEN & R. BERRING, HOW TO FIND THE LAW (8th ed. 1983).

<sup>27</sup> 44 U.S.C. § 903 (1980) reads, in part: "The public proceedings of each House of Congress, as reported by the Official Reporters thereof, shall be printed in the *Congressional Record*. . . ."

The *Record* is divided into three distinct sections entitled "Senate," "House," (the order of which alternates daily) and "Extension of Remarks." The sections of the *Record* contain distinguishable subcategories. The Senate section includes morning business, executive session, legislative session, and the introduction of bills and resolutions. The House section includes one minute speeches, legislative session, and special orders. The "Extension of Remarks" section harbors those insertions unsuitable for printing within the body of the *Record*.

### III. FUNCTIONS OF THE *CONGRESSIONAL RECORD*

The *Congressional Record* is generally considered to serve two basic purposes.<sup>28</sup> First, it preserves an historical record of the legislative debates.<sup>29</sup> Historians and students alike consult the *Record* to gain an appreciation of the congressional proceedings surrounding politically significant events. Second, it is used to determine the purposes that Congress intended to promote when Congress enacted particular federal statutes.<sup>30</sup> The *Record* is availed as legislative history both by administrative agencies when implementing the law and by courts when interpreting it.<sup>31</sup>

When a new statute is enacted by Congress, federal agencies whose duties are affected by the new statute are often required to draft regulations to provide guidelines for the statute's practical enforcement. These agencies frequently look to the *Congressional Record* for guidance when drafting regulations to accompany congressionally mandated programs.<sup>32</sup> The *Record* becomes particularly important when the bill from which the statute was derived and the reports of the congressional committees which considered the merits of the bill leave doubt as to Congress' intent.<sup>33</sup>

While courts rely on legislative history only when a statute is ambiguous as applied to the particular set of facts under consideration,<sup>34</sup> most laws are general by their very nature since Congress cannot foresee the many particular circumstances under which the laws will be applied.<sup>35</sup> When the courts need to interpret a federal statute without the benefit of legal precedent, they rely primarily on four sources: the language of the statute itself; any federal regulations based on the statute; and, when they exist, both the committee reports on the statute and the debates on the statute which appear in the *Congressional Record*.<sup>36</sup>

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<sup>28</sup> See *supra* note 3.

<sup>29</sup> *Id.*

<sup>30</sup> See *supra* note 5.

<sup>31</sup> *Id.*

<sup>32</sup> 124 CONG. REC. 4, 5110 (1978)(remarks of Rep. Steiger).

<sup>33</sup> 121 CONG. REC. 16, 21335 (1975)(remarks of Rep. R. Kasten, Jr.).

<sup>34</sup> Letter from Richard A. Givens, Chairman of the Committee on Federal Legislation, N.Y. County Lawyers' Ass'n, to Rep. John J. Moakley (D-Mass.), Dec. 8, 1977, reprinted in 124 CONG. REC. 1, 207 (1978).

<sup>35</sup> *Id.*

<sup>36</sup> 121 CONG. REC. 18, 22919 (testimony of James G. O'Hara; Mr. O'Hara did not mention federal regulations). Most laws are passed without being debated. Usually only those bills that are of great public interest are discussed on the floors of Congress.

The Supreme Court has stated that the remarks of a single legislator, even those of a sponsor of a bill, are not controlling in analyzing legislative history.<sup>37</sup> Generally, however, the courts do give some weight to such remarks when the stated intention of the legislator is to clarify or explain the bill's purpose.<sup>38</sup> The Supreme Court cites the *Congressional Record* regularly.<sup>39</sup> In the three year period between January 1, 1981 and January 1, 1984, for example, the Court cited the *Record* in 151 opinions.<sup>40</sup>

It should be noted that legislative intent is an amorphous concept. It cannot be presumed that individual members of Congress maintain a single intent on each issue that passes before them. Nevertheless, legislative histories are compiled in order to derive some indication of the purposes meant to be promoted by the passage of particular statutes.<sup>41</sup> These compilations include comparisons of the final language of the statute to the original bill, the committee reports which usually set forth the rationale behind the committees' recommendations to accept or reject the bill, and the debates of the bill on the floors of the House or the Senate.<sup>42</sup> To the extent that remarks made in the legislative debates reflect upon the purposes of the statute's enactment,

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<sup>37</sup> *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *S. & E. Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9 (1971). The statement of an opponent to a bill should receive little weight in construing legislative history. *Hotzman v. Schlesinger*, 414 U.S. 1304, 1313 n.13 (1975); *Mastro Plastics Corp. v. N.L.R.B.*, 350 U.S. 270, 288 (1956).

*See also* *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (Jackson, J., concurring). Justice Jackson warned that to select phrases from the *Record* is to sit as Congress in determining the intent of a statute. Nor does legislative history represent the opinions of the President. "It is not to be supposed that, in signing a bill, the President endorses the whole *Congressional Record*." *Id.*

Also see the remarks of Representative Steiger: "My chief concern is that we may see a return of the practice whereby the judicial branch of our government ignores the record of debate when considering the intent of Congress." 121 CONG. REC. 20, 26633 (1975).

<sup>38</sup> J. JACOBSTEIN & R. MERSKY, *FUNDAMENTALS OF LEGAL RESEARCH* (2d ed. 1981).

<sup>39</sup> *Fernsworth*, *supra* note 3. See, for example, the listed examples of use of congressional debate by the Supreme Court in 121 CONG. REC. 16, 21335 (1975).

<sup>40</sup> LEXIS search using the keywords "Congressional Record" and "Cong. Rec." and restricted between dates 1/1/81 and 1/1/84. Search conducted on November 7, 1984. The circuit courts for the same period cited the *Record* as authority in a total of 888 cases.

<sup>41</sup> *See* JACOBSTEIN, *supra* note 38, at 164. ("[T]he use of legislative histories is a very essential technique of contemporary litigation.")

<sup>42</sup> *Id.* at 164-66. "The discussion of a pending bill by members of Congress [as reported in the *Congressional Record*] may be useful in determining congressional intent." *Id.* at 181. Committee hearings are technically not a part of legislative history since they contain the opinions of non-legislators rather than congressional deliberations of the bill under consideration. *Id.* at 165. Committee reports are usually considered to be the most important indicators of legislative intent. *Id.*



such remarks may play an integral part in establishing legislative intent.<sup>43</sup>

Considering the uses of the *Congressional Record*, it appears important that the *Record* present an accurate report of the floor debates. As explained in the following sections, however, the *Record* often presents a report that differs substantially from actual congressional proceedings.

#### IV. THE REVISION PRIVILEGE

The revision privilege permits members of Congress to edit the substantive content of the remarks they make in debate before their remarks are printed in the *Congressional Record*. Although responsible use of this privilege addresses valid concerns, some use of the revision privilege exceeds the justification for its existence. Indeed, some drastic abuses of the revision privilege can lead to corruption of the legislative process and can thwart the utility of the *Congressional Record* itself.

##### A. *The Mechanics of the Privilege*

The debates in the House and Senate are recorded verbatim by Congress' official shorthand reporters. The reporters, working in brief shifts to insure accuracy, record every word spoken on the floor. The shorthand verbatim reports are quickly transcribed into typed copies. These copies are usually made available to members of Congress to proofread within an hour after the member speaks on the floor in order that members of Congress may revise and extend their own remarks before the midnight deadline for publication in the next day's *Congressional Record*.<sup>44</sup>

The revision privilege is not specifically authorized by statute

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<sup>43</sup> "Arguments for and against amendments and passage are made, explanations of unclear or controversial provisions are offered, and much of the business of the legislative process is revealed in floor discussion." COHEN & BERRING, *supra* note 26, at 302.

<sup>44</sup> Mantel, *The Congressional Record: Fact or Fiction of the Legislative Process*, THE W. POLITICAL QUARTERLY 981, 982-83 (Dec. 1959).

The "Extension of Remarks" section contains revisions that were intended for the body of the *Record* but which were returned after the midnight deadline for inclusion in the next day's *Record*. The daily *Congressional Records* are compiled every thirty days for printing and binding in the permanent *Congressional Record*. "Revisions that failed to get in under the wire can be made, as a rule, for the bound volume published at the end of the session. Thus it is possible to read two versions of the *Congressional Record*, neither of them accurate." Berdiner, *The Wishful Transcript*, ATL. MONTHLY (July 1978) reprinted in 124 CONG. REC. 15, 20323 (1978).

or regulation. Rather, it is a matter of congressional tradition.<sup>45</sup> Under the original revision privilege, the degree of revision that could be made by a member of Congress was virtually unlimited.<sup>46</sup> Utilizing the revision privilege, a member of Congress could add an entire speech to the *Record* and thereby give the appearance that she had actually delivered the inserted speech on the floor of Congress. A 1977 study conducted by the Government Printing Office concluded that the *Record* contained up to seventy percent extraneous material never spoken on the floor.<sup>47</sup> A member of Congress could alter any portion of her speech before it was printed in the *Record*.<sup>48</sup> She could delete passages, rearrange sentences and add whole paragraphs to her speech with no indication that any alteration had been made.<sup>49</sup> She could even alter

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<sup>45</sup> The historical origins of the revision privilege are apparently rooted in the granting of permission to congressional members to extend their remarks after an announcement by the editors of the *Congressional Globe* in 1851 that the *Globe* would thereafter carry only a sketch of the debates. See *supra* text and notes at notes 22-23. The revision privilege provided members of Congress with a vehicle to present portions of the floor debates that they felt to be of particular public interest as well as an opportunity to correct any errors in recording made by the reporters of the debate.

<sup>46</sup> C. CLAPP, *THE CONGRESSMAN, HIS WORK AS HE SEES IT* (1964), reprinted in 121 CONG. REC. 17, 21963 (1975).

<sup>47</sup> 123 CONG. REC. 4, 5113 (1977). In a comparison of 23 countries with a legislative body comparable to our own, a 1973 report by the Joint Committee on Printing found that the *Congressional Record* possessed "the widest degree of permissiveness in incorporating unspoken material." 123 CONG. REC. 3, 3051 (1977).

According to the *Congressional Quarterly*, a non-governmental publication, the *Congressional Record* "records not only what was said in Congress, but also what members want people to believe they would have said had they been there. It's hard to tell one from the other." Reprinted in 121 CONG. REC. 26, 33745 (1975)(remarks of Rep. Hubbard, Jr.).

For a tragic example, see the Oct. 18, 1972 speech of Representative Boggs wishing everyone a happy Christmas recess. Boggs was killed in an airplane crash two days before he supposedly delivered the speech. 121 CONG. REC. 94, 24454 (1975).

See also remarks of Representative Steiger, 121 CONG. REC. 17, 22711 (1975)("It is now virtually second nature for a Senator or Representative to revise remarks which he uttered on the floor.").

Much of what is printed in the *Record* is undoubtedly prompted by the franking law, 44 U.S.C. § 907 (1982). 129 CONG. REC. S12403 (daily ed. Sept. 19, 1983). A member may have portions of the *Record* copied and sent to constituents as franked mail. Thus, a member may insert a statement into the *Record* asserting a favorable position on a popular issue, and then mail copies of his statement to the public at little or no cost. 121 CONG. REC. 17, 21965 (1975).

<sup>48</sup> Senator Neuberger, *The Congressional Record Is Not A Record*, N. Y. Times, Apr. 20, 1958 reprinted in 121 CONG. REC. 15, 22711 (1975)("If this is not rewriting contemporary history, then what is it?").

<sup>49</sup> CLAPP, *supra* note 46. A study by J. A. Hendrix utilizing a side-by-side comparison of excerpts from a congressional speech reported in the New York Times and the revised

the *Record* to reflect the exact opposite of what she actually said in debate.<sup>50</sup>

### B. Attempts To Limit the Scope of the Privilege •

Many attempts have been made over the years by some members of Congress to restrict the use of the revision privilege in order to limit the material printed in the *Congressional Record* to an accurate account of the floor proceedings. In 1958, for example, Senator Richard L. Neuberger (D-Ore.) introduced a resolution declaring that "no changes of a substantive nature" would be allowed in a Senator's speech as recorded by the official reporters of the debates.<sup>51</sup> The resolution was defeated.<sup>52</sup> In 1973, a similar resolution was offered by Representative Pierre S. duPont, IV (R-Del.).<sup>53</sup> Representative duPont contended that members of the House should be permitted to revise grammatical and typographical errors in their recorded remarks, but they should not be allowed to alter the "scope, intent and substance" of their spoken remarks.<sup>54</sup> This resolution was also defeated.<sup>55</sup> Similar resolutions

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version reported in the *Congressional Record* led Hendrix to conclude that the *Record* is an "accurate transcript." Hendrix, *A New Look at Textual Authenticity of Speeches in the Congressional Record*, 31 S. SPEECH J. 153, 159 (1965). Hendrix's conclusion was based on his observation that "the similarities [between the two versions] . . . far outweigh the differences." *Id.* However, a single sample is an insufficient data base from which to extrapolate generalizations about the accuracy of the *Record* as a whole. While "[g]enerally the content [of the *Record*] is pretty close to the reality . . . on occasion it may bear little resemblance to what was actually said." 121 CONG. REC. 19, 25012 (1975). Those occasional changes of a substantive nature have prompted the present concern about the revision privilege.

<sup>50</sup> See, e.g., 121 CONG. REC. 16, 20874-75 (1975).

<sup>51</sup> 121 CONG. REC. 18, 23860 (1975). Senator Neuberger asserted: "The very masthead 'Congressional Record' ought to assure rigid fidelity to truth and circumstances." *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> 119 CONG. REC. 1, 471 (1973). The resolution tendered by duPont is representative of many of the other resolutions offered to restrict the scope of the revision privilege. duPont's resolution, in relevant part, provided as follows:

1. The body of the *Congressional Record* for the House of Representatives shall contain an accurate and verbatim account of remarks actually delivered on the floor of the House.
2. . . . revisions shall be limited to the correction of grammatical and typographical errors; and in no event shall such corrections make any change in the meaning, content or substance of those remarks.
3. Members shall be entitled to extend such remarks by the additions of statements . . . [etc., which] shall be printed in a type face distinctively different from that used for verbatim remarks.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

were offered and defeated in 1975 by Representative Robert W. Kasten, Jr. (R-Wis.)<sup>56</sup> and by Senator Robert Packwood (R-Ore.).<sup>57</sup>

In 1978, a resolution to limit the use of the revision privilege was finally passed. This resolution, championed by Senator Packwood in the Senate and Representative William Steiger (R-Wis.) in the House, was less stringent than its predecessors.<sup>58</sup> The resolution merely required that all speeches that were wholly inserted in the *Record* without being delivered on the floor must be marked in the *Record* by the use of circular symbols called bullets. The rule for publication that resulted from this resolution describes the method by which the bullet symbols are to be used: "Only as an aid in distinguishing the manner of delivery, and in order to contribute to the historical accuracy of the *Record*, statements or insertions *where no part of them was spoken* will be preceded and followed by a 'bullet' symbol, i.e., ●."<sup>59</sup>

Although use of the bullets provides some assistance in distinguishing spoken remarks from unspoken remarks in the *Record*, the system is by no means perfect. The italicized portion of the bulleting rule highlights a "serious loophole"<sup>60</sup> in the bulleting requirement. Only those speeches which are *wholly* inserted in the *Record* are so designated by bullets.<sup>61</sup> If a member speaks as little as one sentence on the floor, the entire remainder of his speech, even if never delivered on the floor, will be printed in the *Record* without the bullet symbols.<sup>62</sup> A member of Congress may

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<sup>56</sup> 121 CONG. REC. 16, 21334 (1975). Mr. Kasten was motivated by his concern over the inaccuracy of the *Record* considering its use by federal agencies and the courts in construing legislative intent. "Presently," he wrote, "the *Congressional Record* is a disgrace as an accurate historical and official record. It contains utterances never uttered and statements never stated." *Id.*

<sup>57</sup> 121 CONG. REC. 18, 23860 (1975). Packwood was motivated by concerns over the interpretation of legislative intent similar to those of Kasten, *supra* note 56.

<sup>58</sup> See 124 CONG. REC. 4, 5207-09 for a compilation of correspondence involved in the development of this resolution.

<sup>59</sup> The Laws and Rules for Publication of the *Congressional Record* (emphasis added). These rules are printed periodically in the back of the *Record*.

<sup>60</sup> 124 CONG. REC. 4, 5113 (1978).

<sup>61</sup> See the Notice of Amendment announcing the implementation of the bulleting requirement. The Notice of Amendment was printed in the *Record* many times between the resolution's passage and the implementation of the bulleting requirement. See, e.g., 124 CONG. REC. 3, 3676 (1978). The Notice read, in part, as follows: "If a member verbally delivers the *first portion* of the statement (such as the first sentence or paragraph), then the entire statement will appear *without* the 'bullet' symbol." (emphasis in original).

<sup>62</sup> See remarks of bulleting proponent, Rep. William Steiger, 124 CONG. REC. 4 (1978). ("The action is a good first step, but it is only a first step . . . .Bulleting of wholly inserted remarks is excellent, but we have not gone far enough when a Member can, by speaking

still alter the "scope, intent and substance"<sup>63</sup> of a delivered speech before it is printed in the *Record* without indicating that changes have been made.<sup>64</sup> Thus, few of the inaccuracies in the *Congressional Record* attributable to the original revision privilege have been removed by enactment of the bulleting requirement.

According to Sen. Charles R. Mathias (R-Md.), former chairman of the Joint Committee on Printing, some members of Congress have found a way to avoid the bulleting requirement altogether. They simply go to the official reporter of the debates and request that the bullets not be used to mark their inserted statements.<sup>65</sup> The bulleting requirement may thus be circumvented by a simple request.<sup>66</sup>

## V. ABUSE OF THE REVISION PRIVILEGE

The ability of members of Congress to go back and make substantive alterations in the texts of their remarks before they are printed in the *Congressional Record* provides a substantial vehicle for distortion of the legislative process. The potential for abuse spans from attempts to slip legislation through Congress by making it appear as if the item of legislation was explained in the floor debates to attempts to influence the administration and interpretation of laws by the insertion of remarks into the *Record* bearing on the issue of legislative intent.

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as little as one sentence, make two pages of inserted material appear to have been delivered.")

The inadequacy of the bulleting requirement was pointedly demonstrated in a speech offered by Rep. Lawrence Coughlin (R-Penn.) after the adoption of the bulleting requirement. 124 CONG. REC. 4, 5262 (1978). After delivering the first paragraph of his speech criticizing the inadequacy of the bulleting requirement on the House floor, Mr. Coughlin announced, "[t]he remainder of my speech will be submitted, but will appear in the *Record* as if I stood before you and continued to speak [i.e., without bullets]." *Id.* Coughlin continued: "The *Congressional Record* was created to serve as an accurate historical and legal document. Unfortunately, it seems to have deteriorated into an inaccurate and often misleading journal." *Id.*

See also 124 CONG. REC. 6, 7294 (1978) in which Rep. Steven D. Symms (R-Idaho) commented in response to an apparent exercise of this "loophole." Referring to comments printed in the *Record* by another Congressman, Symms said: "Either my colleague has a tongue which is faster than a speeding bullet, or we should consider putting some bullets around his extraneous remarks." *Id.*

<sup>63</sup> See *supra* text at note 54.

<sup>64</sup> Alterations in delivered speeches do not have to be marked with bullets. Only wholly inserted statements must be marked. See *supra* text and note at note 62.

<sup>65</sup> 129 CONG. REC. S12402-03 (daily ed. Sept. 19, 1983)(statement of Sen. Mathias).

### A. Examples Of Abuse

Examples of abuse of the revision privilege are hard to uncover. The verbatim transcripts of the debates are classified as "non-public"<sup>67</sup> and, accordingly, are not available for public scrutiny.<sup>68</sup> Nevertheless, the few examples of distortion which have surfaced illustrate how the revision privilege affects the interpretation and application of federal law.

In 1981, Representative Daniel Rostenkowski (D-Ill.), Chairman of the Committee on Ways and Means, reintroduced a bill designed to compensate black lung sufferers.<sup>69</sup> When explaining the bill on the floor of the House, Representative Rostenkowski failed to mention an amendment added to the bill that morning by Senator Robert Dole (R-Kan.), which authorized the Internal Revenue Service to approve special deductions for members of Congress including a 19,000 dollar deduction for their Washington living expenses.

Nevertheless, the next day's *Congressional Record* credits Representative Rostenkowski with two paragraphs discussing the proposal that conclude with the following sentence: "The amendment requires the Treasury Department to determine an appropriate amount which Members [of Congress] may deduct, without substantiation, for away-from-home business expenses."<sup>70</sup> Had Rostenkowski's statement actually been delivered on the floor, the amendment would probably never have been passed. When the amendment was discovered, it was quickly repealed.

In 1979, Representative John J. Duncan (R-Tenn.) pushed through the House an amendment to a bill. The amendment was designed to immunize the Tellico Dam project in Tennessee from a number of federal environmental laws of which the project was in violation.<sup>71</sup> Duncan never read or discussed this amendment on the House floor. Nevertheless, the following day's *Record* credits Duncan with having explained the amendment in full. Duncan reportedly said: "The purpose of my amendment is to establish in

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<sup>66</sup> *Id.*

<sup>67</sup> Miller, *Congress' License To Lie*, READER'S DIG. 72, 76 (Feb. 1983).

<sup>68</sup> *Id.* at 72.

<sup>69</sup> 127 CONG. REC. H9792 (daily ed. Dec. 16, 1981).

<sup>70</sup> *Id.*

<sup>71</sup> According to the Tennessee Valley Authority, the project was in conflict with the Rivers and Harbors Act, the Clean Air Act, the National Historic Preservation Act, and the Endangered Species Act of 1973. Flyer published by "Concerned Tennesseans," entitled *An Unprecedented Violation of Congressional Procedures*.

law the Congress' desire to see that the Tellico Dam and Reservoir is completed and used as designed. . . . My amendment would provide in legislation, what we in Congress *intended* as far as the status of the project is concerned . . . that the Congress *intends* for this project to be 100 percent complete and used as designed."<sup>72</sup> If this abuse had not been discovered, anyone relying on the *Record* to establish the legislative intent in enacting Duncan's amendment would have concluded that Congress intended for the Tellico Dam to be completed regardless of how many environmental statutes it violated.

In 1971, Representative Edith Green (D-Ore.) was reported in the *Record*<sup>73</sup> as having spoken out against a piece of labor legislation asserting that the new legislation would force the repeal of the Equal Pay for Equal Work Act.<sup>74</sup> The sponsor of the bill, Representative John N. Erlenborn (R-Ill.) made no response to this assertion.<sup>75</sup> Officials of the Labor Department, relying on the *Record*, understood Erlenborn's silence to indicate that Green was right, and subsequently used their authority to oppose the proposed legislation.<sup>76</sup>

In reality, Green was wrong.<sup>77</sup> Erlenborn never had an opportunity to disagree with Green's assertion because her statement was never made in his presence nor during the course of the debate.<sup>78</sup> Representative Green, by exercising her revision privilege, had simply inserted her comments in the *Record* after the floor debate had taken place.<sup>79</sup>

The above examples of abuse are not isolated incidents. Representative James G. O'Hara (D-Mich.), for example, explicitly admitted having made insertions in the *Record* bearing upon the intent of Congress in passing particular statutes.<sup>80</sup> The revision privilege allows the insertion of statements that bear upon the issue of congressional intent but which were never heard in the debates when Congress agreed to a bill. As O'Hara noted, this privilege "makes possible a corruption of the legislative process

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<sup>72</sup> 125 CONG. REC. H4663 (daily ed. June 18, 1979).

<sup>73</sup> See 117 CONG. REC. 32, 42096 (1971).

<sup>74</sup> 29 U.S.C. § 206 (1970).

<sup>75</sup> See 117 CONG. REC. 32, 42096 (1971).

<sup>76</sup> L.A. Times, Mar. 17, 1975, *reprinted in* 121 CONG. REC. 18, 22903 (1975).

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> 121 CONG. REC. 18, 22919 (1975). O'Hara believed that use of the revision privilege should be restricted.

and a misrepresentation of the legislative intent.”<sup>81</sup> Another representative stated this observation in sharper terms: “Phony legislative histories are written all the time . . . [the inserted] words might push the [meaning] of [a] statute one way or the other, yet they had no influence whatever on debate or vote . . . . I have observed much skulduggery and the fraudulent making of legislative history by this means.”<sup>82</sup>

### *B. Thwarting The Purposes Of The Record*

As discussed previously, the *Congressional Record* serves both as an historical document and as a record of legislative intent. Abuse of the revision privilege may prevent the *Congressional Record* from fulfilling its major purposes.

There are two primary justifications offered for the existence and use of the revision privilege. The first justification contends that the privilege is needed in order to correct typographical errors in the transcripts made by the official reporters,<sup>83</sup> as well as to remove any grammatical errors<sup>84</sup> and indecorous remarks made in the heat of debate.<sup>85</sup> The second justification contends that the privilege to revise and extend is needed to afford members of Congress an opportunity to put their viewpoints in print when time limitations prohibit them from verbally expressing their viewpoints during the floor debates.<sup>86</sup> Alterations made in the *Record* under these two justifications, however, do not promote the *Congressional Record's* dual purpose as an historical document of congressional proceedings and as a record of legislative intent.<sup>87</sup>

First, it is unnecessary for a member of Congress to proofread his own transcript for typographical errors. Congress employs

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<sup>81</sup> *Id.*

<sup>82</sup> CLAPP, *supra* note 46 (remark by anonymous Republican).

<sup>83</sup> 129 CONG. REC. S12400 (daily ed. Sept. 19, 1983).

<sup>84</sup> Mantel, *supra* note 44, at 984.

<sup>85</sup> Stevens, *Inaccuracies in the Texts of Congressional Speeches*, 15 CENT. STATES SPEECH J. 183, 186 (1964). For an historical example, see the remarks of Rep. Thomas E. Watson (D-Ga.) made in the House in 1892: “On the passage of the bill 113 Democrats voted against, 114 rascally Republicans voted for, and 13 leprous Greenbackers voted with the Republicans.” Watson deleted these words from the verbatim transcript and denied ever making them. *Id.*

<sup>86</sup> Wall St. J., Mar. 31, 1975, *Candor Has Its Limits*, reprinted in 121 CONG. REC. 18, 22902 (1975).

<sup>87</sup> Fernsworth, *supra* note 3.



proofreaders for this purpose.<sup>88</sup> Second, while allowing members of Congress to correct grammatical errors made in debate may make the *Record* a tidier literary document,<sup>89</sup> it may also help to obscure the *Record's* significance as an historical record. Future scholars may become puzzled why seemingly eloquent and powerful speeches went unnoticed by a speaker's contemporaries. The answer might be that the speech actually given was poorly organized or poorly delivered. Without some indication of substantive alterations, historians will not be able to tell the difference. Third, allowing congressional members to delete indecorous remarks spoken during the debates may also cloud the historical value of the *Record*. Members of Congress are exempt from liability for potentially libelous remarks they make during the debates.<sup>90</sup> This undoubtedly promotes some mudslinging and name calling that might prove embarrassing in print.<sup>91</sup> However, indecorous remarks made in the debates can be expunged from the *Record* by a majority vote of the body of Congress in which the remark is spoken.<sup>92</sup> Thus, the revision privilege is not necessary in order to delete indecorous remarks from the *Record*. If the remark is not so repugnant that a majority will vote to delete it, the remark should remain in the *Record* as an important historical element of the debates.<sup>93</sup> Historical knowledge of a single insult may go far in explaining the cooperation of certain participants in the debate. Indeed, it has been remarked that the inclusion of such remarks, as well as the inclusion of verbatim impromptu orations, may very well make the *Record* a more intriguing document to study.<sup>94</sup>

The second justification offered for the insertion of unspoken remarks into the *Record* is that the revision privilege is needed to

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<sup>88</sup> Robinson, *supra* note 10, at 10.

<sup>89</sup> Mantel, *supra* note 44, at 986.

<sup>90</sup> Under the speech or debate clause. U.S. CONST. art. I, § 6.

<sup>91</sup> 104 CONG. REC. 6597 (1958)(remarks of Rep. McCormack) *reprinted in* Mantel, *supra* note 44, at 984. For example, in 1963, Rep. Cooley addressed Rep. Gross in the following manner: "You sit back here and snipe year after year. If you don't want to go why don't you just shut up?" The following day's *Record* quoted Mr. Cooley quite differently: "It is difficult for me to understand why you continue to complain."

<sup>92</sup> Stevens, *supra* note 85, at 186.

<sup>93</sup> Mantel, *supra* note 44, at 994, wrote: "Perpetual doctoring of the primary source of legislative activity is no solution to hasty thoughts and hot tempers."

<sup>94</sup> Sen. Neuberger (D-Ore.), *The Congressional Record Is Not A Record*, N.Y. Times, Apr. 20, 1958 (Magazine) *reprinted in* 132 CONG. REC. 26, 33519 (1977). ("Indeed, the inevitable added zest and controversy and slips and lapses could make the *Record* a far more lively and readable document.").

compensate for the time limitations inherent in the debates. It would be impractical for every member of Congress to express her view on every issue that comes before Congress.<sup>95</sup> Permitting members of Congress to place their opinions "on record" by insertion rather than by actual oral presentation undoubtedly helps to curb a good deal of unnecessary debate.<sup>96</sup>

Inserted statements, however, may have a substantive impact on the interpretation given to a statute after its passage without ever having any influence on the debate or vote.<sup>97</sup> If a statement of congressional intent on a particular statute goes unchallenged on the floor, it should be accorded more weight in establishing Congress' true legislative intent than a statement inserted in the *Record* after the debate when there is no opportunity for rebuttal.<sup>98</sup> Thus, unmarked insertions may carry more weight in discerning legislative intent than they should. The concern over unmarked insertions in the *Record* is particularly profound in those instances when a member of Congress makes a remark bearing on legislative intent during the floor debates when it may influence the deliberations or vote and subsequently uses her revision privilege to alter her statement to reflect a different intent before her remarks are printed in the *Record*.<sup>99</sup>

Thus, those who rely on the *Congressional Record* as evidence of legislative intent may be misled by unmarked inserted statements or substantive alterations made under the revision privilege. The debates as recorded in the *Record* are utilized both by federal agencies when drafting regulations and by the courts when interpreting federal statutes.<sup>100</sup>

The revision privilege presents a potential danger that regula-

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<sup>95</sup> See *supra* text and note at note 86. If, for example, all 435 members of the House of Representatives spoke for as short as one minute each on a single piece of legislation, the debate would last longer than seven hours. L.A. Times, Mar. 17, 1975, reprinted in 121 CONG. REC. 18, 22903 (1975).

<sup>96</sup> However, Congressmen who want to be viewed as participants in the legislative debates should really be involved. 129 CONG. REC. S12403 (daily ed. Sept. 19, 1983)(remarks of Sen. Mathias: "If the appearance is so important, let us use that as an incentive to bring about the reality.").

<sup>97</sup> See *supra* text and note at note 82. See N.Y. County Lawyers' Ass'n. Recommendations Approval (Report No. F-11 recommending approval of H. Res. 479), Nov. 1977, reprinted in 123 CONG. REC. 30, 38911 (1977) for a hypothetical of potential abuse in which the revision privilege might be used by lobbyists as a method to influence the courts when interpreting a bill.

<sup>98</sup> Anderson Bros. v. Valencia, 452 U.S. 205, 232 n.10 (1981)(dissenting opinion).

<sup>99</sup> 123 CONG. REC. 9, 10543 (1977)(remarks of Rep. Steiger).

<sup>100</sup> See *supra* text and notes at notes 30-40.

tions governing the implementation and enforcement of a federal statute will not effectuate the statute's true purpose. Federal agencies (such as the Environmental Protection Agency) often refer to the *Congressional Record* when drafting regulations for the administration of federal statutes.<sup>101</sup> Indeed, some insertions are placed in the *Record* specifically to influence the drafting process.<sup>102</sup> Therefore, an inaccurate *Record* could result in the promulgation of federal regulations which do not adequately reflect congressional intent.

The reported debate on the ninety-eight billion dollar tax increase passed by the House on August 19, 1982<sup>103</sup> provides an example of this potential danger. The *Congressional Record* for that day contains seven pages of comments (roughly 10,000 words) allegedly spoken within a ten minute period.<sup>104</sup> The great bulk of these comments could not have been spoken on the floor within that time. Nevertheless, none of these statements were marked with bullets to indicate that they were not actually spoken on the House floor. If the Internal Revenue Service refers to these inserted, unmarked statements when drafting regulations for the enforcement of this tax increase, it may improperly rely on statements that were not a part of the actual debate or vote.

The revision privilege also creates a danger that the courts will misinterpret the intent of Congress when applying federal statutes.<sup>105</sup> The *Congressional Record* serves as a principal source for determining the legislative intent existing at the time a statute is passed.<sup>106</sup> When questions arise as to the meaning of a federal statute, often both parties to the dispute will comb the *Congressional Record* in search of remarks that will lend support to their positions in briefs and oral arguments presented to the courts.<sup>107</sup> These remarks may influence the decision of the court even when the court does not expressly rely on them in its opinion.<sup>108</sup>

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<sup>101</sup> 124 CONG. REC. 4, 5110 (1978)(remarks of Rep. Steiger).

<sup>102</sup> *Id.* ("Prearranged colloquies between Members of the House or Senate are often used expressly for this purpose. When an unstated argument has been printed without rebuttal, legislative intent can be clouded forever.")

<sup>103</sup> 128 CONG. REC. H6635 (daily ed. Aug. 19, 1982).

<sup>104</sup> 128 CONG. REC. H6614-22 (daily ed. Aug. 19, 1982). See Miller, *supra* note 67, at 75.

<sup>105</sup> 121 CONG. REC. 16, 21335 (1975)("[U]nless the *Record* shows debate on a measure exactly as it took place and identifies clearly the remarks actually spoken on the floor, there is a grave danger the courts will misinterpret the intent of Congress.")

<sup>106</sup> See *supra* text and notes at notes 41-43.

<sup>107</sup> Givens, *supra* note 34.

<sup>108</sup> *Id.*

The courts apparently rely on the *Congressional Record* as an indication of legislative intent when adjudicating controversies of environmental concern. Federal courts, for example, have cited the *Record* in decisions involving the National Environmental Policy Act of 1969 (NEPA)<sup>109</sup> in at least 247 cases.<sup>110</sup> Yet, there is no way to know how much of the supposed "debate" on NEPA reported in the *Congressional Record* was actually spoken and how much was simply inserted after the true debate was over.

### C. The Role Of The Press

It has been asserted, however, that Congress is not the body responsible for providing the public with an accurate account of the floor debates.<sup>111</sup> Sen. Charles R. Mathias (R-Md.), former Chairman of the Joint Committee on Printing, suggests that a separate institution already exists for the purpose of informing the public about the conduct of its elected officials.<sup>112</sup> That institution is the press. Mathias asserts that the press, as the fourth estate of government,<sup>113</sup> is the body responsible for insuring the veracity of congressional members.<sup>114</sup> As part of its duty, the press should inform the public when these officials exceed the scope of acceptable typographical and grammatical editing and enter the dubious realm of substantive revision.

While Sen. Mathias' press-as-watchdog theory is consistent with the concept of freedom of the press, it provides insufficient grounds for releasing Congress of its duty to provide an accurate report of its own proceedings. There are two basic weaknesses in Sen. Mathias' approach. First, Congress has imposed burdens on the press' ability to make comparisons between what is reported in the *Record* and what is actually spoken on the floors of Congress. Tape recordings of the debates are not permitted.<sup>115</sup> In

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<sup>109</sup> 42 U.S.C. §§ 4321-4347 (1976).

<sup>110</sup> LEXIS search using the keyword sequence: (National Environmental Policy Act or NEPA) and (Congressional Record or Cong. Rec.). Search conducted on November 14, 1984.

<sup>111</sup> 129 CONG. REC. S12400-03 (daily ed. Sept. 19, 1983)(statement of Sen. Mathias).

<sup>112</sup> *Id.* at S12401.

<sup>113</sup> Justice Stewart stated that the "primary purpose of the constitutional guarantee of a free press was . . . to create a fourth estate outside the Government as an additional check on the three official branches." Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

<sup>114</sup> 129 CONG. REC. S12401 (daily ed. Sept. 19, 1983).

<sup>115</sup> Miller, *supra* note 67, at 76.

addition, the verbatim transcripts of the debates are classified as "non-public."<sup>116</sup> Accordingly, they are not available for scrutiny by either the public or the press.<sup>117</sup>

The press would be forced to undertake an extremely laborious process in order to adequately monitor the conduct of Congressmen and the use of the revision privilege. In order to make comparisons between the *Record* and the actual proceedings, the press would be required to employ reporters to record verbatim every word spoken on the floors of the House and the Senate. This would be a clearly wasteful duplication of a task already performed by Congress. The press would then have to compare its own transcripts against those which are printed in the *Record* in order to discover substantive discrepancies between the two. The press would also be faced with the arduous task of combing agency reports and court opinions to uncover instances of the material misuse of substantive revisions as indicators of congressional intent.<sup>118</sup>

This tedious scenario underscores the inadequacy of Sen. Mathias' suggestion that the press is well-suited for this monitoring process. The burgeoning volume of government generated information makes it impracticable, if not impossible, for the press to keep a vigilant eye on all governmental activities,<sup>119</sup> much less to perform duplicative tasks which should be unnecessary in the first place. If Congress simply printed accurate transcripts itself, or contracted out to the media to print accurate transcripts, there would be no need for the media to keep a watch for abuses of the revision privilege.<sup>120</sup>

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<sup>116</sup> *Id.* at 72.

<sup>117</sup> *Id.* at 76. According to Miller, only one outsider has ever been allowed to view the original transcripts—a researcher for columnist Jack Anderson. *Id.* Anderson's researcher scrutinized only two days worth of transcripts, yet discovered some substantial changes made via the revision privilege. *Id.* at 73. When Miller asked why the original transcripts were "non-public," he was informed that the manuscripts "are the personal property of the members of Congress." *Id.* at 76.

<sup>118</sup> It should be recalled that the *Record* may be influential in these areas even when not expressly cited by agencies or the courts. *See supra* text at note 108. Thus, even this method would be insufficient to adequately monitor revisions made in the *Record*.

<sup>119</sup> Note, *The First Amendment Right of Access to Government Held Information: A Reevaluation After Richmond Newspapers, Inc. v. Virginia*, 34 RUTGERS L. REV. 292, 294 (1982).

<sup>120</sup> "Accurate" does not necessarily mean that the printed transcripts must be a verbatim account of the debates. Congress might simply employ an editing staff which would make certain that unmarked revisions are made solely for the purpose of correcting grammatical and typographical errors. All substantive changes or additions should

Second, Congress originally adopted the *Congressional Record* in part to redress the inaccuracies attributable to the political biases of the original recorders of the debates.<sup>121</sup> Congress has assumed the role of the press in reporting its own debates. Congress should also assume the media's role as a constitutionally appointed means of scrutinizing the behavior of public officials in order to keep them accountable to their constituency. As Justice Stewart noted in *Saxbe v. Washington Post Co.*,<sup>122</sup> "the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve."<sup>123</sup> To the extent that the *Record* displaces the role of the press, it must also assume responsibility for providing the public with "accurate information"<sup>124</sup> in order to avoid diluting the public's right to "assert meaningful control over the political process."<sup>125</sup>

#### D. What Should Be Done to Improve the Record's Accuracy

Statements that are written and inserted in the *Congressional Record*, rather than delivered on the floor of Congress, merit little

be clearly indicated—either by a more stringent application of the bulleting requirement or by some other publishing technique.

<sup>121</sup> See *supra* text and notes at notes 17-24.

<sup>122</sup> 417 U.S. 843 (1974).

<sup>123</sup> *Id.* at 863-64 quoting *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

<sup>124</sup> *Saxbe*, 417 U.S. at 863.

<sup>125</sup> *Id.* The Court stated that:

An informed public depends on accurate and effective reporting by the news media. No individual can obtain for himself the information needed for the intelligent discharge of his political responsibilities . . . In seeking out the news the press therefore acts as an agent of the public at large. It is the means by which the people receive that free flow of information and ideas essential to intelligent self-government. By enabling the public to assert meaningful control over the political process, the press performs a crucial function in effecting the societal purpose of the First Amendment.

See the remarks of Rep. Kasten, Jr.:

[C]urrent practice may contribute to inaccurate reporting in the press and media. Many members have complained about the manner in which the press reports congressional business. However, the present state of the *Record* forces Members and the public to rely upon press reports that may themselves be based upon incomplete information, in error, or partly the product of personal political preference of the writer. If the *Congressional Record* were a more accurate accounting of congressional debate and activity, I think this problem could be improved.

121 CONG. REC. 16, 21335 (1975).

weight in the construction of legislative history.<sup>126</sup> Thus, when inserted statements in the *Record* are not marked they will appear to have been spoken on the floor as part of the legislative process and may be given more weight in the interpretation of federal statutes than they deserve. This may lead to the misinterpretation of congressional intent.

The *Congressional Record* provides an inaccurate report of the actual floor proceedings. The lax application and enforcement of the bulleting requirements presents a potential for abuse of the revision privilege by allowing unmarked substantive alterations of the floor debates before the debates are printed in the *Record*. Correction of typographical and grammatical errors and the removal of indecorous remarks are in conflict with the utility of the *Record* as an historical document. Even if such corrections and deletions are justified, insertions and other changes are not in light of the *Record's* second purpose as a record of legislative intent. Abuse of the revision privilege may result in the implementation of an inaccurate congressional intent by administrative agencies when relying on the *Record* in writing federal regulations or by the courts when relying on the *Record* when interpreting federal statutes.

In order to eliminate the potential for abuse, Congress should severely restrict the scope of the revision privilege. This restriction could be accomplished through the enactment of more stringent requirements for identifying substantive alterations made in the transcripts of the debates. Ideally, inserted statements should be assigned to a separate index to make it clear that they were not spoken in the actual debates. If it is necessary to place insertions in the main body of the *Record* for purposes of clarity or congruity, the inserted statements should be clearly marked. Substantive changes that may alter the meaning or interpretation of a speech should also be plainly marked. Insertions and substantive changes could be marked through a more stringent application of the bulleting requirement. By placing bullets around *all* inserted remarks and substantive alterations in the legislative debates, Congress would greatly enhance the accuracy of the *Congressional Record* and correspondingly increase the *Record's* value as both an historical document and as a record of congressional intent.

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<sup>126</sup> *Anderson Bros.*, 452 U.S. at 232 n.10; see *supra* text and notes at notes 97-99.

## VI. FIRST AMENDMENT GROUNDS FOR REQUIRING AN ACCURATE CONGRESSIONAL RECORD

If Congress refuses to restrict the use of the revision privilege, a challenge to the present privilege may find constitutional support in a judicial action based upon first amendment principles.<sup>127</sup> First amendment rights are traditionally applied in situations restricting freedom of religion, freedom of speech or freedom of assembly. However, courts have recognized several other distinct constitutional rights stemming from the first amendment. Among these additional rights are the established right to receive information and the emerging right of public access to information within the government's control. The following sections will discuss the merits of asserting these two rights in an attempt to require

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<sup>127</sup> The first amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

A lawsuit seeking this declaration was filed by the Mountain States Legal Foundation in District of Columbia district court seeking an injunction directing the Government Printing Office to print a *Congressional Record* that is an accurate report of congressional proceedings. See their Amended Complaint, *Gregg v. Barret*, D.C. District Court Civil Action No. 84-0204. The suit was filed on behalf of two classifications of plaintiffs: 1) on its own behalf and on the behalf of individually named attorneys on the basis that they are "officers of the court and advocates of the public interest, [and] have been and are thus obligated to represent to the courts that the *Congressional Record* may be relied upon in construing legislative intent . . ."; and 2) on behalf of individually named Representatives in that they "have an interest in receiving such information from their fellow Congressmen, in having access to transcripts of congressional proceedings . . . and in preventing the defendant Public Printer from censoring or distorting communications that have actually occurred on the Senate floor, and from fabricating communications that did not occur." Congressional Record Case Proposal, Mountain States Legal Foundation, prepared by M. Miller, S. Bard, & M. Perna.

The case was dismissed in trial court for lack of jurisdiction under invocation of the speech or debate clause of the U.S. Constitution. *Gregg v. Barret*, No. 84-0204, slip op. at 3 (D.D.C. May 30, 1984). Discussion of the speech or debate clause is beyond the scope of the present article. It should be noted, however, that in situations involving two conflicting constitutional rights, *i.e.* those of the legislature embodied in the speech or debate clause and those of individuals embodied in the first amendment, the doctrine of separation of powers suggests that the court should exercise jurisdiction. Reinstein & Silverstein, *Legislative Procedure and the Separation of Powers*, 86 HARV. L. REV. 1113, 1175 (1973). To permit the invocation of the speech or debate clause to preclude judicial review of first amendment rights, the protection of which has always been the institutional responsibility of the judiciary, would elevate the legislative branch above the judicial branch in such situations. *Id. Contra Eastland v. U.S. Serviceman's Fund*, 421 U.S. 491, 508 (1975) (four dissenting justices, however, stated that constitutional rights of individuals must sometimes take priority over the speech or debate clause.) The speech or debate clause was designed to make Congress a coequal rather than a supreme branch of government. *United States v. Brewster*, 408 U.S. 501, 508 (1972).



Congress to print an accurate *Congressional Record*.<sup>128</sup> In addition, this article will propose an original theory based upon underlying first amendment principles for requiring an accurate *Record*, the concept of constitutionally imposed substantive limitations on the government's authority to distort information that it voluntarily disseminates.

#### A. *The Constitutional Right To Receive Information*

The first amendment guarantees, with some qualifications, a constitutional right to *send* information unrestricted by government interference. This right has long been recognized by the judicial system.<sup>129</sup> Recently, the Supreme Court has held that the first amendment also contains a right to *receive* information unhampered by governmental restraints. Individuals with a specific interest in receiving an accurate record of congressional deliberations might assert a right to receive this information unhampered by the distortion imposed upon the presentation of the floor debates in the *Congressional Record* by members of Congress exercising their revision privilege.<sup>130</sup> In order to determine the merits of such an assertion, it will be useful to examine the requisites necessary in order to maintain a right to receive.

In *Lamont v. Postmaster General*,<sup>131</sup> one of the first cases to recognize a right to receive, the Supreme Court reviewed the constitutionality of the Postal Service Act of 1962 which provided for the detainment of communist propaganda by the Postal Service unless a written request for its delivery was made by the addressee.<sup>132</sup> The Court held that the statute constituted an unconstitutional restriction on the addressee's first amendment rights.<sup>133</sup> As noted by Justice Brennan in his concurrence, it was not the right of the sender being recognized in this decision.

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<sup>128</sup> The right to receive and the right of access were proposed as possible causes of action in the Congressional Record Case Proposal, *supra* note 127. Mountain States Legal Foundation decided not to pursue the right of access doctrine in their lawsuit. See Amended Complaint, *supra* note 127.

<sup>129</sup> See, e.g., *Fiske v. Kansas*, 274 U.S. 380 (1927).

<sup>130</sup> See Amended Complaint, *supra* note 127.

<sup>131</sup> 381 U.S. 301 (1965).

<sup>132</sup> The Act provided, in relevant part: "Mail matter, except sealed letters . . . which is determined by the Secretary of the Treasury . . . to be 'communist political propaganda,' shall be detained by the Postmaster General . . . and the addressee shall be notified that such matter has been received and will be delivered only upon the addressee's request . . ." Postal Service and Federal Employees Salary Act of 1962, 76 Stat. 840, § 305(a).

<sup>133</sup> *Lamont*, 381 U.S. at 307.

Rather, the holding was based on the right of the addressee to receive information freely offered to him without undue interference on the part of the government.<sup>134</sup>

The constitutional right to receive information, however, is accompanied by certain restrictions. In *Kleindienst v. Mandel*,<sup>135</sup> the Supreme Court held that governmental interference with the free flow of information to willing recipients, although generally prohibited, may be permissible in situations encompassing matters of traditional congressional authority. In *Kleindienst*, several university professors brought an action to secure a visa for Ernest E. Mandel, a Marxian theoretician invited to the United States to address a conference on Technology and the Third World.<sup>136</sup> The government refused Mandel's visa under a federal statute which barred entry to the United States, at the discretion of the Attorney General,<sup>137</sup> to any person who advocated "the economic, international and governmental doctrines of world communism."<sup>138</sup> Several university professors asserted that the statute denied them their right to hear, or receive, Mandel's political teachings.<sup>139</sup> While the Court acknowledged that the right to receive was well established,<sup>140</sup> it did not accept plaintiffs' argument that the right to receive required the Court to balance the government's decision to bar Mandel's entry to the country against the plaintiffs' asserted first amendment rights.<sup>141</sup> The Court based its refusal on a finding that the statute was a legitimate exercise of a firmly established congressional power, the power to restrict travel to and from the United States.<sup>142</sup>

The case of *Virginia State Board of Pharmacy v. Virginia County Consumer Council*<sup>143</sup> presents a further limitation on the right to receive. In *Virginia*, consumers of prescription drugs

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<sup>134</sup> *Id.* at 307-08 (concurring opinion).

<sup>135</sup> 408 U.S. 753 (1972).

<sup>136</sup> *Id.* at 756-57.

<sup>137</sup> The Attorney General could waive ineligibility under § 212(d) of the Act. *Id.* at 755-56.

<sup>138</sup> *Id.* at 755. Immigration and Nationality Act of 1952, 66 Stat. 163, §§ 212(a)(28)(D) and (G)(v).

<sup>139</sup> *Kleindienst*, 408 U.S. at 760.

<sup>140</sup> *Id.* at 762.

<sup>141</sup> *Id.* at 765.

<sup>142</sup> *Id.* at 769-70. Justice Marshall would have applied a different constitutional standard. *Id.* at 777 (dissenting opinion) ("It is established constitutional doctrine . . . that the government may restrict First Amendment rights only if the restriction is necessary to further a compelling governmental interest.").

<sup>143</sup> 425 U.S. 748 (1976).

challenged a state statute's declaration that the advertisement of prescription drug prices by pharmacists constituted unprofessional conduct.<sup>144</sup> Since only licensed pharmacists were permitted to dispense prescription drugs in Virginia, the statute effectively prohibited the affirmative dissemination of information pertaining to the price of prescription drugs anywhere within the state.<sup>145</sup> While the statute restricted the permissible conduct of pharmacists rather than of consumers, the Supreme Court nevertheless held that the consumers were entitled to redress under the first amendment since freedom of communication is a right that runs to the recipient of the communication as well as to the communication's source.<sup>146</sup> The Court also noted, however, that the concept of freedom of speech presupposes a willing sender.<sup>147</sup> Without the willing sender requirement, the right to receive information would be paramount to a right to extract information from one who does not wish to send it.<sup>148</sup> Thus, the right to receive information can only be asserted when the holder of the information is willing to send it.

Considering the above limitations on the right to receive, it does not seem as if a right to receive could be successfully asserted in an action seeking to require the publication of an accurate *Congressional Record* for two reasons. First, by permitting the exercise of the revision privilege, Congress is simply asserting its power to control the contents of a document for whose publication it is solely responsible, a power which is part of Congress' traditional authority.<sup>149</sup> Therefore, under *Kliendienst*, a court is unlikely to find that the right to receive prohibits the present revi-

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<sup>144</sup> *Id.* at 749-50.

<sup>145</sup> *Id.* at 752.

<sup>146</sup> *Id.* at 756. The Court stated: "[i]f there is a right to advertise, there is a reciprocal right to receive the advertising, and it may be asserted by these [consumers]." *Id.* at 757.

<sup>147</sup> *Id.* at 756. The Court noted that a willing sender existed in the *Virginia* case: "In the absence of [the statute prohibiting advertising] some pharmacies in Virginia would advertise, publish and promote price information regarding prescription drugs." *Id.* at 756 n.14 quoting Stipulation of Facts 26, App. 15.

<sup>148</sup> Note that the remedy in the *Virginia* case held that the statute prohibiting advertising of prescription drug prices was unconstitutional. The Court did not hold, in any sense, that the consumers had a right to require pharmacists to advertise who did not wish to.

<sup>149</sup> The *Congressional Record* is printed under statutory authority. See *supra* note 6. While these statutes require the *Record* to be a "substantially verbatim report," *supra* note 1, it would be futile to attempt to restrict the behavior of Congress through a first amendment judicial declaration based on statutory language that Congress could change at will.

sion privilege. Second, the present revision privilege does not interfere with communications between willing senders and willing receivers. Although those members of Congress who wish to disseminate an unedited version of congressional deliberations may be classified as willing senders, their right to send information, and the intended recipients' right to receive, is not presently being denied. Congress does not prohibit individual members of Congress from disseminating unedited information about legislative deliberations on their own time and at their own expense. It simply declines to fund such disseminations. Further, if congressional members wish for an unedited version of their own remarks, the only statements of which they are the source, to appear unedited in the *Congressional Record*, they may fulfill this wish by declining to exercise their revision privilege. Those members of Congress who choose to exercise their revision privilege clearly do not constitute willing senders under *Virginia* since they would rather disseminate a revised and extended version of their remarks than distribute the actual statements they made on the floor. Recipients of the revised statements could not compel them to do otherwise under the guise of a right to receive.

It is arguable that remarks made by members of Congress cannot be considered in isolation, and that the unrestrained exercise of the revision privilege by some members of Congress distorts the context of the unaltered speeches disseminated by those congressional members who do constitute willing senders of their unedited remarks. The *Record*, however, is not intended to disseminate the remarks of each Congressman individually; rather, it is intended to convey the statements of Congress as a whole. Therefore, Congress, as one entity, is the appropriate sender to be considered for purposes of satisfying the willing sender requirement outlined in *Virginia* and Congress as a whole has the right to control the content of the message it sends to the nation through the *Congressional Record*.<sup>150</sup>

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<sup>150</sup> Some confusion may result from the fact that both the sender and the governmental body allegedly interfering with the communication in this case are one and the same, namely, Congress. When there exist two clearly distinct private sources constituting the sender and the intended receiver of information, it is easy to discern when the government is interfering with a free flow of information. However, when the government itself constitutes the sender, as in this case, it is difficult to discern which of the government's actions should be attributed to its role as sender and which should be attributed to its role as potential interferor. In the present case, the revision privilege allows Congress to exercise control over the materials it wishes to disseminate as sender. Congress merely permits its members to make revisions. It does not require revisions. Nor does it promote

*B. The Constitutional Right Of Access To Information*

The right of access presents a substantially different first amendment challenge from the one presented by the right to receive. Instead of disputing the government's authority to interfere with political communications, the right of access confronts the government's ability to restrict access to information within the government's control. It may be asserted that the revision privilege, by permitting the distortion of the floor debates before they are printed in the *Record*, denies access to governmental information. Since the scope of the emerging right of access is still uncertain, it will be instructive to consider the evolution of this right in some detail in order to determine if it could provide an effective limitation on the present revision privilege.

In the case of *Pell v. Procunier*,<sup>151</sup> four prison inmates and three professional journalists challenged a California regulation that prohibited the media from selecting specific inmates for interviews.<sup>152</sup> Three journalists were denied permission to interview specific inmates.<sup>153</sup> The plaintiffs, composed of both inmates and journalists, sued to enjoin subsequent enforcement of the regulation.<sup>154</sup> The journalists contended that the regulation unconstitutionally infringed upon their ability to gather news.<sup>155</sup>

The Supreme Court held that the plaintiffs did not have a valid first amendment claim,<sup>156</sup> noting specifically that the press had a right of access only to information available to the public in general.<sup>157</sup> Justice Powell's dissent in the *Pell* opinion, however, foreshadowed the development of a first amendment right of

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revisions with any particular governmental policy in mind. The right to receive does not amount to a restriction on Congress' ability to control the information it wishes to disseminate as a willing sender. To hold otherwise would amount to recognizing a right to extract information that Congress is not willing to send. See *supra* text and notes at notes 147-48.

Although the accuracy of information disseminated in the *Congressional Record* may not be successfully challenged under a right to receive, other first amendment principles may restrict Congress' ability to substantively distort the accuracy of information it voluntarily disseminates. See *infra* text and notes at notes 214-226.

<sup>151</sup> 417 U.S. 817 (1974).

<sup>152</sup> Section 415.071 of the California Department of Corrections Manual provided: "[p]ress and other news media interviews with specific individual inmates will not be permitted." *Pell*, 417 U.S. at 819.

<sup>153</sup> *Id.* at 820.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 821.

<sup>156</sup> *Id.* at 835.

<sup>157</sup> *Id.* at 834.

access. Powell concluded that prohibiting the press from conducting interviews with prisoners prevented it from fulfilling its constitutionally appointed role of informing people about the conduct of their government.<sup>158</sup>

The Supreme Court reached a similar decision in the companion case of *Saxbe v. Washington*.<sup>159</sup> *Saxbe* involved a challenge by a major newspaper to a Federal Bureau of Prisons regulation<sup>160</sup> comparable to the California regulation in *Pell*. Like the *Pell* plaintiffs, the plaintiff in *Saxbe* argued that the regulation unconstitutionally infringed upon its ability to gather newsworthy information.<sup>161</sup> The Court noted that although the federal regulation prohibited the media from selecting specific inmates for interviews, members of the press were free to visit any of their friends and family members who were inmates, to tour and photograph prison facilities, to interview briefly prisoners whom they encountered during prison tours, and to write and receive letters to and from prisoners.<sup>162</sup> In addition, the Court noted that because of the high level of inmate turnover, ex-prisoners were always available to answer questions about the conditions in federal prisons.<sup>163</sup> Based upon these observations, the Court concluded that the prison regulation at issue in *Saxbe* was not intended to conceal federal prison conditions from the public.<sup>164</sup> The Court therefore found *Pell* to be controlling and held that the press should be afforded no greater right of access to governmentally held information than the public in general.<sup>165</sup>

Justice Powell's dissent again laid the groundwork for the development of a right of access.<sup>166</sup> Although he acknowledged that

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<sup>158</sup> *Id.* at 835. (Justice Powell, concurring in part and dissenting in part). See also the remarks of Justice Douglas: "The right to know is crucial to the governing powers of the people." *Id.* at 840 quoting *Branzburg v. Hayes*, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting).

<sup>159</sup> 417 U.S. 843 (1974).

<sup>160</sup> Paragraph 4b(6) of Policy Statement 1220.1A of the Federal Bureau of Prisons stated, in relevant part: "Press representatives will not be permitted to interview inmates . . . [except] with inmates whose identity is not to be made public, if it is limited to the discussion of institutional facilities, programs and activities." *Saxbe*, 417 U.S. at 844 n.1.

<sup>161</sup> *Id.* at 844-45.

<sup>162</sup> *Id.* at 846-47. Similar visitation privileges existed in *Pell*, 417 U.S. at 824-25.

<sup>163</sup> *Saxbe*, 417 U.S. at 848.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 850.

<sup>166</sup> *Id.* Justice Powell's dissent was joined by Justices Brennan and Marshall, two of the other three dissenting voices in *Pell*.

the government need not under all circumstances be forced to justify restrictions on access to information within its control, Justice Powell rejected the notion that all restrictions on media access to government information were free from constitutional review.<sup>167</sup> He asserted that restraints on the ability of the press to gather news must be justified on stronger grounds than simple governmental deference, even when such restraints are applied equally against the press and the public.<sup>168</sup> According to Justice Powell, the majority focused only on the well-established rights explicitly expressed in the first amendment and thereby avoided considering the adverse impact that a restriction on the media's access to information, although applied equally to the press and the public, has upon underlying first amendment values.<sup>169</sup>

Justice Powell further asserted that the Court "must look behind bright-line generalities . . . and seek the meaning of first amendment guarantees in light of the underlying realities of a particular environment."<sup>170</sup> Thus, by insisting that the press has a need to accumulate information in order to perform its first amendment role, Justice Powell created the framework for a judicial theory of a constitutionally based right of access to governmentally held information.

The likelihood that the Court would adopt Justice Powell's argument for recognizing a first amendment right of access was seriously diminished, however, in the subsequent case of *Houchins v. KQED*.<sup>171</sup> In *Houchins*, a broadcasting company sought access to the wing of a county jail where an inmate had committed suicide.<sup>172</sup> The conditions of the jail allegedly contributed to the inmate's suicidal depression.<sup>173</sup> At the time the *Houchins* case was brought, no public tours of the prison facilities were conducted, the inmates' mail was censored, and no inter-

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<sup>167</sup> *Id.* at 861.

<sup>168</sup> *Id.* Justice Powell wrote:

At some point official restraints on access to news sources, even though not directed solely at the press, may so undermine the function of the First Amendment that it is both appropriate and necessary to require the government to justify such regulations in terms more compelling than discretionary authority and administrative convenience. It is worth repeating our admonition in *Branzburg* that "without some protection for seeking out the news, freedom of the press could be eviscerated."

<sup>169</sup> *Id.* at 875.

<sup>170</sup> *Id.*

<sup>171</sup> 438 U.S. 1 (1978).

<sup>172</sup> *Id.* at 3.

<sup>173</sup> *Id.*

views with inmates were permitted of any kind.<sup>174</sup> The plaintiff, KQED, asserted that the county's failure to provide alternative means by which the public could be informed about the conditions of the jail violated the first amendment.<sup>175</sup>

The plurality opinion, authored by Chief Justice Burger, accurately noted that the Supreme Court, in *Pell* and *Saxbe*, had rejected a special right of access for the press beyond that afforded to the public in general.<sup>176</sup> The *Houchins* opinion, however, went beyond these holdings to decide that there was no discernible basis for a constitutionally imposed governmental duty to disclose newsworthy information.<sup>177</sup> The plurality opinion concluded that the first amendment did not mandate a right of access to information within the government's control.<sup>178</sup>

Justice Stevens, joined by Justices Brennan and Powell, dissented. While agreeing with the plurality that the press had no right of access beyond that held by the public in general, Justice Stevens noted that the Court had never before held that all nondiscriminatory exclusions of both the press and the public from access to information would avoid constitutional scrutiny.<sup>179</sup> The dissent noted that "[w]ithout some protection for the acquisition of information about the operation of public institutions such as prisons by the public at large, the process of self-governance contemplated by the Framers would be stripped of its substance."<sup>180</sup> The dissent would have held that a right of access to information exists in favor of both the press and the public under the appropriate circumstances.<sup>181</sup> Justice Stevens, however, did not attempt to define the scope of such a right of access.

A limited right of access to governmentally held information was finally recognized by a majority of the Supreme Court in the case of *Richmond Newspapers, Inc. v. Virginia*.<sup>182</sup> Although the right of access recognized in *Richmond* was limited to a right to attend criminal trials,<sup>183</sup> the *Richmond* holding represents a clear deviation from the flat rejection of a first amendment right of

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<sup>174</sup> *Id.* at 22-23. Cf. the facts in *Pell* and *Saxbe*, *supra* text and note at note 162.

<sup>175</sup> *Houchins*, 438 U.S. at 4.

<sup>176</sup> *Id.* at 11.

<sup>177</sup> *Id.* at 14.

<sup>178</sup> *Id.* at 15.

<sup>179</sup> *Id.* at 27.

<sup>180</sup> *Id.* at 32.

<sup>181</sup> *Id.*

<sup>182</sup> 448 U.S. 555 (1980).

<sup>183</sup> *Id.* at 580.



access presented in *Houchins*. In *Richmond*, the trial court ordered a murder trial closed to the press and public.<sup>184</sup> The plaintiff, Richmond Newspapers, argued that the trial court could not order closure of the courtroom without first holding evidentiary hearings to decide if less restrictive alternative means could be used to protect the rights of the defendant.<sup>185</sup>

The plurality opinion, authored by Chief Justice Burger, held that the trial court, under the facts of the case, had unjustifiably closed its proceedings to the press and the public in violation of their first amendment rights.<sup>186</sup> Explaining the Court's holding, Chief Justice Burger primarily emphasized the historical tradition of openness attending criminal trial proceedings.<sup>187</sup> Although the plurality opinion in the earlier *Houchins* decision precluded a first amendment right of access,<sup>188</sup> Chief Justice Burger was apparently compelled to rely on the first rather than the sixth amendment in *Richmond* due to the Supreme Court's rejection of a sixth amendment right to compel a public trial in an earlier case.<sup>189</sup>

Justice Stevens, in a concurring opinion, described *Richmond* as a watershed case<sup>190</sup> and highlighted *Richmond's* right of access component.<sup>191</sup> He noted that the Supreme Court had never before squarely held that the acquisition of newsworthy material was entitled to constitutional protection.<sup>192</sup> Stevens applauded the plurality for recognizing that the first amendment protected the public and press from infringement of their rights of access to information concerning the operation of their government.<sup>193</sup>

Justice Brennan, in a concurring opinion joined by Justice Marshall, espoused a right of access measured by weighing the public's need for the desired information against the government's interests in preventing the information from being revealed.<sup>194</sup> Justice Brennan further suggested that the Court should pay

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<sup>184</sup> *Id.* at 560.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 580.

<sup>187</sup> *Id.* at 564-74. The Court also emphasized that courtroom proceedings were open to the public at the time the first amendment was adopted. *Id.* at 575.

<sup>188</sup> See *supra* text and notes at notes 177-78. The specific holding in *Houchins*, denying a right of access to prison facilities, may not be overruled by *Richmond*.

<sup>189</sup> *Richmond*, 448 U.S. at 581-82 (Justice White, concurring). The earlier case was *Gannet Co. v. DePasquale*, 443 U.S. 368 (1979).

<sup>190</sup> *Richmond*, 448 U.S. at 582.

<sup>191</sup> *Id.* at 584.

<sup>192</sup> *Id.* at 582.

<sup>193</sup> *Id.* at 584.

<sup>194</sup> *Id.* at 588.

special attention to two specific guidelines in weighing these interests. First, the Court should consider whether the particular governmental institution to which access is sought is traditionally an open one.<sup>195</sup> If so, the institution's history of openness gives rise to a presumptive right of access.<sup>196</sup> Second, the Court should consider whether access to the governmental process in question is important in promoting the goals of that very process.<sup>197</sup> If so, then enforcing a right of access to that process furthers underlying first amendment goals.<sup>198</sup>

Justice Brennan's guidelines were adopted in 1982 by the majority opinion in *Globe Newspaper Co. v. Superior Court*.<sup>199</sup> In *Globe*, a newspaper challenged a trial judge's order closing a criminal trial from the press and the public.<sup>200</sup> The trial involved alleged sexual offenses committed against three minors.<sup>201</sup> The trial judge ordered closure of the trial to spectators as required by a Massachusetts statute.<sup>202</sup>

The majority opinion held that the closure violated the press' and the public's first amendment right of access to criminal trials.<sup>203</sup> In so holding, the majority first noted that criminal trials were traditionally open to the public.<sup>204</sup> The Court further noted that the right to attend criminal trials plays an important role in the functioning of the judiciary and the government as a whole.<sup>205</sup> The majority opinion in *Globe* placed special emphasis on the second of these considerations, in contrast to the majority opinion in *Richmond*<sup>206</sup> which placed primary emphasis on the first. The *Globe* majority emphasized the important functions performed by a right of access in the criminal justice system, stating: "in the

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<sup>195</sup> *Id.* at 589.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> 457 U.S. 596 (1982).

<sup>200</sup> *Id.* at 598.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* The statute was MASS. GEN. LAWS ANN., ch. 278, § 16A (West). ("At the trial of a complaint or indictment for rape . . . where a minor under eighteen years of age is the person upon, with or against whom the crime is alleged to have been committed, . . . the presiding judge shall exclude the general public from the courtroom, admitting only such persons as may have a direct interest in the case.")

<sup>203</sup> *Globe*, 457 U.S. at 602.

<sup>204</sup> *Id.* at 605.

<sup>205</sup> *Id.* at 606. ("Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole.") See also *infra* text at note 207.

<sup>206</sup> See *supra* text at note 187.

broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process—an essential component in our structure of self-government.”<sup>207</sup>

*Globe* represents a significant expansion in the area of the first amendment right of access. The *Globe* opinion stated that the first amendment encompasses all those rights necessary to enjoy other first amendment rights.<sup>208</sup> By protecting the free and open discussion of governmental affairs, “the First Amendment serves to ensure the individual citizen can effectively participate in and contribute to our republican system of self-government.”<sup>209</sup> This function of the first amendment may imply a right of access to governmental institutions in addition to the courtroom. The Supreme Court, however, has yet to apply the right of access doctrine to other governmental institutions.<sup>210</sup>

Even if the right of access doctrine is extended beyond a right to attend criminal trials to include access to other governmentally held information, it is highly unlikely that the Supreme Court would interpret this right to require Congress to print an accurate account of the floor proceedings in the *Congressional Record*. In the criminal trial cases, in which a right of access was successfully asserted, attendance in the courtroom had been denied to both the press and the public. The floor debates in the House and the Senate, however, are already open to attendance by the press and the public.<sup>211</sup> Therefore, “access” to the congressional debates is not being denied. The press in particular is free to attend and take notes on the debates. This is the same degree of attendance held to be constitutionally required by the first amendment in the criminal trial cases.

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<sup>207</sup> 457 U.S. at 606.

<sup>208</sup> *Id.* at 604. (“The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.”)

<sup>209</sup> *Id.*

<sup>210</sup> At least three justices would limit the *Richmond* and *Globe* decisions to criminal trials only. Justice Rehnquist never recognized a right of access. Chief Justice Burger would limit a right of access strictly to proceedings involving an “unbroken, uncontradicted history” of openness. *Globe*, 457 U.S. at 614. Justice O’Connor expressly limited her concurrence in *Globe* to criminal trials. *Id.* at 611.

<sup>211</sup> Except when there is a need for secret proceedings, e.g., on matters involving national security.

The House allowed the public to attend its proceedings from 1789 and the Senate allowed public attendance from 1794. The press was not allowed to attend until 1801. O’Brien, *The First Amendment and the Public’s Right to Know*, 7 HASTINGS CONST. L.Q. 579, 596 (1980).

One who has a pressing reason to obtain an accurate account of a floor debate, however, may not be able to do so after the debate is over. Only members of Congress are presently permitted to view the verbatim transcripts of the debates. Since the government possesses transcripts of the floor debates, requiring the public or press to attend debates in order to procure accurate legislative history may still amount to an unconstitutional infringement of the right of access.

The statement of this problem, however, also points out the limits of the problem's proper solution. Even if the Court were to find that the right of access doctrine applies to the *Record's* transcripts, Congress would not be required to print an accurate account of the legislative proceedings in the *Record*. At best, "access" in this situation would require Congress to provide access to the verbatim transcripts of the floor debates.<sup>212</sup>

Even in the very unlikely event that the Court would compel Congress, based on a right of access, to print the entire verbatim transcripts of the debates in the *Congressional Record*, such a requirement would not restrain Congress from printing additional inserted remarks in the *Record* intermingled with the verbatim account. Congress would only be prohibited from deleting remarks actually spoken on the floor.<sup>213</sup>

The insertion of remarks into the *Record* is of primary concern in the distortion of legislative history. For this reason, a judicial declaration of a right of access to the verbatim transcripts would be of greater utility, for the sake of establishing the actual proceedings of Congress, than a declaration requiring Congress to print a full account of the debates in the *Record*. The most valu-

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<sup>212</sup> Note that this would be a commendable achievement in itself. If the press were permitted to check the *Congressional Record* against the original transcripts, and to report the substance of changes made under the revision privilege, a large proportion of questionable revisions would likely be eliminated for fear of exposure. Of course, such a remedy is still a far cry from the one most desired—an accurate *Record*. Individuals with a need to check the accuracy of the *Record* would be forced to travel to the District of Columbia, petition to see the transcripts and then comb the transcripts to make comparisons. This process would be unnecessarily wasteful in view of the simple solution that could be enacted by Congress: the bulleting of *all* insertions of a substantive nature.

<sup>213</sup> It might be argued that the insertion of remarks would confuse valuable information regarding what was actually said on the floors of Congress by changing the context of those remarks actually delivered. However, this is more appropriately labeled as a distortion of information supplied by the government rather than a refusal of access to information under the government's control. The legal argument against governmental distortion of information which it voluntarily disseminates is considered *infra* in text and notes at notes 214-26.

able result of all, a requirement that the *Record* present an accurate account of the floor proceedings, could not be asserted through the application of a right of access doctrine.

*C. First Amendment Limitations on the Government's Authority to Distort Information*

Although constitutional arguments for an accurate *Congressional Record* do not fall neatly into recognized first amendment rights, central first amendment principles still provide grounds for limiting the present scope of the revision privilege. The following discussion presents a theoretical framework, based upon underlying first amendment values, for prohibiting the government from distorting information that it voluntarily disseminates to the extent that such information reflects upon the government's official actions and proceedings.

The freedoms which are expressly stated in the first amendment share a common purpose of guaranteeing freedom of thought and communication on issues relating to the functioning of government.<sup>214</sup> This central purpose is meant to "ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government."<sup>215</sup>

Citizen participation in a republican government is exercised primarily through the election of public representatives. Professor Alexander Meiklejohn, in his seminal work on the first amendment, stated that public officials are agents of the people who elected them.<sup>216</sup> While it has been asserted that Meiklejohn's theory of citizen participation in government over-emphasizes the democratic ideal,<sup>217</sup> even Meiklejohn's critics recognize that it is through the electoral process that citizens influence the direction of governmental policy.<sup>218</sup> Thus, elected officials must be held accountable to the people who elected them. If they do not ade-

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<sup>214</sup> *Globe*, 457 U.S. at 604 quoting *Richmond Newspapers v. Virginia*, 448 U.S. 555, 575 (1980).

<sup>215</sup> *Globe*, 457 U.S. at 604.

<sup>216</sup> A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT*, 252-55 (1948).

<sup>217</sup> See, e.g., BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482, 503-06 (1980).

<sup>218</sup> *Id.* Underlying this analysis is the fundamental assumption that the executive and legislative branches of our government operate under the consent of the people. Note, *supra* note 119, at 293. Citizens maintain their combined voice in determining the path of governmental policy through the electoral process.

quately represent the political and social interests of those who elected them, then their constituency retains the combined right to remove them from office at subsequent elections and to replace them with persons who will conduct their activities as true "representatives."

It is apparent, therefore, that in order for the electoral process to achieve its intended purpose of representing the interests of the citizenry, the voting public must be capable of making *informed* assessments of their representatives' professional performance.<sup>219</sup> In order to pass judgements upon the decisions of elected officials, the public must be informed of what those decisions are and how they are made.<sup>220</sup> If the public is supplied with inaccurate information about the conduct of its representatives, then the right of the public to meaningfully participate in governmental policy through the electoral process is vitiated. If there is no accountability, then the power of government rests solely within its own institutional branches rather than with the nation's people.<sup>221</sup>

In order for the first amendment to carry out its central purpose, the amendment gives rise to several implicit guarantees.<sup>222</sup> Enforcement of these implicit guarantees is as essential to pro-

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<sup>219</sup> "[T]he people who govern, must try to understand the issues which, incident by incident, face the nation. We must pass judgements upon the decisions which our agents make upon those issues." MEIKLEJOHN, *supra* note 216, at 255. Meiklejohn continued: "And further, we must share in devising methods by which those decisions can be made wise and effective or, if need be, supplanted by others which promise greater wisdom and effectiveness." *Id.*

<sup>220</sup> Appreciation by the legislature of the need of the public to be informed of public information has been manifested in the Freedom of Information Act, 5 U.S.C. § 552, which mandates access to agency documents, with certain restrictions. Congress, however, specifically exempted itself from the Act's coverage. 5 U.S.C. § 551(1)(A)(1982). See also the "Declaration of Policy and Statement of Purpose" of the Sunshine Act, 5 U.S.C. § 552b (1982), stating, in part: "It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government." Pub. L. No. 94-409, § 2, 90 Stat. 1241 (1976).

<sup>221</sup> Note, *supra* note 119, at 294. "In a world where control of knowledge is power, the withholding of information may keep an undeserving bureaucrat in office or gain the ear and attention of the public." *Id.* at 300.

<sup>222</sup> "[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965)(Justice Douglas).

In *Globe*, the Supreme Court held that the first amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the amendment, are nonetheless necessary to the enjoyment of other First Amendment rights." 457 U.S. 596, 604 (1982).

moting first amendment values as is enforcement of those guarantees expressly enumerated in the amendment. In order to ensure meaningful citizen participation in government, the first amendment implicitly restricts the government's ability to disseminate misinformation about governmental processes.<sup>223</sup> The first amendment should thus be interpreted to impose substantive limitations upon the government's ability to distort information that reflects upon the official conduct of elected officials or upon the mechanics of governmental procedures.<sup>224</sup>

The current revision privilege exceeds this first amendment limitation by providing a mechanism for the distortion of information concerning congressional proceedings. The net effect of this misrepresentation denies voters the opportunity to evaluate the professional performance of their elected officials in the congressional debates. The revision privilege makes it impossible for the reader of the *Congressional Record* to appraise the talents of individual congressional members.<sup>225</sup> Instead, the reader of the *Record* is exposed to rewritten speeches, inserted afterthoughts, and the creative rewriting of protective congressional staffs. An element of a representative's accountability to his constituency is thereby lost.<sup>226</sup>

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<sup>223</sup> See the case of *Tarleton v. Sarbe*, in which a lower court held that the Federal Bureau of Investigation has a duty to prevent the dissemination of inaccurate arrest and conviction records. 507 F.2d 1116 (D.C. Cir. 1974). To allow the government to collect and disseminate such inaccurate information, the court held, could induce a leveling conformity inconsistent with the diversity of ideas legally protected by the first amendment. *Id.* See Congressional Record Case Proposal, *supra* note 127, at 19.

<sup>224</sup> Note that this limitation does not require the government to disseminate information. If the government voluntarily selects to disseminate information, however, then first amendment principles prohibit the government from distorting the accuracy of the disseminated information.

<sup>225</sup> This article does not assert that one's performance in the floor debates is the only, or even the most important, attribute of a competent member of Congress. Performance in the floor debates is, however, a valid factor to be taken into account by a member of Congress' constituency when determining the member's political future. Floor debates should therefore be reported, if at all, honestly and accurately, just as should other aspects of a congressional member's professional performance.

<sup>226</sup> According to former Senator Neuberger, the revision privilege amounts to "nothing less than deception of the folk who see the *Record* back home." 121 CONG. REC. 17, 22712 (1975).

In 1821, Jefferson Davis on the same subject said: "I am willing that my own remarks should stand and be published as they are taken by the reporters . . . in order that there may be a fairness in the record, fairness in the representation as it goes out to the country." CONG. GLOBE, 31st Cong., 2d Sess. 596.

While it is undoubtedly true that only a small percentage of the voting public actually reads the *Congressional Record*, information disseminated in the *Record* reaches the

## VII. CONCLUSION

The *Congressional Record* does not provide an accurate report of the legislative debates. The inaccuracy of the *Record* resulting from the revision privilege that allows members of Congress to revise and extend their spoken remarks before they are published may substantively distort the implementation of federal law by administrative agencies and by the courts, both of which rely on the *Record* as a valid indication of congressional intent. In addition, the potential for members of Congress to substantively misrepresent to their constituency what actually transpires during legislative proceedings violates the first amendment's central purpose of insuring that the public remains informed about the activities of its government.

The *Congressional Record* should be set straight. Congress should apply the presently ineffective bulleting requirement more stringently in order to effectively identify all substantive additions to and alterations of the *Record* made under the revision privilege. If Congress refuses to restore the accuracy of the *Record* on its own, it may be possible to seek a judicial declaration requiring an accurate *Record* under the implicit first amendment guarantees of meaningful citizen participation in government. At the very least, it should be known to the public and to the courts that the *Congressional Record* should not be relied upon as an accurate record of what the legislature actually said and heard.

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public through various means. Remarks made in the *Record* are scrutinized by lobbyists, special interest groups, candidates for office, and journalists who report on the activities of congressional members directly to the public. These uses go to the very heart of an elected official's accountability to her constituency.