

# The New York Times

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## SIDEBAR

# *No Easy Way to Be Fair on Media Credentials*

By Adam Liptak

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WASHINGTON — Scotusblog has covered the Supreme Court in depth and with distinction since 2002. It wins journalism awards at a steady clip. Its main reporter, Lyle Denniston, is an old-school journalist of fearsome integrity and independence.

But Scotusblog has never gotten a press credential from the Supreme Court. Its Senate credentials were recently revoked.

Neither institution has explained what is going on, though everybody knows what concerns them: Thomas C. Goldstein, the blog's publisher, also argues before the Supreme Court.

Whether Mr. Goldstein has a conflict of interest is a good question for a journalism seminar. Notwithstanding thoughtful policies to make the blog's reporting independent of Mr. Goldstein's law practice, his dual roles run afoul of some journalistic norms. So does his forthright acknowledgment that in his own work for the blog he would withhold information from readers if he thought publishing it would violate his ethical duties to the court.

But should these issues matter in deciding whether the blog is entitled to credentials? Should the government distinguish among entities that report on its activities based on shifting notions of journalistic best practices?

In other contexts, the Supreme Court has been wary of allocating the protections

of the First Amendment and access to government resources based on official judgments about who is “the press.”

“The very task of including some entities within the ‘institutional press’ while excluding others, whether undertaken by legislature, court or administrative agency, is reminiscent of the abhorred licensing system of Tudor and Stuart England — a system the First Amendment was intended to ban from this country,” Chief Justice Warren E. Burger wrote in 1978.

Scott Gant, the author of “We’re All Journalists Now: The Transformation of the Press and Reshaping of the Law in the Internet Age,” has given these questions a lot of thought.

“I don’t think the government should be in the credentialing business,” he said.

But he recognized that some government resources are scarce, like seats at the Supreme Court. He also acknowledged that journalists can be a proxy for the public, particularly in the absence of television coverage.

If forced to make distinctions, the government should use only neutral criteria, like sustained attention to a subject, he said. The content of the coverage, the writer’s motives and the publication’s ownership ought not matter.

Mr. Goldstein, who has argued important cases on the First Amendment and access to information held by the government, said there was logic to that approach.

“One answer would be not to be in the business of credentialing at all,” he said.

“Defining someone as a journalist also means denying that others are journalists.”

“An objective rule,” he said, would be “to allocate space in the building on the basis of a commitment to cover the institution and readership.”

All of this may make sense in theory. In practice, the Supreme Court and the Senate seem to be struggling to bring order to a very confusing mix of practical

questions. In the meantime, Mr. Denniston continues to report on the Supreme Court for Scotusblog thanks to a credential from a radio station.

Kathleen Arberg, the Supreme Court's public information officer, said she had no news on the blog's request. "We are in the process of reviewing our credentialing procedures and are not issuing new credentials until that process is complete," she said.

Ms. Arberg seemed to indicate that a Senate credential would help Scotusblog's chances at the court. "Our practice has been to assess requests on a case-by-case basis," she said, "and part of that assessment includes determining whether the applicant holds an active press credential. We have traditionally recognized congressional or other government-issued credentials for this purpose."

Mr. Gant said that was a bad idea.

"The court should not be delegating to another branch of government," he said. "They should be making their own decisions."

The Senate is delegating, too. It gives journalists in a group called the Standing Committee of Correspondents the power to decide which of their competitors are entitled to a credential.

Allowing journalists to wield that sort of government power is problematic, as Judge Gerhard Gesell wrote in a 1973 decision about magazine journalists who administered congressional press credentials.

"A group of established periodical correspondents," he wrote, "have undertaken to implement arbitrary and unnecessary regulations with a view to excluding from news sources representatives of publications whose ownership or ideas they consider objectionable."

Mr. Gant was more succinct. "It's the fox guarding the henhouse," he said of the standing committee.

The committee gave no reasons for its decision not to renew Mr. Denniston's

press pass. But it held a public hearing on an appeal on May 23, and Scotusblog live-blogged it.

Gregg Leslie, the legal defense director of the Reporters Committee for Freedom of the Press, was there. The group had sent a letter supporting Scotusblog that was signed by, among others, NPR, Politico and The New Yorker.

“What it really seemed to come down to,” Mr. Leslie said, “is that someone who is very happily a major Supreme Court advocate also wants to be a publisher who directly, day to day, is making editorial decisions.”

Laura Lytle, the director of the Senate Press Gallery, said the standing committee would soon issue a decision on the appeal, this time with reasons. The committee’s chairwoman, Siobhan Hughes of The Wall Street Journal, said, “We don’t exclude people based on ownership or ideas — that would be censorship.” But, she added, “We do look at the structure of an applicant’s business, and specifically whether the editorial side is independent of any group that lobbies the government or that is not principally a news organization.”

Mr. Goldstein said he remained hopeful.

“This shouldn’t be hard, because we operate under journalistic principles and need to cover things at the Senate,” he said, referring to confirmation hearings, testimony by the justices and legislation concerning the court.

“We would be very happy if there was no special credentialing system,” he added. “The problem is creating one, then excluding people that do not follow your business model.”

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