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Presidential Attacks on the Press

Sonja R. West *

INTRODUCTION

Americans are becoming numb to President Donald Trump's attacks on the press. Time and again, the plot unfolds the same way – the press publishes unfavorable coverage of Trump, and he responds with insults. He calls journalists “troublemakers,”¹ “unfair,”² “scum,”³ “disgusting,”⁴ “sleaz[y],”⁵ “slime,”⁶ “phony,”⁷ “crooked,”⁸ “biased,”⁹ “garbage,”¹⁰ “crazy,”¹¹ “sick,”¹²

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1. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 4, 2015, 5:35 PM EST), <https://twitter.com/realDonaldTrump/status/650786295590068224>.

2. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 30, 2017, 5:36 PM EST), <https://twitter.com/realdonaldtrump/status/947235015343202304>.

3. Mark Hensch, *Trump Calls Media 'Scum'*, HILL (Oct. 26, 2015, 8:04 AM EST), <http://thehill.com/blogs/ballot-box/presidential-races/258057-trump-the-media-is-scum>.

4. *Trump: 'Disgusting Reporters, Horrible People'*, USA TODAY (Mar. 15, 2016), <http://www.usatoday.com/videos/news/politics/elections/2016/2016/03/15/81843912>.

5. Jeremy Diamond, *Trump Launches All-Out Attack on the Press*, CNN (June 1, 2016, 5:14 AM EST), <https://www.cnn.com/2016/05/31/politics/donald-trump-veterans-announcement/index.html>.

6. Thomas B. Edsall, Opinion, *One Thing Donald Trump Would Like is Freedom from the Press*, N.Y. TIMES: OPINION (Mar. 15, 2018), <https://www.nytimes.com/2018/03/15/opinion/trump-press-freedom-fake-news.html>.

7. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 7, 2017, 6:58 AM EST), <https://twitter.com/realdonaldtrump/status/894512983384129536> (referring to polling performed by journalists as “phony”).

8. Karma Allen, *Trump Calls News Media "Crooked," "Dishonest," "Sick People" at Phoenix Rally*, ABC NEWS (Aug. 23, 2017, 11:23 AM), <http://www.knoe.com/content/news/Trump-calls-news-media-crooked-dishonest-sick-people-at-Phoenix-rally-441529403.html>.

9. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 23, 2017, 8:18 AM EST), <https://twitter.com/realdonaldtrump/status/844886082663698436>.

10. Louis Nelson, *Trump: BuzzFeed is a 'Failing Pile of Garbage'*, POLITICO (Jan. 11, 2017, 12:36 PM EST), <http://www.politico.com/story/2017/01/trump-presser-slams-buzzfeed-233483>.

11. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 3, 2017, 12:33 PM EST), <https://twitter.com/realdonaldtrump/status/969989251537481730>.

12. Allen, *supra* note 8.

and “among the most dishonest human beings on earth.”¹³ Sometimes he maligns their patriotism, suggesting that they are “enemies of the American people”¹⁴ who are “distorting democracy in our country”¹⁵ while “[t]rying to take away our history and our heritage.”¹⁶

Trump’s habit of hurling invectives at the press is disturbing. It undermines the work of the press and breaks long-standing norms that presidents show respect for the role of the Fourth Estate.¹⁷ But insults alone rarely raise First Amendment issues. Presidents have long used the bully pulpit to respond to or criticize news reports.¹⁸ Even Trump’s near daily verbal assaults

13. Julie Hirschfeld Davis & Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/politics/trump-white-house-briefing-inauguration-crowd-size.html>.

14. Andrew Higgins, *Trump Embraces ‘Enemy of the People,’ a Phrase with a Fraught History*, N.Y. TIMES (Feb. 26, 2017), <https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html>.

15. Donald J. Trump (@realDonaldTrump), TWITTER (July 16, 2017, 7:15 AM EST), <https://twitter.com/realdonaldtrump/status/886544734788997125>.

16. Megan Garber, *Trump’s War Against the Media Isn’t a War*, ATLANTIC (Sept. 27, 2017), <https://www.theatlantic.com/entertainment/archive/2017/09/washington-post-editor-were-not-at-war-were-at-work/541344/>.

17. See John J. Watkins & Charles W. Schwartz, *Gertz and the Common Law of Defamation: Of Fault, Nonmedia Defendants, and Conditional Privileges*, 15 TEX. L. REV. 823, 845–46 (1984) (asserting the press, as the Fourth Estate, must monitor the government free from interference, assistance, or dependency, as it would compromise its independence); Megan Garber, *The Humans of The New York Times*, ATLANTIC (June 15, 2018), <https://www.theatlantic.com/entertainment/archive/2018/06/the-fourth-estate-in-the-age-of-bad-faith/562838/> (discussing the new documentary, *The Fourth Estate*, which highlights the dissolution of norms between the press and the president); cf. Margaret Sullivan, *Trump’s Vicious Attack on the Media Shows One Thing Clearly: He’s Running Scared*, WASH. POST: PERSPECTIVE (Aug. 23, 2017), https://www.washingtonpost.com/lifestyle/style/trumps-vicious-attack-on-the-press-shows-one-thing-clearly-hes-running-scared/2017/08/23/4fc1a6a2-8802-11e7-a50f-e0d4e6ec070a_story.html?utm_term=.a0c28ada0c90 (calling Trump’s campaign against the press “the most sustained attack any president has ever made on the news media.”). *But see* Stephen F. Rhode, *Presidential Power vs. Free Press*, L.A. LAW., Oct. 2017, at 26 (arguing the Trump administration is not the first presidency in conflict, nor the most severe conflict, with the Fourth Estate).

18. David Snyder, *How Trump’s War on Free Speech Threatens the Republic*, MOTHERJONES (June 2, 2017), <https://www.motherjones.com/politics/2017/06/donald-trump-war-free-speech-attacks-news-media/> (“Presidents have complained bitterly about reporters since George Washington (‘infamous scribblers’), but Trump has gone after the media with a venom unmatched by any modern president – including Richard Nixon.”).

on reporters and news organizations can be considered part of our country's "uninhibited, robust, and wide-open"¹⁹ marketplace of ideas. Presidents have opinions too, and journalists should be able to handle their rants.

Yet there are the times when Trump's lashing out at the press goes beyond mere name-calling. He instead uses the power of his presidency in an attempt to punish or silence press organizations that displease him. In these instances, Trump is unsheathing an entirely different kind of weapon. When a president crosses the line from insulting the press to turning the wheels of government as a means to retaliate against news organizations for their reporting, the potential First Amendment violations become very real.

The goals of this short Article are modest. It seeks simply to differentiate the various ways Trump has attacked the press, to emphasize that we should not view them all through the same constitutional lens, and to bring attention to the most serious type of offense. In Part I, I divide the kinds of attacks into three categories of increasing seriousness. I discuss a number of examples in which Trump has used insults, generalized threats, denials of benefits, and government power to punish the press for coverage he dislikes. Then, in Part II, I analyze each type of attack under current First Amendment law. Unsurprisingly, it is Trump's attempts to employ the power of the federal government to retaliate against the press that raise the most troubling constitutional concerns.

Lobbing insults at reporters is one thing, and the instinct to brush this practice aside is understandable. But when the president tries to use the power of the government to silence his critics, the threat to press freedom is far more dangerous.

I. TRUMP'S ATTACKS ON THE PRESS

It is not a secret that President Trump is engaged in "a running war with the media."²⁰ From the beginning of his candidacy he has expressed²¹ – and encouraged²² – hostility toward the press. By the end of his first year in of-

19. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

20. Brian Stelter, *Trump Says He Has "Running War" with Media, Gets Facts Wrong, in CIA Speech*, CNN (Jan. 21, 2017, 5:07 PM EST), <http://money.cnn.com/2017/01/21/media/donald-trump-war-with-the-media/index.html>.

21. Nick Corasaniti, *Partisan Crowds at Trump Rallies Menace and Frighten News Media*, N.Y. TIMES (Oct. 14, 2016), <https://www.nytimes.com/2016/10/15/us/politics/trump-media-attacks.html> ("In recent days, Mr. Trump has sharply escalated those attacks, moving from routine critiques to dedicating nearly the majority of major speeches to ridiculing what he sees as a media cabal that has declared war on him.").

22. Brian Stelter, *Here's How Reporters are Responding to Trump's New Amped-up Attacks*, CNN (Aug. 23, 2017, 11:20 AM EST), <http://money.cnn.com/2017/08/23/media/media-attacks-phoenix-president->

face, he had posted more than a thousand criticisms of the press on Twitter alone.²³ Not all of his attacks on the press are the same, however, and it is important that we recognize key differences. In this Part, I divide the various attacks into three categories, starting with the least concerning and ending with the most.

A. *Insults and Name-Calling*

In his many complaints about the press, Trump has targeted particular news organizations, individual reporters, and the profession as a whole.²⁴ While his grievances are many and varied, common themes among them do arise. He accuses reporters of being biased.²⁵ He says the press is inaccurate,²⁶ often purposely so.²⁷ He claims journalists are trying to hurt him and

trump/index.html (“The President encouraged his audience to boo and chant anti-media slogans, knowing the rally was being broadcast live on cable television.”).

23. Jonathan Peters, *Trump Twitter Spreadsheet Tracks “a Perpetual Campaign Against the Press”*, COLUM. JOURNALISM REV. (Dec. 21, 2017), https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php; see also Jasmine C. Lee & Kevin Quealy, *The 487 People, Places and Things Donald Trump Has Insulted on Twitter: A Complete List*, N.Y. TIMES, <https://www.nytimes.com/interactive/2016/01/28/upshot/donald-trump-twitter-insults.html#the-letter-P> (last updated July 10, 2018) (tracking Trump’s insults of the mainstream media on Twitter).

24. RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 589–90 (2017) (describing attacks on individual reporters).

25. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 17, 2018, 8:11 PM EST), <https://twitter.com/realdonaldtrump/status/953796944564031489> (“very biased”); Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 18, 2017, 7:34 AM EST), <https://twitter.com/realdonaldtrump/status/821697182235496450> (“totally biased”); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 11, 2016, 8:02 PM EST), <https://twitter.com/realdonaldtrump/status/808114703922843649?> (“so biased”); Donald J. Trump (@realDonaldTrump), TWITTER (July 31, 2016, 8:57 PM EST), <https://twitter.com/realdonaldtrump/status/759915863600304128> (“distorted, one-sided and biased”).

26. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 8, 2018, 7:58 AM EST), <https://twitter.com/realdonaldtrump/status/982950739441004544> (“far more fiction than fact”); Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 16, 2016, 6:28 AM EST), <https://twitter.com/realdonaldtrump/status/798850338384023552> (“typically false”); Donald J. Trump (@realDonaldTrump), TWITTER (May 15, 2016, 3:26 PM EST), <https://twitter.com/realdonaldtrump/status/731928825500717057> (“False reporting, and plenty of it”); Donald J. Trump (@realDonaldTrump), TWITTER (May 10, 2016, 8:57 AM EST), <https://twitter.com/realdonaldtrump/status/730018836808933376> (“pushing the false narrative”).

27. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 13, 2018, 5:08 PM EST), <https://twitter.com/realdonaldtrump/status/952301373479104512> (“They

help his opponent.²⁸ And he often likes to insult news organizations by claiming they are “failing,”²⁹ “ratings challenged,”³⁰ or soon to be “out of business.”³¹

At rallies held both before and after he became president, Trump has spoken angrily about the press. In a typical speech, he directs the crowd’s attention to the group of reporters (who have been confined to a “pen”) and proceeds to insult and criticize them.³² He regularly, for example, amps up his audience into chants of “CNN Sucks!”³³ At one rally, as reported by *The New York Times*, “members of the audience shouted epithets at reporters, some demanding that they stop tormenting the president,”³⁴ and a reporter for

don’t even try to get it right[] or correct it when they are wrong.”); Donald J. Trump (@realDonaldTrump), TWITTER (July 27, 2017, 9:45 AM EST), <https://twitter.com/realDonaldTrump/status/890568797941362690> (“Purposely phony reporting!”); Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 24, 2017, 10:09 PM), <https://twitter.com/realDonaldTrump/status/835325771858251776> (“[The] media knowingly doesn’t tell the truth.”).

28. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 24 2016, 9:05 AM EST), <https://twitter.com/realDonaldTrump/status/790539740118446080> (“Media in the tank for Clinton but Trump will win!”); Donald J. Trump (@realDonaldTrump), TWITTER (July 10, 2016, 2:42 PM EST), <https://twitter.com/realDonaldTrump/status/752211419634933760> (“If I make a statement, [the media] twist[s] it and turn it to make it sound bad or foolish.”); Donald J. Trump (@realDonaldTrump), TWITTER (May 15, 2016, 3:26 PM EST), <https://twitter.com/realDonaldTrump/status/731928825500717057> (“The media is really on a witch hunt against me.”).

29. Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 13, 2016, 2:29 PM EST), <https://twitter.com/realdonaldtrump/status/764529295901528064> (New York Times); Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 11, 2016, 10:15 AM EST), <https://twitter.com/realdonaldtrump/status/763740672012738561> (CNN).

30. Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 10:28 PM EST), <https://twitter.com/realdonaldtrump/status/889673743873843200> (CNN); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 2, 2016, 8:28 AM EST), <https://twitter.com/realdonaldtrump/status/771686352438042624> (Morning Joe).

31. Donald J. Trump (@realDonaldTrump), TWITTER (July 7, 2019, 9:21 AM EST), <https://twitter.com/realdonaldtrump/status/1015586529484443648> (New York Times and Washington Post).

32. See, e.g., Daniel Victor, *Trump Calling Journalists ‘Sick People’ Puts Media on Edge*, N.Y. TIMES (Aug. 23, 2017), <https://www.nytimes.com/2017/08/23/business/media/trump-rally-media-attack.html>.

33. Eliza Relman, ‘Traitor!’: CNN Reporter Jim Acosta Heckled by ‘CNN Sucks!’ Chants at Trump Rally, BUS. INSIDER (July 21, 2018, 6:45 PM), <https://www.businessinsider.com/cnn-reporter-jim-acosta-heckled-by-cnn-sucks-chants-at-trump-rally-2018-7>.

34. Mark Landler & Maggie Haberman, *At Rally, Trump Blames Media for Country’s Deepening Divisions*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/us/politics/trump-rally-arizona.html>.

USA Today tweeted that a “man with a little boy on his shoulders is screaming ‘rat!’ at reporters in the press risers.”³⁵

Others who work closely with Trump have amplified this anti-press stance. Then-White House Chief Strategist Steve Bannon labeled the press as the “opposition party” and said it should “keep its mouth shut and just listen for a while.”³⁶ Trump’s former chief of staff, Reince Priebus, said the White House looked into the possibility of making it easier to sue news organizations because “newspapers and news agencies need to be more responsible with how they report the news.”³⁷ When Trump was presented with a ceremonial sword at a Coast Guard Academy graduation ceremony, then-Secretary of Homeland Security John Kelly suggested that the President “use it on the press.”³⁸

B. Generalized Threats and Denials of Benefits

Other statements and actions by President Trump go beyond name-calling and involve more concrete actions against the press. These include more generalized threats against the press and denials of certain benefits, such as access, to disfavored journalists.

On a number of occasions, Trump’s campaign or administration has denied (or threatened to deny) access to journalists because of critical reporting. Certain reporters, for example, were forcibly barred from an administrative agency meeting.³⁹ Reporters who wrote negative stories have been excluded from press briefings.⁴⁰ One credentialed White House reporter claims she was barred from attending an open press event with Trump as punishment for

35. Eliza Collins (@elizacollins1), TWITTER (Aug. 22, 2017, 10:26 PM EST), <https://twitter.com/elizacollins1/status/900182486876999680>.

36. Michael M. Grynbaum, *Trump Strategist Steve Bannon Says Media Should ‘Keep Its Mouth Shut’*, N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/business/media/stephen-bannon-trump-news-media.html>.

37. Andrew Desiderio, *Reince Priebus: We’ve ‘Looked at’ Changing Libel Laws*, DAILY BEAST (Apr. 30, 2017, 10:06 AM EST), <https://www.thedailybeast.com/reince-priebus-weve-looked-at-changing-libel-laws>.

38. Matt Stevens, *In an Aside to Trump, Homeland Security Chief Suggests He Use Sword on the Press*, N.Y. TIMES (May 18, 2017), <https://www.nytimes.com/2017/05/18/us/trump-sword-press.html>.

39. *The Latest: EPA Bars AP, CNN from Summit on Contaminants*, AP (May 22, 2018), <https://apnews.com/d799f4e096cc42cf99ae01b02d1e0688>.

40. Callum Borchers, *White House Blocks CNN, New York Times from Press Briefing Hours After Trump Slams Media*, WASH. POST (Feb. 24, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/24/white-house-blocks-cnn-new-york-times-from-press-briefing-hours-after-trump-slams-media/?noredirect=on&utm_term=.e97f3ded4640.

asking him questions that were deemed “inappropriate.”⁴¹ During his campaign, he blacklisted about a dozen news organizations (including *The Washington Post*⁴²) from covering his campaign events and riding on his press plane because he deemed their coverage of him to be unfair.⁴³ The most striking instance of access denial occurred in November of 2018 when the White House revoked the press pass of CNN reporter Jim Acosta following a heated exchange between him and President Trump.⁴⁴ The White House only restored Acosta’s credentials after the network sued and won a temporary restraining order.⁴⁵

In other instances, Trump has made more indirect and generalized threats against members of the press. He has tried to get reporters fired,⁴⁶ has called for boycotts of news organizations,⁴⁷ has urged others to sue media organizations,⁴⁸ and has himself sued or threatened to sue them⁴⁹ – all be-

41. *CNN Says Its Correspondent Was Excluded from Covering White House Trump Event*, REUTERS (July 25, 2018, 6:12 PM), <https://www.reuters.com/article/us-usa-trump-cnn/cnn-says-its-correspondent-was-excluded-from-covering-white-house-trump-event-idUSKBN1KF358>.

42. Donald J. Trump, FACEBOOK (June 13, 2016), <https://www.facebook.com/DonaldTrump/posts/10157164117925725>.

43. Paul Farhi, *Trump Lifts Ban that Excluded the Washington Post and Other News Media*, WASH. POST (Sept. 7, 2016), https://www.washingtonpost.com/lifestyle/style/trump-lifts-ban-that-excluded-the-washington-post-and-other-news-media/2016/09/07/29b11d86-7501-11e6-8149-b8d05321db62_story.html?utm_term=.3b8408436562 (noting that around two months before election day 2016, Trump banned around twelve news organizations but lifted the ban in early September).

44. Michael M. Grynbaum, *CNN’s Jim Acosta Has Press Pass Restored by White House*, N.Y. TIMES (Nov. 19, 2018), <https://www.nytimes.com/2018/11/19/business/media/jim-acosta-press-pass-cnn.html>.

45. *Id.*

46. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 6, 2018, 6:57 AM EST), <https://twitter.com/realDonaldTrump/status/949610896241946626> (“[Brian Ross s]hould have been fired!”); Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 9, 2017, 6:14 PM EST), <https://twitter.com/realdonaldtrump/status/939634404267380736> (“[Dave Weigel] should be fired.”).

47. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 29, 2017, 6:49 AM EST), <https://twitter.com/realdonaldtrump/status/935838073618870272> (CNN); Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 18, 2016, 5:55 PM EST), <https://twitter.com/realdonaldtrump/status/710947686879531008> (Megyn Kelly); Donald J. Trump (@realDonaldTrump), TWITTER (July 18, 2013, 8:32 AM EST), <https://twitter.com/realdonaldtrump/status/357840308190449667> (Rolling Stone).

48. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 3, 2017, 8:15 AM EST), <https://twitter.com/realDonaldTrump/status/937309279257792512>.

49. SUSAN E. SEAGER, MEDIA L. RES. CTR., DONALD J. TRUMP IS A LIBEL BULLY BUT ALSO A LIBEL LOSER *passim*,

cause of their negative reporting about him. After the website BuzzFeed published an unverified dossier containing negative allegations about him, for example, he made the menacing-sounding threat that it would “suffer the consequences” for the publication.⁵⁰ He also once vaguely suggested that news organizations should lose their press credentials if they publish “fake news” (a phrase, he explained, that refers to negative stories about him).⁵¹

Trump has even called for the weakening of core First Amendment protections for the press by repeatedly saying that his administration would “open up” libel laws to make it easier for him to sue news organizations (specifically mentioning *The New York Times* and *The Washington Post*) that write “hit pieces” about him.⁵² In his words, “Our current libel laws are a sham and a disgrace and do not represent American values or American fairness.”⁵³

Other reports have suggested even more ominous threats against the press. According to former FBI director James Comey, for example, Trump suggested “putting reporters in jail” to send a message about publishing leaked classified information because “they spend a couple days in jail, make a new friend, and they are ready to talk.”⁵⁴ The Department of Homeland Security also raised concerns among journalists when it announced a plan to

http://www.medialaw.org/images/stories/MediaLawLetter/2016/October/Trump_Libel.pdf (last visited Sept. 26, 2018).

50. Harriet Alexander, *Donald Trump Says There Will be ‘Consequences’ for Buzzfeed as He Attacks CNN and Mocks BBC*, TELEGRAPH (Jan. 12, 2017, 7:12 AM EST), <https://www.telegraph.co.uk/news/2017/01/11/donald-trump-says-will-consequences-buzzfeed-attacks-cnn-mocks/>.

51. John Wagner, *Trump Muses About Yanking New Media Credentials in Response to Negative Coverage*, WASH. POST (May 9, 2018), https://www.washingtonpost.com/politics/trump-muses-about-yanking-news-media-credentials-in-response-to-negative-coverage/2018/05/09/746c2918-52a6-11e8-a551-5b648abe29ef_story.html?utm_term=.63468d515367. See generally Lucia Graves, *How Trump Weaponized ‘Fake News’ for His Own Political Ends*, PAC. STANDARD (Feb. 26, 2018), <https://psmag.com/social-justice/how-trump-weaponized-fake-news-for-his-own-political-ends>.

52. Hadas Gold, *Donald Trump: We’re Going to ‘Open Up’ Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM EST), <https://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

53. Michael M. Grynbaum, *Trump Renews Pledge to ‘Take a Strong Look’ at Libel Laws*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/business/media/trump-libel-laws.html>.

54. Oliver Darcy, *Comey Writes in Memo He Laughed After Trump Floated the Idea of Jailing Journalists*, CNN (Apr. 20, 2018, 11:39 AM EST), <http://money.cnn.com/2018/04/20/media/james-comey-trump-jail-journalists/index.html>.

“compile a database of journalists, editors, foreign correspondents, and bloggers to identify top ‘media influencers’” and monitor their public activities.⁵⁵

The types of attacks on the press in this second category go beyond mere insults and name-calling and are clearly more serious. But these attacks also contain just enough ambiguity to make the actual risk to press freedom uncertain. Reporters, for example, are actively kept out of briefings, which is problematic. Yet the attacks also tend to violate norms of presidential behavior more so than legal or constitutional rules. Similarly, ominous threats of potential consequences or even imprisonment are certainly disconcerting, but the threats are also often vague enough to be arguably hyperbolic or simply unrealistic.

C. Using Government Power

The last category of attacks on the press is the most troubling. In these cases, President Trump has attempted to employ the federal government’s power to punish specific members of the press in retaliation for their reporting. If the other examples of hostility toward the press skirt the constitutional line, the instances that fall into this category arguably step right over it.

One of the most public examples of Trump threatening to use government power to target a news organization for its coverage of him is his ongoing crusade against *The Washington Post* and its owner, Jeff Bezos, who is also the founder of the online retailer Amazon.⁵⁶

Judging by his Twitter feed, Trump held generally neutral or positive views of *The Washington Post* and Amazon until the fall of 2015.⁵⁷ His tone first began to change on November 23 of that year when he demanded an apology after the newspaper fact-checked his false claims that Muslims in New Jersey celebrated following the terrorist attacks on September 11, 2001.⁵⁸ Other grievances soon followed: he tweeted a complaint that *The Washington Post* did not recognize him as the winner of the Republican debates⁵⁹ and another complaint that Jennifer Rubin, the newspaper’s conserva-

55. RTDNA Expresses Concern About Reported Impending DHS Database of Journalists, RTDNA (Apr. 6, 2018), https://rtdna.org/article/rtdna_expresses_concern_about_reported_impending_dhs_database_of_journalists.

56. See generally Jeffrey Dastin, *Senate Cancels Postal Service Hearing: Trump’s Amazon Crusade Delayed*, REUTERS (Aug. 31, 2018, 11:28 AM), <https://www.reuters.com/article/us-usa-post-office-amazon-com/senate-cancels-postal-service-hearing-trumps-amazon-crusade-delayed-idUSKCN1LG280>.

57. See generally Donald J. Trump (@realDonaldTrump), TWITTER, <https://twitter.com/realdonaldtrump/>.

58. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 23, 2015, 2:02 PM EST), <https://twitter.com/realdonaldtrump/status/668867262456156160>.

59. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 1, 2015, 3:47 PM EST), <https://twitter.com/realdonaldtrump/status/671792709292720129>.

tive columnist, “only writes purposely inaccurate pieces on me.”⁶⁰ Three days later, on December 7, he suggested that *The Washington Post* was “going out of its way to tell failing candidates how to beat [him].”⁶¹

It was on this same day that his attacks on Amazon began. In less than fifteen minutes, then-candidate Trump fired off three tweets alleging that the 2013 purchase of *The Washington Post* was a “scam”⁶² to give Bezos the “power to screw public [sic] on low taxation of @Amazon!”⁶³ He continued his tirades against both Amazon and *The Washington Post* throughout his campaign (eventually conflating them into the “Amazon Washington Post”) while simultaneously criticizing *The Washington Post*’s coverage of him.⁶⁴ Although the newspaper operates independently of Amazon, Trump would openly connect the dots between the organizations: *The Washington Post* to Bezos to Amazon.⁶⁵

It was at a campaign rally in February of 2016, however, when he adopted an entirely new approach to battling Bezos, Amazon, and *The Washington Post* – threatening to use the power of the presidency against them all. While discussing his views of the news media, he suddenly brought up Bezos and Amazon and declared, “[I]f I become president, oh do they have problems. They are going to have such problems.”⁶⁶ A few months later he told conservative talk show host Sean Hannity that Bezos was “worried” about

60. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 4, 2015, 3:37 PM EST), <https://twitter.com/realdonaldtrump/status/672877439400460290>.

61. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2015, 3:26 PM EST), <https://twitter.com/realdonaldtrump/status/673961899801858048>.

62. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2015, 10:22 AM EST), <https://twitter.com/realdonaldtrump/status/673885376742825984>.

63. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2015, 10:18 AM EST), <https://twitter.com/realdonaldtrump/status/673884271954776064>; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2015, 10:08 AM EST), <https://twitter.com/realdonaldtrump/status/673881733415178240>.

64. Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 10:23 AM EST), <https://twitter.com/realdonaldtrump/status/889672374458646528>.

65. *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2015, 10:08 AM EST), <https://twitter.com/realdonaldtrump/status/673881733415178240> (“The @washingtonpost, which loses a fortune, is owned by @JeffBezos for purposes of keeping taxes down at his no profit company, @amazon.”); Louis Nelson & Nancy Scola, *Trump Attacks Washington Post as ‘Guardian’ of Amazon’s Tax Practices*, POLITICO (June 28, 2017, 9:45 AM EST), <https://www.politico.com/story/2017/06/28/donald-trump-amazon-washington-post-taxes-240039> (“Amazon, which through its ownership controls the Washington Post, should be paying massive taxes . . .”).

66. Jordan Weissmann, *Donald Trump Wants to Get Revenge on Jeff Bezos by Messing with Amazon’s Taxes*, SLATE: MONEYBOX (Mar. 28, 2018, 3:04 PM), <https://slate.com/business/2018/03/donald-trump-wants-to-get-revenge-on-jeff-bezos-by-messing-with-amazons-taxes.html>.

him winning the election.⁶⁷ He again tied *The Washington Post* to Bezos and then to Amazon, alleging that the company was undertaxed and violating antitrust laws: “He thinks I would go after him for antitrust. Because he’s got a huge antitrust problem.” According to Trump, Bezos was “using *The Washington Post*, which is peanuts . . . for political purposes to save Amazon in terms of taxes and in terms of antitrust.”⁶⁸ As time went on, Trump added other accusations to his complaints. In addition to alleged antitrust violations, he (falsely) accused Amazon of not paying taxes and (also falsely) claimed that the company was harming the United States Post Office by paying low delivery rates.⁶⁹

But Trump’s threats against Amazon have turned out to be more than talk. Since his inauguration, he has continued to push for investigations into sales taxes paid by online retailers and the possibility of a new national internet sales tax.⁷⁰ In early 2018, Treasury Secretary Steven Mnuchin told the House Ways and Means Committee that President Trump “feels strongly” about this issue.⁷¹ Trump has also threatened to raise Amazon’s postal rates,⁷² including personally pressuring the U.S. Postmaster General to double what it charges the company.⁷³ And in April 2018, just weeks after publicly

67. Kate Vinton, *In Wake of Trump’s Win, Billion-Dollar Gains for Warren Buffet and Losses for Amazon’s Jeff Bezos*, FORBES (Nov. 9, 2016, 7:12 PM), <https://www.forbes.com/sites/katevinton/2016/11/09/trumps-win-meant-billion-dollar-gains-for-warren-buffett-and-losses-for-jeff-bezos/#5151bf4b6f26>.

68. Mathew Yglesias, *Donald Trump Threatens Amazon as Payback for Washington Post Articles He Doesn’t Like*, VOX (May 13, 2016), <https://www.vox.com/2016/5/13/11669850/donald-trump-threatens-amazon>.

69. Donald J. Trump (@realDonaldTrump), TWITTER (Mar. 29, 2018, 7:57 AM EST), <https://twitter.com/realDonaldTrump/status/979326715272065024>.

70. Naomi Jagoda, *Mnuchin: Trump Administration Examining Online Sales Tax Issue*, HILL (July 26, 2017, 4:12 PM EST), <http://thehill.com/policy/finance/343972-mnuchin-trump-administration-is-examining-online-sales-tax-issue>; Chris Mills, *Trump ‘Supports the Idea’ of a Nationwide Internet Sales Tax, Treasury Secretary Says*, NGR (Jan. 31, 2018, 11:34 PM), <https://bgr.com/2018/01/31/national-internet-sales-tax-collection-trump/>.

71. Toluse Olorunnipa, *Trump Wants Sales Tax Applied to Online Purchases, Mnuchin Says*, BLOOMBERG (Feb. 15, 2018, 12:36 PM EST), <https://www.bloomberg.com/news/articles/2018-02-15/trump-strongly-favors-imposing-online-sales-tax-mnuchin-says>.

72. See Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 2, 2018, 9:35 AM EST), <https://twitter.com/realDonaldTrump/status/980800783313702918> (indicating the relationship between the Post Office and Amazon will change).

73. Damian Paletta & Josh Dawsey, *Trump Personally Pushed Postmaster General to Double Rates on Amazon, Other Firms*, WASH. POST (May 18, 2018), https://www.washingtonpost.com/business/economy/trump-personally-pushed-postmaster-general-to-double-rates-on-amazon-other-firms/2018/05/18/2b6438d2-5931-11e8-858f-12becb4d6067_story.html?noredirect=on&utm_term=.b7df87092932.

accusing Amazon of hurting the financial stability of the Post Office, he issued an unexpected executive order that created a task force charged with examining the Post Office's financial situation.⁷⁴ Six months later, the Postal Service announced a proposed rate raise of up to twelve percent for the shipping service used by Amazon.⁷⁵

Even without causing direct government action, Trump appears to have affected Amazon's profits. After tweeting about the company's taxes and postal rates multiple times over the span of a few days in the spring of 2018, Amazon's stock price fell by almost ten percent in less than forty-eight hours.⁷⁶

The link between *The Washington Post's* coverage of Trump and his threats of government retaliation is clear. He frequently talks about one issue directly alongside the other. In various articles, reporters cited White House sources to confirm that Trump's actions against Amazon were not about tax or Post Office policy but were instead about punishing Bezos for what Trump believes was his influence over *The Washington Post's* coverage of him.⁷⁷

Trump's attacks on Amazon, moreover, are hardly an isolated incident. In fact, he has repeatedly sought to harness the federal government's powers to harm press organizations based on his negative assessment of their work. He once, for example, suggested that the Senate Intelligence Committee investigate news outlets whose reporting, he alleged, is "just made up-FAKE!"⁷⁸

74. Michael D. Shear, *Trump, Having Denounced Amazon's Shipping Deal, Orders Review of Postal Service*, N.Y. TIMES (Apr. 12, 2018), <https://www.nytimes.com/2018/04/12/us/politics/trump-postal-service-amazon.html>.

75. Waverly Colville, *The Post Office Wants to Raise the Fees it Charges Amazon and Other Shippers*, CNBC: TECH (OCT. 11, 2018, 1:30 PM EST), <https://www.cnbc.com/2018/10/11/usps-proposes-amazon-pay-up-to-12-percent-more-for-shipping.html>.

76. Lucinda Shen, *The World's Richest Man Lost \$10.7 Billion as Trump Tweets About Amazon*, FORTUNE (Mar. 29, 2018), <http://fortune.com/2018/03/29/amazon-stock-amzn-jeff-bezos-net-worth/>.

77. E.g., Gabriel Sherman, "*Trump is Like, 'How Can I F--k with Him?': Trump's War with Amazon (and The Washington Post) is Personal*", VANITY FAIR (Apr. 2, 2018, 7:07 PM), <https://www.vanityfair.com/news/2018/04/trump-war-with-amazon-and-the-washington-post-is-personal> ("While the *Post* says that Bezos has no involvement in newsroom decisions, Trump has told advisors he believes Bezos uses the paper as a political weapon."); Sydney Ember, *To Trump, It's the 'Amazon Washington Post.' To Its Editor, That's Baloney*, N.Y. TIMES (Apr. 2, 2018), <https://www.nytimes.com/2018/04/02/business/media/to-trump-its-the-amazon-washington-post-to-its-editor-thats-baloney.html> (italics added) ("People close to the [P]resident have said critical articles in [t]he *Post* often trigger his public musings about Amazon.").

78. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 5, 2017, 6:59 AM EST), <https://twitter.com/realdonaldtrump/status/915894251967385600>.

President Trump also tweeted at the Federal Communications Commission (“FCC”) to look into and “challenge”⁷⁹ the licenses of NBC and other broadcast television networks because “network news has become so partisan, distorted.”⁸⁰ Hours later he was asked about this statement at a press conference and confirmed his intentions by saying, “It is frankly disgusting the way the press is able to write whatever they want to write, and people should look into it.”⁸¹

Another of Trump’s favorite targets is CNN. He has frequently criticized the cable network’s coverage of him, calling it “disgusting,”⁸² “terrible,”⁸³ “a total waste of time,”⁸⁴ “a joke,”⁸⁵ and “garbage.”⁸⁶ He accused the network of bias and called it “an arm of the Clinton campaign.”⁸⁷ He has specifically targeted the network’s president, Jeff Zucker,⁸⁸ and certain re-

79. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 8:09 AM EST), <https://twitter.com/realdonaldtrump/status/918267396493922304>.

80. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 8:09 PM EST), <https://twitter.com/realdonaldtrump/status/918267396493922304>; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 4, 2018, 10:58 AM EST), <https://twitter.com/realdonaldtrump/status/1036991866124861440> (“I have long criticized NBC and their journalistic standards-worse than even CNN. Look at their license?”).

81. Noah Bierman & Brian Bennett, *Trump Threatens Networks, Saying It’s ‘Disgusting the Way the Press Is Able to Write Whatever They Want’*, L.A. TIMES (Oct. 11, 2017), <http://www.latimes.com/politics/la-na-pol-trump-press-20171011-story.html>.

82. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 3, 2016, 4:36 PM EST), <https://twitter.com/realdonaldtrump/status/77217146947652704>.

83. Amber Jamieson, ‘You Are Fake News’: Trump Attacks CNN and BuzzFeed at Press Conference, GUARDIAN (Jan. 11, 2017, 1:41 PM EST), <https://www.theguardian.com/us-news/2017/jan/11/trump-attacks-cnn-buzzfeed-at-press-conference>.

84. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 29, 2017, 6:49 AM EST), <https://twitter.com/realdonaldtrump/status/935838073618870272>.

85. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 8, 2016, 12:10 AM EST), <https://twitter.com/realdonaldtrump/status/774097705513517057>.

86. Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 9:12 AM EST), <https://twitter.com/realdonaldtrump/status/881138485905772549> (reporting he was “extremely pleased” that CNN was exposed as “garbage journalism”).

87. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 9, 2016, 10:37 AM EST), <https://twitter.com/realdonaldtrump/status/774255510191239170>.

88. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 3, 2018, 6:58 AM EST), <https://twitter.com/realdonaldtrump/status/981123772169191424> (“Little Jeff Zuker [sic], whose job is in jeopardy, is not having much fun lately.”); Ryan Grim & Lee Fang, *Here’s the Audio of Donald Trump’s Private RNC Fundraiser at His Own Hotel*, INTERCEPT (June 30, 2017, 12:00 AM), <https://theintercept.com/2017/06/30/heres-the-audio-of-donald-trumps-private-rnc-fundraiser-at-his-own-hotel/> (referring to Zucker as a “horrible human being[]”).

porters, like Jim Acosta.⁸⁹ During a press conference held soon after his election, Trump refused to take a question from Acosta, telling him, “Your organization is terrible” and “You’re fake news.”⁹⁰ He did the same thing to Acosta more than a year later, saying, “CNN is fake news. I don’t take questions from CNN.”⁹¹ Trump has tweeted a video showing him pummeling a figure superimposed with the network’s logo,⁹² a cartoon depicting a “Trump train” hitting a person labeled as CNN,⁹³ and a doctored photo of him with a CNN blood smear on the bottom of his shoe.⁹⁴

It is against this backdrop that we need to consider Trump’s focus on a then-proposed merger between AT&T and Time Warner. During a campaign rally in the fall of 2016, he first raised the issue of the merger as part of a diatribe against CNN, claiming that the network was part of the media “power structure” working to suppress the votes of supporters.⁹⁵ After explicitly noting that the merger would mean the sale of CNN, Trump told an audience that this was “a deal we will not approve in my administration.”⁹⁶ Continuing his commentary on the media supposedly against him, he again suggested that he would look into the 2011 merger between Comcast and NBC, saying the media conglomerate is “trying to poison the mind of the American voter”⁹⁷ and the merger “should never ever have been approved in the first place.”⁹⁸

89. Maxwell Tani, *Trump Battles CNN Reporter in Heated Exchange at Press Conference: ‘You Are Fake News,’* BUS. INSIDER (Jan. 11, 2017, 12:55 PM), <http://www.businessinsider.com/cnn-fake-news-donald-trump-cnn-jim-acosta-question-press-conference-2017-1>.

90. *Id.*

91. Brett Samuels, *Trump: I Don’t Take Questions from CNN*, HILL (July 13, 2018), <https://thehill.com/homenews/media/396858-trump-i-dont-take-questions-from-cnn>.

92. Donald J. Trump (@realDonaldTrump), TWITTER (July 2, 2017, 9:21 AM EST), <https://twitter.com/realDonaldTrump/status/881503147168071680>.

93. Eileen Sullivan & Maggie Haberman, *Trump Shares, Then Deletes, Twitter Post of Train Hitting Cartoon Person Covered by CNN Logo*, N.Y. TIMES (Aug. 15, 2017), <https://www.nytimes.com/2017/08/15/us/politics/trump-shares-then-deletes-twitter-post-of-cnn-cartoon-being-hit-by-train.html>.

94. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 23, 2017, 5:44 PM EST), <https://twitter.com/realDonaldTrump/status/944700332881440769>; see also Julia Manchester, *Media Criticizes Trump for Retweet Portraying CNN as Blood on His Shoe*, HILL (Dec. 24, 2017, 2:03 PM EST), <http://thehill.com/homenews/media/366380-media-criticizes-trump-for-retweet-portraying-cnn-as-blood-on-his-shoe>.

95. Jim Rutenberg, *In AT&T Deal, Government Action Catches Up with Trump Rhetoric*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/business/att-time-warner-cnn-trump.html>.

96. *Id.*

97. Brian Fung, *Why Trump Might Not Block the AT&T-Time Warner Merger, After All*, WASH. POST (Nov. 11, 2016), <https://www.washingtonpost.com/news/the->

After his inauguration, he continued to target the AT&T and Time Warner merger. According to *The New York Times*, Trump administration officials viewed the merger as “a potential point of leverage over their adversary.”⁹⁹ One source told the *Daily Caller* that the White House would not support the merger “if Jeff Zucker remains [P]resident of CNN,”¹⁰⁰ and another told the *Financial Times*, “It’s all about CNN.”¹⁰¹

It thus raised a number of eyebrows when the Department of Justice’s (“DOJ”) Antitrust Division reportedly told AT&T that it needed to sell CNN’s parent company, Turner Broadcasting, as a condition of its approval of the merger.¹⁰² Then, weeks later, the DOJ filed a lawsuit to block the merger.¹⁰³ The lawsuit surprised many observers who said that the merger was not viewed as controversial.¹⁰⁴ AT&T’s CEO, Randall Stephenson, called the lawsuit “an abrupt change in the application of antitrust law.”¹⁰⁵ A number of former DOJ officials filed an amicus brief in the case, arguing that it violates the Constitution for the president to interfere with a DOJ enforce-

switch/wp/2016/11/11/trump-may-have-a-harder-time-blocking-the-massive-att-time-warner-merger-than-he-thought/?utm_term=.267111bd64e5.

98. Ryan Knutson, *Trump Says He Would Block AT&T Time Warner Deal*, WALL STREET J. (Oct. 22, 2016, 2:50 PM EST), <https://www.wsj.com/articles/trump-says-he-would-block-at-t-time-warner-deal-1477162214>.

99. Michael M. Grynbaum, *The Network Against the Leader of the Free World*, N.Y. TIMES (July 5, 2017), <https://www.nytimes.com/2017/07/05/business/media/jeffrey-zucker-cnn-trump.html>.

100. Alex Pfeiffer, *Source: Trump Doesn’t Back the Time Warner and AT&T Merger if Zucker Still Heads CNN*, DAILY CALLER (July 6, 2017), <http://dailycaller.com/2017/07/06/source-trump-doesnt-back-the-time-warner-and-att-merger-if-zucker-still-heads-cnn/>.

101. Shannon Bond, James Fontanella-Khan, & Matthew Garrahan, *US Regulators Demand CNN Sale to Approve AT&T-Time Warner Deal*, FIN. TIMES (Nov. 8, 2017), <https://www.ft.com/content/149b22dc-c494-11e7-a1d2-6786f39ef675>.

102. Michael J. de la Merced et al., *Justice Department Says Not So Fast to AT&T’s Time Warner Bid*, N.Y. TIMES: DEALBOOK (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/business/dealbook/att-time-warner.html>.

103. Cecilia Kang & Michael J. de la Merced, *Justice Department Sues to Block AT&T-Time Warner Merger*, N.Y. TIMES: DEALBOOK (Nov. 20, 2017), <https://www.nytimes.com/2017/11/20/business/dealbook/att-time-warner-merger.html>. A federal judge ruled against the DOJ in June 2018, which allowed the merger to go forward. Emily Stewart, *Judge Approves AT&T Time Warner Merger*, VOX (June 12, 2018, 4:48 EST), <https://www.vox.com/policy-and-politics/2018/6/12/17450944/att-time-warner-decision-merger>.

104. See Kang & de la Merced, *supra* note 103 (comparing the AT&T-Time Warner merger to the 2011 Comcast-NBC Universal merger).

105. Brian Stelter, *Justice Department Sues to Block AT&T-Time Warner Deal*, CNN (Nov. 20, 2017, 7:53 PM EST), <http://money.cnn.com/2017/11/20/media/att-time-warner-deal-lawsuit/index.html>.

ment matter “for corrupt, unlawful, or self-protective purposes – including punishing a media company for exercising its First Amendment rights.”¹⁰⁶

To add support to the conclusion that Trump uses his presidential power to harm news organizations he does not like, we can compare these actions with his administration’s treatment of media organizations he does like. Unlike CNN, Trump is a fan of Fox News and its coverage of him.¹⁰⁷ At the press conference in July of 2018, when he refused to take a question from a CNN reporter, it was a representative from Fox News he turned to declaring, “Let’s go to a real network.”¹⁰⁸ He has given the network more interviews than any other,¹⁰⁹ and he frequently tweets favorably about its shows.¹¹⁰ Trump also has an ongoing, close relationship with Twenty-First Century Fox Inc. Executive Chairman Rupert Murdoch.¹¹¹

106. Brief of Former Department of Justice Officials as Amici Curiae in Support of Neither Party at 15, *United States v. AT&T, Inc.*, No. 17-02511 (D.D.C. 2017).

107. See Mollie Reilly, *Donald Trump Continues to Favor Fox News Over All Other Networks*, HUFFPOST (Oct. 25, 2017, 8:00 AM EST), https://www.huffingtonpost.com/entry/donald-trump-fox-interviews_us_59efc1e3e4b0bf1f8836a7dd (discussing Trump almost exclusive interviews with Fox Network and its positive coverage of Trump).

108. Eliza Relman, *Trump Battles with Media at Fiery UK Press Conference, Refusing Questions from CNN and Praising Fox News*, BUS. INSIDER (July 12, 2018, 10:42 AM), <https://www.businessinsider.com/trump-theresa-may-press-conference-cnn-fake-news-2018-7?r=UK&IR=T>.

109. Philip Bump, *No Network Has Interviewed Trump More Than Fox. Here’s What They’ve Asked Him*, WASH. POST (Oct. 26, 2017), https://www.washingtonpost.com/news/politics/wp/2017/10/26/no-network-has-interviewed-trump-more-than-fox-heres-what-theyve-asked-him/?utm_term=.ff145aa3ab1f. As of October 2017, he had given almost seventy percent of his television interviews to the network. *Id.*

110. *E.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2018, 7:17 AM EST), <https://twitter.com/realdonaldtrump/status/960487657691385856> (thanking “@foxandfriends for exposing the truth”); Donald J. Trump (@realDonaldTrump), TWITTER (May 4, 2017, 7:07 AM EST), <https://twitter.com/realdonaldtrump/status/860088511202029569> (“Congratulations to @foxandfriends on its unbelievable ratings hike.”); Donald J. Trump (@realDonaldTrump), TWITTER (May 4, 2017, 7:18 PM EST), <https://twitter.com/realdonaldtrump/status/737785345459113985> (“Congratulations to @seanhannity on his tremendous increase in television ratings.”).

111. Amy Chozick, *Rupert Murdoch and President Trump: A Friendship of Convenience*, N.Y. TIMES (Dec. 23, 2017), <https://www.nytimes.com/2017/12/23/business/media/murdoch-trump-relationship.html>; Lucia Graves, *Donald Trump and Rupert Murdoch: Inside the Billionaire Bromance*, GUARDIAN (June 16, 2017, 6:00 AM EST), <https://www.theguardian.com/us-news/2017/jun/16/donald-trump-rupert-murdoch-friendship-fox-news> (saying the Trump-Murdoch relationship has “never been stronger”).

Before the announcement of a deal for the Walt Disney Company to buy most of Murdoch's company for more than \$50 billion, Trump reportedly checked with Murdoch to make sure the deal would not include selling Fox News.¹¹² The day the deal was publicly announced, the White House said that Trump called Murdoch to congratulate him.¹¹³ And while Trump said his administration would fight the AT&T merger with Time-Warner "because it's too much concentration of power in the hands of too few,"¹¹⁴ his administration praised the proposed Twenty-First Century Fox merger with Disney because it "could be a great thing for jobs."¹¹⁵ Even more curious is the fact that the AT&T-Time Warner union would be a "vertical" merger, which generally receive less regulatory scrutiny than "horizontal" mergers like the Twenty-First Century Fox-Disney deal.¹¹⁶

As another example, Trump has made it known that he is a fan of Sinclair Broadcasting, the conservative media company.¹¹⁷ He has declared it to be "far superior to CNN and even more Fake NBC, which is a total joke."¹¹⁸ According to Trump, the "fake news networks" like CNN, NBC, ABC, and CBS have a "sick and biased AGENDA" and "are worried about the competition and quality of Sinclair Broadcast."¹¹⁹ During the campaign it was even

112. Chozick, *supra* note 111; *see also* Gabriel Sherman (@gabrielsherman), TWITTER (Dec. 14, 2017, 12:24 AM EST), <https://twitter.com/gabrielsherman/status/941358313236828160>.

113. Chozick, *supra* note 111.

114. Erik Wemple, Opinion, *AT&T-Time Warner Merger: Trump Dashes Trust in Media and Government at the Same Time*, WASH. POST (Nov. 8, 2017), https://www.washingtonpost.com/blogs/erik-wemple/wp/2017/11/08/att-time-warner-merger-trump-dashes-trust-in-media-and-government-at-the-same-time/?utm_term=.2d7bbb435361 (speaking as a candidate on the campaign trail circa October 2016).

115. Andrea Ross Sorkin, *Trump Congratulated Murdoch on The Disney Deal: DealBook Briefing*, N.Y. TIMES: DEALBOOK (Dec. 14, 2017), <https://www.nytimes.com/2017/12/14/business/dealbook/disney-fox-takeover.html>.

116. Callum Borchers, *Two Reasons Trump Loves One Media Merger but Hates Another: Fox News and CNN*, WASH. POST (Dec. 15, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/12/15/two-reasons-trump-loves-one-media-merger-but-hates-another-fox-news-and-cnn/?utm_term=.1e4a68d47595.

117. *See generally* Sydney Ember, *Sinclair Requires TV Stations to Air Segments That Tilt to the Right*, N.Y. TIMES (May 12, 2017), <https://www.nytimes.com/2017/05/12/business/media/sinclair-broadcast-komo-conservative-media.html> (reviewing Sinclair's right-tilted history).

118. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 2, 2018, 9:28 AM EST), <https://twitter.com/realdonaldtrump/status/980799183425802240>.

119. Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 3, 2018, 6:34 AM EST), <https://twitter.com/realdonaldtrump/status/981117684489379840>.

revealed that Trump's son-in-law, Jared Kushner, entered into an agreement with Sinclair for increased media coverage.¹²⁰

It is, therefore, troubling that Sinclair appears to have received favorable treatment by the Trump administration. In the spring of 2017, FCC Chairman and Trump appointee, Ajit Pai, revived a long-dormant and technologically obsolete loophole that would allow television broadcasters to acquire far more stations than before.¹²¹ According to *The New York Times*, since becoming FCC chairman, Pai "has undertaken a deregulatory blitz, enacting or proposing a wish list of fundamental policy changes advocated by [Sinclair chairman David] Smith and his company."¹²² A few weeks later, Sinclair announced a \$3.9 billion bid to buy Tribune Media – a bid that would allow them to reach seventy-two percent of U.S. households, nearly double the congressionally allowed amount.¹²³ The move raised enough questions to cause the FCC's Inspector General to start an investigation into whether the FCC had improperly favored Sinclair or coordinated with it.¹²⁴ Almost a year later, however, Pai expressed concerns about the deal.¹²⁵ The President immediately tweeted out his displeasure with Pai's move saying the deal "would

120. Josh Dawsey & Hadas Gold, *Kushner: We Struck Deal with Sinclair for Straighter Coverage*, POLITICO (Dec. 16, 2016, 5:35 PM EST), <https://www.politico.com/story/2016/12/trump-campaign-sinclair-broadcasting-jared-kushner-232764>.

121. Cecilia Kang, *F.C.C. Watchdog Looks into Changes that Benefited Sinclair*, N.Y. TIMES (Feb. 15, 2018), <https://www.nytimes.com/2018/02/15/technology/fcc-sinclair-ajit-pai.html>; John Hendel & Margaret Harding McGill, *How Trump's FCC Aided Sinclair's Expansion*, POLITICO (Aug. 6, 2017, 7:03 AM EST), <https://www.politico.com/story/2017/08/06/trump-fcc-sinclair-broadcast-expansion-241337>.

122. Cecilia Kang et al., *How A Conservative TV Giant Is Ridding Itself of Regulation*, N.Y. TIMES (Aug. 14, 2017), <https://www.nytimes.com/2017/08/14/us/politics/how-a-conservative-tv-giant-is-ridding-itself-of-regulation.html>.

123. Kang, *supra* note 121; see Alvin Chang, *Sinclair's Takeover of Local News, in One Striking Map*, VOX (Apr. 6, 2018, 8:20 AM EST), <https://www.vox.com/2018/4/6/17202824/sinclair-tribune-map>. Tribune Media has since pulled out of the deal. Hadas Gold & Charles Riley, *Tribune Calls Off \$3.9 Billion Sinclair Media Deal*, CNN (Aug. 18, 2018), <https://money.cnn.com/2018/08/09/media/tribune-sinclair/index.html>.

124. Kang, *supra* note 121. The internal investigation concluded that there was "no evidence, nor even the suggestion, of impropriety, unscrupulous behavior, favoritism towards Sinclair, or lack of impartiality." Cecilia Kang, *F.C.C. Investigation Clears Chairman in Sinclair Inquiry*, N.Y. TIMES (Aug. 27, 2018), <https://www.nytimes.com/2018/08/27/business/fcc-clears-pai-sinclair.html>.

125. Robert Channick, *FCC Chair's 'Serious Concerns' over WGN Sale Puts Sinclair-Tribune Media Merger in Jeopardy*, CHI. TRIB. (July 16, 2018), <http://www.chicagotribune.com/business/ct-biz-fcc-concerns-sinclair-tribune-20180716-story.html>.

have been a great and much needed Conservative voice for and of the People.”¹²⁶

II. GOVERNMENT RETALIATION AGAINST THE PRESS VIOLATES THE FIRST AMENDMENT

President Trump’s various attacks on the press are not all the same, and thus the constitutional analysis should also differ. The Court has given us guidance on how to view different types of First Amendment violations. In this Part, I consider how Trump’s actions toward the press might fit into this jurisprudence.

When the news media cover the president and his policies, it is core political speech – the type of speech that occupies “the heart of the First Amendment.”¹²⁷ As the United States Supreme Court declared in the 1966 case of *Mills v. Alabama*, “there is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”¹²⁸ This, the Court explained, “includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.”¹²⁹

But why is political speech so special? Because, the Court has told us, it “is the essence of self-government,”¹³⁰ is “indispensable to decisionmaking in a democracy,”¹³¹ and serves to protect the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”¹³² Constitutional protection is thus “at its zenith.”¹³³ Any suggestion

126. Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2018, 8:39 PM EST), <https://twitter.com/realdonaldtrump/status/1021917767467982854>.

127. *Lane v. Franks*, 134 S. Ct. 2369, 2377 (2014)

(“Speech by citizens on matters of public concern lies at the heart of the First Amendment, which ‘was fashioned to assure unfettered interchange of ideas for the bring about of political and social changes desired by the people.’” (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)); *see also Connick v. Myers*, 461 U.S. 138, 145 (1983) (quoting *N.A.A.C.P. v. Claiborne Hardware Co.*, 458 U.S. 886, 913 (1982)) (“[S]peech on public issues occupies the ‘highest rung of the hierarchy of First Amendment values,’ and is entitled to special protection.”); *F.C.C. v. Pacifica Found.*, 438 U.S. 726, 772 n.6 (1978) (Brennan, J., dissenting) (noting that political speech falls “within the core area of First Amendment concern”).

128. 384 U.S. 214, 218 (1966).

129. *Id.* at 218–19.

130. *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964).

131. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978).

132. *Roth*, 354 U.S. 476, 484 (1957).

133. *Meyer v. Grant*, 486 U.S. 414, 425 (1988); *see also Connick*, 461 U.S. at 145 (speech about public issues is “entitled to special protection”).

that a “good-faith critic of government” will be punished for his criticism “strikes at the very center” of our First Amendment protection.¹³⁴

We all, therefore, enjoy heightened protection for our speech about the government. But the Constitution also recognizes that the press is unique when it comes to monitoring public officials or, in the words of James Madison, “canvassing the merits and measures of public men of every description.”¹³⁵ The Court has recognized that the press has “a historic, dual responsibility in our society” to report information and to “bring[] critical judgment to bear on public affairs.”¹³⁶ It is through this work that the press “plays a unique role as a check on government abuse”¹³⁷ and “serve[s] as an important restraint on government.”¹³⁸

It is with these bedrock principles in mind that we should consider the various types of attacks on the press by President Trump.

First, there are the insults. As discussed above, Trump has all but turned criticizing the press into an art form. The number and intensity of his verbal attacks are noteworthy for their viciousness, and they fly in the face of longstanding norms of presidential civility toward the press. While this is not without its harms,¹³⁹ the constitutional issues are few.

Harsh political rhetoric typically does not violate the First Amendment.¹⁴⁰ The president enjoys the same free speech protections as other citizens.¹⁴¹ And the United States Supreme Court has recognized our rights to “speak foolishly and without moderation” about matters of public concern.¹⁴² Indeed, we all have a duty to “tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.”¹⁴³ This includes “scurrilous”¹⁴⁴ speech that “induces a condition of unrest, creates dissatisfaction with conditions as they are, or even

134. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 292 (1964).

135. James Madison, *Report on the Virginia Resolutions*, in 5 *THE FOUNDERS CONSTITUTION* 141–47 (Phillip B. Kurland & Ralph Lerner eds. 1987).

136. *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 382 (1984).

137. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

138. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Rev.*, 460 U.S. 575, 585 (1983).

139. See Jones & West, *supra* note 24, at *passim*.

140. See *Watts v. United States*, 394 U.S. 705, 707–08 (1969). To the extent President Trump’s insults are made with the intention of intimidating and silencing journalists, however, they may bolster a First Amendment argument that the President is threatening to use governmental power to punish them for their speech.

141. The president arguably enjoys even more free speech protections than other citizens because he has absolute immunity from civil suits based on his official acts. See *Nixon v. Fitzgerald*, 457 U.S. 731, 756 (1982).

142. *Cohen v. California*, 403 U.S. 15, 26 (1971).

143. *Boos v. Barry*, 485 U.S. 312, 322 (1988).

144. *Cohen*, 403 U.S. at 22.

stirs people to anger.”¹⁴⁵ It can even include lies.¹⁴⁶ The president’s role as a government actor, moreover, does not in and of itself transform his criticisms of the press into constitutional violations.¹⁴⁷ Thus, while Trump’s verbal attacks on the press are noteworthy for their frequency and vitriol, they are unlikely to raise significant First Amendment problems.

In the second category of attacks, Trump’s actions have moved beyond mere name-calling, raising heightened constitutional concerns. These actions tend to fall into two primary groups: denials of access to disfavored journalists and generalized threats to the press as a whole.

The United States Supreme Court has never recognized that members of the press (or any speaker) have a constitutional right of access to most government-controlled places,¹⁴⁸ such as White House press briefings. The First Amendment does not require the president to give interviews to reporters or prohibit him or her from talking to only certain news organizations. Nor does it require that the White House hold regular press briefings or cooperate with an organized press pool.¹⁴⁹ But the First Amendment generally does not allow the government to punish speakers based on the content or viewpoint of their speech. Thus, once the Trump Administration has decided to allow access by the press, it might cross the constitutional line for certain reporters to be excluded in retaliation for past coverage.

In 1977, the U.S. Court of Appeals for the District of Columbia Circuit considered the question of when a journalist can be denied access because of the content of his coverage. In *Sherrill v. Knight*, a reporter from the left-leaning magazine *The Nation* applied for a White House press pass but was denied.¹⁵⁰ The court concluded that if the denial was based on the journalist’s speech, it violated the First Amendment.¹⁵¹ The court held that because the White House made the press room available for reporters, “the protection

145. *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

146. *See United States v. Alvarez*, 567 U.S. 709, 732–33 (2012) (“False factual statements can serve useful human objectives . . .”).

147. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005) (“The Government’s own speech . . . is exempt from First Amendment scrutiny.”); *see also* David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675, 703 (1992) (“[T]he President can use government funds to hold a press conference to set forth the Administration’s views on abortion[] and does not have to invite spokespersons for the other side.”).

148. *See Houchins v. KQED, Inc.*, 438 U.S. 1, 15 (1978) (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (“The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.”); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974).

149. *Jones & West*, *supra* note 24, at 587–89 (discussing the history of White House press coverage).

150. 569 F.2d 124, 126 (D.C. Cir. 1977).

151. *Id.* at 129.

afforded newsgathering under the [F]irst [A]mendment guarantee of freedom of the press . . . requires that this access not be denied arbitrarily or for less than compelling reasons.”¹⁵²

The court’s reasoning in *Sherrill* is in line with United States Supreme Court cases holding that the government cannot deny a speaker a benefit because of the content of her speech.¹⁵³ “[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations,” the Court stated, “his exercise of those freedoms would in effect be penalized and inhibited,” and the government would be able to “produce a result [it] could not command directly.”¹⁵⁴

Trump’s more generalized threats to journalists as a whole likewise raise concerns that constitutionally protected press coverage of the president will be chilled.

The Court has recognized that even seemingly acceptable instances of government speech can violate the First Amendment if the government actor “deliberately set about to achieve the suppression of publications deemed ‘objectionable’”¹⁵⁵ In *Bantam Books, Inc. v. Sullivan*, a key 1963 case, the state of Rhode Island created a commission charged with educating the public about books deemed unsuitable for juveniles.¹⁵⁶ The commission informed book distributors that some of their publications were objectionable, thanked them for their “cooperation,” and noted that purveyors of obscenity would be criminally prosecuted.¹⁵⁷ The Court found this to be a form of “informal censorship,” which violated the First Amendment.¹⁵⁸ It did not matter, the Court said, that no books were seized and no booksellers were prosecuted.¹⁵⁹ The mere threat of action, as well as “coercion persuasion, and intimidation,” was sufficient.¹⁶⁰

The final category of attacks includes the instances in which Trump has employed, attempted to employ, or threatened to employ the power of the federal government to retaliate against specific news organizations because of

152. *Id.* (citations omitted). In response to CNN’s lawsuit against Trump following the revocation of Jim Acosta’s press credentials, Federal District Judge Timothy J. Kelly concluded that the *Sherrill* decision stands for the proposition that “the Fifth Amendment’s due process clause protects a reporter’s First Amendment liberty interest in a White House press pass.” Transcript of Motion Hearing at 6, Cable News Network, Inc. v. Trump (D.D.C. Nov. 16, 2018) (No. 1:18-cv-0610-TJK).

153. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (holding a speaker cannot be denied a benefit on the basis of “constitutionally protected speech”).

154. *Id.* (alterations in original).

155. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

156. *Id.* at 59–60.

157. *Id.* at 62–63.

158. *Id.* at 71.

159. *Id.* at 66–67.

160. *Id.* at 67.

their coverage of him. These situations raise the most serious First Amendment concerns.

The legal analysis on this question is not complicated. According to the Court, it “is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out.”¹⁶¹ Repeatedly, and in a variety of situations, the Court has recognized the constitutional prohibition to government retaliation for speech.¹⁶² Retaliatory actions by the government threaten to chill speech, particularly speech that is critical of the government.

While state actors are always prohibited from punishing speakers based on their message,¹⁶³ the risk is heightened when it comes to members of the press, whose job requires them to closely scrutinize government officials. In the face of critical coverage, the government “has a special incentive to repress opposition and often wields a more effective power of suppression.”¹⁶⁴ As Justice Hugo Black stated in *New York Times Co. v. United States*, “The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.”¹⁶⁵

The press is a powerful adversary to the government. Often the news media need not turn to the law to protect themselves. Instead, they can rely their broad platforms and influence with the public to push back against a hostile government actor. But the inclusion of press freedom in the First Amendment is a recognition that there are times when the balance of power between the press and the government is not equal. In these cases, the work of the press must be safeguarded against government power. In our democratic system, there is little that is more powerful than the President of the United States employing the force of the federal government against a watchful press. These attacks are different than the others and should be recognized for the threats they raise.¹⁶⁶

161. *Hartman v. Moore*, 547 U.S. 250, 256 (2006); *see also Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998) (“The reason why such retaliation offends the Constitution is that it threatens to inhibit exercise of the protected right.”).

162. *See, e.g., Crawford-El*, 523 U.S. at 578, 588 n.10 (1998); *Board of Cty. Comm’rs v. Umbehr*, 518 U.S. 668, 678, 685 (1996); *Branti v. Finkel*, 445 U.S. 507, 515 (1980).

163. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”).

164. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 n.11 (1978) (quoting T. EMERSON, *TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT* 9 (1966)).

165. 403 U.S. 713, 717 (1971) (Black, J., concurring).

166. In October 2018, the writers’ advocacy group PEN American Center, Inc. filed a lawsuit against President Trump’s threats and retaliatory actions against the news media are unconstitutional and seeking an order prohibiting him from using “the

CONCLUSION

The mounting evidence that President Trump is employing the power of the federal government (or simply using the threat that he might employ the power of the federal government) to punish or silence news organizations is alarming. While Trump might have the right to criticize or insult journalists, he cannot use his official power to retaliate against them for their speech.

In a 1974 speech at Yale Law School, United States Supreme Court Justice Potter Stewart addressed the natural tug and pull between the press and the government.¹⁶⁷ When it comes to this struggle, he said, the Constitution “establishes the contest, not its resolution.”¹⁶⁸ This, according to Justice Stewart, meant that the government is not required to reveal information to the news media, while the press “may publish what it knows, and may seek to learn what it can.”¹⁶⁹ In other words, Trump may have no obligation to affirmatively assist the news media, but he also cannot use the force of his office to silence or punish them.

Any time a president attempts to use the federal government as a tool for retaliation against others, we should be alarmed. But when those attacks are targeted at news organizations who are doing their constitutionally assigned jobs of checking the government and informing the public, there should be universal outcry. The Constitution predicted that there would be a contest between the press and the president. But the rules of that contest demand that the press be free to do its work – no matter how much the president hates it.

power and machinery of government to punish his media critics.” Complaint for Declaratory and Injunctive Relief at 19, *PEN Am. Ctr., Inc. v. Trump*, No. 18-9433 (S.D.N.Y. 2018), <https://pen.org/wp-content/uploads/2018/10/PEN-America-v-Trump-Complaint.pdf>.

167. See Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 631 n.† (1975).

168. *Id.* at 636.

169. *Id.*