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The Fragility of the Free American Press

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THE FRAGILITY OF THE FREE AMERICAN PRESS

RonNell Andersen Jones & Sonja R. West

ABSTRACT—President Donald Trump has faced criticism for attacking the press and for abandoning longstanding traditions of accommodating and respecting it. This Essay argues that the national discussion spurred by Trump’s treatment of the press has fallen short of capturing the true seriousness of the situation. Trump’s assault on the custom of press accommodation follows a generation-long collapse of other major press protections. In order to fully understand the critical juncture at which American press freedom now stands, we must expand the discussion beyond talk of a rogue president’s aberrant attacks on the press and consider the increasingly fragile edifice on which the American free press sits. This is because the kind of press we value and need in the United States—one that is free, independent, and democracy-enhancing—does not just occur naturally. Nor is it protected by a single, robust constitutional right. Rather, it is supported by a number of legal and nonlegal pillars, such as the institutional media’s relative financial strength, the goodwill of the public, a mutually dependent relationship with government officials, and the backing of sympathetic judges. Each of these supports has weakened substantially in recent years, leaving the one remaining pillar of tradition and custom to bear more of the weight. Contrary to widespread belief, our concern should not be that Trump might be taking the first step toward crippling the power of the free press, but rather that he might be taking the final step in a process that has long been underway.

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INTRODUCTION

The President of the United States has boldly declared an all-out “war” on the press,¹ and his primary weapon has been an attack on tradition. Repeatedly and aggressively, President Donald Trump has flouted press-protecting norms and customs that have been long respected by other presidents. Throughout his campaign and into his presidency, he has ignored customary media accommodations, criticized or excluded reporters and news organizations perceived as unfriendly, spoken of the press in disparaging and vilifying terms, and even threatened media organizations with lawsuits and retributive governmental actions.

Journalists and scholars have rightly warned us that President Trump’s disrespect for the Fourth Estate is troubling and that it threatens to harm the vitality of this important check on our democracy.² As grave as these warnings have been, however, they have fallen short of capturing the true seriousness of the situation. This is because the kind of press we value and need in the United States—one that is free, independent, and democracy-enhancing—does not just occur naturally. Nor is it protected by a single, robust constitutional right. Rather, our free press sits atop an increasingly

¹ President Donald Trump, Address at CIA Headquarters (Jan. 23, 2017) (transcript available at <http://www.cbsnews.com/news/trump-cia-speech-transcript/> [https://perma.cc/38GM-YSFM]) [hereinafter Trump CIA Speech Transcript].

² See, e.g., Jon Finer, *A Dangerous Time for Press and the Presidency*, ATLANTIC (Feb. 20, 2017), <https://www.theatlantic.com/politics/archive/2017/02/a-dangerous-time-for-the-press-and-the-presidency/517260/> [https://perma.cc/UV8B-S5PQ]; 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> [https://nyti.ms/2lKd1jv].

fragile edifice. This edifice is supported by a number of legal and nonlegal pillars, such as the institutional media's relative financial strength, the goodwill of the public, a mutually dependent relationship with government officials, and the backing of sympathetic judges. Each of these supports, however, has weakened substantially in recent years, leaving one remaining pillar to bear more of the weight. That final pillar is political tradition—a set of customs that demands the President of the United States recognize and respect the vital role of the press. It is this final pillar that Trump has put in his sights.

The key to fully understanding the potential dangers of President Trump's attacks on the press is to realize that they do not exist in a vacuum. This Essay adds context and explores why the President's assault on tradition is so alarming and how other legal and nonlegal press protections are no longer sufficient. We conclude that Trump's stormy relationship with the press, which abandons customary political norms that have long served to safeguard the Fourth Estate, is all the more troubling when viewed against the backdrop of the American press's deteriorating foundation. Contrary to widespread belief, our concern should not be that Trump might be taking the first step toward crippling the power of the free press, but rather that he might be taking the final step in a process that has long been underway.

I. PRESIDENTS AND THE PRESS

It is, of course, the courts that adjudicate the scope of the First Amendment and legislatures who design statutory protections for journalists. The President, however, also holds substantial power over the press. As the country's most prominent policy agenda-setter,³ the President controls much of the government's most significant governmental information—information that is necessary for the press to do its job of informing the public and checking the government. White House press accommodations, discussed in more detail below, are almost entirely within the President's own control. The Executive's prosecutorial discretion and investigatory decisionmaking authority, likewise, give him significant powers bearing on press freedoms.⁴ Presidents, in other words, can make things easy for members of the press, but they can also make things exceptionally difficult.⁵

³ John Lovett et al., *Popular Presidents Can Affect Congressional Attention for a Little While*, 43 POL'Y STUD. J. 22 (2015).

⁴ James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES (Dec. 30, 2016), https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html?_r=0 [<https://nyti.ms/2kcLy6o>].

⁵ For historical context of press-president relations, see RonNell Andersen Jones and Lisa Grow Sun, *Enemy Construction and the Press*, ARIZ. ST. L.J. (forthcoming 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2929708 [<https://perma.cc/SN9P-NWJH>].

It is unsurprising, then, that press-freedom advocates keep a close eye on presidents, tracking their attitudes, accessibility, and actions. Until recently, despite some reservations and even deep tensions, all modern presidents felt compelled to offer at least basic information and traditional accommodations to the White House press corps—and to speak positively of the press and its work in public, even while disparaging it in private.⁶ When presidents have tested the boundaries of these ideals—as some, like President Nixon, surely have done—they have faced scrutiny from the public and press that they knew could threaten their reelections and legacies.⁷

Most recently, for example, journalism groups have issued scathing reports about President Obama, whose administration flouted norms in ways that endangered press freedom on several fronts.⁸ Obama publicly expressed support for freedom of the press, lauding it as an important national priority,⁹ but critics charged that his boots-on-the-ground record had many flaws. In his eight years in office, Obama oversaw three times as many prosecutions of whistleblowers and leakers than occurred in all previous administrations combined; repeatedly used the Espionage Act to target journalistic sources within government; seized and monitored journalists' phone records; subpoenaed reporters for names of confidential sources; and even labeled a reporter an unindicted coconspirator in a criminal case based on journalistic work product.¹⁰ As his Justice Department “fac[ed] mounting criticism from media organizations,” commentators stressed the ways in which Obama’s “heavy-handed approach represent[ed] a sharp break with tradition.”¹¹

If President Obama was no friend of the press, President Trump is its archenemy, and he has repeatedly, publicly, and unabashedly declared as much.¹² In a barrage of tweets¹³ and other commentary, he has made his “running war with the media” a central theme of his time in office.¹⁴ Trump’s

⁶ See *id.* at 33–34.

⁷ See, e.g., WILLIAM E. PORTER, ASSAULT ON THE MEDIA: THE NIXON YEARS (1976).

⁸ Risen, *supra* note 4.

⁹ See, e.g., Dan Corey, *President Obama Sits Down with The Daily Targum*, DAILY TARGUM (May 12, 2016), <http://www.dailytargum.com/article/2016/05/president-obama-sits-down-with-the-daily-targum> [https://perma.cc/Q7JL-M6BR].

¹⁰ Risen, *supra* note 4.

¹¹ *Id.*

¹² See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065> [https://perma.cc/53MU-PZMH] (“The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”); President Donald Trump, Remarks at the Conservative Political Action Conference (Feb. 24, 2017) (transcript available at <https://www.whitehouse.gov/the-press-office/2017/02/24/remarks-president-trump-conservative-political-action-conference> [https://perma.cc/UC2B-W2EX]) [hereinafter Conservative Political Action Conference Transcript].

¹³ Pete Vernon, *Trump Doesn't Miss a Beat as Twitter's Media Critic in Chief*, COLUM. JOURNALISM REV. (Dec. 20, 2016), https://www.cjr.org/analysis/trump_twitter_media_journalism.php [https://perma.cc/J8LN-YCEU].

¹⁴ Trump CIA Speech Transcript, *supra* note 1.

former chief strategist boldly referred to the press as “the opposition party,”¹⁵ and Trump regularly uses derogatory language about journalists and their work that differs “from the gripes of his forebears in both degree and tone.”¹⁶ He sweepingly questions the credibility of the entire profession—using terms like “dishonest,”¹⁷ “lying,”¹⁸ and “failing”¹⁹—and uses brazen, uniformly disrespectful labels including “disgusting,”²⁰ “horrible,” “bad,”²¹ and “scum.”²² He regularly states, without supporting evidence, that members of the press “make up sources” and are “very dishonest people.”²³

In total, the Trump administration has gone well beyond merely critiquing or stonewalling the press, attacking “the very legitimacy of the press as an independent actor in American public life.”²⁴ The President does not even pretend to like the press, and he has shown no willingness to accommodate the press as it engages in newsgathering on matters of public concern.

II. THE PILLARS SUPPORTING A FREE PRESS

Despite the increasingly hostile relationship between the President and the press, however, it is all too easy to become complacent about the strength

¹⁵ Ryan Teague Beckwith, *Read Steve Bannon and Reince Priebus' Joint Interview at CPAC*, TIME (Feb. 23, 2017), <http://time.com/4681094/reince-priebus-steve-bannon-cpac-interview-transcript/> [<https://perma.cc/TW22-LDTJ>].

¹⁶ S.M., *Donald Trump Steps up His Attack on the Media*, ECONOMIST (Aug. 15, 2016), <http://www.economist.com/blogs/democracyinamerica/2016/08/bad-press> [<https://perma.cc/8CTA-QELU>].

¹⁷ Karma Allen, *Trump Calls News Media 'Crooked,' 'Dishonest,' 'Sick People' at Phoenix Rally*, ABC NEWS (Aug. 23, 2017), <http://www.knoe.com/content/news/Trump-calls-news-media-crooked-dishonest-sick-people-at-Phoenix-rally-441529403.html> [<https://perma.cc/NQQ8-HTEM>].

¹⁸ Gabriel Schoenfeld, *Trump vs. 'Lying, Disgusting' Media*, USA TODAY (Jan. 11, 2017, 3:59 PM), <http://www.usatoday.com/story/opinion/2017/01/11/trump-lying-disgusting-media-espionage-laws-gabriel-schoenfeld-column/96389362/> [<https://perma.cc/US64-FLRU>].

¹⁹ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 16, 2017, 3:58 AM), <https://twitter.com/realDonaldTrump/status/832197515248275456> [<https://perma.cc/839M-VCX9>].

²⁰ See, e.g., Ali Vitali, *In His Words: 19 Notable Thoughts from Donald Trump*, NBC NEWS (Aug. 14, 2016), <http://www.nbcnews.com/politics/2016-election/his-words-19-notable-thoughts-donald-trump-n630446> [<https://perma.cc/6T9U-9YT2>] (explaining Trump’s view that “CNN is disgusting”); *Trump: 'Disgusting Reporters, Horrible People,'* USA TODAY (Mar. 15, 2016), <http://www.usatoday.com/videos/news/politics/elections/2016/2016/03/15/81843912/> [<https://perma.cc/N28V-M5RX>] (characterizing the media as “disgusting reporters, horrible people”).

²¹ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 11, 2016, 5:02 PM), <https://twitter.com/realDonaldTrump/status/808114703922843649> [<https://perma.cc/KM6V-GY6B>].

²² Mark Hensch, *Trump Calls Media 'Scum,'* THE HILL (Oct. 26, 2015, 8:04 AM), <http://thehill.com/blogs/ballot-box/presidential-races/258057-trump-the-media-is-scum> [<https://perma.cc/HJ43-6AML>].

²³ Conservative Political Action Conference Transcript, *supra* note 12.

²⁴ Finer, *supra* note 2.

of the American free press. Protecting the press from the government is, after all, one of the reasons the Constitution exists. Doesn't the First Amendment protect the press's rights to gather and report the news? The answer to this question is more complicated than most Americans realize. While the press, of course, does enjoy key constitutional rights and protections, these protections tend to be narrower and less stringent than many people understand. The American press has instead grown to rely on a number of nonconstitutional safeguards in order to do its work. Thus, it is concerning that many of these other protections have been weakening of late.

A. *Constitutional Protections for the Press*

The First Amendment prohibits the government from “abridging the freedom of speech, or of the press.”²⁵ This explicit textual reference makes the press, according to Justice Potter Stewart, “the only organized private business that is given explicit constitutional protection.”²⁶ Additionally, press freedom has undeniable historical importance. The liberty of the press, according to James Madison, is “one of the great bulwarks of liberty”²⁷ and among the “choicest privileges of the people.”²⁸

Yet despite these strong textual and historical arguments, the Supreme Court has long been wary of interpreting the First Amendment's Press Clause as an active and vibrant defender of press freedom—at least in any manner that might distinguish it from the Speech Clause.²⁹ The Court has repeatedly declared that the press should not receive any constitutional privileges that are not equally shared by all speakers,³⁰ and therefore the constitutional rights the press does enjoy tend to be the same rights that we all possess. Without doubt, these rights are significant: they include broad protections against prior restraints³¹ and powerful constitutional safeguards that limit the government's ability to regulate speech based on its content.³² Courts have further held that the First Amendment often shields all speakers against claims that they harmed others either by defamation,³³ invasion of

²⁵ U.S. CONST. amend I.

²⁶ Potter Stewart, *'Or of the Press,'* 26 HASTINGS L.J. 631, 633 (1975).

²⁷ 1 JOSEPH GALES, THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 451 (1834).

²⁸ JEFFREY A. SMITH, PRINTERS AND PRESS FREEDOM 166 (1988) (quoting Letter from James Madison to Edmund Randolph (May 31, 1789), in 5 THE WRITINGS OF JAMES MADISON 372, 377, 380 (Gaillard Hunt ed. 1904)).

²⁹ See, e.g., Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1057 (2011).

³⁰ See, e.g., *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 352 (2010) (“We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.” (quoting *Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 691 (1990) (Scalia, J., dissenting))); *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972) (“Freedom of the press is a ‘fundamental personal right’ which ‘is not confined to newspapers and periodicals.’” (quoting *Lovell v. Griffin*, 303 U.S. 444, 450, 452 (1938))).

³¹ See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971).

³² See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468–70 (2009).

³³ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 254 (1964).

privacy,³⁴ or infliction of emotional³⁵ or physical harm.³⁶ The First Amendment likewise provides “strong medicine” against laws that constitutionally regulate some speech but are too vague or overly broad.³⁷

Like all speakers, the press, therefore, has robust constitutional protections whenever it publishes or broadcasts the news. What these constitutional safeguards do not protect, however, is newsgathering. Despite recognizing in dicta that “news gathering is not without its First Amendment protections” and noting that “without some protection for seeking out the news, freedom of the press could be eviscerated,”³⁸ the Court has almost never actually protected the process of gathering information.³⁹ For journalists working to collect knowledge about the government in order to serve as watchdogs and public informants, this lack of constitutional protection for newsgathering is significant.

Without First Amendment protections for newsgathering, the press is left quite vulnerable while in the process of pursuing information. Members of the press cannot count on the Constitution to provide them with access to government-controlled property,⁴⁰ information,⁴¹ or meetings.⁴² They may be unable to protect their sources, notes, telephone records, or emails if served with a government subpoena⁴³ or search warrant.⁴⁴ They risk facing civil or criminal liability if they engage in undercover reporting⁴⁵ or reveal leaked government information.⁴⁶

³⁴ See *Fla. Star v. B.J.F.*, 491 U.S. 524, 525 (1989).

³⁵ See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 46–47 (1988).

³⁶ *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110, 1122 (11th Cir. 1992); *Herceg v. Hustler Magazine, Inc.*, 814 F.2d 1017 (5th Cir. 1987).

³⁷ *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973).

³⁸ *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972).

³⁹ One exception is *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) (plurality opinion) (declaring a right of access for the press and the public to criminal trials). Also, some lower courts have concluded that *Branzburg*, 408 U.S. at 665, created a qualified reporter’s privilege. See, e.g., *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000); *Shoen v. Shoen*, 5 F.3d 1289, 1292 & n.5 (9th Cir. 1993).

⁴⁰ *Houchins v. KQED, Inc.*, 438 U.S. 1, 16 (1978); *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974).

⁴¹ *Houchins*, 438 U.S. at 15 (“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.”).

⁴² See *Soc’y of Prof’l Journalists v. Sec’y of Labor*, 832 F.2d 1180 (10th Cir. 1987).

⁴³ See *Branzburg*, 408 U.S. at 682.

⁴⁴ See *Zurcher v. Stanford Daily*, 436 U.S. 547, 565 (1978).

⁴⁵ See *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 510 (4th Cir. 1999).

⁴⁶ See, e.g., Ann E. Marimow, *Justice Department’s Scrutiny of Fox News Reporter James Rosen in Leak Case Draws Fire*, WASH. POST (May 20, 2013), https://www.washingtonpost.com/local/justice-departments-scrutiny-of-fox-news-reporter-james-rosen-in-leak-case-draws-fire/2013/05/20/c6289ebac162-11e2-8bd8-2788030e6b44_story.html?utm_term=.61f2ea2aa33f [<https://perma.cc/LM34-SN3A>].

The First Amendment alone, therefore, does not protect the free and independent press beyond providing the same rights that all speakers enjoy. These constitutional rights are necessary, but not sufficient; they fall far short of covering the broad range of activities that working journalists engage in while in pursuit of the news.

B. Nonconstitutional Protections of the Press

The insufficient protections guaranteed by the First Amendment have led America's free and independent press to rely instead on a mishmash of legal and nonlegal privileges and protections. Over time, this collection of both swords and shields has strengthened and emboldened the press as well as helped it fulfill the framing generation's vision of a free press powerful enough to be a worthy adversary to the government.

1. Other Legal Protections

The press has won some significant legislative protections for newsgathering. For example, thirty-one states and the District of Columbia have enacted shield laws that provide various amounts of protection for the press from having to reveal their confidential sources or work product.⁴⁷ The press also secured several federal legislative victories in the 1960s and 1970s with the passage of the federal Freedom of Information Act in 1966,⁴⁸ the Federal Advisory Committee Act in 1972,⁴⁹ and the Government in the Sunshine Act in 1976.⁵⁰ These laws gave all citizens (including the news media) a right of access to many federal documents, federal advisory committee meetings, and federal agency meetings. Many states also have enacted freedom of information and open meeting laws.⁵¹

Without doubt, these statutory rights of access and protection against government subpoenas and warrants are incredibly valuable to the press. But they do come with several noteworthy limitations. First, they vary greatly from jurisdiction to jurisdiction, making their protections unpredictable and uneven.⁵² Second, they are only as strong as the administrations and courts that interpret them. Finally, unlike constitutional protections, statutory protections exist only at the pleasure of the legislators. All of these laws can be amended or repealed, and the press has no legal right to stop it. What legislators giveth, legislators can taketh away.

⁴⁷ REPORTERS COMM. FOR FREEDOM OF THE PRESS, THE REPORTER'S PRIVILEGE COMPENDIUM: AN INTRODUCTION (last visited Oct. 12, 2017), <https://www.rcfp.org/browse-media-law-resources/guides/reporters-privilege/introduction> [https://perma.cc/F57R-6TWT].

⁴⁸ 5 U.S.C. § 552 (2012).

⁴⁹ 5 U.S.C. app. II §§ 1-15 (2012).

⁵⁰ 5 U.S.C. § 552b (2012).

⁵¹ See REPORTERS COMM. FOR FREEDOM OF THE PRESS, FEDERAL OPEN GOVERNMENT GUIDE 6 (2009), <https://www.rcfp.org/rcfp/orders/docs/HOW2FOI.pdf> [https://perma.cc/H42G-D4BY].

⁵² See RonNell Andersen Jones, *Avalanche or Undue Alarm? An Empirical Study of Subpoenas Received by the News Media*, 93 MINN. L. REV. 585, 656 (2008).

2. *Nonlegal Protections*

In addition to limited First Amendment rights and statutory protections, the press has come to rely on several important nonlegal safeguards. These pillars of press freedom have varied in their respective force over the years, but, in combination, they have formed a structure in which a vibrant and proactive press is able to inform citizens about matters of public importance and keep the government accountable.

These pillars include the institutional media's financial strength, which gave it the necessary resources to take on governmentally created obstacles to newsgathering, aggressively support legal challenges securing or defending its rights,⁵³ and lobby for political safeguards through state and federal legislation.⁵⁴ There was a time, furthermore, when the press had powerful allies in the judicial branch, which highly valued the role of the press.⁵⁵ The press was also once buoyed by the public's goodwill—at one time securing the trust of more than two-thirds of Americans.⁵⁶ Also supporting the strength of the free press was its mutually dependent relationship with government officials for sharing and distributing information with the public. Finally, the press has relied heavily on political norms and customs that expect government officials to show a certain level of respect for the role of the press in our democracy.

III. THE ERODING EDIFICE

But that was then, and this, of course, is now. In recent years, all of these key pillars supporting the American free press have weakened, creating a vulnerability that makes Trump's attacks on press traditions even more dangerous than they appear.

A. *Financial Strength*

Not long ago, the press's greatest strength may have been its economic fortitude. But in the last few decades, the financial prowess of the press has all but evaporated. Newspapers have gone from being a business that was

⁵³ See RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 571 (2011).

⁵⁴ See *id.*, at 580–81, 598.

⁵⁵ See RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 253 (2014) (describing an era in which language from the Court about the press was overwhelmingly praising).

⁵⁶ Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP (Sept. 14, 2016), <http://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx> [<https://perma.cc/M892-Y9FZ>].

once the functional equivalent of “a license to print money,”⁵⁷ to being an industry “very much in free fall.”⁵⁸ Without these dollars, the press is unable to perform a number of the crucial tasks it once performed, such as thorough and aggressive newsgathering or mounting legal defenses of its own liberties.⁵⁹

Thanks to the “triple whammy of declining circulation, advertising and classified revenue,” many newspapers have seen “double-digit and triple-digit declines” in profits.⁶⁰ Indeed, while newsgathering and reporting was once quite lucrative, the financial reality of the internet age is that fewer people are willing to pay for news product.⁶¹ While subscriptions wane, advertising dollars that once went to news organizations now funnel into digital advertising, where the beneficiaries are technology companies that do not produce news content.⁶²

The inevitable consequences of these financial hits have been rampant consolidations and closures, even among longstanding metropolitan daily newspapers,⁶³ while surviving news organizations have been “cutting staff to the bone.”⁶⁴ Despite a few notable upticks in staffing in the wake of the recent election,⁶⁵ the industry as a whole has been forced to get by with 20,000 fewer newsroom employees compared to two decades ago.⁶⁶

The concrete ramifications of these losses are exactly as expected. With \$1.6 billion less a year to spend on news compared to a decade ago,⁶⁷

⁵⁷ Eric Alterman, *Out of Print: The Death and Life of the American Newspaper*, NEW YORKER 49 (Mar. 31, 2008), <https://www.newyorker.com/magazine/2008/03/31/out-of-print> [<https://perma.cc/UJ2S-2W8Y>].

⁵⁸ Jordan Weissmann, *The Decline of Newspapers Hits a Stunning Milestone*, SLATE (Apr. 28, 2014, 10:16 AM), http://www.slate.com/blogs/moneybox/2014/04/28/decline_of_newspapers_hits_a_milestone_print_revenue_is_lowest_since_1950.html [<https://perma.cc/H9WM-7QVV>]; see also Michael Barthel, *Despite Subscription Surges for Largest U.S. Newspapers, Circulation and Revenue Fall for Industry Overall*, PEW RES. CTR. (June 1, 2017), <http://www.pewresearch.org/fact-tank/2017/06/01/circulation-and-revenue-fall-for-newspaper-industry/> [<https://perma.cc/9WS4-QW2E>].

⁵⁹ For greater discussion of the financial decline of newspapers, see Jones, *supra* note 53, at 562–70.

⁶⁰ Jones, *supra* note 53, at 619 (quoting Adolfo Mendez, *Updated: U.S. Dailies See Declines in Revenue Profits Over 5-Year Span*, INLAND PRESS ASS'N (Apr. 1, 2010)).

⁶¹ Amy Mitchell and Jesse Holcomb, *State of the News Media 2016*, PEW RES. CTR. (June 15, 2016), <http://www.journalism.org/2016/06/15/state-of-the-news-media-2016/> [<https://perma.cc/4JBK-UYHG>].

⁶² *Id.* (noting that 65% of digital advertising revenue goes to five companies: Facebook, Google, Yahoo, and Twitter).

⁶³ See FED. COMM'NS COMM'N, *THE MEDIA LANDSCAPE* 41, <https://transition.fcc.gov/osp/inc-report/INoC-1-Newspapers.pdf> [<https://perma.cc/U6LH-KA4P>] (listing newspapers that have closed or ended a print edition).

⁶⁴ Weissmann, *supra* note 58.

⁶⁵ See, e.g., Peter Sterne, Kelsey Sutton & Alex Weprin, *New York Times Earmarks \$5 Million to Cover Trump Admin, but Budget Cuts Loom*, POLITICO (Jan. 17, 2017), <http://www.politico.com/blogs/on-media/2017/01/new-york-times-earmarks-5-million-to-cover-trump-admin-but-budget-cuts-loom-233689> [<https://perma.cc/R48C-Y5T4>]; Peter Sterne, *Wall Street Journal Reshuffles Washington Bureau*, POLITICO (Dec. 9, 2016), <http://www.politico.com/media/story/2016/12/wall-street-journal-reshuffles-washington-bureau-004886> [<https://perma.cc/VV8D-TB2V>].

⁶⁶ Mitchell & Holcomb, *supra* note 61.

⁶⁷ PEW RES. CTR. PROJECT FOR EXCELLENCE IN JOURNALISM, *THE STATE OF THE NEWS MEDIA: AN ANNUAL REPORT ON AMERICAN JOURNALISM 2010* (Apr. 6, 2010), <http://assets.pewresearch.org.s3>.

newspapers have had to eliminate costly expenditures such as investigative reporting of difficult stories.⁶⁸ Struggling news organizations also are less able to afford to defend press freedoms in the courts or to lobby for favorable legislation.⁶⁹ Recent studies confirm that “[e]ven when the media’s First Amendment rights are quite directly at stake, newspapers often lack the financial wherewithal to protect their interests.”⁷⁰ In one study, 44% of editors at the nation’s leading news organizations said their organizations were less likely to pursue legal defenses to press freedoms and almost 90% said the reason was a lack of money.⁷¹

This combination of technological, economic, and industry-specific forces has created a dynamic in which a critically important pillar holding up American press freedom—its own financial muscle—has eroded so severely that it can no longer be said to bear meaningful weight.

B. Protection from the Courts

Even when news organizations are able to devote the funds to mount legal challenges, they are also less likely today to find a friend in the courts. In the past, judges often enhanced the press’s power by interpreting law in favor of news media parties. They would, for example, defer to journalists in deciding what was or was not “newsworthy,”⁷² interpret ambiguous laws in favor of the press,⁷³ look more skeptically at government efforts to regulate the press,⁷⁴ or prioritize the need for a free and robust press when weighing competing constitutional interests.⁷⁵

But much of that has changed. In privacy cases, for example, judges once so thoroughly deferred to journalists about what was newsworthy

amazonaws.com/files/journalism/State-of-the-News-Media-Report-2010-FINAL.pdf [https://perma.cc/N3X5-YFX8].

⁶⁸ See generally JAMES T. HAMILTON, *DEMOCRACY’S DETECTIVES: THE ECONOMICS OF INVESTIGATIVE REPORTING* (2017).

⁶⁹ Jones, *supra* note 53.

⁷⁰ Jones & Sun, *supra* note 5, at 29.

⁷¹ Eric Newton, *A News Industry ‘Less Able’ to Defend Freedom: News Leaders Feel Less Able to Confront Issues in Court in the Digital Age*, KNIGHT FOUND. (Apr. 21, 2016), <https://www.knightfoundation.org/articles/news-industry-less-able-defend-freedom> [https://perma.cc/68XY-GJ5F].

⁷² See Amy Gajda, *Judging Journalism: The Turn Toward Privacy and Judicial Regulation of the Press*, 97 CALIF. L. REV. 1039, 1041 (2009).

⁷³ See, e.g., *Angelico v. State of Louisiana*, 593 F.2d 585, 588 (5th Cir. 1979).

⁷⁴ See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (stating that the government “carries a heavy burden of showing justification for the imposition of” a prior restraint on the press).

⁷⁵ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (stating that the “interest of the public here outweighs the interest of appellant or any other individual” (citing *Sweeney v. Patterson*, 128 F.2d 457, 458 (1942), *cert. denied*, 317 U.S. 678)).

enough to outweigh a plaintiff's privacy claim that for many courts, the "[n]ews" was "whatever news media said it was."⁷⁶ But that respect for the editorial judgment of journalists has greatly decreased. Media law scholar Amy Gajda has found that courts are becoming more willing to second-guess the media's news judgment and less likely to favor the media's legal defenses in privacy cases.⁷⁷

The press is also finding less protection in the courts in defamation cases. While there is some evidence that the number of libel lawsuits filed against the press has decreased,⁷⁸ the news media is now more likely to lose the cases that do go forward and at a much higher cost. Since 2010, the press has only prevailed in 39% of the libel and privacy cases that have gone to trial.⁷⁹ This is a significant decline from the 52% of cases that the press won only a decade earlier.⁸⁰ And the median damage award against the press has grown to \$1.1 million—a fivefold increase over the \$200,000 average in the 1980s.⁸¹ Increasingly, moreover, the press is facing high-stakes lawsuits bankrolled by wealthy opponents of the press, perpetuating a financial game of chicken in which the news organizations are struggling to stay competitive.⁸²

The United States Supreme Court has also grown less interested in press protections. In the last decade, the Court has issued no major opinions articulating press freedoms⁸³ and has likewise denied certiorari on several hotly contested press issues.⁸⁴ The Court's dicta about the press—the primary signal-setting mechanism it has used to reinforce press liberty in the past⁸⁵—seems to have shifted from "largely favorable and praising depictions of the press to largely distrusting and dismissive ones."⁸⁶ Likewise, when the Justices talk about the press off the bench, including at conferences and in speeches, they regularly criticize it.⁸⁷ The Justices, particularly in recent

⁷⁶ AMY GAJDA, *THE FIRST AMENDMENT BUBBLE* 36 (2015).

⁷⁷ *Id.* at 55–60.

⁷⁸ Enrique Armijo, *Communication Law, Technological Change, and the New Normal*, 19 COMM. L. & POL'Y 401, 405–06 (2014).

⁷⁹ Emily Bazelon, *Billionaires vs. the Press in the Era of Trump*, N.Y. TIMES (Nov. 22, 2016), <https://www.nytimes.com/2016/11/22/magazine/billionaires-vs-the-press-in-the-era-of-trump.html> [https://nyti.ms/2jEIUKG].

⁸⁰ *Id.*

⁸¹ *Id.*; see also David A. Logan, *Libel Law in the Trenches: Reflections on Current Data on Libel Litigation*, 87 VA. L. REV. 503, 513–14 (2001).

⁸² Bazelon, *supra* note 79.

⁸³ Lyrissa Barnett Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1820 (2012).

⁸⁴ See, e.g., *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *cert. denied*, 547 U.S. 1187 (2006) (investigation of improper government leaks to the press in a Privacy Act case); *In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (D.C. Cir. 2005), *cert. denied*, 545 U.S. 1150 (2005) (assertion of reporter's privilege for protection of a confidential source).

⁸⁵ See, e.g., RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 705, 717 (2014).

⁸⁶ Jones, *supra* note 55, at 255.

⁸⁷ See RonNell Andersen Jones, *U.S. Supreme Court Justices and Press Access*, 2012 BYU L. REV. 1791, 1805–06 n.96 (2012).

years, have sometimes seemed to go out of their way to speak poorly of the press and to cast doubt on its value to the democracy.⁸⁸

All told, the courts have gone from an entity solidly in the corner of a free, protected press to one that now looks upon the press with at best skepticism and at worst animosity.

C. Public Support

Perhaps the starkest trend the American press has experienced is the complete about-face in the way the public perceives its value, credibility, and role in democracy.⁸⁹ The practical impact of this shift in public opinion on modern press freedom is severe.

In the 1970s, when more than two-thirds of Americans reported that they had trust and confidence in the mass media,⁹⁰ the press translated this support into generous governmental access and substantial opportunities for newsgathering. At the beginning of the Trump presidency, however, press confidence dropped to its lowest level in Gallup polling history.⁹¹ Less than a third of those polled said they had a great deal or fair amount of trust in the media, representing a drop of 8% from the year before—and marking a steady downward trend since the turn of the 21st century.⁹² Indeed, opinions of the press now fall below even the public approval ratings for the President, which are also at a modern low.⁹³

Fueled in part by an overall decline in trust in all traditional institutions,⁹⁴ much of the public no longer feels that the press works for them

⁸⁸ See, e.g., RonNell Andersen Jones, *Justice Scalia and Fourth Estate Skepticism*, 15 FIRST AMEND. L. REV. 258, 264–65 (2017).

⁸⁹ This material draws heavily from a fuller discussion of this topic in RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 266–68 (2014).

⁹⁰ Swift, *supra* note 56.

⁹¹ *Id.*

⁹² *Id.* There has been, however, some evidence of an upturn in the public's trust in the press since the 2016 election. See *In U.S., Confidence in Newspapers Still Low but Rising*, GALLUP (June 28, 2017), <http://news.gallup.com/poll/212852/confidence-newspapers-low-rising.aspx> [https://perma.cc/WE9T-4GBW] (showing a rise from 20% to 27%); Chris Kahn, *The Press, Branded the 'Enemy' by Trump, Increasingly Trusted by the Public: Reuters/Ipsos Poll*, REUTERS (Oct. 3, 2017), <https://www.reuters.com/article/us-trump-effect-media-poll/the-press-branded-the-enemy-by-trump-increasingly-trusted-by-the-public-reuters-ipsos-poll-idUSKCN1C813L> [https://perma.cc/8FZU-ZJGL].

⁹³ *Presidential Approval Ratings—Donald Trump*, GALLUP, <http://www.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx> [https://perma.cc/FY8E-PR25].

⁹⁴ Derek Thompson, *Why Do Americans Distrust the Media*, ATLANTIC (Sept. 16, 2016), <https://www.theatlantic.com/business/archive/2016/09/why-do-americans-distrust-the-media/500252/> [https://perma.cc/M49Q-9ADZ]; Jay Rosen, *Winter Is Coming: Prospects for the American Press Under Trump*, PRESS THINK (Dec. 28, 2016), <http://pressthink.org/2016/12/winter-coming-prospects-american-press-trump/> [https://perma.cc/9JAS-FW2J] (describing “[a] low-trust environment for most institutions and their leaders”).

and has their interests at heart. In the 1970s, 73% of Americans described Walter Cronkite as “the most trusted figure in American public life.”⁹⁵ In more recent polls, however, less than a third of Americans report that they can believe all or most of what major news organizations report.⁹⁶ Between 2002 and 2012, most traditional press outlets, both print and broadcast, saw double-digit drops in believability ratings.⁹⁷ Some have charged that the press’s own efforts to compete in the reality-television environment have fueled a media “obsession with non-news, frivolity, and entertainment.”⁹⁸ But the political fragmentation of the media is also impacting public perception, because “[w]hen it’s easier to find news sources that confirm people’s biases, it’s also easier to find news stories that inflame their outrage.”⁹⁹ A “sustained attack by conservative media—particularly talk radio—on the credibility and trustworthiness of the mainstream media has also damaged the press’s stature and reputation with many American citizens.”¹⁰⁰

Whatever the causes of the decline, Americans increasingly and overwhelming now perceive that news stories are often inaccurate, that news reports tend to favor one side, and that the news is often influenced by powerful people and organizations.¹⁰¹ The data show that the public strongly faults the press for its perceived lack of fairness, its unwillingness to admit mistakes, its inaccurate reporting, and its political bias.¹⁰² Perhaps most significantly, while the public once overwhelmingly believed that the press advanced and served democracy, recent polls show an equal number saying that it actually harms democracy.¹⁰³ The once-sturdy pillar of public support that has long sustained the freedom of the press is now slight.

⁹⁵ DAVID A. YALOF & KENNETH DAUTRICH, *THE FIRST AMENDMENT AND THE MEDIA IN THE COURT OF PUBLIC OPINION* 10 (2002).

⁹⁶ *Media Use and Evaluation*, GALLUP, <http://www.gallup.com/poll/1663/media-use-evaluation.aspx> [<https://perma.cc/Q3RQ-S8AY>] (quoting a producer from a major TV news network).

⁹⁷ PEW RES. CTR., *FURTHER DECLINE IN CREDIBILITY RATINGS FOR MOST NEWS ORGANIZATIONS* 1 (2012), <http://www.people-press.org/files/2012/08/8-16-2012-Media-Believability1.pdf> [<https://perma.cc/992K-7MZL>] (finding that, with the exception of local newspapers and TV news, the believability rating of every outlet examined “suffered a double-digit drop”).

⁹⁸ David L. Geary, *The Decline of Media Credibility and Its Impact on Public Relations*, PUB. REL. Q., 8, 10 (Fall 2005).

⁹⁹ Thompson, *supra* note 94.

¹⁰⁰ Jones & Sun, *supra* note 5, at 32.

¹⁰¹ PEW RES. CTR., *VIEWS OF THE NEWS MEDIA: 1985–2011* (Sept. 22, 2011), <http://www.people-press.org/files/legacy-pdf/9-22-2011%20Media%20Attitudes%20Release.pdf> [<https://perma.cc/L52E-WQ7Z>].

¹⁰² *Id.*

¹⁰³ *Id.* at 6.

D. Interdependent Relationship with Government Officials

For most of modern history, the press held significant power in its role as “the crucial middlemen in the process,”¹⁰⁴ which created a “mutual dependence”¹⁰⁵ between the press and government officials. The press needed politicians in order to gain access to information about the government, and politicians needed the press in order to communicate their messages to the public. This intrinsic inter-reliance served as a safeguard against government officials simply refusing to interact with the press. That dynamic, however, has been radically and perhaps permanently altered in recent years for at least three interrelated reasons: shifts in technology, changes in media consumption patterns, and the removal of barriers for politicians’ direct communication to the public.

In recent years, “technology has scrambled every aspect of the relationship between news producers and the people who consume news.”¹⁰⁶ About two-thirds of Americans now get at least some of their news on social media sites such as Facebook and Twitter.¹⁰⁷ Through these platforms, Americans are more able to obtain information directly from government agencies, public officials and political campaigns, rather than the legacy press.¹⁰⁸ Indeed, a majority of internet users “now get political material from blogs, comedy sites, government websites, candidate sites or alternative sites.”¹⁰⁹

The common thread among all of these new media news sources is that they enable a very different kind of news consumption than occurred in the era of traditional journalism. In 1950, when the total paid circulation for U.S.

¹⁰⁴ Elmer E. Cornwell, Jr., *The President and the Press: Phases in the Relationship*, 427 ANNALS AM. ACAD. POL. & SOC. SCI. 53, 62 (1976).

¹⁰⁵ *Id.* at 57.

¹⁰⁶ Kristen Purcell, Lee Rainie, Amy Mitchell, Tom Rosenstiel, & Kenny Olmstead, *Understanding the Participatory News Consumer: The News Environment in America*, PEW RES. CTR. (Mar. 1, 2010), http://www.journalism.org/files/legacy/Participatory_News_Consumer.pdf [<https://perma.cc/MP8S-CYSB>].

¹⁰⁷ Elisa Shearer & Jeffrey Gottfried, *News Use Across Social Media Platforms 2017*, PEW RES. CTR. (Sept. 7, 2017), <http://www.journalism.org/2017/09/07/news-use-across-social-media-platforms-2017/> [<https://perma.cc/KN2F-6CDN>].

¹⁰⁸ *Election 2016: Campaigns as a Direct Source of News*, PEW RES. CTR. (July 18, 2016), <http://www.journalism.org/2016/07/18/election-2016-campaigns-as-a-direct-source-of-news/> [<https://perma.cc/MQN4-BH33>]; Amy Mitchell et al., *Millennials and Political News: Social Media—The Local TV for the Next Generation?*, PEW RES. CTR. (June 1, 2015), <http://www.stateofthedia.org/2013/overview-5/> [<https://perma.cc/29Y3-GZT7>].

¹⁰⁹ Michael Gurevitch et al., *Political Communication—Old and New Media Relationships*, 625 ANNALS AM. ACAD. POL. & SOC. SCI. 164, 167 (2009).

daily newspapers was the equivalent of almost 125% of households,¹¹⁰ politicians knew they needed the press as a conduit to get their messages to the masses. Government officials today know that accommodation of the press does not guarantee widespread dissemination of their message to constituents. The newspaper reader of yesterday, for example, may have stumbled upon political news on the way to the sports or society page,¹¹¹ but the social media reader of today may “curate news consumption,”¹¹² seeing only what she seeks out or what her social media platform’s algorithms determine would suit her preferences.¹¹³ The press, therefore, is losing the power it once had to ensure that a story reached its audience and to highlight particular stories by placing them on the front page or at the beginning of a broadcast.¹¹⁴ The incentives that previously drove the symbiotic relationship between politicians and the press have been weakened by this shift in media consumption.

The final and critically important piece of this puzzle is that the same technological developments that enable news consumers to select their content also allow politicians and government officials to directly convey theirs. Candidates and elected officials have long wished to eliminate the press as a filter and speak more directly to the population.¹¹⁵ In the last decade, technological change has meant that some—including Barack Obama¹¹⁶ and Hillary Clinton¹¹⁷—have attempted it with more frequency and greater success. But none have been as successful as President Trump, who not only regularly communicates with his estimated more than 60 million

¹¹⁰ COMMC’NS MGMT., INC., SIXTY YEARS OF NEWSPAPER CIRCULATION TRENDS 13 (May 2011), http://media-cmi.com/downloads/Sixty_Years_Daily_Newspaper_Circulation_Trends_050611.pdf [<https://perma.cc/8JQD-EQL9>] (noting also that by 2010, the number was 36%).

¹¹¹ Jones, *supra* note 53, at 568.

¹¹² Jones & Sun, *supra* note 5, at 35.

¹¹³ See *id.*; Amy Mitchell, Jeffrey Gottfried, Jocelyn Kiley, & Katerina Matza, *Political Polarization & Media Habits*, PEW RES. CTR. (Oct. 21, 2014), <http://www.journalism.org/files/2014/10/Political-Polarization-and-Media-Habits-FINAL-REPORT-7-27-15.pdf> [<https://perma.cc/5BT3-K3TB>]; Jon Keegan, *Blue Feed, Red Feed: See Liberal Facebook and Conservative Facebook, Side by Side*, WALL STREET J. (May 18, 2016, 8:00 AM), <http://graphics.wsj.com/blue-feed-red-feed/> [<https://perma.cc/DW5W-XWAS>].

¹¹⁴ See Matt Carroll, *The Front Page Is Dead! Long Live the Social Media Platform!*, MEDIUM (Sept. 9, 2015), <https://medium.com/@matthewscarroll/the-front-page-is-dead-long-live-the-social-media-platform-a580683bdbeb> [<https://perma.cc/SX5X-FABY>].

¹¹⁵ Jones and Sun, *supra* note 5, at 33 (describing attempts by past presidents to avoid the press as intermediary).

¹¹⁶ Ari Melber, *Caught on Tape: Obama Adviser Explains How to Control Media*, HUFFINGTON POST (May 25, 2011), http://www.huffingtonpost.com/ari-melber/caught-on-tape-obama-advi_b_325782.html [<https://perma.cc/62QN-YC65>].

¹¹⁷ Clare Foran, *Clinton’s End-Run Around the Press*, ATLANTIC (Aug. 7, 2016), <https://www.theatlantic.com/politics/archive/2016/08/hillary-clinton-media-press-conferences/495965/> [<https://perma.cc/TG5X-93SB>]; *Election 2016: Campaigns as a Direct Source of News*, PEW RES. CTR. (July 18, 2016), <http://www.journalism.org/2016/07/18/election-2016-campaigns-as-a-direct-source-of-news/> [<https://perma.cc/6U7X-CRMK>].

combined followers on Twitter, Facebook, and Instagram,¹¹⁸ but also regularly disparages the traditional press when doing so.¹¹⁹ Trump has made clear his intention to use social media to control or marginalize the news media in communicating his message.¹²⁰ This is somewhat ironic, given that his candidacy was buoyed by a mutually beneficial relationship with the press that produced nearly \$2 billion worth of free coverage.¹²¹ Now, however, Trump seems determined to sever the historically interdependent ties between the President and the press.

These developments, of course, are not just cutting out a middleman or distributor; they are cutting out a set of functions—fact-checking, educating, exercising editorial discretion, and offering context. Equally significantly, they are cutting out a practical guarantee of at least some continued protection of those functions and some of the access necessary to perform them.

IV. TRUMP'S FLOUTING OF TRADITIONS AND NORMS

It should by now be clear that President Trump has launched his “war on the press” during a time when many of the defenses of a free press have been considerably weakened. And it is within this context that he has taken aim at the key components of the last remaining pillar of a free press: traditions and norms.

For some time, a significant part of the press's ability to cover government officials and policies—particularly in the Executive Branch—lay not in legally enforceable constitutional rights or laws, but rather in long-recognized customs dictating that the government grant the press both access and respect. From the earliest days of his presidential campaign to the Oval Office, Trump and his surrogates have broken rank with virtually all modern presidents by showing their willingness to flout these established customs

¹¹⁸ Phillip Bump, *No, Donald Trump Doesn't Have 110 Million People Following Him on Social Media*, WASH. POST (June 6, 2017), https://www.washingtonpost.com/news/politics/wp/2017/06/06/no-donald-trump-doesnt-have-110-million-people-following-him-on-social-media/?utm_term=.eab5f6babbdac [<https://perma.cc/XNX6-ZXS3>].

¹¹⁹ See *supra* text accompanying notes 1–2.

¹²⁰ See Mathew Ingram, *Here's Why Donald Trump Says He Loves Twitter and Plans to Keep Tweeting*, FORTUNE (Jan. 17, 2017, 11:01 AM), <http://fortune.com/2017/01/17/trump-loves-twitter/> [<https://perma.cc/M7AL-B63C>]; see also Michael Gove, *Donald Trump: 'Brexit Will Be a Great Thing . . . You Were So Smart'*, TIMES (Jan. 16, 2017), <https://www.thetimes.co.uk/article/brexit-will-be-a-great-thing-you-were-so-smart-to-get-out-09gp9z357> [<https://perma.cc/V539-AB6F>] (explaining that Trump “has no intention of abandoning Twitter because he believes it gives him a direct connection to the American people”).

¹²¹ See Jim Rutenberg, *The Mutual Dependence of Donald Trump and the News Media*, N.Y. TIMES (Mar. 20, 2016), <https://www.nytimes.com/2016/03/21/business/media/the-mutual-dependence-of-trump-and-the-news-media.html> [<https://nyti.ms/2kkokv2>].

and norms. And the concerns do not stop there. On the horizon, there are even more traditions that Trump could choose to override, which would make it even more difficult for the press to do its job. In this section, we take a look at some of his most troubling breaks from tradition.

A. *Customs of Access and Accommodation for the Press*

Perhaps the one place where the Trump administration has most actively pushed back on press-protecting norms is in the area of press access. In numerous instances, government officials working for Trump have excluded journalists from the official (and sometimes public) work of the administration.

Even as a presidential candidate, Trump used access as a tool to attempt to control or punish press coverage of his campaign. Certain reporters and even some news organizations as a whole were “blacklisted” and denied press credentials, often allegedly because the candidate disapproved of the reporters’ coverage.¹²² Such reporters were sent away (sometimes by local law enforcement) if they arrived at a Trump rally or were forced to spend hours in line every day in order to cover the event (and, even then, one reporter claims she was turned away by Trump security).¹²³ Even credentialed reporters were forced to stay within a designated “press pen,”¹²⁴ were not allowed to approach the candidate with questions,¹²⁵ and were required to have an “escort” to use the restroom.¹²⁶

The blacklisting went beyond access to the Trump rallies, with campaign surrogates refusing to talk with certain reporters both on and off the record. Andrew Kaczynski, a former political reporter for *BuzzFeed*, told the *Columbia Journalism Review* that the campaign’s refusal to respond to his requests for comments “was something I never encountered from a professional political campaign in Congress, the Senate, at the presidential level, anywhere.”¹²⁷

¹²² Patrick Caldwell, *Donald Trump’s Media Enemies List*, MOTHER JONES (Mar. 16, 2016), <http://www.motherjones.com/politics/2016/03/donald-trump-banned-publications> [https://perma.cc/8GSE-8R9Y]; see also Michael Calderone, *Donald Trump Blacklists the Washington Post in Latest Assault on the Press*, HUFFINGTON POST (June 13, 2016, 6:31 PM), http://www.huffingtonpost.com/entry/donald-trump-washington-post_us_575f1de8e4b071ec19eedf7f [https://perma.cc/GSP9-VVUU].

¹²³ Caldwell, *supra* note 122.

¹²⁴ Michael Calderone, *Trump Campaign Restricts Reporters Covering What Happens off Stage*, HUFFINGTON POST (Nov. 25, 2015, 2:24 PM), http://www.huffingtonpost.com/entry/donald-trump-campaign-journalists-restricted_us_5655c50be4b08e945fea918f [https://perma.cc/KGT4-BCMQ].

¹²⁵ Michael Calderone, *Donald Trump May Love Good Press, but His Campaign Is the Most Hostile to Reporters*, HUFFINGTON POST (Jan. 15, 2016, 5:58 PM), http://www.huffingtonpost.com/entry/donald-trump-campaign-media_us_56994194e4b0ce4964245a99 [https://perma.cc/PNY9-8L7P].

¹²⁶ Katy Tur (@KatyTurNBC), TWITTER (Nov. 24, 2015, 5:49 PM), https://twitter.com/KatyTurNBC/status/669331944111538176?ref_src=twsrc%5Etfw [https://perma.cc/22K3-TRHZ].

¹²⁷ Shelley Hepworth, Vanessa Gezari, Kyle Pope, Cory Schouten, Carlett Spike, David Uberti & Pete Vernon, *Covering Trump: An Oral History of an Unforgettable Campaign*, COLUM. JOURNALISM REV. (Nov. 22, 2016), https://www.cjr.org/special_report/trump_media_press_journalists.php [https://perma.cc/X3RK-9JEF].

Trump has also flouted the tradition of having a designated press pool—a practice that dates back to the administration of President Dwight Eisenhower.¹²⁸ This small group of rotating reporters and photographers observes the President in his public outings and shares information with other reporters. President Trump and others in his administration, however, have at times refused to allow pool reporters to travel with them or observe official government events. As a candidate, Trump did not allow press pool reporters to travel or fly with him, and on multiple occasions, he even refused to wait for or inform the pool of his movements.¹²⁹ He continued this pattern as President-elect and as President by not allowing pool reporters to accompany him on his public travels and appearances. Early on, he refused to allow members of the press to accompany him on his plane and to his first visit with President Barack Obama.¹³⁰ His practices have forced reporters to learn about the President's public movements by chance, such as from another reporter who happened to be having dinner in the same restaurant,¹³¹ or from tweets or videos posted by members of the public.¹³² Even when the pool reporters are allowed to accompany the President, they have sometimes been blocked from seeing him—left outside in a van or placed in a basement with black plastic coverings over the windows.¹³³

At some key diplomatic meetings, Trump has barred the American press from attendance, leaving the public only with the photographs and

¹²⁸ Alexandria Symonds, *When the President Travels, Who's Allowed to Join Him?*, N.Y. TIMES (July 17, 2017), <https://www.nytimes.com/2017/07/17/insider/presidential-travel-protective-press-pool.html> [https://nyti.ms/2uumfW2].

¹²⁹ Michael Calderone, *Donald Trump Ditches Reporters En Route to 2nd Debate*, HUFFINGTON POST (Oct. 9, 2016, 6:38 PM), http://www.huffingtonpost.com/entry/donald-trump-debate-reporters_us_57fab747e4b0b6a43033348c [https://perma.cc/BAT6-D2CY].

¹³⁰ Kathleen Hennessey, *Trump Bucks Protocol on Press Access*, AP NEWS (Nov. 11, 2016), <https://apnews.com/22b62277e34b47008a760c660084968a> [https://perma.cc/8YMJ-Z2AH].

¹³¹ Rebecca Morin, *Press Pool Left in Darkness as Trump Dines at His Hotel*, POLITICO (Feb. 25, 2017, 10:59 PM), <http://www.politico.com/story/2017/02/trump-dines-own-hotel-press-pool-235401> [https://perma.cc/8VRX-FDBG].

¹³² Eliza Collins, *Trump Ditches Reporters Goes to Dinner, WHCA Calls It 'Unacceptable,' USA TODAY* (Nov. 16, 2016, 10:11 AM), <https://www.usatoday.com/story/news/politics/onpolitics/2016/11/16/trump-ditches-reporters-goes-dinner-whca-calls-unacceptable/93952790/> [https://perma.cc/XBH9-BRPU].

¹³³ Deborah Barfield Berry, *Black Plastic Covers Windows, Blocking Reporters' Views of Trump Golfing*, USA TODAY (Feb. 11, 2017, 12:16 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/02/11/black-plastic-covers-windows-blocking-reporters-views-trump-golfing/97787920/> [https://perma.cc/6JMC-M3MU]; Philip Bump, *President Trump Attended a Private Mar-a-Lago Event Saturday Night—Without Telling the Media*, WASH. POST (Feb. 19, 2017), https://www.washingtonpost.com/news/politics/wp/2017/02/19/president-trump-attended-a-private-mar-a-lago-event-saturday-night-without-telling-the-media/?utm_term=.906e06a8f9c3 [https://perma.cc/M29K-S6Z6].

notes from the foreign press.¹³⁴ Other members of his administration have followed suit—most notably Secretary of State Rex Tillerson, who broke with a half-century of tradition and allowed only one reporter (of his choosing) to accompany him on his first official trip to Asia.¹³⁵ More recently, White House Press Secretary Sarah Huckabee Sanders even argued that it was “highly inappropriate” for the press to question the accuracy of statements made by Chief of Staff John Kelly simply because Kelly is a retired four-star Marine general.¹³⁶ These anti-press actions have extended to the President’s private enterprises as well, with the Trump Hotel banning the press from its premises during the inauguration.¹³⁷

Attempts to block or control press access have also extended to the White House press room. For more than a century, the press has had direct access to the West Wing.¹³⁸ As historian George Juergens explained, when the press moved into the first White House press room in 1902, the room “was more than just a convenience; by conferring a sort of legitimacy on their presence, it suggested that they were no longer there just as guests of the president. They were filling a public function.”¹³⁹ Soon after, the White House Correspondents Association was founded to advocate for the press corps that “keeps a daily watch on the administration” and relies “heavily on their proximity to the president and his staff inside the walls of the historic building.”¹⁴⁰

Even before Trump’s inauguration, his team began threatening to break the tradition of allowing reporters to work in the West Wing of the White House, where reporters could have easier access to senior officials. Trump’s then-Chief-of-Staff Reince Priebus stated that the administration was considering evicting reporters from their office space in the West Wing press

¹³⁴ Julie Hirschfeld Davis, *Trump Bars U.S. Press, but Not Russia’s, at Meeting with Russian Officials*, N.Y. TIMES (May 10, 2017), https://www.nytimes.com/2017/05/10/us/politics/trump-russia-meeting-american-reporters-blocked.html?_r=0 [<https://nyti.ms/2pyXPEv>]; Jackie Wattles, *Trump’s First Overseas Trip: Zero Press Conferences*, CNNMONEY (May 28, 2017, 1:37 PM), <http://money.cnn.com/2017/05/28/media/trump-press-abroad-trip/index.html> [<https://perma.cc/N32A-WGFV>].

¹³⁵ Brian Stelter, *Media Protests After Tillerson Takes Only One Reporter to Japan*, CNNMONEY (Mar. 15, 2017, 6:30 PM), <http://money.cnn.com/2017/03/15/media/rex-tillerson-press-corps-travel/> [<https://perma.cc/RLC9-X7WV>].

¹³⁶ Dan Merica, *Sanders: It Is ‘Highly Inappropriate’ to Debate Kelly*, CNN (Oct. 20, 2017), <http://www.cnn.com/2017/10/20/politics/white-house-sarah-sanders-john-kelly-highly-inappropriate/index.html> [<https://perma.cc/5JRY-ZYQY>].

¹³⁷ Josh Voorhees, *Trump’s D.C. Hotel Has Reportedly Banned Reporters During Inauguration Week*, SLATE (Jan. 18, 2017, 2:42 PM), http://www.slate.com/blogs/the_slatest/2017/01/18/trump_s_d_c_hotel_bans_reporters_during_inauguration_week_report.html [<https://perma.cc/3TFG-FSK9>] (noting that “it’s a reminder that Donald Trump and his associates—both inside the government and out of it—have no interest in allowing reporters access unless it is on Trump’s terms”).

¹³⁸ James A. Jacobs, *The President, the Press, and Proximity: The Creation of the White House Press Center*, 37 WHITE HOUSE HIST. (2015), <https://www.whitehousehistory.org/the-president-the-press-and-proximity> [<https://perma.cc/M6GC-MXNE>].

¹³⁹ George Juergens, *Theodore Roosevelt and the Press*, 111 DAEDALUS 113, 119 (1982).

¹⁴⁰ *History of the WHCA*, WHITE HOUSE CORRESPONDENTS’ ASS’N (last visited May 3, 2017), <http://www.whca.net/history.htm> [<https://perma.cc/CH32-F57K>].

briefing room to a different location away from the White House.¹⁴¹ While the administration later backtracked on the suggestion to move the press briefing room, it did claim the right to handpick the reporters allowed in—a right that was previously the exclusive province of the White House Press Correspondents Association.¹⁴²

Dating back to the early twentieth century, there also has been a tradition of regular and respectful presidential news conferences.¹⁴³ The reliable opportunity for the press to ask and receive answers from the President is important both for its substance and for its symbolism. One political scientist with a focus on the President and the press explained that the press conference establishes that “[p]residents and their staffs have settled on the press as a legitimate authority to pose questions of a president, even as they disagree on what role it is the press plays in our society.”¹⁴⁴ But this, too, has changed under Trump. The White House press briefings “are now shorter, less frequent, and routinely held off-camera.”¹⁴⁵ President Trump himself only held one solo press conference in his first six months in office.¹⁴⁶

Michael Calderone of *Huffington Post* described the dilemma the White House press corps faces when it comes to access to the President:

Journalists worry a lot about precedent because their access isn’t inscribed by law but hashed out through arrangements with the White House. Each presidential administration tangles with the White House press corps, but in the end, certain traditions are upheld. There’s nothing stopping Trump from

¹⁴¹ Mike DeBonis, *News Conferences Could Be Moved from White House, Priebus Says*, WASH. POST (Jan. 15, 2017), https://www.washingtonpost.com/news/powerpost/wp/2017/01/15/news-conferences-could-be-moved-from-white-house-priebus-says/?utm_term=.2c45ece332c2 [https://perma.cc/XU9H-6PPS].

¹⁴² Shannon Stapleton, *Trump Backs Off White House Press Move, Wants Staff to Choose Access*, NEWSWEEK (Jan. 18, 2017, 2:22 PM), <http://www.newsweek.com/donald-trump-press-white-house-press-room-white-house-white-house-daily-544222> [https://perma.cc/58C6-M7MY].

¹⁴³ Martha Joynt Kumar, *Source Material: Presidential Press Conferences: The Importance and Evolution of an Enduring Forum*, 35 PRESIDENTIAL NEWS Q. 166, 167–68 (2005).

¹⁴⁴ *Id.* at 171.

¹⁴⁵ Rosie Gray, *The White House Press Briefing Is Slowly Dying*, ATLANTIC (June 20, 2017), <https://www.theatlantic.com/politics/archive/2017/06/where-have-all-the-cameras-gone/530916/> [https://perma.cc/7Q4T-W4N7].

¹⁴⁶ Carrie Dann, *Trump Lags Predecessors in Press Conferences*, NBC NEWS (June 20, 2017), <http://www.nbcnews.com/politics/first-read/trump-lags-predecessors-press-conferences-n774881> [https://perma.cc/Y8WG-77SF].

deciding not to hold a daily press briefing or kicking media outlets off the White House grounds.¹⁴⁷

B. Norms of Respect for the Press

Beyond the Trump administration's efforts to eliminate traditional norms of press access, the President and his staff have violated existing customs of publicly treating the press with respect—both by acknowledging the importance of journalists' work and also by understanding the role of the press as an often-critical government watchdog.

Rather than proclaiming respect for the essential role of a free press (even if, perhaps, disagreeing with the work of select journalists), Trump and his surrogates have repeatedly sought to delegitimize the news media. Whether calling a news organization a “pile of garbage,”¹⁴⁸ referring to journalists as “among the most dishonest human beings on earth,”¹⁴⁹ or dismissing them as “fake news,” Trump has systematically dismissed or demonized the press. In stark contrast to past administrations, he has failed to model respect for the institution of the press and for its importance to American democracy.

Beyond his attempts to diminish the press as an institution, moreover, Trump and others in his administration have repeatedly targeted particular news organizations or individual reporters when they did not like certain coverage. Trump has publicly mocked, degraded, and criticized journalists and also retaliated against these journalists by selectively denying access, refusing to take questions, or threatening to take legal or governmental action.

As a candidate, for example, Trump criticized several individual reporters by name. During his campaign rallies, he repeatedly called out NBC reporter Katy Tur, arguing that she was not accurately reporting on the crowd.¹⁵⁰ And after Fox News host Megyn Kelly asked him some pointed questions during one of the Republican primary debates, Trump and his surrogates took multiple swipes at her.¹⁵¹ In one of the more controversial

¹⁴⁷ Michael Calderone, *A Donald Trump Presidency Presents a Grave Threat to the Press*, HUFFINGTON POST (Nov. 7, 2016), https://www.huffingtonpost.com/entry/donald-trump-press-threat_us_5820e469e4b0e80b02cbe800 [<https://perma.cc/8BFN-4BR8>].

¹⁴⁸ Louis Nelson, *Trump: BuzzFeed Is a 'Failing Pile of Garbage'*, POLITICO (Jan. 11, 2017, 12:36 PM), <http://www.politico.com/story/2017/01/trump-presser-slams-buzzfeed-233483> [<https://perma.cc/EQ7Z-4CQ5>].

¹⁴⁹ 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> [<https://nyti.ms/2kdmHiy>].

¹⁵⁰ Kristen Bellstrom, *What Is Donald Trump's Beef with NBC Reporter Katy Tur? Here's the Backstory*, FORTUNE (Nov. 3, 2016), <http://fortune.com/2016/11/03/donald-trump-katy-tur/> [<https://perma.cc/VT6Q-GJJ8>].

¹⁵¹ See, e.g., Phillip Rucker, *Trump Says Fox's Megyn Kelly Had 'Blood Coming out of Her Wherever'*, WASH. POST (Aug. 8, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/08/07/trump-says-foxs-megyn-kelly-had-blood-coming-out-of-her-wherever/?utm_term=.68d7dc57e525 [<https://perma.cc/ET8Q-ZABF>]; Rebecca Sinderbrand, *'You Are Fascinated with Sex'*:

moments of his campaign, Trump appeared to mock *New York Times* reporter Serge Kovaleski's physical disability after falsely accusing Kovaleski of backing away from a story he had written.¹⁵²

Soon after the election, Trump met with members of the media and criticized several reporters in the room by name, including CNN's president, Jeffrey Zucker. The meeting, the *New York Times* reported, "crystallized concerns that Mr. Trump, emboldened by his victory, may refuse to abide the traditional dynamic of a president and the journalists who cover him, a naturally adversarial relationship that is nevertheless based on some level of mutual trust."¹⁵³

Trump's actions thus far have seemed to confirm these concerns. About six months into his presidency, he posted a series of tweets personally criticizing the hosts of MSNBC's *Morning Joe*, who were frequently critical of him. Trump claimed the female host, Mika Brzezinski, was "crazy" and that her face was "bleeding" from a facelift.¹⁵⁴ A few days later, he went after the CNN network, which he frequently criticizes for its negative coverage of him, by posting a short video that was doctored to portray him wrestling and punching a figure whose head was replaced by the CNN logo. He included the hashtags "#FraudNewsCNN" and "#FNN."¹⁵⁵ A month later, he faced criticism for retweeting an image of a Trump train running over a CNN reporter just days after a woman was run down and killed by a white nationalist in Charlottesville, Virginia.¹⁵⁶

That Megyn Kelly-Newt Gingrich Showdown Was One for the Ages, WASH. POST (Oct. 26, 2016), https://www.washingtonpost.com/news/the-fix/wp/2016/10/25/you-are-fascinated-with-sex-that-megyn-kelly-newt-gingrich-showdown-was-one-for-the-ages/?utm_term=.219a4f15c1c4 [<https://perma.cc/4B85-W2WN>].

¹⁵² Jose A. DelReal, *Trump Draws Scornful Rebuke for Mocking Reporter with Disability*, WASH. POST (Nov. 26, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/11/25/trump-blasted-by-new-york-times-after-mocking-reporter-with-disability/?utm_term=.44ab8d2e991d [<https://perma.cc/87CB-U87C>].

¹⁵³ Michael M. Grynbaum & Sydney Ember, *Trump Summons TV Figures for Private Meeting, and Lets Them Have It*, N.Y. TIMES (Nov. 21, 2016), https://www.nytimes.com/2016/11/21/business/media/trump-summons-tv-figures-for-private-meeting-and-lets-them-have-it.html?_r=0 [<https://nyti.ms/2k17MbJ>].

¹⁵⁴ Glenn Thrush & Maggie Haberman, *Trump Mocks Mika Brzezinski; Says She Was 'Bleeding Badly from a Face-Lift'*, N.Y. TIMES (June 29, 2017), <https://www.nytimes.com/2017/06/29/business/media/trump-mika-brzezinski-facelift.html> [<https://nyti.ms/2unzq7F>].

¹⁵⁵ Donald J. Trump (@realDonaldTrump), TWITTER (July 2, 2017, 7:21 AM), <https://twitter.com/realDonaldTrump/status/881503147168071680> [<https://perma.cc/F2YY-VXZ6>].

¹⁵⁶ David Nakamura & Arron C. Davis, *After Charlottesville, Trump Retweets—then Deletes—Image of Train Running over CNN Reporter*, WASH. POST (Aug. 15, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/08/15/after-charlottesville-trump-retweets-then-deletes-image-of-train-running-over-cnn-reporter/?utm_term=.446379c8dee2 [<https://perma.cc/E57D-FXKP>].

In addition to insults and name-calling, Trump and other members of his administration have retaliated against reporters or news organizations that have published negative stories about him. As previously mentioned, he “blacklisted” several major news organizations because of their coverage of him including the *Washington Post*, Univision, *BuzzFeed*, *Politico*, the *Daily Beast*, *Huffington Post* and the *Des Moines Register*.¹⁵⁷ After the election, he held a press conference at which he refused to take a question from CNN reporter Jim Acosta, telling him, “Not you. Not you. Your organization is terrible,” and, “You’re fake news.”¹⁵⁸ In the same press conference, he called the website BuzzFeed “a failing pile of garbage” after the site published a memo containing unverified, highly negative allegations about him. For this coverage, Trump threatened that BuzzFeed was “going to suffer the consequences, they already are.”¹⁵⁹ Soon after his inauguration, Trump’s then-press secretary Sean Spicer also shut out reporters from major news organizations like the *New York Times*, CNN, and the BBC from a briefing in his office.¹⁶⁰ One editor said that “[n]othing like this has ever happened at the White House in our long history of covering multiple administrations of different parties.”¹⁶¹

Frequently, Trump has resorted to threats of legal retaliation when he is unhappy with the reporting of particular news organizations. Both as a candidate and as President, he has declared his desire to “open up our libel laws” in order to make it easier for him to sue the news media.¹⁶² Even though the President does not have the power to unilaterally change the constitutional protections in defamation cases, his declarations that the media is overprotected are unusual. They are also in line with the many other times he has threatened to sue members of the press. During the campaign, for example, he threatened to bring legal action against the *New York*

¹⁵⁷ Tom Kludt & Brian Stelter, *The Blacklist: Here Are the Media Outlets Banned by Donald Trump*, CNN (June 14, 2016, 12:52 PM), <http://money.cnn.com/2016/06/14/media/donald-trump-media-blacklist/> [https://perma.cc/XNV9-VFCC].

¹⁵⁸ 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> [https://perma.cc/RF8J-86Y5].

¹⁵⁹ *Id.*

¹⁶⁰ Julie Hirschfeld Davis & Michael M. Grynbaum, *Trump Intensifies His Attacks on Journalists and Condemns F.B.I. ‘Leakers,’* N.Y. TIMES (Feb. 24, 2017), <https://www.nytimes.com/2017/02/24/us/politics/white-house-sean-spicer-briefing.html> [https://nyti.ms/2IEcmOS].

¹⁶¹ *Id.*

¹⁶² Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html> [https://nyti.ms/2nEy5Zo].

Times,¹⁶³ the *Washington Post*,¹⁶⁴ the Associated Press,¹⁶⁵ *Huffington Post*,¹⁶⁶ *Rolling Stone*,¹⁶⁷ and the Hispanic Media Coalition.¹⁶⁸

Trump also has warned that he might misuse the powers of the federal government in order to punish news organizations he dislikes. During the campaign, he threatened the owner of the *Washington Post*, Jeff Bezos, by stating of Bezos's online retail company, Amazon: "If I become president, oh do they have problems. They're going to have such problems."¹⁶⁹ And, indeed, once in office, Trump continued to tie the *Washington Post* to Amazon and repeatedly suggested that Congress should look into Amazon's taxes.¹⁷⁰ A couple of months later, he again invoked the power of Congress by asking in a tweet why the Senate Intelligence Committee was not "looking into the Fake News Networks in OUR country to see why so much of our news is just made up-FAKE!"¹⁷¹ Soon after, he suggested that the FCC-granted licenses for the broadcast television networks should be challenged¹⁷²—a premise he doubled down on hours later when he was asked about his statement at a press conference and replied, "It is frankly disgusting

¹⁶³ Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 17, 2016, 5:57 PM), <https://twitter.com/realDonaldTrump/status/777280259875975169> [<https://perma.cc/QJ2F-G958>].

¹⁶⁴ Joe Otterson, *Donald Trump Threatens to Sue Washington Post*, WRAP (Jan. 19, 2017, 8:26 AM), <http://www.thewrap.com/donald-trump-threatens-to-sue-washington-post-over-casino-bankruptcy-story/> [<https://perma.cc/7NMR-YDUW>].

¹⁶⁵ Erik Wemple, *Trump Threatened to Sue the AP over Panama Condo Story*, WASH. POST (Apr. 12, 2016), https://www.washingtonpost.com/blogs/erik-wemple/wp/2016/04/12/trump-threatened-to-sue-the-ap-over-panama-condo-story/?utm_term=.f23a06a1c0b3 [<https://perma.cc/ZFN5-ZYCR>].

¹⁶⁶ Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 6, 2015, 9:00 PM), <https://twitter.com/realDonaldTrump/status/585260932831453184> [<https://perma.cc/XLP7-4W99>].

¹⁶⁷ *Id.*

¹⁶⁸ Anita Bennett, *Donald Trump Threatens to Sue National Hispanic Media Coalition*, WRAP (July 2, 2015, 6:17 PM), <http://www.thewrap.com/donald-trump-threatens-to-sue-national-hispanic-media-coalition/> [<https://perma.cc/L4XH-FYA2>].

¹⁶⁹ Tim Stenovec, *Donald Trump Just Said if He's Elected President Amazon Will Have Problems*, BUS. INSIDER (Feb. 26, 2016), <http://www.businessinsider.com/donald-trump-says-amazon-will-have-such-problems-2016-2> [perma.cc/VZ3T-AFXR].

¹⁷⁰ Conor Gaffey, *Donald Trump vs. Amazon: All the Times the President and Jeff Bezos Have Called Each Other Out*, NEWSWEEK (July 25, 2017), <http://www.newsweek.com/donald-trump-vs-amazon-jeff-bezos-641506> [<http://perma.cc/NG3A-UNVC>].

¹⁷¹ Jenna Johnson, *Trump Suggests Senate Intelligence Committee Investigate Media Companies*, WASH. POST (Oct. 5, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/10/05/trump-suggests-senate-intelligence-committee-investigate-media-companies/?utm_term=.c53bdaedc60e [<http://perma.cc/75D8-4DHL>].

¹⁷² David Shepardson, *Trump Suggests Challenging TV Network Licenses over 'Fake News'*, REUTERS (Oct. 11, 2017), <https://www.reuters.com/article/us-usa-trump-media/trump-suggests-challenging-tv-network-licenses-over-fake-news-idUSKBN1CG1WB> [<http://perma.cc/BQ8F-TV9U>].

the way the press is able to write whatever they want to write, and people should look into it.”¹⁷³

C. Other Traditions at Risk

The press also relies on other norms that Trump has not yet attacked, although he is free to do so. If Trump chose to also ignore or destroy these customs and traditions, it would make the work of a free press much more difficult. Among the most vital of these as-of-yet-undisturbed traditions are those that safeguard the press from government subpoenas, from government monitoring, and from prosecutions for the receipt or publication of classified information.

Because there is no federal reporter’s shield law, the press now relies on norms that federal prosecutors will only subpoena reporters in limited circumstances and will not put them in jail for doing their jobs. These norms are enshrined in Department of Justice guidelines, which the administration is under no legal obligation to follow. Revised by the Obama administration in 2013 and 2015, the guidelines are an attempt to “ensure the Department strikes the appropriate balance between two vital interests: protecting the American people by pursuing those who violate their oaths through unlawful disclosures of information and safeguarding the essential role of a free press in fostering government accountability and an open society.”¹⁷⁴

The Department guidelines offer significant safeguards for the press, including more direct review by the Attorney General and more notice to news organizations when prosecutors seek information from journalists’ newsgathering. Attorney General Jeff Sessions, however, has announced that the Department of Justice is now “reviewing policies affecting media subpoenas.” He stated, “We respect the important role that the press plays and will give them respect, but it is not unlimited.”¹⁷⁵

¹⁷³ 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> [<http://perma.cc/B533-HWX8>].

¹⁷⁴ DEP’T OF JUSTICE, REPORT ON REVIEW OF NEWS MEDIA POLICIES 1 (July 12, 2013), <https://www.justice.gov/iso/opa/resources/2202013712162851796893.pdf> [<https://perma.cc/7QVD-ATLL>]. Members of the media also questioned whether a last-minute intervention by the Department of Justice into a merger deal between CNN’s parent company, Time-Warner, and AT&T might have been retaliatory. See Ed Kilgore, *Is the Trump Administration Objecting to a Big Merger to Punish CNN?*, N.Y. MAG. (Nov. 8, 2017), <http://nymag.com/daily/intelligencer/2017/11/is-administration-objecting-to-big-merger-to-punish-cnn.html> [<https://perma.cc/64XX-UST4>]. It was reported that the head of the Department’s antitrust division suggested that AT&T should sell CNN in order to get the multibillion-dollar deal approved. See Michael J. de la Merced, Emily Steel, Andrew Ross Sorkin and Cecilia Kang, *Justice Department Says Not So Fast to AT&T’s Time Warner Bid*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/business/dealbook/att-time-warner.html> [<http://perma.cc/XFX9-JTQE>].

¹⁷⁵ Callum Borchers, *Jeff Sessions Might Subpoena Journalists to Reveal Leakers. Mike Pence Once Fought Against That*, WASH. POST (Aug. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/08/04/jeff-sessions-might-subpoena-journalists-to-reveal-leakers-mike-pence-once-fought-against-that/?utm_term=.2a24773827c0 [<https://perma.cc/M2QV-EJ6L>]; see also Steven Dubois, *Judge: Reporter Won’t Have to Testify at Oregon Refuge Trial*, AP NEWS (Feb. 24, 2017),

Should members of the Trump administration decide to crack down on reporters who obtain or publish leaked classified information, moreover, they could turn to the Espionage Act of 1917,¹⁷⁶ a federal law prohibiting the retention or disclosure of classified government information. In the past, this law has rarely been used to prosecute government employees who leak information to the press. Yet, as mentioned earlier, the Obama administration prosecuted leaks to the press more frequently than previous administrations, even going so far as to twice put reporters in legal jeopardy for their newsgathering.¹⁷⁷ Thus, there is a real possibility that the Trump administration could even more aggressively pursue criminal charges against government whistleblowers and the reporters to whom whistleblowers leak their information.

Finally, it is possible that the Trump administration could weaken press-friendly norms via the federal Freedom of Information Act. While the law requires federal agencies to release all sorts of government documents, it includes nine key exceptions under which the government can withhold information.¹⁷⁸ Presidential administrations have taken very different approaches to interpreting these exceptions. They have also differed in how vigorously they are willing to defend agencies that do not disclose requested information. Under each new presidential administration, the Attorney General issues a memorandum and guidelines regarding how broadly those exemptions will be viewed and how aggressively the administration will fight disclosing documents. These memoranda and guidelines dictate how the Department of Justice's Office of Information Policy will handle requests for government information under the law.¹⁷⁹

Taken as a whole, President Trump's behavior toward and statements about the press violate longstanding traditions and norms that have governed all other modern presidents' relationships with working journalists. He has, in other words, attacked the final pillar that formerly held up American press freedom.

<https://www.apnews.com/a26385419e554834a21ef1f161efe586/Judge:-Reporter-won't-have-to-testify-at-Oregon-refuge-trial> [<https://perma.cc/3H4M-GN53>] (describing how Sessions approved a subpoena against a reporter "shortly after his confirmation" as Attorney General).

¹⁷⁶ 18 U.S.C. § 793 (2012).

¹⁷⁷ See *supra* text accompanying notes 8–11.

¹⁷⁸ 5 U.S.C. § 552(b)(1)–(9) (2012).

¹⁷⁹ Jonathan Peters, *What Trump Could (and Couldn't) Do to Restrict Press Freedom if Elected*, COLUM. JOURNALISM REV. (Oct. 27, 2016), http://www.cjr.org/united_states_project/donald_trump_lawsuits_press_freedom.php [<https://perma.cc/98SZ-FTL5>].

CONCLUSION

The national discussion spurred by President Trump's treatment of the press must take place in a wider context of appreciation for the actual state of the American press. It is true that the current President's disparaging view of—and disrespectful behavior towards—journalists has immediate consequences for the work of newsgathering and thus hampers the flow of information to citizens in the democracy. But the damage does not end there. Trump's assault on the traditions of valuing and accommodating the press follows a generation-long collapse of other major press protections. To fully understand the critical juncture at which American press freedom now stands, therefore, we must expand this discussion beyond talk of a rogue president's aberrant attacks on the press. We must instead engage in a broader conversation about the critical roles of the press in our society, the mechanisms by which we have protected those roles in the past, the potential impact of underprotecting newsgatherers, and how we can best preserve our free and independent press.