PRESIDENTIAL ATTACKS ON THE PRESS

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By Sonja R. West1

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 the president, and he responds with insults. He calls journalists “troubleshooters,”2 “unfair,”3 “scum,”4 “disgusting,”5 “sleazy,”6 “slime,”7 “phony,”8 “crooked,”9 “biased,”10 “garbage,”11 “crazy,”12 “sick,”13 and “among the most dishonest human beings on Earth.”14 Sometimes he maligns their patriotism, suggesting that they are “enemies of

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13 Allen, supra note 9.
the American people”\textsuperscript{15} who are “distorting democracy in our country”\textsuperscript{16} while “trying to take away our history and our heritage.”\textsuperscript{17}

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.\textsuperscript{18} But insults alone rarely raise First Amendment issues. Presidents have long used the bully pulpit to respond to or criticize news reports.\textsuperscript{19} Even Trump’s near daily verbal assaults on reporters and news organizations can be considered part of our country’s “uninhibited, robust, and wide-open”\textsuperscript{20} marketplace of ideas. Presidents have opinions too, and journalists should be able to handle his rants.

Yet there are also times when Trump’s lashing out at the press go beyond mere name-calling, and he instead attempts to use the power of his presidency 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 the use of 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.


\textsuperscript{16} Donald J. Trump (@realDonaldTrump), TWITTER (July 16, 2017, 4:15 AM), \url{https://twitter.com/realdonaldtrump/status/88654734788997125?lang=en}.

\textsuperscript{17} Megan Gartner, \textit{Trump’s War Against the Media isn’t a War—You Need Two Sides for That}, ATLANTIC (Sept. 27, 2017), \url{https://www.theatlantic.com/entertainment/archive/2017/09/washington-post-editor-were-not-at-war-were-at-work/541344/}.

\textsuperscript{18} Margaret Sullivan, \textit{Trump’s VICIOUS ATTACK ON THE MEDIA SHOWS ONE THING CLEARLY: He’s Running Scared}, WASH. POST (Aug. 23, 2017), \url{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-e0d4e6ee070a_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.”).

\textsuperscript{19} David Snyder, \textit{How Trump’s WAR ON FREE SPEECH Threatens the Republic – The First Amendment, and the Press, are in for a Rough Ride}, MOTHERJONES (June 2, 2017, 10:00 AM), \url{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.”).

Lobbing insults at reporters is one thing, and the instinct to brush it aside is arguably understandable. But this president is also doing something else that represents a far more dangerous threat to press freedom – trying to use the power of the government to silence his critics. We must take this very seriously.

I. Trump’s Attacks on the Press

It is not a secret that President Trump is engaged in “a running war with the media.” From the beginning of his candidacy he has expressed – and encouraged – hostility toward the press. By the end of his first year in office, he had posted more than a thousand criticisms of the press on Twitter alone. 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 the profession as whole, particular news organizations and even individual reporters. While his grievances are many and varied, common themes among them do arise. He accuses reporters of being


22 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.”).


biased.\textsuperscript{26} He says the press is inaccurate,\textsuperscript{27} often purposely so.\textsuperscript{28} He claims journalists are trying to hurt him and help his opponent.\textsuperscript{29} And he often likes to insult news organizations by claiming they are “failing,”\textsuperscript{30} “ratings challenged,”\textsuperscript{31} or soon to be “out of business.”\textsuperscript{32}

At rallies held both before and after he became president, Trump has spoken angrily about the press. During a rally in August of 2017, for example, he amped up his audience into chants of “CNN Sucks!” According to \textit{The New York Times}, “members of the audience shouted epithets at reporters, some demanding that they stop tormenting the president”\textsuperscript{33} and a reporter for \textit{USA Today}, tweeted that “a man with a little boy on his shoulders is screaming ‘rat!’ at reporters in the press risers.”\textsuperscript{34}


\textsuperscript{28} Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 13, 2018, 5:08 PM), https://twitter.com/realdonaldtrump/status/952301373479104512 (“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), 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 (“knowingly doesn’t tell the truth”).


\textsuperscript{31} Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 10:28 PM), https://twitter.com/realdonaldtrump/status/88967374378343200 (“ratings challenged @CNN”); Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 2, 2016, 8:28 AM), https://twitter.com/realdonaldtrump/status/771686352438042624 (“low ratings @Morning_Joe”).

\textsuperscript{32} https://twitter.com/realdonaldtrump/status/101558652948443648


\textsuperscript{34} https://twitter.com/elizacollins1/status/90018248687699680
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.” Former Chief-of-Staff Reince Preibus 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.” 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.”

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. Reporters who wrote negative stories have been excluded from press briefings. One credentialed White House reporter claims she was barred from attending an open press event with the president as punishment for asking him questions that were deemed “inappropriate.”

During his campaign, he blacklisted about a dozen news organizations (including The Washington Post) from covering his campaign events and riding on his press plane because he deemed their coverage of him to be unfair.

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38 The Latest: EPA bars AP, CNN from summit on contaminants, AP (May 22, 2018), https://apnews.com/d799f4e096cc42cf99ae01b02d1e0688.


In other instances, Trump has made more indirect and generalized threats against members of the press. He has tried to get reporters fired, has called for boycotts of news organizations, has urged others to sue media organizations, and has himself sued or threatened to sue them—all because 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. 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).

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. In his words: “Our current libel laws are a sham and a disgrace and do not represent American values or American fairness.”

Other reports have suggested even more ominous threats against the press. According to former FBI director James Comey, for example, the president 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.” The Department of Homeland Security also raised concerns among journalists.

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47 Id.
52 RTDNA Expresses Concern About Reported Impending DHS Database of Journalists, RTDNA (Apr. 6, 2018, 4:40 AM),
when it announced a plan to compile a database of “journalists, editors, correspondents, social media influencers, bloggers, etc.” and monitor their public activities.  

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 they also tend to violate norms of presidential behavior more 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. This category includes instances in which President Trump has attempted to employ the federal government’s power to punish specific members of the press in retaliation of 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.

Judging by his Twitter feed, Trump held generally neutral or positive views of The Washington Post and Amazon until the fall of 2015. 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. Other grievances soon followed: he tweeted a complaint that The Washington Post did not recognize him as the winner of the Republican debates and another complaint that Jennifer Rubin, the newspaper’s conservative columnist, “only writes purposely inaccurate pieces on me.” 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].”

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54 Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 23, 2015, 2:02 PM), https://twitter.com/realdonaldtrump/status/66867262456156160.
It was on this same day that his attacks on Amazon began. In less than 15 minutes, then-candidate Trump fired off three tweets alleging that the 2013 purchase of *The Washington Post* was a “scam” to give Bezos the “power to screw public on low taxation of @Amazon!” He continued his tirades against both Amazon and *The Washington Post* throughout his campaign, repeatedly conflating them as the “Amazon Washington Post,” while simultaneously criticizing *The Washington Post*’s coverage of him. Although the newspaper operates independently of Amazon, Trump would openly connect the dots between the organizations: *The Washington Post* to Bezos to Amazon.

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. As part of a discussion on his views of the news media, he suddenly turned to Bezos and Amazon and declared, “if I become president, oh do they have problems.” They are going to have such problems. A few months later he told conservative talk show host Sean Hannity that Bezos is “worried” about him winning the election. He again tied *The Washington Post* to Bezos and then to Amazon, alleging that the company is undertaxed and violating antitrust laws: “He thinks I would go after him for antitrust. Because he’s got a huge antitrust problem. He’s using *The Washington Post*, which is peanuts, he’s using that for political purposes to save Amazon in terms of taxes and in terms of antitrust.” 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.

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61 See, e.g. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 7, 2015, 10:08 AM), 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.”); Brian Stelter, *Donald Trump Rips into Possible AT&T-Time Warner Deal*, CNN (Oct. 22, 2016), (alleging that “Amazon, which through its ownership controls the Washington Post, should be paying massive taxes.”), http://money.cnn.com/2016/10/22/media/donald-trump-att-time-warner/index.html.


63 Id.


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. In early 2018, Treasury Secretary Steven Mnuchin told the House Ways and Means Committee that the president “feels strongly” about this issue. Trump has also threatened to raise Amazon’s postal rates, including personally pressuring the U.S. Postmaster General to double what it charges the company. And in April 2018, just weeks after publicly 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.

Even without causing direct government action, Trump seemed to have been able to affect 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. 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 the president’s actions against Amazon were not about tax or Post Office policy but were instead about punishing Bezos for what Trump believes is his influence over The Washington Post’s coverage of him.

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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!”  

The president also tweeted that the Federal Communications Commission needed to “look into” and “challenge” the licenses of NBC and other broadcast television networks because “network news has become so partisan, distorted.”  

Another of Trump’s favorite targets is CNN. He has frequently criticized the cable network’s coverage of him, calling it “disgusting,” “terrible,” “a total waste of time,” “a joke,” and “garbage.”  He accused the network of bias and called it an “arm of the Clinton campaign.”  He has specifically targeted the network’s president, Jeff Zucker, and certain reporters, like Jim Acosta. During a press conference held soon after his election, Trump refused to take a question from Acosta, telling him, “Not you. Not you. Your organization is terrible” and, “You’re fake news.” He did the same thing to Acosta more than a year later, saying “CNN is fake news. I don’t take questions

81 Id.
85 Id.
from CNN.” Trump has retweeted a video showing him pummeling a figure superimposed with the network’s logo, a cartoon depicting a “Trump train” hitting a person labeled as CNN, and a doctored photo of him with a CNN blood smear on the bottom of his shoe.

It is against this backdrop that Trump turned his focus to a 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. 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.” Continuing his commentary on the media “power structure” that he claims is against him, he likewise suggested that he would look into the 2011 merger between Comcast and NBC Universal, saying the media conglomerate is “trying to poison the mind of the American voter.”

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.” One source told the Daily Caller that the White House would not support the merger “if Jeff Zucker remains [P]resident of CNN” and another told the Financial Times, “It’s all about CNN.”

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

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91 Stelter, supra note 61.
Broadcasting, as a condition of its approval of the merger. Then, weeks later, the DOJ filed a lawsuit to block the merger. The lawsuit surprised many observers who said that the merger was not viewed as controversial. AT&T’s CEO Randall Stephenson called the lawsuit “an abrupt change in the application of antitrust law.” A number of former DOJ officials filed an amicus brief in the case, stating that it violates the Constitution for the president to interfere with a Justice Department enforcement matter “for corrupt, unlawful, or self-protective purposes – including punishing a media company for exercising its First Amendment rights.”

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. At the press conference in July or 2018 when he refused to take a question from a CNN reporter, it was a represented from Fox News he turned to declaring, “Let’s go to a real network.” He gives the network more interviews than any other, and he frequently tweets favorably about its shows. Trump also has an

102 As of October, 2017, he had given almost 70 percent of his television interviews to the network. 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; Mollie Reilly, Donald Trump Continues to Favor Fox News over All Other Networks, HUFFPOST (Oct. 25, 2017, 8:00 AM), https://www.huffingtonpost.com/entry/donald-trump-fox-interviews_us_59e6c1e3e4b0bf1f8836a7dd.
ongoing, close relationship with Twenty-First Century Fox Inc. Executive Chairman Rupert Murdoch.\textsuperscript{104}

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.\textsuperscript{105} The day the deal was publicly announced, the White House said that the president called Murdoch to congratulate him.\textsuperscript{106} 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,”\textsuperscript{107} he praised the proposed Twenty-First Century Fox merger with Disney because it “could be a great thing for jobs.”\textsuperscript{108} 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.\textsuperscript{109}

As another example, Trump has made it known that he is a fan of Sinclair Broadcasting, the conservative\textsuperscript{110} media company. He has declared it to be “far superior to CNN and even more fake NBC, which is a total joke.”\textsuperscript{111} 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.”\textsuperscript{112} During the

\begin{footnotes}
\textsuperscript{110} 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.
\end{footnotes}
campaign it was even revealed that Trump’s son-in-law, Jared Kushner, entered into an agreement with Sinclair for increased media coverage.113

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.114 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.”115 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.116 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.117 Almost a year later, however, Pai expressed concerns about the deal.118 The president immediately tweeted out his displeasure with Pai’s move and saying the deal “would have been a great and much needed Conservative voice for and of the People.”119

II. Government Retaliation Against the Press Violates the First Amendment

Just as President Trump’s attacks on the press are not one-size-fits-all, neither should be the constitutional analysis of them. 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.”120 As the United States Supreme Court declared in the 1966 case of Mills v. Alabama, “there is practically

117 Kang, supra note 114.
119 https://twitter.com/realdonaldtrump/status/1021917767467982854
120 Lane v. Franks, 134 S. Ct. 2369, 2377 (2014); see also Connick v. Myers, 461 U.S. 138, 145 (1983) (stating that “speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection”) (quotations omitted); F.C.C. v. Pacifica Found., 438 U.S. 726, 772 (1978) (Brennan, J., dissenting) (noting that political speech falls “within the core area of First Amendment concern).
universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”\textsuperscript{121} 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.”\textsuperscript{122}

But why is political speech so special? Because, the Court has told us, it “is the essence of self-government,”\textsuperscript{123} is “indispensable to decisionmaking in a democracy,”\textsuperscript{124} and serves to protect the “unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”\textsuperscript{125} Constitutional protection is thus “at its zenith.”\textsuperscript{126} And the idea that a “good faith critic of government” will be punished for his criticism “strikes at the very center” of our First Amendment protection.\textsuperscript{127}

We all, therefore, enjoy heightened protection for our speech about the government. But the Constitution also recognizes that the press, in particular, 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.”\textsuperscript{128} 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.”\textsuperscript{129} It is through this work that the press “plays a unique role as a check on government abuse”\textsuperscript{130} and “serve[s] as an important restraint on government.”\textsuperscript{131}

It is with these bedrock principles in mind that we should consider the various types of attacks on the press by 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 long-standing norms of presidential civility toward the press. While this is not without its harms,\textsuperscript{132} the constitutional issues are few.

\textsuperscript{122} Id.
\textsuperscript{123} Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).
\textsuperscript{125} Roth v. United States, 354 U.S. 476, 484 (1957).
\textsuperscript{126} Meyer v. Grant, 486 U.S. 414, 425 (1988); see also Connick, 461 U.S. at 145 (1983) (speech about public issues is “entitled to special protection.”).
\textsuperscript{128} JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS (1800), reprinted in 5 THE FOUNDERS CONSTITUTION 141-47 (Phillip B. Kurland & Ralph Lerner eds.) (1987).
\textsuperscript{132} See Jones & West, supra note 25.
Harsh political rhetoric typically does not violate the First Amendment. The president enjoys the same free speech protections as other citizens. And the United States Supreme Court has recognized our rights to “speak foolishly and without moderation” about matters of public concern. 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.” This includes “scurrilous” speech that “induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” It can even include lies. The president’s role as a government actor, moreover, does not in and of itself transform his criticisms of the press into constitutional violations. 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 Supreme Court has never recognized that members of the press (or any speaker) have a constitutional right of access to most government-controlled places, 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. 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.

133 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.
134 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. Nixon v. Fitzgerald, 457 U.S. 731 (1982).
136 Cohen, 403 U.S. at 22 (1971).
137 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
139 United States 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) (noting that “the 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.”).
141 See supra note 25, at 65-67 (discussing the history of White House press 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. The court concluded that if the denial was based on the journalist’s speech, it violated the First Amendment. The court held that because the White House made the press room available for reporters “the protection afforded news-gathering under the first amendment guarantee of freedom of the press requires that this access not be denied arbitrarily or for less than compelling reasons.”

The court’s reasoning in *Sherrill* is in line with Supreme Court cases holding that the government cannot deny a speaker a benefit because of the content of her speech. “[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 which [it] could not command directly.”

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

The Supreme 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.’” 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. 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. The Court found this to be a form of “informal censorship,” which violated the First Amendment. It did not matter, the Court said, that no books were seized and no booksellers were prosecuted. The mere threat of action, as well as “coercion persuasion, and intimidation,” was sufficient.

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

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144 *Id.*
145 *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (holding a speaker cannot be denied a benefit on the basis of “constitutionally protected speech”).
146 *Id.* (quotations omitted).
148 *Id.* at 67.
speaking out." Repeatedly, and in a variety of situations, the Court has recognized the constitutional prohibition to government retaliation for speech. 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, 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.” As Justice Hugo Black stated in *New York Times Co. v. United States*, “[t]he Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government.”

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. And few actions in our democratic system are more powerful than when the president of the United States employs 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.

**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, Supreme Court Justice Potter Stewart addressed the natural tug and pull between the press and the government. When it comes to this struggle, he said, “The Constitution establishes the contest, not its resolution.” This, according to Justice Stewart, meant that the government is not required to reveal

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151 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.”).
information to the news media, while the press “may publish what it knows and may seek to learn what it can.” ¹⁵⁴ 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.

¹⁵⁴ Potter Stewart, Or of the Press, 26 HASTINGS L.J. 631 (1975).