

ENEMY CONSTRUCTION AND THE PRESS

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ABSTRACT

When the President of the United States declared recently that the press is “the enemy,” it set off a firestorm of criticism from defenders of the institutional media and champions of the press’s role in the democracy. But even these Trump critics have mostly failed to appreciate the wider ramifications of the President’s narrative choice. Our earlier work describes the process of governmental “enemy construction,” by which officials use war rhetoric and other signaling behaviors to convey that a person or institution is not merely an institution that, although wholly legitimate, has engaged in behaviors that are disappointing or disapproved, but instead an illegitimate “enemy” triggering a state of Schmittian exceptionalism and justifying the compromise of ordinarily recognized liberties. The Trump administration, with a rhetoric that began during the campaign and burgeoned in the earliest days of Donald Trump’s presidency, has engaged in enemy construction of the press, and the risks that accompany that categorization are grave. This article examines the fuller components of that enemy construction, beyond the overt use of the label. It offers insights into the social, technological, legal, and political realities that make the press ripe for enemy construction in a way that would have been unthinkable a generation ago. It then explores the potential motivations for and consequences of enemy construction. We argue that enemy construction is particularly alarming when the press, rather than some other entity, is the constructed enemy. Undercutting the watchdog, educator, and proxy functions of the press through enemy construction leaves the administration more capable of delegitimizing other institutions and constructing other enemies—including the judiciary, the intelligence community, immigrants, and members of certain races or religions—because the viability and traction of counter-narrative is so greatly diminished.

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I. INTRODUCTION

When newly elected President Donald Trump declared that the mainstream press is “the enemy,” it set off a firestorm of criticism from defenders of the institutional media and champions of the press’s role in the democracy.¹ That pushback is unquestionably correct. But even these Trump critics have not explored in depth the wider ramifications of the President’s narrative choice.

Our earlier work describes the process of governmental “enemy construction,”² by which officials construct a public enemy that they can then combat. We have noted that when engaging in this enemy construction, government uses war rhetoric and other signaling behaviors to convey that a person or institution is not merely an institution that, although wholly legitimate, has engaged in behaviors that are disappointing or disapproved, but instead is an illegitimate “enemy.” As we have discussed elsewhere, one motivation the government might have for constructing an institution as an enemy is explained by the work of political theorist Carl Schmitt, who envisions a state of exception for such enemies that can be used to justify the compromise of ordinarily recognized liberties.³ The Trump administration, with a rhetoric that began during his campaign and has burgeoned in his presidency, has engaged in enemy construction of the press, and the risks that accompany that categorization are grave.

Part II of this article scrutinizes the fuller components of that enemy construction, beyond the overt use of the label. It draws upon our earlier work on enemy construction to explore the ways that Schmitt’s “public enemy” principle appears to be a controlling theme of the current administration’s approach to governance. It explores the rhetorical framing, the delegitimizing signaling, and the anticipatory undercutting that are the primary tools in the administration’s current enemy construction of the press and describes how

1. See, e.g., Jon Finan, *A Dangerous Time for the 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/>; 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>; Martha Minow & Robert Post, *Standing Up for ‘So-Called’ Law*, BOS. GLOBE (Feb. 10, 2017), <https://www.bostonglobe.com/opinion/2017/02/10/standing-for-called-law/VLbDYmrwpdjCn8qs5FPJaK/story.html>; William Steakin, *Dan Rather Blasts Trump’s Attack on the Press as ‘a Deep Betrayal,’* AOL (Feb. 18, 2017, 3:02 PM), <https://www.aol.com/article/news/2017/02/18/dan-rather-blasts-trumps-attack-on-the-press-as-a-deep-betraya/21716862/>.

2. Lisa Grow Sun & RonNell Andersen Jones, *Disaggregating Disasters*, 60 UCLA L. REV. 884, 924–25 (2013).

3. *Id.* at 924.

this enemy construction is not merely different in degree but different in kind from the tensions and antagonisms with the press that have punctuated many previous presidencies. Part III offers insights into the social, technological, legal, and political realities that make the press ripe for enemy construction in a way that would have been unthinkable a generation ago. Part IV then describes the motivations behind and the risks accompanying this enemy construction, examining the potential contours of Schmittian exceptionalism generally and in the press context. It explores the ways that enemy construction is particularly alarming when it is the press, rather than some other entity, that is the constructed enemy. We argue that subverting the watchdog, educator, and proxy functions of the press through enemy construction both diminishes our democracy and empowers the administration to delegitimize other institutions and construct other enemies—including the judiciary, the intelligence community, and certain races or religions—because the viability and traction of counter-narrative is so greatly diminished.

II. ENEMY CONSTRUCTION OF THE PRESS BY THE TRUMP ADMINISTRATION

On the campaign trail and throughout his first year in office, President Trump and his administration have overtly labeled the mainstream press “the enemy of the American People,”⁴ barred major news organizations from attending daily White House briefings,⁵ and excoriated the press almost daily in the most inflammatory of terms.⁶ These are just a few examples of the many ways, discussed more fully below, that the Trump administration has constructed the press as an enemy.

Analyzing these actions through the paradigm of enemy construction offers important clues into the motivations of the Trump administration’s portrayals and treatment of the press, as well as some important insights into the consequences of these portrayals and treatment. Our previous enemy-construction scholarship has highlighted the ways in which governmental

4. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realdonaldtrump/status/832708293516632065?lang=en> (“The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”).

5. Adam Liptak, *Barring Reporters from Briefings: Does It Cross a Legal Line?*, N.Y. TIMES (Feb. 28, 2017), <https://www.nytimes.com/2017/02/28/us/politics/white-house-barring-reporters-from-briefings.html>.

6. See discussion *infra* Section II.B.

actors are tempted to gravitate toward behaviors evoking the worldview of Carl Schmitt, a German political theorist who examined the foundations of government—often through the lens of emergency powers—during the Weimar Republic.⁷ An appreciation for Carl Schmitt’s arguments, which have gained renewed traction in recent years, can illuminate the themes of the Trump administration’s decision-making regarding the press and other groups. Trump’s words, behaviors, and “warnings” about the press map remarkably neatly onto these enemy-construction principles, and the framework makes clear that in a very short period of time, the administration has crossed over from a realm of common press-President tensions into the territory of enemy construction. It is constructing an enemy of one of the nation’s core democratic institutions.

A. Schmitt and the Role of Enemy Construction

In framing our consideration of enemy construction, we focus on Schmitt’s arguments not because we find them persuasive on their own terms nor because we believe that Trump and his administration are necessarily students of Schmitt’s writings, but because they nonetheless—whether purposefully or unwittingly—seem to be taking a page from Schmitt’s playbook and conceptualizing governance in fundamentally Schmittian terms.⁸ Moreover, Schmitt’s ideas seem to have captured the imagination of a wide array of academics and pundits seeking to explain or justify broad executive power to deal with national security threats decisively—and, often, without constraints imposed by other branches or ordinary legal rules and norms.⁹ That is, Schmitt’s ideas express the zeitgeist of the creeping national-

7. Ellen Kennedy, *Emergency Government Within the Bounds of the Constitution: An Introduction to Carl Schmitt*, “The Dictatorship of the Reich President According to Article 48 R.V.,” 18 CONSTELLATIONS 284, 284 (2011).

8. Cf. Kim Lane Scheppele, *Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1009 (2004) (noting that Carl Schmitt’s work remains relevant today “because the prolonged period of crisis that Weimar experienced produced theoretical justifications for the state of emergency that are in many ways more resonant to the modern ear” than conceptions articulated by earlier philosophers and adopted in the political systems of, for example, ancient Greece and Rome).

9. See, e.g., ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 4 (2010) (relying on Schmitt’s work to argue that the law imposes no real constraints on the executive, who therefore has broad authority checked only by political measures); Christian J. Emden, *Lessons from Carl Schmitt: Political Theology, Executive Power and the “Impact of Political Events,”* H-NET REVIEWS, Oct. 2006, at 4 (reviewing CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* (George Schwab trans., Univ. of Chi. Press 2005) (1922)), <https://www.h-net.org/reviews/showpdf.php?id=12384>

security exceptionalism that characterized much of the Cold War and that has deepened in many quarters since 9/11—an exceptionalism justified by the identification and declaration of a parade of “existential threats” to the American way of life.

Schmitt’s fundamental project is a challenge to liberalism and attendant notions of legality and the rule of law. That challenge is centered around his claim that the sovereign possesses (and must possess) two interrelated powers considered more fully below: the power to choose and declare enemies of the state and the power, in times of emergency, to invoke a “state of exception”—a realm outside of the constraints of law and ordinary norms. In the state of exception, the sovereign has essentially unlimited power to do as it pleases to neutralize threats to the political community’s “way of life.”¹⁰

In the Schmittian worldview, the essence of politics—its defining activity—is the “struggle against the enemy.”¹¹ So understood, politics¹² is the division of the world into friend and enemy,¹³ where the enemy is “the other, the stranger”—one who “in a specially intense way” is “existentially something different and alien, so that in the extreme case conflicts with him are possible.”¹⁴ This enemy is not a private enemy, a “private adversary whom one hates,” but rather “the public enemy” that emerges from the potential conflict between “one fighting collectivity of people” with another.¹⁵ A sovereign state that loses the “capacity or the will” to decide who qualifies as an enemy “ceases to exist politically.”¹⁶ So conceptualized, a sovereign must be willing to police its boundaries to keep the enemy out—to maintain its political boundaries by excluding those who don’t belong.

(“Schmitt’s vision of the Reichspräsident as safeguarding the constitution through extra-constitutional authority ties in almost perfectly with current proposals by some public lawyers, at least in the United States, for what is often termed a ‘unitary executive.’”).

10. CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 49 (George Schwab trans., Rutgers Univ. Press 1976) (1932).

11. George Kateb, *Political Action: Its Nature and Advantages*, in *THE CAMBRIDGE COMPANION TO HANNAH ARENDT* 130, 132 (Dana Villa ed., 2000).

12. Schmitt, of course, distinguishes between everyday, ordinary “party politics” and the truly political. SCHMITT, *supra* note 10, at 32 (distinguishing “party politics” from the truly “political,” which is oriented toward and organized around the friend/enemy dichotomy).

13. *Id.* at 26 (“The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”).

14. *Id.* at 27.

15. *Id.* at 28. Indeed, in pure Schmittian thinking, a real enemy exists only if there is some “real possibility” of violence latent in the conflict. *Id.* at 33, 49.

16. *Id.* at 49.

Moreover, Schmitt recognizes the possibility not only of external enemies, but also of domestic or internal enemies.¹⁷ The state may use a variety of techniques to delineate and designate these enemies—including “ostracism, expulsion, proscription, or outlawry”—but “the aim is always the same, namely to declare an enemy.”¹⁸ These “declared enemies of state”¹⁹ are those who threaten the political unity of the state in a variety of ways, including aiding and abetting an external enemy whom the state has decided constitutes an “existential threat” to the political community’s “own way of life.”²⁰ Aid to external enemies need not necessarily be material, concrete aid; rather, “[i]f a part of the population declares that it no longer recognizes enemies, then, depending on the circumstance, it joins their side and aids them.”²¹ Indeed, challenging the sovereign’s designation of external enemies itself threatens the “homogeneity of opinion”—or “[m]inimal agreement” on values—that Schmitt views as a “precondition for the existence of a political community.”²² Accordingly, the sovereign “must homogenize the community by appeal to a clear friend-enemy distinction, as well as through the suppression, elimination, or expulsion of internal enemies who do not endorse that distinction.”²³ On this view, diversity is a weakness, a threat to the state that can and should be extinguished.

B. Trump’s Enemy Construction Methodology

In an angry tweet four weeks into his presidency, President Trump derided “the FAKE NEWS media” as “the enemy of the American people.”²⁴ He listed some mainstream news organizations by name and amended the tweet minutes later to add more—ultimately referencing three of the nation’s primary broadcast news organizations and the newspaper boasting the

17. *Id.* at 46 (“As long as the state is a political entity this requirement for internal peace compels it in critical situations to decide also upon the domestic enemy. Every state provides, therefore, some kind of formula for the declaration of an internal enemy.”).

18. *Id.* at 47.

19. *Id.*

20. *Id.* at 49.

21. *Id.* at 51.

22. GAVIN RAE, *THE PROBLEM OF POLITICAL FOUNDATIONS IN CARL SCHMITT AND EMMANUEL LEVINAS* 124 (2016); CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 9 (Thomas McCarthy ed., Ellen Kennedy trans., MIT Press 1985) (1923) (“Democracy requires, therefore, first homogeneity and second—if the need arises—elimination or eradication of heterogeneity.”).

23. Lars Vinx, *Carl Schmitt*, *STAN. ENCYCLOPEDIA PHIL.* (Oct. 1, 2014), <https://plato.stanford.edu/archives/spr2016/entries/schmitt/>.

24. Trump, *supra* note 4.

second-largest circulation in the country and long regarded as a national newspaper of record.²⁵ Administration officials confirmed that the President meant what he said,²⁶ and in the following days, the President doubled down on the statement.²⁷ As a pure matter of labeling, then, the President might be said to have constructed the press as an enemy.

But enemy construction as envisioned by Schmitt is a more complicated and nuanced delineation. Simple labeling—even the overt use of the term “enemy”—might still be construed as little more than a hyperbolic complaint about a friendly “insider” institution, rather than the construction of an “other” foe. Schmittian enemy construction is instead a more intense and focused process of persuading the relevant insider audiences that this enemy “other” is “existentially something different” in a “specially intense way.”²⁸

Even under this more rigorous set of criteria for enemy construction, though, Trump’s relationship with the press seems unquestionably calculated to construct the press as an enemy. The deeper and broader constructive work is seen in at least three ways: (1) Trump’s rhetorical framing of the press; (2) his delegitimizing treatment of the press; and (3) his anticipatory undercutting of the press. That is, in the things he says, the things he does, and the things he forecasts, Trump is consistently and unrelentingly delineating the press as an enemy—an “other” that threatens the political unity of the state and that ought to be distrusted, countered, and perhaps ultimately stripped of ordinarily observed rights and liberties because of this exceptional status.

1. Rhetorical Framing

The use of the term “enemy of the people” goes a long distance toward an effort to sever an institution from the body politic, to be sure. Yet a fuller investigation of Trump’s rhetorical framing of the press reveals a much more comprehensive compilation of rhetorical signals designed for enemy construction. In its frequency, negativity, definitiveness, and reductionism,

25. Roger Yu, *USA Today, WSJ, NYT Are Top Three Papers in Circulation*, USA TODAY (Oct. 28, 2014, 12:46 PM), <http://www.usatoday.com/story/money/business/2014/10/28/aam-circulation-data-september/18057983/>.

26. Trump, *supra* note 4.

27. Office of the Press Secretary, The White House, Remarks by President Trump at the Conservative Political Action Conference (Feb. 24, 2017), <https://www.whitehouse.gov/the-press-office/2017/02/24/remarks-president-trump-conservative-political-action-conference> [hereinafter CPAC Transcript].

28. SCHMITT, *supra* note 10, at 27.

Trump's rhetoric unquestionably frames the media, or at least broad swaths of those working within it, as the enemy.

Early in what was once conceived of as a long-shot campaign for the Republican nomination,²⁹ Trump and his surrogates took on the mantle of openly, publicly rebuking the press in unprecedented ways. His campaign events were consistently marked with abusive rhetoric about and toward working journalists attending the events,³⁰ and he encouraged supporters to join him in taunts and jeers directed at the press corps.³¹ Mocking, criticizing, and verbally attacking individual reporters and media executives became a staple of Trump's presentations.³² The starkness of the chosen terminology—

29. Peter Morici, *Why Trump (Still) Remains a Long Shot*, FOX NEWS (Sept. 21, 2016), <http://www.foxnews.com/opinion/2016/09/21/why-trump-still-remains-long-shot.html>; Brian Schwartz, *Once Viewed as Long Shot, Investors Now Realize Trump Might Win*, FOX BUS. (Sept. 14, 2016), <http://www.foxbusiness.com/markets/2016/09/14/once-viewed-as-long-shot-investors-now-realize-trump-might-win.html>.

30. See, e.g., Kyle Balluck, *Trump Knocks New York Times Ad Campaign: 'Try Reporting Accurately & Fairly,'* HILL (Feb. 26, 2017, 7:14 AM), <http://thehill.com/homenews/administration/321220-trump-knocks-new-york-times-ad-campaign-try-reporting-accurately> (attacking *The New York Times*); Jonathan Easley, *Trump Takes Feud with Press to Campaign Rally in Florida*, HILL (Feb. 18, 2017, 6:27 PM), <http://thehill.com/homenews/administration/320262-trump-doubles-down-on-media-i-will-never-let-them-get-away-with-it> (rebuking the media at rally); Rebecca Savransky, *Media Members Defend NBC Reporter Targeted by Trump*, HILL (Nov. 2, 2016, 1:36 PM), <http://thehill.com/blogs/blog-briefing-room/news/304011-media-members-defend-nbc-reporter-targeted-by-trump> (criticizing Katy Tur); *Donald Trump Taunts NBC News' Katy Tur at Miami Rally*, BLOOMBERG POL. (Nov. 2, 2016, 12:33 PM), <https://www.bloomberg.com/politics/videos/2016-11-02/donald-trump-taunts-nbc-news-katy-tur-at-miami-rally> (criticizing Katy Tur).

31. See, e.g., Josh Feldman, *'I Love It!' Trump Taunts WaPo at Rally After Revoking Press Credentials*, MEDIAITE (June 14, 2016, 8:03 PM), <https://www.mediaite.com/online/i-love-it-trump-taunts-wapo-at-rally-after-revoking-press-credentials/> ("These people in the back . . . [t]hey are so dishonest we just took the press credentials away."); *Donald Trump Taunts the 'Dishonest' Media*, CNN (Oct. 21, 2016), <http://www.cnn.com/videos/politics/2016/10/21/donald-trump-rally-taunts-media.cnn> ("We are in a rigged system and a big part of the rigging is the dishonest media."); *Trump Taunts Press Over Being Stuck on Plane*, NBC NEWS (Sept. 15, 2016), <http://www.nbcnews.com/video/trump-taunts-press-over-being-stuck-on-plane-766441539766> (taunting the press stuck on a plane).

32. See, e.g., Brett Molina, *Jeff Bezos, Who Once Joked About Sending Trump to Space, Changes Tune*, USA TODAY (Nov. 10, 2016, 10:24 PM), <http://www.usatoday.com/story/tech/news/2016/11/10/bezos-congratulates-trump-election-victory/93585602/> (suggesting Bezos is using *The Washington Post* against Trump); CNN, *Trump Mocks Reporter with Disability*, YOUTUBE (Nov. 25, 2015), <https://youtu.be/PX9reO3QnUAerge> (mocking Serge Kovaleski); *Did Trump Really Mock a Reporter's Disability? Videos Could Back Him Up*, FOX NEWS (Sept. 14, 2016), <http://www.foxnews.com/politics/2016/09/14/did-trump-really-mock-reporters-disability-videos-could-back-him-up.html> (showing a series of clips of Trump mocking the press); *Highlights of the Donald Trump vs Megyn Kelly Battle*, CNN, <http://www.cnn.com/videos/politics/2015/08/10/a-timeline-of-donald-trump-vs-megyn-kelly->

words like “dishonest,”³³ “lying,”³⁴ “failing,”³⁵ “disgusting,”³⁶ “third-rate,”³⁷ “bad,”³⁸ and “scum”³⁹—delegitimized the press beyond the obvious reputational damage attempted. This drumbeat of anti-press rhetoric gained attention for its consistency and for its pure shock value—and, largely because the rhetoric represented such a departure from the norms observed by all previous and contemporary candidates, it took on a “special[] intens[ity]” of the sort Schmitt envisioned.⁴⁰

Beyond name calling and competency questioning, Trump’s campaign rhetoric about the press cast it in classic enemy lexicon by suggesting to the American people that it systematically abuses the justice system and damages reputations without recourse. This narrative of the “struggle against the enemy” contextualized the threat that the enemy should be seen as posing.⁴¹ Trump’s public remarks regularly characterized reporters as unrepentant

origwx-allee.cnn (showing a series of clips of Trump’s comments about Kelly) (last visited Dec. 24, 2017); *Trump Shuts Down CNN Reporter*, CNN, <http://www.cnn.com/videos/politics/2017/01/11/donald-trump-jim-acosta-cnn-fake-news.cnn> (“Not you. . . . [Y]ou are fake news.”) (last visited Dec. 24, 2017).

33. 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/>.

34. *Id.* (“I would never kill them, but I do hate them. And some of them are such lying, disgusting people.”). Some Trump supporters have used the infamous German word “*lügenpresse*” (meaning “lying press”) to refer to the mainstream American media. See Jeff Nesbit, *Donald Trump Supporters Are Using a Nazi Word to Attack Journalists*, TIME (Oct. 25, 2016), <http://time.com/4544562/donald-trump-supporters-lügenpresse/> (“Supporters of . . . Donald Trump have begun to use an old German word—once invoked by Nazis and now currently in vogue with far-right political activists in Germany—to attack American media covering his campaign.”).

35. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 16, 2017, 3:58 AM), <https://twitter.com/realDonaldTrump/status/832197515248275456>.

36. See, e.g., Ali Vitali, *In His Words: 19 Notable Thoughts from Donald Trump*, NBC NEWS (Aug. 14, 2016, 7:48 PM), <http://www.nbcnews.com/politics/2016-election/his-words-19-notable-thoughts-donald-trump-n630446> (“CNN is disgusting”); *Trump: ‘Disgusting Reporters, Horrible People,’* USA TODAY (Mar. 15, 2016), <https://www.usatoday.com/videos/news/politics/elections/2016/2016/03/15/81843912/> (calling the press “disgusting reporters, horrible people”).

37. Dylan Byers, *Maggie Haberman: The New York Times Reporter Trump Can’t Quit*, CNN MONEY (Apr. 7, 2017, 5:21 PM), <http://money.cnn.com/2017/04/07/media/maggie-haberman-trump/index.html>.

38. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 11, 2016, 5:02 PM), <https://twitter.com/realDonaldTrump/status/808114703922843649>.

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

40. SCHMITT, *supra* note 10, at 27.

41. See *id.* at 26.

actors who “say whatever they want and get away with it.”⁴² At a February 2016 rally, the candidate berated the irresponsibility and incompetence of the press and announced, “Believe me, if I become president, oh do they have problems. They’re gonna have such problems.”⁴³

Trump kept this campaign promise. One day after his inauguration, he gave a speech that wholly embraced enemy rhetoric on a new scale,⁴⁴ employing war terminology that we and other scholars have described as the prototypical linguistic device of enemy construction.⁴⁵ “[A]s you know,” the President said in his first post-inaugural speech, “I have a running war with the media. They are among the most dishonest human beings on Earth.”⁴⁶ Within days, the President’s chief strategist would speak of the press as “the opposition party,”⁴⁷ and his Press Secretary would angrily threaten to “hold the press accountable” for contradicting the President’s narrative about the size of inauguration crowds and for unfavorable coverage of his travel ban.⁴⁸ In the coming month, Trump would tangentially offer characterizations of the press as an enemy during dozens of speeches and interviews ostensibly focused on other matters.⁴⁹ He engaged in discussion of the presidential campaign long after he was declared the winner of the election and well into his time in office,⁵⁰ primarily as a precursor to a vilification of the press,

42. Jim DeFede, *The CBS4 Interview: Trump on Rigged System and the Press*, CBS MIAMI (Oct. 23, 2016, 11:28 PM), <http://miami.cbslocal.com/2016/10/23/the-cbs4-interview-trump-on-rigged-system-the-press/>.

43. Dawn Chmielewski, *Donald Trump to Amazon: If He’s President ‘They’re Gonna Have Such Problems,’* RECODE (Feb. 26, 2016, 12:41 PM), <http://www.recode.net/2016/2/26/11588282/donald-trump-to-amazon-if-hes-president-theyre-gonna-have-such>.

44. *Read Trump CIA Speech Transcript*, CBS NEWS (Jan. 23, 2017, 3:53 PM), <http://www.cbsnews.com/news/trump-cia-speech-transcript/> [hereinafter *CIA Speech Transcript*].

45. See, e.g., Sun & Jones, *supra* note 2, at 924.

46. *CIA Speech Transcript*, *supra* note 44.

47. Ryan Teague Beckwith, *Steve Bannon and Reince Priebus’ Joint Interview at CPAC*, TIME (Feb. 23, 2017), <http://time.com/4681094/reince-priebus-steve-bannon-cpac-interview-transcript/>.

48. Ian Schwartz, *WH’s Sean Spicer Lambastes Media in First Presser: “We’re Going to Hold the Press Accountable,”* REAL CLEAR POL. (Jan. 21, 2017), https://www.realclearpolitics.com/video/2017/01/21/whs_sean_spicer_lambastes_media_in_first_presser_were_going_to_hold_the_press_accountable.html.

49. See, e.g., *CIA Speech Transcript*, *supra* note 44.

50. *Trump’s Victory Tour Stump Speech, Annotated*, NPR (Dec. 7, 2016, 12:38 PM), <http://www.npr.org/2016/12/07/504570429/trumps-victory-tour-stump-speech-annotated>.

whose inability to accurately forecast the results of the election he attributed to the malice borne of enemy status.⁵¹

By mid-February, when the President held his first solo press conference in office, nominally to announce a secretary of labor nominee, he made this war against the enemy press the predominant theme of his exchange with the gathered journalists.⁵² He called the media “fake” nearly twenty times in roughly seventy minutes.⁵³ His follow-up “enemy of the people” tweet was reinforced at a Conservative Political Action Group speech the next week at which the President opened with speculation about how the press would misreport the reception he received and then continued with a scathing rebuke of the media.⁵⁴ The press, he said, “make up sources,” are “very dishonest people,” and “do a tremendous disservice to our country.”⁵⁵ Using explicit “other” characterizations, he repeatedly stated that the media “doesn’t represent the people,” and “[has its] own agenda, and it’s not your agenda, and it’s not the country’s agenda.”⁵⁶ “We have to fight it,” he said.⁵⁷

Throughout the following months, the President’s Twitter rants against the press—some of which were nonsensical⁵⁸—made headlines, and derogatory commentary on the press became a staple of his public speeches. Perhaps his most prominent theme at rallies, speeches, and in other public comments on his 100th day in office was the despicability of the media’s failure to give him credit for achievements.⁵⁹ At a July 2017 Kennedy Center speaking

51. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:39 AM), <https://twitter.com/realDonaldTrump/status/827874208021639168> (“After being forced to apologize for its bad and inaccurate coverage of me after winning the election, the FAKE NEWS @nytimes is still lost!”).

52. Donald J. Trump, *Full Transcript: President Donald Trump’s News Conference*, CNN (Feb. 17, 2017, 4:12 AM), <http://www.cnn.com/2017/02/16/politics/donald-trump-news-conference-transcript/> [hereinafter *First News Conference Transcript*].

53. *Id.*

54. CPAC Transcript, *supra* note 27.

55. *Id.*

56. *Id.*

57. *Id.*

58. See Scott Simon, ‘Covfefe’: *The Tweet Heard Around the Wrold* [sic], NPR (June 3, 2017, 7:32 AM), <http://www.npr.org/2017/06/03/531264632/the-tweet-heard-around-the-wrold> (discussing the tweet from President Trump on May 31, 2017 that began “[d]espite the constant negative press covfefe . . .”).

59. See, e.g., Steve Volk & Mark Berman, *Trump Opens 100-Day Rally Assailing Media Gathered for Correspondents’ Dinner*, WASH. POST (Apr. 29, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/04/29/protesters-to-hold-opposition-march-as-president-trump-hosts-100-day-rally/> (reporting on Trump’s speech that stated that CNN and MSNBC are fake news and that *The New York Times* was a failing organization); John Dickerson, *Full Transcript: President Donald Trump’s Interview with ‘Face the Nation,’* CBS NEWS (Apr. 30, 2017, 10:39 AM), <http://www.cbsnews.com/news/trump->

event, Trump reiterated his claim that the media is pursuing an agenda hostile to the American people: “The dishonest media will never keep us from accomplishing our objectives on behalf of our great American people, will never happen. Their agenda is not your agenda. . . . I will never stop fighting for you.”⁶⁰ As of July 24, 2017, Trump had used the phrase “fake news” to both describe and attack various media outlets in seventy-three separate tweets.⁶¹ Even when speaking to a non-partisan audience of young people at the National Boy Scout Jamboree, Trump repeatedly called out the “fake media” and “fake news.”⁶²

In the wake of substantial criticism⁶³ of some of Trump’s early overt “enemy” labeling, President Trump argued that neither his tweets on the subject nor the administration’s subsequent reinforcement of the assertion actually took the position that the media as a whole is the enemy, but instead were more targeted criticisms of certain media engaged in disappointing or damaging behavior.⁶⁴ It is difficult to contend, however, that these walk-

interview-full-transcript-face-the-nation/ (interview transcript with President Trump on his first 100 days in office, in which he called mainstream media “fake media,” and stated he wished he would have known how dishonest the media is prior to taking office); Donald J. Trump (@realDonaldTrump), TWITTER (Apr. 21, 2017, 3:50 AM), <https://twitter.com/realDonaldTrump/status/855373184861962240> (“No matter how much I accomplish during the ridiculous standard of the first 100 days, & it has been a lot (including S.C.), media will kill!”).

60. *President Trump Tribute to Veterans at Kennedy Center*, C-SPAN (July 1, 2017), <https://www.c-span.org/video/?430774-2/president-trump-tribute-veterans-kennedy-center>.

61. Christopher Rosen, *All the Times Donald Trump Has Called the Media ‘Fake News’ on Twitter*, ENT. WKLY. (July 24, 2017, 7:33 AM), <http://ew.com/tv/2017/06/27/donald-trump-fake-news-twitter/>; see also Alicia Parlapiano & Larry Buchanan, *@realDonaldTrump: Cataloging Every Tweet by the President in His First 100 Days*, N.Y. TIMES (Apr. 28, 2017), <https://www.nytimes.com/interactive/2017/04/28/us/politics/donald-trump-twitter-100-days-of-tweets.html> (highlighting ten different themes of Trump’s use of Twitter, including “Discrediting the Media”).

62. President Donald Trump, Speech at the 2017 Boy Scout Jamboree (July 24, 2017), in Helen Regan, *Read the Full Transcript of President Trump’s 2017 Boy Scout Jamboree Speech*, TIME (July 25, 2017, 10:02 AM), <http://time.com/4872118/trump-boy-scout-jamboree-speech-transcript/>.

63. See, e.g., Mahita Gajanan, *‘That’s How Dictators Get Started’: John McCain Slams President Trump’s Attacks on Media*, FORTUNE (Feb. 19, 2017, 10:30 AM), <http://fortune.com/2017/02/19/donald-trump-john-mccain-media-dictators/>; Eun Kyung Kim, *George W. Bush Opens Up on Trump’s War with the Media, Travel Ban, Russia and Veterans*, TODAY (Feb. 27, 2017, 8:10 AM), <http://www.today.com/news/george-w-bush-opens-trump-s-war-media-russia-travel-t108627>.

64. See, e.g., Matthew Boyle, *Exclusive—President Trump: New York Times ‘Intent Is So Evil and So Bad,’ ‘They Write Lies,’* BREITBART (Feb. 27, 2017), <http://www.breitbart.com/big-government/2017/02/27/exclusive-president-trump-new-york-times-intent-is-so-evil-and-so-bad-they-write-lies/> (“Well, it’s not the media. It’s the fake media. . . . There’s a difference. The

backs meaningfully undercut the overarching enemy construction that is occurring. Of course, the overt labeling is merely one piece of a much wider enemy construction blueprint employed by the Trump administration. More to the point, the overall rhetorical impact of Trump's overt enemy labeling conveys a far more categorical impression than his later limiting statements would suggest. All contextual, stylistic, and periphrastic signals accompanying the "enemy of the people" statements sent a broader message that Trump meant for a very large group of most media organizations to be included in the accusation, and not a narrow group of "Fake News" outlets, as Trump later asserted. For example, when speaking of this category that he identifies as "Fake News," he has suggested that its scope is "tremendous."⁶⁵ Likewise, in his original "enemy-of-the-people" tweets, he sweepingly made reference to entire news organizations,⁶⁶ rather than to specific errors from specific stories, thus indicating a comprehensive, categorical labeling rather than a narrower critique of particular coverage that he finds inaccurate or misleading.

Moreover, because Trump "included some of the country's most widely-consumed and well-respected news organizations in his definition of 'fake media,'" ⁶⁷ his condemnation necessarily takes on a wide-ranging, inclusive character. All three major television networks—NBC, ABC, and CBS—were mentioned by name, as were CNN and *The New York Times*. The combined circulation and viewership of just those outlets mentioned in the tweet is

fake media is the opposition party. The fake media is the enemy of the American people. There's tremendous fake media out there. Tremendous fake stories. The problem is the people that aren't involved in the story don't know that. . . . They take 'fake' media off. They say 'the media is the enemy of—well, they didn't say the 'fake media.' I didn't say the media is the enemy—I said the 'fake media.' . . . I wasn't talking about that. I was talking about the fake media, where they make up everything there is to make up."); see also CPAC Transcript, *supra* note 27 ("A few days ago, I called the fake news 'the enemy of the people'—and they are. They are the enemy of the people. . . . They are very dishonest people. In fact, in covering my comments, the dishonest media did not explain that I called the fake news the enemy of the people—the fake news. They dropped off the word 'fake.' And all of the sudden, the story became, the media is the enemy. They take the word 'fake' out, and now I'm saying, oh, no, this is no good. But that's the way they are. So I'm not against the media. I'm not against the press. I don't mind bad stories if I deserve them. And I tell you, I love good stories, but . . . I don't get too many of them. But I am only against the fake news media or press—fake, fake. They have to leave that word.").

65. Boyle, *supra* note 64 ("There's tremendous fake media out there. Tremendous fake stories.").

66. Trump, *supra* note 4 ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!").

67. William Cummings, *Trump on New York Times: 'The Intent Is So Evil and So Bad,'* USA TODAY (Feb. 28, 2017, 1:09 AM), <http://www.usatoday.com/story/news/politics/onpolitics/2017/02/27/trump-breitbart-interview/98504402/>.

nearly twenty-five million Americans.⁶⁸ Trump has used that same “fake news” phrase in reference to several other publications⁶⁹ that are also major news sources for Americans, often seemingly based solely on the publication of coverage that is unfavorable.⁷⁰ Before his nomenclature changed to the “fake news” label, he and his surrogates attacked “the mainstream media,”⁷¹

68. David Bauder, *Fox Business Surges in Ratings Competition with CNBC*, SEATTLE TIMES (Feb. 28, 2017, 2:21 PM), <https://www.seattletimes.com/business/fox-business-surges-in-ratings-competition-with-cnbc/> (reporting average nightly audiences of 8.4 million, 8.6 million, and 7 million for *ABC World News Tonight*, *NBC Nightly News* and *CBS Evening News*, respectively); Sidney Ember, *New York Times Co. Reports Loss as Digital Subscriptions Grow*, N.Y. TIMES (May 3, 2016), <https://www.nytimes.com/2016/05/04/business/media/new-york-times-co-q1-earnings.html> (“The Times has a daily print circulation of 590,000, and 1.1 million on Sunday” and “roughly 1.2 million digital-only subscriptions . . .”); Hadas Gold, *2015 Q2 Ratings Report: ABC, Fox News on Top; MSNBC Struggles as CNN Makes Gains*, POLITICO (June 30, 2015, 4:33 PM), <http://www.politico.com/blogs/media/2015/06/2015-q2-ratings-report-abc-fox-news-on-top-msnbc-struggles-as-cnn-makes-gains-209762> (reporting CNN had an average primetime viewership of 576,000).

69. See, e.g., Max Greenwood, *Washington Post: Our Story Wasn’t Fake, It Led to Trump Ousting Flynn*, HILL (Feb. 24, 2017, 11:43 AM), <http://thehill.com/homenews/administration/321009-washington-post-editor-stands-by-flynn-story-amid-trumps-fake-news> (noting Trump called *Washington Post* “fake news”); Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 15, 2017, 3:40 AM), <https://twitter.com/realdonaldtrump/status/831830548565852160?lang=en> (“The fake news media is going crazy with their conspiracy theories and blind hatred. @MSNBC & @CNN are unwatchable.”).

70. Indeed, even some who are ideologically aligned with President Trump have suggested that “fake news” has become a label that he applies to any entity that ever publishes anything unflattering to him or his administration. See, e.g., *Politics in the News: Previewing President Trump’s Week Ahead*, NPR MORNING EDITION (Feb. 27, 2017, 4:59 AM), <http://www.npr.org/2017/02/27/517458906/politics-in-the-news-previewing-president-trumps-week-ahead> (Jonah Goldberg, senior editor of the *National Review*, calling Trump’s “fake news” claims “grossly irresponsible” and “basically just indefensible”: “Look—I’ve made my living for a very long time beating up on liberal media bias. I think it’s a real thing. That is not what he’s saying. . . . What he is basically saying is any critical or inconvenient coverage of me is wholly fake and illegitimate. And I think that is a very dangerous route for the president of the United States to go down in terms of his rhetoric.”).

71. See, e.g., *Trump: Clinton Controls Mainstream Media*, USA TODAY (Oct. 14, 2016), <http://www.usatoday.com/videos/news/nation/2016/10/14/92037728/>; see also Chris Cillizza, *Kellyanne Conway Gave a Master Class in Not Answering Questions in Her Fox News Interview*, WASH. POST (Jan. 30, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/kellyanne-conway-gave-a-master-class-in-not-answering-questions-in-her-fox-news-interview/> (Trump advisor Kellyanne Conway critiquing the “mainstream media”); Michael M. Grynbaum, *Trump Strategist Stephen Bannon Says Media Should ‘Keep Its Mouth Shut,’* N.Y. TIMES (Jan. 26, 2017), <https://www.nytimes.com/2017/01/26/business/media/stephen-bannon-trump-news-media.html> (noting that in his “scathing” attack on the press, “Mr. Bannon mostly referred to the ‘elite’ or ‘mainstream’ media”); Allan Smith, *Trump Echoes Steve Bannon in Raucous Nationalist Speech to the Biggest Conservative Conference of the Year*, BUS. INSIDER (Feb. 24, 2017, 3:30 PM),

which, by its very name, suggests a reference to the historically recognized body of press that constitute the “main” sources of information to average Americans. Indeed, both Trump and his advisors have used the more general term “media” in their enemy-construction rhetoric, declaring that “the media” is the opposition party⁷² and that Trump has a “running war with the media.”⁷³ All told, whatever his true intent in the “enemy of the people” statements, Donald Trump has engaged in rhetoric that feeds a narrative that the media as a whole, or at least in very large part, ought to be thought of as an enemy.

Notwithstanding Trump’s attempts to recharacterize some of his most bombastic statements, the combined force of these depictions is categorical and scathing, creating an unprecedented state of affairs in the United States. The American people are told, nearly every time their President speaks, that they are a part of an “us” to which the media does not belong.⁷⁴ Depicting the press as this existentially different “other,” always in terms chosen for their negative impact and often delivered face-to-face to reporters in a way that signals that disrespect for them carries no taboo, Trump openly divides the political universe into friend and foe and enthusiastically places the press under the adversary column.

2. Treatment Designed to Signal Delegitimization

Enemy construction by government officials often couples fiercely negative adversarial rhetoric with governmental decision-making designed to signal the enemy’s outsider status. Indeed, it is these overt behaviors that demonstrate that negative rhetoric is not mere expression of displeasure with a trusted, insider institution but rather enemy-construction language about a distrusted, outsider one. These delegitimizing behavioral signals have been central to the Trump administration’s enemy construction of the press.

<http://www.businessinsider.com/trump-cpac-speech-echoes-bannon-2017-2> (quoting advisor Stephen Bannon as saying that the mainstream media “were dead wrong on the chaos of the campaign,” “dead wrong in the chaos of the transition,” and “absolutely dead wrong about what’s going on today”).

72. Beckwith, *supra* note 47 (referring to “the media” in discussion of it as opposition party); Nolan D. McCaskill, *Trump Backs Bannon: ‘The Media Is the Opposition Party,’* POLITICO (Jan. 27, 2017, 3:43 PM), <http://www.politico.com/story/2017/01/donald-trump-steve-bannon-media-opposition-party-234280> (quoting Trump as saying in an interview, “[y]eah, I think the media’s the opposition party in many ways”).

73. *CIA Speech Transcript*, *supra* note 44.

74. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 2, 2017, 1:04 PM), <https://twitter.com/realdonaldtrump/status/881604490041995271> (“The dishonest media will NEVER keep us from accomplishing our objectives on behalf of our GREAT AMERICAN PEOPLE! #AmericaFirst[.]”).

Some of the most prominent enemy-status signals have taken the form of denied access. Revoking the press credentials of some news organizations during the campaign⁷⁵ and belittling journalists and their employers while refusing to take their questions at his first press conference as President-elect,⁷⁶ Trump set a very early tone of press exclusion and enemy characterization. He abandoned some basic traditions that had long signaled cooperation with the press, deciding not to allow reporters to travel with him on his plane⁷⁷ and failing to inform them when he went out into public.⁷⁸ These high-profile exclusions, because they contradicted longtime press-President norms and because they were marked with explicit “other” characterizations, continued a definitional demarcating of the enemy, drawing a line between those on the inside and those on the outside. This demarcation was done openly and publicly, with an intended audience broader than the affected journalists; the true audience was the American public, being told that the press was not a trusted democratic institution but an outsider to be managed, controlled, and suspected.

This behavior continued into the presidency, with very early signals immediately post-inauguration that the executive was considering removing the White House Press Corps from the West Wing⁷⁹ and that he might have his own administration, rather than the White House Correspondents Association, decide who has access to the briefings.⁸⁰ By a month into his time in office, President Trump’s Press Secretary was excluding some media

75. 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/> (discussing Trump campaign media bans); *Trump Revokes Press Credentials for Washington Post*, FOX NEWS (June 13, 2016), <http://www.foxnews.com/politics/2016/06/13/trump-revokes-press-credentials-for-washington-post.html> (discussing the Trump campaign ban on *The Washington Post*).

76. *First News Conference Transcript*, *supra* note 52.

77. Jordan Fabian, *Press Worries Over President-elect Trump*, HILL (Nov. 12, 2016, 9:18 AM), <http://thehill.com/homenews/administration/305632-press-worries-over-president-elect-trump>.

78. Eliza Collins, *Trump Ditches Reporters Goes to Dinner, WHCA Calls It ‘Unacceptable,’* USA TODAY (Nov. 16, 2016, 5:55 PM), <http://www.usatoday.com/story/news/politics/onpolitics/2016/11/16/trump-ditches-reporters-goes-dinner-whca-calls-unacceptable/93952790/>.

79. *White House Reporters to ‘Fight’ Trump Team’s Plan to Limit Their ‘West Wing Access,’* FOX NEWS (Jan. 16, 2017), <http://www.foxnews.com/politics/2017/01/16/white-house-reporters-to-fight-trump-teams-plan-to-limit-their-west-wing-access.html>.

80. *See id.*

outlets from publicly announced briefings.⁸¹ During his first half-year as President, he attempted to secretly prohibit recording of press conferences⁸² and, when the administration was criticized for inconsistencies in answers on significant news items,⁸³ he threatened to cancel press conferences altogether.⁸⁴

Other delegitimizing and exclusionary signals have taken the form of more explicit confrontations with the press. So, for example, one of Trump's first acts as President-elect was to call a meeting of reporters and media executives at which he reportedly scolded and shamed the press. While presidents traditionally have begun their terms with outreach to the working press, the Trump administration abandoned any air of cooperativeness that has previously attended the office, conveying an adversarial rather than collaborative relationship. This targeted attacking has continued unabated. Midway through his first year as President, Trump set off firestorms of criticism, even within his own party, for retweeting a video that depicted him physically assaulting a person whose face bore the logo of the cable network

81. Mark Hensch, *Media Figures Slam White House for Excluding Outlets from Briefing*, HILL (Feb. 24, 2017, 2:54 PM), <http://thehill.com/homenews/administration/321063-media-slams-limited-wh-press-access>.

82. Ben Mathis-Lilley, *White House Warns Reporters Not to Report on Instructions About Not Reporting on Thursday's Press Conference*, SLATE: THE SLATEST (June 22, 2017, 12:31 PM), http://www.slate.com/blogs/the_slatest/2017/06/22/white_house_press_conference_no_camera_notice_is_not_reportable_white_house.html (declaring that no video would be allowed at the following press briefing and that the announcement is "not reportable").

83. Jenna Johnson, *After Trump Fired Comey, White House Staff Scrambled to Explain Why*, WASH. POST (May 10, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/10/as-trump-fired-comey-his-staff-scrambled-to-explain-why/> (reporting on White House Press Secretary Sean Spicer's inability to answer direct questions from the press regarding the firing of FBI Director James Comey).

84. Donald J. Trump (@realDonaldTrump), TWITTER (May 12, 2017, 5:59 AM), <https://twitter.com/realDonaldTrump/status/863000553265270786> ("As a very active President with lots of things happening, it is not possible for my surrogates to stand at podium with perfect accuracy! . . .") (ellipses in original); Donald J. Trump (@realDonaldTrump), TWITTER (May 12, 2017, 6:07 AM), <https://twitter.com/realDonaldTrump/status/863002719400976384> (" . . . Maybe the best thing to do would be to cancel all future 'press briefings' and hand out written responses for the sake of accuracy???" (ellipses in original)); see also Philip Rucker, *Trump Threatens to Cancel White House Briefings Because It Is 'Not Possible' for His Staff to Speak With 'Perfect Accuracy'*, WASH. POST (May 12, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/05/12/trump-threatens-to-cancel-white-house-briefings-because-it-is-not-possible-to-always-tell-the-truth/>; Jennifer Hansler, *Trump on Russia Allegations: 'There Is No Collusion'*, CNN (May 13, 2017, 10:39 PM), <http://www.cnn.com/2017/05/13/politics/donald-trump-fox-judge-jeanine/index.html> (reporting on Trump's Fox News interview and tweet in which he stated that he was considering canceling all future press conferences because of the "level of hostility" from media).

CNN⁸⁵ and for tweeting scathing, vulgar attacks on the physical appearance, intelligence, and mental health of two news anchors,⁸⁶ which his Press Secretary characterized as an appropriate response to mistreatment by the media.⁸⁷ As the one-year anniversary of his inauguration approached, Trump declared by tweet that he would be “announcing THE MOST DISHONEST & CORRUPT MEDIA AWARDS OF THE YEAR” with subjects including “Dishonesty & Bad Reporting in various categories from the Fake News Media.”⁸⁸ The “event” was postponed,⁸⁹ then downplayed by Trump’s press secretary as merely a “potential event.”⁹⁰ It ultimately materialized as a tweet

85. Donald J. Trump (@realDonaldTrump), TWITTER (July 2, 2017, 7:21 AM), <https://twitter.com/realDonaldTrump/status/881503147168071680> (depicting a video of Trump assaulting an anonymous person whose face is covered by the CNN logo and the statement: “#FraudNewsCNN #FNN”).

86. Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:52 AM), <https://twitter.com/realDonaldTrump/status/880408582310776832> (“I heard poorly rated @Morning_Joe speaks badly of me (don’t watch anymore). Then how come low I.Q. Crazy Mika, along with Psycho Joe, came . . .” (ellipses in original)); Donald J. Trump (@realDonaldTrump), TWITTER (June 29, 2017, 5:58 AM), <https://twitter.com/realDonaldTrump/status/880410114456465411> (“ . . . to Mar-a-Lago 3 nights in a row around New Year’s Eve, and insisted on joining me. She was bleeding badly from a face-lift. I said no!” (ellipses in original)); Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 6:20 AM), <https://twitter.com/realDonaldTrump/status/881140479454310401> (“Crazy Joe Scarborough and dumb as a rock Mika are not bad people, but their low rated show is dominated by their NBC bosses. Too bad!”); *see also* Jessica Estepa, ‘Please Just Stop’: Republicans Plead with Trump over Mika Brzezinski Tweets, USA TODAY (June 29, 2017, 5:32 PM), <https://www.usatoday.com/story/news/politics/onpolitics/2017/06/29/republican-lawmakers-condemn-donald-trumps-attacks-morning-joe-hosts/439046001/>.

87. Morning Joe (@Morning_Joe), TWITTER (June 30, 2017, 3:50 AM), https://twitter.com/Morning_Joe/status/880740301509279744 (containing video of Morning Joe segment in which Sarah Huckabee Sanders states that President Trump will “hit back” when attacked by the liberal media).

88. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 2, 2018, 8:05 PM), <https://twitter.com/realDonaldTrump/status/948359545767841792> (“I will be announcing THE MOST DISHONEST & CORRUPT MEDIA AWARDS OF THE YEAR on Monday at 5:00 o’clock. Subjects will cover Dishonesty & Bad Reporting in various categories from the Fake News Media. Stay tuned!”).

89. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 7, 2018, 1:35 PM), <https://twitter.com/realDonaldTrump/status/950103659337134080> (“The Fake News Awards, those going to the most corrupt & biased of the Mainstream Media, will be presented to the losers on Wednesday, January 17th, rather than this coming Monday. The interest in, and importance of, these awards is far greater than anyone could have anticipated!”).

90. Callum Borchers, *Trump’s ‘Fake News Awards’ Were a Huge Flop*, WASH. POST (Jan. 17, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/01/17/trumps-fake-news-awards-are-shaping-up-to-be-a-total-flop/?utm_term=.7688ecf3980d (quoting Sarah Huckabee Sanders as saying “[w]e’ll keep you guys posted on any details around that potential event”).

from the President linking to an initially non-functioning webpage⁹¹ titled “The Highly-Anticipated 2017 Fake News Awards,”⁹² containing no categories but instead a simple list of eleven errors that had been admitted by the press⁹³ or asserted by the President⁹⁴ in the preceding year, followed by a list of accomplishments that the President suggested had been ignored “[w]hile the media spent 90% of the time focused on negative coverage or fake news.”⁹⁵ Although the gimmick ended up with significantly fewer theatrics than the President’s announcement had suggested might occur, the mere announcement of the event spurred backlash from defenders of the press⁹⁶ and from critics in the President’s own party, who labeled Trump’s war with the press Stalinist⁹⁷ and argued that Trump’s “unrelenting attacks on the integrity of American journalists and news outlets” have “provided cover for repressive regimes to follow suit.”⁹⁸

91. Kathryn Watson, *Trump Announces Fake News Winners on Twitter, But Link Stops Working Soon After*, CBS NEWS (Jan. 17, 2018), <https://www.cbsnews.com/news/fake-news-awards-trump-tweets-winners-list-includes-paul-krugman-brian-ross-full-list-gop-website/>.

92. See *The Highly-Anticipated 2017 Fake News Awards*, GOP (Jan. 18, 2018), <https://gop.com/the-highly-anticipated-2017-fake-news-awards/>.

93. *Id.* (listing, among other things, columnist Paul Krugman’s 2016 editorial prediction that markets would not recover from a Trump election, a mistaken assertion by Newsweek that Trump did not shake the Polish First Lady’s hand, a claim that CNN deliberately “edited a video to make it appear President Trump defiantly overfed fish” on a trip to Japan, and a tweet from a *Washington Post* reporter showing an image of a crowd at a rally at a time Trump claimed was well before his arrival).

94. *Id.* Trump’s final “award” was not directed at any particular media entity or story, but instead declared that “Russian collusion is perhaps the greatest hoax perpetrated on the American people. THERE IS NO COLLUSION!” *Id.*

95. *Id.*

96. See, e.g., Daniel Funke, *Trump’s ‘Fake News Awards’ Make It Even Harder to Address Misinformation*, POYNTER (Jan. 17, 2018), <https://www.poynter.org/news/trumps-fake-news-awards-make-it-even-harder-address-misinformation>.

97. The Republic, *Read the Full Text of Flake’s Speech on ‘Fake News’ and Trump’s Attacks on the Media*, AZCENTRAL (Jan. 17, 2018), <https://www.azcentral.com/story/news/politics/arizona/2018/01/17/sen-jeff-flakes-speech-full-text-trump-attacks-news-media/1040041001/> (“Mr. President, it is a testament to the condition of our democracy that our own president uses words infamously spoken by Josef Stalin to describe his enemies. It bears noting that so fraught with malice was the phrase ‘enemy of the people,’ that even Nikita Khrushchev forbade its use, telling the Soviet Communist Party that the phrase had been introduced by Stalin for the purpose of ‘annihilating such individuals’ who disagreed with the supreme leader.”).

98. John McCain, Opinion, *Mr. President, Stop Attacking the Press*, WASH. POST (Jan. 16, 2018), https://www.washingtonpost.com/opinions/mr-president-stop-attacking-the-press/2018/01/16/9438c0ac-faf0-11e7-a46b-a3614530bd87_story.html?utm_term=.ba6de8f0376f.

It is likewise an enemy-construction technique to repeatedly characterize an institution as a public risk against which the rule of law and government action should be employed and from which the public needs protection. Trump as a candidate and as a President has embraced a theme of highlighting risks to the populace from the press and calling for aggressive and unprecedented governmental retaliation against it.

For example, he has used his platform as President to argue against constitutional protections for reporters who use confidential sources, saying a removal of those protections would have the positive result of “drying up stories.”⁹⁹ Additionally, within a single week, ten months into his presidency, he tweeted that a congressional committee should investigate media outlets with which he had conflicts¹⁰⁰ and that a broadcast network should lose its license from the FCC, because “it is frankly disgusting the way the press is able to write whatever they want to write, and people should look into it.”¹⁰¹

Sometimes these delegitimization techniques are cast as threats of actions Trump himself might undertake to stifle the work of the press. He repeatedly and conspicuously spoke of a plan to “open up libel law” to make the media more susceptible to damages in libel suits.¹⁰² He threatened to sue *The New York Times* for publishing stories on his leaked tax returns¹⁰³ and stories

99. See CPAC Transcript, *supra* note 27 (“They shouldn’t be allowed to use sources unless they use somebody’s name. Let their name be put out there. Let their name be put out. . . . [A]nd they shouldn’t use [confidential] sources. They should put the name of the person. You will see stories dry up like you’ve never seen before.”).

100. 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>] (discussing a tweet urging the Senate Intelligence Committee to “look[] into the Fake News Networks in OUR country to see why so much of our news is just made up—FAKE!”).

101. See, e.g., 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>]; 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-newsidUSKBN1CG1WB> [<http://perma.cc/BQ8F-TV9U>].

102. Jacob Gershman, *Can Trump ‘Open Up’ Libel Laws*, WALL ST. J.: L. BLOG (Nov. 14, 2016, 4:14 PM), <http://blogs.wsj.com/law/2016/11/14/can-trump-open-up-libel-laws/>.

103. Joe Flint, *Donald Trump Criticizes Television News Executives*, WALL ST. J. (Nov. 22, 2016, 7:55 AM), <https://www.wsj.com/articles/donald-trump-to-meet-with-top-television-news-executives-1479749182>; David Folkenflik, *Donald Trump, Those Taxes and The New York Times*, NPR (Oct. 3, 2016), <http://www.npr.org/2016/10/03/496373010/donald-trump-those-taxes-and-the-new-york-times>.

quoting women who suggested he had sexually assaulted them.¹⁰⁴ These threats are not grounded in the reality of American media law—the President cannot unilaterally alter the standards in libel law, and clear case law from the U.S. Supreme Court holds that the First Amendment protects the media when it publishes materials of public concern that the newspaper lawfully obtained¹⁰⁵—but the assertions themselves, made by a charismatic executive, are powerful additional signaling tools. They signal that the press is an “other”—an entity not only unworthy of respect from the executive, but also likely to abuse any legal protections it is given and undeserving of the protections it has. Trump’s enemy construction of the press counters the existing constitutional and legal norms that signal a legitimate role in the democracy and replace them with a framework of threatening behavior and collective risk.

Finally, and equally telling, the Trump administration has employed the delegitimization technique of outreach to the public that is specifically designed to highlight the press’s enemy status and to reinforce the other enemy-construction rhetoric and behaviors. One notable example is the “Mainstream Media Accountability Survey,”¹⁰⁶ sent to supporters and posted on social media early in the administration. Criticized by social scientists as unsound as an actual data-gathering mechanism,¹⁰⁷ the survey asked participants to respond to loaded and leading questions that ask whether the mainstream media “reported unfairly,” “unfairly characterized” the religious, “has been far too quick to spread false stories,” and “has been too eager to jump to conclusions about rumored stories.”¹⁰⁸ These efforts are different than the mere use of press-as-enemy rhetoric, because they ask the public to engage the narrative and embrace its structure as a foundational truth about the entity being discussed.

104. Alan Rappoport, *Donald Trump Threatens to Sue The Times Over Article on Unwanted Advances*, N.Y. TIMES (Oct. 13, 2016), <https://www.nytimes.com/2016/10/14/us/politics/donald-trump-lawsuit-threat.html>.

105. *Bartnicki v. Vopper*, 532 U.S. 514, 527–28 (2001) (citing *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 102 (1979)).

106. *Mainstream Media Accountability Survey*, GOP, <https://gop.com/mainstream-media-accountability-survey/> (last visited Dec. 24, 2017) [hereinafter *Survey*].

107. See, e.g., Danielle Kurtzleben, *The Trump Media Survey Is Phenomenally Biased. It’s Also Useful*, NPR (Feb. 17, 2017, 1:13 PM), <http://www.npr.org/2017/02/17/515791540/the-trump-media-survey-is-phenomenally-biased-it-also-does-its-job-well>.

108. *Survey*, *supra* note 106.

3. Anticipatory Undercutting

Perhaps most significantly, Trump casts the press as an enemy by forecasting their bad acts and anticipatorily blaming them for the future bad acts of other enemies of the republic. He explicitly identifies the threats that he expects them to pose to the populace at large and anticipates their role as internal enemies that will inevitably aid external enemies. Identifying victims is key to enemy construction, and linking internal enemies to external ones is key to any persuasive internal-enemy construct. Trump and his administration have subtly but repeatedly engaged in this anticipatory undercutting of the press.

One of the Trump administration's most potent tools for anticipatorily undercutting the press is the accusation that the mainstream media is downplaying and minimizing the threat that "radical Islamic terrorism" poses to the United States and its allies—a threat that the Trump administration has called its "highest priority."¹⁰⁹ This narrative implies that the mainstream media is somehow aligned or even complicit with the enemy that the Trump administration has vowed to "eradicate completely from the face of the Earth"¹¹⁰ and recalls Schmitt's description of internal enemies as those who implicitly aid external enemies by refusing to recognize them as an "existential threat" to the community's "way of life."

In a February 6, 2017 speech in Florida to troops at MacDill Air Force Base, home to both the U.S. Central Command and the U.S. Special Operations Command,¹¹¹ Trump painted a dark picture of this threat against the United States and the western world:

We're up against an enemy that celebrates death and totally worships destruction. You've seen that. ISIS is on a campaign of genocide, committing atrocities across the world. Radical Islamic terrorists are determined to strike our homeland, as they did on 9/11, as they did from Boston to Orlando to San Bernardino and all across

109. *America First Foreign Policy*, WHITE HOUSE, <https://www.whitehouse.gov/america-first-foreign-policy> (last visited Dec. 24, 2017) ("Defeating ISIS and other radical Islamic terror groups will be our highest priority.").

110. *Inaugural Address: Trump's Full Speech*, CNN (Jan. 21, 2017), <http://www.cnn.com/2017/01/20/politics/trump-inaugural-address/> ("We will reinforce old alliances and form new ones—and unite the civilized world against radical Islamic terrorism, which we will eradicate completely from the face of the earth.").

111. David A. Graham, *Trump's Baseless Claim That the Media Covers Up Terror Attacks*, ATLANTIC (Feb. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-centcom-media-terror-cover-up/515823/>.

Europe. You've seen what happened in Paris and Nice. All over Europe it's happening.¹¹²

Trump then continued, "It's gotten to a point where it's not even being reported. And in many cases, the very, very dishonest press doesn't want to report it. They have their reasons and you understand that."¹¹³ After accusing the media of failing to report attacks, Trump declared that "today we deliver a message in one very unified voice to these forces of death and destruction. America and its allies will defeat you. . . . We will defeat radical Islamic terrorism. And we will not allow it to take root in our country."¹¹⁴ Continuing to draw strong battle lines between allies and enemies, he declared, "We need strong programs so that people that love us and want to love our country and will end up loving our country are allowed in. Not people that want to destroy us and destroy our country."¹¹⁵ The President's implication that the press had either sinister or self-interested motives for failing to report terrorist attacks suggests that he thinks they are aligned, not with those who "love us," but perhaps with those bent on our destruction.

While President Trump provided no specific examples of unreported terrorist attacks during his speech, the White House later released a list of seventy-eight terrorist incidents, many of which White House Press Secretary Sean Spicer said were "underreported"—rather than "unreported."¹¹⁶ Even before Trump's February 6 speech, however, a top Trump administration

112. Aric Jenkins, *Read President Trump's Speech Claiming the Press Doesn't Report Terror Attacks*, TIME (Feb. 6, 2017), <http://time.com/4661658/donald-trump-terror-attacks-speech-macdill-air-force-base/>.

113. *Id.*

114. *Id.*

115. *Id.*

116. John Wagner & Philip Rucker, *Here Are the 78 Terrorist Attacks the White House Says Were Largely Underreported*, WASH. POST (Feb. 6, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/02/06/here-are-the-78-terrorist-attacks-the-white-house-says-were-largely-under-reported/>; *WH Releases List of Terror Attacks It Claims Didn't Get Enough Coverage*, CBS NEWS (Feb. 6, 2017, 8:55 PM), <http://www.cbsnews.com/news/white-house-releases-list-of-terror-attacks-says-most-didnt-receive-media-attention-they-deserved/> (quoting Sean Spicer explaining that Trump "felt that members of media [didn't] always cover some of those events to the extent that other events might get covered . . . [l]ike a protest gets blown out of the water, and yet an attack or a foiled attack doesn't necessarily get the same coverage"); *id.* (quoting White House statement that "[t]here has been a major attack targeting the West executed or inspired by [ISIS] more than once every two weeks" yet "[m]ost have not received the media attention they deserved"). Another White House spokesperson, Lindsay Walters, later attempted to clarify that "the real point here is that these terrorist attacks are so pervasive at this point that they do not spark the wall-to-wall coverage they once did," a description which sounds significantly less accusatory than Trump's initial remarks. Wagner & Rucker, *supra*.

spokesperson had already suggested that the media had failed to report a terrorist attack on U.S. soil. Appearing on MSNBC's "Hardball," Kellyanne Conway, Trump's former campaign manager turned counselor to the President, responded to criticism of the immigration executive order by accusing the media of failing to cover a terrorist "massacre" that never occurred:

I bet it's brand new information to people that President Obama had a six-month ban on the Iraqi refugee program after two Iraqis came here to this country, were radicalized—and they were the masterminds behind the Bowling Green massacre. . . . [M]ost people don't know that because it didn't get covered.¹¹⁷

Conway later said that she had misspoken and intended to refer to a foiled terrorist plot, not a completed attack,¹¹⁸ even though she had twice cited the "attack" or "massacre" in earlier interviews.¹¹⁹

In July 2017, President Trump doubled down on his suggestion that the media is aligned with the enemies of the United States when he accused *The New York Times* of thwarting important counterterrorism efforts. In a July 22, 2017 tweet, Trump blamed the "Failing New York Times" and "[t]heir sick agenda over National Security" for "foil[ing a] U.S. attempt to kill the single most wanted terrorist, Al-Baghdadi."¹²⁰ This claim—which *The Times* vigorously contests¹²¹—suggests that the media is providing much more direct aid to the country's enemies than merely deflecting attention from terrorist attacks.

Many critics have suggested that the Trump administration is setting the stage to blame both the federal judiciary and the media for any future terrorist attacks against the U.S.¹²² After U.S. district court Judge James Robart issued

117. Bill Chappell, *Bogus 'Bowling Green Massacre' Claim Snarls Trump Adviser Conway*, NPR (Feb. 3, 2017, 9:53 AM), <http://www.npr.org/sections/thetwo-way/2017/02/03/513222852/bogus-bowling-green-massacre-claim-snarls-trump-adviser-conway>.

118. *See id.*

119. David Smith, *Kellyanne Conway's Fictitious 'Bowling Green Massacre' Not a One-Time Slip of the Tongue*, GUARDIAN (Feb. 6, 2017, 6:01 PM), <https://www.theguardian.com/us-news/2017/feb/06/kellyanne-conway-fake-bowling-green-massacre-three-times>.

120. Donald J. Trump (@realDonaldTrump), TWITTER (July 22, 2017, 3:45 AM), <https://twitter.com/realDonaldTrump/status/888711488717934592>.

121. Michael R. Gordon, *How Trump Got It Wrong in Saying The Times Foiled Killing of ISIS Leader*, N.Y. TIMES (July 23, 2017), <https://www.nytimes.com/2017/07/23/us/politics/trump-tweet-new-york-times-national-security.html>.

122. *See, e.g.,* Philip Rucker, *'If Something Happens': Trump Points His Finger in Case of a Terrorist Attack*, WASH. POST (Feb. 6, 2017), <https://www.washingtonpost.com/politics/if->

a temporary restraining order preventing the implementation of Trump's January 27, 2017 executive order on immigration,¹²³ Trump tweeted: "Just cannot believe a judge would put our country in such peril. If something happens blame him and court system. People pouring in. Bad!"¹²⁴ Likewise, Trump's narrative that the media limits coverage of terrorist attacks and pursues its own "sick agenda" that aids terrorists suggests that they—at least at times—side with those who are against us, rather than for us, and positions them as potential internal enemies who can be blamed for making it easier for terrorists to inflict harm on U.S. citizens and interests.

C. Distinguishing Enemy Construction of the Press from Press Tension

Thoughtful observers of modern presidential history will note that many presidents have had their own tensions with the media and made their own unflattering comments about the press. Commentators who argue that the Trump press treatment is overblown have highlighted these historical conflicts, and they assert that Trump's anti-press rhetoric and behavior is no different.¹²⁵ All presidents are at war with the press, they suggest, and only the fervor of modern politics drives allegations that Trump's press situation is unprecedented.¹²⁶ This is an important inquiry, and for purposes of understanding the scope and contours of our enemy construction argument, we must examine why Trump's accumulated body of press rhetoric and media treatment crosses a line not crossed by previous presidents. That is, the current situation is different in kind, and not just in degree, from past press-

something-happens-trump-points-his-finger-in-case-of-a-terror-attack/2017/02/06/8e315b78-eca6-11e6-9662-6eedf1627882_story.html ("President Trump appears to be laying the groundwork to preemptively shift blame for any future terrorist attack on U.S. soil from his administration to the federal judiciary, as well as to the media.").

123. Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) (*revoked by* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017)).

124. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 5, 2017, 12:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800>.

125. D.C. McAllister, *Sorry, Journalists: Trump Isn't the First President to Threaten the Press*, FEDERALIST (Jan. 24, 2017), <http://thefederalist.com/2017/01/24/sorry-journalists-trump-isnt-first-president-threaten-press/> (arguing that "[t]he press is hyperventilating" and that "Trump is not, by any stretch of the imagination, the first president to wage war on the press. Yet the Republic has survived").

126. *Id.* (noting "there have been presidents in the past who lied with a smile, who silenced the press with a finger to the lips or a cup to the ear, who used modern technology to their advantage," and arguing that "[p]residents are going to wage war against the press" and "[i]nstead of whining about it, labeling it 'unprecedented,' or calling for media solidarity, journalists should do their jobs—not in the name of social justice or personal pride, but in the name of truth on behalf of the American people").

President hostilities, and thus the risks presented by that situation are more severe.

1. Press-President Tensions

Modern press-President relations are riddled with examples of antagonism between the two—and with efforts by presidents to control, manipulate, or combat the work of the press.¹²⁷ John F. Kennedy regularly pushed back at the press and, particularly on matters of foreign policy and national security, insisted that the “deadly challenge” facing the country warranted significant limitations on what the government shared with the press and even on what the press shared with the people.¹²⁸ Lyndon B. Johnson famously engaged in “never-tiring efforts to manipulate, seduce, and punish them.”¹²⁹ Gerald Ford tightly controlled his presidential image during campaign years, stonewalling the Washington media and opting “to answer only the more uninformed questions posed by local reporters wherever he traveled.”¹³⁰ “Intensely private” Jimmy Carter “proved his ability to elude newsmen almost at will,” and his administration sometimes overtly lied to the press about his whereabouts.¹³¹ Ronald Reagan, “prone to making gaffes,” had a staff that imposed bans on questions in certain settings, restricted press access to “[no] more than one tightly controlled appearance per day,” and deliberately

127. Richard Harris, *The Presidency and the Press*, NEW YORKER (Oct. 1, 1973), <https://www.newyorker.com/magazine/1973/10/01/the-presidency-and-the-press> (discussing the consistent criticism by the press of presidents throughout history and administrative attempts at quashing opposition through prosecution of reporters, threats, and attempts to censor and to undermine credibility).

128. See, e.g., John F. Kennedy, President of the U.S., Address to the American Association of Newspaper Editors (Apr. 20, 1961), in *April 20, 1961: Address to the American Association of Newspaper Editors*, UVA MILLER CTR., <https://millercenter.org/the-presidency/presidential-speeches/april-20-1961-address-american-association-newspaper-editors> (last visited Dec. 29, 2017).

129. BRIGITTE LEBENS NACOS, *THE PRESS, PRESIDENTS, AND CRISES* 82 (1990); see also JOHN TEBBEL & SARAH MILES WATTS, *THE PRESS AND THE PRESIDENCY* 489 (1985) (noting that Johnson’s behavior toward the press left “scarcely one redeeming feature to permit a charitable conclusion”).

130. JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* 4 (1984).

131. *Id.* at 3 (describing how Carter’s staff lied to the media by claiming Carter “was at the executive mansion when he was in fact at the opera” and how Carter had Secret Service lead the press “on wild goose chases in Carter’s car while Carter sped off in the opposite direction in a different vehicle”).

impeded questioning of the President.¹³² George W. Bush sometimes viewed the media as “an unrepresentative, irresponsible interest group,”¹³³ and his Press Secretary once accused *The New York Times* of “gross negligence” and “reporting failures.”¹³⁴

Pundits have also emphasized that President Trump’s immediate predecessor, Barack Obama, had what most media law experts agree was a dismal record on press freedom.¹³⁵ Among other things, the Obama administration threatened prosecution of journalists in connection with government leaks, pursued criminal charges against more whistleblowers than all previous presidents combined, seized records of more than twenty Associated Press phone lines, and actively criticized major newspapers for their use of confidential sources.¹³⁶

Undoubtedly, the modern President whose struggles with and challenges against the press show the most parallels to Trump’s is Richard Nixon. Commentators on Trump and the press have regularly argued that Trump’s approach echoes Nixon’s.¹³⁷ This is true in a number of notable ways.

132. *Id.* at 4–5, 10 (describing administration efforts to have “known friendlies” at news conferences and to drown out questions by starting the engine of the presidential helicopter before the President appeared).

133. Jon Marshall, *Nixon Is Gone, but His Media Strategy Lives On*, ATLANTIC (Aug. 4, 2014), <http://www.theatlantic.com/politics/archive/2014/08/nixons-revenge-his-media-strategy-triumphs-40-years-after-resignation/375274/>; see also Ken Auletta, *Fortress Bush*, NEW YORKER (Jan. 19, 2004), <https://www.newyorker.com/magazine/2004/01/19/fortress-bush> (discussing the distance that the George W. Bush Administration maintained with the press because of Bush’s view that the press was not on his side).

134. Marshall, *supra* note 133.

135. *Id.*; 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>; Mary Katharine Ham, *Trump’s Presser Shows Media Double Standard on Politicians Attacking the Press*, FEDERALIST (Jan. 12, 2017), <http://thefederalist.com/2017/01/12/trumps-presser-shows-media-double-standard-politicians-attacking-press/>.

136. Marshall, *supra* note 133 (“In July, Obama spokesman Josh Earnest criticized the *Washington Post* for using anonymous sources even as the White House insisted its own officials remain anonymous during a phone interview with reporters.”).

137. See Mark Feldstein, *Trump’s War on the Media Carries Chilling Echoes of Nixon*, WASH. POST (June 16, 2016), https://www.washingtonpost.com/opinions/in-trumps-war-on-the-media-chilling-echoes-of-nixon/2016/06/16/837d6bd8-3318-11e6-95c0-2a6873031302_story.html?utm_term=.7bb2b425387; Mollie Reilly, *Donald Trump Calls the Media ‘the Enemy of the American People,’* HUFFINGTON POST (Feb. 17, 2017, 5:10 PM), http://www.huffingtonpost.com/entry/donald-trump-media-tweet_us_58a76de7e4b037d17d27cab9 (“NBC News presidential historian Michael Meschloss pointed out how Trump’s rhetoric echoed President Richard Nixon’s during the Watergate scandal.” (citing Michael Beschloss (@BeschlossDC), TWITTER (Feb. 17, 2017, 3:06 PM), <https://twitter.com/BeschlossDC/status/832712935956885505>)); Avi Selk & Kristine Phillips,

Nixon, like Trump, accused the media of being out to get him¹³⁸ and predicted that the press would mischaracterize his public support or the reception he received.¹³⁹ He believed the liberal media to be biased against him personally,¹⁴⁰ maintaining that he had “entered the Presidency with less support from the major publications and TV networks than any President in history” and that “their whole objective in life is to bring us down.”¹⁴¹ Like Trump, Nixon employed war and enemy terminology to characterize the relationship. In his 1978 memoir, Nixon wrote that he “considered the influential majority of the news media to be part of my political opposition” and that he “was prepared to have to do combat with the media.”¹⁴² Within the Oval Office, Nixon “regularly referred to the media as ‘the enemy,’” and “put journalists . . . on his ‘enemies list.’”¹⁴³ His aides recalled him saying that “our worst enemy seems to be the press.”¹⁴⁴ Like Trump, Nixon suspected the press was biased and even disloyal in its reporting—privately

Watergate Reporter Carl Bernstein: Trump’s Attacks on the Press Are More Dangerous than Nixon’s, WASH. POST (Feb. 19, 2017), <https://www.washingtonpost.com/news/the-fix/wp/2017/02/19/watergate-reporter-carl-bernstein-trumps-attacks-on-the-press-are-more-dangerous-than-nixons/>.

138. Marshall, *supra* note 133 (“[P]erpetually insecure Nixon was sure reporters were out to get him. After voters rejected his 1962 bid to become California’s governor, he accused journalists of being ‘delighted that I lost’ . . .”).

139. See WILLIAM E. PORTER, ASSAULT ON THE MEDIA: THE NIXON YEARS 193 (1976) (describing how during his last public appearance as president, when he was greeted with standing applause from several hundred people, Nixon predicted that the press would report that it was “arrange[d]”).

140. Debra Gersh Hernandez, *Nixon and the Press*, 127 EDITOR & PUBLISHER 82, 86 (1994) (“Some of the problems were simply institutional But in my case the problems were more than just institutional.” (quoting RICHARD NIXON, THE MEMOIRS OF RICHARD NIXON 354 (Touchstone 1990) (1978))); David L. Paletz & Robert M. Entman, *Presidents, Power, and the Press*, 10 PRESIDENTIAL STUD. Q. 416, 421 (1980).

141. Chester Pach, “*Our Worst Enemy Seems to be the Press*”: *TV News, the Nixon Administration, and U.S. Troop Withdrawal from Vietnam, 1969–1973*, 34 DIPLOMATIC HIST. 555, 556 (2010) (citing Memorandum from Richard Nixon, President, U.S., to H.R. Haldeman, Chief of Staff, White House (Jan. 6, 1970) [hereinafter Nixon Memorandum] (on file with the Nixon Library and Museum)).

142. Hernandez, *supra* note 140, at 86.

143. Finer, *supra* note 1; see also Selk & Phillips, *supra* note 137 (quoting Nixon as telling Adm. Thomas H. Moorer, chairman of the Joint Chiefs of Staff that “[t]he press is your enemy” and to “never treat them nice” because they are always “trying to stick a knife right in our groin”).

144. WILLIAM M. HAMMOND, PUBLIC AFFAIRS: THE MILITARY AND THE MEDIA, 1968–1973, at 460 (1996) (“Passing the compliment to Bunker, Henry Kissinger noted, ‘The president made the additional comment that our worst enemy seems to be the press.’”); *id.* at 620 (“‘Our worst enemy seems to be the press!’ Nixon had exclaimed during the 1971 incursion into Laos, but his comment oversimplified a matter of the greatest complexity.”).

suggesting that the media was hoping that the U.S. would fail in Vietnam¹⁴⁵ and at one point instructing his aides that “the discrediting of the press must be our major objective.”¹⁴⁶

In at least some communications with the public, the Nixon administration did employ rhetoric designed to undermine the press as an institution. It strategically decided to start referring to reporters as “the media,” which it concluded had a more ominous and negative connotation than “the press.”¹⁴⁷ Nixon urged his Vice President, Spiro Agnew, to give speeches subtly undermining the media, saying the “small and unelected elite” of journalists held a “concentration of power over American public opinion unknown in history,”¹⁴⁸ referring to television news executives as “a tiny, enclosed fraternity,”¹⁴⁹ and referencing “a widening credibility gap . . . between the national news media and the American people.”¹⁵⁰

Nixon took steps to inconvenience the press and limit its access, moving reporters out of west lobby of the White House into newer quarters that impeded their observations¹⁵¹ and giving far fewer press conferences than his immediate predecessors.¹⁵² Beyond this, the President and his close advisors

145. Pach, *supra* note 141, at 559 (describing a conversation with his aides in the Oval Office in which Nixon stated that journalists wanted “the operation to fail since they oppose it and predicted it would fail”); *id.* at 564 (describing a 1972 memorandum to H.R. Haldeman, in which Nixon wrote that journalists had “a vested interest in seeing the United State lose the war” and were “doing their desperate best to report all the bad news and to downplay all the good news”).

146. *Id.* at 564.

147. Marshall, *supra* note 133.

148. Feldstein, *supra* note 137.

149. Pach, *supra* note 141, at 557.

150. *Id.* at 560.

151. PORTER, *supra* note 139, at 65 (“The whole purpose is to cut the press off from the flow of visitors to the White House.”).

152. *Id.* at 159 (noting that in 1971 Nixon answered press questions nine times, while presidents in the preceding twenty-five years had done so between twenty-four and thirty-six times a year); *see also* Kira Brekke, *How Nixon Ruined the Relationship Between the White House and the Press*, HUFFINGTON POST (Aug. 7, 2014, 05:05 PM), http://www.huffingtonpost.com/2014/08/07/nixon-white-house-relationship-with-press_n_5659158.html (containing audio of Nixon threatening to fire his Press Secretary if reporters were given White House access for purposes other than briefings, saying “I want it clearly understood from now on, ever, no reporter from the Washington Post is ever to be in the White House. Is that clear?”).

internally mocked¹⁵³ and privately targeted,¹⁵⁴ scolded,¹⁵⁵ pressured,¹⁵⁶ and intimidated¹⁵⁷ individual journalists. In a move Trump would later mirror, Nixon invited top broadcast officials to the White House and berated them, saying “your reporters just can’t stand the fact that I am in this office.”¹⁵⁸ His Press Secretary told these “anti-Nixon” networks that they would “pay for that, sooner or later, one way or another.”¹⁵⁹ In the years that followed, the administration would seek an injunction against major newspapers’ publication of the Pentagon Papers¹⁶⁰ and “d[o] everything [it] could to intimidate The Washington Post into dropping the Watergate investigation,”¹⁶¹ demonstrating a willingness to aggressively push back against newsgatherers.

2. Distinguishing Tensions from Enemy Construction

Despite these significant patterns of presidential tension with the press, no President before Donald Trump has engaged in full enemy construction in

153. See Pach, *supra* note 141, at 556 (stating that Nixon, when referring internally to a CBS News correspondent, said “[h]e’s a Communist” (citing Nixon Memorandum, *supra* note 141)); David Wise, *The President and the Press*, ATLANTIC, Apr. 1973, <https://www.theatlantic.com/magazine/archive/1973/04/the-president-and-the-press/305573/> (describing sardonic references to Dan Rather).

154. Marshall, *supra* note 133 (“Nixon read a summary of each morning’s news and then directed his staff how to respond, noting in the margins which reporters he liked and disliked. When Stuart Loory of the *Los Angeles Times* wrote about how much Nixon’s vacation home cost taxpayers, the president angrily told his staff to ban Loory from the White House.”).

155. Wise, *supra* note 153 (describing how Nixon aides sought out CBS correspondent Daniel Schorr for criticism at an event and confronted Dan Rather about his reporting).

156. *Id.* (“There is a constant pattern of pressure intended to inhibit us. What the lawyers call a chilling effect. To make us unconsciously pull in our horns.”).

157. PORTER, *supra* note 139, at 3 (describing “attacks intended to damage the credibility not of a single journalist but of whole classes of them; to intimidate publishers and broadcast ownerships; and, almost unthinkably, to establish in American jurisprudence the legality of censorship”); Marshall, *supra* note 133 (“Intimidating journalists, avoiding White House reporters, staging events for television—now common presidential practices—were all originally Nixonian tactics.”); see Paletz & Entman, *supra* note 140, at 420 (“Only the Nixon administration undertook a concerted, extended effort to punish—to assault—the press.”); Feldstein, *supra* note 137 (describing how a top Nixon adviser told the head of CBS News that Nixon’s administration would “bring you to your knees” and “break your network”).

158. Feldstein, *supra* note 137.

159. *Id.*

160. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971). For discussion of Nixon’s approach to the case, see PORTER, *supra* note 139, at 81–105.

161. Finer, *supra* note 1.

the Schmittian sense. Trump's relationship crosses that line in ways that other presidents' have not, for at least two significant reasons.

First, other presidents' critiques of and challenges to the press have largely been isolated and incidental, rather than sweeping and categorical. While criticizing the behaviors of the press and imposing limitations on the press are rhetorical and signaling tools in enemy construction, they are necessary but not sufficient conditions of that construction. Viewed as a whole, every previous administration has engaged in those critiques and imposed those limitations within an overarching framework that signaled the press remained a legitimate institution—just one whose performance within that legitimate sphere was disappointing, antagonizing, or even infuriating.¹⁶² This legitimate-but-bothersome characterization is fundamentally different from an illegitimate-and-enemy one. The central feature of a Schmittian enemy is that it is an “other”—symbolically and rhetorically banished to a sphere outside the cooperative body politic.¹⁶³ Every previous President has maintained an overarching tone of legitimacy and insider treatment of the press.

Even Nixon, whose conflicts with the press were both extensive and shockingly parallel to some of Trump's, experienced those conflicts episodically over the course of an entire troubled presidency. While he regularly used “enemy” terminology in his inner circle, he routinely reaffirmed to both the press and the public that he conceived of the press as an institution of value to the populace and as central to democracy.

Indeed, in his first speech to the public regarding the Watergate scandal, Nixon acknowledged that “the system that brought the facts to light and that will bring those guilty to justice” was a system that included “a vigorous free press.”¹⁶⁴ Speaking to reporters in the aftermath of that speech, he said, “We've had differences in the past, and just continue to give me hell when you think I'm wrong. I hope I'm worthy of your trust.”¹⁶⁵ In keeping with this theme, on topics like the right of reporters to protect confidential sources and the limitations of government in subpoenaing them, Nixon recognized the need to shield journalists from those pressures and accepted a societal role played by journalists—even those whose coverage he might perceive as

162. Editorial, *Trump's War on Journalism*, L.A. TIMES (Apr. 5, 2017), <http://www.latimes.com/projects/la-ed-trumps-war-on-journalism/> (“Most presidents, irritated as they may have been, have continued to acknowledge—at least publicly—that an independent press plays an essential role in American democracy.”).

163. *Finer*, *supra* note 1.

164. PORTER, *supra* note 139, at 1.

165. *Id.* at 2.

unfair.¹⁶⁶ Even when directing his aides not to provide journalists with information, Nixon suggested that he respected the role the press was trying to play: “I respect people that are trying to kill me,” he famously said, “I don’t give them the knife.”¹⁶⁷ All told, the pattern for Nixon was a begrudging and belligerent acknowledgment of the press’s structural role and the validity of its institutional position.

Nixon may well not have believed in this role, but, as one Nixon scholar put it, he “almost always presented a respectable facade.”¹⁶⁸ The point is that pretense and impression matter in the realm of enemy construction. This is because even insincere support for a feigned insider—if it overwhelmingly dominates the communication about the subject—conveys to both that insider and the observing public that the entity, despite its troubled relationship with the government, operates within the protective zone of institutional legitimacy and not as an outsider enemy. This approach stands in contrast to the overarching enemy-focused tone and the consistent institutional delegitimization by the Trump administration.

Second, other presidents’ critiques of and challenges to the press—especially those that went the full distance toward labeling the press an “enemy” or using other especially inflammatory and adversarial language—were private, rather than public. Schmitt’s core “struggle against the enemy”¹⁶⁹ is a public struggle, and the enemy with which he is concerned is expressly *not* a “private adversary whom one hates.”¹⁷⁰ The public enemy that President Trump is constructing of the press is an enemy “fighting [the] collectivity of people,” and this renders it fundamentally different in kind from any previous presidential conception of the press as a private nemesis, no matter how confrontational, accusatorial, or vindictive. A key Schmittian concept is that “my” enemy, or “the enemy of this administration,” is fundamentally different than a characterization as “the enemy of the people.” In this way, Trump stands in stark contrast to Nixon, whose rivalry with the press, although it played out on an important national stage, was self-defined as personal.¹⁷¹

166. *Id.* at 118 (“When you go, however, to the question of subpoenaing the notes of reporters, when you go to the question of Government action which requires the revealing of sources, then I take a very jaundiced view of that kind of action. . . . But as far as the subpoenaing of notes are concerned, a reporter’s, as far as bringing any pressure on the networks as the Government is concerned, I do not support that.”).

167. Pach, *supra* note 141, at 559.

168. Feldstein, *supra* note 137.

169. Kateb, *supra* note 11, at 132.

170. SCHMITT, *supra* note 10, at 28.

171. Hernandez, *supra* note 140, at 85.

Trump's enemy construction is public not only in the sense that the enemy he has announced is a public enemy and not merely a personal one,¹⁷² but also in the sense that his audience for enemy construction is broad and unrestricted. He has made it his unabashed agenda to publicize his rhetorical framing, his delegitimizing treatment, and his anticipatory undercutting of the press. Contemporary reports from the Nixon era make clear that "much of the pressure by government . . . t[ook] place out of public view" and "the telephone calls from White House assistants and the visits to network executives by presidential aides [were] seldom publicized."¹⁷³ As observers of Nixon have noted, he "saved his most biting commentary for the seclusion of the Oval Office,"¹⁷⁴ and when he declared the press an "enemy" to be feared, distrusted, combatted, or ostracized, he most often "was talking to one person" in "comments [that] wouldn't be made public until later."¹⁷⁵ We know about Nixon's rhetoric and understand the nature of Nixon's ire against the press primarily from memoranda, audio recordings, and Nixon's own memoirs released well after he left the presidency. In contrast, Trump is the current President, speaking directly to the public in his capacity as chief executive, and delivering to it a clear narrative about a public enemy. Indeed, he has made that narrative and its accompanying delegitimizing behaviors a public centerpiece of his governance. It is the very definition of the construction of a Schmittian enemy "other" to communicate to those who are "inside" that the despised, existentially different entity is on the outside and ought to cease to maintain its previous political existence.¹⁷⁶

III. THE EMERGENT VULNERABILITY OF THE MAINSTREAM MEDIA TO ENEMY CONSTRUCTION

A generation ago, it would have been virtually unthinkable for a U.S. President to engage in a sustained and unrelenting attempt to construct the mainstream media as an enemy of the American people. Indeed, even though, as just described, President Nixon shared many of President Trump's inclinations to vilify the press—particularly in his private dealings—he apparently made the calculation that he was unlikely to prevail in a fully

172. Indeed, Trump's initial tweet on the subject expressly rejected the premise that the enemy relationship was his. *See* Trump, *supra* note 4 ("The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!").

173. Wise, *supra* note 153.

174. Finer, *supra* note 1.

175. Selk & Phillips, *supra* note 137.

176. SCHMITT, *supra* note 10, at 49.

public war against the media. Today, however, such an attempt is much more possible than in the past. The mainstream media is now far more vulnerable to enemy construction because both its financial resources and its public reputation are substantially diminished. Even some Justices of the Supreme Court—charged with protecting First Amendment values—are significantly more skeptical today about the media’s contribution to civic affairs. Moreover, the President can now, more than at any other time in history, speak directly to the American people; accordingly, he is no longer compelled to preserve some relationship with the press—or some modicum of press credibility—so that the press can serve as an effective intermediary for the President’s own public message.

The last two decades have witnessed a dramatic decline in both the audience and the financial prospects of mainstream American news organizations.¹⁷⁷ The demise of newspapers, in particular, has been so precipitous and ubiquitous that it has inspired the aptly named “Newspaper Death Watch” website, the most recent edition of which reported that *The New York Times*’ “advertising business is in free-fall” and that budget shortfalls at *The Wall Street Journal* have forced the paper to streamline sections and lay off substantial numbers of staff.¹⁷⁸

This dramatic realignment of the traditional news media—driven by fundamental changes in the way people access news in the internet age and by the concomitant disaggregation both of the media itself and the services it has traditionally provided—means that the mainstream media today has many fewer financial resources to fend off attacks on its credibility and legitimacy.¹⁷⁹ Even when the media’s First Amendment rights are quite directly at stake, newspapers often lack the financial wherewithal to protect their interests. A recent survey of editors at the nation’s leading news organizations found that sixty-five percent of responding editors believed “the news industry [is] ‘less able’ to pursue legal activity around First-Amendment related issues than it was 10 years ago,” and that more than half agreed that “[n]ews organizations are no longer prepared to go to court to preserve First Amendment freedoms.”¹⁸⁰ These concerns were not merely hypothetical or abstract: “Some 44 percent of the editors said their own news

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

178. Paul Gillin, *Bad News on the Doorstep*, NEWSPAPER DEATH WATCH (Nov. 3, 2016, 8:21 PM), <http://newspaperdeathwatch.com/bad-news-on-the-doorstep/>.

179. See Jones, *supra* note 177, at 562–70.

180. Eric Newton, *A News Industry ‘Less Able’ to Defend Freedom*, JOHN S. & JAMES L. KNIGHT FOUND. (Apr. 21, 2016), <https://www.knightfoundation.org/articles/news-industry-less-able-defend-freedom>.

organizations were less likely to [sue to vindicate access rights or other press freedoms] than in the past.”¹⁸¹ When queried, nine out of ten editors said the explanation was “money.”¹⁸² The diminished financial resources of the media leave them far more vulnerable to enemy construction than has historically been the case.

In addition to the more vulnerable financial position of the media, the mainstream media is more susceptible to enemy construction today because its public reputation has already been substantially diminished by its own missteps—including reporting of faulty forecasting during the presidential election—and by a sustained attack from conservative media, particularly conservative talk radio. According to Gallup polling, Americans’ trust in the media has plummeted to its lowest point since Gallup began polling on media confidence levels in 1972.¹⁸³ Just thirty-two percent of Americans report that “they have a great deal or fair amount of trust” that the media will “report the news fully, accurately and fairly”¹⁸⁴—down from forty percent just the year before. Even more striking, trust among those who identify as Republicans dropped even more precipitously—from thirty-two percent in 2015 to just fourteen percent in 2016 expressing “a great deal or fair amount of trust” in the mass media.¹⁸⁵

While perceived bias in the media’s coverage of the 2016 presidential election cycle may help explain the most recent drops in public confidence,¹⁸⁶ the decline is nonetheless part of a long-term trend.¹⁸⁷ Americans’ trust and confidence in the media peaked in the mid-1970s at seventy-two percent during the heyday of the “investigative journalism” of Vietnam and Watergate.¹⁸⁸ Then, “[a]fter staying in the low to mid-50s through the late 1990s and into the early years of the new century, Americans’ trust in the media has fallen slowly and steadily” and “has consistently been below a majority level since 2007.”¹⁸⁹

Some of the wounds to the media’s stature and reputation are arguably self-inflicted. Press critics have asserted that the media’s “need to compete for ratings” has fed an “obsession with non-news, frivolity, and

181. *Id.*

182. *Id.*

183. Art Swift, *Americans’ Trust in Mass Media Sinks to New Low*, GALLUP NEWS (Sept. 14, 2016), <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx>.

184. *Id.*

185. *Id.*

186. *See id.*

187. *See id.*

188. *Id.*

189. *Id.*

entertainment.”¹⁹⁰ Moreover, others have criticized what they view as increasing partisanship among media outlets—particularly the rise of more obviously partisan cable news networks like MSNBC and Fox News.¹⁹¹

Indeed, academic studies about the degree of partisanship of mainstream news outlets like *The New York Times* and *The Wall Street Journal* suggest that mainstream news outlets generally lean to the left,¹⁹² and there is little doubt that many citizens view the mainstream media as politically partisan. A 2009 Pew Research Center poll, for example, “found that 74 percent of respondents believe stories tend to favor one side of an issue over another, up from 66 percent” in 2007.¹⁹³

Even the U.S. Supreme Court, charged with protecting constitutional press freedoms, has adopted a far less positive tone in its descriptions of the media and the media’s role.¹⁹⁴ In recent years, the Court has shifted from “largely favorable and praising depictions of the press to largely distrusting and dismissive ones.”¹⁹⁵ Like American citizens, the Court seems far less persuaded than it once was that the press has a vital and irreplaceable role to play in American society and governance.¹⁹⁶

190. David L. Geary, *The Decline of Media Credibility and Its Impact on Public Relations*, PUB. REL. Q., Fall 2005, at 8, 10; see also Matthew Ingram, *Here’s Why the Media Failed to Predict a Donald Trump Victory*, FORTUNE (Nov. 9, 2016, 12:37 PM), <http://fortune.com/2016/11/09/media-trump-failure/> (arguing that in “the current media landscape . . . mainstream media outlets are desperate for revenue and reliant on a click-based or eyeball-based business model” that encourages sensationalist coverage).

191. See, e.g., *Study: More Think News Stories Are Biased*, NBC NEWS (Sept. 14, 2009, 4:27:20 AM), http://www.nbcnews.com/id/32832992/ns/us_news-life/t/study-more-think-news-stories-are-biased/ [hereinafter *Study*].

192. See, e.g., Tim Groseclose & Jeffrey Milyo, *A Measure of Media Bias*, 120 Q.J. ECON. 1191, 1191 (2005) (using the number of times that a particular media outlet cites various think tanks and policy groups to determine its political leaning and finding that the mainstream media has a strong liberal bias); see also TIM GROSECLOSE, LEFT TURN: HOW LIBERAL MEDIA BIAS DISTORTS THE AMERICAN MIND 97–197 (2012) (arguing that mainstream media has a liberal bias and that the conservative outlets lean less to the right than the rest of the media leans to the left).

193. *Study*, *supra* note 191. The widespread adoption of a more “interpretive” style of reporting, which provides more analysis of news events, may have contributed to this perception. See, e.g., James L. Baughman, *The Fall and Rise of Partisan Journalism*, U. WISCONSIN-MADISON CTR. FOR JOURNALISM ETHICS (Apr. 20, 2011), https://ethics.journalism.wisc.edu/2011/04/20/the-fall-and-rise-of-partisan-journalism/#_edn14.

194. RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 255 (2014).

195. *Id.*

196. See *id.*

Additionally, much like the European press after the Brexit vote,¹⁹⁷ the mainstream news media in the U.S. suffered another serious blow to its credibility when it reported predictions about the presidential race that turned out to be wildly mistaken. As one conservative commentator explained, “The news media’s spectacular failure to get the election right has made it only easier for many conservatives to ignore anything that happens outside the right’s bubble and for the Trump White House to fabricate facts with little fear of alienating its base.”¹⁹⁸ Indeed, that the media’s sense of the facts on the ground during the election was so demonstrably, incontrovertibly wrong seems to have reinforced perceptions among more conservative voters that the press was extremely biased against Trump and that the mainstream media’s fact-finding is not to be trusted. Trump himself has frequently launched his tirades against the press with searing indictments of the media’s election coverage.¹⁹⁹ The post-election self-flagellation²⁰⁰ in many quarters of the media lends credence to Trump’s narrative that the media is untrustworthy, biased, and out-of-touch.

197. James Hohmann, *The Daily 202: Why Trump Won—and Why the Media Missed It*, WASH. POST (Nov. 9, 2016), <https://www.washingtonpost.com/news/powerpost/paloma/daily-202/2016/11/09/daily-202-why-trump-won-and-why-the-media-missed-it/5822ea17e9b69b6085905dee/>; David Millward, *How the Pollsters Got the US Election Wrong—Just Like Brexit*, TELEGRAPH (Nov. 9, 2016, 5:34 AM), <http://www.telegraph.co.uk/news/2016/11/09/how-the-pollsters-got-the-us-election-wrong---just-like-brexit/>; Jim Rutenberg, *A ‘Dewey Defeats Truman’ Lesson for the Digital Age*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/09/business/media/media-trump-clinton.html>.

198. Charles J. Sykes, Opinion, *Why Nobody Cares the President Is Lying*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/opinion/sunday/why-nobody-cares-the-president-is-lying.html>.

199. See, e.g., CPAC Transcript, *supra* note 27 (alleging that “very dishonest” reporters “make it up, and they make up something else, and you saw that before the election—polls, polls”).

200. See, e.g., Rutenberg, *supra* note 197 (arguing that “[t]he misfire” on election “night was about a lot more than a failure in polling” but rather “a failure to capture the boiling anger of a large portion of the American electorate that feels left behind by a selective recovery, betrayed by trade deals that they see as threats to their jobs and disrespected by establishment Washington, Wall Street and the mainstream media”); *id.* (“Journalists didn’t question the polling data when it confirmed their gut feeling that Mr. Trump could never in a million years pull it off. They portrayed Trump supporters who still believed he had a shot as being out of touch with reality. In the end, it was the other way around.”); Will Rahn, *Commentary: The Unbearable Smugness of the Press*, CBS NEWS (Nov. 10, 2016, 6:00 AM), <http://www.cbsnews.com/news/commentary-the-unbearable-smugness-of-the-press-presidential-election-2016/> (arguing that the media got the election so wrong because of “its unbearable smugness,” the fact that “with a few exceptions, we were all tacitly or explicitly #WithHer,” and because of the media’s complete disrespect and lack of understanding for Trump voters).

Since the election, the perception of media bias has also been reinforced by a “string of high-profile corrections and retractions by major news organizations on stories about President Trump or his allies.”²⁰¹ For example, within a stretch of a few days at the end of June 2017, *The New York Times*, the Associated Press, and CNN were forced to either retract or correct reporting criticizing the Trump administration.²⁰² Other serious errors have likewise undermined the media’s credibility, even though the total number of affected stories was small.²⁰³

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. One “leading voice in conservative radio” who, after close to twenty-five years behind the microphone, left talk radio shortly after Trump’s election,²⁰⁴ recently opined in *The New York Times* that the relentless conservative-talk-show attack on “the mainstream media for its bias and double standards” had the “cumulative effect” of “delegitimiz[ing] those outlets and essentially destroy[ing] much of the right’s immunity to false information.”²⁰⁵ Conservative media intended, he asserted, to “creat[e] a savvier, more skeptical audience,” but

201. Jonathan Easley, *Media Errors Give Trump Fresh Ammunition*, HILL (July 4, 2017, 11:19 AM), <http://thehill.com/homenews/media/340564-media-errors-fuel-trump-attacks>.

202. Becket Adams, Opinion, *A Rather Large New York Times Correction*, WASH. EXAMINER (June 30, 2017, 12:01 AM), <http://www.washingtonexaminer.com/a-rather-large-new-york-times-correction/article/2627527> (reporting that *The New York Times* had to correct an assertion that all “17 American intelligence agencies” agreed that Russia had orchestrated election attacks, when only four had reached that conclusion); Michael M. Grynbaum, *A Costly Retraction for CNN and an Opening for Trump*, N.Y. TIMES (June 27, 2017), <https://www.nytimes.com/2017/06/27/business/media/cnn-retracted-story-on-trump.html> (reporting that “CNN was forced to apologize after retracting a story on its website that a Russian bank linked to a close ally of President Trump was under Senate investigation” and that “[t]hree high-ranking journalists at the network resigned”); Easley, *supra* note 201 (reporting the Associated Press’s correction of “four stories that had run from early April to late June” making the same assertion about seventeen American intelligence agencies).

203. Easley, *supra* note 201; *see also* Rowan Scarborough, *James Comey Debunks New York Times Story that Fueled Unproven Trump-Russia Collusion*, WASH. TIMES (June 8, 2017), <http://www.washingtontimes.com/news/2017/jun/8/james-comey-debunks-new-york-times-story-fueled-un/> (“A major New York Times story that helped spawn the unproven Trump-Russia collusion narrative for months in Washington was debunked Thursday by former FBI Director James B. Comey.”).

204. *All Things Considered: Radio Host Charlie Sykes on Being a ‘Contrarian Conservative’ in the Age of Trump*, NPR (Dec. 18, 2016, 4:59 PM), <http://www.npr.org/2016/12/18/506076747/radio-host-charlie-sykes-on-being-a-contrarian-conservative-in-the-age-of-trump>.

205. Sykes, *supra* note 198.

“[i]nstead . . . opened the door for President Trump, who found an audience that could be easily misled.”²⁰⁶

Beyond the problems of its dwindling coffers and reputation, the media is much more susceptible today to enemy construction than in the past because the President no longer needs the cooperation and reputation of the press to carry his own message to the American people. This change is perhaps the most important factor in opening the door to a President constructing the press as a public enemy. It helps explain why no presidents in the last century would have even considered attempting to fully construct the press as an enemy and why Trump now appears so very motivated to do so.

For much of modern press-President history, “the press relied on politicians for access to information while politicians relied on the press for access to the public’s ear.”²⁰⁷ In such a dynamic, there was no incentive to vilify the press, even if a President distrusted it, feared it, or hated it. The press was, at a minimum, a necessary evil. The public niceties exhibited by even the likes of President Nixon²⁰⁸ are a testament to a lengthy era of American history in which both the administration and the press simply committed to work within the system to gain the mutual benefits of the “symbiotic relationship.”²⁰⁹ Indeed, the record of presidential decision-making about relationships with the press abundantly demonstrates that although administrations often made efforts to eliminate the press as a filter on certain key issues and speak more directly to the people (Franklin D. Roosevelt’s fireside chats²¹⁰ and direct television appearances from many subsequent presidents²¹¹ are among the best examples), they ultimately

206. *Id.*

207. RonNell Andersen Jones & Sonja R. West, Opinion, *Don’t Expect the First Amendment to Protect the Media*, N.Y. TIMES (Jan. 25, 2017), <https://www.nytimes.com/2017/01/25/opinion/dont-expect-the-first-amendment-to-protect-the-media.html>.

208. See *supra* text accompanying notes 151–155.

209. Jones & West, *supra* note 207.

210. See generally RUSSELL D. BUHITE & DAVID W. LEVY, *FDR’S FIRESIDE CHATS* (2010) (describing how Roosevelt’s chats represented an unprecedented presidential attempt to achieve intimacy with the nation).

211. PORTER, *supra* note 139, at 37 (describing how Nixon’s first press conference as President in January 1969 was deliberately scheduled during prime time for television and after the time when the newspapers went to press for the following morning); see *id.* at 19; Pach, *supra* note 141, at 556 (Nixon describing plans to use television and radio to evade hostile print journalists who “filter[ed] his ideas to the public”); Wise, *supra* note 153 (“I made up my mind that until after this broadcast, my only releases to the press would be for the purpose of building up the audience which would be tuning in. Under no circumstances, therefore, could I tell the press in advance what I was going to say or what my decision would be I was determined to

concluded that the wider cooperative engagement with the media was a necessity.²¹²

An important 1976 study on the relationship between the press and the President highlighted this historical inevitability of press cooperation. It described the media as “the crucial middlemen in the process” of presidential communications with the public,²¹³ emphasizing that “the importance for the president of his relationship with the press . . . is enormous, to say nothing of the president’s importance to the press.”²¹⁴ The reasons were political, structural, and technological: “Without the channels of access to his constituency which the news media represent, and given the fact that American democracy has rarely tolerated direct governmental propaganda efforts through media it controlled, he would have no means of leading. . . . [The President’s] access ultimately depends on a trade-off with the proprietors of the media.”²¹⁵ To be sure, this “mutual dependence characteristically has rarely bred mutuality of interest”²¹⁶ and the relations between the two “rarely involve cordial cooperation,”²¹⁷ but “as long as the media . . . are the middlemen in the process which links the chief executive with his national constituency,” the scholar predicted, “they will remain a crucial if not the crucial factor in [his] success.”²¹⁸

Today, for the first time in modern history, a President appears to have made the calculation that those go-betweens are no longer necessary links to the citizenry. He is emboldened by shifts in the communications landscape and the delivery of news that permit the direct, unfiltered communication with the populace that presidents before him craved. In the decade leading up to Trump’s election, technology “scrambled every aspect of the relationship between news producers and people who consume news.”²¹⁹ While “[a]

tell my story directly to the people rather than to funnel it to them through a press account.” (quoting RICHARD NIXON, *SIX CRISES* 103 (1962)).

212. See, e.g., Debra Gersh Hernandez, *supra* note 140, at 86 (“I was prepared to have to do combat with the media in order to get my views and my programs to the people, and despite all the power and public visibility I would enjoy as President, I did not believe that this combat would be between equals. The media are far more powerful than the President in creating public awareness and shaping public opinion, for the simple reason that the media always have the last word.” (quoting NIXON, *supra* note 140, at 355)).

213. Elmer E. Cornwell, Jr., *The President and the Press: Phases in the Relationship*, *ANNALS*, Sept. 1976, at 53, 62.

214. *Id.* at 54.

215. *Id.* at 56–57.

216. *Id.* at 57.

217. *Id.* at 53.

218. *Id.* at 64.

219. KRISTEN PURCELL ET AL., PEW RES. CTR., UNDERSTANDING THE PARTICIPATORY NEWS CONSUMER: HOW INTERNET AND CELL PHONE USERS HAVE TURNED NEWS INTO A SOCIAL

generation ago, the newspaper was the primary—or perhaps only—source of a wide range of useful information for many citizens,” it was displaced in relatively short order by digital communications that allowed more targeted consumption of the reader’s preferred categories of news and information.²²⁰ Twitter, the social media tool most favored by Trump, allows him to speak directly to more than forty-two million followers daily.²²¹ Millions of others follow him on other social media platforms.²²²

The strong majority of Americans who are now getting their news from social media²²³ represent a change not only in news distribution, but also in news content. Social media feeds allow the user to curate news consumption, and users now consume mostly material that aligns with and reinforces their ideologies and world views.²²⁴ Trump has shown a propensity to take advantage of that dynamic,²²⁵ in what may constitute “a seismic change in

EXPERIENCE 8 (2010),
http://www.journalism.org/files/legacy/Participatory_News_Consumer.pdf.

220. Jones, *supra* note 177, at 565–66.

221. Donald J. Trump Twitter Stats, TWITTER COUNTER, <http://twittercounter.com/realDonaldTrump> (last visited Nov. 4, 2017).

222. Samuel Burke, *How Many Social Followers Does Trump Actually Have?*, CNN (June 17, 2017, 12:44 PM), <http://money.cnn.com/2017/06/17/technology/trump-social-media-followers/index.html>.

223. JEFFREY GOTTFRIED & ELISA SHEARER, PEW RES. CTR., NEWS USE ACROSS SOCIAL MEDIA PLATFORMS 2016, at 2 (2016), http://assets.pewresearch.org/wp-content/uploads/sites/13/2016/05/PJ_2016.05.26_social-media-and-news_FINAL-1.pdf (noting that sixty-two percent of people now get their news from social media).

224. See Walter Quattrociocchi, Antonio Scala & Cass R. Sunstein, *Echo Chambers on Facebook* 1–2 (Harvard John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 877, 2016), http://www.law.harvard.edu/programs/olin_center/papers/pdf/Sunstein_877.pdf (offering quantitative evidence that Facebook users promote their favorite narratives, resist information that does not conform to their beliefs, and are driven by confirmation bias to share certain content that creates informational cascades within their communities); see also *Blue Feed, Red Feed: See Liberal Facebook and Conservative Facebook, Side by Side*, WALL ST. J., <http://graphics.wsj.com/blue-feed-red-feed/> (last visited Nov. 4, 2017) (describing an analysis of how political reality is depicted differently for conservatively aligned and liberally aligned Facebook users).

225. Kelly Cohen, *Trump Will Continue to Tweet as President*, WASH. EXAMINER (Dec. 27, 2016, 9:49 AM), <http://www.washingtonexaminer.com/trump-will-continue-to-tweet-as-president/article/2610400> (quoting Press Secretary Sean Spicer as saying social media gives Trump “this direct pipeline in the American people, where he can talk back and forth” and that its presence “allows him to add an element of a conversation that’s never occurred”).

executive information distribution”²²⁶ that removes the press from the equation or at least marginalizes its role in his communication strategy.²²⁷

Thus, for the first time in press-President relations, the press has gone from being a necessary evil to merely being an evil. Removing this barrier to enemy construction means that the other strong motivators for engaging in enemy construction become driving forces in the President’s media decision-making. What to say to the press, whether to engage with them, and even how to depict them to the wider public audience all become questions that can be answered unencumbered by the structural realities of the past.

IV. THE MOTIVATIONS FOR AND CONSEQUENCES OF ENEMY CONSTRUCTION

A. *Potential Motivations for Enemy Construction*

Given the strong evidence that the Trump administration is engaging in enemy construction, the important questions are why and to what potential effect. What motivates enemy construction and what might happen as a result of it?

Defining enemies and declaring war on them is a time-honored technique of both overt propaganda and more ordinary political and social campaigns. One of the primary functions of constructing enemies is to define and unify a political community and to solidify ties with potential allies. For many political communities, defining the enemy can be a mechanism for defining the community itself—for clarifying both its values and its boundaries—and thus an important mechanism for increasing social cohesion.²²⁸ Rallying

226. *Press on Notice: Play Fair or Trump’ll Flick You Off*, ORLANDO SENTINEL (Jan. 27, 2017), <https://www.pressreader.com/usa/orlando-sentinel/20170127/281822873518216> (noting that “President Trump will continue to bypass traditional news distribution centers” by going “directly to the people”).

227. Even at his first official press conference, Trump made absolutely clear that he was taking his message directly to the American people and that he viewed the media’s presence as incidental and essentially irrelevant to his endeavor: “I’m making this presentation directly to the American people, with the media *present*, which is an honor to have you.” See *First News Conference Transcript*, *supra* note 52 (emphasis added). Trump’s brief positive nod to the media was immediately negated by his subsequent explanation for bypassing the media and taking his message directly to the people: “[M]any of our nation’s reporters and folks will not tell you the truth, and will not treat the wonderful people of our country with the respect that they deserve.” *Id.*

228. NICHOLAS J. O’SHAUGHNESSY, *POLITICS AND PROPAGANDA: WEAPONS OF MASS SEDUCTION* 125 (2004) (arguing that we engage in “social construction” of enemies because “[w]e

against common enemies likewise refocuses discussion and energy away from divisive social problems and internal conflicts, thereby unifying and integrating the political community²²⁹ and promoting the creation of useful alliances, both internal and external. If “the enemy of my enemy is my friend,”²³⁰ defining a shared enemy can help build coalitions even when other interests diverge.

Relatedly, the construction of enemies allows the drawing of clear battle lines, which then aid in smoking out the true preferences of other potential allies and enemies: others’ treatment of the declared enemy can become a litmus test for whether they, too, are friend or foe. Conversely, defining an enemy allows allies who nonetheless defend those enemies to establish credibility with other factions or with the “opposition,” which may create more space for that ally to grow its base or engage in otherwise suspect policymaking that furthers joint aims.

Another key function of enemy construction is the creation of convenient scapegoats for existing social problems or future policy failures.²³¹ Such blame-shifting can prevent the fracturing of existing communities and alliances when the community suffers serious losses while simultaneously strengthening opposition to the enemy. Moreover, constructing enemies is a way to channel powerful negative emotions like hatred, frustration, and fear into a socially approved outlet that minimizes the chance that these potent social forces will destabilize the political community or threaten social cohesion. The existence of such enemies can also stabilize the existing social order by giving those “at the bottom of [the] social pyramid” someone “upon whom they can look down.”²³²

One can also imagine a myriad of other motivations for enemy construction. For example, labeling those who question or argue with a policy as “enemies” can help undermine their credibility. Additionally, a leader might think that constructing an enemy allows the leader to signal to both

define ourselves by reference to what we are not” and that “this clarifies our values or where we stand, and gives us a coherent sense of selfhood”).

229. *Id.* (“[R]hetoric of enemies is a potent means of gaining and sustaining social integration in modern society. . . . [T]he main effect of war rhetoric is social integration through the constitution of common enemies: ‘a victim-villain hierarchy is necessary to the production of political incitement.’” (internal citations omitted)).

230. *See, e.g.*, Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUM. L. REV. 2193, 2201 (2012) (discussing “the enemy of my enemy is my friend” notion in the context of delegations to enemies).

231. *See, e.g.*, O’SHAUGHNESSY, *supra* note 228, at 125 (“We need enemies because we need someone to blame when things go wrong: the term ‘witch hunt’ is apposite and propaganda involves finding the appropriate victims.”).

232. *Id.* at 124.

supporters and potential supporters that she is reasonable and conciliatory in her approach to governance when she later compromises with that enemy. A policy or position forged in cooperation with an old enemy may thus garner deeper support from a broader coalition of constituents.²³³

The reasons for Trump's enemy construction of the press surely draw from many of these various motivations and rationales. Commentators have argued, for example, that Trump is constantly targeting the press to distract from other, more controversial substantive issues or scandals.²³⁴ Trump may also be using enemy rhetoric to smoke out other allies or enemies (which conservative news outlets will defend the mainstream press and which will not?) or, alternatively, to give other potential allies opportunities to look reasonable by defending the press (or other constructed enemies) against his worst rhetorical excesses.²³⁵ Trump himself may be pushing boundaries early in his presidency so that his own later actions—with respect to both the press and other constructed enemies—will seem reasonable by comparison.²³⁶

Additionally, Trump appears to be employing press-as-enemy rhetoric to consolidate support among his base and to reinforce his narrative that only he

233. Cf. Gersen & Vermeule, *supra* note 230, at 2229 (arguing that cooperation with enemies can “credibly signal to third parties” that “their views [will be taken] into account”).

234. See, e.g., Carlos Garcia, *Chuck Todd Accuses Trump of Attacking the Media to Distract from One Scandal*, BLAZE (Feb. 27, 2017, 6:33 PM), <http://www.theblaze.com/news/2017/02/27/chuck-todd-accuses-trump-of-attacking-the-media-to-distract-from-one-scandal/> (reporting that NBC's Chuck Todd accused the Trump administration of “escalat[ing]” attacks on the media whenever there is a “troubling news story on Russia”).

235. The recent defense of the press offered by some Fox News commentators, for example, may raise the stature of the network among more liberal segments of the population. See, e.g., Amy B. Wang, *Fox News Anchor Chris Wallace Warns Viewers: Trump Crossed the Line in Latest Attack on Media*, WASH. POST (Feb. 19, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/19/fox-news-anchor-chris-wallace-warns-viewers-trump-crossed-the-line-in-latest-attack-on-media/?utm_term=.df1cb1e85bff.

In the analogous context of Trump's enemy construction of the judiciary, Trump's rhetoric creates opportunities for nominees like Supreme Court nominee Judge Neil Gorsuch to garner support among the Trump opposition by critiquing Trump's framing of the judiciary as enemies of public safety. See, e.g., Ashley Killough, *Supreme Court Nominee Gorsuch Calls Trump's Tweets 'Disheartening'*, CNN (Feb. 9, 2017, 12:14 PM), <http://www.cnn.com/2017/02/08/politics/gorsuch-trump-tweets/> (“Supreme Court nominee Neil Gorsuch told a US senator Wednesday that President Donald Trump's tweets about the judiciary are ‘demoralizing’ and ‘disheartening.’”).

236. See, e.g., Chris Cillizza, *A Fascinating Theory from the World of Sports About Donald Trump's First 7 Days*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/01/30/a-fascinating-theory-from-the-world-of-sports-about-donald-trumps-governing-style/?utm_term=.e1fe52290386 (arguing that “what feels like line-pushing now will seem normal sometime soon” and “[t]hat by pushing so hard so fast, Trump is redefining what he can do and how the political establishment—and the country at large—will react”).

can be trusted to tell the real story. By transforming the media into an enemy, Trump ensures that any negative information about him becomes part of the narrative that the “lying” press has declared war on both Trump and, more importantly, the country and its people. The more the media fights back, the more their enemy status is confirmed, at least among Trump’s base. The more people come to view the mainstream press as the enemy, the more Trump can control the narrative. This strategy also allows Trump to float trial balloons about controversial policies and then deny that he ever did so. In addition to consolidating his base at home, Trump may also be employing press-as-enemy rhetoric to build trust with other regimes around the world who are likewise hostile to a free press or to human rights more generally and to signal that he will hold these countries to lower standards than did his predecessors.²³⁷

Beyond these more traditional rationales for enemy construction, however, lurks one of the most insidious potential consequences of declaring the press to be the enemy of the people: constructing the press as an enemy can pave the way for the invocation of Schmittian exceptionalism that justifies limitation on press freedoms and thus subverts the important watchdog, educator, and proxy roles of the press. This undermining of vital press functions, in turn, damages the democracy and empowers the administration to more easily construct enemies of our other critical institutions—like the judiciary—and of vulnerable groups—such as Mexican immigrants and Muslims.

237. Trump could be using anti-press rhetoric, for example, to build ties with Russia’s Vladimir Putin or even with China’s leaders. See Lizzie Dearden, *Donald Trump Emulating ‘Autocratic’ Vladimir Putin’s Actions in the 2000s, Says Former US Ambassador to Russia*, INDEPENDENT (Feb. 16, 2017, 9:03 AM), <http://www.independent.co.uk/news/world/americas/russia-donald-trump-vladimir-putin-russia-autocratic-president-emulate-2000s-former-us-ambassador-a7582881.html> (“When [Mr. Trump] calls the press the enemy, for instance, that reminds me of Vladimir Putin in 2000 when he declared that the press was the enemy and went after them.”); see also Tom Phillips, *Trump’s Media Attacks Play into China’s Hands, Says Beijing Press*, GUARDIAN (Feb. 17, 2017, 10:58 PM), <https://www.theguardian.com/world/2017/feb/18/media-attacks-by-trump-play-into-china-hands-global-times> (“China’s state-run Global Times newspaper celebrated how Trump’s early moves in office suggested he would be ‘less concerned about issues like human rights’—long a bone of contention between western governments and Beijing’s authoritarian rulers. ‘His war with mainstream media makes it difficult for Trump to ally with the media on [the] ideological front against China.’”); *id.* (quoting commentator Bill Bishop’s argument that “Trump’s bid to cow the media into becoming an ‘obedient, unquestioning’ force came straight out of the Communist party playbook” and was akin to the “sweeping crackdown” launched last year by China’s Xi Jinping, in which he demanded “absolute loyalty” from the press).

B. The Risks of Schmittian Exceptionalism

1. Enemy Construction and the State of Exception

As discussed in Part II, Carl Schmitt's attack on liberalism centers on two interrelated powers of government—the power to declare enemies and the power to invoke the state of exception. The latter of these powers features prominently in Schmitt's *Political Theology*, which begins with the famous (or perhaps infamous) line: “Sovereign is he who decides on the exception.”²³⁸ Schmitt claims that the state of exception is necessary because the conditions of a true emergency cannot be anticipated and thus cannot be governed by laws and norms established *ex ante*.²³⁹ Accordingly, even the conditions justifying the state of exception cannot be specified in advance, and thus the sovereign has authority to determine when the state of exception is necessary, what measures are appropriate to quell the threat, and how long those measures (and the state of exception itself) should remain in place.²⁴⁰ In making all of these decisions, the sovereign acts politically—on the basis of the friend/enemy distinction—and wholly outside of the “juridical” realm—outside of the constraint of law and ordinary norms.²⁴¹ Ultimately, Schmitt generalizes from the state of exception to build his case against the rule of law even in ordinary times, arguing that the exception demonstrates the essentially vacuous nature of the rule of law and the liberal conception of legality.²⁴²

The relationship between these two powers—the power to declare enemies and the power to invoke the state of exception—might be relatively apparent, but it is often underappreciated, perhaps because Schmitt himself did not fully

238. SCHMITT, *supra* note 9, at 5.

239. *Id.* at 6–7 (“The precise details of an emergency cannot be anticipated, nor can one spell out what may take place in such a case, especially when it is truly matter of an extreme emergency and of how it is to be eliminated.”).

240. *Id.* at 7 (“[The sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it.”).

241. *Id.* at 6–7 (arguing that “the most guidance the constitution can provide” with respect to the state of exception “is to indicate who can act in such a case” and that when the sovereign acts to suspend the constitution “he stands outside the normally valid legal system”).

242. See, e.g., Julian Davis Mortenson, *Law Matters, Even to the Executive*, 112 MICH. L. REV. 1015, 1020 (2014) (“From these fact-specific observations about particular emergency power laws . . . Schmitt’s position rapidly transformed into a challenge to the very concept of liberal legal order. It quickly became clear that what he called the exception was actually the rule, pervading the liberal state during emergencies and calm alike.”); *id.* at 1020 n.19 (“Schmitt starts with a set of observations about emergency and works inward from that fringe case to his nihilistic conclusion about the nature of law everywhere.”).

and expressly articulate the connection. On closer inspection, however, it becomes clear that these two powers are mutually constitutive: the declaration of enemies helps set the stage for the state of exception, and the rhetoric of the state of exception then reinforces the legitimacy of those enemy declarations. As we have argued elsewhere, “Schmittian notions of the state of exception are undergirded by the friend/foe distinction.”²⁴³ The sovereign has the power to define who is friend and who is foe—to delineate who is inside and who is outside of the national polity. The designation or construction of such enemies, in turn, helps justify the sovereign’s invocation of a “state of exception,” ungoverned by legal rules or norms.²⁴⁴

This connection becomes all the more salient when we consider that, in exercising these two powers, the only real constraint on the sovereign that Schmitt recognizes is a practical one: the sovereign is the entity, with the real, factual power on the ground to declare enemies and to usher in the state of exception.²⁴⁵ Presumably, at least in democracies, the power to exercise those authorities must be bolstered by public information campaigns that convince enough of the population that a certain group directly or indirectly threatens the political community’s survival and that extreme measures are, therefore, appropriate to put down that threat. While the sovereign, in Schmitt’s conception, need not necessarily reflect the will of the people, it must “express” the people’s will, at least to the degree necessary to retain its power to act.²⁴⁶ The popular will thus must be shaped and molded to suit the sovereign’s agenda.

Enemy construction is a critical part of any such information campaign. Of course, we have noted elsewhere that there is “a bit of a chicken-and-egg

243. Sun & Jones, *supra* note 2, at 924.

244. See SCHMITT, *supra* note 9, at 6–7; cf. Scheppele, *supra* note 8, at 1074 (“[Schmitt] imagines a sovereign of a nation, one who . . . has as a primary job defining who is inside the sphere of protection (the friend) and who is outside (the enemy), locked in perpetual and mortal combat. The idea of the exception is related to this fundamentally agonistic conception of politics; the exception is what allows the sovereign to strike out against the enemy with the rationale that he is protecting the friend.”).

245. In Schmitt’s construct it is irrelevant, for example, whether a particular person has formal authority (under a constitution or otherwise) to declare the state of exception; all that matters is who, as a practical matter, has the power to do so. “Sovereign is he who decides on the exception.” SCHMITT, *supra* note 9, at 5.

246. Cf. RAE, *supra* note 22, at 125 (noting that, for Schmitt, “the constitutional sovereign does not *represent* the will of the people,” but rather “*expresses* it by actively taking *decisions*”); *id.* (“For Schmitt, sovereignty is expressive not representational, and decisive not consensual. This expression is, however, dependent on the decision of the populace regarding the values that will define it, which, in turn, is dependent on the populace being able to come to agreement regarding the values that will define it. It is for this reason that he insists that the population be homogenous.”).

problem” when evaluating the relationship between enemy construction and the rhetoric of the state of exception—particularly war and national security rhetoric that suggests the country’s security cannot be guaranteed without creating exceptions to ordinary societal laws and norms.²⁴⁷ One might well ask whether security-exceptionalism rhetoric “cause[s] enemy construction” or whether “society employ[s that] rhetoric because enemies have already been identified.”²⁴⁸ We continue to believe that this relationship is “best viewed as a mutually reinforcing cycle, in which war rhetoric encourages the hunt for enemies and the identification of enemies, in turn, entrenches the rhetoric of war.”²⁴⁹ This inextricable link between enemy construction and invocation of the state of exception illuminates and lays bare some of the most important risks of enemy construction and is explored more fully below.

The trajectory of basic liberties—and, particularly, executive respect for those liberties—post-9/11 gives some sense of how national-security based exceptionalism can transform basic understandings of constitutional and statutory rights.²⁵⁰ After 9/11, for example, President Bush claimed broad—nearly limitless—executive authority to detain even U.S. citizens as “enemy combatants” without provision of due process.²⁵¹ In the realm of public information access alone, national-security exceptionalism has been invoked to justify “governmental constrictions on the application of FOIA, increased classification of documents, and [other] U.S. Department of Homeland Security measures calling for governmental secrecy in the name of combatting terrorism.”²⁵² Similarly, exceptionalism has also been invoked to justify “refusal to reveal facts related to exercises of the Patriot Act surveillance powers, torture and interrogation techniques, the names of detainees believed to be connected to terror attacks, and other information on alleged enemy combatants.”²⁵³ These restrictions on public information access, taken together, have “prevent[ed] public scrutiny or constitutional

247. Sun & Jones, *supra* note 2, at 924 n.209.

248. *Id.*

249. *Id.*

250. See, e.g., Kaarlo Tuori, *A European Security Constitution?*, in *THE LONG DECADE: HOW 9/11 CHANGED THE LAW* 103, 108 (David Jenkins et al. eds., 2014) (arguing that “the concept of national security has been invoked to warrant expanding presidential powers ever since the Truman presidency and the start of the Cold War” and that “[s]ecurity’ or ‘national security’ has become the main justification for a permanent state of exception” in the U.S.).

251. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 510–11 (2004) (describing the government’s position that a U.S. citizen can be held as an “enemy combatant” without knowledge of charges, access to a lawyer, or other basic rights).

252. Sun & Jones, *supra* note 2, at 907–08.

253. *Id.* at 908.

challenge” of many of the counterterrorism measures taken by the executive branch in response to 9/11.²⁵⁴

2. Exceptionalism and Press Freedom

If President Trump’s campaign to establish the press as an “enemy of the American people” proves persuasive, that success may open the door to arguments that the security of the country justifies—or even requires—limitations on press freedoms and press access. As we have argued elsewhere, if the government constructs enemies who threaten the public good, the government may invoke that threat to justify limiting government transparency and withholding information both from those enemies and, by extension, from the public as a whole.²⁵⁵ Taken to its logical conclusion in the press context, the Schmittian logic of the state of exception likewise suggests that government could justifiably reduce recognized press freedoms—including those that flow from the Constitution and those anchored in traditional executive branch respect for First Amendment norms—in order to neutralize the threat posed by the press and ensure the safety of the American people.

a. Limitation of Constitutional Press Freedoms

By constructing the press as an enemy, President Trump positions himself to argue in both political and legal forums that the press is no longer deserving of the basic constitutional protections it has long enjoyed. While the list of protections that the Constitution provides to the press is relatively short, these protections form the bedrock of traditional First Amendment jurisprudence. Together, these constitutional guarantees prevent the government from singling out the press for taxation or other financial burdens,²⁵⁶ from punishing the publication of “lawfully obtained, truthful information” on matters of public concern,²⁵⁷ from interfering with the editorial discretion of

254. *Id.*

255. *Id.* at 921–24.

256. *See* *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 591 (1983) (holding that “Minnesota’s ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers”).

257. Sonja R. West, *The Stealth Press Clause*, 48 GA. L. REV. 729, 738 (2014); *see* *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (holding that “if a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order”).

the media,²⁵⁸ from requiring government preclearance before the press can publish information,²⁵⁹ and from awarding damages for defamation of a public figure absent a showing of “actual malice.”²⁶⁰ Additionally, like the public, journalists have the right to attend trials and, because they act as the public’s “surrogate[.]”—“they [are] often . . . provided special seating and priority of entry so that they may report what people in attendance have seen and heard.”²⁶¹

If the press is effectively constructed as an “enemy” dangerous to the American people, these press protections might be eroded in several different ways. First, many of these existing protections incorporate some kind of exception for extraordinary circumstances in which the government can show a particularly compelling need.²⁶² If courts can be convinced that the press is somehow threatening national security—that the circumstances are sufficiently akin or “tantamount to a time of war”²⁶³—then these exceptions might be expanded in ways that would impinge on existing press freedoms. Second, constructing the press as the enemy might help persuade courts that the press should enjoy no special protections and that existing press protections should be relaxed. Third—in the most extreme case—Trump might campaign for a constitutional amendment that would explicitly limit press freedom, on the grounds that the press constitutes a recognized enemy.

258. *See, e.g.,* Miami Herald Publ’g Co. v. Tornillo, 418 U.S. 241, 244 (1974) (invalidating a Florida statute that forced newspapers to publish a political candidate’s reply to any attack by the paper on the officer’s “personal character or official record”); CBS, Inc., v. Democratic Nat’l Comm., 412 U.S. 94, 123 (1973) (invalidating provisions of the Fairness Doctrine that required stations to broadcast paid editorial content).

259. *Near v. Minnesota*, 283 U.S. 697, 721–23 (1931) (invalidating a prior restraint on publication of defamatory material).

260. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

261. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572–73 (1980) (“Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.”).

262. *See, e.g., Daily Mail*, 443 U.S. at 103 (holding that publishing truthful, lawfully obtained material cannot be punished “absent a need to further a state interest of the highest order”); *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (noting that the government “carries a heavy burden of showing justification for the imposition of . . . a [prior] restraint” on publication (quoting *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971))); *Near*, 283 U.S. at 716 (noting that bar on prior restraints is not absolute and that war-time conditions might justify prior restraints against publication of information that might pose an “actual obstruction to its recruiting service” or that might reveal “the sailing dates of transports or the number and location of troops”).

263. *Sullivan*, 403 U.S. at 726 (Brennan, J., concurring) (emphatically rejecting argument that the Cold War tensions surrounding the publication of the Pentagon Papers were “tantamount to a time of war” that might arguably justify a prior restraint).

While Trump has never outlined a comprehensive plan of attack on constitutional press freedoms, he has explicitly suggested that he would try to undermine specific press freedoms. As discussed above, during the course of his presidential campaign, for example, Trump suggested in no uncertain terms that he would work to undermine existing legal limitations on libel suits against the press.²⁶⁴ He explained:

Our press is allowed to say whatever they want and get away with it. And I think we should go to a system where if they do something wrong—I'm a big believer, tremendous believer of the freedom of the press, nobody believes it stronger than me—but if they make terrible, terrible mistakes and those mistakes are made on purpose to injure people, and I'm not just talking about me, I'm talking about anybody else, then yes, I think you should have the ability to sue them.²⁶⁵

Three months after Trump's election, his Chief of Staff told an interviewer that a constitutional amendment to scale back libel protection was being "looked at."²⁶⁶ Of course, constitutional amendments are rare, and absent such a move, any incursions on constitutional press freedoms would require the cooperation of the judicial branch. It may be unlikely that the courts will be willing to accede to significant inroads on press autonomy and freedom. However, the past willingness of courts in other contexts to accept arguments that national-security exceptionalism requires some limitation of basic freedoms²⁶⁷—combined with the current weakness of the institutional media²⁶⁸—should caution against completely disregarding this risk. Indeed, the same trends that evidence the mainstream media's vulnerability to enemy construction—the decline of newspaper circulation, the shuttering of many local newspapers, the dwindling coffers of even former media giants—likewise suggest that the mainstream media may well be ill-equipped to push back against even substantial encroachments on longstanding liberties.²⁶⁹

264. See, e.g., Tom Kludt, *Donald Trump Says He Wants Libel Laws More Like the UK's*, CNN (Oct. 24, 2016, 12:40 PM), <http://money.cnn.com/2016/10/24/media/donald-trump-sue-news-organizations/>.

265. *Id.*

266. Josh Marshall, *Priebus: Trump Considering Amending or Abolishing 1st Amendment*, TALKING POINTS MEMO (Apr. 30, 2017, 3:41 PM), <http://talkingpointsmemo.com/edblogger/priebus-trump-considering-amending-or-abolishing-1st-amendment>.

267. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 532–33 (2004) (holding, post-9/11, that a U.S. citizen can be held as an "enemy combatant" subject only to minimal due process requirements); *Korematsu v. United States*, 323 U.S. 214, 223–24 (1944) (upholding internment of Japanese Americans in the United States during World War II).

268. Jones, *supra* note 177, at 559–60.

269. See Newton, *supra* note 180.

Moreover, even if courts ultimately reject arguments that existing press freedoms should be curtailed, aggressive prosecutorial decisions or litigation positions could potentially chill at least some media outlets from exercising their First Amendment rights. Enemy construction that increases press self-censorship will have accomplished many of its goals.

b. Limitation of Press Protections Within Executive Control

Moreover, even if courts stand firm against any executive invocation of exceptionalism to justify limits on constitutional protections for the press, the President can, at a minimum, reduce traditional press protections that are quite clearly within executive control. Indeed, because the Supreme Court has interpreted the First Amendment to “provide[] only limited protection for the press”—including the specific liberties discussed above—most press protection flows from “nonlegal safeguards,” including “political norms and traditions” and executive respect for the press’s roles in the democracy.²⁷⁰ And, indeed, the President has wide discretion over many of the traditional norms and protections that shape how the press fulfills those roles. The President obviously has control, for example, over press access in a wide variety of venues, from press conferences held in the White House to more informal interactions with journalists, and Trump’s administration has already exercised that authority to exclude from press briefings journalists from media organizations (including *The New York Times*, the BBC, the *Los Angeles Times*, and CNN) that Trump accuses of being “fake news.”²⁷¹

Even more importantly, however, the President, as the head of the executive branch, has extensive power to shape the exercise of prosecutorial discretion and investigatory functions in ways that profoundly influence the ability of working journalists to do their jobs. For example, because courts have not recognized a strong reporter’s privilege to refuse to reveal sources and there is no federal reporters’ shield law,²⁷² federal policy regarding when reporters can be subpoenaed to reveal their sources in court proceedings is determined by Department of Justice guidelines.²⁷³ The content of those guidelines is completely within the control of Trump’s Attorney General,

270. Jones & West, *supra* note 207.

271. Liptak, *supra* note 5; Rosen, *supra* note 61.

272. See RonNell Andersen Jones, *Rethinking Reporter’s Privilege*, 111 MICH. L. REV. 1221, 1225–26 (2013).

273. Policy Regarding Obtaining Information from, or Records of, Members of the News Media; and Regarding Questioning, Arresting, or Charging Members of the News Media, 28 C.F.R. § 50.10 (2017).

who serves at the pleasure of the President.²⁷⁴ Given Trump’s recent attack on the press’s use of anonymous sources—including his allegations that the “fake news” who are “the enemy of the people” hide behind anonymous sources when they “make up stories and make up sources”²⁷⁵—it seems likely that Trump will capitalize on this enemy construction to justify guidelines that more frequently, and more aggressively, compel reporters to divulge their sources.²⁷⁶

Moreover, a related issue is the potential application of the Espionage Act,²⁷⁷ which historically has been used to prosecute spies, to federal whistleblowers and the reporters who receive and, potentially, publish leaked information. Under President Obama, there were nine Espionage Act prosecutions of leakers or whistle-blowers who gave national security information to reporters, “compared with only three by all previous administrations combined.”²⁷⁸ In at least one Espionage Act case, the DOJ named a news reporter—Fox News’ James Rosen—an unindicted co-conspirator and executed a warrant seizing his personal emails.²⁷⁹ Critics charge that application of the Espionage Act to journalists chills reporting,

274. Jones & West, *supra* note 207 (arguing that it is “custom” and not law that has shaped the DOJ’s current policy of “forcing reporters to reveal confidential sources only as a last, rather than a first, resort”).

275. CPAC Transcript, *supra* note 27; *see also* Donald J. Trump (@realDonaldTrump), TWITTER (May 28, 2017, 5:34 AM), <https://twitter.com/realDonaldTrump/status/868807754231820291> (“Whenever you see the words ‘sources say’ in the fake news media, and they don’t mention names” (ellipses in original)); Donald J. Trump (@realDonaldTrump), TWITTER (May 28, 2017, 5:45 AM), <https://twitter.com/realDonaldTrump/status/868810404335673344> (“ . . . it is very possible that those sources don’t exist but are made up by fake news writers. #FakeNews is the enemy!” (ellipses in original)).

276. Early signals do suggest that Trump’s Attorney General is less willing to protect reporters from subpoenas. *See, e.g.,* 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), <https://www.apnews.com/a26385419e554834a21ef1f161efe586/Judge:-Reporter-won't-have-to-testify-at-Oregon-refuge-trial> [<https://perma.cc/3H4M-GN53>] (reporting that Sessions approved a subpoena against a journalist within days of his confirmation as Attorney General).

277. 18 U.S.C. §§ 792–799 (2012).

278. Risen, *supra* note 135 (noting that the Obama administration “has repeatedly used the Espionage Act, a relic of World War I-era red-baiting, not to prosecute spies but to go after government officials who talked to journalists”).

279. Judson Berger, *DOJ Invoked Espionage Act in Calling Fox News Reporter Criminal ‘Co-Conspirator,’* FOX NEWS (May 22, 2013), <http://www.foxnews.com/politics/2013/05/22/doj-invoked-espionage-act-in-calling-fox-news-reporter-criminal-co-conspirator.html>.

particularly because the law is so broad, and worry that “Obama [has] handed [Trump] a road map”²⁸⁰ for more expansive and aggressive Espionage Act prosecutions that will threaten the press’s ability to investigate and report on potential government wrongdoing.

Prosecutorial discretion, shaped by Trump’s policies, will also determine how the DOJ deals with a wide variety of other questions, such as tapping of reporters’ phones or accessing their phone records.²⁸¹ In each of these areas, the guidance from the President and the atmosphere established by him could lead to significantly greater governmental incursions on the work of the press.

More broadly, the tone set by the President impacts the climate and culture for journalism throughout the country. Early indicators in the first year of the Trump administration suggest that his enemy construction may have increased the risks faced by journalists on the job.²⁸² Moreover, Trump’s repeated insinuations that other government entities should retaliate against the working press²⁸³ create suspicion that he is using regulatory authority to punish media outlets he disfavors.²⁸⁴ All told, President Trump will have substantial power to control how much respect and freedom the press is accorded, and his construction of the press as enemy suggests both his potential intent to limit traditional protections and the public justification he will offer for doing so.

280. Risen, *supra* note 135 (quoting Lucy Dalglish, Dean of the Philip Merrill College of Journalism at the University of Maryland).

281. *See, e.g.*, Charlie Savage & Leslie Kaufman, *Phone Records of Journalists Seized by U.S.*, N.Y. TIMES (May 13, 2013), <http://www.nytimes.com/2013/05/14/us/phone-records-of-journalists-of-the-associated-press-seized-by-us.html> (reporting that “[f]ederal investigators secretly seized two months of phone records for reporters and editors of The Associated Press in what the news organization said Monday was a ‘serious interference with A.P.’s constitutional rights to gather and report the news”).

282. *See, e.g.*, Indira Lakshmanan, *President Trump’s War on the Press Is Dangerous. He’s Discrediting a Profession He Fears*, POYNTER (May 25, 2017), <http://www.poynter.org/2017/president-trumps-war-on-the-press-is-dangerous-hes-discrediting-a-profession-he-fears/461352/> (stating that Trump’s treating of the press as the “enemy of the people” has led to an increasing trend in physical violence against reporters, most notably Republican candidate Greg Gianforte’s physical assault on a reporter).

283. *See* discussion *supra* Section II.B.2.

284. *See*, David Folkenflik, *DOJ Set to Block AT&T Takeover of Time Warner*, NPR (Nov. 8, 2017), <https://www.npr.org/sections/thetwo-way/2017/11/08/562898390/doj-set-to-block-at-t-takeover-of-time-warner> (quoting a free press advocate as saying [i]f the reason that’s coming down [for blocking AT&T’s takeover of Time Warner] is, ‘Punish CNN,’ then that’s a real problem” but “we don’t really know, and because of everything Trump has said, you can’t help but ask the question”).

C. *Diminishment of Press Functions and Reduction of Barriers to Construction of Other Enemies*

Potential limitations on press freedoms and access will impede the press's ability to serve important societal functions and thus will directly damage our democracy. Moreover, as discussed above,²⁸⁵ the Schmittian framework for enemy construction envisions the possibility of an "internal" enemy who aids or abets an external enemy.²⁸⁶ These internal, domestic enemies gain their status because, among other things, they pose a threat to the sovereign's ability to identify and combat other enemies.²⁸⁷ The Trump administration's enemy construction of the press envisions the press as this type of enemy, and this classification suggests that we should be attentive to additional potential consequences of that enemy construction that arise out of that status. If it is the case that the press is an "enemy" largely because it threatens the sovereign's designation of other internal and external enemies, then the sovereign's invocation of exceptionalism to hamper the press's functions might well be driven by a wider set of motivations related to those other enemies. That is, a sovereign constructing the press as an internal enemy may well be driven by a desire to neutralize the role the press plays in challenging the sovereign's construction of other enemies. Thus, the Trump administration's enemy construction of the press is best understood not only as an end in itself, but a means to eliminate barriers to his construction of other internal and external enemies.

Accordingly, among the risks of constructing the press as an enemy is an overarching risk that this construction will so undermine the press's capacity to investigate, gather, and disseminate the news that the government will be all the more empowered to construct enemies out of other institutions—such as the judiciary and the intelligence community—and vulnerable groups—including Mexican immigrants and Muslims. The latter set of these would presumably be classified by Trump as external enemies—wholly outside of our political community, whereas the former are clearly internal, and therefore would be classified as internal enemies. These internal enemies have their own role in checking enemy construction of external enemies. Thus, diminishment of the press's ability to check the enemy construction of other critical institutions of our democracy will, in turn, further facilitate Trump's continued enemy construction of vulnerable populations as external enemies.

285. See discussion *supra* Section II.A.

286. SCHMITT, *supra* note 10, at 49.

287. *Id.*

Perhaps the best way to recognize what would be lost if enemy construction of the press and its accompanying exceptionalism were fully successful is to consider the primary functions a protected press plays in the democracy. The next sections address the potential consequences of undermining the press's watchdog, educator, and proxy functions.

1. Reduction of the Press's Watchdog Function

A longstanding “basic assumption of our political system [is] that the press will often serve as an important restraint on government.”²⁸⁸ This so-called “watchdog function” is centered in larger First Amendment notions about freedom of expression as a democracy-enhancement device: we value the press for telling us what our elected officials are up to, so that we can, in turn, have an informed dialogue about their performance and make informed decisions about whether we wish to elect them again.²⁸⁹ In this sense, the American press “serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.”²⁹⁰ We expect the press to “guard[] against the miscarriage of justice”²⁹¹ and to “expos[e] corruption among public officers and employees.”²⁹² Conducting what Justice Stewart called “organized, expert scrutiny of government,”²⁹³ the press expends the time, energy, and resources to observe and keep accountable those who represent the public.²⁹⁴ More significantly, as a “mighty catalyst in awakening public interest in governmental affairs,”²⁹⁵ the press allows its audience to do the same.

A reduction in the full force of this function, then, might rob the democracy of critical information about what the government is doing—and

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

289. *Id.* at 585 (“[A]n informed public is the essence of [a] working democracy.”).

290. *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

291. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 587 (1976) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966)).

292. *Estes v. Texas*, 381 U.S. 532, 539 (1965).

293. Potter Stewart, “*Or of the Press*,” 26 *HASTINGS L.J.* 631, 634 (1975).

294. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (“[T]he press has exerted a freedom in canvassing the merits and measures of public men, of every description . . .” (quoting JAMES MADISON, REPORT ON THE VIRGINIA RESOLUTIONS, 24th Sess. (1800), reprinted in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 546, 570 (Jonathan Elliot ed., 1876))).

295. *Estes*, 381 U.S. at 539.

particularly—about government attempts to mislead the public and to perpetrate other abuses of power. The press, for example, often engages in rigorous fact-checking of assertions made by government officials. Often these facts involve critical issues of the day—such as current controversies about the Trump administration’s entanglements with Russia²⁹⁶ and other potential Trump conflicts of interest.²⁹⁷ This kind of investigative journalism, which is critical to both exposing—and deterring—corruption and abuse of power often relies heavily on government whistle-blowers and the use of anonymous sources. If Trump’s enemy construction of the press paves the way for him to be particularly aggressive in compelling reporters to reveal their anonymous sources or in subjecting reporters to Espionage Act prosecutions, the watchdog function of the institutional press will suffer.

In addition to investigating possible government corruption and abuse, the press also checks facts that are critical to the administration’s attempt to construct other enemies.²⁹⁸ Thus, the press’s fact-checking function can serve

296. See, e.g., Rosalind S. Helderman & Tom Hamburger, *Flynn Episode ‘Darkens the Cloud’ of Russia that Hangs Over Trump Administration*, WASH. POST (Feb. 14, 2017), https://www.washingtonpost.com/politics/flynn-episode-darkens-the-cloud-of-russia-that-hangs-over-trump-administration/2017/02/14/bc8d752a-f2db-11e6-8d72-263470bf0401_story.html?utm_term=.b29fa64cd4e0; Eugene Kiely, *Fact Check: Trump, Russia, and the U.S. Election*, USA TODAY (Dec. 9, 2016, 9:45 AM), <http://www.usatoday.com/story/news/politics/elections/2016/12/09/fact-check-trump-russia-election-hacking/95192810/>.

297. See, e.g., Glenn Kessler & Michelle Lee, *Fact Check: Trump’s Claim that ‘the President Can’t Have a Conflict of Interest,’* WASH. POST (Jan. 11, 2017, 9:53 AM), https://www.washingtonpost.com/politics/2017/live-updates/trump-white-house/confirmation-hearings-trump-speaks-and-vote-a-rama-analysis-and-updates/fact-check-trumps-claim-that-the-president-cant-have-a-conflict-of-interest/?utm_term=.37a7a71ae1c5; Alina Selyukh, *Trump Ethics Monitor: Has the President Kept His Promises?*, NPR (Feb. 17, 2017, 5:00 AM), <http://www.npr.org/2017/02/17/513724796/trump-ethics-monitor-has-the-president-kept-his-promises>.

298. See, e.g., Linda Qiu, *Fact-Checking Claims About Trump’s Travel Ban*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/politics/fact-checking-claims-about-trumps-travel-ban.html>; Imtiyaz Delawala, Maryalice Parks & Ryan Struyk, *Fact-Checking President Donald Trump’s Address to a Joint Session of Congress*, ABC NEWS (Feb. 28, 2017, 10:52 PM), <http://abcnews.go.com/Politics/fact-checking-president-donald-trumps-address-joint-session/story?id=45801701> (checking Trump’s remarks on issues including the impact of immigrants on employment, wages, and crime); Domenico Montanaro, Danielle Kurtzleben, Scott Horsley, Sarah McCammon & Richard Gonzales, *Fact Check: Donald Trump’s Speech on Immigration*, NPR (Aug. 31, 2016, 9:44 PM), <http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration>; Jessica Taylor & Danielle Kurtzleben, *Fact Checking This Week in the Trump Administration*, NPR (Feb. 4, 2017, 11:20 AM), <http://www.npr.org/2017/02/04/513348780/fact-checking-this-week-in-the-trump-administration> (checking claims about rollout of immigration ban); Paul Wiseman & Christopher S. Rugaber, *AP Fact Check: Trump’s Inaugural Speech*, PBS NEWSHOUR (Jan. 20, 2017, 4:41

as an important barrier to the administration's enemy construction of other groups. In the context of the Russia investigation, for example, the Trump administration has been "assault[ing] . . . the very legitimacy of [U.S.] intelligence agencies,"²⁹⁹ by "compar[ing] the intelligence community to Nazi Germany" and calling "the former director of the CIA" a "partisan political hack."³⁰⁰ The press has both highlighted these attacks and fact-checked the underlying claims.³⁰¹

Similarly, another group that Trump appears to be attempting to construct as enemies is Mexican immigrants, particularly undocumented immigrants. During the campaign, for example, he frequently associated immigrants with violence and crime that threatened U.S. citizens.³⁰² Post election, Trump has continued to suggest that immigrants are dangerous.³⁰³ Moreover, Trump has also begun to argue that immigrants have undermined one of the pillars of our democracy—free and fair elections—by alleging that "millions of people" voted in the presidential election illegally.³⁰⁴ The press is playing an important role in fact-checking and testing each of these claims.³⁰⁵

PM), <http://www.pbs.org/newshour/rundown/ap-fact-check-trumps-inaugural-speech/> (checking claims about "radical Islamic terrorism").

299. Jon Finer, *Why the President Is Feuding with the Media and the Intelligence Community*, ATLANTIC (Jan. 26, 2017), <https://www.theatlantic.com/politics/archive/2017/01/why-the-president-is-feuding-with-the-media-and-the-intelligence-community/514484/>.

300. *Id.*

301. See, e.g., *id.*; Eugene Kiely, *Fact Check: Trump and the Intelligence Community*, USA TODAY (Jan. 23, 2017, 5:33 PM), <http://www.usatoday.com/story/news/politics/2017/01/23/fact-check-trump-intelligence-community-cia/96964670/>.

302. In the June 16, 2015 speech in which Trump announced he was running for President, for example, Trump declared: "When Mexico sends its people, they're not sending their best. They're not sending you. They're not sending you. They're sending people that have lots of problems, and they're bringing those problems with us. They're bringing drugs. They're bringing crime. They're rapists. And some, I assume, are good people." Donald J. Trump, Presidential Campaign Announcement (June 6, 2015), in *Donald Trump Announces a Presidential Bid*, WASH. POST (June 16, 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donald-trump-announces-a-presidential-bid/?utm_term=.9932975e7515.

303. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 12, 2017, 3:34 AM), <https://twitter.com/realDonaldTrump/status/830741932099960834>.

304. Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664> ("In addition to winning the Electoral College in a landslide, I won the popular vote if you deduct the millions of people who voted illegally[.]").

305. Compare Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES (Jan. 23, 2017), <https://www.nytimes.com/2017/01/23/us/politics/donald-trump-congress-democrats.html> ("President Trump used his first official meeting with congressional leaders on Monday to falsely claim that millions of unauthorized immigrants had robbed him of a popular vote majority, a

Thus, a final critical piece of the press's watchdog function is its overarching role in challenging enemy construction itself and in highlighting to the public that it is occurring. Concomitantly, the press's watchdog function likewise suggests a vital role in challenging the link between enemy construction and exceptionalism—in challenging the scope, contours, or necessity of exceptionalism and in underscoring the trade-offs that are made between security and liberty and between security and other values.³⁰⁶ Trump's enemy construction of the press heightens the risk that the press may not be able to play this critical role of calling attention to ways that fear might compromise important American commitments and values.

2. Reduction of the Press's Educator Function

At its most fundamental level, “[a]n untrammelled press [is] a vital source of public information.”³⁰⁷ It is society's great teacher, “informing the citizenry of public events and occurrences,”³⁰⁸ and acting as the “chief” source of citizens' information on a number of topics.³⁰⁹ Put simply, we rely on the press to tell us how the world works. It does this in a variety of ways—by checking and countering facts asserted by others, by framing current affairs through an historical lens, by providing context and counterargument, and by offering information about the impact of government decision-making. The U.S. Supreme Court has called this teaching role the “[g]reat responsibility” of the press,³¹⁰ and has noted that “[w]ithout the information

return to his obsession with the election's results even as he seeks support for his legislative agenda.”), with Rowan Scarborough, *Trump Argument Bolstered: Clinton Could Have Received 800,000 Votes from Noncitizens*, WASH. TIMES (Jan. 26, 2017), <http://www.washingtontimes.com/news/2017/jan/26/hillary-clinton-received-800000-votes-from-nonciti/> (“Hillary Clinton garnered more than 800,000 votes from noncitizens on Nov. 8, an approximation far short of President Trump's estimate of up to 5 million illegal voters but supportive of his charges of fraud.”).

306. See, e.g., Opinion, *The War on Civil Liberties*, N.Y. TIMES (Sept. 10, 2002), <http://www.nytimes.com/2002/09/10/opinion/the-war-on-civil-liberties.html> [hereinafter *War on Civil Liberties*] (suggesting that “to curtail individual rights, as the Bush administration has done, is to draw exactly the wrong lessons from history”).

307. *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983) (quoting *Grosjean v. Am. Press Co.*, 297 U.S. 233, 250 (1936)); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980) (noting the press is central to “public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system” (quoting *Neb. Press Assn. v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring))).

308. *Estes v. Texas*, 381 U.S. 532, 539 (1965).

309. See *Richmond Newspapers*, 448 U.S. at 573.

310. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975).

provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally.”³¹¹

A reduction of this educator function, then, would debilitate the flow of important information in our democracy. Indeed, today’s press has consistently served this teaching role on a wide variety of crucial public issues. Sometimes it does so by engaging in newsgathering that educates us on important facts, and in this sense, this role overlaps heavily with the watchdog function just discussed. But the press as educator is also fulfilling a much broader set of duties—educating about history and current events’ likely place within it, about the workings of complex topics, and even about constitutional doctrine and governmental structure.³¹² More concretely, the educator function is very much a duty to provide context and reveal impact, exposing the story behind the story and illuminating the nuances beyond the facts.

Recent examples of these contributions by the press illustrate the ways in which the educator function presents an obvious barrier to other internal and external enemy constructions. For example, in the wake of President Trump’s derogatory commentary about the federal judge who halted implementation of the travel ban,³¹³ the press educated the public about the role of the judiciary, its history, the importance of judicial independence,³¹⁴ and the process by which this particular judge was selected and nearly unanimously

311. *Id.* at 492.

312. *See, e.g., War on Civil Liberties, supra* note 306 (discussing war-on-terror limitations on individual liberties and noting that “[e]very time the country has felt threatened and tightened the screws on civil liberties, it later wished it had not done so,” including the Sedition Act of 1798, McCarthyism, and World War II Japanese-American internments).

313. *See* Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976> (“The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!”).

314. *See, e.g.,* Alexander Bolton, *Graham: Free Press and Independent Judiciary Are Worth Fighting for*, HILL (Feb. 19, 2017, 12:33 PM), <http://thehill.com/homenews/sunday-talk-shows/320298-graham-free-press-and-independent-judiciary-are-worth-fighting-for> [hereinafter Bolton, *Graham*] (quoting Republican Senator Lindsey Graham speaking about the role of U.S. courts); Alexander Bolton, *McConnell: ‘Best to Avoid Criticizing Judges Individually,’* HILL (Feb. 5, 2017, 9:35 AM), <http://thehill.com/homenews/senate/317961-mcconnell-best-to-avoid-criticizing-judges-individually> (quoting Senate Majority Leader Mitch McConnell as criticizing Trump for attacking the federal judge).

confirmed.³¹⁵ Press coverage of the judiciary also aimed to highlight the potential impacts of delegitimizing the courts.³¹⁶

Likewise, when Trump restricted travel from predominantly Muslim countries and characterized Muslims as an enemy against which strict immigration enforcement needed to be implemented, the press contextualized the action by providing historical comparisons³¹⁷ and by offering differing views from Trump's opponents and from skeptics within Trump's own party.³¹⁸ It gave historical perspective³¹⁹ and educated the public about the details of the process of refugee vetting.³²⁰ For example, the press took issue with President Trump's assertion that only 109 people were affected by the

315. See, e.g., Thomas Fuller, *'So-Called' Judge Criticized by Trump is Known as a Mainstream Republican*, N.Y. TIMES (Feb. 4, 2017), <https://www.nytimes.com/2017/02/04/us/james-robart-judge-trump-ban-seattle.html> (describing the professional experience of and selection and confirmation process for the judge and quoting Republican leader from his state as saying he is "a smart, thoughtful guy and very even-tempered"); Amy Wang, *Trump Lashes Out at 'So-Called Judge' Who Blocked Travel Ban*, WASH. POST (Feb. 4, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/04/trump-lashes-out-at-federal-judge-who-temporarily-blocked-travel-ban/?utm_term=.d0ba71470902 (describing that Trump's tweet "appeared to question the legitimacy of the federal judge who issued the ruling" and reporting that the judge was appointed by George W. Bush).

316. See, e.g., *Trump Attacks on the Judiciary Raise Safety Concerns for Judges*, CBS NEWS (Feb. 11, 2017, 9:59 AM), <http://www.cbsnews.com/news/trump-attacks-judiciary-safety-concerns-judges/>.

317. See, e.g., Ann M. Simmons & Alan Zarembo, *Other Presidents Have Blocked Groups of Foreigners from the U.S., But Never So Broadly*, L.A. TIMES (Jan. 31, 2017, 7:55 PM), <http://www.latimes.com/nation/la-na-immigrant-ban-history-20170130-story.html> (comparing and contrasting Trump's invocation of the Immigration and Nationality Act to invocations by Presidents Obama, Clinton, George W. Bush, George H.W. Bush, and Reagan); *George H.W. Bush and Ronald Reagan Debate on Immigration in 1980*, USA TODAY, <http://www.usatoday.com/videos/news/2017/01/28/george-h.-w.-bush-and-ronald-reagan-debate-immigration-1980/97184364/> (last visited Nov. 4, 2017).

318. See John Yoo, Opinion, *Executive Power Run Amok*, N.Y. TIMES (Feb. 6, 2017), https://www.nytimes.com/2017/02/06/opinion/executive-power-run-amok.html?_r=0 (conservative scholar argues that even his "robust vision of the presidency" does not support some of Trump's actions, like his assertion of constitutional authority over the Mexican border wall or his "ill-conceived policy" on banning Muslims).

319. See, e.g., Julie Vitkovskaya et al., *Previously Barred Refugees, Immigrants Can Continue Entering the U.S.*, WASH. POST (Feb. 9, 2017), <https://www.washingtonpost.com/graphics/national/immigration-order-explainer/> (parsing out different groups affected by the executive order and providing context about the number of visa-holders and refugees admitted from various countries in the recent past).

320. See, e.g., Bill Whitaker, *A Look at How Syrian Refugees Were Vetted Before Trump*, CBS NEWS (Jan. 29, 2017), <http://www.cbsnews.com/news/60-minutes-syrian-refugee-crisis/> (transcript of 60 Minutes broadcast detailing the process for vetting Syrian refugees living in Jordanian camps).

travel ban.³²¹ Press coverage of the ban also went well beyond simple fact-checking of numbers, documenting the impacts on individual refugees and visa-holders set to travel to the United States to reunite with their families or receive medical care who were barred from boarding their planes.³²²

Having the press constructed as an enemy and subjected to the diminished protections that follow from exceptionalism would therefore leave us without a unique and important source of education on matters of public affairs. That educative function is imperative, particularly as it acts to counter additional enemy construction that flourishes in the wake of miseducation.

3. Reduction of the Press's Proxy Function

The central concept of the press as a Fourth Estate is that it will act as a useful “surrogate” of the people.³²³ When “constraints on time, space, knowledge, or ability keep the individual citizen from participating directly,” the press is the “entity that will do the hard work of finding out what is happening in the democracy, and then pass along the information to those who could not or would not glean it for themselves.”³²⁴ The Court has noted that “in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.”³²⁵ The press goes where we would like to go and does what we would like to do, acting as a proxy and serving as our boots on the ground. More than this, it also helps us to sift, prioritize, and digest the massive bulk

321. See, e.g., Glenn Kessler, *The Number of People Affected by Trump's Travel Ban: About 90,000*, WASH. POST (Jan. 30, 2017), https://www.washingtonpost.com/news/fact-checker/wp/2017/01/30/the-number-of-people-affected-by-trumps-travel-ban-about-90000/?utm_term=.a2b0960905e9 (arguing that the real number of affected will ultimately be closer to 90,000); Ron Nixon, *More People Were Affected by Travel Ban Than Trump Initially Said*, N.Y. TIMES (Jan. 31, 2017), <https://www.nytimes.com/2017/01/31/us/politics/trump-ban-immigrants-refugees.html> (reporting Customs and Board Protection officials' later explanation that “721 people had been denied boarding for the United States after it began enforcing the travel ban” and that an additional “872 refugees were granted waivers to enter the country”).

322. See, e.g., David Williams, *Immigration Ban Leaves Children Stranded, Families Split*, CNN (Feb. 4, 2017, 3:42 PM), <http://www.cnn.com/2017/02/03/politics/trump-immigration-ban-children-trnd/> (detailing stories of families separated by the travel ban and children with serious medical conditions who were prevented from traveling to the U.S. to receive the expert medical care they needed).

323. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

324. Jones, *supra* note 194, at 257.

325. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

of available information on public affairs.³²⁶ This function of the press as “a dialogue builder—a critically important distiller of societal information and shaper of community conversations through the application of editorial insight and journalistic acumen”³²⁷—is vital, because “[w]ithout some core of shared information and common purposes, there can be no meaningful discussion of public issues.”³²⁸

Accordingly, if the press is hampered in its performance of the proxy function, the public will have less access to information that can only be gained by intensive reporting on location and will be less able to digest and prioritize the information it does receive. Thus, for example, the working press has recently reported from airports around the country about the impacts of the travel executive order,³²⁹ from the border and border towns about the feasibility of the border wall and locals’ reaction to the plan,³³⁰ and from Syrian refugee camps in Jordan about the U.S. process for vetting refugees.³³¹ Some of the information so gleaned by the press will be relevant to attempts by the executive to construct other enemies—such as enemy construction of Syrian refugees—and other information will be pertinent to government affairs more generally.

In addition to going to places where it would be difficult for individual citizens to go, the press speaks to people who individual citizens would have

326. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966) (calling the press the entity “specifically selected” by the Constitution “to play an important role in the discussion of public affairs”).

327. Jones, *supra* note 194, at 257.

328. David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. 331, 332–33 (2014) (“Democracy requires dialogue, and dialogue requires some agreement about the subjects to be discussed. What the press does, usefully though not uniquely, is organize public dialogue. News outlets sift, select, and package the news, and in so doing create a community . . .”).

329. See, e.g., Jonah Engel Bromwich, *Lawyers Mobilize at Nation’s Airports After Trump’s Order*, N.Y. TIMES (Jan. 29, 2017), https://www.nytimes.com/2017/01/29/us/lawyers-trump-muslim-ban-immigration.html?_r=0.

330. See, e.g., Dudley Althaus & Dan Frosch, *Texas Border Cities React to Donald Trump’s Border Wall*, WALL ST. J. (Jan. 25, 2017, 8:06 PM), <https://www.wsj.com/articles/texas-border-cities-react-to-donald-trumps-border-wall-1485356419> (“Some officials and residents in border states that have benefited from stronger ties with Mexico reacted with concern over the potentially negative impact building a wall could have on regional communities, while expressing support for enhanced security along the border.”); Frank Bajak, *Americans Who Live Near Border Say Trump’s Wall Is Unwelcome*, PBS NEWSHOUR (Nov. 22, 2016, 2:06 PM), <http://www.pbs.org/newshour/rundown/americans-live-near-border-say-trumps-wall-unwelcome/> (reporting from an AP journalist who visited Los Ebanos, Texas to investigate places where Trump’s border wall could be built).

331. See, e.g., Whitaker, *supra* note 320 (transcript of 60 Minutes broadcast reporting from the Zaatari refugee camp in Jordan about how vetting of the Syrian refugees who live there occurs).

difficulty both finding and accessing. Many people at the center of current events or controversies—including both government officials and private citizens—cannot reasonably be expected to give hundreds of interviews to interested citizens or answer multitudes of repetitive questions, but will likely be more willing and able to impart information to journalists willing to publish that information to a wider audience. For example, recent press interviews have shone light on allegations about Trump associates' relationships with Russia³³² and on his plan to significantly step up immigration enforcement by hiring 15,000 new Border Patrol and Immigration and Customs Enforcement (ICE) agents.³³³ The press's access to people who might not otherwise speak takes on particular significance when a source needs or prefers anonymity.

Likewise, the press is more likely to have the time and capacity to observe government actions—and interactions with citizens—directly by observing trials and other government proceedings. Journalists are also better positioned to access government records and to file Freedom of Information Act (FOIA)³³⁴ petitions when access is denied.³³⁵

Finally, another way that the press serves a proxy role is by spending the time, energy, and resources to prioritize the most relevant information and then to digest, synthesize, and categorize it in ways that help illuminate public issues. This function may be particularly important at the beginning of an administration when there is a flood of proposed appointees and new policies

332. See, e.g., Michael S. Schmidt, Mark Mazzetti & Matt Apuzzo, *Trump Campaign Aides Had Repeated Contacts with Russian Intelligence*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/us/politics/russia-intelligence-communications-trump.html> (reporting interview with Paul Manafort, Trump's former campaign manager, in which he asserted that he had "never knowingly spoken to Russian intelligence officers" and "never been involved with anything to do with the Russian government or the Putin administration or any other issues under investigation today"); *id.* (reporting interviews with intelligence officials about intercepted calls between "senior Russian intelligence officials" and Trump campaign members "and other Trump associates").

333. See Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't Be Easy*, NPR (Feb. 23, 2017, 5:12 AM), <http://www.npr.org/2017/02/23/516712980/trumps-plan-to-hire-15-000-border-patrol-and-ice-agents-wont-be-easy-to-fulfill> (interviewing "Shawn Moran, vice president of the National Border Patrol Council, the union that represents Border Patrol agents" about the process for hiring new agents).

334. 5 U.S.C. § 552 (2012), *amended by* Pub. L. No. 114-185, 130 Stat. 538 (2016).

335. See Jones, *supra* note 177, at 604–11; Lydia Wheeler, *Intelligence Agencies Sued for Records on Russian Election Interference*, HILL (Dec. 27, 2016, 4:24 PM), <http://thehill.com/regulation/administration/311928-intelligence-agencies-sued-for-records-on-russian-election> (reporting suit by journalist and an MIT Ph.D. candidate to compel the CIA, FBI, Department of Homeland Security, and Office of the Director of National Intelligence to comply with a FOIA request for "records pertaining to Russia's interference in the presidential election").

with which the public must contend. *The New York Times*, for example, has endeavored to help structure discussion about how unusual the Trump administration's early actions truly are by asking a range of experts with different political commitments to rate those actions along two axes: importance and normality/abnormality.³³⁶ While these sorts of attempts may be more or less persuasive or helpful, they can serve, at least, to provide starting points for citizen analysis and broader conversations about the contours of information that would be most helpful to have and about which issues are most immediately pressing.

If Trump's enemy construction of the press makes the press less able to perform these proxy functions, Americans access to important information—gleaned from on-the-ground reporting, interviews with elected officials and citizens, observations of government proceedings, and records searches and requests—is likely to be significantly curtailed. Moreover, their ability to prioritize, digest, and synthesize the mountains of information that is available will also be compromised. Importantly, in their role in structuring public discussion, the press can shape community dialogue about who is and who is not an enemy and about the benefits and disadvantages of any particular enemy construction,³³⁷ and in the absence of these kinds of conversation starters, enemy construction of other groups is more likely to go unnoticed and unconsidered.

336. Quoc Trung Bui, Claire Cain Miller & Kevin Quealy, *Just How Abnormal Is the Trump Presidency? Rating 20 Events*, N.Y. TIMES (Feb. 27, 2017), <https://www.nytimes.com/interactive/2017/02/27/upshot/whats-normal-whats-important-a-ranking-of-20-events-in-the-trump-administration.html> (observing that “[i]t’s understandable if President Trump’s first month has left your head spinning, given the pace of news, the middle-of-the-night Twitter posts and the vows to upend Washington,” asking “experts across the ideological spectrum—people who have served in government or studied the way governments work—to rate 20 news events for importance and abnormality,” and then charting the resulting ratings along those two axes to aid in visualizing the various issues).

337. Bolton, *Graham*, *supra* note 314 (“Sen. Lindsey Graham . . . defended the press and the judiciary—two recent targets of President Trump—as ‘worth fighting and dying for.’”); Jon Finer, *Trump Is Attacking Any Institution that Challenges Him*, ATLANTIC (Feb. 5, 2017), <https://www.theatlantic.com/politics/archive/2017/02/trump-is-attacking-any-institution-that-challenges-him/515727/> (arguing that Trump’s “unprecedented assault on institutions that could delay or derail his radical agenda”—including “the press and intelligence community, two entities in American society that traditional[ly] provide the verified facts that are the basis for policy decisions”—is a “disturbing . . . theme” of his governance); David Remnick, *Donald Trump and the Enemies of the American People*, NEW YORKER (Feb. 18, 2017), <http://www.newyorker.com/news/news-desk/donald-trump-and-the-enemies-of-the-american-people> (criticizing Trump’s labeling of the media as the “enemy of the American People”); *That’s How Dictators Get Started’: McCain Defends the Free Press*, NBC NEWS (Feb. 18, 2017), <http://www.nbcnews.com/meet-the-press/video/-that-s-how-dictators-get-started-mccain-defends-the-free-press-880252483608>.

D. Potential Mitigating Factors

In our assessment of the potential impacts of Trump's enemy construction of the press, we should, of course, acknowledge that Trump's enemy construction may fail to persuade enough people to allow him to successfully invoke national-security type exceptionalism to justify extensive limitations on press freedom. One possibility is that the country is already sufficiently polarized that Trump's enemy-rhetoric persuades only those who were already persuaded and reflects—rather than alters—the current political landscape. Additionally, one of the risks for the executive in constructing an enemy is that the enemy-construction effort itself energizes the enemy's supporters and rallies them to defend against the executive's attack.³³⁸ Indeed, many major news organizations have reported a dramatic increase in subscriptions since Trump's election.³³⁹

Nonetheless, the risks of enemy construction of the press are significant enough that they deserve serious attention and consideration. Moreover, these risks are also substantially heightened by Trump's use of anticipatory undercutting. If Trump is, in fact, setting the stage to blame institutions like

338. Margaret Sullivan, Opinion, *Are Americans Moved by Trump's Media-as-Enemy War Cry? The Opposite May Be True*, WASH. POST (July 10, 2017), https://www.washingtonpost.com/lifestyle/style/are-americans-moved-by-trumps-media-as-enemy-war-cry-the-opposite-may-be-true/2017/07/10/c3d082ea-658c-11e7-9928-22d00a47778f_story.html?utm_term=.e43be8de41be (stating that recent Pew Research indicates that the negative view of the media, a view in which a majority of Republicans hold, remains unchanged since Trump became President but that those who are left-leaning have a more positive view of the media).

339. See, e.g., Shannon Bond, *'Failing' New York Times Gets Digital Trump Boost: Newspaper Criticised by New President Sees Subscribers Signing Up in Record Numbers*, FIN. TIMES (Feb. 2, 2017), <https://www.ft.com/content/7c6e25da-e96b-11e6-967b-c88452263daf> (reporting that *The New York Times* “added 276,000 net digital-only subscriptions in the final three months of 2016, the best showing since it implemented its paywall in 2011 . . . bringing total circulation to more than [three million] subscribers in print and online”); Matthew J. Belvedere, *New York Times Subscription Growth Soars Tenfold, Adding 132,000, After Trump's Win*, CNBC (Nov. 29, 2016, 11:38 AM), <http://www.cnbc.com/2016/11/29/new-york-times-subscriptions-soar-tenfold-after-donald-trump-wins-presidency.html> (reporting that, in the two weeks post-election, *The New York Times* gained 132,000 new subscribers, which was “10 times” the growth rate for the same time period the prior year); Joseph Lichterman, *After Trump's Win, News Organizations See a Bump in Subscriptions and Donations*, NIEMAN LAB (Nov. 14, 2016, 2:35 PM), <http://www.niemanlab.org/2016/11/after-trumps-election-news-organizations-see-a-bump-in-subscriptions-and-donations/> (“As a result of Trump's unexpected election, news organizations [including *ProPublica*, *The New York Times*, and *The Atlantic*,] have reported subscription growth as readers respond to Trump's threats against the independent press and First Amendment.”). One might even speculate that Trump hopes the media will put up a good fight, as that keeps Trump and his actions continually in the news and in the public eye, just as occurred during the campaign.

the media and the judiciary when the next serious terrorist attack occurs on U.S. soil, the likelihood that the press's enemy construction will result in significant, concrete cutbacks on press freedoms moves from the realm of the possible to the probable.

V. CONCLUSION

President Trump has not merely engaged in bombastic rhetoric about the press. He has not merely engaged in abusive treatment of the press. Rather, a close investigation of the full scope of his words and behaviors demonstrates that he has engaged in classic Schmittian enemy construction. Taking advantage of recent social, technological, and political shifts that left the press vulnerable to this construction, the administration has passed a threshold not approached by previous administrations in their tensions with the media. Trump is signaling—through his terminology, through his delegitimizing actions, and through his anticipatory undercutting—that the press is literally the enemy, to be distrusted, ignored, and excluded.

Schmitt's insider-outsider, us-versus-them framework suggests that enemy construction comes with potentially significant corollaries. Enemy construction is a step toward exceptionalism, which is itself a justification for reducing or rejecting ordinarily recognized liberties. This consequence is a stark one for any institution in a democracy, but it is a particularly troublesome one for the press, given the special functions the press performs for the wider public and the special role it has in finding and delivering counter-narratives. Most significantly, enemy construction that diminishes the watchdog, educator, and proxy functions of the press opens the door to additional opportunities for the administration to construct other enemies. In many very real respects, the press is the primary obstacle preventing the President from engaging in full enemy construction of other internal enemies, like the judiciary or the intelligence community. These internal institutions combine with the press to act as the major checks on the construction of potential external enemies, like Mexican immigrants or Muslim refugees. Thus, Trump's enemy construction of the press should not be discounted as mere puffery, but should be recognized for the dire risks that it poses.