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Enemy Construction and the Press

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ENEMY CONSTRUCTION AND THE PRESS

RonNell Andersen Jones* & Lisa Grow Sun**

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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Table of Contents

I. Introduction.....	3
II. Enemy Construction of the Press by the Trump Administration	4
A. Schmitt and the Role of Enemy Construction	5
B. Trump’s Enemy Construction Methodology	7
1. Rhetorical Framing	8
2. Treatment Designed to Signal Delegitimization	15
3. Anticipatory Undercutting.....	18
C. Distinguishing press enemy construction from press tension.....	20
1. Press-President Tensions	21
2. Distinguishing Tensions from Enemy Construction	25
III. The Emergent Vulnerability of the Mainstream Media to Enemy Construction.....	28
IV. The Motivations for and Consequences of Enemy Construction	36
A. Potential Motivations for Enemy Construction	36
B. The Risks of Exceptionalism	39
1. Enemy Construction and The State of Exception.....	39
2. Exceptionalism and Press Freedom.....	42
C. Diminishment of Press Functions and Reduction of Barriers to Construction of Other Enemies	47
1. Reduction of the Press’s Watchdog Function	48
2. Reduction of the Press’s Educator Function	52
3. Reduction of the Press’s Proxy Function	54
D. Potential Mitigating Factors	58
V. Conclusion.....	59

I. INTRODUCTION

When the president of the United States declared recently 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 mostly failed to appreciate the wider ramifications of the president’s narrative choice.

Our earlier work describes the process of governmental “enemy construction,”² 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 is an illegitimate “enemy” triggering a state of Schmittian exceptionalism and justifying the compromise of ordinarily recognized liberties.³ 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.

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 Carl 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 this enemy construction is not merely different in degree but different in kind from the tensions and antagonisms with the

¹ See, e.g., Martha Minow & Robert Post, *Standing Up for “So-Called Law,”* Boston Globe, Feb. 10, 2017, <https://www.bostonglobe.com/opinion/2017/02/10/standing-for-called-law/VLbDYmrwpdjCn8qs5FPJaK/story.html>; Jon Finan, *A Dangerous Time for Press and the Presidency*, THE ATLANTIC, Feb. 20, 2017, <https://www.theatlantic.com/politics/archive/2017/02/a-dangerous-time-for-the-press-and-the-presidency/517260/>; William Steakin, *Dan Rather Blasts Trump’s Attack on the Press as ‘A Deep Betrayal,’* AOL.COM, Feb. 18, 2017, <https://www.aol.com/article/news/2017/02/18/dan-rather-blasts-trumps-attack-on-the-press-as-a-deep-betraya/21716862/>; 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>.

² Lisa Grow Sun & RonNell Andersen Jones, *Disaggregating Disasters*, 60 U.C.L.A. L. REV. 884, 924 (2013).

³ *Id.*

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 during the short time since assuming office on January 21, 2017, President Trump and his administration have overtly labeled the mainstream press “the enemy of the American People,”⁴ barred major news organizations including the *New York Times* (long viewed as the country’s paper of record) 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 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—

⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065> (“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 Section II.B, *infra*.

during the Weimar Republic. 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.

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.⁷ 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.⁸ That is, Schmitt's ideas express the zeitgeist of the creeping national-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

⁷ 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).

⁸ See, e.g., ERIC POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (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-German, H-Net Reviews, Oct. 2006 (reviewing CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Univ. of Chicago Press 2005) (1922)), <https://www.h-net.org/reviews/showpdf.php?id=12384> (observing that “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’”).

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.”⁹

In the Schmittian worldview, the essence of politics—its defining activity—is the “struggle against the enemy.”¹⁰ So understood, politics¹¹ is the division of the world into friend and enemy,¹² 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.”¹³ 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.¹⁴ A sovereign state that loses the “capacity or will” to decide who qualifies as an enemy “ceases to exist politically.”¹⁵ 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.

Moreover, Schmitt recognizes the possibility not only of external enemies, but also of domestic or internal enemies.¹⁶ 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.”¹⁷ These “declared enemies of state”¹⁸ 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

⁹ CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* 49 (George Schwab trans., 1932).

¹⁰ George Kateb, *Political Action: Its Nature and Advantages*, in *THE CAMBRIDGE COMPANION TO HANNAH ARENDT* 129, 131 (Dana R. Villa, ed. 2000).

¹¹ Schmitt, of course, distinguishes between everyday, ordinary “party politics” and the truly political. SCHMITT, *supra* note 9 at 32 (distinguishing “party politics” from the truly “political,” which is oriented toward and organized around the friend/enemy dichotomy).

¹² *Id.* at 26 (“The specific political distinction to which political actions and motives can be reduced is that between friend and enemy.”)

¹³ *Id.* at 27.

¹⁴ *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.

¹⁵ *Id.* at 49.

¹⁶ *Id.* at 46 (“As long as the state is apolitical 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.”).

¹⁷ *Id.* at 47.

¹⁸ *Id.* at 47.

way of life.”¹⁹ Aid to external enemies need not necessarily be material, concrete aid; rather, “if part of the population declares that it no longer recognizes enemies, then, depending on the circumstance, it joins their side and aids them.”²⁰ Indeed, challenging the sovereign’s designation of external enemies itself threatens the “homogeneity of opinion—or “minimal agreement” on values—that Schmitt views as a prerequisite to legitimate governance—as a “precondition for the existence of a political community.”²¹ 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.”²² 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.”²³ 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 second-largest circulation in the country and long regarded as a national newspaper of record.²⁴ Administration officials confirmed that the president meant what he said,²⁵ and in the following days, the president doubled down on the statement.²⁶ As a pure matter of labeling, then, the

¹⁹ *Id.* at 49.

²⁰ *Id.* at 51.

²¹ GAVIN RAE, *THE PROBLEM OF POLITICAL FOUNDATIONS IN CARL SCHMITT AND EMMANUEL LEVINAS* 124 (2016); CARL SCHMITT, *THE CRISIS OF PARLIAMENTARY DEMOCRACY* 38 (1985) (“Democracy requires, therefore, first homogeneity and second—if the need arises—elimination or eradication of heterogeneity.”).

²² *Carl Schmitt*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY, (Oct. 1, 2014) <https://plato.stanford.edu/entries/schmitt/>.

²³ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065>.

²⁴ Roger Yu, *USA Today, Wall Street Journal, and 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/>.

²⁵ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065>.

²⁶ 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].

president might be said to have engaged in enemy construction vis-à-vis the press.

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.”²⁷

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: Trump’s rhetorical framing of the press; his delegitimizing treatment of the press; and 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, 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 longshot campaign for the Republican nomination,²⁸ 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,²⁹ and he encouraged supporters to

²⁷ SCHMITT, *supra* note 9, at 27.

²⁸ 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>; 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>.

²⁹ See, e.g., *Donald Trump Taunts NBC News’ Katy Tur at Miami Rally*, BLOOMBERG

join him in taunts and jeers directed at the press corps.³⁰ Mocking, criticizing, and verbally attacking individual reporters and media executives became a staple of Trump's presentations.³¹ The starkness of the chosen terminology—words like “dishonest,”³² “lying,”³³ “failing,”³⁴

POLITICS (Nov. 2, 2016, 1:33 PM), <https://www.bloomberg.com/politics/videos/2016-11-02/donald-trump-taunts-nbc-news-katy-tur-at-miami-rally> (criticizing Katy Tur); Jonathan Easley, *Trump Takes Feud with Press to Campaign Rally in Florida*, THE HILL (Feb. 18, 17, 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); Kyle Balluck, *Trump Knocks New York Times Ad Campaign: 'Try Reporting Accurately & Fairly'*, THE 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); Rebecca Savransky, *Media Members Defend Reporter Targeted by Trump*, THE 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).

³⁰ See, e.g., *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.”); Mediaite, *'I Love It!' Trump Taunts WaPo at Rally After Revoking Press Credentials*, YOUTUBE (June 15, 2016), https://youtu.be/k_dkcyQYDRw (“These people in the back...[t]hey are so dishonest we just took the press credentials away.”); *Trump Taunts Press Over Being Stuck on Plane*, NBC NEWS (Sept. 16, 2016), <http://www.nbcnews.com/video/trump-taunts-press-over-being-stuck-on-plane-766441539766> (taunting the press stuck on a plane).

³¹ 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); *Did Trump Really Mock a Reporter's Disability*, FOX NEWS (Sept. 13, 2016, 1:16), <http://video.foxnews.com/v/5123278995001/?#sp=show-clips> (showing a series of clips of Trump mocking the press); *Trump Mocks Reporter with Disability*, CNN (Nov. 25, 2015), <https://youtu.be/PX9reO3QnUAerge> (mocking Serge Kovaleski); *Highlights of the Donald Trump vs. Megyn Kelly Battle*, CNN (Aug. 10, 2015), <http://www.cnn.com/videos/politics/2015/08/10/a-timeline-of-donald-trump-vs-megyn-kelly-origwx-allee.cnn> (showing a series of clips of Trump's comments about Kelly); *Trump Shuts Down CNN Reporter*, CNN (Jan. 13, 2017), <http://www.cnn.com/videos/politics/2017/01/11/donald-trump-jim-acosta-cnn-fake-news.cnn> (“Not you...you are fake news.”).

³² Nikita Vladimirov, *Trump Defends the Size of His Inaugural Crowd*, THE HILL (Jan. 21, 2017, 4:07 PM), <http://thehill.com/blogs/blog-briefing-room/news/315484-trump-defends-size-of-his-inaugural-crowd>.

³³ Gabriel Schoenfeld, *Trump vs. 'Lying, Disgusting' Media*, USA TODAY, Jan. 11, 2017 <http://www.usatoday.com/story/opinion/2017/01/11/trump-lying-disgusting-media-espionage-laws-gabriel-schoenfeld-column/96389362/> (reporting Trump's statement about journalists at a campaign rally that “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*

“disgusting,”³⁵ “third-rate,”³⁶ “bad,”³⁷ and “scum”³⁸—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.³⁹

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”⁴⁰ contextualized the threat that the enemy should be seen as posing. Trump’s public remarks regularly characterized reporters as unrepentant actors who “say whatever they want ... and get away with it.”⁴¹ 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 going to have such problems.”⁴²

Attack Journalists, TIME.COM, Oct. 25, 2016, <http://time.com/4544562/donald-trump-supporters-lügenpresse/>.

³⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 16, 2017, 3:58 AM), <https://twitter.com/realDonaldTrump/status/832197515248275456>.

³⁵ 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 (May 15, 2016), <http://www.usatoday.com/videos/news/politics/elections/2016/2016/03/15/81843912/> (“disgusting reporters, horrible people”).

³⁶ 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/>.

³⁷ Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 11, 2016, 5:02 PM), <https://twitter.com/realDonaldTrump/status/808114703922843649>.

³⁸ Mark Hensch, *Trump Calls Media ‘Scum,’* THE HILL (Oct. 26, 2015, 8:04 PM), <http://thehill.com/blogs/ballot-box/presidential-races/258057-trump-the-media-is-scum>.

³⁹ SCHMITT, *supra* note 9, at 27.

⁴⁰ *Id.* at 26.

⁴¹ 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/>.

⁴² 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>.

Trump kept this campaign promise. One day after his inauguration, he gave a speech that wholly embraced enemy rhetoric on a new scale,⁴³ employing war terminology that we and other scholars have described as the prototypical linguistic device of enemy construction.⁴⁴ “As 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.”⁴⁵ Within days, the president’s chief strategist would speak of the press as “the opposition party,”⁴⁶ 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.⁴⁷ 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.⁴⁸ 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,⁴⁹ primarily as a precursor to a vilification of the press, whose inability to accurately forecast the results of the election he attributed to the malice borne of enemy status.⁵⁰

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.⁵¹ He called the media “fake” nearly 20 times in roughly 70 minutes. His follow-up “enemy of the people” tweet was reinforced at a Conservative Political Action Group speech the next week at

⁴³ *Trump CIA Speech Transcript*, CBS (Jan. 23, 2017, 3:23 PM), <http://www.cbsnews.com/news/trump-cia-speech-transcript/> [hereinafter *CIA Speech Transcript*].

⁴⁴ Sun & Jones, *supra* note 2, at 924.

⁴⁵ *CIA Speech Transcript*, *supra* note 43.

⁴⁶ *Steve Bannon and Reince Priebus’ Joint Interview at CPAC*, TIME (Feb. 23, 2017) <http://time.com/4681094/reince-priebus-steve-bannon-cpac-interview-transcript/>.

⁴⁷ Ian Schwartz, *WH’s Sean Spicer Lambastes Media in First Presser: “We’re Going to Hold the Press Accountable,”* REAL CLEAR POLITICS (Jan. 21, 2017), http://www.realclearpolitics.com/video/2017/01/21/whs_sean_spicer_lambastes_media_in_first_presser_were_going_to_hold_the_press_accountable.html

⁴⁸ *CIA Speech Transcript*, *supra*, at note 43.

⁴⁹ *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>.

⁵⁰ *See, e.g.*, Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 14, 2017, 5:39AM), <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!”).

⁵¹ Donald J. Trump, *Full Transcript: President Donald Trump’s News Conference*, CNN, Feb. 17, 2017, <http://www.cnn.com/2017/02/16/politics/donald-trump-news-conference-transcript/> [hereinafter *First News Conference Transcript*].

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.⁵² The press, he said, “make up sources,” are “very dishonest people,” and “do a tremendous disservice to our country.”⁵³ 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.”⁵⁴ We “have to fight it,” he said.

In the wake of substantial criticism⁵⁵ for his 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.⁵⁶ It is difficult to contend, however, that these walk-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

⁵² *CPAC Transcript*, *supra* note 26.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ See, e.g., Mahita Gajanan, ‘That’s How Dictators Get Started’: John McCain Slams President Trump’s Attacks on Media, *FORTUNE*, Feb 19, 2017, <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.COM*, Feb. 27, 2017, <http://www.today.com/news/george-w-bush-opens-trump-s-war-media-russia-travel-t108627>.

⁵⁶ See, e.g., *CPAC Transcript*, *supra* note 26; Boyle, *supra* note 36 (“Well, it’s not the media. It’s the fake media. ... There’s a difference. The 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 26 (“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’re 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 a 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 ya, I love good stories, but we don’t go...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.”).

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.”⁵⁷ Likewise, in his original “enemy-of-the-people” tweets, he sweepingly made reference to entire news organizations,⁵⁸ 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,’”⁵⁹ 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 nearly twenty-five million Americans.⁶⁰ Trump has used that same “fake news” phrase in reference to several other publications⁶¹ that are also major news sources for Americans, often seemingly based solely on the

⁵⁷ Boyle, *supra* note 36 (“There’s tremendous fake media out there. Tremendous fake stories.”).

⁵⁸ Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065> (“The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”)

⁵⁹ William Cummings, *Trump on New York Times: ‘The Intent is So Evil and So Bad,’* Feb. 27, 2017, USA TODAY, <http://www.usatoday.com/story/news/politics/onpolitics/2017/02/27/trump-breitbart-interview/98504402/>.

⁶⁰ Sidney Ember, *NY Times Co. Reports Loss as Digital Subscriptions Grow*, May 6, 2016 (“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*, June 30, 2015 (reporting CNN had an average primetime viewership of 576,000); *Fox Business Surges in Ratings Competition with CNBC*, ASSOCIATED PRESS, Feb. 20, 2017, http://hosted.ap.org/dynamic/stories/U/US_NIELSENS?SITE=AP (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).

⁶¹ See, e.g., Max Greenwood, Wash. Post: Our story wasn’t fake, it led to Trump ousting Flynn, *The Hill*, Feb. 24, 2017 (noting Trump called Washington Post “fake news”); Donald J. Trump (@realDonaldTrump), TWITTER, Feb. 15, 2017, 3:40 a.m., <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[.]”)

publication of coverage that is unfavorable.⁶² Before his nomenclature changed to the “fake news” label, he and his surrogates attacked “the mainstream media,”⁶³ which, by its very name, suggests a reference to the historically recognized body of press that are 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 party⁶⁴ and that Trump has a “running war with the media.”⁶⁵ 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.

⁶² 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, National Public Radio Morning Edition, Feb. 27, 2017 (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.”).

⁶³ *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* Michael Grynbaum, *Trump strategist Stephen Bannon says the 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?_r=0 (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 the raucous nationalist speech to the biggest conservative conference of the year*, BUSINESS INSIDER, Feb. 24, 2017, <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”); Chris Cillizza, *Kellyanne Conway gave a master class in not answering questions in her Fox News interview*, WASH. POST, Jan. 26, 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/?utm_term=.a1d8d24012d3 (Trump advisor Kellyanne Conway critiquing the “mainstream media”).

⁶⁴ *Steve Bannon and Reince Priebus’ Joint Interview at CPAC*, TIME (Feb. 23, 2017) <http://time.com/4681094/reince-priebus-steve-bannon-cpac-interview-transcript/> (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, <http://www.politico.com/story/2017/01/donald-trump-steve-bannon-media-opposition-party-234280> (quoting Trump as saying in an interview, “Yeah, I think the media’s the opposition party in many ways.”).

⁶⁵ *CIA Speech Transcript*, *supra* note 43

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. 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.

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 campaign⁶⁶ and belittling journalists and their employers while refusing to take their questions at his first press conference as president-elect,⁶⁷ Trump set a very early tone of press exclusion and enemy characterization. He abandoned some basic traditions that had long singled cooperation with the press, deciding not to allow reporters to travel with him on his plane⁶⁸ and failing to inform them when he went out into public.⁶⁹ These high-profile exclusions, because they contradicted longtime

⁶⁶ 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).

⁶⁷ *First News Conference Transcript*, *supra* note 51.

⁶⁸ Jordan Fabian, *Press Worries Over President-elect Trump*, THE HILL (Nov. 12, 2016, 9:18 AM), <http://thehill.com/homenews/administration/305632-press-worries-over-president-elect-trump>.

⁶⁹ Eliza Collins, *Trump Ditches Reporters Goes to Dinner, WHCA Calls It 'Unacceptable'*, USA TODAY (Nov. 16, 2016, 10:11 AM), <http://www.usatoday.com/story/news/politics/onpolitics/2016/11/16/trump-ditches->

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 Wing⁷⁰ and that he might have his own administration, rather than the White House Correspondents Association, decide who has access to the briefings.⁷¹ By a month into his time in office, President Trump’s press secretary was excluding some media outlets from publicly announced briefings.⁷²

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.

It is likewise an enemy-construction technique to repeatedly characterize an institution as a public risk against whom the rule of law should be employed and from whom 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. 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.”⁷³

reporters-goes-dinner-whca-calls-unacceptable/93952790/.

⁷⁰ *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>.

⁷¹ *Id.*

⁷² Mark Hensch, *Media Figures Slam White House for Excluding Outlets from Briefing,* THE HILL (Feb. 24, 2017, 2:54 PM), <http://thehill.com/homenews/administration/321063-media-slams-limited-wh-press-access>.

⁷³ *CPAC Transcript, supra* note 26 (“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. And 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.”).

He repeatedly and conspicuously spoke of a plan to “open up libel law” to make the media more susceptible to damages in libel suits.⁷⁴ He threatened to sue the *New York Times* for publishing stories on his leaked tax returns⁷⁵ and stories quoting women who suggested he had sexually assaulted them.⁷⁶ 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 obtained⁷⁷—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,”⁷⁸ sent to supporters and posted on social media early in the administration. Criticized by social scientists as unsound as an actual data-gathering mechanism,⁷⁹ the survey asked participants to respond to loaded and leading questions that ask whether the mainstream media “reports unfairly,” “unfairly characterizes” the religious, “has been far too quick to spread false stories,” and “has been too eager to jump to conclusions about rumored stories.”⁸⁰ These efforts are different than the mere use of press-as-enemy rhetoric, because they ask the public to

⁷⁴ Jacob Gershman, *Can Trump ‘Open Up’ Libel Laws*, WALL STREET J. (Nov. 14, 2016, 4:14 PM), <http://blogs.wsj.com/law/2016/11/14/can-trump-open-up-libel-laws/>.

⁷⁵ Joe Flint, *Donald Trump Criticizes Television News Executives*, WALL STREET J. (Nov. 22, 2016 7:55 AM), <https://www.wsj.com/articles/donald-trump-to-meet-with-top-television-news-executives-1479749182>.

⁷⁶ 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>.

⁷⁷ *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

⁷⁸ Trump Mainstream Media Accountability Survey, GOP.COM, <https://gop.com/mainstream-media-accountability-survey/>.

⁷⁹ Danielle Kurtzleben, *The Trump Media Survey Is Phenomenally Biased. It’s Also Useful*, NPR, (Feb. 17, 2017 01:13 PM), <http://www.npr.org/2017/02/17/515791540/the-trump-media-survey-is-phenomenally-biased-it-also-does-its-job-well>.

⁸⁰ Survey, *supra*, at note 78.

engage the narrative and embrace its structure as a foundational truth about the entity being discussed.

3. Anticipatory Undercutting

Perhaps most significantly, Trump casts the press as an enemy by explicitly identifying the threats that he expects them to pose to the populace at large and by anticipating 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."⁸¹ 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"⁸² 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 Airforce Base, home to both the U.S. Central Command and the U.S. Special Operations Command,⁸³ 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 Bernadino and all across Europe. You've

⁸¹ THE WHITE HOUSE, AMERICA FIRST FOREIGN POLICY, <https://www.whitehouse.gov/america-first-foreign-policy> ("Defeating ISIS and other radical Islamic terror groups will be our highest priority.").

⁸² Donald Trump, "Inaugural Address: Trump's Full Speech," Jan. 21, 2017, <http://www.cnn.com/2017/01/20/politics/trump-inaugural-address/>.

⁸³ David A. Graham, *Trump's Baseless Claim that the Media Covers Up Terror Attacks*, THE ATLANTIC, Feb. 6, 2017, <https://www.theatlantic.com/politics/archive/2017/02/trump-centcom-media-terror-cover-up/515823/>.

seen what happened in Paris and Nice. All over Europe it's happening.⁸⁴

Trump then continued, "It's gotten to a point where it's not even been reported. And in many cases, the very, very dishonest press doesn't want to report it. They have their reasons and you understand that."⁸⁵ 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."⁸⁶ Continuing to draw strong battle lines between allies and enemies, he declared, "We need strong programs so that people that love us and want our country and will end up loving our country are allowed in. Not people that want to destroy us and destroy our country."⁸⁷ 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."⁸⁸ Even before Trump's February 6 speech, however, a top Trump administration 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

⁸⁴ 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/>.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ John Wagner & Philip Rucker, *Here are the 78 Terrorist Attacks the White House Says were Largely Underreported*, WASHINGTON 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/?utm_term=.81a0c8bb6017; *WH Releases List of Terror Attacks It Claims Didn't Get Enough Coverage*, CBS NEWS, Feb. 7, 2017, <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 get covered. . . . Like a protest gets blown out of the water, and yet an attack or a foiled attack doesn't necessarily get the same coverage.").

“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.”⁸⁹ Conway later said that she had misspoken and intended to refer to a foiled terrorist plot, not a completed attack,⁹⁰ even though she had twice cited the “attack” or “massacre” in earlier interviews.⁹¹

Many critics have suggested that the Trump administration is setting the stage to blame both the federal judiciary and the media for any future terrorists attacks against the U.S.⁹² After U.S. district court judge James Robart issued a temporary restraining order preventing the implementation of Trump’s January 27, 2017 executive order on immigration,⁹³ 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!”⁹⁴ While Trump has not connected the dots as clearly with regard to media responsibility, his narrative that the media limits coverage of terrorist attacks 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 press enemy construction 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

⁸⁹ Bill Chappell, *Bogus ‘Bowling Green Massacre’ Claim Snarls Trump Advisor Conway*, NPR.org, Feb. 3, 2017, <http://www.npr.org/sections/tetwo-way/2017/02/03/513222852/bogus-bowling-green-massacre-claim-snarls-trump-adviser-conway>.

⁹⁰ *See id.*

⁹¹ David Smith, *Kellyanne Conway’s Fictitious ‘Bowling Green massacre’ Not a One-Time Slip of the Tongue*, THE GUARDIAN, (Feb. 6, 2017 06:01 PM), <https://www.theguardian.com/us-news/2017/feb/06/kellyanne-conway-fake-bowling-green-massacre-three-times>.

⁹² *See, e.g.*, Philip Rucker, ‘If Something Happens’: Trump Points *His Finger in Case of a Terrorist Attack*, WASHINGTON POST, Feb. 6, 2017, https://www.washingtonpost.com/politics/if-something-happens-trump-points-his-finger-in-case-of-a-terror-attack/2017/02/06/8e315b78-eca6-11e6-9662-6eedf1627882_story.html?tid=a_inl&utm_term=.25b2c80389a6.

⁹³ White House, Executive Order, “Protecting the Nation from Foreign Terrorist Entry into the United States,” Jan. 27, 2017.

⁹⁴ Donald J. Trump (@realDonaldTrump), TWITTER (Feb 5, 2017, 1:39 PM), <https://twitter.com/realDonaldTrump/status/828342202174668800>.

Trump press treatment is overblown have highlighted these historical conflicts, and they assert that Trump’s anti-press rhetoric and behavior is no different.⁹⁵ 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.⁹⁶ 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-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. 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.⁹⁷ Lyndon B. Johnson famously engaged in “never-tiring efforts to manipulate, seduce, and punish them.”⁹⁸ 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.”⁹⁹ “Intensely private” Jimmy Carter “proved his

⁹⁵ D.C. McAllister, *Sorry, Journalists: Trump Isn’t the First President to Threaten the Press*, THE 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”).

⁹⁶ *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”).

⁹⁷ See, e.g., JOHN F. KENNEDY SPEECH TO AMERICAN ASSOC. OF NEWSPAPER EDITORS, <https://millercenter.org/the-presidency/presidential-speeches/april-20-1961-address-american-association-newspaper-editors>.

⁹⁸ BRIGITTE LEBENS NACOS, *THE PRESS, PRESIDENTS, AND CRISES* (1990); see also JOHN TEBBEL AND SARAH MILES WATTS, *THE PRESS AND THE PRESIDENCY* (1985) (Johnson’s behavior toward the press left “scarcely one redeeming feature to permit a charitable conclusion”).

⁹⁹ JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* (1984).

ability to elude newsmen almost at will,” and his administration sometimes overtly lied to the press about his whereabouts.¹⁰⁰ 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 impeded questioning of the president.¹⁰¹ George W. Bush sometimes viewed the media as “an unrepresentative, irresponsible interest group,”¹⁰² and his press secretary once accused the *New York Times* of “gross negligence” and “reporting failures.”¹⁰³

Pundits have also emphasized that President Trump’s immediate predecessor, Barak Obama, had what most media law experts agree was a dismal record on press freedom.¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶ This is true in a number of notable ways.

¹⁰⁰ *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”).

¹⁰¹ *Id.* at 4 (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).

¹⁰² Jon Marshall, *Nixon Is Gone, but His Media Strategy Lives On*, THE ATLANTIC, Aug. 4, 2014, <http://www.theatlantic.com/politics/archive/2014/08/nixons-revenge-his-media-strategy-triumphs-40-years-after-resignation/375274/>

¹⁰³ *Id.*

¹⁰⁴ Mary Katharine Ham, *Trump’s Presser Shows Media Double Standard On Politicians Attacking the Press*, THE FEDERALIST (Jan. 12, 2017) <http://thefederalist.com/2017/01/12/trumps-presser-shows-media-double-standard-politicians-attacking-press/>; Marshall, *supra* note 93. James Risen, *If Donald Trump Targets Journalists, Thank Obama*, N.Y. TIMES, Dec. 30, 2016, https://www.nytimes.com/2016/12/30/opinion/sunday/if-donald-trump-targets-journalists-thank-obama.html?_r=0.

¹⁰⁵ Marshall, *supra* note 102. (“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.”).

¹⁰⁶ Avi Selk & Kristine Phillips, *Watergate Reporter Carl Bernstein: Trump’s attacks on the press are more dangerous than Nixon’s*, WASHINGTON POST Feb. 19, 2017, <https://www.washingtonpost.com/news/the-fix/wp/2017/02/19/watergate-reporter-carl->

Nixon, like Trump, accused the media of being out to get him¹⁰⁷ and predicted that the press would mischaracterize his public support or the reception he received.¹⁰⁸ He believed the liberal media to be biased against him personally,¹⁰⁹ 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.”¹¹⁰ 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.”¹¹¹ Within the Oval Office, Nixon “regularly referred to the media as ‘the enemy,’” and “put journalists ... on his ‘enemies list.’”¹¹² His aides recalled him saying that “our worst enemy seems to be the press.”¹¹³ Like Trump, Nixon

bernstein-trumps-attacks-on-the-press-are-more-dangerous-than-nixons/ (NBC News presidential historian Michael Beschloss pointed out how Trump’s rhetoric echoed President Richard Nixon’s during the Watergate scandal); *see also* Mark Feldstein, *Trump’s War on the Media Carries Chilling Echoes of Nixon*, WASHINGTON 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=.7bb2b425387c.

¹⁰⁷ Marshall, *supra* note 102. (“... perpetually 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”).

¹⁰⁸ *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]”).

¹⁰⁹ David L. Paletz & Robert M. Entman, *Presidents, Power, and the Press*, 10 PRESIDENTIAL STUD. Q. 416, 421 (1980) (“Some of the problems were simply institutional. . . . But in my case the problems were more than just institutional.”); Debra Gersh Hernandez, *Nixon and the Press*, 127 EDITOR & PUBLISHER 82(1994) (quoting RICHARD NIXON, THE MEMOIRS OF RICHARD NIXON (1978)).

¹¹⁰ 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 to H.R. Haldeman (Jan. 6, 1970)).

¹¹¹ Hernandez, *supra* note 109.

¹¹² Jon Finer, *A Dangerous Time for Press and the Presidency*, THE ATLANTIC, Feb. 20, 2017, <https://www.theatlantic.com/politics/archive/2017/02/a-dangerous-time-for-the-press-and-the-presidency/517260/>; *see also* Selk & Phillips, *supra* note 106 (quoting press as saying to Adm. Thomas H. Moorer, chairman of the Joint Chiefs of Staff, “The press is your enemy. Enemies. Understand that? ... Now, never act that way ... give them a drink, you know, treat them nice, you just love it, you’re trying to be helpful. But don’t help the bastards. Ever. Because they’re trying to stick the knife right in our groin.”).

¹¹³ WILLIAM M. HAMMOND, PUBLIC AFFAIRS: THE MILITARY AND THE MEDIA, 1968–1973 460, 620 (1996) (“Passing the compliment to Bunker, Henry Kissinger noted, ‘The

suspected the press was biased and even disloyal in its reporting—privately suggesting that the media was hoping that the U.S. would fail in Vietnam¹¹⁴ and at one point instructing his aides that “the discrediting of the press must be our major objective.”¹¹⁵

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.”¹¹⁶ 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,”¹¹⁷ referring to television news executives as “a tiny, enclosed fraternity,”¹¹⁸ and referencing “a widening credibility gap ... between the national news media and the American people.”¹¹⁹

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 observations¹²⁰ and giving far fewer press conferences than his immediate predecessors.¹²¹ Beyond this, the president and his close advisors internally mocked¹²² and privately targeted,¹²³ scolded,¹²⁴

president made the additional comment that our worst enemy seems to be the press.”); *id.* (“‘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.”).

¹¹⁴ Pach, *supra* note 110, 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.* (describing a 1972 memorandum to H.E. Haldeman, in which Nixon wrote that journalists had “a vested interest in seeing the United States lose the war” and were “doing their desperate best to report all the bad news and to downplay all the good news.”).

¹¹⁵ *Id.* at 564.

¹¹⁶ Marshall, *supra* note 102.

¹¹⁷ Feldstein, *supra* note 106.

¹¹⁸ Pach, *supra* note 114, at 557.

¹¹⁹ *Id.* at 560.

¹²⁰ PORTER, *supra* note 108, at 65 (“The whole purpose is to cut the press off from the flow of visitors to the White House.”).

¹²¹ PORTER, *supra* note 108, at 159 (1976) (noting that in 1971 Nixon answered press questions 9 times, while presidents in the preceding 25 years had done so between 24 and 36 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 (audio of Nixon threatening to fire his press secretary if reporters are given White House access for purposes other than briefings: “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?”).

¹²² *See* Pach, *supra* note 114 at 556 (citing Memorandum from Richard Nixon to H.R. Haldeman (Jan. 6, 1970)) (Nixon, when referring internally to a CBS News correspondent

pressured,¹²⁵ and intimidated¹²⁶ 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.”¹²⁷ His press secretary told these “anti-Nixon” networks that they would “pay for that, sooner or later, one way or another.”¹²⁸ In the years that followed, the administration would seek an injunction against major newspapers’ publication of the Pentagon Papers¹²⁹ and “do everything [it] could to intimidate The Washington Post into dropping the Watergate investigation,”¹³⁰ 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 the Schmittian sense. Trump’s relationship crosses that line in ways that other presidents have not, for at least two significant reasons.

stated: “He’s a Communist.”); David Wise, *The President and the Press*, THE ATLANTIC, April 1973, <https://www.theatlantic.com/magazine/archive/1973/04/the-president-and-the-press/305573/> (describing sardonic references to Dan Rather).

¹²³ Marshall, *supra* note 102 (“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.”).

¹²⁴ Wise, *supra* note 122 (describing how Nixon aides sought out CBS correspondent Daniel Schorr for criticism at an event and confronted Dan Rather about his reporting).

¹²⁵ *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.”).

¹²⁶ Marshall, *supra* note 102 (“Intimidating journalists, avoiding White House reporters, staging events for television—now common presidential practices—were all originally Nixonian tactics”); *see* PORTER, *supra* note 99 at 3 (describing “attacks intended to damage the credibility not of a single journalist but of the whole classes of them; to intimidate publishers and broadcast ownerships; and, almost unthinkably, to establish in American jurisprudence the legality of censorship.”); Paletz & Entman, *supra* note 100 at 442 (“Only the Nixon administration undertook a concerted, extended effort to punish—to assault—the press.”); (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”).

¹²⁷ Feldstein, *supra* note 106.

¹²⁸ *Id.*

¹²⁹ *The New York Times Co. v. United States*, 403 U.S. 713 (1971). For discussion of Nixon’s approach to the case, *see* PORTER, *supra* note 108, at 81–105

¹³⁰ Jon Finer, *A Dangerous Time for Press and the Presidency*, THE ATLANTIC, Feb. 20, 2017, <https://www.theatlantic.com/politics/archive/2017/02/a-dangerous-time-for-the-press-and-the-presidency/517260/>.

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. 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.¹³¹ 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.”¹³² 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.”¹³³ 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 unfair.¹³⁴ 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 the people that are trying to kill me,” he

¹³¹ *Finer, supra* note 112.

¹³² *PORTER, supra* note 108, at 2.

¹³³ *Id.* at 3.

¹³⁴ *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. . . . 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.”).

famously said, “I don’t give them the knife.”¹³⁵ 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 façade.”¹³⁶ 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 of 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”¹³⁷ is a public struggle, and the enemy with which he is concerned is expressly *not* a “private adversary whom one hates.”¹³⁸ 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.¹³⁹

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,¹⁴⁰ but also in the sense that his audience for enemy construction is broad and unrestricted. He has made it his unabashed agenda to publicize

¹³⁵ Pach, *supra* note 114, at 559

¹³⁶ Feldstein, *supra* note 106.

¹³⁷ George Kateb, *Political Action: Its Nature and Advantages*, in THE CAMBRIDGE COMPANION TO HANNAH ARENDT (Dana R. Villa, ed.) 129, 131 (2000).

¹³⁸ SCHMITT, *supra* note 9, at 28.

¹³⁹ Hernandez, *supra* note 109.

¹⁴⁰ Indeed, Trump’s initial tweet on the subject expressly rejected the premise that the enemy relationship was his. See Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realDonaldTrump/status/832708293516632065> (“The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”).

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 are seldom publicized.”¹⁴¹ As observers of Nixon have noted, he “saved his most biting commentary for the seclusion of the Oval Office,”¹⁴² 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.”¹⁴³ 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.¹⁴⁴

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 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;

¹⁴¹ Wise, *supra* note 122.

¹⁴² Finer, *supra* note 112.

¹⁴³ Selk & Phillips, *supra* note 106.

¹⁴⁴ SCHMITT, *supra* note 9, at 49.

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.¹⁴⁵ 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.¹⁴⁶

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.¹⁴⁷ 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.”¹⁴⁸ These concerns were not merely hypothetical or abstract: “Some 44 percent of the editors said that their own news organizations were less likely [to sue to vindicate access rights or other press freedoms] than in the past.”¹⁴⁹ When queried, nine out of ten editors said the explanation was “money.”¹⁵⁰ 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

¹⁴⁵ See generally RonNell Anderson Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557 (2011).

¹⁴⁶ Paul Gillin, *Bad News on the Doorstep*, NEWSPAPER DEATH WATCH, Nov. 3, 2016, <http://newspaperdeathwatch.com/>.

¹⁴⁷ Jones, *supra* note 145.

¹⁴⁸ Eric Newton, *A News Industry ‘Less Able’ to Defend Freedom: News Leaders Feel Less Able to Confront Issues in Court in the Digital Age*, April. 21, 2016, <https://www.knightfoundation.org/articles/news-industry-less-able-defend-freedom>.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

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 1972.¹⁵¹ 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 full, accurately, and fairly”¹⁵²—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 a fair amount of trust” in the mass media.¹⁵³

While perceived bias in the media’s coverage of the 2016 presidential election cycle may help explain the most recent drops in public confidence,¹⁵⁴ the decline is nonetheless part of a long-term trend.¹⁵⁵ American’s’ 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. Then, “after 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.”¹⁵⁶

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 entertainment.”¹⁵⁷ 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.¹⁵⁸

¹⁵¹ Art Swift, *Americans’ Trust in Mass Media Sinks to New Low*, GALLUP.COM, Sept. 14, 2016, <http://www.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx>

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *See id.*

¹⁵⁵ *See id.*

¹⁵⁶ *Id.*

¹⁵⁷ 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, <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).

¹⁵⁸ *See, e.g., Study: More Think News Stories Are Biased*, NBC NEWS (Sept. 14, 2009 04:27 AM), http://www.nbcnews.com/id/32832992/ns/us_news-life/t/study-more-think-news-stories-are-biased/#.WLML1xIrJp8.

Indeed, academic studies about the degree of partisanship of mainstream news outlets like the *New York Times* and *Wall Street Journal* suggest that mainstream news outlets generally lean to the left,¹⁵⁹ 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 2007.¹⁶⁰

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.¹⁶¹ In recent years, the Court has shifted from “largely favorable and praising depictions of the press to largely distrusting and dismissive ones.”¹⁶² 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.¹⁶³

Additionally, much like the European press after the Brexit vote,¹⁶⁴ 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 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.”¹⁶⁵ Indeed, that the

¹⁵⁹ See, e.g., Tim Groseclose & Jeffrey Milyo, *A Measure of Media Bias*, 120 QUARTERLY J. OF ECONOMICS 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* (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).

¹⁶⁰ Study, NBC News, *supra* note 158. 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*, CENTER FOR JOURNALISM ETHICS April 20, 2011, https://ethics.journalism.wisc.edu/2011/04/20/the-fall-and-rise-of-partisan-journalism/#_edn14.

¹⁶¹ RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALAB. L. REV. 253, 255 (2014).

¹⁶² *Id.*

¹⁶³ See *id.*

¹⁶⁴ 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>; David Millward, *How The Pollsters Got the US Election Wrong – Just Like Brexit*, THE TELEGRAPH (Nov. 9, 2016), <http://www.telegraph.co.uk/news/2016/11/09/how-the-pollsters-got-the-us-election-wrong---just-like-brexit/>.

¹⁶⁵ Charles J. Sykes, Op-ed, *Why Nobody Cares the President Is Lying*, N.Y. TIMES,

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.¹⁶⁶ The post-election self-flagellation¹⁶⁷ in many quarters of the media lends credence to Trump's narrative that the media is untrustworthy, biased, and out-of-touch.

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,¹⁶⁸ 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.”¹⁶⁹ Conservative media intended, he asserted, to “creat[e] a savvier, more skeptical audience,” but [i]nstead . . . opened the door for President Trump, who found an audience that could be easily misled.¹⁷⁰

Feb. 4, 2017, https://www.nytimes.com/2017/02/04/opinion/sunday/why-nobody-cares-the-president-is-lying.html?_r=0&mtref=www.wbur.org&assetType=opinion.

¹⁶⁶ See, e.g., *CPAC Transcript*, *supra* note 26 (alleging that “very dishonest” reporters “make it up, and they make up something else, and you saw that before the election—polls, polls”).

¹⁶⁷ See, e.g., Will Rahn, *Commentary: The Unbearable Smugness of The Press*, CBS NEWS, Nov. 10, 2016, <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) ; Rutenberg, *supra* note 164 (arguing that “[t]he misfire” on election “night was a lot more than a failure in polling”; rather, “[i]t was 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 dating 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.”).

¹⁶⁸ Interview with Charlie Sykes, *All Things Considered*, *Radio Host Charlie Sykes on Being a 'Contrarian Conservative' in the Age of Trump*, NPR.ORG (Dec. 18, 2016), <http://www.npr.org/2016/12/18/506076747/radio-host-charlie-sykes-on-being-a-contrarian-conservative-in-the-age-of-trump>.

¹⁶⁹ Sykes, *supra* note 165.

¹⁷⁰ *Id.*

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 a full enemy construction of the press 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.”¹⁷¹ 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 Nixon¹⁷² 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.”¹⁷³ 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 chats¹⁷⁴ and direct television appearances from many subsequent presidents¹⁷⁵ are among the best examples), they ultimately

¹⁷¹ RonNell Andersen Jones & Sonja R. West, *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>.

¹⁷² See *supra*, text accompanying notes 132-136.

¹⁷³ RonNell Andersen Jones & Sonja R. West, *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>.

¹⁷⁴ See generally RUSSELL D. BUHITE AND DAVID W. LEVY, *FDR’S FIRESIDE CHATS* (2010) (describing how Roosevelt’s chats represented an unprecedented presidential attempt to achieve intimacy with the nation).

¹⁷⁵ PORTER, *supra* note 108, 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); *id.* at 19; Pach, *supra* note 114, 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 122 (Nixon commenting that he “made up [his] 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 tell my story directly to the people rather than to funnel it to them through a press account.”).

concluded that the wider cooperative engagement with the media was a necessity.¹⁷⁶

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,¹⁷⁷ 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.”¹⁷⁸ The reasons were political, structural, and technological: “Without the channels of access to this 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.”¹⁷⁹ To be sure, this “mutual dependence characteristically has rarely bred mutuality of interest”¹⁸⁰ and “the relations between the two rarely involve cordial cooperation,”¹⁸¹ 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.”¹⁸²

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.”¹⁸³

¹⁷⁶ See, e.g., Debra Gersh Hernandez, *Nixon and the Press*, 127 EDITOR & PUBLISHER 82 (1994) (quoting RICHARD NIXON, *THE MEMOIRS OF RICHARD NIXON* (1978)) (Nixon noting he “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.”).

¹⁷⁷ Elmer E. Cornwell, Jr. *The President and the Press: Phases in the Relationship*, *Annals, AAPSS*, 427, Sept. 1976.

¹⁷⁸ *Id.* at 54.

¹⁷⁹ *Id.* at 56-57.

¹⁸⁰ *Id.* at 57.

¹⁸¹ *Id.* at 1.

¹⁸² *Id.* at 62.

¹⁸³ Pew Res. Ctr. Project for Excellence in Journalism, *Understanding the Participatory News Consumer: The News Environment in America*, JOURNALISM.ORG (Mar. 1, 2010), http://www.journalism.org/analysis_report/news_environment_america

While “[a] 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.¹⁸⁴ Twitter, the social media tool most favored by Trump, allows him to speak directly to more than 25 million followers daily.¹⁸⁵ On Twitter, Facebook and Instagram, he has a total of more than 40 million combined followers.¹⁸⁶

The strong majority of Americans who are now getting their news from social media¹⁸⁷ 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.¹⁸⁸ Trump has shown a propensity to take advantage of that dynamic,¹⁸⁹ in what may constitute “a seismic change in executive information distribution”¹⁹⁰ that removes the press from the equation or at least marginalizes its role in his communication strategy.¹⁹¹

¹⁸⁴ Ronnell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE L. REV. 557, 565 (2011).

¹⁸⁵ <http://twittercounter.com/realDonaldTrump>

¹⁸⁶ Kelly Cohen, *Trump Will Continue to Tweet as President*, WASH. EXAMINER, Dec. 27, 2017, <http://www.washingtonexaminer.com/trump-will-continue-to-tweet-as-president/article/2610400>.

¹⁸⁷ Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms*, May 26, 2016, <http://www.journalism.org/2016/05/26/news-use-across-social-media-platforms-2016/> (noting that 62% of people now get their news from social media).

¹⁸⁸ See Walter Quattrociocchi, Antonio Scala & Cass Sunstein, *Echo Chambers on Facebook*, June 13, 2016, available at https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2795110 (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 STREET J., <http://graphics.wsj.com/blue-feed-red-feed/> (describing an analysis of how political reality is depicted differently for conservatively aligned and liberally aligned Facebook users).

¹⁸⁹ Kelly Cohen, *Trump Will Continue to Tweet as President*, WASH. EXAMINER, Dec. 27, 2017, <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”).

¹⁹⁰ *Press on Notice: Play Fair or Trump’ll Flick You Off*, ORLANDO SENTINEL, Jan. 27, 2017 (noting that “President Trump will continue to bypass traditional news distribution centers” by going “directly to the people”).

¹⁹¹ Even at his first official press conference, see *First News Conference Transcript*, *supra* note 51, 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

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.¹⁹² Rallying against common enemies likewise refocuses discussion and energy away from divisive social problems and internal conflicts, thereby unifying and integrating the political community¹⁹³ and promoting the creation of useful alliances, both internal and external. If “the

irrelevant to his endeavor: “I’m making this presentation to the American people, with the media *present*, which is an honor to have you.” (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.”

¹⁹² 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 define ourselves by reference to what we are not. This clarifies our values or where we stand, and gives us a coherent sense of selfhood.”).

¹⁹³ O’SHAUGHNESSY, *supra* note 192, at 125 (noting arguments that “rhetoric of enemies is a potent means of gaining and sustaining social integration in modern society” and that “the 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).

enemy of my enemy is my friend,”¹⁹⁴ 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.¹⁹⁵ 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, enemy construction channels 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.”¹⁹⁶

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, if a leader constructs an enemy, then later compromises or reconciliation with that enemy can signal to both supporters and potential supporters that she is reasonable and conciliatory in her approach to governance. A policy or position forged in cooperation with an old enemy may thus garner deeper support from a broader coalition of constituents.¹⁹⁷

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

¹⁹⁴ See, e.g. Jacob E. Gersen & Adrian Vermeule, *Delegating to Enemies*, 112 COLUMBIA L. REV. 2193, 2201 (discussing “the enemy of my enemy is my friend” notion in the context of delegations to enemies).

¹⁹⁵ See, e.g., O’SHAUGHNESSY, *supra* note 192, 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.”).

¹⁹⁶ O’SHAUGHNESSY, *supra* note 192, at 124.

¹⁹⁷ Cf. Gersen & Vermeule, *supra* note 194, at 2229 (arguing that cooperation with enemies can “credibly signal to third parties” that “their views [will be taken] into account”).

from other, more controversial substantive issues or scandals.¹⁹⁸ 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.¹⁹⁹ 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.²⁰⁰

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

¹⁹⁸ See, e.g., Carlos Garcia, *Chuck Todd Accuses Trump of Attacking the Media to Distract from one Scandal*, THE BLAZE, Feb. 27, 2017, <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”).

¹⁹⁹ 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, <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.’”).

²⁰⁰ See, e.g., Chris Cillizza, *A Fascinating Theory from the World of Sports about Donald Trump’s First 7 Days*, Washington 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”).

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-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.²⁰¹

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: enemy construction of the press 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.

B. The Risks of 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."²⁰² Schmitt claims that the state of exception is necessary because the conditions of a true emergency cannot be anticipated and thus

²⁰¹ Trump could be using anti-press rhetoric, for example, to build ties with Russia's Vladimir Putin, see Lizzie Dearden, *Donald Trump Emulating 'Autocratic' Vladimir Putin's Action in the 2000s, Says Former US Ambassador to Russia*, Independent, Feb. 16, 2016, <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."), or even with China's leaders (reporting that "China's state-run Global Times newspaper celebrated how Trump's early moves in office suggested that he would be 'less concerned about human rights'—long a bone of contention between western governments and Beijing's authoritarian rulers" and that the Chinese paper also argued that Trump's "war with the mainstream media makes it difficult for Trump to ally with the media on [the] ideological front against China").

²⁰² CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5 (George Schwab trans., Univ. of Chicago Press 2005) (1922).

cannot be governed by laws and norms established *ex ante*.²⁰³ 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.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶

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 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.”²⁰⁷ 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 turns, helps justify the sovereign’s invocation of a “state of exception,” ungoverned by legal rules or norms.²⁰⁸

²⁰³ *Id.* at 6 (“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.”).

²⁰⁴ *Id.* at 7 (“[The sovereign] decides whether there is an extreme emergency as well as what must be done to eliminate it.”)

²⁰⁵ *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”).

²⁰⁶ 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.”).

²⁰⁷ Sun & Jones, *supra* note 2, at 924.

²⁰⁸ See SCHMITT, *supra* note 202, at 6-7; 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,

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.²⁰⁹ 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.²¹⁰ 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 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.²¹¹ 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."²¹² 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."²¹³ This inextricable link

1074 (2004) ("[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.").

²⁰⁹ 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, has a practical matter, has the power to do so. "Sovereign is he who decides on the exception." SCHMITT, *supra* note 202, at 5.

²¹⁰ Cf. RAE, *supra* note 21, at 125 (noting that, for Schmitt, "the constitutional sovereign does not *represent* the will of the people; he *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.").

²¹¹ Sun & Jones, *supra* note 2, at 924 n.208.

²¹² *Id.*

²¹³ *Id.*

between enemy construction and invocation of the state of exception illuminates and lays bare some of the most important 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.²¹⁴ 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.²¹⁵ 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.”²¹⁶ 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.”²¹⁷ These restrictions on public information access, taken together, have “prevented public scrutiny or constitutional challenge” of many of the counterterrorism measures taken by the executive branch in response to 9/11.²¹⁸

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.²¹⁹ Taken to its logical conclusion in

²¹⁴ See, e.g., Kaarlo Tuori, *A European Security Constitution?*, in *THE LONG DECADE: HOW 9/11 CHANGED THE LAW* (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.).

²¹⁵ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (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).

²¹⁶ Sun & Jones, *supra* note 2, at 907-08.

²¹⁷ *Id.* at 908.

²¹⁸ *Id.*

²¹⁹ *Id.* at 921-24.

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,²²⁰ from punishing the publication of “lawfully obtained, truthful information” on matters of public concern,²²¹ from interfering with the editorial discretion of the media,²²² from requiring government preclearance before the press can publish information,²²³ and from awarding damages for defamation of a public figure absent a showing of “actual malice.”²²⁴ 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.”²²⁵

²²⁰ See *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 480 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”).

²²¹ Sonja R. West, *The Stealth Press Clause*, 48 *GEORGIA L. REV.* 729, 738; *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”).

²²² See, e.g., *Miami Herald Publishing 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 National Committee*, 412 U.S. 94 (1973) (invalidating provisions of the Fairness Doctrine that required stations to broadcast paid editorial content).

²²³ *Near v. Minnesota*, 283 U.S. 697 (1931) (invalidating a prior restraint on publication of defamatory material).

²²⁴ *New York Times v. Sullivan*, 378 U.S. 254 (1969).

²²⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (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.”).

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.²²⁶ 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”²²⁷—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.

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.²²⁸ He explained:

Our press is allowed today whatever they want and get away with it. And I think we should go to a system where if they 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.²²⁹

²²⁶ See, e.g., *Daily Mail*, 443 U.S. at 103 (holding that publishing truthful, lawfully obtained material cannot be punished “absent a need for further a state interest of the highest order); *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”); *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).

²²⁷ *N.Y. Times Co.*, 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).

²²⁸ See, e.g., Tom Kludt, *Donald Trump Says He Wants Libel Laws More Like the UK’s*, CNN.COM, Oct. 24, 2016, <http://money.cnn.com/2016/10/24/media/donald-trump-sue-news-organizations/>.

²²⁹ *Id.*

Of course, aside from the quite unlikely possibility of a constitutional amendment, any incursions on constitutional press freedoms would require the cooperation of the judicial branch, and it seems 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 freedoms²³⁰—combined with the current weakness of the institutional media²³¹—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.²³² 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 of 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.²³³ 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

²³⁰ See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (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 (1944) (upholding internment of Japanese Americans in the United States during World War II).

²³¹ RonNell Andersen Jones, *Litigation, Legislation, and Democracy in a Post-Newspaper America*, 68 WASH. & LEE LAW REVIEW 557, 559 (2011).

²³² See Newton, *supra* note 148.

²³³ Jones & West, *supra* note 171.

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.”²³⁴

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 their sources and there is no federal reporters’ shield law,²³⁵ federal policy regarding when reporters can be subpoenaed to reveal their sources in court proceedings is determined by Department of Justice guidelines.²³⁶ The content of those guidelines is completely within the control of the Trump’s attorney general, who serves at the pleasure of the president.²³⁷ 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”²³⁸—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.

Moreover, a related issue is the potential application of the Espionage Act,²³⁹ which historically has been used to prosecute spies, to federal whistle-blowers 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.”²⁴⁰ In at least one Espionage Act case, the DOJ

²³⁴ Liptak, *supra* note 5.

²³⁵ See RonNell Andersen Jones, *Rethinking Reporter’s Privilege*, 111 MICH. L. REV. 1221 (2013).

²³⁶ *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 CFR 50.10.

²³⁷ Jones & West, *supra* note 171 (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”).

²³⁸ *CPAC Transcript*, *supra* note 26.

²³⁹ 18 U.S.C. § 792 et seq.

²⁴⁰ James Risen, *If Donald Trump Targets Journalist, 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> (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”).

named a news reporter—Fox News’ James Rosen—an unindicted co-conspirator and executed a warrant seizing his personal emails.²⁴¹ Critics charge that application of the Espionage Act to journalists chills reporting, particularly because the law is so broad, and worry that “Obama has handed [Trump] a road map”²⁴² 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.²⁴³ All told, President Trump will have substantial power to control how much 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.

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,²⁴⁴ the Schmittian framework for enemy construction envisions the possibility of an “internal” enemy who aids or abets an external enemy.²⁴⁵ 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.²⁴⁶ 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

²⁴¹ 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>.

²⁴² Risen, *supra* note 240 (quoting Lucy Dalglish, Dean of the Philip Merrill College of Journalism at the University of Maryland).

²⁴³ 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”).

²⁴⁴ See *supra*, Part IIA.

²⁴⁵ SCHMITT, *supra* note 9, at 49.

²⁴⁶ *Id.*

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 press-enemy construction 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.

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.”²⁴⁷ 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.²⁴⁸ In this sense, the American press “serves and was designed to serve as a powerful

²⁴⁷ *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575, 585 (1983).

²⁴⁸ *Id.* at 585 (“an informed public is the essence of a working democracy”).

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.”²⁴⁹ We expect the press to “guard[] against the miscarriage of justice”²⁵⁰ and to “expos[e] corruption among public officers and employees.”²⁵¹ Conducting what Justice Stewart called “organized, expert scrutiny of government,”²⁵² the press expends the time, energy, and resources to observe and keep accountable those who represent the public.²⁵³ More significantly, as a “mighty catalyst in awakening public interest in governmental affairs,”²⁵⁴ 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 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 Russia²⁵⁵ and other potential Trump conflicts of interest.²⁵⁶ 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

²⁴⁹ *Mills v. Alabama*, 384 U.S. 214, 219 (1966).

²⁵⁰ *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976).

²⁵¹ *Estes*, 381 U.S. at 539.

²⁵² Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 634 (1975).

²⁵³ *New York Times v. Sullivan*, 376 U.S. at 275 (quoting 4 ELLIOT’S DEBATES ON THE FEDERAL CONSTITUTION 570 (1876)) (“the press has exerted a freedom in canvassing the merits and measures of public men, of every description.”)

²⁵⁴ *Estes v. Texas*, 381 U.S. 532, 539 (1965).

²⁵⁵ See, e.g., Eugene Kiely, *Fact Check: Trump, Russia, and the U.S. Election*, USA TODAY, Dec. 9, 2016, <http://www.usatoday.com/story/news/politics/elections/2016/12/09/fact-check-trump-russia-election-hacking/95192810/>; 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

²⁵⁶ 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, 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.ORG, Feb. 17, 2017, <http://www.npr.org/2017/02/17/513724796/trump-ethics-monitor-has-the-president-kept-his-promises>.

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.²⁵⁷ Thus, the press's fact-checking function can serve 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,"²⁵⁸ by "compar[ing] the intelligence community to Nazi Germany" and calling "the former director of the CIA" a "partisan political hack."²⁵⁹ The press has both highlighted these attacks and fact-checked the underlying claims.²⁶⁰

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

²⁵⁷ See, e.g., Linda Qiufeb, *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>); *Fact Check: Donald Trump's Speech on Immigration*, NATIONAL PUBLIC RADIO, Aug. 31, 2017, <http://www.npr.org/2016/08/31/492096565/fact-check-donald-trumps-speech-on-immigration>; Imtiyaz Delawala and MaryAlice Parks, *Fact-checking President Donald Trump's Address to a Joint Session of Congress*, ABC NEWS, Feb. 28, 2017, <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); Paul Wiseman and Christopher S. Rugaber, *AP Fact Check: Trump's Inaugural Speech*, PBS NEWSHOUR, Jan. 20, 2017, <http://www.pbs.org/newshour/rundown/ap-fact-check-trumps-inaugural-speech/> (checking claims about "radical Islamic terrorism"); Jessica Taylor and Danielle Kurtzleben, *Fact Checking This Week in the Trump Administration*, NATIONAL PUBLIC RADIO, Feb. 4, 2017, <http://www.npr.org/2017/02/04/513348780/fact-checking-this-week-in-the-trump-administration> (checking claims about rollout of immigration ban).

²⁵⁸ Jon Finan, *Why the President is Feuding with the Media and the Intelligence Community*, THE 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/>.

²⁵⁹ *Id.*

²⁶⁰ See, e.g., *id.*; Eugene Kiely, *Fact Check: Trump and the Intelligence Community*, USATODAY.COM, Jan. 23, 2017, <http://www.usatoday.com/story/news/politics/2017/01/23/fact-check-trump-intelligence-community-cia/96964670/>.

immigrants with violence and crime that threatened U.S. citizens.²⁶¹ Post-election, Donald Trump has continued to suggest that immigrants are dangerous.²⁶² 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 “million of people” voted in the presidential election illegally.²⁶³ The press is playing an important role in fact-checking and testing each of these claims.²⁶⁴

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.²⁶⁵ 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

²⁶¹ In the June 16, 2015 speech in which Trump announced he he was running for president the presidency, 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.” *Full Text: 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.

²⁶² Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 12, 2017, 3:34 AM), <https://twitter.com/realDonaldTrump/status/830741932099960834>.

²⁶³ Donald J. Trump (@realDonaldTrump), TWITTER (Nov. 27, 2016, 12:30 PM), <https://twitter.com/realdonaldtrump/status/802972944532209664?lang=en> (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”).

²⁶⁴ Compare Michael D. Shear & Emmarie Huetteman, *Trump Repeats Lie About Popular Vote in Meeting with Lawmakers*, N.Y. TIMES, Jan. 23, 2017 (“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 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.”).

²⁶⁵ See, e.g., *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> (suggesting that “to curtail individual rights, as the Bush administration has done, is to draw exactly the wrong lessons from history”).

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.”²⁶⁶ It is society’s great teacher, “informing the citizenry of public events and occurrences,”²⁶⁷ and acting as the “chief” source of citizens’ information on a number of topics.²⁶⁸ 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 “great responsibility” of the press,²⁶⁹ and has noted that “[w]ithout the information 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.”²⁷⁰

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.²⁷¹ 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.

²⁶⁶ *Minneapolis Star & Tribune Co.*, 460 U.S. at 585 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936)). See also *Richmond Newspapers 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”).

²⁶⁷ *Estes v. Texas*, 381 U.S. 532, 539 (1965).

²⁶⁸ *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 (1980)

²⁶⁹ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975).

²⁷⁰ *Id.*

²⁷¹ See, e.g., *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> (Discussing war-on-terror limitations on individual liberties and noting that “every time the country has felt threatened and tightened the screws on individual liberties, it later wished that it had not done so,” including the Sedition Act of 1789, McCarthyism, and WWII Japanese-American internments).

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,²⁷² the press educated the public about the role of the judiciary, its history, the importance of judicial independence,²⁷³ and the process by which this particular judge was selected and nearly unanimously confirmed.²⁷⁴ Press coverage of the judiciary also aimed to highlight the potential impacts of delegitimizing the courts.²⁷⁵

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 comparisons²⁷⁶ and by offering differing views from Trump's opponents and from skeptics within

²⁷² See Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 4, 2017, 5:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976?lang=en> ("The opinion of this so-called judge, which essentially takes law-enforcement away from our country, is ridiculous and will be overturned!").

²⁷³ See, e.g., Alexander Bolton, *McConnell: 'Best to avoid criticizing judges individually'*, THE HILL, Feb. 5, 2017, <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); Alexander Bolton, *Graham: Free press and independent judiciary are worth fighting for*, THE HILL, Feb. 19, 2017 (quoting Republican senator Lindsey Graham speaking about the role of U.S. courts).

²⁷⁴ See, e.g., 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); Thomas Fuller, *'So-Called Judge Criticized by Trump is Known as a Mainstream Conservative'*, N.Y. TIMES Feb. 4, 2017 (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").

²⁷⁵ See, e.g., *Trump attacks on the judiciary raise safety concerns for judges*, CBS NEWS, Feb. 11, 2017, <http://www.cbsnews.com/news/trump-attacks-judiciary-safety-concerns-judges/>.

²⁷⁶ See, e.g., Ann M. Simmons and Alan Zarembo, *Other Presidents Have Blocked Groups of Foreigners from the U.S., But Never So Broadly*, L.A. TIMES, Jan. 31, 2017 (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, Jan. 31, 2017, <http://www.usatoday.com/videos/news/2017/01/28/george-h.-w.-bush-and-ronald-reagan-debate-immigration-1980/97184364/>.

Trump's own party.²⁷⁷ It gave historical perspective²⁷⁸ and educated the public about the details of the process of refugee vetting.²⁷⁹ For example, the press took issue with President Trump's assertion that only 109 people were affected by the travel ban.²⁸⁰ 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.²⁸¹

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.²⁸² When "constraints on time, space, knowledge, or ability keep the individual citizen from participating

²⁷⁷ See John Yoo, *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 executive power" 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).

²⁷⁸ 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).

²⁷⁹ See, e.g., Bill Whitaker, *A Look at How Syrian Refugees Were Vetted Before Trump*, CBSNEWS.COM, 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).

²⁸⁰ See, e.g., 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").

²⁸¹ See, e.g., David Williams, *Immigration Ban Leaves Children Stranded, Families Split*, CNN.COM, Feb. 4, 2017, <http://www.cnn.com/2017/02/03/politics/trump-immigration-ban-children-trnd/> (detailing stories of families separated by the travel ban and children seeking with serious medical conditions who were prevented from traveling to the U.S. to receive the expert medical care they needed).

²⁸² *Richmond Newspapers*, 448 U.S. at 573.

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.”²⁸³ 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.”²⁸⁴ 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 of available information on public affairs.²⁸⁵ 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”²⁸⁶—is vital, because “without some core of shared information and common purposes, there can be no meaningful discussion of public issues.”²⁸⁷

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,²⁸⁸ from the border and border towns about the feasibility of the border wall and locals’ reaction to the plan,²⁸⁹

²⁸³ RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALABAMA L. REV. 235 (2014).

²⁸⁴ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975).

²⁸⁵ *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”)

²⁸⁶ RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALABAMA L. REV. 235 (2014).

²⁸⁷ See David A. Anderson, *The Press and Democratic Dialogue*, 127 HARV. L. REV. F. 331 (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[.]”)

²⁸⁸ 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.

²⁸⁹ See, e.g., Dudley Althaus & Dan Frosch, *Texas Border Cities React to Donald Trump’s Border Wall*, WALL STREET J., Jan. 25, 2017, <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

and from Syrian refugee camps in Jordan about the U.S. process for vetting refugees.²⁹⁰ 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 that individual citizens would have 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 Russia²⁹¹ and on his plan to significantly step up immigration enforcement by hiring 15,000 new Border Patrol and Immigration and Customs Enforcement (ICE) agents.²⁹² 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

Bajak, *Americans Who Live Near Border Say Trump's Wall is Unwelcome*, PBS NEWSHOUR, Nov. 22, 2016, <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).

²⁹⁰ See, e.g., Bill Whitaker, *A Look at How Syrian Refugees Were Vetted Before Trump*, CBSNEWS.COM, Jan. 29, 2017, <http://www.cbsnews.com/news/60-minutes-syrian-refugee-crisis/> (transcript of 60 Minutes broadcast reporting from the Zaatari refugee camp in Jordan about how vetting of the Syrian refugees who live there occurs).

²⁹¹ 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 “and other Trump associates”).

²⁹² See Brian Naylor, *Trump's Plan to Hire 15,000 Border Patrol and ICE Agents Won't Be Easy*, NPR.ORG, Feb. 23, 2017, <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).

better positioned to access government records and to file Freedom of Information Act (FOIA)²⁹³ petitions when access is denied.²⁹⁴

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 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.²⁹⁵ While these sort 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 like 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,²⁹⁶ and in the absence of

²⁹³ Public Information; Agency Rules, Opinions, Orders, Records, and Proceedings, 5 U.S.C. § 552 (2006).

²⁹⁴ See Jones, *supra* note 145, at 604-11; Lydia Wheeler, *Intelligence Agencies Sued for Records on Russian Election*, The Hill, Dec. 27, 2016, <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”).

²⁹⁵ See Quoc Trung Bui, Claire Cain Miller, and 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>.

²⁹⁶ Jon Finan, *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

these kinds of conversation starters, enemy construction of other groups is more likely to go unnoticed and unconsidered.

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. Indeed, many major news organizations have reported a dramatic increase in subscriptions since Trump's election.²⁹⁷

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 the media and the judiciary when the next serious terrorist

community, two entities in American society that tradition [sic] 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”); Alexander Bolton, *Graham: Free Press and independent judiciary are Worth Fighting For*, THE HILL, Feb. 19, 2017, <http://thehill.com/homenews/sunday-talk-shows/320298-graham-free-press-and-independent-judiciary-are-worth-fighting-for> (“Sen. Lindsey Graham . . . defended the press and the judiciary—two recent targets of President Trump—as ‘worth fighting and dying for’”); *That's House Dictators Get Started': McCain Defends the Free Press*, NBCNEWS.COM, Feb. 18, 2017, <http://www.nbcnews.com/meet-the-press/video/-that-s-how-dictators-get-started-mccain-defends-the-free-press-880252483608>.

²⁹⁷ 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*, FINANCIAL TIMES, Feb. 2, 2017, <https://www.ft.com/content/7c6e25da-e96b-11e6-967b-c88452263daf>; Joseph Lichterman, *After Trump's Win, News Organizations See a Bump in Subscriptions and Donations*, NIEMANLAB.ORG, Nov. 14, 2016. 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.

attack occurs on U.S. soil, the risk that the press's enemy construction will result in significant, concrete cutbacks on press freedoms move 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.