Communications Lawyer
Publication of the Forum on Communications Law
American Bar Association
Volume 33, Number 03, Winter 2018
THE JOURNAL OF MEDIA, INFORMATION, AND COMMUNICATIONS LAW

In this issue
COVER STORY

"Failing *New York Times*" v. Trump: Is There a First Amendment Claim for Official Condemnation by Tweet?

BY FRANK D. LOMONTE AND LINDA RIEDEMANN NORBUT

Scornful condemnation from government officials is an accepted "cost of doing business" for journalists. Backlash from people in power can be a badge of honor signifying that the reporter's work has struck a nerve. Name-calling by government authority figures is not normally regarded as a threat to the vitality of an independent press, much less an actionable constitutional violation.

But, as has been observed daily since the November 2016 election, these are not normal times. The vitriol directed toward specific journalists and news organizations by President Trump and his administration is of a duration and intensity rarely seen in contemporary public life. At times, the rhetoric has gone beyond just criticism, hinting at concrete acts of reprisal for unfavorable (or in the President's preferred term, "fake") coverage. These attacks have prompted some critics to question whether the President's behavior is actually unlawful. After Trump directed an especially caustic tweetstorm at NBC News, press-freedom advocate Trevor Timm told CNN's Brian Stelter:

> [T]here's a good argument that he is already violating the First Amendment just by making these threats. You know, there [are] Supreme Court cases and appeals court cases around the country that talk about how government officials using their position of power can't threaten or coerce private entities into censorship or self censoring themselves for cases that would otherwise be protected speech. And that's exactly what we have here.[1]

Outside the rough-and-tumble of political reporting, it's accepted that official acts short of actual punishment—including threats, intimidation and denunciation—can violate a speaker's constitutional rights. The White House press corps is, of course, not the typical speaker. But neither is the president of the United States the typical regulator. Can presidential condemnation, especially when accompanied by the potential of retaliatory government action, violate the First Amendment rights of journalists? This article examines what it would take for words alone—even coming

Continued on page 21

Frank LoMonte *is the director and* **Linda Riedemann Norbut** *is a fellow at the Brechner Center for Freedom of Information at the University of Florida College of Journalism and Communications.*

"Failing *New York Times*" v. Trump cont'd

Continued from page 1
from the world's most powerful leader—to give rise to a triable constitutional claim.

The Chilling Effect Doctrine

It is boilerplate First Amendment law that a concretely adverse action by a government official against a speaker based on the content of speech violates the First Amendment. So when a speaker is arrested, fired from government employment or otherwise deprived of a benefit or privilege because of legally protected speech, the constitutional violation is self-evident.[2] The issue becomes murkier when the injury is not the tangible loss of liberty or employment, but the intangible loss of being effectively denied full freedom to speak as a result of official intimidation—known as the chilling effect.

At its core, the chilling effect is an act of deterrence. In the law, the basis of deterrence is generally the fear of punishment, whether it be a fine, imprisonment, imposition of civil liability, or deprivation of a governmental benefit. Specifically in the First Amendment context, the chilling effect can occur not only when constitutionally protected speech is actually silenced but also when it is unduly discouraged.

The first time that the Supreme Court used the term "chill" in a First Amendment case was in 1952,[3] and the phrase "chilling effect" was subsequently introduced in 1963.[4] Two years later, the Court explained that it was the "threat of prosecutions of protected expression" that created the chilling effect on speech, even in light of "the prospect of ultimate failure of such prosecutions."[5]

In *Laird v. Tatum*,[6] a case challenging military surveillance of civil-rights advocates, the Court noted that, "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights."[7] The Court held that "governmental action may be subject to constitutional challenge even though it has only an indirect effect on the exercise of First Amendment rights."[8] Under the *Laird* standard, a speaker challenging government action that inhibits speech must establish "specific present objective harm or a threat of specific future harm."[9] An actual chill of protected speech is not necessary to state a First Amendment violation. The proper inquiry is whether a government official's acts would chill or silence a person of "ordinary firmness" from future activities protected by the First Amendment.[10] As a general matter, a speaker can make out a *prima facie* First Amendment case by showing (1) an interest protected by the First Amendment; (2) adverse action by a government defendants substantially motivated by the exercise of that right, and (3) a chill on the exercise of that right.[11]

Where Intimidating Speech Crosses the Line

On several occasions, the Court has confronted First Amendment challenges arising not out of official government restraints on speech, but government condemnation of particular speech or speakers that could have a deterrent effect either on the speaker or on audience members. These "denunciation" cases are instructive in assessing whether tweets from a sitting president's account can cross the line from protected political expression to forbidden governmental coercion. Two Supreme Court cases provide an instructive starting point.

In *Bantam Books, Inc. v. Sullivan*,[12] a Rhode Island review board (the "Commission") sent book distributors a blacklist of books identified as "objectionable" for sale to minors, with the strongly implied threat that continued sale of the books would result in a referral to prosecutors. Even though the Commission itself had no prosecutorial power, and its notices purported to be merely "advising" booksellers of their legal rights, the Court had no difficulty enjoining the notices as a violation of the First Amendment. The Court found that the Commission's purpose and effect was to suppress the distribution of publications that (whatever their suitability for children) were lawful for adults to buy and read, such that the warning system "was in fact a scheme of state censorship effectuated by extralegal sanctions."[13] The opinion built on earlier rulings in which movie theaters were subjected to onerous pre-screening approvals and licensing conditions. An important factor in *Bantam Books* was that the Commission's threats included a notice that the list of "objectionable" books was being shared with local police, so merchants reasonably feared arrest if they continued stocking the books.[14]

Two years later, in *Lamont v. Postmaster General*,[15] the Court invalidated a federal statute directing the Postal Service to intercept mail originating from a list of hostile countries, which would be delivered only if the addressees sent back a card indicating their desire to receive "communist political propaganda." Even though no one was actually prevented from speaking, imposing this stigmatizing additional step in the delivery process was, in the justices' view, analogous to imposing a tax or license on speech based on its disfavored political content, and therefore an unconstitutional burden.[16] *Lamont* thus stands for the proposition that publishers have a right to be free of untoward government interference even when the government's coercion targets the audience (that is, making the subscriber more reluctant to accept delivery of the literature) and not the speaker.

In other words, the Supreme Court has established that government action that deters speech may be unconstitutional even if the government does not directly prohibit that speech. As the Court has stated, "indirect coercive pressure" can be as effective in deterring speech as direct prohibition: "Under some circumstances, indirect 'discouragements' . . . have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes."[17]

Applying *Bantam Books*, lower courts have at times found coercive speech by government officials to be a violation of the speaker's First Amendment rights even without proof that the official had authority to make good on an implied threat of adverse

action.

The most recent and detailed exposition came from Seventh Circuit Judge Richard Posner in the 2015 case of a county sheriff who pressured credit-card companies to stop doing business with a website, Backpage.com, accused of hosting prostitution ads.[18] Posner explained how a government official, making threats, can violate the First Amendment:

> [T]he fact that a public-official defendant lacks direct regulatory or decisionmaking authority over a plaintiff, or a third party that is publishing or otherwise disseminating the plaintiff's message, is not necessarily dispositive. . . .What matters is the distinction between attempts to convince and attempts to coerce. A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.[19]

Posner discounted Sheriff Tom Dart's argument that a government official is free to express disapproval of speech, noting that Dart was unmistakably speaking in his law enforcement role and not his citizen role in sending letters to MasterCard and Visa that contained thinly veiled threats of liability for facilitating sex trafficking: "The First Amendment forbids a public official to attempt to suppress the protected speech of private persons by threatening that legal sanctions will at his urging be imposed unless there is compliance with his demands."[20] It was immaterial, Posner wrote, that Dart had no actual authority to arrest or prosecute the credit-card issuers:

> By writing in his official capacity, requesting a "cease and desist," invoking the legal obligations of financial institutions to cooperate with law enforcement, and requiring ongoing contact with the companies, among other things, Dart could reasonably be seen as implying that the companies would face some government sanction—specifically, investigation and prosecution—if they did not comply with his "request." This is true even if the companies understood the jurisdictional constraints on Dart's ability to proceed against them directly.[21]

The *Backpage* decision built on a handful of comparable rulings, including the Second Circuit's *Okwedy v. Molinari*,[22] in which the Staten Island borough president sent a letter to a billboard company to complain about some billboards with Bible verses aimed at denouncing homosexuality. The letter categorized the billboards' messages as "unnecessarily confrontational and offensive," and said the message of intolerance was "not welcome in [the] Borough." The letter merely pleaded for the company to act "as a responsible member of the business community," but fell short of making any threats of legal action.[23] The court nonetheless found the letter to be a First Amendment violation. Even absent an explicit threat or any direct regulatory authority over the billboard company, the court found that the company could reasonably have believed that the borough president intended to use his official power to retaliate if the company did not respond favorably to his appeal.[24]

Consistent with the standard set forth in *Laird*, the reasonable apprehension of retaliation—even if the retaliation does not come directly from the government authority that condemns the speech—has been a pivotal point in establishing a First Amendment violation.[25]

The *Meese* Cases: Dissuasion Is Not Coercion

While speakers have succeeded in challenging government dis-endorsement that is accompanied by either a wrongful threat of enforcement action against the speaker or interference with distribution of the speech, a challenge is less promising if the government merely stigmatizes the speech or the speaker, without more.

In *Meese v. Keene*, film distributors challenged a federal statute requiring agents of non-U.S. entities to file paperwork with the Justice Department when exhibiting films that qualified as "political propaganda."[26] The challenged injury was the reputational harm of being federally characterized as a distributor of propaganda, which the exhibitors believed might make audiences reluctant to attend their showings. The Court found that, while stigmatization was enough of an injury to confer standing, the statute did not unconstitutionally burden speech. To the contrary, the justices decided, the requirement to make additional disclosures when showing a "propaganda" film actually gave the audience more information, which the exhibitor was free to supplement with counter-speech vouching for the film's virtues.[27] The Court expressly distinguished the *Lamont* case — on which the film distributors principally relied — by noting that in *Lamont*, there was actual interference with the delivery of the speaker's message, not just discouragement.

In a parallel case again involving the Reagan Justice Department, *Penthouse Int'l, Ltd. v. Meese*,[28] publishers of adult magazines were denied First Amendment redress against a federal commission that distributed a memo to retailers interpreted as pressure to stop carrying the magazines. The Attorney General's Commission on Pornography warned the retailers that, by virtue of stocking *Penthouse* and other adult publications, they would be named in an upcoming Commission report as purveyors of pornography and were being given a chance to respond. Distinguishing the *Bantam Books* line of cases, the D.C. Circuit stated that nothing in the Commission's correspondence could be understood as a threat of prosecution, and "the Supreme Court has never found a government abridgement of First Amendment rights in the absence of some actual or threatened imposition of governmental power or sanction."[29]

We do not see why government

> officials may not vigorously criticize a publication for any reason they wish. As part of the duties of their office, these officials surely must be expected to be free to speak out to criticize practices, even in a condemnatory fashion, that they might not have the statutory or even constitutional authority to regulate. . . . If the First Amendment were thought to be violated any time a private citizen's speech or writings were criticized by a government official, those officials might be virtually immobilized.[30]

As a result of the *Meese* cases, it would be difficult for a news organization to mount a First Amendment claim against a government critic if the criticism did no more than discourage viewership.

Religious Dis-endorsement and the First Amendment

While cases about coercive government speech are somewhat rare in the realm of media, they are much more common in the context of religion and religious speech. The courts have been called on repeatedly to determine when mere government speech about religion or religiosity, without any concrete accompanying official act, can itself constitute a First Amendment violation. In that context, courts have held that the government has violated the Establishment Clause when it has either endorsed or expressed "disapproval" of religion.[31] The driving principle is that government has no legitimate role in judging the religious beliefs of people "either by praise or denunciation."

The U.S. Supreme Court's case *Lemon v. Kurtzman*[32] remains the controlling authority on Establishment Clause cases. Under *Lemon*, government speech or action constitutes a violation when the government: (1) has a predominantly religious purpose, (2) has a principal or primary effect of advancing or inhibiting religion, or (3) fosters excessive entanglement with religion. Applying *Lemon*, courts have held that the government has violated the Establishment Clause even when no official act has been taken against a religion. For instance, in the Ninth Circuit case of *Catholic League for Religious and Civil Rights v. City and County of San Francisco*, a non-binding resolution opposing a Vatican directive that Catholic archdiocese stop placing children for adoption with same-sex couples was held to be an unconstitutional condemnation of Catholicism. The court dispensed with the idea that no "actual" harm came to Catholic adherents, opining that even "[t]hough it is hard to imagine that government condemnation of the Catholic Church would generate a pogrom against Catholics as it might at another time or for a religion with fewer and more defenseless adherents, the risk of serious consequences cannot be disregarded."[33] It further provided examples of such possible ramifications, including fear that "[v]andals might be emboldened by knowledge that their government agrees that the Catholic Church is hateful and discriminatory," or that "[p]arishioners might be concerned about driving their car to Mass for fear that it might be keyed in the parking lot." In other words, it is the mere creation of fear through the use of official governmental condemnation—that is, fear that the non-Catholic recipients of such speech will be encouraged to turn on Catholic adherents—that runs afoul of the First Amendment.[34]

These cases, however, are of only limited value in understanding where judges might draw the line on government denouncement of a news organization. As understood by the Supreme Court, the Establishment Clause contemplates an affirmative right to be free of government speech condemning one's religion or religiosity, in a way that the speech and press clauses of the First Amendment do not. Government speakers are free to express disapproval of media coverage or media outlets as part of political give-and-take on issues of public concern, so wherever the line exists for anti-media speech, more will be required to sustain a First Amendment violation than merely showing that government authorities criticized a speaker's beliefs or message.

Stigmatization and Due Process

The Due Process Clause can come into play when government speech inflicts severe reputational harm. Due Process claims based on loss of reputation are often brought and evaluated in tandem with First Amendment claims, because both share a core concern that government condemnation will interfere with a speaker's ability to effectively exercise his rights. In recent years, this strain of due process jurisprudence has had a workout, thanks to claims by would-be travelers mistakenly placed on federal terrorism "watch lists" and at times denied privileges, including the ability to board planes. The initial wave of these cases has produced diverging views as to whether appearing on a "no-fly" list is a sufficiently serious deprivation to trigger the protection of the Due Process Clause.[35]

In a 1976 case involving a man mistakenly pictured on a police warning poster identifying shoplifters, *Paul v. Davis*, the Supreme Court declined to "constitutionalize" the tort of defamation.[36] The justices announced what has become known as a "stigma-plus" standard for due process claims arising out of harm to reputation, and found that the plaintiff's discomfort at being publicly accused of shoplifting insufficient to support a constitutional claim absent evidence of lost employment or other tangible harm.[37] The Court distinguished the accused shoplifter's case from successful due-process challenges in which government stigmatization was accompanied by the loss of a constitutionally recognized liberty or property interest, such as suspension from school or disqualification from government employment.

Have journalists or news organizations suffered a deprivation of constitutionally protected interests traceable to condemnation by President Trump? None of those the President has singled out as deserving of firing, including *The New York Times*' Dave Weigel and Fox's Megyn Kelly, has actually been fired. (Kelly took what was arguably a promotion to NBC-TV's "Today" show after the 2016 campaign, saying that Trump's harassment on Twitter confirmed, but did not initiate, her interest in leaving the combative cable news arena.[38]) Major national news outlets do not appear to be suffering economically from presidential disapproval; in fact, subscriptions are rising.[39]

At the same time, public distrust

of news media is worsening in parallel with, and arguably driven by, the President's rhetoric. A Poynter Institute survey published in December 2017 found that only 19 percent of Republicans expressed confidence that the media fairly and accurately reports the news, and that 44 percent of Americans believe the press manufactures unfavorable stories about President Trump.[40] The President's undisguised objective is to undermine belief in mainstream news reporting, as expressed in a celebratory tweet on Oct. 22, 2017, after the release of a survey comparable to Poynter's: "It is finally sinking through. 46% OF PEOPLE BELIEVE NATIONAL NEWS ORGS FABRICATE STORIES ABOUT ME. FAKE NEWS, even worse! Lost cred." Nevertheless, it would be challenging for a media plaintiff to establish an actionable cause-and-effect between particular statements by the President and a loss of public trust sufficiently concrete to deprive the plaintiff of a constitutionally protected interest.[41]

Possible Claims Against President Trump

A recent analysis published by *Columbia Journalism Review* examining tweets posted to the @realdonaldtrump account since the start of the Trump presidential campaign in June 2015 found 990 that could be considered critical of the media or of particular journalists.[42] The comments run the range from name-calling ("the most dishonest human beings on Earth") to more pointed calls for especially disliked journalists to be fired.[43] The President takes special pleasure in jabbing at *The New York Times*, which he has repeatedly claimed (in a distortion of history) "apologized" for anti-Trump bias in its campaign coverage. A favorite condemnation tactic is to characterize a news organization as "failing" or "ratings starved," suggesting a cause-and-effect between the organization's declining audience (whether the decline is real or imagined) and its unenthusiastic coverage of Trump.

A media plaintiff could readily satisfy most of the threshold prerequisites for a First Amendment claim. First, there is state action. The White House and President Trump's attorneys have taken the position that tweets posted to @realdonaldtrump represent statements of official Administration policy.[44] Second, the challenged government action is substantially motivated by the exercise of First Amendment rights. The President plainly is responding to (and at times specifically referencing) news reports, and even news reports that turn out to be inaccurate are protected by the Constitution. The uncertainty, then, is in establishing that the condemnation was sufficiently severe as to chill speech. This requires analyzing what the President has said and its foreseeable effect on a speaker of reasonable firmness.

In a handful of instances, the President has gone beyond mere criticism and has hinted at adverse official action in response to journalists' protected speech.

Probably the most-debated sequence of posts came on Oct. 11, 2017, in response to an NBC News report indicating that Trump startled his top national-security aides by saying in a private meeting that he wanted a massive increase in nuclear weapons. After that report aired, Trump tweeted this series:

- "Fake @NBCNews made up a story that I wanted a "tenfold" increase in our U.S. nuclear arsenal. Pure fiction, made up to demean. NBC = CNN!"
- "With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their License? Bad for country!"
- "Network news has become so partisan, distorted and fake that licenses must be challenged and, if appropriate, revoked. Not fair to public!"

Although NBC as a network is not an FCC-licensed entity, its affiliate local stations are, and the President's tweets could reasonably be understood as a "call to action" to rescind the affiliates' licensure. While FCC members are statutorily independent of the Administration, they owe their appointments to the President. A speaker could reasonably assume that a presidential directive ("must be challenged and, if appropriate, revoked") will carry, at the least, substantial influence. Even if the FCC could not legitimately remove a station's license because of perceived bias in news reporting, it is not necessary for purposes of a First Amendment claim that the threatened government action be well-founded. As the doctrine of retaliatory threat speech was set forth in the *Bantam Books* cases—in particular, in the Seventh Circuit's explication in *Backpage.com* — the foundational ingredients for a First Amendment claim exist: Condemnation of an identifiable speaker, accompanied by a threat to use government authority to deter or penalize protected speech.[45]

In a less direct threat, on March 30, 2017, the President's account retweeted a *New York Post* opinion column sharply critical of *The New York Times* and then added, "The failing @nytimes has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?" This tweet, like the broadside directed at NBC News, hints at official action that might be within the scope of presidential authority (if only indirectly, since significant rollbacks in the constitutional protections for media defendants would require the Supreme Court to reconsider half a century of precedent). The March 30 tweet capped a string of 13 anti-*Times* posts following the inauguration, including tweets in which the President identified the *Times* and other disfavored news outlets as "the enemy of the American people," repeatedly accused the paper of fabrication, and called for the *Times* to be sold to a new owner who will "either run it correctly or let it fold with dignity!"

The threat of adverse action toward the *Times* was more remote than in the case of NBC, as the removal of federal licensure poses a direct and immediate threat to a station's existence, while changing libel laws poses a danger only in the subsequent event of a lawsuit. Moreover, while instigating a groundless FCC de-licensure proceeding is wrongful, it is less clear that it is wrongful to initiate a change in the legal standard for proving libel, which is an issue of legitimate debate. Since the President is within his authority to seek to change the law, it is uncertain whether a reviewing court would look searchingly behind such a proposal (if made) to its motives.

In a third instance, the President again connected animus toward the

media with adverse government action by tweeting on Oct. 5, 2017: "Why isn't the Senate Intel Committee looking into the Fake News Networks in OUR country to see why so much of our news is just made up-FAKE!" The President could reasonably be perceived as having sufficient influence with Congress to provoke an investigation. But the tweet by itself cannot support a First Amendment claim, because it fails to identify a target with sufficient particularity to confer standing (although the post might be relevant in a hypothetical claim brought by NBC, as it came a day after two especially hostile anti-NBC tweets calling the network's reporting "dishonest" and demanding an apology).

Short of this handful of direct or implied threats, prevailing First Amendment doctrine appears to insulate the President against liability for merely venting hostility toward media outlets, even if done with the hope of driving down viewership.

Most of the President's post-election tweets about journalists are variations on the theme of "fake news," a term he used in 100 posts from Inauguration Day through the end of 2017. While undoubtedly some Trump followers understand the message literally — that mainstream outlets actually fabricate stories critical of the President to advance a liberal agenda—"fake" is increasingly a meaningless term used interchangeably with "biased."

In the context of contentious political debate, a mere accusation of bias is unlikely to satisfy the threshold for a constitutional claim. Even where the President has arguably defamed an individual or a business—for instance, claiming that a news organization intentionally publishes falsehoods—we know from the *Paul* case that the Supreme Court does not regard defamation as a constitutional matter.

Moreover, none of these posts calls on anyone to take any adverse action or can reasonably be understood as threatening government reprisal. The President obviously is in no position to use governmental authority against those in his Twitter audience who read the *Times* or watch NBC. The *Meese* cases indicate that merely discouraging the public from purchasing a publication falls short of conduct violating the First Amendment.

Under a traditional First Amendment analysis, then, few if any of the President's tweets would qualify as actionable violations of a media plaintiff's rights. But the @realdonaldtrump tweets present unique constitutional concerns beyond the *Bantam Books*/*Meese* line of precedent.

First, unlike in typical "disendorsement" cases, the President is seeking to discredit or silence core political expression addressing matters of public concern, not speech at the margins of obscenity where government suppression battles are typically fought. A court might justifiably put a thumb on the journalist's side of the scale when the government is seeking to intimidate news organizations that fail to adhere to the sitting administration's viewpoint.

Second, unlike in typical "disendorsement" cases, the President's commentary on the way his administration is covered does not advance any colorably legitimate government interest. No public purpose is served by undermining trust in news organizations or denigrating journalists. This scenario thus diverges from cases such as *Meese*, in which the Justice Department was seeking to call attention to the perceived social ills of pornography. The validity of the government's justification is not explicitly made an element of the *Bantam Books* cases, but in traditional First Amendment analysis of content-based speech regulations, it is a decisive consideration.

Threshold Hurdles to a Constitutional Claim

Even given ample precedent that government denunciation can give rise to a constitutional claim, powerful practical hurdles make a constitutional challenge to presidential tweets unlikely.

In the first place, President Trump's well-established record of wildly hyperbolic statements on social media would make it difficult to establish that a reasonable audience member takes his invective literally. A recent libel plaintiff ran into this very obstacle in the case of *Jacobus v. Trump*,[46] in which a Republican strategist and Trump critic alleged she was defamed by presidential tweets belittling her as an embittered job-seeker who "begged" Trump's campaign to hire her. The judge observed that, while the tweets were clearly demeaning, they were not defamatory in the context of a heated exchange of insults on Twitter, a forum in which readers expect to encounter "imprecise and hyperbolic" statements in the nature of a "schoolyard squabble." "Indeed," the judge remarked, "to some, truth itself has been lost in the cacophony of online and Twitter verbiage to such a degree that it seems to roll off the national consciousness like water off a duck's back."

Further, speakers have been most successful in challenging government condemnation where they can show that the condemnation actually interfered with their ability to distribute speech to the intended audience, such as making retailers more reluctant to sell certain books or magazines. This was the decisive point in the Eighth Circuit's determination that a Minnesota college professor's condemnation of literature as genocide-denial propaganda did not inflict a constitutional injury on the publisher.[47] Although being targeted for government denunciation was enough to confer standing on the publisher, there was no showing that the condemnation actually resulted in the material being less accessible to students. Absent proof of such interference, the mere allegation that students might be less likely to believe the literature could not sustain a First Amendment claim.

No television network or newspaper is likely to take the position that it refrained from candid commentary about the President or avoided stories unflattering to his administration out of fear of reprisal resulting from social-media invective. Indeed, those most aggressively singled out for condemnation—the *Times*, CNN and NBC News—show no outward indication of having altered their coverage or avoided critical commentary in fear of adverse presidential action.[48]

Nevertheless, courts have held that even if a speaker is heroically courageous, the chilling effect is not measured by the subjective standard of that speaker's unusually thick skin, but by an objective standard of the reasonable speaker. As the Ninth Circuit aptly put it, "it would be unjust to allow a defendant to escape

liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity. . . . [T]he proper inquiry asks 'whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities.'"[49]

Even if the elements of a constitutional claim could be established, the question of remedy remains. Injunctive relief can provide effective redress when a speaker challenges the enforceability of a government enactment that interferes with each successive attempt at expression, such as a burdensome permit requirement or tax. But when the challenged government conduct amounts to sporadic insults, it is not at all clear that a court could craft effective injunctive relief.

The other potential remedy for a First Amendment violation, money damages, is foreclosed by *Nixon v. Fitzgerald*,[50] in which the Supreme Court held that presidents are immune for civil damages in federal court for acts taken during their time in office, even years after leaving office (in that case, arranging for a Pentagon official to lose his job in retaliation for embarrassing congressional testimony). Although the *Nixon* case leaves open the possibility that a president can be held liable for acting beyond the "outer perimeter of his official responsibility,"[51] it would be a challenging tightrope act for a media plaintiff to establish that the President's social-media speech was "state action" (a necessary prerequisite for a constitutional claim) and yet at the same time beyond his official responsibilities.

Conclusion

The government has a recognized interest in participating in the marketplace of ideas as a speaker, even when the speech involves attempting to influence public opinion—for instance, persuading women to choose childbirth over abortion, which the Supreme Court legitimized in *Planned Parenthood of S.E. Pa. v. Casey*.[52] Still, the government's dissuasion power is circumscribed by the Constitution in a way that a private "market participant's" is not. If the president of the United States makes an official pronouncement that particular speakers are unworthy of being heard or believed with the purpose of deterring speech, the speaker's constitutional rights are implicated. And condemnation can inflict cognizable injury even if the president has no intent or authority to act on the condemnation.

Presidential denunciation of news coverage, or even of particular journalists, is nothing new. During the early days of America's military involvement in Vietnam, President Kennedy infamously called the Washington bureau chief of *The New York Times*, trying (unsuccessfully) to get war correspondent David Habersham fired.[53] The Nixon administration ferociously criticized Washington journalists and in particular the *Washington Post*, which Vice President Agnew and the President's press secretary repeatedly accused of fabrication.[54] What makes the bombardment by President Trump seem to represent an escalation is both the tone (at times lapsing into crude personal insults) and the venue (a universally accessible social-media platform through which anyone can rebroadcast the message).

Social-media posts from an account with Trump's 45 million-strong following are qualitatively different from an Illinois sheriff's letter to a credit-card company—and the distinction is a double-edged one. Trump tweets are, in one respect, more influential because they are seen by a worldwide audience and capable of inciting vast numbers of people into action, in a way that a private letter is not. But the sheriff's letter in *Backpage* carried a gravity that a 280-character outburst on a platform known for jokey informality does not. Realistically, the letter would place a speaker in greater fear of imminently adverse government action than the tweet.

A constitutional challenge to presidential condemnation on social media would present difficult and perhaps prohibitive practical obstacles, but a solid doctrinal foundation exists in the law of government disendorsement. Nevertheless, it should not take an injunction for a sitting president to exercise restraint and judgment in using the digital bully pulpit. The most persuasive argument on behalf of journalists singled out for presidential approbation is not that the speech violates the Constitution, but that it violates the norms of a civil society in which unsubstantiated charges of falsity and fabrication devalue the public discourse.

Endnotes

1. "CNN Reliable Sources," CNN, Oct. 15, 2017, *transcript available at* http://transcripts.cnn.com/TRANSCRIPTS/1710/15/rs.01.html.
2. "Generally, standing is found based on First Amendment violations where the rule, policy or law in question has explicitly prohibited or proscribed conduct on the part of the plaintiff." Parsons v. United States Dept. of Justice, 801 F.3d 701, 711 (6th Cir. 2015).
3. Weiman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J. concurring).
4. Gibson v. Florida Legis. Investigation Comm., 372 U.S. 539, 556–57 (1963).
5. Dombrowski v. Pfister, 380 U.S. 479, 494 (1965).
6. 408 U.S. 1 (1972).
7. *Id.* at 11.
8. *Id.* at 12–13.
9. *Id.* at 13–14.
10. Bennett v. Hendrix, 423 F.3d 1247, 1251 (11th Cir. 2005).
11. Curley v. Village of Suffern, 268 F. 3d 65, 73 (2d Cir. 2001).
12. 372 U.S. 58 (1963).
13. *Id.* at 72.
14. In the view of Yale's Robert Post, the realistic fear of imminent criminal prosecution distinguishes the *Bantam Books* scenario from that of the contemporary news publishers the President attempts to intimidate via social media. Robert Post, *Friends, Enemies, and Trump's First Amendment Violations*, TakeCareBlog.com (Sept. 26, 2017), *available at* https://takecareblog.com/blog/friends-enemies-and-trump-s-first-amendment-violations.
15. 381 U.S. 301 (1965).
16. *Id.* at 307.
17. American Communications Ass'n v. Douds, 339 U.S. 382, 403 (1950).
18. Backpage.com, LLC v. Dart, 807 F.3d 229, 230–131 (7th Cir. 2015).
19. *Id.* at 230-31 (quoting Okwedy v. Molinari, 333 F.3d 339, 344 (2d Cir. 2003)).
20. *Id.* at 231.
21. *Id.* at 236 (quoting Backpage v. Dart, 127 F.Supp.3d 919, 928-29 (N.D. Ill. 2015)).
22. 333 F.3d 339 (2d Cir. 2003).
23. *Id.* at 341-42.
24. *Id.* at 344. *See also* Skyywalker Records v. Navarro, 798 F. Supp. 578 (S.D. Fla. 1990) (finding that sheriff

committed an unlawful prior restraint of a popular rap album when his deputy obtained an advisory court opinion that the record was obscene, which the sheriff then disseminated to music stores, causing them to pull the album from their shelves). (The ruling was reversed on other grounds, 960 F.2d 934 (11th Cir. 1992), when the Eleventh Circuit disagreed with the trial court's conclusion that the record was obscene.)

25. *See* Rattner v. Netburn, 930 F.2d 204, 208 (2d Cir. 1991) (noting that there is a valid claim for violation of First Amendment rights "where comments of a government official can *reasonably be interpreted* as intimating that some form of punishment or adverse regulatory action will follow the failure to accede to the official's request.") (emphasis added). *See also* Zieper v. Metzinger, 474 F.3d 60 (2d Cir. 2007) (finding a triable First Amendment claim where FBI agents visited film distributor's home and led him to believe that other FBI agents were on the way, to coerce him to pull film about dramatized terrorism attack off the web, but nevertheless granting judgment for government defendants on qualified immunity grounds).

26. 481 U.S. 465 (1987).

27. *Id.* at 480.

28. 939 F.2d 1011 (D.C. Cir. 1991).

29. *Id.* at 1015.

30. *Id.* at 1015–16.

31. Catholic League for Religious and Civil Rights v. City and County of San Francisco, 624 F.3d 1043, 1053–54 (9th Cir. 2010).

32. 403 U.S. 602 (1971).

33. *Id.* at 1059.

34. As this article goes to publication, President Trump is in fact being sued by three counter-demonstrators who say his invective from the podium during a campaign rally provoked attendees to assault them. *See* Nkwanguma v. Trump, No. 3:16-cv-247-DJH-HBB, 2017 WL 3430514 (W.D. Ky. Aug. 9, 2017) (dismissing plaintiffs' negligence claims but reaffirming earlier ruling that plaintiffs can proceed on a theory of incitement).

35. *Compare* Tarhuni v. Holder, 8 F.Supp.3d 1253 (D. Ore. 2014) (no "stigmatization" claim for plaintiff of Libyan dissent placed on "no-fly" list, because list was made available only for airlines' internal use and not distributed to the public) *with* Latif v. Holder, 28 F.Supp.3d 1134 (D. Ore. 2014) (different Oregon district judge concludes that "no-fly" listing is actionable under the Due Process Clause, because employees at departure gate and surrounding passengers became aware of plaintiff's status, causing them to suspect him of disloyalty to America).

36. 424 U.S. 693 (1976).

37. *Id.* at 712.

38. Erin Nyren, *Megyn Kelly Says She Left Fox News Because of Trump*, VARIETY (Sept. 21, 2017).

39. Ken Doctor, *Trump Bump Grows Into Subscription Surge—and Not Just for the* New York Times, THESTREET.COM (Mar. 3, 2017), *available at* https://www.thestreet.com/story/14024114/1/trump-bump-grows-into-subscription-surge.html.

40. Indira Lakshmanan, *Half of America Thinks We're Making It Up*, THE POYNTER INSTITUTE (Dec. 22, 2017), *available at* https://www.poynter.org/news/half-america-thinks-were-making-it.

41. In addition to Due Process, Prof. Nelson Tebbe has theorized that "hateful" government speech can, even in the absence of concrete action, constitute an Equal Protection violation—for example, if the government were to establish a differently named form of "marriage" reserved for same-sex couples so as to stigmatize those marriages as being of lesser value, even if all of the tangible legal benefits were exactly the same. *See* Nelson Tebbe, *Government Nonendorsement*, 98 MINN. L. REV. 648 (Dec. 2013).

42. Jonathan Peters, "Trump Twitter Spreadsheet Tracks 'a Perpetual Campaign against the Press,'" COLUMBIA JOURNALISM REVIEW (Dec. 21, 2017), *available at* https://www.cjr.org/united_states_project/trump-twitter-spreadsheet-press-attacks.php.

43. A PDF of the spreadsheet, compiled by a New York University student researcher for the Committee to Protect Journalists, is posted at https://www.dropbox.com/s/glwr6uart3ralh4/Spreadsheet%20for%20CJR%20%28Updated%29.pdf?dl=0.

44. Lorelei Laird, *DOJ Says Trump's Tweets are Official Presidential Statements*, ABA JOURNAL (Nov. 14, 2017).

45. One of many complications such a case would present is whether parent NBC-TV (the non-licensed entity that was threatened) can establish an injury based on a "hostage theory" that its affiliates might face FCC sanction. Conceivably, the network could establish injury by showing a reasonable belief that local stations will hesitate to join or remain in the network if carrying NBC news programming puts their licensure at risk.

46. 45 Media L. Rep. 1097 (N.Y. Sup. Ct. Jan. 9, 2017).

47. Turkish Coalition of America, Inc. v. Bruininks, 678 F.3d 617 (8th Cir. 2012).

48. In a comparable case involving a state prosecutor's intimidating phone call to the publisher of a local newspaper, the newspaper lost its First Amendment case because no evidence showed that the call actually caused the paper to alter its coverage. *See* Zherka v. DiFiore, 412 Fed. Appx. 345, 348 (2d Cir. 2011) (unpublished) ("Where a party can show no change in his behavior, he has quite plainly shown no chilling of his First Amendment right to free speech") (quoting Curley v. Village of Suffern, 268 F.3d 65, 73 (2d Cir. 2001)).

49. Mendocino Envtl. Ctr. v. Mendocino County, 192 F.3d 1283, 1300 (9th Cir. 1999). *See also* Bennett v. Hendrix, 423 F.3d 1247 (11th Cir. 2005).

50. 457 U.S. 731 (1982).

51. *Id.* at 756 (internal quotes omitted).

52. 505 U.S. 833, 807–08 (1992).

53. Jon Finer, *A Dangerous Time for the Press and the Presidency*, THE ATLANTIC (Feb. 20, 2017).

54. *See* Oscar Winburg, *When It Comes to Harassing the Media, Trump Is No Nixon*, THE WASHINGTON POST (Oct. 16, 2017).