

STOP THE PRESSES: DONALD TRUMP’S ATTACK ON THE MEDIA

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I. INTRODUCTION

Few would disagree with Thomas Jefferson that “[t]he only security of all is in a free press.”¹ But is our press truly free? Some from the left may argue that even the American free presses simply serve the moneyed classes. Some from the right may argue that the press spews nonsense tilted toward the personal, leftist views of the journalists. Most Americans would likely agree, however, that we are blessed with a robust and free press. And one suspects those living under truly dictatorial conditions would embrace our free press normative structure, whatever warts it may have.

In this Article, we consider whether President Trump violates the law when he attacks the press. President Trump has (in)famously-and repeatedly – called the press the “enemy of the American people[,]” among other condemnations.² Do such purely verbal attacks violate national law or even international laws or norms? President Trump has also threatened the press and even taken retaliatory action, perhaps most notoriously when he revoked

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¹ Although Thomas Jefferson is often upheld as a great defender of the free press, many commentators have noted his own hostilities with the press after becoming President. Whether Donald Trump’s relation with the press is substantively different from his Presidential predecessors is an interesting question, though beyond the scope of this note. Letter from Thomas Jefferson to Marquis de Lafayette (Nov. 4, 1823), in *QUOTES BY AND ABOUT THOMAS JEFFERSON, 1821-1830* (Library of Congress, Washington D.C.).

² Donald Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), https://twitter.com/realDonaldTrump/status/832708293516632065?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwerm%5E832708293516632065&ref_url=https%3A%2F%2Fwww.nytimes.com%2F2017%2F02%2F17%2Fbusiness%2Ftrump-calls-the-news-media-the-enemy-of-the-people.html.

CNN reporter Jim Acosta's White House pass on November 8, 2018.³ If President Trump's verbal attacks do not violate the law, do his threats and actions? If so, what legal options are available against a sitting President?

II. PRESIDENT TRUMP'S VERBAL ATTACKS ON THE PRESS

On October 16, 2018, an organization known as PEN American Center ("PEN American") filed a lawsuit against President Donald Trump in his official capacity over his relationship with the press.⁴ We start with this lawsuit because it considers all three areas considered presently: (1) President Trump's verbal attacks on the press, (2) his threats against the press, and (3) retaliatory action against the press. Although PEN American's complaint contains a lengthy background of President Trump's verbal attacks, the lawsuit focuses on injunctive relief against retaliatory action. PEN American's complaint concedes that, although the President's verbal attacks, such as calling the press the "enemy of the American people," are reprehensible, they may not necessarily violate the law and, indeed, may be protected by the First Amendment.⁵

As discussed below, PEN American is probably correct that his verbal attacks are not likely actionable, but the complaint's opening concession raises a very interesting question which cannot be so quickly disposed. Article II, Sec. 1 of the United States Constitution specifies the President's primary responsibility to "...preserve, protect, and defend the Constitution of the United States."⁶ Does the country's chief defender of the United States Constitution violate the law by openly denigrating the free press, a central right guaranteed thereunder? *Should* these attacks be balanced, morally, against the President's own free speech rights? Further complicating the matter is the blurry line between verbal denigration and verbal threats. After all, one could easily argue that any open attack by the President is, *ipso facto*, a threat, given his power, position, and myriad avenues of open or discrete retaliation available to him.⁷ For instance, one could disagree as to whether any individual tweet is merely "personal negative opinion" or threat.⁸

³ Amy B. Wang and Paul Farhi, *White House Suspends Press Pass of CNN's Jim Acosta After His Testy Exchange with Trump*, THE WASHINGTON POST, Nov. 8, 2018, https://www.washingtonpost.com/politics/2018/11/08/white-house-suspends-press-pass-cnns-jim-acosta-after-testy-exchange-with-trump/?noredirect=on&utm_term=.52804d99bc9c.

⁴ Compl. 1, PEN Am. Ctr., Inc. v. Trump, No. 18-9433, 2018 WL 5019438 (S.D. N.Y. Oct. 16, 2018).

⁵ *Id.* at 5.

⁶ U.S. CONST., art. II, § 1.

⁷ As discussed below, PAC notes that President Trump planned to challenge a proposed merger of AT&T and Time Warner (CNN's parent company) as retaliation for CNN's negative press coverage of him. Complaint, *supra* note 4, 7. One can imagine a parade of horrors such as spying, wiretapping, excessive IRS scrutiny, etc. by which the President could openly or discretely carry out his anger at certain members of the press, otherwise "merely" expressed as personal opinion.

⁸ On October 25, 2018, for instance, 211 journalists published a letter condemning President Trump's "sustained pattern" of attacks on the free press describing his behavior as "un-American and utterly

With those considerations, we try to analyze the legal ramifications of President Trump's personal attacks on the press. The First Amendment to the United States Constitution states that "*Congress shall make no law...abridging the freedom of speech, or of the press...*" (emphasis added).⁹ Given the Constitution's dictate that the President defend the Constitution, it should not matter that the First Amendment expressly limits Congress' power but not that of the Executive. After all, the President's oath of office comes directly from the Constitution's mandate that the President defend the Constitution.

That said, the "political question doctrine"¹⁰ alone almost certainly precludes the Courts from preventing President Trump's verbal attacks. As noted in *Peterson v. United States*, "courts have consistently ruled that...a claim...the President violated his oath of office...is not cognizable."¹¹

What about private civil lawsuits by members of the press? Whether a sitting President can be sued civilly (or even prosecuted) are hotly debated topics given, *inter alia*, the Mueller investigation and President Trump's ongoing litigation with Stormy Daniels.¹² To the extent President Trump is merely stating his personal antipathy toward the press, or even individual journalists or certain news outlets, such statements are likely protected by the First Amendment just as they would be for a private individual, as PEN American recognizes in its complaint (though possible civil liability for his actions is discussed later in this note).¹³

If the courts cannot prevent President Trump's barrage of attacks on the press, then opponents may look to the remaining branch of government through Congressional impeachment. In *Nixon v. United States*, the Supreme

unlawful and unseemly for the President of the United States and leader of the free world." In the letter, the journalists explain that these attacks threaten the safety of journalists everywhere. Meagan Flynn, *More than 200 retired journalists condemn president's 'un-american' attacks on press*, ST. LOUIS POST-DISPATCH (Oct. 25, 2018), https://www.stltoday.com/news/national/more-than-retired-journalists-condemn-president-s-un-american-attacks/article_eecb93a4-ab77-5edf-aa78-8091bffb537d.html.

⁹ U.S. CONST. amend I.

¹⁰ "The 'political question' doctrine provides another 'narrow exception' to the rule that the "[j]udiciary has a responsibility to decide cases properly before it." *Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 194–195 (2012). A case "involves a political question ... where there is a 'textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.'" *Id.* at 195; *District of Columbia v. Trump*, 291 F. Supp. 3d 725, 756 (D. Md. 2018).

¹¹ *Peterson v. United States*, 774 F.Supp.2d 418, 426 (D.N.H. 2011). See e.g., *Ramp v. Bush*, No. 08–336, 2008 WL 686727, at *1 (N.D. Ohio Mar. 13, 2008) (explaining that whether the President complied with his oath of office is "indisputably a political question," not a justiciable one); *Catholic Charities CYO v. Chertoff*, No. 07–1307, 2007 WL 2344995, (N.D. Cal. Aug. 16, 2007); *Sadowski v. Bush*, 293 F.Supp.2d 15, 19 (D.D.C. 2003).

¹² Tessa Berenson, *Stormy Daniels' Lawsuit Against Donald Trump Raises the Question: When Can You Sue the President?*, *Time* (Mar. 7, 2018), <http://time.com/5189549/stormy-daniels-lawsuit-can-you-sue-president-united-states/>.

¹³ *Compl.*, *supra* note 4, 5. See *Zaloga v. Borough of Moosic*, 841 F.3d 170, 176 (3d Cir. 2016) ("when a public official's allegedly retaliatory acts are in the form of speech, the official's own First Amendment speech rights are implicated").

Court considered the case of disgraced United States District Court Judge Walter Nixon who challenged his impeachment following a bribery conviction.¹⁴ The Court held that it had no power to review the propriety of Congress' impeachment since the Constitution provides this power solely to the legislative branch.¹⁵ The authorities are generally in agreement.¹⁶ The point here is the courts would likely not review any Congressional decision to impeach President Trump, should it ever come to that.

If it is left to Congress, then one may ask whether impeachment for attacking the free press is a wise course of action. Though President Trump's unjustified vitriol against the press is appalling, impeachment sets a dangerous precedent in the absence of clear criminal acts; the ballot box is the more prudent option.

Before turning to President Trump's threats, it should be noted that the United Nations has weighed in on the issue.¹⁷ On August 2, 2018, representatives of the United Nations and the Inter-American Commission on Human Rights stated that President Trump's attacks on the press "are strategic, designed to undermine confidence in reporting and raise doubts about verifiable facts" and that the President has never provided proof of his repeated claims of "nefarious motivation or animus" from various journalists.¹⁸

At the risk of running too far afield into the political matters, this is a point worth noting. President Trump's attacks on the press go hand-in-hand with him playing fast and loose with the truth. The former is a servant of the latter and a dangerous warning of autocratic tendencies. At the beginning of Trump's Presidency, conservative columnist Bret Stephens writing for *Time* warned that the President views "[t]ruth [as] what you can get away with."¹⁹ Mr. Stephens explained the repetition and ubiquity of President Trump's lies overcome due outrage, noting astutely as follows: "It's the same truth

¹⁴ *Nixon v. United States*, 506 U.S. 224, 226 (1993),

¹⁵ *Id.* at 238.

¹⁶ The aftermath of Bill Clinton's impeachment triggered a wave of study on this issue. Most scholars agree the Courts will not involve itself in this process under the political question doctrine. *See, e.g.*, Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 DUKE L.J. 1457, 1519 (2005) (noting that "general policy" holds the process of impeachment and definition of impeachable offenses are not subject to judicial review). There may be some disagreement, however, even if on purely philosophical grounds. *See, e.g.*, Martin H. Redish, *Judicial Discipline, Judicial Independence, and the Constitution: A Textual and Structural Analysis*, 72 S. CAL. L. R. 673, 693-94 (attacking the idea that the scope of "impeachable offenses" should be a political question though noting the high Court in *Nixon* argues against involvement in impeachment proceedings).

¹⁷ *See Trump Attacks on Media Violate Basic Norms of Press Freedom, Human Rights Experts Say*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS (Aug. 2, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23425&LangID=E>

¹⁸ *Id.*

¹⁹ Bret Stephens, *Don't Dismiss President Trump's Attacks on the Media as Mere Stupidity*, TIME, (Feb. 26, 2017, 6:59 PM) <http://time.com/4675860/donald-trump-fake-news-attacks/>

contained in Stalin's famous remark that the death of one man is a tragedy but the death of a million is a statistic."²⁰

III. PRESIDENT TRUMP'S THREATS AND ACTIONS AGAINST THE PRESS

Turning to President Trump's threats against the press, the Third Circuit recently explained the distinction between words/opinions and threats (and raised the government actor's First Amendment rights discussed above), as follows:

The District Court correctly determined that "where a public official's alleged retaliation is in the nature of speech, in the absence of a threat, coercion, or intimidation intimating that punishment, sanction, or adverse regulatory action will immediately follow, such speech does not adversely affect a citizen's First Amendment rights, even if defamatory." [] . . . As noted, normally "an [official's] actions have [not] adversely affected [the] exercise of [] First Amendment rights where the [] alleged retaliatory acts were criticism, false accusations, or verbal reprimands." [] However, a retaliation claim involving a government official's own speech must involve a "threat, coercion, or intimidation" by the official that a punishment will follow from the continued exercise of a plaintiff's First Amendment rights.²¹

President Trump is an active tweeter and seemingly unafraid to state his opinion, so we can start with several statements to construe whether he has crossed the line to actionable threats against the free exercise of the press's First Amendment rights. The PEN American complaint, discussed at the start of this note, identifies three such threats: (a) using the Postal Service to harm Amazon because its owner's (Jeff Bezos) newspaper the, *Washington Post*, publishes unfavorable articles; (b) blocking an AT&T/Time Warner merger because the latter's subsidiary (CNN) publishes unfavorable articles; and (c) revoking broadcast licenses for news outlets critical of him.²²

Many of President Trump's tweets contain threats, or at least statements that may be construed as threats, if the press does not publish

²⁰ *Id.*

²¹ Noonan v. Kane, 698 F. App'x 49, 53–54 (3d Cir. 2017) (citations omitted).

²² Complaint 6-7, PEN Am. Ctr., Inc. v. Trump, No. 18-9433, 2018 WL 5019438 (S.D.N.Y. Oct. 16, 2018). In a particularly shocking allegation, former FBI director James Comey wrote in a February 19, 2017, memo that Trump shared concerns about leaks from within his administration. The president suggested jailing reporters "to find out what they know." See Phillip Bump, *What the Comey memos say*, WASH. POST (Apr. 19, 2018) https://www.washingtonpost.com/news/politics/wp/2018/04/19/what-the-comey-memos-say/?utm_term=.ff90e2f94a06. This raises yet more questions: (1) as shocking as his public attacks on the press are, how much worse might his private conversations be; and (2) could publication of such private conversations form the basis for a First Amendment retaliation claim?

stories deemed favorable to him: “With all of the Fake News coming out of NBC and the Networks, at what point is it appropriate to challenge their license?”²³ (Oct. 11, 2017); “...Maybe the best thing to do would be to cancel all future ‘press briefings’ and hand out written responses for the sake of accuracy???”²⁴ (May 12, 2017); “much of what [the press] says is FAKE NEWS, pushing a political agenda or just plain trying to hurt people.”²⁵ (Aug. 16, 2018). Further, setting up the question of just how concrete the threat must be to support legal action is President Trump’s ominous threat after another round of watching Saturday Night Live:

Nothing funny about tired Saturday Night Live on Fake News NBC! Question is, how do the Networks get away with these total Republican hit jobs without retribution? Likewise for many other shows? Very unfair *and should be looked into*. This is the real Collusion!²⁶

Before we consider whether such statements are actionable threats, we consider whether such “First Amendment retaliation claims” may be brought against a sitting President at all. In the PEN American lawsuit, for instance, Defendant President Donald Trump predictably sought dismissal of the lawsuit and, pursuant to the court’s instruction, his attorneys at the Department of Justice (“DOJ”) filed a letter on February 12, 2019, outlining the anticipated bases for such a Motion.²⁷ The letter first raises a question of PEN American’s standing to bring such a complaint (an issue not discussed in this note).²⁸ Second, the DOJ questions whether the courts may enter injunctive relief against a President in the context of his official duties.²⁹ Third, the DOJ argues that PEN American has failed to state a valid claim for relief. In this third prong of the letter, the DOJ states as follows:

Plaintiff has failed to plausibly allege the elements of a First Amendment retaliation claim. “To plead a First Amendment retaliation claim a plaintiff must show: (1) he has a right

²³ Donald Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 10:55 AM), <https://twitter.com/realdonaldtrump/status/918112884630093825?lang=en>.

²⁴ Donald Trump (@realDonaldTrump), TWITTER (May 12, 2017, 9:07 AM), <https://twitter.com/realdonaldtrump/status/863002719400976384?lang=en>.

²⁵ Donald Trump (@realDonaldTrump), TWITTER (Aug. 16, 2018, 11:10 AM), https://twitter.com/realdonaldtrump/status/1030094399362007040?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1030094399362007040&ref_url=https%3A%2F%2Fwww.washingtonpost.com%2Fnews%2Farts-and-entertainment%2Fwp%2F2018%2F08%2F16%2Ftrump-responds-after-hundreds-of-newspaper-editorials-criticize-his-attacks-on-the-press%2F.

²⁶ Donald Trump (@realDonaldTrump), TWITTER (Feb. 17, 2019, 8:52 AM), https://twitter.com/realdonaldtrump/status/1097116612279316480?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweetembed%7Ctwtterm%5E1097116612279316480&ref_url=https%3A%2F%2Fthehill.com%2Fhomenews%2Fmedia%2F430377-trump-rips-saturday-night-live-over-total-republican-hit-jobs-this-is-the-real (emphasis added).

²⁷ Defendant’s Letter, PEN Am. Ctr., Inc. v. Trump, No. 18-9433, 2018 WL 5019438 (S.D.N.Y. Oct. 16, 2018).

²⁸ *Id.* at 1.

²⁹ *Id.* at 3.

protected by the First Amendment; (2) the defendant's actions were motivated or substantially caused by plaintiff's exercise of that right; and (3) the defendant's actions caused him some injury."³⁰

In their response letter filed a week later, after responding to the standing argument, PEN American cited several cases and other authority to support the jurisdiction of the court to enter injunctive relief noting, *inter alia*, that the Court in *Dist. Of Columbia v. Trump* held it may, consistent with the Emoluments Clause, enjoin a President from receiving monies to which he is not entitled³¹ and that the Court in *Knight First Amendment Institute at Columbia Univ. v. Trump* held it had the power to enjoin the President from the unconstitutional action of blocking people from the President's Twitter account.³²

These letters raise two interesting and related questions: (a) can the court issue injunctive relief against a sitting President for executive actions, and (b) can Presidential threats of retaliation, without more, support a First Amendment retaliation claim against the President.

The weight of authority would seem to support a claim for injunctive relief, though little case law addresses the precise issue of such claims against a sitting President.³³ In *Stockman v. Trump*, for instance, a transgendered member of the military brought a First Amendment retaliation claim in opposition to the Trump Administration's prohibition of transgendered citizens joining the military.³⁴ This case, however, concerned a policy of the administration and not words, threats, or actions coming from the President himself.³⁵ As mentioned in PEN American's response letter, the court in

³⁰ *Id.* Given Defendant Donald Trump denies that injunctive relief may be entered, I do not read this third prong of the letter to concede that a claim might be viable. Instead, President Trump argues that PEN American fails to state a claim for First Amendment retaliation even if one may request injunctive relief against a sitting President.

³¹ 291 F.Supp.3d 725, 751 (D.D.C. 2018). Interestingly, in *Citizens for Ethics and Responsibility in Washington v. Trump*, another Plaintiff also sued Trump for violating the Emoluments Clause, alleging President Trump violates the Constitution when his businesses accept payments from foreign officials. *Citizens for Ethics and Responsibility in Washington v. Trump*, 276 F. Supp. 3d 174, 181-82 (S.D.N.Y. 2017) [hereinafter *CERW*]. At first blush, these cases appear helpful in determining whether Courts will consider a lawsuit against a sitting President for violating a Constitutional duty. In *CERW*, though, the Court did not reach the issue, instead dismissing the case on standing grounds. In the case PEN American cites (*District of Columbia v. Trump*), the Court's Constitutional textual analysis led it to conclude that Congress does not have the exclusive right to consider Presidential violations of the Emoluments Clause. If correct, this decision seems limited to the Emoluments clause and not necessarily helpful in a broader view of the propriety of judicial oversight of possible Presidential violations of the Constitution. *Id.* at 756-57 (procedurally, on Nov. 2, 2018 the Court denied President Trump's request for leave to file an interlocutory appeal in *D.C. v. Trump*, though an eventual appeal seems inevitable).

³² 302 F.Supp.3d 541, 578; Plaintiff's Letter, PEN American v. Trump, No. 18-9433, 2018 WL 5019438 (S.D.N.Y. Oct. 16, 2018).

³³ See *supra* Section II.

³⁴ *Stockman v. Trump*, 331 F. Supp. 3d 990, 993 (C.D. Cal. 2018).

³⁵ *Id.* at 1001. On January 22, 2019, the United States Supreme Court vacated an injunction against the military's policy, though appellate review of the constitutionality of the policy has not yet occurred.

Knight First Amendment did grant an injunction against the President for personally blocking citizens from his Twitter account.³⁶

With a limited body of case law concerning the President himself, we turn to cases concerning such First Amendment retaliation generally. As *Doherty v. City of Maryville* summarizes:

To be entitled to injunctive relief, plaintiffs must first show that a failure to issue an injunction or other equitable relief is likely to result in continuing irreparable harm. The Supreme Court has stated that “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” [] However, in order for the court to find irreparable harm to be continuing, future harm cannot be speculative. [] Usually plaintiffs must show a pervasive pattern of past violations of their constitutional rights to support the argument that there is a substantial likelihood that their rights will be violated in the future.³⁷

In a rare case addressing claimed interference with free press rights specifically, Judge Danny Reeves of the Eastern District of Kentucky held such a claim survives a motion to dismiss.³⁸ In *Strader*, which considered economic harm, a journalist alleged that Kentucky Department of Fish and Wildlife Resources (“KDFWR”) promoted a hunting and fishing radio show and expo to compete with the Plaintiff in retaliation for his criticism of the KDFR.³⁹ The Court noted that the Sixth Circuit recently affirmed that threat to one’s economic livelihood may support a First Amendment retaliation claim and held that it was plausible that KDFWR’s actions could do so.⁴⁰ Putting this together, the Court determined that such a claim may lie if the plaintiff’s economic interests were harmed and whether the defendant’s actions (and such harm) “would deter an investigative journalist of ordinary firmness from exercising his First Amendment rights.”⁴¹ In later proceedings, though, the Court granted summary judgment, finding that the Plaintiff “does not even argue, much less offer proof, that his ability to make a living has been hindered” by the competing radio program.⁴²

³⁶ Plaintiff’s Letter at 3, *PEN Am. Ctr., Inc. v. Trump*, No. 18-9433, 2018 WL 5019438 (S.D.N.Y. Oct. 16, 2018) (the Court also granted a temporary restraining order that the President restore Jim Acosta’s press pass, as discussed in more detail below); *See generally*, *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541 (S.D.N.Y. 2018).

³⁷ *Doherty v. City of Maryville*, No. 3:07-CV-157, 2009 WL 2823670, at *3 (E.D. Tenn. Aug. 28, 2009).

³⁸ *Strader v. Ky. Dep’t of Fish & Wildlife Res.*, No. CIV.A. 3:09-62-DCR, 2011 WL 181300, at *8 (E.D. Ky. Jan. 19, 2011).

³⁹ *Id.* at *2, *7-8.

⁴⁰ *Id.* at *8.

⁴¹ *Id.* at * 7-8 (citing *Fritz v. Charter Tp. Of Comstock*, 592 F.3d 718 (6th Cir. 2010)).

⁴² *Strader v. Ky. Dep’t of Fish & Wildlife Res.*, Civ. A. 3:09-62-DCR, 2012 WL 3220732, at * 3 (E.D. Ky. Aug. 6, 2012).

Members of the press may try to demonstrate that President Trump's actions have caused adverse economic effects, though this may be hard to prove. But has President Trump demonstrated an intent to interfere with the press's ability to do its job, generally? In other words, could a court find that President Trump will continue to harm the right to freely publish in the future? This may turn on whether his actions chill the free exercise of the First Amendment rights of a free press.⁴³ Some courts have asked whether the claimed retaliatory action would "deter a person of ordinary firmness" from engaging in activities protected by the First Amendment.⁴⁴ This would seem an uphill climb in the absence of actual retaliatory action, though it will be interesting to see how the PEN American litigation plays out.

As mentioned above, President Trump has also moved beyond threats and into active steps against the press.⁴⁵ In July 2018, the White House banned CNN reporter Kaitlan Collins from a Rose Garden press conference for asking questions the White House deemed "inappropriate."⁴⁶ On November 8, 2018, President Trump's office revoked Jim Acosta's White House press pass.⁴⁷ In brief summary, a United States District Court granted a temporary restraining order to return Mr. Acosta's press pass, and the President quickly made the revocation permanent.⁴⁸ It seems the President knew this act violated the law; in fact, in *Sherrill v. Knight*, the court held that the revocation of press credentials without notice and opportunity to respond unlawfully violated free press rights.⁴⁹

It has already been stated above that the courts likely have jurisdiction over a sitting President to issue injunctive relief for violation of the exercise of First Amendment rights. Assuming this is so, what relief does the aggrieved reporter have in such a situation? If you are limited to injunctive

⁴³ See, e.g., *Davis v. Vill. Park II Realty Co.*, 578 F.2d 461, 464 (2d Cir. 1978) (attempt to terminate tenant's lease may chill First Amendment activities on behalf of tenants' association).

⁴⁴ *Noonan v. Kane*, 698 F. App'x. 49, 50-53 (3d Cir. 2017) (former state employees stated a claim based on allegations that state's Attorney General may release embarrassing e-mails if the former employees spoke out against the Attorney General); *Mattei v. Dunbar*, 217 F. Supp. 3d 367, 377 (D. Mass. 2016) (threats of physical harm would deter a person of ordinary firmness from exercising such rights).

⁴⁵ See *supra* Section III.

⁴⁶ Vanessa Romo, *CNN Reporter: White House Called My Questions 'Inappropriate,' Banned Me From Event*, NPR (July 25, 2018, 10:59 PM), <https://www.npr.org/2018/07/25/632518447/white-house-reporter-says-she-was-banned-from-press-event-for-inappropriate-ques>.

⁴⁷ *Jim Acosta: White House defends revoking CNN man's access*, BBC NEWS (Nov. 14, 2018), <https://www.bbc.com/news/world-us-canada-46213088>.

⁴⁸ Jason Schwartz, *Judge orders White House to return press credentials to CNN's Acosta* (Nov. 16, 2018, 10:33 AM), <https://www.politico.com/story/2018/11/16/judge-orders-white-house-to-return-press-credentials-to-cnns-acosta-995512>. As best as the authors of this note can tell, there was no further fallout or litigation following the incident with Kaitlan Collins. In short, the President barred her from this one event and the President's office did not retaliate further, and CNN did not litigate the issue.

⁴⁹ *Sherrill v. Knight*, 569 F.2d 124, 130-31 (D.D.C. 1977). For an analysis of *Sherrill v. Knight*, see Luke M. Milligan, *Rethinking Press Rights of Equal Access*, 65 WASH. & LEE L. REV. 1103, 1115 (2008) (among other things, this article discusses the various Court standards for whether a public official may lawfully limit or deny press passes in individual cases). In the Jim Acosta matter, there was no notice, hearing, or written explanation for the denial, making this an easy case for the Court and avoiding trickier questions of whether the denial rested on valid substantive (i.e., non-content based) grounds.

relief against a sitting President, then President Trump could engage in short term bullying with impunity. He could exclude a reporter and then restore the reporter's rights, negating the need for injunctive relief. So, this note considers whether the reporters may recover monetary damages against President Trump as a possible avenue to prevent this behavior.

The Supreme Court, in *Nixon v. Fitzgerald*, ruled that the President is entitled to absolute immunity from civil damages based on his official acts.⁵⁰ In *Fitzgerald*, the Supreme Court held "immunity from damages liability [should apply] within the 'outer perimeter' of his official responsibility."⁵¹ As this phrasing indicates, the Court clearly intended a broad grant of immunity.⁵² The phrase "outer perimeter" does indicate a limit, however. If the Court intended absolute immunity, it could have established it. Until now, the courts have not had the opportunity to construe the phrase "outer perimeter of official responsibility," though the unprecedented Trump Presidency may provide it many times over.

Although *Clinton v. Jones* almost entirely encompassed pre-Presidential acts, there was a claim for an alleged defamatory statement made while Bill Clinton was President.⁵³ The Eighth Circuit stated it was an open question whether such a defamatory statement fell inside or outside of the "outer perimeter."⁵⁴ On remand, the lower court avoided the issue and instead ruled that statements denying an assault are privileged under Arkansas law since the statements were made in connection with litigation.⁵⁵ In *Zervos v. Trump*, however, a New York state court denied President Trump's motion to dismiss a defamation claim brought by one of his many sexual assault accusers.⁵⁶

All of this begs the question whether personal attacks on the press fall within the "outer perimeter of official duties." Although a philosophical argument may be made that such unconstitutional acts have nothing to do with his official duties, President Trump is likely immune from claims for money damages, as things like licensing, access to press conferences, and the like fall, at least, within the outer perimeter of his official duty, no matter how distasteful Trump's comments and handling of these issues may be.⁵⁷ But,

⁵⁰ *Nixon v. Fitzgerald*, 457 U.S. 731, 757 (1982). *But see Clinton v. Jones*, 520 U.S. 681 (1997) (holding that a sitting President does not have immunity for acts done *before* taking office and, in fact, such cases need not be delayed during the President's term in office).

⁵¹ *Fitzgerald*, 457 U.S. at 756.

⁵² *Id.*

⁵³ *Jones v. Clinton*, 72 F.3d 1354, 1357 (8th Cir. 1996).

⁵⁴ *Id.* at 1359 n.7.

⁵⁵ *Jones v. Clinton*, 974 F. Supp. 712, 730 (E.D. Ark. 1997). Notably, though, after a settlement the Court also found President Clinton in contempt of Court (while still President) for his "willful failure to obey this Court's discovery Orders." *Jones v. Clinton*, 36 F. Supp.2d 1118, 1120 (E.D. Ark. 1999).

⁵⁶ *Zervos v. Trump*, No. 50522/17, 2018 WL 1404883, at *790, *795 (N.Y. Sup. Ct. 2018).

⁵⁷ Aviva A. Orenstein, *Presidential Immunity from Civil Liability Nixon v. Fitzgerald*, 68 CORNELL L. REV. 236, 254-55 (1983) (concluding that in wake of *Nixon v. Fitzgerald* that the President is immune from civil damages for Constitutional violations while President). This is probably correct.

again, there is very little case law defining the phrase in the context of a sitting United States President.

IV. CONCLUSION

Many commentators have rightfully excoriated President Trump's attacks on the free press.⁵⁸ When he crosses the line into threats and overt action, he is subject to claims for injunctive relief, if not monetary damages. Organizations like CNN and PEN American should be applauded for filing lawsuits in court to confront these actions, despite the challenges they face in doing so.

⁵⁸ See e.g., Jane Merrick, *The entire White House press corps should walk out and stop indulging this bully*, CNN (last updated Nov. 8, 2018, 9:46 AM) <https://www.cnn.com/2018/11/08/opinions/the-white-house-press-corps-should-walk-out-opinion-intl/index.html> (Imploring the press to be united in its stance against President Trump). Ms. Merrick notes, among other things, that the President's office appears to have circulated a doctored video falsely making it appear Jim Acosta assaulted an intern who tried to remove his microphone as he tried to ask more question.

