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GOVERNMENT LIES AND THE PRESS CLAUSE

HELEN NORTON*

We tell lies. We do so frequently, for a variety of reasons, and with very different consequences. At times our falsehoods are selfish or cruel, at other times compassionate or constructive. Because lies seem endemic to the human condition, we should not be terribly surprised to find that our government engages in them as well: it is of course populated by human beings as flawed (and as virtuous) as the rest of us. And yet the government's lies—on some topics, for some purposes, and to some audiences—can threaten unusually damaging harms to their specific targets as well as the general public. In this Essay, I consider a particular universe of potentially dangerous governmental falsehoods: the government's lies and misrepresentations about and to the press.

Governmental efforts to regulate private speakers' lies clearly implicate the First Amendment, as many (but not all) of our own lies are protected by the Free Speech Clause.¹ But because the government has no First Amendment rights of its own, the constitutional limits, if any, on its own lies (and its other expressive choices) are considerably less clear.

In earlier work, I explored in some detail the Free Speech and Due Process Clauses as possible constraints on certain government lies that inflict economic and reputational harm, that punish or silence individuals' speech, or that imprison or deny other protected liberties.² In this Essay I focus instead on

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1. *See generally* United States v. Alvarez, 567 U.S. 709, 729–30 (2012) (holding that the First Amendment protects certain lies about receiving military honors).

2. Helen Norton, *The Government's Lies and the Constitution*, 91 IND. L.J. 73, 94 (2015) [hereinafter Norton, *The Government's Lies*].

the ways in which some of the government's press-related lies and misrepresentations can frustrate the two values most commonly identified as underlying the First Amendment's Press Clause: exposing (and thus checking) government misconduct, and informing public opinion about a wide range of matters.

More specifically, the press performs a critically valuable "checking" function by uncovering government misconduct; this is sometimes called the press's "watchdog" role.³ As Vince Blasi explains, the Press Clause's checking value is distinct from the self-governance, enlightenment, and autonomy values protected by the Free Speech Clause:

Simply put, the proposition is that systematic scrutiny and exposure of the activities of public officials will produce more good in the form of prevention or containment of official misbehavior than harm of various forms such as diminution in the efficiency of the public service or weakening of the trust that ultimately holds any political society together⁴

The press also performs a separate but related function in informing the citizenry about a great variety of matters; this is sometimes called the press's "educator" role.⁵ As RonNell Andersen Jones and Lisa Grow Sun make clear:

[W]e 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

3. See *Mills v. Alabama*, 384 U.S. 214, 219 (1966) ("The Constitution specifically selected the press . . . to play an important role in the discussion of public affairs. Thus the press serves and was designed to serve as a powerful antidote to any abuses of power by governmental officials and as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve.").

4. Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 552 (1977); see also *id.* at 538–39 ("The central premise of checking value is that the abuse of official power is an especially serious evil . . .").

5. See RonNell Andersen Jones & Lisa Grow Sun, *Enemy Construction and the Press*, 49 ARIZ. ST. L.J. 1301 (2017).

the impact of government decision-making.⁶

The Press Clause thus protects the press not for the press's own sake, but instead because the press serves the public interest in these ways.

With this as background, the remainder of this essay examines the Press Clause implications of certain governmental lies and misrepresentations about and to the press. Part I identifies a number of these falsehoods and the ways in which they can frustrate the press's effectiveness in performing its watchdog and educator functions. For example, the government's misappropriation of the press's identity (i.e., the government's lies that it *is* the press) and the government's obfuscation of its role as author of material it has produced for publication (i.e., the government's lies that it is *not* the press) undermine the press's independence and credibility. The public needs to see and understand the press and the government as distinct entities with very different roles if the press is to offer a meaningful check on the government; the government's lies about being (or not being) the press thus threaten to blur the line between the two in damaging ways. Relatedly, the government's lies *to* the press about its own behavior—coupled with its lies *about* the press intended to discredit the press—seek to position the government as the authoritative source of information and directly interfere with the press's ability to hold the government accountable to the public through accurate and credible reporting. Part II then considers potential legal, structural, political, and expressive responses to such governmental falsehoods and their harms. Possibilities include not only a more muscular Press Clause doctrine that would prohibit certain governmental lies and misrepresentations that interfere with Press Clause functions, but also engaged counterspeech and oversight by other government actors, the press, and the public more generally.

6. *Id.* at 1360.

I. THE GOVERNMENT'S PRESS-RELATED LIES AND MISREPRESENTATIONS

This Part sketches some of the ways in which the government's press-related lies and misrepresentations can frustrate the press's ability to fulfill its watchdog and educator roles. As we shall see, some of the challenges we face today in this respect are far from new, while others may strike us as different in degree and perhaps in kind due to technological and political change.

A. *The Government's Lies and Misrepresentations About Being the Press*

Sometimes speakers lie in ways that inflict not only second-party harms upon their deceived listeners but also third-party harms upon their lies' subject.⁷ More specifically, some speakers falsely assume the identity of a third party in ways that threaten reputational and related harms upon the third party as well as autonomy harms to the duped second-party listener. We might think about these lies of misappropriation as a type of identity theft.

Indeed, for these reasons the government frequently punishes those who misappropriate *its* identity, as a wide range of federal and state statutes prohibit individuals' false claims to be law enforcement officers or other government officials. Such lies not only impose second-party harms upon their deceived listeners, but also undercut public trust in and cooperation with the government in ways that limit the government's effectiveness.⁸

Of course, the government itself sometimes lies about

7. As another example, a defamatory lie can both deceive the second-party listener and damage the reputation of the third-party subject. See Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 107 (2012) (discussing the difference between second- and third-party harms of speech in general); Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 186–87 (2013) (discussing the difference between second- and third-party harms of lies in particular).

8. See Helen Norton, *Lies to Manipulate, Misappropriate, and Acquire Government Power*, in *LAW AND LIES: DECEPTION AND TRUTH-TELLING IN THE AMERICAN LEGAL SYSTEM* (Austin D. Sarat, ed., 2015) (describing the “wide range of laws that prohibit lies about being the government—i.e., laws that punish an individual's false claims to be a government official or that she speaks on behalf of the government”).

its identity—most commonly in the law enforcement context where undercover agents assume fictional personas. We generally accept the harms of such lies as justified by their law enforcement benefits in discovering illegal conduct.⁹ Sometimes, however, the government lies not by assuming an entirely fictional identity, but instead by misappropriating the identity of a real third party.¹⁰ Consider the following example: as part of a 2010 investigation into a drug distribution ring, federal Drug Enforcement Agency officials arrested Sondra Arquiett and seized her phone and other personal belongings.¹¹ Without Ms. Arquiett’s knowledge (much less her consent), they used the data on her phone to create a fake Facebook page in her name that featured a number of her personal photos and then—pretending to be Ms. Arquiett—used this page to contact several suspected drug ring participants. Upon discovering the impersonation, Ms. Arquiett alleged that she feared for her safety if the recipients were to wrongly conclude that she had cooperated with federal investigators; she filed several tort claims seeking compensation for such third-party harm and ultimately reached a \$134,000 settlement with the government (in which the government admitted no wrongdoing).¹²

Facebook asserted that it, too, had suffered third-party harm, contending that the government’s lie undermined Facebook’s reputation as a safe and trusted environment for users to “engage in authentic interactions with the people they know and meet in real life” and enabled use of its site for cyberbullying and other destructive behavior.¹³ In response to

9. See Norton, *The Government’s Lies*, *supra* note 2, at 94.

10. See Elizabeth E. Joh & Thomas W. Joo, *Sting Victims: Third-Party Harms in Undercover Police Operations*, 88 S. CAL. L. REV. 1309, 1311 (2015); Elizabeth E. Joh, *Bait, Mask, and Ruse: Technology and Police Deception*, 128 HARV. L. REV. F. 246, 247–48 (2015).

11. See Complaint at 2–3, *Arquiett v. United States*, No. 7:13-cv-00752 (N.D.N.Y. Jun. 27, 2013) [hereinafter *Arquiett Complaint*]; see also Terrence McCoy, *DEA Created a Fake Facebook Profile in this Woman’s Name Using Seized Pics – Then Impersonated Her*, WASH. POST: MORNING MIX (Oct. 7, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/10/07/dea-created-a-fake-facebook-profile-in-this-womans-name-using-seized-pics-then-impersonated-her/> [https://perma.cc/YH6A-C2CX].

12. See Jacob Gershman, *U.S. to Pay Woman \$134,000 for Impersonating Her on Facebook*, WALL ST. J.: L. BLOG (Jan. 20, 2015), <http://blogs.wsj.com/law/2015/01/20/u-s-to-pay-woman-134000-for-impersonating-her-on-facebook/> [http://perma.cc/AJV8-YET6].

13. Letter from Joe Sullivan, Chief Sec. Officer, Facebook, to Michele M. Leonhart, Adm’r, D.E.A. (Oct. 17, 2014), <https://assets.documentcloud.org/>

these concerns, the Department of Justice announced a review of its policies governing agents' use of social media accounts to misappropriate an individual's identity.¹⁴

But sometimes the government lies about its identity by misappropriating the identity *of the press*.¹⁵ For example, in 2007 the FBI impersonated the Associated Press (AP) while investigating bomb threats at a high school. More specifically, the FBI pretended to be the AP and sent fake news stories (headlined "Bomb threat at high school downplayed by local police department" and "Technology savvy student holds Timberline High School hostage") to a suspect with a request that he review the drafts for accuracy to see whether he would make damaging admissions; he ultimately pled guilty.¹⁶ The FBI later explained:

[w]e identified a specific subject of an investigation and used a technique that we deemed would be effective in preventing a possible act of violence in a school setting. Use of that type of technique happens in very rare circumstances and only when there is sufficient reason to believe it could be successful in resolving a threat.¹⁷

When the FBI's behavior was revealed in 2014, AP General Counsel Karen Kaiser wrote to then-Attorney General Eric Holder to assert that the government's misappropriation of the AP's name and reputation raised serious constitutional concerns by undermining the "most fundamental component of a free press—its independence."¹⁸ As Kaiser explained, "[t]he

documents/1336541/facebook-letter-to-dea.pdf [http://perma.cc/YH6A-C2CX].

14. See Sari Horowitz, *Justice Dept. Will Review Practice of Creating Fake Facebook Profiles*, WASH. POST (Oct. 7, 2014), https://www.washingtonpost.com/world/national-security/justice-dept-will-review-practice-of-creating-fake-facebook-profiles/2014/10/07/3f9a2fe8-4e57-11e4-aa5e-7153e466a02d_story.html [http://perma.cc/YB5R-6CCZ].

15. For detailed discussion of this incident, see Andy T. Wang, *Stealing Press Credentials: Law Enforcement Identity Misappropriation of the Press in the Cyber Area*, 6 U. MIAMI NAT'L SEC. & ARMED CONFL. L. REV. 25, 35 (2015–16).

16. Complaint at 3, RCFP, et al. v. FBI et al., No. 1:15-cv-01392 (Aug. 27, 2015) [hereinafter RCFP Complaint]; Martin Kaste, *FBI Spoofs News Story to Send Spyware to Suspect*, NPR: THE TWO-WAY (Oct. 28, 2014), <http://www.npr.org/sections/thetwo-way/2014/10/28/359655386/fbi-uses-newspapers-name-to-send-spyware> [http://perma.cc/X8E3-BUK2].

17. *Id.*

18. Letter from Karen Kaiser, Gen. Counsel, Associated Press, to Eric Holder, Att'y Gen., U.S. Dep't of Justice (Oct. 30, 2014), <https://corpcommapp.files>.

FBI may have intended this false story as a trap for only one person. However, the individual could easily have reposted this story to social networks, distributing to thousands of people, under our name, what was essentially a piece of government disinformation.”¹⁹

In response to a *New York Times* editorial that similarly criticized the government’s practice,²⁰ then-FBI Director James Comey justified the operation as “proper and appropriate under . . . F.B.I. guidelines at the time.”²¹ Director Comey noted, however, that the “use of such an unusual technique” today would “probably require higher level approvals . . . [although] it would still be lawful and, in a rare case, appropriate.”²² Nevertheless, Gary Pruitt, the president and CEO of the AP, continued to object to such tactics as compromising the AP’s reputation in particular and a free and independent press in general.²³ Pruitt further noted that this practice could harm AP employees who work in conflict zones because it makes “suspect [the AP’s] claim to operate separately and freely from the U.S. government.”²⁴

In short, if the press is to perform a meaningful checking function, then the public needs to see and understand it as distinct from the government and with very different roles. Governmental lies about being the press threaten instead to blur the line between the two in damaging ways.²⁵ And, as the

wordpress.com/2014/10/letter_103014.pdf [http://perma.cc/2M4X-UQUC].

19. *Id.*

20. Editorial, *Deceptions of the F.B.I.*, N.Y. TIMES (Oct. 31, 2014), <http://www.nytimes.com/2014/11/01/opinion/deceptions-of-the-fbi.html> [http://perma.cc/SHE3-GW4G].

21. James B. Comey, Letter to the Editor, *To Catch a Crook: The F.B.I.’s Use of Deception*, N.Y. TIMES (Nov. 6, 2014), http://www.nytimes.com/2014/11/07/opinion/to-catch-a-crook-the-fbis-use-of-deception.html?_r=0 [http://perma.cc/TU42-PP7W].

22. *Id.*; see also OFFICE OF THE INSPECTOR GEN., U.S. DEPT OF JUSTICE, A REVIEW OF THE FBI’S IMPERSONATION OF A JOURNALIST IN A CRIMINAL INVESTIGATION, <https://oig.justice.gov/reports/2016/o1607.pdf> (last revised Sept. 2016) [http://perma.cc/3BGR-HV3A].

23. Letter from Gary Pruitt, President and CEO, Associated Press, to Eric H. Holder, Att’y Gen., U.S. Dep’t of Justice and James B. Comey, Dir. Fed. Bureau of Investigations (Nov. 10, 2014), <https://corpcommapp.files.wordpress.com/2014/11/holdercomeyletter.pdf> [http://perma.cc/L2QM-QDY9].

24. *Id.*

25. This is not a new problem. At various times, the government has sought to recruit reporters to serve as government agents. See JAMES B. RESTON, DEADLINE 327 (1991) (describing the *New York Times*’s worries about the CIA’s efforts to use journalists for intelligence purposes).

next subparts explore, the government sometimes engages in press-related lies and misrepresentations to position itself as the authoritative source of news at the press's expense.

B. The Government's Lies and Misrepresentations About Not Being the Press

Sometimes the government deliberately obscures or misrepresents its identity as the author of material it has produced or commissioned for publication by the press. As Gia Lee and Lawrence Lessig have separately described, the government sometimes conceals its identity as the source of a message to improve the message's reception in situations where the public might otherwise doubt the government's credibility.²⁶ We might think of these as lies (or misrepresentations) of misattribution.²⁷

Jodie Morse is among those to have detailed a long history in which "the government has regularly and deliberately concealed its role in press communication."²⁸ Examples of the government's lies and misrepresentations of this sort include the Reagan Administration's payments "to journalists and academics to prepare op-ed columns critical of the Nicaraguan government's arms build-up" that did not disclose their governmental source;²⁹ the Clinton Administration's deals with

26. Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 985–90 (2005) ("The government, in other words, may make its views appear to be held by more esteemed or authoritative sources than they necessarily are, and more widely accepted than they really are."); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1017–18 (1995) ("Call this the Orwell effect: when people see that the government or some relatively powerful group is attempting to manipulate social meaning, they react strongly to resist any such manipulation. . . . What the Orwell effect will mean is that government will have an incentive to minimize the extent to which its messages seeking change seem to be messages from it, by tying its messages to independent authorities (for example, doctors) or authority (science).").

27. Here I explore the possible Press Clause implications of such government speech; elsewhere I have suggested that lies and misrepresentations of this sort may also frustrate Free Speech Clause values. Helen Norton, *The Measure of Government Speech: Identifying Expression's Source*, 88 B.U. L. REV. 587 (2008) (proposing that government identify itself as the source of a message as a condition of claiming the government speech defense to Free Speech Clause challenges). For discussion of misattribution issues involving government speech more broadly, see Abner Greene, *(Mis)Attribution*, 87 DENV. U. L. REV. 833 (2010).

28. Jodie Morse, *Managing the News: The History and Constitutionality of the Government Spin Machine*, 81 N.Y.U. L. REV. 843, 845–46 (2006).

29. *Id.* at 854.

television networks to run government-approved anti-drug messages without attribution to the government; and the Bush Administration's contracts with newspaper columnists to produce op-eds supporting its "No Child Left Behind" initiative without disclosing the Administration's sponsorship.³⁰

These misrepresentations threaten both second-party harms to the deceived public and third-party reputational and credibility harm to the press that serves them. More specifically, these misrepresentations distort public discourse when the government's views are more persuasive to the public than they would have been if accurately attributed to the government. These misrepresentations also undermine the integrity and independence of the press, and thus its effectiveness in performing its checking function. As C. Edwin Baker explains:

[T]he press's claim to special constitutional protection encompasses most importantly a demand that the government not purposefully undermine its institutional integrity in its performance of these roles. Payment to the press to present the government's message as the press's own message (as opposed to payment for carriage as an advertisement) undermines this independence and breaches the press's institutional integrity. The notion of a free press presumes that its speech represents its choices, not the government's choices. Though the individual media entity presumably enters voluntarily into the agreement with the government not to identify the government as a payee, because the protection of the integrity of the press is for the benefit of the public, the government's payment violates the public's rights relating to a free press. . . . In contrast, violation of institutional interest does not occur if the communication is presented as that of the government, as it would if the content is explicitly identified as advertisement. Likewise, the integrity of the press is not compromised, although its quality may be tested, when the government, through press releases or 'leaks' or good public relations management or even lies, leads the press on the basis of the press's own reporting or journalistic routines to

30. *Id.* at 843.

print stories that the government wants reported.³¹

A longstanding appropriations rider bans federal agencies from engaging in undefined government “propaganda” and thus technically constrains such practices by the federal executive branch.³² But this statute is rarely enforced. The Government Accounting Office (GAO) is the administrative body nominally responsible for attending to this “propaganda ban,”³³ but has a purely advisory function and no direct enforcement power; it can do no more than make findings and refer them to Congress or other governmental bodies for further investigation.³⁴ Moreover, the GAO has interpreted the ban on undefined propaganda to prohibit a federal agency’s “covert propaganda” (i.e., materials promoting the government’s policies and programs that do not disclose their governmental source) only in a very narrow set of circumstances,³⁵ and it has thus found very few violations.³⁶ As a practical matter, this leaves little remedy for the government’s failure to claim authorship of op-eds, video news releases, advertisements, and other materials produced for press publication.³⁷

31. C. Edwin Baker, *The Independent Significance of the Press Clause Under Existing Law*, 35 HOFSTRA L. REV. 955, 968 (2007).

32. Consolidated Appropriations Act, Pub. L. No. 115-31 (May 5, 2017).

33. OFFICE OF GEN. COUNSEL, U.S. GEN. ACCOUNTING OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 21–24 (3d ed. 2004).

34. Morse, *supra* note 28, at 859.

35. See, e.g., Letter from Anthony H. Gamboa, Gen. Counsel, U.S. Gov’t Accountability Office to Senators Frank R. Lautenberg and Edward M. Kennedy (September 30, 2005) <http://www.gao.gov/decisions/appro/305368.pdf> [<https://perma.cc/H5F8-3GCL>] (“Every agency has a legitimate interest in the ‘dissemination to the general public . . . of information reasonably necessary to the proper administration of the laws’ for which the agency is responsible. However, while we agree that the Department should disseminate information to the public on the NCLB [No Child Left Behind] Act, it must disclose its role.”) (citations omitted).

36. See Letter from Daniel I. Gordon, Acting Gen. Counsel, U.S. Gov’t Accountability Office regarding Department of Defense – Retired Military Officers as Media Analysts, B-316443 (Jul. 21, 2009) <http://www.gao.gov/decisions/appro/316443.htm> [<https://perma.cc/373N-QLEP>] (explaining the GAO’s unwillingness to find a violation of the propaganda ban: “Application of the prohibition is necessarily balanced against an agency’s responsibility to inform the public about its activities and programs, explain its policies and priorities, and defend its policies, priorities, and point of view.”).

37. Of course, the press itself can be complicit in these lies and misrepresentations. While the Constitution’s Press Clause and the statutory propaganda rider constrain the government (rather than the press) as a legal

C. *The Government's Lies To and About the Press*

The government's lies to the press directly interfere with the press's ability to report the truth to the public as required by its watchdog and educator functions. These harms are magnified in situations where the government has monopoly access to the information in question.³⁸ This is especially the case, for example, of matters related to war and national security, such as the government's deceptions in justifying its military interventions in Vietnam³⁹ and Iraq.⁴⁰

The government's lies are even more likely to succeed in deceiving the public if the government has undercut the press's credibility through expressive attacks. These dangers grow larger in an environment where government officials and

matter, the press should decline to facilitate the government's lies of misattribution as a matter of journalistic ethics and professionalism. See HELEN THOMAS, WATCHDOGS OF DEMOCRACY? 193 (2006) (“[B]roadcast stations that accept government handouts and videos should make their sources clearly known. Otherwise, they are participating in the deception.”).

38. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring) (“Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.”).

39. See DAVID WISE, THE POLITICS OF LYING: GOVERNMENT DECEPTION, SECRECY, AND POWER 29 (1973) (“Often, in the foreign policy and national security area, what the government says is the news. The Tonkin Gulf episode was a classic illustration of this. The public was told that on August 4 two American warships on ‘routine patrol,’ had, in Defense Secretary Robert McNamara’s words, been under ‘continuous torpedo attack’ by North Vietnamese PT boats; in response, Lyndon Johnson ordered the first bombing attack on North Vietnam and pushed the Tonkin Gulf resolution through Congress, thereby acquiring a blank check to escalate the war. Later it became clear that there had been much confusion and considerable doubt within the government as to whether any PT-boat attack had taken place at all. The public, however, had to rely entirely on Lyndon Johnson and Robert McNamara for their news of the incident. If the details seem unimportant in the larger tapestry of the war, we need only recall that at the time only 163 Americans had died in Vietnam.”).

40. See Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims Before the Use of Force*, 26 CONST. COMMENT. 433, 444 (2010) (“The president and his top officials relied on controlled information release in a number of ways to support their use of force advocacy. That they withheld much information within their control meant that they could rely upon the public’s knowledge that they had superior access to the entire body of existing information to characterize the facts with greater certainty than the content of the information reflected, to omit mention of dissent, to suggest that they had more and better quality information than they presented, and to ask the public to embrace the truth of the threat claims based on trust rather than proof.”).

political candidates increasingly use social media to speak directly to the public free from the questions of a watchdog press.⁴¹

To be sure, the government and the press have had a contentious relationship from the founding—perhaps inevitably so, given the press’s role as government watchdog.⁴² For example, animosity toward the press fueled the enactment of the Alien and Sedition Acts in the 1790s, when “[o]ver the course of the debate, Federalists more clearly defined the threat they believed newspapers posed. It was the mediating influence that newspapers had between the people and their representatives in government.”⁴³ Much more recently, during the Watergate crisis, “[President Nixon] accused the now iconic Woodward and Bernstein of ‘shabby journalism,’ ‘character assassinations,’ and ‘a vicious abuse of the journalistic process.’ He charged their employer, the Post, with a ‘political effort’ to ‘discredit this administration and individuals within it.’”⁴⁴

The Trump Administration has now intensified such expressive attacks on the press in arguably unprecedented ways.⁴⁵ For example, President Trump has labeled the media as “the enemy” of the American people⁴⁶—a term initially

41. See Ivan Moreno, *Social Mediation: Politicians Bypass Press, Control Message*, ASSOCIATED PRESS (Dec. 16, 2016), <https://apnews.com/d011180ce42c450d8cf70a7bf9aed884/social-mediation-politicians-bypass-press-control-message> [<https://perma.cc/EU5T-PNZV>] (“By making social media platforms the first stop to announce or react to events in a controlled setting, the politicians are bypassing the press — who would call into question assertions made at news conferences — and taking their message to where their audience is most likely to be engaged.”).

42. For a detailed history of the longstanding tensions between Presidents and the press, see Jones & Sun, *supra* note 5.

43. TERRI DIANE HALPERIN, *THE ALIEN AND SEDITION ACTS OF 1798: TESTING THE CONSTITUTION* 66 (2016).

44. ALLAN J. LICHTMAN, *THE CASE FOR IMPEACHMENT* 27 (2017); see also SUSAN A. BREWER, *WHY AMERICA FIGHTS: PATRIOTIC AND WAR PROPAGANDA FROM THE PHILIPPINES TO IRAQ* 216 (2009) (“Through this attack on the ‘elite’ media, the [Nixon] administration positioned itself as respecting the people’s right to think for themselves, while at the same time defining what they thought.”); RESTON, *supra* note 25, at 315 (“When the United States did begin to intervene [in Vietnam] in 1961 and soon ran into trouble, Washington’s reaction to the depressing military news was to blame the reporters.”).

45. See Jones & Sun, *supra* note 5, at 1326 (characterizing “the current situation [under the Trump Administration as] different in kind, and not just in degree, from past press-President hostilities, and thus the risks presented by that situation are more severe”).

46. Jenna Johnson & Matea Gold, *Trump Calls the Media ‘the Enemy of the American People’*, WASH. POST (Feb. 17, 2017), <https://www.washingtonpost.com/news/post-politics/wp/2017/02/17/trump-calls-the-media-the-enemy-of-the-amer>

employed during the French Revolution's Reign of Terror and later used by Stalin and other authoritarian rulers.⁴⁷ Without factual support, he charged the press with lying about the size of his inaugural crowd, "thus trying to delegitimize the news media's institutional act of holding Trump accountable to factual reality."⁴⁸ Without providing evidence, he charged the press with misrepresenting his criticism of intelligence officials: "I have a running war with the media. They are among the most dishonest human beings on Earth. And they sort of made it sound like I had a feud with the intelligence community."⁴⁹ Again without proof, he accused the press with failing to report acts of terrorism: "ISIS is on a campaign of genocide, committing atrocities across the world . . . and in many cases, the very, very dishonest press doesn't want to report it."⁵⁰ He has repeatedly described negative press coverage of his Administration as inevitably false: "Any negative polls are fake news."⁵¹ In short, he has consistently

ican-people/?utm_term=.0e529c9cb52f [https://perma.cc/VUB2-NA9B]; *see also id.* (quoting Trump as saying that "The press has become so dishonest that if we don't talk about, we are doing a tremendous disservice to the American people. Tremendous disservice. We have to talk to find out what's going on, because the press honestly is out of control. The level of dishonesty is out of control."); Jones & Sun, *supra* note 5, at 1312 (describing President Trump's first official press conference in which "[h]e called the media 'fake' nearly twenty times in roughly seventy minutes").

47. See Andrew Higgins, *Trump Embraces 'Enemy of the People,' a Phrase With a Venomous Past Now Rattles American Politics*, N.Y. TIMES (Feb. 26, 2017) https://www.nytimes.com/2017/02/26/world/europe/trump-enemy-of-the-people-stalin.html?_r=0 [https://perma.cc/4CJJ-ULHD].

48. Greg Sargent, *At the Roots of Trump's New Fury: Total Contempt for American Democracy*, WASH. POST (Mar. 6, 2017), https://www.washingtonpost.com/blogs/plum-line/wp/2017/03/06/at-the-root-of-trumps-new-fury-total-contempt-for-american-democracy/?utm_term=.17e716d04177 [https://perma.cc/VFF5-22NV].

49. Julie Hirschfeld Davis & Matthew Rosenberg, *With False Claims, Trump Attacks Media on Turnout and Intelligence Rift*, N.Y. TIMES (Jan. 21, 2017), <https://www.nytimes.com/2017/01/21/us/politics/trump-white-house-briefing-inauguration-crowd-size.html> [https://perma.cc/HYL6-NQRU].

50. Julie Hirschfeld Davis, *Trump Says Journalists 'Have Their Reasons' to Play Down Terror Threat*, N.Y. TIMES (Feb. 6, 2017), <https://www.nytimes.com/2017/02/06/us/politics/donald-trump-centcom.html> [https://perma.cc/CZ2R-UDC8]; *see also id.* ("The president's comments on Monday were reminiscent of his claim during a visit last month to the headquarters of the Central Intelligence Agency in Langley, Va., that the news media had fabricated his feud with the intelligence community. Those remarks came only days after he likened American intelligence officials to Nazis, after several weeks in which he had denigrated their work.").

51. Glenn Kessler & Michelle Ye Hee Lee, *Fact-Checking President Trump's News Conference*, WASH. POST (Feb. 16, 2017), <https://www.washingtonpost.com/>

made false statements of fact that mischaracterize the press's performance and denigrate the value of its watchdog function.

Professors Jones and Sun remind us of the constitutional dangers of such expressive attacks: “[C]onstructing the press as an enemy can pave the way for the invocation of Schmittian exceptionalism that justifies limitation on press freedoms and thus subverts the important watchdog, educator, and proxy roles of the press.”⁵² The combination of government falsehoods *to* the press (and the public) together with its lies *about* the press thus threaten the press's ability to perform its constitutionally protected truth-seeking functions.

II. WHAT TO DO ABOUT IT

In this Part, I briefly consider possible legal, structural, political, and expressive responses to the harms threatened by the government's press-related lies and misrepresentations.

Governmental lies raise challenging constitutional problems in part because they don't involve the traditional exercise of the state's coercive power: we might describe the government's expression as “soft law” distinct from its “hard law” actions where it punishes or otherwise regulates the behavior of others. Although the Supreme Court has recognized a “government speech defense” that exempts the government's own expressive choices from Free Speech Clause scrutiny,⁵³ it has yet to address the ways in which the government's speech

news/fact-checker/wp/2017/02/16/fact-checking-president-trumps-news-conference/?utm_term=.4257c8e0c5b0 [https://perma.cc/T8WQ-H9C6]; *see also* Transcript: President Donald Trump Rally in Harrisburg, Pennsylvania (Apr. 29, 2017) <http://www.shalldnation.com/2017/04/23/video-president-donald-trump-rally-in-harrisburg-pennsylvania-saturday-april-29-2017> [https://perma.cc/EK3L-N2QH] (“Media outlets like CNN and MSNBC are fake news. Fake news. . . . They're incompetent, dishonest people who, after the election had to apologize because they covered it, us, me, but all of us—they covered it so badly that they felt they were forced to apologize because their predictions were so bad.”).

52. Jones & Sun, *supra* note 5, at 1346; *see also id.* at 1368 (“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.”).

53. *Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 553 (2005); *see also Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (“If [public entities] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.”).

might affirmatively threaten other constitutional values.⁵⁴

Here I explore the possibility that the Press Clause can be understood to restrain certain government lies and misrepresentations that frustrate the press's ability to fulfill its watchdog and educator functions. As a threshold matter, this requires us to grapple with two foundational questions about the meaning of the Press Clause: whether it does (or should do) any work other than that already accomplished by the Free Speech Clause and, if so, what specifically that distinct work should include.⁵⁵

Thoughtful commentators have long proposed that the Press Clause should be interpreted to provide the press with a special right to access information under the government's control and to engage in related newsgathering activities.⁵⁶ Steven Shiffrin, for example, urges that

[i]f the press is recognized as an institution with a special responsibility to report the news and to expose wrongdoing by powerful individuals and institutions, it should be given special rights of access to gather news by entering prisons, protest sites, scenes of disaster, witnessing the return of war casualties, executions, public meetings, and the like.

54. The sole exception to date is the Court's interpretation of the Establishment Clause to constrain government's religious speech in certain settings. See Mary Jean Dolan, *Government Identity Speech and Religion: Establishment Clause Limits After Sumnum*, 19 WM. & MARY BILL RTS. J. 1, 24 (2010) ("[A] large proportion of all Establishment Clause jurisprudence could be thought of as involving claims about government religious speech, with the other broad category related to government aid.").

55. See LEE BOLLINGER, UNINHIBITED, ROBUST, AND WIDE-OPEN: A FREE PRESS FOR A NEW CENTURY 8–9 (2010) ("It seems that the press has all the rights afforded citizens under the Free Speech Clause. What is less clear is whether the Free Press Clause gives the press any rights not available to all citizens. There are numerous decisions denying that the press has unique rights. But this has been a matter of active debate."); Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025 (2011) (describing the doctrinal question in detail).

56. BOLLINGER, *supra* note 55, at 121 ("It is of the highest importance in a democracy that there be a constitutional right of the press to have reasonable access to the most consequential actions undertaken by the government (going to war most certainly falls in that category), such that the government cannot act in secret with total impunity and that there is a judicial forum in which the balance of interest in these situations can be adjudicated."); Vince Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 492 (1985) ("It would be anomalous for a constitutional regime founded on the principle of limited government not to impose some fundamental restrictions on the power of the officials to keep citizens ignorant of how the authority of the state is being exercised.").

For example, it makes sense that the general public has no general right of access to prisons, but denying access to reporters is a prescription for inhumane punishment.⁵⁷

Under this view, additional Press Clause rights would enable the press to better perform its watchdog and educator roles, and thus better serve the public.

The Court, however, has yet to interpret the Press Clause to provide such an affirmative right of access.⁵⁸ Its reluctance to date has rested in large part on the perceived difficulties in identifying the “press” that would be entitled to such a right.⁵⁹

A number of commentators have proposed solutions to this line-drawing problem. Sonja West, for example, urges a functional understanding of the press that attends to its actual ability and commitment to gather news and disseminate it to the public in ways that serve as “a check on the government and the powerful” people; as she points out, although today almost any of us can be a publisher, relatively few of us have the training, capacity, or dedication to be newsgatherers.⁶⁰

57. STEVEN H. SHIFFRIN, WHAT IS WRONG WITH THE FIRST AMENDMENT 126 (2017); *see also id.* (“Under existing law, access is too often the exception and not the rule. Of course access needs to be limited in reasonable ways. But the rule that wholesale denials of access are consistent with the First Amendment is convenient, but it protects injustice.”).

58. *E.g.*, *Houchins v. KQED, Inc.* 438 U.S. 1, 15–16 (1978) (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) (declining to find an affirmative governmental duty “to make available to journalists sources of information not available to members of the public generally”); *Branzburg v. Hayes*, 408 U.S. 665, 682–84 (1972) (“The First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally.”). *But see* RonNell Andersen Jones, *The Dangers of Press Clause Dicta*, 48 GA. L. REV. 844, 844–45 (2014) (emphasizing that—even while declining to provide the press with special treatment—the Court has repeatedly stated in dicta that the press performs unique and important functions); Sonja West, *The Stealth Press Clause*, 48 GA. L. REV. 729 (2014) (same).

59. *E.g.*, *Citizens United v. Fed. Elec. Comm’n*, 558 U.S. 310, 352 (2010) (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”).

60. Sonja West, *Press Exceptionalism*, 127 HARV. L. REV. 2434, 2443–44 (2014); *see also id.* (“Compared to occasional public commentators, the press tends to possess distinct qualities. The press, for example, has knowledge, often specialized knowledge, about the subject matter at issue. The press serves a gatekeeping function by making editorial decisions regarding what is or is not newsworthy. The press places news stories in context, locally, nationally, or over time. The press strives to convey important information in a timely manner. The

Indeed, governmental entities already engage in this sort of functional exercise: many states recognize a reporter's privilege that requires them to identify those entitled to protect the confidentiality of their sources,⁶¹ and other governmental institutions (like the Supreme Court itself) must similarly decide to whom to issue a limited number of press passes.⁶² For purposes of this essay, I thus assume that "the press" can be meaningfully identified in ways that permit us to understand the Press Clause to protect rights distinct from those protected by the Free Speech Clause.⁶³

Putting aside for the moment the question whether the Press Clause provides the press with certain affirmative rights, here I suggest the possibility that we can understand the Press Clause to protect certain negative rights by prohibiting press-related lies by the government that undermine the press's

press has accountability to its audience and gives attention to professional standards or ethics. The press devotes time and money to investigating and reporting the news. It also expends significant resources defending itself against legal attacks as well as advocating for legal changes that foster information flow. And the press has a proven ability to reach a broad audience through regular publication or broadcast. For all of these reasons, members of the press, in contrast to occasional public commentators, would be best positioned to use potential press rights in ways that would benefit society as a whole.").

61. See *The Reporter's Privilege*, REP. COMM. FOR FREEDOM OF THE PRESS, <http://www.rcfp.org/reporters-privilege> (last visited Aug. 28, 2017) [<https://perma.cc/3977-KLYY>] (listing states that protect a reporter's privilege to protect confidential sources from government efforts to compel their disclosure).

62. See *Press Credentials*, SUPREME CT. OF THE U.S., <https://www.supremecourt.gov/publicinfo/press/presscredentials.aspx> (last visited Aug. 28, 2017) [<https://perma.cc/P54Z-9DUS>] (describing the Court's requirements for press credentials).

63. See SHIFFRIN, *supra* note 57, at 127 ("There is no question that defining the press involves difficulties that are compounded by the rise of the Internet, and it may be that the term press might need to be applied in different ways in different contexts. But the difficulties are not insuperable. Regularity of publication, the size of the audience reached, the nature of the subject matter, and possible delegation of decisions away from governmental actors to press organizations and the like (as is often done when press galleries are created) are each considerations that make the inquiry less difficult."); see also ROBERT POST, *CITIZENS DIVIDED* 72 (2014) ("Corporations that serve the checking value should receive constitutional protections appropriate to that value. Corporations that do not serve the checking value should not receive these constitutional protections. What is constitutionally decisive is the relationship between a speaker and the checking value; the corporate form of the speaker is irrelevant. Corporations that serve the checking value are *for this very reason* constitutionally distinct from both expressive associations and ordinary commercial corporations. No doubt it may be difficult to distinguish corporate speakers that serve the checking value from those that are ordinary commercial corporations, but analogous difficulties afflict much constitutional law.").

watchdog and educator functions. For example, governmental lies of misappropriation—that is, its lies about being the press—can blur the line between the government and the press in the public’s mind in ways that undermine public trust in the independence of the press and thus damage the effectiveness of its news-gathering functions. The government’s lies of misattribution—i.e., its lies about not being the press—can similarly interfere with Press Clause functions by misleading the public about the source of press publications in ways that not only threaten to skew the public’s decision-making, but also breach the public’s trust in the press.

Moreover, just as governmental threats of criminal or economic punishment intended to muzzle media watchdogs can impermissibly coerce the press in violation of the Press Clause,⁶⁴ so too can government lies intended to stymie the press’s checking efforts. To start with a simple example, the government’s lies to the press about the time and place of key government meetings frustrate the Press Clause because they deny access to those meetings as effectively as the government’s locking of the pressroom’s doors. The government’s lies to the press about matters to which the government has monopoly access can serve as equally effective barriers to newsgathering: again, the government has lied in ways that deny the press the ability, as a functional matter, to report the truth, and the harms of governmental lies to the press and public are arguably greater than those of governmental nondisclosures.⁶⁵ Moreover, because the costs to the government of refraining from lies are arguably less

64. See THOMAS, *supra* note 37, at 75 (“[A] White House aide, acting under instructions from [President Nixon], alerted the television networks that they faced the possibility of antitrust lawsuits if they did not let more conservatives on the networks.”); *Amazon ‘Getting Away with Murder on Tax’, says Donald Trump*, GUARDIAN (May 13, 2016), <https://www.theguardian.com/us-news/2016/may/13/amazon-getting-away-with-on-tax-says-donald-trump> [<https://perma.cc/K2K4-38WQ>] (characterizing candidate Trump as threatening to target Washington Post and Amazon owner Jeff Bezos for scrutiny under tax and antitrust laws in retaliation for the Post’s criticism). In certain circumstances, we can understand such threats as government speech that is sufficiently coercive to violate the Press Clause. See Norton, *The Government’s Lies*, *supra* note 2, at 99–108 (discussing when government speech is sufficiently coercive of its targets’ behavior to violate the Free Speech or Due Process Clauses).

65. See David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 356 (1991) (“Ordinarily, withholding information is not as effective as lying [in offending listener autonomy] because a lie affirmatively throws the hearer off the track.”).

burdensome than affirmatively providing access or disclosure, interpreting the Press Clause to protect the press's negative right not to be lied to may be less onerous to the government than recognizing the press's positive right to access information under the government's control.⁶⁶

To be sure, suggestions for a more muscular view of the Press Clause rest little on the Court's current doctrine and rely instead on purpose-based and pragmatic arguments. Moreover, operational barriers to such a doctrinal move include concerns about its potential for chilling government expression⁶⁷ and about courts' institutional competence to decide these matters.⁶⁸ My expectations about courts' willingness to revisit their to-date-limited Press Clause doctrine are thus modest at best, which underscores the importance of protecting the press through the exercise of soft power.

For example, as Lawrence Sager observed in other contexts, government officials can and should still feel bound by constitutional values even if the federal courts decline to consider certain constitutional claims due to concerns about justiciability or remedies.⁶⁹ In other words, government

66. See David A. Anderson, *Freedom of the Press in Wartime*, 77 U. COLO. L. REV. 49, 49 (2006) ("The Press Clause should be read as imposing limits on the government's ability to manipulate public opinion by restricting war coverage. This would not mean that every individual claiming to be press has a constitutional right of access to war zones, but it would mean that restrictions that make it impossible for the press to fulfill its institutional role, such as complete exclusion from the theater of operations, would be unconstitutional.")

67. See Norton, *The Government's Lies*, *supra* note 2, at 83–88.

68. Remedies and standing issues pose additional—but not necessarily insuperable—challenges to a more robust understanding of the Press Clause. See Anderson, *supra* note 66, at 97–98 ("Deciding what relief to grant when a violation of the institutional right is found would also be challenging. If the right is only institutional, a successful litigant would not necessarily be entitled to personal relief. To make institutional rights enforceable in a system that relies on self-interested litigants, courts would have to tailor relief not only to the theory of the right, but also to the practicalities of enforcement through litigation. This might require special rules to reward successful litigants without conferring the same benefits to all others similarly situated. Again, inability to answer all these questions *ex ante* need not preclude giving meaning to the Press Clause; the answers should be worked out gradually."); Helen Norton, *The Equal Protection Implications of Government's Hateful Speech*, 54 WM. & MARY L. REV. 159, 202–05 (2012) (drawing from Establishment Clause precedent to identify ways to establish standing when making constitutional challenges to the government's speech).

69. Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1227 (1978) ("[G]overnment officials have a legal obligation to obey an underenforced constitutional norm

officials can and should engage in voluntary self-restraint by choosing not to engage in lies, misrepresentations, and other behavior that undermine key Press Clause values. Furthermore, simply identifying and cataloguing the threats to Press Clause values posed by the government's press-related lies and misrepresentations can valuably inform what "we the people" demand of our government's expressive choices. Along these lines, RonNell Andersen Jones and Sonja West urge that we insist that the government respect longstanding traditions that protect the press: "It is primarily customs and traditions, not laws, that guarantee that members of the White House press corps have access to the workings of the executive branch."⁷⁰

Additional responses to the government's press-related lies and misrepresentations include counterspeech by other government officials through searching oversight and public discussion. Legislatures can also enact statutes that directly constrain executive branch lies of misappropriation and misattribution. For example, they could prohibit law enforcement officers from pretending to be the press, and they could require government speakers to disclose themselves as the authors of material prepared for publication or broadcast by the press. In addition, legislatures can provide legal protections for the whistleblowers who expose governmental lies and other misconduct—indeed, oversight and public

which extends beyond its interpretation by the federal judiciary to the full dimensions of the concept which the norm embodies. This obligation to obey constitutional norms at their unenforced margins requires governmental officials to fashion their own conceptions of these norms and measure their conduct by reference to these conceptions. Public officials cannot consider themselves free to act at what they perceive or ought to perceive to be peril to constitutional norms merely because the federal judiciary is unable to enforce these norms at their margins. . . . The observation that public officials have an obligation in some cases to regulate their behavior by standards more severe than those imposed by the federal judiciary constitutes a significant claim on official behavior and, if accepted, should alter discourse among and about officials.”)

70. 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> [<https://perma.cc/5NN8-R82D>]; see also Blasi, *supra* note 56, at 485 (“The defining feature of a pathological period is a shift in basic attitudes, among certain influential actors if not the public at large, concerning the desirability of the central norms of the first amendment. It seems evident, therefore, that one of the most important ways in which adjudication in ordinary times might influence the course of pathology would be by helping to promote an attitude of respect, devotion, perhaps even reverence, regarding those central norms.”).

exposure of such matters are often possible only with the help of whistleblowers like FBI Deputy Director Mark Felt (Watergate's "Deep Throat") and Sergeant Joseph Darby (who exposed the mistreatment of prisoners at Abu Ghraib).⁷¹ And lawyers—both governmental and nongovernmental—have long played a significant role in exposing deception by powerful actors.⁷²

Of course, the press itself is a source of oversight and counterspeech. At its best (but the press has not always been at its best),⁷³ it challenges the veracity of government's

71. Statutory whistleblower protections are especially important in light of the Supreme Court's failure to provide First Amendment protections to many government whistleblowers. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not protect public employees' speech pursuant to their jobs—including their truthful reports of government lies and other forms of misconduct—when those reports are part of their official duties); see also Helen Norton, *Constraining Public Employee Speech: Government's Efforts to Claim Its Workers' Speech as Its Own*, 59 DUKE L.J. 1 (2009) (describing multiple cases in which lower courts have invoked *Garcetti* to permit government employers to punish employees who sought to expose the government's lies and other misconduct).

72. As an illustration, recall the role of litigation in exposing the lies of the tobacco industry. See ARI RABIN-HAVT & MEDIA MATTERS, LIES, INCORPORATED: THE WORLD OF POST-TRUTH POLITICS 32–33 (2016) ("We are aware of the [tobacco] industry's behavior because as part of their 1998 settlement with the federal government, the big tobacco companies—Phillip Morris, R.J. Reynolds, Brown & Williamson, and Lorillard Tobacco, as well as the Tobacco Research Institute and the Council for Tobacco Research—were forced to make millions of previously secret documents public. They have now been archived, made searchable and placed online. What emerged was a complete history of the tobacco companies' efforts to influence policy debates over several decades.")

73. See Jacobs, *supra* note 40, at 453 ("Despite their access and public responsibilities, most media entities did not effectively fact check the Bush Administration's threat claims before the use of force. The generally pro-war media coverage had a number of particular aspects. One was that the media reflected or embraced the patriotism that threat claims typically invoke. Another was that reporters included information and advocacy volunteered by top executive branch officials, rather than digging for information or opinions offered by sources outside the Administration or by lower level employees."); Gregory Margarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 117 (2004) ("Far too frequently, however, news organizations have gone out of their way to avoid presenting information that might fuel criticism of government policy. Increasingly controlled by large entertainment corporations that strive to avoid alienating consumers and advertisers, national media outlets have suppressed information of potentially great importance for assessing government policy. At times media outlets have gone farther, slanting their newsgathering and reporting to support dubious government assertions. The government has encouraged some of these failings, but they all ultimately depend on media corporations' voluntary withdrawal from vigorous newsgathering and

factual assertions at the time they are made. Along these lines, the Trump Administration's assault on truth-seeking individuals and institutions (and, at times, on the notion of truth itself)⁷⁴ may have inspired an increased commitment to vigorous inquiry and analysis by some press institutions.⁷⁵

CONCLUSION

David Wise offered a lament about the Johnson and Nixon Administrations that continues to resonate today:

[T]he politics of lying had changed the politics of America. In place of trust, there was widespread mistrust; in place of confidence, there was disbelief and doubt in the system and its leaders. The consent of the governed is basic to American democracy. If the governed are misled, if they are not told the truth, or if through official secrecy and deception, they lack information on which to base intelligent decisions, the system may go on — but not as a democracy. After nearly two hundred years, this may be the price America pays for the politics of lying.⁷⁶

A government that respects and serves its people does not lie to them. In this essay, I've sought to show how attention to Press Clause values might remind and inspire courts, lawyers,

reporting.”).

74. See e.g., Eric Bradner, *Conway: Trump White House Offered 'Alternative Facts' on Crowd Size*, CNN: POLITICS (Jan. 23, 2017, 12:38 PM), <http://www.cnn.com/2017/01/22/politics/kellyanne-conway-alternative-facts/> [<https://perma.cc/ATW4-TQRP>].

75. See Neil Richards, *Free Speech and the Twitter Presidency*, 2017 U. ILL. L. REV. ONLINE: Trump 100 Days (Apr. 29, 2017) (describing how the press has developed “new ways of reporting on executive branch falsity” through, for example, the use of headlines that expose the lack of evidence for governmental claims); Greg Sargent, *Memo to the Media: Stop Giving Trump the Headlines He Wants*, WASH. POST (Dec. 29, 2016), https://www.washingtonpost.com/blogs/plum-line/wp/2016/12/29/memo-to-the-media-stop-giving-trump-the-headlines-he-wants/?utm_term=.cafec65b7381 [<https://perma.cc/F9BW-HRK3>] (“I would like to propose a rule of thumb for these situations: *If the headline does not convey the fact that Trump's claim is in question or open to doubt, based on the known facts, then it is insufficiently informative.*”); see also THOMAS, *supra* note 37, at xiii (“It is the job of reporters and editors to ask the tough questions of those in power and to act on the answers with trust, integrity, and honesty guiding their judgment.”).

76. WISE, *supra* note 39, at 18.

government officials, the press, and the public to insist upon high expectations of our government's speech about and to the press—and thus to the rest of us.