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THE FIRST AMENDMENT IN THE ERA OF PRESIDENT TRUMP

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It's truly my great honor and pleasure to be here. You might remember last summer, in campaigning for President, Donald Trump referred to the press, and I'm quoting his exact words, as "dishonest, disgusting, and scum."[1] Just ten days ago, you might have heard in a press conference, President Donald Trump said that the "press is out of control."[2] He referred to the press as the greatest threat facing the country. The next day, in a Tweet, he referred to the press as being the enemy of the people.[3]

As long as there has been a United States, there has been an adversarial relationship between those in government and the press. It's never started quite so soon in a President's administration as what we're seeing in the last few weeks. But also, never in American history has any President spoken of the press in these terms. It certainly forces us to think about what is the nature of the First Amendment in the context of the Trump Presidency.

Now, this is supposed to be a talk about the First Amendment, in a slightly different context, because *Denver Law Review* was kind enough to invite me and it was supposed to be delivered on September 6, and by coincidence, I had a Ninth Circuit argument the next day so I had to postpone. But though I apologized for having delayed this, I think the timing could not be more appropriate in talking about what is the nature of the First Amendment and its protections in this moment of American history, and what the Trump Administration is likely to mean for it.

I think to answer this question, I need to develop two points. The first is what's the nature of the Supreme Court's protection of the First Amendment? It doesn't make sense to look at just what Donald Trump is saying because we need to consider the Supreme Court's orientation to free speech at this moment in American history. Then second, what exactly can

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1. *See* Jeremy Diamond, *Trump Launches All-Out Attack on the Press*, CNN (June 1, 2016), http://www.cnn.com/2016/05/31/politics/donald-trump-veterans-announcement.

2. *Donald Trump Says Press Is 'Out of Control,'* BBC (Feb. 16, 2017), http://www.bbc.com/news/av/world-us-canada-38997075.

3. Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 2:48 PM), https://twitter.com/realDonaldTrump/status/832708293516632065.

the Trump Administration do and what can't it do with regard to its assault on the press.

It's interesting to talk about the Roberts Court and freedom of speech. Obviously, we look at what the Roberts Court's orientation of the First Amendment is in order to imagine what it could with regard to some of the cases coming up in terms of Trump Administration actions. I think that the Roberts Court is in some ways different from any other we have seen in American history with regard to freedom of speech. It is a Supreme Court that is very protective of freedom of speech except when the institutional interest of the government as government are implicated. Then it's not at all protective of speech.

So, in talking about the Roberts Court and to have a basis for talking about how the Trump Administration is going to be dealt with in the courts, let me separate each of these two things I've said about the Roberts Court. One is its general orientation towards protecting speech, but the other is its refusal to do so when the government as government is involved.

You find its strong commitment to free speech as a general matter, in so many developments and areas. For example, the Roberts Court has refused to expand the categories of unprotected speech with the First Amendment. If you study free speech law, you know that at least since the early 1940s, the Supreme Court has said that there are some categories of speech that are unprotected, so the government can prohibit or at least regulate the expression. Incitement of illegal activity, obscenity, child pornography, and false and deceptive advertising are all categories of unprotected speech.

The Roberts Court has been asked to expand those categories and create new categories of unprotected speech, but it has refused to do so. Most notably, in a couple of cases, the Roberts Court was asked to find that violent speech is unprotected, and therefore, the speech can be prohibited or at least regulated by the government. The Roberts Court emphatically refused to do so.

One of these cases was *United States v. Stevens*[4] involving a federal law that prohibited the sale or distribution or possession of images of animal cruelty. One of the arguments that the United States government made to the Supreme Court was just as the government could try to dry up the market for child pornography by prohibiting possession of it, so should the government be able to dry up the market to depictions of animal cruelty. The government focused on these so-called snuff films that depicted great cruelty to animals.

Then-Solicitor General Elena Kagan argued the case to the Court and said that such violent depictions, pure violence depicted towards animals,

4. 559 U.S. 460 (2010).

should be outside the scope of First Amendment protections, but the Supreme Court, in an 8–1 decision, rejected that argument. Chief Justice Roberts wrote for the Court and only Justice Alito dissented. Chief Justice Roberts explicitly said that there is no exception to the First Amendment with regard to violent speech.

Another example of this was a case called *Brown v. Entertainment Merchants*.[5] California adopted a law that made it a crime to sell or rent violent video games to minors under eighteen years of age without parental consent. It didn't prohibit such violent video games, it just required the same kind of parental consent that the Supreme Court has approved for sexually explicit materials. But the Supreme Court, in a 7–2 decision, declared the law unconstitutional. Here, Justice Scalia wrote the opinion for the Court. What's more, the Court expressly declared that there is no exception to the First Amendment for violent speech. The Court emphatically said that children are protected under the First Amendment, and that video games, even violent ones, are speech protected under the Constitution.

The Court couldn't analogize, as Justice Breyer did in his dissent, to regulations of sexually explicit speech. But Justice Scalia said sexually explicit speech is a category outside the First Amendment, at least regarding obscenity, because there's no such category with regard to violent speech.

Another illustration of the Roberts Court's commitment to free speech is that it's narrowed the existing categories of unprotected speech. Not only is it unwilling to create new ones, but it's been unwilling to extend the existing ones and has even limited them. I think perhaps the most revealing case with regard to the Roberts Court and free speech is a decision called *Snyder v. Phelps*[6] that involved a small church at Topeka, Kansas, the Westboro Baptist Church, led by Fred and Margie Phelps that make it a practice of going to funerals of those who died in military service. They use that as the occasion for expressing a vile anti-gay, anti-lesbian message.

Matthew Snyder was a Marine who died in military service in Iraq. The members of Westboro Baptist Church went to his funeral in Maryland. They asked the police where they could stand before the funeral and during it. The officers pointed to a spot about one thousand feet away from the funeral. Before the funeral service began, they chanted and sang. During the service, they were silent but held up signs. That night on the news, Matthew Snyder's father, Albert Snyder, was able to watch footage and read the signs. He was deeply offended. He sued, based on diversity jurisdiction in federal court, for intentional infliction of emotional distress and invasion of privacy. After all, the Supreme Court had said that there

5. 564 U.S. 786 (2011).
6. 562 U.S. 443 (2011).

can be tort liability for speech so long as it's consistent with the First Amendment.

The jury ultimately awards $10 million in compensatory and punitive damages. But the Supreme Court found that the awarded damages and liability violated the First Amendment. What's more, it was an 8–1 decision. Chief Justice Roberts wrote for the Court and Justice Alito dissented. I think this case stands with a very important proposition—that the government cannot punish speech or hold speech liable just because it's offensive. The Court said there cannot be liability for intentional infliction of emotional distress for speech that is otherwise protected by the First Amendment.

Let me give you a third way that the Roberts Court is protective of speech. It has been quite emphatic that any content-based restrictions on speech must meet strict scrutiny. If you study First Amendment law, you know that even before the Roberts Court, the Supreme Court had said that content-based restriction of speech—attempts by government to regulate speech based on the topic or the message—must meet strict scrutiny and must be narrowly tailored to achieve a compelling purpose.

But no Supreme Court has been more insistent on that proposition than the Roberts Court. I will give you a couple of examples. *United States v. Alvarez*[7] is a case where the results surprised me, though I was pleased by it. There's a federal law that makes it a federal crime for individuals to claim to have received military honors that he or she didn't actually earn. This involved a man in Riverside, California, who went to a meeting, it was a board that he was elected to, and he claimed to have been awarded the Congressional Medal of Honor that he didn't actually earn. The United States government prosecuted him for violating the Stolen Valor Act of 2005.

Ultimately, the case came to the Supreme Court, and in a 6–3 decision, the Supreme Court found the federal statute unconstitutional and ruled in favor of Alvarez. Here, Justice Kennedy wrote the opinion for the Court. Justice Kennedy said the federal statute is a content-based restriction on speech, whether it applies is entirely on the content of the message. If somebody falsely claims to receive a military honor, then it's a federal crime. But Justice Kennedy said since it has to meet strict scrutiny, the government has to show not just a compelling interest, but that the law is narrowly tailored to achieve its purpose. The Court said the government failed strict scrutiny; the government couldn't show us it was hurt by the relatively few instances in which individuals falsely claim military honors. Moreover, he said there are other remedies available. More speech, as according to this case. Just expose that the person didn't actually receive the military honor.

7. 567 U.S. 709 (2012).

Or another example of the Supreme Court being insistent that content-based restrictions have to meet strict scrutiny was *Reed v. Town of Gilbert*.[8] The town of Gilbert is in Arizona. It had an ordinance that prohibited signs on public property, but it had about two dozen categories of exceptions. One exception was for political signs. The ordinance was very broad in this exception. Political signs could be put up throughout the election season, there could be more than one sign on the same piece of public property, the signs could be almost any size, and the signs could remain up during the election season.

On the other hand, there was another exception for directional signs—signs to give people directions to a meeting or to worship services. These signs had to be put up only a few hours before the meeting or the worship service and they needed to be taken down several hours after. There can be only one sign on a particular piece of public property giving directions, and it had to be quite small.

Reed is the pastor of the Good News Church in Gilbert, Arizona. He says their church relies on signs to tell people where worship services are being held on Sundays and challenged the ordinance. The lawyer representing Clyde Reed and the Good News Church did something very clever in his brief before the Supreme Court—something that all of us who handle appeals might learn from. The first page of his brief is two pictures. One picture is a corner in Gilbert, Arizona, during the election season. It was crowded with many different signs of various sizes and shapes. The other picture was a corner where there's one tiny sign for the Good News Church all by itself.

The Supreme Court unanimously declared the Gilbert ordinance unconstitutional. Justice Clarence Thomas wrote the opinion for the Court. He said all content-based restrictions on speech must meet strict scrutiny unless it is a category of unprotected speech. He subjected this ordinance to strict scrutiny and declared it unconstitutional. I did some quick research after this case came down, looked at just the cities where I live in Orange County, California. Every single one of them had a content-based restriction on signs on public property, every one of which would be unconstitutional. I haven't done the research for Denver, for surrounding cities. My guess is the same is true here.

One final way in which the Roberts Court has been very protective of speech is expanding who is protected by the First Amendment's safeguarding of expression. The most famous case here, perhaps the most important case in the first dozen years of the Roberts Court, is *Citizens United v. Federal Election Commission*.[9] There, the Supreme Court held

8. 135 S. Ct. 2218 (2015).
9. 558 U.S. 310 (2010).

that corporations have the right to spend unlimited amounts of money from their corporate treasuries on elections.

Just seven years earlier, in *McConnell v. Federal Election Commission*,[10] the Supreme Court upheld the same provisions that were struck down in *Citizen United*. *Citizens United* explicitly overruled *McConnell*. Of course you can ask, what was the difference between 2003 and 2010? Did the Court find some musty history of the First Amendment that led it to believe it made a mistake? No, the difference is that Justice O'Connor, who'd been in the majority in *McConnell*, was replaced by Justice Alito, who then cast the deciding vote with those with the dissent in *McConnell* to overrule.

Citizens United v. Federal Election Commission has an enormous effect in our political system. The effect is probably less seen with regard to presidential elections. It's much more at the local or even the state level. Campaigns where the candidates have less name recognition, campaigns where money can make so much difference. There's now starting to be a substantial body of political science literature that shows in these elections, campaign spending makes a difference, and the ability of corporations to spend the money of their treasuries determines who gets elected and determines who even runs for office, as often people choose not to run, knowing the corporate wealth that will be ready against them.

If you put together all of the cases that I described for you, you can see why I say the Roberts Court has generally been a strongly pro-speech Court, and you have to keep that in mind, but there is an important point here. The Roberts Court has not been a pro-speech Court when the institutional interests of the government as government are at stake. I can give you many illustrations of this as well. Think about the situations where the government can claim an institutional interest. One would be the employment context. Here, a very important case from the Roberts Court is *Garcetti v. Ceballos*.[11] Richard Ceballos is a deputy district attorney in Los Angeles County. He's also an adjunct professor at my law school. He had a case where he doubts about the veracity of the testimony of the witness, a deputy sheriff. He did some investigation, and he concluded that the deputy sheriff was lying. He wrote a memo to the file to that effect.

His supervisor, by coincidence a former student of mine at the University of Southern California Law School, told him to soften the tone of the memo. He refused to do so. He turned it over to the defense lawyer, as he believed he was constitutionally obligated to do under *Brady v. Maryland*.[12] His supervisor removed him from his supervised position and transferred him to much less desirable location. He sued and said that this

10. 540 U.S. 93 (2010).
11. 547 U.S. 410 (2006).
12. 373 U.S. 83 (1963).

demotion violated the First Amendment, because it was retaliation for him writing that memo and giving it to the defense lawyer.

The Supreme Court ruled 5–4 against Richard Ceballos. Justice Kennedy wrote the opinion for the Court. Ironically, he was joined by the same justices who joined him in *Citizens United* four years later—Chief Justice Roberts, Justice Scalia, Justice Thomas, and Justice Alito. Justice Kennedy said, "There is no First Amendment protection for the speech of government employees on the job in the scope of their duties." That is upholding, I'm quoting, "There is no First Amendment for the speech of government employees on the job in the scope of their duties."

Think of a whistleblower who stays internal to the organization and then gets demoted or fired. There's no protection. Over a decade and a half ago, I was asked to do a report on the Los Angeles police department in the wake of the Rampart scandal. I had the chance to interview almost a hundred police officers as part of preparing my study. I learned that there was a code of silence strictly enforced with the Los Angeles police department, that officers who came forward and reported misconduct felt that their back wouldn't be protected if they were in danger. Indeed, I learned a new phrase—"freeway therapy"—that if an officer reported misconduct of another officer he or she would be transferred to the precinct furthest from where he or she lived. In Los Angeles, that can be a two-hour drive, hence the phrase freeway therapy.

I concluded that to deal with the problem of police abuse in Los Angeles, the code of silence had to be tackled. There had to be protection for officers who came forward and reported misconduct. *Garcetti v. Ceballos* said there is no First Amendment protection for the officer who comes forward and reports misconduct within the department. There's no First Amendment protection for speech on the job in the scope of duties.

When you think about the institutional interest of the government, another area you might focus on is students. Here too, there's a Roberts Court case rejecting protection of freedom of speech. The case is called *Morse v. Frederick*.[13] The Olympic torch was through Juno, Alaska. A school released its students to stand on the sidewalk and watch. A student got together with his friends and unfurled a banner that said, "Bong hits for Jesus." My favorite part of the oral argument was when Justice Souter said, "I have no idea what that means."

But the principal thought that was a message to encourage illegal drug use. She confiscated the banner and suspended the student from school. The Supreme Court ruled 5–4 in favor of the principal and against the student. Chief Justice Roberts determined that schools have an important interest in discouraging illegal drug use. Therefore, the Chief

13. 551 U.S. 393 (2007).

Justice said schools can punish speech that they see as encouraging illegal drug use.

Justice Stevens, writing for dissent, argued that there's no reason to believe that this banner would have any effect in encouraging illegal drug use. Is it hard to believe that New York students, the smartest or the slowest among them, were likely to use illegal drugs because of this banner? But that didn't matter to the majority.

Another area of focus on the interest of government as government is in the context of the military. I argued a Supreme Court case a few years ago on behalf of Dennis Apel. Dennis had been part of a protest on a military base, and he was then issued an order that prevented him from ever going onto a military base again. What was involved here is whether he could go in the public area of the military base, which was on the side of a major road, the Pacific Coast Highway. We won unanimously in the Ninth Circuit, but I lost in the Supreme Court by the close margin of nine to nothing. Justice Breyer, writing for the Court, expressing the need for great deference to the military when it comes to regulating speech, even when it comes to areas of military bases that are public.

Another area where we might see the institutional interest of the government as government is regarding prisoners. Again, the Roberts Court has not been protective of speech. To give you an example, there was a case a decade ago, *Beard v. Banks*.[14] It involved the Pennsylvania rule that said that in a maximum-security prison, inmates could not have any written material, and that would include any photographs of family members. They couldn't have newspapers, they couldn't have books, they couldn't have magazines, they couldn't have pictures of loved ones. What is a clearer restriction of free speech than that? And yet, the Supreme Court upheld that rule, proclaiming the need for great deference to prisons and prison authorities.

You see this deference to the government as government when national security is at stake. I think one of the more important cases the Roberts Court with regard to freedom of speech was *Humanitarian Law Project v. Holder*[15] in 2010. It involved the federal statute that makes it a federal crime to give material assistance to a terrorist organization. The issue in this case is whether speech alone is enough to be found material assistance.

The facts of the case are quite important. It involved two groups of Americans. One wanted to advise a Kurdish group on how to use international law in the United Nations for peaceful resolution of the disputes. This Kurdish group wanted to form a separate country, breaking away from Turkey. The other involved a group of Americans that wanted to help a Sri Lankan group. The Sri Lankan group was seeking to get

14. 548 U.S. 521 (2006).
15. 561 U.S. 1 (2010).

humanitarian assistance from the United Nations and other international organizations.

There was no allegation at any stage of the litigation that these American groups were advocating terrorism or devising how to commit terrorist activity. It was speech on how to use international law to peacefully resolve disputes and to get humanitarian assistance. Yet, the Supreme Court ruled, in a 6–3 decision, that this speech could be punished as material assistance for a terrorist organization. Both the Sri Lankan and the Kurdish groups were labeled by State Department as terrorist organizations, and the Supreme Court said any speech to help them could be punished.

A dissenting Justice Breyer said that what the Court should have thought of here is whether this speech is inciting illegal activity. We have a test for that, and it was announced in *Brandenburg v. Ohio*[16] in 1969. Speech can be punished for inciting illegal activity only if it's directed at causing imminent illegality and it's likely to result in illegality. He said the majority doesn't even mention the test. The majority expresses the need for great deference to the government as government.

I'll give you one more example of how the Roberts Court has not been protective of speech when government as government is involved, and that's in the area of government speech itself. In fact, I find one of the most troubling areas in terms of First Amendment in the Roberts Court is creating this new principle that if the government itself is the speaker, then there's no basis for a First Amendment challenge. I'll mention a case from just a year and half ago, from June of 2015. It's a case called *Walker v. Texas Division of the Sons of Confederate Veterans*.[17]

Texas has two kinds of license plates. There are the general plates, the ones you get if you don't request anything else, and then there are specialized plates. There are many ways in which specialized plates can come to be produced. Nonprofit organizations can request that Texas produce specialized plates with particular insignias, slogans, pictures. For example, the Texas Department of Motor Vehicles has produced license plates that say, "Go Gators," referring to the University of Florida sports team. They produced license plates that say, "I'd rather be golfing," and so on.

The Texas Division of the Sons of Confederate Veterans requested that the Texas Department of Motor Vehicles issue license plates with the Confederate flag. Texas refused to do so, and a lawsuit was brought against them. The Fifth Circuit said that this was a content-based restriction on speech and should be unconstitutional.

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16. 395 U.S. 444 (1969).
17. 135 S. Ct. 2239 (2015).

The Supreme Court, in a 5–4 decision, reversed in favor of the State of Texas. Justice Breyer wrote the opinion for the Court. His opinion was joined by Justices Ginsburg, Kagan, and Thomas. Justice Alito wrote the dissent, joined by Chief Justice Roberts, as well as Justices Scalia and Kennedy. That's not a split you see every day on the Roberts Court. Justice Breyer said that when the government is the speaker, its speech cannot be challenged as violating the First Amendment. He says the government has to be able to speak. It needs to encourage people to recycle, encourage parents to vaccinate their children. He said license plates are a form of government speech, they're a government-issued ID. He said, Texas, since it is government speech, can refuse to have the Confederate flag on the license plates.

Justice Alito, writing for the dissent, said the license plate may be government speech, but what's on it is private speech. Texas has created a forum for private messages. He disagreed with the majority that when people see something on a license plate, they perceive it as government speech. He says when people see "Go Gators" on a Texas license plate, they don't assume that the Texas legislature has encouraged people to root for the Florida Gators rather than the Texas Longhorns. When they see "I'd rather be golfing," they don't assume the State of Texas has encouraged people to golf rather than go to work.

I like the result in this case. I like that Texas isn't going to issue license plates with the Confederate flag. But I find myself much more in agreement with the dissent than with the majority. Texas doesn't have to allow private groups to put messages on a license plate. Once it does so, it shouldn't be able to discriminate based on the content, based on the topic or the viewpoint.

The reason I'm so upset about the government speech factor is I see no stopping point. The Supreme Court has said that the government can speak by adopting private speech as its own. Imagine that a city council said that "we are going to allow anti-abortion protests, but not pro-choice protests in city park" and then adopt the anti-abortion protest as its own government speech. Or what if a city playhouse says, "We're only going to produce plays written by Republican authors." Or libraries say, "We're only going to buy books written by liberal authors." All of that should clearly violate the First Amendment, but the speech adopted by the city council, the playhouse, and the library is all government speech. Should the government be able to engage in content-based restrictions just by declaring the message to be adopted as government speech? That seems the door the Court has opened by saying it's going to give so much deference to government as government.

I've tried to give you a detailed picture of the Roberts Court being protective of speech, but not when the government as government is involved. It's in this context that I think I can talk about what we're seeing

already, what we might see over the course of the next four years from the Trump Presidency.

In some ways, of course, it's early to be talking about the Trump Presidency. We're just one month and eight days into the Trump Presidency, but we certainly had the statements I mentioned in my introduction, of the press is the enemy of the American people, the press being out of control. What are some of the things that the Trump Administration might do, and how might the courts deal with these in light of the law that I just described to you?

One thing that candidate Donald Trump repeatedly said is that he wanted to see the American law of defamation changed.[18] He said that if he became President, the law of libel and slander would be revised to make it much easier for plaintiffs to succeed. He spoke approvingly of the law in England in this regard that does make it much easier for plaintiffs to succeed. In the United States, if the plaintiff is a public official or a public figure, he or she can recover for defamation only by proving actual malice, that the defendant knew the statement was false or acted with reckless disregard of the truth. In England, generally, the burden of proof is reversed, and also, there's no notion of actual malice.

I do not think that President Trump is going to succeed in this regard. First, as we all know, defamation law is state law—it's not federal law. There is no federal law with regard to libel and slander. It's a law in each of the fifty states, so what can the President and Congress do about it? But second, limits on defamation come from the First Amendment and there's no indication that the Roberts Court or even any of its members want to reconsider those.

If you ask me what the most important free speech case is in all of American history, I would say *New York Times v. Sullivan*[19] in 1964. No free speech case is more revered, none is more canonical than that. When it came down, then-University of Chicago law professor Harry Calvin said it should be an occasion for dancing in the streets. It was *New York Times v. Sullivan* that said that a public official can recover for defamation only by proving with clear and convincing evidence, falsity in the statement, and actual malice.

It was *New York Times v. Sullivan* that said that public debate has to be open and robust. It was *New York Times v. Sullivan* that said that even a false speech has to be protected by the First Amendment so it would be the breathing space that expression needs. It was *New York Times v. Sullivan* that said that even "vituperative attacks on public officials," those were the Court's words, are protected by the First Amendment.

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18. *See* Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 20, 2017), https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html.

19. 376 U.S. 254 (1964).

Now, one of the justices on the current Court has called into question *New York Times v. Sullivan*. I do not see that President Trump's desire to change defamation law will come to any fruition. I don't think the states are going to change their law, but even if they do, the First Amendment still limits defamation recovery.

But that's just one area where candidate and President Trump called for changes in the law. It's clear that President Trump has a focus, one might say a preoccupation, of those who are leaking information to the press. You might have seen two weeks ago when national security advisor Michael Flynn was forced to resign. There was a good deal of attention. Why was he forced to resign? He had impermissible, and maybe illegal, contacts with Russia before Trump was inaugurated. He lied to Vice President Pence and others about this.

What did President Trump say about Flynn? Did he criticize Flynn for the contacts with Russia? Did he criticize Flynn for the lies, including to the Vice President? No. What President Trump said was these were results of leaks, maybe as a result of leaks from holdovers from the Obama Administration. In fact, if you're seeing today's news, the headline of CNN, it is President Trump saying that perhaps President Obama is responsible for those leaks.[20]

Last week, there were reports of other impermissible contacts between those in the Trump campaign and Russia. President Trump criticized the media for reporting this and again said they're going to look for leaks. You might have seen in the last couple of days White House Press Secretary Sean Spicer said, he took the phones of those who work for him and looked at the phones to see if they were sending leaks, including by encrypted messages.

There are certainly things that the United States government can do if it wants to go after those who are leaking information. One thing you can do is bring prosecutions under the Espionage Act of 1918[21] that makes it a crime to disclose national security information. It's interesting that the Espionage Act of 1918 and its precursor, the Espionage Act of 1917,[22] had been on the books now just about a century. In an entire hundred years, there have only been twelve prosecutions brought under the Espionage Act. Nine of them were brought during the Obama administration.

Given the attitude that President Trump has expressed towards those who are leaking information and his attitude towards the press more generally, I predict we are going to see more, many more prosecutions under the Espionage Act for leaking national security information.

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20. Eli Watkins, *Trump Says Obama Behind Leaks*, CNN (Mar. 1, 2017, 1:05 AM), http://www.cnn.com/2017/02/27/politics/donald-trump-barack-obama-leaks.

21. Act of May 16, 1918, ch. 75, 40 Stat. 553 (current version at 18 U.S.C. §§ 792–799 (2012)).

22. Act of June 15, 1917, ch. 30, 40 Stat. 217 (current version at 18 U.S.C. §§ 792–799 (2012)).

First Amendment issues may arise. I think that the First Amendment would protect the press that publishes the information, but I don't think that the First Amendment's going to provide protection for the government official who is caught leaking the information. After all, in *Garcetti v. Ceballos* that I told you, the Supreme Court held that there's no First Amendment protection for speech of government employees on the job within the scope of their duties. In general, the Supreme Court has failed to provide much protection in the context of somebody who might be providing information to the press.

Yet history also shows the importance of such leaks of information. The Watergate scandal and the cover-up, illegal activity, came to light only because of an anonymous source—Deep Throat. The torture that occurred in Abu Ghraib was revealed only because of leaks. The massive illegal wiretapping done under the Bush Administration was revealed only because of leaks. The more the government is successful in using the Espionage Act to dry up such leaks, the more all of us will lose a key check on the government.

Another tactic that I believe we're going to see from the Trump Administration is forcing reporters to disclose their sources. This too was done perhaps more by the Obama Administration than any prior administration. Think of New York Times reporter Judy Miller going to prison for not fully disclosing sources, but that was before the Obama Administration. I can point to a number of instances where the Obama Administration tried to force reporters to face the penalty of contempt of court to disclose their sources. I think because of the preoccupation for leaks in the Trump Administration, you'll see them trying to bring reporters before grand juries and force them to disclose their sources.

Here too, the law provides relatively little protection. The key Supreme Court case here was *Branzburg v. Hayes*[23] in 1972. There, the Court ruled 5–4 that reporters do not have any First Amendment protection that is keeping them from disclosing their sources. States and state courts generally have some "shield law" protecting reporters, but there is no federal shield law, and the absence of a federal shield law means that if the Trump Administration wants to bring reporters forward, they can do so.

Another thing that we began to see and are likely to see even more is the Trump Administration discriminating among media outlets. You might remember that during the presidential campaign, President Trump's campaign denied media credentials to the Washington Post and Politico because he found their reporting to be too unfavorable. Last Friday, the Press Secretary did an informal briefing, he called it, and I'm quoting, "a gaggle," and excluded from being there among others, the New York

23. 408 U.S. 665 (1972).

Times, the Los Angeles Times, Politico, and BuzzFeed.[24] The editors of the New York Times responded to this by saying that in all the years the New York Times has been covering the Presidency, never before have they seen a President exclude members of the media on the basis of a particular outlet being unfavorable in covering an administration.[25]

This was an informal briefing. There's no doubt that presidents and press secretaries have done informal briefings to some and not all of the media, and yet the idea of literally someone standing at the door and saying, since you're from the New York Times, or you're from the Los Angeles Times, or you're from Politico, you're not welcome. Whereas all of the far-right media was allowed into that briefing.

I think if this becomes a pattern, you will see a lawsuit filed certainly if there is an official press conference and only those who report favorably to the President are allowed in. I think here, the media will win and the Trump Administration will lose, that this is viewpoint discrimination. It's being done by the government at official events, and viewpoint discrimination goes to the very core of the First Amendment.

Now I focused on only some of the things that are likely to occur in the next four years, but just that these have happened in such a short time shows why it's so important to focus on the Trump Presidency and the First Amendment and why it's so important to do so in the context of where is the Roberts Court with regard to free speech, when are they likely to be a check on the government and when are they likely to side with the government.

I conclude with the words of James Madison from the Federalist papers. He said, "Knowledge will forever govern ignorance: [that] people who mean to be their own Governors, must arm themselves with the power [that] knowledge gives."[26] He said, "A popular Government, without popular [knowledge], or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both."[27]

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24. *See* Julie Hirschfeld Davis & Michael M. Grynbaum, *Trump Intensifies His Attacks on Journalists and Condemns F.B.I. 'Leakers,'* N.Y. TIMES (Feb. 24, 2017), https://www.nytimes.com/2017/02/24/us/politics/white-house-sean-spicer-briefing.html.

25. *Id.*

26. James Madison, Letter to W.T. Barry (Aug. 4, 1822), https://www.loc.gov/item/mjm018999.

27. *Id.*