

University of Michigan Law School

## University of Michigan Law School Scholarship Repository

---

Articles

Faculty Scholarship

---

2017

### Are Trump's Attacks on the Media Adversely Affecting Public Opinion?

Leonard M. Niehoff

*University of Michigan Law School, lniehoff@umich.edu*

Available at: <https://repository.law.umich.edu/articles/2828>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



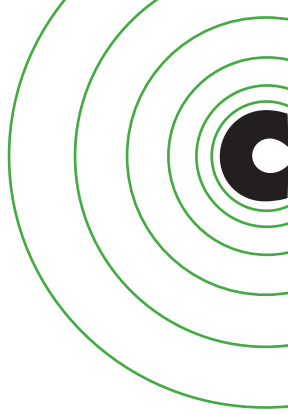
Part of the [Communications Law Commons](#), [First Amendment Commons](#), and the [Social Influence and Political Communication Commons](#)

---

#### Recommended Citation

Niehoff, Leonard. "Are Trump's Attacks on the Media Adversely Affecting Public Opinion?" *Communications Lawyer* 33, no. 2 (2017): 1, 5-6.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).



# Communications Lawyer

Publication of the Forum  
on Communications Law  
American Bar Association  
Volume 33, Number 2, Fall 2017

THE JOURNAL OF MEDIA, INFORMATION, AND COMMUNICATIONS LAW

## In this issue COVER STORY

Are Trump’s Attacks on the Media Adversely Affecting Public Opinion? ..... 1

From the Chair: “Fake News” .... 2

Recent High-profile Cases Highlight the Need for Greater Procedural Protections for Freedom of the Press ..... 7

O-M-G. Worst Article EVERRRR! Or When Does the Yelp-Fueled Takedown Rise to Defamation? .. 16

Preliminary Injunctions Enforcing Contractual Nondisparagement Clauses ..... 20

After Charlottesville, How Committed Do We Remain to Free Speech for All? ..... 29

## Are Trump’s Attacks on the Media Adversely Affecting Public Opinion?

BY LEN NIEHOFF

Both during the election cycle and as president of the United States, Donald Trump has enthusiastically and aggressively attacked the media. On Twitter, in speeches, and at rallies he has repeatedly deployed his favorite “f words” against mainstream broadcast, print, and online news sources: “fake,” “fraudulent,” “failing,” and (phonetically) “phony.” Some attacks have been personal to individual journalists, some have been more institutionally focused, and some have been made in contexts that appeared to create physical risk to reporters who were present. But whatever the variation in flavors, the frequency of the attacks has remained constant. Indeed, Trump has devoted more tweets to attacking the news media than he has to job creation, one of the centerpieces of his campaign platform.

Words have consequences, particularly when they come from the leader of the free world. One consequence has been an international expression of concern over whether the United States has abdicated its leadership role with respect to freedom of the press and whether this is fueling

antimedia sentiment and violence around the world. The United Nations high commissioner for human rights has described this shift as “a stunning turnaround.”

These attacks on the media, and their potential consequences, raise important questions for purposes of domestic media law. Have the president’s statements had a negative effect on how U.S. citizens view the media? If so, then how significant is the effect? Will that effect creep into legal proceedings and threaten to compromise their fairness? Will his strident and incessant attacks have an impact on how juries think about media defendants—perhaps even on how judges and legislatures do so?

We obviously cannot answer these questions with any certainty—and perhaps we never will. Consider, after all, the process we would need to follow: First, we would need to agree upon the kind of evidence that reliably measures public viewpoints about the media. Second, we would need to agree upon the kind of evidence that reliably suggests a material change in those viewpoints. Third, to avoid blundering into the sorts of errors that *post hoc, ergo propter hoc* reasoning often yields, we would need to agree upon the kind of evidence that reliably supports an inference that his remarks caused those changes. And, finally, we would need to agree upon the kind of evidence that reliably shows his criticisms are having an unfairly

(Continued on page 5)

Len Niehoff is of counsel to Honigman Miller Schwartz and Cohn LLP in Michigan, where he practices media law, and is professor from practice at the University of Michigan Law School.

---

## Are Trump's Attacks on the Media Adversely Affecting Public Opinion?

*continued from page 1*

negative effect in the specific context of legal proceedings. As noted, we may never have the capacity to fulfill all these requirements and certainly do not have it now.

It may, however, remain possible for us to say something even where we concede we cannot say it with the level of authority and certainty we would prefer. In that spirit, and within those severe limitations, we can ask: is there any indication that Trump's criticisms are having an impact on public views of the media that may affect a media defendant's ability to get a fair day in court? Let's look at what the very limited available evidence may tell us.

One important resource is the *State of the First Amendment* report, which the Newseum Institute has been preparing and publishing since 1997. Given the outcome of the last presidential election, we have good reason to greet polling results with skepticism. But the methodology used by the Institute assures a relatively low error rate, reporting a 95 percent confidence level with a margin of error of 3.7 percent in 2017.

Beginning in 2016, the Institute noted signs of significantly increased public support for media freedom. For example, in 2016 a record low percentage of respondents (33 percent) agreed with the proposition that the press has too much freedom to do what it wants. In that same year, a record high percentage of respondents (51 percent) stated that the American press has about the right amount of freedom. In 2016, there was also a modest increase (2 percent) in the number of Americans who agreed with the proposition that the news should act as a government watchdog, yielding a strong 71 percent in agreement with this statement.

But the numbers from 2016 showed cause for serious concern as well. The Institute reported that 74 percent of Americans disagreed with the statement that the media attempts to report news without bias. This capped a four-year trend since the last presidential election, leading to a record low percentage of Americans (23 percent) who believe the media are unbiased. In addition, in 2016, the majority of Americans (51

percent) stated that the news media had been inaccurate in its reporting on the presidential campaign.

In light of the well-recognized dynamic of "confirmation bias," which prompts people to accept information that aligns with what they already think true, this would appear to make Trump's attacks on the media deeply problematic. After all, much of his railing against the media rests explicitly or implicitly upon an accusation of unfairness on their part. His accusations that the media publish statements that are "fake" or "fraudulent" or "phony" might, therefore, prompt many American citizens who are predisposed to this viewpoint to shrug and say, "Yeah, that sounds about right to me."

Furthermore, these 2016 numbers suggest that Americans distinguish between (a) abstract and generalized questions about what rights the media should have and (b) more pragmatic and specific questions about whether the media abuse their freedom. This does not bode well for outcomes in legal proceedings. After all, in any given case a jury is not called upon to decide the grand scope of First Amendment freedoms, but rather to determine whether in this particular instance the media behaved in a responsible, fair, accurate, and unbiased manner. These numbers may suggest that most jurors will enter the decision-making process with a presumption that the defendant did not do so.

The Institute's 2017 report reflects some interesting shifts. The percentage of Americans who disagree with the notion that the media have too many freedoms remained strong at 69 percent. Thus, in an abstract and generalized sense, most Americans remained supportive of media rights and freedoms.

This year, however, 43 percent indicated that they believed the news media reported without bias. This is a very significant improvement over the 23 percent that held this view the year before and is to that extent an encouraging development. It is important to note, though, that this press-approval rating of sorts is statistically indistinguishable from the 44 percent approval rating that Americans have given President Trump

and that the media have generally characterized as dismal.

Still, there are other signs of hope. Since the 2016 election, the *New York Times*, *Wall Street Journal*, *LA Times*, and *Washington Post*—all of whom have been sharply critical of President Trump—have shown a marked increase in readership and subscribers. In the final three months of 2016 alone, the *New York Times* added 250,000 digital subscribers. And both NPR and PBS saw a meaningful increase in listeners and viewers in 2016.

While this is probably a less reliable indicator of popular sentiment, donations to media-related organizations and journalism defense funds have also increased. For example, the number of donations to the Reporters Committee for the Freedom of the Press increased from about 2 per week to an average of 250 per week since the election. And other organizations, such as the Center for Public Integrity and the International Consortium of Investigative Journalists have seen a roughly 70 percent increase in individual donations. Furthermore, many young people seem inspired to jump into the pipeline: high school and summer journalism programs have reported a significant increase in interest in the last year.

It seems important, though, not to make too much of these numbers. After all, trust ratings for the media remain very low. And it is hard to know what to think about things like increased subscription numbers. They may reflect a change in the direction of general public opinion. Or they may, more modestly, signal that those who were already supportive of the media have been jarred out of their complacency and have decided to invest accordingly.

In any event, national averages offer no consolation to media defendants faced with the challenges posed by a specific case in a specific venue. We do not know all the reasons that ABC's parent company Disney chose to pay \$177 million to settle the "pink slime" defamation lawsuit brought by a South Dakota-based beef product company that had been the subject of an unflattering news report. But one consideration may have been that Donald Trump

## Are Trump's Attacks on the Media Adversely Affecting Public Opinion?

continued from page 1

negative effect in the specific context of legal proceedings. As noted, we may never have the capacity to fulfill all these requirements and certainly do not have it now.

It may, however, remain possible for us to say something even where we concede we cannot say it with the level of authority and certainty we would prefer. In that spirit, and within those severe limitations, we can ask: is there any indication that Trump's criticisms are having an impact on public views of the media that may affect a media defendant's ability to get a fair day in court? Let's look at what the very limited available evidence may tell us.

One important resource is the *State of the First Amendment* report, which the Newseum Institute has been preparing and publishing since 1997. Given the outcome of the last presidential election, we have good reason to greet polling results with skepticism. But the methodology used by the Institute assures a relatively low error rate, reporting a 95 percent confidence level with a margin of error of 3.7 percent in 2017.

Beginning in 2016, the Institute noted signs of significantly increased public support for media freedom. For example, in 2016 a record low percentage of respondents (33 percent) agreed with the proposition that the press has too much freedom to do what it wants. In that same year, a record high percentage of respondents (51 percent) stated that the American press has about the right amount of freedom. In 2016, there was also a modest increase (2 percent) in the number of Americans who agreed with the proposition that the news should act as a government watchdog, yielding a strong 71 percent in agreement with this statement.

But the numbers from 2016 showed cause for serious concern as well. The Institute reported that 74 percent of Americans disagreed with the statement that the media attempts to report news without bias. This capped a four-year trend since the last presidential election, leading to a record low percentage of Americans (23 percent) who believe the media are unbiased. In addition, in 2016, the majority of Americans (51

percent) stated that the news media had been inaccurate in its reporting on the presidential campaign.

In light of the well-recognized dynamic of "confirmation bias," which prompts people to accept information that aligns with what they already think true, this would appear to make Trump's attacks on the media deeply problematic. After all, much of his railing against the media rests explicitly or implicitly upon an accusation of unfairness on their part. His accusations that the media publish statements that are "fake" or "fraudulent" or "phony" might, therefore, prompt many American citizens who are predisposed to this viewpoint to shrug and say, "Yeah, that sounds about right to me."

Furthermore, these 2016 numbers suggest that Americans distinguish between (a) abstract and generalized questions about what rights the media should have and (b) more pragmatic and specific questions about whether the media abuse their freedom. This does not bode well for outcomes in legal proceedings. After all, in any given case a jury is not called upon to decide the grand scope of First Amendment freedoms, but rather to determine whether in this particular instance the media behaved in a responsible, fair, accurate, and unbiased manner. These numbers may suggest that most jurors will enter the decision-making process with a presumption that the defendant did not do so.

The Institute's 2017 report reflects some interesting shifts. The percentage of Americans who disagree with the notion that the media have too many freedoms remained strong at 69 percent. Thus, in an abstract and generalized sense, most Americans remained supportive of media rights and freedoms.

This year, however, 43 percent indicated that they believed the news media reported without bias. This is a very significant improvement over the 23 percent that held this view the year before and is to that extent an encouraging development. It is important to note, though, that this press-approval rating of sorts is statistically indistinguishable from the 44 percent approval rating that Americans have given President Trump

and that the media have generally characterized as dismal.

Still, there are other signs of hope. Since the 2016 election, the *New York Times*, *Wall Street Journal*, *LA Times*, and *Washington Post*—all of whom have been sharply critical of President Trump—have shown a marked increase in readership and subscribers. In the final three months of 2016 alone, the *New York Times* added 250,000 digital subscribers. And both NPR and PBS saw a meaningful increase in listeners and viewers in 2016.

While this is probably a less reliable indicator of popular sentiment, donations to media-related organizations and journalism defense funds have also increased. For example, the number of donations to the Reporters Committee for the Freedom of the Press increased from about 2 per week to an average of 250 per week since the election. And other organizations, such as the Center for Public Integrity and the International Consortium of Investigative Journalists have seen a roughly 70 percent increase in individual donations. Furthermore, many young people seem inspired to jump into the pipeline: high school and summer journalism programs have reported a significant increase in interest in the last year.

It seems important, though, not to make too much of these numbers. After all, trust ratings for the media remain very low. And it is hard to know what to think about things like increased subscription numbers. They may reflect a change in the direction of general public opinion. Or they may, more modestly, signal that those who were already supportive of the media have been jarred out of their complacency and have decided to invest accordingly.

In any event, national averages offer no consolation to media defendants faced with the challenges posed by a specific case in a specific venue. We do not know all the reasons that ABC's parent company Disney chose to pay \$177 million to settle the "pink slime" defamation lawsuit brought by a South Dakota-based beef product company that had been the subject of an unflattering news report. But one consideration may have been that Donald Trump

carried the state with a whopping 61.5 percent of the vote.

This suggests that the right question is not whether Trump's comments are having an effect on public sentiment nationally, but whether they are having an adverse effect on public sentiment anywhere the media might be sued—which, in this digital age, means anywhere at all. If we can ever assemble a perfect statistical methodology, it will almost certainly tell us that the answer is a resounding “yes.” In the meantime, to quote a Nobel Prize winning author: “You don’t need a weather man to know which way the wind blows.”

### Endnotes

1. See, e.g., *Trump Attacks Media as “Fake” and “Fraudulent,” Pushes Back about His Use of Twitter*, FOX NEWS POLITICS (July 1, 2017), <http://www.foxnews.com/politics/2017/07/01/trump-resumes-attacks-on-cnn-msnbc-says-van-susteren-fired-for-resisting-trump-hate.html>; Laura Entis, *Trump Calls the New York Times “Failing”—It’s Not, Largely Because of Him*, FORTUNE (July 27, 2017) <http://fortune.com/2017/07/27/trump-new-york-times-failing>.
2. See, e.g., Maya Kosoff, *White House Defends Trump Tweet Attacking “Low I.Q.,” Female Journalist for “Bleeding Badly,”* VANITY FAIR (June 29, 2017), <https://www.vanityfair.com/news/2017/06/trump-tweets-mika-brzezinski-was-bleeding-badly-from-a-face-lift>.
3. See note 1, *supra*.
4. Daniel Victor, *Trump, Calling Journalists “Sick People,” Puts Media on Edge*, N.Y.T. (Aug. 23, 2017) <https://www.nytimes.com/2017/08/23/business/media/trump-rally-media-attack.html?mcubz=1&r=0>.
5. Madeleine Sheehan Perkins, *As President, Trump Attacked the Media on Twitter More Times than He’s Tweeted about Jobs and the Military*, BUS. INSIDER (June 29, 2017), <http://www.businessinsider.com/trump-tweets-about-the-media-2017-6>.
6. See Nick Cumming-Bruce, *UN Human Rights Chief Condemns Trump’s Attacks on Media*, N.Y.T. (Aug. 30, 2017), <https://www.nytimes.com/2017/08/30/world/europe/trump-press-united-nations.html?mcubz=1>.
7. *Id.*
8. See THE 2016 STATE OF THE FIRST AMENDMENT (2016), available at [http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC\\_SOFA16\\_report.pdf](http://www.newseuminstitute.org/wp-content/uploads/2016/06/FAC_SOFA16_report.pdf).
9. See THE 2017 STATE OF THE FIRST AMENDMENT (2017), <http://www.newseuminstitute.org/first-amendment-center/state-of-the-first-amendment>.
10. See Harvard Harris Poll, MOOD OF THE COUNTRY (field date July 19–24, 2017).
11. Tien Tzuo, *Why Newspaper Subscriptions Are on the Rise*, Techcrunch, (Mar. 4, 2017), <https://techcrunch.com/2017/03/04/why-newspaper-subscriptions-are-on-the-rise>; Laurel Wamsley, *Big Newspapers Are Booming: “Washington Post” to Add 60 Newsroom Jobs*, NPR (Dec. 27, 2016), <http://www.npr.org/sections/thetwo-way/2016/12/27/507140760/big-newspapers-are-booming-washington-post-to-add-sixty-newsroom-jobs>; Matthew J. Belvedere and Michael Newberg, *New York Times Subscription Growth Soars Tenfold, Adding 132,000, After Trump’s Win*, CNBC (Nov. 29, 2016), <https://www.cnbc.com/2016/11/29/new-york-times-subscriptions-soar-tenfold-after-donald-trump-wins-presidency.html>.
12. Mathew Ingram, *Trump’s Victory Has People Signing up for News Like It’s Going Out of Style*, FORTUNE (Mar. 7, 2017), <http://fortune.com/2017/03/07/the-trump-effect>.
13. Pew Research Center, Public Broadcasting Fact Sheet, (Aug. 7, 2017), <http://www.journalism.org/fact-sheet/public-broadcasting>.
14. Jennifer Gould Keil, *Donations for Press Freedom Group Spike in Trump Era*, NY POST (May 24, 2017), <http://nypost.com/2017/05/24/donations-for-press-freedom-group-spike-in-trump-era>.
15. Nicholas Fandos, *Non-profit Journalism Groups Are Gearing Up with Flood of Donations*, N.Y.T. (Dec. 7, 2016), <https://www.nytimes.com/2016/12/07/business/media/nonprofit-journalism-groups-are-gearing-up-with-flood-of-donations.html?mcubz=3&r=0>.
16. *Id.*
17. Jeff John Roberts, *Disney Paid \$177 Million to Settle ABC “Pink Slime” Case*, FORTUNE (Aug. 10, 2017), <http://fortune.com/2017/08/10/disney-pink-slime>.
18. Bob Dylan, “Subterranean Home-sick Blues” (1965).