

## Media Law Update, 2018 First Amendment Freedoms in Year One of Donald Trump's Presidency

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### The First Amendment in the Early Trump Era

During his first year as President of the United States, Donald J. Trump criticized First Amendment freedoms in unprecedented ways while professing his love for them, telling a room full of conservative leaders in February 2017: "I love the First Amendment. Nobody loves it better than me. Nobody. I mean, who uses it more than I do?"

*Criticisms of the press:* During President Trump's first year, he criticized the press in harsh, and some say, dangerous, ways. He has often called the mainstream press "fake news" and said reporters make up sources to publish false stories. In one tweet in February 2017 deleted after criticism, he wrote, "The FAKE News (failing @nytimes, @CNN, @NBCNews and many more) is not my enemy, it is the enemy of the American people. SICK!" In October 2017, he said from the White House: "[It's frankly disgusting](#) the way the press is able to write whatever they want to write and people should look into it." At a political rally in Arizona in August 2017, Trump launched into a [litany of criticisms of the press](#), saying it is "taking away our history and our heritage" and said of journalists, "I really think they don't like our country."

*"Opening up" libel laws:* While campaigning for the presidency in February 2016, candidate Trump promised the media would "have problems" if he won. "I'm going to [open up our libel laws](#) so when they write purposely negative and horrible and false articles we can sue them and win lots of money," he said. In January 2018, following the publication of Michael Wolff's book *Fire and Fury: Inside the White House*, Trump said his administration [would propose new libel laws](#) to make it easier to win libel lawsuits. "Our current libel laws are a sham and a disgrace, and do not represent American values or American fairness. You can't say things that are false — knowingly false — and be able to smile as money pours into your bank account. We're going to take a very, very strong look at that. And I think what the American people want to see is fairness."

*Threats of prior restraints and lawsuits:* President Trump's attorney Charles Harder threatened a prior restraint to stop Michael Wolff's book from being published, and [threatened to sue](#) former top aide Steve Bannon for allegedly violating a non-disclosure agreement. The letter to Bannon said, "You [Bannon] have breached the Agreement by, among other things, communicating with

author Michael Wolff about Mr. Trump, his family members, and the Company, disclosing Confidential Information to Mr. Wolff, and making disparaging statements and in some cases outright defamatory statements to Mr. Wolff about Mr. Trump, his family members, and the Company, knowing that they would be included in Mr. Wolff's book and publicity surrounding the marketing and sale of his book."

*Criticisms of protestors:* President Trump regularly criticized protestors as being unpatriotic and worse. He mocked NFL players for kneeling during the National Anthem to protest racism and police shootings and said they [should be fired](#) if they didn't stand.

*Journalist Protection Act:* A California Congressman, Eric Swalwell, [introduced legislation](#) to add journalists to a list of individuals against which causing bodily harm is considered a federal crime. In a [press release](#), Swalwell said the law was needed in light of the president's rhetoric against journalists and several noted physical attacks against journalists in 2017. These included an incident in April 2017 in which Greg Gianforte [body slammed a reporter](#) on the eve of his election to Congress as a representative from Montana and an incident in March 2017 in which OC Weekly [journalists were assaulted](#) at a Trump rally in Huntington Beach.

## **The Supreme Court and New First Amendment Law**

*Gorsuch joins the Roberts Court:* The newest associate justice joined the U.S. Supreme Court in April 2017. Neil Gorsuch was appointed by President Donald J. Trump to fill the seat vacated by Antonin Scalia after the U.S. Senate refused to hold confirmation hearings for President Barack Obama's nominee Merrick Garland. Gorsuch served on the Tenth Circuit Court of Appeals. He was said to be a proponent of textualism and original intent, and was [a reliably conservative vote](#) during his first term.

*SCOTUS First Amendment cases:*

***Matal v. Tam:*** In an 8-0 vote, the Supreme Court ruled that the disparagement clause of the Lanham Act violates the First Amendment. The case involved the application for a trademark from Simon Tam and his band, The Slants. The U.S. Trademark Office said the name was disparaging to "persons of Asian descent." A unanimous Supreme Court ruled that the interest of avoiding offense in trademarks was not a sufficient interest to overcome First Amendment protections and struck down the disparagement clause.

***Packingham v. North Carolina:*** In an 8-0 vote, the Supreme Court struck down a state law that banned sex offenders from using social media websites. The Court found that North Carolina's law was too broad and not narrowly tailored to survive intermediate scrutiny as a content-neutral speech restriction.

***Janus v. AFSCME:*** In a case to be decided in the current term, the Court is asked to decide: Do mandatory union dues violate the First Amendment?

[\*Masterpiece Cakeshop v. Colorado Civil Rights Union\*](#): In a case to be decided in the current term, the Court is asked to decide: Is there a First Amendment right to refuse service to gays and lesbians?

[\*Lozman v. City of Riviera Beach\*](#): In a case to be decided in the current term, the Court is asked to decide: When is the government impermissibly retaliating against a citizen for exercising his First Amendment rights?

[\*Minnesota Voters Alliance v. Mansky\*](#): In a case to be decided in the current term, the Court is asked to decide: Can states overcome strict scrutiny in justifying laws that ban campaigning outside of polling places?

[\*National Institute of Family and Life Advocates v. Bacerra\*](#): In a case to be decided in the current term, the Court is asked to decide: Can the state require anti-abortion counseling centers to post signs about the state's contraception and abortion services?

[\*Carpenter v. U.S.\*](#): In a case to be decided in the current term, the Court is asked to decide: Is it a violation of the Fourth Amendment to allow the government to conduct warrantless seizure and search of historical cell-phone records?

### **Big Monetary Judgments in Libel and Privacy Cases**

*Rolling Stone settles libel lawsuits over rape story*: After a riveting story published in November 2014 recounting a gang rape by members of a fraternity at the University of Virginia was discredited and recanted, Rolling Stone settled several libel lawsuits filed against a former associate dean and members of the fraternity. In April 2017, the magazine settled with an associate dean who was awarded \$3 million in damages [after a jury trial](#). In June 2017, the magazine [settled with the fraternity](#) for \$1.65 million. A [third settlement](#) for an unknown amount in December 2017 with some fraternity members appeared to be the end of the legal controversy.

*ABC pays huge settlement over pink slime story*: Three weeks into a trial in South Dakota in June 2017 filed by Beef Products, Inc., over allegedly defamatory news reports of the “pink slime” beef additive, ABC News settled a libel lawsuit for a [reported \\$177 million](#). Although the terms were confidential, an attorney BPI suggested the settlement was the largest libel settlement in U.S. history. BPI's lawsuit sought as much as \$1.9 billion in damages, alleging that ABC's reporting caused huge drops in beef sales resulting in the closing of several production facilities. ABC News stood by their stories.

*Daily Mail settles with Melania Trump*: The British tabloid The Daily Mail [settled a libel lawsuit](#) in April 2017 filed by Melania Trump, First Lady of the United States. Trump filed suit after the Daily Mail published a story in August 2016 about Trump's immigration to the United States and insinuations that her she “provided services beyond simply modeling.” The Daily Mail retracted the story and apologized, and reportedly paid \$2.9 million to settle the case.

## Reporting on Hacks and Leaks

*Buzzfeed sued for publishing Russian dossier:* A “dossier” of allegations connecting Donald Trump to Russians circulated prior to the 2016 presidential election but didn’t become public until BuzzFeed published it in January 2017. While some facts were confirmed, other more salacious allegations were not. The publication sparked debate among journalism ethicists about whether it was appropriate to publish. Two individuals have sued BuzzFeed for libel as a result of the publication. In February 2017, Aleksej Gubarev, CEO of the web company XBT, [filed a libel lawsuit against BuzzFeed](#) and editor Ben Smith in Broward County, Florida. In January 2018, Michael Cohen, President Trump’s longtime personal attorney, [filed a libel lawsuit](#) against BuzzFeed in federal court in the Southern District of New York.

*Trump orders investigations into leaks:* President Donald Trump demanded action by his Justice Department against leakers, and the number of leak investigations during Trump’s first year as president skyrocketed. [Leaks that outraged Trump](#) included those that reported details of his conversations with foreign leadkers. In November 2017, Attorney General Jeff Sessions said [27 investigations were open](#) into leaks of government information – up for an average of three open investigations per year during the second term of the Obama administration. “We intend to get to the bottom of these leaks,” Sessions told a House oversight committee.

*Reality Winner arrested under Espionage Act:* A 25-year-old Air Force veteran was charged with violating the Espionage Act for [allegedly leaking information](#) from the National Security Agency that provided evidence of Russian hacks computer systems of U.S. elections officials. Within days of a [bombshell story](#) by The Intercept website based on the documents, the Justice Department identified the leaker as Reality Winner, who worked at for a military contractor in Augusta, Georgia. Winner has remained held without bail since her arrest on June 3, 2017. The government identified Winner quickly in part because of information provided by reporters in their attempts to verify the records she allegedly sent to them anonymously. The Intercept’s editors admitted they should have done more to minimize the risks of source exposure and the website’s owner is contributing to Winner’s legal defense. The case drew [widespread attention](#) online, including a social media and legal defense team [@standbyreality](#).

## “Right to Know” and Access Laws

*Right to record police:* The Third Circuit of Appeals in July 2017 joined five other appellate circuits (First, Fifth, Seventh, Ninth, and Eleventh) in ruling that citizens have a First Amendment right to record the police in public places. In *Fields v. City of Philadelphia*, [the appellate circuit overturned](#) a district court ruling that sided against citizens, writing, “Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public.”

*Judge bars reporting from public records:* A Nevada judge [issued a prior restraint against journalists](#) from publishing information on autopsy reports that were released in response to a public records request. The order in February 2018 resulted from the release of autopsy reports of the victims of the Las Vegas Mandalay Bay shootings. While the released reports redacted personally identifiable information, a widow of one victim sued to stop the release. A judge

sided with the widow and [ordered the report to be returned or destroyed](#) and prohibited any reporting based on the document.

*CA public laws cover private email accounts:* The California Supreme Court [unanimously ruled in March 2017](#) that state public records laws apply to public business conducted on private accounts of public officials. In [City of San Jose v. Ted Smith](#), the court ruled that communications of public officials on private devices are public records if "relate in some substantive way to the conduct of the public's business." The case involved a public records request filed by a lawyer and community activist about a redevelopment project in San Jose, which argued that communications on private devices were not covered by the law.

*Actor age ban on IMDb struck down:* A federal judge [struck down a California law](#) in February 2018 that prohibited some websites, such as IMDb, from reporting the ages of actors. In 2016, California passed AB 1687 after lobbying by SAG-AFTRA, a union representing 160,000 actors and media professionals. The law required "commercial online entertainment employment service providers" to remove subscribers' dates of birth upon request from websites ostensibly to limit age discrimination against actors. In [IMDb v. Becerra](#), U.S. district court judge Vince Chhabria granted an permanent injunction on a motion for summary judgment to stop enforcement of AB 1687. The judge ruled that the law was a content-based restriction on speech requiring the application of strict scrutiny and not a regulation of commercial contracts or a commercial speech restriction. "[T]he record provides no evidence that California explored less-speech-restrictive alternatives, like amendment, clarification, or enhanced enforcement of antidiscrimination laws, before imposing this restriction on IMDb's speech," Judge Chhabria wrote. Even if it had, the law still would fail because it is not narrowly tailored and is over inclusive, the judge ruled.

## **Digital Law and Policy**

*Political advertising on social media:* Members of both houses of Congress introduced bills to better police campaign finance laws on social media as a result of [disclosures that Russian agents had purchased thousands of advertising](#) on social media platforms to influence the 2016 presidential election. [The Honest Ads Act](#), proposed in the Senate by Amy Kolbuchar of Minnesota (D), and co-sponsored by Mark Warner of Virginia (D) and John McCain of Arizona (R), and in the U.S. House by Derek Kilmer of Washington (D) and Mike Coffman of Colorado (R), would apply existing campaign-finance laws to online communications and also require social media companies with more than 50 million users to collect information on ad rates, sales and targeting demographics.

*Broadcast deregulations:* The Federal Communications Commission under new chairman Ajit Pai launched several efforts to [scale back regulations](#) for broadcasters during the first year of President Trump's administrations. Among the changes include rolling back rules preventing the cross ownership of newspapers and radio and television stations in the same markets; lifting caps on how many broadcast stations a single company can own; and removing rules that require broadcast television station owners to operate a main studio in each locality.

*Net neutrality:* The Trump administration's [rollback of net neutrality regulations](#) have sparked litigation and legislative actions. "Net neutrality" is the concept that internet service providers must treat all web traffic equally and cannot charge different rates for different content or users. Net neutrality was codified into law by the Obama administration, but the Trump administration reversed those regulations. In 2018, 23 state attorneys general filed a lawsuit to block the change, and five states passed laws prohibited ISPs from violating net neutrality principles in state business. Democrats in Congress also introduced legislation to reverse the Trump administration's net neutrality rollback.

## **Culture Wars on College Campuses**

(notes below from forthcoming article: Jason M. Shepard and Kathleen Bartzen Culver, "Culture Wars on Campus, Academic Freedom, the First Amendment and Partisan Outrage in Polarized Times," *San Diego Law Review*, February/March 2018)

*Campus protests:* The University of California, Berkeley, became a particularly notable hotspot when violent protests erupted in response to the appearance of alt-right figure and firebrand provocateur Milo Yiannopoulos. In February 2017, CNN carried live dramatic video showing [large fires on the Berkeley campus](#) started by leftist protestors that caused more than \$100,000 in damage. Critics blasted the university for not arresting more of the protestors and lawbreakers. On Twitter, President Donald Trump threatened to revoke federal funding from UC Berkeley after violence erupted on campus in response to a visit from Yiannopoulos. Conservative writer Ann Coulter had an event cancelled at Berkeley as a result of planned protests. In part as a response to criticism, new Berkeley Chancellor Carol T. Crist [announced 2017 as the "Free Speech Year"](#) at the university.

*Free speech zones:* At Pierce College in Los Angeles, student Kevin Shaw [filed a lawsuit](#) after being prohibited from passing out the U.S. Constitution in Spanish outside of the campus's free speech zone, which comprises just 616 square feet of the 426-acre campus. The Los Angeles Times editorialized, "when a public college or university squeezes the expression of political views into a tightly circumscribed area, it not only undermines its commitment to the free exchange of ideas; it runs afoul of the 1st Amendment." Universities have often backpedaled on these policies after legal challenges.

*Congressional bills:* At the federal level, both the House and Senate [held hearings in 2017](#) to examine the state of campus free expression and consider proposed legislation to better enforce free speech principles on university campuses. In the House, several bills were advocated for adoption at an April 2017 hearing of the House judiciary committee. Greg Lukianoff, president and chief executive officer of the Foundation for Individual Rights in Education (FIRE) urged Congress to pass the Campus Anti-Harassment Act, a bill requiring campuses to align anti-harassment and anti-discrimination policies with the legal standards from the Supreme Court's 1999 decision in *Davis v. Monroe County Board of Education*. Second, he also urged Congress to pass a bill titled the Campus Free Expression Act, limiting universities' use of free-speech zones. Third, he urged Congress to pass a federal New Voices Act, protecting student journalism on campuses from censorship and punishment. Stanley Kurtz, senior fellow at the Ethics and Public Policy Center in Washington D.C., outlined the Goldwater Institute's proposal for state

legislative action and called on Congress to require universities to protect student speech and association rights, such as the proposals FIRE advocated, as a condition of federal funding. In the Senate hearing in June 2017, Senator Chuck Grassley (R-Iowa), chair of the Senate of Judiciary, said that recent events show that “those who would curtail free speech have been emboldened,” and those who might challenge orthodoxies have been chilled into silence.

*Student Whistleblower Protection Act:* In wake of the suspension of a community college student for disseminating a video of his instructor making negative comments about President Trump’s election, the California State Legislature considered SB 677, titled the Student Whistleblower Protection Act. The bill was introduced by Republican Sen. John Moorlach, which would have added a provision to the state education code stating that it is not a violation of the policy if the recording is done by someone who reasonably believed the activities violated federal, state, or local laws or policies. A legislative summary of the bill from the Senate Judiciary Committee noted opposition from multiple education associations that believed the bill would “contribute to a chilling effect on free speech in the classroom.” In opposing the bill, the California Scholars for Academic Freedom said it feared the bill “is an attempt to change the environment of free exchange of ideas in the classroom” and would “foster an unnecessarily adversarial relationship between students and faculty.” [The bill died in committee](#) in April 2017 after failing to get the requisite support to move forward.

*“New Voices” Laws:* Several states in 2017 passed legislation giving students First Amendment rights in public schools as part of a campaign by the Student Press Law Center called “New Voices.” Fourteen [states now provide explicit legal protections](#) for free expression for students, negating some of the effects of the 1988 *Hazelwood v. Kuhlmeier* decision. In 2017, states that passed New Voices legislation included North Dakota, Nevada, Rhode Island and Vermont. Legislation is pending in several states in 2018.