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From Bloggers in Pajamas to the Gateway Pundit

How Government Entities Do and Should Identify Professional Journalists for Access and Protection

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One of the potential impediments to having the government grant special access or protection to "the press" is identifying who counts as a journalist. Over the past few decades, changes in digital technology have dramatically lowered barriers to entry for those who gather and publish information or provide commentary.[1] One news scoop might appear in *The New York Times* while the next might come from the proverbial blogger in pajamas who is breaking news from bed. As we learned when a teenager in Minneapolis recorded the police murder of George Floyd in 2020,[2] images recorded by ordinary citizens and posted on social media can spark reform and even catalyze a social movement.

If these changes in who reports news and how it is disseminated mean that everyone is "the press,"[3] or at least that it is impossible to identify today who counts as "the press," then any system of press exceptionalism that grants professional journalists special access or privileges is doomed to fail as potentially unconstitutional for being arbitrary or discriminatory.[4]

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[1] On the rise of this "cheap speech," *see* Richard L. Hasen, Cheap Speech: How Disinformation Poisons Our Politics – and How to Cure It (2022).

[2] Rachel Treisman, *Darnella Frazier, Teen Who Filmed Floyd's Murder, Praised for Making Verdict Possible*, NPR (Apr. 21, 2021, 11:15 AM), https://www.npr.org/sections/trial-over-killing-of-george-floyd/2021/04/21/989480867/darnella-frazier-teen-who-filmed-floyds-murder-praised-for-making-verdict-possib [https://perma.cc/EV4B-QEBA].

[3] *See* Timothy E. Cook, *Freeing the Presses: An Introductory Essay*, in Freeing the Presses: The First Amendment in Action 1, 8 (Timothy E. Cook ed., 2005) (explaining one view of the Press Clause as that "all individuals have a right to disseminate their viewpoints for general consideration").

[4] Arbitrary government conduct potentially violates the Due Process Clause of the Fifth and Fourteenth amendments. *See infra* note 58 (discussing *Dunleavy* case).

In fact, despite two decades of pajama-wearing bloggers and even with billions of TikTok, X, Facebook, Instagram, and other social media users regularly posting audio, video, photos, and text, government entities continue to generally have little trouble differentiating between professional journalists – those who regularly gather, report, and disseminate information to the public – and others. Government entities regularly identify members of the press. They do so in order to grant them special access to court proceedings, emergency scenes such as fires or riots, the White House, and government briefings; to give them a special "shield" against testifying in court or turning over evidence about conversations with others gathered in the process of reporting; and to grant them exceptions from other rules applicable to others, such as the usual disclosure and other campaign finance rules that apply to those who disseminate candidate speech in cooperation with candidates.

These special press privileges are rarely subject to successful litigation, at least so far as is evident through reported court cases. And they tend to protect professional journalists, as they are the ones most often and likely fulfilling the core functions of the press in educating the public and checking the government for excess, corruption, and incompetence.[5]

The biggest problem today for this type of "press exceptionalism" is not distinguishing between those who occasionally make or report news and those who do it as a profession. Government entities seem more than competent to draw those distinctions in ways that the courts have permitted. Instead, it is figuring out how to deal with those who are professional *faux* journalists: They act as though they are following journalistic standards and reporting the news, but they regularly and intentionally distribute false information for profit or political reasons or both. The

This argument is separate from the constitutional question whether, assuming it is possible to rationally identify "the press," giving preferential treatment to the press over others who gather or share information violates the First Amendment or the Equal Protection Clause of the Fifth and Fourteenth Amendments. For example, Professor Eugene Volokh argues that the Press Clause in the First Amendment protects the press as a technology rather than as an industry. Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology? From the Framing to Today*, 160 U. Pa. L. Rev. 459 (2012); *but see* Sonja R. West, *The "Press," Then & Now*, 77 Ohio St. L.J. 49 (2016) and Sonja R. West, *Press Exceptionalism*, 127 Harv. L. Rev. 2434 (2014).

It might be argued (although Professor Volokh has not argued) that press exceptionalism violates the Equal Protection Clause for treating professional journalists better than others. This point was suggested by the Supreme Court in Citizens United v. Federal Election Commission, 558 U.S. 310, 352 (2010), which rejected a federal limitation on corporate spending on speech promoting candidates in elections but one that exempted media corporations. For a response, *see* Sonja R. West, *Favoring the Press*, 106 Calif. L. Rev. 91 (2018). I do not delve into this separate question in this chapter.

[5] Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. Rev. 1025, 1069–70 (2011) ("I suggest that the press fills two primary roles that go beyond the values served by our basic free speech rights. The first is that the press gathers and conveys information to the public about newsworthy matters; and the second is that the press serves as a check on the government by conveying information to the voters about 'what [their] Government is up to.'" (internal citation omitted)).

question of how to treat sources like the website The Gateway Pundit that produce "real 'fake news'" – "fabricated stories designed to achieve particular ends, whether of political strategy or financial gain or both,"[6] – threatens the continued vitality of press exceptionalism.

This chapter examines how government entities determine who is a journalist to allocate resources under conditions of scarcity and ensure that the press can conduct their functions without undue government regulation and interference. Using a new data set of 172 laws, rules, and procedures that different government entities have used to define the press, Section 17.1 describes the most common tests government entities employ to identify journalists and compares them to each other. Although the definitions and tests differ in their particulars – and some rules simply say they apply to "journalists," "news media," or similar such terms without further definition – most of the definitions appear aimed at identifying the class of professionals who regularly gather, report, and disseminate news.

Section 17.2 describes the relatively rare reported litigation around these press-defining rules, teasing out the potential dangers of relying on particular definitions of journalists. Much of the litigation easily distinguishes between professional and nonprofessional journalists, and a few cases have dealt with the exclusion of journalists for permissible reasons, such as disruptive behavior. But not every issue is easy. Using the example of litigation over Maricopa County, Arizona's decision to exclude a faux journalist for The Gateway Pundit from an area where ballots were being tabulated following the 2022 elections, Section 17.2 focuses particularly on the line between unconstitutional viewpoint discrimination and permissible extension of the press exemption only to those who engage in legitimate professional journalism.

Section 17.3 then makes four normative recommendations about the tests government entities *should* use to define journalists. First, government entities should have explicit and meaningful standards for press exceptionalism. Entities should produce a set of written rules that are easily accessible and fairly applied. Second, most press exceptionalism should be limited to professional journalists who regularly produce news stories or commentary. It should not apply to the occasional blogger or poster on social media who is not regularly gathering, reporting, and disseminating news. Third, applicability of press exceptionalism should not turn on the type of technology, such as the use of digital technology, used to disseminate content. Fourth, and most controversially, government entities should continue to have the power to grant press exceptionalism to "bona fide correspondents of repute in their profession"[7] (a standard incorporated into some government press policies) so long as they do not engage in viewpoint discrimination. The key here is to exclude those who

[6] Lili Levi, *Real "Fake News" and Fake "Fake News,"* 16 First Amend. L. Rev. 232, 248 n.55 (2018).

[7] *See infra* Sections 17.3 and 17.4.

violate basic journalism norms by having no track record of consistently gathering, reporting, and disseminating truthful information or with a track record of consistently and intentionally reporting and disseminating empirically verifiable false claims as true.

The normative standards I suggest are consistent with the reasons for press exceptionalism: The press plays socially important functions in providing citizens, voters, and others with valuable information and checking the power of government. Rules should assure preferential access for professional journalists, regardless of the medium in which they work, who are most likely to fulfill these functions, without giving a government entity the opportunity for viewpoint discrimination among the class of professional journalists. The most difficult questions concern how to deal with faux journalists without slipping into viewpoint discrimination.

17.1 THE PRINCIPLES AND PRACTICES OF GOVERNMENT PRESS DEFINITIONS

17.1.1 *The Purposes of Defining the Press: Allocating Scarce Resources and Protecting the Press Function*

The two primary reasons why government entities recognize press exceptionalism are allocation of space or other resources under conditions of scarcity and crafting exceptions to generally applicable rules so that the press can do its job unfettered by government regulation and limits.

Scarcity. Not everyone who wants to attend oral arguments in person at the U.S. Supreme Court can get in. There are three lines for attendance: one for lawyers who are admitted to the bar, another for the general public, and a third for people who are guests of the justices. There is a separate admission procedure for those who are credentialed members of the press. There are 439 seats, with 50 allocated to the public and 36 allocated to the press.[8]

The Supreme Court maintains a press gallery in the courtroom where note taking and artist sketching is permitted. Access requires a Supreme Court "hard pass" or "day pass" issued by the Public Information Office (PIO).[9] Members of the press get additional access to other parts of the Supreme Court building. The Court maintains a pressroom and even has limited space for audio and video broadcasts.

[8] Amy Howe, *Courtroom Access: The Nuts and Bolts of Courtroom Seating – and the Lines for Public Access*, SCOTUSblog (Apr. 1, 2020, 1:06 PM), https://www.scotusblog.com/2020/04/courtroom-access-the-nuts-and-bolts-of-courtroom-seating-and-the-lines-to-gain-access-to-the-courtroom/ [https://perma.cc/3C6N-54TG].

[9] *The Public Information Office*, U.S. Sup. Ct. 5–6, https://www.supremecourt.gov/publicinfo/PIOServices.pdf [https://perma.cc/WM3H-LE9N].

The Court has issued three single-spaced pages of rules and four pages of commentary for obtaining the two types of press passes.[10] The Court revised the rules in 2015 "to address changes in the journalism profession."[11] Early in its set of rules, the Court's PIO explained its goals and the scarcity constraint it faces:

> The PIO's seven-member staff must carefully allocate the limited space and resources available for press usage. The Courtroom has a limited number of seats set aside exclusively for the media, and the press room has 18 carrels for the media's use. To ensure efficient allocation of space and resources, the PIO has traditionally reserved hard passes for full-time professional journalists employed by media organizations that have records of substantial and original news coverage of the Court and a demonstrated need for regular access to the Court's press facilities. The PIO makes no assessment of the content or quality of a journalist's coverage in the credentialing process. But because the Court's fundamental function is adjudication of important issues, the PIO must ensure that press credentialing does not create any appearance of partiality or unfair advantage among litigants or attorneys engaged in the Court's judicial processes. And because a press credential provides access to non-public spaces, the PIO must also be attentive to security concerns.[12]

The Supreme Court is not the only government entity that must deal with scarcity. To consider a few other common examples, the U.S. Department of Defense limits access to the Pentagon and nearby buildings only to approved journalists who apply, provide evidence that they are working as journalists with a bona fide need for access, and undergo a "security-awareness briefing."[13] The city of Chicago limits "access to areas reserved for the news media for the purpose of gathering and editing spot news or photographing news events"[14] while the Riverside County Fire Department in California asks members of the press to wear press credentials if they are not otherwise easily identifiable as members of the press, such as through the presence of a television news van. "We realize that you have a job to do, and we will help facilitate that as long as you are not in the way of our operation. We know that you want to cover the story, not become a part of the story . . . Generally, you will have unlimited access to an emergency scene. The only reason a fire department in

[10] *Requirements and Procedures for Issuing Supreme Court Press Credentials*, U.S. Sup. Ct., https://www.supremecourt.gov/publicinfo/press/Media_Requirements_And_Procedures_Revised_071023.pdf [https://perma.cc/GZL7-7S8W]; *Commentary*, U.S. Sup. Ct., https://www.supremecourt.gov/publicinfo/press/Media_Credential_Commentary_February_2015_mod.pdf [https://perma.cc/99ZC-3EU8].

[11] *Requirements and Procedures for Issuing Supreme Court Press Credentials*, *supra* note 10, at 1.

[12] *Id.*

[13] *For the Media: Badges & Passes*, U.S. Dep't of Defense, https://www.defense.gov/Resources/For-the-Media/ [https://perma.cc/XHR5-UB5A].

[14] Chi., Ill., Municipal Code § 4-328-010 (2023), https://codelibrary.amlegal.com/codes/chicago/latest/chicago_il/0-0-0-2638039 [https://perma.cc/8F9T-DHV2].

California can limit the media's access is to prevent the media from interfering with the firefighters ability to do their job."[15]

Exceptions to Generally Applicable Rules. Sometimes a government law or policy will define the press not to secure access to a scarce resource but instead to exempt news media from otherwise generally applicable laws that, if applied to news media, could interfere with the press functions of informing the public and providing a check on government.

The most common example of these rules are media "shield" laws, which give the media a privilege against testifying about certain information, such as confidential sources. For example, under West Virginia law,

> No reporter may be compelled to: (1) Testify in any civil, criminal, administrative or grand jury proceeding in any court in this state concerning the confidential source of any published or unpublished information obtained by the reporter in the course of the above described activities without the consent of the confidential source, unless such testimony is necessary to prevent imminent death, serious bodily injury or unjust incarceration; or (2) Produce any information or testimony that would identify a confidential source, without the consent of the confidential source, unless such testimony or information is necessary to prevent imminent death, serious bodily injury or unjust incarceration.[16]

But laws protecting the press function go far beyond media shields. For example, the Federal Election Campaign Act imposes certain disclosure requirements and limits on corporate activity for those who make "expenditures" in relation to federal campaigns. The term "expenditure" is defined very broadly to include "anything of value, made by any person for the purpose of influencing any election for Federal office."[17] However, applying the expenditure rules to media activities could ensnare news reporting and editorial writing into the realm of campaign finance law. Simply spending resources reporting and writing about a candidate running for federal office could count as an expenditure if it is intended to help the public decide whether the candidate is fit for office.

For this reason, the same law exempts from the definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."[18]

Congress enacted this press exemption to generally applicable campaign finance laws because it did not intend to "limit or burden in any way the First Amendment

[15] *Public Affairs and Community Education Bureau: Additional Resources*, Riverside Cnty. Fire, https://www.rvcfire.org/about-us/pio [https://perma.cc/9SZM-YBA9].
[16] W. Va. Code § 57-3-10(b) (2024).
[17] 52 U.S.C. § 30101(9)(A)(i) (2024).
[18] *Id*. § 30101(9)(B)(i).

freedoms of the press and of association." The exemption "assures the unfettered right of the newspapers, TV networks, and other media to cover and comment on political campaigns."[19]

Likely for similar reasons of not interfering with the press function, government entities sometimes exempt the press from definitions of lobbying. For example, Michigan law exempts from the definition of "lobbyist" a "publisher, owner, or working member of the press, radio, or television while disseminating news or editorial comment to the general public in the ordinary course of business."[20]

To consider one more example, an Oregon law regulating the types of mail that may be sent and received by patients in state institutions exempts "journalist mail" from certain restrictions, which the law defines as:

> Any mail sent by a patient to a news media organization such as, but not limited to a newspaper, a magazine and a television station's news department, or sent to a patient from a news media organization, and which is clearly labeled "journalist mail" on the addressee side of the envelope, set apart from the return and mailing addresses for ease of recognition, and where the news media organization is verifiable.[21]

Sometimes, government entities enact rules that have the effect of subsidizing the press function. For example, the Federal Communications Commission has a set of detailed rules for determining how to respond to requests for documents under the Freedom of Information Act. These rules are derived from Congress's FOIA rules contained in a federal statute, including a requirement to treat news media more favorably than the general public when it comes to public records requests.[22] The agency charges fees to search for documents and also fees for "review" of documents by government employees to determine if such documents are exempt from disclosure under complex FOIA rules. Charges for such document "review" apply to any "commercial use request," a definition which otherwise could cover journalists who work for press entities (at least those press entities that run for-profit). The FCC rules, however, exempt from the definition of "commercial use" requests made by the news media.[23] This exemption means the government bears the cost of reviewing FCC documents sought by the news media, but other commercial enterprises pay for such document review.

[19] H.R. Rep. No. 93-1239, at 4 (1974).
[20] Mich. Comp. Laws Ann. § 4.415(7)(a) (West 2024).
[21] Or. Admin. R. § 309-102-0110(13) (2024).
[22] *See* 5 U.S.C. § 552(a)(4)(A) (2024). *See also* Price v. Garland, 45 F.4th 1059, 1075 (D.C. Cir. 2022) (rejecting challenge to fee requirements for commercial filming on National Park Service land that includes exceptions for, among other things, filming by the news media).
[23] *See* 47 C.F.R. §0.466(a)(4) (2024); *see also id.* §0.467 (2024). On the potential problems with the FOIA's dysfunction being driven by non-journalists inundating government agencies with requests, *see* Margaret B. Kwoka, Saving the Freedom of Information Act (2021).

17.1.2 *Examples of How Government Entities Define the Press*

Government officials must implement any rules providing for press exceptionalism, meaning that government officials must somehow identify who counts as the press for purposes of the relevant rule. As we will see, some laws, rules, and regulations do not define who counts as a journalist, leaving significant discretion in the hands of government officials. But most rules do offer some definitions or criteria.

Consider again the Supreme Court, which has particularly detailed and onerous rules given a situation of both great demand and a stark scarcity of space. To qualify for a Supreme Court press "hard pass" – which provides the greatest access and privileges to the Court – an applicant must be a "full-time journalist" who "operates or is employed by a media organization, and the applicant's primary professional work is for the media organization through which the applicant seeks a hard pass." Further, the "applicant or the applicant's media organization [must have] a record of substantial and original news coverage of the work of the Court" and the applicant must attest that he or she "will be present at the Court regularly for reporting purposes." Even meeting those requirements is not enough. The applicant cannot "practice law before the Court and [must be] independent of individuals and entities that practice law before the Court" and cannot have been a Court employee for the prior two years.[24]

Perhaps because these rules come from an institution with leaders and a staff comprising elite lawyers, the "Commentary" to the Supreme Court's rules provides additional guidance. For example, "We expect that an applicant will normally be able to satisfy the 'full-time journalist' requirement through the affirmation of the applicant's employer or supervisor. To determine whether this requirement has been satisfied, we may also ask applicants if they hold active press credentials from another government entity, such as the Congressional or White House press galleries."[25] And on the question of "substantial and original" news coverage of the Court, the commentary provides:

> Journalists and organizations with records of substantial and original coverage of the Court are more likely to disseminate information about the Court's work to the public. This requirement may be satisfied by documentation of past reporting. For journalists who have not previously covered the Court, the requirement may be

[24] *Requirements and Procedures for Issuing Supreme Court Press Credentials*, *supra* note 10, at 2. The rules are somewhat more lax for getting a (less valuable) "Day Pass":

> Day Passes. To qualify for a day pass, an applicant must demonstrate:
>
> The applicant is a journalist affiliated with a media organization or, as space allows, a writer who is not affiliated with a media organization; and
>
> The applicant has a need to report from the Court on, or to observe, a particular Court session.
>
> Exceptions. Applicants may be relieved of the need to meet the requirements listed above when necessary to address new or unanticipated situations, to prevent undue hardship, or to ensure fairness in the application of these requirements.

Id.

[25] *Commentary*, *supra* note 10, at 1.

> satisfied if the applicant's media organization – rather than the applicant – has regularly published substantial and original reporting about the Court.[26]

For its October 2023 term, the Supreme Court reported that there were twenty-three hard pass holders (and two artists). All the hard pass holders were from major news outlets, like the Associated Press and the Washington Post, except for one: Amy Howe, of the Howe on the Court website and, much more prominently, of the widely respected SCOTUSblog website.[27] Indeed, it was the status of SCOTUSblog's reporters that led the Supreme Court to revise its rules in 2015. Howe's husband and SCOTUSblog co-founder, Tom Goldstein, was a regular Supreme Court practitioner. No doubt this circumstance led the Court to adopt the criterion of journalistic independence from lawyers appearing before the Court as a prerequisite to a Supreme Court hard pass.[28]

Similarly, the Federal Election Commission (FEC) has provided guidance through its regulations and advisory opinions on the applicability of the media exemption. One regulation expands on the statutory provision exempting costs incurred by news media as an "expenditure," which was written in 1974 as part of amendments to the Federal Election Campaign Act.[29] The regulation explicitly expands statutory language to cover newer forms of media not in existence when Congress crafted the press exemption:

> Any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), *website*, newspaper, magazine, or other periodical publication, *including any Internet or electronic publication*, is not an expenditure unless the facility is owned or controlled by any political party, political committee, or candidate, in which case the cost for a news story:
>
> (a) That represents a bona fide news account communicated in a publication of general circulation or on a licensed broadcasting facility; and
>
> (b) That is part of a general pattern of campaign-related news account that give reasonably equal coverage to all opposing candidates in the circulation or listening area, is not an expenditure.[30]

[26] *Id.*

[27] *Hard Pass Holders for the October 2023 Term*, U.S. Sup. Ct., https://www.supremecourt.gov/publicinfo/Hard_Pass_List_OT_23.pdf [https://perma.cc/W4GA-KESX].

[28] For more on the SCOTUSblog controversy, *see* Richard L. Hasen, Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections 142 (2016); Sam Hananel & Mark Sherman, *Supreme Court Notebook: SCOTUSblog Denied Press Credential*, Associated Press (Feb. 9, 2015, 6:42 PM), https://apnews.com/article/bb8e6893b47c44b38a46fbf47bc96d5c [https://perma.cc/2662-J5ZA].

[29] The statute, currently codified at 52 U.S.C. § 30101(9)(B)(i) (2024), exempts from the definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."

[30] 11 C.F.R. § 100.132 (effective Mar. 1, 2024) (emphasis added); *see also id.* § 100.73 (effective Mar. 1, 2024) (similar exemption to Federal Election Campaign Act definition of "contributions").

Federal Communications Commission regulations, in exempting news media from costs of reviewing documents requested under FOIA, similarly recognize that technology advances affect the definition of "news media." It lists examples of the news media, entities such as:

> television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase or subscription by, or free distribution to, the general public. These examples are not all-inclusive. Moreover, *as methods of news delivery evolve (for example, the adoption of electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities.*[31]

One of the more entertaining examples of an FEC advisory opinion discussing the scope of the press exemption concerned comedian Stephen Colbert's creation of a "super PAC" (called "Americans for a Better Tomorrow, Tomorrow"), which he used to criticize campaign finance rules as part of his television show, "The Colbert Report." The show appeared on the Comedy Central cable television channel owned by a corporation, Viacom. Colbert asked the FEC whether he could engage in certain political activities under the press exemption despite Viacom's status as a corporation and given spending limits then in effect on corporations. In a lengthy opinion, the FEC applied its earlier precedents, cited congressional legislative history in creating the press exemption, and considered court cases in concluding that some of the activities proposed by Colbert and to be funded by Viacom would fall under the press exemption and other activities would not.[32]

The Supreme Court and the FEC apply very different criteria in defining who can benefit from press rules, in part because the Supreme Court must deal with

[31] 47 C.F.R. §0.466(a)(7) (emphasis added). The full subsection reads:

> The term representative of the news media refers to any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. In this clause, the term news means information that is about current events or that would be of current interest to the public. Examples of news-media entities are television or radio stations broadcasting to the public at large and publishers of periodicals (but only if such entities qualify as disseminators of news) who make their products available for purchase or subscription by, or free distribution to, the general public. These examples are not all-inclusive. Moreover, as methods of news delivery evolve (for example, the adoption of electronic dissemination of newspapers through telecommunications services), such alternative media shall be considered to be news-media entities. A freelance journalist shall be regarded as working for a news-media entity if the journalist can demonstrate a solid basis for expecting publication through that entity, whether or not the journalist is actually employed by the entity. A publication contract would present a solid basis for such an expectation; the Commission may also consider the past publication record of the requester in making such a determination.

[32] Fed. Election Comm'n, Advisory Opinion 2011-11 (June 30, 2011), https://www.fec.gov/files/legal/aos/2011-11/AO-2011-11.pdf [https://perma.cc/V57P-3C4G].

conditions of physical scarcity – only so many people can be present in the courtroom to watch the facial expressions and gestures of the justices, lawyers, and others – while there is no limit under FEC rules on how many entities and persons may be entitled to an exemption from generally applicable campaign finance laws. But the FEC is concerned that companies that own media but are not engaging in press functions in relation to certain election-related activities may try to use the exemption. It therefore must draw sensible and administrable lines to protect the press function while not allowing the exception to swallow up all of campaign finance law.

More generally, there are many ways to define the press, driven in part by the reasons for the definitions. For example, there is a legitimate government interest in keeping people away from an active fire scene. But it is also important that the government allow a limited number of qualified people access to the scene to provide the public with valuable and accurate reports about the conditions at the scene of the emergency. Likewise, allowing every blogger or Instagram poster to claim the media shield would end compelled testimony in court, which is vital for the courts' role in determining truth. But giving professional news media a shield from testifying in court is also a good thing because it enables the press to protect confidential sources who provide information valuable to the public.

17.1.3 *An Empirical Look at How Government Entities Define the Press*

Here, I offer the first systematic analysis of how government entities define the press.[33] Thanks to the great efforts of a team of UCLA Law researchers led by Sherry Leysen and Sam Hall, we have compiled a database of 172 examples of government entities defining the press for one government purpose or another, and we have categorized how the government entities have done so.

The research team found the examples of government rules that define the press through a variety of searches of electronic databases including Westlaw, Google searches, and examinations of government entity websites.[34] The database is not comprehensive – for example, it leaves out some redundant rules concerning FOIA requests and similar procedures under state and local law – but does cover a wide spectrum of federal, state, and local government entities including agencies, courts, and police and fire departments. A methodological appendix, posted online,

[33] Before this study, Professor Sonja West offered numerous helpful examples of press exceptionalism contained in various state and federal statutes. *See* West, *supra* note 5, at 1062–68. West provided four general categories: "Medium of Communication or News Affiliation," "News-Related Activities," "Circulation or Regularity of Publication," and "Wage Earning or Livelihood." *Id*. The current study offers more examples, and not just of legislatively enacted rules.

[34] The database, including explanations of coding, is posted at https://electionlawblog.org/wp-content/uploads/Hasen-Journalist-Definitions-Database-as-posted.xlsx [https://perma.cc/A49W-G96J].

describes in greater detail the methodology for identifying and classifying these rules.[35]

The major categories of rules in the 172-item database are: media shield laws and privileges (63 examples), media credentialing (27 examples), rules related to obtaining public records (24 examples), rules for student journalists (19 examples), rules related to emergencies or public safety (12 examples), and lobbying or campaign finance rules (8 examples).

Of the 172 rules, 95 expressly provide a definition or definitions of "the press" or a variant on the term and 112 (partially overlapping with the first group of rules) define "journalist" or a variant of the term. Consider, for example, the detailed rules for media accreditation at NASA. Its main rule provides access for "Professional News Media." It provides:

> Applicant must be employed or performing work on behalf of such news-gathering and distribution organizations as: newspapers, magazines, trade newsletters, television and radio stations, independent production companies with approved projects, and internet news sites. To be given NASA media credentials, individuals from these organizations must be full or part-time professional media (i.e. receive external payment for researching and reporting news/commentary/analysis/informational content). Media must report for the outlet they are credentialed under. Individuals not employed by such organizations will be considered freelancers.[36]

Subsidiary rules govern accreditation by freelancers as well as for determining which internet organizations can qualify for the media accreditation. Among other things, applicants from internet organizations must show they are more than content aggregators, that content on the organization's website is "accurate and updated regularly," that content is "not solely to sell a product or service separate from the news/commentary/analysis/information," that content "is not solely available and distributed on social media platforms, including, but not limited to blogs," and that the "website exercises editorial oversight (i.e. runs corrections, updates)."[37]

Of the 172 rules in the database, 33 define neither a journalist nor the press. However, some of these 33 rules still require some proof that the applicant is working as a professional journalist. For example, the U.S. Department of State does not define explicitly who is a journalist for the purpose of issuing a foreign individual a press pass. But the application process asks the applicant for, among other things, the name of the journalist's organization, "a short (2–4 sentence) biography describing your work and experience as a journalist," the "type of

[35] The methodological appendix is posted at https://electionlawblog.org/wp-content/uploads/Journalists-and-The-Press-Methodology-as-posted.pdf [https://perma.cc/NE3Q-4SNB].

[36] Brian Dunbar, *NASA Agencywide Media Accreditation Policy*, NASA (Apr. 7, 2023), https://www.nasa.gov/general/nasa-agencywide-media-accreditation-policy/ [https://perma.cc/7DXW-W92E].

[37] *Id*.

Media (magazine, newspaper, TV, radio, online, news agency, other)," the media's audience size and its website address, "an original letter addressed to the State Department's Foreign Press Centers . . . from the director of the media organization for which you work, written in English, on the organization's letterhead, and dated no more than 30 days prior to your application, confirming the details of your assignment to the United States," and "three articles, images, or other media produced by the applicant and run by foreign news organizations within the last sixty days that credit the applicant."[38]

A few rules leave the issue of determining who is a journalist in the hands of a government employee without much guidance and without recognition of changing technology. Consider Ohio's media shield statute, which allows nondisclosure of sources by a "person engaged in the work of, or connected with, or employed by any newspaper or any press association for the purpose of gathering, procuring, compiling, editing, disseminating, or publishing news."[39] Aside from the vagueness of terms such as being "connected with" a newspaper, how broadly should the term "newspaper" be read? Ohio judicial precedent suggests quite narrowly. A 1960 Ohio court case held that the statute did not include "periodicals" such as the Dun & Bradstreet financial reports.[40] The case is old but appears to remain good law. I have found no reported Ohio cases considering whether this privilege applies to full-time, online-only political websites or blogs, for example, if

[38] *Foreign Press Center Media Credential Application Guidelines (Washington, D.C.)*, U.S. Dep't of State, https://www.state.gov/foreign-press-center-media-credential-application-guidelines-washington-dc/ [https://perma.cc/5EP6–7C7A].

[39] Ohio Rev. Code Ann. § 2739.12 (West, Westlaw through File 18, 135th Gen. Assemb. 2023–24).

[40] Deltec v. Dun & Bradstreet, Inc., 187 F. Supp. 788 (N.D. Ohio 1960). For cases raising similar questions about how broadly to construe statutory language protecting journalists, especially in light of changing technology, *see* Toll v. Wilson, 453 P.3d 1215 (Nev. 2019); Gubarev v. Buzzfeed, Inc., No. 17-cv-60426, 2017 WL 6547898 (S.D. Fla. Dec. 21, 2017); Forensic Advisors, Inc. v. Matrixx Initiatives, Inc., 907 A.2d 855, 863 (Md. Ct. Spec. App. 2006); Price v. Time, Inc., 416 F.3d 1327 (11th Cir. 2005); *In re* Burnett, 635 A.2d 1019 (N.J. Super. Ct. Law Div. 1993); Cepeda v. Cohane, 233 F. Supp. 465 (S.D.N.Y. 1964).

In Tripp v. Department of Defense, 284 F. Supp. 2d 50 (D.D.C. 2003), a federal court held that a reporter for the newspaper *Stars and Stripes* was entitled to assert a reporter's privilege even though the newspaper was under the control of the U.S. Department of Defense: "both the DOD and Congress intend for the *Stars and Stripes* to operate like other commercial newspapers, and enjoy First Amendment protections and prohibitions. While it is true that *Stars and Stripes* is within DOD control, the legislative history of the National Defense Authorization Act reveals that Congress intended the information gathered by editors and reporters and published in *Stars and Stripes* to be free of interference from the DOD chain of command, provided it is balanced, accurate, and of interest to the readership." *Id.* at 56.

For a good general overview of the history of media shield laws and their status in federal and state courts, *see* 23A Charles A. Wright, Kenneth W. Graham, Jr. & Ann Murphy, Federal Practice and Procedure § 5426 *General Rule – Journalist Privilege* (Supp. 2023). For an early look on how changes in technology should affect who is entitled to assert the journalist's privilege, *see* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 Minn. L. Rev. 515 (2007).

they might be considered "newspapers," similar to when the FEC added websites to the statutory definition of what entities are covered by the campaign finance press exemption.[41]

In looking through the definitions of "journalist," "news media," and the like among the rules in the database, the most common aim appears to be identifying people whose profession is journalism: those who gather, report, and disseminate news as their (full or part-time) jobs. For example, twenty rules in the database require the applicant to list the type of journalist employer for whom they work and/or provide a letter from this employer verifying employment. Eight rules require that the applicant attest or prove independence from lobbyists, with five of those also requiring independence from control of political parties. Seven rules require attestation that the reporting will cover the subject matter relevant to the requester's access (as the Supreme Court rules do), and eleven rules require evidence of the requester's standing or list as a standard the "bona fides" of the journalist or of the produced journalism.

Some of the rules rely at least in part on an external source of authority, such as a committee of journalists that helps police access. Under the rules for admission to the U.S. Senate gallery, a "Standing Committee of Correspondents," elected by those who are already admitted with press privileges into the Senate, determines admission for "bona fide correspondents of repute in their profession." This is a key standard, discussed more fully below.

In making such a showing, applicants for the U.S. Senate gallery must show that they are full-time paid correspondents, that they work for a "news organization" with daily publication and mailing privileges under U.S. Postal Service rules or "whose principal business is the daily dissemination of original news and opinion of interest to a broad segment of the public, and which has published continuously for 18 months."[42] Further,

[41] A separate privilege applies to those "engaged in the work of, or connected with, or employed by any noncommercial educational or commercial radio broadcasting station, or any noncommercial educational or commercial television broadcasting station, or network of such stations, for the purpose of gathering, procuring, compiling, editing, disseminating, publishing, or broadcasting news." Ohio Rev. Code Ann. § 2739.04 (Westlaw). It is doubtful whether this provision would apply to podcasters or others who are professional journalists working in video or audio but who do not work for a radio or television "broadcasting station, or network of such stations."

[42] *Governing Rules*, U.S. Senate Press Gallery, https://www.dailypress.senate.gov/membership/gallery-rules/ [https://perma.cc/PFY9–3USP].

Some government entities engage in bootstrapping, whereby permission to serve as a journalist for one government entity satisfies the conditions for the other. For example, in determining whether someone is a "full-time journalist" for the purposes of the Supreme Court rules, "we may also ask applicants if they hold active press credentials from another government entity, such as the Congressional or White House press galleries." *Commentary*, *supra* note 10. For some criticism of the lack of transparency surrounding the U.S. Senate Gallery's treatment the request for a press credential by SCOTUSBlog's then-reporter, Lyle Denniston, *see* Jonathan Peters, *Why Can't SCOTUSBlog Get a Credential?*, Colum. Journalism Review,

> the applicant must reside in the Washington, D.C. area, and must not be engaged in any lobbying or paid advocacy, advertising, publicity or promotion work for any individual, political party, corporation, organization, or agency of the U.S. Government, or in prosecuting any claim before Congress or any federal government department, and will not do so while a member of the Daily Press Galleries.
>
> Applicants' publications must be editorially independent of any institution, foundation or interest group that lobbies the federal government, or that is not principally a general news organization.[43]

Rules for student media unsurprisingly refer to recognition by the university where the student is engaging in journalism. For example, a Hawaii law protecting student journalists from certain adverse consequences for controversial reporting defines a student journalist as "a student who determines, gathers, compiles, writes, edits, photographs, records, or prepares information or advertising for inclusion in university-sponsored media."[44] The statute also defines what counts and what is excluded from the definition of "university-sponsored media."[45]

17.2 LITIGATION OVER GOVERNMENT PRESS EXCEPTIONALISM

Litigation over who is entitled to press exceptionalism is relatively rare. Of the 172 rules in the database, 136 did not lead to reported decisions over who is entitled to exercise the exemption.[46] This section considers the cases that have led to reported decisions and concludes that they are generally unremarkable and involved people or entities who either are not professionals or are journalists who were excluded from certain press privileges for not meeting certain objective criteria. The exception is the recent case of *TGP Communications, LLC v. Sellers*, which

Apr. 29, 2014, https://www.cjr.org/behind_the_news/why_cant_scotusblog_get_a_credential.php [https://perma.cc/92HR-CL8D].

[43] *Governing Rules*, *supra* note 42.

[44] Haw. Rev. Stat. § 304A-951(h) (2023).

[45] *See id.*:

> "University-sponsored media" means any material:
>
> (1) Prepared, written, published, or broadcast in any media by a student journalist in the university system;
> (2) Distributed or generally made available, either free of charge or for a fee, to members of the student body; and
> (3) Prepared under the direction of a student media advisor, regardless of whether the material is supported financially by the university or by use of facilities of the university or produced in conjunction with a class for which the student is enrolled.
>
> "University-sponsored media" does not include material intended for distribution or transmission for classroom purposes only.

[46] In the database, 36 of the rules were cited in litigation. Two of the rules in the database, listed last, involve courts applying non-statutory (or non-constitutional) standards. Together that makes 38 of the 172 examples involving court decisions.

involved The Gateway Pundit, a far-right outlet known for spreading disinformation. This case raised difficult questions about the line between determining bona fide journalist qualifications and impermissible viewpoint discrimination.

17.2.1 *People or Entities Who Are Not Professionals*

A good number of the cases involve people who are not members of the professional media claiming a press privilege.[47] For example, in *Borden v. Bare*, a federal district court held that Fresno County, California, sheriffs did not violate the constitutional rights of a person who was not a member of the media and who attempted to stand in the "designated media area" around a county courthouse to make a cellphone recording of the courthouse's lobby and security area. She was arrested when she would not leave after being asked to do so. In this case, even the plaintiff did not contend that she was a member of the news media.[48]

Similarly, in *Campaign Legal Center v. Federal Election Commission*,[49] a super PAC supporting Hillary Clinton's presidential campaign argued that it was entitled to the media exemption from limits on campaign contributions to a candidate. The PAC claimed the press exemption because one of the things it did was write op-eds in support of Clinton's candidacy. Treating the matter as self-evident, the district court concluded that the PAC could not qualify for the exemption because the media exemption "is for the media." It held the Federal Election Commission acted in an arbitrary and capricious manner in concluding otherwise.[50]

Along similar lines, a Texas appellate court denied media status to a labor union operating a website. In *Service Employees International Union No. 5 v. Professional Janitorial Service of Houston, Inc.*,[51] a labor union was sued for defamation and other torts by PJS, a janitorial service, for statements made on the union's website. The union regularly communicated through its website, which had over 4,000 visitors

[47] A number of cases concern the question whether as a matter of statutory construction a particular jurisdiction's rule for press exceptionalism could be applied to bloggers or operators of a YouTube video channel. *See* Benvenuto v. Brookman, No. HHD-CV-106119733S, 2020 WL 8024760 (Conn. Super. Ct. Nov. 13, 2020) (blogger not entitled to media shield law where legislature did not intend law to protect bloggers and blog allowed for posting of unedited comments by its subscribers); Green v. Pierce County, 487 P.3d 499 (Wash. 2021), *cert. denied*, 142 S.Ct. 1399 (2022) (not determining whether operator of a YouTube channel constitutes "news media" for purpose of Washington state public records requests because operator YouTube channel did not have a separate legal existence apart from the operator; dissenter would have found operator entitled to be considered news media).

[48] Borden v. Bare, No. 20-cv-01103, 2022 WL 4586231 (E.D. Cal. Sept. 29, 2022). The Ninth Circuit affirmed in an unpublished opinion on qualified immunity grounds. Borden v. Bare, No. 22-16569, 2023 WL 6937410 (9th Cir. Oct. 20, 2023).

[49] Campaign Legal Ctr. v. FEC, 466 F. Supp. 3d 141 (D.D.C. 2020). The case remains ongoing. 646 F. Supp. 3d 57 (D.D.C. 2022), *appeal filed*, No. 22-5336 (D.C. Cir. Dec. 23, 2022).

[50] 466 F. Supp. 3d at 159.

[51] Serv. Emps. Int'l Union Loc. 5 v. Pro. Janitorial Serv. of Hous., Inc. 415 S.W.3d 387 (Tx. Ct. App. 2013).

per day. When the trial court denied the union summary judgment on its claims, it sought to take an interlocutory appeal before the case went to trial. Such an appeal before trial in a defamation case is allowed under Texas law only for members of the news media, including electronic media. The union claimed its website counted as electronic media, but the appeals court disagreed, concluding in an extensive analysis that "although the record establishes that the union publishes information concerning political and social issues to the public through its websites, the record does not establish that the union's primary business is reporting the news or that it was acting in the capacity of a journalist or news reporter in publish[ing] its statements about PJS. Thus, the union does not qualify as a 'member of the electronic media.'"[52]

17.2.2 *Journalists Excluded for Not Meeting Objective Criteria*

Some cases involve journalists who argue that they were improperly excluded from press access.[53] Most of these cases are unsuccessful. In one, a journalist complained that he was being excluded from press conferences held by Chicago's mayor on the grounds that he was asking difficult questions, but the journalist's own evidence showed that his "aggressive and irate" behavior in government offices was the reason for his exclusion.[54]

In *Ateba v. Jean-Pierre*,[55] Simon Ateba, a journalist working for Today News Africa, complained when he and about 500 other journalists lost "hard pass" access to the White House when the White House reinstated an earlier policy requiring that applicants for a hard pass show they held a press credential from the Supreme Court or the press gallery of one of the Houses of Congress. Ateba had some history of interrupting White House press conferences to complain that he was not getting answers to his press inquiries about issues concerning US-Africa relations, and he claimed viewpoint discrimination.

A federal district court rejected his arguments. The court held that the "bona fide correspondents of repute in their profession" standard from the Senate Press gallery

[52] *Id.* at 402.

[53] For cases concerning applicability of a requirement that a journalist be "independent" in some way, *see* Simon v. Northwestern Univ., 321 F.R.D. 328, 331 (N.D. Ill. 2017) (documentary filmmaker who was also an attorney waived Illinois reporter's privilege by joining prisoner's legal team as an attorney); Aberdeen City Council v. Bloomberg, L.P., No. 23 Misc. 70, 2023 WL 5489064, at *5 (S.D.N.Y. Aug. 25, 2023) (personal relationship between journalist Stephanie Ruhle and CEO of company that Ruhle wrote about for Bloomberg did not vitiate Second Circuit's journalist privilege for Ruhle and Bloomberg absent evidence "that Ruhle made any changes to a story at Plank's direction, attempted to circumvent her editors, or sought any special treatment from Bloomberg for Under Armour").

[54] Kelly v. Lightfoot, No. 22-cv-4533, 2023 WL 5720988, at *5 (N.D. Ill. Sept. 5, 2023) ("Based on these facts plead[ed] by Plaintiff, it is implausible that Plaintiff's questions were the reason for his credential revocation. Second, Plaintiff's exhibits and attached evidence demonstrate that Plaintiff's conduct (pushing through Mayor Lightfoot's security team, demonstrating aggressive and irate behavior) was the reason for his credential revocation.").

[55] Ateba v. Jean-Pierre, No. 23-cv-02321, 2023 WL 8469743 (D.D.C. Dec. 7, 2023), *appeal filed*, No. 24-05004 (D.C. Cir. Jan. 11, 2024).

as administered by the Standing Committee of Correspondents (discussed above) imposed professional standards that did not violate the First Amendment. "Importantly, reliance on a professional credentialing body also tends to reduce the risk Ateba apparently fears most – that the White House will discriminate against journalists based on their relationship with the White House."[56]

The *Ateba* case stands in marked contrast to clashes between the Trump White House and journalists Jim Acosta and Brian Karem, both of whom had their hard press passes suspended on grounds of supposedly unprofessional behavior. Federal courts ordered the press passes restored because the White House violated the journalists' due process rights in not providing sufficient notice of the kind of conduct that could merit a suspension.[57] Similarly, in *Alaska Landmine, LLC v. Dunleavy*,[58] a federal district court held that an Alaska governor's decision of who to include in or exclude from press conferences likely violated due process because of the failure of the governor's office to articulate an "explicit and

[56] *Id*. at *26.

[57] *See* Karem v. Trump, 960 F.3d 656 (D.C. Cir. 2020). The Acosta dispute is described at page 661. The Karem incident arose from the following dispute:

> In July 2019, President Trump hosted a Social Media Summit attended by various internet influencers and personalities, including former presidential advisor Sebastian Gorka. At the Summit's conclusion, the President delivered prepared remarks in the Rose Garden, which the White House press corps, Appellee Brian Karem included, covered. Like other reporters, Karem listened to the remarks from a roped-off press area that surrounded the rows of chairs where Summit attendees, including Gorka, sat.
>
> After concluding his remarks, President Trump walked back towards the White House, at which point Karem shouted a question at the President, who ignored it and went inside. Several Summit attendees, however, reacted to Karem's question: one shouted, "He talked to us, the real news," and another said sarcastically, "Don't be sad, don't be sad." Karem smiled, gestured to the attendees, and declared, "This is a group eager for demonic possession." Although several people laughed, Gorka "took it differently." He "turned around in his chair and yelled, 'And you're a 'journalist,' right?' – making air quotes with his hands." As Gorka began to stand, Karem shouted in response, "Hey come on over here and talk to me, brother, or we can go outside and have a long conversation," while motioning backward with his right thumb over his shoulder. Gorka then walked briskly toward Karem, shouting, "Are you threatening me now in the White House? In the Rose Garden? You are threatening me in the Rose Garden?" With the two men now standing face to face, Karem, his voice lowered, stated, "I said I'd be happy to talk to you." Gorka, still yelling, responded, "You are a punk! You're not a journalist! You're a punk!" Gorka then walked away, and, as he did, Karem twice shouted in his direction, "Go home," and then, "Hey Gorka, get a job!"
>
> Several minutes after this initial incident, Karem again encountered Gorka, this time in the White House Palm Room. Placing his hand on Gorka's arm, Karem "tried to explain that, in making his earlier comment, he had only meant that he wanted to talk." "Gorka … disagreed," prompting Karem to repeat, "I said 'talk.'" As staffers began ushering press out of the Palm Room, Gorka repeatedly told Karem, "You're done." Before walking away, Karem tried to shake Gorka's hand, but Gorka refused.

Id. at 662 (citations omitted).

[58] Alaska Landmine, LLC v. Dunleavy, 514 F. Supp. 3d 1123 (D. Alaska 2021).

meaningful standard" for inclusion or exclusion of those seeking press access.[59] The plaintiff was a political blogger who previously was invited to governor press conferences but was then excluded.

17.2.3 *Exclusion of Potentially Faux Journalists Who Are Not "Bona Fide Correspondents of Repute in Their Profession"*

By far the most difficult issue today on the question of press exceptionalism concerns not the line between professionals and nonprofessionals but between professionals who adhere to journalistic standards and faux journalists who are employed to regularly produce real "fake news."[60] In the era of cheap speech, it is easy to produce content that appears to be journalism but in fact complies with no journalistic norms, such as verification of facts, and is instead intentional propaganda shared solely for political motives or profit.[61]

A recent case, *TGP Communications, LLC v. Sellers*, illustrates the problem. In an unpublished order (not citable as precedent under the court's rules),[62] a U.S. Court of Appeals for the Ninth Circuit panel granted an injunction pending appeal to Jordan Conradson, a "reporter" for the website The Gateway Pundit, after Conradson was denied a press pass to observe the counting of ballots after the 2022 midterm elections by Maricopa County, Arizona.[63] Maricopa County rules for issuing a press pass had much in common with other rules covered in this chapter, and the county copied the rules used for press passes by Wisconsin's governor and upheld against First Amendment challenge at the U.S. Court of Appeals for the Seventh Circuit (in a case discussed later in this section).[64] The rules included these requirements:

> e. Is the petitioner a bona fide correspondent of repute in their profession, and do they and their employing organization exhibit the following characteristics?

[59] *Id*. at 1134. *See* also the recent settlement of a case brought by Laura Belin, who operated a political blog in Iowa for seventeen years but was denied a press credential by the Iowa legislature. The credential was first denied for no reason, and then denied on grounds that Belin was not "nonpartisan." As part of the settlement, the legislature removed that criterion. Tyler Jett, *Bleeding Heartland Journalist Wins 50K Settlement in Suit Challenging Press Pass Denial*, Des Moines Register, Apr. 2, 2024, https://www.aol.com/bleeding-heartland-journalist-wins-50k-193247516.html.

[60] *See* Levi, *supra* note 6.

[61] *See generally* Hasen, *supra* note 1.

[62] *See* 9th Cir. R. 36-3(a).

[63] TGP Commc'ns, LLC v. Sellers, No. 22-16826, 2022 WL 17484331 (9th Cir. Dec. 5, 2022), *appeal dismissed*, No. 22-16826, 2023 WL 3698762 (9th Cir. May 1, 2023).

[64] Answering Brief, TGP Commc'ns, LLC v. Sellers, No. 22-16826, 2022 WL 17980262, at *8 (Dec. 19, 2022) ("When creating the Policy, the County did not create a new standard from whole cloth. Instead, the County adopted the Policy essentially verbatim from a press pass policy already used in the Office of the Governor of Wisconsin. As discussed below, the County felt safe adopting this Policy because it had already been examined by the Seventh Circuit and determined to be constitutionally valid." (citation omitted)).

i. Both avoid real or perceived conflicts of interest;
ii. Both are free of associations that would compromise journalistic integrity or damage credibility;
iii. Both decline compensation, favors, special treatment, secondary employment, or political involvement where doing so would compromise journalistic integrity; and
iv. Both resist pressures from advertisers, donors, or any other special interests to influence coverage.[65]

Maricopa County had determined that Conradson did not qualify for a press pass because he and The Gateway Pundit "(a) do not avoid real or perceived conflicts of interest and (b) are not free of associations that would compromise journalistic integrity or damage credibility." And the county found that Conradson is "not a bona fide correspondent of repute in [his] profession."[66]

The Ninth Circuit, stressing the preliminary nature of the review of denial of a temporary restraining order, held that Conradson and The Gateway Pundit would likely succeed on appeal because the county likely engaged in viewpoint discrimination in violation of the First Amendment.[67]

In support of its argument that Conradson had a conflict of interest violating the rules, the county noted that Conradson attended political party events, but it presented no other evidence of conflicts of interest. The Ninth Circuit held that this was insufficient evidence of a conflict.[68] More importantly, the county pointed to what it saw as Conradson's unprofessionalism, demonstrating that he was not a journalist of good repute:

> As part of the application process, Mr. Conradson submitted three links to work examples. Those three articles . . . do little more than proselytize *The Gateway Pundit*'s views. Each article germinates from a news report or press release (such as the County's announcement of Press Pass criteria). Mr. Conradson then expresses an opinion about the news report or press release and supports that opinion by referencing like-minded social media posts, prior articles by *The Gateway Pundit*, and allying websites that express the same viewpoints. Moreover, each article uses inflammatory and/or accusatory language, such as "Fake News Media," "globalist elitist establishment," and "highly flawed 2022 Primary Elections." And while Mr. Conradson is certainly entitled to express his opinions, his poorly sourced, researched, and reported work lacks the journalistic integrity and credibility required by the Press Pass criteria.[69]

[65] *TGP Commc'ns*, LLC, 2022 WL 17484331, at *2 (quoting county rules).
[66] *Id.*
[67] *Id.* at *4–5.
[68] *Id.*
[69] *Id.* at *5.

Instead of viewing the county's evidence as proof of Conradson's lack of bona fide standing among journalists, the Ninth Circuit saw it as an indication that the county was engaged in viewpoint discrimination:

> It is the County's politically-tinged assessment of Conradson's prior reporting that appears to have led it to deny him a press pass. That type of viewpoint-based discrimination is exactly what the First Amendment protects against. Because it appears at this preliminary stage that the County engaged in viewpoint discrimination, it is likely that the County's denial of a press pass will not survive review when considering Conradson's as-applied challenge.[70]

The Ninth Circuit also rejected the relevance of other evidence of Conradson's unprofessional behavior as probative of his lack of bona fides:

> The county noted that "Conradson appeared at press conference on October 13, 2022, with a hidden camera. On November 10, 2022, he showed up at [the Maricopa County Tabulation and Election Center] under the guise of being there to pick up his credentials." He allegedly became disruptive, and the County had to remove him from the facility. Such conduct is troubling. None of these subsequent acts, however, could have influenced the County's previous denial of the press pass.[71]

This case later settled and so the record was not more fully developed. At the early stages of the litigation, the county did not appear to present more evidence about whether Conradson and The Gateway Pundit were engaged in legitimate journalism.

A more fully developed record might well have led the courts to conclude that The Gateway Pundit should be considered faux journalism and not comprised of "bona fide correspondents of repute in their profession." One academic study of websites purporting to present news, for example, found the organization to be one of the leading sources of false claims online in the United States,[72] including the incendiary false claim that the 2020 US presidential election was stolen. The fact-checking organization PolitiFact examined 26 claims made by The Gateway Pundit and rated 23 of the 26, or 88 percent of them, "mostly false," "false," or "pants on fire" false.[73] Both Facebook and Twitter removed and demoted content from the website and its founder on grounds of persistent spread of disinformation.[74]

[70] *Id.* (footnote omitted).

[71] *Id.* at *4 n.2.

[72] Produktentwicklung Analyse, *Media Analysis of the US Election: September 2020*, PRESSRELATIONS: KNOWLEDGE DISCOVERY (Oct. 30, 2020), https://www.pressrelations.com/blog/en/media-analysis-of-the-2020-us-election [https://perma.cc/888E-4GHQ].

[73] *PolitiFact Scorecard: The Gateway Pundit*, POLITIFACT, https://www.politifact.com/personalities/gateway-pundit/ [https://perma.cc/2E5M-EPX6].

[74] Peter Eisler, *Facebook's Struggle with Gateway Pundit Highlights Challenge of Containing Disinformation*, REUTERS (Dec. 3, 2021, 3:12 PM), https://www.reuters.com/business/media-telecom/facebooks-struggle-with-gateway-pundit-highlights-challenge-containing-2021-12-03/; Alexis Benveniste, *Twitter Banned Gateway Pundit Founder Jim Hoft*, CNN (Feb. 8, 2021,

In briefing on the appeal, Maricopa County further claimed that items posted on The Gateway Pundit and by Conradson encouraged threats of violence against county workers: "For example, Mr. Conradson published a blog post wherein he falsely accused an election worker of improperly accessing and deleting election data, and he included the election worker's name and photograph in the post. This post directly led to the election worker in question receiving death threats, including statements such as 'hang that crook from [the] closest tree so people can see what happens to traitors,' in the comments to Mr. Conradson's post."[75]

The county claimed it was motivated by security concerns rather than viewpoint discrimination in excluding Conradson, noting that the county had given press passes to companies it considered ideologically similar, such as Newsmax, the Western Journal, and the Epoch Times.[76] The Gateway Pundit countered that the county had not raised security concerns in denying Conradson a press pass, that evidence of such threats was not in the record, that the threats did not come from defendants, and that there was insufficient evidence as to the similarity between The Gateway Pundit and others given press passes.[77]

More significantly for the purposes of this chapter, some supporters of The Gateway Pundit argue that it is unconstitutional to award press passes only to journalists who are bona fide professionals of repute. For example, the group FIRE (Foundation for Individual Rights and Expression) filed an amicus brief along with another organization in the *TGP Communications* case attacking the very idea that government entities are permitted to consider standards such as repute in the profession or commitment to objectivity as a legitimate basis to decide who gets a press pass. FIRE wrote that "terms like 'repute,' 'associations,' 'journalistic integrity,' and 'credibility'" are vague and standardless. It further argued that it "is highly questionable whether the government even *could* devise non-viewpoint discriminatory criteria to decide whether a journalist

12:27 PM), https://www.cnn.com/2021/02/07/media/twitter-ban-gateway-pundit-founder-jim-hoft/index.html [https://perma.cc/XY6E-A8C8].

[75] Answering Brief, *supra* note 64, at *10–11 (citations omitted).

[76] *Id*. at *32. There is additional discussion of the security concerns in the district court opinion denying a temporary restraining order (that was later overturned by the Ninth Circuit). TGP Commc'ns LLC v. Sellers, 642 F. Supp. 3d 957, 961 (D. Ariz. 2022), *rev'd*, No. 22-16826, 2022 WL 17484331 (9th Cir. Dec. 5, 2022), *appeal dismissed*, No. 22-16826, 2023 WL 3698762 (9th Cir. May 1, 2023).

[77] Appellants' Reply Brief, TGP Commc'ns, LLC v. Sellers, No. 22-16826, 2022 WL 18024026, at *24–25 (Dec. 23, 2022). On the viewpoint discrimination point, appellants countered:

> The County attempts to absolve itself of viewpoint discrimination by claiming that it "granted press passes to several other organizations with a similar viewpoint, such as Newsmax, the Western Journal, and the Epoch times." The only valid portion of this statement is the use of the Oxford Comma. What are these other publications' viewpoints? The record is void of any finding in that regard. Are their viewpoints the same as *one another*? Are their viewpoints even internally consistent amongst even their own journalists and editors? They certainly are not the same viewpoints as the Appellants.

Id. at *13–14.

demonstrates 'objectivity,' because requiring a journalist to be 'objective' inherently requires him to meet the government's conception of a particular viewpoint ('objectivity') and punishes him for reporting from other viewpoints (such as a conservative slant)."[78]

In making its argument, FIRE sought to have the Ninth Circuit reject a contrary holding of the U.S. Court of Appeals for the Seventh Circuit in *John K. MacIver Institute for Public Policy v. Evers*.[79] That case concerned an application by the Wisconsin governor's office of the same standards later adopted by Maricopa County to exclude someone from a press conference on grounds of not meeting the standards. The Seventh Circuit defended the governor's standards as reasonable, viewpoint neutral, consistent with public policy in informing the public, and in line with similar standards used by the U.S. Congress and many others.[80] *Ateba* too is a case where a federal district court appeared to uphold the general permissibility of a "bona fide repute in the profession" standard.[81]

17.3 HOW GOVERNMENT ENTITIES SHOULD DEFINE THE PRESS IN LIGHT OF FIRST AMENDMENT VALUES FOR PRESS EXCEPTIONALISM

In this final section of the chapter, I turn from describing and analyzing how government entities *actually determine* who is the press for purposes of press

[78] Brief of Amici Curiae Foundation for Individual Rights and Expression and the Marion B. Brechner First Amendment Project in Support of Plaintiffs-Appellants and Reversal, TGP Commc'ns, LLC v. Sellers, No. 22-16826, 2022 WL 17869087, at *9–10 (Dec. 16, 2022).

[79] *Id.* at *11; John K. MacIver Inst. for Pub. Pol'y, Inc., v. Evers, 994 F.3d 602 (7th Cir. 2021).

[80] *See* 994 F.3d at 610–11:

> We find that the Governor's media-access criteria are indeed reasonable and not an effort to suppress MacIver's expression because of its viewpoint. The Governor contends that its criteria are intended to consider limited space constraints, address security concerns, and ensure that those in attendance will maximize the public's access to newsworthy information, and be more likely to abide by professional journalistic standards such as honoring embargoes and off-the-record communications. The resulting list of qualified media personnel includes a wide variety of news organizations and journalists from across the state and nation. The first three of the criteria listed in the memorandum are reasonably related to the viewpoint-neutral goal of increasing the journalistic impact of the Governor's messages by including media that focus primarily on news dissemination, have some longevity in the business, and possess the ability to craft newsworthy stories. The list prioritizes access by journalists whose reporting will reach wider audiences, while also allowing room for smaller media outlets (such as tribal publications). The criteria listed in numbers four and five of the memorandum are reasonably related to the viewpoint-neutral goal of increasing journalistic integrity by favoring media that avoid real or perceived conflicts of interest or entanglement with special interest groups, or those that engage in advocacy or lobbying. Similar standards are also used by other governmental bodies such as the U.S. Congress. There is nothing inherently viewpoint-based about these criteria, and MacIver has not provided any evidence that the Governor's office manipulates these neutral criteria in a manner that discriminates against conservative media.

[81] *See supra* notes 55–56 and accompanying text.

exceptionalism to the question of how they *should* do so. In setting forth four principles, I am guided by the normative view that press exceptionalism benefits the public when it facilitates the press function of providing the public regularly with valuable information and serving as a check on government overreach, corruption, or unconstitutional action. (Following Sonja West, I believe that First Amendment protection for freedom of speech, properly understood, should provide great protection for those not able to take advantage of press exceptionalism who occasionally engage in newsgathering, reporting, and disseminating information.[82])

First, consistent with the *Dunleavy* case,[83] government entities should articulate *explicit and meaningful standards* for enforcing press exceptionalism. The entity should publish a set of written rules that are easily accessible and fairly applied. Without such standards, arbitrary government action becomes too likely. Lack of written standards can also create the appearance of favoritism even if unwritten rules are being applied consistently. As the D.C. Circuit held in a 1977 case, the White House's "failure to articulate and publish an explicit and meaningful standard governing denial of White House press passes for security reasons, and to afford procedural protections to those denied passes, violates the First and Fifth Amendments."[84]

Second, most *press exceptionalism should be limited to professional journalists who regularly produce news stories or commentary*. Especially under conditions of scarcity, those who are most likely to regularly provide the public with reliable information and serve as a check on the government should be the ones with the greatest access and freedom from otherwise applicable government regulation. Professionalism does not require that the person is necessarily paid by a news organization, although that is strong evidence of working in the journalism profession. The key is the regularity of gathering, reporting, and disseminating information. Such a standard protects student journalists working with university-affiliated media, for example. It does not, however, cover bloggers or social media posters who only on rare occasions make or break news or who rarely provide news analysis or commentary.

Third, the question of applicability of a rule of press exceptionalism *should not turn on the type of technology used to disseminate journalism*. Today, even many long-standing respected local newspapers publish most or all of their news digitally, and many, to save costs, have eliminated print editions. There is no reason to believe that content published via new technology should be subject to different standards than content produced for newspapers, magazines, radio, or television.

Digital media did not exist when government officials crafted many of the press exceptionalism rules in my database. Some government entities have read language

[82] West, *supra* note 5, at 1058.
[83] Alaska Landmine, LLC v. Dunleavy, 514 F. Supp. 3d 1123 (D. Alaska 2021).
[84] Sherrill v. Knight, 569 F.2d 124, 131 (D.C. Cir. 1977).

broadly – such as reading the term "newspaper" to encompass new forms of news media. When possible as a matter of statutory interpretation, this type of broad reading of rules benefits society. When such interpretation is not fairly possible, legislatures or government entities should revise or rewrite the rules to account for changes in technology.

Saying that technology of dissemination should not be relevant to press exceptionalism is different from arguing that every blogger or poster on social media is entitled to press exceptionalism. In fact, the focus on professional journalism would mean that in the current moment, most bloggers and social media posters would not be entitled to such an exception. But professional journalists working in new media should be treated the same as professional journalists working in legacy media. NASA's ban on all "bloggers," for example (which it classifies incorrectly as a type of "social media"), should be changed. People who work as professional journalists should qualify, whether they write their professional journalism for a blog or another website or not.

Fourth, and most controversially and delicately, *government entities, or journalistic societies given powers by government entities, should continue to have the power to identify the press by reference to a "bona fide correspondents of repute in their profession" standard, so long as they do not engage in viewpoint discrimination.*

We should reject the nihilism of a post-truth world, insisting that we cannot distinguish between The New York Times and The Gateway Pundit and that there is no way of measuring objectivity in reporting. In contrast to the arguments of FIRE and others, there *are* empirically verifiable facts in the world, and entities purporting to be journalists that systematically deny those facts or regularly present empirically false claims as facts should not be considered journalists entitled to press exceptionalism. The best way to enforce such rules is by examining whether the entity claiming press privileges complies with journalistic practices, such as fact-checking, giving those written about a chance to respond, and not reporting empirically false facts as proven. These issues can be examined in a systematic way without inviting arbitrary government action.

The key is to avoid slipping into viewpoint discrimination, particularly if the viewpoints expressed by the person seeking press exceptionalism are controversial. Someone who proves employment as a professional journalist should be denied press privileges only if the person seeking press status has *no track record of consistently gathering, reporting, and disseminating truthful information*, or if the person has *a track record of consistently reporting and disseminating empirically verifiable false claims as true*. This standard takes away most discretion on the part of government entities, giving them something specific and empirically verifiable to focus on, and such a decision may be meaningfully reviewed by courts.

This standard unavoidably puts government bodies in the position of deciding whether those purporting to be journalists are regularly peddling lies rather than the

truth, and this no doubt presents some dangers.[85] What would stop a deceptive government entity from declaring real professional journalists to be faux journalists peddling fake news? Here, we must rely upon the courts to look over the shoulder of those government officials to ensure that the inquiry is not a pretext for viewpoint discrimination.

Judicial review appeared to work in the *TGP Communications* case. Maricopa County should not have relied on the fact that Conradson "expresse[d] his opinion" in his articles or that he used "inflammatory and/or accusatory language, such as 'Fake News Media,' 'globalist elitist establishment,' and 'highly flawed 2022 Primary Elections'"[86] to deny press access. These criteria indeed appear aimed at discriminating against the journalist and his publication for his viewpoint. These criteria do not point to whether Conradson was gathering and reporting true facts, regardless of his political spin or ideology.

But if the county could have demonstrated that Conradson showed no track record of consistently gathering, reporting, and disseminating truthful information, or if he had had a consistent track record of reporting and disseminating empirically verifiable false claims as true, then the county reasonably could have denied him press privileges without violating the First Amendment.[87]

This line between determining a journalist's bona fides and engaging in viewpoint discrimination requires a careful look at the record of the person seeking the press exemption, and doubtful cases should be resolved in favor of press exceptionalism.[88] But there are cases where press privileges could and should be properly denied when a full-time professional faux journalist is not engaged in the act of journalism, and government entities should be allowed to say so in appropriate cases and act on this conclusion. Denial of press privileges to faux journalists furthers the reasons for having press exceptionalism in the first place.

Finally, it is worth recognizing the potential political backlash that may come from allowing government entities to exclude faux journalists from press

[85] *See* RonNell Andersen Jones & Lisa Grow Sun, *Freedom of the Press in Post-Truthism America*, 98 Wash. U.L. Rev. 419, 466–67 (2020), for a discussion of an alternative approach focused more on process questions (such as whether the organization checks its facts) than on making a substantive judgment.

[86] TGP Commc'ns, LLC v. Sellers, No. 22-16826, 2022 WL 17484331, at *5 (9th Cir. Dec. 5, 2022).

[87] More recent reporting revealed that even within The Gateway Pundit organization, employees were worried about the truthfulness of Conradson. He was instrumental in spreading lies about two Georgia election workers, falsely claiming they had stolen the 2020 presidential election in Georgia for Joe Biden. Sam Levine, *Workers at Far-Right Site Gateway Pundit Feared Credibility Issues, Filing Shows*, The Guardian (May 1, 2024), https://www.theguardian.com/us-news/2024/may/01/gateway-pundit-2020-election-lies [https://perma.cc/2GYU-BNQ3].

[88] The case of "pink slime" local "news" websites presents some especially difficult questions about who should count as a professional journalist. *See* Tow Center for Digital Journalism, *"Pink Slime": Partisan Journalism and the Future of Local News* (Jan. 2024), https://towcenter.columbia.edu/sites/default/files/content/%E2%80%9CPink%20Slime%E2%80%9D_%20Partisan%20journalism%20and%20the%20future%20of%20local%20news%20%281%29.pdf [https://perma.cc/4Y33-C3TE].

exceptionalism. The Gateway Pundit, for example, has consistently spread false statements, such as about rigged or stolen elections, favored by right-wing populists. A decision to exclude The Gateway Pundit from observing Maricopa County's ballot-counting process, particularly when election denialists were falsely claiming that such counting was "rigged," likely would be seen by some as viewpoint discrimination even if the exclusion was based solely upon the website's failure to adhere to basic journalistic practices.

To mitigate this risk, government entities, as noted above, should resolve close cases in favor of press exceptionalism. A partisan press is becoming increasingly the norm again in American journalism,[89] and government entities should be careful not to confuse the question of the political views of a journalist (or the journalist's employer) with whether a person posing as a journalist is actually a journalist. Journalists and entities can hold and write from whatever point of view they like without risking the benefits of press exceptionalism. What people claiming to be journalists cannot do if they want the benefits of press exceptionalism is consistently present empirically verifiable false statements as true or consistently deny the truth of empirically verifiable true statements. In the end, how government entities handle this difficult question could reflect not only on the legitimacy of journalism but on the legitimacy of government and US democracy as well.

[89] Andersen Jones & Sun, *supra* note 85, at 472–79.