5-21-2017

The Trump Presidency and the Press

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Recommended Citation
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Additional Information
This article is part of the series Constitutional Connections by John M. Greabe and was originally published by the Concord Monitor.
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This past Tuesday, the New York Times broke the story of an extraordinary conversation that took place between President Donald Trump and then-FBI Director James Comey on the day after Gen. Michael Flynn’s resignation from the position of national security adviser.

As the Times recounts it, the president concluded a Feb. 14 terrorism briefing by asking all participants except Comey to leave the room. The president then complained to Comey about intelligence leaks, suggested imprisoning reporters who publish classified information, and asked him to discontinue any investigation of Flynn.

Understandably, news coverage of that conversation has focused on whether the president obstructed justice in seeking to intervene with Comey on Flynn’s behalf. But the president’s suggestion that reporters be imprisoned also merits close attention.

It is not difficult to understand why presidents frequently voice frustration with the press. Imagine being subjected to critical analysis 24/7 by reporters, bloggers and pundits who often lack complete and accurate information but face competitive pressure to publish quickly.

Moreover, many who present themselves as members of the media are in reality little more than partisan
The founders envisioned the free press serving as the ‘fourth estate’

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propagandists looking to stir up anger at those in power. But even so, President Trump's hostility toward the press seems exceptional.

The president has repeatedly accused mainstream media outlets of purveying “fake news.” He also has tweeted that the press is “the enemy of the American people,” and proposed relaxing libel laws so that public officials might more easily sue reporters and news organizations. (In a recent column, I explained why the president lacks constitutional authority to change libel laws in this way.)

Indeed, at a commencement speech at the U.S. Coast Guard Academy on Wednesday, the President stated: “No politician in history – and I say this with great surety – has been treated worse or more unfairly.” Strong stuff.

So why the extreme rhetoric? Consider, first, present political circumstances. The president’s political party controls the Senate, the House of Representatives, and a majority of governorships and state houses. We are in a period of highly consolidated political power.

This is precisely the sort of situation – one conducive to the emergence of tyranny – that worried the founders and led them to adopt a system of checks and balances by separating federal power into three departments and dividing power between the federal government and the states.

This also is precisely the sort of situation the founders had in mind when they ratified the First Amendment, which places punishment of speech and regulation of the press beyond the power of public officials. The First Amendment thus effectively makes the press a “fourth estate” – in essence, a fourth branch of government – that can serve as an additional check on the operation of the political branches.

Note that, insofar as the press was (and is) to serve this checking function, the founders did not contemplate that it would be balanced or fair in its treatment of those who hold governmental power. The founders were realists. They understood how the press would operate. Indeed, the press at the time of the founding was far more partisan, sensationalist and nasty than it is today.

For the founders, empowering the press was about constraining the exercise of governmental power.

Now, consider what we have seen unfold during the Trump presidency. The president came to power at the crest of a Republican wave that was built. Obamacare was to be repealed. Regulations were to be rolled back. Etc.

And yet, four months after the inauguration, relatively little has been achieved beyond the confirmation of Justice Neil Gorsuch to replace Justice Antonin Scalia on the U.S. Supreme Court.

Why has so little been accomplished with a single party in control of the federal government? Clearly, President Trump believes that the press has played a principal role in slowing things down. And it would be difficult to say that he is wrong.

With respect to immigration, media accounts of campaign statements suggesting an intention to target Muslims have been the main sources of evidence that courts have relied on in temporarily halting implementation of the president’s two “travel bans.” It is unusual for media-generated evidence to feature so prominently in judicial decisions.

With respect to Obamacare, the press has aggressively reported Congressional Budget Office estimates that millions of people would lose health insurance under the Republican replacement plan. This reporting has caused a public outcry – which itself has been aggressively reported – that many credit for putting Republicans to a Hobson’s choice of either supporting wildly unpopular legislation or failing to deliver on a core campaign promise.

With respect to various regulatory rollbacks, there has been no shortage of negative press coverage of President Trump’s Cabinet appointments and policy priorities, including what has been dubbed his “war on science.” And on top of this sits the recent bombshell reports regarding the firing of James Comey, the disclosure of highly classified information to Russian officials and the accelerating investigation of the Trump campaign’s involvement in Russia’s election interference.

Readers will of course have differing views about whether the stalling of the president’s agenda is to be cheered or regretted. But understand that the role the press has played in bringing things nearly to impasse is entirely consistent with our constitutional design.

(John Greabe teaches constitutional law and related subjects at the University of New Hampshire School of Law. He also serves on the board of trustees of the New Hampshire Institute for Civic Education.)