

Why Trump's frivolous libel lawsuit against the New York Times is dangerous

By Theodore J. Boutrous Jr.

On Wednesday, Donald Trump became the first sitting president ever to file a defamation lawsuit against a news organization. The lawsuit against the New York Times is almost certainly dead on arrival in the courts, but it exemplifies the threat the Trump presidency poses to First Amendment values and freedom of the press.

The complaint, filed in New York state court on behalf of the Trump campaign and seeking “millions of damages,” is paper thin — a mere eight pages of embarrassingly shoddy legal work that attacks as false and defamatory an opinion piece written by former Times executive editor Max Frankel. The piece, headlined “The Real Trump-Russia Quid Pro Quo,” was published three days after Attorney General William P. Barr issued his misleading summary of the Mueller report on March 24, 2019, and three weeks before the Mueller report itself was released. The gist of the piece is that Mueller’s conclusions were essentially beside the point because the publicly reported facts had already established that the Trump campaign and Russia “had an overarching deal: the quid of help in the campaign against Hillary Clinton for the quo of a new pro-Russian foreign policy,” including relief from harsh Obama-era sanctions.

Frankel cited published news reports about the Trump campaign’s interactions with Russians, including the June 2016 Trump Tower meeting and former national security adviser Michael Flynn’s guilty plea for lying about whether he discussed sanctions relief with the Russian ambassador during the transition. Based on these and other “known facts,” Frankel expressed his view on what he called the “real

deal between the Trump campaign and Russia.

The First Amendment bars the Trump campaign’s defamation claim — something its lawyers surely know. The Frankel piece opines on issues of utmost public concern about concededly public figures during a presidential election. The First Amendment’s protections are at their zenith in these circumstances.

As the Supreme Court declared in its landmark 1964 decision in *New York Times Company v. Sullivan*, the First Amendment embodies our “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”

To enforce that commitment, the court in *Sullivan* invoked the First Amendment to rein in state-law defamation lawsuits and establish the strict “actual malice” standard, which requires a public figure to prove, by clear and convincing evidence, that the defendant made an allegedly defamatory statement of *fact* knowing it was false or with reckless disregard for the truth.

The Trump campaign can’t possibly meet this standard regarding the Frankel piece, which is pure opinion, based on fully disclosed public facts. In other words, Frankel wasn’t claiming to be reporting on or to have access to damaging new facts; he was simply expressing his opinion based on widely publicized truthful information that the world was already debating.

Applying *Sullivan*, state and federal courts around the country have repeatedly held that the First Amendment protects opinions under these circumstances. That is because, in the Supreme Court’s words in *Hustler Magazine, Inc. v. Falwell*,

“[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”

So if the Trump campaign’s lawsuit is doomed to failure, why did they file it? The flimsy complaint says it was filed to “inform *The Times* readers (and the rest of the world) of the true facts.” But Trump, as president, has the biggest megaphone in the world and uses it with impunity. The lawsuit is a transparent misuse of the judicial branch as a political and fundraising stunt.

The lawsuit also plainly aims to chill freedom of speech and freedom of the press when it comes to Trump. During the 2016 campaign, he threatened to sue all the women who had spoken out about his sexual misconduct. Before that he sued a journalist for \$5 billion (and lost), later explaining, “I did it to make his life miserable, which I’m happy about.” Asked this week about his campaign’s lawsuit, Trump threatened that “there’ll be more coming.”

The Supreme Court warned in *Sullivan* that political figures could wield defamation suits to silence “would-be critics.” Trump is making that a reality. More ominously, he is also getting at least some traction on his vow to “open up the libel laws” to make it easier to sue. Justice Clarence Thomas, out of the blue, last year called on the court to consider overturning *Sullivan*.

Trump’s lawsuit may be frivolous. His intentions are serious — and dangerous to us all.

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