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Trump's lawsuit against Bolton will fail

By THEODORE J. BOUTROUS JR.

The Trump administration's lawsuit against John Bolton is a paper tiger, designed for a showy roar of outrage but with little prospect of any real bite.

The suit, filed by the Justice Department late Tuesday, purports to seek to halt publication of Bolton's White House memoir, "The Room Where It Happened." Scheduled for release on June 23, the book reportedly contains damaging information about President Trump's handling of national security issues, including the Ukraine matter that got him impeached.

The lawsuit — followed by Wednesday night's bid for an emergency hearing and order — is almost certain to fail to achieve Trump's quest to block publication of the book. Instead, the complaint on its face demonstrates that this is just the latest example of Trump flouting the First Amendment and manipulating and abusing the national security apparatus for personal and political purposes to hide information of great public concern from the American people.

Bolton, who served as national security adviser for 17 months, signed standard nondisclosure agreements with the government agreeing to submit any manuscript about his tenure to the White House for prepublication review so that the government could ensure that it did not contain classified information. As the Justice Department's own lawsuit concedes, Bolton did just that on Dec. 30, 2019, and then engaged in a painstaking four-month back-and-forth with Ellen Knight, the official charged with conducting the prepublication review. The process included lengthy in-person meetings with Bolton and detailed edits purging the manuscript of any information Knight deemed classified.

As a result, the complaint acknowledges that, by April 27, 2020, Knight "had completed her review and was of the judgment that the manuscript draft did not contain classified information." That should have been the end of the matter — and Bolton and his publisher Simon & Schuster should have been free to release the book.

Then the White House's new senior director for intelligence, Michael Ellis, intervened. Ac-

ording to the complaint, Ellis, a Trump political loyalist who had previously served in the White House counsel's office and played a bit part in the Ukraine episode, was supposedly "concerned that the manuscript still appeared to contain classified information, in part because the same Administration that the Author served is still in office and that the manuscript described sensitive information about ongoing foreign policy issues."

But that's just another way of saying the book includes recent, newsworthy information of public concern that the president wants to conceal. And for his part, Trump, who has made clear his desire to delay publication of the Bolton book until after the presidential election, on Monday gave reporters a slightly different, and equally unconvincing, spin on the White House's efforts to muzzle Bolton: He views "every conversation with me as president highly classified" and he thinks that "maybe [Bolton] is not telling the truth."

The administration's lawsuit alleges that Bolton, if the book is published next week, will be in breach of his nondisclosure agreements and fiduciary duties to the United States. It asks the court to order Bolton "to instruct or request his publisher, insofar as he has the authority to do so, to further delay the release date." This effort will fail for several reasons.

The biggest problem is that the administration is seeking a prior restraint of speech before it occurs — not just damages for injuries allegedly caused by speech after the fact. The Supreme Court has never upheld a prior restraint on speech about matters of public concern, and in the Pentagon Papers case refused to enjoin publication of a trove of classified information concerning the Vietnam War. Any prior restraint, the court explained, "bear[s] a heavy presumption against its constitutional validity." As the court elaborated in *Nebraska Press Association v. Stuart*, prior restraints are "the most serious and the least tolerable infringement on First Amendment rights" and "one of the most extraordinary remedies known to our jurisprudence."

While the Justice Department's complaint tries to evade the prior restraint label by asking the court to order Bolton to stop Simon

& Schuster from publishing, this tortured approach cannot hide that a prior restraint is exactly what the administration is seeking: a court order stopping publication of a book. The chief government reviewer of the book concluded, after exhaustive analysis and editing, that the book contains no classified information. But even if it did, that would not be sufficient to justify a prior restraint. Ellis's vague "concerns" and Trump's baseless assertion that every conversation with him is classified do not come close to justifying a prior restraint.

Moreover, the cat is out of the bag. The complaint doesn't even name the publisher as a defendant, and the books have already been printed and shipped to warehouses. Advance copies have been distributed to journalists and others. So even if the Justice Department can persuade a judge to enjoin Bolton, the non-parties remain free to disseminate the book.

Relying on a 1980 Supreme Court case, *Snepp v. United States*, the Justice Department asks the district court to strip Bolton of profits from the book by imposing a "constructive trust for the benefit of the United States." But this case is nothing like *Snepp*. The former CIA agent in *Snepp* never even presented a manuscript of his book to the agency before publishing. In fact, the Supreme Court said that the agent "deliberately and surreptitiously" avoided the prepublication review process. Here, by contrast, Bolton complied with the prepublication review process in good faith. In fact, it is not Bolton but the Trump administration that has breached the contract by unreasonably withholding clearance — not to protect classified information or national security, but for the unlawful purpose of helping Trump's political chances in November.

In its 2014 decision in *Lane v. Franks*, the Supreme Court reiterated that "there is considerable value ... in encouraging, rather than inhibiting, speech by public employees. ... 'The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.'" Trump's effort to hide this book from public view is an affront not just to Bolton's First Amendment rights but also to the rights of all of us.