“Fake News” and the Fourth Estate

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COMM 3650 | Prof. Ryan Cheek | April 22, 2022

“As long as there has been a United States, there has been an adversarial relationship between those in government and the press,” Erwin Chemerinsky said. “But also, never in American history has any President spoken of the press in these terms. It certainly forces us to think about what is the nature of the First Amendment in the context of the Trump Presidency” (Chemerinsky, p. 533). Throughout Donald Trump’s presidency, he proved himself a threat to democracy by attacking the First Amendment rights of free press and free speech. As Thomas Jefferson once wrote, “A well-informed electorate is a prerequisite to democracy.” Citizens must have unrestricted access to pertinent information in order to make well-informed decisions and fulfil their civic duties. By limiting the public’s access to vital information through various mass media, Trump put democracy in jeopardy and denied Americans their Constitutional rights.

Lyrissa Lidsky (2018) said the press has a special role in American democracy and refers to it as the “Fourth Estate – an unofficial branch of government in our scheme of separation of powers that checks the power of the three official branches.” The press is a watchdog that informs the public what the legislative, executive and judicial branches of the government are doing and “enables informed public discussion and rational public policy” (p. 907). Media are facing a legitimacy crisis, which is “exacerbated by President Donald Trump’s repeated attacks, asserted in over one thousand tweets in his first year alone, on the press as purveyors of ‘fake news’” (Lidsky, p. 910).

Trump used “the power of his presidency in an attempt to punish or silence press organizations that displease him” (West, p. 916). One of the ways he did this, both as president and post-presidency, is through Strategic Lawsuits Against Participation, known as SLAPP suits.

These “weak but expensive to defend defamation lawsuits” are aiming “not to prevail on the merits but to harass defendants and chill free speech” (Toscano, p. 1-3).

In 1964, *New York Times v. Sullivan* established that the right to publish all statements is protected under the First Amendment, and that in order to prove libel, the plaintiff must prove that statements against them were published with actual malice or knowledge that the information was false. Trump frequently brought lawsuits to court that he knew he would lose based on this precedent, but used them as a fear tactic to scare his critics into silence. In fact, at a 2016 rally in Texas, Trump promised to “open up” libel laws to make it easier to sue news outlets that disagree with him (Borchers, 2016).

One such SLAPP suit occurred in 2020, when Trump’s campaign sued the Washington Post for libel, alleging that the paper knowingly published false information (via two opinion pieces) that Trump worked with Russia in a conspiracy concerning the 2016 election. The campaign asserted that the publications caused millions of dollars in damage because the campaign would be forced to run corrective advertisements (*Donald J. Trump for President, Inc. v. WP Company LLC*, 2020).

Kevin T. Baine, legal counsel for The Washington Post, submitted a motion to dismiss. In the document, Baine argued that the lawsuit betrayed “a fundamental misunderstanding of the First Amendment and the role of the press in a democracy,” which is to inform the public about vital information that affects their well-being (*Donald J. Trump for President, Inc. v. WP Company LLC*, 2020).

“Trump for President may be embarrassed by its candidate’s position, but that does not give rise to a defamation claim against the Post,” the document stated. “President Trump is the

standard-bearer of his party and the man who defines what Trump for President stands for, and it is neither false nor defamatory of him or his campaign to report or comment on what he says about this or any other issue” (*Donald J. Trump for President, Inc. v. WP Company LLC*, 2020). The case appears to have stalled, with no updates since Oct. 2021.

In Sept. 2021, Trump filed a lawsuit against his niece, Mary Trump, along with The New York Times and three of its reporters, claiming they worked together in an “insidious plot” against him after Mary Trump provided Donald Trump’s tax documents to The New York Times in 2018 (*Trump, Donald J. vs. Trump, Mary L. et al*, 2021). These documents were pivotal in the Times’s Pulitzer-winning article asserting that Trump had lied when he claimed he was a self-made billionaire with no help from his wealthy father and revealed that Trump inherited hundreds of millions of dollars through dubious tax schemes (Weiser, 2021).

The New York Times responded in a statement, “This lawsuit is an attempt to silence independent news organizations and we plan to vigorously defend against it” (Weiser, 2021). Much of the litigation concerns whether or not the lawsuit falls under New York’s expanded anti-SLAPP laws, which went into effect in Nov. 2020. The new law protects defendants in public legal actions and is more broad than previous laws, meaning it generally protects news reporting. In order for a defendant to dismiss the SLAPP suit, they need to demonstrate that the legal action involves “public petition and participation” and file a motion to dismiss. The burden then shifts to the plaintiff to demonstrate that the lawsuit has a substantial basis (N.Y. Civ. Rights, 2020).

In a memorandum in support of Mary Trump’s motion to dismiss, her attorneys stated, “Mr. Trump is … a serial SLAPP artist and this baseless lawsuit is more of the same.” They argue

that the lawsuit is “no more than a transparent effort to punish his niece and these journalists for disseminating truthful information of great public interest concerning Mr. Trump’s fitness for the office and aspects of his personal and financial history that he had long sought to hide, to chill them and others from reporting on such information in the future.” In order for the lawsuit to survive dismissal under the anti-SLAPP law, Trump would have to prove that his claims have a substantial basis, and according to the memorandum, “Mr. Trump’s claims do not challenge as false a single word in either Mary Trump’s Book or The Times’ reporting,” but instead are about a confidentiality provision in an agreement regarding the wills of Trump’s late parents. Among the reasons Mary Trump’s attorneys argue that the agreement is not enforceable is because it is not a sweeping gag order and “its enforcement would be contrary to public policy, including powerful First Amendment interests” (*Trump, Donald J. vs. Trump, Mary L. et al*, 2021). As of April 2022, the case is still pending.

This lawsuit isn’t the only time Trump has filed a SLAPP suit against the New York Times. In February 2020, his re-election campaign sued the Times for defamation, citing a 2019 opinion piece that claimed there had been a “quid pro quo” between Trump and Russia in order to help him get elected in 2016 — they claim he promised to take a pro-Russia stance in foreign policy in exchange for Russia’s help in winning the election. The official complaint stated that The New York Times “obviously had a malicious motive” and knew these statements were false when they published them, “knowing it would misinform and mislead its own readers, because of The Times’ extreme bias against and animosity toward the Campaign, and The Times’ exuberance to improperly influence the presidential election in November 2020” (*Donald J. Trump for President, Inc. v. New York Times Company*, 2021).

The Times submitted a motion to dismiss, saying that the op-ed was a “quintessential statement of opinion, protected by the First Amendment and vital to our democracy.” The Times’s attorneys argued, “Anyone who has witnessed the President's attacks on a free press over these past three years will see this suit for what it is: an abuse of the judicial process by the President and his campaign. It is, as a matter of New York law, frivolous, vexatious, and meritless.” Additionally, they said the real goal of the complaint was to “enlist the courts of New York in Mr. Trump's toxic campaign against news organizations that dare to hold the administration accountable.”

The campaign claimed it had suffered millions of dollars of damages, but, as the Times’s lawyers pointed out, they waited a year to file the lawsuit, “meaning that the action was commenced just in time for the 2020 election campaign season.” They argued that the suit is “sanctionable litigation brought to harass and maliciously injure,” putting it in the category of a SLAPP suit (*Donald J. Trump for President, Inc. v. New York Times Company*, 2021).

Judge James d’Auguste agreed with the Times and dismissed the case with prejudice, meaning that Trump’s campaign cannot refile the lawsuit. He cited the fact that the piece was “nonactionable opinion” and that bias and ulterior motive do not constitute actual malice as defined by *New York Times v. Sullivan*. “News organizations function as a platform for facilitating constitutionally protected speech on issues of public concern and courts will not impose defamation liability against these entities absent a clear showing of actual malice,” he wrote (*Donald J. Trump for President, Inc. v. New York Times Company*, 2021).

SLAPP suits are not the only way Trump suppressed First Amendment rights as president. In the age of the internet, social media is a significant part of political discourse, and

in many cases, the courts have yet to figure out how to apply existing First Amendment principles and doctrines to social media platforms. “However, existing legal frameworks can and should be retrofitted to the Internet and social media” (Day & Weatherby, p. 312). In one such legal framework, *Rosenberger v. Rectors and Visitors of the University of Virginia,* the Supreme Court determined that the government should not target or censor particular views on a subject: “The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.” During Trump’s presidency, he often blocked his critics on Twitter, barring them from seeing his tweets. In *Knight First Amendment, Inc. v. Trump*, the court determined that due to Trump’s status as a political leader, the Twitter account @realDonaldTrump is a public forum, and Trump’s act of blocking users who criticized him is viewpoint-based discrimination, which was found unconstitutional based on the *Rosenberger* decision. By limiting access to his Twitter account, Trump clearly infringed on his critics’ constitutional rights to freedom of speech and expression and inhibited the press’s ability to fulfil their Fourth Estate duties as described by Lidsky (2018).

In a karmic turn of events, on Jan. 8, 2021, just two days after the attack on the U.S. Capitol in an attempt to stop Congress from certifying the 2020 election results, Trump’s Twitter account was permanently suspended in an effort to lower the risk of further incitement of violence. Twitter “exists to enable the public to hear from elected officials and world leaders directly,” the social media company said in a blog post. “However, we made it clear going back years that these accounts are not above our rules entirely and cannot use Twitter to incite violence, among other things” (Twitter, 2021). Additionally, Trump has been indefinitely

suspended from Facebook and YouTube. According to the 1996 Communications Decency Act, interactive computer service providers shall not be held liable for any “good faith” actions to restrict objectionable material (47 U.S. Code). Trump filed a class action lawsuit against Twitter for what Trump’s attorneys call “an aggressive campaign of prior restraint against a multitude of Putative Class Members through censorship (flagging, shadow banning, etc.) resulting from legislative coercion and collusion with federal actors” (*Trump et al v. Twitter, Inc et al*, 2021). As of April 2022, the case is still ongoing, and the implications its results will have on the modern understanding of the First Amendment have yet to be seen.

Even before Trump’s ban from Twitter and the subsequent lawsuit, he frequently accused the company of attacking his First Amendment rights. On May 26, 2020, Twitter first attached a fact-check to one of his tweets, saying that it may potentially be misleading. In a since-deleted tweet, Trump responded, “Twitter is completely stifling FREE SPEECH, and I, as President, will not allow it to happen!” He then claimed that social media platforms silence conservative voices and threatened to pass regulations or even shut them down. On May 28, he made an executive order that called for a review of the Communications Decency Act and ordered government agencies to limit advertising on platforms that participated in what the Justice Department would decide was “viewpoint-based speech restrictions.” In a Washington Post op-ed, Lee C. Bollinger and Donald E. Graham argued that using governmental power to punish a company that won’t do what the president wants is “a grotesque First Amendment violation” and that “not since the McCarthy era has our country experienced such an effort to neuter the press and evade the government accountability that comes only through meaningful reporting.” Additionally, they assert that Trump’s attacks on Twitter are “no less worthy of

outrage than previous attacks on the traditional news outlets that dominated media years ago” (Bollinger & Graham, 2020). On May 14, 2021, President Biden revoked the executive order targeting Twitter (Shephardson, 2021).

Trump has proven time and time again that he has reckless disregard for the First Amendment and, as president, frequently attacked mass media organizations and those who work for them. He attacked his critics on numerous occasions through frivolous SLAPP suits in an attempt to silence those who dared to keep him in check. He pushed the boundaries of existing First Amendment law as it applies to the internet. “Any time a president attempts to use the federal government as a tool for retaliation against others, we should be alarmed,” West said. “But when those attacks are targeted at news organizations who are doing their constitutionally assigned jobs of checking the government and informing the public, there should be universal outcry. The Constitution predicted that there would be a contest between the press and the president. But the rules of that contest demand that the press be free to do its work – no matter how much the president hates it” (West, p. 938).

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