

Trump Turns Tables

The former President was harmed by his opponents' willful lies.

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Late last month, Donald Trump filed [suit](#) against the conspirators who conceived and propagated the falsehood that he had colluded with the Russians to influence the outcome of the 2016 presidential election. Like most of Trump's ventures, the suit is ambitious, even grandiose. Trump is suing, among others, Hillary Clinton, the DNC, Marc Elias, the international law firm Perkins Cole, Christopher Steele, Fusion GPS, James Comey, Andrew McCabe, ABC, and other yet to be named media corporations. He is suing them for, among other things, injurious falsehood, computer fraud, theft of trade secrets, malicious prosecution, and violation of the RICO (Racketeer Influenced and Corrupt Organizations) act.

Trump's suit was, of course, immediately mocked by his political enemies. Whether it can, as Trump's lawyers have framed it, proceed and perhaps ultimately prevail is a technical legal question that will have to be decided by the courts. Nevertheless, the complexity of the legal issues, and the role of officials with legal expertise in resolving them, should not stop American citizens from thinking about whether some form of such a suit *should* be able to proceed in a properly constituted legal system.

The best way to achieve clarity on this question is to reduce it to its simplest form, stripped of any reference to personalities. If someone

spreads falsehoods about someone else, in order to damage the latter's reputation, should the victim be able to sue for damages? If one man knowingly conveys falsehoods to law enforcement about another man, and succeeds in provoking a lengthy and costly investigation, has the victim been injured in a legally cognizable sense, for which he can seek legal restitution? The obvious, common-sense answer to these questions is: Yes, the victim of such behavior has been injured and should be able to sue. This answer is also consistent with long-established traditions of American law.

For some people, however, it is very difficult to separate such questions from the personalities involved. Many will respond: But it's Trump! Some considerable share of Americans think Trump is one of the most malign influences in the history of American politics. They will be tempted to think that his suit should not proceed because, to them, he's a bad guy.

If we are to preserve our system of equality of rights, it is important to recognize that whether Trump is a bad or good guy is entirely irrelevant to the merits of the kind of lawsuit he is bringing. Our system of civil law aims to protect the rights of all: the strong and the weak, the popular and the unpopular, the good and even the bad. If the worst person in America sued the best, the only important question would be the facts of the case and the legitimacy of the claim in light of the law. If Mother Teresa negligently crashed into Harvey Weinstein's car, the lowlife would have a right to sue the saint and collect damages. It must be so if we are to have equal rights under law. Whether a person has been unjustly injured is usually susceptible to reliable inquiry and resolution.

Some will say that the principles of democracy preclude suits such as Trump's. The claims about Trump were made in the context of a

political contest, and democratic politics requires that the participants be free to argue as vigorously as they like. Moreover, litigants like Trump should not be able to sue media corporations for propagating falsehoods, because democracy depends on news outlets that are free to encourage wide-ranging debate. Suits like Trump's chill the freedom of debate that is necessary for a healthy democracy.

This argument is misconceived. Democracy does not require the freedom to lie about one's political opponents. The opposite is nearer the truth. A healthy democratic culture precludes lying about political opponents, because free deliberation demands that voters have access to reliable, accurate information about their choices. In a democratic republic such as ours, the people get to choose their representatives freely, but that freedom is illusory if the voters can be duped out of choosing what they prefer. Democracy is government based on the consent of the people, but consent can be defeated by fraud as well as force. This is, moreover, pretty much what Hillary Clinton and her enablers intended by propagating the idea that Trump was wittingly a Russian tool.

The Supreme Court has held that the First Amendment provides robust protection for political speech—even speech that propagates defamatory falsehoods. That is the doctrine of *New York Times v. Sullivan* (1964), in which the Warren Court held that a public figure suing for libel must prove “actual malice,” or that the target of the suit spread falsehoods knowing that they were false, or at least acted with reckless indifference to the truth. This standard makes it almost impossible for any public figure to succeed in a libel suit.

However, the “actual malice” standard, and the near impunity that it gives to those who would defame in pursuit of political ends, are not

requirements of the First Amendment. "Actual malice" as a constitutional requirement is the invention of an activist Supreme Court choosing to depart from the traditional understanding of the First Amendment, which had held that libel was not within the scope of freedom of speech and of the press, properly understood. In recent years, Justices Clarence Thomas and Neil Gorsuch have highlighted the constitutional weakness of the "actual malice" standard and indicated a willingness to revisit it.

The lawyers and judges involved in Trump's case will have to handle it according to the existing principles of American law. Conscientious citizens, however, should look upon the case as an opportunity to reflect on the kind of legal culture we need to restore to preserve equality of rights, democratic deliberation, and constitutional fidelity.