Trump Trumped: President Trump faces both state and family privates being put on parade as two injunction applications fail

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Donald Trump, billionaire, former TV personality, social media addict – and President of the United States of America – is looking for a little bit of privacy. But two recent attempts which might have kept the President's privates on parade, have both failed. One is the case brought by the United States in the United States District Court for the District of Columbia to prevent the publication of a "tell-all" book by former National Security Adviser, John Bolton. The other is the case brought by Trump's younger brother in the New York Surrogate's Court and Supreme Court, to prevent the publication of a "tell-even-more" book by the President's niece, Mary Trump.

While these legal shenanigans concern showdowns between the President and his "work-family", and his "family-family," they also highlight the differences between media laws enjoyed or endured by two Transatlantic cousins, the Americans and the English. Like most families, Britain and America have had some ups and downs over the years, but there are some things about the English legal system that President Trump might prefer to the home-grown variety, especially its more plaintiff-friendly defamation laws, and its preparedness to grant privacy injunctions.

Donald and defamation

Not long before his election, Donald Trump lamented the libel laws of the US as he became embroiled in allegations of unwanted advances towards women, published by the New York Times. However, while his lawyers proffered their dagger, and demanded that the newspaper remove from its website these "reckless, defamatory" allegations, that weapon was blunted on the sturdy shield of the First Amendment. Trump's lawyers threatened that failure to comply would leave them with "no option but to pursue all available actions and remedies." Trouble was, that for a public figure such as The Don (let alone his later incarnation as the President) "all available options" were limited.

Public figures in America – and a billionaire TV personality and a President would both fall into that category – need to prove actual malice to succeed in a libel action in the US. But seemingly aghast at this need to prove either that the author knew that the words spoken were untrue, or was reckless as to whether or not they were true, the then aspiring President said that if he won the election, he would "open up our libel laws," such that "purposely negative and horrible and false articles," would enable plaintiffs to "sue and win lots of money."

Mr. Trump's vision looked more plaintiff-friendly than that in the US; perhaps he had been casting envious eyes at the law on the other side of the Atlantic in England. There, the law provides a defense to an action for defamation where the defendant shows that the alleged defamatory statement was, or formed part of a statement on a matter of public interest, and the defendant reasonably believed that publishing the statement was also in the public interest. But the plaintiff does not need to establish that the defendant was malicious in its publication like he must in the US. Further, if running a truth defense in the English courts, the burden of proof is on the defendant to show that defamatory allegations are true, rather than the harsher standard for the plaintiff in the US requiring him to show that they are false.

Housing the grand Royal Courts of Justice where Court 13 has heard many a libel case over the years, London became known as "the libel capital of the world." Libel tourism has recently waned as English laws have gradually become less plaintiff-friendly, and less attractive for "forum shoppers." But its newspapers and publishers still cast their own envious eyes back across the Pond to the US and its free-speech-loving Constitutional proclamation, "Congress shall make no law… abridging the freedom of speech."

Thus far, despite the forecast of opened up libel laws, President Trump has made no ingress into the First Amendment, and the defamation laws of his native land remain steadfastly defendant-friendly, placing greater hurdles in the way for public figures such as he to "sue and win lots of money."

The President and privacy

What then of privacy protection, of keeping confidences and of securing secrets? Once again the laws favor the plaintiff more in Europe than in America. Under English law, a claim of misuse of private information may succeed where the complainant has a reasonable expectation of privacy in respect of material published without consent, provided the right is not outweighed by the exercise of other rights at play, for example the right to free speech. What's more, in the courts of England and Wales, a pre-publication injunction is available to prevent the dissemination of private and confidential information before the news has hit the newsstands. Although they are not handed out by judges like candy, as some detractors might argue, injunctions are a powerful prize for a privacy-seeking plaintiff.

In England, as in the US, such prior restraints are rarely available in defamation cases. But, in the land of the free, free speech wins, and prior restraints even for privacy protection are almost anathema. Indeed, the mere mention of such a horror will have the blood of any First Amendment lawyer boiling. Back to "the Trump cases," where the efforts to wield the mighty weapon of prior restraint against John and Mary, and against the First Amendment, have failed no doubt leaving the President's blood boiling.

The court room where it happened

In the case of John Bolton, the United States as plaintiff appeared to be on to a winner when the court heading its motion found it was likely to prevail on the merits that Bolton's book – The Room Where It Happened – contained classified information that put national security at risk, and further that Bolton failed to live up to his obligations by "rushing" to publish before his book had been fully vetted for classified information. Indeed, the Court found that Bolton would likely face potential civil and criminal penalties for his conduct.

But halting any applause before it began, the Court also found that an injunction would not be effective because, by the time the United States finally sought the injunction, the book was already in the hands of so many third parties that the horses were not only outside the barn, they had also left the country. Specifically, advanced copies had been shipped nationally and internationally to books stores and news-rooms, and reviews and excerpts had already leaked on-line. Therefore, no injunction prohibiting Bolton from proceeding with publication could prevent irreparable injury. According to the decision:

- Defendant Bolton has gambled with the national security of the United States. He has exposed his country to harm and himself to civil (and potentially criminal) liability. But these facts do not control the motion before the Court. The government has failed to establish that an injunction will prevent irreparable harm. Its motion is accordingly DENIED. *United States v. Bolton*, 2020 WL 3401940 (D.D.C. 2020).

The purpose of pre-publication injunctions – in the UK or the US – is to maintain the status quo until the competing issues at play can be properly weighed. A plaintiff who claims to be seeking to protect the national security of the United States, just like a plaintiff seeking privacy protection and reputation protection, will find monetary damages after the event for any harm done an insufficient remedy. But an injunction-seeking plaintiff has to move in a timely fashion.

King Canute and the waves of publicity

The English Judge, Mr. Justice Eady, found similarly to the Bolton court, in a notable case for a president of a different sort in a case brought by the former president of the FIA – the Federation Internationale de l'Automobile – Max Mosely. He had sought an injunction to prevent further publication of a British tabloid article and video footage accompanying the online version, about extracurricular activities between him and a number of women. But by the time the injunction application was heard the article had been read and the video footage viewed so many times that the "the dam has effectively burst." Here, the judge commented that the court would not act as "King Canute," pointlessly seeking to hold back the tide of publication when its waves were already crashing in.

A plaintiff then will have a hard job in shutting the stable door after the horse has bolted. Or as in the United States' case, after the Bolton has bolted. But this failure to prevent a horrific portrayal of the President's office has been followed swiftly by failure to prevent a similarly damning portrayal of Trump's pre-presidential life, as set forth in a book by his niece Mary Trump.

Dishing the family dirt

The plaintiff, Trump's brother, argued that Mary Trump had executed a non-disclosure agreement (NDA) to settle a family dispute, and that the proposed "tell-all" book would be a breach of that agreement.

The courts in England and Wales will also uphold an injunction application where material is private and confidential, or where a confidentiality agreement or NDA is in place and where there is no competing, and overriding interest to protect, such as a public interest justification to expose hypocrisy, or criminality. And that surely seems fair enough on both sides of the Atlantic.

So why the failure for Mary's uncle here? Initially, Trump's brother sought the injunction in the Queens Surrogate's Court. Wrong venue. True, the settlement agreement containing the NDA was executed (years ago) in connection with the settlement of the estate of Donald Trump's father (and Mary Trump's grandfather). But any breach of the NDA now could have no bearing on the administration of the long-ago resolved estate. But if not there, where? The New York State Supreme Court, which has general jurisdiction, was the better jurisdiction.

Trump's brother quickly re-filed the case in the Dutchess County Supreme Court, where he met with initial success. Specifically, on June 30, 2020, Justice Hal B. Greenwald temporarily restrained Mary Trump, as well as her publisher Simon & Schuster, from proceeding with publication to maintain the status quo until a hearing could be held on July 10, 2020 to determine whether the book's contents violated the NDA and/or whether the NDA should be enforced.

But once again, hold that applause. Because that same day, both Mary Trump and Simon & Schuster appealed. On July 1, 2020 the Appellate Division, Second Department permitted the restraining order to stand against the author, but vacated it as against the publisher. Both had first Amendment rights here the court found, but Mary had allegedly contracted hers away for consideration, agreeing not to wash the family laundry

in public and that if she did, she could be hauled before the court for doing so.

Given the preliminary posture of the case, the Court did not rule on whether the book actually violated the NDA, or on whether the NDA was specifically enforceable against this book. But it did note that even an NDA that looked reasonable in 2001, when Trump was a private citizen (albeit a famous one), might be viewed differently now that he was president. "[T]he legitimate interest in preserving family secrets may be one thing for the family of a real estate developer, no matter how successful; it is another matter for the family of the President of the United States." Trump v. Trump, 2020 WL 3602286 (2d Dep't July 1, 2020).

The position for the publisher was quite different; no NDA, no ceding of First Amendment rights; no injunction.

Simon & Schuster wasted no time in acting on its success, moving its publishing date up by two weeks, to July 14, 2020 and shipping the book to reviewers and book-stores. Within days, reviews and excerpts were already appearing on-line, and they paint a less than rosy family portrait of Uncle Donald.

Mary Trump then applied to the lower court asking it to lift the restraining order against her on the ground (among others) that it is currently pointless. On July 13, 2020, her motion was granted, the TRO was dissolved, and Robert Trump's motion for a preliminary injunction was denied. The Court found (among other things) that the horse was already out of the barn and out of the country, that the underlying agreement may be too broad to be enforceable, at least via injunctive relief, that Robert Trump, the only plaintiff, had not shown how he, personally, would be irreparably harmed by statements in Mary Trump's book; and that a pre-publication injunction would run afoul of the First Amendment under the circumstances.

Game over?

As Trump first forecast in his desire for those defamed to be able to "sue and won lots of money," the plaintiffs here may still be able to sue after the event. Indeed, Trump can try to sue Mary for damages for violation of the NDA and/or for defamation, and the United States may successfully argue that Bolton's book gives rise to civil and criminal liability. But none of that can now put the cat back in the bag, or the genie back in the bottle; the horse is out of the barn, the dam has burst. Stand and shout at the waves of negative publicity as much as he like, but President Canute cannot now stop the flood of accusations from crashing upon him.

The tensions between privacy and public interest; between reputation and the right to know; between free speech and national security or non-disclosure agreements are played out every day, in both the US and the UK, by popstars and politicians, if not presidents, and by regular Joes, battling against publishers, broadcasters and social media platforms. However, at the same time we in both democratic countries are entitled to learn information which has an impact upon us as citizens. In the UK, public figures and private persons alike are entitled to some degree of privacy, and to a reputation, in this busy, competitive, intrusive, and at times salacious world, and they are entitled to seek to protect and preserve them through the courts when they are attacked and damaged. In the US, such persons will more likely be relegated to an after-the-fact damages claim (if one can be sustained), absent a very compelling reason (such as an enforceable NDA) for an injunction. Even then, as we have seen above, actually stopping a publication from going forward against a defendant willing to risk civil (and perhaps criminal) penalties for the sake of publication is very difficult as a practical matter. The trick is all in the balance.

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