

## Turnabout = Fair Play?

Welcome to *Constitutional Context*. This is Professor Glenn Smith with another “five-minute bite of background about the Court and Constitution.”

A recent podcast (entitled “Libel to Stay”) explained why Free-Speech doctrines prevented Donald Trump from suing journalist Bob Woodward (or any other serious critic) for defamation. So, on the flip side, one of this month’s podcasts addresses how the First Amendment recently saved the President as a *defendant* in a defamation suit brought by Stephanie Clifford (aka “Stormy Daniels”).

On October 15<sup>th</sup> United States District Judge James Otero dismissed the libel action growing out of a presidential tweet casting doubt on Ms. Clifford’s allegation that, with Mr. Trump’s knowledge, a man threatened Clifford and her daughter, warning her not to speak to a magazine about her affair with the President. Riffing off of Ms. Clifford’s work with a sketch artist to produce a composite picture, the President’s tweet said in its entirety: “A sketch years later about a nonexistent man. A total con job, playing the Fake News Media for Fools (but they know it!)”

Judge Otero’s main reason for not allowing the libel case to proceed (and even ordering that Clifford pay Trump’s legal fees!) was that the Trump tweet was constitutionally protected “rhetorical hyperbole.” The Judge followed the decades-old lead of Supreme Court decisions distinguishing between statements that would likely be taken as statements of fact from those likely to be perceived as non-factually-based opinions.

As last month’s podcast noted, First-Amendment decisions since 1964 give critics of political officials and public figures (which Ms. Clifford is considered to be, as distinct from simply a private citizen) substantial “breathing room.” Such leeway ensures that “debate on public issues remains ‘uninhibited, robust, and wide-open.’” One key aspect of this strong free-speech protection is denying defamation liability for statements that cannot “reasonably [be] interpreted as stating actual facts” about an individual.

In applying this principle, Judge Otero initially recognized that, taken separately, two phrases in the President’s tweet seem to be “verifiably true/false statements” – “(1) that the man who threatened Ms. Clifford does not exist and therefore, that [she] is lying about her encounter with him; and (2) that Ms. Clifford is engaging in a ‘con job’ or is lying.” Because libel consists of intentionally making a false statement about the plaintiff, Judge Otero correctly noted that “[i]f the man who threatened Ms. Clifford does exist or if Ms. Clifford is not lying...Mr. Trump’s tweet would be verifiable as false.”

What ultimately saved the President, however, was Judge Otero’s conclusion that the tweet should be evaluated “as a whole” in light of the President’s “incredulous tone, suggesting that the content of his tweet was not to be understood as a literal statement.” So viewed, the tweet was a “hyperbolic statement” against a “political adversary.”

Two additional points about the Clifford v. Trump litigation should be underlined:

First, it is possible that Judge Otero's dismissal will be reversed on appeal (by the Ninth Circuit federal court, no less! – a favorite target of presidential scorn). Less-charitable jurists might, for example, disagree with Judge Otero's view that the "hyperbolic" tone of the whole statement negates the more factually inclined subparts. After all, the President announces policies and other executive decisions in such colorful tweets.

Second, it is noteworthy that Judge Otero's opinion assumes a dark characterization of modern political speech about and involving U.S. presidents. In arguing that it would be unfair to allow Ms. Clifford to strongly criticize President Trump without letting him respond in kind, Judge Otero wrote that preventing a president from issuing a "strongly-worded response...to another politician or public figure...would deprive this country of the 'discourse' common to the political process."

Judge Otero's characterization of the combative nature of our current "common" political discourse is probably accurate. But it also seems, to borrow one of the President's favorite tweet words, "Sad."