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"Constitution Does Not Shield Presidents from
Defamation Suits"

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The Justice Department's announcement this week that the Constitution does not shield presidents from civil lawsuits stemming from a president's defamatory remarks represents two important victories—one for constitutionally limited government and the other for individuals who could be destroyed by the words of the nation's chief executive.

The DOJ's declaration clarified its position on the broad question of immunity for former President Donald Trump against a lawsuit filed by the writer E. Jean Carroll, who says that Trump raped her in a Manhattan department store dressing room decades ago.

For three years, the DOJ, under both Republican and Democratic leadership, had contended that Trump was acting within the scope of his presidential duties when he denied sexually assaulting Ms. Carroll. That position protected Trump, as it would other federal employees, from civil lawsuits when acting in their official capacity.

In this week's court filing, however, the DOJ declared that new evidence had surfaced since Trump left office, including the fact that the jury in a recent civil trial in New York found the former president liable for sexually assaulting Ms. Carroll 30 years ago.

The new facts indicated that Trump, in his derogatory comments against Ms. Carroll in 2019, was

motivated by a "personal grievance," stemming from events that occurred many years before his presidency. His comments were, indeed, made through official channels often used by presidents in communicating with the media, and thus within the category of "work context." However, the DOJ emphasized that the allegations of Ms. Carroll that prompted Trump's response related to a "purely personal incident"—the alleged sexual assault in a department store. Trump's remarks did not reflect a desire to "serve the United States Government."

The question of whether former President Trump was engaged in "official acts" when responding to Ms. Carroll's allegations of sexual abuse is critical to the character and disposition of the case. After Ms. Carroll filed suit, the DOJ, under the leadership of Attorney General William Barr, invoked a federal law that substitutes the government as the defendant when a federal official is sued for official acts, which leads to the dismissal of the case.

But the presiding federal district court judge, Lewis Kaplan, rejected the DOJ's invocation of the federal statute on grounds that Trump's remarks bore "no relationship to the official business of the United States." That seemed clear, of course, but Trump's legal team filed a round of appeals with the result that the case ultimately returned to Judge Kaplan.

Judge Kaplan asked the DOJ to weigh in a second time on the question of whether Trump's comments were related to official business, or merely an exercise in "personal grievance." The department's filing declared on the face of the new evidence that Trump was not covered by the federal statute.

The DOJ rightly cited two factors for its reversal. It invoked a D.C. Court of Appeal's clarification of the statute about what qualifies as "public work." The

court held that it is determined in part by "the subjective state of mind of the employee," that official responses to press questions don't always qualify and that the professional purpose can be so "insignificant" as to be irrelevant. It also cited the recent verdict of a New York jury that found Trump sexually abused and defamed Ms. Carroll, and the fact that he has since been accused of defaming her again in response to the verdict.

It was relatively easy for the DOJ to conclude that there was little, if any official conduct in Trump's derogatory comments about Ms. Carroll. That conclusion represents a victory for constitutionally limited government and the rights and reputations of American citizens.

Imagine a different outcome, one that would permit the federal government to intervene and substitute itself in a civil lawsuit against a president who has defamed a citizen. In such a world, a president, acting with total immunity from liability, might destroy the reputations of men and women with impunity. In such a world, there would be little, if any, protection for critics of the president. Imagine the chilling effect on dissident speech and then imagine the effect on our democracy.

The Framers of the Constitution created a limited presidency that was subject to the rule of law, one devoid, as James Wilson declared, of "privileges not annexed to the character of any other citizen." This principle includes the denial to the president of authority to defame citizens of the United States.

