

# Maryland Federal Court Dismisses Nunes Advisor's Defamation Lawsuit

By Maxwell S. Mishkin

Derek J. Harvey, a senior aide to serial libel plaintiff Congressman Devin Nunes, followed his boss's lead late last year by filing a defamation lawsuit with the help of Nunes's usual attorney Steven Biss. Last month, the U.S. District Court for the District of Maryland dismissed Harvey's Complaint for failure to state a claim and lack of personal jurisdiction. [Harvey v. CNN, et al.](#), 2021 U.S. Dist. LEXIS 29487 (D. Md. Feb. 17, 2021).

## Background

In August 2019, a whistleblower wrote to the Senate Select Committee on Intelligence and the House Select Permanent Committee on Intelligence to report that during a July 2019 telephone call, President Donald Trump had "pressured" Ukrainian President Volodymyr Zelensky to "initiate or continue an investigation into the activities of former Vice President Joseph Biden and his son, Hunter." The following month, Congress launched a formal impeachment inquiry, which included sending a request for records to Florida businessman Lev Parnas, who was reportedly linked to President Trump's personal attorney Rudy Giuliani.

In October 2019, Parnas was charged in the Southern District of New York with violating federal campaign finance laws. Parnas hired New York attorney Joseph A. Bondy to defend him in the matter. The following month, CNN published a news report that included a statement from Bondy that Parnas was "willing to tell Congress about meetings" that Nunes "had in Vienna last year with a former Ukrainian prosecutor to discuss digging up dirt on Joe Biden." The report further quoted Bondy about the extent of the interactions between Parnas, Nunes, and Harvey in connection with efforts to obtain information about the Biden family.

In December 2019, the House approved two Articles of Impeachment against President Trump, and the following month the House released records of WhatsApp messages between Parnas and Harvey, which included Harvey's request for Parnas to "get materials" concerning a rumored link between U.S. foreign aid to Ukraine and the Clinton Foundation. Bondy later sent a letter to Senator Mitch McConnell "to provide a brief summary of what Mr. Parnas's testimony would be" if he were called as a witness at the impeachment trial, including testimony concerning Nunes, Harvey, Giuliani, and others. The Senate voted not to allow witnesses to be called at the trial, however, and ultimately acquitted President Trump in February 2020.

## The Complaint

In October 2020, Harvey sued CNN, Parnas, and Bondy in Maryland federal court, asserting claims of defamation and false light invasion of privacy. Harvey alleged that the defendants falsely claimed that he and Nunes flew to Vienna to meet with former Ukrainian Prosecutor

General Viktor Shokin, and that they did so in a hurry after Republicans lost control of the House of Representatives in 2018 to avoid having to report the trip to the new Democratic leadership. Harvey sought tens of millions of dollars in compensatory and punitive damages on each claim, as well as a permanent injunction barring the defendants from repeating the challenged statements.

CNN, Bondy, and Parnas each moved to dismiss the Complaint under Rule 12(b)(6) for failure to state a claim, and Bondy (a New York resident) and Parnas (a Florida resident) further moved to dismiss under Rule 12(b)(2) for lack of personal jurisdiction.

### **The District Court's Opinion**

On February 17, 2021, just two weeks after briefing closed on the motions to dismiss, Judge Richard D. Bennett issued a 41-page opinion dismissing each of Harvey's claims against all three defendants.

As to Bondy and Parnas, the Court concluded that it lacked personal jurisdiction because Maryland's long-arm statute did not extend to allegedly defamatory statements made entirely outside of that state. The Court further found that it would violate due process to exercise jurisdiction over Bondy and Parnas in Maryland because "[t]he only alleged connection between these Defendants and the State of Maryland is simply that Harvey is a Maryland resident and claims to have suffered harm in his home state."

As to CNN, the Court explained that Harvey failed to state a claim on multiple grounds.

First, the Court observed that it was not defamatory for CNN to report or suggest that Harvey "was assisting Nunes in [his] investigation of a political rival," because the House Republicans themselves expressed the belief that "there was 'nothing wrong with asking serious questions' about the Bidens and their dealings in Ukraine."

Second, the Court noted that two of the challenged statements Harvey attributed to CNN were actually published by other news organizations, such that they could not possibly give rise to a claim against CNN.

Third, the Court found that many of the statements challenged in Harvey's Complaint were actually about Nunes, not about Harvey, and thus they did not satisfy the threshold "of and concerning" element of a defamation claim.

Fourth, the Court recognized that many of the challenged statements and the implications they allegedly conveyed were not materially false. The Court reached this conclusion in part based on the WhatsApp messages that Harvey himself incorporated into the pleadings.

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Fifth, the Court determined that the use of the term “smear campaign” in one challenged report could not give rise to a claim, because “[a]ny accusation that Nunes and other engaged in a ‘smear campaign’ of anyone is a protected statement of opinion – not a provably false assertion of fact.”

Sixth, the Court ruled that when CNN’s reports fairly and accurately summarized official records from President Trump’s first impeachment proceedings and “provid[ed] a link to the actual documents themselves,” CNN’s reporting was protected by Maryland’s fair report privilege. Moreover, because Bondy’s statements “were absolutely privileged under Maryland law” as “statements made on behalf of his client,” CNN’s reporting on those statements was protected by the fair report privilege as well, because those “two privileges ‘operate in tandem.’”

Seventh, the Court concluded that Harvey – a Senior Advisor to a member of Congress and a former member of the National Security Council – was a public official and that his Complaint contained only “conclusory allegations” that “fail to plausibly allege actual malice” on the part of CNN. The Court added that the same failure led to the recent dismissal of one of Nunes’s many libel complaints “prepared by counsel now representing Harvey.”

The Court granted Harvey leave to file an Amended Complaint within 15 days “if [he] possesses facts to cure such manifest deficiencies.” Harvey has not submitted any further pleadings in the matter as of this writing.

*Charles D. Tobin, Chad R. Bowman, and Maxwell S. Mishkin of Ballard Spahr LLP represented defendant Joseph A. Bondy. Defendant Lev Parnas was represented by Rodney A. Smolla and David C. Holland. Defendant CNN was represented by Stephen J. Fuzesi, Thomas G. Hentoff, and Nicholas G. Gamse of Williams & Connolly LLP. Plaintiff Derek J. Harvey was represented by Joseph L. Meadows of Bean, Kinney & Korman, P.C., and Steven S. Biss.*