

Can Trump Change Libel Laws?

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“Change libel laws?” President Trump suggested in a tweet on March 30th of this year.¹ He was unhappy with reporting in *The New York Times* for “[getting him] wrong for two solid years,” and thus came up with this solution.² In his article, “Can Trump Change Libel Laws?” *New York Times* writer Adam Liptak expands on Trump’s comments:

“I’m going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money,” Mr. Trump said. “We’re going to open up those libel laws. So when *The New York Times* writes a hit piece which is a total disgrace or when *The Washington Post*, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they’re totally protected.”³

Essentially, Trump wants to lessen the protection reporters have over the things they can say and write – he is suggesting that it should be made easier for public figures like himself to file successful defamation lawsuits⁴ – because he does not like what is being said about him.

However, while Trump has every right to disagree with or dislike the things written about him, is that enough for him to be able to sue such reporters more easily? His solution to this issue seems too good to be true. Can Trump really change libel laws, or is this protection that reporters have valid?

Before we dive into the questions posed above, first it is important to state what libel laws are. According to Don R. Pember and Clay Calvert, libel itself is “the publication or

¹ Donald J. Trump. Twitter Post, March 30, 2017 (7:27 AM), <https://twitter.com/realDonaldTrump/status/847455180912181249>

² Ibid.

³ Adam Liptak, “Can Trump Change Libel Laws?” *The New York Times*, March 30, 2017, <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html?rref=collection%2Ftimestopic%2FLibel%20and%20Slander>

⁴ Jacob Sullum, “Trump Want to ‘Change Libel Laws’ So That Truth Is No Defense,” *Hit & Run*, March 31, 2017, <http://reason.com/blog/2017/03/31/trump-wants-to-change-libel-laws-so-that>.

broadcast of any statement that injures someone's reputation or lowers that person's esteem in the community.”⁵ In other words, it is “the written or broadcast form of defamation,”⁶ which is “the act of making untrue statements about another which damages his/her reputation.”⁷

Therefore, libel *laws* exist as a means for those who have been defamed in written form to counter this defamation – in other words, libel laws exist to protect a person's reputation. And in order to succeed in a libel case as a plaintiff, one must pass these criteria as considered by the courts: “the defamatory nature of the communication, how it was published, the truth or falsity of the claims, whether it is ‘of and concerning’ an individual, reputational harm caused and the degree of fault.”⁸ However, the courts do not make it easy for a plaintiff to pass all of these criteria. Furthermore, defendants of a libel case also have defenses available, such as by proving the statement to be true, proving the statement to be fair comment, or proving that the statement is protected by privilege.⁹ Therefore, given that libel cases are hard to win in terms of suing someone who defamed you, libel laws also exist to protect a person's right to freedom of speech.

This is precisely why President Trump wants to change libel laws – with the way the laws are currently set up with the criteria and defenses, and considering Trump's place and status in the country, it would be really difficult for him to win a libel lawsuit. In this sense, the reporters have a great amount of protection over the things they are able to write about. This is very interesting, because up until the twentieth century, libel law was considered to be “a robust check

⁵ Don R. Pember and Clay Calvert, *Mass Media Law*, 19th ed. (New York: McGraw-Hill Education, 2015), 144.

⁶ *Legal Dictionary*, s.v., “libel,” accessed November 12, 2017, <http://dictionary.law.com/Default.aspx?selected=1153>.

⁷ *Legal Dictionary*, s.v., “defamation,” accessed November 12, 2017, <http://dictionary.law.com/Default.aspx?selected=1153>.

⁸ “Libel,” *Reporters Committee for Freedom of the Press*, accessed November 14, 2017, <https://www.rcfp.org/digital-journalists-legal-guide/libel>.

⁹ James Sturcke, “Libel Laws Explained,” *The Guardian*, August 31, 2006, <https://www.theguardian.com/technology/2006/aug/31/news.politicsandthemedial>

against reckless and sensational press” by many judges and juries.¹⁰ While this is still true of libel laws, over time, the institutional press has influenced America’s view of the purpose of the freedom of press and journalism’s role in a democratic society, making for a “more press friendly era in libel law, from the wire service defense to the actual malice standard.”¹¹ With that in mind, here is the next question to be considered: is this protection valid or can people who hold power, like Trump, change libel laws?

The simple answer to the question posed above is no – the president cannot change libel laws,¹² and the simple reason for that is because people like reporters have access to their First Amendment rights. Liptak explains in his article that this is because libel law is a state-law tort, which means that “state courts and state legislatures have defined its contours.”¹³ He then goes on to explain that since the Supreme Court’s 1964 decision in *New York Times v. Sullivan* – a case in which L.B. Sullivan, Montgomery city commissioner, filed a libel action against a newspaper and four black ministers who endorsed an ad claiming that the arrest of Reverend Martin Luther King, Jr. for perjury was part of an effort to destroy King’s efforts to integrate public facilities and encourage people of color to vote, claiming that these allegations personally defamed him¹⁴ – “the Supreme Court has placed constitutional limits on how states can define libel, notably by requiring public officials and, later, public figures to prove actual malice.”¹⁵ This point is made clear by Justice William J. Brennan, Jr., who served in this case and had the majority opinion:

¹⁰ Patrick File, “Retract, Expand: Libel Law, the Professionalization of Journalism, and the Limits of Press Freedom at the Turn of the Twentieth Century,” *Communication Law & Policy* 22, no. 3 (2017): 1.

¹¹ Ibid.

¹² Liptak, “Can Trump Change Libel Laws?”

¹³ Ibid.

¹⁴ “*New York Times Company v. Sullivan*,” *Oyez*, accessed November 14, 2017, www.oyez.org/cases/1963/39.

¹⁵ Liptak, “Can Trump Change Libel Laws?”

The Court held that the First Amendment protects the publication of all statements, even false ones, about the conduct of public officials except when statements are made with actual malice (with knowledge that they are false or in reckless disregard of their truth or falsity). Under this new standard, Sullivan's case collapsed.¹⁶

According to Justice Brennan, protection was needed in order to justify “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open,” and that such debate “may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”¹⁷ With that in mind, changing libel laws means that the Supreme Court must reconsider the *New York Times v. Sullivan* standard and overrule it or overrule a constitutional amendment, such as the First Amendment.¹⁸ Such overruling is very unlikely, and the best Trump could do is to appoint Supreme Court justices who would “vote to overturn the precedent.”¹⁹ Trump himself, or anyone for the matter, cannot change libel laws unless they are a Supreme Court justice, who even then can only change libel laws by majority vote.

Let us say libel laws are able to be changed as Trump suggests, however. What would be the implications of that? The biggest issue that I believe this brings about concerns the First Amendment, especially because libel laws are meant to protect people’s First Amendment rights. The amendment reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of

¹⁶ “New York Times Company v. Sullivan,” *Oyez*.

¹⁷ “New York Times Company v. Sullivan,” *Legal Information Institute*, accessed November 14, 2017, <https://www.law.cornell.edu/supremecourt/text/376/254>

¹⁸ Liptak, “Can Trump Change Libel Laws?”

¹⁹ *Ibid*.

the people peaceably to assemble, and to petition the government for a redress of grievances.²⁰

It exists to protect the basic liberties that citizens have access to, which are freedom of religion, speech, the press, petition, and assembly.²¹ Because we are considering the First Amendment in light of libel laws, it is freedom of speech and of the press that is at stake here. Freedom of speech is what entitles citizens to say what they think and gives citizens the right to openly share their opinions and disagree with others without fear of punishment by government authorities, as long as their speech does not “intentionally hurt someone else's reputation by making false accusations” or are irresponsible statements that cause deliberate harm to others.²² Freedom of the press is what makes it possible for citizens to be informed about what is going on in the government, as it allows reporters and editors to “criticize the government without the risk of punishment, provided they do not deliberately tell lies.”²³ Both of these freedoms are of the most cherished of liberties, but they often conflict with other rights and liberties, and so the courts must consider the question, “What are the limits of free speech?”²⁴ A basic principle that serves to decide the limits of free speech is the “clear and present danger” test, set by *Schenck v. the United States*, a case from World War I.²⁵ The principle is that “free speech would not be protected if an individual were a ‘clear and present danger’ to United States security.”²⁶ With freedom of the press, the same principle applies, but censorship and prior restraint also come into

²⁰ “First Amendment,” *Legal Information Institute*, accessed November 16, 2017, https://www.law.cornell.edu/constitution/first_amendment

²¹ “First Amendment Rights,” *American Government Online Textbook*, accessed November 16, 2017, <http://www.ushistory.org/gov/10b.asp>.

²² Barbara S. Feinberg, “Explaining the Bill of Rights,” *Scholastic*, accessed November 16, 2017, <https://www.scholastic.com/teachers/articles/teaching-content/explaining-bill-rights/>

²³ *Ibid.*

²⁴ “First Amendment Rights,” *American Government Online Textbook*.

²⁵ *Ibid.*

²⁶ *Ibid.*

play. According to the American Government Online Textbook, “the courts have ruled that the government may not censor information before it is written and published, except in the most extreme cases of national security.”²⁷ Therefore, censorship and prior restraint is considered to be unconstitutional unless the material poses a serious threat to the government and country.

With these definitions of freedom of speech and of the press in consideration, if libel laws are set up to protect a person’s right to freedom of speech and the press’ right to freedom of the press in addition to protecting a person’s reputation, speech or publication that does not pose a serious threat to the United States or the government – in addition to speech that is not provably defamatory, false, or malicious, a serious threat to the one being spoken or written about, and damaging to the person²⁸ – should be protected under libel laws. Therefore, changing libel laws to make it easier for people like Trump to win libel cases would mean violating the freedom of speech and of the press that such reporters and editors have access to. As Jacob Sullum puts it, “journalism can be not just negative but unfair, unbalanced, or misleading without being libelous,”²⁹ as long as it does not pose a serious threat, among other things as mentioned above. Essentially, changing libel laws as Trump suggests them to be changed would be unconstitutional, because it goes against the First Amendment.

Furthermore, Liptak points out something said by Judge Gorsuch, who was asked about *New York Times v. Sullivan*:

“*New York Times v. Sullivan* was, as you say, a landmark decision and it changed pretty dramatically the law of defamation and libel in this country,” he said. “Rather than the common law of defamation and libel, applicable normally for a long time, the Supreme

²⁷ “First Amendment Rights,” *American Government Online Textbook*.

²⁸ Pember and Calvert, *Mass Media Law*, 153.

²⁹ Sullum, “Trump Want to ‘Change Libel Laws’ So That Truth Is No Defense”.

Court said the First Amendment has special meaning and protection when we're talking about the media, the press in covering public officials, public actions and indicated that a higher standard of proof was required in any defamation or libel claim. Proof of actual malice is required to state a claim ... That's been the law of the land for, gosh, 50, 60 years.”³⁰

Judge Gorsuch emphasizes the importance of the First Amendment in considering libel cases particularly for the media and the press. This higher standard of proof ensures that the First Amendment rights of reporters are protected. And not only that, but he states that this has been the law of the land for at least 50 years! If something has been standing as a standard for that long, it has likely been standing for good reason and such laws should not be able to be changed so easily, especially for reasons that are not very significant.

It is also worth mentioning one more thing in particular that served as a rationale for the ruling of *New York Times v. Sullivan*. This rationale is mentioned by Pember and Calvert: “When public officials like Sullivan take a government post, they must expect that their work will be closely scrutinized and even criticized by the people they serve.”³¹ Public officials should expect to at least some degree to be written and talked about, and that such material can include hate, criticism, and even inaccurate information. And especially if what is said about them does not pose a threat or bring about serious damages to them, there is no reason for public officials to need to sue and win libel cases, as there are plenty of other opportunities that they can take to make up for what is said about them if they are truly concerned. They “have easy access to the press to deny allegations made against them, to give their side of the story, and to even verbally

³⁰ Liptak, “Can Trump Change Libel Laws?”

³¹ Pember and Calvert, *Mass Media Law*, 178.

attack their critics.”³² Instead of bringing things to court, which is unnecessary, they can find someone else to publish the truth.

Being that the definition of a public official includes any person who is an elected government officeholder, regardless of how high or low the public office, President Trump clearly falls under this category. Therefore, even before coming into his role as president, he should expect to be written about in the ways he currently is, even if he feels the material is disgraceful or misleading. He should expect criticism, hate, and all other forms of content that people will say and write of him – even false content! Such things are inevitable when one is in such a position, because people will have opinions and people will talk, and one cannot just sue everybody that says something about them just because they do not agree with or like what is being said. That would be unreasonable and unnecessary, especially because there are other approaches that can be taken, such as finding another reporter that would be willing to publish the truth for you if so desired.

In conclusion, to revisit and answer President Trump’s question, “Change libel laws?”³³ the answer is: no, it is neither possible nor necessary for libel laws to be changed. There is very good reason why libel laws are made to be as strict as they are, namely to protect people’s First Amendment rights. Changing libel laws for the reasons Trump indicates would be unconstitutional, especially considering the role he has in this country and the nature of what is being said and published about him. As far as we know, the things being said about Trump in the material he addresses does not pose a serious threat to him, his reputation or the country, and has not been proven to be malicious either, and so there truly is no need for changes in libel law, and the protection over these reporters’ words and publications are certainly valid.

³² Pember and Calvert, *Mass Media Law*, 178.

³³ Donald J. Trump, Twitter Post.

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