5-7-2017

Can President Trump 'Open Up' the Libel Laws?

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Recommended Citation

John M. Greabe, *Can President Trump 'Open Up' the Libel Laws?,* Concord Monitor, Feb. 26, 2017 at D1, D3.

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Constitutional Connections

Libel and slander are branches of the law of defamation. Defamation law authorizes remedies for reputational harm caused by some false statements of fact. A libel is a defamatory statement that is printed or written; a slander is a defamatory statement that is spoken.

During the 2016 presidential campaign, candidate Donald Trump suggested that, if elected, he would "open up our libel laws" to facilitate lawsuits by public officials against news organizations.

A few weeks ago, President Trump concluded a tweet critical of the *New York Times* with the rhetorical question: "Change libel laws?" And last weekend, White House Chief of Staff Reince Priebus stated that the administration has looked into modifying the law of libel.

So what power does the Constitution give the president to "open up" the libel laws? In truth, almost none.

For starters, libel and slander are *state law* causes of action. There are no federal statutes that generally regulate libel or slander. And the Supreme Court has ruled that the Constitution does not protect harm to one's reputation.

Obviously, the president has no power to alter state law. And just as obviously, he has no power to enact federal law on his own.

Sometimes, the president may use

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his law enforcement discretion to change the ways in which federal laws are *administered*. Consider, for example, President Trump's recent executive orders mandating stricter enforcement of federal immigration statutes.

But, again, there is no federal law of libel or slander for the president to enforce more or less strictly.

So what then is the president considering?

One path forward could be for the president to ask Congress to enact a federal libel law that is more to his liking than the laws presently on the books in the states. But such a request would almost certainly fail.

First, many in Congress would surely view such a proposal as an unwarranted attack on our free press. A free press has long been considered a linchpin of democracy and necessary for transparency in government. Exposing the press to libel suits could deter it from performing its essential functions.

Second, many in Congress would surely conclude that, even if the Constitution were to permit the federalization of the law of libel (a doubtful proposition), actually doing so would constitute an inappropriate federal intrusion into a regulatory area properly reserved to the states.

But let's suppose, purely for the sake of argument, that the president *could* persuade Congress to enact legislation making it easier for public officials to sue the press, and that such legislation *could* plausibly be grounded in a power the Constitution gives to Congress. Even so, any such legislation would violate the free speech and free press guarantees of the First Amendment.

Under current law, the states are not free to fashion the law of libel and slander as they see fit. Rather, because libel and slander actions seek monetary damage awards that punish defamatory speech, the Supreme Court has interpreted the First Amendment to place a number of limits on how states can define them.

One such limit makes it exceedingly difficult for elected officials – and, indeed, public figures generally – to prevail in a libel or slander action: the legal rule formulated in the Supreme Court's landmark 1964 decision in *New York Times v. Sullivan.*

New York Times v. Sullivan arose out of a libel action brought against the paper and four African American clergymen who authored a full-page advertisement, titled "Heed Their Rising Voices," that ran on March 29, 1960. The advertisement described aspects of the violent Southern resistance to the civil rights movement and solicited funds for the defense of Martin Luther King, Jr., who had been indicted for perjury,

The plaintiff, a commissioner of the city of Montgomery, Ala., with responsibility for public safety, complained that a number of relatively minor factual inaccuracies about the Montgomery police force contained in the advertisement had caused him reputational harm. An Alabama jury agreed and awarded him $500,000. The Alabama Supreme Court affirmed. But the United States Supreme Court, in an opinion by Justice William Brennan, reversed.

Taking note of our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials," the court held that the First Amendment bars a public official from establishing libel unless he proves by clear and convincing evidence that the defendant published a false statement about him with "actual malice" – that is, with knowledge of its falsity or a reckless disregard of the truth.

In practice, this standard is nearly impossible to satisfy.

So is there anything else the president could do to "open up" our libel laws?

The Supreme Court has not shown an interest in retreating from *New York Times v. Sullivan*, so only one option remains: to seek a constitutional amendment overturning the case's actual-malice standard. Unless we were to call a second constitutional convention, such an amendment would require approval by two-thirds of each house of Congress, and then three-fourths (37) of the states. This simply is not going to happen. The bottom line is this: The Constitution does not allow the president to open up the libel laws.

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