

Libel To Stay

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

I get the ideas for the subjects of these podcasts from a variety of sources. Some podcasts are suggested by decisions made, or soon to be made, by the Supreme Court or lower courts. Others bounce off of controversies about legislative or other policy-changing proposals. Occasionally, a public statement by an official – or a question asked by a student – sets the wheels in motion.

But this is my first podcast prompted by a presidential tweet! In August, the President posted a tweet lambasting Bob Woodward’s new book *FEAR*, an expose of the Administration. It occurred to me that the question President Trump raised at the end was a golden opportunity to clarify important issues involving state-versus-federal power and free speech.

Specifically, after lamenting that Woodward and his ilk could “make up stories and form a picture of a person that is literally the exact opposite of the fact, and get away with it without retribution or cost,” Trump concluded: “Don’t know why Washington politicians don’t change libel laws?”

Well, Mr. President, even though Washington officials are often the target of unwanted press attention and public criticism they deem false and unfair, they’re unlikely to try to change the law providing financial redress for false injuries to reputation. The two main reasons why illustrate important aspects of our constitutional system.

First, like most personal-injury claims (known as “torts”), the laws providing financial redress for libel (and its spoken cousin slander) are mainly creatures of *state* law. There are standard facets to the libel definition -- at its core, libel is intentionally uttering a false statement of fact that damages the reputation of the target. But state laws vary significantly about standards of proof and intent, measures of damages, privileges, and the like.

Because federal law has no general libel law, if “Washington politicians” wanted to change libel laws, they would first have to *federalize* libel by passing a nationwide law that muscled out state laws. This would be a relatively radical move for any Congress – and especially for many of the President’s conservative supporters for whom “states’ rights” is an article of faith.

Thus, the first answer to the President’s question shines a light on the enduringly *federalist* nature of our constitutional system, in which the key shot callers on most civil and criminal matters work in state legislatures and courthouses.

A second reason why Congress is unlikely to change the libel laws in the direction suggested by the President is that, since the 1964 decision in *New York Times v. Sullivan*, First-Amendment law has afforded substantial protection to media defendants and others accused of libeling public officials and public figures. *New York Times* required “breathing space” for those who further our “profound national commitment” to “uninhibited, robust and wide-open” debate, even through “sharp attacks on government and public officials.” A line of precedents supported by a broad ideological array of justices requires that a public official alleging libel show that the accused libeler acted with “actual malice.” This means that the author of a critical book or article either knew that damaging statements were false or acted with “reckless disregard” about whether they were true or false. This is a highly protective standard; mere journalistic “negligence” is insufficient.

These constitutional constraints are, of course, the “supreme Law of the Land.” They can’t be legislated away by Congress. Unless the Court were to overturn more than fifty years of precedents -- highly unlikely! -- legislative reformers would face the thankless task of trying to thread a very pointed constitutional needle.

Importantly, this second answer to the President’s tweeted query shows the enduring power of the individual-liberties constraints embedded in the Bill of Rights!

Now, if only the President could listen to this podcast for the answer to his question!
Regardless, thank YOU for listening!