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GUEST ESSAY

The Supreme Court Faces a Huge Test on Libel Law

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By Floyd Abrams
Mr. Abrams is a prominent First Amendment lawyer whose many clients have included The New York Times, which he successfully represented in the Pentagon Papers case. His firm represents The Times on occasion.

Next Friday, the United States Supreme Court is scheduled to meet to consider whether to hear appeals from two libel cases in which the plaintiffs seek to persuade the justices to reconsider the single greatest First Amendment victory for the press in American history.

Two of the court's justices, Clarence Thomas and Neil Gorsuch, already have expressed a readiness to do just that, a disturbing turn that could weaken speech protections and threaten the country's free and robust press.

Their focus is the court's unanimous 1964 decision in the case of New York Times v. Sullivan, won by the paper in the midst of the civil rights revolution. The purported libel appeared in a full-page advertisement in The Times titled "Heed Their Rising Voices," which criticized a "wave of terror" against civil rights demonstrators in the South led by the Rev. Dr. Martin Luther King Jr.

Most of the assertions in the advertisement were accurate; a few were not. The police commissioner of Montgomery, Ala., L.B. Sullivan, who was not named in the ad, sued The Times, claiming it had in effect falsely accused him of misconduct. He was awarded $500,000 by an all-white jury, a verdict upheld by Alabama's highest court.

For news organizations, the threat the case presented was not only sizable if not crippling libel judgments. It was also that such a result would deter reporting critical of government and public officials.

When the case reached the Supreme Court, the justices applied the First Amendment for the first time in a libel case. The core of the court's ruling in reversing the Alabama judgment was that the First Amendment barred public officials from recovering damages for a "defamatory falsehood relating to his official conduct" in the absence of clear and convincing evidence that the statement was made with what the justices called "'actual malice"— that it was made "with knowledge that it was false or with reckless disregard of whether it was false or not."

Such sweepingly broad protection was required, the court concluded, because the First Amendment embodied a "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 attack on government and public officials."

"Erroneous statement is inevitable in free debate," the court added, and "must be protected if the freedoms of expression are to have the 'breathing space' that they need to survive."

Later decisions by the court expanded the "actual malice" standard to apply to public figures outside government.

If Sullivan is overruled, defendants in libel cases will lose constitutional protections they now have, and the United States could well return to a libel regime akin to England's.

England is the mother country of the United States, a democracy from which America has learned much. But its libel law is at war with First Amendment principles. English law does not provide anything close to the protections of the Sullivan decision. Inaccurate statements about even the most powerful individuals in society receive little legal protection in England; a defendant could be liable for a false statement even if he was unaware that it was false. Moreover, the burden of proof is on the defendant; the defendant must prove that what he said was true. In the United States, the plaintiff must prove it was false.

A return by the Supreme Court to anything like the English approach could significantly chill speech of the most important sort. That has happened disturbingly often in England. In 2014, Cambridge University Press declined to publish a book about connections between President Vladimir Putin of Russia and organized crime because of England's strict libel laws. In a letter to the author, Karen Dawisha, an executive for the publisher, wrote: "The decision has nothing to do with the quality of your research or your scholarly credibility. It is simply a question of risk tolerance in light of our limited resources." The book was ultimately published in the United States. No libel action was filed.

A recent example of the potentially chilling impact of English libel law can be seen in libel litigations brought this year by supporters of Mr. Putin in courts in London against the journalist Catherine Belton and her publisher, HarperCollins, for her widely lauded book, "Putin's People: How the KGB Took Back Russia and Then Took On the West."

The "ruinous" legal action, according to Toomas Hendrik Ilves, a former president of Estonia and a journalist before that, is intended "not just to crush her, but to deter anyone else who dares to investigate the nexus of intelligence, business, organized crime and state power that gave birth to and sustains Russia's ruling elite."

That is, of course, precisely the sort of threat that the Sullivan decision seeks to protect against.

The stark difference in approach between American and English libel law led Congress to unanimously pass legislation, signed by President Barack Obama in 2010, barring state or federal courts from enforcing foreign libel judgments against U.S. defendants that are not consistent with First Amendment protections as set forth in the Sullivan decision.

That law, the Speech Act, was adopted partly in response to a libel suit brought in London by a Saudi billionaire against an American author, Rachel Ehrenfeld, whose book "Funding Evil: How Terrorism Is Financed and How to Stop It" alleged that he had funded terrorism.

Ms. Ehrenfeld had credible sources for her assertions. But she declined to appear in court and submit to English jurisdiction, noting, as she later explained, that her book "was neither published nor marketed in Britain." Libel law in England "chills free speech through the award of disproportionate damages" and leaves defendants with "a lack of viable defenses," she wrote in The Times.

Should the court agree to hear one or both of the libel cases, that does not mean, of course, that either or both would be overruled. (The Times joined in an amicus brief in support of the defendant in one of those cases when it was before an appeals court.) But it is troubling that two of the court's nine justices have criticized Sullivan and seem ready to overrule it. Only four votes are required for the full court to take up cases, and if it does so, a fifth would be needed for any ruling.

When the Supreme Court decided the Sullivan case 57 years ago, Alexander Meiklejohn, a leading First Amendment scholar, exclaimed that it was "an occasion for dancing in the street." If the court agrees to hear one or both of the libel cases before it, that would be an occasion for us all to hold our breath.

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