Oklahoman Q&A with Jon Epstein: Free speech, press guarantees protect the public

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President Trump and several members of his staff criticized Michael Wolff's book, "Fire and Fury: Inside the Trump White House," an unflattering and critical portrayal of the president and the White House.

A lawyer working on Trump's behalf even sent a cease-and-desist letter to the publisher. In response to that threat, the publisher actually moved up the publication date.

Following publication of the book, Trump repeated a campaign pledge to make it easier for people to sue news organizations and publishers for defamation, denouncing the country's libel laws as a "sham."

What is the standard for a public figure or public official to be able to prove a defamation claim against the publishers of critical statements?

In 1964, the United States Supreme Court ruled (in New York Times v. Sullivan) that the Constitution guarantees a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the false statement was made about him with "actual malice" — meaning with knowledge that it was false or with reckless disregard of whether it was false. The test "is a subjective one," measured by the actual state of mind of the publisher, not by what a reasonably prudent publisher would have done.

Why does the Constitution provide this type of protection rather than allowing public officials to successfully assert defamation claims for any publication that they contend is false?

The free speech and press guarantees protect the public by allowing issues to be freely and vigorously discussed, and such protection is necessary for an effective democracy. Thomas Jefferson once said, "Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

The Supreme Court has explained that expression on public issues "has always rested on the highest rung of the hierarchy of First Amendment values" because there is a "profound national commitment" to the

principle that “debate on public issues should be uninhibited, robust, wide open” and “Speech concerning public affairs is more than self-expression; it is the essence of self-government.” It determined that this free debate is necessary even if it includes caustic and sometimes unpleasantly sharp attacks on government officials.

What could happen if those protections were removed?

It would lead to a chilling effect on political debate out of concern that contrary or unpopular views may be stifled by the threat that a jury may disagree with the statement. Even Trump has recognized the concern about lessening the protection when he joked in a prior interview that he personally might get sued a lot more if the libel laws were loosened. He may have been sued for his comments that President Obama was born in Africa and that the father of Sen. Ted Cruz had aided the assassination of President John F. Kennedy.

Attorneys

- Jon A. Epstein