Can Trump Change Libel Laws?

By ADAM LIPTAK    MARCH 30, 2017

WASHINGTON — In a Thursday morning Twitter post, President Trump returned to a favorite theme. He was unhappy with reporting in The New York Times, and he had a solution. “Change libel laws?” he asked.

What does he mean?

On the campaign trail, where he was not constrained by Twitter’s character limit, Mr. Trump was more expansive.

“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.”

What does libel law say?

It is indeed hard for public figures to win libel suits. They have to prove that something false was said about them, that it harmed their reputation and that the
writer acted with “actual malice.” That last term is misleading, as it has nothing to do with the ordinary meaning of malice in the sense of spite or ill will.

To prove actual malice, a libel plaintiff must show that the writer knew the disputed statement was false or had acted with “reckless disregard.” That second phrase is also a term of art. The Supreme Court has said that it requires proof that the writer entertained serious doubts about the truth of the statement.

That is a high bar, and public figures rarely file libel suits and seldom win them.

Can the president change libel laws?

No. Libel law is a state-law tort, meaning that state courts and state legislatures have defined its contours.

Since the Supreme Court’s 1964 decision in New York Times v. Sullivan, 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. That protection was needed, Justice William J. Brennan Jr. wrote, to vindicate a “profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide-open.”

Such debate, Justice Brennan wrote, “may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.”

Changing New York Times v. Sullivan would require either the Supreme Court to overrule it or a constitutional amendment. Neither is remotely likely, though Mr. Trump could try to appoint Supreme Court justices who would vote to overturn the precedent.

Where does Judge Neil M. Gorsuch stand?

Last week, at his Supreme Court confirmation hearings, Judge Gorsuch was asked about New York Times v. Sullivan by Senator Amy Klobuchar, Democrat of Minnesota. She wanted to know whether “the First Amendment would permit public officials to sue the media under any standard less demanding than actual malice?”
Judge Gorsuch, cagey when asked about other precedents, seemed comfortable with this.

“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 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.”

Would Mr. Trump face other challenges in suing for libel?

Beyond the actual malice rule, Mr. Trump would have to prove injury to his reputation. As Judge Gorsuch put it in a 2011 opinion, libel law is “about protecting a good reputation honestly earned.”

The state of Mr. Trump’s reputation arose during the presidential campaign, when his lawyers asked for a retraction of an article in The Times that reported on complaints from two women who said Mr. Trump had touched them inappropriately.

Mr. Trump’s lawyers called the article libelous and seemed to threaten to sue. David McCraw, a lawyer for The Times, responded that Mr. Trump’s reputation was too tarnished to allow a successful libel suit.

“The essence of a libel claim, of course, is the protection of one’s reputation,” Mr. McCraw wrote. But Mr. Trump’s reputation in this area, Mr. McCraw said, could not have been harmed by The Times’s report in light of, for instance, Mr. Trump’s own statements about groping women.

“Nothing in our article has had the slightest effect on the reputation that Mr. Trump, through his own words and actions, has already created for himself,” Mr.
McCraw wrote.

So far, there has been no lawsuit filed over the article.

What does The Times have to say about the latest Twitter post?

“We continue to be extremely proud of our coverage of the Trump administration, which has been tough and fair, as it should be,” said Eileen Murphy, a Times spokeswoman.

Get politics and Washington news updates via Facebook, Twitter and in the Morning Briefing newsletter.

A version of this article appears in print on March 31, 2017, on Page A13 of the New York edition with the headline: From Provocative Tweet to Black-Letter Reality.