

DEFAMING THE PRINCE: WHY THE MEDIA IS ENTITLED TO IMMUNITY FROM A PRESIDENTIAL DEFAMATION SUIT

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*This article argues that media outlets should be completely immune from defamation suits initiated by a U.S. President. The article presents the current defamation standard for public officials and explores the history of tense President-press relations. It then argues that defamation lawsuits are a dangerous tool in the hands of a sitting President and that the potential for abuse of these lawsuits makes them inconsistent with the First Amendment. In support of this claim, the author offers several doctrinal and policy rationales for eliminating the *New York Times Co. v. Sullivan* standard with respect to a sitting President in favor of a zero-liability rule. In a political climate dominated by charges of “Fake News” and with the election of a notoriously litigious President, now is an opportune time to explore the implications of allowing a sitting President to bring a cause of action for defamation.*

I. INTRODUCTION

On the campaign trail, then-candidate Donald Trump made an interesting promise: “if I win . . . I’m going to open up the libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money.”¹ President Trump’s comments betrayed a fundamental misunderstanding of defamation law. The President has very little power to shape state common-law tort principles or the constitutional decisions that guide them.² However, his comments raised interesting questions about the application of defamation law to the President. While no sitting President has

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1. Hadas Gold, *Donald Trump: We’re Going to ‘Open Up’ Libel Laws*, POLITICO (Feb. 26, 2016, 2:31 PM), <http://www.politico.com/blogs/on-media/2016/02/donald-trump-libel-laws-219866>.

2. See Adam Liptak, *Can Trump Change Libel Laws?*, N.Y. TIMES (Mar. 30, 2017), <https://www.nytimes.com/2017/03/30/us/politics/can-trump-change-libel-laws.html>.

ever sued for defamation, current First Amendment doctrine can plausibly be read as allowing such a suit. This indicates a potentially more ominous misunderstanding by President Trump: that he *needs* to “open up” libel laws in order to sue.³ In reality, it would be just as easy for President Trump to bring a defamation suit as President as it was when he was the leader of his business. While defamation suits are ultimately hard to *win* under current First Amendment doctrine, their strategic use by wealthy public officials to stifle criticism is a dangerous weapon against the press.⁴

The current standard for defamation lawsuits by public officials was set forth in *New York Times Co. v. Sullivan*.⁵ There, the Court decided that the First Amendment allows public officials to sue for defamation under state law only if they can prove that the defendant acted with “actual malice”—i.e., with knowledge that the defamatory communication was false or with reckless disregard for its truth.⁶ The Court has since decided numerous other cases regarding defamation suits by public officials, generally fashioning rules that make lawsuits harder for plaintiffs.⁷ While the standard makes it difficult for plaintiffs to prevail, it can also subject defendants to extensive discovery and costly trials. If the claims make it to trial, media freedom is left in the hands of juries—notoriously fickle decision-makers.⁸

The ability of powerful public figures to bring suit has a chilling effect on journalists—the risk of litigation expenses and potential damages makes them wary to publish reports that might invoke the ire of a wealthy plaintiff. This chilling effect poses First Amendment concerns and motivated the Court in *Sullivan* to protect the press via a heightened burden of proof for public official plaintiffs.⁹ While the current rule’s effect may ameliorate concerns about a broad chilling effect on all political reporting, the rule does not go far enough with respect to media coverage of the President. A President who has sufficient personal resources to mount a litigation offensive against the press could bully them into reporting only certain information. This strategy, ostensibly legal

3. One author has credited current Supreme Court doctrine with creating an “exaggerated impression in the minds of some potential plaintiffs and lawyers that the press is impervious to public-plaintiff libel suits” when in fact, that is far from the truth. David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 523 (1991).

4. See, e.g., Emily Bazelon, *Billionaires vs. the Press in the Era of Trump*, N.Y. TIMES MAG. (Nov. 22, 2016), https://www.nytimes.com/2016/11/22/magazine/billionaires-vs-the-press-in-the-era-of-trump.html?_r=0 (discussing *Gawker* case where a plaintiff was awarded \$140 million and forced *Gawker* out of business).

5. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

6. *Id.* at 279–80.

7. See, e.g., the cases discussed *infra* in Section II.E.

8. This is especially true in an age where the majority of Americans believe that media outlets are biased and intentionally publish fake news in order to advance an agenda. See *POTUS Less Trusted than Media*, “Fake News” Comes from All Sources, MONMOUTH U. POLLING INST. (Mar. 29, 2017), https://www.monmouth.edu/polling-institute/reports/MonmouthPoll_US_032917/.

9. See *Sullivan*, 376 U.S. at 271.

under current doctrine, has been proven effective at the international level.¹⁰ Autocratic leaders around the world have used defamation lawsuits to successfully stifle the political press. In Singapore, for example, the Prime Minister and his family members have used defamation suits for decades to successfully limit critical reporting.¹¹

Further, aspects of the Presidency distinct from any other public position justify departure from the *Sullivan* standard in favor of absolute immunity for presidential reporting. First, the President has more power than any other U.S. public official.¹² If one assumes that press freedom should be at its apex when reporting on matters most fundamental to democratic self-governance, then reporting on the President deserves greater protection than reporting on less powerful public officials. Second, the Court has reasoned that public officials and public figures should have a higher defamation burden because they can more easily rebut perceived defamatory claims.¹³ The President has more power than any other public official to rebut criticism and thus a unique ability to save face and minimize any damage caused by defamation. This supports a stricter defamation rule for the President. Third, there is no federal statute and many states lack statutes against Strategic Lawsuits Against Public Participation ("SLAPPs").¹⁴ This leaves media outlets vulnerable to a sitting President's transparent attack because state courts lack sufficient tools to dismiss the lawsuits outright. This could subject media defendants to expensive discovery. Fourth, the President has absolute civil immunity from actions he or she takes in an official capacity.¹⁵ For reasons that prompted the Court to grant this immunity in *Nixon v. Fitzgerald*, the press deserves reciprocal immunity for presidential reporting. Finally, there are numerous institutional factors beyond possible legal liability that encourage the White House press corps and other reporters to do their job ethically and report accurately. These constraints, such as reputation and White House access, appropriately limit presidential reporters' incentives to lie and defame the President.

In a political climate dominated by charges of "Fake News" and with the election of a notoriously litigious President, now is an opportune time to explore the implications of allowing a sitting President to bring a cause of action for defamation. This Article proceeds in four parts. Part II presents a summary of the background, facts, arguments concerning, and opinions issued in *New York Times Co. v. Sullivan*. It then briefly describes subsequent Supreme Court cases that clarify the standard that *Sullivan* sets forth. Part III explores the historically contentious President-press relationship and demonstrates why a presidential defamation suit is a legitimate tactic in the context of the historical effort to combat an unwieldy press. Part IV describes the lack of obstacles a President

10. See *infra* Section V.C.2.

11. See *infra* Section V.C.2.

12. See *infra* Section V.B.1.

13. See *infra* Section V.B.3.

14. See *infra* Section IV.A.

15. See *infra* Section V.B.4.

would face in bringing a defamation suit and how, under the current *Sullivan* standard, the President could win. Part V criticizes *Sullivan* and argues that the Supreme Court should adopt a zero-liability rule for defaming a sitting President.

II. NEW YORK TIMES V. SULLIVAN

A. Facts

The case arose in 1960 in the midst of the civil rights movement. Martin Luther King, Jr., arrested for the fourth time in as many years, had become the target of increasingly vicious violence in Alabama.¹⁶ The Committee to Defend Martin Luther King and the Struggle for Freedom in the South published a full-page advertisement on March 29, 1960, in the *New York Times* soliciting funds to assist with his legal defense and other civil rights activities.¹⁷ The advertisement, the subject of the defamation suit, described the oppression African Americans faced in the South and implored the public to support Dr. King.¹⁸

The advertisement, along with another article describing the racial violence in Montgomery, instantly sparked controversy.¹⁹ On April 19, 1960, three Montgomery City Commissioners (including L.B. Sullivan) filed the first in a series of civil suits against the *Times*, Dr. King, and some of the Committee leaders who had taken out the advertisement.²⁰ To the Southern officials, these suits were a means of striking back against increasing outside criticism and pressure to reform traditionally oppressive treatment of African Americans.²¹ Many in the South viewed the civil rights movement as a communist conspiracy, and media outlets like the *Times* confirmed the view that, at the very least, the disturbances were caused by outside agitation.²²

The stakes were tremendous for both sides in the lawsuits. If the Alabama city officials vindicated their claims in court, they would have a powerful tool for suppressing negative media portrayals of the South and police brutality. The *Times* faced the daunting specter of both a sizeable judgment in this particular case and a degradation of their ability to criticize public officials across the country.²³

After the Montgomery Circuit Court disposed of the *Times*' procedural and

16. Bruce L. Ottley et al., *New York Times v. Sullivan: A Retrospective Examination*, 33 DEPAUL L. REV. 741, 743–44 (1984).

17. *Id.* at 744.

18. *Id.* at 744–45.

19. *Id.* at 746 n.30 (listing numerous articles published by southern media outlets including those entitled “(Reply to New York Times) Not a City of Race Terror” in the Alabama Journal, “The Abolitionist Hellmouths”, and “The Big Lie’ Editor—Wonders Where the New York Times Got its News” in the Montgomery Adviser).

20. *Id.* at 747.

21. *Id.*

22. *Id.*

23. *Id.* at 748.

other legal challenges to the lawsuit, a trial was held.²⁴ The trial environment was not favorable to the defendants. The Montgomery Press was decidedly pro-plaintiff and the jury was all white.²⁵ The local press outed the jurors' names to the rest of the community,²⁶ undoubtedly increasing the pressure on them to find the *Times* liable. The presiding judge openly revealed his biases before trial even started by segregating the courtroom "for the good of all people" in attendance and stating his disdain for the Fourteenth Amendment in open court: "the white man's justice . . . will give the parties equal justice under the law."²⁷ The unconscionably unfair trial culminated in a unanimous jury verdict for the plaintiffs in the amount of \$500,000.²⁸ This set the stage for an eventual challenge in the Supreme Court.²⁹

B. Arguments

Professor Herbert Wechsler represented the *New York Times* in its appeal to the Supreme Court.³⁰ He primarily argued that allowing states to recognize a public official's right to sue for libel in any circumstances was akin to reviving the Sedition Act of 1789—which made it a criminal offense to communicate "false, scandalous and malicious writings" against either the government or government officials "with intent to defame"—and was therefore unconstitutional.³¹ M. Roland Nachman, an Alabama attorney, represented Sullivan.³² He made numerous arguments for why the Supreme Court should uphold the jury verdict, including that there was sufficient evidence to support the verdict and that the verdict was unreviewable under the Seventh Amendment.³³ Nachman also argued that there was no precedent supporting immunity from defamation suits by public officials and that it had no basis in the First Amendment.³⁴

C. Majority Opinion

In *Sullivan*, the Court unanimously agreed that the First Amendment prohibited Sullivan's state-law defamation claim.³⁵ The Court held that the First

24. *Id.* at 759.

25. *Id.*

26. *Id.*

27. *Id.* at 760.

28. *Id.* at 763.

29. *Id.* at 766–67.

30. *Id.* at 766.

31. *Id.* at 771.

32. Bruce Weber, *M. Roland Nachman, Lawyer in Times v. Sullivan Libel Case, Dies at 91*, N.Y. TIMES (Dec. 4, 2015), https://www.nytimes.com/2015/12/05/us/m-roland-nachman-lawyer-in-times-v-sullivan-libel-case-dies-at-91.html?_r=0.

33. Ottley et al., *supra* note 16, at 773. The Seventh Amendment states "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

34. Ottley et al., *supra* note 16, at 774.

35. *Id.* at 777.

Amendment protects citizens against defamation suits by public officials in most circumstances.³⁶ To justify this decision, it distinguished the wide body of case law stating that the First Amendment does not protect libel by noting that “[n]one of the cases sustained the use of libel laws to impose sanctions upon expression critical of the official conduct of public officials.”³⁷ The Court quoted numerous legal scholars to support the claim that the Framers preferred to let good ideas drown out bad ones rather than impose silence on certain speech by law.³⁸ It reaffirmed the “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.”³⁹ Accordingly, “erroneous statement[s]” must be tolerated in order to give freedom of expression adequate “breathing space” to survive.⁴⁰

Picking up on one of Professor Wechsler’s main arguments, the Court noted that James Madison and Thomas Jefferson’s early rejection of the Sedition Act lent further support to this interpretation of the First Amendment.⁴¹ Rejection of the Act confirmed some influential Framers’ conception about the scope of the First Amendment’s protection for the press.⁴² The Court held that Alabama’s civil defamation law was tantamount to the Sedition Act (which the Court assumed was unconstitutional⁴³) and was therefore unconstitutional itself.⁴⁴

After laying this groundwork, the Court declared a rule prohibiting the recovery of damages for publishing a defamatory falsehood related to official conduct unless that statement is made with “actual malice”—i.e., “with knowledge that it was false or with reckless disregard for whether it was false or not.”⁴⁵ The Court supported this new rule by citing a Kansas Supreme Court decision and a number of other state court opinions that adopted a similar rule.⁴⁶

In the last section of the opinion, the Court applied its new test to the facts in the case and concluded that there was insufficient evidence for a jury to conclude that actual malice existed.⁴⁷ Further, the Court found that there was not sufficient proof that the advertisement’s statements were “of or concerning”

36. *Id.* at 779–80.

37. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 268 (1964).

38. *Id.* at 270.

39. *Id.*

40. *Id.* at 271.

41. *Id.* at 273–77.

42. *Id.*

43. No court has definitively held that the Act was unconstitutional. A similar act, the Sedition Act of 1918, was passed without much comment at the end of World War I and was used to imprison numerous influential figures at the time. *See* Sedition Act of 1918, Pub. L. 65-150, 40 Stat. 553 (repealed 1920); *This Day in History—1918, Congress Passes Sedition Act*, HISTORY, <http://www.history.com/this-day-in-history/u-s-congress-passes-sedition-act> (last visited May 11, 2017). It is unclear whether such a statute would be upheld as constitutional today.

44. *Sullivan*, 376 U.S. at 278.

45. *Id.* at 279–80.

46. *Id.* at 280 n.20.

47. *Id.* at 285–86.

Sullivan to the extent required by the First Amendment to support a libel claim.⁴⁸ By applying the actual malice standard to the facts in this way, the Court effectively foreclosed any further attempts to pursue this case on remand.⁴⁹ The majority opinion was largely heralded as a complete victory for the *New York Times*, the free press, and the civil rights movement.⁵⁰

D. Concurring Opinions

Justice Hugo Black and Justice Arthur Goldberg authored separate concurring opinions, each joined by Justice William Douglas. Justice Black favored reversal of the jury verdict because he believed the *Times* “had an absolute, unconditional constitutional right to publish [the] criticisms of the Montgomery agencies and officials.”⁵¹ He did not agree that the majority’s actual malice standard would adequately protect the right to freely discuss public matters.⁵² In particular, Justice Black took issue with the use of libel as a political tool to suppress certain viewpoints:

. . . this technique for harassing and punishing a free press—now that it has been shown to be possible—is by no means limited to cases with racial overtones; it can be used in other fields where public feelings may make local as well as out-of-state newspapers easy prey for libel verdict seekers.⁵³

“Absolute immunity” from libel lawsuits, he claimed, was the only possible way to protect the press from “destruction.”⁵⁴

Justice Goldberg agreed that citizens should have an “absolute, unconditional privilege to criticize official conduct” and that the privilege should not depend upon “probing by the jury of the motivation” of the speaker.⁵⁵ Justice Goldberg further commented that speech about public affairs would be chilled if speakers risked civil liability and that the ability of “minority groups to secure publication of their views on public affairs and to seek support for their causes will be greatly diminished.”⁵⁶ Echoing the majority, Justice Goldberg reiterated that in many jurisdictions, judicial officers are cloaked with absolute immunity for defamatory statements because “to submit all officials . . . to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of

48. *Id.* at 291. “Transforming generalized allegations about the government into personal attacks that support a libel claim,” the Court claimed, posed “disquieting implications for criticism of governmental conduct.” *Id.*

49. Ottley et al., *supra* note 16, at 778.

50. See, e.g., Garrett Epps, *The Civil Rights Heroes the Court Ignored in New York Times v. Sullivan*, ATLANTIC (Mar. 20, 2014), <https://www.theatlantic.com/national/archive/2014/03/the-civil-rights-heroes-the-court-ignored-in-em-new-york-times-v-sullivan-em/284550/> (discussing the historical significance of the case).

51. *Sullivan*, 376 U.S. at 293 (Black, J., concurring).

52. *Id.*

53. *Id.* at 295.

54. *Id.*

55. *Id.* at 298 (Goldberg, J., concurring).

56. *Id.* at 300.

their duties.”⁵⁷ This logic applies to protection for the press: if government officials are protected from libel for official conduct, the press and ordinary citizens should be given the same protection when criticizing their government.⁵⁸

While these concurrences serve as the ideological basis for the some of the arguments made in this article, the absolutist position they espouse has largely been relegated to a historical footnote. Public officials have brought numerous high-profile defamation suits in the years since this opinion was issued under the actual malice standard.⁵⁹ The Court has had numerous opportunities to revisit the *Sullivan* standard and has implicitly rejected the Black/Douglas/Goldberg absolute immunity position. However, the Court has expanded and altered the *Sullivan* standard in significant ways in the proceeding decades. The following subsection describes Supreme Court jurisprudence clarifying the *Sullivan* standard.

E. Expanding and Contracting Sullivan

Defamation law is expansive and complex. Individual states define defamation differently and all of those definitions interact in unique ways with the Supreme Court’s constitutional standards.⁶⁰ Since *Sullivan*, the Supreme Court has mainly strengthened protections for the press from libel lawsuits by public officials. However, in a couple important ways, the Court has narrowed the standard and left public officials with troubling power to harass and intimidate the press.

1. Expanding Protection for the Press

The case law largely addresses two key terms in *Sullivan*: the definition of “actual malice” and what constitutes a “public figure” for purposes of applying the standard. Subsequent cases have confirmed that the “actual malice” requirement is a misnomer. Indeed, one member of the *Sullivan* majority later expressed regret in a 1979 opinion with the language the Court chose for the standard because “malice as used in the *New York Times* opinion simply does not mean malice as that word is commonly understood.”⁶¹ As the Court later clarified in *Garrison v. State of Louisiana*, state defamation standards that only require “malice” in the more commonly understood sense of ill will, enmity, or hatred, do not survive First Amendment scrutiny.⁶² Rather, malice in the *Sullivan* context means “the defendant knew the defamatory statement was untrue, or published it in reckless disregard of its truth or falsity.”⁶³

57. *Id.* at 303 (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949)).

58. *Id.* at 304.

59. See *infra* Section II.E.2.

60. See, e.g., DAVID A. ELDER, DEFAMATION: A LAWYER’S GUIDE § 7.2, Westlaw (database updated Aug. 2017) (providing extensive examples of state court opinions interpreting the Supreme Court opinions).

61. *Herbert v. Lando*, 441 U.S. 153, 199 (1979) (Stewart, J., dissenting).

62. *Garrison v. Louisiana*, 379 U.S. 64, 67 (1964).

63. *Lando*, 441 U.S. at 199–200 (citing fourteen cases besides *Sullivan* that supported this

With respect to reckless disregard, a defamation defendant's failure to investigate the truth or falsity of his statements does not in itself establish reckless disregard as an element of actual malice.⁶⁴ It is not a negligence standard.⁶⁵ The Court admitted that the exact contours of the term "reckless disregard" in the defamation context would be determined on a case-by-case basis, but that a defendant must "entertain[] serious doubts as to the truth of his publication" to satisfy this requirement.⁶⁶

The Court has also provided lengthy guidelines regarding who constitutes a "public figure" under the *Sullivan* standard. For purposes of this Article, an extended discussion of these decisions is unnecessary: the President is undoubtedly a public figure.⁶⁷

Post-*Sullivan*, the Court also mandated that appellate courts conduct an independent constitutional review of the facts after a defamation claim succeeds on the merits at the trial level.⁶⁸ This rule "abrogates the usual rule that jury determinations are not to be set aside unless clearly erroneous."⁶⁹ The Court has stated that "judges—and particularly Members of this Court—must exercise such review in order to preserve the precious liberties established and ordained by the Constitution."⁷⁰ This principle has allowed the Court to hear numerous defamation cases in the years since *Sullivan* and decide on a case-by-case basis whether particular facts satisfy the *Sullivan* standard.⁷¹

understanding of the meaning of "malice").

64. *St. Amant v. Thompson*, 390 U.S. 727, 733 (1968).

65. *Id.*

66. *Id.* at 730–31.

67. In *Rosenblatt v. Baer*, the Court held that although specific guidelines for who qualifies as a public official should be determined on a case-by-case basis, only "those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs" are subjected to the *Sullivan* standard. 383 U.S. 75, 85 (1966). It further clarified that a public official must be specifically named in the allegedly defamatory material, and cannot be "one of a small group acting for an organ of government." *Id.* at 82. The Court has also held that a *candidate* for public office must be subjected to the heightened *Sullivan* standard, *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971); that public figures in addition to public officers are subject to the standard, *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 155 (1967); and that the standard does not apply to those that are not public officers or figures unless there is "clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974).

68. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 510–11 (1984).

69. *Anderson*, *supra* note 3, at 495.

70. *Bose Corp.*, 466 U.S. at 510.

71. *See, e.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (holding that deliberate alteration of words uttered by plaintiff with knowledge of the falsity does not amount to actual malice unless the alteration constitutes a material change in the meaning conveyed by the statement); *Time, Inc. v. Pape*, 401 U.S. 279 (1971) (striking down jury award for defamation in favor of policeman against news magazine publisher); *Greenbelt Coop. Publ'g Ass'n v. Bresler*, 398 U.S. 6 (1970) (striking down jury award for defamation in favor of prominent real estate developer against newspaper publisher); *St. Amant v. Thompson*, 390 U.S. 727 (1968) (striking down jury award for defamation in favor of policeman against candidate for public office). Some members of the Court have criticized this approach, claiming that "the Court looks at the facts in

Finally, the Court definitively held that *Sullivan* requires a heightened, clear-and-convincing evidentiary standard for proving actual malice.⁷² It has required Plaintiffs to prove a defamatory statement false in order to state a claim for defamation.⁷³ And, the Court also replaced the traditional common-law presumption that defamatory statements are false and replaced it with a burden on the plaintiff to prove falsity and fault.⁷⁴

The post-*Sullivan* defamation decisions largely solidified press protection from libel lawsuits by public officials. The definitions of public official and public figure are extremely broad, making the *Sullivan* standard widely applicable. The burden is on the plaintiff to prove falsity. The actual malice standard, although vague, is an extremely difficult standard for plaintiffs to satisfy—and they must do so by clear and convincing evidence. Finally, even if a public official plaintiff receives a favorable jury verdict, appellate courts functionally review these verdicts de novo and decide whether they pass constitutional muster. However, the Court has abridged press freedom in two important ways since *Sullivan*.

2. Narrowing Press Protection

In two significant ways, the Court has removed barriers to public official⁷⁵ defamation suits. First, multiple Court decisions affirm that some factual scenarios establish valid defamation claims by public officials within Constitution limits.⁷⁶ From these cases, plaintiffs can draw analogies to their own defamation cases and make stronger arguments for why they satisfy the *Sullivan* standard. Second, in *Herbert v. Lando*, the Court held that a media defendant's internal communications about publishing decisions and the "editorial process" are discoverable in defamation litigation.⁷⁷ The Court

both cases as though it were a jury and reaches [a] conclusion." *Butts*, 388 U.S. at 171 (Black, J., dissenting). This is a problem not only because it "is a flat violation of the Seventh Amendment," but also because "[n]o one, including this Court, can know what is and what is not constitutionally . . . libelous under this Court's rulings." *Id.* The Court's decisions "boil down to a determination of how offensive to this Court a particular libel judgment may be, either because of its immense size or because the Court does not like the way an alleged libelee was treated." *Id.* at 172.

72. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986) (holding that the clear and convincing evidence standard applies at the summary judgment stage as well as in trial).

73. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 23 (1990) (Brennan, J., dissenting).

74. *Id.* at 16 (majority opinion).

75. This includes public figures as well. The Court has shied away from any meaningful distinctions between the two in terms of which standard is applied. See *Harte-Hanks Commc'ns, Inc. v. Connaughton*, 491 U.S. 657, 693 (1989). Thus, this article uses the term "public official" and "public figure" interchangeably, with both terms encompassing both groups.

76. See, e.g., *Butts*, 388 U.S. at 156–58 (majority opinion) (upholding a defamation verdict against a newspaper publisher for accusing an athletic director of fixing a football game); *Harte-Hanks Commc'ns, Inc.*, 491 U.S. at 693 ("As in *Butts*, the evidence in the record in this case, when reviewed in its entirety, is 'unmistakably' sufficient to support a finding of actual malice."); see also *Wolston v. Reader's Digest Ass'n, Inc.*, 443 U.S. 157 (1979) (upholding a defamation verdict for relative of suspected KGB agents); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976) (upholding defamation verdict for a member of a wealthy industrial family against *Time* magazine because the Court held the plaintiff was not a public official and was exempt from the *Sullivan* standard).

77. *Herbert v. Lando*, 441 U.S. 153, 155 (1979).

reasoned that plaintiffs attempting to prove actual malice would bear too difficult a burden without access to this sort of discovery.⁷⁸

Even though the majority of post-*Sullivan* cases protect the press, both the *Lando* decision and lingering uncertainty over the contours of *Sullivan* have exposed media outlets to the risk of extremely high litigation costs and other burdens. Examples abound in the years following *Lando* of defamation cases brought by public figures that were extremely expensive to defend. In *Westmoreland v. CBS*, a retired army general brought a defamation suit against CBS concerning a controversial Vietnam exposé.⁷⁹ Despite an eventual dismissal of the case, CBS was forced to spend more than \$3.5 million to defend itself.⁸⁰ In a similar case, the *Washington Post* spent about \$2 million defending itself against former Mobile Oil President William Tavoulareas.⁸¹ NBC spent about \$9 million defending itself against performer Wayne Newton in a defamation action.⁸² In 1995, ABC News reportedly spent \$15 million in attorneys' fees defending against a lawsuit by multiple tobacco companies for publishing evidence that the tobacco companies manipulated nicotine levels in the manufacturing process.⁸³ Finally, in 2015 the online news outlet *Mother Jones* successfully defended itself against a defamation case brought by a major Republican donor,⁸⁴ but was forced to spend over \$2.5 million in legal fees.⁸⁵

Although there is no way to quantify the chilling effect cast by high litigation costs, it undoubtedly makes news outlets more cautious about the information they publish.⁸⁶ Even with the high bar that public official plaintiffs must satisfy under *Sullivan*, discovery costs give wealthy public officials the ability to control the media in constitutionally concerning ways. Justice Marshall strongly emphasized this point in his dissent to *Herbert v. Lando*:

As members of the bench and bar have increasingly noted, rules designed to facilitate expeditious resolution of civil disputes have too often proved tools for harassment and delay. . . . The possibility of such abuse is enhanced in libel litigation, for many self-perceived victims of defamation are animated by something more than a rational calculus of their chances of recovery. Given the circumstances under which libel actions arise, plaintiffs' pretrial maneuvers may be fashioned

78. *Id.* at 170.

79. *Westmoreland v. CBS Inc.*, 601 F. Supp. 66, 67 (S.D.N.Y. 1984).

80. David Kohler, *Forty Years After New York Times v. Sullivan: The Good, the Bad, and the Ugly*, 83 OR. L. REV. 1203, 1210, 1215 (2004).

81. *Id.* at 1215.

82. *Id.*

83. *Id.* at 1215–16.

84. See *Vandersloot v. Found. for Nat'l Progress*, No. CV-2013-532, 2015 BL 462704, at *1 (7th Dist. Ct. Idaho Oct. 6, 2015). The trial court that dismissed the case considered the plaintiff a public figure and held that he had failed to prove facts sufficient to satisfy the *Sullivan* actual malice standard. *Id.* at *24–25.

85. Monika Bauerlein & Clara Jeffery, *We Were Sued by a Billionaire Political Donor. We Won. Here's What Happened.*, MOTHER JONES (Oct. 8, 2015), <http://www.motherjones.com/media/2015/10/mother-jones-vandersloot-melaleuca-lawsuit>.

86. See discussion *infra* Section V.C.

more with an eye to deterrence or retaliation than to unearthing germane material.

Not only is the risk of *in terrorem* discovery particularly pronounced in the defamation context, but the societal consequences attending such abuse are of special magnitude. Rather than submit to the intrusiveness and expense of protracted discovery, even editors confident of their ability to prevail at trial or on a motion for summary judgment may find it prudent to steer far wide of the unlawful zone thereby keeping protected discussion from public cognizance. Faced with the prospect of escalating attorney's fees, diversion of time from journalistic endeavors, and exposure of potentially sensitive information, editors may well make publication judgments that reflect less the risk of liability than the expense of vindication.⁸⁷

While this phenomenon is troubling for the free press in general, it is particularly troubling with respect to a sitting President. As arguably the most powerful person in the world, the President of the United States deserves the most exacting scrutiny, and thus the risk to the press of *in terrorem* discovery is at its peak. The next Section recounts the history of President-press relationships and demonstrates that defamation lawsuits could easily be the next tactic in a historically tumultuous struggle to control the President's message and image.

III. THE "DISHONEST" MEDIA: A RECURRING THEME

Presidential contempt for the press is an American tradition. George Washington used to complain bitterly about the media's "willful and malignant misrepresentation" of facts during his presidency.⁸⁸ The media consistently lambasted him as a fraud and a traitor and accused him of wanting to be a king.⁸⁹ While maintaining an outward resolve in the midst of these attacks, Washington's dislike for the press was no secret.⁹⁰ John Adams lamented the press' "narrow bigotry, the most envious malignity, the most base, vulgar, sordid, fishwoman scurrillity. . . the most palpable lies."⁹¹ Adams helped pass the Sedition Act of 1893—which punished "false, scandalous, or malicious writing[s] . . . against the government"⁹²—to curb what he viewed as press excesses.⁹³

Thomas Jefferson, whom the press viewed more favorably than Adams, still referred to adverse media coverage as "an evil for which there is no remedy."⁹⁴ Decades later, President James K. Polk accused the national media

87. *Herbert v. Lando*, 441 U.S. 153, 204–05 (1979) (Marshall, J., dissenting).

88. JAMES KEOGH, *PRESIDENT NIXON AND THE PRESS* 16 (1972).

89. *Id.* at 18.

90. *Id.* at 17. Thomas Jefferson recounted that at a private cabinet meeting, President Washington said "*by God*, [I] would rather be in [my] grave than in [my] present situation," in reference to the press. *Id.*

91. *Id.* at 18–19.

92. Sedition Act, ch. 74, 1 Stat. 596, §2 (1798).

93. See KEOGH, *supra* note 88, at 18.

94. *Id.* at 19.

of giving “aid and comfort to the enemy” during the Mexican-American War.⁹⁵ When the telegram became a popular source of communication, President James Buchanan remarked that the commercial and social advantages it brought did not outweigh its “political evils.”⁹⁶ He claimed telegrams kept the public in a “constant state of excitement” even though many of them were “sheer falsehoods, [] especially those concerning myself.”⁹⁷ During the Civil War, the *New York World* called President Lincoln a baboon, monster, and an “ignorant, third-rate, backwoods lawyer” who was destroying press freedom.⁹⁸

Before Grover Cleveland was elected in 1885, Presidents tended to keep their criticisms of the press to themselves and their closest confidants.⁹⁹ However, President Cleveland berated the press publicly on a frequent basis, calling them animals and scavengers and insulting them whenever he had a chance.¹⁰⁰ President Theodore Roosevelt generally had a cautious but amiable relationship with the Press.¹⁰¹ However, when Joseph Pulitzer’s *New York World* published a story regarding government corruption related to the acquisition of the Panama Canal, Roosevelt instructed his attorney general to indict Pulitzer for criminal libel.¹⁰² Although the Supreme Court ultimately dismissed the charges on statutory interpretive grounds,¹⁰³ the case represented one of the most aggressive and blatant attacks against the press in United States history.

William Howard Taft referred to the Press as “unscrupulous.”¹⁰⁴ Woodrow Wilson accused the press of “playing with fire” during World War I and potentially helping the Germans.¹⁰⁵ Franklin Roosevelt accused the Press at times of “deliberate misrepresentation of fact” and acting “un-American.”¹⁰⁶ President Kennedy, though treated favorably by the media, still criticized them and at one point had all twenty-two White House subscriptions of the *New York Herald* cancelled for its negative coverage.¹⁰⁷ President Johnson, facing criticism about the Vietnam war, once personally called the President of CBS and asked, “Frank, are you trying to fuck me?”¹⁰⁸ He then used his influence to have the Royal Canadian Mounted Police investigate a reporter’s past because he was convinced the reporter was a “communist.”¹⁰⁹

95. *Id.* at 21.

96. *Id.*

97. *Id.*

98. *Id.* at 23.

99. *Id.*

100. *Id.* at 24.

101. *Id.*

102. See MARGARET A. BLANCHARD, *REVOLUTIONARY SPARKS: FREEDOM OF EXPRESSION IN MODERN AMERICA* 60–61 (1992).

103. *Id.* at 61.

104. KEOGH, *supra* note 88, at 26.

105. *Id.* at 27.

106. *Id.* at 29.

107. *Id.* at 33.

108. JOSEPH C. SPEAR, *PRESIDENTS AND THE PRESS: THE NIXON LEGACY* 34 (1984).

109. *Id.*

While Presidents have had their share of disdain for the press, perhaps the most notably hostile figure towards the press was Richard Nixon. Nixon mounted an all-out offensive against the press during his first term, and ratcheted up the intensity when the Watergate scandal broke.¹¹⁰ CBS President Frank Stanton noted at the time that “no more serious episode has occurred in government-press relationships since . . . the ill-fated . . . Sedition Act[] forbade criticism of the government[.]”¹¹¹ The Nixon White House employed various tactics to manipulate and silence the press: gag orders; false rumors; government agencies including the CIA, FBI, FCC, and FTC were instructed to harass and investigate anti-Nixon news organizations and reporters; wiretaps were ordered against some members of the press; members of the White House gave virulently anti-press news conferences; harsh retribution including criminal charges was doled out to those who leaked government information to the press; the President threatened not to renew federal licenses for media broadcasts; and federal subpoenas were issued to journalists who did not reveal their sources.¹¹²

There is overwhelming evidence that many Presidents, at least for some time during their presidency, harbor resentment towards the media. There is also evidence that Presidents will resort to aggressive tactics to combat perceived media bias or influence reporting. In this effort, Presidents have a tendency to flirt with the line between constitutional and unconstitutional methods. For example, one of the earliest tactics to suppress dissenting voices in the press, the Sedition Act, has been deemed unconstitutional, albeit in dicta.¹¹³ President Roosevelt’s directive to prosecute Joseph Pulitzer, although dismissed on other grounds,¹¹⁴ certainly raised constitutional concerns. President Nixon’s harsh tactics and use of government agencies to harass media outlets resembled authoritarian abuse of power.¹¹⁵ Left unchecked, there is a risk the executive branch will expand its arsenal of press-muzzling weapons into an unconstitutional realm.

Leaders at the state and international level have already used defamation lawsuits against the press successfully. For example, numerous state governors

110. *Id.* at 111.

111. *Id.* at 116.

112. *See id.* at 111–70 (describing in detail the tactics Nixon used to combat the press); *see also* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 523 (2002) (describing Nixon-era tactics to subvert the press).

113. *See New York Times v. Sullivan*, 376 U.S. 254, 276 (1964) (referencing “a broad consensus that the Act, because of the restraint it imposed upon criticism of government and public officials, was inconsistent with the First Amendment.”).

114. *See United States v. Press Publ’g Co.*, 219 U.S. 1, 8 (1911).

115. *See* Dan Kennedy, *Trump’s Attacks on the Press Conjure up the Ghost of Richard Nixon*, WGBH NEWS (May 17, 2016), <http://news.wgbh.org/2016/05/17/trumps-attacks-press-conjure-ghost-richard-nixon> (“By contrast, Trump, like Nixon during Watergate, would go after the press purely for personal reasons—not by denouncing the media (or, rather, not just by denouncing the media) but by abusing his powers as president. Bring negative information to light about Nixon and you might lose your television stations. Report harshly on Trump and your tax status might be threatened—and you may even face an antitrust suit. This is the way authoritarians reinforce their power—through fear and intimidation, the rule of law be damned.”).

since the Twentieth Century have resorted to libel lawsuits against media outlets and political opponents.¹¹⁶ And recently, autocratic leaders in developing countries such as Singapore,¹¹⁷ Cambodia,¹¹⁸ Malaysia,¹¹⁹ Haiti,¹²⁰ and Dominica¹²¹ have used defamation lawsuits against political opponents and the media.

While no sitting U.S. President has ever adopted this technique, the possibility is not far fetched. Both a former President¹²² and presidential candidate¹²³ have sued and won lawsuits against media outlets for defamation damages. This possibility becomes even more plausible with a President that has shown a propensity for using aggressive litigation before assuming the presidency. President Trump, for example, is notably litigious and has been labeled a “libel bully” as a private citizen.¹²⁴ Over a three-decade period, Trump and his companies filed over 4,000 lawsuits, an unprecedented number for any person who ultimately became President.¹²⁵ Of these, Trump has filed at least seven speech related lawsuits against the *Chicago Tribune*, the author of a

116. See, e.g., *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 (8th Cir. 1986) (South Dakota governor); *Empire Printing Co v. Roden*, 247 F.2d 8, 18 (9th Cir. 1957) (Alaska governor); *Thomson v. Cash*, 402 A.2d 651, 656 (N.H. 1979) (New Hampshire governor); *Cross v. Guy Gannett Publ'g Co.*, 121 A.2d 355, 359 (Me. 1956) (allowing former governor of Maine to sue and win for articles published while he was governor); *King v. Globe Newspaper Co.*, 512 N.E.2d 241, 243 (Mass. 1987) (ex-governor of Massachusetts allowed to sue for articles published while he was governor in an attempt to revive political career); *Thomson v. Cash*, 402 A.2d 651, 656 (N.H. 1979) (New Hampshire governor); see also Fox Butterfield, *Massachusetts Governor's Libel Lawsuit May Help His Ailing Political Career*, N.Y. TIMES (Jan. 11, 1982), <http://www.nytimes.com/1982/01/11/us/massachusetts-governor-s-libel-suit-may-help-his-ailing-political-career.html?mcubz=1>; Nick Grube, *Former Hawaii Gov. Cayetano Settles Libel Lawsuit Against Super PAC*, HONOLULU CIV. BEAT (June 13, 2014), <http://www.civilbeat.org/2014/06/former-hawaii-gov-cayetano-settles-libel-lawsuit-against-super-pac/>.

117. *Lee Hsien Loong v. Roy Ngerng Yi Ling* [2014] SGHC 230; see also *Lee Hsien Loong v. Roy Ngerng Yi Ling*, COLUM. U., <https://globalfreedomofexpression.columbia.edu/cases/lee-hsien-loong-v-roy-ngerng-yi-ling/> (last visited May 11, 2017).

118. Prak Chan Thul, *Cambodia PM Files Fresh Lawsuit Against Opposition Leader*, REUTERS (Jan. 18, 2017), <http://www.reuters.com/article/us-cambodia-politics-idUSKBN1520XN>.

119. *Malaysia PM Launches Defamation Lawsuit Against Malaysiakini Website*, ABC NEWS AUSTRALIA (June 3, 2014), <http://www.abc.net.au/news/2014-06-03/malaysia-pm-legal-action-against-news-portal/5498390>.

120. Latara Appleby, *Journalist Reaches Settlement in Defamation Case with Haitian Prime Minister*, REPS. COMMITTEE FOR FREEDOM PRESS (Oct. 31, 2013), <https://www.rcfp.org/browse-media-law-resources/news/journalist-reaches-settlement-defamation-case-haitian-prime-minister>.

121. *Prime Minister Files Lawsuit Against Opposition Leader*, WIREDJA (Feb. 10, 2017), <http://www.wiredja.com/news/justice/dominica-prime-minister-files-lawsuit-against-opposition-leader>.

122. See Philip Greene, *Teddy Roosevelt's Cocktail Court Battle*, DAILY BEAST (Nov. 7, 2016), <http://www.thedailybeast.com/articles/2016/11/07/teddy-roosevelt-s-cocktail-court-battle>.

123. *Goldwater v. Ginzburg*, 414 F.2d 324 (2d Cir. 1969), cert. denied, 396 U.S. 1049 (1970).

124. Susan E. Seagar, *Trump is a Libel Bully but Also a Libel Loser*, MEDIA L. RESOURCE CTR., http://www.medialaw.org/index.php?option=com_k2&view=item&id=3470 (last visited May 13, 2017).

125. *Id.*

biographical book about Trump, a former Trump University student, a former Miss USA beauty pageant contestant, comedian and talk-show host Bill Maher, a hotel bartender, and Univision.¹²⁶

The following Section argues that the rules for sitting Presidents are currently the same as for all other public figures. This allows Presidents to assault the media through defamation lawsuits and potentially even win one in the right circumstances.

IV. THE PRESIDENT CAN CURRENTLY BRING (AND POTENTIALLY WIN) A DEFAMATION SUIT

A. The President Can Easily Bring Defamation Suits

The *Sullivan* standard applies only when the plaintiff is considered a public official or public figure. But once the standard applies, it applies equally to all public officials—from a state water board commissioner to the President of the United States. As such, it is just as easy for the President to bring defamation lawsuits as it is for a private citizen considered a public figure or a low-level public official. While no Supreme Court precedent exists to confirm this, there is no reason to believe the President is not simply a public official for purposes of a defamation suit. As mentioned, a presidential candidate, a former President, and numerous governors have been subject to the standard without comment from the highest Court.¹²⁷

Thus, a President with sufficient resources faces few legal barriers to bringing a defamation suit. While the *Sullivan* standard protects media outlets somewhat from losing the suits on the merits, it leaves the press exposed to intrusive and expensive discovery and trial processes.

This is a fact that President Trump was intimately familiar with as a private citizen. President Trump lost six out of seven of his libel lawsuits on the merits, and only won the case against the former Miss USA contestant because she defaulted by failing to appear.¹²⁸ While it seems like the consistent failure would have deterred Mr. Trump, evidence suggests that the ultimate resolution of the disputes was not his motivation for bringing them. In 2006, Trump bragged to the *Washington Post* that he brought a libel lawsuit against an author that alleged Trump overstated his wealth just “to make a point.”¹²⁹ He continued, “I spent a couple of bucks on legal fees, and they spent a whole lot more. I did it to make [defendant’s] life miserable, which I’m happy about.”¹³⁰ As President of the

126. *Id.*

127. *See Goldwater*, 414 F.2d 324, *cert. denied*, 396 U.S. 1049.

128. Seagar, *supra* note 124.

129. Richard Tofel, *Donald Trump and the Return of Seditious Libel*, PROPUBLICA (Nov. 21, 2016, 1:54 PM), <https://www.propublica.org/article/donald-trump-and-the-return-of-seditious-libel>.

130. *Id.*; *see also* Bazelon, *supra* note 4 (confirming President Trump’s propensity to file aggressive lawsuits against critics).

United States, he could easily use this familiar tactic to assault the press.¹³¹ In fact, during his campaign, Trump threatened the *New York Times* with a libel suit for printing a story about two women who alleged that Mr. Trump had sexually assaulted them.¹³²

Media defendants have few realistic options for securing dismissal of suits that survive the pleading stage. First, media defendants might argue that no precedent supports a President filing a personal civil lawsuit and that such a claim is not viable. While no sitting President has ever filed such a suit, there is a strong argument that Presidents generally have the power to file civil suits. The seminal case regarding presidential immunity from private actions, *Clinton v. Jones*, held that a President can be sued while in office for private conduct that occurred before becoming President.¹³³ In declining to stay the lawsuit, the Court rejected President Clinton's argument that the presidency is so unique and important to the functioning of America that it requires undivided attention.¹³⁴ The Court found it improbable that private suits would "occupy any substantial amount of" the President's time and held that allowing the civil suit to go forward did not unconstitutionally enlarge the judiciary's power.¹³⁵ Although this does not directly answer the question of whether a President could sue private parties himself, it provides a strong inference that a President can engage in litigation if he or she chooses to.¹³⁶ The President's *initiation* of a lawsuit would likely serve as a waiver to any objections concerning interference with the Executive office caused by being a party in litigation.¹³⁷

Second, media defendants might try to take advantage of "anti-SLAPP" (Strategic Litigation Against Public Participation) protections. Approximately thirty states have enacted anti-SLAPP statutes that provide defendants with an effective tool to defend against strategic defamation lawsuits.¹³⁸ In states with strong anti-SLAPP legislation,¹³⁹ a President would likely face more intense obstacles in attempting to bring a strategic defamation lawsuit. However, many states lack any sort of anti-SLAPP protection at all,¹⁴⁰ and large media outlets

131. See Bazelon, *supra* note 4 (expressing a similar concern).

132. Letter from David McCraw, Vice President & Assistant Gen. Counsel, The N.Y. Times Co., to Marc E. Kasowitz, Kasowitz, Benson, Torres & Friedman LLP (Oct. 13, 2016), <https://www.nytimes.com/interactive/2016/10/13/us/politics/david-mccraw-trump-letter.html>.

133. *Clinton v. Jones*, 520 U.S. 681, 682 (1997).

134. *Id.* at 697.

135. *Id.* at 701–02.

136. See Julie Hilden, *If the President is Libeled, Can He Sue? Should He?*, FINDLAW (Oct. 4, 2005), <http://supreme.findlaw.com/legal-commentary/if-the-president-is-libeled-can-he-sue-should-he.html> (noting this inference).

137. None of the arguments Clinton advanced for why the Court should defer the private lawsuit applied when a President *permissively* becomes involved in private litigation. See Brief for Petitioner at 7–10, *Clinton v. Jones*, 518 U.S. 1016 (1996) (No. 95-1853), 1996 WL 448096 at *7–10.

138. *State Anti-SLAPP Laws*, PUBLIC PARTICIPATION PROJECT, <https://anti-slapp.org/your-states-free-speech-protection/> (last visited May 13, 2017).

139. See *id.* (grading each state with respect to the strength of its anti-SLAPP laws).

140. *Id.*

that distribute content nationally would likely be subject to jurisdiction in those states.¹⁴¹ Without any sort of federal anti-SLAPP protection, the President can easily shop for a forum where he or she enjoys high approval ratings, where there is favorable defamation law, and where there is no anti-SLAPP law. While he or she cannot look to foreign jurisdictions to file suit due to a 2010 federal law,¹⁴² plenty of domestic jurisdictions meet this description.¹⁴³

B. The President Could Win a Meritorious Defamation Suit

State-law defamation elements vary state to state. California's defamation law exemplifies the standard elements: (1) a false and un-privileged¹⁴⁴ publication by writing, printing, picture, effigy, or other fixed representation to the eye, (2) which exposes any person to hatred, contempt, ridicule, or disgrace, or (3) which causes that party to be shunned or avoided, or (4) which has a tendency to injure that party in [their] occupation.¹⁴⁵ One can imagine the endless array of publications that might satisfy these elements. Consider, for example, some of the claims made about Hillary Clinton during her presidential candidacy. "News" reporting that Clinton was involved in a child sex trafficking ring,¹⁴⁶ insinuating that she was responsible for the "mysterious deaths" of close associates,¹⁴⁷ and stating that she engaged in satanic rituals¹⁴⁸ appears to satisfy the state-law requirements.

After applying the state-law analysis, courts must apply constitutional principles when the plaintiff is a public official. The President is undoubtedly a public official, so the heightened *Sullivan* standard applies.¹⁴⁹ Thus, if the

141. See, e.g., Ottley et al., *supra* note 16, at 760–70 (describing the court battle over whether *Times* was subject to personal jurisdiction of Alabama state courts).

142. See 28 U.S.C. § 4102 (2012). There is some evidence the President or his affiliates may have otherwise been inclined to sue in foreign jurisdictions. See Laurel Wamsley, *Melania Trump and the 'Daily Mail' Settle Libel Lawsuits*, NPR (Apr. 12, 2017, 2:40 PM), <http://www.npr.org/sections/thetwo-way/2017/04/12/523581249/melania-trump-and-the-daily-mail-settle-libel-lawsuits> (describing how Melania Trump, as first lady, settled a defamation lawsuit she filed in Great Britain potentially because of the country's favorable libel laws).

143. *State Anti-SLAPP Laws*, *supra* note 138.

144. Privileges include "discharge of official duty," statements made in legislative or judicial proceedings, a fair reporting of statements made in a public meeting, etc. See 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW §562 (10th ed. 2005).

145. WEST'S COMM. ON CAL. CIVIL JURY INSTRUCTIONS, CALIFORNIA CIVIL JURY INSTRUCTIONS 7.00, Westlaw (database updated Sept. 2017); see also *Wong v. Tai Jing*, 189 Cal. App. 4th 1354, 1369 (2010) (citing *Taus v. Loftus*, 151 P.3d 1185, 1209 (Cal. 2007)) (describing the elements of a defamation claim in California).

146. Joshua Gillin, *How Pizzagate Went from Fake News to a Real Problem for a D.C. Business*, POLITIFACT (Dec. 5, 2016, 5:23 PM), <http://www.politifact.com/truth-o-meter/article/2016/dec/05/how-pizzagate-went-fake-news-real-problem-dc-busin/>.

147. *Clinton Death List: 33 Spine-Tingling Cases*, WORLDNETDAILY (Aug. 21, 2016), <http://www.wnd.com/2016/08/clinton-death-list-33-most-intriguing-cases/>.

148. *Bombshell: Hillary Clinton's Satanic Network Exposed*, INFOWARS (Nov. 4, 2016), <https://www.infowars.com/bombshell-hillary-clintons-satanic-network-exposed/>.

149. The Supreme Court of Massachusetts commented that the President of the United States would be the clearest example of a public official when considering a spectrum of government

President uncovered sufficient evidence that the news outlet knew the falsity of its story or had reckless disregard for its truth, the President could win the suit.

While it may seem fair to provide the President with legal recourse against media outlets that publish blatantly false and defamatory articles, such recourse cannot exist without creating an unacceptable risk of abuse and a concomitant chilling effect on the free press. The First Amendment should provide an absolute bar on defamation actions by a sitting President for allegedly defamatory material published while they were in office or the campaign trail.

V. THE CASE FOR IMMUNITY FROM PRESIDENTIAL DEFAMATION LAWSUITS

If you can't handle the heat, get out of the kitchen.

—President Harry S. Truman

A. Sullivan's Shortcomings

Great jurists and scholars have argued that the *Sullivan* actual malice standard does not go far enough in protecting press freedoms consistent with the First Amendment. In his brief for the *New York Times* in *Sullivan*, Professor Herbert Wechsler argued that the First Amendment requires absolute immunity for press statements about public officials.¹⁵⁰ Justices Black and Douglas famously supported that position in their concurring opinions in *New York Times v. Sullivan* and numerous other concurrences and dissents for years after.¹⁵¹

Other critics have noted the absurdity of putting the question of “truth” before a jury in the context of political speech.¹⁵² Justice Harlan stated that “‘truth’ is not a readily identifiable concept, and putting to the preexisting prejudices of a jury the determination of what is ‘true’ may effectively institute

employees. *See Lane v. MPG Newspapers*, 781 N.E.2d 800, 806 (Mass. 2003) (“While we agree that the limited responsibilities of an elected town meeting representative may place that position at the far end of a continuum of elected public officials from that of the President of the United States, the principle of ‘uninhibited, robust, and wide-open’ public debate regarding the conduct of those we elect to govern applies equally to both.”).

150. Anthony Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to “The Central Meaning of the First Amendment”*, 83 COLUM. L. REV. 603, 607 (1983).

151. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 360 (1974) (Douglas, J., dissenting); *Ginzburg v. Goldwater*, 396 U.S. 1049, 1050 (1970) (Black & Douglas, JJ., dissenting denial of certiorari); *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 171 (1967) (Black, J., dissenting); *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black, J., concurring); *id.* at 401 (Douglas, J. concurring); *Garrison v. Louisiana*, 379 U.S. 64, 79 (1964) (Black, J., concurring); *id.* at 80 (Douglas, J., concurring). This theory is based partly on Professor Alexander Meiklejohn’s “absolutist” First Amendment theory. The theory, in short, is that since the true sovereign in American government is the people, the government cannot prohibit the people’s political speech in any way whatsoever. *See Alexander Meiklejohn, The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245 (1961).

152. *See, e.g., Ashley Messenger, Reflections on New York Times Co. v. Sullivan, 50 Years Later*, 12 FIRST AMEND. L. REV. 423, 432–34 (2014) (“This is where the goal of ‘truth’ creates problems. The principle is valid most of the time, but not always. There are times when one knows a statement to be false, but the statement is not being made to prove the truth of the matter asserted; the statement deserves repetition because it conveys some other relevant information, such as to show the mindset or motive of a person.”).

a system of censorship.”¹⁵³ Indeed, *New York Times v. Sullivan* rested on the proposition that the central meaning of the First Amendment is that Americans have a right to differ about political truth and state their views without fear of reprisal.¹⁵⁴

And, in at least one context, a state supreme court granted the media absolute immunity from defamation lawsuits by public officials except where that speech incites imminent violence.¹⁵⁵ The Illinois supreme court stated that “it is better that an occasional individual or newspaper that is so perverted in judgment and so misguided in his or its civic duty should go free than that all of the citizens should be put in jeopardy of imprisonment or economic subjugation if they venture to criticize an inefficient or corrupt government.”¹⁵⁶

For these and other reasons, some have argued that *Sullivan*’s actual malice standard is flawed. As Professor Anthony Lewis commented, the logic of *Sullivan* “pointed to the conclusion that Americans may criticize the public actions of public men without fear of any penalty. If there can be no test of truth in political debate, *then there can be no libel actions as a result of anything said in such debate.*”¹⁵⁷ Thus, drawing the constitutional line at knowing falsity or reckless disregard for the truth seems somewhat arbitrary.¹⁵⁸ The Court provides extensive justification for why the First Amendment prohibits libel actions by public officials in general, but absolutely none for why it draws a line at speech made with actual malice.¹⁵⁹ The Court gave no explanation for why actual malice is a better standard for balancing freedom of the press with common law defamation principles than, say, a negligence standard.

Despite lingering doubt over the decision’s logic, the *Sullivan* standard provides a somewhat practical solution to balancing First Amendment protections with the common-law rights of public officials and figures to protect their reputation.¹⁶⁰ Whether the *Sullivan* standard goes far enough (or perhaps too far) in protecting media outlets from these attacks from any public official has been debated at length.¹⁶¹ However, courts and the academic community

153. *Time, Inc.*, 385 U.S. at 406 (Harlan, J., concurring in part and dissenting in part).

154. See Lewis, *supra* note 150, at 620.

155. *City of Chicago v. Tribune Co.*, 139 N.E. 86, 91 (Ill. 1923).

156. *Id.*

157. Lewis, *supra* note 150 (emphasis added); see also Lee C. Bollinger, *The End of New York Times v. Sullivan: Reflections on Masson v. New Yorker Magazine*, 1991 SUP. CT. REV. 1, 6 (1991) (“*Sullivan* provided a basic theory for the First Amendment but did not provide a theory for why the particular regulation of speech it upheld was justified when other forms of regulation are not”); Len Niehoff, *Three Puzzling Things About New York Times v. Sullivan: Beginning the Anniversary Conversation*, COMM. LAW., June 2013, at 10, 13.

158. Bollinger, *supra* note 157.

159. *Id.*

160. See John Bruce Lewis & Bruce L. Ottley, *New York Times v. Sullivan at 50: Despite Criticism, the Actual Malice Standard Still Provides “Breathing Space” for Communications in the Public Interest*, 64 DEPAUL L. REV. 1, 27–36 (2014) (highlighting various scholars who have reluctantly come to accept the standard).

161. See e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 370–88 (1974) (White, J., dissenting) (providing a lengthy historical background of the common law of defamation and

have not yet considered application of the *Sullivan* standard to a sitting United States President.

Because of the President's unique and powerful office and because of the potentially devastating chilling effect on presidential reporting, the First Amendment should not tolerate a presidential defamation lawsuit in the United States. The *Sullivan* standard falls short of providing the press with sufficient "breathing room" to investigate and criticize in this context. The following Section analyzes the President's unique station and why the broad "public official" designation is inappropriate for the President.

B. The President is Unlike Other Public Officials

1. With the Greatest Power Comes the Greatest Scrutiny

The Constitution vests no other individual in the United States government with even close to as much power as the President. This power gives him or her greater ability to affect national policy than any other public figure at any level of state or federal government. The Constitution grants the President the ill-defined "executive power,"¹⁶² which has been construed to allow, among other things, unilateral military strikes against foreign nations without Congressional approval,¹⁶³ suspension of due process rights for certain American citizens during wartime,¹⁶⁴ the ability to promulgate executive orders,¹⁶⁵ and the ability to decide how vigorously certain laws are enforced.¹⁶⁶ The Appointments Clause allows the President to appoint all cabinet positions, heads of administrative agencies, foreign diplomats, and Article III federal judges.¹⁶⁷ While the contours of the President's powers have been debated since the inception of the Country, it is nearly beyond debate the President is the most

suggesting that the First Amendment was not intended to abridge this common-law remedy); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring) (arguing the standard is insufficient to protect media outlets); Erik Wemple, *Antonin Scalia Hates 'NYT v. Sullivan'*, WASH. POST: ERIK WEMPLE (Dec. 4, 2012), https://www.washingtonpost.com/blogs/erik-wemple/wp/2012/12/04/antonin-scalia-hates-nyt-v-sullivan/?utm_term=.166d473482ae (noting Justice Scalia "hated" the Sullivan standard because it created far more protections for the press than had been available traditionally at common law).

162. See U.S. CONST. art. II; see also *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (attempting to define the scope of this power).

163. See, e.g., *Authority to Use Military Force in Libya*, 35 Op. O.L.C. 1 (Apr. 1, 2011), <https://www.justice.gov/sites/default/files/olc/opinions/2011/04/31/authority-military-use-in-libya.pdf> (justifying President Obama's use of military force in Libya); Ryan Lizza, *Was Trump's Strike on Syria Legal?*, NEW YORKER (Apr. 7, 2017), <http://www.newyorker.com/news/ryan-lizza/was-trumps-strike-on-syria-legal>.

164. See *Korematsu v. United States*, 323 U.S. 214 (1944) (allowing executive action detaining Japanese-Americans during World War II for no reason other than their ethnicity).

165. See generally JOHN CONTRUBIS, CONG. RESEARCH SERV., 95-772A, EXECUTIVE ORDERS AND PROCLAMATIONS (1999).

166. See, e.g., *The Department of Homeland Security's Authority to Prioritize Removal of Certain Aliens Unlawfully Present in the United States and to Defer Removal of Others*, 38 Op. O.L.C. 1 (Nov. 19, 2014), (explaining President Obama's position that he could prioritize enforcement of certain provisions of an immigration law and refuse to enforce others).

167. See U.S. CONST. art. II.

powerful public official in the United States.

Accordingly, the law must allow the press greater “breathing room” to investigate the President than other public officials. The Court never explained in *Sullivan* why the actual malice standard correctly balances investigative freedom and the right of public officials to protect their reputation. However, the level of investigative freedom should correspond to the level of a public official’s power and influence. The greater the official’s potential public impact, the greater right the public should have to information that bears on that official’s fitness for office. For example, a county official with a small role in local government should not be subject to the same defamation standard as a United States Senator. The public interest in investigation of less powerful public figures, like a county official, does not outweigh that official’s right to protect his or her reputation. But such a case-by-case rule would likely be unworkable for courts. Thus, the actual malice rule applies broadly with the understanding that it may over- and under-deter defamation lawsuits at the margins.¹⁶⁸

With respect to the President, it is easy to draw a bright line. The actual malice rule is insufficient to ensure press autonomy in presidential reporting. Press freedom should be at its most unconstrained with respect to the President. The argument for the *Sullivan* actual malice standard loses its persuasive force when applied to the most powerful officials. Thus, the Court should make an exception to the rule for the President.

2. Presidents Often Have Vast Personal Resources for Lawsuits

George Washington, the first United States President, set the bar high for presidential wealth.¹⁶⁹ While some Presidents were of more modest means, the vast majority of Presidents have been, like Washington, quite wealthy.¹⁷⁰ In modern times, every President since John F. Kennedy has been a multi-millionaire before assuming office.¹⁷¹ Thus the President, more than most other public officials, often has the independent financial capacity to sue. Defamation lawsuits to control media narratives are an increasingly popular tactic among wealthy public figures.¹⁷² As previously noted, President Trump has even admitted to filing tenuous lawsuits prior to the presidency just to intimidate

168. See *infra*, note 178.

169. Kathleen Elkins, *Here’s What It Was Like to Be George Washington, the Richest President in US History*, BUS. INSIDER (July 3, 2016), <http://www.businessinsider.com/george-washington-richest-president-in-us-history-2016-6>.

170. Jeff Desjardins, *The Net Worth of Every U.S. President*, VISUAL CAPITALIST (Oct. 23, 2014, 8:45 PM), <http://www.visualcapitalist.com/net-worth-every-us-president/>.

171. *Id.*; see also Michael Galvis, *Barack Obama’s Net Worth on His 55th Birthday*, TIME: MONEY (Aug. 4, 2016), <http://time.com/money/4439729/barack-obama-net-worth-55th-birthday/> (giving timeline of Barack Obama’s wealth and indicating he received millions of dollars in book advances before assuming office). While Richard Nixon was a millionaire for much of its life, the source does not indicate whether he was so before assuming the presidency. Desjardins, *supra* note 170.

172. See Bazelon, *supra* note 4 (describing the recent phenomenon of billionaires bankrolling libel lawsuits to destroy media outlets).

defendants.¹⁷³ While being wealthy should not preclude an individual from defending their reputation, the combination of wealth and unmatched political power should be cause for concern over the prospect of presidential defamation suits.

3. Opportunity to Rebut Criticism

One of the crucial pieces of rationale for applying a heightened “actual malice” standard to public officials is that they can more easily respond to defamatory statements than can private individuals.¹⁷⁴ Indeed, this rationale justified extending the actual malice standard to non-government public figures in addition to public officials,¹⁷⁵ and provided grounds for rejecting the application of the standard to private individuals defamed by the media.¹⁷⁶ But as the Court has admitted, this is a generalization: surely not all public officials have the same access to media coverage, and some may have barely any more than a private citizen.¹⁷⁷ Since public figures fall on a wide spectrum with respect to their access to media coverage, an ideal legal standard would be one that partially adjusts based on where the figure falls on that spectrum.¹⁷⁸ In other words, if it were practicable, the Court would impose a stricter standard on public officials who attract significant media attention and a more relaxed standard on public officials with little or no access to media attention. However, considerations of judicial economy forced the one-size-fits-all standard with a threshold “public official” inquiry.¹⁷⁹

The President of the United States, with vast power to attract media attention no matter the circumstances, always falls on one extreme of the spectrum. While it would be difficult to assess empirically, it is not unreasonable to claim the President is among a select few in the world who attract more consistent media attention than anyone else.¹⁸⁰ Since Woodrow

173. See Tofel, *supra* note 129.

174. This was the rationale the Court used in *Gertz* to deny *Sullivan* protection to media outlets being sued by private individuals even if the subject at issue was of public concern. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 338–39 (1974).

175. *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 154–55 (1967).

176. *Gertz*, 418 U.S. at 347.

177. *Id.* at 343–44.

178. See *id.* (citation omitted) (“[I]t might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed. But this approach would lead to unpredictable results and uncertain expectations, and it could render our duty to supervise the lower courts unmanageable. Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.”).

179. *Id.*

180. While this would be hard to prove empirically, evidence from the 2016 election campaign support this assertion. See Nicholas Confessore & Karen Yourish, *\$2 Billion Worth of Free Media for Donald Trump*, N.Y. TIMES (Mar. 15, 2016), https://www.nytimes.com/2016/03/16/upshot/measuring-donald-trumps-mammoth-advantage-in-free-media.html?_r=0 (describing how Trump had already received about \$2 billion in free media coverage in March of the election year).

Wilson scheduled the first news conference in 1913,¹⁸¹ Presidents have had reporters at their beck and call whenever they wish to deliver a message or answer questions.¹⁸² In fact, a press corps of around 250 journalists stationed in and around the White House keeps vigilant daily watch over the executive branch.¹⁸³

The President's access to media has expanded even further in the age of social media. Although Presidents have always sought direct lines of communication to voters, no previous form of communication allowed Presidents such unfiltered, direct access literally into the pockets of everyday Americans.¹⁸⁴ In 2015, Barack Obama launched the @POTUS Twitter account, making him the first President to engage directly with the electorate via social media.¹⁸⁵ President Trump, an active Twitter user as a private citizen, has carried this tradition into the presidency and had over twenty million followers when he was sworn in.¹⁸⁶ President Trump has explicitly stated that Twitter allows him to "fight back" against news stories he considers false or unduly critical.¹⁸⁷ Instead of scheduling press conferences or releasing statements that are often filtered through media outlets, Presidents now need only turn on their smart phones, type in a message, and millions of their followers instantly receive it.

This unparalleled access to media outlets justifies an even stricter defamation standard for sitting Presidents. There is no doubt that if and when a defamatory statement is made about the President, the President has access to a great many means of responding to that statement. The Court has admitted that the *Sullivan* standard might be too stringent for public officials who have a limited access to media outlets and thus cannot respond easily to criticism.¹⁸⁸ By this logic, the *Sullivan* standard should also be considered too weak for those public officials with unlimited access not only to media coverage, but directly to a large portion of the electorate via social media. While drawing lines regarding which public officials warrant which standard would be concededly difficult, it is not difficult to draw a line at the President of the United States: he

181. Martha Joynt Kumar, *Presidential Press Conferences*, WHITE HOUSE HIST. ASS'N (May 16, 2011), <https://www.whitehousehistory.org/presidential-press-conferences>.

182. See John Woolley & Gerhard Peters, *Presidential News Conferences*, AM. PRESIDENCY PROJECT, <http://www.presidency.ucsbl.edu/data/newsconferences.php> (last visited May 13, 2017).

183. Christi Parsons & George Condon, *History of the WHCA*, WHITE HOUSE CORRESPONDENTS' ASS'N, <http://www.whca.net/history.htm> (last visited May 13, 2017).

184. Tamara Keith, *Commander-In-Tweet: Trump's Social Media Use and Presidential Media Avoidance*, NPR (Nov. 18, 2016, 3:46 PM), <http://www.npr.org/2016/11/18/502306687/commander-in-tweet-trumps-social-media-use-and-presidential-media-avoidance>.

185. Alex Wall, *Introducing @POTUS: President Obama's Twitter Account*, OBAMA WHITEHOUSE ARCHIVES: BLOG (May 18, 2015, 11:40 AM), <https://obamawhitehouse.archives.gov/blog/2015/05/17/introducing-potus-presidents-official-twitter-account>.

186. Brian Stelter, *Donald Trump's Twitter Milestone: 20 Million Followers*, CNN (Jan. 16, 2017, 4:32 PM), <http://money.cnn.com/2017/01/16/media/donald-trump-twitter-20-million-followers/index.html>.

187. See Keith, *supra* note 184.

188. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–44 (1974).

or she deserves a stricter standard.

4. Presidential Immunity

In *Sullivan*, the Court justified the actual malice standard by looking at various official libel immunities that states grant to public officers.¹⁸⁹ The Court wrote:

[A]ll [states] hold that all officials are protected unless actual malice can be proved. The reason for the official privilege is said to be that the threat of damage suits would otherwise inhibit the fearless, vigorous, and effective administration of policies of government and dampen the ardor of all but the most resolute . . . in the unflinching discharge of their duties. Analogous considerations support the privilege for the citizen-critic of government. It is as much his duty to criticize as it is the official's duty to administer.¹⁹⁰

Nowhere is this truer than with respect to the President of the United States. However, in *Nixon v. Fitzgerald*, where an ex-military analyst sued the President for damages stemming from a clear case of wrongful termination, the Court held that sitting Presidents are entitled to even greater protection than any state official—Presidents are entitled to “absolute immunity” from damages lawsuits stemming from official acts.¹⁹¹ Anticipating the difficulty of drawing bright lines concerning the scope of “official acts,” the Court held that even actions on the “outer perimeter” of the President’s official authority are completely immunized.¹⁹² The Court justified this decision because of potential “diversion of his energies by concern with private lawsuits.”¹⁹³

The Court’s rationale in *Nixon* can reasonably be extended to justify a reciprocal rule for presidential press coverage. First, freedom of the press is a much clearer and more explicitly enshrined constitutional principle than presidential immunity.¹⁹⁴ Second, if “press” is simply substituted for “President” in numerous passages in *Fitzgerald*, the logic applies with equal force. Does not the press occupy a “unique position” in our constitutional scheme?¹⁹⁵ Does not the diversion of press energy by concern of private lawsuits “raise unique risks to the effective functioning of government[?]”¹⁹⁶ Does not the press concern itself with matters likely to “arouse the most intense

189. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964).

190. *Id.*

191. *Nixon v. Fitzgerald*, 457 U.S. 731, 749 (1982).

192. *Id.* at 755.

193. *Id.* at 751.

194. On the one hand, there is actually a strong textualist argument that presidential immunity was specifically rejected by the Framers of the Constitution given the express provision of *congressional* immunity in the Speech and Debate Clause. *See id.* at 750 n.31. On the other hand, the First Amendment clearly prohibits the government from making laws “abridging the freedom of speech; or of the press.” U.S. CONST. amend. I. While the text by no means implies that any law making any speech illegal is unconstitutional, there was undoubtedly a much clearer constitutional command from the Framers regarding free speech than there was about the President’s right to be free from criminal or civil prosecution from any acts he or she takes while in office.

195. *Nixon*, 457 U.S. at 749.

196. *Id.* at 751.

feelings[?]"¹⁹⁷ Thus, the press should be afforded absolute immunity with respect to presidential reporting, even if the subject is on the “outer perimeter” of news that might be relevant to an adequately informed public. No constitutional provision elevates the importance of the President’s duties above those of the press, and both should be free to conduct their political functions without fear of litigation. In fact, founders such as Thomas Jefferson believed that the free press was *more* important to the functioning of the country than government itself.¹⁹⁸

One of the criticisms of the *Sullivan* decision is that it assumes, without empirical evidence, that defamation lawsuits will naturally “chill” speech. The following Section analyzes the chilling effect and argues that presidential defamation lawsuits have a particularly high capacity to chill speech.

C. The Chilling Consequences of Presidential Defamation Suits

1. The Presence of a General Chilling Effect

While it is hard to quantify the amount of non-defamatory speech left unpublished in the United States due to fear of litigation, evidence suggests that it is significant. Well-known litigator David Boies claimed in 1996 that he believed the chilling effect among journalists—which prompted the *Sullivan* standard initially—remained “significant” despite heightened protection for defendants.¹⁹⁹ He recalled several instances where he was counseling a media client that hesitated or declined to publish a clearly non-defamatory story due to the risk of paying to prove it was non-defamatory in court.²⁰⁰ Further, the chilling effect has been shown empirically to be a legitimate phenomenon in some criminal contexts.²⁰¹ That is, when a statute sets criminal liability at a certain point, the amount of conduct that approaches that point decreases.²⁰²

Defamation’s chilling effect is especially apparent in the field of psychology. Due in part to Barry Goldwater’s successful defamation suit against a magazine in the late sixties, the American Psychological Association now prohibits psychologists from making public comment about public figures’ mental conditions.²⁰³ This rule has sparked controversy among psychologists

197. *Id.* at 752.

198. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), in 11 THE PAPERS OF THOMAS JEFFERSON 48 (Julian P. Boyd ed., 1955) (“[W]ere 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.”).

199. David Boies, *The Chilling Effect of Libel Defamation Costs: The Problem and Possible Solution*, 39 ST. LOUIS U. L.J. 1207, 1208 (1995).

200. *Id.*

201. Brandice Canes-Wrone & Michael C. Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095, 1097 (2015).

202. *See id.* (finding that the number of “near-late-term abortions” dropped in jurisdictions prohibiting late-term abortions).

203. Brian K. Cooke et al., *The Risks and Responsible Roles for Psychiatrists Who Interact with the Media*, 42 J. AM. ACAD. PSYCHIATRY & L. 459, 460 (2014).

who decry it as an impermissible restriction of free speech.²⁰⁴ Finally, the most direct examples of defamation's chilling effect on journalism are sporadic reports of American journalists who withhold publication due to fear of litigation. In one recent example, the American Bar Association refused to publish its report on Donald Trump's litigation history due to fear of a defamation suit.²⁰⁵

Analyzing defamation's chilling effect in similar foreign jurisdictions also sheds light on the effect in the United States. Consider the effect of pro-plaintiff libel laws on media in Britain. In 1997, a group of British legal scholars published an in-depth report of the direct and structural influences that libel law had on various media outlets in the United Kingdom.²⁰⁶ The researchers posited that defamation had a pervasive structural effect on the press by influencing how British journalists pursue and write stories based on the threat of liability.²⁰⁷ They found that, in every branch of the British media, there were so-called "no-go areas" in which editors felt unsafe publishing.²⁰⁸ Further, they suggested defamation liability forced the British press to be "polemical" rather than fact-oriented, and to adopt their lawyers' recommendations to cast factual assertions as opinion in order to avoid liability.²⁰⁹ In the words of one journalist, in Britain "it is safer to write opaquely or make comment than it is to engage in clear and hard-edged investigative journalism."²¹⁰

Perhaps most striking is the British law's effect on British book publishers. After a spate of expensive defamation suits, publishers have simply ceased to deal in "high risk" investigative journalism because of the "horrendous costs" of defamation lawsuits.²¹¹ One publisher noted that "[l]ibel costs have become a major inhibition when it comes to publishing lively and thus possibly contentious non-fiction."²¹² Recent refusals to publish potentially controversial investigative journalism illustrate this chilling effect. In 2003, fear of defamation suits stopped Rachel Ehrenfeld's book—*Funding Evil: How Terrorism is Financed and How to Stop it*—from being published in the U.K.,

204. *Id.* at 461; see also *Psychiatrists Divided Over the Goldwater Rule in the Age of Trump*, NPR: ALL THINGS CONSIDERED (May 15, 2017), <http://www.npr.org/2017/05/15/528502969/psychiatrists-divided-over-the-goldwater-rule-in-the-age-of-trump>.

205. See Charlotte England, *U.S. Lawyers 'Too Scared' to Publish Report on Donald Trump Baselessly Suing People – In Case He Baselessly Sues Them*, INDEPENDENT (Oct. 25, 2016), <http://www.independent.co.uk/news/world/americas/donald-trump-aba-lawyers-too-scared-baseless-suing-american-bar-association-report-a7378981.html>; see also Judith Matloff, *Documentary Filmmakers Fear More Legal Challenges in Trump Era*, COLUM. JOURNALISM REV. (Dec. 7, 2016), https://www.cjr.org/business_of_news/documentary_film_makers_lawsuits_trump.php (describing documentary filmmaker's concerns about future defamation suits by Republican donors featured in the film).

206. See ERIC BARENDT ET AL., *LIBEL AND THE MEDIA: THE CHILLING EFFECT* (1997).

207. See *id.* at 192–94.

208. *Id.* at 192.

209. *Id.* at 193.

210. *Id.*

211. *Id.* at 140.

212. *Id.*

yet still exposed her to \$250,000 in fines in the country after a Saudi businessman sued her for libel.²¹³ In 2014, Cambridge University Press refused to publish a book about Russian Prime Minister Vladimir Putin due to fear of litigation.²¹⁴ In a letter to the book's author, the publisher wrote that "[e]ven if the Press was ultimately successful in defending such a lawsuit, the disruption and expense would be more than we could afford[.]"²¹⁵ Finally, due to libel concerns, publishers refused for years to publish a book investigating abuses by the Scientologist church authored by Pulitzer-prize winning journalist Lawrence Wright.²¹⁶ The eventual independent book publisher, whom some in the media have labeled a "brave man," faces looming court battles from the Church of Scientology.²¹⁷ Defamation liability also chills broadcasting freedom in Britain. An HBO documentary based on Wright's book was unavailable in the UK for some time.²¹⁸ Even a South Park episode mocking the Scientologist church was never aired in Britain.²¹⁹

While the foregoing examples demonstrate that defamation liability does chill media expression to some extent, they do not prove that the chilling effect is significant under the *Sullivan* standard in the United States. One could argue that the comparative systems are sufficiently distinct such that the clear effect in Britain provides no evidence of a chilling effect under the *Sullivan* standard in the U.S. But, while it may be easier to bring suit in the U.K.,²²⁰ there is reason to believe that the results of the British study can be extrapolated to the United States. Multiple elements of the American system make libel lawsuits in the U.S. just as, if not more, attractive to potential plaintiffs as the British system. First, in the United States, both parties pay their own litigation costs, whereas in Britain the losing party has to pay the other side's costs.²²¹ The British method decreases the effectiveness of using defamation lawsuits as a strategic tool for wealthy plaintiffs.

Second, the American regime is unique in that it couples the element of luck with historically exorbitant damages awards. Since actual malice is a

213. Ari Shapiro, *On Libel and the Law, U.S. and U.K. Go Separate Ways*, NPR (Mar. 21, 2015, 7:11 AM), <http://www.npr.org/sections/parallels/2015/03/21/394273902/on-libel-and-the-law-u-s-and-u-k-go-separate-ways>.

214. *Id.*

215. *Id.*

216. See Damian Thompson, *At Last—Going Clear is Over Here*, SPECTATOR (Apr. 23, 2016, 9:00 AM), <https://www.spectator.co.uk/2016/04/at-last-going-clear-is-over-here/#>.

217. See *id.*

218. See Mark Sweeney, *Scientology Documentary Going Clear Gets Go-Ahead to Air on Sky in UK*, GUARDIAN (Aug. 5, 2015), <https://www.theguardian.com/media/2015/aug/05/scientology-documentary-clear-sky-uk-us-hbo>.

219. Thompson, *supra* note 216.

220. See BARENDT, *supra* note 206, at 30. For a historical comparison of the different laws, see IAN LOVELAND, *POLITICAL LIBELS: A COMPARATIVE STUDY* (2000).

221. See Editorial, *The Cost of Libel Reform*, TELEGRAPH (Sep. 15, 2013), <http://www.telegraph.co.uk/news/uknews/leveson-inquiry/10311161/The-cost-of-libel-reform.html> (last visited Aug. 22, 2017) ("Under the current rules, if someone brings a case for libel and loses, they have to pay the defendant's legal costs as well as their own.").

question of fact often decided by a jury, there is always an element of luck in defamation cases.²²² Even with an extremely strong case, a defendant may lose if they are in an unfriendly jurisdiction.²²³ As one author stated:

[w]hen a case goes to a jury, the *Sullivan* rule means little or nothing. All those phrases designed by the Supreme Court to protect freedom of speech and press may not in fact be applied. When a judge's charge lasts an hour or more, and one sentence speaks of the need to find "reckless disregard," it rolls right past the jurors[.] . . .²²⁴

This element of luck is particularly troubling given the potential for astronomical damages awards in the United States. Of the ten largest damages awards against media outlets, eight stemmed from libel lawsuits.²²⁵ Of those eight, five involved news reporting on the government or some other public issue.²²⁶ The damages in those five verdicts ranged from around \$19 million to \$227 million, and three of those damages awards were upheld on appeal.²²⁷ News of these awards can be extremely disturbing for media outlets, especially when in each of these cases, "the huge verdicts were sustained under circumstances where one can at least reasonably question whether the applicable standards were satisfied."²²⁸ In Britain, in contrast, journalists believe that damages awards exceeding five figures are exceedingly rare.²²⁹ So, while defamation lawsuits may be more common in Britain, unique features of the American system level the playing field to some extent and make Britain a probative case study.

While direct, empirical evidence of a chilling effect in the United States under the *Sullivan* standard is difficult to conjure, the anecdotal evidence mentioned previously certainly supports this effect.²³⁰ Further, the empirical evidence of this effect in Britain—whose journalists face a comparable defamation regime to those in the U.S.—provides support for the effect's existence despite the *Sullivan* standard. However, additional evidence is necessary to fully support the claim that a *President's* ability to sue poses a unique threat of chilling effect on political reporting. A case study from a developing country provides further insight on this point and a cautionary tale about presidential abuse of defamation suits.

222. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 360 (1974) (Douglas, J., dissenting) ("[A] jury determination, unpredictable in the most neutral circumstances, becomes for those who venture to discuss heated issues, a virtual roll of the dice separating them from liability for often massive claims of damage. . . . It is only the hardy publisher who will engage in discussion in the face of such risk[.]").

223. See, e.g., Section II.E.2 *supra* (describing the racially hostile conditions present in the *Sullivan* trial).

224. See Lewis, *supra* note 150, at 620–21.

225. See Kohler, *supra* note 80, at 1213.

226. *Id.*

227. *Id.*

228. *Id.* at 1214.

229. BARENDT, *supra* note 206, at 73 (quoting one journalist who believed that "telephone number" verdicts are very rare).

230. See Canes-Wrone & Dorf, *supra* note 201.

2. Executive Defamation Suits' Chilling Effect on Political Media in Singapore

Autocratic Prime Ministers of Singapore have used civil defamation suits against foreign and domestic press entities to stifle negative reporting for decades.²³¹ Professor Cherian George described the gradual restriction of press freedom by leader Lee Kuan Yew during the decades he ruled as Prime Minister in the late Twentieth Century.²³² George notes that defamation lawsuits brought by the Prime Minister and his family were a key tactic for controlling the press.²³³ In particular, any suggestion that the Prime Minister's family members were given their government positions due to nepotism sparked swift defamation lawsuits.²³⁴ This tactic caused media outlets to practice self-censorship and restrain their reporting tactics.²³⁵

George reports that these lawsuits have basically frozen negative political speech due to the chilling effect. He claims that "[j]ust like the domestic media, foreign news organizations have . . . become less combative and quicker to accept their fate when ruled offside by the state."²³⁶ Multiple journals have either stopped reporting in Singapore or have significantly curbed political reporting due to defamation lawsuits brought by Prime Minister Yew or his family members.²³⁷ Numerous publications, including *The Economist*, have ceased publishing any critical political journalism partially due to the Prime Minister and leadership party's defamation lawsuits.²³⁸ *The New York Times*, an organization with a proud history of standing up for First Amendment values, has been forced to kowtow to the authoritarian regime lest it face a barrage of defamation lawsuits.²³⁹ Professor George concludes that the taming of these two proud journals, once unafraid to criticize political leadership, "provided the ultimate vindication for Lee Kuan Yew's faith in the profit motive to counter firebrand journalism."²⁴⁰

The Prime Minister and leadership party have even targeted small, independent news organizations and bloggers. Recently, Prime Minister Lee Hsien Loong won a \$150,000 civil defamation suit against local Singaporean

231. See generally Kirsten Han, *Lessons from Singapore on Press Freedom in Trump's America*, PEOPLE'S WORLD (Jan. 24, 2017, 1:27 PM), <http://www.peoplesworld.org/article/lessons-from-singapore-on-press-freedom-in-trumps-america/>.

232. CHERIAN GEORGE, *FREEDOM FROM THE PRESS: JOURNALISM AND STATE POWER IN SINGAPORE* 23–39 (2012).

233. *Id.* at 40–43.

234. *Id.*

235. *Id.*

236. *Id.* at 42.

237. *Id.* at 43.

238. See *The Singapore Exception*, ECONOMIST (Jan. 18, 2015), <http://www.economist.com/news/special-report/21657606-continue-flourish-its-second-half-century-south-east-asias-miracle-city-state>.

239. See generally Clark Hoyt, Opinion, *Censored in Singapore*, N.Y. TIMES (Apr. 3, 2010), <http://www.nytimes.com/2010/04/04/opinion/04pubed.html>.

240. *Id.*

blogger Roy Ngerng.²⁴¹ One Singaporean journalist claimed this media assault has created a “culture where the government is assured of dominance, not just in the political sphere, but in controlling the narratives and frames that we use to understand the society we live in.”²⁴²

Although it is difficult to quantify defamation law’s chilling effect on presidential reporting in the United States, there is strong evidence that it has an influence on American journalism. The more concerning issue, though, is the potential for abuse of defamation lawsuits spawning a far more pronounced chilling effect. The Singaporean Prime Ministers’ success in stifling dissent through defamation suits is a clear example of how defamation suits can be used to control and suppress political reporting. Although the *Sullivan* standard provides moderate protection, the potential for abuse and an intolerable chilling effect remain present.

D. Incentives

This final subsection addresses an intuitive counter-argument to a zero-liability regime: the lack of incentives to report honestly if there is no defamation liability. Professor Richard Epstein of the University of Chicago has analyzed the *Sullivan* standard through a law-and-economics lens and concluded that it does not appropriately calibrate incentives to maximize social utility.²⁴³ Instead, he argues, “common law rules of defamation (sensibly controlled on the question of damages) represent a better reconciliation of the dual claims of freedom of speech and the protection of individual reputation than does the *New York Times* rule that has replaced it.”²⁴⁴ In his analysis, Epstein analyzes the zero-liability rule of defamation—i.e., the Black and Douglas position that the press should be immune from defamation suits by public officials.²⁴⁵ He concludes that the rule would be unworkable because “[a] world without any protection against defamation is a world with too much defamation, too much misinformation—in a word, too much public fraud.”²⁴⁶

When the zero-liability rule is applied to all public officials, Epstein’s concern is that there are steep social costs to such a rule. First, he claims the quality of candidates for public office might deteriorate because those with the best reputations would be at the greatest potential risk for media defamation, and we might see a rise in candidates with “lesser reputation and perhaps lesser character.”²⁴⁷ Second, the quality of public discourse would decline because the press, unconcerned with potential defamation liability, would likely make more

241. See Han, *supra* note 231.

242. *Id.*

243. See generally Richard A. Epstein, *Was New York Times v. Sullivan Wrong?*, 53 U. CHI. L. REV. 782, 817–18 (1986).

244. *Id.* at 817.

245. See generally *id.* at 797–801.

246. *Id.* at 799.

247. *Id.*

false statements.²⁴⁸

When applied to all public officials more broadly, these arguments are somewhat compelling. However, when the arguments are applied to a zero-liability rule for speech concerning *only the President*, they lose their footing. First, it is unlikely that the possibility of defamation will deter people from seeking the most powerful office in the world. The 2016 presidential election provided no indication that defamatory conspiracy theories or claims about misconduct generally deter candidates for running for the presidency.

Second, Epstein claims that the private benefit to journalists of printing defamatory material about public figures in a world with zero liability is greater than the private cost.²⁴⁹ That is, with no liability for potential defamation, journalists would have too few incentives to tell the truth. This claim mistakenly assumes that legal liability is the only barrier standing in the way of a press corps eager to lie to and deceive the public. This assumption is particularly untrue with respect to reporting on the President and White House. Specifically, Epstein's argument does not consider several other costs associated with false presidential reporting.

Strong institutional constraints on false reporting incentivize reporters not to defame the President regardless of potential legal liability. The Press has a historically symbiotic relationship with the executive branch.²⁵⁰ Reporters rely on officials within the White House for news, and officials rely on the media to publicize their programs and give them important information about undercurrents in Washington.²⁵¹ This relationship is built completely on trust and credit.²⁵² Reporters trust officials to give them full information when possible and officials rely on reporters not to report something that officials want to keep hidden from the public.²⁵³ This trust, in turn, builds reputations for journalists among public officials and colleagues in Washington.²⁵⁴ When news organizations do something to lose that trust or tarnish their reputation, like publish a story based on a discredited source, they can be excommunicated from the White House entirely.²⁵⁵ Publishing a false or defamatory report, then, has grave consequences for a reporter's career. Beyond access to the White House, news outlets risk losing market share and followers when they are discredited,²⁵⁶

248. *Id.* at 800.

249. *Id.* at 798–99.

250. See Kumar, *supra* note 181.

251. *Id.*

252. *Id.*

253. See *id.*

254. See *id.*

255. See, e.g., Jason Daley, *The Complicated History Between the Press and the Presidency*, SMITHSONIAN.COM (Jun. 14, 2016), <http://www.smithsonianmag.com/smart-news/complicated-history-between-press-and-presidency-180959406/> (mentioning how the *Washington Daily News*' press credentials have been revoked for unfavorable coverage and how President Nixon excommunicated *The Washington Post* entirely from the White House except for press conferences).

256. Lindsey Ellefson, *Poll About 'Fake News' Shows That Major Media Outlets Are Still Seen as Credible*, MEDIAITE (Dec. 12, 2016, 5:36 PM), <http://www.mediaite.com/online/poll->

and individual reporters risk losing their job, becoming un-hirable,²⁵⁷ and being kicked out of journalistic organizations and trade groups.²⁵⁸

These factors act as powerful incentives for reporters to report accurately about the president and other public officials. While it is difficult to know the exact weight these factors have in shaping the conduct of reporters who investigate the President, Epstein's claim relies on the unsupported assumption that the threat of litigation is somehow inherently more powerful than these other consequences. To the contrary, evidence suggests that even with no liability rules, the Press' conduct would remain relatively honest due to the other institutional implications for lying. Thus, Epstein's criticism of a zero-liability rule falls flat when applied to the President. Presidential reporting constitutes a unique organ of the media that has strong incentives to tell the truth regardless of potential defamation lawsuits. This is further support for a complete bar on Presidential defamation actions.

VI. CONCLUSION

If a presidential defamation claim ever reaches the Supreme Court, the foregoing considerations strongly support the Court's adoption of a zero-liability rule for presidential reporting. The President is without a doubt a different sort of public official than the Court has ever considered in a defamation case. While the President's reputation is important, it does not justify a rule that can inhibit speech or be aggressively misused. As Justice Black stated, "[t]his Nation, I suspect, can live in peace without libel suits based on public discussions of public affairs and public officials. But I doubt that a country can live in freedom where its people can be made to suffer physically or financially for criticizing their government, its actions, or its officials."²⁵⁹

Federal Courts have limited jurisdiction and, as a result, limited power to shape public policy. Interpreting the Constitution and holding the government accountable to the admirable principles and vision expressed therein are some of the few tools the "least dangerous branch" has been granted. The Constitution specifically casts the judiciary as the guardian of the free press vis-à-vis the First Amendment, and the Court must live up to its responsibility to ensure the other branches of government do not abuse the Fourth Estate. Implementing press immunity from presidential defamation lawsuits is an important step in fulfilling

about-fake-news-shows-that-major-media-outlets-are-still-seen-as-credible/.

257. See James Poniewozik, *Why Brian Williams Lost His Job, and Why He Has a New One*, TIME (June 18, 2016), <http://time.com/3926988/brian-williams-nbc-fired-new-show/> (describing Brian Williams's recent ordeal after it was discovered he was fabricating coverage about the Iraq War); see also Julia Carrie Wong, *The Intercept Admits Reporter Fabricated Stories and Quotes*, GUARDIAN (Feb. 2, 2016), <https://www.theguardian.com/media/2016/feb/02/the-intercept-fires-reporter-juan-thompson> (describing Juan Thompson's excessive false reporting and the steps his employer took to cut ties to him).

258. *Professional Journalism Organizations*, AM. MEDIA INST., <https://americanmediainstitute.com/journalism-resources/professional-journalism-organizations/> (last visited Aug. 26, 2017).

259. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 297 (1964) (Black, J., concurring).

that obligation.