<u>Overview of *New York Times Company v. Sullivan* (for Ari Melber)</u>

New York Times Company v. Sullivan is a landmark 1964 Supreme Court decision that greatly expanded the First Amendment freedoms of the press and of speech. Writing for a unanimous court, Justice Brennan found that for a libel or defamation case, initiated by a public official, to succeed, he or she must prove that the allegedly libelous or defamatory statement was made with "actual malice" — that is, "with knowledge of its falsity or with reckless disregard of whether it was true or false." In two separate concurrences, Justices Black and Goldberg argued that the Court did not go far enough in its decision, contending that it should have established an absolute right to criticize public officials. The ruling's impact was enormous. To be sure, some news entities barely changed their practices, but by raising the bar for libel, the Court paved the way for outlets such as FOX to air inaccurate information without fear of repercussion. Over the past decade, many on the right have begun to question the decision, and two justices on the Supreme Court (Thomas and Gorsuch) recently expressed an openness to revisiting *Sullivan*.

<u>Facts of the Case</u>

In 1960, the New York Times ran a full-page advertisement titled "Heed Their Rising Voices" that was paid for by a pro-Civil-Rights group. Among other things, the ad praised non-violent protesters in Montgomery, Alabama, and forcefully condemned the Montgomery police. The ad, however, was not entirely truthful. For example, while the police were accused of forming a "ring" around a local college campus, this never actually occurred. The ad also falsely stated that Martin Luther King Jr. had been arrested seven times; he had only been arrested four times.

Enter L. B. Sullivan. The ad never mentioned Sullivan by name, but because he was the Montgomery Commissioner of Public Affairs (meaning he oversaw the Police Department), he believed that the advertisement implicitly referred to him. So, Sullivan sued the Times for libel.

The case began in trial court, where the judge informed the jury that the words printed in the Times were "libelous per se" (i.e., they were presumed to be harmful by virtue of the fact that they were false). The trial judge also noted that under Alabama law, actual malice is assumed if something is "libelous per se." Consequently, to award general damages, the jury only needed to find that the content of the advertisement referred, in one way or another, to Sullivan. In short, the Alabama standard for libel was low, but the consequences were high; the jury found the Times guilty of libel, and Sullivan was awarded approximately $500,000 in damages.

The Alabama Supreme Court sustained the trial court's ruling, leading the Times to bring the case to the US Supreme Court. There were many niche issues at play, but at its core, the case centered around one, overarching question: Did Alabama's libel law violate the First Amendment, thereby infringing on the Times' freedom of speech and freedom of the press?

The Majority Opinion (Justice Joseph Brennan)

Writing for a unanimous Court, Justice Brennan issued a broad ruling in favor of the Times. False statements, he wrote, are the tradeoff of living in a country built upon free speech. Thus, if a public official wants to hold the press accountable for libel, he or she must prove that the statement was made with actual malice. Moreover, public officials are held to a standard of actual malice, and it is only reasonable that this same right be afforded to the governed.

I. To begin, the Court recognizes that false statements are unavoidable in a country so committed to the principle of free speech; it is the price we pay for having the freedom to speak our minds. As such, the Court concludes that erroneous statements are to be expected in the United States and will inevitably be made by both citizens and the press.

II. However, that is not to say that we have an unlimited right to say whatever we want. Rather, the Court holds that "the constitutional guarantees [of the First Amendment] require a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not…" (279).

III. The Court also notes that public officials have broad leeway when it comes to their own public statements, and it would be absurd to live in a country that claims to be governed "by the people" if the people have less freedom of speech than their leaders: "As Madison said, 'the censorial power is in the people over the Government, and not in the Government over the people.' It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves" (282).

The Concurrences (Justice Black and Justice Goldberg)

Justices Black and Goldberg issued two separate concurrences, both of which were joined by Justice Douglas. Their arguments essentially amounted to the same thing: the Court did not go far enough in its decision. Instead, the Court should have afforded to the press and the citizen an absolute right to criticize public officials — including through the use of falsehoods.

I. Justice Black writes a fiery concurrence, arguing that the Court, in its ruling, has failed to prevent the "destruction" of the free press. "This nation," he writes, "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" (297).

II. As for Justice Goldberg, he contends that there is no such thing as "libel" when it comes to criticism of the government: "In a democratic society, one who assumes to act for the citizens in an executive, legislative, or judicial capacity must expect that his official acts will be…criticized. Such criticism cannot, in my opinion, be muzzled or deterred by the courts at the instance of public officials under the label of libel" (299).

Ramifications of the Decision

It is no understatement to say that *New York Times v. Sullivan* forever changed the American news industry. The decision, which raised the standard for libel, allowed for an explosion of reporting on illicit governmental activities.[1] No longer as intimidated by the threat of a lawsuit, reporters were, in a sense, liberated. However, the effects of *Sullivan* were not entirely positive. The decision made it far more difficult to hold accountable those publishing false information, and as a result, misinformation and conspiracy theories have entered the mainstream media.

But that is not to say that *Sullivan* gives news entities a blank check; lies remain prohibited under the "actual malice" standard, as does a mindless neglect for the truth. Therefore, even after the decision came down, some newspapers did not change their operations. As the NYT wrote in 2018, "[*Sullivan*] doesn't really change the way newspaper lawyers go about their jobs…No lawyer here has ever reviewed a story draft, concluded it was a factual wreck and then declared it was good to go because the reporter didn't have a reckless disregard for the truth."

At the time of the decision, *Sullivan* was widely praised, but in recent years, support for *Sullivan* has dwindled. Right-wing news personalities (many of whom work at FOX) began to disparage the decision, arguing that it has allowed for the rise of left-wing propaganda. In 2021, DC Circuit Judge Laurence Silberman published a controversial opinion that (a) called for *Sullivan* to be overturned, and (b) claimed that the Washington Post and the New York Times "are virtually Democratic Party broadsheets." Of course, the shoe for the last year has been on the other foot, given the recent defamation lawsuit (settled for a large sum) brought by Dominion against FOX, so it's rather ironic that FOX anchors and conservatives, of all people, have been the ones criticizing *Sullivan*.

Members of the Supreme Court have also begun to question the decision. In 2019, Justice Thomas wrote that *Sullivan* and other similar decisions "were policy-driven decisions masquerading as constitutional law" and should be overturned. Justice Gorsuch reiterated this sentiment a few years later, writing that *Sullivan* has "evolved into an ironclad subsidy for the publication of falsehoods by means and on a scale previously unimaginable." However, few

[1] It should also be noted that in subsequent cases, the Court expanded upon *Sullivan* to argue that the "actual malice" standard applies not only to public officials, but to "public figures" as well.

believe that the Court will overturn *Sullivan*, especially given the fact that Chief Justice John Roberts is such an ardent defender of the First Amendment.