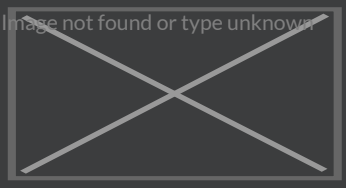

News & Insights

OKC Attorney Jon Epstein: Debate on Public Issues Should be Uninhibited

By: Jon A. Epstein

The Oklahoman

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Paula Burkes, Business writer

A few weeks ago, United States Supreme Court Justice Clarence Thomas fired a formal shot at New York Times v. Sullivan, the 1964 Supreme Court landmark decision that recognized Constitutional protection to the press in its role as the watchdog of government officials, and foreshadowed an important debate that he believes should occur in a future case. What did the Supreme Court do in the Sullivan case?

A. The United States Supreme Court determined that the First Amendment bars public officials (and later, public figures) from recovering damages for defamation unless they can show that the statement at issue was false and made with "actual malice"— that is, with knowledge that it was false or with reckless disregard of whether it was false or not. The Sullivan case did not alter the lesser standard in private figure defamation cases which, in most states, allows private figure plaintiffs to assert claims if the false statement was published due to the defendant's negligence.

Q. What is Justice Thomas' criticism of Sullivan?

A. He said "there appears to be little historical evidence suggesting that The New York Times actual-malice rule flows from the original understanding of the First or Fourteenth Amendment" and that the Supreme Court was wrong when it imposed that standard in 1964, nearly 175 years after the First Amendment was ratified.

Q. Why is the Sullivan case so important?

A. The media plays a significant role in bringing important information to the public. The courts have noted that reporting concerning public affairs is the essence of self-government. In Sullivan, the court determined that the high barrier to recovery by public official defamation plaintiffs is necessary to guarantee a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. It recognized that such debate may include caustic and even unpleasant attacks on government and public officials.

Q. What is Justice Thomas proposing?

A. He proposes that the Supreme Court should, in an appropriate case, reconsider whether the Constitution actually provided the protections set forth in Sullivan. He suggests that those protections "were policy-driven decisions masquerading as constitutional law" and that instead of applying the First Amendment as it was understood by the people who ratified it, the court in Sullivan fashioned its own federal rules by balancing the competing values at stake in defamation suits.

Q. What is the impact of Justice Thomas' opinion?

A. President (Donald) Trump has made numerous threats to change the libel laws to make it easier to use the courts to stifle the press. If the Sullivan protections are abolished, it would make it far more risky to publicly criticize public figures. Without protections for uninhibited, and open debate on public issues, the public may never have been informed about important stories, e.g. Watergate, the Pentagon Papers, Benghazi, the Clinton email saga and the Harvey Weinstein accusations. The Sullivan protections do not immunize reporters from liability for publishing a story about which they have an actual awareness that it is probably false. However, in order to encourage the free exchange of information about public issues that is so necessary to a healthy democracy, they do provide breathing room for less than perfect reporting about public officials.

Attorneys

- Jon A. Epstein