



Yes, Donald Trump Can Create Problems For Free Speech & The First Amendment

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A few weeks ago, Donald Trump's spokesperson claimed that he had **"single-handedly brought back free speech."** It was an odd thing to say for a variety of reasons. First, the US has really strong free speech protections and they haven't gone away (even if there are some threats to them). That is, free speech doesn't need to be "brought back" because it's already here. Second, Trump himself, just a few weeks earlier was quoted deliberately **mocking free speech**, claiming that people who support it are "foolish people." And then, of course, there's the fact that Trump has a **very, very long and detailed history** of both threatening to sue, and actually suing, over the speech of others. As Walter Olson noted:

Donald Trump has been filing and threatening lawsuits to shut up critics and adversaries over the whole course of his career. He **dragged reporter Tim O'Brien** through years of litigation over a relatively favorable Trump biography that assigned a lower valuation to his net worth than he thought it should have. He **sued** the **Chicago Tribune's architecture critic** over a piece arguing that a planned Trump skyscraper in lower Manhattan would be "one of the silliest things" that could be built in the city. He **used the threat of litigation** to get an investment firm to fire an analyst who correctly predicted that the Taj Mahal casino would not be a financial success. He sued comedian Bill Maher **over a joke**.

That first case is instructive. I highly recommend **reading the details**. O'Brien wrote a biography of Trump which was mostly favorable to Trump, but which briefly mentioned that he might *only* be worth hundreds of millions of dollars, rather than billions, and Trump sued him over *that* claim. And as that link notes, Trump didn't just lose, he was "*humiliated*" by the courts. Incredibly, Trump still seems to insist that he "won" the case by basically redefining having the case totally tossed out of the courts as winning:

And that leaves out plenty of other threats, such as threatening to **sue Rosie O'Donnell for mocking him**, **threatening to sue competitor Ted Cruz** for challenging his political views or actually **suing Univision** claiming that because its President of Programming posted an Instagram picture showing Trump next to Charleston, South Carolina, shooter Dylann Roof, with the text "No comments," that was somehow "defamatory." That lawsuit was **just settled a few weeks ago**, which is interesting because, as John Oliver **recently noted**, Trump insists he refuses

to settle lawsuits.

Anyway, last Friday Trump made even more news, saying that if he wins he's planning to "**open up" libel laws** to make it even easier to sue. Given his statement in the Tweet above about how he won... except for what libel laws actually say, it's not surprising that he wants to change such laws.

Here are the key points. After talking about how he hates the Washington Post, and thinks Jeff Bezos just bought it for political influence, he notes:

If I become President, oh, are they going to have problems. They're going to have such problems.

... One of the things I'm going to do if I win, and I hope we do and we're certainly leading. I'm going to open up our libel laws so when they write purposely negative and horrible and false articles, we can sue them and win lots of money. We're going to open up those libel laws. So when The New York Times writes a hit piece which is a total disgrace or when The Washington Post, which is there for other reasons, writes a hit piece, we can sue them and win money instead of having no chance of winning because they're totally protected.

.... So we're going to open up those libel laws, folks, and we're going to have people sue you like you've never got sued before...

That last line is said pointing to the media. Trump followed that up by **extolling the virtues of libel law in the UK**, which is famous for how horrible they are and how they're abused to silence speech around the globe.

Well, in England, I can tell you, it's very much different and very much easier. I think it's very unfair when the New York Times can write a story that they know is false, that they virtually told me they know it's false, and I say, why don't you pull the story, and they say, we're not going to do that, because they can't basically be sued. And you can't be sued because can you say anything you want, and that's not fair.

Of course, as Politifact noted, Trump is **flat out wrong** (shocker there) in saying that the NY Times can't be sued if it knowingly publishes a false story. That is, in fact, the standard necessary for defamation in this country.

Many others rushed in to point out something that seemed even more fundamental, which is that **libel law is based entirely on state, rather than federal, statutes** leading some, like Mathew Ingram at Fortune, to **claim that Trump really can't do much** to carry out those threats. Indeed, many commentators are treating Trump's confusion over the difference between

state and federal laws (**and** his apparent confusion over key First Amendment precedents that would mean even if it were a federal issue, he couldn't just change the law the way he wanted to) as yet another example of Trump being ridiculously clueless on policy matters he's discussing.

And, of course, it is true that Trump appears to not understand NY Times v. Sullivan, one of the most important cases on the intersection of defamation and the First Amendment, which found that for *public figures* there is *tremendous leeway* in allowing speech, such that it is only defamatory if statements are not only false, but made with "actual malice." Trump, obviously, doesn't like this, but seems to think you can just "open up" the law, ignoring that the issue is not the law, but the 1st Amendment of the Constitution and First Amendment precedent.

That said, this is **not** a situation where you can just wave this off and say, "Oh, clueless Trump, he can't really impact free speech like that." As Marc Randazza explains in a CNN story, Trump can actually still create tremendous damage to the First Amendment if he were to become President. First off, you may have noticed that there's a vacancy on the Supreme Court, and a Senate insisting it won't look at any nominees until the next President comes into office. If that's the case, then it's entirely possible Trump could appoint someone willing to overturn NYT v. Sullivan. That might be difficult to do with the rest of the court, but it's not impossible.

On top of that, though, there *are* federal laws related to defamation that Trump could harm. For years we've talked about the importance of anti-SLAPP laws, which allow people sued for defamation, where it's clearly designed to just shut them up, to get those lawsuits tossed quickly and (often) to get their legal fees paid for. People who file SLAPP (Strategic Lawsuits Against Public Participation) hate these laws, and Trump appears to be a serial SLAPP filer. And, as we've been discussing, there's an ongoing push for a federal anti-SLAPP law that may have some real momentum. Yet, if that law actually passes Congress under a President Trump, it seems pretty obvious that it will be vetoed.

So, yes, it's easy to just mock Trump as clueless on this particular subject, and to note that it's not nearly as easy as he seems to think to just "open up" libel laws. But don't be fooled: if he were to become President, rather than "bringing free speech back," he will have plenty of power to create a serious chill on free speech in this country.