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file - FIRST AMENDMENT

NEW YORK TIMES V. SULLIVAN: A BLIGHT ON ENLIGHTENED PUBLIC DISCOURSE AND GOVERNMENT RESPONSIVENESS TO THE PEOPLE

Two decades ago in New York Times v. Sullivan, 1/ the Supreme Court held that the First Amendment stripped public officials of protection against a sullied reputation ascribable to defamatory falsehoods regarding official conduct absent proof by clear and convincing evidence 2/ that the calumnies had been uttered with actual malice. The so-called "actual malice" doctrine of New York Times has raised a virtually insurmountable barrier to successful defamation suits by public officials. 3/

The actual malice doctrine is a classic illustration of Justice Oliver Wendell Holmes' observation that: "Great cases like hard cases make bad law. For great cases are called great . . . because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgement. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend." 4/

The defamation action that culminated in the New York Times ruling was bottomed on a political advertisement ostensibly sponsored by a number of renowned civil rights proponents. The

advertisement denounced the employment of force and violence by official authorities in the South against Negro students and Martin Luther King in response to protests against racially discriminatory laws and practices. Misstatements of fact in the advertisement were fastened upon by an Alabama jury to return a verdict against the New York Times and four Negro clergymen in the amount of $500,000 for damage to the reputation of a municipal commissioner responsible for supervising the police and fire departments of Montgomery.

Other pending defamation actions predicated on the identical political advertisement exposed the New York Times to potential damages of $2.5 million. Alabama law, moreover, imposed strict liability for defamatory statements injurious to official reputation, and authorized juries to award general damages virtually untrammelled by legal guidelines.

The truculent response of the Alabama jury to an advertisement in a Northern newspaper generally rebuking the South for its civil rights practices smacked of antebellum efforts in Congress to proscribe the use of the United States Postal System for the dissemination of abolitionist literature. 5/

The alarming facts presented in the New York Times litigation, coupled with the strict liability provisions of Alabama defamation law, generated the hydraulic force of which Holmes spoke that provoked the Court unanimously to embrace

unprecedented First Amendment protection of falsehoods that tarnish the reputations of public officials. The Court was effusive in its praise of the contribution to the democratic process made by scourges of public officials; its reasoning betrayed an imbalanced understanding of competing constitutional values. Ignored was the deterrent to public service created by an absence of adequate protection against defamatory falsehoods and the consequent obstacle to vindicating the will of the electorate through the appointment by elected officials of competent, loyal, and dedicated persons entrusted with forging and supervising the implementation of public policy. There was also a failure to consider an arsenal of auxiliary safeguards against official misconduct or secrecy that eclipse the asserted benefits to responsive government made by crowning the media with virtual absolute immunity for falsely assailing public officials. Further elided was the constructive influence on enlightened public discourse generated by exposing critics of public officials to liability for negligent utterances of falsehoods that wound reputation.

Fidelity to constitutional norms and informed public dialogue would be enhanced by replacing the actual malice doctrine of New York Times with First Amendment jurisprudence that would tolerate defamation actions by public officials predicated on negligent misstatement of facts. Public officials should also be empowered to seek declaratory judgments against

their traducers to establish authoritatively the truth or falsehood of statements damaging to reputation, but not to obtain damages in such suits.

I.

The New York Times Case

A commissioner of Montgomery, Alabama, Sullivan, initiated a civil libel action against the New York Times and four black clergymen bottomed on two portions of a full-page advertisement that solicited support for black civil rights causes in the South. The allegedly libelous statements asserted that truckloads of armed police in Montgomery ringed a state college campus and padlocked the student dining hall in an attempt to starve non-violent protesting students into submission; that Martin Luther King had been arrested seven times for innocuous offenses; and that King had been the object of intimidation and violence. In truth, King had been arrested only four times, the campus dining hall was not padlocked, and large numbers of police were deployed near the college campus, but did not "ring" the campus. Sullivan declined to prove actual pecuniary injury ascribable to the alleged libel.

The claimed defamatory advertisement was submitted to the New York Times with a certifying letter from A. Phillip Randolph, Chairman of the sponsoring "Committee to Defend Martin Luther King and the Struggle for Freedom in the South." The Times made no effort to confirm the accuracy of the advertisement, although

its own files contained published articles demonstrating several factual errors. Commissioner Sullivan's request for a retraction was refused on the ground that the advertisement omitted any reference to him.

A jury was instructed that under Alabama law, the challenged statements were "libelous per se," and thus if found to be false justified an award of compensatory damages without proof of pecuniary injury. Punitive damages could be awarded, however, only by finding that the libelous statements had been made with actual malice. An undifferentiated verdict of $500,000 that failed to separate compensatory from punitive damages was returned in favor of Sullivan. The Supreme Court of Alabama affirmed the judgment.

The United States Supreme Court reversed, holding that the First Amendment "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." 6/ Writing for the Court, Justice Brennan declared that the First Amendment was fashioned to foster unfettered political discussion, an essential ingredient to government responsiveness to the will of the people and to an enlightened quest for political truths. These twin goals would be subverted, Brennan insisted, if misstatements of fact damaging to the reputation of a public

official could be answered with a sizeable defamation award because of the consequent deterrent to public and media criticism of government servants. A defamation rule that holds the critic of official conduct answerable in damages for any factual error that blackens reputations, he maintained, will occasion self-censorship and hesitancy to utter truths about public officials because of doubt whether the truths could be proven in court or reluctance to incur the expense of doing so. Accordingly, Brennan concluded, only an actual malice rule for defamation actions initiated by public officials is faithful to the First Amendment.

In sequel cases, the Court has held that proof of malice requires evidence that the defamer entertained a high degree of awareness of the probable falsity of his utterance or publication, 7/ that defamation recoveries are constitutionally tolerable only for false assertions of fact, but not for opinions, 8/ and that compensatory damages are limited to provable actual injury and may not be presumed. 9/

II.

The Errant Reasoning of the Court

The reasoning of the New York Times decision is profoundly flawed. The Court miscalculated both the probable magnitude of self-censorship that might occur if persons who villify public officials were vulnerable to damages for defamatory falsehoods attributable to negligence, as well as the benefits to

enlightened choices by the electorate achieved by fostering the dissemination of facts in lieu of falsehoods to inform a voter's deliberative processes.

If detractors of government officials were required to guarantee the accuracy of all factual statements that tarnished reputations, the Court declared in New York Times, then the deterrent to commentary on public affairs would be substantial. No empirical or other support was proferred to substantiate that conclusion. 10/ Moreover, the Court neglected to consider that the putative deterrent would be substantially mitigated if a negligence standard as opposed to a strict liability standard was held to be a First Amendment requirement in defamation actions initiated by government officials. Logic and experience suggest that inhibitions on media or other criticism of public officials if a negligence standard for defamation actions obtained would be attenuated at best.

The Court has declared that persons who voice commercial speech can be held strictly liable for misrepresentations or misleading omissions without affronting the First Amendment, in part because a strict liability standard is unlikely to curtail the flow of truthful commercial information. 11/ The commercial advertiser, the Court has recognized, retains a powerful financial incentive to continue advertising his product or service even if inadvertant or negligent misstatements or omissions eventuate in adverse court judgments.

Inexplicably, however, the Court has ignored a comparably

powerful incentive for the media to persist in coverage and commentary on public officials, notwithstanding exposure to adverse defamation judgments predicated on negligent misstatements of fact. Members of the mass media ferociously and incessantly compete with rivals for primacy in reporting or unearthing alleged wrongdoing or scandals in government. The reputation of a media company, its influence on public policy and opinion, and a broad customer base, all coveted by those in the media business, are substantially dependent on the number of politically fetching, riveting, or colorful news stories offered to its audience. Accordingly, there is no reason to believe that the mass media will languish in its critical or occasional vexing scrutiny of public officials by the threat that negligence in disseminating misstatements of fact damaging to the reputation of a public official could saddle a media company with damages. The availability of liability insurance to safeguard against financial loss or insolvency engendered by defamation suits further reduces any deterrent to media criticism of public officials associated with a negligence standard of liability. At present, policies of up to $10 million dollars can be purchased for a premium of a few hundred dollars annually for small papers, and a few thousand for big city dailies. 12/

Experience, moreover, provides no cogent evidence that the media or others were intimidated or reticent in decrying the actions or character of public officials prior to the landmark New York Times ruling when defamation suits could succeed absent

proof of actual malice. 13/ Neither the Court nor others have been able to assemble such evidence of deterrence. 14/ One reason for the lack of apprehension over defamation actions that might arguably dampen the ardor with which public officials are frequently condemned is the reluctance of the latter to initiate suits against the media. This phenomenon is illuminated by recalling President Franklin Roosevelt's advice to his intimate and much maligned associate Harry Hopkins, who was contemplating a defamation action against the press for false assertions charging improper acceptance of gifts by himself and his spouse. Roosevelt importuned against a libel action, noting:

> "This is a fight in which you would be licked before you could even get started. The whole proceedings would give them a glorious opportunity to pile on the smears -- and, after what you would have to take, what earthly good would it do you to win a verdict and receive damages of one dollar?"

Hopkins reluctantly yielded to this advice. 15/

The Court in New York Times also declined to consider that the goal of the First Amendment -- to promote government responsiveness to the will of the people through edifying public debate on matters of importance to the polity -- is advanced more by a negligence standard for defamation actions initiated by public officials than by an actual malice standard. Under a negligence standard, there is less likelihood that falsehoods will obstruct a sober and intelligent evaluation of public officials and their policies by members of the electorate

responsible for determining who should be entrusted with the powers of government. An actual malice standard substantially hinders the vindication of this First Amendment aspiration by increasing the likelihood that falsehoods about government officials will be disseminated and artifically distort public opinion regarding government responsiveness to the will of the voters. Intelligent exercise of the franchise and enlightened public debate in a democracy is undermined by negligently misinforming the public about the actions or integrity of government officials. Even the Court has conceded that there is no constitutional value in false statements of fact. 16/

The actual malice rule also perversely inhibits the assembly of facts needed for complete and fair appraisal of official conduct. The rule requires a public official to prove that his villifier entertained serious doubts as to the truthfulness of published defamatory falsehoods as a condition of recovery. Accordingly, the rule creates an incentive for the recipient of vivid, inflammatory, or lurid defamatory allegations regarding official conduct to desist from efforts to verify the allegations that might raise suspicions as to their truth prior to publication, a result contrary to the First Amendment goal of promoting informed public opinion. A constitutional doctrine that places a legal premium on ignorance of facts that would disprove allegations of official misconduct or impropriety seems facially dubious. 17/

There seems no First Amendment reason to exonerate the mass media or others from a responsibility to undertake reasonable efforts to confirm the accuracy of defamatory factual statements regarding public officials at the hazard of answering in damages for negligence in this regard. Even if this responsibility causes delay in publication, ordinarily such delay will not reduce the value of the factual assertions in the forging of public opinion and public policy. Public discussion of important government policies or actions typically occurs over a prolonged period. Statements of fact pertinent to such discussion do not forfeit their utility to the public if they enter the marketplace of ideas after reasonable measures have been exhausted to substantiate their accuracy. Although this time of entry into public discussion may frequently be later than the time that would occur absent a legal requirement of reasonable attempts to verify facts, any consequent loss in the richness or thoroughness of public colloquy would be insignificant. Moreover, where statements of fact would lose their value in the democratic process unless published immediately, for example, statements regarding a nominee for executive office whose confirmation vote is imminent, then the requirements of undertaking reasonable confirmatory measures prior to dissemination would be less arduous than if time were not of the essence.

In sum, the actual malice standard of New York Times is at war with the Court's understanding of First Amendment purposes. Those goals would be better advanced by an exposition of the

First Amendment that would accommodate a negligence standard for defamation actions pursued by public officials.

III.

Auxiliary Safeguards Against Government Misconduct

Tacit in the fulsome praise in the New York Times opinion of media criticism and scrutiny of the conduct or character of public officials is the suggestion that the conventional press is indispensable to informing the public adequately about the operations of government in order to insure responsiveness to the electorate and integrity in government administration. The view that the press is the paramount pillar in a democratic society to making the electoral process work and to educating the public about government affairs partially explains why the Court in New York Times so hastily subjugated the reputations of public officials to negligent disseminations of falsehoods regarding official conduct. Any assumption that media coverage of government institutions and public officials is the centerpiece of effective democracy in contemporary times, however, is misplaced. Countless auxiliary mechanisms in the United States complement the mass media in the tasks of assisting public understanding of government and of disclosing or deterring maladministration or corruption in office.

Many legislative proceedings are televised at the federal and state levels. 18/ Judicial proceedings are open to the public and are televised in many states. 19/

The federal Government in the Sunshine Act 20/ and sister

sunshine laws applicable to state and local governments provide a wealth of opportunities for persons directly to monitor government operations and decisonmaking. Similarly, the federal Freedom of Information Act 21/ and its cohorts at the state and local levels enable persons to obtain a vast array of documents utilized by government in discharging its responsibilities.

The Ethics in Government Act 22/ and the Inspector Generals Act 23/ and the Civil Service Reform Act 24/ together require broad financial disclosure statements from thousands of high level federal Government officials, establish a Merit System Protection Board, create a brigade of inspectors general within the executive branch, and provide for the appointment of a special prosecutor to safeguard against maladministration, corruption, or other wrongdoing within government.

A detailed review of the provisions of these Acts may prove rewarding, as their lengthy and complicated requirements are largely unknown to all but those government servants whose lives are ordered by them. The Ethics in Government Act, which applies to virtually all Presidential appointees, 25/ as well as to candidates for the Presidency and Vice Presidency, requires the filing of a financial disclosure report and its periodic amendment. 26/ Such reports must detail the source and nature of all the employee's income, gifts, reimbursements, business investments, and financial liabilities. 27/ These requirements partially bind the spouses and dependent children of such officials as well. 28/ Officials are forbidden to hold financial

interests in concerns which they regulate or with which they deal in their official capacity, and provisions are made for the divestment of such interests and the creation of blind trusts, complete with separate tax returns. 29/ The Act establishes an Office of Government Ethics in the Office of Personnel Management with responsibility for administering the reporting requirements, providing advice, and reporting potential violations of the Act to the Attorney General. 30/

The Inspector Generals Act provides for the creation of Inspector Generals in most cabinet departments and agencies of the executive branch. The stated purpose is to "promote economy, efficiency and effectiveness" in administration and to "prevent and detect fraud and abuse." 31/ Each Inspector General has an Assistant Inspector General for Auditing and one for Investigations. 32/ Inspector Generals are required to report potential criminal violations to the Attorney General, 33/ and to report semi-annually to the Congress. 34/ The Act also provides protection of the anonymity of employees who complain of wrongdoing. 35/

The Merit Systems Protection Board is composed of three Presidential appointees, subject to Senate confirmation and appointed for terms of seven years. 36/ The Board has the authority to issue subpoenas, take depositions, and hold hearings, and its purpose is to "adjudicate employee appeals and protect the merit system."37/ As the protector of the civil service, the Board exists to examine incidents of illegal

political activity by government employees, as well as to review all "activities prohited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking". 38/ The Board is endowed with a Special Counsel, a kind of prosecutor, and is required to submit an annual report to the President and the Congress. 39/

The Ethics in Government Act provides for the establishment of a special prosecutor or independent counsel when there exists reasonable grounds to investigate any high ranking official 40/ of the executive branch for violation of any federal criminal law. 41/ The Act requires the Attorney General to investigate all allegations made against senior executive branch officials, and to request that a special prosecutor be appointed if such allegations warrant further investigation. Special prosecutors are granted "full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice" 42/ including use of grand juries, authority to appear in court, access to national security materials, and power to seek grants of immunity from prosecution. Taken altogether, these provisions provide a significant check on improper actions within executive branch departments, and the reporting provisions ensure that the existence of any improper actions should become known to the Congress and public.

Additionally, the Federal Election Campaign Act 43/ and the

Office of Public Integrity (DOJ)

Lobbying Act 44/ require comprehensive disclosure of campaign contributions and expenditures concerning the political process. This information is open for public inspection, provides a deterrent to corruption, and enables the electorate to assess which persons or interest groups may be exerting special influence on elected officials to aid in the formation of individual political judgments.

Several dimensions of the Nation's constitutional separation of powers are also calculated to inform the public about its governing officials and to deter wrongdoing. Illustrative are the countless confirmation hearings held in the Senate regarding nominees submitted by the President, oversight or other hearings conducted by congressional committees regarding executive branch departments or agencies, and lawsuits initiated by private parties and others challenging the legality of federal action, a phenomenon encouraged by the Equal Access to Justice Act which provides attorneys fees to successful litigants against the United States. 45/ During the last fiscal year, the Senate Judiciary Committee alone confirmed sixty-four nominations, the House Government Operations Committee held eighty-one oversight hearings, and 35,881 lawsuits were filed against the federal government.

An impressive constellation of flourishing voluntary organizations is dedicated to disclosing information about government affairs, official wrongdoing, or dereliction by public

officials. Prominent among these organizations are the two national political parties, Common Cause, the League of Women Voters, the Americans for Democratic Action, the National Organization for Women, the Americans for Constitutional Action, the Eagle Forum, the Committee for a Free Congress, and the Moral Majority.

In sum, there is no plausible danger that if the zeal and insouciance with which the mass media assails public officials were marginally blunted by abandonment of the actual malice doctrine and the employment of a negligence standard to govern defamation actions by public officials that the educational opportunities for voters needed for the mechanisms of self-government to operate effectively would be impaired or that the incidence of government maladministration or corruption would increase.

IV.

Government Responsiveness

In New York Times, the Court acknowledged that government responsiveness to the will of the electorate is a paramount First Amendment goal. Under the Constitution, the electoral process is the primary vehicle for achieving this goal. Voters cast ballots based at least in part on policies and programs championed by rival candidates. Generally speaking, elected officials seek to effectuate campaign promises made to the electorate. Through this process of candidate pledges and voting, the electorate

ultimately controls the evolution and implementation of public policy.

The growth and complexity of government coupled with a concomitant emergence of career civil servants makes the integrity of the electoral process largely dependent on the ability of elected officials to attract talented, loyal, and dedicated supporters to appointed office in order to vindicate campaign promises. The imperative is perhaps best illustrated by examining the Office of the President of the United States.

The tasks that must be performed to forge and administer important presidential policies are beyond the capacity of any one person. The President thus requires skilled and loyal subalterns to originate and effectuate a host of major policy decisions. 46/ Career civil servants may be wedded to policies that diverge from those of the President, and thus are not necessarily a reliable source of manpower to advocate the President's goals, ardently, unflaggingly, and judiciously. A recalcitrant civil service is most likely to be encountered when the voters have signalled a desire for a change in policy by ousting an incumbent President. Career civil servants might be personally enthralled with longstanding policies they have administered for many years, and thus be resentful or sullen towards those who seek to chart a new course. Former National Security Advisor and Secretary of State Henry Kissinger has described the difficulties of eliciting bureaucratic

responsiveness to the instructions and announced policy objectives at the Department of State. Kissinger observes:

> "[A] lifetime of service and study has given [Foreign Service employees a conviction that they possess] insights that transcend the untrained and shallow-rooted views of political appointees...[w]hen there is not a strong hand at the helm...[d]esk officers become advocates for the countries they deal with and not spokesmen of national policy...They will carry out clear-cut instructions with great loyalty, but the typical Foreign Service officer is not easily persuaded that an instruction with which he disagrees is really clear-cut." 47/

Unsympathetic career civil servants may seek to evade effectuation of a President's program through endless procrastination or premature disclosure to the public that may ignite counteraction in the Congress or elsewhere. These actions may effectively scuttle a presidential initiative because timing is frequently of the essence to political success.

There are almost 3 million employees in the federal civil service, almost all armed with an impressive array of legal protections against discharge. 48/ These protections advance legitimate ends, 49/ and should not be eroded without meticulate and deliberate consideration of the consequences. The practical and legal impediments to insuring that career civil servants will unswervingly and tirelessly advance a President's policies, however, underscores the importance to a President of selecting several thousand 50/ talented and faithful political appointees to Cabinet and sub-Cabinet positions to formulate and supervise the administration of programs that the President was elected to effectuate. These political appointees are authorized to manage

career civil servants, who will ordinarily discharge the clear commands of their superiors.

Presidents, however, have been increasingly frustrated in attaining the services of highly-qualified and dedicated adherents for mid-level Cabinet posts. A matrix of reasons explains this unhappy development, including financial disclosure requirements, 51/ conflict of interest laws, 52/ and uninspiring compensation. 53/ Informal discussions with persons involved in recruiting for the Executive Branch indicates that the actual malice rule of New York Times also contributes to dissuading prospective political appointees from offering their talents to vindicate the policies of the President and the electoral process.

The actual malice rule fosters apprehension that a public official's reputation could be irretrievably sullied by the mass media or other critics through the negligent dissemination of falsehoods regarding his character or actions. Adversaries of potential political appointees or publicity seekers may spread false allegations through the mass media prior to or during any Senate confirmation process. Stories may be fabricated regarding improper or corrupt influence exerted on an appointee once he assumes office in order to discredit his policies or actions or force a resignation.

Falsehoods damaging to an official's reputation may inflict personal or family psychological or emotional scars, social ostracism or ridicule, or permanent curtailment of private

business or academic opportunities. In addition, many officials are deeply concerned that an adverse historical reputation will blunt the influence that their ideas or actions might otherwise exert on their posterity and the Nation's future. The profound importance of reputation to an individual's well being, and thus a natural disinclination to expose it to irresponsible assault, was recognized in Shakespeare's timeless language:

> He who filches my purse steals trash
> He who steals my good name
> Steals something that enriches him not
> But makes me poor indeed. 54/

To recapitulate, the New York Times actual malice doctrine, by encouraging persons to attack the reputations of public officials by the dissemination of falsehoods, obstructs the ability of the President and other elected officials to recruit talented and loyal supporters to assist in the formulation and execution of their policies. The deterrent to public service engendered by the actual malice rule undermines a fundamental purpose of our constitutional system: making government policies and actions responsive to the will of the people as expressed through the election of candidates to public office. Any First Amendment interpretation that is so disparaging of this transcendent constitutional goal is immediately suspect.

V.

Protection of Reputation

Justice Holmes observed that "[a]ll rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are

other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." Hudson Water Co. v. McCarter, 55/ A flaw in the Supreme Court's exposition of the First Amendment in New York Times was the wholesale subjugation of reputational interests to the First Amendment right to criticize public officials. Justice Stewart expounded the constitutional status of an individual's interest in a good name, explaining that offering protection to the same

> "reflects no more than our basic concept of the essential dignity and worth of every human being -- a concept at the root of any decent system of ordered liberty. The protection of private personality, like the protection of life itself, is left primarily to the individual States under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as a basic of our constitutional system." 56/

Recent years have witnessed a rising tide of legal concern for reputational interests, which casts doubt on whether the actual malice doctrine properly accommodates competing constitutional values. In Gertz v. Welch, the Supreme Court endowed private parties with protection against negligent damage to reputation inflicted by the media that had been earlier denied in Rosenbloom v. Metromedia 57/ when the defamatory statements were of general or public concern. Rule 6(e) of the Federal Rules of Criminal Procedure has been repeatedly construed to frown on disclosure of grand jury information that would harm reputational interests. 58/ The Government in the Sunshine Act and Freedom of Information Act exempt from mandatory publicity or

disclosure matters that would besmirch reputations. 59/ State laws have also blossomed that protect artists from reputational harm caused by disfigurement of their creations, 60/ and that recognize a commercial property right in an entertainer's reputation eligible for protection under inheritance laws. 61/

The convergence of growing legal and societal respect for reputational values coupled with experience and sober reflection makes reconsideration of the New York Times actual malice doctrine by the judiciary and others a worthy undertaking.

VI.

Conclusion

A legal system that offers only niggardly safeguards against false assaults on the reputations of public officials encourages an atmosphere of suspicion and cynicism surrounding government. Such an atmosphere impairs the ability of government to undertake bold and decisive measures to address many vexing problems that confront contemporary society. When the motives and integrity of public officials are constantly under a cloud because of falsehoods, then the assembly of needed public support to execute programs with success becomes problematical.

Fidelity to the First Amendment and other constitutional aspirations would be best harmonized if the Supreme Court authorized public officials to initiate defamation actions bottomed on the negligent publication of falsehoods. In addition, public officials should be endowed with rights to bring declaratory judgment actions to obtain authoritative judicial

rulings regarding the truthfulness of defamatory allegations of fact. No damages would be available in such proceedings, but neither would reasonable care in seeking verification of the allegations be sufficient to prevent an adverse judgment against the defamer. The sole issue in the declaratory judgment suit would be the truth vel non of the factual allegations injurious to the reputation of the maligned public official. The prevailing party would be entitled to attorney fees if the court found that such an award would advance the goal of an informed electorate.

The proposed structure for curbing defamation suits by public officials is informed by a more measured and comprehensive understanding of competing constitutional values than is reflected in the harsh actual malice doctrine so contemptuous of reputational interests. In any event, enlightened evolution or alteration of the actual malice doctrine in the courts can only profit by more rather than less examination of its guiding factual assumptions and constitutional philosophy.

FOOTNOTES

1. 376 U.S. 254 (1964).

2. The "clear and convincing" standard was not expicitly embraced by the Court until Lorain Journal v. Milkovich, 449 U.S. 966, 970 (1980), but was foreshadowed by Justice Brennan in Sullivan, see 376 U.S. at 285-286.

3. Justice White notes in Herbert v. Lando, 441 U.S. 553, that "our cases from New York Times to Gertz have considerably changed the profile "in libel cases, and states that "[t]he plaintiff's burden is now considerably expanded." Id. at 175-6.

4. Northern Securities Co. v. United States, 193 U.S. 197, 400, (1904) (Holmes, J., dissenting).

5. President Andrew Jackson claimed that the "painful excitement producted in the South" by abolitionist literature was sufficient reason to ban such "incendiary" material from the mails. Annual Message of President Jackson, December 2, 1835. See H. Greeley, The American Conflict, 123, 129. See also M. James, The Life of Andrew Jackson, 692, 705. Jackson's suggestion was referred to a Select Committee of the Senate, chaired by Senator John C. Calhoun of South Carolina. Calhoun, as a State's Rights advocate, objected to allowing the Federal government to determine what material would be considered "incendiary" and thus banned from the mails. Calhoun accordingly proposed allowing each State to make that determination for itself. Calhoun's bill, however, died on an 18-18 vote, and the proposal went no further. H. Greeley, Id.

6. New York Times v. Sullivan, at 279-280.

7. St. Amant v. Thompson, 390 U.S. 727, 731 (1968).

8. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-340 (1974).

9. Id. at 349-350.

10. See, Id. at 390-91, where Justice White noted that "it is quite incredible to suggest that threats of libel

suits from private citizens are causing the press to refrain from publishing the truth. I know of no hard facts to support that proposition, and the Court funishes none." Justice White goes on to state that:

> [t]he communications industry has increasingly become concentrated in a few powerful hands operating very lucrative businesses reaching across the Nation and into almost every home. Neither the industry as a whole nor its individual components are easily intimidated, and we are fortunate that they are not. Requiring them to pay for the occasional damage they do to private reuptation will play no substantial part in their future performance or their existence. Id.

11. See, Bates v. Arizona State Bar, 433 U.S. 350, 383 (1977); Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771-772 (1976).

12. The cost of libel insurance varies with the frequency of publication, circulation, and the record of the paper. A community weekly with an average circulation of 10,000 and no record of libel losses or investigative reporting can obtain a $10 million libel insurance policy for between $450 and $500. A big city daily newspaper with a tradition of aggressive reporting would pay between $2,000 and $3,500, or more, for the same coverage. Telephone Interview with Media Professional Insurance of Kansas City, Missouri.

13. Gertz v. Welch, supra at 391.

14. See note 10, supra.

15. See, R. Sherwood, Roosevelt and Hopkins, p. 699.

16. Gertz v. Welch, supra at 341 (1974).

17. In Herbert v. Lando, 441 U.S. 153, (1979), Justice White noted that permitting defamation plaintiffs to take discovery of the editorial process to prove malice might discourage the publication of false information: "Those who publish defamatory falsehoods with the requisite culpability, however, are subject to liability, the aim

being not only to compensate for injury but also to deter publication of unprotected material threatening injury to individual reputation," and that this result was "no more than what our cases contemplate and does not abridge either freedom of speech or of the press." Id. at 172. As Justice White pointed out, "if the claimed inhibition flows from the fear of damages liability for publishing knowing or reckless falsehoods, those effects are precisely what New York Times and other cases have held to be consistent with the First Amendment." Id. at 171.

18. At the state level, C-SPAN, a Washington, D.C. based cable service, feeds gavel to gavel coverage of U.S. House sessions to 1200 cable systems nationwide. Funding for this non-profit service is provided through monthly subscriber fees paid by affiliates and through some institutional advertising. The 1200 cable systems serve 15.7-16 million homes. Twenty-nine states provide public television coverage of State House and Senate debates on a periodic, daily, or weekly basis. National Conference of State Legislatures Survey at 57.

19. Thirty-nine states televised judicial proceedings on either an experimental or permanent basis in 1983. Coverage in these cases is usually restricted. Nearly all states prohibit the televising of cases involving juveniles, and most states prohibit coverage of victims of sex crimes, domestic relations cases, and trials involving trade secrets. Coverage of jurors is often restricted to prevent visual identification of jurors. Further, many states prohibit coverage of victims or witnesses who object to such televising. National Center for State Courts, Williamsburg, Virginia.

20. 5 U.S.C. §§ 552b, et seq.

21. 5 U.S.C. §§ 552, et seq.

22. P.L. 95-521, 92 Stat. 1824, 2 U.S.C. § 701, 5 U.S.C. Appx.

23. P.L. 95-452, 92 Stat. 1101, as amended P.L. 96-88, 93 Stat. 694, 5 U.S.C. Appx.

24. P.L. 95-454, 5 USC § 1201

25. See note 30, infra.

26. 5 U.S.C. Appx. § 202.

27. 5 U.S.C. Appx. § 202(a).

28. 5 U.S.C. Appx. § 202(e) (1)(A).

29. 5 U.S.C. Appx. § 202 (f)(1) et. seq.

30. 5 U.S.C. Appx. § 401.

31. 5 U.S.C. Appx. § 2.

32. 5 U.S.C. Appx. § 3.

33. 5 U.S.C. Appx. § 4.

34. 5 U.S.C. Appx. § 5.

35. 5 U.S.C. Appx. § 7.

36. 5 U.S.C. § 1201

37. S. Rep. No. 95-969, 2nd Sess., reprinted in 1978 U.S. Code Cong. & Ad. News 2724. The Congress passed the Senate version (S.2640) of the Civil Service Reform Act of 1978.

38. 5 U.S.C. § 1206(e)(i)

39. 5 U.S.C. § 1209

40. 28 U.S.C. § 591(b)

41. 28 U.S.C. § 592

42. 28 U.S.C. § 594(a)

43. P.L. 92-225, 86 Stat. 3.

44. Ch. 753, P.L. 601, 60 Stat. 839, 2 U.S.C. § 261 et seq.

45. P.L. 96-481, 94 Stat. 2325, 5 U.S.C. § 504a et seq.

46. See, Fein, Promoting the President's Policies Through Legal Advocacy: An Ethical Imperative of the Government Attorney, Federal Bar News & Journal, Vol. 30/Nos 9-10, Sept/Oct, 1983 at 406.

47. See, White House Years at 29.

48. Most employees in the executive branch are insulated

from removal after a change of Administration because of consitutional safeguards, See, Branti v. Finkel, 445 U.S. 507 (1980), Elrod v. Burns, 427 U.S. 347 (1976), or Statutory protections, see, 5 U.S.C. § 2301 (Merit System Principles), § 4301 (Performance Appraisal), § 7511 (Adverse Action).

49. In United Public Workers v. Mitchell, 330 U.S. 75 (1947), the Court sustained the constitutionality of the Hatch Act, 18 U.S.C. § 61 et seq., because Congress has a legitimate interest in promoting an efficient public service. To avoid politicalization of the Civil Service and to safeguard the ability of employees to exercise protected rights without jeopardizing their employment or advancement, Congress is entitled to limit the type of political activities in which civil servants might engage.

50. The President appoints approximately 400 officials "with the advice and consent of the Senate," excluding ambassadors, federal judges, and United States Attorneys, but including Presidential appointments at all independent agencies (roughly half the positions) and all Cabinet departments. The President currently has another 1,654 Schedule C (non-career civil service) and 744 non-career Senior Executive Service positions at his disposal. The total number of all non-military Presidential appointments to these full-time policy making positions - the people appointed to help the President create and pursue his programs - is therefore only 2,800. There are, by contrast, over 2,130,000 non-military federal employees.

51. See, discussion of the disclosure requirements imposed by the Ethics in Government Act, P.L. 95-521, at pp. 13-14.

52. See, e.g. the Ethics in Government Act, P.L. 95-521, 2 U.S.C. § 701, 5 U.S.C. Appx.

53. Salaries in the Senior Executive Service currently range from $58,938 to $69,600.

54.

55. 209 U.S. 349 (1908).

56. Rosenblatt v. Baer, 383 U.S. 75, 92 (1966). But see Paul v. Davis, 424 U.S. 693 (1976).

57. 403 U.S. 29 (1971).

58. See, United States v. Sells Engineering, 103 S. Ct. 3133 (1983), United States v. Baggot, 103 S. Ct. 3164 (1983), Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979).

59. See, 5 U.S.C. § 552b (c)(6) (Government in the Sunshine Act; 5 U.S.C. § 552 (b)(6), (b)(7) (Freedom of Information Act).

60. New York's law, for instance, states that "no person other than the artist . . . shall knowingly display in a place accessible to the public or publish a work of fine art of that artist or a reproduction thereof in an altered, defaced, mutilated or modified form if the work is displayed, published or reproduced as being the work of the artist . . . and damage to the artist's reputation is reasonably likely to result therefrom." N. Y. Code § 14.53 (1983). California has a similar statute. See Cal. Code § 987 et. seq. (West 1983).

61. See Cal. Code § 989 (West 1983).