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Will the Supreme Court Revisit 'New York Times v. Sullivan'?

By Jimmy Hoover
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Former coal baron Don Blankenship has joined a growing number of litigants asking the U.S. Supreme Court to revisit its landmark First Amendment ruling, *The New York Times v. Sullivan*, which for nearly 60 years has required public figures to prove "actual malice" by journalists to succeed in defamation lawsuits.

In a heated petition filed last week, the ex-CEO of Massey Energy said the court's *Sullivan* ruling grants the press "a license to publish defamatory falsehoods that misinform voters, manipulate elections, intensify polarization, and incite unrest."

Blankenship is attempting to revive his defamation lawsuit against several media organizations over mischaracterizations of his criminal record during his failed 2018 U.S. Senate candidacy in West Virginia.

He is part of a recent onslaught of litigants urging the Supreme Court to overrule *Sullivan* and its demanding standard for holding media organizations liable for defaming public figures. *Sullivan* has come under attack in recent years from Republicans, including former President Donald Trump and Florida Gov. Ron DeSantis.

In *Sullivan*, the Supreme Court unanimously ruled against an Alabama public official who had sued The New York Times over an ad that ran in the paper soliciting funds for Dr. Martin Luther King Jr.'s legal defense. The Supreme Court said public officials could not collect damages in a libel or defamation case unless the defendant either knew the statement to be false or had a reckless disregard for the truth.

The decision stemmed the tide of libel suits from southern officials against media outlets during the civil rights movement, and laid down a marker for press freedom. It would eventually be extended to cover public figures outside of officeholders.

It also represented a "sea change" from the strict liability regime for defamation that had existed for generations before, according to University of Buffalo Law School professor Samantha Barbas.

The decision aided the civil rights movement and guarded "the ability to report on officials without the threat of potentially bankrupting

libel suits that they faced before *Sullivan,*" said Barbas, the author of a new book on the decision called, "Actual Malice: Civil Rights and Freedom of the Press in New York Times v. Sullivan."

Like others, Blankenship seized on the writings of current and past Supreme Court justices in his May 15 petition to revisit *Sullivan*.

Chief among those is Justice Clarence Thomas, who made headlines in 2019 when he called *Sullivan* and related rulings "policy-driven decisions masquerading as constitutional law." Blankenship also seized on Justice Neil Gorsuch's criticism of the doctrine in 2021, when he said that "the actual malice standard has evolved from a high bar to recovery into an effective immunity from liability."

"Overruling *Sullivan* will spark a resurgence of fact-based journalism," said Blankenship, who is represented by Eric Peter Early of Early Sullivan Wright Gizer & McRae. "Best practices for accuracy and truthful reporting will be incentivized. Reliable information will be exchanged in the public square."

In response to the petition, Barbas said getting rid of *Sullivan* would have a "significant" and "chilling" effect on press coverage of public figures in media organizations around the country.

"That would be an extreme change," she added.

The court's ruling in *Sullivan* has been the "centerpiece of the American free speech regime" since it was decided in 1964, Barbas said.

Theodore J. Boutrous Jr., a prominent First Amendment attorney at Gibson, Dunn & Crutcher, agreed.

"It would be dramatic, terrible, unnecessary, and I just don't think the court is going to do it," Boutrous said.

Minor Slip-Up or Defamation?

Blankenship is suing Fox, MSNBC, CNN and other media outlets for labeling him a convicted felon during his failed run for a Senate seat in West Virginia in 2018.

Blankenship was at the helm of Massey in 2010 when a mine explosion at the Upper Big Branch Mine killed 29 miners. He was later convicted of conspiracy related to his effort to cover up internal mine safety violations.

While he was not held liable for the 29 people who died in the explosion, the incident spurred the investigation which led to the eventual conviction.

Blankenship claims prominent anchors at the cable news giants either knowingly, or recklessly, branded him a "convicted felon" during his Senate run, leading to his primary defeat to Republican Patrick Morrisey. His lawsuit originally named more than 100 media organizations as defendants, but most were dismissed by the former CEO voluntarily or by the district court.

He has since trained his focus on on-air statements by Fox News' Neil Cavuto and MSNBC's Chris Hayes.

The U.S. Court of Appeals for the Fourth Circuit rejected Blankenship's claims and, applying the Supreme Court's decision in *Sullivan*, said he had failed to show that the defendants had acted with "actual malice," given his status as a public figure.

"Some of the statements may have been the product of carelessness and substandard journalistic methods," Chief Judge Roger L. Gregory wrote in the appellate court's published opinion. "But at the end of the day, the record does not contain evidence that the commentators and journalists responsible for the statements were anything more than confused about how to describe a person who served a year in prison for a federal offense."

In his appeal to the Supreme Court, Blankenship said the Fourth Circuit improperly assumed the role of the jury and resolved factual disputes as to the "scienter," or state of mind, of the defendants without allowing his defamation case to go to trial.

Blankenship's petition also excoriates what he calls the "politico-media complex" and asserts that his branding as a convicted felon was the result of Fox CEO Rupert Murdoch's intervention on behalf of Trump and Sen. Mitch McConnell, R-Kentucky, both of whom opposed the former coal magnate's candidacy.

'A Wave of Defamation Cases'

Blankenship's is not the only recent Supreme Court petition to take aim at *Sullivan*. The court on Monday morning refused certiorari, or review, in an appeal from former Democratic Congressman Alan Grayson of Florida, asking the court to revisit the decision. Grayson had sued political operatives for allegedly defaming him by stating he had engaged in profiteering and spousal abuse.

"I believe we're going to keep seeing cert. petitions that raise this issue at least for the near future," said Boutrous. "Parties are making this argument in trial courts and lower courts to try to preserve the issue. And I do think we're going to be fighting on this battlefield for a while."

These Supreme Court appeals are part of an uptick in defamation litigation around the country amid attacks on *Sullivan* and press freedom, according to Boutrous.

"We've seen this wave of defamation cases really over the last six or seven years in part because some politicians and high-profile individuals and companies have used them as a political tool and a tool to try to intimidate journalists and others from speaking out," he said. "That's exactly what *New York Times v. Sullivan* is intended to prevent."

Blankenship's appeal alludes to the recent defamation lawsuit against Fox brought by Dominion Voting Systems, which the network settled for $785 million.

But according to Barbas, Dominion's success in that case actually supports upholding *Sullivan*, and undermines claims it has effectively immunized broadcasters over their on-air statements.

"I think that [settlement] actually strengthens *Sullivan* because it shows that the protections for reputation are not dead," she said.

While Barbas is doubtful the Supreme Court will overrule *Sullivan* any time soon, she suggested the court might at some point rein in its application of the "actual malice" standard to all public figures, a phrase she said has come to encompass anyone who wades into an area of public discourse.

That's unlikely to happen in the case of a disgraced coal magnate who runs for Senate, she said.

"It would seem that the most sympathetic plaintiff would be someone who is an ordinary citizen. … Not a CEO. Not a celebrity," Barbas added.

The case is *Blankenship v. NBCUniversal LLC.*

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