New York Times v. Sullivan

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New York Times v. Sullivan

Documentary Supplement

Eric B. Easton



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To Professor Daniel Freeman, for inviting me to teach this case to his young scholars for many years.

About the Author

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Professor Easton is an executive board member and past chair of the Mass Communications Law Section of the Association of American Law Schools and a member of the Society of Professional Journalists, the Association for Education in Journalism and Mass Communications, and the International Communication Association. He is a past chair of the Maryland State Bar Association's Section on Legal Education and Admission to the Bar, past chair of the Communication Skills Committee of the American Bar Association's Section on Legal Education and Admission to the Bar, and a member of the Association of Legal Writing Directors and the Legal Writing Institute. He has also directed the Law School's LL.M. in the Law of the United States and chaired the University's Faculty Senate and Institutional Review Board.

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Introduction

The decision of the Supreme Court of Alabama gives a scope and application to the law of libel so restrictive of the right to protest and to criticize official conduct that it abridges the freedom of the press, as that freedom has been defined by the decisions of this Court. It transforms the action for defamation from a method of protecting private reputation to a device for insulating government against attack. If the judgment stands, its impact will be grave—not only upon the press but also upon those whose welfare may depend on the ability and willingness of publications to give voice to grievances against the agencies of governmental power. The issues are momentous and call urgently for the consideration and determination of this Court.

Written by attorney Herbert Wechsler in 1962, this paragraph triggered a legal process that would change the course of First Amendment law forever. What began as a common law libel case was transformed into matter of constitutional significance rivaling the Alien and Sedition Act of 1798 and the Espionage Act of 1917. Wechsler's petition for certiorari in *New York Times v. Sullivan* is now widely and justly heralded as a masterpiece of litigation strategy, persuasive writing, and creative lawyering. Without it, that landmark press freedom decision might never have been written.

New York Times v. Sullivan is said to embody the "central meaning" of the First Amendment, namely, that punishing sedition—criticism of government—is impermissible under the Constitution. If that had been the only accomplishment of the Supreme Court's decision in that case, it would easily have qualified as a landmark in constitutional law. But the decision did so much more:

- Ended the "blackmail" of the national press covering civil rights.
- Adapted the common law of libel to American constitutional values.
- Defined "state action" broadly enough to cover private lawsuits.
- Distinguished paid political advertising from commercial speech.
- Set the stage for reconsidering privacy and emotional distress torts.

This book, like others in this "Deep Dive" series, has been designed especially for use in the law school classroom—constitutional law,

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advanced torts, media law, and advanced legal writing—to enable the student to explore how these achievements were won through the actual documents produced by the lawyers and judges involved in the case.

Chapter 1 focuses on the early stages of *New York Times v. Sullivan* and its origin in the Civil Rights movement. Chapter 2 covers pretrial proceedings, Chapter 3 deals with the trial itself, and Chapter 4 looks at the Alabama appeal. Chapter 5 discusses the certiorari proceedings, and Chapter 6 covers the proceedings before the Supreme Court after certiorari was granted, culminating in the Court's opinion. Finally, Chapter 7 looks at the legacy of *New York Times v. Sullivan* through the libel cases that followed it to the Supreme Court.

To facilitate discussion, some questions have been included at the end of each chapter. While a few might encourage some additional reading (do you still have your civil procedure book?), most require only reasoned analysis. All are intended to focus on the lawyering skills demonstrated by the outstanding counsel on both sides of the issue. Chances are, you won't be handling any landmark cases in your first few years out of law school, but the skills you'll find here are the very same skills you will need in your own practice.

To facilitate your reading, extensive footnoting that plague more scholarly works have been avoided. Several outstanding books and countless articles have told the *New York Times v. Sullivan* story, and the narrative offered here breaks no new ground in that regard. Accordingly, works from which that narrative derives have been listed here, along with a brief note about each.

By far, the best sources on the evolution of this case are Anthony Lewis's Make No Law: The *Sullivan* Case and the First Amendment (1991) and Kermit L. Hall and Melvin Urofsky's *New York Times v. Sullivan*: Civil Rights, Libel Law, and the Free Press (2011). Lewis, the great *New York Times* journalist and author of Gideon's Trumpet, brilliantly set the *Sullivan* case in the context of press freedom and the evolution of First Amendment jurisprudence. Academics Hall and Urofsky's treatment of the case emphasizes its origin in the civil rights movement and contextualizes the case from that perspective. A third book devoted to the case, Harvey Fireside's *New York Times v. Sullivan*: Affirming Freedom of the Press (1999), is especially designed for young readers.

Two books that shed light on the inner workings of the Supreme Court while the Sullivan case was being decided are Bernard Schwartz's Super Chief: Earl Warren and His Supreme Court—A Judicial Biography (1983) and Steff Stern and Stephen Wermiel's Justice Brennan: Liberal Champion (2010). An outstanding book on *Sullivan's* legacy is Wermiel's collaboration with Lee Levine on The Progeny: Justice

WILLIAM J. BRENNAN'S FIGHT TO PRESERVE THE LEGACY OF *New York Times v. Sullivan* (2014).

First Amendment anthologies that have useful sections on the Sullivan case include The First Amendment (1999), edited by Peter Irons, one of the "May It Please the Court" series that provides heavily edited live recordings and transcripts of oral arguments before the Supreme Court, and First Amendment Stories (2012), edited by Richard W. Garnett and Andrew Koppelman, which includes a chapter entitled *The Story of* New York Times v. Sullivan by Mary-Rose Papandrea. Two other books that greatly help to contextualize the case are Harry Kalven, Jr.'s masterpiece, A Worthy Tradition: Freedom of Speech in America (1988) and, for the civil rights perspective, Gene Roberts and Hank Klibanoff's The Race Beat: The Press, the Civil Rights Struggle, and the Awakening of a Nation (2007).

A complete list of articles on *New York Times v. Sullivan* might occupy this entire book. Herewith, a list of major articles on the case, with thanks to University of Baltimore Law Librarian Joanne Colvin and apologies for the many excellent works inevitably left out:

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- Tushnet, Mark, *Introduction: Reflections on the First Amendment and the Information Economy*, 127 HARV. L. REV. 2234 (2013-2014).
- Urofsky, Melvin I., New York Times Co. v. Sullivan as a Civil Rights Case, 19 COMM. L. & POL'Y 157 (2014).
- Volokh, Eugene, Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition, 96 Iowa L. Rev. 249 (2010).
- Youm, Kyu Ho, *The "Actual Malice" of* New York Times v. Sullivan: *A Free Speech Touchstone in a Global Century*, 19 COMM. L. & POL'Y 185 (2014).

Finally, a word or two about primary sources. This book is further indebted to the University of Baltimore Law Library for purchasing the four-reel microfilm of all the trial and appellate proceedings from Alabama. Most of the U.S. Supreme Court filings are available on Lexis or Westlaw or both, and the complete oral argument transcription is available at Oyez.com. Herbert Wechsler's papers are housed in the Columbia University Rare Book & Manuscript Library. M. Roland Nachman's papers are in the Alabama Department of Archives and History. The papers of Justice William O. Brennan are housed in the Library of Congress. A good selection of articles from southern newspapers in the early 1960s is available from Newspapers.com.

Chronology

1960: Complaint—Libel Suit—Motions—Interrogatories—Answer—Trial—Verdict—Motion for New Trial

March 29	Times publishes advertisement "Heed Their Rising Voices"
April 8	L. B. Sullivan demands retraction by the <i>Times</i> , four ministers
April 14	Stringer Don McKee responds to <i>Times</i> 's request for investigation
April 15	Times declines retraction, asks how ad refers to Sullivan
April 19	Sullivan files libel complaint in Circuit Court of Montgomery
April 21	Summons and complaint served on McKee
April 26	Times receives summons, complaint from Alabama Secretary of State
May 9	Alabama Governor John Patterson demands retraction from <i>Times</i> , ministers
May 16	Times retracts as to Patterson and apologizes in letter
May 20	Times files motion to quash service of process
May 22	Ministers file demurrers to the complaint
May 30	Sullivan moves to require <i>Times</i> to produce all relevant records
Мау 30	Patterson files libel suit
June 9	Judge Walter B. Jones grants motion to produce
June 16	Times files exception to ruling on motion to produce
June 17	Sullivan serves interrogatories on <i>Times</i>
June 29	Jones grants Sullivan's motion to produce records
July 25	Jones holds hearing on motion to quash service
August 5	Jones denies <i>Times</i> 's motion to quash
August 18	Times objects to interrogatories, files demurrer
September 20	Jones decides which interrogatories the <i>Times</i> must answer
October 28	Times files answer to Sullivan's complaint

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November 1 Jones overrules all demurrers, begins trial on the merits

November 3 Trial ends, verdict announced

November 9 Judgment entered awarding Sullivan \$500,000 in

9 Judgment entered awarding Sumvan \$500,000 i

damages

December 2 Times files motion for new trial

1961: New Trial Hearing—Denied—Judgment Enforced— Motion and Appeal

January 13 Hearing on motions for new trial postponed to March 3 Jones denies new trial for ministers January 18 February 3 Sheriff begins seizing ministers' property to satisfy judgment Sale of ministers' property scheduled for March 20 February 15 February 20 Federal judge refuses to enjoin sale of ministers' property Minister Ralph Abernathy's car sold at auction February 21 Times motion for new trial denied March 17 March 20 Jones refuses to waive \$1 million bond for ministers April 7 Jones refuses to nullify sale of Abernathy car *Times* gives notice of appeal April 13 Ministers move to join appeal April 27 October 5 Times files brief with Alabama Supreme Court December 19 Oral arguments held in Alabama Supreme Court

1962: Affirmed-Certiorari

August 30 Alabama Supreme Court affirms trial court judgment

November 21 Times files petition for certiorari

December 15 Sullivan submits brief in opposition to certiorari in

Times

December 17 Sullivan submits brief in opposition to certiorari in

Abernathy

December 29 Ministers submit reply to Sullivan's brief in opposition

1963: Supreme Court Grants Certiorari—Amicus Briefs Filed

January 7 U.S. Supreme Court grants certiorari to the *Times* and

the ministers

August 30 Tribune Co. submits amicus brief

September 6 Times submits brief

September 9 Ministers submit brief; ACLU submits amicus brief

October 3 Sullivan submits briefs in both cases

1964: Supreme Court Oral Arguments—Decision

January 6 Oral arguments in *Times* case
January 7 Oral arguments in ministers' case

January 10 Justices conference

March 9 Decision

New York Times v. Sullivan