

Defamation

Elizabeth Joh: So, politics tends to bring up a lot of rumors and whisper campaigns. And the presidential election of 1884 wasn't any different.

Roman Mars: Some have said it's one of the nastiest campaigns in American history. But we'll let you be the judge.

Elizabeth Joh: The Republican nominee that year was James Blaine, who was a longtime politician. Blaine had been accused of taking bribes from railroad companies when he'd been speaker of the House. And Blaine's opponents taunted him about his unethical business deals with this little ditty: "Blaine, Blaine, James G. Blaine, the continental liar from the state of Maine."

Roman Mars: Vicious.

Elizabeth Joh: The Democratic nominee in 1884, was a newcomer, New York Governor Grover Cleveland. So, several days after the Democratic convention, the Buffalo Evening Telegraph published an exposé titled A Terrible Tale: A Dark Chapter in a Public Man's History. The story reported that a decade earlier, Cleveland had fathered an illegitimate child with a Buffalo woman named Maria Halpin. The story was a little more complicated than that might seem. In the language of the day, Halpin had "bestowed her favors upon several prominent men in Buffalo." So, here's the thing. All of the others were married, and Cleveland was a bachelor. Cleveland wasn't the only possible father. But what Cleveland did was essentially took the fall for his friends, including his married law partner, Oscar Folsom. He took responsibility for the child, who was actually named Oscar Folsom Halpin. Cleveland arranged for the boy to be adopted. And when Halpin had a mental breakdown, she was institutionalized. So, the blame campaign, Cleveland's opponent, came up with a famous taunt for Cleveland. "Ma, Ma, where's my pa?" They marched in public with dolls and baby carriages.

Roman Mars: But Grover Cleveland didn't deny the affair and managed to weather the storm.

Elizabeth Joh: Blaine made his own missteps in the campaign, and ultimately Cleveland made it to the White House. And that taunt to Cleveland--"Ma, Ma, where's my pa?"--was answered by President Cleveland's supporters with "Gone to the White House. Ha ha ha." Blaine and Cleveland were early targets of really dramatic and sensational newspaper stories designed to sell papers. And the 1880s witnessed the birth of what we now call "yellow journalism"--that kind of story. Papers like Joseph Pulitzer's New York World and William Randolph Hearst's New York Journal competed with each other to produce ever more eye-opening stories. And, of course, in President Cleveland's case, he was quick to admit the affair. And the story, as sensational and dramatic as it was, put it to something that Cleveland, as a public figure, had to account for. So now it's 2018. We're seeing claims about fake news, threats of lawsuits against the press, complaints about harms to people's reputations...

Roman Mars: And President Trump is right in the middle of it. In fact, on January 9th, his personal attorney tweeted that he filed a defamation action against BuzzFeed for publishing the Russian dossier.

Elizabeth Joh: So, it's time to ask what does the Constitution say about defamation, a free press, and the First Amendment?

Roman Mars: This is what Trump Can Teach Us About Con Law--an ongoing series of indefinite length, where we take the tweets and bluster of the 45th President of the United States and harness that hot air to power a machine that helps us learn the U.S. Constitution like we never have before. Our music is from Doomtreet Records. Our professor is Elizabeth Joh. And I'm your fellow student and host, Roman Mars.

Elizabeth Joh: So, everyone's reputation matters. And when someone makes a claim that harms your reputation--that you're a serial liar, for example--that can be really damaging and hard to undo. The law of defamation addresses these situations--bad things others say or write or broadcast about you to third parties. Defamation law itself goes back to the Middle Ages. If one Lord sullied the reputation of another, they'd fight to the death. We've abandoned that particular method of resolving defamation claims, but you can still initiate a legal claim against another person for harming your reputation. In American law, defamation is primarily something that's defined by the states. But it's subject to First Amendment limits. And remember, the First Amendment says that "Congress shall make no law abridging the freedom of speech or of the press."

Roman Mars: Probably the most important Supreme Court case on defamation, the First Amendment, and the press' ability to publish stories about public officials comes from the civil rights era.

Elizabeth Joh: Most people know the story of Rosa Parks--her famous refusal to sit on the back of a Montgomery bus that sparked the city's famous bus boycott in 1955. In helping to organize the boycott, the Montgomery Improvement Association named a 26-year-old Reverend Martin Luther King Jr. as its head. King's home was bombed in January of 1956, and the bus boycott was just one of many civil rights struggles in the South that involved protests, lawsuits, and sometimes deadly violence. So, on February 1st, 1960, four African American students from the North Carolina Agricultural and Technical College staged the first sit-in. They walked into a whites only lunch counter at a Greensboro, North Carolina, Woolworth's and asked for coffee. The students were denied service, and they sat quietly in protest. The so-called "sit-in movement" spread across the state, then to Virginia, and then further south. Newspapers from across the country, including The New York Times, covered the protests and sent additional reporters down south. On February 25th, 35 students from Alabama State College asked to be served at the snack bar in the basement of the Montgomery County Courthouse. The white snack bar owner responded by turning off the lights and closing the snack bar down. The very next day, Governor John Patterson demanded that the students who participated in the protests be expelled from school. And on February 27th, most of the 800 students at Alabama State marched to the state capital to protest the governor's actions.

Roman Mars: Klansmen wielding bats attacked the student protesters while the police just stood by.

Elizabeth Joh: Just a month later, on March 29th, 1960, a group of civil rights leaders decided to publish a full-page ad in the New York Times to raise funds for the civil rights activists in the South. The ad was called Heed Our Voices and specifically addressed the sit in movement and the activism of Martin Luther King. And one paragraph in particular said something like this: "In Montgomery, Alabama, after students sang My Country Tis of Thee on the state capitol steps, their leaders were expelled from school, and truckloads of

police armed with shotguns and tear gas ring the Alabama State College campus. When the entire student body protested to state authorities by refusing to reregister, their dining hall was padlocked in an attempt to starve them into submission." Other parts of the ad described the plight of King and asked Times readers to support the defense of Martin Luther King, the support of the embattled students, and the struggle for the right to vote.

Roman Mars: Remember, this was a fundraising advertisement. It was not a piece of reporting.

Elizabeth Joh: But keep in mind, it was published as an ad in The New York Times. And while the ad didn't name any specific law enforcement officials, it did depict Southern police forces as brutal and racist. The Montgomery Police Department referred to in the ad was headed by Police Commissioner Lester Bruce Sullivan.

Roman Mars: And the ad, unfortunately, had a few factual errors.

Elizabeth Joh: Dr. King had been arrested not seven but four times. And the Alabama state students had been expelled not for protesting but for the sit-in. And while there were large numbers of police during the time, they did not "ring the campus," as the ad said. No one had padlocked the dining hall. And the protesting students--this is pretty minor--had sung The Star-Spangled Banner not My Country Tis of Thee. As a result, Police Commissioner Sullivan decided to file a defamation lawsuit against The New York Times. And after just two hours of deliberation, a jury returned a verdict in Sullivan's favor. They awarded him \$500,000. Alabama's law on libel--that's defamation in writing or broadcast--was like other states' at the time.

Roman Mars: The Times was guilty of defaming Sullivan, a public official, by publishing facts that weren't true.

Elizabeth Joh: His reputation was harmed, and that was it. The Alabama Supreme Court upheld the judgment against the Times. And now, while Sullivan actually probably did feel like his reputation was harmed, it's also true that the lawsuit was really also instrumental. It was to get back at what Southern law enforcement officials thought of as "meddlesome" and "provocative" reporters from the North. And victory in this case meant that the Times or any other publication had to be really careful that not one single detail could be wrong in anything they published about a public official--not a thing. And the concern here is that if they were going to be super careful in this way, that might cause them to be cautious--and in fact so cautious that they might refrain from vigorous reporting of sometimes unpleasant facts.

Roman Mars: The case of New York Times versus Sullivan made its way up to the United States Supreme Court.

Elizabeth Joh: And on March 9th, 1964, Justice Brennan delivered the opinion of the Court. Was the way that Alabama law let a public official win in a libel case in this way a violation of the First Amendment? The Supreme Court answered yes.

Roman Mars: The Supreme Court sided with the New York Times.

Elizabeth Joh: Requiring that any criticism of official conduct to be 100% error free would, in the Court's words, "lead to self-censorship" and would, quote, "dampen the vigor and limit the variety of public debate." "It wasn't enough," said the Court, "that The Times had

published some mistakes." In *New York Times versus Sullivan*, the Supreme Court said that in order for a public official to win in a defamation lawsuit, there had to be clear and convincing evidence not only that the statements were false, but also--and here's the important part--that the defendant did so with, quote, "actual malice." What this really means is that The New York Times had to have known that the statements they made were false or that they were reckless about it. "Reckless" in this case really means they took a really high risk that the statements were false and decided to publish them anyway. The judgment in favor of the Montgomery police commissioner was reversed.

Roman Mars: So, what does the case of *New York Times versus Sullivan* really mean?

Elizabeth Joh: It means that it is very difficult for a public official to win a defamation lawsuit, even if it's a lawsuit about some facts that are wrong. Does that mean that a public official might have to live with some erroneous statements published about them? Yes. But as the Supreme Court itself said in the case, "We consider this case against the background of a profound national commitment to the principle that debate on public issues should be robust and wide open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."

Roman Mars: Which is good because it's become very clear that some public officials deserve the occasional vehement, caustic, and unpleasantly sharp attack. So, let's get to Trump.

Elizabeth Joh: Trump has a curious relationship with the press. Long before he was president, he courted the press. He placed ads in major newspapers. He's been interviewed by reporters dozens and dozens of times. First as a candidate, and now as a president, though, he's also attacked the press. He's called them fake news. He has a special epithet for some of the papers--for example, "the failing New York Times."

Roman Mars: There are so many examples of Trump's distaste for a current libel law, but we'll just mention a few.

Elizabeth Joh: On September 17th, 2016, The New York Times reported a really long piece on how Trump had relied on hundreds of millions of dollars in taxpayer subsidies to build his fortune. That afternoon, candidate Trump tweeted, "My lawyers want to sue the failing New York Times so badly for irresponsible intent. I said no for now. But they are watching. Really disgusting." Here's the thing. "Irresponsible intent"--that's not a thing. No one is guilty of irresponsible intent. On October 12th, 2016, The New York Times reported the accounts of two women who came forward and said Trump had assaulted them years before. Trump denied the charges. And right after midnight, his lawyer sent a letter to the executive editor of the Times. The article, according to Trump's lawyer Marc Kasowitz, was, quote, "reckless, defamatory, and constitutes libel per se." You recognize those legal buzzwords? And they demanded that they retract the letter. The next day, David McCraw, who is the assistant general counsel for the Times--he's one of their lawyers--shot back: "Nope." Instead, McCraw wrote in a letter that went viral. "We did what the law allows. We publish newsworthy information about a subject of deep public concern. If Mr. Trump disagrees, we welcome the opportunity to have a court set him straight." And the threatened defamation lawsuit? It never arose. Then in March of 2017, President Trump tweeted, "The failing New York Times has disgraced the media world. Gotten me wrong for two solid years. Change libel laws?" That tweet echoes an earlier statement Trump had made on the campaign trail in 2016, when he said that if elected, he'd, quote, "Open up our libel laws so that when newspapers write purposely negative stories, we can sue them

and make lots of money." Whatever President Trump may think of the law of defamation--and what he's really referring to is First Amendment protections for the press--he just can't do anything about it. The only way to get rid of New York Times versus Sullivan, the case, would be to convince the Supreme Court to overturn it--that's pretty remote--or to have a constitutional amendment, which is just never going to happen.

Roman Mars: So, in January of 2018, we have another defamation issue. A new book called Fire and Fury: Inside the Trump White House by Michael Wolff has been published.

Elizabeth Joh: So, some excerpts that have been passed around already say that there is a chaotic, bumbling White House. No one is in charge. All sorts of terrible things are happening. The book attributes some very critical views of the White House by former Trump adviser Stephen Bannon. For instance, Bannon described a Trump Tower meeting that included the president's son, Donald Jr., his son-in-law, Jared Kushner, and a Russian lawyer as "treasonous." When these excerpts first came out, the White House put out an official statement that said, "Steve Bannon has nothing to do with me or my presidency. When he was fired, he not only lost his job, he lost his mind." And on January 4th, lawyers for the president sent to the publisher of Fire and Fury what lawyers call a "cease and desist letter."

Roman Mars: That just means: "Don't publish this or else."

Elizabeth Joh: It's 11 pages, but I'll quote just one sentence. "Your publication of the false, baseless statements about Mr. Trump gives rise to, among other claims, defamation by libel per se."

Roman Mars: Which sounds really intimidating. But remember that The New York Times versus Sullivan decision is the relevant law here. It wouldn't be enough for Michael Wolff to have made factual errors in his book about the President of the United States.

Elizabeth Joh: Instead, Trump would have to prove that the statements were not only false, but also that they were made with actual malice. That's the legal standard. And that's just not very easy to do. And so, on January 8th, the lawyers for Henry Holt, the publisher of Fire and Fury, responded with this letter. "Mr. Trump is the president of the United States with the bully pulpit at his disposal. Your letter stopped short of identifying a statement in the book that is factually false or defamatory. Instead, the letter appears to be designed to silence legitimate criticism. This is the antithesis of an actionable legal claim."

Roman Mars: Will this ever end? Well, probably not while Trump is president.

Elizabeth Joh: In 2011, long before the campaign, Trump apparently watched Lawrence O'Donnell on MSNBC. He tweeted, "I heard, because his show is unwatchable, that Lawrence has made many false statements last night about me. Maybe I should sue him?"

Roman Mars: I have follow-up questions for Elizabeth about libel and its cousin, slander, right after this. How do you actually look into the heart of a journalist writing an article and prove that they have some kind of malicious intent?

Elizabeth Joh: For public officials, it rarely happens that they win. I mean, you need evidence--some smoking gun--some email. "We know this is false, but let's go ahead and publish it anyway." Right? And that doesn't matter. I mean, the important thing here is that libel law, because of the First Amendment, no longer means, "Well, you made a mistake.

You said something about me that's not true, no matter how important or trivial. And so, then you're guilty." So, the First Amendment is saying, "Well, on balance, we'll take the risk." Or the Supreme Court is saying, "We'll take the risk that, you know, sometimes reporters are going to get things wrong. They'll issue corrections. But as long as this is in the course of sort of vigorous professional journalism, we have to allow it. Otherwise, you know, a free society, you know, can't be sustained unless you have a free press." And for the Supreme Court, that's been a longstanding balance that seems right. When you're a public official or a public figure--that's another kind of person that's subject to these rules--you're sort of taking that risk. You want to be that famous? You want to run for the presidency? You are going to assume that some of these bad, nasty, sometimes occasionally untrue things might be said about you. But you go into it with your eyes open. You're not a private person who's being written about in this way.

Roman Mars: Given the fact that these types of lawsuits rarely succeed, why do these men in power, like Harvey Weinstein and Trump, threaten to sue The New York Times every time something was written about them that they don't like?

Elizabeth Joh: So, you know, of course, I can't get into Trump's head, but I think that there's a couple of different reasons. One, you know, it fits with Trump's persona. I think it means that, "look, you know, by my very cease and desist letter, by my lawyer saying, 'You know what? We're going to sue you for libel,'" it raises the question for at least among some of Trump's supporters, "well, could he be right? Is it maybe not something to be believed at all? Maybe they're all making up lies." So, the very fact of the letter kind of reframes the issue as "don't believe any of this. It's all a lie." You don't even have to get to the filing of the lawsuit to change the conversation about, you know, the truthfulness of the book or the reporting, right? You know, in just regular old lawsuits, when you think about what does it mean to threaten a lawsuit, if you're The New York Times, it's like a flyswat. You say, "Fine, bring it on," which is essentially what The New York Times has said. But it's also a signal sometimes to smaller press outlets or if you're a blogger, let's say, that, you know, you should just be scared and be quiet because you can't afford a huge lawsuit. It'll bankrupt you. And that occasionally happens, too. So just the mere fact of a lawsuit, even if you're not going to win, can be so expensive and costly in lots of ways that the better alternative for a small paper might be: "Okay, we'll retract it." And that's the danger, too, and a danger that the Court recognized in the Times case. Even though it was The New York Times, which still is a giant institution, it was really talking about all kinds of reporting. And I think that's more relevant in 2018 than it was in the 1960s.

Roman Mars: What's the difference between libel and slander?

Elizabeth Joh: That's a good question. So, libel and slander are both types of defamation. Libel is written or broadcast defamation--defamatory statements. And slander is spoken to a third party. But defamation always involves saying something that harms the reputation of another by saying it to a third party. If I say to you, "Roman, you always cheat at cards," and then you break down and cry, that's bad. But it's not defamation. But if I stand on the street corner in Oakland, downtown Oakland, and I say, "Roman Mars is a card cheat," then that is slander. If I broadcast on my blog, "Roman Mars is a card cheat," that's libel.

Roman Mars: This show is produced by Elizabeth Joh and me, card cheater Roman Mars. You can find us online at trumpconlaw.com, on Facebook, and on Twitter. All the music in Trump Con Law is provided by Doomtree Records, the Midwest Hip-Hop Collective. They are the absolute best label going right now. You've got to get into it. You can find out all about Doomtree Records, get merch, and learn about current tours at

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