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Lies and Legality: Evaluating the Legislation's Role in Monitoring Campaign Truthfulness

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The first presidential debate between candidates Hillary Clinton and Donald Trump took place Monday, September 26, and unsurprisingly, both were subjected to frequent accusations of outright lying from one another. Given the gravity of the situation – a campaign to be elected to the highest office of what could conservatively be called a major international power – one might be tempted think that apparent perfidy would be a serious, and perhaps even criminal, charge. After all, these are men and women going out in front of every camera in the country and asking its people to consign their trust to them with their vote; doing so under false pretenses and misrepresentations seems to transcend the boundaries of the merely unsavory into the unconscionable.

However, in reality, the inverse of that assertion actually carries the day in America – political candidates are afforded almost unfettered leeway to publicly lie during the course of elections, and usually with impunity. In fact, the Federal Communications Act explicitly states that broadcasters of campaign material "shall have no power of censorship" over the political advertisements they air, regardless of the dubious nature of their claims. 47 U.S.C. § 315. While some states have attempted to enact false advertising laws to keep state-level political mudslinging contests in check, enforcement has apparently been infrequent and ineffective when weighed against First Amendment protections.

In *State ex. rel. Public Disclosure Com'n v. 199 Vote No! Committee*, the State of Washington on relation of the Public Disclosure Commission brought suit against the executive director and treasurer of the 199 Vote No! Committee alleging that the committee had published an advertisement that contained a "false statement of material fact," which was in violation of a Washington statute prohibiting any person from "sponsoring, with actual malice, a political advertisement containing a false statement of material fact." 957 P.2d 691, 693 (Wash. 1998); RCW 42.17.530(1)(a). The Supreme Court of Washington, en banc, held that the original statute facially violates the First Amendment and did not enforce it against the committee, thus illustrating the difficulties such laws have in attempting to contain misleading campaign statements. *Id*.

Not all judges agree with the Washington Supreme Court, and indeed Justice Talmadge stated in his concurring opinion for *199 Vote No!* that, "Today, the Washington State Supreme Court becomes the first court in the history of the Republic to declare First Amendment protection for calculated lies." *Id.* at 701. Justice Talmadge went on to bemoan the majority's "shocking" obliviousness to "the increasing nastiness of modern American campaigns," which he noted was characterized at a "win at any cost attitude involving the vilification of opponents and their ideas." *Id*. This all trends towards the inevitable question of why it should evidently be permissible to lie one's way into elected office with the blessing of the legislature.

A cynic might humbly suggest that obviously Congress would not pass laws restricting or outright criminalizing false statements in political campaigns, for the simple reason that then the people passing such laws would never be able to get re-elected themselves. However, preserving some degree of faith in the legislative process certainly requires affording them at least some benefit of the doubt, and in this instance that excuse is readily found enshrined within the First Amendment's guarantee of the right to free speech. The Supreme Court made that

pronouncement years ago in the case of *Monitor Patriot Co.* when it stated that, "[a] community that imposed legal liability on all statements in a political campaign deemed 'unreasonable' by a jury would have abandoned the First Amendment as we know it." *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 275 (1971). In other words, a candidate does not forfeit their right to free speech – including the right to make absurd or untrue assertions – upon taking the stump.

Perhaps some would consider this a less than desirable outcome, as we are taught from a young age that lying is abhorrent and honesty is the best policy. Certainly, then, one would hope that these ideals would also be embodied in the "best and brightest" that we elect to be our leaders, without the necessity of the voting population to "fact check" for truthfulness all their statements. But, on the other hand, if we the people are too naïve or ignorant to be able to make use of the vast array of resources available to us to independently verify the purported facts espoused by our political candidates, then we were never really electing a candidate based on their policies in the first place, and the truth, or lack thereof, would never have been relevant at all. The remedy for an untrustworthy candidate is not in the legislative process, but nested securely in the electoral process, and that is a responsibility that the people should not aspire to abdicate.

Source:

Brooks Jackson, FALSE ADS: THERE OUGHTA BE A LAW! - OR MAYBE NOT FACTCHECK.ORG (2004), http://www.factcheck.org/2004/06/false-ads-there-oughta-be-a-law-or-maybe-not/ (last visited Sep 28, 2016).