

Washington Law on Lies by Politicians Found Unconstitutional

The Washington Supreme Court ruled Oct. 4, 2007 that the state cannot punish political candidates for making false statements about their opponents unless the false statements are also defamatory.

In a split 4 to 1 to 4 decision, the state's highest court upheld a facial challenge to a statute, Wash. Rev. Code § 42.27.530(1)(a), which prohibited false advertising or electioneering communication concerning a political candidate made with "actual malice." "Actual malice" means knowledge of falsity or reckless disregard for the truth. According to the Washington court, 14 states, including Minnesota, have similar laws.

The case arose out of a 2002 election for a seat in the state senate, the majority opinion by Justice James M. Johnson said. In the election, incumbent Senator Tim Sheldon, a Democrat with 79 percent of the vote, prevailed over Green Party challenger Marilou Rickert. After the election, Sheldon filed a complaint with the state Public Disclosure Commission, alleging Rickert made false statements with actual malice when she sent out a brochure claiming he had voted to close a camp for developmentally disabled youth.

The Public Disclosure Commission found that the camp was for juvenile delinquents, not developmentally disabled children, and that Sheldon had not voted to close the facility. The Commission fined Rickert \$1,000, and a trial court affirmed. The Washington Supreme Court reversed in *Rickert v. Public Disclosure Commission*, 168 P.3d 826 (Wash. 2007), holding that the state cannot punish political speech that is false and made with actual malice absent proof that the speech is defamatory.

The four-justice plurality ruled that content-based restrictions on speech, especially political speech, cannot withstand First Amendment scrutiny unless they are "narrowly tailored" to serve a "compelling interest." Calling the statute a "government-enforced censorship scheme," the plurality argued that the state's purported interests in protecting political candidates and the integrity of elections were not compelling.

Johnson's plurality opinion said that the voters, and not the government, should evaluate the honesty and value of political speech. "[The statute] naively assumes that the government is capable of correctly and consistently negotiating

the thin line between fact and opinion in political speech. Yet, political speech is usually as much opinion as fact."

One justice, in a brief concurrence, characterized the majority opinion as going "too far in concluding that any government censorship of political speech would run afoul of the First Amendment." Chief Justice Gerry L. Alexander pointed to defamatory speech as an example of political speech that can be regulated. Alexander declined to join the plurality opinion, but agreed with the result, and provided the deciding vote to strike down the statute as unconstitutional on its face.

Four justices dissented, arguing "the majority's decision is an invitation to lie with impunity. . . . [T]he use of calculated falsehood is not constitutionally protected." Although "there is no such thing as a *false idea*," false statements of fact made with actual malice can be constitutionally punished, the dissenting opinion by Justice Barbara Madsen said.

In Madsen's view, the majority failed to distinguish between statements of fact and statements of opinion and misinterpreted U.S. Supreme Court precedent. The dissenters argued that because false statements of fact made with actual malice are not constitutionally protected speech, a lesser degree of scrutiny should have been applied.

Other cases regarding similar laws have reached conflicting conclusions. The Washington Supreme Court had previously struck down a similar law that prohibited any political speech containing a false statement of material fact. After that case, *State ex. rel. Public Disclosure Commission v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998), the legislature amended the statute to require that the false speech be about a political candidate. In *Rickert*, the court struck down the new law.

Similarly, in 1996 the Minnesota Court of Appeals struck down a law that made it a misdemeanor to communicate political information "with reason to believe" it was false. In *State v. Jude*, 554 N.W.2d 750 (Minn. App. 1996), the court held that the Minnesota law was unconstitutionally overbroad because it did not require that the false statements were made with actual malice.

In 1998 Minnesota passed a new law, Minn. Stat. 21 1B.06, incorporating the actual malice standard. That law, still in force in Minnesota, is very similar to the law struck down in *Rickert* and was cited by the *Rickert* dissent in support of the proposition that false political speech made with actual malice can be punished.

The 6th Circuit U.S. Court of Appeals has also partially upheld an Ohio law, Ohio Rev. Code Ann. § 3517.21, that prohibits "knowingly" making false statements about political candidates. In that case, *Pesttrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991), a three-judge panel held that the elections commission could not levy fines against candidates who knowingly made false statements about their opponents, but it could initiate investigations and recommend that local authorities prosecute violations.

The majority of the Washington Supreme Court dismissed the unfavorable cases in different jurisdictions, stating "such holdings should be neither admired nor emulated. The notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment."

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