Case Note

Bearing False Witness

Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee, 957 P.2d 691 (Wash. 1998).

In 1992, the Washington Attorney General charged a political action committee with violating a Washington statute[1] that prohibited sponsoring, with actual malice, "political advertising that contains a false statement of material fact."[2] In *Washington ex rel. Public Disclosure Commission v. 119 Vote No! Committee*, the Supreme Court of Washington held that the statute violates the First Amendment when applied in the context of an initiative campaign.[3] The court found that the statute infringed on a form of expression that lies at the heart of the First Amendment: political speech.[4] Subjecting the statute to "exacting scrutiny," the court concluded that the state's "claimed compelling interest to shield the public from falsehoods during a political campaign is patronizing and paternalistic. . . . At its worst, the statute is pure censorship, allowing government to undertake prosecution of citizens, who, in their view, have abused the right of political debate."[5]

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1. WASH. REV. CODE § 42.17.530 (1998). The statute required proof by "clear and convincing evidence." *Id.*

2. *Id. See* Don Carter, *Foes of 'Death with Dignity' Sued over Ads*, SEATTLE POST-INTELLIGENCER, June 12, 1992, at B6. At issue was a leaflet circulated in opposition to a 1991 initiative. The measure would have permitted physician-assisted suicide for competent adults who had been diagnosed with a terminal illness by two doctors and who requested such assistance in writing in the presence of two witnesses. *See* Tom Paulson, *Aid in Dying Initiative Is Rejected*, SEATTLE POST-INTELLIGENCER, Nov. 6, 1991, at A1. The leaflet stated that the measure "would let doctors end patients' lives without benefit of safeguards . . . . [Y]our eye doctor could kill you." Washington *ex rel.* Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 693 n.1 (Wash. 1998).

3. *119 Vote No!*, 957 P.2d at 699. The four justices who would have upheld the statute nonetheless concluded that the leaflet at issue did not meet the strict standards for falsehood established by the statute. *See id.* (Guy, J., concurring); *id.* at 701 (Talmadge, J., concurring). The trial court had reached the same conclusion. *See id.* at 694.

4. *See id.* at 694-96.

5. *Id.* at 697, 698-99.

At least nineteen states have enacted statutes prohibiting knowingly making false statements in political advertising.[6] Although some courts have invalidated portions of these statutes,[7] no court has previously found a narrow prohibition of malicious false statements to be facially unconstitutional.[8] Several courts have found that challenges to the statutes are governed by *Garrison v. Louisiana*,[9] in which Justice Brennan wrote for the United States Supreme Court:

> [T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in

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6. *See* Cleveland Ferguson, III, Comment, *The Politics of Ethics and Elections: Can Negative Campaign Advertising Be Regulated in Florida?*, 24 FLA. ST. U. L. REV. 463 app. at 501-03 (1997) (tabulating data on state statutes). For a survey of the state statutes and their interpretation by courts, see Richard F. Neel, Jr., Note, *Campaign Hyperbole: The Advisability of Legislating False Statements out of Politics*, 2 J.L. & POL. 405, 406-14 (1985). These statutes are rarely enforced. *See* Jack Winsbro, Comment, *Misrepresentation in Political Advertising: The Role of Legal Sanctions*, 36 EMORY L.J. 853, 875 (1987). The prosecution of the 119 Vote No! Committee was the first enforcement action under the Washington statute as amended in 1988. *See* James Wallace, *State Must Decide Whether Initiative Foes Misled Public*, SEATTLE POST-INTELLIGENCER, May 28, 1992, at A1.

7. *See, e.g.*, Pestrak v. Ohio Elections Comm'n, 926 F.2d 573, 578 (6th Cir. 1991) (holding that an Ohio provision authorizing the issuance of cease-and-desist orders by an administrative body, rather than by a court, violates the First Amendment); Vanasco v. Schwartz, 401 F. Supp. 87, 94-95 (S.D.N.Y. 1975) (holding that a prohibition on "misrepresentations" of any candidate's qualifications, positions, or party affiliation is unconstitutionally overbroad and vague); State v. Burgess, 543 So. 2d 1332, 1336 (La. 1989) (holding that a prohibition on "scurrilous, false, or irresponsible adverse comment" is unconstitutionally overbroad); State v. Jude, 554 N.W.2d 750, 753-54 (Minn. Ct. App. 1996) (holding that a statute punishing dissemination of statements the speaker knew or had reason to believe were false did not meet the First Amendment's actual malice standard and was therefore unconstitutionally overbroad).

8. *See, e.g.*, *Pestrak*, 926 F.2d at 577 (upholding an Ohio statute and noting that "false speech, even political speech, does not merit constitutional protection if the speaker knows of the falsehood or recklessly disregards the truth"); *Vanasco*, 401 F. Supp. at 93 (noting that "calculated falsehoods are of such slight social value that no matter what the context in which they are made, they are not constitutionally protected."); State v. Davis, 499 N.E.2d 1255, 1258 (Ohio Ct. App. 1985) (upholding criminal sanctions for those who knowingly make false statements in political campaigns); *see also 119 Vote No!*, 957 P.2d at 704-05 (Talmadge, J., concurring) (citing state court decisions that denied constitutional protection to calculated falsehoods).

The actual malice standard was developed by the United States Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), which held that libel suits brought by public officials require proof that the defendant knew the statement was false or acted with reckless disregard for whether it was true or false. Two concurring justices in the *119 Vote No!* majority suggested that the Washington statute might be constitutional if applied to false statements about candidates for public office. *See 119 Vote No!*, 957 P.2d at 699 (Madsen, J., concurring). None of the opinions in the case noted that in those circumstances the statute *must* be constitutional under the logic of *Sullivan*. In *Sullivan*, the Court was concerned that Alabama's use of the civil law of libel might allow it to circumvent the First Amendment's clear prohibition of laws that criminally punished seditious libel. The Court held, "What a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law of libel." *Sullivan*, 376 U.S. at 277. Since *Sullivan* endorsed an actual malice standard for libel suits brought by public officials, *see id.* at 279-80, a criminal statute prohibiting the same conduct must survive First Amendment scrutiny. Otherwise the civil libel standard upheld in *Sullivan* would be an unconstitutional end-run around the First Amendment.

9. Garrison v. Louisiana, 379 U.S. 64 (1964).

> which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."[10]

The Washington Supreme Court distinguished *Garrison* and a long line of similar cases on the grounds that those cases involved private reputational interests that were not present in the context of an initiative campaign.[11]

This Case Note argues that although the Washington court was correct to note a distinction between these two types of campaigns, it incorrectly analyzed the interests at stake when, in initiative campaigns, citizens act as legislators. In particular, the court overlooked the compelling state interest in ensuring the accuracy of information that is transmitted to legislative bodies.[12]

I

American law long has recognized that accurate information is an essential predicate to the rational exercise of the lawmaking function. Federal and state decisions have consistently upheld the extensive investigatory powers of legislative bodies on precisely that basis.[13] In the leading case of *McGrain v. Daugherty*,[14] the United States Supreme Court noted that such powers had been seen as essential corollaries of the

10. *Id.* at 75 (quoting Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)). *Garrison* was held to be controlling precedent in *Pestrak*, 926 F.2d at 577, and in *Vanasco*, 401 F. Supp. at 91.

11. *See 119 Vote No!*, 957 P.2d at 697.

12. An interest in the provision of accurate information to legislative bodies is distinct from an interest in the rationality or integrity of electoral outcomes generally. For an argument that freedom of speech should be balanced against a vital interest in rational electoral outcomes, see James A. Gardner, Comment, *Protecting the Rationality of Electoral Outcomes: A Challenge to First Amendment Doctrine*, 51 U. CHI. L. REV. 892, 894 (1984). Justice Talmadge found that the Washington statute furthered a compelling interest in ensuring the integrity of the electoral process. *See 119 Vote No!*, 957 P.2d at 708 (Talmadge, J., concurring).

13. The United States Senate and House of Representatives, for example, each have the power to summon witnesses, compel testimony under oath, and subpoena documents. *See* 2 U.S.C. § 190m, 191-92 (1994). Individuals who refuse to comply with congressional subpoenas can be fined up to one thousand dollars and imprisoned for up to a year. *See id.* § 192. Any person who lies under oath to a congressional committee can be prosecuted for perjury, fined, and imprisoned for up to five years. *See* 18 U.S.C. § 1621 (1994); *see also* United States v. Cross, 170 F. Supp. 303 (D.D.C. 1959) (holding a federal perjury statute applicable to testimony before Congress). In 1996, Congress expanded the federal false statements statute to prohibit materially false statements made to a congressional investigatory committee. *See* 18 U.S.C.A. § 1001 (West Supp. 1998). The statement need not be under oath, and the statute provides for a fine and a prison term of up to five years. *See id.* § 1001(a).

14. 273 U.S. 135, 175 (1927).

legislative power in the British Parliament and in the colonial legislatures.[15] The Court concluded:

> A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who possess it. . . . [S]ome means of compulsion are essential to obtain what is needed.[16]

State courts have reached similar conclusions.[17] For example, in 1885, the New York Court of Appeals found that "[t]he power of obtaining information for the purposes of framing laws to meet supposed or apprehended evils is one which has, from time immemorial, been deemed necessary, and has been exercised by legislative bodies."[18] This power was "indispensable to intelligent and effectual legislation."[19] For the California Supreme Court in 1929, modernity had only heightened the importance of legislative factual investigation: "[I]n this age of new ventures and of large concerns . . . . the necessity of investigation of some sort must exist as an indispensable incident and auxiliary to the proper exercise of legislative power."[20]

Washington law similarly recognizes the importance of accurate information to the legislative process. The state legislature has the power to subpoena witnesses and papers.[21] Any person who fails to appear or who refuses to testify can be punished under the criminal law by fines of up to five hundred dollars and imprisonment for up to six months.[22] Such persons can also be punished under contempt provisions, which authorize a fine of up to one thousand dollars and imprisonment for the duration of the legislative session.[23] Persons convicted of perjury before the legislative

15. *See id.* at 161; *see also* James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 159-66 (1926) (examining British and colonial precedents).

16. *McGrain*, 273 U.S. at 175. This language was approvingly quoted in *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 504-05 (1975). *See also In re* Chapman, 166 U.S. 661, 671 (1897) (upholding congressional authority to compel the attendance of witnesses and compel the disclosure of evidence).

17. For an overview of state court decisions upholding the investigatory powers of state legislatures, see 72 AM. JUR. 2D *States* § 48 (1974). *See also* Annotation, *Power of Legislative Body or Committee To Compel Attendance of Non-member as Witness*, 50 A.L.R. 21 (1927) (citing state cases).

18. Keeler v. McDonald, 2 N.E. 615, 624 (N.Y. 1885).

19. *Id.*

20. *Ex parte* Battelle, 277 P. 725, 730 (Cal. 1929).

21. *See* WASH. REV. CODE § 44.16.010 (1998).

22. *See id.* § 44.16.120.

23. *See id.* § 44.16.150.

body can be punished by as much as a twenty thousand dollar fine and up to ten years in prison.[24] The Washington Supreme Court has upheld these provisions, noting that "whenever the legislature has authority to enact laws, it has corresponding authority to make necessary investigations for the ascertainment of such facts as are a necessary predicate for the enactment of the law . . . ."[25]

Implicit throughout this body of law is the idea that rational lawmaking requires accurate, relevant information about the conditions of the polity and the implications of proposed legislation.[26] Lawmakers, of course, may differ on the *reasonableness* of proposed legislative action, but decisions made in the absence of such information, or on the basis of false, misleading information, are irrational by definition. The threat of irrational decisions is sufficiently disturbing that courts have shown little hesitation in allowing legislators to compel whatever information is necessary to reach an informed decision.

This expansive legislative investigatory power places a significant burden on two forms of political speech: the speech of those who prefer to lie to the legislature in order to further their own view of appropriate legislation, and the speech of those who prefer to remain silent rather than assist the legislature in its fact-finding capacity. No court, however, has found that the First Amendment protects a right to lie or a right to remain silent before a legislative body.[27] As the Supreme Court has stated, "it is

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24. *See* WASH. REV. CODE §§ 9A.20.020, 9A.72.010-020 (1998).

25. State *ex rel.* Hamblen v. Yelle, 185 P.2d 723, 728 (Wash. 1947) (citation omitted); *see also* State *ex rel.* Robinson v. Fluent, 191 P.2d 241, 245 (Wash. 1948) (upholding the investigatory power).

26. *Cf.* STANLEY KELLEY, JR., POLITICAL CAMPAIGNING: PROBLEMS IN CREATING AN INFORMED ELECTORATE 9-10 (1960) (arguing that rationality in voting requires full information about the alternatives to be voted upon and the effects of each); Gardner, *supra* note 12, at 897 (noting the importance of accurate, relevant information to rational voting).

27. The right to remain silent is protected by the Fifth Amendment in criminal cases in which the testimony would incriminate the witness. *See* U.S. CONST. amend. V. This privilege extends to testimony before legislative hearings. *See* Watkins v. United States, 354 U.S. 178, 188 (1957). If Congress grants immunity for testimony, however, the witness cannot invoke the privilege. *See* 18 U.S.C. § 6005 (1994). In no case does the right to remain silent create a right to lie. *See* Brogan v. United States, 118 S. Ct. 805, 810 (1998) ("[N]either the text nor the spirit of the Fifth Amendment confers a privilege to lie.").

The United States Supreme Court has also required that legislative investigations not unduly infringe on individual associational rights protected by the First Amendment. In *Gibson v. Florida Legislative Investigation Committee*, the Court held that there was no substantial relation between a Florida legislative committee's request for the NAACP's membership list and the committee's purpose of investigating Communist activity. 372 U.S. 539, 551 (1963). In *Barenblatt v. United States*, the Court held that where associational rights "are asserted to bar governmental interrogation resolution of the issue always involves a balancing . . . of the competing private and public interests at stake." 360 U.S. 109, 126 (1959); *see also Watkins*, 354 U.S. at 198 ("It is manifest that despite the adverse effects which follow upon compelled disclosure of private matters, not all such inquiries are barred."); United States v. Emspak, 95 F. Supp. 1010, 1011 (D.D.C. 1951) (rejecting a First Amendment challenge to a law punishing those who refuse to testify before or produce papers for Congress).

unquestionably the duty of all citizens to cooperate with the Congress in its efforts to obtain the facts needed for intelligent legislative action. It is their unremitting obligation to respond to subpoenas . . . and to testify fully with respect to matters within the province of proper investigation."[28] The overwhelming importance of "intelligent legislative action" clearly overrides any First Amendment interest in an individual's right to lie.

II

During initiative campaigns, the people themselves act as a legislative body. As the Washington Supreme Court has itself noted, "the passage of an initiative measure as a law, by the people, is not the exercise of the power of any different sovereignty than is the passage of a law by the Legislature. Each is simply the exercise of the legislative power of the state."[29] When the people act as legislators, they regularly confront issues that are just as complex as those faced by elected legislators. In 1998, ballot initiatives in various states included measures to rewrite campaign finance laws substantially, create tax credits for air-quality improvements, and end current utility deregulation plans.[30] In determining the rules that should govern initiative campaigns, it is therefore appropriate to turn to the laws that govern legislative proceedings. By overlooking this body of law, the Washington court failed to analyze properly the relevant interests at stake.

If there is a compelling state interest in ensuring the accuracy of information transmitted to lawmakers when issues are presented in the legislative chamber, it is hard to discern why that interest should disappear when the lawmaking power is assumed by the citizenry. Indeed, this interest may be even stronger in the initiative context. As one leading scholar of direct democracy has put it, "the integrity of ballot issue elections is too often compromised by misleading claims, phony statistics, and misrepresentations to the voters. Well-publicized fines and penalties for obvious violators of [laws such as Washington's] will go a long way toward encouraging better-informed debate."[31] In Washington, the consequences of ill-considered initiatives are exacerbated by the state constitution's provision that, during the first two years after its enactment, an initiated measure can only be amended by a two-thirds vote of the legislature.[32]

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28. *Watkins*, 354 U.S. at 187-88 (1957).

29. State v. Paul, 151 P. 114, 116 (Wash. 1915).

30. *See* Sam Howe Verhovek, *Popularity of Ballot Initiatives Leads to Questions*, N.Y. TIMES, Nov. 2, 1998, at A22.

31. THOMAS E. CRONIN, DIRECT DEMOCRACY: THE POLITICS OF INITIATIVE, REFERENDUM, AND RECALL 239-40 (1989).

32. WASH. CONST. art. II, § 41.

Although one could view the person or organization sponsoring a false statement of material fact in political advertising as a legislator, in which case the Constitution's Speech and Debate Clause might shield the fabrications from punishment,[33] it is more appropriate to view the sponsor as a witness to a legislative body. The false statement of material fact does not in itself advance any argument or express any idea. It is simply a statement about the factual predicates underlying proposed legislative action. As such, it more closely resembles testimony than it does the deliberative and argumentative functions of speech and debate on the floor of a legislative chamber. Such a distinction has been implicitly recognized by federal courts, which have held that when Members of Congress testify before congressional committees, they act as witnesses, not legislators, and therefore no Speech or Debate Clause immunity applies.[34]

The argument for viewing the calculating liar as a witness is further strengthened by the lack of other methods for dealing with deception in initiative campaigns. Citizen-lawmakers who wish to investigate the factual basis for proposed legislation cannot compel testimony under oath, cannot punish contumacious witnesses for contempt, and cannot subpoena documents or other evidence. As a practical matter, empowering individual citizens to do any of these things would be thoroughly unworkable. Statutes such as Washington's become necessary because these investigative powers that courts have found so "indispensable"[35] to the proper exercise of the legislative function are unavailable to citizen-lawmakers.

The Washington Supreme Court found that a statute prohibiting deliberate lies in initiative campaigns serves no compelling state interest and "assumes the people . . . are too ignorant or disinterested to investigate, learn, and determine for themselves the truth or falsity in political debate."[36] By similar reasoning, laws against perjury before a congressional

33. The Speech and Debate Clause, U.S. CONST. art I, § 6, cl. 1, and its counterparts in state law, *see, e.g.*, 72 AM. JUR. 2d *States* § 55 (1974), provide legislators with immunity for any speech or debate made in the legislative chambers. If the liar is seen as a legislator, one might argue that his statements partake of a similar immunity. *Cf.* AKHIL REED AMAR, THE BILL OF RIGHTS 24-25 (1998) (noting a connection between the Speech and Debate Clause and the First Amendment's protection of freedom of speech). The argument from the Speech and Debate Clause, however, does not necessarily defeat a statute such as Washington's. The clause states that members may not be questioned "in any *other* place" for speeches in chambers, U.S. CONST. art I, § 6, cl. 1; it does not prohibit such questioning by the members of that chamber themselves. The Constitution explicitly permits each chamber to determine its rules of procedure, punish disorderly behavior, and expel members. *Id.* § 5, cl. 2. A legislative body could constitutionally prohibit malicious false statements of material fact by members as a rule of procedure. Likewise, it could censure or expel a member for repeated malicious lying. Washington's statute can be seen as analogous to such procedural rules.

34. *See* United States v. Rose, 28 F.3d 181, 188 (D.C. Cir. 1994); FEC v. Wright, 777 F. Supp. 525, 530 (N.D. Tex. 1991). *But see* United States v. Durenberger, Crim. No. 3-93-65, 1993 WL 738477, at *1 (D. Minn. Dec. 3, 1993) (declining to follow *Wright*).

35. *See, e.g.*, Keeler v. McDonald, 2 N.E. 615, 624 (N.Y. 1885).

36. *119 Vote No!*, 957 P.2d at 699.

committee presumably assume that Members of Congress are too "ignorant or disinterested" to learn the truth of matters for themselves. Yet courts have consistently held that legislative bodies must have the power to sort out truth and falsehood before making a decision. The law against perjury before a congressional committee and the Washington statute are both attempts to ensure the accuracy of information upon which a legislative body must make a decision. Rather than recognizing this compelling interest, the Washington court instead created the only sphere in the legislative process in which unlimited deliberate lies are constitutionally immune from any sort of remedy.

The Washington statute is narrowly tailored to achieve its purposes. Its strictures extend only to advertisements. It requires proof by "clear and convincing evidence" that the sponsoring person or organization knew the statement was false or acted with reckless disregard for whether it was true or false.[37] The statute does not prohibit advertising that is merely deceptive or misleading. It does not prohibit negligent mistakes. It targets only the deliberate lie. This is the standard that juries must employ when determining whether a citizen has violated the act and violated the trust of her fellow citizen-lawmakers. It is a standard that is fully consonant with the ideals of deliberative democracy that the First Amendment is intended to foster.

III

In finding the Washington statute unconstitutional, the *119 Vote No!* court contradicted not only every court that has considered the issue but also the essential holdings of a long line of cases on the nature and scope of the legislative power. The court offered no persuasive justification for punishing malicious lies to elected legislators with imprisonment and fines, but cloaking those same lies with absolute constitutional protection when made to citizen-lawmakers. Nor did it explain why citizen-lawmakers must ferret out the truth without the benefit of even minimal protections against fraud and deception—a burden no court has ever imposed on a legislature. These distinctions make no sense as a matter of logic or of law, and they ultimately undercut the very citizen-lawmaking function they purport to protect.

—*Carlton F.W. Larson*

37. WASH. REV. CODE § 42.17.530 (1998); *cf.* Robert M. O'Neil, *Regulating Speech To Cleanse Political Campaigns*, 21 CAP. U. L. REV. 575, 590 (1992) (stressing the importance of a "clear and convincing" standard).