

False Ads: There Oughta Be A Law! - Or Maybe Not

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(This article was originally posted June 3, 2004. We are reissuing it now, updated only to fix bad links and such. Politicians still can lie legally. —B.J.)

Here's a fact that may surprise you: Candidates have a legal right to lie to voters just about as much as they want. That comes as a shock to many. After all, *consumers* have been protected for decades from false ads for commercial products. Shouldn't there be "truth-in-advertising" laws to protect *voters*, too?

Turns out, that's a tougher question than you might imagine. For one thing, the [First Amendment](#) to the U.S. Constitution says, "Congress shall make no law ... abridging the freedom of speech," and that applies to candidates for office especially. And secondly, in the few states that have enacted laws against false political ads, they haven't been very effective.

Bogus Psychics & Twirling Ballerina Dolls

Laws protecting consumers from false advertising of products are enforced pretty vigorously. For example, the Federal Trade Commission took action in 2002 to protect the public from the self-proclaimed psychic "Miss Cleo," who the FTC said promised free readings over the phone and then socked her gullible clients with enormous telephone charges. The FTC even forced a toy company a while back to stop running ads showing its "Bouncin' Kid Ballerina Kid" doll standing alone and twirling gracefully without human assistance, which the FTC said was video hokum.

But there's *no* such truth-in-advertising law governing federal candidates. They can legally lie about almost anything they want. In fact, the [Federal Communications Act](#) even *requires* broadcasters who run candidate ads to show them uncensored, even if the broadcasters believe their content to be offensive or false.

This is taken very seriously. In a 1972 case, the Federal Communications Commission forced stations in Atlanta, Ga., to accept a paid political ad from J.B. Stoner — a self-proclaimed "white racist" running for the U.S. Senate on the National States Rights party ticket. The NAACP objected to Stoner's ad because it said the "main reason why niggers want integration is because niggers want our white women." The FCC sided with Stoner, citing freedom of speech decisions of the Supreme Court.

Stations can reject ads for any reason from political groups other than candidates. And they may reject ads from *all* candidates for a given office. But if they take ads from one candidate, they can't legally refuse ads from opponents except for technical reasons (such as being too long or short to fit standard commercial breaks, or if the recording quality is poor) or if they are "obscene." Rejecting a candidate's ad because it's false is simply not allowed.

So what gives? Surely the public stands to suffer more damage from a presidential candidate lying about his opponent than from a bogus psychic. Isn't the process of choosing the leader of the most powerful nation on the planet a more important matter than whether some doll really does what the TV ads show? Yes. But ...

For one thing, the First Amendment guarantee of free speech poses a big obstacle to enacting or enforcing such laws — which it should.

The First Amendment: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The very idea of self-government rests on the idea that voters — given enough uncensored information — can best decide who should be in power and who should not. So free speech applies first and foremost to candidates. As the U.S. Supreme Court said unanimously in a 1971 libel [case](#), "It can hardly be doubted that the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office."

So states have found it hard to enact laws against false political advertising — and even harder to make them work.

Minnesota: The Case of the Furloughed Rapist

Example: In a 1994 House race in Minnesota, Republican candidate Tad Jude ran an emotion-packed ad against Democrat William Luther in the final weekend of the race. It was reminiscent of the notorious "Willie Horton" ads run against Democratic presidential candidate Michael Dukakis in the 1988 presidential election.

In the Jude ad, the candidate cited the case of a woman and two daughters who were kidnapped and raped repeatedly over two days by a man who had been released from prison on a furlough. Jude's ad claimed the rapist "may never have been released and this crime never committed" if Democrat Luther, a state senator, had not blocked a bill sponsored by Republican Jude, who was also a state senator. "Sending [Luther] to Congress would be a crime," it concluded. The ad was false. Even if Jude's proposed legislation had been enacted, it could not possibly have prevented the crime it described. Reason: Jude's bill would have applied only to persons imprisoned for offenses committed on or after August 1, 1987, and the convict mentioned in the ad had been sentenced in 1983.

Jude lost the election, but the ad may have had an effect. His losing margin was only 549 votes out of more than 200,000 cast. It was Jude's misfortune, however, to live in one of the very few states that outlaws false political advertising. A special prosecutor presented the case to a grand jury, which indicted Jude and his campaign manager. A conviction could have led to a year in jail and a \$3,000 fine.

The trial judge later threw the case out, however, and the Minnesota Court of Appeals refused to reinstate the indictment against Jude. In its opinion, the appeals court said that the Minnesota law was too broad, allowing someone to be charged for having only "reason to believe" that an ad they helped prepare was false. The court said that U.S. Supreme Court rulings required a higher standard: evidence of "actual malice." To convict, prosecutors would have to prove Jude either *knew* the ad was false or acted with "reckless disregard" for whether it was true or not. That would have been a tough job; Jude had testified to the grand jury that he was under the false impression that the ad was true, that the rapist named in the ad had been convicted later of a second offense that would have made him subject to the legislation he had proposed. So Jude went free and, in fact, ran against Luther a second time in 1996. That time Luther won with nearly 56 percent of the [vote](#).

The case exposes two problems with relying on truth-in-advertising laws to protect voters from campaign falsehoods. First, prosecutors can't move quickly enough to cure the damage caused by a last-minute, false attack. Jude wasn't indicted until more than a year after the election that he almost won. And second, under the "actual malice" standard a candidate could lie profusely in ads and still get away with it by claiming he or she *thought* the ads were true, so long as no convincing evidence surfaced to the contrary.

Washington State: The Case of the Killer Ophthalmologists

Washington state also ran into problems trying to enforce its truth-in-political-advertising law after a 1991 ballot referendum fight. At issue was a proposed "death with dignity" law. A group opposed to it, the "119 Vote No! Committee," issued a leaflet saying that if the proposal passed it "WOULD LET DOCTORS END PATIENTS' LIVES WITHOUT BENEFIT OF SAFEGUARDS...No special qualifications— your eye doctor could kill you."

The ballot proposition failed, and the state's Public Disclosure Commission brought an action charging the 119 Committee with violating state law against false political advertising. The commission said the proposition did contain standards and it was false to say it would open the door to killer ophthalmologists. But the trial court dismissed the charges in this case, too, and the Washington State Supreme Court later struck down the law under which the committee had been charged.

The Supreme Court's majority [opinion](#) questioned whether state government officials had any right to substitute their judgment for that of the voters in matters of political speech. Quoting earlier court opinions, it said:

Washington State Supreme Court: Instead of relying on the State to silence false political speech, the First Amendment requires our dependence on even more speech to bring forth truth. ... The First Amendment exists precisely to protect against laws such as [the Washington state truth-in-advertising law] which suppress ideas and inhibit free discussion of governmental affairs.

The Washington court wasn't unanimous. A judge who dissented complained that the majority had become "the first court in the history of the Republic to declare First Amendment protection for calculated lies" and said that his fellow judges were "shockingly oblivious to the increasing nastiness of modern political campaigns."

At least one other state is enforcing a law against bogus campaign ads. But voters shouldn't take much comfort from that, as the following case study shows.

Ohio: The Case of the Lying Treasurer

Ohio's law has been tested in the courts and has survived, and the Ohio Elections Commission looks into 30 to 40 complaints each year, according to its executive director, Philip C. Richter. And the seven-member, bipartisan Elections Commission takes its job seriously, as demonstrated in a 1998 case involving a false TV commercial run by the Republican candidate for governor, Bob Taft, against his Democratic opponent, Lee Fisher.

The ad appeared Sept. 18. Fisher complained to the commission, which held hearings and decided the matter less than a month after the ad first aired — astonishing speed to anyone familiar with the usual pace of election-law enforcement. Richter told FactCheck.org that the commission wanted to decide the matter *before* voters went to the polls, and it met that deadline with more than two weeks to spare.

On Oct. 16 the commission announced its decision. By what it called "clear and convincing evidence" it ruled that the Taft ad violated Ohio's law against false statements. The ad claimed Fisher, who had been the state's attorney general, "cut crime-fighting employees by 15 percent," when in fact the number of credentialed investigators actually increased from 214 to 231 during his four-year tenure. Also, the Taft ad claimed "Ohio's police have endorsed Bob Taft ... and rejected Lee Fisher." Actually, the state's Fraternal Order of Police had been split over its endorsement of Taft, and it didn't represent all of "Ohio's police" in any event.

But Taft paid no real penalty for the false ad, except for some unfavorable publicity. The Elections Commission issued only a letter of reprimand to Taft's campaign treasurer and his campaign organization. The commission has no power to levy fines. In rare cases it forwards complaints to a prosecutor for possible criminal proceedings, but it didn't do that in the Taft case. Taft went on to win the election easily.

Contrast this nearly toothless Ohio law with what the Federal Trade Commission was able to extract from Miss Cleo, who [agreed](#) to pay a \$5 million penalty to the government and also to give up claims of more than \$500 million (yes, half a *billion* dollars) against her former "clients."

"Convicted of Lying?"

As if to underscore the futility of using government to regulate truth in politics, *The Associated Press* quoted Fisher's campaign manager, Alan Melamed, after the commission's decision was announced as saying: "Bob Taft has found his place in history. ... He's the first candidate for governor to be convicted of lying." That itself was a false statement. The commission specifically rejected Fisher's complaints against Taft personally, and it has no power to "convict," a word that implies criminal violations.

And so it goes. All this should tell voters that — legally — it's pretty much up to them to sort out who's lying and who's not in a political campaign. Nobody said democracy was supposed to be easy. It is, of course, the job of news organizations to assist; that's why the First Amendment guarantees a free press as well as free speech. We at FactCheck.org try hard to help. But on Election Day, it's up to you.