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Ohio Has a Ministry of Truth, And It Isn't Much Better Than George Orwell's

By Trevor Burrus
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Can politics be cleaned of lies, spin, and allegations? Can a government agency—an Orwellian "Ministry of Truth"—police political rhetoric in order to determine what is true, what is false, and what is, as Stephen Colbert would say, "truthy"?

That is just what the Supreme Court is considering in *Susan B. Anthony List v. Driehaus*, which will be argued in April. The case is a challenge to Ohio's bizarre statute prohibiting knowingly or recklessly making "false" statements about a political candidate or ballot initiative. In other words, the Ohio Election Commission (OEC) essentially runs a ministry of truth to which any citizen can submit a complaint. Amazingly, twenty other states have such laws.

Laws against lying in political speech are not administered by disinterested truth seekers, but by people with their own political convictions. They chill large amounts of truthful speech and deprive the public of hearing a robust debate on the issues. And, as we will see, they are used by political opponents to turn campaigning into litigation.

The case arises out of a strange combination of a defeated former Congressman, some non-existent political billboards, and a bunch of sour grapes. During the 2010 election, Susan B. Anthony List (SBAL), a 501(c)(4) dedicated to ending abortion, planned to erect billboards saying, "Shame on Steve Driehaus! Driehaus voted FOR taxpayer-funded abortions!" The claim was based on Driehaus's support for the Affordable Care Act. Although never erected, the billboards were reported in the news and SBAL disseminated the claim through other, less blatant, means. Driehaus thus filed a complaint with the OEC against SBAL, arguing that SBAL's claim about taxpayer-funded abortions was false and therefore illegal. The complaint, combined with Driehaus's threat of legal action against the advertising company that owned the billboards, successfully suppressed SBAL's speech. Driehaus lost the election.

Disgruntled Congressmen and other elected representatives can certainly be tattle-tales ("Mommy, he's lying!"), and if the government provides an avenue for tattling, then they will use it against their enemies. In fact, and unsurprisingly, that is how laws like Ohio's are nearly always used, for retribution and electoral strategy against political enemies. During litigation against a similar law in Florida, the investigation manager for the Florida Election Commission

testified under oath that *98 percent* of the complaints received are “politically motivated” and that “many times” the point is to punish political opponents or to “harass that person and otherwise divert their attention from the campaign.”

Moreover, rather than spend money on combating SBAL’s claims with his own free speech, Driehaus spent money on lawyers to drag SBAL into court. In so doing, he deprived the public of hearing more debate on the subject of taxpayer-funded abortions. Also, by making SBAL retain lawyers, he also deprived them of money to use on more speech, something I’m sure Driehaus didn’t worry about. Instead of a public debate on whether the ACA actually provides for taxpayer-funded abortions, the debate occurred behind the closed doors of the OEC.

We have encountered a similar law before, the infamous Sedition Act of 1798. That law made it illegal to “write, print, utter or publish…any false, scandalous and malicious writing or writings against the government of the United States” or officers of the United States. No reputable scholar believes that the Sedition Act would not be struck down as blatantly unconstitutional today.

One of those convicted under the Sedition Act was James T. Callender, a pamphleteer and “scandalmonger” who was the first person to widely publicize the allegations that Thomas Jefferson had fathered numerous children with his slave Sally Hemings. That allegation was called “false” and “scandalous” by many Jefferson supporters who, had they had the Ohio Election Commission at their disposal, would surely have filed a complaint. Callender’s allegations would not be proven substantially true for another 200 years. How would the OEC have ruled on them?

Or, to use a more contemporary example, how would the OEC’s ministry of truth rule on President Obama’s now legendary claim that “if you like your health care plan you can keep it.” Politifact rated that claim true in 2008, only to call it the “Lie of the Year” for 2013.

Shockingly, a conviction for false political speech in Ohio can carry a $5,000 fine and up to *six months* in jail. Before a criminal case can begin, however, the OEC must first judge the complaint and, if they find it meritorious, refer it to a prosecutor. The OEC is thankfully very reticent to refer claims to prosecutors, not having referred a single case to a prosecutor in the last decade.

But, as the SBAL saga shows, the mere existence of the OEC’s ministry of truth is enough to severely hamper First Amendment activity. In fact, this case is before the Court not squarely on the First Amendment issue, but on the procedural difficulties surrounding SBAL’s attempt to challenge the OEC. The Court should look past those issues and simply strike down the law.

This is a good time for the Supreme Court to hear a case about alleged political lies. Americans are increasingly separating into like-minded camps with entirely private interpretations of what the “facts” are. The Fox News crowd may believe that the ACA provides for taxpayer-funded abortions, while the MSNBC crowd may not. The “truth” of this question is more nuanced than either side seems to realize, and it depends upon legal, economic, and even theological interpretations.

If we can’t agree on so many issues, then certainly ministries of truth aren’t above the fray. Only a robust and open marketplace of ideas can effectively combat lies consistent with the First Amendment. Ministries of truth should be left in *1984*.