

## Viewpoint: Political Lies Reach the U.S. Supreme Court

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**Ben Feuer, The Recorder**

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The experts who study this sort of thing say the average American lies 11 times a week. Some of those are little white lies—"this is delicious, honey," or "only that one time in college." Others are a bit greyer—"I've got the cash, promise," "honestly, this has never happened to me before," or "my intentions with your daughter are completely honorable, sir." And other lies are blacker still—"there is no doubt that Saddam Hussein now has weapons of mass destruction," or "I did not have sexual

relations with that woman."

Most daily lies are private fibs, person to person, to which social consequence may attach but the government plays no role. But occasionally, lying creates problems with the state. You can't falsely yell "bomb" on a crowded plane any more than you can yell "gun" in a crowded movie theater, and if you creatively revise your quarterly corporate earnings statement before release, an indictment may follow. Likewise, common law and statutory civil remedies have long existed for defamation, false advertising, perjury and other nonfactual speech alleged to cause harm.

Criminal and civil prohibitions on lying, however, sometimes run up against the First Amendment. The U.S. Supreme Court will hear oral argument about one such situation on April 22. In *Susan B. Anthony List v. Driehaus*, the court will review an Ohio law that makes it a crime to make a "false statement" about a political candidate if you know or should know the statement is false.

During the 2010 election campaign, anti-abortion advocacy group The Susan B. Anthony List sought to erect a billboard in Cincinnati that charged an incumbent congressman with "voting for tax-payer funded abortion" because he voted in favor of the Affordable Care Act. The incumbent, Democrat Steve Driehaus, filed a complaint with the state elections commission that alleged the billboard would violate Ohio's false political statement law because the Affordable Care Act provides only for abortions paid for from private funds; the advocacy group disagreed, arguing the Act allows federal subsidies for insurers of certain low-income families. The elections commission found probable cause that the billboard would violate state law, but then the incumbent lost the election and withdrew his complaint. The advocacy group brought an action in federal district court anyway, however, challenging the law on the basis that it chills speech and enforcement could occur at any time.

The district court granted Ohio's motion to dismiss and the Sixth Circuit affirmed. The Court of Appeals found the case unripe for adjudication because the advocacy group did not face an imminent threat of actual enforcement of the law.

When the Supreme Court takes up *Driehaus*, it will do so against the backdrop of its 2012 decision in *United States v. Alvarez*, 132 S. Ct. 2537. In *Alvarez*, a plurality of the court found that a statute that criminalized the act of falsely claiming to have won certain military decorations violated the First Amendment, but no individual rationale garnered a majority of the justices. Rather, three justices (Roberts, Ginsburg, and Sotomayor) joined an opinion written by Justice Kennedy that held false speech is fully protected by the First Amendment, and like any content-based restriction on speech, laws penalizing false speech are subject to strict scrutiny. That level of scrutiny generally permits content-based restrictions only on speech that has

been historically restricted, such as obscene, fraudulent or threatening speech. "[S]ome false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee," Kennedy wrote.

Justice Breyer, joined by Justice Kagan, separately concurred, but on the ground that Congress could have accomplished its goals by narrower means, like creating a master database of all armed forces medal winners (which, somewhat surprisingly, does not exist). In their intermediate scrutiny view, false speech is often "less valuable" than true speech, deserving "little First Amendment protection" but not "no protection at all."

Finally, Justice Alito dissented from the Alvarez plurality, joined by Justices Scalia and Thomas. The dissent asserted that "the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest" because "as a general matter false factual statements possess no intrinsic First Amendment value." Rather, to the extent false speech deserves any protection, it is prophylactically, to give "breathing room" for true speech. Justice Alito would look only to whether the claimed false speech relates to an "instrumental purpose" of the First Amendment, like historical or scientific debate.

Thus, while four justices clearly support the view that false speech is fundamentally protected by the First Amendment, five justices do not, with two concluding false speech is protected but less than other speech, and three considering it entirely unprotected other than for a prophylactic purpose.

The same Court that decided Alvarez so inharmoniously will hear the *Driehaus* arguments later this month. The Alvarez divisions may nudge the justices toward a procedural result involving ripeness or mootness like the lower courts, rather than a decision on the merits. But even if the court takes that route, laws prohibiting false political speech may be on a deathwatch: under any of the formulations the justices put forth in Alvarez, false political speech would likely meet the requirements for First Amendment protection.

That's probably a good thing. Political speech is an extraordinarily important type of speech from a First Amendment perspective, perhaps the most important form of speech. Granting appointed officials the authority to decide what political speech is "true" and what isn't is fraught with risk of subjectivity or abuse. Where does the division lie between a false statement of fact and a political opinion?

Indeed, half-truths have always been a part of American electioneering, from John Quincy Adams (who implied Andrew Jackson was a drunkard and murderer) through John Kerry (whose presidential ambitions were sunk by fast-moving Swift Boats). In a witty amicus brief filed by legendary American satirist P.J. O'Rourke, the Cato Institute invoked a term coined by comedian Stephen Colbert—"truthiness"—to describe the kind of political statements that can't be described as either "true" or "false." It turns out, that includes most of them. For example, claiming the Affordable Care Act increases tax-payer funded abortion is "truthy" because it depends whether the listener interprets "fund" to include indirect support, as the advocacy group in *Driehaus* did.

Because government is so poorly suited to the task of determining how truthful political speech may be, such speech should be immune from penalty under the First Amendment. Indeed, there is a strong argument that almost all false speech should be subject to First Amendment protection in the political sphere. Political speech that is true one day—"the era of big government is over," or "mission accomplished"—may be less than true the next. Rather than with bureaucratic oversight, such speech is best remediated with more speech, with counterpoint ads, with websites like PolitiFact, all of which force political speakers to lay their credibility on the line with every assertion. As Ninth Circuit Chief Judge Alex Kozinski asked in his concurrence to that court's denial of en banc rehearing in Alvarez, "How can you develop a reputation as a straight shooter if lying is not an option?"

The idea that reputational harm is the First Amendment's preferred punishment for most false speech, rather than pecuniary or penological sanction, is evident in a high-profile order from a New York district court in late March. The order dismissed a lawsuit by a group of pro-democracy activists against the Chinese search

engine Baidu, based on its filtration of search results to remove websites related to the Chinese democratic movement even when the site is accessed from the United States. The plaintiffs contended restricting search results violates their First Amendment right to access results of algorithm-driven search engines without political censorship.

The district court rejected the argument, finding instead that Baidu enjoys limitless editorial discretion under the First Amendment to present whatever search results it chooses, even to lie by omission to further its political perspective. But, the court noted, as Baidu's reputation for censoring search results grows, users face no costs in switching to another search provider, and can easily penalize it for failing to be a "straight shooter."

Another example of the reputational harm principle came in an Eastern District of California opinion last year dismissing a false advertising class action against fallen bicycling legend Lance Armstrong, based on his autobiography's failure to mention his illegal doping habit. Book purchasers sued, claiming they wouldn't have purchased the book if they knew it perpetuated a false premise that Armstrong's success arose from talent and hard work alone. The court rejected the argument, however, finding the book and its related promotional materials fully protected First Amendment opinion, whether or not they contained "false and misleading" statements.

These district court cases, along with the bipartisan Alvarez plurality, suggest a growing judicial recognition of the value of false speech. Where would the First Amendment be if a bureaucrat barred JFK from warning us about the phony "missile gap," told Nixon that he was, indeed, too much of a crook to claim not to be, or fined Romney for asserting that the 47 percent of individuals paying no income tax would certainly vote for President Obama, when studies show only a third of them do?

However the Supreme Court decides *Driehaus*, one guaranteed truth is that political lies big and small are here to stay. Some of them will be so malicious and harmful that they will rightly subject the speaker to a civil defamation action. But given how critical unfettered political discourse is to the structure and functioning of democratic society, the First Amendment's near-absolute protection of political speech demands that laws like Ohio's meet strict scrutiny—and come up short.

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