

MINUTES

MONTANA SENATE
54th LEGISLATURE - REGULAR SESSION
COMMITTEE ON STATE ADMINISTRATION

Call to Order: By CHAIRMAN ETHEL HARDING, on January 17, 1995,
at 10:00 AM

ROLL CALL

Members Present:

Sen. Ethel M. Harding, Chairman (R)
Sen. Kenneth "Ken" Mesaros, Vice Chairman (R)
Sen. Mack Cole (R)
Sen. Mike Foster (R)
Sen. Don Hargrove (R)
Sen. Vivian M. Brooke (D)
Sen. Bob Pipinich (D)
Sen. Jeff Weldon (D)

Members Excused: N/A

Members Absent: N/A

Staff Present: David Niss, Legislative Council
Gail Moser, Committee Secretary

Please Note: These are summary minutes. Testimony and
discussion are paraphrased and condensed.

Committee Business Summary:

Hearing: SB94 SB98
Executive Action: N/A

{Tape: 1; Side: A; Approx. Counter: 54.6}

HEARING ON SB94

Opening Statement by Sponsor:

SEN. LINDA NELSON, Senate District 49, Medicine Lake, said that SB94 is a bill to clarify the procedure for write-in elections. To illustrate the importance of SB94, SEN. NELSON recounted a situation that occurred in Sheridan County concerning a write-in election for County Sheriff and the candidate Galen Marsh. Mr. Marsh won the election by only seven votes, so the opponent asked for a recount. Some voters wrote in only the last name of the candidate, and those votes were counted for the candidate. However, some voters wrote in the last name but a first name that

was not the first name of this candidate who had filed as a write-in candidate. After an *opinion* by the Secretary of State's office, the recount Board then threw out the votes by last name only, and Mr. Marsh lost the election. Mr. Marsh appealed to the District Court, and it was the opinion of the District Court judge that the recount Board had been right. This case is now going to the Supreme Court. The intent of SB94 is to clear up the ambiguity in the law so it is clear what parts of candidate's names, nicknames, initials, etc., need to be used in order to count votes.

Proponents' Testimony: None

Opponents' Testimony: None

Questions From Committee Members and Responses:

SEN. MIKE FOSTER asked Senator Nelson to clarify if *Mike* would be considered a nickname of *Michael*. SEN. NELSON stated she was not sure how that would be considered. SEN. FOSTER referred to the lines being added on page 2 "*A write-in vote must be counted if the vote sufficiently identifies the individual, including identification by a nickname or initials instead of a first name.*" SEN. FOSTER asked Senator Nelson if this addressed the concern about only the last name of the candidate being written in, does that *sufficiently* identify the individual. SEN. NELSON responded that a last name only would not be acceptable, and that this issue is further clarified by 13-10-211 regarding how the candidate has *filed* to run as a candidate.

SEN. KEN MESAROS asked Senator Nelson for clarification regarding the use of initials. SEN. NELSON responded that a candidate would not likely *file* only with their initials and last name unless they actually use their initials as their name.

SEN. MESAROS asked Senator Nelson to clarify the intent that whenever the name is submitted to appear on a write-in campaign the full name or the name and the initials or however the person is recognizable would be acceptable. SEN. NELSON said that she is open to suggestions on how to make the filing requirement as clear as possible.

SEN. BOB PIPINICH asked Ed Argenbright if candidates have to register their names as they file now, and how it impacts the ballot counting. Ed Argenbright, Commissioner of Political Practices referred the question to Joe Kerwin. Joe Kerwin, the Election Bureau Chief of the Secretary of State's office, stated that a nickname alone would not be counted, and SEN. NELSON added that a candidate certainly would not *file* under a nickname alone.

SEN. DON HARGROVE asked Senator Nelson if there had been consideration of last minute filing by an opponent simply to confuse the issue of who is actually on file as a write-in candidate. **SEN. NELSON** stated that since write-in candidates have to file no later than 15 days prior to the election, it wouldn't be a last minute problem.

SEN. VIVIAN BROOKE asked Senator Nelson to verify the intent of SB94 is to clarify that, for a write-in election, the writing in of a last name only is not sufficient to be counted.

SEN. NELSON answered that that is exactly what needs to be clarified in the law.

SEN. JEFF WELDON asked Senator Nelson if a voter had written in "Mr. Marsh" would that vote have counted. **SEN. NELSON** answered no, "Mr. Marsh" would not be counted.

CHAIRMAN ETHEL HARDING commented that in her area, a candidate who was not generally known by his actual name filed under his actual name plus his nickname so that all votes would be counted.

Closing by Sponsor:

SEN. NELSON stated there is clearly a need for SB94.

HEARING ON SB98

Opening Statement by Sponsor:

SEN. MIKE FOSTER, Senate District 20, Townsend, stated that he refers to SB98 as the "campaign reform and integrity act", and it is a constituent bill. **SEN. FOSTER** explained the new items on page 1 regarding current office holders resigning in order to become a candidate for another office. **SEN. FOSTER** also explained the exceptions to this new provision.

SEN. FOSTER discussed the change on page 2, lines 2-3. SB98 would discontinue use of a list of registered voters as a jury selection listing and implement the use of a list of licensed drivers (18 and over) in the county. Another option would be to continue using the list of registered voters but add a five-year exemption after jury duty is served once.

SEN. FOSTER stated that the third issue on page 2, line 20, changes the date of the primary election from June to September. The reason for this change comes from complaints from constituents regarding the length and expense of campaigns.

SEN. FOSTER stated he believes this change will also increase voter interest in the primary election.

SEN. FOSTER explained the next change proposed by SB98 which is to allow voters to vote a split ticket in the primary. This aspect also needs to be coordinated with SB30 which was introduced by Senator Gage. **SEN. FOSTER** stated this was also a common complaint from constituents.

SEN. FOSTER discussed the last change on page 4, lines 15 - 18 which states that during the last 10 days of a campaign, a candidate cannot raise a false or misleading voting record issue against an opponent. A violator is subject to a civil penalty up to \$1,000. This will address the problem of the last minute sneak attack. **SEN. FOSTER** said the language in SB98 doesn't necessarily take care of this the way he had intended, but it's the best that could be done while still considering the First Amendment. **SEN. FOSTER** handed out excerpts from minutes of the Citizen's Task Force on Political Practices (**EXHIBIT 1**). This Task Force was assembled by Ed Argenbright, the Commissioner of Political Practices. A presentation was made by Connie Erickson of the Legislative Council at that Task Force meeting. **SEN. FOSTER** handed out a memo of her presentation (**EXHIBIT 2**). **SEN. FOSTER** explained that Ms. Erickson's presentation illustrates how other states are attempting to deal with campaign falsity issues. **SEN. FOSTER** said his main concern is the lack of time available to respond to last-minute attacks by an opponent.

Proponents' Testimony:

Deborah Smith, Montana Common Cause, said her group supports section 7 of SB98 only. They support the objectives of SB98 to prohibit last-minute attacks, but believe the language in SB98 is too vague to accomplish this purpose as Senator Foster himself had stated. **Ms. Smith** stated that First Amendment concerns reflected in SB98 do not cover libel or slander. **Ms. Smith** stated Common Cause would like to see an amendment to SB98 regarding false and misleading representations of a voting record to clarify that means any public voting record. **Ms. Smith** also stated the Commissioner of Political Practices needs more clear direction to determine what is false or misleading. **Ms. Smith** also expressed concern that the proposed language only regulates the candidate making statements and would not allow the Commissioner to impose a civil penalty on any person or group who makes or publishes statements on behalf of a candidate that are false or misleading about an opposing candidate. Common Cause would be happy to work with Senator Foster to make SB98 a more effective deterrent. **Ms. Smith** added that she believes it is not just the last 10 days of a campaign when sneak attacks cause problems.

Laurie Koutnik, Executive Director of the Christian Coalition of Montana, stated her appreciation to Senator Foster and work done to address these election concerns. **Ms. Koutnik** stated support for changing the jury selection listing as well as the ability to vote a split ticket in the primary.

Dick Motta, citizen, stated he would like to extend some of the provisions of SB98 to school elections. **Mr. Motta** described a situation in Missoula where the taxpayers voted down a particular ballot issue in April. **Mr. Motta** said after that ballot issue was defeated, the school board came back with the same mill levy and intimidated the school teachers, students, and parents so the ballot issue was passed. **Mr. Motta** said this intimidation is a total violation of the voting process and has no place in our society. **Mr. Motta** said intimidation tactics are used in each of these school elections because the school board is allowed four opportunities to pass a ballot issue. **Mr. Motta** also said there should not be any use of school funds to support or oppose a ballot issue. **Mr. Motta** stated he would like there to be only one school election per year and that it be held during the primary in June. **Mr. Motta** stated if a school ballot issue passed or failed in June, the schools could react and prepare their budgets to be submitted to the county superintendents by September 1. **CHAIRMAN HARDING** interjected that **Mr. Motta's** testimony does not seem to be associated with SB98 and to include these issues would change the intent of SB98. **David Niss** stated that the title includes broad phrases such as "generally revising the laws concerning candidates, electors, and elections." **Mr. Motta** said he thinks all elections should be taken into consideration and timing of school ballot issues should be consistent with the primary to minimize the number of elections we have a year. **Mr. Motta** also stated he believes any instance where a complaint is filed should include a response from the Commissioner of Political Practices within 30 days.

Opponents' Testimony:

Robert Throssel, Montana Association of Clerk & Records, stated if the primary election was held in September, it would make it impossible to conduct a general election in November as the current laws are written. **Mr. Throssel** said Rep. Grinde introduced a similar bill in the House that would have moved the primary from June to August. Even an August date would cause timing problems for the Clerk & Records. Rep. Grinde's bill has been tabled by the House Local Government Committee. Rep. Tropila is also planning to introduce a bill that would move the primary and school election together on the same date sometime in spring. **Mr. Throssel** said there are a number of statutes that involve timing of the various issues involved with elections, and the coordination of all new bills with relevant statutes is an involved task.

{Tape: 1; Side: B; Approx. Counter: 41.5}

Questions From Committee Members and Responses:

SEN. MESAROS asked Senator Foster if other parties identified as representing a candidate should also be held responsible for

last-minute attacks rather than just the candidate. **SEN. FOSTER** agreed that it is not always just the candidate, but perhaps it could be an organization. **SEN. MESAROS** asked Senator Foster if he would recommend amendments for section 7. **SEN. FOSTER** said that he would work on language to amend section 7 of SB98.

SEN. MESAROS asked Robert Throssel what new primary date would allow adequate time considering existing law. **Mr. Throssel** said the entire general timeline that's built into current statute would need to be reviewed to come up with a new primary date.

SEN. BROOKE stated she feels the provision in lines 27 and 28 on page 1 is redundant since a candidate cannot file for two offices at one time. **SEN. FOSTER** responded that the language in lines 27 and 28 is essential because, for example, if a Representative decided to run for the State Senate, without this exception, they would have to resign from their position as Representative immediately. This provision would allow them to finish the term as Representative.

SEN. BROOKE asked Senator Foster if there was some way to have section 7 address situations where a last-minute attack is made by an anonymous party. **SEN. FOSTER** referred to Ms. Koutnik's testimony that someone can always figure out a way to get around the law if they want to and that SB98 is not a cure-all.

SEN. MACK COLE asked Senator Foster if he thought having the Task Force on Political Practices was advantageous and should it be continued. **SEN. FOSTER** said absolutely and that Mr. Argenbright made a positive step by putting together this coalition of people who represented a wide range of interests.

SEN. COLE stated he felt the 10-day limit should be broadened. **SEN. FOSTER** responded that prior to 10 days, a candidate typically has an opportunity to respond to a new issue, but within 10 days, it is extremely difficult for a candidate to respond to a new issue. **SEN. COLE** clarified that he was actually more concerned with including parties other than the candidate to be held responsible.

SEN. HARGROVE asked Ed Argenbright how many complaints were filed and how many sanctions were issued by the Office of the Commissioner of Political Practices. **Mr. Argenbright** stated that this last election cycle saw the greatest number of official complaints -- about 30. **Mr. Argenbright** stated that towards the end of the election cycle, their phone rings constantly with informal complaints -- approximately a couple hundred.

Mr. Argenbright said his office has a good deal of success correcting minor problems simply by making a phone call but, to his knowledge, there has never been a successful prosecution under the current criminal statute. To apply the standard of proof required of a criminal statute to prove that someone knowingly distorted, misrepresented, or made a false statement is very difficult. **Mr. Argenbright** made a recommendation for SB98

to allow the Commissioner to assess a **civil** penalty rather than a **criminal** penalty. **SEN. HARGROVE** asked Mr. Argenbright if the full legal redress was the only option available to the Commissioner rather than some form of a simple sanction. **Mr. Argenbright** stated that approximately 85% of candidates for the legislature sign the Code of Fair Campaign Practices. However, there are no sanctions for violating the tenants of that Code. **Mr. Argenbright** stated that during this last campaign, in most cases where a person alleged a violation on the part of someone else, the person alleging won the election. **Mr. Argenbright** said that is the bottom line, as long as the nasty attack mode wins elections, it will continue. There is also the issue of determining what voting record is misrepresented: the first, second, or the final vote?

SEN. WELDON said during the last session, he attempted to design a bill to change the jury selection list from registered voters to licensed drivers. **SEN. WELDON** asked Senator Foster who would provide the list of licensed drivers to the county. **SEN. FOSTER** stated he believed that information is available from the courthouse. **SEN. WELDON** said he thought it was the Department of Justice in Helena who maintains those lists, and the computer technology was apparently not available last session to easily provide this information. **SEN. FOSTER** said he believes the county and state computers are much more linked up now than they were two years ago.

SEN. WELDON asked Senator Foster what could be done about people who do not drive but want to serve on a jury. **SEN. FOSTER** said that is likely a small population. **SEN. WELDON** agreed but suggested there be a method for those people to voluntarily submit their name to the county for jury duty.

SEN. WELDON asked Senator Foster what would happen in the years of a presidential election. **SEN. FOSTER** said he did not view this as a problem, but SB98 could be amended to have an earlier primary in presidential election years. **SEN. FOSTER** stated he wanted to consider this question further.

SEN. WELDON addressed section 7 and that the word "misleading" is a subjective determination. **SEN. WELDON** discussed an example of what he would consider a statement to educate the public when in fact it would be construed by the opponent to be a *misleading* statement. **SEN. FOSTER** said that determination is the responsibility of the Commissioner of Political Practices.

CHAIRMAN HARDING stated she is aware of other states that hold a primary election in September. **CHAIRMAN HARDING** asked Mr. Throssel if the clerks would be amenable to work to change the time frames for those things to be accomplished prior to a primary. **Mr. Throssel** stated that the clerks would be willing to work with the various people involved but that there would need to be more items covered regarding the timing issues to move the date of the primary. **CHAIRMAN HARDING** asked about lines 27

through 30 on page 3 regarding the mailing of the ballot, and if there is split ticket voting, would both ballots be returned in one envelope whether it was marked or not. **Mr. Throssel** stated that detail issues such as this would likely be covered under SB30 which deals with allowing a split ticket vote in the primary.

CHAIRMAN HARDING asked Senator Foster if he would be amenable to working on section 7 since there have been so many concerns expressed. **SEN. FOSTER** said he would be happy to work to strengthen section 7 of SB98.

CHAIRMAN HARDING also asked Senator Foster about the primary date that concerns the clerks. **SEN. FOSTER** stated that he had talked with the Clerk in Broadwater County regarding these ideas, and she stated that the suggestion for an August primary (as Rep. Grinde's bill proposed) was not acceptable because that date would fall on the day before the county's budget hearing. However, she said a September primary would be workable.

SEN. BROOKE asked Senator Foster about section 1 and did it refer to *appointed* officials resigning from their particular appointments or just *elected* officials. **SEN. FOSTER** stated it was strictly for *elected* officials currently holding office.

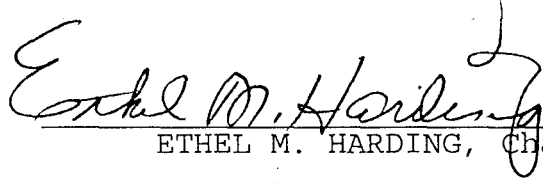
Closing by Sponsor:

SEN. FOSTER said he is willing to work with Common Cause, or Commissioner Argenbright, or anyone else with ideas to strengthen SB98. If the goal is to dilute SB98, he would not be interested in amendments. In response to Mr. Motta's concerns regarding school elections and use of school funds, **SEN. FOSTER** said he believes there is a complaint being handled regarding the Missoula schools. **SEN. FOSTER** stated he is not sure when a decision will be made on those issues, but perhaps they could be addressed in SB98 at some point.

CHAIRMAN HARDING closed the Hearing on SB98.

ADJOURNMENT

Adjournment: 11:40 AM



ETHEL M. HARDING, Chairman



GAIL MOSER, Secretary

EMH/gem

Tuesday
1-17-95

DATE _____

SEN:1995
wp.rollcall.man
CS-09

CITIZENS TASK FORCE ON POLITICAL PRACTICES

The initial meeting of the Citizens Task Force on Political Practices was held in Room 108 of the Capitol in Helena, Montana, at 9:30 a.m. on October 25, 1993.

All members were present:

Senator Robert J. "Bob" Brown	Whitefish
Representative Ervin Davis	Charlo
Joe Durso, Jr.	Missoula
Representative Mike Foster	Townsend
M. Susan Good	Great Falls
Don Holland	Rosebud
Patricia "Pat" Hunt	Helena
Fred Lark	Lewistown
Betty T. Lund	Hamilton
Vic Miller	Billings
Thelma J. Stiffarm	Box Elder
Senator Jeff Weldon	Arlee

Commissioner Ed Argenbright welcomed the members and thanked them for volunteering their time and expertise to serve on the committee. He then asked each member to briefly comment on their particular interests. Concerns expressed by committee members included:

- (1) the "archaic" methods the Commissioner's office is required to use because the computers are out-dated,
- (2) a lack of understanding regarding campaign practices on the part of the electronic media,
- (3) questions about specific ways to include the public in understanding the legal requirements in reporting campaign finances and the functions of the Commissioner's office,
- (4) a desire for more public participation in campaigns,
- (5) concern about the thin budget for the Commissioner's office, and
- (6) a frustration about the negative advertising that occurs just prior to the day of an election with no time for response on the part of the candidate who is the target of the negative advertising.

Commissioner Argenbright introduced his staff: Dulcy Hubbert and Donna Muffick, administrative assistants. He then introduced Jim Scheier, staff attorney from the Department of Justice, who, when requested by the Commissioner, serves as legal counsel for the office.

Steve Brown, attorney, former legislator, and an initial drafter of the legislation creating the Commissioner's office, explained to the committee the political environment during the time the office was created. He told the committee that during the period of 1972-1975, two events intensified public suspicion of

access computers in their communities. Ms. Lund said, in answer to a question, that most of the county clerks and recorders have computers. The committee agreed that computer-filing would initially have to be voluntary because even though larger campaigns may have sophisticated software programs, treasurers of local candidates and committees submit handwritten reports.

Mr. Durso thought that the Commissioner's office could charge a reasonable fee for filing that would generate some revenue. The committee discussed this and felt that money collected by the Commissioner's office should be retained by the office for operating expenses rather than going directly into the general fund. Those committee members who are also legislators told the other committee members that it may be difficult to do that because the legislative budget committees do not generally approve of earmarked revenue funds.

Mr. Durso expressed his agreement with Senator Weldon that Senate Bill 205 be implemented as an administrative change and felt the Commissioner was empowered to do so. After some discussion, the committee unanimously agreed.

Connie Erickson, a researcher from the Legislative Council, spoke to the committee about her work as it related to Question #3: What can be done to discourage last-minute negative campaign ads based on distortions and exaggerated claims.

She told the committee that House Joint Resolution 13 requested an interim study of campaign misrepresentations. The Legislative Council determined that it was not necessary to appoint a special committee to do the study and staff was assigned to conduct the study. However, as priorities were set and as staff changes occurred, this study was put on the back burner. Although she had only begun and her work has not been completed, she shared with the committee the research she had done to this point.

Regarding First Amendment issues, 26 states have statutes that deal with unfair campaign practices. Some have a fair campaign practice code but these are voluntary with no penalty. Twenty-one states have laws that prohibit false campaign statements and seven have laws that apply only to written false statements.

Ms. Erickson said case law is very sparse on this subject. She did, however, find two trends. The appellate courts are applying rules of strict construction. At the same time, courts are applying broad interpretations. This has created problems when attempts are made to force a broad interpretation into a narrow statute. She also found that courts are reluctant to overturn an election.

She told the committee that there were constitutional concerns about false statements and laws that include "knowingly." She

cited Vanesco v. Schwartz (1975) in which the action must conform to the actual malice standard, the intention that it is false or in reckless disregard of its truth or falsity. You must be sure to incorporate actual malice.

Representative Foster asked Ms. Erickson if she would provide committee members with copies of her presentation as well as the two articles she recently reviewed. Ms. Erickson agreed to do so.

Ms. Good said she would like to see a restriction that voting records could not be introduced into campaigns within ten days before the election. She felt the candidates had ample time from the previous legislative session through the months of campaigning to bring up any issues relating to the voting record of the incumbent and that it was unfair to interject voting records at the last minute. She told the committee that last-minute campaign issues by literature drop did not give the opposing candidate enough time to respond. She also pointed out that all TV and radio time is gone by this time so a timely response is impossible.

Ms. Hunt disagreed and said that the incumbent is being given another advantage that a challenger does not have. The incumbent has a voting record while the challenger has none. Mr. Durso expressed concern about any actions that could be perceived to be against free speech.

The committee discussed the advantages of an incumbent. Mr. Miller felt it was a problem of educating the public. Senator Brown suggested that the Republican and Democratic Central Committees could discuss this issue and that instead of cursing the darkness, one candle might be lit. The committee discussed the problem of any perceived political activity in connection with the Commissioner's office.

Senator Weldon thought the Commissioner's idea of designing public service announcements to run prior to the next election with high visibility individuals doing the spots would have a positive effect. Mr. Miller said he supports the idea. Mr. Holland agreed with the magnified effects of a statewide PSA series and said his experience with it is very positive.

The committee discussed the problem of abandoned campaign signs after the election was over and felt there should be some way this could be resolved.

The committee took a brief recess. Commissioner Argenbright told members of the committee that they would break into two groups to study the first two questions and the entire committee would study the third question. After members selected which of the first two questions they would like to study, the membership of the two committees are as follows:

Senate Members
D WYN GAGE
CHAIRMAN
GARY C. AKLESTAD
MIKE HALLIGAN
J LYNCH



House Members
RED MENAHAN
VICE CHAIRMAN
ERVIN DAVIS
H.S. HANSON
NORM WALLIN

Montana Legislative Council

Room 138 • State Capitol
Helena, Montana 59620-1706
(406) 444-3064
FAX (406) 444-3036

SENATE STATE ADMIN.

EXHIBIT NO. 2
DATE 01-17-95
BILL NO. SB98

October 28, 1993

TO: Ed Argenbright, Commissioner of Political Practices
FROM: Connie F. Erickson
RE: House Joint Resolution No. 13

Last session, the Legislature passed House Joint Resolution No. 13 (HJR 13), requesting the establishment of an interim committee to study solutions to misrepresentations that occur during political campaigns. Because the study was so narrowly focused, the Legislative Council decided not to create a separate interim committee just for this issue. Rather, the Council asked staff to conduct the study and report their findings and recommendations, if any, to the Council itself. In late August, the Council made some committee reassignments because of the loss of a staff member. As a result, the campaign misrepresentations study has been put on the "back burner" for the time being and quite possibly will not be completed.

What I am presenting to you in this memorandum is the initial research I was able to complete prior to the staff reassignments. I am glad to see that your task force will be addressing this issue, among others, so that the intent of HJR 13 will not be lost.

LAWS IN OTHER STATES

There are 26 states that have statutes dealing with unfair campaign practices, generally referred to as campaign falsity statutes. They cover such issues as disclosure, campaign literature, and dirty tricks. Nine states, including Montana, have a fair campaign practices code. Such a code is generally signed by candidates on a voluntary basis. There are no penalty provisions, and such provisions are not feasible as long as signing the code remains voluntary. Laws in 21 states prohibit false campaign statements. Some apply only to false incumbency designations. One state prohibits misrepresentations of political party support. Seven state prohibitions apply only to written false statements. Violations are generally misdemeanors.

Case law addressing campaign falsity statutes is sparse. In those few states that have developed a body of case law of any size, two trends are apparent. Appellate courts generally have applied a rule of strict construction to campaign falsity statutes but have taken a comparatively liberal attitude when examining the statements at issue in a case. The result is often a broad interpretation of the statement that places it outside the scope of the statute. Using this approach, courts have interpreted campaign falsity statutes as applying only to statements of fact. This often leads to the conclusion that the statements at issue are not false statements of fact, subject to statutory penalty. One reason for applying the rule of strict construction is the possibility of overturning an election, thus disenfranchising those who voted for the winner.

CAMPAIGN FALSITY STATUTES AND THE FIRST AMENDMENT

Campaign falsity statutes that regulate political speech raise immediate constitutional concerns, specifically the first amendment's freedom of speech guarantee. Any attempt by a state government to regulate protected political speech must withstand the most exacting constitutional scrutiny. However, in Garrison v. Louisiana (1964), Justice Brennan wrote, "That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. . . . Hence, the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

The leading case on the issue of campaign falsity statutes versus first amendment rights is Vanasco v. Schwartz (1975). In this decision, a U.S. District Court, later affirmed by the U.S. Supreme Court, struck down New York's campaign falsity statutes as unconstitutionally overbroad on their face. The statutes prohibited any deliberate misrepresentation of any candidate's qualifications, positions on issues, or party affiliation or endorsements. The statutes did not specify that the misrepresentations must be deliberate. In its findings, the District Court said that any state regulation of campaign speech must conform to the "actual malice" standard applicable to public figures under New York Times v. Sullivan (1964). (To be actual defamation, a statement must be made with knowledge that it is false or in reckless disregard of its truth or falsity.) However, Vanasco did reaffirm Garrison by recognizing that calculated falsehoods are not protected under the Constitution.

Since Vanasco, campaign falsity statutes have been invalidated in Ohio, Nebraska, and Louisiana. The Ohio and Louisiana decisions are on appeal. Nebraska repealed its statute. A similar statute in North Dakota was upheld by that state's Supreme Court because the statute did meet the actual malice standard mandated by New York Times.

Montana's campaign falsity statute (13-35-234, MCA) contains the wording ". . . a statement or representation with knowledge of its falsity or with a reckless disregard as to whether it is true or not . . .". This would appear to satisfy the actual malice standard, so the statute might withstand a first amendment challenge. However, some legal scholars believe that Montana's prohibition against knowingly misrepresenting a voting record or position on public issues may be unconstitutionally overbroad and thus vulnerable to challenge.

It is my understanding that one of the issues that your task force will be addressing is that of last-minute negative campaigning. There is a Mississippi statute that prohibits the

making of any charges concerning a candidate's private life that reflect upon the candidate's honesty, integrity, or moral character, whether the charges are true or false, during the last 5 days before an election. It would appear that this statute is unconstitutional because it prohibits true statements from being made late in a campaign. An Alabama statute that prohibited electioneering on election day was challenged and held unconstitutional because it banned the free discussion of governmental and political affairs. It is understandable that a state would want to ensure that the electorate is not misinformed by last-minute attacks on candidates. However, it cannot outlaw protected speech in the process.

How then does a state address this issue of last-minute negative campaigning? Any campaign falsity statute must incorporate the actual malice standard, and the statute's sole objective should be the prohibition of calculated falsehoods that are constitutionally unprotected.

I hope that my comments will assist you in your deliberations. I cannot guarantee that I will be able to complete any more research. However, I will continue to gather information as time permits and will be happy to share it with you and the task force.

lao 3301cexa.

DATE 1-17-95

SENATE COMMITTEE ON State Administration

BILLS BEING HEARD TODAY: S.B. 94 -

S.B. 98 -

< ■ >

PLEASE PRINT

< ■ >

Check One

Name	Representing	Bill No.	Support	Oppose
Ed Argenbright	Comm. Political Practices	98		
Darrell Beckstrom	Motor Vehicles	98	X	
Deborah Smith	Common Cause		X	
Laurie Koetnik	Christian Coalition of VT	98	X	
RICHARD MOTT	R. MOTT	98	X	
Robert Throssell	VT Assoc. CL & Rec	34 98		X

VISITOR REGISTER

PLEASE LEAVE PREPARED STATEMENT WITH COMMITTEE SECRETARY