

STORAGE NAME: h0651c.cjcl

DATE: April 5, 1997

**HOUSE OF REPRESENTATIVES
AS FURTHER REVISED BY THE COMMITTEE ON
CIVIL JUSTICE & CLAIMS
BILL RESEARCH & ECONOMIC IMPACT STATEMENT**

BILL #: HB 651

RELATING TO: Elections

SPONSOR(S): Representative Posey

STATUTE(S) AFFECTED: s. 104.271, F.S.

COMPANION BILL(S):

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) ELECTION REFORM (GRC) YEAS 8 NAYS 1
- (2) CRIME AND PUNISHMENT (JC) YEAS 7 NAYS 0
- (3) CIVIL JUSTICE & CLAIMS (JC) YEAS 8 NAYS 0
- (4)
- (5)

I. SUMMARY:

This bill provides that any person who willfully charges a candidate with a violation of the election code, when the person knows that such charge is false or malicious, commits a felony of the third degree. Such person shall be disqualified from holding office until the restoration of the person's civil rights.

The bill also provides that any person who makes or causes to be made any statement about a candidate which is false commits a violation of the election code and shall be personally liable for damages. For a person to violate the provisions of this bill, it is not required that the person who makes the false statement actually know the statement was false.

This bill has an indeterminate fiscal impact.

II. SUBSTANTIVE RESEARCH:

A. PRESENT SITUATION:

Subsection (1) of s. 104.271, F.S., currently provides that a candidate who willfully charges an opposing candidate with a violation of the election code, which charge is known by the candidate making such charge to be false or malicious, commits a felony of the third degree.

Subsection (2) of s. 104.271, F.S., currently provides that a candidate who in any election, with actual malice makes or causes to be made any statement about an opposing candidate which is false commits a violation of the election code, subject to a civil penalty of up to \$5,000.

B. EFFECT OF PROPOSED CHANGES:

The bill amends subsection (1) of s. 104.271, F.S., to provide that any person who willfully charges an opposing candidate with a violation of the election code, which charge is known by the candidate making such charge to be false or malicious, commits a felony of the third degree.

The bill also amends subsection (2) of s. 104.271, F.S., to provide that any person who in any election, makes or causes to be made any statement about an opposing candidate which is false commits a violation of the election code, subject to a civil penalty of up to \$5,000. This subsection is also amended to provide that any person making or causing to be made any statement about a candidate which is false shall be personally liable for damages.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

Expansion of the criminal civil portions of this section will possibly increase the workload of the state attorney's and the Florida Elections Commission.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

Not applicable.

(2) what is the cost of such responsibility at the new level/agency?

Not applicable.

(3) how is the new agency accountable to the people governed?

Not applicable.

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

- b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

- a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

- b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

- a. If the bill purports to provide services to families or children:

- (1) Who evaluates the family's needs?

Not applicable.

- (2) Who makes the decisions?

Not applicable.

- (3) Are private alternatives permitted?

Not applicable.

- (4) Are families required to participate in a program?

Not applicable.

- (5) Are families penalized for not participating in a program?

Not applicable.

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

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- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

Not applicable.

- (2) service providers?

Not applicable.

- (3) government employees/agencies?

Not applicable.

D. SECTION-BY-SECTION RESEARCH:

This section need be completed only in the discretion of the Committee.

III. FISCAL RESEARCH & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

None.

2. Recurring Effects:

This bill provides that a person who knowingly and falsely accuses a candidate of violating the election code commits a felony of the third degree. Previously, this statute only applied to another candidate. The changes contemplated in this bill could result in additional prosecutions, with indeterminate fiscal impact.

This bill also provides that it is a violation of the election code for any person to make a false statement about a candidate. Previously, this statute only applied to candidates who made false statements and required such false statements to be made with actual malice. Such a violation will be subject to a civil penalty of \$5,000. The changes contemplated by this bill could result in an increased number of prosecutions before the Florida Elections Commission, with indeterminate fiscal impact.

3. Long Run Effects Other Than Normal Growth:

This bill provides that a person who knowingly and falsely accuses a candidate of violating the election code commits a felony of the third degree. Previously, this statute only applied to another candidate. The changes contemplated in this bill could result in additional prosecutions, with indeterminate fiscal impact.

This bill also provides that it is a violation of the election code for any person to make a false statement about a candidate. Previously, this statute only applied to candidates who made false statements and required such false statements to be made with actual malice. Such a violation will be subject to a civil penalty of \$5,000. The changes contemplated by this bill could result in an increased number of prosecutions before the Florida Elections Commission, with indeterminate fiscal impact.

4. Total Revenues and Expenditures:

This bill provides that a person who knowingly and falsely accuses a candidate of violating the election code commits a felony of the third degree. Previously, this statute only applied to another candidate. The changes contemplated in this bill could result in additional prosecutions, with indeterminate fiscal impact.

This bill also provides that it is a violation of the election code for any person to make a false statement about a candidate. Previously, this statute only applied to candidates who made false statements and required such false statements to be made with actual malice. Such a violation will be subject to a civil penalty of \$5,000. The changes contemplated by this bill could result in an increased number of prosecutions before the Florida Elections Commission, with indeterminate fiscal impact.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

None.

2. Recurring Effects:

None.

3. Long Run Effects Other Than Normal Growth:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

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1. Direct Private Sector Costs:

None.

2. Direct Private Sector Benefits:

None.

3. Effects on Competition, Private Enterprise and Employment Markets:

None.

D. FISCAL COMMENTS:

None.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

Not applicable.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

Not applicable.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

Not applicable.

V. COMMENTS:

The bill imposes liability and civil penalties if any person makes a false statement about a candidate regardless of the state of mind of the offender. The law divides up a person's state of mind into four categories for the purposes of liability. The false statement may be made (1) unknowingly, (2) negligently, (3) with reckless disregard of the truth, or (4) intentional or knowingly. The United States Supreme Court has struck down statutes which allow a person to be sued for an unintentional or negligent false statement.

The lead case in regulating the content of political speech is New York Times v. Sullivan, 376 U.S. 254 (1964). In New York Times, an elected official brought a libel suit against *The New York Times* for publishing an article which allegedly misrepresented the official's activities. The court held that in order to establish libel or slander against a public figure the plaintiff must not only prove that a false statement was made, but also that such statement was made with "actual malice." In order to show "actual malice" the public figure must prove that the defendant knew that his or her statement was false, or that the statement was made with reckless disregard as to its truth or falsity.

In 1968, the case of St. Amant v. Thompson, 390 U.S. 727 (1968), elaborated on the actual malice standard. In St. Amant a candidate for political office falsely charged another public official with criminal conduct during a television interview. The court ruled that “reckless disregard cannot be shown by proof of mere negligence. To find reckless disregard, “there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for the truth and demonstrates actual malice.”

The New York Times standard of “actual malice” was expanded to include state regulation of political campaign speech in Vanesco v. Schwartz, 401 F.Supp. 87, (S.D.N.Y. 1975), *summarily aff’d.*, 423 U.S. 1041 (1976).

The U.S. Supreme Court has consistently applied the New York Times standard since 1964. See, Garrison v. Louisiana, 379 U.S. 64 (1964); Linn v. United Plant Guard Workers of America, 385 U.S. 53 (1966); Bond v. Floyd, 385 U.S. 116 (1966); Buckley v. Valeo, 424 U.S. 1 (1976); Herbert v. Lando; 441 U.S. 153 (1979); Bose Corp. v. Consumers Union of the U.S., Inc., 466 U.S. 485 (1984); McDonald v. Smith, 472 U.S. 479 (1985); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Harte-Hanks Communications, Inc. v. Connaughton, 491 U.S. 657 (1989); and Masson v. New Yorker Magazine, 501 U.S. 496 (1991).

This bill has been amended into a general election reform bill in the Senate. The bill in the Senate was changed to require that a person **knowingly** make a false statement before being held liable for civil penalties or a cause of action. Knowingly is a higher standard than reckless disregard for the truth which is the standard currently required by the U.S Supreme Court.

COMMITTEE ON CIVIL JUSTICE & CLAIMS

Staff of the Committee on Civil Justice and Claims has reviewed HB 651. As suggested above, by changing the New York Times actual malice standard, this bill raises potential constitutional questions. The United States Supreme Court has suggested that “political speech,” in particular, is worthy of the highest level of protection. E.g., Tinker v. Des Moines School District, 393 U.S. 503 (1969). However, whether false statements about an opposing candidate actually qualify as political speech is questionable.

The State of Florida must protect speech at that level required by the Supreme Court’s interpretation of the First Amendment of the United States Constitution. Additionally, the Florida Constitution sets forth a specific qualification to the right of free speech. Article I, Section 4, states in part: “Every person may speak, write and publish his sentiments on all subjects *but shall be responsible for the abuse of that right.*” (emphasis added)

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

None.

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VII. SIGNATURES:

COMMITTEE ON ELECTION REFORM:

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