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Election Projections: First Amendment Issues

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Summary

Media projections may be based both on exit polls and on information acquired as to actual ballot counts. The First Amendment would generally preclude Congress from prohibiting the media from interviewing voters after they exit the polls. It apparently would also preclude Congress from prohibiting the media from reporting the results of those polls. Congress, could, however, ban voter solicitation within a certain distance from a polling place, and might be able to include exit polling within such a ban. It also might be able to deny media access to ballot counts, either when the polls have not closed in the jurisdiction whose votes are being counted, or when the polls have not closed across the nation.

When the media project the winner of an election before the polls close, some people who otherwise had planned to vote might decide not to vote. If enough such people would have voted against the projected winner, then their decision not to vote could affect the result in the election. Media projections, then, might indirectly affect the outcome of an election, and some have suggested that Congress therefore ban them.

Media projections may be based both on exit polls and on information acquired as to actual ballot counts completed up to the time of the projections. The First Amendment would preclude Congress from prohibiting the media from interviewing voters after they exit the polls. At most, Congress might be able to include exit polling within a more general prohibition on voter solicitation within a certain distance from a polling place. We consider this point in Section II of this report.

The First Amendment apparently would also preclude Congress from prohibiting the media from reporting the results of exit polls. Congress, therefore, apparently could not ban media projections outright. Could Congress, however, deny media access to ballot counts, either when the polls have not closed in the jurisdiction whose votes are being counted, or when the polls have not closed across the nation? Could it, in other words, prohibit governmental officials who are counting votes from releasing election results? We consider that question in Section III of this report.

I. Banning Media Projections

Media projections are speech, and the First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It is possible, however, though by no means certain, that Congress could limit the right of broadcast radio and television stations to report election result projections. This is because the Supreme Court, citing "spectrum scarcity," *i.e.*, the limited number of available broadcast frequencies, has "permitted more intrusive regulation of broadcast speakers than of speakers in other media." *Turner Broadcasting System v. Federal Communications Commission*, 512 U.S. 622, 637 (1994). But to restrict broadcast radio and television, but not cable television and the Internet, would seem to go only a small way toward banning media election projections.

A statute that restricted speech of media other than broadcast radio and television, if challenged, would be subject to "strict scrutiny" by the courts. This means that the courts would uphold it only if the government proves that it is necessary "to promote a compelling interest" and is "the least restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989).

Would there be a "compelling interest" in prohibiting media projections? Though there might be a compelling interest in preventing the media from interfering with elections so as potentially to affect the outcome, it seems questionable whether election projections, if they are understood by potential voters to be merely projections, could be said to interfere with elections. Voters who hear or read such projections presumably know that they are only projections, and that their votes could still make a difference in the election. If they decide that that difference is not significant enough to make it worth their while to vote, then they have made a free choice. The Supreme Court has written in another context: "The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996).

If there is concern that some potential voters might be misled by projections to think that the winner of an election has been determined, then Congress might be able to require that disclosures accompany projections. Although the First Amendment protects the right not to speak as well as the right to speak, the courts might view compelled disclosures in this case as serving a compelling interest in protecting the right to vote.

In the seemingly unlikely event that a court were to find a compelling interest in prohibiting media election result projections, then the government would still have to show that there was no less restrictive means to further that interest. Making this determination would entail consideration of other proposals to deal with the perceived problem.

II. Banning Exit Polling Within a Prescribed Distance from the Polls

The purpose of legislation banning exit polling within a prescribed distance from the polls would be to make exit polling more difficult. In *Burson v. Freeman*, 504 U.S. 191 (1992), the Supreme Court upheld a Tennessee statute that prohibited the solicitation of

votes and the display or distribution of campaign materials within 100 feet of the entrance to a polling place. The Court recognized that this statute both restricted political speech, to which the First Amendment "has its fullest and most urgent application," and "bar[red] speech in quintessential public forums," the use of which for assembly and debate "has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens." *Id*. at 196, 197. Further, the statute restricted speech on the basis of its content, as it restricted political but not commercial solicitation, and therefore was not "a facially content-neutral time, place, or manner restriction." *Id*. at 197.

The Court therefore subjected the Tennessee statute to strict scrutiny, which means that it required the state to show that the regulation serves a compelling state interest and "is necessary to serve the asserted interest." *Id*. at 199. Although applying strict scrutiny usually results in a statute's being struck down, in this case the Court concluded "that a State has a compelling interest in protecting voters from confusion and undue influence," and "in preserving the integrity of its election process." *Id*. Or, more simply, in preventing "two evils: voter intimidation and election fraud." *Id*. at 206. The next question, then, was whether a 100-foot restricted zone is necessary to serve this compelling interest. The Court, noting that "all 50 States limit access to the areas in or around polling places," said that, though it would not specify a precise maximum number of feet permitted by the First Amendment, 100 feet "is on the constitutional side of the line." *Id*. at 206, 211.

In *Daily Herald Co. v. Munro*, 838 F.2d 380 (9th Cir. 1988), decided prior to *Burson*, the Ninth Circuit struck down a Washington statute that prohibited exit polling within 300 feet of a polling place. The court granted that "[s]tates have an interest in maintaining peace, order, and decorum at the polls and 'preserving the integrity of their electoral processes.'" *Id*. at 385. But the court found that "the statute is not narrowly tailored to advance that interest," because it prohibits nondisruptive as well as disruptive exit polling. *Id*. "Moreover, the statute is not the least restrictive means of advancing the state's interest. The statute is unnecessarily restrictive because [another Washington statute] already prohibits disruptive conduct at the polls," and "that several other less restrictive means of advancing this interest exist: for example, reducing the size of the restricted area; requiring the media to explain that the exit poll is completely voluntary; requiring polling places to have separate entrances and exits, . . . or prohibiting everyone except election officials and voters from entering the polling room." *Id*.

This reasoning of the Ninth Circuit may no longer stand after the Supreme Court's decision in *Burson*. As for the statute's being unnecessary because another statute already prohibited disruptive conduct, the Court in *Burson* found that "[i]ntimidation and interference laws [*i.e.*, laws that prohibit only disruptive conduct] fall short of serving a State's compelling interests because they 'deal with only the most blatant and specific attempts' to impede elections." 504 U.S. at 206-207. As for there being a less restrictive means to preserve the integrity of the electoral process, the Court in *Burson* did not require the state to provide "factual finding to determine the necessity of [its] restrictions on speech." 504 U.S. at 222 (Stevens, J., dissenting). Rather, it found that "the link between ballot secrecy and some restricted zone surrounding the voting area . . . is common sense." *Id*. at 207.

But the plaintiffs in *Munro* also "argue[d] that the statute is unconstitutional for another reason: that the stated purpose for the statute of protecting order at the polls was a pretext, and that the state's true motive was to prevent the media from broadcasting

election results before the polls closed." *Id.* at 386. The court found "that, assuming that at least one purpose of the statute was to prevent broadcasting early returns, the statute is unconstitutional because this purpose is impermissible . . . . [A] general interest in insulating voters from outside influences is insufficient to justify speech regulation." *Id*. at 387. "In addition," the court said, even if this were a permissible purpose, "the statute is not narrowly tailored to protect voters from the broadcasting of early returns. Election-day broadcasting is only one use to which the media plaintiffs put the information gathered from exit polling . . ." *Id*. at 387-388. The information is also used to analyze the results of elections, and prohibiting exit polling prohibits speech involving such other uses of the information.

Reading *Munro* together with *Burson* suggests that Congress could prohibit the solicitation of votes and the display or distribution of campaign materials within 100 feet (or some other reasonable distance) of the entrance to a polling place, but could not prohibit exit polling for the purpose of preventing voters from receiving media projections. Any limit on exit polling would seem permissible only to the extent it could be justified as part of a general restriction on interfering with voters *before* they vote. In *Burson*, the Court found that the Tennessee statute's restriction could be limited to voter solicitation, and need "not restrict other types of speech, such as charitable and commercial solicitation or exit polling, within the 100-foot zone." 504 U.S. at 207. But the Court did not say that a statute could *not* also restrict other types of speech, if it could demonstrate that doing so was necessary to serve a compelling governmental interest.

A post-*Burson* court of appeals case found greater justification for restricting campaigning than for restricting exit polling, because, "[w]hile there is no evidence of widespread voter harassment or intimidation by exit-pollers, there is evidence that poll workers do create these problems." *Schirmer v. Edwards*, 2 F.3d 117, 122 (5th Cir. 1993), *cert. denied*, 511 U.S. 1017 (1994). The court distinguished *Munro* on this basis, and upheld a 600-foot campaign-free zone.

III. Banning Media Access to Ballot Counts

If Congress could not ban media projections outright, could it prohibit government officials from releasing ballot counts to the media? Could Congress, that is, deny media access to ballot counts, either when the polls have not closed in the jurisdiction whose votes are being counted, or when the polls have not closed across the nation? The purpose of restricting access in the latter case would be to prevent potential voters in states in western time zones from being influenced by learning the results in states in eastern time zones.

The First Amendment, the Supreme Court has written,

> goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'"

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 575-576 (1980). Nevertheless, although "news gathering is not without its First Amendment protections"(*Branzburg v. Hayes*, 408 U.S. 665, 707 (1972)), these protections are not generally as great as are protections from censorship. The Court has held that the First Amendment does not prevent prison officials from prohibiting "face-to-face interviews between press representatives and individual inmates." *Pell v. Procunier*, 417 U.S. 817, 819 (1974).

In so holding, the Court did not find it necessary for the government to establish a compelling need to justify the prohibition, as the government in the ordinary case must to justify statutes that censor speech. Rather, the Court "balance[d] First Amendment rights" against governmental interests such as "the legitimate penological objectives of the corrections system" and "internal security within the corrections facilities," taking into account available alternative means of communication. *Id*. at 824, 822, 823. Furthermore, the Court wrote, although the First Amendment bars the "government from interfering in any way with a free press," it does not "require government to accord the press special access to information not shared by members of the public generally." *Id*. at 834, 833.

If Congress enacted a statute prohibiting the release of ballot counts, and it were challenged as unconstitutional, the court presumably would apply the sort of balancing test it used in *Pell v. Procunier* to reach a decision. It would assess the importance of denying media access to ballot counts, perhaps considering whether media projections, or learning the results in other states, tend to mislead potential voters, or whether potential voters are merely making free choices about the importance of their vote in light of status of the election at the time they hear a media projection or the result in another state.

A court might also evaluate the efficacy of prohibiting the release of ballot counts, considering, for example, whether, if denied access to ballot counts, the media might nevertheless make projections based merely on exit polls, which might be more misleading than those based on ballot counts. Finally, a court might consider whether Congress could accomplish its goal by alternative means that would restrict speech less. An example might be to require that projections be accompanied by disclosure of the information on which the projection is based.

IV. Concluding Note

Whether or not there is a First Amendment barrier to banning exit polling within a prescribed distance from the polls, or to prohibiting the release of ballot counts, there is still the question of Congress's power to regulate in this area. Congress has clear power to regulate House and Senate elections, but less clear power to regulate presidential elections, aspects of which the Constitution vests in the states. For additional information on this subject, see CRS Report RL30747, *Congressional Authority to Standardize National Election Procedures*, by (name redacted).