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STATE OF ALABAMA
OFFICE OF THE ATTORNEY GENERAL

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May 31, 2000

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Honorable Patricia Yeager Fuhrmeister
Shelby County Probate Judge
Post Office Box 825
Columbiana, Alabama 35051

Probate Judges – Elections – Polling
Places - Videotapes

All citizens are allowed to photograph or videotape general election activities in a polling place as long as they remain 30 feet outside a polling place and do not photograph an elector marking their ballot. After the polls close, at least one member of the news media must be allowed, if requested, to enter the polling place and to photograph or videotape the vote-tabulation process. Section 17-7-18 of the Code of Alabama prohibits, however, any person from taking photographs or videotaping inside of or within 30 feet of a polling place while voting is in progress.

Dear Ms. Fuhrmeister:

This opinion of the Attorney General is issued in response to your request.

QUESTION

Under what circumstances, if any, is it permissible for members of the news media to enter a polling place and take photographs and/or videotape as voters mark ballots and/or deposit them into the ballot box?

FACTS AND ANALYSIS

Every voter in Alabama has the right to vote a secret ballot, and that ballot shall be “kept secret and inviolate.” ALA. CODE § 17-8-11 (1995). Based upon this provision, unless an elector voluntarily waives this protection and consents to a photograph, no one should be allowed to photograph or videotape an elector while the elector marks a ballot.

With respect to the question of photographs being taken of general election scenes in polling places, section 17-7-18 of the Code of Alabama provides:

Except as electors are admitted to vote and persons to assist them as herein provided, and except the sheriff or his deputy, the inspectors, returning officer, clerks of elections and watchers, no person shall be permitted within 30 feet of the polling place.

ALA. CODE § 17-7-18 (1995). This provision prohibits all persons not listed in the statute, which would include members of the news media, from entering a polling place or coming within 30 feet of a polling place. Restrictions on First Amendment rights such as this must serve a compelling governmental interest and be narrowly drawn so that there is no more infringement than is necessary to further that interest.

The State has a compelling interest in preserving the integrity of its election process, and the United States Supreme Court has held that a restricted zone around the voting area is necessary to protect a voter from intimidation and fraud. *Burson v. Freeman*, 504 U. S. 191, 211 (1992) (plurality opinion); *Id.* at 216 (Scalia, J., concurring). In *Burson*, the United States Supreme Court found that a Tennessee law that prohibited solicitation of votes and campaign material within 100 feet of a polling place passed the “strict scrutiny” test and was constitutional. *Id.* at 211 (plurality opinion). The Court stated, “[t]he only way to preserve the secrecy of the ballot is to limit access to the area around the voter. Accordingly, we hold that some restricted zone around the voting area is necessary to secure the State’s compelling interest.” *Id.* at 207-208 (plurality opinion).

There is a distinction between the Tennessee statute considered in *Burson* and the Alabama statute in question here. The Tennessee statute

prohibited only solicitation of votes and campaigning. Alabama's statute, on the other hand, prohibits anyone, other than specific persons, from coming within 30 feet of the polling place, regardless of the reason for their presence. Because Tennessee's statute was not content-neutral, the Court held that it must withstand strict scrutiny. Under this analysis, the Court found Tennessee's statute constitutional.

A content-neutral statute, such as the Alabama statute, is not subject to this heightened standard of analysis. Instead, content-neutral provisions are subject only to an intermediate level of scrutiny. See *United States v. O'Brien*, 391 U.S. 367 (1968); *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994). Although restrictions on First Amendment rights must be narrowly drawn, the purpose behind Alabama's statute is to avoid any potential intimidation of voters and to avoid election fraud. Prohibiting all unnecessary individuals from coming within 30 feet of the polling place serves this compelling governmental interest. Thus, it is the opinion of this Office that a court would find the Alabama statute constitutional.

Although a literal interpretation of section 17-7-18 of the Code would prohibit anyone who is not specifically listed in the statute from entering a polling place, this Office has previously held that children under the age of 18 may accompany parents into the voting booth. Opinion to Honorable Don Siegelman, Secretary of State, dated June 11, 1980, A.G. No. 80-00414. This Office does not find this exception inconsistent with the purposes behind section 17-7-18. In a case decided prior to the *Burson* decision, the Florida Supreme Court found unconstitutionally overbroad a Florida statute prohibiting nonvoters from coming within 50 feet of a polling place, although the Court held that the statute could prohibit nonvoters from the polling place itself. *Firestone v. News-Press Publishing Co., Inc.*, 538 So. 2d 457, 460 (Fla. 1989). The Court did, however, allow some nonvoters access to the polling place. The Court stated:

The provisions of section 101.121, therefore, should not be interpreted to prohibit someone from accompanying an aged or infirm voter to the polls or to prohibit voters from bringing their children with them to the polls rather than hiring a baby sitter. Likewise, the statute should not be interpreted to prevent a doctor from entering the building to treat a voter who needs emergency care or to prevent a person bringing

food or beverages to the election workers. These activities are all incidental to the voting process and are sometimes necessary to facilitate someone else's ability to vote. (citation omitted).

Id. at 460.

In the opinion of this Office, the key, as noted by the Court in *Firestone*, is whether a nonvoter's presence facilitates the voting process. Because it is difficult to see how the presence of the media in the polling place facilitates voting and, because their presence might intimidate some voters, it is the opinion of this Office that the prohibition in section 17-7-18 furthers the compelling governmental interest in preserving the voting process without unduly interfering with First Amendment rights.

It might be argued that the presence of the media at a polling place has no negative effect on voters. In *Burson*, however, the Supreme Court noted that many acts of intimidation, while undetected and seemingly innocuous, may nonetheless drive the voter away from the polling place. *Burson* at 207 (plurality opinion). It is this effect that the Alabama statute seeks to guard against.

The Court noted further in *Burson* that it is not necessary to point to specific instances of voter intimidation or election fraud; in fact, the lengthy history of these distance restrictions makes such an effort difficult, if not impossible. *Id.* at 208-209. That the media has been allowed into polling places in the past without identifiable negative effects does not mean that their presence has not discouraged some voters from voting. This danger, as noted by the Court in *Burson*, indicates a strong need to remove all nonessential persons from the voting area.

The media has no greater right of access than do individuals. *Branzburg v. Hayes*, 408 U. S. 665, 684 (1972); Opinion to Honorable Frank Roberts, Mayor, Phenix City, dated August 9, 1976. It could not be argued that any individual has a First Amendment right to enter the polling place in violation of section 17-7-18.

Accordingly, it is the opinion of this Office that members of the media are not allowed within the polling place or within 30 feet of the polling place. The media may, of course, photograph or videotape general election activities from beyond 30 feet of the polling place. Thirty feet is measured from the door of the building in which the voting machines or

ballot boxes are housed. Opinion to Honorable Don Siegelman, Secretary of State, dated December 10, 1981, A.G. 82-00113.

After the polls close, state law provides that members of the media have a right to be present during the tabulation process. At least one representative of a newspaper or press association must be allowed (if requested) to be present at the close of the polls to observe the vote totals. At this point, photographing or videotaping the tabulation process would be permitted. ALA. CODE § 17-9-33 (1995); ALA. CODE §§ 11-46-52(d), 11-46-123(d) (1992).

CONCLUSION

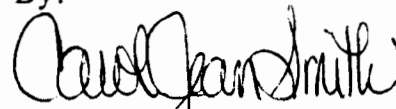
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I hope this opinion answers your question. If this Office can be of further assistance, please contact Brenda F. Smith of my staff.

Sincerely,

BILL PRYOR
Attorney General

By:



CAROL JEAN SMITH
Chief, Opinions Division

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