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Opinion No. 13-26

Restrictions on Use of Photographic Devices in a Polling Place

QUESTION

Do the provisions of House Bill 921/Senate Bill 803 of the First Session of the 108th Tennessee General Assembly (hereinafter "HB921") place an unconstitutional restriction upon the freedom of the press in violation of the First Amendment to the United States Constitution or article I, section 19 of the Tennessee Constitution?

OPINION

HB921 is defensible from a facial constitutional challenge.

ANALYSIS

HB921 proposes to amend Tenn. Code Ann. § 2-7-103, which governs who may be present in a polling place during an election, by adding the following new language as subsection (f):

> No person shall use photographic or other electronic monitoring or recording devices, cameras, or cellular telephones while such person is in a polling place while voting is taking place; provided, however, that the county election commission may allow the press to use photographic devices in the polling place under such conditions and limitations as the election commission finds appropriate. The election commission shall not allow the press to photograph an optical scan ballot, the face of a voting machine or DRE unit while a voter is voting such ballot, machine or DRE unit and no photography shall be allowed of the voter list, electronic voter list, or the use of a voter list or electronic voter list. This subsection (f) shall not prohibit the use of photographic or other electronic monitoring or recording devices, cameras or cellular telephones by poll officials for official purposes.

HB921, 108th Tenn. Gen. Assembly, 1st Sess. (2013).[1]

HB921 as proposed does not place any facial unconstitutional restrictions on the freedom of the press in violation of the First Amendment to the United States Constitution or article I, section 19 of the Tennessee Constitution.[2] HB921 does not place any restrictions on the right of the press to be present in the polling place, *see* Tenn. Code Ann. § 10-7-103(a), nor does it place any restrictions on the right of the press to publish. Instead, it places limited restrictions on the ability of the press to gather defined information in the polling place during any election, *i.e*., restricts the media's use of photographic, electronic monitoring or other recording devices except under defined circumstances.[3] The United States Supreme Court has recognized that the First Amendment – in addition to protecting freedom of speech and the press – also contains protections for some news-gathering activity. *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972) ("[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated."). However, the Supreme Court has repeatedly held that this First Amendment right of access to information is qualified and subject to limitation. For example, the Court has recognized that "[t]he right to speak and publish does not carry with it the unrestrained right to gather information." *Zemel v. Rusk*, 381 U.S. 1, 17 (1965). Similarly, in *Branzburg*, the Court concluded that the press "has no special immunity from the application of general laws [and] no special privilege to invade the rights and liberties of others," and, therefore, the "First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg*, 408 U.S. at 681-684. While the First and Fourteenth Amendments bar government from interfering in any way with a free press, the "Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." *Pell v. Procunier*, 417 U.S. 817, 832 (1974).

As regards HB921, the press has no right to unrestricted use of photographic and electronic recording devices in a Tennessee polling place during elections. In evaluating whether there is a right of access to information, government bodies, their processes and their decisions, the United States Supreme Court employs a balancing test. A right of First Amendment access requires a two-prong evaluation of "whether the place and process have historically been open to the press" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8 (1986). Where both prongs of the test are satisfied, "a qualified First Amendment right of public access attaches." *Id*. at 9. This test, often referred to as the "experience and logic" test, balances the interests of the people in observing

[1] This Office is unaware of any amendments to HB921 as of this date.

[2] This Office cannot anticipate all possible factual situations in which HB921, if enacted, might be applied or "as applied" constitutional challenges that might develop. *See generally Waters v. Farr*, 291 S.W.3d 873, 922-23 (Tenn. 2009) (Koch, J., concurring in part and dissenting in part) (discussing in depth distinctions between "as applied" and "facial" constitutional challenges). Accordingly, such "as applied" challenges are outside the scope of this opinion.

[3] HB921 provides that the county election commission may place "such conditions and limitations" on the media's use of devices as it "finds appropriate." Inappropriate use of this discretion by an election commissioner could give rise to an "as applied" First Amendment challenge to HB921.

and monitoring the functions of their government against the government's interest or long-standing historical practice of keeping certain information from public scrutiny.

The Third Circuit Court of Appeals recently applied this balancing test to polling places during an election in a case involving a challenge to a portion of the Pennsylvania Election code mandating that:

> [a]ll persons, except election officers, clerks, machine inspectors, overseers, watchers, persons in the course of voting, persons lawfully giving assistance to voters, and peace and police officers, when permitted by the provisions of this act, must remain at least ten (10) feet distant from the polling place during the progress of the voting.[4]

PG Pub. Co. v. Aichele, 705 F.3d 91, 95 (3rd Cir. 2013). The Third Circuit found that both prongs of the "experience and logic" test militated against finding a right of access and held that there was no protected First Amendment right of access to a polling place for news-gathering purposes. *Id*. at 112-113. In doing so, the Third Circuit relied upon the United States Supreme Court's thorough exegesis on the history of voting in America to find that "our Nation's history demonstrates a decided and long-standing trend away from openness, toward a closed electoral process." *Id*. at 110 (citing *Burson v. Freeman*, 504 U.S. 191, 200-06 (1992)).

Here, HB921 is less restrictive than the election regulation at issue in *PG Pub. Co*. Unlike the Pennsylvania regulation, HB921 does not restrict press access to polling places during elections but simply restricts the use of photographic devices in certain limited circumstances. Applying the "experience and logic" test utilized by the Third Circuit, a court would likely conclude that there is no protected First Amendment right of the press to the unrestricted use of photographic and other electronic recording devices by the press in polling places during elections, particularly since Tennessee has a history of restricting access to polling places in order to "secure the purity of elections." *See Burson*, 504 U.S. at 205 (discussing history of Tennessee's regulations of access to polling places beginning in 1890). Accordingly, HB921 would not place any facial unconstitutional restriction on the freedom of the press in violation of the First Amendment.

Tennessee courts have not specifically addressed the issue of whether article I, section 19 of the Tennessee Constitution, like the First Amendment, contains protections for some news-gathering activity, *i.e*., a right of access. The Tennessee Supreme Court has held, though, that article I, section 19 should be construed as having a scope at least as broad as that afforded the freedoms of speech and press by the First Amendment. *Leech v. American Booksellers Assoc*., 582 S.W.2d 738, 745 (Tenn. 1979). However, Tennessee courts have also recognized that while article I, section 19 of the Tennessee Constitution restricts prior restraints on the publication and dissemination of materials critical of governmental actions, it does not necessarily provide a right of access to governmental meetings or processes. *Mayhew v. Wilder*, 46 S.W.3d 760, 772

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[4] "Polling place" is defined as "the room provided in each election district for voting at a primary or election." 25 Pa. Stat. Ann. § 2602(q).

(Tenn. Ct. App. 2001). As such, a court would likely conclude that no protected right exists under article I, section 19 to the unrestricted use of photographic and other electronic recording devices by the press in polling places during elections. Accordingly, HB921 would not place any facial unconstitutional restriction on the freedom of the press in violation of article I, section 19 of the Tennessee Constitution.

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