

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2277

2001 SENATE POLITICAL SUBDIVISIONS

SB 2277

2001 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2277

Senate Political Subdivisions Committee

☐ Conference Committee

Hearing Date February 1, 2001

| Tape Number | Side A | Side B | Meter # |
|---|--------|--------|-----------|
| 1 | x | | 19.3-53.7 |
| | | x | 0.0-0.3 |
| Committee Clerk Signature <i>Mary Jo Wocken</i> | | | |

Minutes:

The hearing was opened on SB2277, relating to the polls.

SENATOR URLACHER : Sponsor and presenter of this bill. The big concern, we see the majority of the votes within state probably in the eastern 1/3 of the state and when projections are coming early in our rural areas in the west it affected the number of voters that turned out because they had already determined what happened. I would hope to bring about some uniformity in resolving those reports. So that we do have more fairness and a better turnout for our state elections. As far as the timing of the opening and closing of polls, needs to be addressed but I think the thrust of this bill and the concerns are within the reports of the election returns.

SENATOR COOK: Of course, besides, the restrictions on election results you are making a change in the time you indicated that, how sensitive are you to that? Your adding two hours to the required time the polls would be open and you say in the central time zone. SENATOR

URLACHER: I think if this does create some dispute then there is a more workable time brought

forward I think that is acceptable. SENATOR FLAKOLL: Would this prevent at all though, the passing of a local t.v. station passed to an affiliate, like a national affiliate like say the winner of a Governors race or a U.S. Senate race to prevent national media from reporting those, is that ever a concern? SENATOR URLACHER: I guess I haven't got a true answer, I don't think we can have any control outside of the state. To funnel outside and back in, I would hope to be recognized within the media what's trying to be accomplished here, and not happen. But I guess that's not a very good answer for you. More of a legal question than I can respond to. SENATOR COOK: Senator Urlacher, I would assume before were done somebody is going to speak towards the constitutionality of this bill. SENATOR URLACHER: Very likely. Very likely. Its not been tested of course and I think the media's response will recognize what we are trying to do here and work with us. I would hope it would be on the basis and the wishes of the people and the fairness that goes into there that would govern the reaction. SENATOR CHRISTENSON: Are there any studies that substantiate the fact that people don't vote because of the election has been projected or announced? SENATOR URLACHER: Not officially, but through concerns over time. Its kind of a natural need to drive 15 or 20 miles to the polling place and hear results of some magnitude, that you just loose their input. Our percentages are way down and I think its more rural people that probably don't respond, because of the distance. Those polling places are spread out quite a large area. I think that has a direct affect. SENATOR FLAKOLL: Don't we have somewhat a similar problem which could be addressed by this bill or any other ones, in that with the ever increasing number of polls that are taken throughout the state, we look at the governors race in particular this last year where there was constant polls that were released to see if there is a large disparity in some year, would that maybe discourage some people from voting on either side, when there is a single office concern? I'm just looking from not only the

campaign standpoint but also the media standpoint? There really doing a lot more of these polls, some of them scientific in nature, others of course not very much so. We cannot really adjust those, and those are sometimes taken within days or hours. SENATOR URLACHER: I don't think that we can probably stop those early polls. But, my primary concerns are about the ending results, at the closing of the polls. MR. AL JAEGER: Secretary of State, See written testimony. As Secretary of State we're not concerned with Section 2 of the bill, because that doesn't involve my office. Section 1 would be a concern to my office and the county auditors. I would suspect the concern on the part of the counties would be to stay open for an extra hour in terms of wages, also know that those of you have worked at polls, that if a poll opens at 7am our poll workers are required by law to stay there all day. Lunch comes in etc., it gets to be a long day and that is a concern. I don't have the problem with the concept of and I understand the intent of the bill in terms of having the polls close at the same time. I understand that, I don't know if that should be 7am to 6pm, does that become unfair, should it be 7:30am and 6:30, I don't know what it should be. Even until 8pm closing time would require 40 counties to stay open an hour longer than under current law. From an elections official standpoint, how do we make it workable?

SENATOR COOK: Mr. Jaeger, elections results, do we have a single county or polling district where they can actually have election results before the poll closes? There isn't any counting that goes on until after the polls close, is that not correct? AL JAEGER: I'm not quite sure if I follow your question Senator Cook. SENATOR COOK: There is a difference between exit polls and election results. AL JAEGER: Right, and nobody and no county can have election results prior to the polls closing because the system is such that the counting doesn't start until after the polls close. SENATOR COOK: Thank you Al, that was my point. SENATOR WATNE: Since were looking at this section of the law, I see a part in here where it says," the precincts in which 75

or fewer votes were cast", could elect to open at noon. Out of curiosity and because of declining population in some of these areas do you know of any counties that had 75 or less votes in them, as far as precincts? AL JAEGER: I don't know if there is any, I guess Foster County has a couple of them. Just as a historical reference, in the early 1950's North Dakota had about 2200 precincts, and I'm sure it was even a little higher, the last election we had a little under 700. Consolidation of precincts that's happening, but there are a few areas. Polling locations in elections gets to be kind of an interesting thing, it get to be very emotional for people as to where they vote. They want to vote in the township because they don't want to drive to town, but they'll go to the township and then drive to town to have coffee. The point is where they vote. Voting gets to be a very emotional situation. Some of those smaller precincts, that is a county decision. SENATOR URLACHER: If or when you consider changing the timing of the polls, I hope that you would look at the employees and business closes and accommodate that timing with their opportunity to vote. KEVIN GLATT: Burleigh County Auditor, here in Bismarck. We are in opposition to the section to change that requires polling places to be open until 9 pm. election worker and poll workers in Burleigh County for many years, many elections have requested that polling places in the city of Bismarck close at 7 pm instead of 8 pm. See written testimony. Based on the sample I don't think its necessary in Burleigh County to keep the polls open another hour. I also have great concern for the election workers who put in a long day the way it is. Its getting harder and harder to find election workers and keeping the polling places another hour, I think is going to compound that. I understand the need to provide access to the polls, but basically with the recent law change two sessions ago, authorizing a vote by mail, basically anybody can vote early, just so they don't to often. JACK MCDONALD: North Dakota Newspaper Association and the North Dakota Broadcasters Association, strongly oppose this bill as it is proposed. Adopt our

amendments and we will then endorse the bill. See written testimony. I think people come to vote because of local issues. The exit polling if its done at all by the local stations again is not broadcast out here cause its done by the eastern stations. We would then respectfully request that you either kill the bill itself if that would be your wishes, or we take no position on the poll closing type of thing, to try to afford some uniformity, we would try to take that we would ask that you adopt our proposed amendment which drops Section 2 from the bill. SENATOR LYSON: Did I hear you say, or did you say that KFYZ, would still be able to broadcast NBC's of projected polling? JACK MCDONALD: I don't see how you can prevent the national broadcast and the national news if KFYZ has got it and Tom Brokaw breaks in on the national news. SENATOR LYSON: I hear what your saying, but if this law came into effect, wouldn't NBC be barred from cutting in to a station that is owned and operated in this state and not be able to say that? JACK MCDONALD: The broadcast rules are governed by the Federal Communication Commission, and they super cede state law, so we can't in North Dakota stop what is being broadcast on the national network on a air wave or air frequency given to them by the FCC. I don't think we could in North Dakota. SENATOR FLAKOLL: Last fall I heard the results of the governors race at about 8:06 pm. I think that the presidential and governors race and things like are the ones that really can draw the people out, that's proven out by the voters turnout. All of us in the legislature would like to think, that were the ones that inspire people to come to the polls, but the truth be when we look at the data from year to year, I think its different. Do you think there would be any, maybe we should look at having some perimeters that are similar to what we have for people that are up for election with respect to distances from the polls or something like that, just to slow the pace down and keep the polling place a more

private area? So that there isn't as much going in their and grabbing people right by the polling places and see who is doing those types of things? What are your thoughts on that? JACK

MCDONALD: I understand what your saying. I am not real wild about those provisions either and frankly they also do have several court cases on that very issue alone, of what you can or cannot prohibit within the certain distances of the poll. You can take action which you think is necessary to protect the integrity of the polling place, but, most of that court cases come up in the electioneering issue of how close to a poll. I'm not a great one to advocate restricting people rights to talk to whomever they want to talk to, that's a 1st amendment right, but once you start going down that road, you have some of the same problems you have here, is a constitutional issue in state law. SENATOR LEE: It is hard to legislate common sense. I agree with Senator

Flakoll and I don't know how we fix it. JACK MCDONALD: I am a lawyer in my real life and pay attention to the media journals. The problems that arose in the last presidential election, everyone knows what they were, I think everyone involved in that from the media standpoint has been severely shaken with what happened as far as their accuracy and their mistakes and I think great efforts are being taken to avoid those types of things in the future. I am not here to apologize for the press, its just one of those things that happened. You'll never see a repeat of that again. I think this is more of a national problem than a state problem and all your going to be doing is causing the local media here some problems, and your not going to be solving the real area. SENATOR MATHERN: Mr. Jaeger, you deal with, or have any statistics of the absentee

balloting that is done? I know when we visited with the Cas County officials it has grown astronomically, the numbers. I know a a lot of people not wanting to stand in line, or not sure of the weather, or going to be out of town. Do you get those statistics? AL JAEGER: We probably are getting those, but I don't know off the top of my head. We do ask our auditors to provide us

with certain information. We may have it already. We are in the process of doing so much data entry I don't even think its been actually entered and determined what that percentage is. There is a lot of interest in it in this last election since the absentee balloting did not require a reason to use it. Voting by mail does get a little costly for the county. People like the fact of the flexibility to vote by coming in early and with the weather concerns or travel concerns. We will have this data available at a later date. JACK MCDONALD: Absentee balloting is very popular in Bismarek. Many offices have used the absentee ballot to encourage voting. I would certainly encourage you to keep that.

Hearing Closed on SB2277. SENATOR COOK: I would suggest you take to heart some words that Mr. McDonald said, one of the solutions is not to talk to the press. So that we can be assured they don't give any projections on how we might be voting on this maybe we should follow that suggestion.

February 1, 2001 (Tape 1, Side A, Meter #22.0-35.9)

SENATOR COOK: Senator Flakoll in discussion brought up a unique idea. I thought about restricting, in so many feet of a poll, certain activity. Are there any of you interested in even pursuing to see it that is a. This as we may have it here I believe is unconstitutional. SENATOR WATNE: If, I, what we have already is unconstitutional. This is exactly the same as our election law right now, unenforceable, campaigning near a school. There is not penalty whatsoever, you tell them don't do, no way to enforce. That last section...SENATOR COOK: Do you want to try to address the concern of the bill that Senator Urlacher had and pursue a way of making this a better bill, or do you want to take action on it now? SENATOR POLOVITZ: I would like to take action on it now, and I would Move it to a Do Not Pass. SENATOR COOK: I could take a motion, ok. Is there a second to that?

Senator Polovitz Moved for a Do Not Pass

Senator Mathern 2nd

Committee Discussion Followed

Roll Call Vote 6 yes, 2 no, 0 absent

Carrier: Senator Cook

February 8, 2001 (Tape 2, Side A, 18.7-22.1)

Senator Cook, committee we got SB2277, we have already put that out of here on a Do Not Pass. I've not dropped it in yet...for the intent of hopefully somebody might motion that we reconsider this action for the interest of taking a look at an amendment that might make it a better bill.

Senator Watne moved to reconsider the bill.

Senator Lyson- 2nd

Roll call vote 6 Yes, 1 No 1 Absent

Senator Cook: The intent of this bill, we've got some amendments that would change the last section. The most important part of the bill, we questioned the constitutionality.. It says no person may publicly by radio, television or any other electronic media broadcast or publish election results for protection. The amendments will deal more with the rights of a voter, and have some restrictions of questions that may be asked the voter within 100 ft. Of the polling place. Its nothing new and creative, there are other states that have done it. In 1992, the Supreme Court, voted 5- 3 to uphold a Tennessee ban on all campaign activities within 100 ft of the polls. I'll tell you that is the intent, and in all interests of fairness, Mr. McDonald and others have some

Page 9

Senate Political Subdivisions Committee

Bill/Resolution Number SB2277

Hearing Date February 1, 2001

2-8-01

comments they would like to make to you in the hall. The hearing is closed. We will have the amendments before you and then we will get this bill out tomorrow.

SENATOR MATHERN: What does this bill do to the language in Section 1, are we talking about deleting that, or would that stand?

SENATOR COOK: It would be my hope, that we would completely delete the changes in Section 1. That is what my hope would be, and what we do will be up to the committee.

February 15, 2001 (Tape 1, Slide A, Meter # 0.0- 11.6)

SENATOR COOK opened the hearing on SB2277. All present in attendance.

Senator Cook asked the committee to review amendments from the Attorney Generals office.

The committee then held discussion on this bill.

Senator Watne Moved the amendment. Senator Lyson 2nd

Roll call vote AG amendments: Roll Call vote on SB2277 4 yes, 4 No, 0 Ab

Senator Cook that motioned failed. Senator Mathern, I didn't realize this took a majority.

Amendments to delete changes in Section 1. Remove underline from 15 to 16. Senator Lyson made this motion. Senator Lee 2nd

Roll call vote: 6 yes, 2 No 0 Ab

Senator Flakoll moved a Do Not Pass as amended

Senator Christenson 2nd

Roll call vote: 5 Yes, 3 No, 0 Ab.

Carrier: Senator Lee

Date: February 1, 2001
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. *S.B. 2277*

| Senate | Political Subdivisions | Committee |
|--------|------------------------|-----------|
|--------|------------------------|-----------|

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass

Motion Made By Senator Palovitz Seconded By Senator Mothorn

[illegible]

Total (Yes) 6 No 2

Absent 0

Floor Assignment Senator Cook

If the vote is on an amendment, briefly indicate intent:

Date:
Roll Call Vote #:

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO.

| Senate | Political Subdivisions | Committee |
|--------|------------------------|-----------|
|--------|------------------------|-----------|

☐ Subcommittee on _____
or
☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Motion to reconsider S.B. 2277

Motion Made By Sen. Watson Seconded By Sen. Lupon

[illegible]

Total (Yes) 6 No 1

Absent 1

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Date: Feb. 15, 2001
Roll Call Vote #: 1

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. *SB.2277*

| Senate | Political Subdivisions | Committee |
|--------|------------------------|-----------|
|--------|------------------------|-----------|

☐ Subcommittee on _____

or

☐ **Conference Committee**

Legislative Council Amendment Number _____

Action Taken Moved on Amendments -

Motion Made By Sen. Watne Seconded By Sen. Lyson

[illegible]

Total (Yes) 4 No 4

Absent 0

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Roll Call Vote #: 2

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES

Senate Political Subdivisions

Committee

☐ Subcommittee on _____

or

☐ **Conference Committee**

Legislative Council Amendment Number _____

Action Taken

Motion Made By

Seconded

By

[illegible]**Total (Yes)**

No

Absent

Floor Assignment

If the vote is on an amendment, briefly indicate intent:

Roll Call Vote #: 3

2001 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. *A.B. 2277*

| Senate | Committee |
|--------|-----------|
|--------|-----------|

Subcommittee on _____

or

☐ Conference Committee

Legislative Council Amendment Number _____

Action Taken Do Not Pass as Amended SB 2272

Motion Made By Senator Hatael Seconded By Senator Christensen

[illegible]

Total (Yes) 5 No 3

Absent

Floor Assignment Senator Lee

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE (410)
February 16, 2001 7:53 a.m.

Module No: SR-29-3596
Carrier: Lee
Insert LC: 10653.0101 Title: .0200

REPORT OF STANDING COMMITTEE

SB 2277: Political Subdivisions Committee (Sen. Cook, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO NOT PASS** (5 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). SB 2277 was placed on the Sixth order on the calendar.

Page 1, line 2, replace "; and to" with a period

Page 1, remove lines 3 and 4

Page 1, remove lines 6 through 22

Page 2, remove the underscore under lines 1 through 4

Renumber accordingly

2001 TESTIMONY

SB 2277



OFFICE OF ATTORNEY GENERAL
STATE OF NORTH DAKOTA

Wayne Stenehjem
ATTORNEY GENERAL

MEMORANDUM

CAPITOL TOWER

State Capitol
600 E. Boulevard Ave.
Dept. 125
Bismarck, ND 58505-0040
701-328-2210
800-368-6888 (TTY)
FAX 701-328-2226

**Consumer Protection
and Antitrust Division**
701-328-3404
800-472-2600
Toll Free in North Dakota
FAX 701-328-3535

Gaming Division
701-328-4848
FAX 701-328-3535

Licensing Section
701-328-2329
FAX 701-328-3535

CAPITOL COMPLEX
State Office Building
900 E. Boulevard Ave.
Bismarck, ND 58505-0041
FAX 701-328-4300

Civil Litigation
701-328-3640

Natural Resources
701-328-3640

Racing Commission
701-328-4290

**Bureau of Criminal
Investigation**
P.O. Box 1054
Bismarck, ND 58502-1054
701-328-5500
800-472-2185
Toll Free in North Dakota
FAX 701-328-5510

Fire Marshal
P.O. Box 1054
Bismarck, ND 58502-1054
701-328-5555
FAX 701-328-5510

Fargo Office
P.O. Box 2665
Fargo, ND 58108-2665
701-239-7126
FAX 701-239-7129

TO: Senator Dwight C. Cook, Chairman
Senate Political Subdivisions Committee

FROM: John J. Fox, Assistant Attorney General JJF

RE: Senate Bill 2277

DATE: February 5, 2001

The Attorney General asked that I contact you about section 2 of Senate Bill 2277 regarding restriction of broadcasting early election results or projections. We briefly discussed some of the constitutional questions raised by section 2, and he asked that I work with you to try to make this provision more defensible.

I have drafted some amendments to Senate Bill 2277 for your review (copy attached). The amendments would change the focus of section 2 from prohibiting early broadcasting to placing restrictions within 100 feet of polling places on exit polling and interviewing of voters. The amendments are patterned after current N.D.C.C. § 16.1-10-06.2 (copy attached) and similar statutes. These types of reasonable time, place, and manner restrictions on activities around polling places are generally upheld by the courts.

Please contact me if you have any questions or wish to discuss this matter further.

pg
Attachments

PROPOSED AMENDMENTS TO SENATE BILL NO. 2277

Page 2, line 1, replace "Projections of election results" with "Impeding movement at polling place" and replace "publicly by radio" with "approach a person attempting to enter, exit, or who is in a polling place, for the purpose of exit polling or interviewing the person. This prohibition applies in any polling place or within one hundred feet [30.48 meters] from any entrance or exit leading into or out of a polling place"

Page 2, remove line 2

Page 2, line 3, remove "election results"

Renumber accordingly

Sources: S.L. 1911, ch. 129, § 14; C.L. 1913, § 936; R.C. 1943, § 16-2015; N.D.C.C., § 16-20-15.

16.1-10-06.2. Sale or distribution at polling place. No person may approach a person attempting to enter a polling place, or who is in a polling place, for the purpose of selling, soliciting for sale, advertising for sale, or distributing any merchandise, product, literature, or service. This prohibition applies in any polling place or within one hundred feet [30.48 meters] from any entrance leading into a polling place on election day.

Sources: S.L. 1987, ch. 251, § 1.

16.1-10-07. Candidate guilty of corrupt practice to vacate nomination of office. If any person is found guilty of any corrupt practice the person must be punished by being deprived of the person's government job, or the person's nomination or election must be declared void, as the case may be. This section does not remove from office a person who is already in office and who has entered upon the discharge of the person's duties where such office is subject to the impeachment provisions of the Constitution of North Dakota.

Sources: S.L. 1981, ch. 241, § 7.

DECISIONS UNDER PRIOR LAW

Application.

The Corrupt Practices Act applies to all primary and general elections held in the state. *Ransom County Farmers' Press v. Lisbon Free Press*, 49 N.D. 1165, 194 N.W. 892 (1923), decided prior to the enactment of NDCC Chapter 16.1-10; *Maher v. Juhnelt*, 73 N.D. 742, 19 N.W.2d 453 (1945).

Offer to Refund Salary.

The publication by a candidate for the office of county judge of an offer to refund his official salary in part is a violation of the Corrupt Practices Act. *Diehl v. Totten*, 32 N.D. 131, 155 N.W. 74, 1918A Ann. Cas. 884 (1915), decided prior to the amendment of NDCC § 16.1-16-05.

16.1-10-08. Penalty for violation of chapter. Any person violating any provision of this chapter, for which another penalty is not specifically provided, is guilty of a class A misdemeanor.

Sources: S.L. 1981, ch. 241, § 7.

Cross-References.

Election offenses, see § 16.1-01-12.

CHAPTER 16.1-11

NOMINATIONS FOR OFFICE — PRIMARY ELECTION

| Section | Section |
|---|--|
| 16.1-11-01. Primary election — When held — Nomination of candidates — Nomination for special elections. | conduct — Mail ballot election. |
| 16.1-11-02. Presidential preference contest — Time for holding. | 16.1-11-02.2. Presidential preference contest — Requirements — Expired. |
| 16.1-11-02.1. Presidential preference contest | 16.1-11-03. Political parties authorized to conduct presidential preference contest. |

February 1, 2001

SENATE POLITICAL SUBDIVISIONS COMMITTEE
SB 2277

CHAIRMAN COOK AND COMMITTEE MEMBERS:

My name is Jack McDonald. I am appearing today on behalf of the North Dakota Newspaper Association and the North Dakota Broadcasters Association. While we appreciate and respect the intentions of the sponsors, we nevertheless strongly oppose SB 2277 as introduced, and urge that you either give it a do not pass, or adopt our amendments and then pass the bill.

1.) First, this is a bill that will only hurt North Dakota businesses, but will not solve the problem being addressed. Very few North Dakota stations broadcast exit polls or predictions. This bill will not stop CBS or NBC from doing exit polling and broadcasting North Dakota predictions. However, it will stop KFYZ radio from going around during the noon hour of election day and reporting on voter turnout, and then interviewing the chairman of the Republican Party who might say that the party is happy on the good turnout and they have high hopes of electing a new governor. It will stop the internet editions of newspapers from reporting early results.

2.) Secondly, does anyone have any real evidence that anyone in North Dakota has not gone to the polls, or has left a poll, because he or she heard some results? Someone standing in line with headphones on? This is one of the urban myths that never is proven.

3.) Thirdly, the prohibitions in Section 2 are clearly prior restraints which are unconstitutional. What is a prior restraint? Quite simply, a prior restraint occurs when there is an official restriction upon speech in advance of publication. Forbes v. City of Seattle, 785 P2d 431 (1990). Although the prohibition against prior restraints is by no means absolute, the gagging of a publication has been considered acceptable only in very exceptional cases. As former U.S. Supreme Court Justice Blackmun stated, "Even where questions of allegedly urgent national security, or competing constitutional interests, are concerned, we have imposed this most extraordinary remedy only where the evil that would result from the reportage is both great, and certain, and cannot be mitigated by less intrusive measures." CBS v. Davis, 114 S.Ct. 912 (1994). The problem here is not that great, is not that certain, and could be avoided by other means, one of which would be to simply not talk to the reporters or not listen to the newscasts. We respectfully urge either adoption of the amendments or a **do not pass**.

prior restraint

If you have any questions, I'd be glad to try to answer them. THANK YOU FOR YOUR TIME AND CONSIDERATION.

PROPOSED AMENDMENTS TO SB 2277

On page 1, delete lines 23 and 24.
On page 2, delete lines 1 through 4

Renumber accordingly

FEBRUARY 9, 2001

SENATE POLITICAL SUBDIVISIONS COMMITTEE MEMBERS:

Regarding SB 2277 and limiting or banning exit polls:

- Exit polls limits or bans are **not** constitutional and that is why there is not an exit poll ban or limitation on the books in any state. That is why Congress has not enacted federal legislation on this. The 9th Circuit Federal Court in 1983 struck down a Washington state law exactly like the law proposed for SB 2277. The U.S. Supreme Court in 1992 did not deal with exit polls, but upheld only a 300 foot ban on campaigning or electioneering in Tennessee in light of major voter fraud problems shown to exist in that State. The Court said this was a "rare" circumstance to meet a major problem shown by evidence presented to the Court.
- This prohibition in SB 2277 is after the vote, so it doesn't protect the ballot. All it does is limit the First Amendment rights of North Dakotans to talk to someone in a public place (sidewalks) after they leave the polls. This is a solution? To stifle the free speech of North Dakota citizens?
- There is no evidence of any problems in North Dakota with exit polling. No one has even cited an incidence of exit polling in North Dakota. There is not even any evidence before the committee that exit polls are done in North Dakota. The only evidence is unhappiness with bad calls on the Presidential race in Florida.
- Chairman Cook said he had a three point test for legislation: Is there a problem? Does the bill solve the problem? Will the bill cause more problems? This legislation fails all three tests.
 - No one has cited any "problems" with ND exit polling. There were no election day errors or citizen complaints in ND caused by exit polling.
 - This doesn't solve any ND problems, since none exist.
 - It will cause more problems since it will put a clearly unconstitutional measure on the books that will either be challenged in the federal courts, thus costing the state considerable funds to defend, or, it will simply not be enforced.

Why pass a law in North Dakota to meet a national problem that came to light because of difficulties in Florida? WE RESPECTFULLY REQUEST THAT YOU DO NOT AMEND SB 2277 AND KEEP IT AS A "DO NOT PASS." Thank You.

Jack McDonald
ND Broadcasters Association

NOVEMBER 7, 2000
General Election
VOTES CAST BETWEEN 7:00pm & 8:00pm

| | | <u>total</u> | <u>7/8</u> | <u>%</u> |
|--------|-----------------------|--------------|------------|----------|
| Pct 16 | City of Lincoln | 560 | 28 | 4.8 |
| Pct 21 | Courthouse | 610 | 9 | 1.4 |
| Pct 35 | Myhre School | 957 | 16 | 1.7 |
| Pct 41 | BSC | 1158 | 23 | 2 |
| Pct 42 | Grimsrud School | 1194 | 20 | 1.7 |
| Pct 43 | Highland Acres School | 864 | 16 | 1.9 |
| Pct 52 | State Capitol | 1295 | 20 | 1.5 |
| Pct 54 | Pioneer School | 747 | 10 | 1.3 |
| Pc 55 | Simle Middle School | 1145 | 25 | 2.2 |
| Pct 56 | WillMoore School | 1304 | 12 | 0.9 |
| | | 9,834 | 179 | 1.8% |

34,777 Total Ballots Cast - Burleigh County

These 10 precinct are a sample (32%) of the 31 precincts that are open from 7:00pm until 8:00pm.

Polling Hours in Burleigh County:
City Precincts 7:00am - 8:00pm
Rural Precincts 9:00am - 7:00pm

| | | |
|-------------|----------|--------|
| Morton | closes @ | 7:00pm |
| Cass | closes @ | 8:00pm |
| Grand Forks | closes @ | 8:00pm |
| Ward | closes @ | 7:00pm |

ALVIN A. JAEGER
SECRETARY OF STATE

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SECRETARY OF STATE

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February 1, 2001

TO: Senator Cook and Members – Senate Political Subdivisions Committee

FR: Al Jaeger, Secretary of State

RE: SB 2277 – Polling Hours

As Secretary of State, I am concerned about the times in the subject bill, which would require polls in the central time zone to remain open until 9:00 p.m. and those in the mountain time zone to remain open until 8:00 p.m.

Current law allows the polls to open as early as 7:00 a.m. and they must be open no later than 9:00 a.m. At the end of the day, the polls must stay open to at least 7:00 p.m. and counties have the option to stay open until 9:00 p.m.

According to the data obtained from the various County Auditors, these closing times would be one hour later than the poll closing times now observed by any one of the counties throughout the state. Attached is listing of the state's counties and their respective closing times.

If the committee does conclude that the polls should close at the same time throughout the state, then I would recommend that the bill be amended to have the polls close at 8:00 p.m. in the central time zone and 7:00 p.m. in the mountain time zone.

A change to a 8:00 p.m. closing time in the central time zone will mandate approximately 40 of the state's counties to extend the hours their polls are open by one hour.

North Dakota Counties - Polling Hours - June 13, 2000

| County | Central Time Zone Polling Hours | City |
|-------------|---|--|
| Barnes | 3 precincts open at 12:00 noon to 7:00 pm CDT all the rest open from 9:00 am to 7:00 pm CDT | |
| Benson | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Bottineau | 7:00 am to 7:00 pm CDT | 7:00 am to 7:00 pm CDT |
| Burke | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Burlingame | 9:00 am to 7:00 pm CDT | 7:00 am to 8:00 pm CDT |
| Cass | 7:00 am to 8:00 pm CDT | |
| Cavalier | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Dickey | 8:00 am to 7:00 pm CDT | 8:00 am to 7:00 pm CDT |
| Divide | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Eddy | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Emmons | 9:00 am to 7:00 pm CDT | |
| Foster | 3 will be 12:00 noon to 7:00 pm CDT; 5 will be 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Grand Forks | 9:00 am to 7:00 pm CDT | 7:00 am to 8:00 pm CDT |
| Griggs | 9:00 am to 7:00 pm CDT | |
| Kidder | Precinct #10 12 Noon to 7:00 pm CDT all others are open from 9:00 am to 7:00 pm CDT | |
| LaMoure | 9:00 am to 7:00 pm CDT | |
| Logan | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| McHenry | Precinct #4 will be 12:00 noon to 7:00 pm CDT; the rest are 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| McIntosh | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| McLean | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Mountrail | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Nelson | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Oliver | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Pembina | 9:00 am to 7:00 pm CDT | |
| Pierce | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Ramsey | 8:00 am to 7:00 pm CDT except 4 will open at 12 Noon to 7:00 pm CDT | 8:00 am to 7:00 pm CDT |
| Ransom | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Renville | 8:00 am to 7:00 pm CDT | 8:00 am to 7:00 pm CDT |
| Richland | 9:00 am to 7:00 pm CDT | 4 cities 7:00 am to 7:00 pm and 1 city 11:30 am to 7:00 pm CDT |
| Rolette | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Sargent | 9:00 am to 7:00 pm CDT | |
| Sheridan | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Steele | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Stutsman | 7:00 am to 7:00 pm CDT | 7:00 am to 7:00 pm CDT |
| Towner | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Traill | 9:00 am to 7:00 pm CDT | |
| Walsh | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Ward | 7:00 am to 7:00 pm CDT | 7:00 am to 7:00 pm CDT |
| Wells | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |
| Williams | 9:00 am to 7:00 pm CDT | 9:00 am to 7:00 pm CDT |

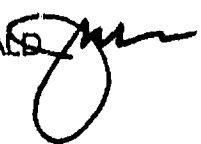
North Dakota Counties - Polling Hours - June 13, 2000

| County | Mountain Time Zone Polling Hours | City |
|---------------|--|--|
| Adams | 9:00 am to 7:00 pm MDT | 9:00 am to 7:00 pm MDT |
| Billings | 9:00 am to 7:00 pm MDT | |
| Bowman | 9:00 am to 7:00 pm MDT | 8:00 am to 7:00 pm MDT |
| Dunn | 9:00 am to 7:00 pm MDT | 9:00 am to 7:00 pm MDT |
| Golden Valley | 1 will be open from 12 noon to 7:00 pm MDT and the rest are open from 9:00 am to 7:00 pm MDT | |
| Grant | 9:00 am to 7:00 pm MDT | 9:00 am to 7:00 pm MDT |
| Hettinger | 9:00 am to 7:00 pm MDT | 9:00 am to 7:00 pm MDT |
| McKenzie | 8 are 9:00 am to 7:00 pm CDT; 2 are 9:00 am to 7:00 pm MDT; 2 are 12 Noon to 7:00 pm MDT; 1 will be 11:00 am to 7:00 pm CDT; 1 will be 11:00 am to 7:00 pm MDT | 9:00 am to 7:00 pm CDT |
| Mercer | 9:00 am to 7:00 pm MDT | 9:00 am to 7:00 pm MDT |
| Morton | Flasher, New Salem, Almont, Glen Ullin, Hebron are open from 9:00 am to 7:00 pm MDT all others are open from 7:00 am to 7:00 pm CDT | |
| Slope | 9:00 am to 7:00 pm MDT | 9:00 am to 7:00 pm MDT |
| Sloux | 1 precinct 12 noon to 7:00 pm MDT; 4 precincts 9:00 am to 7:00 pm MDT | 1 precinct 12 noon to 7:00 MDT; 2 precincts 9:00 am to 7:00 pm MDT |
| Stark | 8:00 am to 7:00 pm MDT | 8:00 am to 7:00 pm MDT |

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Mary Jo Wocken
**WHEELER WOLF
LAW FIRM**

Jax Legislative Memo

To: SENATE POLITICAL SUBDIVISIONS COMMITTEE
From: JACK MCDONALD 
CC:
Date: February 8, 2001
Re: SB 2277, Exit Polling

Attached, for your information in considering SB 2277, concerning exit polling, are two recent articles in nation-wide publications that have a direct bearing on this bill.

The first is from the Winter 2001 issue of *Communications Lawyer*, a quarterly journal published by the American Bar Association's Communications Law Forum.

Note that at page 32, the authors cite the many court cases, both on the state and federal level, which have struck down as unconstitutional bans on exit polling. The article does note, at page 35, that while two recent U.S. Supreme Court decisions may indicate a bit of a weakening of this position, it's likely that the ban on exit polling will remain because they are not designed to protect the ballot; i.e. people have already voted by the time exit polls are used.

The other article is from the January-February 2001 Issue of *Quill*, the magazine of the Society of Professional Journalists. It describes the mistakes that were made...and acknowledged....by the media, and some of the efforts being undertaken to correct those mistakes, including statements by NBC and ABC that they would no longer make any projections in a state until the polls closed in that state.

We think its better to allow self-correction then to pass legislation that's likely to face constitutional challenges. Thank you.

Communications Lawyer

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THE JOURNAL OF MEDIA, INFORMATION AND COMMUNICATIONS LAW

Congress, the Networks, and Exit Polls

SUSAN E. SEAGER AND LAURA R. HANDMAN

In 1982, Republican Congressman Wayne Grisham of California proposed federal legislation making it a crime for any network to project the winner in any state before its polls had closed.¹

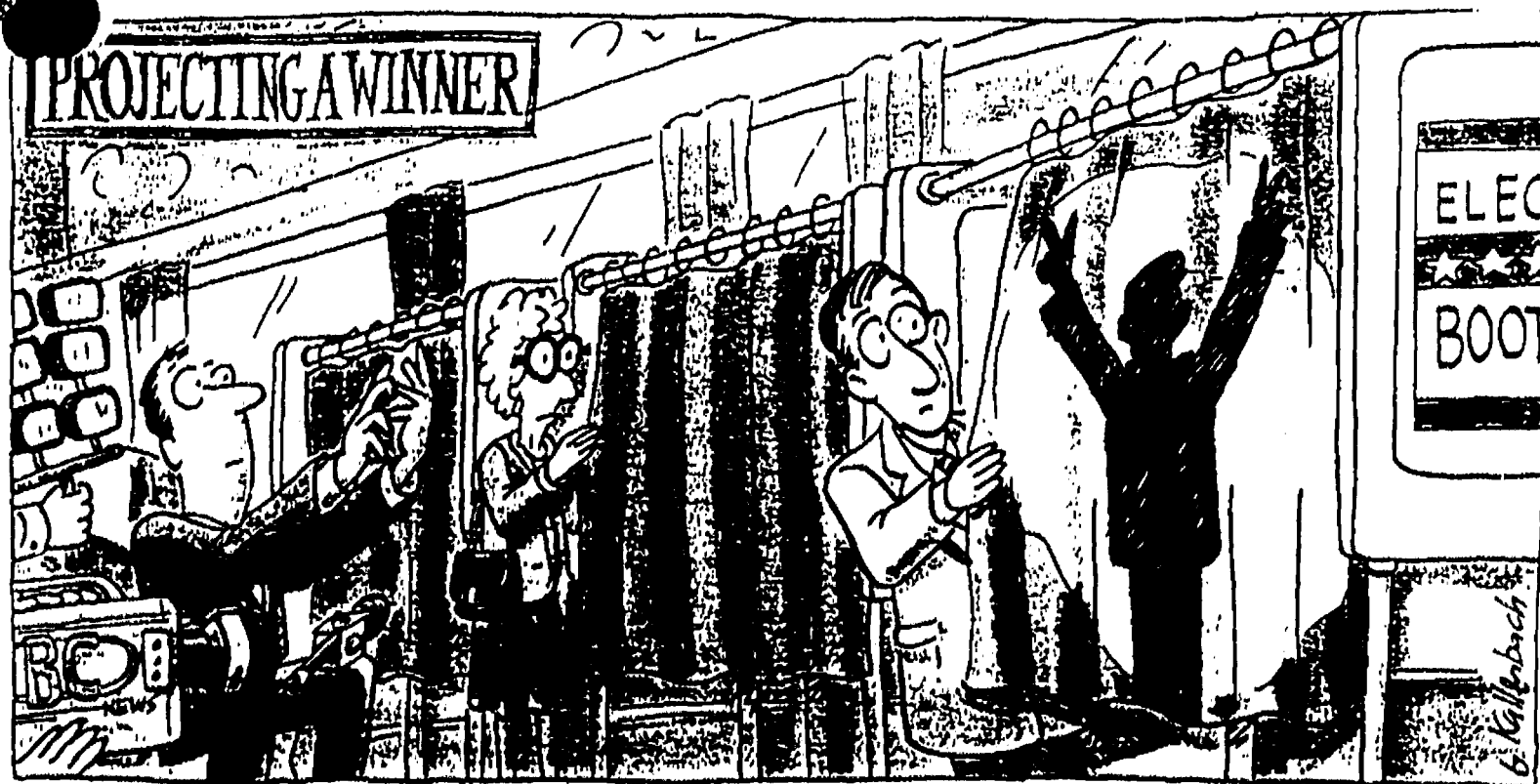
Eighteen years later, W.J. "Billy" Tauzin, R-La., announced a congressional investigation into the television networks' botched Florida projections in the 2000 presidential election, but quickly conceded that he would not seek any legislation governing their coverage. "I

don't think we have the legal power to constrain the networks from reporting," the congressman told journalists at his November 9 news conference. "That's why we have carefully in the past held hearings and held discussions with networks and eventually worked out what became an agreement."² Tauzin sent a letter to the networks demanding answers to thirteen detailed questions about their newsgathering and decision-making processes on election night.³ The

congressman also said he would convene public hearings in January 2001 to ask network news executives further questions about their practices, and that a system of national uniform polling hours will be considered.⁴

Has Congress really abandoned threats of legislation to stop networks from projecting election outcomes before all polls have closed? Probably. In the past two decades, courts have struck

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Congress, The Networks, Exit Polls

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down as unconstitutional a series of laws aimed at stopping exit polls and choking off broadcast projections. Congress has apparently gotten the message. But Congress has not given up its attack on exit polls and election night projections, relying on the bully pulpit of congressional hearings and veiled threats to pressure the networks to delay broadcasting projections of election results.

This article reviews the legal and political developments over the past twenty years related to network projections on election night and the use of exit polls. Although courts have repeatedly struck down state laws that restrict exit poll newsgathering, members of Congress continue to use not-so-subtle coercion to persuade the networks to temporarily withhold information about elections in progress. Congressional investigations and pressure to self-regulate raise a unique set of constitutional issues. Asking media organizations to answer detailed questions about their newsgathering techniques, editorial decisions, and unpublished material raises concerns about First Amendment protections for a free press in its quest to cover a democratic government. Congressional hearings that admittedly will not lead to any legislation, coupled with veiled threats that other arms of the federal government could be used to punish noncooperative networks, could still chill the free speech rights of the networks. Indeed, the threats are not so veiled—the FCC has been asked by a Washington law firm to investigate the networks' election night "fiasco," suggesting that the networks may have violated the FCC requirement that broadcast licensees must serve the "public interest."⁴

Exit Polls and Voter News Service

This is not the first time that projected election results have turned out to be er-

roneous. The nation's first election broadcast is said to have taken place on a ham radio in 1916, when a small group of ham radio operators in New York listened to radio broadcasting pioneer Lee DeForest as he incorrectly declared that presidential hopeful Charles Evans Hughes had unseated incumbent Woodrow Wilson.⁵ In 1948, NBC broadcast legend H.V. Kaltenborn got it wrong when he declared that Tom Dewey would unseat Harry Truman. For the 1952 election, CBS and NBC decided to try out new technology—computers—to accurately predict that Dwight D. Eisenhower was the winner on election night.

Over the next several decades, the networks invested millions in exit polls, computers, and polling consultants, all in an effort to beat each other in declaring the winner. In early 1964, CBS pollster Lou Harris made the first use of an exit poll to enable CBS to tell viewers that Barry Goldwater had won the Republican nomination for president. Exit poll information also became rich food for academics and pollsters, who could mine the data for information on why people voted.

But the most obvious use for exit polls was to predict winners. At first, CBS explained that it was using machines and statistics to "estimate" or "project" the winner on election night. But by election night in 1964, CBS began the practice of declaring that the winner had been "elected." When Walter Cronkite announced at 9:04 P.M. EST that Lyndon Johnson had been "elected," only 20 percent of the national popular vote had been counted.⁶ It would turn out to be a landslide for Johnson, so the networks' early projections were never in doubt and could not have had any impact on the outcome.

Although the networks made errors in calling some elections during the 1960s and 1970s, it wasn't until the 1980 presidential election that the networks' election night practices sparked a major controversy. Using exit poll information and other indicators, NBC announced that challenger Ronald Reagan had won twenty-two states with a combined 270 electoral votes and would be the next president of the United States.⁷ But it was only 8:15 P.M. EST, and 5:15 P.M. in the West, where polls in at least twenty-three states remained open for another two hours and forty-five minutes.⁸ After ABC and CBS also

declared Reagan the upset winner, Jimmy Carter made his concession speech at about 9:45 P.M. EST (6:45 P.M. PST), one hour and fifteen minutes before the polls closed in California and other Western states.

Projections and Voter Turnout

A howl of protest erupted. The loudest complaints came from Democrats, who believed that the early news of a Reagan victory depressed Democratic voter turnout in the West, causing several Democratic congressional incumbents to lose to GOP challengers. They made the same complaints in 1984 when Reagan won reelection. "If you've ever been robbed," said Al Swift, D-Wash., "you know how some West Coast voters felt in the last two presidential elections when TV networks declared a winner hours before their polls closed."¹⁰ California Secretary of State March Fong Eu declared that "Would-be voters suddenly became nonvoters after the media projections. . . . Election volunteers did not show up and voter information phones stopped ringing during a time when they are usually tied up."¹¹

Meanwhile, the growing use of exit polls in every state was prohibitively expensive for the networks. For the 1989–1992 election cycle, the projected election unit budget for CBS alone was \$21 million.¹² The need to cut costs finally prompted the established networks of ABC, NBC, CBS, and CNN to pool their resources and pay for one shared exit poll data service. Eventually, Associated Press and Fox joined the consortium. The shared data service was called Voter News Service (VNS), which conducted and compiled exit poll data and actual Election Day poll returns. Individual networks still make their own election calls based on the pooled data and their own consultants, allowing room for competition in declaring the "winner" first, a practice that critics say leads to recklessness and errors such as those that occurred on election night on November 7, 2000.¹³ Still, until this year such errors were never on a national scale, and VNS remained a relatively obscure arm of the networks.

This year, it was the Republicans who cried foul when the major networks declared that Vice President Al Gore won the critically important State of Florida at 7:50 P.M. EST (4:50 P.M. PST), three hours and ten minutes before

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polls closed in the West and about an hour before they closed in the western panhandle of Florida's panhandle. The networks began retracting their projections for Gore at 9:55 P.M., saying their data had been faulty. Several hours later, Fox, followed by the other networks in rapid succession, declared at 2:16 A.M. that Gov. George W. Bush in fact had taken the Sunshine State and the presidency. This was followed by still another red-faced announcement just before 4 A.M. that Florida was too close to call.¹⁴

But Republicans asserted that the damage was already done, and that the illusion of an easy Gore victory chilled Republican voter desire in the West and in the Florida panhandle, causing GOP congressional candidates to lose to their Democratic challengers.¹⁵ Although some exit poll experts scoff at the charge that exit poll broadcasts can ever trigger significantly lower voter turnout, they say that the networks never should have "called" the presidential victor in Florida on election night. The data showed that the candidates were separated by less than one-quarter of 1 percent, which was too close to call.¹⁶

Republicans are now leading the charge against the media, with Tauzin calling for a congressional investigation. "I lost some dear friends, [Congressmen Brian P.] Bilbray and [James] Rogan and perhaps even [Steven T.] Kuykendall," Tauzin said, explaining one reason for his congressional investigation of the networks' election practices. "[T]he early call in Florida may have disenfranchised, subtly, voters particularly out West, and I'm very sad about that because obviously I've lost some good friends in Congress over that; I take that very personally."¹⁷ Tauzin also complained that the early announcement about Florida "may have discouraged voters . . . in Florida," where the western panhandle straddles two time zones, and where polls were still open for another hour when the networks made their announcement at 7:50 P.M. EST that Gore had won the state.¹⁸

Given the amount of rhetoric from both major political parties, one would expect empirical studies to demonstrate that election night projections do in fact cause voter participation to plummet in Western states. But such studies are difficult to find. Tauzin admitted that he lacked "any proof that anybody didn't vote [in the 2000 election], except peo-

ple who called in and said they didn't, because they thought it was over . . . it's all anecdotal."¹⁹ Martin Plissner, former political director of CBS News, said that "[n]o verifiable example has ever turned up of any Western voter abandoning an intent to vote because of the early announcement that Carter had lost the 1980 presidential race."²⁰ A study of Oregon voters in the November 1984 presidential election found that network projections did not influence voter turnout. Of 639 people who did not vote, fewer than 3 percent said they were influenced by early reports by the television networks.²¹ More recently, one Florida voter told Associated Press that he cancelled his plans to vote on November 7 after hearing the network projection that Gore would carry the state, but a local election official scoffed at his claim. "What a perfect excuse for that lazy slob," the official was quoted as saying.²²

VNS Targeted for Breakup

VNS, meanwhile, has more on its hands than a congressional hearing. An antitrust advocacy group composed of academics, lawyers, and business leaders has written the Justice Department urging the breakup of the media consortium.²³ A group with ties to the Republican Party filed suit in Florida against VNS and seven TV networks, seeking an injunction to block any future election night projections.²⁴ This is

somewhat ironic since it was the networks, and not VNS, that called the election for Bush. VNS went on the offensive last March when some Internet publications leaked some of its exit poll projections during the presidential primaries. VNS's lawyers fired off a "cease and desist letter," warning *Slate* magazine and other online publications that it would sue for copyright infringement, unlawful interference with contractual relations, and misappropriation of "hot news."²⁵ The latter is a little-used doctrine that creates a property right in news reports. It was recognized by the Supreme Court in *Associated Press v. International News Service* in 1918²⁶ and given new vigor by the Second Circuit in 1997.²⁷

Prior Restraint

Despite the paucity of hard data showing that network behavior discourages voter turnout, Congress held a series of hearings on the subject in the early 1980s. Congressman Grisham proposed his criminal statute that would bar networks from projecting the winner in any state before the polls had closed in that state.²⁸ Colorado Senator Tim Wirth demanded that the networks suppress all announcements about election night winners until the polls had closed in the West.²⁹ But even those with the most rudimentary First Amendment knowledge must know that laws requiring a delay in the broadcast of lawfully obtained information, in this case exit poll data, would be unconstitutional prior restraint. The U.S. Supreme Court repeatedly has held that prior restraints are "presumptively unconstitutional" and may be used, if at all, only under extremely rare and unusual circumstances.³⁰

In the seminal *Pentagon Papers* decision, the Court held that the stringent constitutional requirements for justifying a prior restraint had not been satisfied, despite the government's assertion that publication of classified information about the Vietnam War would threaten national security. "[O]nly gov-

. . . [E]mpirical studies demonstrating that election night projections cause voter turnout to plummet in Western states . . . are difficult to find.

ernmental allegation and proof that publication must inevitably, directly and immediately cause the occurrence of an event kindred to imperiling the safety of a [troop] transport already at sea can support even the issuance of an interim restraining order."³¹ The government's vague generalized interest in protecting citizens from their own failure to vote because of network projections does not come close to meeting the high standard set by the courts. Even a one-hour delay would be unconstitutional. The "loss of First Amendment rights, even for minimal periods of time, unquestionably constitutes irreparable injury."³²

To avoid the insurmountable problems posed by the prior restraint doctrine, federal lawmakers have toyed

with adopting proposed uniform poll hours across the nation. There has been disagreement among the states, however, over which hours would best serve the coasts, and some critics contend that Congress lacks the constitutional authority to mandate election hours for individual states.³³ State legislatures, meanwhile, decided to attack the problem from a different angle by passing dozens of laws to ban exit polls.

State Bans on Exit Polls

The U.S. Supreme Court has not ruled directly on the issue, but lower federal courts and state courts have struck down every exit poll restriction challenged by the media. The Ninth Circuit issued the only federal appeals court decision in *Daily Herald v. Munro*.³⁴ At issue was a statute passed by the Washington State Legislature in 1983 that prohibited anyone from coming within 300 feet of a polling place to conduct "any exit poll or public opinion poll with voters."³⁵ The restriction was challenged by a local newspaper, the *Daily Herald*, as well as by the *New York Times*, ABC, and CBS. Judge Warren J. Ferguson, writing for the majority, began his analysis by finding that the taking of the poll, and not just dissemination of its results, was protected by the First Amendment because it involved citizens discussing their political choices. "A major purpose of the First Amendment was to protect the free discussion of governmental affairs," the court said. "This of course includes discussions of candidates."³⁶ In the second step of his analysis, Judge Ferguson found that the First Amendment was also implicated because reporters were gathering information, and "the First Amendment protects the media's right to gather news."³⁷

The court found that the statute was a content-based restriction on speech at a public forum (the polling place, sidewalks, and streets) and, as such, was "presumptively" unconstitutional unless it was narrowly tailored to promote a compelling government interest. Although the state had an interest³⁸ in "maintaining peace, order, and decorum" at the polls, and "preserving the integrity of their electoral processes," the exit poll ban was not narrowly tailored to advance this interest. The state already banned disruptive conduct at the polls with another statute. It could have

adopted more narrowly tailored statutes to curb disruptive exit pollsters, such as requiring polls to have separate exits and entrances or reducing the size of the restrictive area. The court declined, however, to say whether these adjustments would pass constitutional muster.

Scrutinizing the statute's legislative history, the lower court had also found that the legislature's asserted purpose of protecting decorum at the polls was in fact a pretext, and that the true purpose of the ban was to prevent the broadcasting of early election returns, which some state officials believed might influence voter turnout. The court rejected such a "general interest in insulating voters from outside influences" as "insufficient to justify speech regulation" and "impermissible."³⁹ The appellate court cited *Mills v. Alabama*,⁴⁰ in which the U.S. Supreme Court had struck down a criminal statute forbidding anyone from electioneering on election day as applied to the prosecution of a newspaper for endorsing a candidate for president in an election day editorial.⁴¹ Washington State's statute also flunked the strict scrutiny test because its broad reach effectively blocked all uses of the exit poll information, such as postelection newspaper stories or analyses by scholars.⁴²

In his concurring opinion, Judge Stephen Reinhardt emphasized that it was the public dissemination of the exit poll information, not the individual discussions or newsgathering, that was the core First Amendment activity warranting the utmost protection. Because a "major purpose" of the First Amendment is "to protect the free discussion of governmental affairs" and ensure an "informed" public debate on politics, such a purpose would be "meaningless if the media were not allowed to obtain the information, including information of the type yielded by exit polls, on which such debate turns." Exit poll information must be protected because the data "provide(s) information not only on the outcome of the election but also on why people vote the way they did."⁴³

The conclusions of *Daily Herald v. Munro* are echoed by other courts that have struck down similar statutes. Such statutes have been found to be unconstitutional because they are content-based restrictions requiring strict scrutiny, because they impermissibly restrict the

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The First Amendment

DEBORAH J. MATTIES

Now that the 2000 presidential election has finally been decided, attention may shift from Florida to California, where state action against vote-trading Internet websites promises to be a particularly important First Amendment battleground.

During the presidential campaign, many supporters of Vice President Al Gore worried that the rising popularity of third party candidate Ralph Nader would siphon votes from Gore and hand the presidency over to George W. Bush. Partly in response to James Raskin's article that appeared in the online magazine *Slate* on October 24, 2000, several so-called Nader Trader sites popped up during October 2000. Using such catchy names such as voteswap.com or votexchange2000.com, they tried to increase the number of votes for Green Party candidate Nader (in order to secure federal funding for 2004 for the Green Party) while keeping George W. Bush out of the White House.

The mechanisms among the sites varied, but they usually had an interactive component that allowed the visitor to submit demographic information and presidential voting intention. If the visitor lived in a swing state and wanted to vote for Nader, the system searched for another visitor who lived in a "safe" state and wanted to vote for Gore. The site sent both visitors an e-mail that informed them of each other's e-mail address and encouraged them to discuss their voting preferences in the upcoming presidential election.¹

The Nader Trader sites also contained political content and links to other campaign and political sites. They explained how the Electoral College works and made projections regarding how electors from certain states would vote based on current polling data. Whether visitors signed up to be matched with other voters or actually had made a pledge with other voters,

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Secretary of State, and Nader Trader Websites

they were confronted with information about the impact of their votes in the presidential election.

California Shuts Down the Sites

Approximately one week before Election Day, as the number of daily visits to the Nader Trader sites was increasing exponentially, California Secretary of State Bill Jones sent the following letter to the operators of voteswap.com:

Your website specifically offers to broker the exchange of votes throughout the United States of America. This activity is a corruption of the voting process in violation of the Elections Code sections 18521 and 18522 as well as Penal Code section 182, criminal conspiracy. . . . As the Chief Elections Officer of the State of California, I demand that you end this activity immediately. If you continue, you and anyone knowingly working with you may be criminally prosecuted to the fullest of the law.¹

voteswap.com received the letter, its operators and those of votexchange2000.com and several other similar sites shut down their sites' operational features. Visitors to votexchange2000.com were greeted with the message, "We have been forced to shut our service down. Click [here](#) to read why," which led to the following explanation:

We're sorry, but we have had to disable the operative part of the website under threat of prosecution from the state of California. While we are all in favor of changing the way the electoral process works, we are certainly not in the business of breaking the law.

We suggest that you reach out yourself to friends and relatives in other parts of the country to arrange your own private vote exchange. We will be unable to arrange such an exchange. In keeping with our privacy policy, we have deleted the email addresses of those who have already been paired up. All email addresses we have will subsequently be deleted.

A few days later but still before the election, the American Civil Liberties Union of Southern California (along with the plaintiffs, the operators of votexchange2000.com) filed a complaint and ex parte application for a temporary restraining order in the U.S. District Court for the Central District of

California.³ In essence, the complaint alleged that the secretary of state's action amounted to a prior restraint on speech, and asked the court to restrain the secretary's threat of prosecution so that the operators of Nader Trader sites could make their sites operational again.

Political Speech and the First Amendment

The ACLU argued that the Nader Trader sites contain only pure political speech, and that such speech, when found on the Internet, is entitled to the most stringent constitutional protection under the First Amendment and the Supreme Court's decision in *Reno v. ACLU*.⁴ The plaintiffs also argued that the pledges to vote made as a result of participation on Nader Trader sites also were pure political speech because the promises made by alleged voters are unverifiable and unenforceable, and therefore, merely hortatory.

The court allowed the defendant to file an opposition before ruling. In his legal response, the secretary of state failed to address the ACLU's First Amendment arguments. Instead, he argued that he had no desire to interfere with "expressive activities" on the Internet, but that he objected to the specific activity of bartering, exchanging, or swapping votes. The secretary of state argued that he merely expressed his legal opinion to the persons operating voteswap.com, whom he believed were engaged in that activity.

The secretary of state noted his lack of authority to prosecute offenders of laws, but claimed to be empowered to investigate possible illegal conduct (in this case, in response to complaints), to opine as to the legality of actions taken in the state, and to make referrals to state prosecutors. The secretary of state, although acknowledging that he had written the operators of voteswap2000.com in response to complaints about that website, argued that his office had received no complaints about the plaintiffs and that he had sent no letter to the operators of votexchange2000.com regarding possible illegal activity. In

contrast, he argued, he did review another site, winwincampaign.org, on the basis of a complaint. Because he did not find that winwincampaign.org was offering to broker the sale or trade of votes, he did not send a cease-and-desist letter to its operators.

The plaintiffs objected in their reply brief that the standard for a prior restraint of speech was met, despite the secretary of state's lack of direct authority to bring legal action against the operators of Nader Trader websites. Moreover, the operators of the plaintiff website, although they had not received a cease-and-desist letter, were engaged in an activity almost identical to that of the operators of the site that was targeted by the secretary of state. Thus, they felt the same threat of prosecution as did the operators of voteswap.com.

The day before the election, the district court denied the application for a temporary restraining order without comment.

Whither Vote Trading?

Since Election Day, the plaintiffs have amended their complaint to add claims under the "dormant" Commerce Clause and under the Equal Protection Clause, and they have amended their requested relief by seeking monetary damages. The case remains pending in the Central District of California.

The opposition of the secretary of state and the summary decision of the district court left many First Amendment issues, notably Free Expression and Association Clauses, unaddressed.

Neither the defendant nor the court addressed the question of whether the websites at issue were engaged in the illegal bartering of votes. The question would likely include a discussion of whether the mechanism on the site was conduct or protected speech. To answer this question under the specific California statutes, a court would need to determine whether the unenforceable and unverifiable pledge to vote is an "other consideration" under California statute that could induce another voter to

vote for a particular candidate. The plaintiff in the case rightly conceded that to offer to give money in exchange for a vote would be illegal under federal law and most state statutes. However, it might be hard to measure any tangible value to the voter who receives an unenforceable and unverifiable promise from another voter.

Even if a promise or pledge to vote did have measurable value, the usual detrimental effects of votes given for traditional consideration (such as money or position) are certainly absent. A wealthy voter has no advantage over a poor one when it comes to trading a vote. A genuine trade could occur only once, but multiple trades could be attempted by the rich and poor alike. The potential for fraud and abuse, certainly present when a trade of votes is contemplated, is no greater than if a voter bases his or her choice upon an unverified statement about a political candidate or the candidate's views.

Many in the press have compared individual vote swapping to logrolling in state and federal legislatures. Why, they say, is it impermissible for two voters to vote in a way that advances their collective desires when legislators in California and elsewhere routinely agree to vote for a bill that they do not support in return for a promise by the bill's sponsor to vote for a bill that they do support? "Logrolling practices are well-known, and have never been thought to be constitutionally proscribable."¹

Prior Restraint of Speech

If the district court accepted the secretary of state's apparent argument that his actions did not amount to a prior restraint of speech, it did so with no explanation. The case cited by the plaintiffs in their reply brief, *Bantam Books v. Sullivan*,² also involved an opinion by a nonprosecutorial officer of the state. In *Bantam Books*, the official's opinion that certain expression was illegal obscenity was considered by the court to be a threat of prosecution or blacklisting, despite that officer's lack of actual authority to prosecute. A more recent case cited by the plaintiffs, *Culinary Workers v. Del Papa*,³ involved a letter from the attorney general to a union warning it of possible violations of state law. Again, despite the attorney general's protests that he had no authority to prosecute the union under the statute cited in the letter, the court held

that the letter was a sufficient threat to give the union a basis to seek redress in the courts.

The secretary of state also ignored the restraint on speech that his letter may have imposed upon voters who had used or heard about the site or similar sites. These voters, who joined the ACLU's suit, alleged in the complaint that they had hoped to access the Nader Trader websites to make contact with other voters who shared their political concerns. These voters alleged that, after the secretary of state's actions, they were afraid of prosecution by the state, and that, as a result, the state kept them from exercising political speech and associational rights.

Intimidation of Voters?

Even if it were proven that the secretary of state's action and California law did place a prior restraint on speech, the secretary of state would still be able to argue that this restraint was narrowly tailored to achieve the compelling state interest of preventing coercion or intimidation of voters. As the plaintiffs pointed out in their brief, a limit on electioneering within 100 feet of a polling place has been held to be a narrowly tailored remedy to achieve this interest.⁴

It is unlikely that the state would demonstrate that the vote swapping sites presented the same level of intimidation or coercion as face-to-face electioneering at the entrance to a polling place. Voters, while compelled in most cases to go to a polling place to vote, are not required to visit a vote swap website or even to discuss voting preferences prior to the election. Moreover, even if a voter voluntarily visited a Nader Trader website, was introduced to another voter who wanted to make a voting pledge, and made such a pledge with that other voter, an anonymous and distant pledging partner would not present the same face-to-face coercion present at a polling place.

Regardless of how vote swapping sites are judged by the courts under the Constitution, many citizens will object to the idea of swapping votes on the ground that such an action is immoral, irresponsible, and subversive of the electoral system. The media reports and popular discussions in Internet chat rooms thus far regarding the Nader Trader sites have focused not on the legal issues involved, but rather on the prudence and implications of engaging

in the activity. Supporters of the Nader Trader sites' legality should find this debate healthy because it reinforces the First Amendment principles that they believe are embodied in the vote swapping process itself. ☐

Endnotes

1. A message from one of the Nader Trader websites might have said:

We have located someone who would like to swap votes with you. You have indicated you are a Gore supporter from a blow-out state (D.C.) who is willing to vote for Nader if a Nader supporter in a swing state votes for Gore.

Vote Swapper #3471 from California has agreed to vote for Gore in exchange for you voting for Nader. Of course, remember that this is just a friendly agreement, and you are taking their word that they will follow through. We encourage you to contact this person, their name is [first name] and their email address is [name]@hotmail.com.

If you change your mind and would like to opt-out or if you are unhappy with your partner, use the link below: [link]

2. CAL. ELECTION CODE section sign (twice) 18522-18522 Section 18521 provides, in relevant part, that

(a) person shall not directly or through any other person receive, agree, or contract for, before, during, or after an election, any money, gift, loan, or other valuable consideration, office, place, or employment for himself or any other person because he or any other person: (a) Voted, agreed to vote, refrained from voting, or agreed to refrain from voting for any particular person or measure . . . (d) Induced any other person to . . . (3) Vote or refrain from voting for any particular person or measure.

3. *Porter v. Jones*, No. 00-11700 RJK (C.D. Cal. 2000).

4. 521 U.S. 844, 870 (1997).

5. Memorandum in Support of Plaintiffs' Application for a Temporary Restraining Order at 15. See also Richard L. Hasen, *Vote Buying*, 88 CAL. L. REV. 1323, 1338-48 (2000).

6. 372 U.S. 58 (1963).

7. 200 F.3d 614 (9th Cir. 1999).

8. See *Burson v. Freeman*, 504 U.S. 191, 198-99 (1992). In *Burson*, the Court balanced the right to free expression with the right to vote, and held that the state has compelling interests in (1) "protecting the right of its citizens to vote freely for the candidates of their choice," and (2) protecting "the right to vote in an election conducted with integrity and reliability," which are advanced by the narrowly tailored restriction on electioneering within 100 feet of a polling place. The case also provides a thorough history of the evolution of the secret ballot and other measures taken in the United States and abroad to prevent fraudulent elections.

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ht to gather news, and because impermissibly restrict the public's right to talk about politics with each other and pollsters.⁴⁴

Some recent U.S. Supreme Court decisions, however, signal that the Court has weakened the traditional First Amendment protections for speech in public streets, particularly on election day near the polls. In 1992, the Supreme Court voted five to three (with Justice Thomas abstaining) to uphold a Tennessee ban on all campaign activities within 100 feet of the polls in *Burson v. Freeman*.⁴⁵ With the caveat that it was a "rare case," Justice Blackmun, writing for the plurality, deemed the statute to be a content-based restriction that survived strict scrutiny because there was a compelling state interest in remedying a history of voter intimidation and fraud outside the polls. In language that is perhaps ominous for First Amendment protection of exit polling, the Court stressed that "the link between ballot secrecy and some restricted zone surrounding the voting" was not merely timing—it is content. The only way to preserve the secrecy of the ballot is to limit access to the area around the voter.⁴⁶

Writing for the dissent, Justice Stevens noted that there had been no signs of voter fraud and intimidation since the 1880s, and that the plurality "confused history with necessity" and "blithely dispensed with the need for factual findings" of alleged voter intimidation and fraud. The dissent cited the exit poll decisions by the Florida Supreme Court and lower federal courts, noting that the courts had invalidated similar restrictions on exit polling because "careful fact-finding" revealed no evidence of voter intimidation, and therefore, such prohibitions were not "necessary."⁴⁷

This year, a split Court voted five to four to uphold a Colorado abortion clinic statute in *Hill v. Colorado*. The statute makes it a crime to approach within eight feet of a person who is entering a health care facility and communicate in any fashion without consent. Justice Stevens found the statute to be a content-neutral statute in terms of time, place, and manner that was justified by the patients' interests in access to the clinic and in privacy—"the unwilling listener's interest in avoiding unwanted communication."⁴⁸

The dissenters argued that the statute was clearly a content-based restriction that could not survive strict scrutiny. Suggesting the "deck seem[s] stacked," Justice Scalia denounced the decision as replacing "(u)ninhibited, robust and wide-open debate" with "the power of the state to protect an unheard of 'right to be left alone' on the public streets."⁴⁹ In only slightly more moderate tones, Justice Kennedy stressed the First Amendment protection for the "concept of immediacy, the idea that thoughts and pleas and petitions must not be lost with passage of time," arguing that for the antiabortion speech to be "effective," it must be allowed at the time the decision is about to occur.⁵⁰

* Although *Burson* and *Hill* suggest that exit poll restrictions short of an outright ban might receive some support in the U.S. Supreme

Court as necessary to protect the compelling interest of ballot secrecy, the Court is still likely to strike down such content-based statutes. Exit polling is conducted after a citizen has voted, and voter intimidation or fraud is no longer a danger. Overbearing behavior on the part of pollsters can be regulated by a more narrowly tailored restriction. The immediacy of the speech in exit polls is compelling: voters are readily available, their recollections are fresh, and the news is hot. Even more important, exit poll restrictions inhibit speech and information related to the workings of government and politics, a core First Amendment value implicating a broader informed citizenry. In *Hill*, the speech was aimed at persuading individual patients to change their minds about personal medical procedures. The media's First Amendment interest in gathering news was not a factor in either *Burson* or *Hill*. This newsgathering interest, both in the outcome and the reasons for the vote, also would weigh in favor of striking down exit poll restrictions.

The Pledge

In 1985, Congress decided on a new avenue of attack. Both Al Swift, D-Wash., chairman of the House Task Force on Elections, and William M. Thomas, R-Cal., the committee's ranking Republi-

can, had a vested interest in trying to keep the networks from doing anything that might possibly discourage voter turnout in their states. The pair decided the best way to obtain cooperation from the networks was to forge a voluntary agreement with them. Congress passed a House Concurrent Resolution asking the networks to voluntarily refrain from broadcasting election projections in each state until all of its polls had closed.⁵¹ Congressional hearings were held, and network officials pledged not to broadcast the outcome in any particular state until its polls were closed.⁵² But this agreement left room for maneuvering. In fact, the networks had agreed to refrain from making their projections in any one state until all or most of that state's polls had closed.⁵³ Thus, contrary to some reports, the networks did not

This strange, informal agreement known as "The Pledge" is arguably just a nonbinding gratuitous promise.

violate their agreement when they announced that Gore had "won" Florida at 7:50 p.m. EST, because most of the state's precincts had closed by that time.

Congressman Tauzin, who chairs the Subcommittee on Telecommunications, Trade and Consumer Protection, wants to revise the agreement so that the networks agree to delay projecting the winner of the presidential contest in each state until all of the state's polls have closed. ABC and Fox reportedly have already agreed to Tauzin's request.⁵⁴

This strange, informal agreement between Congress and the networks, known as "The Pledge," is arguably just a nonbinding gratuitous promise. Tauzin has "no intent to enforce it";⁵⁵ and in fact, it seems unlikely that Congress could lawfully enforce the agreement.⁵⁶

Unconstitutional Congressional Hearings?

Congressional hearings pose a series of potential constitutional problems. To be sure, Congress has wide latitude to hold hearings and subpoena witnesses. Courts give enormous deference to the activities of Congress and would be loath to issue an injunction prohibiting

the legislative branch from holding public hearings and launching investigations. But some courts have suggested that congressional hearings and investigations could be limited if Congress acts outside its "legitimate legislative sphere," and if the First Amendment interests outweigh the asserted congressional interests.⁵⁷

Judge David Bazelon of the D.C. Circuit suggested in a 1975 law review article that the use of "lifted eyebrow" tactics by Congress to pressure the broadcast media, particularly through the use of threats of action by the FCC or other federal regulators, raises "serious issues."⁵⁸ In a case directly on point, a federal district judge in California invalidated a "family viewing policy" that had been adopted by broadcast networks after Congress held a series of public hearings to limit violent and sexually oriented materials. The district court found in *Writers Guild of America, West v. FCC* that the FCC's use of threats of more public hearings and other measures to coerce the networks into adopting the "self-regulatory reform" was "backroom bludgeoning" that violated the First Amendment.⁵⁹

Similarly, in *Bantam Books, Inc. v. Sullivan*,⁶⁰ the U.S. Supreme Court found that the use of a Rhode Island advisory commission to inform book stores of which books it considered to be "objectionable," coupled with warnings that the committee could trigger obscenity prosecutions by local police, was a form of "informal censorship" and intimidation that violated the First and Fourteenth Amendments.⁶¹ In one of the most unusual First Amendment opinions to date, District of Columbia District Judge Gerhard Gesell issued a permanent injunction barring the publication of a congressional report that he found was written "solely for the sake of expos[ing] or intimidat[ing]" progressive political groups, ranging from the Black Panther Party to Students for a Democratic Society, and had "no relationship to any existing or future proper legislative purpose." The court in *Hentoff v. Ichord*⁶² declared that it was in no way enjoining any member of Congress from speaking and used "caution and great deference." But the court lifted the injunction because the report "obscures the legislative function of Congress" and would "inhibit free speech and assembly."⁶³

In statements about the upcoming congressional hearings on network election reports, Tauzin's press secretary, Ken Johnson, has stressed repeatedly that Congress is not embarking "on a witch hunt" and is not considering any legislation to curb network behavior. But when asked what possible enforcement tools are available to Congress when it cannot constitutionally pass a law banning or delaying the broadcast of exit poll information or predictions, Johnson replied, "Oh, we'll just see them in front of the FCC."⁶⁴ He laughed and said he was "just joking," but it is doubtful that the networks would see the humor.

In fact, a Washington, D.C., law firm has filed a formal complaint with the FCC seeking an investigation of the networks for their election night errors and asking the commission to consider sanctions "up to and including" license revocation. The law firm, which filed the complaint on behalf of itself, wants the FCC to investigate whether the networks failed to act "in the public interest," which is a requirement of an FCC license renewal under 47 U.S.C. § 309(a).⁶⁵ The firm recently won a D.C. Circuit decision ordering the commission to consider a citizen's group's claim that CBS's 60 Minutes aired an allegedly "distorted" report on the Ukraine. CBS has vigorously denied the claim.⁶⁶

Newsgathering Privilege

Congress could possibly run afoul of the First Amendment by asking questions and demanding unpublished material that invade the networks' behind-the-scenes newsgathering practices and editorial decisions. Most of the courts throughout the country have recognized a qualified privilege of journalists to refuse to disclose unpublished materials or testify about newsgathering activities. The privilege applies in both civil and criminal cases, even when there is no traditional confidential source to protect. The federal reporter's privilege can be overcome only where the news organization has unpublished material that is (1) highly material and relevant, and critically needed, (2) disclosure would not unduly intrude into protected First Amendment interests, and (3) the information is not available from other sources.⁶⁷

Whether the reporter's qualified privilege also applies to congressional inquiries poses a fundamental question

about the source of the reporter's privilege. If it is constitutionally required, Congress would be required to observe it. If it is recognized only at common law, Congress may not be required to recognize it. According to a recent Second Circuit decision, the question of the source of the privilege is still undecided, awaiting a confrontation with Congress to bring the question to the fore.⁶⁸

In his letter to the networks, Congressman Tauzin asks, "What relationship and data sharing does your organization have with VNS and what analysis in-house or otherwise is used to project a winner in a State?" Another question is, "Did your organization use different models, standards or timing to call the projected winner in Massachusetts, Texas, Virginia, Georgia, California or Florida?"⁶⁹ According to the congressman's office, all of the networks responded to his letter, although some have simply said they are conducting an internal investigation without answering all of his questions.⁷⁰

Possible Network Responses

Network officials could arguably refuse to answer such questions by saying that such questions are not material or relevant to potential legislation that might be considered by Congress (i.e., to institute uniform national polling hours), and that disclosure would unduly intrude on protected First Amendment interest in uninhibited, uncensored media reports on elections. In 1971, CBS challenged the legality of a congressional investigation into its documentary, "The Selling of the Pentagon," and refused to comply with a congressional subpoena for outtakes from the documentary that was critical of the Pentagon. CBS contended that the material was privileged under the First Amendment. A congressional committee recommended that CBS be cited for contempt of Congress, but the full House voted down the proposed contempt citation.⁷¹

In 1992, when the Senate launched an investigation to find out who leaked Anita Hill's sexual harassment allegations against Supreme Court nominee Clarence Thomas, the special counsel subpoenaed reporters Nina Totenberg of National Public Radio and Timothy Phelps of *Newsday*. Both refused to reveal their sources, saying the information was protected by the First Amendment. The special counsel then subpoenaed

mailed the reporters' home phone records, sparking media protests. Ranking member [redacted] Senate Rules Committee indicated said the subpoenas would not be enforced, and the investigation concluded at a cost of \$550,000 without producing any information on the leaks.⁷² Senator Ted Stevens of Alaska noted at the time that there was "no legal precedent dealing specifically with the apparent conflict between freedom of the press guaranteed by the First Amendment and Congress's inherent constitutional power to compel testimony and documents in the pursuit of an investigation," but Stevens also hailed the decision to drop the subpoenas as a move that "affirms the First Amendment, affirms the role of an independent press in a free society and affirms the Senate's commitment to freedom of inquiry and due process. . . ."⁷³

The U.S. Supreme Court has issued various opinions on whether private citizens can assert the First Amendment as the basis for refusing to answer questions from Congress. During the height of the nation's anticommunist fervor, the Supreme Court voted five to four to uphold a contempt of Congress conviction in *Barenblatt v. United States*,⁷⁴ finding that the congressional need for information about communist activities in education outweighed First Amendment interests.

However, in another five-to-four opinion just a few years later, the Court issued an opinion that was more protective of the First Amendment in *Gibson v. Florida Legislative Investigation Committee*.⁷⁵ The Court held that a legislative probe that intrudes into areas protected by the First Amendment must demonstrate an "overriding and compelling interest" and a "substantial" nexus between the information sought and the compelling interest.⁷⁶ The Court made it clear that it would closely scrutinize any legislative investigation implicating the First Amendment. "It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as freedom of speech or press, freedom of political association, and freedom of communication. . . ."⁷⁷ The Court found that Florida legislature's contempt citation against an NAACP official for refusing to produce membership lists for a

communism investigation was unconstitutional because of the lack of evidence of any link between the NAACP branch and the Communist Party.⁷⁸

In the upcoming Tauzin investigation, network officials might decline to answer at least some questions posed by Congress, asserting that the questions seek privileged information about unpublished and proprietary data used by the networks in reporting on election returns. Moreover, the information about network practices has little, if any, connection to any potential legislation.

Conclusion

The networks, already stung by their own flip-flops on election night, may not want to risk the potential public backlash by protesting the upcoming congressional hearings or protesting their agreement with Congress to withhold information until polling places close. But if the networks chose to do so, they would have some legal support to back up their challenges to congressional authority to pry into their news-gathering activities, and to use coercion to impose what would be unconstitutional censorship if the voluntary agreement were codified as law.

Now that we know that our ballot counting system is deeply flawed by machine and human errors, the networks' exit poll information serves as a check on the accuracy of state election returns. Whether the network projections were accurate or not, it is apparent that the real problems were caused by machine malfunctions, confusing "butterfly" ballots, and other voter errors. This is not the time to permit government to censor independent sources that measure the will of the voter. □

Endnotes

1. Anthony M. Barlow, *Restricting election day Exit Polling: Freedom of Expression v. the Right to Vote*, Comment, 58 U. CIN. L. REV. 1003, 1012 n.62 (1990). See also Note, *And the Winner Is . . . Election Day Projections and the First Amendment*, 4 CARDOZO ARTS & ENT. L.J. 373 (1985); Note, *Early Election Projection, Restrictions on Exit Polling, and the First Amendment*, 3 YALE L. & POL'Y REV. 210 (1984); Note, *Exit Polls and the First Amendment*, 98 HARV. L. REV. 1927 (1985); Note, *Restricting the Broadcast of Election-Day Projections: A Justifiable Protection to the Right to Vote*, 9 U. DAYTON L. REV. 297 (1984).

2. Transcript of Nov. 9, 2000, news conference by Billy Tauzin, R-La., FDCH Politi-

cal Transcripts, available on LEXIS-NEXIS (Tauzin News Conference).

3. Letter from W.J. "Billy" Tauzin, Member of Congress, to Michael Eisner, The Walt Disney Co. (Nov. 9, 2000) (on file with authors). Tauzin sent copies of this letter to the chiefs of NBC, ABC, CBS, Fox, Associated Press, and CNN. Telephone Interview with Ken Johnson, press secretary to Congressman Tauzin (Dec. 4, 2000) (Johnson Interview). Some of the questions posed by Tauzin in his letter to the networks include: "What relationship and data sharing does your organization have with VNS and what analysis in house or otherwise is used to project a winner in a state?"; "What processes are employed by your organization when a discrepancy exists between VNS data and in house election data?"; "Does your organization use the same statistical models for projecting a winner in each state?"; "Did your organization use different models, standards or timing to call the projected winner in Massachusetts, Texas, Virginia, Georgia, California or Florida?"; "Does your organization still comply with the 1985 congressional agreement?"

4. Johnson Interview, *supra* note 3. Johnson was not more specific about any possible legislation to nationalize polling times.

5. *NBC and Fox May Drop VNS, Law Firm Seeks FCC Investigation*, COMMUNICATIONS DAILY, Dec. 1, 2000, available on Westlaw, 2000 WL 4696763.

6. MARTIN PLISSNER, *THE CONTROL ROOM: HOW TELEVISION CALLS THE SHOTS IN PRESIDENTIAL ELECTIONS* 69 (1999).

7. *Id.* at 73, 77.

8. *Id.* at 81-85.

9. *Id.* at 84; Barlow, *supra* note 1, at 1.

10. Barlow, *supra* note 1, at 1.

11. PLISSNER, *supra* note 6, at 84.

12. *Id.* at 87.

13. *Id.* at 91-100.

14. Martha T. Moore, *TV, Newspaper got big one wrong: Vote projections err one way, then the other*, USA TODAY, Nov. 9, 2000.

15. Tauzin News Conference, *supra* note 3, at 5. The complaints were bipartisan, however. The Democrats contend that the subsequent erroneous call for Bush led to Gore's telephone call conceding to the Texas governor, Gore's awkward retraction to Bush, and Bush's sense that his victory had been snatched out from under him. Richard Morin, *Bad Call in Florida*, WASH. POST, Nov. 13, 2000.

16. Interview with Martin Plissner, Dec. 6, 2000.

17. Tauzin News Conference, *supra* note 3, at 5.

18. *Id.* at 1.

19. *Id.* at 3.

20. PLISSNER, *supra* note 6, at 84.

21. Fred Rothenberg, *Source Says Net-*

works Agree to End Exit-Poll Characterizations, Associated Press, Jan. 17, 1985.

23. Associated Press, *Group Sues over Gore Projections*, WASH. POST, Nov. 14, 2000.

24. Associated Press, *Breakup of Voter News Service Urged*, WASH. POST, Nov. 28, 2000. The group, American Antitrust Institute, said that the group should be broken up because its pooled information caused all the networks to make the same mistake.

25. *Group Sues over Gore Projections*, *supra* note 22.

26. Jack Shafer, *All the News That's Fit to Suppress*, WALL ST. J., Mar. 15, 2000.

27. 248 U.S. 215 (1918).

28. National Basketball Ass'n and NBA Properties, Inc. v. Motorola, Inc., 105 F.3d 841, 845 (1997).

29. Barlow, *supra* note 1, at 1012 n.62.

30. PLISSNER, *supra* note 6, at 85-86.

31. Nebraska Press Ass'n v. Stuart, 427 U.S. 538, 558-59 (1976) ("[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity").

32. New York Times Co. v. United States, 403 U.S. 713, 714 (1971) (per curiam). See also Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103-04 (1979) (government statute punishing newspaper for publishing truthful information lawfully obtained about matter of public significance violates the First Amendment "absent a need to further a 'test of the highest order'"); Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 838, 843 (1978) (court must not accept legislature's finding that disclosure of truthful information about secret court proceedings constituted a "clear and present danger" to the administration of justice; state may not criminally punish publication of lawfully obtained information about public officials in their public duties).

33. Elrod v. Burns, 427 U.S. 347, 373 (1976).

34. Barlow, *supra* note 1, at 1011-12 & nn.57-61; James R. Dickenson, *Networks Limit Exit-Poll Data*, WASH. POST, Jan. 18, 1985.

35. 838 F.2d 380 (9th Cir. 1988).

36. *Daily Herald*, 838 F.2d at 382.

37. *Id.* at 384.

38. *Id.* (quoting 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.")).

39. The Court did not explicitly find that the state's interest was compelling, but did so impliedly.

40. *Daily Herald*, 838 F.2d at 387.

41. 384 U.S. 214, 218-20 (1966).

42. *Mills*, 384 U.S. at 218-20.

43. *Daily Herald*, 838 F.2d at 387-88.

44. *Id.* at 389-90. Judge Reinhardt cites Owen L. Fiss, *Why the State?*, 100 HARV. L. REV., 781, 785-86 (1987), for his conclusion

that the state has an "affirmative duty" to promote public debate on government.

45. See CBS v. Smith, 681 F. Supp. 794, 803 (S.D. Fla. 1988) (striking down exiting poll restriction because "newsgathering is a basic right protected by the First Amendment"); Journal Broadcasting of Kentucky, Inc. v. Logsdon, 1988 U.S. Dist. LEXIS 16864, 4 (W.D. Ky. 1988); NBC v. Colburg, 699 F. Supp. 241, 242 (D. Mont. 1988). ("[g]athering and dissemination of information concerning why and how people vote constitutes speech which is protected by the First Amendment"); NBC v. Cleland, 697 F. Supp. 1204, 1210 (N.D. Ga. 1988) ("because [the statute] restricts the freedom to speak about elections, government and politics, the statute strikes at the very core of the First Amendment"); CBS Inc. v. Groves, 15 Media Law Rep. 2275, 2278 (D. Minn. 1988) (granting preliminary injunction barring enforcement of law restricting exit polls: state's interest in protecting would-be voters from possible discouragement caused by network projections was not compelling interest and not narrowly tailored); National Broadcasting Co. v. Karpan, No. C88-0320-B (D. Wyo. 1988); Firestone v. News-Press Publishing Co., 538 So. 2d 457, 459 (Fla. 1989) (state failed to substantiate claims that exit polling disrupted voting).

46. 504 U.S. 191 (1992).

47. *Burson*, 504 U.S. at 208-09, 210-11.

48. *Id.* at 222-23 (Stevens, J., dissenting).

49. 120 S. Ct. 2480, 2494, 2499 (2000).

Justice Stevens also said that the statute was narrowly drawn, allowing speakers to use their voices, signs, and other forms of communication to reach the patients from outside the "minor place restriction" created by the eight-foot, no-approach zone. *Id.* at 2496-97.

50. *Hill*, 120 S. Ct. at 2503-05, 2515 (Scalia, J., dissenting).

51. *Id.* at 2530 (Kennedy, J., dissenting).

52. Barlow, *supra* note 1, at 1012 & n.63.

53. PLISSNER, *supra* note 6, at 85; Johnson Interview, *supra* note 3.

54. PLISSNER, *supra* note 6, at 85; Johnson Interview, *supra* note 3.

55. David Hatch, *ABC Blinks on Projections; Net Agrees to Wait on Calling Races*, ELECTRONIC MEDIA, Nov. 27, 2000; Johnson Interview, *supra* note 3.

56. Johnson Interview, *supra* note 3.

57. *Id.*

58. Timothy B. Dyk and Ralph E. Goldberg, *The First Amendment and Congressional Investigations of Broadcast Programming*, 3 J.L. & POL. 625, 640-41 (1987). See also Robert Corn-Revere, *Television Violence and the Limits of Voluntarism*, 12 YALE J. ON REG. 187 (1995).

59. David L. Bazelon, *FCC Regulation and the Telecommunication Press*, 1975 DUKE L.J. 213, 215-17 (1975), also dis-

cussed in Corn-Revere, *supra* note 57, at 202-03.

60. Writers Guild of America, West v. FCC, 423 F. Supp. 1064, 1149-53 (C.D. Cal. 1976). Unfortunately, the district court opinion was vacated on appeal on jurisdictional grounds. Writers Guild of America, West v. ABC, 609 F.2d 355 (9th Cir. 1979), 60, 372 U.S. 58 (1963).

61. *Bantam Books*, 372 U.S. at 69. A key factor in the Court's decision was that the commission's notices were followed up by a policeman's visit to the bookstores.

62. 318 F. Supp. 1175, 1182 (D.C. Cir. 1970).

63. *Hentoff*, 318 F. Supp. 1175, 1182 (D.C. Cir. 1970).

64. Johnson Interview, *supra* note 3.

65. *NBC and Fox May Drop VNS, Law Firm Seeks FCC Investigation*, COMMUNICATIONS DAILY, Dec. 1, 2000, available on Westlaw, 2000 WL 4696763; Interview with Arthur V. Belendiuk, Dec. 11, 2000; Complaint (filed with FCC on November 27, 2000) (on file with authors).

66. The D.C. Circuit held that the FCC acted "arbitrarily and capriciously in denying [the] petition without analyzing more precisely the evidence . . . presented" and ordered the agency to set a hearing on the challenge to CBS's license application. *Serafyn v. Federal Communications Comm'n*, 149 F.3d 1213, 1225 (D.C. Cir. 1998).

67. See, e.g., *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

68. See *Gonzales v. NBC*, 186 F.3d 102, 109 n.6 (2d Cir. 1999); see also Laura R. Handman and Rebecca R. Reed, *Reporter's Privilege Under Federal Law Circa 2000 and Beyond*, LIBEL DEFENSE RESOURCE CENTER BULLETIN, 1999 Issue No. 3, Part II, 70-71 (1999).

69. Tuzin Letter, *supra* note 3, at 2.

70. Johnson Interview, *supra* note 3.

71. Dyk and Goldberg, *supra* note 57, at 639-40.

72. Reuters, *Law Firm Paid \$550,000 After Failing to Find Leaks in Thomas Case*, BUFFALO NEWS, Dec. 1, 1992, available on Westlaw, 1992 WL 3673438; *The Senate Plumbers Close Up Shop*, ST. LOUIS POST-DISPATCH, Mar. 28, 1992, available on Westlaw, 1992 WL 3522483.

73. *Misguided Business: Senate Committee Decides to Quit Abusing Reporters*, HOUSTON CHRON., Mar. 28, 1992, available on Westlaw, 1992 WL 11460843; TELEVISION DIGEST, Mar. 30, 1992, available on Westlaw, 1992 WL 2245468.

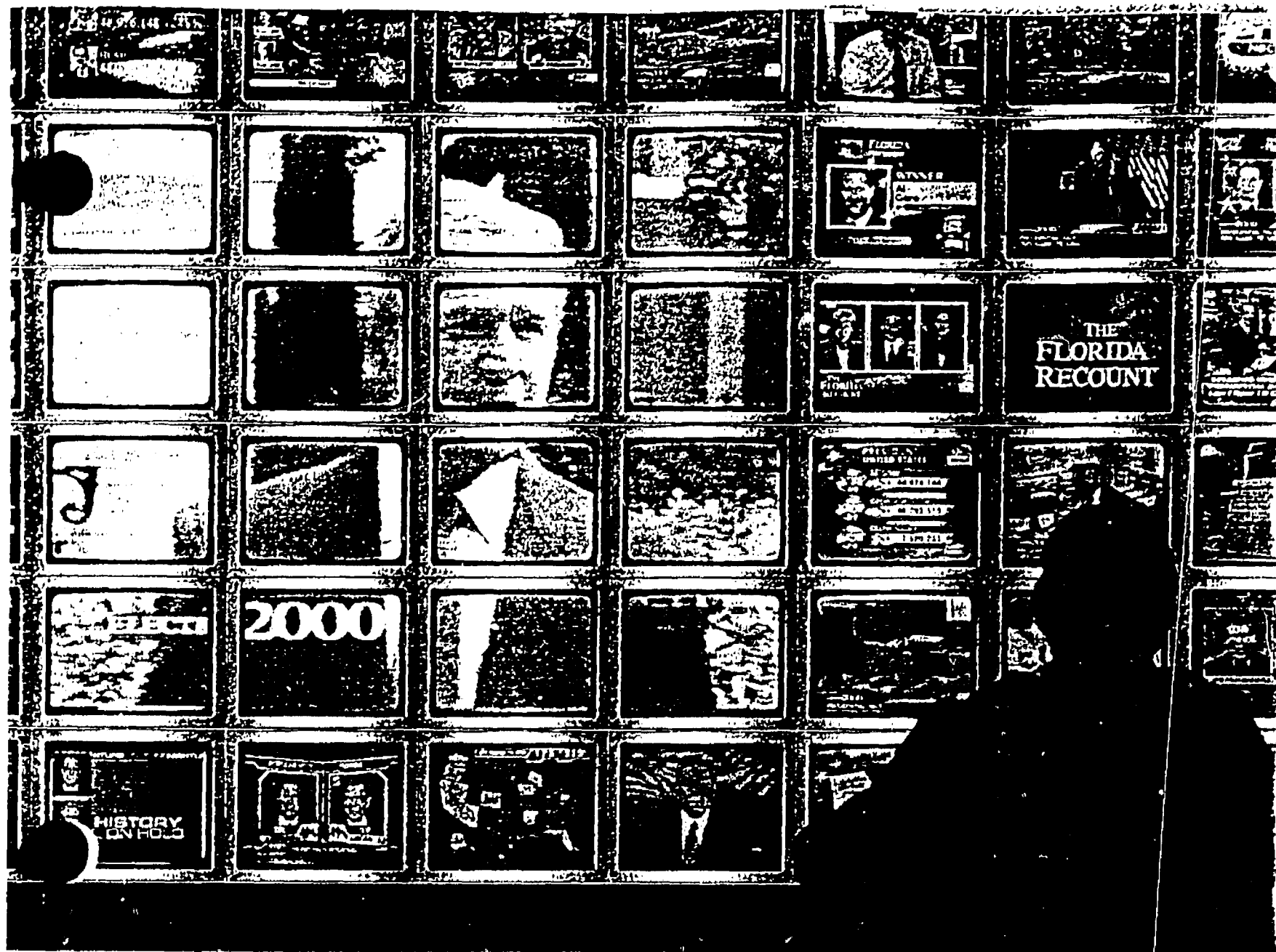
74. 360 U.S. 109, 126 (1959).

75. 372 U.S. 539 (1963).

76. *Gibson*, 372 U.S. at 546.

77. *Id.* (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 245 (1957) (reversing the Florida Supreme Court's finding that the contempt citation was constitutional)).

78. *Id.* at 540-43, 558.



How did we get it

The media's election-night screw-ups resulted in a complex game of finger-pointing. What happened – and how do we avoid it in the future?

By Meredith O'Brien

Some say it was faulty data from the Voter News Service (VNS), which provides the networks and The Associated Press with exit polling and raw vote counts. Some blame Florida for producing flawed vote counts. Still others say that what is being called a night of unmitigated disaster – during what should have been the networks' premier moment – exposed television news organizations' vulnerable underbelly and embodies what's wrong with network news.

The national television networks have been eating a lot of crow for weeks since they blew presidential election night calls twice, once predicting that Vice President Al Gore had won Florida and later prematurely dubbing Texas Gov. George W. Bush president-elect. Both calls were taken back in unceremonious form with network electoral maps shifting the Sunshine State's color from Gore blue to Bush red and

then to an uncertain yellow or gray color like restless chameleons. The graphics, which aired briefly identifying Bush as the next president, also had to be shelved for more than a month until the Florida vote count and the U.S. Supreme Court finally made a Bush victory official.

What happened on election night? How could the networks have gotten not one, but two major calls so wrong? Why the mistakes happened depends largely upon who one asks. Whatever the cause, many agree that the credibility of the networks has suffered. In at least two national polls conducted soon after the election, the public said it disapproved of the way the media handled itself on election night.

But how to avoid the mistakes in the future? The suggestions are plentiful in number, but so far, none have shown any legs.

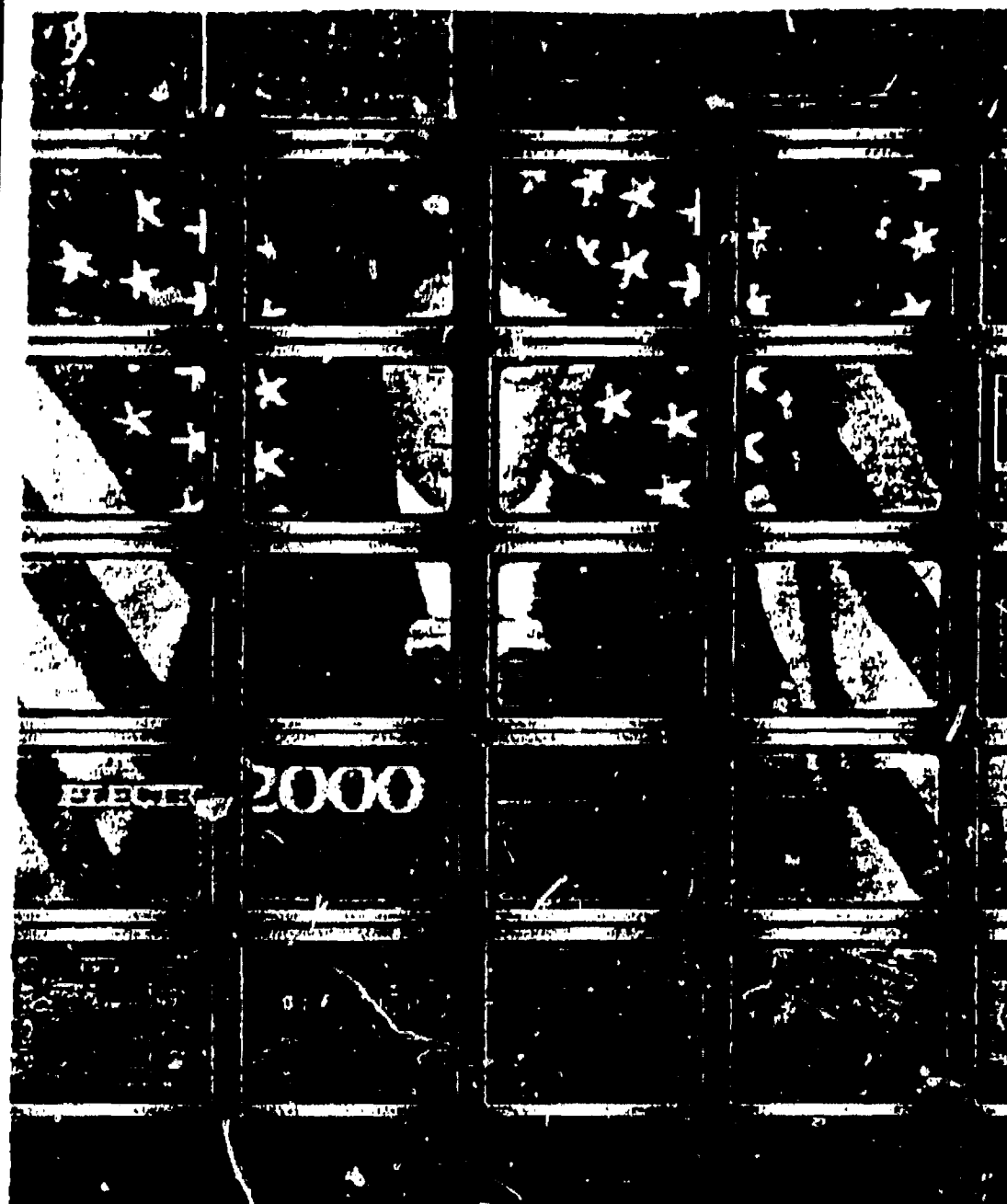
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So Wrong?

DATA

The current hypothesis among those involved with making the network predictions is that the mistakes resulted from a combination of bad data from VNS and the state of Florida.

VNS is the lifeblood of the networks on election night. This service -- a polling consortium headed by ABC, CBS, CNN, Fox, NBC and The Associated Press -- was created in 1990 to save networks money by not having to collect its own individual data. The group conducts its polling around the country and provides its members with the poll results and as raw election data, which the networks and AP draw from to make conclusions and make projections.

An internal report by VNS found a number of problems with the group's data collection methods on Nov. 7. "VNS said it underestimated the number of absentee ballots cast in Florida and the advantage they would give Bush," the

AP reported in late December. The Washington Post characterized the VNS analysis saying: "The group had no reliable way of estimating the number of Florida's absentee ballots in the presidential race, which were almost double what it had expected. What's more, the news service dramatically underestimated the number of Florida votes still uncounted at 2 a.m." The Post also quoted the report -- which has not been released to the public -- as saying that "budget limitations ... have placed heavy burdens on all VNS staff and [have] made the task of covering elections far more difficult than necessary."

When contacted by Quill, Lee C. Shapiro, VNS' director of media services, said: "We are undergoing both internal and external reviews, and at this time we have no comment."

In the meantime, the networks, which live and die by VNS numbers, have been making a plethora of comments -- some made on election

'Let's get one thing straight from the get-go. We would rather be last in reporting returns than be wrong. If we say somebody has carried a state, you can pretty much take it to the bank, book it that that's true.'

CBS ANCHORMAN DAN RATHER ON ELECTION NIGHT 2000

'This where we appear to be folks. CBS News has now, for the second time tonight, pulled back Florida.'

RATHER, HOURS LATER

'... If you're disgusted with us, frankly, I don't blame you.'

RATHER

'What the networks giveth, the networks taketh away.'

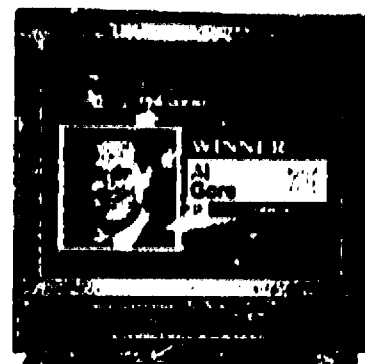
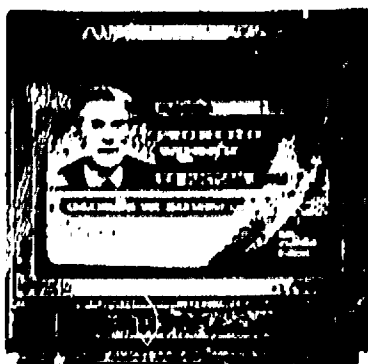
NBC NEWS ANCHORMAN TOM BROKAW

'We don't just have egg on our face. We have omelet all over our suits.'

BROKAW

'Could you pass the crow?'

CNN ANCHORWOMAN JUDY WOODRUFF



'It was an unenviable, naked showcase of what the network news is about right now. The i

night speculating about how Gore created such momentum — they'd like to take back.

The problems started between 7:49 and 8 p.m. on Nov. 7, according to an AP timeline chronicling the mistaken calls. Between those times, all of the members of the VNS consortium — citing VNS projections from exit polling data — declared Gore the winner of Florida. This was crucial because Florida had long been predicted by the pundits as one of the must-win states in order to capture the presidency. With Gore apparently securing Florida, in addition to winning battleground states like Pennsylvania and Michigan, the hopes that Bush could win grew dim. According to several Republican congressmen and the Bush campaign, the first mistaken call of Gore winning Florida — made while polls were still open for 10 minutes in the Florida panhandle — disenfranchised voters, not only in Florida but throughout the western part of the country where polls weren't closed yet.

At around 9:55 p.m., upon reviewing incoming data and receiving complaints from the Bush campaign, the networks began retracting the Gore win in Florida. NBC's director of elections, Sheldon Gawiser, later told the AP that the VNS numbers were skewed because they didn't antic-

ipate the number of absentee ballots and used sample precincts that were "too Democratic."

But the night was far from over. By 2:16 a.m., the Fox News Channel became the first to declare that Bush had won Florida — and the presidency. The rest of the networks, though not AP, made the same call minutes later. AP sent an update at 2:37 a.m. warning that the race was still too close to call. "The pressure to join the parade was enormous, but AP people who know the state of Florida and understood the voting patterns and the tabulations we were seeing held firm, to their great credit," said AP President Louis D. Boccardi in a statement.

Not only did all the networks jump on board naming Bush president, but several newspapers, basing their information on TV broadcasts, made the same leap. The Boston Globe, The New York Times, The Miami Herald, The Philadelphia Inquirer, USA Today and The St. Louis Post-Dispatch were among the publications that told their readers that Bush had won, only to have some of the companies chase down delivery trucks to retrieve the newspapers when the networks pulled back their Bush declarations a little before 4 a.m. Even Gore himself, after seeing the network reports, called Bush to

concede. But, following the networks' lead, he soon called Bush back to retract the concession.

NETWORKS RESPOND

CBS' Dan Rather, who made the early election night promise that CBS would rather be right than first and wrong with a call, later admitted the errors. "We made a mistake," he said on CNN's "Reliable Sources." "We were wrong. We were just flat wrong. CBS News has by far the best record in the business on election nights. And statistically over the years, we've called about, I think, at least 20,000, probably 30,000 races. And I think we've been wrong on 20. But that doesn't excuse what happened the other night."

Most of the fingers have been pointed at VNS. Kathleen Frankovic, CBS' director of surveys, said everything VNS was telling the networks about Gore winning Florida seemed solid. "All of the evidence was pointing toward Gore call, all of it," she told the AP.

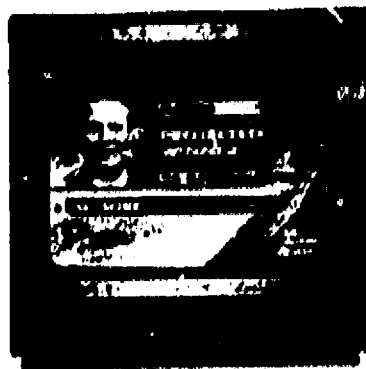
ABC's Sam Donaldson echoed Frankovic's sentiments. "It happened, the old garbage in garbage out, a lot of the information coming to the Voter News Service in Florida," Donaldson said on "Reliable Sources." "There were 121 precincts down there. Forty-five of them had exit polls. These were matched by the computers. The information was called in to New York. And a lot of it turned out to be wrong. And therefore, based on that, we all made our projections."

"We are very disappointed in what [VNS] did," Marty Ryan, Fox News' executive producer for political coverage, also told CNN. "We don't think their work was up to par. And we think something has to be done about VNS, and whether that's restructuring the way it's done, whether it's a technology issue or a sampling issue, something has to be done."

The networks have either released statements or made people available to talk about the mishaps, as well as set up both internal and external review committees to assess where the blame lies. Quill was able to get comments from all except for Fox News and CNN.

In their release, NBC News said it wouldn't renew its membership with VNS "until it is satisfied that VNS has taken the steps needed to ensure the accuracy and integrity of its data."





re blood and bone is not there anymore.' — ALEX JONES

tionally, the network said it would not project a winner until after the last polling in a state.

ABC News' statement also vowed that it would wait until all polls are closed in a given state before making a call. It also called for an outside review of VNS and would "take all reasonable steps to insulate those involved directly making projections from the pressures of competition from other news organizations."

At CBS News, its spokeswoman Sandy Telus was rueful. "We in no way take lightly bad calls on election night," she said, adding that results of their investigation would be made public when it's completed.

In a letter to Louisiana Congressman Billy Ezdin's office, CBS News President Andrew Heyward said the problems with the Florida election weren't limited to VNS errors and luck. He called "a very significant computer error made by the Volusia County [Florida] Elections Department." He also said there were incorrect vote tabulations in Duval County. "We were as good as the information we were getting from the sources we trusted," Heyward wrote. "In this case, that information is not good and neither were we."

Warren Mitofsky, president of Mitofsky International, who advised CBS and CNN on their election night calls, put it more succinctly: "It was a disaster."

But Mitofsky said that bad data, specifically from the state of Florida regarding vote counts, was the root of the problem. "The numbers we were being supplied with were wrong," said Mitofsky, who has been in the business for more than 30 years and is considered one of the founders of exit polling. The entire series of mistakes is erroneously casting a pall over exit polling, he said, adding that VNS has only made one error before, in a 1996 New Hampshire state race. "If this had happened in a minor state, this wouldn't all be going on. But everybody saw the identification of the next president."

While it would be ideal for the networks to collect their own data, it's not realistic, he said.

MPH'S GOT NO CLOTHES

The fact that the networks formed VNS to save money and rely almost exclusively on its

data is indicative of a larger problem with television news, say media critics.

"These mistakes probably would have been avoided 15 years ago," said Tom Rosenstiel, director of the D.C.-based Project for Excellence in Journalism. In recent years, there have been major cutbacks in the networks' polling units, depth of expertise and political reporting staff, he said, coinciding with a shift "toward softer news features."

Alex Jones, director of Harvard's Shorenstein Center for Press, Politics and Public Policy, agreed that the problems go deeper than what happened in Florida. Instead of allocating resources to bolstering bureaus, obtaining and retaining experienced editors and staff and promoting "a culture that is about news," Jones said networks opted to spend money on on-air talent and equipment, making them "a shadow of what they used to be."

Jones said he was shocked when all the networks recanted the initial call for Gore in Florida. To him, that indicated that the networks "had no real basis for making this decision. ... It effectively said to me that the emperor has no clothes."

And to make the mistakes on such a high-profile night, when TV broadcasts are where everyone — including the candidates — turns, was not just bad luck, Jones said.

"It was an unenviable, naked showcase of what the network news is about right now," he said. "The infrastructure blood and bone is not there anymore."

Rosenstiel said he doubts whether there's enough commitment by the networks to spend the money necessary to reinforce their news organizations to try to prevent a repeat of the election 2000 miscalls.

Venerable CBS newsmen Walter Cronkite also weighed in on the election imbroglio and knocked his former profession. "I don't understand the need for this speed, although I was certainly one of the progenitors of the whole idea of exit polling," Cronkite told a West Virginia newspaper. "Nowadays, with the exit polling, we're calling these states so early that there are really some three hours left of voting time on the west coast and it seems to me that very probably it could work just as well to withhold the returns until all the states have voted."

IN BRIEF

NEWSPAPER GROUP PLANS TO KEEP VOTE COUNT GOING

The presidential election had been settled only a week when news organizations started reviewing 6,600 Broward County, Florida, ballots Dec. 18 to try to determine if they had been properly counted in November.

About a dozen reporters, lawyers, a statistician, and county residents Randy and Judy Cernick crowded around tables in a warehouse in Fort Lauderdale as two county employees held up each disputed punch-card ballot for their inspection. The count moved slowly, with 424 ballots tallied over seven hours.

Reporters from The Associated Press, The New York Times, and The Washington Post were conducting a two-day preliminary inspection of the ballots to decide whether a full statewide review would be feasible.

"Our concern is whether a statewide review could be done in the way that it would need to be done," said Kevin Walsh, AP bureau chief for Florida. "While we haven't reached a decision either way, we're continuing to discuss the issue with our members in Florida and across the country," he told the AP.

Others investigating the ballots were The Miami Herald, The Wall Street Journal, Tribune Publishing Co., which represents the Chicago Tribune, The Orlando Sentinel, the South Florida Sun-Sentinel, The (Baltimore) Sun, and Newsday of Long Island.

At a meeting in Washington, D.C., on Dec. 14, other major outlets, including The Washington Post and CNN, discussed joining the effort, which some expect to evolve into a broad consortium.

New York Times Managing Editor Bill Keller said that the paper hopes to put together a pool of wire, print and broadcast news organizations to check out the ballots.

"The rationale is that the ballots are there to be seen, and it would be interesting to take a look," he told Editor and Publisher on Nov. 14. "We're not interested in conducting our own election. We don't plan to call a winner in Florida."

Edward Kosner, The New York Daily News' editor in chief, said in a story published in the News on Dec. 7 that the public's right to know the true election tally outweighs the political ramifications. "Better to know the truth than not," Kosner said, quoting Stanley Walker, famed city editor at the old New York Herald Tribune.

BUSH WINS' HEADLINES BECOME ONLINE COMMODITY

Newspapers that prematurely called George W. Bush the winner of the U.S. presidential election became instant commodities on Internet auction sites on Nov. 8.

The errant headlines served as reminders of the embarrassing "Dewey Defeats Truman" headline in the then-Chicago Daily Tribune in 1948, when Harry Truman had actually beaten Thomas Dewey in the presidential race.

A New York Post edition sporting the headline "Bush Wins!" drew nearly 40 bids on the auction Web site eBay. After starting at \$2, the bidding shot up to more than \$250.

Several thousand copies of various newspapers declaring a Bush victory were up for sale on eBay, including the Akron Beacon Journal, Kansas City Star, New York Post and several papers from Texas, including the Fort Worth Star-Telegram and the Austin American-Statesman.

COVERAGE GAFFES ERODE PEOPLE'S FAITH IN MEDIA

If some people doubted journalists' accuracy and motives in July 1998, when political news stories focused on Monica Lewinsky and presidential honesty, their mood turned far more cynical as they attempted to follow the electoral tangle in Florida.

According to a Gallup Poll of 1,026 adults conducted Dec. 2-4, only 32 percent of the public now think that news organizations "get the facts straight" and 65 percent do not.

Even when taking the three-percentage-point error margin into account, the poll's results indicate that public cynicism about the news media has reached an all-time high since Gallup Polls started asking this question in 1985. A similar Gallup Poll in July 1998 showed that journalists narrowly got the benefit of the doubt on the question of accuracy, 50 percent to 45 percent.

The earlier high point of cynicism in Gallup's polls came in August 1988, which coincided with the political parties' presidential conventions. Then, the "often inaccurate" view outpolled the "facts straight" view 50 percent to 40 percent.

The public seems to agree with Cronkite. A national poll conducted by the Pew Center for People & the Press between Nov. 10 and 12 found that 69 percent of its 1,113 respondents said they felt anger or disappointment with the networks' mistaken calls. Fifty-two percent said the first miscall of Gore winning Florida likely had an effect on how people voted in the western portions of the country. Eighty-seven percent of those polled said they want the networks to wait until "nearly all the votes are counted on election night rather than predicting a winner," according to the center, which noted that 81 percent think the only reason for the projections is for a network to be able to say it was first with the news.

A CNN/USA Today/Gallup poll conducted during the same period found similar results. Fifty-five percent of the 1,014 people surveyed said they disapproved of how the media conducted themselves on election night.

Time magazine Managing Editor Walter Isaacson was even harsher in his assessment. "And it was almost like you were there at a symbolic moment, like, 'Don't trust TV anymore.' They don't because basically, the TV commentators don't trust the viewers," Isaacson told CNN. "They just try to say, 'We'll make a call,' without explaining all the details about it, without being nuanced about it, without giving raw numbers."

CONGRESSIONAL HEARINGS SLATED

Several Republican congressmen took the criticism further. In calling for hearings before the House Telecommunications Subcommittee to determine how the election night projections were made, Rep. Tauzin, R-La., chairman of the subcommittee, said the timeliness with which the networks made their calls is worrisome.

Tauzin's spokesman Ken Johnson said while the hearings—where the networks, AP and VNS are requested to testify—are not meant to be "a witch hunt," there were "inherently biased" calls made on election night for which people need to be accountable.

Tauzin maintains that in every state where Gore won by six or more points, he got an immediate victory call from the networks, while in 11 states where Bush won by similar margins, the calls were delayed, sometimes by extended periods.

"The networks' election night victory calls portrayed a skewed electoral picture," Johnson said, giving the image early in the night of Gore "sweeping to victory." After the Florida call for Gore, Johnson said it appeared to voters that "there was little chance" Bush could win, given Gore victories in Michigan and Pennsylvania.

Despite the vehement protestations of network officials that calling Florida when there were 10 minutes left for voters in the state's panhandle to vote did not drive anyone away from the polls, Johnson said Tauzin has evidence that people did indeed leave the polls because of the

projection. "Whether it was one or 1,000 [voters], the networks did a disservice to the American voters," Johnson said. He cited a study that he says estimates that 10,000 voters went home after the networks called Florida for Gore.

But Harvard's Jones says that the talk of disenfranchisement in the western part of the United States is bunk. "I've never seen any evidence... that calling elections in one state affects another," he said.

In a letter to Tauzin, ABC News said: "Studies raise questions whether projections of winners for some races in some parts of the country affect voters in other parts of the country. This year in particular, the outcome of the presidential election remained entirely uncertain during the approximately two hours that ABC projected that Vice President Gore would prevail in Florida."

CBS' Heyward made the same argument in his letter to Tauzin. "In the case of Florida, it would be extremely difficult to argue any impact on turnout of a call made at 7:50 p.m.," he wrote. "The polls were closed in all but 5.8 percent of the state's precincts, with the rest closing just 10 minutes later."

CBS' chief anchorman concurred.

"For a long time, I thought that there might be that effect," Rather told CNN. "But there has been study after study and there is no empirical evidence, and I say no, zero empirical evidence that it affects that vote."

Regardless of Rather's point of view on whether it has an effect, he, along with his own network, ABC and NBC advocate the establishment of a national poll closing time so that any projections made by the networks would be done after all the polls close.

Tauzin and Congressman Ed Markey, D-Ma., plan to introduce a bill this winter to establish a uniform closing time—9 p.m. for the east, 8 p.m. for the central part of the country and 7 p.m. for the west. Tauzin's spokesman said having the polls open for 24 hours or delaying daylight savings time until after the election could ease the implementation of a national closing time. A previous attempt in the early 1980s to create such a uniform closing time failed.

But Rosenstiel said the most important caveat journalists are missing is that they shouldn't be influencing the way the process works. "The problem is it's not the role of journalists to tell Congress how to set up elections," he said. "It's our job to cover elections as they exist."

Jones said the whole notion of a national poll closing time is a red herring that doesn't get to the heart of what caused the errors on election night in the first place.

"I think they really ought to do some soul searching," he said.

Meredith O'Brien is a freelance writer.

● Election coverage: A major media mistake

allure to act independently on election night leaves news organizations struggling with loss of credibility.

The stage was set. The stakes were huge. Voter interest newly rejuvenated. Election night 2000 was another chance for the national media to reaffirm its central role in our democracy. It was a chance for journalists to wrap themselves in glory, to regain some of their lost credibility, but it didn't turn out that way. It didn't turn out that way because journalists and their institutions did not follow one of SPJ's central ethical tenants — "Act independently."

That command usually means to act independently outside influences. In other words, it means to act independently from other news organizations. SPJ's Code of Ethics goes on to tell us to "remain free of associations and activities that may compromise integrity or damage credibility." Does anyone think that seven wrong calls followed by seven reversals followed by five wrong calls and five reversals helped with our credibility?

The first loss of independence started several election cycles ago when the networks stopped doing individual exit polls. In a cost cutting move a cooperative was formed and over the years what emerged was a group called Voter News Service (VNS). In a stab at continued independence, each of the networks and The Associated Press maintain their own election desks. They get an exit poll, projections and the raw data from VNS and can make their own projections working with their own models and watching key precincts and returns.

The repeated false calls on election night revealed just how flimsy that stab at independence is. VNS and all six news organizations that rely on VNS information made the incorrect Florida call for Gore early in the evening, and all but the AP and VNS itself fell into the same trap by calling the state for Bush later that night based on incomplete returns.

Broadcast journalists weren't the only ones to rely too heavily on faulty information. Many newspapers rushed to press "Bush Wins" headlines. Were they basing this on their independent look at the returns? It doesn't seem likely. Does attributing it to "network reports" get them off the hook? Not a very comfortable argument to make. Eventually the five networks had to admit they had made another huge mistake and

many papers had to stop their presses.

If the networks and papers had in fact worked independently and not yielded to competitive pressures, they should have known the uncounted votes meant the race was still in doubt. Think of what it would have meant to a network's credibility if they could have said they were the only one to get it right. Instead all five are now rightly paying the price.

Unfortunately, the networks' reliance on each other for polling information is not the only election-night example of journalists not acting independently. Another example — one that is far worse — involves John Ellis, the first cousin of Gov.

Bush. Ellis resigned his position as a columnist with The Boston Globe before the election, citing his loyalty to the presidential candidate. But that same conflict of interest was apparently no obstacle to the Fox network. It hired Mr. Ellis and placed him on its election desk. In that position, Mr. Ellis had a voice in the Fox decision to be the first to call the state of Florida for Bush. The lack of journalistic

'Does anyone think that seven wrong calls followed by seven reversals ... helped with our credibility?'



GARY HILL

independence for a decision of this import is breathtaking. This debacle clearly demonstrates the need for independence. If the other networks were just parroting the Fox call, they not only got it wrong, but by extension they are adopting Fox's ethical standards as their own.

Now it's time to look to another part of our ethics code for guidance, the part that says "Be Accountable". This means that, as journalists, we should expose unethical practices of journalists and the news media, clarify and explain news coverage and invite dialogue with the public over journalistic conduct, and admit mistakes and correct them promptly.

Many of the organizations have announced they will undertake a self-examination to figure out what went wrong. If the public is to accept these examinations, it is important that they be thorough and that the results are shared with everyone. There is no other way to regain the trust of the American public. It is heartening to hear that NBC and Fox are already considering whether or not they will continue to participate in the single exit poll structure.

It is only through measures such as these that news organizations can slowly and painfully rebuild the public trust they so profoundly shook in a single evening.

Gary Hill is co-chair of SPJ's ethics committee and the director of investigations for KSTP-TV in Minneapolis. Contact him at ghill@kstp.com.

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Mary Jo Wachen
**WHEELER WOLF
LAW FIRM**

Jax Legislative Memo

To: SENATE POLITICAL SUBDIVISIONS COMMITTEE

From: JACK MCDONALD

CC:

Date: February 15, 2001

Re: SB 2277, Exit Polling

Attached, for your information in considering SB 2277, concerning exit polling, are Feb. 14 articles from *The New York Times* and Reuters, the British news service, on the Congressional hearing currently being held on the election night mistakes in Florida.

Note: (1) Congress indicates it won't try to ban exit polling or otherwise limit First Amendment rights.

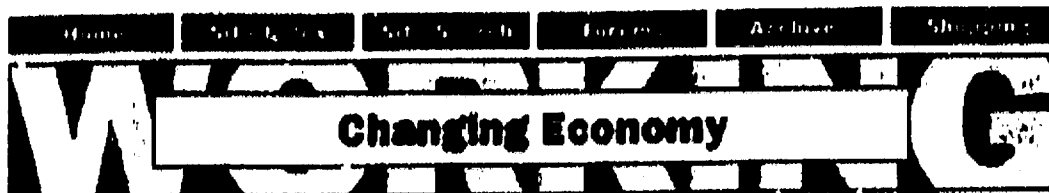
(2) All of the networks have said they will not use exit polls to project any winners until the polls in that state are closed.

(3) Congress is considering uniform poll closing legislation.

Therefore, the ND Broadcasters Association asks that you reject any amendments to **SB 2277** to ban or limit exit polling and give this bill a do not pass. Thank you.

National

The New York Times


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NETWORKS

February 14, 2001

Media Executives Face Congress

By THE ASSOCIATED PRESS

Filed at 6:51 p.m. ET

WASHINGTON (AP) -- The nation's top TV executives, responding to a congressional inquiry into their election-night mistakes in Florida, agreed Wednesday that they will no longer proclaim a winner until all the polls in a state are closed and pledged changes in their election process to avoid future errors.

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The media representatives, speaking to the House Energy and Commerce Committee, also urged Congress to enact a uniform poll closing time for the nation, a move they said would end the perception that early calls in Eastern states might influence voters in the West where polls are still open.

The heads of ABC, NBC, CBS, CNN and Fox also said they would avoid using exit polls to call close elections, develop additional sources for election data and take other steps in response to the election night debacle in which the networks first called Florida for Al Gore, retracted that decision and then later gave Florida and the presidency to George W. Bush. The Associated Press made the early wrong call, but did not make the later call for Bush.

"We are embarrassed by these errors," said Andrew Lack, president of NBC News. "We are absolutely intent on avoiding them and making sure they don't happen again."

Rep. Billy Tauzin, R-La., the committee chairman, said he called the hearing to examine flaws in the statistical models used by the networks that he said favored the Democrats. But he said he saw "no evidence of intentional bias."

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* Some of the news chiefs said there was no credible evidence that early calls affected voters. But all welcomed legislation sponsored by Tauzin and Rep. Ed Markey, D-Mass., to make poll closing times uniform around the nation.

Louis D. Boccardi, president and chief executive officer of the AP, questioned whether Congress was overstepping First Amendment bounds.

"To put it more plainly, we believe that such an official government inquiry into essentially editorial matters is inconsistent with the First Amendment values that are fundamental to our society."

Rep. Diana DeGette, D-Colo., agreed: "It would be terribly wrong of the U.S. Congress to trample on the First Amendment rights of the media in order to solve a short-term problem."

Democrats on the panel said the hearing should not deflect attention from a larger issue of fixing an election system that they said disenfranchised hundreds of thousands of voters. "When will we have a congressional investigation, a congressional hearing, on the issue of those who were denied the right to vote," said Rep. Bobby Rush of Illinois.

House Democratic leader Dick Gephardt of Missouri said the Democrats were forming a special committee to examine election changes.

Those testifying spoke of the common problems noted in independent studies conducted by each of the networks. The problems began when all the networks mistakenly declared Gore the winner in Florida shortly before 8 p.m. EST on Nov. 7 and were forced to retract that call several hours later. Then, in the early hours of Nov. 8, all the networks, but not the AP, prematurely declared Bush the winner in Florida and thus the president-elect.

The network officials said Voter News Service, the consortium they created to do exit polling and vote counting, provided faulty exit poll data, underestimated absentee voting and used outdated voter pattern models in Florida.

The mistake, said Andrew Heyward, president of CBS News, "was not only embarrassing to say the least, but it was damaging to our most important asset -- our hard-won credibility with our viewers, listeners and Internet users."

David Westin, president of ABC News, added that his organization "could have protected itself against error by resisting the inevitable competitive pressures that came with knowing that other news

organizations were projecting the next president of the United States while we were not."

Lack said the networks also erred in not doing a better job before the election in reporting on the possible problems in the election system and the difficulty some people would have in getting their vote counted accurately.

"We didn't do nearly enough digging into these facts," he said. "We booted it in more ways than one."

The networks also variously pledged to use the AP vote count and other second sources to confirm VNS votes and invest in improving VNS data collection. CNN said it would no longer declare winners when the margin between the candidates is 1 percent or less. CBS said it would begin using a "leaning" category to describe some races.

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On the Net:

House Energy and Commerce Committee:
<http://www.house.gov/commerce/>

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Wednesday, Feb. 14, 2001

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REUTERS**U.S. House panel tunes into TV election coverage**

WASHINGTON (Reuters) - Heads of major television networks have been invited to Capitol Hill Wednesday to discuss the Election Night mistakes heard around the globe.

The chairmen and presidents of Fox News, CBS News, CNN, NBC News and ABC News will try to explain how they misled viewers with faulty projections about Democratic presidential candidate Al Gore and then Republican rival George W. Bush.

The hearing by the House of Representatives Energy and Commerce Committee could lead to voluntary agreements on how the networks project future winners and limited legislation on how Americans vote.

Committee Chairman Billy Tauzin, a Louisiana Republican, has said he will not seek any restrictions on the networks' freedom of speech and ability to cover an election.

But Tauzin said he would like to see a universal time for all polls nationwide to close. That, in turn, would help enable networks to withhold projections until all voting is done.

Some of the biggest complaints about the networks' coverage of the 2000 presidential election is that they erroneously projected Gore as the winner in Florida before all the polls in the state even closed. Florida votes in two time zones.

WHO WON?

Then the networks, after pulling back their prediction on Gore, compounded their mistake by prematurely projecting Bush as the victor in Florida and the president-elect.

They later withdraw the Bush projection when all precincts reported

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and the vote tally showed the race too close to call.

The contest was ultimately decided a month later when a divided U.S. Supreme Court refused to permit a hand count of disputed Florida ballots, allowing Bush to emerge as the winner in the state and the president-elect by a margin of 537 votes.

The election has prompted some members of Congress as well as public interest groups to call for reform in how Americans elect their leaders.

The disputed contest helped showcase the existence of antiquated voting machines, confusing ballots and so-called hanging chads.

It also unearthed the little known fact that many votes are simply not counted for a variety of reasons, such as holes which are inadequately punched out in paper ballots.

CBS Anchor Dan Rather, in an interview aired Tuesday night in Public Broadcasting System's "The News Hour with Jim Lehrer," admitted the networks erred. But he added, "I'm not sure that our mistakes are the most important mistakes made on Election Night."

"The most important question about election night is how do we get an election as close to perfection in terms of people casting their votes and getting their votes counted," Rather said.

NETWORKS TO MAKE CHANGES

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The major networks recently announced reforms of their own to try to avoid a repeat of their Election Night 2000 performances.

In addition, legislation has been introduced in the Senate to establish commissions to study how to best make elections more efficient and a reflection of the true sentiment of voters.

House Democratic Leader Dick Gephardt of Missouri called a news conference Wednesday to announce formation of a Democratic Caucus Special Committee on Election Reform.

Democrats have accused House Speaker Dennis Hastert, an Illinois Republican, of deliberately delaying the appointment of a bipartisan panel.

A Hastert aide said the speaker intends to name a bipartisan committee later this month, but plans to reject calls by Democrats to have the panel evenly split between Democrats and Republicans.

The aide said there will be at least one more Republican than Democrat on the panel to reflect the party's narrow majority in the House.

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