



July 11, 2007

**VOTE “NO” ON BROWNBACK AMENDMENT FORCING
THE FCC TO ATTEMPT TO REGULATE MEDIA
VIOLENCE (SUBMITTED AS AN AMENDMENT TO THE
FINANCIAL SERVICES APPROPRIATIONS BILL)**

The Honorable Robert C. Byrd
Chairman, Senate Appropriations Committee
311 Hart Senate Office Building
Washington, DC 20510

The Honorable Thad Cochran
Ranking Member
Senate Appropriations Committee
113 Dirksen Senate Office Building
Washington, DC 20510

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Dear Chairman Byrd and Ranking Member Cochran:

On behalf of the American Civil Liberties Union (ACLU), and its hundreds of thousands of members, activists, and fifty-three affiliates nationwide, we urge you to reject Senator Brownback’s amendment forcing the Federal Communications Commission to regulate violence on television. While the FCC’s recent report suggests taking that overwhelmingly parental right and placing it impermissibly in the hands of politicians, the report also discusses the legal and constitutional complexities of such regulation. Slipping an amendment of such consequence into this appropriations bill—with such limited discussion—is reckless and shows little regard for the significant First Amendment issues at hand.

The American Civil Liberties Union is committed to preserving and protecting free speech and the First Amendment and strongly believes that the government should not replace parents as decision makers in America’s living rooms. There are some things the government does well, but deciding what is aired and when on television is not one of them. Parents already have many tools to protect their children, including blocking programs and channels, changing the channel, or turning off the television. If we need to provide parents with more effective tools and/or a better understanding of how to use the tools that are available to them, our focus should be on making those educational opportunities available—not encouraging government to replace America’s parents as the primary decision makers in their own homes.

The Federal Communication Commission's April 2007 Report on Violent Television and its Impact on Children erroneously concluded that under Supreme Court precedent allowing regulation of indecency in the media, Congress has a legal basis to regulate violent television content. The Report further recommended that Congress take action to address violent programming, including limiting violence to specific hours of the day or forcing cable and satellite operators to sell their channels on an a la carte basis.¹

The ACLU repeatedly has voiced its concern over both the constitutionality of governmental regulation of violent programming and the adequacy of the research that the FCC uses to justify regulation. Our concern is that imposing standards for television violence would be unconstitutional and damage numerous important values that define America: the right to a free and open media, the right to free speech and the right of parents to control the upbringing of their children.

Parents Have the Power to Control What Their Kids Watch

Today, parents have unprecedented capability to control what comes into their homes and what media their children consume. Aside from the ability to just turn off the TV, parents can use the many forms of technology available to them to block channels and programs.

The tools available to parents are many and varied. The most basic and user-friendly tool every parent has against unwanted media content is the ability to turn the television off, or to establish rules about where and when children may watch TV. Current technology augments parental ability to block unwanted content. Television ratings provide a baseline for predicting objectionable content in upcoming shows. The V-chip, a standard feature in all televisions 13 inches and larger since January 2000, allows viewers to block specific programs based on ratings; multiple websites, including the FCC's own site, provide detailed instructions and tutorials on how to use the V-chip. Cable and Satellite television subscribers can block individual channels using either analog or digital set-top boxes.

Recent technology in digital boxes permits blocking by rating, channel, title, and even, in some systems, program description. Cable subscribers that do not have set-top boxes can simply ask their cable companies to block specific channels that they do not want in their homes. Additionally, a multitude of web sites rate television shows, giving parents guidance that suits their individual taste and ratings to determine what their children watch.

The Supreme Court has vigorously underscored the vital role parents play in determining what media content enters their homes. Importantly, the Court has emphasized that parental action and available technology do not have to be perfect to be preferable to governmental action, specifically stating that

¹ In the Matter of Violent Television Programming and Its Impact on Children, FCC 07-50, 22 FCCR 7929, MB 04-261 at 3 (April 25, 2007).

“[i]t is no response that voluntary blocking requires a consumer to take action, or may not go perfectly every time. A court should not assume a plausible, less restrictive alternative would be ineffective; and a court should not presume parents, given full information, will fail to act.”² The Courts have recognized that parents already have all of the technology they need to block unwanted media content from their homes, and have made clear that the responsibility remains on the parents to actually use those controls available to them.

Such technology enables and facilitates precision in parental efforts to monitor the media content that enters the home. Nevertheless, the FCC’s Report declared current technology ineffective based on limited consumer use. However, limited consumer use of these technologies does not render the current technology unworkable or inadequate; rather, it indicates areas for more consumer education, awareness, and improvement.

The government may have a role in educating parents about media literacy, and assisting them in finding tools that better help them analyze and evaluate what they see.

Congress could consider passing legislation to better educate parents and children and ensure that parents are able to use the tools and the technologies that are already available to them. The solution is to teach parents to use the tools at their disposal more often and more effectively, as they see fit. If parents are upset by what they see on television, they have the power to change the channel, turn off the TV, or block the station. Monitoring television habits and determining what content is and is not appropriate should be made in the home, not by government officials in Washington, DC.

Studies on Media Violence Causing Actual Violence Are, at Best, Inconclusive

The FCC’s Report presents a slanted view of the studies on exposure to media violence to support its erroneous contention that there is a substantial governmental interest in regulating media violence. Though the Report mentions the FTC’s 2000 Report³, the FCC fails to reference the Study’s more important Appendix A, which reviewed and analyzed the available research on the impact of violence in the entertainment media. Regarding causation, the FTC noted that “[m]ost researchers and investigators agree that exposure to media violence alone does not cause a child to commit a violent act, and that it is not the sole, or even the most important, factor in contributing to youth aggression, anti-social attitudes, and violence.” Rather, the FTC stated that the research on causation had identified “interacting risk factors, such as genetic, psychological, familial, and socioeconomic characteristics.”

² *United States v. Playboy*, 529 U.S. 803, 824 (2000).

³ *Marketing Violent Entertainment to Children: A Review of the Self-Regulation and Industry Practices in the Motion Picture, Music Recording & Electronic Game Industries: A Report of the Federal Trade Commission* (Sept. 2000).

Such a finding is in line with the brief submitted on behalf of 33 media scholars in the case of *Interactive Digital Software Association v. St. Louis* in 2002, which the FCC never mentioned.⁴ Those scholars stated that “[i]f one conclusion is possible, it is that the jury is not still out. It’s never been in. Media violence has been subjected to a lynch mob mentality, with almost any evidence used to prove guilt.” Actual violent crime statistics provide support for these findings and statements, and demonstrate that the conclusion that media violence causes actual violence is intuitively incorrect. While media violence was increasing, the violent crime rate – specifically the juvenile crime rate—was decreasing throughout the 1990s, according to FBI statistics. If media violence was a causative factor, one would expect to see a rise in violent crime, rather than a decrease.

Notably, courts examining allegations that violent video games cause actual violence have been unconvinced by the data, holding laws restricting minors’ ability to obtain violent video games unconstitutional.⁵ State efforts to restrict youth’s access to violent video games attempted to use a similar framework as that recommended by the FCC for media violence: equate violence with indecency. The courts, however, have insisted that violence and indecency are distinct types of speech.⁶

It has become clear that there is no one single factor that causes violence; the causes of violence are many and varied and the problem is complex. We urge Congress to reject any proposals that would allow the Federal Communications Commission to regulate violence on television. Any attempt to force “violence” into a “safe harbor” would be unwise, unconstitutional and would ignore the root causes of violence.

There is a long history of using the media as a scapegoat for society’s problems. At one time or another, books, movies, opera, jazz, blues, rock ‘n roll, heavy metal and rap music, comic books, and videogames have all been accused of causing antisocial or violent behavior among minors and adults. Crime statistics do not support these claims. Despite the explosive growth of the media in the 1990s, which included allegedly increased violence on television and in video games, crime in general (and youth crime in particular) declined.

It would be virtually impossible for the government to create a definition of violence that would allow “acceptable” violence and would restrict “unacceptable” violence.

Assumptions about the negative effects of viewing violence ignore the positive societal value of certain violent programs that teach us important

⁴ The brief was submitted to the FCC as an attachment to the ACLU’s Comment on Notice of Inquiry, MB Docket No. 04-261; In the Matter of Violent Television Programming And Its Impact on Children, dated September 14, 2004.

⁵ See e.g., *Kendrick*, 244 F.3d at 575 (“[N]o showing has been made that games of the sort found in the record of this case have [the effect of inciting youthful players to breaches of the peace]”).

⁶ *Id.* at 574.

lessons about history or call attention to problems society must address. “Roots” was a national television event of enormous educational value that necessarily showed the brutality of the institution of slavery. The made-for-television movie “The Burning Bed” was credited with bringing about reform of existing spousal-abuse laws and included what some would call disturbingly violent scenes. “Saving Private Ryan” was a powerful move about the horrors of war, and included many disturbing scenes to illustrate that point.

Shielding children from all violence ignores reality and ill-prepares them for participation in a world that can often be violent. As one court striking down regulations of violent video games wrote, history, most notably “the murderous fanaticism displayed by young German soldiers in World War I”, aptly illustrates the danger of allowing the government to control children’s access to information and opinion, depriving them of the “freedom to form their political views on the basis of uncensored speech” before they turn eighteen and are able to vote.⁷ “People are unlikely to become well-functioning, independent-minded adults and responsible citizens if they are raised in an intellectual bubble...To shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.”⁸

Since not all portrayals of violence are bad, the government would have insurmountable difficulty defining what is “good” violence and “bad” violence. Even those who research this issue use inconsistent definitions of violence. If the researchers cannot concur on an objective definition, then will any regulations or ratings provide truly objective results that please all parents?

Similar to concerns about the feasibility of defining violence, one court noted that the FCC’s indecency test was “undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.”⁹ Specifically, the court used the example of “Saving Private Ryan”, in which repeated use of four letter words was not considered indecent, profane, or gratuitous. In comparison, a single use of those same words was considered “shocking and gratuitous” when used at the Golden Globes.¹⁰ The inconsistent standard in defining “indecency” created an impermissible “chilling effect on free speech.”¹¹ Likewise, adequately defining “violence” will present similar unconstitutional chilling effects.

It would be virtually impossible for the government to create a definition of violence that would allow “acceptable” violence and would restrict

⁷ *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572, 576-577 (7th Cir. 2001).

⁸ *Id.* at 577.

⁹ *Fox Television Stations, Inc. v. Federal Comm’n*, No. 06-1760-AG (L), 2007 WL 1599032, at *15 (2d Cir. June 4, 2007). Note that the indecency regime that the court found impermissibly vague was the basis for the FCC’s conclusion it had the authority to regulate violence on television. Thus, that conclusion is also suspect.

¹⁰ *Id.*

¹¹ *Id.* at *15-16.

“unacceptable” violence. Any such definition likewise would be indiscernible and inconsistent, and would chill speech by requiring broadcasters to “steer far wider of the unlawful zone” and would thus violate the First Amendment.¹²

FCC Recommendations for Regulation Violate Constitutionally Protected Expression

Courts have found that violent speech and violent depictions are protected by the First Amendment.¹³ The Supreme Court has determined in several cases that “speech that many citizens find shabby, offensive, or even ugly” is still protected. The First Amendment makes it clear that the government should have no power to restrict expression because of its messages, its ideas, its subject matter, or its content.¹⁴ Moral and aesthetic judgments are for the *individual* to make, not the government, even with a mandate or approval of a majority.¹⁵

The overriding justification for regulation of television violence “is the concern for the effect of the subject matter on young viewers.”¹⁶ Clearly, any such regulation by the government would be content-based. Content-based speech restrictions are subject to strict scrutiny. Strict scrutiny requires that any content-based speech regulation must be narrowly tailored to promote a compelling government interest. If a less restrictive alternative would serve the Government’s purpose, it must use that alternative.¹⁷

The FCC’s reliance on the 1978 decision in *FCC v. Pacifica Foundation* as authority to regulate media violence is outdated. The *Pacifica* Court premised its holding on reduced First Amendment protection for broadcasting, permitting restrictions based on substantial—not compelling—governmental interests. The *Pacifica* Court reasoned that the lower standard was proper because of the medium’s “uniquely pervasive” presence in the lives of all Americans” and on its accessibility to children, coupled with the government’s interests in the well-being of children and in supporting parental supervision of children.”¹⁸

A recent Second Circuit court decision rejected the FCC’s continuing reliance on *Pacifica* in light of the substantial advancements in technology. The court went so far as to state that it would be “remiss not to observe that it is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children.”¹⁹ The proliferation of satellite channels, cable television channels, and the internet “ha[ve] begun to erode the “uniqueness” of broadcast media.”²⁰ At the same time, “blocking

¹² *Speiser v. Randall*, 357 U.S. 513, 526 (1958).

¹³ FCC Report at 11 (citing *Winters v. New York*, 333 U.S. 507, 510 (1948)).

¹⁴ *Police Dep’t v. Mosley*, 408 U.S. 92, 95 (1972).

¹⁵ *Playboy*, 529 U.S. at 818.

¹⁶ *Id.* at 811.

¹⁷ *Id.* at 813.

¹⁸ *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978).

¹⁹ *Fox v. FCC*, 2007 WL 1599032, at *17.

²⁰ *Id.* at *18.

technologies such as the V-chip have empowered viewers to make their own choices about what they do, and do not, want to see on television.”²¹

Similarly, the Supreme Court’s *Playboy* decision distinguished *Pacifica* on the grounds that “[c]able systems have the capacity to block unwanted channels on a household-by-household basis.” Therefore, “the option to block reduces the likelihood, so concerning to the court in *Pacifica*, that traditional First Amendment scrutiny would deprive the Government of all authority to address this sort of problem.” The FCC’s regulatory powers are bounded by the Constitution, and the Courts have recognized that technology has changed the role Government can play.

The Supreme Court has specifically recognized that cable technology permits a level of control over media content that was not contemplated by the *Pacifica* Court. The Court in *Playboy* dealt with a statute requiring cable providers either to completely scramble sexually explicit or indecent channels or limit the programming on such channels to a 10pm to 6am “safe harbor” time period in order to shield children.²² The Supreme Court struck down these provisions of the statute because less restrictive alternatives allowing consumers to block those channels existed, stating that “targeted blocking is less restrictive than banning, and the Government cannot ban speech if targeted blocking is a feasible and effective means of furthering its compelling interests.”²³ The Court stated that “these judgments are for the individual to make, not for the Government to decree, even with the mandate or approval of a majority. Technology expands the capacity to choose; and it denies the potential of this revolution if we assume the Government is best positioned to make these choices for us.”²⁴

Courts have rejected the FCC’s arguments regarding the ineffectiveness of current technology as a reason to impose further regulation. In *Fox*, the FCC argued that the V-Chip was an ineffective alternative, because “in its view, few televisions feature a V-chip, most parents do not know how to use it, programs are often inaccurately rated, and fleeting expletives could elude V-chip blocking even if the show during which they occurred was otherwise accurately labeled.”²⁵ The Court concluded that “[i]f the *Playboy* decision is any guide, technological advances may obviate the constitutional legitimacy of the FCC’s robust oversight.”²⁶

Conclusion

Parents have the tools they need to protect their children. If the government steps in and regulates the content of television shows or relegates certain shows to a late-night or early morning hour, it steps over the line and begins to replace parents as the ultimate decision makers in their children’s lives.

²¹ *Id.*

²² *Playboy*, 529 U.S. at 806.

²³ *Id.* at 809-810, 815.

²⁴ *Id.* at 818.

²⁵ *Fox v. FCC*, 2007 WL 1599032, at *18.

²⁶ *Id.*

The FCC's findings on violence provide a disputable basis for a governmental interest in regulation. Recent court decisions, ignored by the FCC in its report, clearly show that in light of the current technologies enabling parents to control content precisely and through a variety of mechanisms, the government will need to demonstrate a compelling basis before it can regulate media content. In addition, the means of regulation will have to be narrowly tailored.

The most effective and most precise mechanisms are those already available to all parents. The power to control the upbringing of their children, including what they watch should remain in the most capable, effective, and constitutional hands possible: the parents'. We urge members of the committee to reject Senator Brownback's amendment. If you have any questions, please do not hesitate to call Terri Schroeder at (202) 675-2324 or by email at tschroeder@dcaclu.org.

Sincerely,

A handwritten signature in black ink, appearing to read 'C. Fredrickson', with a long horizontal flourish extending to the right.

Caroline Fredrickson
Director

A handwritten signature in black ink, appearing to read 'Terri A. Schroeder', with a long horizontal flourish extending to the right.

Terri Schroeder
Senior Lobbyist