

United States Senate
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights and Property Rights
March 29, 2006
Hearing on “State Regulation of Violent Video Games and the First Amendment”

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I would like to thank Chairman Brownback and Senator Feingold for the opportunity to submit written comments for the record. First, let me introduce the Media Coalition. It was established in 1973; its members are trade associations representing book and magazine publishers, movie, recording and video game manufacturers, booksellers, librarians, and recording, video and video game retailers in the United States.

The hearing addresses important legal issues and a broad range of complex research relating to video games with violent content. The members of the Media Coalition understand that children today are exposed to a greater amount of media than ever before. We recognize the concerns of some parents that their children may be consuming media they consider inappropriate. While acknowledging these concerns, it is important to stress that any regulation of Constitutionally-protected speech based on its content is immediately suspect. As a general rule, government regulation of speech based on its violent content is not permissible. In addition, minors have a First Amendment right to see and hear video games as they do other media. Although video games are a relatively new form of speech, there is no legal basis for imposing restrictions on speech with violent content in this format. In addition the video game industry’s rating system is voluntary; such a system would be unconstitutional were it mandated by the government. Finally, assumptions about the effect on minors of viewing or listening to depictions or descriptions of violence are anything but conclusive. Different researchers, often looking at the same data, have come to very different conclusions about causality, and it is clear that little correlation exists between the availability of media, violent or otherwise, and actual crime statistics.

**REGULATION OF SPEECH WITH VIOLENT
CONTENT IS UNCONSTITUTIONAL**

Speech is presumed to be protected by the First Amendment unless it falls into a few very narrow categories. As the Supreme Court stated in Free Speech Coalition v. Ashcroft: “As a general principle, the First Amendment bars the government from dictating what we see or read or speak or hear. The freedom of speech has its limits; it does not embrace certain categories of speech, including defamation, incitement, obscenity and pornography produced with children.” 535 U.S.1382, 1389 (2002). The Court has never approved the restriction of speech based solely

on violent content. Indeed, as shown below, federal courts consistently have rejected government attempts to do so.

Regulation of Speech with Violent Content Violates the First Amendment

The courts consistently have held that speech with violent content is protected by the First Amendment and may not be banned or restricted either for adults or minors. The case law includes a growing body of law striking down restrictions on violent media that were enacted.

- § Video Software Dealers Ass'n v. Schwarzenegger, 401 F. Supp. 2d 1034 (N.D. Cal. 2005) granting preliminary injunction barring enforcement of California law barring the sale or rental of video games with violent content and mandating labeling of games.
- § Entertainment Software Ass'n v. Blagojevich, 404 F. Supp 2d 1051 (N.D. Ill. 2005) granting permanent injunction barring enforcement of Illinois law barring the sale or rental of video games with violent content and mandating labeling of games and posting signs about industry rating system.
- § Entertainment Software Ass'n v. Granholm, 404 F. Supp. 2d 978 (E.D. Mich. 2005) granting preliminary injunction barring enforcement of California law barring the sale or rental of video games with violent content.
- § Interactive Digital Software Ass'n v. St. Louis County, 329 F.3d 954 (8th Cir. 2003) enjoining enforcement of a county ordinance that barred the sale or rental of video games with violent content.
- § American Amusement Machine Ass'n v. Kendrick, 244 F.3d 572 (7th Cir. 2001), *cert. denied*, 534 U.S. 994 (2001) enjoining enforcement of a city ordinance that limited minors' access to violent video games.
- § Video Software Dealers Ass'n v. Maleng, 325 F. Supp. 2d 118 (W.D. Wash. 2004) barring enforcement of a state law that barred dissemination to minors of video games that included violence against "a public law enforcement officer."
- § Bookfriends v. Taft, 233 F.Supp.932 (S.D. Ohio 2002) deeming speech with violent content as fully protected by the First Amendment and enjoining enforcement of Ohio's "harmful to juveniles" law that would have criminalized dissemination to a minor of speech with violent content.
- § Eclipse Enterprises Inc. v. Gulota, 134 F.2d 63 (2d Cir. 1997) finding unconstitutional a law barring the sale to minors of trading cards of notorious criminals.
- § Davis-Kidd Booksellers, Inc. v. McWherter, 886 S.W. 2d 705 (Tenn. 1993) striking down a restriction on the sale to minors of material containing "excess violence."
- § Video Software Dealers Assn. v. Webster, 968 F.2d 684 (8th Cir. 1992) holding that "unlike obscenity, violent expression is protected by the First Amendment."

Distinguishing "Good" Violence from "Bad," "Excessive," or "Gratuitous" Violence

The impossibility of distinguishing "acceptable" from "unacceptable" violence is a fundamental problem with government regulation in this area. The evening news is filled with images of real violence in Iraq and Afghanistan routinely perpetrated by the "bad" guys. Often this horrific

violence goes unpunished. Some of our most celebrated literature, cinema, and music is filled with graphic depictions of violence. Books including the Bible, Shakespeare's *Titus Andronicus* and Truman Capote's *In Cold Blood*, movies such as *Saving Private Ryan* or *Bonnie and Clyde* and music from opera to country are filled with depictions or descriptions of violence that at times is horrific. It would be virtually impossible for the government to create a definition that would allow "acceptable" violence but would restrict "unacceptable" violence. As noted above, no court has been satisfied that the government has solved this problem.

Government-Mandated/Enforced Rating Systems Are Unconstitutional

While voluntary ratings exist to help parents determine what is appropriate for their children, a government-mandated rating system or government enforcement of an existing voluntary rating system would have a profound chilling effect on the distribution of constitutionally protected material and would likely be unconstitutional. Even government pressure on industries to change or amend a voluntary rating regime veers alarmingly close to a government-mandated system. Courts in nine states have held it unconstitutional for the government to enforce the Motion Picture Association of America's rating system or to financially punish a movie that carries specific rating designations. In MPAA v. Specter, 315 F. Supp. 824 (E.D. Pa. 1970), the court enjoined enforcement of a Pennsylvania statute that penalized exhibitors showing movies unsuitable for family or child viewing, as determined by CARA ratings. In Eastern Federal Corporation v. Wasson, 316 S.E. 2d 373 (S.C. 1984), the court ruled that a tax of 20% on all admissions to view movies rated either "X" or unrated was an unconstitutional delegation of legislative power to a private trade association. See also Swope v. Lubbers, 560 F.Supp.1328 (W.B. Mich, S.D. 1983); (use of MPAA ratings was improper as a criteria for determination of constitutional protection) Drive-In Theater v. Huskey, 435 F.2d 228 (4th Cir. 1970) (sheriff enjoined from prosecuting exhibitors for obscenity based on "R" or "X" rating).

The Rights of Minors to See and Listen to First Amendment-Protected Material

While parents have great influence over what media their kids read, hear, or view, and while minors do not enjoy the protection of the First Amendment to the same extent as adults, the U.S. Supreme Court has ruled that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected material to them." Erznoznick v. City of Jacksonville, 422 U.S. 212-13 (1975). In Ginsberg v. New York, 390 U.S. 629 (1968), the Court established a three-part test for determining whether material is "harmful to minors" and may, therefore, be banned for dissemination to minors. The Ginsberg test is specifically limited to sexually explicit material; it does not contemplate regulation of violent content as "harmful to minors."

Other Resources Are Available to Educate Parents

For those parents who are concerned about their children's viewing habits, there are many resources available to help them determine whether material is appropriate for their kids. In addition to the industry rating system, many organizations, including religious institutions and

advocacy organizations, review and rate media for the specific types of content they consider objectionable. Also, many newspapers and magazines have reviews of video games that include ratings or comments about programming that some might find objectionable.

RESEARCH DOES NOT SUPPORT THE CONCLUSION THAT MEDIA CAUSES ACTUAL ANTI-SOCIAL BEHAVIOR

The rationale for restricting access to media with violent content is the belief that it causes actual violence. We do not think the current research supports this conclusion. In publishing our report, *Shooting the Messenger: Why Censorship Won't Stop Violence*, and reviewing and assembling legal documents in many of the cases cited above, we reviewed many documents that address the state of existing research regarding the effects of media with violent content. These various sources review multiple problems with the conclusions ascribed to some research suggesting that there is any meaningful link between media violence and actual violence. We will highlight some of the arguments they make.

Very Complex Problem with Many Factors, Research Is Inconclusive at Best

As noted in many studies, the causes of violence are myriad and complex. The National Research Council's comprehensive 1993 report, *Understanding and Preventing Violence*, offered a matrix of the risk factors for violent behavior. Media with violent content is omitted entirely as a factor. The Surgeon General's lengthy 2001 report *Youth Violence: A Report of the Surgeon General* extensively explored the causes of youth violence. The authors briefly addressed the impact of consumption of media on children's behavior. They concluded that despite a "diverse body" of research, it was not possible to come to a conclusion about the effect of media consumption on minors in either the short- or long-term.

Researchers often look at the same data and reach starkly different conclusions about what it means. Certain researchers have consistently concluded that their data has shown a connection between media violence and real violence. Other researchers have reviewed the same data and disagreed with these conclusions. Some of the reasons researchers have reached different conclusions are explored in our report, *Shooting the Messenger: Why Censorship Won't Stop Violence*.

No Correlation Between Media Violence and Actual Crime Statistics

There is a long history of blaming the media for increases in crime and other anti-social behavior. At one time or another, books, movies, opera, jazz, blues, rock and roll, heavy metal and rap music, comic books and video games all have been accused of causing anti-social or violent behavior among minors (and adults). Crime statistics do not support these claims. Despite the explosive growth of media generally and video games specifically, crime statistics have not risen correspondently. In the past decade media consumption has grown enormously, but crime in general and youth crime in particular has declined steadily in much of the country.

Conclusion

We recognize the challenges that parents face in raising their children in the information age. Nevertheless, restrictions on video games that have violent content are contrary to the First Amendment. Nor is there a legal rationale for imposing or enforcing a rating system on video games or any other media. Furthermore, the basis for these restrictions is uncertain; the research does not support the claims that media violence leads to actual violence. We believe it is best to leave to individual parents the responsibility to determine what their kids see.

Thank you for allowing us to share our views with the Committee.

The members of Media Coalition are:

American Booksellers Foundation for Free Expression
Association of American Publishers
Comic Book Legal Defense Fund
Entertainment Software Association
Freedom to Read Foundation
Interactive Entertainment Merchants Association
Magazine Publishers of America
Motion Picture Association of America
National Association of Recording Merchandisers
PMA, The Independent Book Publishers Association
Recording Industry Association of America
Video Software Dealers Association.