

Testimony of
The Honorable Patrick Leahy

October 2, 2002

Statement Of Senator Patrick Leahy,
Chairman, Senate Judiciary Committee,
Hearing On
"Stopping Child Pornography:
Protecting Our Children And The First Amendment"
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Let us make clear at the outset of this hearing that we are all against child pornography - that vote would be an easy one. The harder task is finding legislative solutions that are not merely designed to make us all look tough on child pornography in the short term, but that can withstand the test of time and the scrutiny of the courts. We need a law with teeth, but not one with false teeth.

This hearing will allow experts from all perspectives to come together as we work toward a solution that both protects our children and honors the First Amendment. Too often these issues become temptations to demagoguery. We owe our children more than a press conference. We owe them action that will be effective in helping prosecutors build solid cases and obtain convictions that stick.

Earlier this year, the Supreme Court in *Ashcroft v. Free Speech Coalition* [122 S. Ct. 1389 (April 16, 2002)] ("Free Speech") struck down portions of the 1996 Child Pornography Prevention Act ("CPPA") for violating the First Amendment. We should not have been surprised on this Committee since we had been warned in 1996 that parts of this law were unconstitutional. Now, with varying legislative proposals before us, we must work together not to repeat our earlier mistakes.

We should be wary of enacting quick fixes that risk doing more harm than good. Even with parts of the CCPA struck down, many effective federal laws dealing with child pornography and obscenity remain on the books. A cursory review of Department of Justice and FBI press releases shows that federal enforcement of the child pornography laws continues and that it is resulting in people being investigated, prosecuted, and sent to jail. That being said, we should always be examining our laws to see if additional tools are required to fight crime.

That is why I joined Senator Hatch in introducing S.2520, the PROTECT Act, shortly after the Supreme Court's decision in *Free Speech*, to protect our Nation's children from exploitation by those who produce and distribute child pornography, and to do so within the parameters of the First Amendment. It is a good faith response to the Supreme Court's decision, not a challenge to it.

The Free Speech Decision and its Implications: In *Free Speech*, the Supreme Court voted 7-2 to strike down a provision banning virtual child pornography - that is, child porn made with morphed computer images and without using real children -- and a second provision banning material that is "pandered" as child pornography.

The Court in *Free Speech* faced a difficult task - applying the time honored principles of the First Amendment to the computer age. The Internet provides many opportunities for doing good, but also for doing harm. In recent years, the Congress has made a number of attempts to stop the Internet from being used to distribute child pornography involving the sexual abuse of children, but those efforts have time and again failed to pass constitutional muster. Past efforts, such as the Communications Decency Act, the CPPA, and the Child Online Protection Act have violated constitutional limits and been nullified by the courts. Each time the Supreme Court has faced this task, it has provided valuable guidance to the Congress that we should heed.

The majority opinion in *Free Speech* is grounded on two basic premises. First, the Court ruled that the definition of child pornography in the CPPA was overbroad and covered a substantial amount of material that was not "obscene" under the Supreme Court's traditional obscenity test. [*Miller v. California*, 413 U.S. 15 (1973).] The CPPA would have criminalized such non-obscene movies as *Traffic*, *Romeo and Juliet*, and *American Beauty* simply because minors were depicted in some sexually explicit scenes, because there was no requirement that the material be evaluated as a whole.

Second, the CPPA was unconstitutional for covering a broad array of pornographic material involving computer-generated images or youthful-looking adults.

The PROTECT Act of 2002: Senator Hatch and I have together crafted a bipartisan bill that attempts to work within the limits set by the Supreme Court. It narrows the definition of virtual child porn by requiring consideration of the artistic, literary or educational value of the work as a whole, so that films like *Traffic* are not covered and banned. It also fixes the specific concerns raised about the affirmative defense in the old CPPA.

One approach would simply be to add an "obscenity" requirement to the child pornography definitions. Outlawing all obscene child pornography - real and virtual; minor and 'youthful-adult;' simulated and real - would clearly pass a constitutional challenge because obscene speech enjoys no protection at all. Under the Supreme Court's *Miller* test, such material (1) "appeals to the prurient interest," (2) is utterly "offensive" in any "community," and (3) has absolutely no "literary, artistic or scientific value." Other provisions are intended to address the fatal flaws identified by the Supreme Court in the CPPA with more narrow definitions of "child pornography." While these new provisions are more narrowly tailored than both the original CPPA and the Administration's proposal, I look forward to hearing from the constitutional scholars here today whether further refinements are warranted.

I recognize that it does not do America's children any good to write an unconstitutional law to prove an ideological point. The Hatch-Leahy bill reflects a good faith attempt to protect children to the greatest extent possible without crossing that line.

Our legislation -- unlike the Administration's proposal -- also provides new tools to help police and investigators prosecute child pornography cases and protect the rights of child victims. As a former prosecutor, I know these tools will help. Let me name a few of these provisions:

? Victim Shield Law: The PROTECT Act would provide, for the first time ever, a children's shield law to keep the identity of child victims out of court and protect them from being traumatized again in the court process.

? Sentencing Enhancement for Child Sex Offenders: Incredibly, the current sentencing guidelines carry a lower sentence for someone who actually travels across state lines to sexually molest a minor than for someone who possesses child pornography that has crossed state lines. The PROTECT Act would ask the Sentencing Commission to fix that disparity and increase penalties for repeat offenders.

? New Felony for Using Pornography to Induce a Minor to Engage in Illegal Activity: The PROTECT Act creates a new crime for using any child pornography, virtual or not, to persuade a minor to engage in illegal activity. This directly addresses the concern that sex offenders use this material in molesting children and presents no First Amendment problem because it is based on conduct, not speech.

? Notice Requirements to Prevent Surprise Defenses: The PROTECT Act allows defendants to assert an affirmative defense that no real children were involved in making the images in question, but imposes strict new notice and discovery requirements on the defense. As a former prosecutor, I know how difficult it is when defendants can come in at the last second - or even during the trial - and assert a new defense. This bill levels the playing field.

? Better Record Keeping: The Act enhances the record-keeping requirements for pornographic material and the penalties for keeping false records. It also allows prosecutors for the first time to use those materials in court to prove child pornography cases, which may provide evidence to defeat a virtual porn defense.

? New Pandering Felony: The PROTECT Act also creates a new crime for the act of pandering obscene child pornography.

The Justice Department Proposal: Everyone wants to protect our children, but we need to do it with cases and laws that stick. That is what we have tried to do in the PROTECT Act. It is far easier to come up with a "quick fix," without attention to constitutional limits. Constitutional law experts and law professors with whom I have consulted on this matter have confirmed the Justice Department's proposal will not withstand scrutiny under the First Amendment after the Free Speech case.

Let me discuss a couple of the most problematic aspects of the Justice Department's proposal. First, it rejects any attempt to incorporate the Supreme Court's doctrine of "obscenity" into the definition of child pornography. Not even one provision takes that approach, which would at least ensure that some of the law was upheld. Instead, in its new definition of "child

pornography," the Justice Department simply changes the words "appears to be" in the current statute to "appears virtually indistinguishable from" in the new provision. The problem with that approach is the same argument that was urged by the Department in the Free Speech case and overwhelmingly neglected.

Second, the Justice Department's proposal regarding the new crime for child pornography involving "prepubescent" children is also problematic under the Court's Free Speech case. Although the section is entitled "Obscene visual depictions of young children" the Justice Department has assiduously avoided any "obscenity" requirement in the provision itself. Headlines and titles like "prepubescent" and "obscene" are popular, but will not fool our federal judges when there is no obscenity requirement in the statute itself, only in the title.

Moreover, the provision contains absolutely no requirement that the material be judged as a whole for artistic, literary, or scientific value. That was a point that the Supreme Court repeatedly pounded home in the Free Speech case, yet it is ignored by the Justice Department. This approach is especially frustrating because in the cases that the Department is likely to prosecute, it would be easy to meet the obscenity test. The Department's current approach, however, invites a parade of legitimate movies and scientific or educational materials that may be covered by the overbreadth of the provision to challenge the legislation. Since no affirmative defense is available under this new crime, it cannot be saved from the Free Speech case on that basis either.

There are other problematic provisions in the Justice Department's proposal, but I simply raise these two in order to make the point that the Department's proposal seems to be more concerned with making a public point than with making successful cases. If the Department's proposal becomes law, it will result in yet another round of court cases, followed by another round of cases being thrown out, followed by another round of legislation.

America's children deserve better, and I think that, while we may disagree on some of the specifics, Senator Hatch and I have made a good faith and bipartisan effort to come up with a law that will survive judicial scrutiny and protect them for years to come.

I hope that today's hearing will be an opportunity for reasoned discussion and debate. These are important problems that deserve serious consideration. We can protect our children while honoring the First Amendment. We owe it to them to do no less.

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