

**STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
APPROVING IN PART & CONCURRING IN PART**

Re: Violent Television Programming and Its Impact on Children, *Report*, MB Docket No. 04-261

America is hooked on violence. That manifests itself in news coverage with the credo, “if it bleeds, it leads.” To an alarming extent, the same credo applies to much entertainment programming and even some commercials. The top ten highest rated broadcast programs consistently have programs with violent content leading the pack.¹ In the primetime ratings game, violence sells and our children are innocent bystanders. This very unfortunate state of affairs is the shared responsibility of networks, broadcasters, cable operators and programmers, advertisers, and ultimately viewers.

There is considerable evidence in the social science literature that violence in the media can cause children to act more violently or aggressively. Particularly in light of the spasm of unconscionable violence at Virginia Tech, but just as importantly in light of the excessive violent crime that daily afflicts our nation, there is a basis for appropriate federal action to curb violence in the media.

This is an issue of deep personal significance to me as a parent of small children. I am particularly fortunate that my career choice has sensitized me to the relentless assault of violent content on television that confronts me and my children. A turning point for me came at my first confirmation hearing for this position, when Senator Sam Brownback showed me a study about how the brain scans changed for people while they were watching violent programming. Ever since, I have viewed, particularly over my children’s shoulders in those instances when I let them watch, the cavalcade of violence that afflicts children’s and adult programming alike.

It is clear that parents are the first, last *and* best line of defense against all forms of objectionable content. Speaking as a parent, the problem is that in today’s media landscape, families have to navigate through a sea of violence. Making a bad situation worse, most parents don’t know about the navigational tools available to them, so they are like 17th Century sailors subject to the whims of an angry sea when they could be using more modern techniques. The following chart, which simply reflects the casual observations of me and my staff, is meant to illustrate the volume of violent shows on television during the current primetime line-up.

¹ See Nielsen Media Research ratings for week of March 19 through 25, 2007, which reveal that six of the top ten broadcast shows among all households and five of the top show among adults 18-49 contained graphic violent content.

**Primetime Broadcast Shows with Violent Content
Aired 8-10pm**

DAY	PROGRAM (NETWORK)
Monday	24 (FOX) International Fighting League – Battleground (MY Network) Prison Break (FOX)
Tuesday	American Heiress (MY Network) Law & Order: Criminal Intent (NBC) NCIS (CBS) The Unit (CBS)
Wednesday	Bones (FOX) Criminal Minds (CBS) Crossing Jordan (NBC) Saints and Sinners (MY Network)
Thursday	CSI (CBS) Grey’s Anatomy (ABC)
Friday	Close to Home (CBS) Ghost Whisperer (CBS) Grey’s Anatomy (ABC) Raines (NBC) Smallville CW Supernatural (CW)
Saturday	Cops (FOX) America’s Law & Order (NBC) Most Wanted (FOX) WWE Smackdown (CW)
Sunday	Cold Case (CBS) Desperate Housewives (ABC)

The problem with this *Report* we are presenting to Congress is that it is not clear from reading it which if any primetime shows are being recommended for regulation. Are we saying Law and Order should be banned during hours when children are watching? It is anyone’s guess after reading this *Report*. The *Report* is not a model of clarity.

Like most parents with young children, I live in perpetual fear of the shows *and* commercials to which my son or daughter will be exposed to on any given evening. Whether it is a primetime show with a violent scene or merely a commercial with a violent preview, inappropriate material pops up much too often for my comfort. I am sure my children are not the only ones who have difficulty sleeping after they are inadvertently exposed to violence on television.

I fully understand that it is my choice to turn the television on or off, and similarly, it is the viewing public’s responsibility to refrain from watching shows that they consider objectionable or harmful to their families and children. Sometimes, though, it is a trailer for a news show or a promotion for a horror movie that comes on during what was considered safe family programming, like the Super Bowl. As a parent and policymaker, I am profoundly concerned by the general lack of accountability, compassion, and thoughtfulness of some in the media entertainment industry. Yet this *Report* offers no discussion or suggestions as to what to do about violence in advertising

and promotional spots during shows when children are watching, which is one of the biggest complaints we hear from parents in the real world. At a minimum, this is an issue worth confronting through a public-private partnership with the major media outlets.

Studies have shown, and my personal observations support, that by age 18, an American child will have seen upwards of 15,000 simulated murders and about 200,000 acts of violence. Clearly, there is something wrong with this picture. Government has an important role to support parents who are struggling to protect the well-being of their children.

Borne out of this concern and responsibility, over three years ago, the Committee on Energy and Commerce of the U.S. House of Representatives sent a letter requesting that the Commission study media violence and its impact upon children. The Committee asked the Commission to formulate and propose a definition of “excessively violent programming” that would be able to withstand constitutional scrutiny. Specifically, the Committee wanted the Commission to analyze “whether there are any constitutional limitations in defining ‘excessively violent programming that is harmful to children,’ or in constraining or prohibiting broadcast of such material during hours when children are likely to be a significant part of the broadcast viewing audience.” The Commission further asked for “measures that [could] facilitate a consumer’s use of the television rating system.”

This *Report* is part of a national dialogue between the American people, Congress, regulatory agencies, public interest organizations, the courts and the entertainment industry. In light of this national interest, this *Report* should include an objective, authoritative discussion of the constitutional and regulatory challenges of regulating media content based on our experience with regulating indecent speech. The *Report* should provide a complete and thorough analysis of all parental control technologies and resources that are currently available to families and households. Overall, this *Report* should weigh the national interest of protecting children from violent content against the cumulative effect of all available parental control technologies and resources, and the constitutional concerns. It should provide a working definition most likely to sustain judicial scrutiny. In so doing, the *Report* should make recommendations that would empower parents and families, and provide Congress with a set of options – not just content and price regulation. In short, the Report should do what Congress asked.

To my disappointment, this *Report* does not fully display the experience and informed judgment of an expert federal agency that has regulated media content over thirty years. Specifically, this Report does not deal adequately with the constitutional dimensions of regulating violent content on free over-the-air TV, or subscription-based cable and satellite TV services. In fact, it muddies the issues and legal distinctions that the courts have made regarding the ability of the government to intervene in different media formats. Nor does this Report discuss fully how federal courts have ruled in numerous cases involving the regulation of violence. Oddly enough, the Report does not even discuss the full menu of parental assistance tools that are available today to millions

of families. And, as a result of this incomplete analysis, the recommendations made in this Report are not fully responsive to the specific questions presented by the Committee, or inadequate to provide parents, like me, with the necessary support to protect our children. Like a financial consultant who advises a client that he could win the lottery, this *Report* discusses an optimal conclusion, but does not provide a complete analysis or a sound plan.

Congress asked the Commission to study media violence and to propose a definition of violence that would be “best suited, and most likely to be sustained in court.” Rather than acknowledge that, after three years, the Commission has been unable to do so, the *Report* passes the buck, declaring that “Congress could do so.” The definitional difficulties here should not be dealt with in such a casual, dismissive manner. After all, this is a protected constitutional right under the First Amendment that we are recommending Congress to curtail without any thoughtful legal analysis. We shirk our responsibility by saying that we can define violence that should be banned since the guidelines developed by the television industry contain categories of violence for ratings purposes. Which of those categories do we propose to ban during hours when children are watching? Given that we are not able to offer a definition ourselves, it does not appear to be as easy to define as some suggest.

The fact of the matter is that “not all violence is created equal.”² The Commission has not been able to formulate and recommend a definition of violence that would cover the majority of violent content that is inappropriate for children, provide fair guidance to programmers, and stand a decent chance of withstanding constitutional scrutiny, in light of judicial precedent. While we may want to define prohibited-violence and regulate it in conformance with constitutional standards, the *Report* does not refer to any court or judicial scholar that has suggested such definition is available or probable.

To the contrary, the *Report* diminishes the extent to which courts have either expressed serious skepticism or invalidated efforts to regulate violent content.³ I believe we have an obligation to provide Congress with the complete analysis of this “jurisprudential quagmire,” whereby “any regulation of television violence confronts an inherent tradeoff between precision and effectiveness” and “any restriction in this area that is neither overboard nor vague will leave unregulated so much violent programming that it will no longer accomplish a compelling interest.”⁴

² UCLA Center for Communication Policy, *The UCLA Television Violence Report 1997*.

³ *Winters v. New York*, 333 U.S. 507, 510-11 (1948); *Interactive Digital Software Assoc. v. St Louis County*, 329 F.3d 954 (8th Cir. 2003); *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir 2001), *cert denied*, 122 S.Ct. 462 (2001); *Eclipse Enters. v. Gulotta*, 134 F.3d 63 (2nd Cir. 1997); *Video Software Dealer’s Ass’n v. Webster*, 968 F.2d 684 (8th Cir. 1992); *Allied Artists Pictures Corp. v. Alford*, 410 F. Supp. 1348 (W.D. Tenn 1976).

⁴ Harry T. Edwards and Mitchell N. Berman, *Regulating Violence on Television*, 89 NORTHWESTERN U.L. REV. 1487, 1502-03, 1555 (1995)

The central tension we face is that adults' access to violent programming is protected under the First Amendment to the U.S. Constitution. The difficult question is precisely which violent programming, if any, the government can regulate in the interest of protecting children. That question – the most challenging Congress faces – is never answered here.

Providing Congress with a complete record should be the central objective of this *Report*, but sadly that is not accomplished. In 2003, the Commission found that “new modes of media have transformed the landscape, providing more choice, greater flexibility, and more control than at any other time in history.” In today's *Report*, however, the Commission simply ignores many of the developments that empower parents and viewers with more control over their programming choices. Cable subscribers, for example, have various options available, depending on if they have digital or analog cable. Digital cable set-top boxes allow parents to block shows with certain ratings, titles, or by time or date, and analog cable subscribers can use their set-top or “lockbox” technology that locks specific channels so that channel can no longer be viewed. Digital and personal video recorders, and video-on-demand permit families to “time-shift” or watch programming whenever they deem appropriate. Similarly, satellite TV subscribers have access to the Locks & Limits feature on DirecTV and Adult Guard on Dish Network. In addition to these operator-provided control technologies, TV manufacturers have been required since 1997 to install a V-Chip in all TV sets larger than 13 inches, giving parents the ability to block certain content based on age- and content-based rating. Parents and viewers may find that these tools provide varying degrees of effectiveness but this *Report* fails to explore these issues adequately.

The Commission is justifiably concerned about the limited consumer use of the V-Chip, the limited consumer understanding of the rating system and the limited deployment of digital cable set-top boxes and their accompanying advanced parental control features. However, these tools – and the online resources – provide a good basis from which to build. Instead of rushing to conclude that the TV ratings system – whether voluntary or mandatory – is and will always likely be unworkable, and that blocking technology does not adequately promote parental supervision and protect the well-being of children, the Commission has an obligation to advise Congress how we can attempt to improve their effectiveness. We fail to do so here.

While this *Report* recommends content and price regulation as the only legislative remedies to address violence on TV, I believe the Commission is missing a historic opportunity to discuss a host of meaningful “consumer choice” recommendations that would truly enhance and facilitate parents' effort to safeguard their children from the exposure to violent programming. From developing enforceable public interest obligations to implementing a national consumer education campaign, there are other recommendations that should be part of the national dialogue on media violence.

If we were able to craft a constitutionally-sustainable definition of violence, presumably it would apply to only the most extreme and gratuitous depictions of violence. While that might help parents navigate past a few icebergs in a sea of violence,

they would still be faced with sailing a pretty stormy sea on their own. Our own experience in regulating indecency demonstrates that regulation only applies to the most egregious cases, and there is a vast array of sexually explicit television that many parents, including myself, would find inappropriate for their children but which does not rise to the level of indecency. In the case of violence, I certainly would not want my children watching the opening scenes of *Saving Private Ryan*, but I doubt any court would uphold us banning it during evening hours. I do not even like my kids watching a cartoon of an anvil falling on the coyote's head, but I do not think any court would let us ban it. So our narrowly focused recommendations might help on the margins, but do little to deal with the vast problem parents confront on a daily basis.

One of our few recommendations, a la carte, which is primarily a price-regulation mechanism, is far too blunt an instrument to provide much help to beleaguered parents who already have the ability to block any cable channel they want, whether they are analog or digital subscribers. The History Channel, for example, sometimes broadcasts war scenes far too violent for young children, but dropping it would deprive them of valuable educational content it often airs. TV violence is not viewed in the record as a channel-by-channel problem. Perhaps that is why leading experts have not suggested a la carte as a solution. It makes its debut here with little explanation as to why or how it would be of any practical use to parents.

Given how much of the concern about violence arises from what is on broadcast television, it is not even clear how a la carte price regulation would help parents avoid violent programming unless it applied to each broadcast channel, which this report does nothing to clarify. I suppose a parent could choose to receive only Home and Garden Television and the Food Channel to avoid violent programming, since there are so few other channels devoid of violence, but I do not see how that helps parents much.

A recent study from the Parents Television Council (PTC) found that, in midst of the unprecedented wave of media consolidation between 1998 and 2006, violence on television during the hours of 8:00 p.m., 9 p.m. and 10 p.m. grew by 45, 92 and 167 percent, respectively.⁵ This finding is highly relevant to the Commission's current review of the broadcast media ownership rules. The apparent correlation between increased media concentration and media violence questions whether *any* effort to permit further concentration of ownership can be squared with the public interest. Furthermore, this finding reinforces the substantial need of Congress and/or this Commission to develop enforceable public interests obligations for general audience broadcast programming.⁶ Despite repeated requests from Members of Congress, consumer and

⁵ *Dying to Entertain: Violence on Prime Time Broadcast Television 1998 to 2006*, Parents Television Council, Special Report, January 2007, at 6.

⁶ As the Supreme Court has held, and this Commission has argued passionately in court, "a licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *CBS v. FCC*, 453 U.S. 367, 388 (1969).

children's advocacy organizations, Commissioner Copps and me, this Commission has failed to complete a proceeding to address this important concern since 1999.

So while this *Report* focuses its recommendations on the novel and questionable approach of mandating a la carte, and constitutionally-difficult content regulation, it neglects to provide much discussion of a host of tools that could clearly provide parents some relief. Rather than focusing solely on the sliver of violent programming that may or may not be amenable to regulation, we should have also focused on the real, everyday problems parents face which are more fully addressed by more comprehensive solutions that sometimes involve working with media executives to set better standards to protect children from exposure to TV violence.

Other recommendations that do not implicate constitutional protections, but are noticeably missing from this Report, include the need for a coordinated and sustained national effort to educate parents, engage industry and encourage the development of new technologies. Such an effort could include an education campaign, authorized and funded by Congress, would seek to improve consumer awareness and understanding of all existing parental controls technologies and resources, especially the V-Chip and content descriptors. A multi-faceted campaign would: (1) expand existing industry-led and private efforts, such as TVboss.org. and Pause Parent Play, to further educate parents and families; (2) require manufacturers set new TVs to receive only TV-G children programming, until consumers and parents reset or opt-in for programming that is appropriate for their household; (3) rate all programming, including news, promotions and commercials;⁷ (4) use audio, in addition to visual, ratings and descriptors of all rated programs; (5) promote media literacy at schools; (6) encourage more positive children's programming; and (7) encourage the development of enhanced V-Chip software and blocking technologies to filter objectionable content.

Congress could also consider legislation that explicitly exempts a television code and a family hour from antitrust law. This measure could permit the broadcast, cable, satellite and advertising industries to establish an inter-industry code on the subject of television violence. Such an approach, along with the national coordinated effort and education campaign, I believe, would help reduce children's exposure to media violence. Accordingly, these ideas deserve consideration by Congress, even though they are not mentioned in this Report.

Unfortunately for those who care passionately about this issue, as I certainly do, this Report could do much more. I vote for it because it is a start and better than nothing, but we leave much of the real work to Congress to tackle the tough issues Congress asked us to help them with.

⁷ A 2004 study of commercials during major sporting events found that almost one in five displayed behavior deemed unsafe or violent, and, as a result, urged parents to limit and supervise their children exposure to televised sports. See Robert F. Tamburro, Patricia L. Gordon, James P. D'Apolito and Scott C. Howard, *Unsafe and Violent Behavior in Commercials Aired During Televised Major Sporting Events*, 114 *Pediatrics* (Dec 2004), at 694-698.