

Commentary For Congress

By Larry Walters

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Editor's note: The following is the Written Testimony of Lawrence G. Walters and Marc J. Randazza, of Weston, Garrou, DeWitt & Walters, submitted to the Subcommittee on Constitution, Civil Rights, and Property Rights of the Judiciary Committee of the United States Senate on March 16, 2005, as commentary on the "[Brownback hearings](#)" – examining the repercussions of the recently dismissed federal obscenity charges leveled against Extreme Associates.

Weston, Garrou, DeWitt & Walters is a law firm with a long history of protecting the First Amendment to the United States Constitution. Our mission for nearly four decades has been to serve as a check on governmental censorship, frequently seeking the assistance of the judiciary when the executive or the legislative branches overstep their bounds in contravention of the document which defines the meaning of this nation – the Constitution. Our firm has litigated Free Speech cases in virtually every United States jurisdiction, and has handled seven cases at the United States Supreme Court, all dealing with censorship of erotic materials.

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As constitutional scholars and lawyers, the authors of these comments are greatly concerned with Senator Brownback's recent attacks on constitutionally-protected speech and his attempts to undermine the authority of the judicial branch. A prior hearing was conducted in connection with erotic materials in November, 2004, in which loosely-defined "scientists" were called upon to provide testimony that adult speech is somehow akin to addictive drugs. As with today's hearing, no representative of the targeted industry was invited to testify, or formally notified of, those hearings.

Today, the Subcommittee has been convened because Senator Brownback and Senator Hatch apparently disagree with the decision recently handed down by United States District Court Judge Gary Lancaster in the United States v. Extreme Associates, et. al. case. In that case, speech and expressive conduct was improperly the subject of prosecution by the Department of Justice, which utilized the nation's obscenity laws as a tool of censorship. The judiciary serves as a check on invalid or unconstitutional executive or legislative power, and in the Extreme Associates case, Judge Lancaster properly interpreted the law and handed down a ruling that was protective of this most fundamental of constitutional rights; the right to Free Expression.

Senators Brownback and Hatch, denied their favored outcome, which would have resulted in a chilling of Americans' Free Speech rights, seek to discredit this decision, issued from the independent judicial branch, by "illustrating the negative impact" of this case on "prosecuting producers of obscene material." This Subcommittee, and the entire Senate, should listen to the words of one of the experts being called to testify at the instant hearing, that he uttered when speech he supported was threatened. Robert Destro gave the opinion,

when abortion protestors were threatened, that the First Amendment's protections protect the government from shutting down speech, no matter how disagreeable that speech may be.

We find it terribly troubling that in seeking out constitutional scholars, the Subcommittee has apparently chosen hand-picked witnesses who are most likely to support a very narrow and improper reading of the First Amendment. While Mr. Destro may have made the lofty statements quoted above, he is not well known for his objectivity on constitutional issues, as evidenced by his clearly specious arguments in attempting to overturn the rights of Terri and Michael Schiavo on behalf of Governor Jeb Bush of Florida, wherein the Florida Legislature again attempted to legislatively overrule the decisions of the Florida courts, by passing "Terri's Law." Professor Schauer, of Harvard University, was the author of the Meese Commission Report on Pornography, a now widely discredited and outdated study. The Subcommittee should question whether Professor Schauer is here to offer his expert advice as a constitutional scholar, or to attempt to breathe life into that long-ridiculed Report.

Another expert being called today is Patrick Trueman. While Schauer and Destro have published works that would at least qualify them as constitutional scholars – regardless of their biases – Trueman's qualifications as such are clearly specious. Of all the constitutional scholars available, was Trueman chosen for his expertise, research, and knowledge? Or was he chosen for his views on liberty, or rather his views on the threat that liberty presents to his personal morality? Those views include the following telling commentary: "The foundation for Lawrence [v. Texas] rests on the ever-expanding 'right to privacy,' which threatens our culture like no other force in society." (emphasis added). We find it troubling that of all the threats to our society that may exist, this "expert" finds a growth in personal liberty to be the greatest cause for alarm.

If this Subcommittee wishes to rely on these experts, rely upon what they have said in the past when they stated it outside the debate over pornography. Professor Schauer has stated "Congress has its own views about constitutional interpretation, views that conveniently produce outcomes routinely congruent with Congress' own policy views." Do not allow this Subcommittee to act as a government-appointed censor, reflecting the personal morality of a few Senators, while sacrificing protected speech in the process.

The First Amendment does not act to protect speech that we all like. The First Amendment exists to protect speech that we do not like. For when popular speech is at issue, there is no need to protect it. This Subcommittee should learn the historical lesson of the loss of constitutional rights. We as a nation sacrificed the Fourth Amendment, virtually in its entirety, in an effort to fight the "War on Drugs" in the 1980's. Citizens are now left with virtually no protection from unreasonable search and seizure in their homes, cars, and personal effects. We sincerely hope that the First Amendment does not suffer the same fate, and result in a casualty of the "War on Porn," which appears to be the next political football.

We may look at the expression existent in some pornography and be appalled. Certainly, much of this expression could be considered by many to be indecent. Nevertheless, forces that seek to roll back the First Amendment seek nothing short of stifling expression due to a dislike or distaste for the ideas contained therein. If we look back into history, there have always been elements which seek to stifle expression for social and political reasons. Many works of art from the Renaissance were once considered blasphemous, profane, and a direct

affront to both political and religious authority. This was in a time that questioning or challenging such authority could very easily bring the challenger's neck under an ax blade. Nevertheless, today we consider some of these works of art to be priceless elements and fixtures in our human cultural heritage. Where would we be if the Renaissance artists who pushed forward the boundaries of human expression were confronted by Senator Brownback? Where would we be if the Senator Brownbacks of history had succeeded in wiping Galileo's writings from the tablet of human history?

It may appear arrogant and excessive to compare an Extreme Associates video to the masterful touch of Michelangelo. However, it is far more arrogant to decide what expression and what art will eventually lead mankind to gaze upon it hundreds of years from now as an integral part of human cultural history. Those who wish to stamp out pornography wish to stamp out ideas. What ideas are so dangerous, what ideas are so threatening, that they must be exterminated? More importantly, are the beliefs and moralities of Senators Brownback and Hatch so fragile, that they cannot continue to exist alongside the expression of Extreme Associates? As it has often been said, the remedy for bad speech, is more speech; not censorship.

Human history is built upon dangerous and strange ideas. If we look back, deep into human history, it certainly must have seemed to be a dangerous idea when the first man began to use fire. Nevertheless, without fire, would mankind ever have advanced beyond that cowering cave dwelling creature that we once were? The earth being round, the crossing of the Atlantic, the earth not being the center of the universe, evolution, the equality of races, and many other of our modern notions of social justice, were all once considered to be "dangerous ideas."

The arrogance that may exist in the statement that today's pornography may be "the future's fine art" pales in comparison to the arrogance of one who would seek to extinguish an idea by force of law. And it furthermore pales in comparison to the arrogance in the notion that when a few ideologues such as Brownback and Hatch disapprove of speech protected by the First Amendment, that they should be able to roll back, or even attempt to roll back, the First Amendment, so that their own personal beliefs and morality may go unchallenged.

In conclusion, we would ask the members of the Subcommittee to reflect on the original intent of the framers of the Constitution, in mandating a Separation of Powers, and an independent judiciary. Federal judges should not be answerable to Senators who disagree with their legal interpretation. This is a dangerous trend in American politics, which should be ceased immediately to protect the very foundation of our government, our democracy, and our freedom.

Stay tuned to XBiz for continuing coverage of the Brownback hearings, and Congressional efforts to limit free expression.

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