

The American Constitution Society

For Law And Policy

Supreme Court to Review Child Online Protection Act

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The Supreme Court has decided to review a Third Circuit Court of Appeals decision that struck down the Child Online Protection Act (COPA). COPA, passed in 1998 by Congress, would penalize web site operators with fines of up to \$50,000 per offense, prison terms of up to six months, or both. The COPA Commission website (www.copacommission.org) explained that COPA's purpose was "to prohibit online sites from knowingly making available to minors material that is "harmful to minors" (sexually explicit material meeting definitions set forth in the Act). Commercial providers of material "harmful to minors" may defend themselves against prosecution by "restricting the access of minors to such material."

Last term, the Third Circuit decided COPA was unconstitutional as a flat ban on protected speech because COPA's use of "contemporary community standards" to identify material that is harmful to minors rendered the statute substantially overbroad. The Supreme Court rejected the lower court decision stating that reliance on community standards to determine what is harmful to minors was not sufficient by itself to render the statute unconstitutional. The case was remanded back to the Third Circuit for further proceedings regarding whether COPA was 1) overbroad for other reasons, 2) unconstitutionally vague or 3) would survive strict scrutiny analysis. *Ashcroft v. ACLU*, 122 S. Ct. 1700 (2002).

Earlier this year, the Third Circuit again struck down the law, this time finding that COPA suffered from numerous flaws. These flaws included expansive definitions of "material harmful to minors" and "for commercial purposes" as well as burdensome affirmative defenses. Coupled with their previous finding regarding contemporary community

standards, these flaws only added to the wide range of speech covered by COPA. The Bush administration, disappointed with the Circuit Court decision, appealed to the high court arguing that children needed to be protected from the harmful effects of Internet pornography. Solicitor General Theodore Olson's contention was that COPA was a reasonable solution because it only targeted commercial pornography, primarily web sites that use free sexually explicit teasers available to anyone surfing the Internet.

Ann Beeson, Associate Legal Director for the ACLU, in an online chat for washingtonpost.com explained what the constitutional concerns were:

"In its attempt to deny minors access to certain speech on the Internet, COPA criminalizes a wide range of speech that is unquestionably protected for adults. Our clients range from Salon magazine (which publishes columns by noted sex therapist Susie Bright), to ArtNet.com (which carries Andres Serrano and other controversial photos), to PlanetOut.com (a large web site with valuable content for the lesbian and gay audience). These online publishers are afraid that if COPA is upheld they could go to jail."

One of the ACLU's main contentions to COPA is that there are a number of alternatives (ranging from filtering programs to educating parents and children on avoidance of inappropriate sites) that would prevent minors from viewing Internet pornography. Even if COPA were to make it through the Supreme Court, it would do nothing to stop the operations of overseas porn sites. Don Telage, chairman of the COPA Commission argued there was "no single technology or method" that would "completely protect children from harmful material online." Until the Supreme Court hears the case, the federal government may not prosecute anyone under the law.

Restricting the Reach of the PATRIOT Act: Bipartisan Proposals to "Fix" the Bill

The PATRIOT Act celebrated its second anniversary this weekend, and since its enactment, bipartisan discontent with the bill has grown notably. Although President Bush continues to ask Congress for even greater police powers, most recently the power to compel testimony without court supervision, legislators have proposed a number of bills (with equally campy titles) that would limit some of PATRIOT's most overreaching provisions:

- ◆ The Safety and Freedom Ensured (SAFE) Act would alter the provisions of § 215, a provision the ACLU challenged in July. The provision allows the FBI to seize personal records including business, medical, and library records, as well as student records and genetic records without probable cause.
- ◆ The Protecting the Rights of Individuals Act adds court oversight and institutional checks and balances to some aspects of PATRIOT.
- ◆ The Ben Franklin True Patriot Act addresses PATRIOT in its entirety and additionally focuses on other post-9/11 security measures, in particular, the President's claimed power to designate enemy combatants.

For more comprehensive PATRIOT Act coverage, see <http://www.aclu.org/safeandfree/>.

University of Minnesota Clerical Workers on Strike

University clerical workers have been on strike since last Tuesday, and there is little indication that the University has changed its negotiating strategy to work toward a quick resolution. Some students, honoring the picket lines, have opted not to come to classes until the strike is over, and NLG has organized a note exchange and other resources for students sympathetic to the strike. A few faculty members have scheduled classes off campus to support the strikers.

Among the goals union workers are hoping to achieve is affordable healthcare. While the current contract provides a number of health plan options, including one that does not cost the employee anything, the University is calling for substantial increases in health plan costs under the new contract. The no cost option would be entirely eliminated, and even the least expensive of the remaining health plans would increase premiums more than \$700 per year, effectively amounting to a pay cut in that amount. For employees with families and dependents, the increase is even more substantial, amounting to an increase in cost of almost \$2,000 in some cases. Additionally, the University's proposal doubles employees' co-pay for office visits, and significantly raises out-of-pocket costs for prescription medications. The out-of-pocket costs for prescription medications would increase again next year.

The University is also seeking to eliminate some contractual provisions that are virtually costless to the school, but that provide necessary benefits to the clerical workers. In 1981, the University eliminated step increases for non-unionized workers, and now, despite agreeing that

step increases pose no negative financial impact on the school because of the high turnover rate in clerical positions, the University is seeking to eliminate step increases for union employees as well. Without step increases, clerical workers, who are at the bottom of the pay scale, have no mechanism for advancement.

Finally, the union is negotiating for basic job security provisions, many of which are standard contractual language. The union's proposals would require the University to rehire laid off employees with no pay cuts, and to eliminate selection criteria and subsequent probation for those workers. The union would also mandate hiring priority for senior, qualified employees where the University has been making external hires rather than rehiring laid off employees or qualified internal employees. Hiring priority provisions, like this one, exist in most Minnesota state contracts and public employment contracts, including some at the University. These provisions cost the University nothing. The University is not willing to negotiate non-economic issues in exchange for wage freezes and other changes. Instead, the University proposal eliminates lay off protection and offers no substitute.

AFSCME has produced flyers and bulletins detailing these proposals and the progress of the strike. They are available online at <http://www.afscme3800.org/>. Within the law school, there is a strike resource table in the subplaza for more information and ways to support the strikers as well as a listserv with updates on strike activities (email Nick Woomer woom0001@umn.edu to join the listserv).

Supreme Court Wrap-Up: Major Decisions of the Last Few Months

- ◆ *Lawrence v. Texas*: Despite a feisty Scalian dissent, the Court overruled *Bowers v. Hardwick* and held unconstitutional a Texas statute that criminalized same sex sodomy. The Minnesota Law Review's symposium this year will focus on the decision. Professors Carlos Ball, Dale Carpenter, William Eskridge, Chai Feldblum, Suzanne Goldberg, Nan Hunter, Andrew Koppelman, and Miranda McGowan will all participate in the event on Saturday, November 22 starting at 9:00 a.m. in Room 25. The event, *Gay Rights After Lawrence v. Texas*, will be the first symposium in the country focusing on the decision.
- ◆ *Grutter v. Bollinger* and *Gratz v. Bollinger*: The Court upheld the University of Michigan Law School's race-conscious admissions policy, validating the use of race as a "plus factor" in admissions. In the latter case, however, the Court invalidated the school's undergraduate affirmative action admissions policy.
- ◆ *United States v. American Library Association*: The Children's Internet Protection Act, which withholds federal funding from libraries that do not use a program to block access to certain types of websites, does not violate the First Amendment. Although the program, intended to prevent children from viewing offensive websites, is arguably overbroad as it blocks access to websites that do not contain offensive material, the Court held that CIPA is a valid exercise of the government's spending power, and that this content-based regulation on speech is constitutional.
- ◆ *FEC v. Beaumont*: A prohibition on direct election contributions by nonprofit advocacy groups does not constitute a constitutionally invalid impediment to free speech. The Court declined to review the statute under strict scrutiny, stating instead that the limitation need only be "closely drawn to match a sufficiently important interest."

The full text of these opinions are available at <http://www.supremecourtus.gov/opinions/02slipopinion.html>.