

Three Alternate Futures: Evaluating the State of the Adult Industry under Each Presidential Candidate

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As the Democratic Party wrestles with its knock-down, drag-out primary contest between Senator Barack Obama (D-IL) and Senator Hillary Clinton (D-NY), desperately seeking a solution for unity, the adult industry is no doubt wrestling with its own concerns regarding how it will fare under the potential presidency of the three remaining major candidates. The choice of the voters in November 2008, will dramatically impact the way in which the adult industry will fare – potentially for many years to come. Therefore, an objective, informed evaluation of each candidate’s stance on erotic entertainment, and First Amendment issues in general, is critically important to determining the potential impacts on the industry.

This article is not intended as a political endorsement, or as a recommendation on how to cast your vote. That personal decision will likely be influenced by a variety of factors beyond First Amendment issues. It should also be noted that the author is not affiliated with any political party, and is not employed by any candidate’s election campaign.

Hillary Clinton

Senator Clinton is a complicated political *persona*. Her views on First Amendment issues tend to fluctuate with the political objective at hand, and do not appear to be significantly influenced by any strongly-held moral or philosophical beliefs. Interestingly, when Senator Clinton became First Lady in January 1993, one of her first official acts was to order an end to the routine access to the West Wing that the media covering the White House had taken for

granted for decades.¹ She even tried to get the press corps removed from the White House, altogether, and banished to a detached structure called the “Old Executive Office Building.”²

While such a sweeping policy change never came to pass, it does demonstrate a degree of antipathy toward fundamental notions of a free press. The distrust of the press carried over into recent times, as Senator Clinton has continued to block access to important documents housed in the Clinton Presidential Library, relating to her White House work.³ While this Candidate’s attitude toward media access and open government may not directly impact the free expression issues relevant to the adult industry, they do reveal a certain degree of casualness when it comes to upholding core First Amendment values.

During her tenure as a Senator from New York, Clinton has shown a willingness to impose government regulation on violent or sexually-oriented media. For example, she was one of the first to jump on the bandwagon criticizing the videogame, *Grand Theft Auto: San Andreas*, which contained un-lockable content that some deemed “pornographic” but which would not have earned a Hollywood movie more than a PG-13 rating, by today’s standards.⁴ As the instructions for unlocking the graphic content become widely available on the Internet, Clinton responded by saying: “The disturbing material in *Grand Theft Auto* and other games like it is stealing the innocence of our children and is making the difficult job of being a parent even harder.”⁵

In response to this incident, Clinton proposed what became known as the Family Entertainment Protection Act (FEPA), cosponsored by several Senators, including Joe

¹ T. Mauro, “Hillary Clinton: Wariness of the Press,” *FirstAmendmentCenter.org* (October 30, 2007).

² *Id.* This building is, however, connected by tunnels, and serves as the Vice President’s primary office building.

³ *Id.*

⁴ Staff, “Senator Clinton announces legislation to keep inappropriate videogames out of the hands of children,” www.Senate.gov (July 14, 2005).

⁵ *Id.*

Lieberman.⁶ The Bill called for mandatory, federal enforcement of the (currently) voluntary Entertainment Software Rating Board (ESRB) rating system for videogames, purportedly for the purpose of protecting children from inappropriate content.⁷ The FEPA sought to impose fines of \$1000.00, or 100 hours of community service, for first-time offenses of selling videogames labeled “Mature” (M) or “Adult Only” (AO) to a minor. The Bill also called for an investigation by the FTC into the ESRB, to determine whether games have been properly rated in the first place. Clinton introduced the measure because of her purported belief “that the ability of our children to access pornographic and outrageously violent material on videogames rated for adults is spiraling out of control.”⁸

Clinton has also apparently bought into the largely discredited studies allegedly demonstrating a link between exposure to violent videogames and aggressive behavior of children, conducted by researchers at the Indiana University School of Medicine, and others.⁹ Thus far, none of these purported studies have been accepted as evidence of “harm” caused to minors playing violent videogames, in any court of law.¹⁰ The FEPA subsequently died in Committee and has not been reintroduced.¹¹

This aggressive approach toward regulating erotic and violent videogame content provides some insight into Senator Clinton’s views on adult-oriented media in general. While the focus of her efforts in connection with the *Grand Theft Auto* matter was on protecting children, such justification is universally cited for censorship of the adult industry. Accordingly, while Democrats, as a whole, have been traditionally less hostile to the interests of the adult

⁶ *Wikipedia.com* – Family Entertainment Protection Act.

⁷ *Id.*

⁸ *Senate.gov, supra.*

⁹ *Id.*

¹⁰ *See, e.g., Entertainment Software Association v. Blagojevich*, 404 F. Supp. 2d 1051 (N.D. Ill. 2005); *Videogame Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (ND Cal. 2005); *Interactive Digital Software Association v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003).

¹¹ *Wikipedia.com* – Family Entertainment Protection Act.

industry than Republicans, Senator Clinton appears to jump on the “protect the children” bandwagon when necessary to satisfy political objectives.

Senator Clinton did show some promise in regard to Free Speech issues, during the dispute over an art display at the Brooklyn Museum of Art, which was described as “offensive to Catholics.”¹² At the time, then-Mayor, Rudolph W. Giuliani threatened to cut City financing to the museum if the display, which depicted the Virgin Mary adorned with elephant dung and sexually-explicit photos, was not removed.¹³ Giuliani characterized the debate as an effort to use public funds to bash the Catholic religion.¹⁴ Despite the potential political fallout from alienating the Catholic voters in New York, Clinton supported the free expression rights of the museum to display the art. Carefully tempering her remarks, Clinton summed up her position by stating: “I would not go to see this exhibit [but] it is not appropriate to penalize and punish an institution such as the Brooklyn Museum.”¹⁵ Whether Clinton was attempting to appeal to the highbrow New York art crowd, or simply standing on principle, cannot be known. However, a glimmer of First Amendment purism can be seen by her stance in this dispute.

John McCain

As noted above, the Republicans, as a group, have historically been substantially more aggressive against the interests of the adult entertainment industry, over the last several decades. From Nixon to Reagan to Bush I and II, Republican administrations have pursued criminal charges against the industry, and blamed erotic material for the moral decline of society and dissipation of family values. Nixon ordered the preparation of the Meese Commission Report,¹⁶ which was designed to “find” a causal link between pornography and sex crime, after the first

¹² A. Nagourney, “First Lady Assails Mayor Over Threats to Museum,” *New York Times* (September 28, 1999).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Attorney General's Commission on Pornography, Final Report, July 1986, Vol. I, 225, 903.

presidential report on pornography (under President Johnson)¹⁷ failed to uncover any statistically significant correlation.

Under President Reagan, the Justice Department began to pursue adult video producers aggressively, for the first time using the nation's racketeering laws, which were amended up to include obscenity violations as "predicate offenses."¹⁸ This move increased the potential jail terms and fines for obscenity offenses, exponentially. George H. W. Bush continued the War on Pornography until President William J. Clinton took the reins, bringing additional obscenity cases to a screeching halt – instead devoting Justice Department resources to the prosecution of child pornography. The adult industry – which now included the adult Internet – proliferated in the 1990s under Clinton, despite his signing of one of the worst pieces of censorship legislation to ever be passed by Congress. This law, called the Communications Decency Act of 1996, made virtually all erotic media on the Internet a federal felony.¹⁹ Of course, in 1997, a unanimous Supreme Court quickly invalidated the law prior to occurrence of any enforcement.²⁰

George W. Bush reignited the obscenity debate by appointing an ultra-conservative, Religious Right, Attorney General – John Ashcroft. Ashcroft's appointment resulted in the initiation of a new round of obscenity cases.²¹ Ashcroft's successor, Alberto Gonzales, then wielded the baton, and actually (and more relentlessly) pursued a greater number of obscenity prosecutions than Ashcroft. Further, Gonzalez, upon confirmation, committed to prosecuting "the distributors of hardcore pornography that meets the test for obscenity."²² Gonzales was

¹⁷ Report of the Commission on Obscenity and Pornography, September 1970, U.S. Government Printing Office. (This Report was commissioned by President Lyndon B. Johnson, near the end of his administration. The Pornography Commission found that the government "should not seek to interfere with the right of adults who wish to do so to read, obtain, or view explicit sexual materials.")

¹⁸ 18 U.S.C. § 1961.

¹⁹ Title 47 U.S.C.A. § 223 (1994 ed., Supp. II).

²⁰ *Reno v. ACLU*, 521 U.S. 844 (1997).

²¹ D. McCullagh, "Ashcroft's hard line on hard-core," *Wired News* (June 9, 2001).

²² J. Kay, "U.S. Attorney's porn fight gets bad reviews," *Law.com* (August 30, 2005).

forced to resign in disgrace, as a result of the U.S. Attorney firing scandal, and is now succeeded by Michael B. Mukasey. While the new AG has not been particularly vocal on adult industry issues, the obscenity cases continue, with a new prosecution against Evil Angel's John Stagliano, occurring in April 2008, under his watch.

It is against the foregoing backdrop that a potential McCain presidency must be evaluated. Irrespective of Senator McCain's individual views on obscenity or the First Amendment, it must be assumed that his Republican Administration will be filled with substantially more conservative prosecutors²³ and appointed officials. Consequently, this translates into comparatively worse news for the adult industry than either of the Democrats. That being said, John McCain has often been viewed as a "maverick" and an independent-minded Republican, often bucking the system and rejecting the counsel of the more conservative wing of the party.²⁴ Notwithstanding, for McCain to clinch the election, he must sew up the conservative block's vote. That means promises will be made, and those promises might be kept. Conservatives have been demanding the obscenity prosecutions they were "promised" since they first helped elect Bush in 2000.²⁵

It may be possible to overlook some of this negative predisposition by Republican candidates if it were not for the fact that Senator McCain appears to have bought into the whole concept of blaming media for criminal activity by viewers. When asked about violence in movies and television, McCain voiced support for legislation requiring warning labels on violent

²³ Moreover, any President normally appoints numerous federal judges during his tenure. That power, itself, should figure carefully into the analysis, since judges will ultimately be deciding the Constitution.

²⁴ Mathews, Blitzer call McCain a "Maverick", *Media Matters* (August 31, 2007).

²⁵ T. Chris, "Gonzales' strange priorities," *TalkLeft.com* (September 19, 2005).

media products similar to cigarette warning labels.²⁶ He calls for a close look at the “entertainment media and the violent images ... with which they are bombarding our children.”²⁷

Moreover, McCain does not appear to have much general respect for First Amendment principles. When confronted by talk show host Don Imus about the claim that his campaign finance legislation²⁸ violated the First Amendment, McCain responded by stating: “I would rather have a clean government than one where quote 'First Amendment rights' are being respected that has become corrupt ... If I had my choice, I'd rather have the clean government.”²⁹ McCain has routinely relegated the First Amendment to second place in political debates, even supporting prohibitions on burning the American Flag; a patently unconstitutional effort.³⁰

McCain's other anti-First Amendment blemishes include sponsoring the library filtering law; dubbed the Children's Internet Protection Act (CIPA),³¹ requiring that schools and libraries receiving federal funds install filters to block material that is deemed obscene or harmful to minors. He also recently sponsored the Stop the Online Exploitation of Children Act, which proposed expansion of penalties for obscene content to bloggers and other web hosts, in order to protect children. McCain, one of the drafters of the legislation, stated in a speech on the Senate floor: “Technology has contributed to the greater distribution and availability, and some believe, desire for child pornography.”³² To date, the bill has failed to pass.

McCain's consistent, anti-First Amendment stance has earned him a lifetime rating of 26%, relating to his votes on civil liberties legislation, as determined by the American Civil

²⁶ *OnTheIssues.org*, citing: Press Release: “Violent Labeling Bill” Jun 16, 1999.

²⁷ *OnTheIssues.org*, citing: CNN AllPolitics Apr 30, 1999.

²⁸ Bipartisan Campaign Reform Act of 2002 (BCRA), Public Law No. 107-155.

²⁹ T.Mauro, “For McCain, First Amendment runs 2nd to campaign reform,” *FirstAmendmentCenter.com* (September 4, 2007)

³⁰ “Where does McCain stand on the flag burning amendment?” *Yahoo.com* (April 8, 2008).

³¹ Pub. L. 106-554.

³² D. McCullagh, “Senator: Illegal images must be reported,” *CNetNews.com* (December 11, 2006).

Liberties Union.³³ This poor record may be partially explained by his views on the relationship between religion and government. Interestingly, when asked whether he thinks the United States Constitution established a Christian nation, McCain responded that “I would probably have to say yes, that the Constitution established the United States of America as a Christian nation.”³⁴ So much for First Amendment principles of separation of church and state.³⁵

As is evident from the above, McCain appears, from his public comments, voting record, and political party’s lengthy history, to be the worst choice for the adult industry’s interests. While questionable notions of a purported, independent-leaning mentality may hold some margin of hope in less open hostility to the adult industry than that which has been exhibited by the current Administration, some new legislation, and criminal prosecution is virtually guaranteed, using the hack-kneed justification of protecting children. Those in the adult industry still supporting Senator McCain for President should carefully consider the potential consequences of such a decision on their business interests, for years to come.

Barack Obama

One source names Barack Obama the most liberal member of the United States Senate.³⁶ However, “liberal” does not always equate to “civil libertarian,” as evidenced by the many feminists who view themselves as socially liberal, yet are vehemently opposed to pornography, which is seen as a means to victimize women.³⁷ Indeed, while Senator Obama may ultimately be viewed as the candidate who is least hostile against adult industry, he has a varied record when it comes to First Amendment issues.

³³ “For McCain, First Amendment runs 2nd to campaign reform,” *supra*.

³⁴ *Id.*

³⁵ This concept is derived from the “Establishment Clause” of the First Amendment, which has been interpreted by the courts as prohibiting any excessive entanglement between the government and religion.

³⁶ B. Friel, R. E. Cohen & K. Victor, “Obama: Most Liberal Senator In 2007,” *National Journal* (January 31, 2008).

³⁷ “Anti-pornography movement,” *Wikipedia.com*; Feminists Against the First Amendment, *The Atlantic*; <http://www.theatlantic.com/doc/199211/feminism-censorship/2>.

Certainly, Obama has been schooled in constitutional law, as he serves as a Senior Lecturer at the University of Chicago, where he specialized in due process issues.³⁸ While employed as an attorney with Miner, Barnhill, and Gallard, PC, Obama litigated civil rights cases, but focused on issues involving voting rights and employment, not free speech cases. There is something to be said for electing a civil rights attorney as President of the United States, generally, as an individual with such qualifications would presumably be much more sensitive to constitutional obligations and restraints than, for example, the current Administration, which has viewed the Bill of Rights as more of a hindrance to its objectives than a set of guiding principles.

Obama has demonstrated some sensitivity to religious freedom in his speeches and public presentations. However his commitment to separation of church and state is questionable, given statements like: “Secularists are wrong when they ask believers to leave their religion at the door before entering into the public square.”³⁹

Senator Obama does appear to be committed to the concept of freedom of information and open government. As a state senator in Illinois, Obama cosponsored the Verbatim Record Bill, SB1586, adopted into law in August 2003. This law requires public bodies to make video or audio recordings of any meetings behind closed doors, and was the first of its kind.⁴⁰ His commitment to open government carried over to his U.S. Senate position, where he has advocated similar transparency in government, cosponsoring the Federal Funding Accountability and Transparency Act of 2006. The bill created an online database to track approximately one trillion dollars in government on grants and contracts. Subsequently, it was signed into law effective January 1, 2008. Moreover, Obama has pledged to increase public access to government information if he is elected President by, for example, posting non-emergency bills

³⁸ C. Holliday, “Obama’s First Amendment shows varied views,” *FirstAmendmentCenter.org* (August 9, 2007).

³⁹ *Id.*

⁴⁰ *Id.*

for five days online to give the public a chance to provide feedback before he signs them into law.⁴¹

Although his record on open government and religious freedom may be impressive, Obama appears to be less committed to free expression as a cultural value. For example, when Obama was a state senator in Illinois, the State sought to issue “Choose Life” license plates. Obama was critical of the plates, and believed that their issuance resulted in an unfair promotion of an anti-abortion position.⁴² Ultimately, an advocacy group sued, and a District Court Judge ordered the State to start offering the plates, observing that the First Amendment protects unpopular and even some hateful speech.⁴³ Obama’s position in this dispute could, however, arguably be considered a pro-First Amendment stance, as preventing the issuance of license plates with a traditionally pro-Christian, anti-abortion message, may be seen as preventing an Establishment Clause violation.

Obama has also been critical of misogynistic and violent lyrics in rap music, opining that the rappers were “degrading their sisters” with their slang terms for women.⁴⁴ Obama has also supported more indecency regulation of broadcasters and cable companies. However, this often involves a difficult balancing act. In a November 2005, speech to the Kiser Family Foundation, Obama described the difficulty in balancing First Amendment liberties with cultural values in the context of regulating sex and violence on television.⁴⁵

However, Obama does see a role for the government in regulating the videogame industry. In that regard, he said: “I would call upon the videogame industry to give parents better information about programs and videogames by improving the voluntary rating system we

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

currently have ... and even if the industry does do some responsible self-policing, there is still a role for the federal government to play.”⁴⁶ In another comment, Obama ominously threatened to get the FTC involved if videogame ratings did not become clear: “If the industry doesn’t, then my administration would.”⁴⁷

Turning specifically to the Internet, Obama’s comments regarding a particularly offensive website raised some eyebrows. That incident occurred when Lindsay Ashford, an American expatriate living in Europe, and a self-professed pedophile, posted pictures of the presidential candidates’ children, evaluating their “cuteness.” Obama’s attorney, Robert Bauer, sent a cease and desist letter to Ashford, calling the use of the photos and the comments “a criminal act.” Obama’s representative demanded immediate removal of the photos, as well as any references to Obama and his family.⁴⁸ Various Free Speech organizations and advocates expressed surprise at this demand, as Free Speech principles clearly covered the display of a presidential candidate’s family on a website – irrespective of the disturbing context.⁴⁹ After a brief First Amendment backlash, the issue died down, and Obama did not further pursue the demand for removal.

Aside from these few points of diversion from core First Amendment principles, Obama’s background and training in civil rights issues, and his overall approach to open government and free expression suggest that his administration would be the least likely to pursue a campaign of open hostility and criminal prosecution against the adult entertainment industry, as exemplified by the current Administration’s efforts.

⁴⁶ B. Crecente, “Presidential Candidates Talk Video Game Censorship,” *Kotaku.com*, citing www.commonensemedia.org.

⁴⁷ P. Haas, “Candidates Weigh In On Video Game Regulation,” *Cinemablend.com* (December 12, 2007).

⁴⁸ Obama’s First Amendment shows varied views,” *supra*.

⁴⁹ *Id.*

Conclusion

As in most presidential elections, there is no perfect candidate. The same holds true for the adult entertainment industry in the upcoming 2008 election. Each of the candidates has particular strengths and weaknesses. The two Democrats have a limited experience scorecard, thus making it difficult to predict exactly how they would approach certain cultural issues of importance to the adult entertainment industry. McCain has a long track record, but has been fairly consistent in his hostility toward First Amendment interests.

After enduring eight years of a Republican-influenced law enforcement policy, and appointment of two ultra-conservative Supreme Court Justices, voting for McCain appears to be the most detrimental from the standpoint of the adult industry's interests. Alone, his ability to appoint more conservative judges at all levels of the judiciary presents a serious concern.

Of the two Democrats, Hillary Clinton has evidenced a willingness to propose and support legislation adverse to media interests, based on a purported desire to protect the children. This mentality can result in tremendously detrimental legislation for the adult industry. Although Obama has delivered some troubling public comments on issues impacting freedom of speech, his track record, education, and overall civil rights mindset suggest that his administration would be the least hostile to the livelihood of those involved in the adult industry.

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