

Center for Democracy & Technology Transition Memo
Theme: Preserving Free Speech on the Internet
Issue: Protecting Children Online Without Violating the First Amendment

★ **Issue/Problem.** In each session of Congress since the rise of the Internet, members have introduced bills that would restrict access to lawful content online or place burdensome regulations on online service providers. Recent proposals would, for example, have prohibited minors from using social networking sites and other popular services. Such proposals are often blatantly unconstitutional and would, in any event, do little to actually protect children online.¹

★ **Policy History.** In the mid-1990s, Congress tried twice to censor Internet content in the name of protecting children. In 1996, Congress passed the Communications Decency Act (CDA), which would have reduced content on the Internet to a level appropriate for a child. In the 1997 landmark case *Reno v. ACLU*, the Supreme Court decided that the Internet deserves the same high level of First Amendment protection as print media, and struck down the CDA as unconstitutional. A year later, in response to the *Reno* case, Congress passed the Child Online Protection Act (COPA), which criminalized making certain online “commercial” material accessible to minors. Over the past 10 years, courts have repeatedly enjoined COPA as being unconstitutional – most recently in July 2008 – but the Department of Justice continues to pursue wasteful appeals.

In both the CDA and COPA cases, the courts noted that government efforts to protect children online would likely impinge on the rights of adults to both create and consume content. More importantly, the courts recognized that other means exist to more effectively guard children against inappropriate Internet material or ill-intentioned adults without violating the First Amendment: specifically, media literacy and technological parental empowerment tools.

★ **What the Obama Administration Should Do.** (1) President Obama should be a strong and vocal advocate for expanding *Reno’s* reach. As new digital media are developed and as traditional media like TV and radio converge with digital media, it will be essential that the entire 21st Century communications landscape receive maximum legal protection against government censorship. The President should direct the Department of Justice (DOJ) to argue this approach in the courts.

2) President Obama should oppose Congressional or agency proposals that would unconstitutionally stifle online speech, even if presented in the name of protecting children. President Obama should encourage the Federal Communications Commission (FCC) not to regulate content on the Internet in any fashion. The DOJ should discourage state legislatures and Attorneys General from pursuing similar proposals.

¹ See, e.g., CDT analysis of Child Safety and Free Speech Issues in the 110th Congress (February 6, 2008): <http://www.cdt.org/speech/20080206freespeechincongress.pdf>

(3) President Obama should include in his budget funding for the development of “media literacy” curricula for both parents and children, and technological parental empowerment tools (e.g., filtering or monitoring software). The President should direct the Department of Education or encourage the Federal Trade Commission (FTC) to develop media literacy model curricula like that developed by the Virginia Department of Education.²

★ **Campaign Platform.** These recommendations would fulfill the promise of President Obama’s technology platform, which states:

“Obama values our First Amendment freedoms and our rights to artistic expression and does not view regulation as the answer to these concerns. Instead, an Obama administration will give parents the tools and information they need to control what their children see on television and the Internet in ways fully consistent with the First Amendment.”³

★ **Other Voices.** While some child safety advocates call for greater government regulation of Internet content, there is strong and broad support for media literacy education and the use of technological parental empowerment tools as alternatives to government regulation, based on a broad recognition that such tools both better protect children online and do not violate the First Amendment rights of adults. In addition to what the courts have said in the CDA and COPA cases, a broad coalition of industry and public interest groups support this approach as evidenced by the briefs filed in the COPA case.⁴ And two authoritative reports reached the same conclusion: the National Research Council’s report entitled “Youth, Pornography and the Internet” (2002) under the leadership of former Attorney General Richard Thornburg, http://books.nap.edu/html/youth_internet/; and the Final Report of the COPA Commission (2000), <http://www.copacommission.org/report/>.

★ **For More Information.**

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Resources:

- CDT Election 2008 free speech blog post (Oct. 6, 2008): <http://blog.cdt.org/2008/10/06/next-president-must-preserve-free-speech-on-the-internet/>
- CDT Election 2008 report (June 2008): <http://www.cdt.org/election2008/speech/>

November 13, 2008

² <http://www.doe.virginia.gov/VDOE/Technology/OET/internet-safety-guidelines.shtml>

³ http://obama.3cdn.net/780e0e91ccb6cdbf6e_6udymvin7.pdf (p. 3)

⁴ <http://www.cdt.org/speech/copa/20071029COPAamicus.pdf>