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Internet Indecency: The Supreme Court Decision on the Communications Decency Act

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Summary

In *Reno v. American Civil Liberties Union*, No. 96-511 (June 26, 1997), the Supreme Court, by a 7-2 vote, declared unconstitutional two provisions of the Communications Decency Act (CDA) that prohibited indecent communications to minors on the Internet. The CDA is Title V of the Telecommunications Act of 1996, P.L. 104-104. Section 502 of the Act rewrote 47 U.S.C. § 223(a) and added subsections (d) through (h) to 47 U.S.C. § 223. It did not amend subsections (b) or (c), which restrict commercial dial-a-porn services. In *Reno v. ACLU*, the Supreme Court struck down § 223(a) in part and § 223(d) in whole.

The Statute

47 U.S.C. § 223(a). Section 223(a)(1)(A) makes it a crime, by means of a telecommunications device, knowingly to transmit a communication that is "obscene, lewd, lascivious, filthy, indecent, with intent to annoy, abuse, threaten, or harass another person." Section 223(a)(1)(B) makes it a crime, by means of a telecommunications device, knowingly to transmit a communication that is "obscene or indecent, knowing that the recipient of the communication is under 18 years of age . . . ."

Although the statute defines "telecommunications," it does not define "telecommunications device." However, it provides in § 223(h)(1)(B) that the term "does not include the use of an interactive computer service." It defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server . . . ." 47 U.S.C. § 230(e)(2). Thus, it appears that § 223(a)(1)(A) and (B), by excluding interactive computer services, are intended to apply to communications, by telephone, fax machine, or computer, that are sent to particular individuals, not those that can be accessed by multiple users.

In *Reno v. ACLU*, the Supreme Court held § 223(a)(1)(B) unconstitutional insofar as it applies to "indecent" communications.

47 U.S.C. § 223(d). Section 223(d) makes it a crime knowingly to use "an interactive computer service to send to a specific person or persons under 18 years of age, or . . . to display in a manner available to a person under 18 years of age, any . . . communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs . . . ." This prohibition seems equivalent to a prohibition of "indecent" material, but § 223(d) does not use the word "indecent," a fact of which the Supreme Court took note in *Reno v. ACLU* (slip op. at 24-25) when it held § 223(d) unconstitutional.

The Decision

The Supreme Court found that "the CDA is a content-based blanket restriction on speech . . . ." Slip op. at 21. As such, it may be found constitutional only if it serves "to promote a compelling interest" and is "the least restrictive means to further the articulated interest." *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115, 126 (1989). The Court did not say that the CDA serves a compelling interest, but it did refer to "the legitimacy and importance of the congressional goal of protecting children from harmful materials." Slip op. at 1.

Later, the Court wrote: "we need neither accept nor reject the Government's submission that the First Amendment does not forbid a blanket prohibition on all `indecent' and `patently offensive' messages communicated to a 17-year old -- no matter how much value the message may contain and regardless of parental approval. It is at least clear that the strength of the Government's interest in protecting minors is not equally strong throughout the coverage of this broad statute." Slip op. at 32. In addition, the Court noted, as a possible alternative to the CDA, "making exceptions for messages with artistic and educational value." Slip op. at 33. These quotations suggest that there may be less than a compelling interest in "protecting" older children from indecent material -- at least such material as has artistic or educational value.

Moving on to the "least restrictive means" test, the Court held that the CDA's "burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve." Slip op. at 28. "[T]he governmental interest in protecting children from harmful materials . . . does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not `reduc[e] the adult population . . . to . . . only what is fit for children.'" Slip op. at 29.

This leaves uncertain whether, if there is no less restrictive means than the CDA by which to protect children, the government could constitutionally reduce the adult population to only what is fit for children. The Court did not reach this question, but neither did it find that there were less restrictive means than the CDA to protect children. Rather, it found that the government had failed to meet its burden "to explain why a less restrictive provision would not be as effective as the CDA." Slip op. at 33.

The Court found that the CDA was too broad and too vague. "The breadth of the CDA's coverage," the Court wrote, "is wholly unprecedented." Slip op. at 31. It "is not

limited to commercial speech or commercial entities. Its open-ended prohibitions embrace all nonprofit entities and individuals posting indecent messages or displaying them on their own computers in the presence of minors. The general undefined terms `indecent' and `patently offensive' cover large amounts of nonpornographic material with serious educational or other value. Moreover, the `community standards' criterion as applied to the Internet means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message." Slip op. at 32-33.

As for the CDA's vagueness, the Court wrote: "Regardless of whether the CDA is so vague that it violates the Fifth Amendment, the many ambiguities concerning the scope of its coverage render it problematic for purposes of the First Amendment. For instance, each of the two parts of the CDA uses a different linguistic form. The first uses the word "indecent," . . . while the second speaks of material that . . . [is] patently offensive . . . . Given the absence of a definition of either term, this difference in language will provoke uncertainty among speakers about how the two standards relate to each other and just what they mean. . . . The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images." Slip op. at 24-26. Unlike "obscenity" as defined in *Miller v. California*, the material proscribed by the CDA need not be "specifically defined by the applicable state law," and is not "limited to `sexual conduct,'. . . [but] extends also to include (1) `excretory activities' as well as (2) `organs' of both a sexual and excretory nature.'" Slip op. at 25-27.

The Supreme Court provided examples of communications that it seemed troubled that the CDA could potentially cover. These included "any of the seven `dirty words' used in the Pacifica monologue," "discussions about prison rape or safe sexual practices, artistic images that include nude subjects, and arguably the card catalog of the Carnegie Library." Slip op. at 32. It could also make a felon of "a parent allowing her 17-year old to use the family computer to obtain information that she, in her parental judgment, deems appropriate . . . . Similarly, a parent who sent his 17-year-old college freshman information on birth control via e-mail could be incarcerated even though neither he, his child, nor anyone in their home community, found the material `indecent' or `patently offensive,' if the college town's community thought otherwise." Slip op. at 33.
In addition, the CDA "would confer broad powers of censorship, in the form of a `heckler's veto,' upon any opponent of indecent speech who might simply log on [to, for example, a "mail exploder," also known as a "listserv"] and inform the would-be discoursers that his 17-year-old child . . . would be present." Slip op. at 35.

The Court distinguished the Internet from radio and television, on which it has permitted the government to limit indecent material. First, "[t]he CDA's broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet." Slip op. at 20. Second, the Court has never decided whether indecent broadcasts "would justify a criminal prosecution." Slip op. at 20. Third, radio and television, unlike the Internet, have, "as a matter of history . . . `received the most limited First Amendment protection, . . . in large part because warnings could not adequately protect the listener from unexpected program content. . . . [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material." Slip op. at 20-21.

Congress's Options

Could Congress reenact the CDA in a narrower form that would be constitutional? The Supreme Court did not say that it could, but neither did it foreclose the possibility. It wrote:

> The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet -- such as commercial web sites -- differently from others, such as chat rooms.

Slip op. at 33.

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