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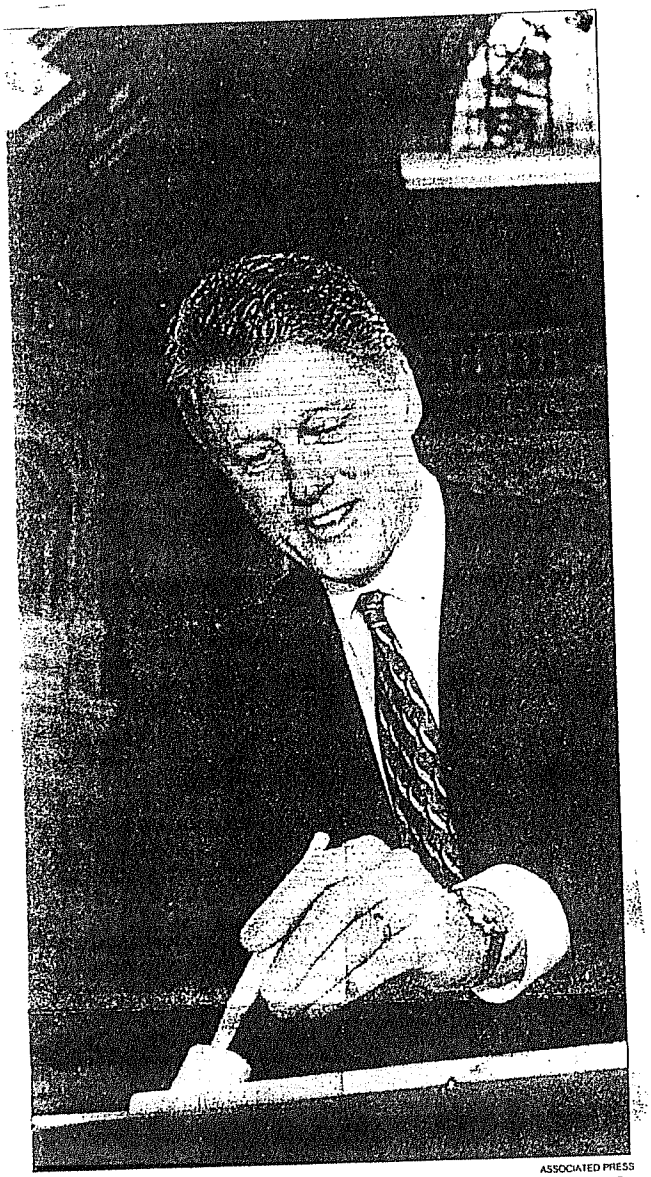
how the decency fight was won

Savvy political veterans trounced naive free speech advocates when congressional debate shifted to family safety from on-line technology



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President Clinton signed the sweeping Telecommunications Act of 1996 on Feb. 8.

BY HOWARD BRYANT
AND DAVID PLOTNIKOFF
Mercury News Staff Writers

The Internet's free speech supporters lost their historic battle over cyberspace decency standards because they were outgunned, outflanked, outconnected and out-thought in the most crucial battle of the on-line community's brief history.

Historically, the Internet's motley core of entrepreneurs and free spirits had avoided the inside-the-beltway machinations of Washington. But emergence of the Communications Decency Act, a part of the sprawling telecommunications overhaul law enacted recently, forced a hastily assembled coalition of on-line industry groups and civil libertarians to play the politics of engagement with lawmakers and conservative and family groups.

Not only were they ill-equipped for the bruising, hardball environment of Capitol Hill, but perhaps most importantly, they failed to make a critical

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The long road to on-line decency standards

EXON

GORTON

Feb. 1, 1995: Sens. James Exon, D-Neb., and Slade Gorton, R-Wash., introduce Senate Bill 314, the Communications Decency Act, which provides criminal penalties for "indecent" material on-line.

March 23, 1995: CDA is attached to a larger Senate telecommunications overhaul bill.

June 14, 1995: By an 84-16 vote, the Senate passes the CDA as attached to the larger telecommunications bill. The Leahy bill fails.

Dec. 6, 1995: The House half of the conference committee approves a proposal with criminal penalties for transmission of material "harmful to minors" but then reverses course to substitute a broad "indecency" standard for the looser "harmful to minors" language.

Feb. 1, 1996: The Telecommunications Act of 1996 passes both the House and Senate, with the criminal penalties for indecent content approved Dec. 6.

Feb. 8, 1996: President Clinton signs the act into law. Civil libertarians immediately file suit to challenge the decency provisions.

LEAHY

April 7, 1995: Sen. Patrick Leahy, D-Vt., introduces Senate Bill 714 as an alternative to the CDA; it would only commission the Justice Department to study the problem of objectionable material.

June 30, 1995: Reps. Chris Cox, R-Calif., and Ron Wyden, D-Ore., introduce House Bill 1978 as another alternative to the CDA; it advocates parental control measures and has no criminal penalties.

Aug. 4, 1995: The House passes the Cox/Wyden bill as attached to a House telecommunications overhaul. A separate amendment with criminal penalties for transmission of indecent material is approved, as the overall House telecommunications bill passes by 421-4 vote. The House and Senate bills go to a conference committee to be reconciled.

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Source: Center for Democracy and Technology; photographs courtesy Associated Press, Omaha World-Herald

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How bare-knuckled politics won decency fight

DECENCY

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realization: that the fight over standards had moved from legal and technical grounds to more emotional and moral grounds. To many in Congress, the issue was protecting children from pornography — not niceties of technology or constitutional speech protections, and certainly not the sovereignty of the Internet.

"It was almost like a gunfight," says Brian Ek, the Washington pointman for the Prodigy on-line service. "We went in outgunned with the very real belief reinforcements were going to arrive, and they did not."

The decency act President Clinton signed recently provides six-figure fines and federal prison for people who make available indecent material — words or images — in on-line areas that may be accessible to minors.

Whatever the perspective on the law — that it's free-speech sabotage or vital protection of vulnerable youths — it's a historic move by the federal government to regulate private and public communication in a medium that's reshaping personal and business life almost daily.

The yearlong battle over the act actually culminated shortly before Christmas, when a group of members of the House broke away from a meeting in an overheated, standing-room-only Capitol hearing room. They headed behind closed doors to settle on which of two competing Internet content provisions would survive and make it into what would become the behemoth Telecommunications Act of 1996.

When the deal was done, the Internet interests were dazed and uncomprehending. Outmaneuvered at the last second, their fight was lost by a single vote — cast by the most unlikely of players.

Here's how it all happened.

AP FILE PHOTOGRAPH

Donna Rice-Hughes, left, and Dee Jepsen helped marshal forces on Capitol Hill to convince lawmakers of filth lurking on the Internet.

Filled with confidence

Coalition began in spring to shift focus to children

As the lawmakers retreated to their private meeting that Wednesday morning, the coalition pushing for government restrictions was confident.

Led by the National Law Center for Children and Families, the Family Research Council and a group called Enough is Enough, the coalition last spring began to leaflet, negotiate and jawbone with key political leaders, steering them toward the idea that controls were essential.

The group's core appeal was based on a passionate calculus: Children had access to some of the most hardcore pornography available; the kids should come first.

Removing technology as a base issue proved to be a remarkable feat, considering the fundamental issue *was* technology. To do that, the coalition used the vision of America's living rooms. Members were convinced: When lawmakers learned what their children, and the children of their constituents, could see on-line, children and adults engaging in sex acts with animals and each other, they would have no choice but to react accordingly.

That's where the famous Exon "blue book" came in. Sen. James Exon, a Nebraska Democrat who sponsored the decency provisions, compiled a collection of brutal images of pornography that can be found on the Internet, and he showed his book around the capital to vividly underscore his call for controls.

By contrast, "the other side would send their people to these senators, literally with laptops, to show them how the technology worked," said Donna Rice-Hughes of Enough is Enough.

With that — with laptop computers fighting a losing battle of perception against kiddie porn — Rice-Hughes and others knew the advantage was already beginning to shift their way.

"What we showed was that there was an evil being transmitted directly into the house, with no controls, with no way of stopping it," Rice-Hughes said. "We wanted to know what they were going to do about it."

Even more critically, the coalition forces were tightly connected to key players in Washington. For instance, Enough is Enough Executive Director Dee Jepsen is the wife of former Iowa senator Roger Jepsen, and that provided after-hours access to Washington's power brokers working on the telecom bill.

"There were a lot of calls at midnight to the senators and their staffs," Rice-Hughes said.

Smut-buster joins in

Former prosecutor helped write decency standards

Perhaps the most crucial insider connection was a former top obscenity prosecutor in the Justice Department, and a former smut-buster in Cleveland, named Bruce Taylor. Over 20 years, Taylor had gained a reputation for having a strong First Amendment background, but while maintaining a hard enforcement edge.

It was late March when Sen. Dan Coats, R-Ind., approached Taylor and asked him to write decency standards for the telecommunications bill. Taylor was honored and took pride in the fact he was being called upon to win a battle, but knew he was in for the fight of his life. On-line services, cable TV companies and telecommunications firms had millions of dollars at their disposal, while his firm, the National Law Center for Families and Children, was only two years old and almost too tiny to notice.

Before the bill passed Congress, Taylor ended up meeting or conducting exclusive discussions with numerous insiders, including Sens. Exon, Charles Grassley, R-Iowa, and Jesse Helms, R-N.C.

"They asked us: What was effective? What was constitutional? Would this fly? Would that fly?" Taylor said. "We had access to the Senate because they trusted us. They knew we wouldn't lie to them. They didn't know that about the others."

Another key Washington connection was Cathy Cleaver, director of legal studies for the Family Research Council, a Washington D.C.-based advocacy group. Cleaver, like Taylor, was asked by Coats to assist in writing decency provisions.

"We had to change the status quo, which is always difficult to do," she said. "We had to forge new ground. The truth was that everybody wanted this bill, but not everybody wanted all of its provisions."

Beyond the emotions and the access, the winning coalition also benefited from missteps and miscalculations by Internet supporters. Most importantly, the Internet community failed to understand the historic tidal wave they faced — that the political climate made some form of law regarding the Internet inevitable.

Had the Internet community relinquished a no-law-at-all position, Taylor said, some compromise could have been reached.

"The difference between the law and the no-law people was that we knew Congress was going to do *something*," he said.

Own worst enemy

Arrogance diminished hope of credibility

As the legislative process rumbled along, some in the Internet community also became their own worst enemies by insulting lawmakers who opposed them — hardly a way to influence people.

Example: In late February, Exon offered the first draft of his indecency bill to the Electronic Frontier Foundation, one of the key Internet community players, for critique and feedback. Sources say the EFF added five provisions that, in essence, would have gutted it by calling for a study and not providing for power to prosecute offenders.

Exon was infuriated.

"Exon was looking for input from both sides to forge something honest and reasonably constructed," Taylor said. "Instead, EFF hoodwinked him. They lied to him, and for that reason, no one listened seriously to anything they said."

Later, the EFF "would call everyone names," Taylor said. "(EFF lawyer Mike) Godwin would call us Nazi censors if we didn't agree with him. Talk about a way to get doors slammed in your face."

Compared with the well-marshaled, well-connected team of veteran lobbyists allied with Cleaver and Taylor, the group lined up on the other side of the debate resembled a community-college football squad facing the San Francisco 49ers.

This junior college team was something called the Interactive Working Group, an ad-hoc coalition that included all the commercial on-line services, the Center for Democracy and Technology, the American Civil Liberties Union, the EFF and others. The working group had formed in 1994 to explore general First Amendment issues, digital privacy regulations and other legislation that would impact the Net.

Exon's indecency provisions were the first threat to galvanize them into plying the halls of Congress as a united front.

Of the large corporations behind consumer on-line services, only Microsoft, Apple and America Online had full-time legislative specialists in Washington last spring. The big consumer on-line services — Prodigy, CompuServe, AOL, Microsoft, MCI and Apple — met for the first time ever as a group on Jan. 30, 1995, just one week before Exon's bill was introduced in the Senate.

"We were thrown into the biggest legislative battle in the history of our industry, literally one week after we organized," said Bill Burrington, America Online's assistant general counsel and director of public policy.

Because both their members and their technology were so unfamiliar on Capitol Hill, the working group faced a doubly daunting task: schooling themselves in the ways of Congress while simultaneously schooling legislators on the complex technical concepts behind Internet controls.

"We were starting from absolute scratch with the majority of the lawmakers," Burrington says. "Exon had his blue notebook, and we had our gray notebook computers loaded with parental control software demos."

The Internet was such unfamiliar turf for lawmakers that even after a year of tutorials, perhaps 10 percent of them understood the details of what they were voting on when Congress finally passed the telecommunications act, Burrington estimates.

Worse still, the working group's efforts weren't helped by the fact the Internet community was an unknown, faceless constituency in Washington. Actually, the Net denizens were worse than unknown: Given techno-myopia common inside the beltway, many were thought to be hackers, crypto-anarchists and porn entrepreneurs. While conservatives and members of the religious right could claim a large and well-organized base in almost any congressional district, the Net community always appeared to be from somewhere else.

Although the Net community tried to make its opposition to decency standards heard in Washington, anger and dismay festering on-line was never focused into a form that appealed to Congress. Indeed, some even say efforts such as e-mail campaigns and Net-based petitions may actually have backfired with members of Congress.

"The tone and language of the e-mail they were bombarded with was not the way they were used to being addressed," said Prodigy's Ek. "The perception they have in Washington of the typical Internet user is the guy with the broken glasses and the plastic pocket protector — and the angry e-mail helped cement that perception."

Two liberal Democrats on the House-Senate conference committee — Pat Schroeder of Colorado, right, and John Conyers of Michigan — stunned anti-regulation supporters when they voted to approve last-minute language adding an indecency provision.

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Counter proposal

Free speech advocates find allies in Congress

In mid-June, shortly after an overwhelming Senate vote to pass Exon's decency act, the working group seemed to be finding a way to turn the tide, when it found two House members willing to sponsor a bipartisan counter-attack — Ron Wyden, D-Ore. and Chris Cox, R-Newport Beach.

Their bill focused on software that would put parents in control, sidestepping the main censorship question. It specifically barred Federal Communications commission from Internet regulation.

When Cox/Wyden sailed through the House by an overwhelming vote of 421-4, the on-line interests were elated. After months of just reacting to Exon, they finally had a ball of their own in play.

And things just got better from there. As support for Cox/Wyden gathered, the working group was able to demonstrate specifics, such as an Internet content-labeling system, on the floors of the House and Senate.

"It was looking pretty good for us," Ek recalls. "We had more filtering software for parents coming out all the time — and (it) worked."

In the fall, lawmakers from both chambers assembled in a conference committee to morph together the different versions of the telecommunications bill passed in each house. Ek sensed from conversations with key players that the more middle-of-the-road family groups, such as Enough as Enough, could be brought around to see parental control software as an acceptable answer.

"It looked like the more radical elements of the religious right seemed to be becoming more isolated," he said.

Finally, at the end of November, after three months of inaction while Congress was embroiled in the federal budget dispute with Clinton, lawmakers returned their attention to the telecommunications bill and the question of objectionable material on the Internet.

During the layoff, it appeared the on-line community had begun to embrace the idea that a bill would be approved, and that any bill without criminal sanctions against smut-peddlers was not politically viable.

Toward that end, one Republican House member, Rick White, of Washington, tried to broker a compromise that used Cox/Wyden as a base and incorporated the criminal teeth of the Exon decency act. Instead of the broad decency language of Exon, it offered a more restrained "harmful-to-minors" standard thought to be more enforceable.

Thus the stage was set for a showdown Dec. 6. As House members of the conference committee met, White's compromise was approved, much to the delight of Internet industry advocates.

Over in a flash

With a one-word change compromise hopes end

But delight turned to horror a few minutes later as Rep. Bob Goodlatte, R-Va., offered a one-word amendment substituting the "indecency" standard for White's "harmful to minors." Said one Net lobbyist in the Capitol that day: "This was the ghoul of Exon coming out of the closet right in front of us."

Two liberal Democrats, Pat Schroeder of Colorado and John Conyers of Michigan, voted for the indecency language, and in a flash it was over. Almost a year's worth of lobbying died in a surprise vote of 17-16. The decency standard was a done deal; there was no chance it would be reconsidered before the final bill was assembled.

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>
> *— Donna Rice-Hughes, Enough is Enough*

"The members said they were with us, yet it fell apart right there," said Jerry Berman, director of the Center for Democracy and Technology and leader of the working group.

It was Conyers who was perhaps the biggest surprise. Why did one of the most liberal Democrats in the House provide one of the crucial votes to put decency standards over the top?

"The congressman is opposed to virtually all limits on freedom of speech," said his spokesman, Rodney Walker. "As far as why he voted for (the decency standard), I'm afraid there just isn't a short answer. I'm sorry."

With the votes tallied, it became clear the strategy set in motion months before by the pro-control coalition had worked marvelously. Once the debate moved from technology to child-porn and family safety, the on-line community found itself unable to fight on those terms.

"Everybody on the Net who followed this assumed we were able to go in and talk about this as a free-speech platform," said Ek.

The next stage

Decency regulations will be fought in court

Postscript: Beyond Cox's involvement, California's big congressional delegation chose to stay on the sidelines of the decency-standard battle, although some members were involved in the overall telecommunications bill. Sen. Dianne Feinstein, for example, co-authored cable TV content-control provisions and was a co-sponsor of provisions mandating the "V-chip" TV control.

Rep. Anna Eshoo, D-Palo Alto, came closest to the action as a member of the conference committee. Internet supporters, said her aide Lewis Roth, "did a lot of talking to themselves (and) we got a lot of e-mail and faxes, but seldom did we hear from them directly. You certainly didn't see the politically savvy campaign of the Christian coalition."

On Feb. 15, one week after Clinton signed the Communications Decency Act into law as part of the Telecommunications Act of 1996, a federal judge in Philadelphia issued a temporary restraining order partially blocking its enforcement. The judge ruled the term "indecent" was unconstitutionally vague.

Last week, a group of 22 on-line services, content providers and public interest groups filed suit in federal court in Philadelphia, arguing that the Internet is a unique medium unsuited to old models of regulation. The plaintiffs say they expect judicial fast-tracking will land the new law where everyone said it would go — the U.S. Supreme Court — by the end of the year.