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MEMORANDUM

To: Board of Trustees

From: Patrick Maines

Subject: The Growing Assault on Freedom of Speech

Those of you who attended our last Board meeting know that we were not at all surprised to read that Dennis Kucinich, in his role as head of a new House Domestic Policy Subcommittee, plans hearings aimed at reinstatement of the Fairness Doctrine.

Never mind the relative political puniness of the gentleman, or the long odds of congressional passage of legislation at this time. The unmistakable (and unavoidable) significance of this development is that the now years-long assault on freedom of speech is not only not abating, it is gaining traction.

Let's count the shapes, over the last few years, that this assault has assumed.

*McCain-Feingold, most notably its restrictions on political speech through advertising; an unequivocal rape of the speech clause of the First Amendment, the Supreme Court's virtually unintelligible decision notwithstanding.

*Proposals ranging from onerous fines to license revocations for "indecent" (and now violent?) speech on TV and radio.

*Proposed restrictions on the advertising of all manner of legal products that are out of favor with single issue "consumer" lobbies.

*Campus speech codes, extant despite the fact that the Supreme Court has never upheld them in cases that have reached it; which codes drive a stake through the heart of virtually every argument ever made in favor of robust and unfettered speech.

*Proposals to regulate, through FEC regulations, political speech on the Internet.

*Efforts, like that of the late and unlamented "Gore Commission," to mandate "public interest" obligations on digital broadcasters, specifically to include requirements re election/political news.

*Anti-consolidation strategies whose transparent motive is to affect the political content of news organizations.

*And now, the prospective return of the Fairness Doctrine, a law (or regulation) which, if enacted and upheld by the Supreme Court, would immediately jeopardize the editorial freedom of an entire industry (talk radio).

As some of you will remember, in 2004 I sent three memoranda to the Board. These memos warned that the assault on freedom of speech and of the press was not going away, that in fact it was accelerating; that it tapped into a large base of foundation support; that it reflected diverse kinds of unhappiness with the media; and that, for all these reasons and more, this was a war we were losing.

Let me repeat that now: We are losing this war. And should the Democrats hold onto the Congress and win the White House in 2008, I think this fact will become apparent to everyone.

Which is not, of course, to suggest that the GOP has been such a great friend, or wise steward of our constitutional rights. Although the vote in Congress was very close, George Bush signed McCain-Feingold into law.*

And Kevin Martin's campaign, in opposition to broadcast indecency, threatens to provide both a precedent and a blueprint for additional ways to regulate content in this industry. Is there any doubt that the proponents of a reinstated Fairness Doctrine will borrow liberally from the FCC's indecency playbook? Kevin, of course, won't himself be in favor of a new Fairness Doctrine, but that's beside the point; in a very practical sense the damage has already been done.

In a recent Broadcasting & Cable piece, I argued that one of the problems with free speech advocacy is its parochialism. Let me expand on that.

On January 18th of this year ASNE hosted a conference at the National Press Club called the First Amendment Summit. Many distinguished speakers discussed the issue of "compelled disclosure" and a federal shield law for reporters. Shield laws, like access to information through FOIA, are timely and even compelling issues for journalists, and it is neither wrong nor surprising that a group like ASNE would host a conference on this subject. But are they, strictly speaking, First Amendment issues?

I think the answer to that question is that they are, or may be, but I am struck by the fact that this conference addressed just the question of reporters' rights-- and did so moreover without including discussion of any of the issues mentioned above--in what was said to be an emergency "First Amendment Summit." One hopes that the attendees and sponsors of this affair do not believe that they are doing more to protect the First Amendment than they really are.

Sitting over here in our little aerie in Arlington, we sometimes get the impression that people think there are many First Amendments: one for political speech, one for citizens, one for commercial speech, one for entertainment, etc. The reality, of course, is that there's only one First Amendment, and that if you weaken it anywhere you weaken it everywhere.

Which is why it would be not only refreshing, but very helpful as a matter of policy, if media companies and their lobbies would occasionally stick up for the First Amendment rights of their competition in other media industries, and of people in all walks of life outside of the media.

I began this note with a reference to the likelihood of congressional hearings in re the reinstatement of a Fairness Doctrine for broadcasters. Let me end it with this observation: Nothing could be worse. Not only would it impose all kinds of drastic "reforms" on much of the electronic media, it would fuel the already substantial feeling on the part of many Republicans that the First Amendment is just a tool in the hands of their political enemies, rather than an objective guarantor of freedom of speech for all.

* In 1987, Ronald Reagan vetoed legislation, passed overwhelmingly, that would have reinstated the Fairness Doctrine. Reagan said he thought the Doctrine was inconsistent with the First Amendment. In 2002, George Bush signed McCain-Feingold, which passed Congress very narrowly. Bush said he was worried about the constitutionality of the bill, but signed it anyway. And that, in a nutshell, is the difference between Reagan and Bush.

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