

You Can't Say That On Television: The FCC's Hard Line Stance on Broadcast Indecency

George W. Bush. Dick Cheney. Nichole Richie. Cher. Bono. What do these strange bedfellows share in common? All five might need their mouths washed with soap after a [recent Second Circuit Court of Appeals decision](#) regarding the Federal Communications Commission's "fleeting obscenity" policy. The court struck down the FCC's new policy of fining broadcasters who allowed blurted curse words on television. A majority of the judges held that the FCC's change in policy "fail[ed] to provide a reasoned analysis justifying its departure from the agency's established practice," and was "arbitrary and capricious." The majority denounced the FCC's reasoning for stricter regulations as "divorced from reality." The regulators did not, however, return to their offices hat in hand: [Kevin Martin, Chairman of the FCC](#), blasted the court as being itself "divorced from reality," leading the Commission to appeal the decision to the Supreme Court. The Court has granted review and will hear arguments this fall term.

The FCC was established by the Communications Act of 1934 [the Communications Act of 1934](#) to "regulat[e] interstate and foreign commerce in communication by wire and radio." In other words, the FCC's control extends to radio and television broadcasts (including cable and satellite), phone services, and Internet service. That initial charter grew into [regulation of indecent speech](#) over the airwaves: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both." However, the FCC's right to censor under this regulation is subject to a strict limitation. Section 326 of the Communications Act expressly prohibits the FCC from censoring broadcasts. These seemingly competing mandates necessitate a balancing act for the FCC. They can't tell people what to put on radio or television, but if a station broadcasts profanity, the FCC can fine them, possibly imprison them, or revoke their license to broadcast after the fact.

It started with George...

The recently deceased [George Carlin](#) gave the Commission their first crack at exercising the indecent speech regulatory power. In 1975, the FCC fined the Pacifica Foundation for their radio broadcast of [Carlin's infamous "Seven Filthy Words" routine](#). Pacifica appealed the fine, and the Court of Appeals for the D.C. Circuit overturned it. In a move that mirrors the case in question today, the FCC appealed the decision to the Supreme Court. [The Court overturned the Court of Appeals](#), noting that broadcast media is "uniquely accessible to children" and "received the most limited First Amendment protection" for that very reason. The upshot was that the FCC could regulate indecent material, even if it was not considered "obscene." The Court was careful to note that the decision "d[id] not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast." The Carlin routine was judged a planned "verbal shock treatment."

After the *Pacifica* decision, the FCC specifically said it would "observe the narrowness of the Pacifica holding," and rejected several challenges to the license

renewals of broadcasters who had aired isolated profanities. (Application of WGBH Educ. Found., 69 F.C.C.2d 1250 (1978).) The important question in these post-*Pacifica* cases was if the offending broadcast's use of obscene material should be classified as "verbal shock treatment" or "isolated use." The question changed in 1987 when the FCC decided it would judge indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs." (Infinity Broad. Corp., et al., 3 F.C.C.R. 930 (1987).) The FCC deemed such speech as actionable when it was "broadcast at times of the day when there is a reasonable risk that children may be in the audience." (Regents of the Univ. of Cal., 2 F.C.C.R. 2703.)

In 2001, the FCC further clarified their broadcast indecency rule. The Commission provided that for language to be considered indecent, it must describe or depict sexual or excretory organs or activities. If it does, the language must be "patently offensive as measured by contemporary community standards for the broadcast medium." (Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999 (2001).) To determine "patent offensiveness," the Commission considers the explicitness or graphic nature of the language, whether the language dwells on or repeats at length the indecent material, and if the language panders, titillates, or is presented for shock value.

Here is where the celebrities come in. The FCC's new "hard-line" stance on fleeting obscenities first appeared in response to complaints regarding the 2004 Golden Globe broadcast. During that show, U2 frontman Bono accepted an award by saying "[t]his is really, really, fucking brilliant," driving irate individuals and groups to file obscenity complaints. The FCC's Enforcement Bureau denied the complaints, finding the language didn't describe sexual or excretory organs or activities, and didn't dwell on or repeat at length the questionable language. The Commission itself reversed the lower Bureau's decision, finding that "fuck" was patently offensive under community standards and has an inherently sexual connotation. (Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 4975.) In a move that parents saw as a win, the Commission declared that isolated broadcasts of "fuck" would run afoul of its indecency standards. While NBC and its stations were not fined for this violation, all broadcasters were put on notice that fleeting obscenities would no longer be tolerated.

In 2006, the Commission backed up their threat by declaring additional broadcasts indecent. Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005, 21 F.C.C.R. 2664 (2006). Among the offenders was Fox's broadcast of the 2002 and 2003 Billboard Music Awards. Both broadcasts featured the word "fuck" from Nicole Richie and Cher. The Commission also announced that the word "shit" was presumed indecent and profane. Because the programs in question were broadcast before the Golden Globes decision no fine was imposed, but this didn't stop the networks from marching to their lawyers and filing an appeal.

Bush and Cheney Rescue the Networks

As an agency of the Federal government, the FCC is governed by the Administrative Procedure Act, which charges courts with setting aside agency rulings that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A court must look at the reasons the agency provides for the policy or decision to see if there is a reasonable basis for it.

The court hearing the *Fox* appeal examined several reasons the FCC provided for its about-face on the regulation of fleeting obscenities. The primary reason for the change appeared to be the “first blow” theory; children are forced to hear these words without warning and a chance for defense. While the *Fox* court noted that the Supreme Court rejected the same reasoning in the *Pacifica* case, they failed to see why the FCC tolerated the “first blow” for over thirty years just to suddenly change the policy today. The FCC also presented other reasons in support of the change, such as the burden of distinguishing the literal meaning of the fleeting profanities, and a fear of broadcasters abusing the fleeting “loophole.” The *Fox* court, however, believed it easy to see that Bono wasn’t talking about sex during his acceptance speech, but was simply excited. The court noted President Bush and Vice President Cheney had recently used expletives out of anger and frustration, in ways that “no reasonable person would believe referenced ‘sexual or excretory organs or activities’.”

It’s not always about the Constitution

The *Fox* court stressed that it did not decide the case on constitutional grounds due to the longstanding principal of judicial restraint (a principal that requires courts to avoid answering constitutional questions of a matter can be decided on other grounds). Sometimes, though, a court can’t help itself. The Second Circuit majority, in dicta, noted they were “skeptical” as to whether the FCC’s new policy on fleeting expletives is constitutional.

The FCC’s regulation appeared to the court to be a content-based regulation of First-Amendment-protected speech. The policy was applied to awards shows, but not to a news broadcast and an airing of *Saving Private Ryan*, both of which contained obscenities like “fuck” and “shit.” First Amendment jurisprudence frowns upon government regulation that gives too much discretion to governmental agencies. (*Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992).) Such discretion is seen as censorship of certain kinds of speech, based on the content of that speech.

While not controlling law, the *Fox* court’s dicta makes clear how the majority feels about the constitutionality of the FCC regulations, and the Supreme Court may consider this in its upcoming review of the case. The Court has only agreed to hear the statutory portion (regarding whether the FCC’s reasons for the new policy are arbitrary and capricious), making it unlikely that any major pronouncement affecting First Amendment jurisprudence will result from their decision. Given the controversy’s profane nature, it’s lucky for broadcasters that cameras will not be allowed in the courtroom.