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Section 1: Moot Court, FCC v. Fox Television Stations

Institute of Bill of Rights Law, William & Mary Law School

I. MOOT COURT ARGUMENT:
FCC v. Fox Television Stations

In This Section:

New Case: 07-582 *FCC v. Fox Television Stations*

FCC v. Fox Television Stations

07-582

Ruling Below: *Fox Television Stations v. Federal Communications Commission,* 489 F.3d 444, 2007 U.S. App. LEXIS 12868 (2007), *cert. granted, FCC v. Fox TV Stations,* 2008 U.S. LEXIS 2361 (2008).

In 2006, the FCC ruled that Fox Television and other networks had violated indecency standards by broadcasting instances of "fleeting expletives." This ruling was in contrast with previous standards that defined indecent material to be that which "dwells on or repeats at length descriptions of sexual or excretory organs or activities." The networks appealed the FCC decision, claiming the change in policy was inconsistent and unconstitutional. The Second Circuit agreed with the networks and vacated the order of the FCC.

Question Presented: Whether the court of appeals erred in striking down the Federal Communications Commission's determination that the broadcast of vulgar expletives may violate federal restrictions on the broadcast of "any obscene, indecent, or profane language," 18 U.S.C. 1464; see 47 C.F.R. 73.3999, when the expletives are not repeated.

FOX TELEVISION Stations, Inc., CBS Broadcasting, Inc., WLS Television, Inc., KTRK Television, Inc., KMBC Hearst-Argyle Television, Inc., ABC, Inc., Petitioners,
v.
FEDERAL COMMUNICATIONS COMMISSION, United States of America, Respondents.

United States Court of Appeals for the Second Circuit

June 4, 2007

POOLER, Circuit Judge:

Fox Television Stations, Inc., along with its affiliates FBC Television Affiliates Association (collectively "Fox"), petition for review of the November 6, 2006, order of the Federal Communications Commission ("FCC") issuing notices of apparent liability against two Fox broadcasts for violating the FCC's indecency and profanity prohibitions. Fox, along with other broadcast networks and numerous amici, raise administrative, statutory, and constitutional challenges to the FCC's indecency regime. The FCC, also supported by several amici, dispute each of these challenges. We find that the FCC's new policy regarding "fleeting expletives" represents a significant departure from positions previously taken by the agency and relied on by the broadcast industry. We further find that the FCC has failed to articulate a reasoned basis for this change in policy. Accordingly, we hold that the FCC's new policy regarding "fleeting expletives" is arbitrary and capricious under the Administrative Procedure Act. The petition for review is therefore granted, the order of the FCC is vacated, and the matter is

remanded to the Commission for further proceedings consistent with this opinion. Because we vacate the FCC's order on this ground, we do not reach the other challenges to the FCC's indecency regime raised by petitioners, intervenors, and amici.

BACKGROUND

The FCC's policing of "indecent" speech stems from 18 U.S.C. § 1464, which provides that "[w]hoever 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." The FCC's authority to regulate the broadcast medium is expressly limited by Section 326 of the Communications Act, which prohibits the FCC from engaging in censorship. *See* 47 U.S.C. § 326. In 1960, Congress authorized the FCC to impose forfeiture penalties for violations of Section 1464. The FCC first exercised its statutory authority to sanction indecent (but non-obscene) speech in 1975, when it found Pacifica Foundation's radio broadcast of comedian George Carlin's "Filthy Words" monologue indecent and subject to forfeiture. True to its title, the "Filthy Words" monologue contained numerous expletives in the course of a 12-minute monologue broadcast on the radio at 2:00 in the afternoon. In ruling on this complaint, the FCC articulated the following description of "indecent" content:

> [T]he concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience. Obnoxious, gutter language describing these matters has the effect of debasing and brutalizing human beings by reducing them to their mere bodily functions, and we believe that such words are indecent within the meaning of the statute and have no place on radio when children are in the audience.

See Citizen's Complaint Against Pacifica Found. Station WBAI (FM), N.Y., N.Y., 56 F.C.C.2d 94 at P 11 (1975).

* * *

In its brief to the Supreme Court, the FCC stressed that its ruling [in *Pacifica*] was a narrow one applying only to the specific facts of the Carlin monologue. The Court took the Commission at its word and confined its review to the specific question of whether the Commission could find indecent the Carlin monologue as broadcast. *See FCC v. Pacifica Found.*, 438 U.S. 726, 732-35 (1978). The Court first rejected Pacifica's statutory argument that "indecent" in Section 1464 could not be read to cover speech that admittedly did not qualify as obscenity. Finding that obscene, indecent, and profane have distinct meanings in the statute, the Court held that the FCC is permitted to sanction speech without showing that it satisfied the elements of obscenity. . . . The Court [] found that the FCC could, consistent with the First Amendment, regulate indecent material like the Carlin monologue. . . .

Justices Powell and Blackmun, who concurred in the judgment and supplied two of the votes necessary for the 5-4 majority, also emphasized in their concurring opinion that the Court's holding was a narrow one

limited to the facts of the Carlin monologue as broadcast. Foreshadowing the question now before us, they explicitly noted that "[t]he Commission's holding, and certainly the Court's holding today, does not speak to cases involving the isolated use of a potentially offensive word in the course of a radio broadcast, as distinguished from the verbal shock treatment administered by respondent here." Furthermore, citing the FCC's brief to the Court, Justice Powell stated that he did not foresee an undue chilling effect on broadcasters by the FCC's decision because "the Commission may be expected to proceed cautiously, as it has in the past."

The FCC took the *Pacifica* Court's admonitions seriously in its subsequent decisions. Shortly after the *Pacifica* ruling, the FCC stated the following in an opinion rejecting a challenge to a broadcaster's license renewal on the basis that the broadcaster had aired indecent programming:

> With regard to "indecent" or "profane" utterances, the First Amendment and the "no censorship" provision of Section 326 of the Communications Act severely limit any role by the Commission and the courts in enforcing the proscription contained in Section 1464. The Supreme Court's decision in *FCC v. Pacifica Foundation* affords this Commission no general prerogative to intervene in any case where words similar or identical to those in *Pacifica* are broadcast over a licensed radio or television station. We intend strictly to observe the narrowness of the *Pacifica* holding. In this regard, the Commission's opinion, as approved by the Court, relied in part on the repetitive occurrence of the "indecent" words in question. The opinion of the Court specifically stated that it was not ruling that "an occasional expletive . . . would justify any sanction . . ." Further, Justice Powell's concurring opinion emphasized the fact that the language there in issue had been "repeated over and over as a sort of verbal shock treatment." He specifically distinguished "the verbal shock treatment [in *Pacifica*]" from "the isolated use of a potentially offensive word in the course of a radio broadcast."

The FCC also specifically held that the single use of an expletive in a program that aired at 5:30 p.m. "should not call for us to act under the holding of *Pacifica*." . . .

It was not until 1987 that the FCC would find another broadcast "indecent" under Section 1464. *See Infinity Broad. Corp., et al.*, 3 F.C.C.R. 930 (1987) ("Infinity Order"). . . . The Infinity Order affirmed on reconsideration three decisions issued simultaneously by the FCC in April 1987 that found certain programs indecent. *See Pacifica Found., Inc.*, 2 F.C.C.R. 2698 (1987); *The Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *Infinity Broad. Corp.*, 2 F.C.C.R. 2705 (1987). The FCC explained in the Infinity Order that it would no longer take the narrow view that a finding of indecency required the use of one of the seven "dirty words" used in Carlin's monologue. The FCC instead would use the generic definition of indecency it had articulated in connection with its prior decision in *Pacifica*. Under the Commission's definition, "indecent speech is language that describes, in terms patently

offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs. Such indecent speech is actionable when 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, at P 3. The FCC also reaffirmed, however, the prevailing view that a fleeting expletive would not be actionable. . . . [The Infinity Order was upheld by the D.C. Circuit.]

This restrained enforcement policy would continue. In 2001, pursuant to a settlement agreement by which the FCC agreed to clarify its indecency standards, the Commission issued a policy statement to "provide guidance to the broadcast industry regarding our case law interpreting 18 U.S.C. § 1464 and our enforcement policies with respect to broadcast indecency." *Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464, 16 F.C.C.R. 7999,* at P 1 & P 30 n.23 (2001) ("Industry Guidance"). The FCC first noted that "indecent speech is protected by the First Amendment, and thus, the government must both identify a compelling interest for any regulation it may impose on indecent speech and choose the least restrictive means to further that interest."

The FCC then explained that an indecency finding involves the following two determinations: (1) whether the material falls within the "subject matter scope of [the] indecency definition—that is, the material must describe or depict sexual or excretory organs or activities"; and (2) whether the broadcast is "*patently offensive* as measured by contemporary community standards for the broadcast medium." The FCC considers the following three factors in determining whether the material is patently offensive: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the materials *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate*, or *whether the material appears to have been presented for its shock value*." The policy statement contained numerous examples of prior FCC decisions evaluating whether certain material was indecent in an attempt to provide guidance to broadcasters. In discussing the second factor in the "patently offensive" analysis, the FCC cited examples distinguishing between material that "dwells" on the offensive content (indecent) and material that was "fleeting and isolated" (not indecent).

This restrained enforcement policy would soon change. During NBC's January 19, 2003, live broadcast of the Golden Globe Awards, musician Bono stated in his acceptance speech "this is really, really, fucking brilliant. Really, really, great." *Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program,* 19 F.C.C.R. 4975, at P 3 n.4 (2004) ("Golden Globes"). Individuals associated with the Parents Television Council filed complaints that the material was obscene and indecent under FCC regulations. The FCC's Enforcement Bureau, however, denied the complaints on the basis that the expletive as used in context did not describe sexual or excretory organs or activities and that the utterance was fleeting and isolated. The Bureau accordingly found that the speech "does not fall within the scope of the Commission's indecency prohibition," and reaffirmed FCC policy that "fleeting and isolated remarks of this nature do not warrant Commission action."

Five months later, the full Commission reversed the Bureau's decision. First, the FCC held that any use of any variant of "the

F-Word" inherently has sexual connotation and therefore falls within the scope of the indecency definition. *Golden Globes,* at P 8. The FCC then held that "the 'F-Word' is one of the most vulgar, graphic, and explicit descriptions of sexual activity in the English language" and therefore the use of that word was patently offensive under contemporary community standards. The Commission found the fleeting and isolated use of the word irrelevant and overruled all prior decisions in which fleeting use of an expletive was held not indecent.

* * *

The Commission, however, declined to impose a forfeiture because "existing precedent would have permitted this broadcast" and therefore NBC and its affiliates "necessarily did not have the requisite notice to justify a penalty." *Id.* at P 15. The Commission emphasized, though, that licensees were now on notice that any broadcast of the "F-Word" could subject them to monetary penalties and suggested that implementing delay technology would ensure future compliance with its policy.

* * *

On February 21, 2006, the FCC issued an order resolving various complaints against several television broadcasts. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 F.C.C.R. 2664 (2006) ("Omnibus Order"). Through this order, the FCC intended to "provide substantial guidance to broadcasters and the public about the types of programming that are impermissible under our indecency standard." *Id.* at P 2. In Section III.B of the Omnibus Order, the Commission found four programs . . . indecent and profane under the policy announced in *Golden Globes.* The factual situations at issue are as follows:

> ***2002 Billboard Music Awards***: In her acceptance speech, Cher stated: "People have been telling me I'm on the way out every year, right? So fuck 'em."
>
> ***2003 Billboard Music Awards***: Nicole Richie, a presenter on the show, stated: "Have you ever tried to get cow shit out of a Prada purse? It's not so fucking simple."
>
> ***NYPD Blue***: In various episodes, Detective Andy Sipowitz and other characters used certain expletives including "bullshit," "dick," and "dickhead."
>
> ***The Early Show***: During a live interview of a contestant on CBS's reality show *Survivor: Vanuatu,* the interviewee referred to a fellow contestant as a "bullshitter."

In finding these programs indecent and profane, the FCC reaffirmed its decision in *Golden Globes* that any use of the word "fuck" is presumptively indecent and profane. The Commission then concluded that any use of the word "shit" was also presumptively indecent and profane. Turning to the second part of its indecency test, the FCC found that each of the programs were "patently offensive" because the material was explicit, shocking, and gratuitous. Citing *Golden Globes,* the Commission dismissed the fact that the expletives were fleeting and isolated and held that repeated use is not necessary for a finding of indecency. The FCC, however, declined to issue a forfeiture in each case for the express reason that the broadcasts in question occurred before the decision in *Golden Globes,* and thus "existing precedent would have permitted this broadcast."

* * *

The FCC then issued a new order on November 6, 2006. *See Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* 21 FCC Rcd 13299 (2006) ("*Remand Order*"). The *Remand Order* vacated Section III.B of the Omnibus Order in its entirety and replaced it with the *Remand Order*. *Id.* at P 11. In the *Remand Order*, the FCC reaffirmed its finding that the 2002 and 2003 Billboard Music Award programs were indecent and profane, but reversed its finding against *The Early Show* [finding that the expletive used was not indecent because it occurred in the context of a "*bona fide* news interview"]. It also dismissed on procedural grounds the complaint against *NYPD Blue.*

* * *

DISCUSSION

Fox, CBS, and NBC (collectively, "the Networks"), supported by several amici, raise a variety of arguments against the validity of the Remand Order, including: (1) the *Remand Order* is arbitrary and capricious because the Commission's regulation of "fleeting expletives" represents a dramatic change in agency policy without adequate explanation; (2) the FCC's "community standards" analysis is arbitrary and meaningless; (3) the FCC's indecency findings are invalid because the Commission made no finding of scienter; (4) the FCC's definition of "profane" is contrary to law; (5) the FCC's indecency regime is unconstitutionally vague; (6) the FCC's indecency test permits the Commission to make subjective determinations about the quality of speech in violation of the First Amendment; and (7) the FCC's indecency regime is an impermissible content-based regulation of speech that violates the First Amendment. The FCC, also supported by several amici, dispute each of these contentions. We agree with the first argument advanced by the Networks, and therefore do not reach any other potential problems with the FCC's decision.

I. Scope of Review

Before turning to the merits of the Networks' arguments, we first note that we reject the FCC's contention that our review here is narrowly confined to the specific question of whether the two Fox broadcasts of the Billboard Music Awards were indecent and/or profane. The *Remand Order* applies the policy announced in *Golden Globes.* If that policy is invalid, then we cannot sustain the indecency findings against Fox. Thus, as the Commission conceded during oral argument, the validity of the new "fleeting expletive" policy announced in *Golden Globes* and applied in the *Remand Order* is a question properly before us on this petition for review. As the D.C. Circuit explained in rejecting this precise argument in another proceeding, "the agency may not resort to adjudication as a means of insulating a generic standard from judicial review." *ACT I,* 852 F.2d at 1337.

II. Administrative Procedure Act

Courts will set aside agency decisions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). As the Supreme Court has explained: "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency. Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of the United States, Inc.*

v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). Agency action is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* Reviewing courts "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Id.* The Networks contend that the *Remand Order* is arbitrary and capricious because the FCC has made a 180-degree turn regarding its treatment of "fleeting expletives" without providing a reasoned explanation justifying the about-face. We agree.

First, there is no question that the FCC has changed its policy. As outlined in detail above, prior to the *Golden Globes* decision the FCC had consistently taken the view that isolated, non-literal, fleeting expletives did not run afoul of its indecency regime. This consistent enforcement policy changed with the issuance of *Golden Globes*. . . . The Commission declined to issue a forfeiture in *Golden Globes* precisely because its decision represented a departure from its prior rulings. *See Golden Globes,* 19 F.C.C.R. 4975, at P 15 ("Given, however, that Commission and staff precedent prior to our decision today permitted the broadcast at issue, and that we take a new approach to profanity, NBC and its affiliates necessarily did not have the requisite notice to justify a penalty."). The Omnibus Order similarly declined to issue a forfeiture because "existing precedent would have permitted this broadcast." *Omnibus Order,* 21 F.C.C.R. 2664, at PP 111, 124, 136, 145.

Although the *Remand Order* backpedals somewhat on this clear recognition that the Commission was departing from prior precedent, in its brief to this court, the FCC now concedes that *Golden Globes* changed the landscape with regard to the treatment of fleeting expletives. *See* Br. of Respondent FCC at 33.

Agencies are of course free to revise their rules and policies. *See Chevron U.S.A. Inc. v. NRDC,* 467 U.S. 837, 863 (1984) ("An initial agency interpretation is not instantly carved in stone."). Such a change, however, must provide a reasoned analysis for departing from prior precedent. As this court has explained:

> [W]hen an agency reverses its course, a court must satisfy itself that the agency knows it is changing course, has given sound reasons for the change, and has shown that the rule is consistent with the law that gives the agency its authority to act. In addition, the agency must consider reasonably obvious alternatives and, if it rejects those alternatives, it must give reasons for the rejection, sufficient to allow for meaningful judicial review. Although there is not a "heightened standard of scrutiny . . . *the agency must explain why the original reasons for adopting the rule or policy are no longer dispositive.*" Even in the absence of cumulative experience, changed circumstances or judicial criticism, an agency is free to change course after reweighing the competing statutory policies. But such a flip-flop must be accompanied by a reasoned explanation of why the new rule effectuates the statute as well as or better than the old rule.

N.Y. Council, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth., 757 F.2d 502,

508 (2d Cir. 1985).

* * *

The primary reason for the crackdown on fleeting expletives advanced by the FCC is the so-called "first blow" theory described in the Supreme Court's *Pacifica* decision. In *Pacifica,* the Supreme Court justified the FCC's regulation of the broadcast media in part on the basis that indecent material on the airwaves enters into the privacy of the home uninvited and without warning. 438 U.S. at 748. The Court rejected the argument that the audience could simply tune-out: "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow." *Id.* at 748-49. Relying on this statement in *Pacifica,* the Commission attempts to justify its stance on fleeting expletives on the basis that "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'" *Remand Order,* at P 25.

We cannot accept this argument as a reasoned basis justifying the Commission's new rule. First, the Commission provides no reasonable explanation for why it has changed its perception that a fleeting expletive was not a harmful "first blow" for the nearly thirty years between *Pacifica* and *Golden Globes.* More problematic, however, is that the "first blow" theory bears no rational connection to the Commission's actual policy regarding fleeting expletives. As the FCC itself stressed during oral argument in this case, the Commission does not take the position that *any* occurrence of an expletive is indecent or profane under its rules. For example, although "there is no outright news exemption from our indecency rules," *Remand Order,* at P 71, the Commission will apparently excuse an expletive when it occurs during a "*bona fide* news interview," *id.* at P 72-73 (deferring to CBS's "plausible characterization" of a segment of *The Early Show* interviewing a contestant on its reality show *Survivor: Vanuatu* as news programming and finding expletive uttered during that part of the show not indecent or profane). Certainly viewers (including children) watching the live broadcast of *The Early Show* were "force[d] . . . to take the 'first blow'" of the expletive uttered by the *Survivor: Vanuatu* contestant. Yet the Commission emphasized during oral argument that its news exception is a broad one and "the Commission has never found a broadcast to be indecent on the basis of an isolated expletive in the face of some claim that the use of that language was necessary for any journalistic or artistic purpose." The Commission further explained to this court that a broadcast of oral argument in this case, in which the same language used in the Fox broadcasts was repeated multiple times in the courtroom, would "plainly not" be indecent or profane under its standards because of the context in which it occurred. The Commission even conceded that a re-broadcast of precisely the same offending clips from the two Billboard Music Award programs for the purpose of providing background information on this case would not result in any action by the FCC, even though in those circumstances viewers would be subjected to the same "first blow" that resulted from the original airing of this material. Furthermore, the Commission has also held that even repeated and deliberate use of numerous expletives is not indecent or profane under the FCC's policy if the expletives are "integral" to the work. *See Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Televison Network's Presentation of the Film "Saving*

Private Ryan," 20 F.C.C.R. 4507, at P 14 (2005) ("Saving Private Ryan") (finding numerous expletives uttered during film *Saving Private Ryan* not indecent or profane because deleting the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"). In all of these scenarios, viewers, including children who may have no understanding of whether expletives are "integral" to a program or whether the interview of a contestant on a reality show is a "*bona fide* news interview," will have to accept the alleged "first blow" caused by use of these expletives. Thus, the record simply does not support the position that the Commission's new policy was based on its concern with the public's mere exposure to this language on the airwaves. The "first blow" theory, therefore, fails to provide the reasoned explanation necessary to justify the FCC's departure from established precedent.

* * *

For decades broadcasters relied on the FCC's restrained approach to indecency regulation and its consistent rejection of arguments that isolated expletives were indecent. The agency asserts the same interest in protecting children as it asserted thirty years ago, but until the *Golden Globes* decision, it had never banned fleeting expletives. While the FCC is free to change its previously settled view on this issue, it must provide a reasoned basis for that change. The FCC's decision, however, is devoid of any evidence that suggests a fleeting expletive is harmful, let alone establishes that this harm is serious enough to warrant government regulation. Such evidence would seem to be particularly relevant today when children likely hear this language far more often from other sources than they did in the 1970s when the Commission first began sanctioning indecent speech. Yet the *Remand Order* provides no reasoned analysis of the purported "problem" it is seeking to address with its new indecency policy from which this court can conclude that such regulation of speech is reasonable. The Commission has similarly failed to explain how its current policy would remedy the purported "problem" or to point to supporting evidence.

* * *

Accordingly, we find that the FCC's new policy regarding "fleeting expletives" fails to provide a reasoned analysis justifying its departure from the agency's established practice. For this reason, Fox's petition for review is granted, the *Remand Order* is vacated, and the matter is remanded to the FCC for further proceedings consistent with this opinion. Because we have found that the FCC's new indecency regime, announced in *Golden Globes* and applied in the *Remand Order*, is invalid under the Administrative Procedure Act, the stay of enforcement previously granted by this court in our September 6th order is vacated as moot.

* * *

LEVAL, *Judge, dissenting*:

I respectfully dissent from my colleagues' ruling because I believe the Federal Communications Commission ("FCC" or "Commission") gave a reasoned explanation for its change of standard and thus complied with the requirement of the Administrative Procedures Act, 5 U.S.C. § 706(2)(A).

[Judge Leval recounted the facts of the Bono

incident and the FCC's change in policy.]

In adjudicating indecency complaints the Commission generally employs a context-based evaluation to determine whether the particular utterance is "*patently offensive* as measured by contemporary community standards." *Industry Guidance on the Commission's Case Law Interpreting* 18 U.S.C. § 1464, 16 F.C.C.R. 7999, at P 8 (2001) ("*Industry Guidance*"). Factors weighing in favor of a finding of indecency are: "(1) the *explicitness or graphic nature* of the description or depiction of sexual or excretory organs or activities; (2) whether the material *dwells on or repeats at length* descriptions of sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate,* or *whether the material appears to have been presented for its shock value*." *Industry Guidance,* at P 10. Especially in relation to the "pandering" factor, a finding of violation is less likely if the broadcast of the utterance involved a genuine news report, or if censorship of the expletive would harm or distort artistic integrity. Prior to the Bono incident, the Commission attached great importance to the second factor, which focuses on whether an expletive was repeated. Under the pre-*Golden Globes* rulings, the fact that an utterance was fleeting was virtually conclusive in assuring it would not be deemed a violation (unless it breached special barriers, such as by referring to sexual activities with children). With its *Golden Globes* adjudication, however, the Commission adopted a less permissive stance. It announced that henceforth fleeting expletives would be judged according to a standard more closely aligned with repeated utterances of expletives. Thus, the Commission has declared that it remains unlikely to find a violation in an expletive that is broadcast in the context of a genuine news report, or where censorship by bleeping out the expletive would compromise artistic integrity, but it will no longer give a nearly automatic pass merely because the expletive was not repeated. *See Remand Order*, at P 23.

The Commission explained succinctly why lack of repetition of the F-Word would no longer result in a virtual free pass. "[W]e believe that, given the core-meaning of the 'F-Word,' any use of that word or a variation, in any context, inherently has a sexual connotation. . . . The 'F-Word' is one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language. Its use invariably invokes a coarse sexual image." *Golden Globes,* at PP 8-9. "[A]ny use of that word has a sexual connotation even if the word is not used literally." *Remand Order*, at P 16.

My colleagues find that in so altering its standards the Commission has acted illegally. They rule that the Commission failed to give a reasoned analysis explaining the change of rule. They accordingly find that the change of standard was arbitrary and capricious and therefore violated the Administrative Procedure Act. I disagree. In explanation of this relatively modest change of standard, the Commission gave a sensible, although not necessarily compelling, reason. In relation to the word "fuck," the Commission's central explanation for the change was essentially its perception that the "F-Word" is not only of extreme and graphic vulgarity, but also conveys an inescapably sexual connotation. The Commission thus concluded that the use of the F-Word—even in a single fleeting instance without repetition—is likely to constitute an offense to the decency standards of § 1464.

The standards for judicial review of administrative actions are discussed in a few

leading Supreme Court opinions from which the majority quotes. Agencies operate with broad discretionary power to establish rules and standards, and courts are required to give deference to agency decisions. A court must not "substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("Administrative decisions should [not] be set aside . . . because the court is unhappy with the result reached."). In general, an agency's determination will be upheld by a court unless found to be "arbitrary and capricious." *See* 5 U.S.C. 706(2)(A).

An agency is free furthermore to change its standards. The Supreme Court has made clear that when an agency changes its standard or rule, it is "obligated to supply a reasoned analysis for the change." *State Farm,* 463 U.S. at 42. If an agency without explanation were to make an adjudication which is not consistent with the agency's previously established standards, the troubling question would arise whether the agency has lawfully changed its standard, or whether it has arbitrarily failed to adhere to its standard, which it may not lawfully do. Accordingly our court has ruled that "an agency . . . cannot simply adopt inconsistent positions without presenting 'some reasoned analysis.'" *Huntington Hosp.,* 319 F.3d at 79.

* * *

In my view, in changing its position on the repetition of an expletive, the Commission complied with these requirements. It made clear acknowledgment that its *Golden Globes* and *Remand Order* rulings were not consistent with its prior standard regarding lack of repetition. It announced the adoption of a new standard. And it furnished a reasoned explanation for the change. Although one can reasonably disagree with the Commission's new position, its explanation—at least with respect to the F-Word—is not irrational, arbitrary, or capricious. The Commission thus satisfied the standards of the Administrative Procedures Act.

* * *

"Supreme Court to Rule on Broadcast Indecency"

Los Angeles Times
March 18, 2008
David G. Savage

WASHINGTON—The Supreme Court agreed Monday to rule for the first time in 30 years on what constitutes indecency on broadcast television and radio.

The justices will weigh whether federal regulators may levy large fines on broadcasters who let expletives on the airwaves during daytime and early evening hours.

The court could rule that the Federal Communications Commission has broad power to decide what is acceptable for broadcasts. Or the justices could conclude that the 1st Amendment's protection for the freedom of speech does not allow the government to punish broadcasters for an occasional vulgarity.

The justices have not ruled on the indecency standard since 1978, when they upheld fines against a radio station for broadcasting comedian George Carlin's "seven dirty words" monologue in midafternoon. One justice described Carlin's performance as "a sort of verbal shock treatment" because the familiar curse words were repeated over and over.

Since then, however, it has been unclear whether the use of a single expletive could be judged indecent. Federal law forbids broadcasting "any obscene, indecent or profane language," but Congress has left it to the FCC and the courts to define indecency.

Last year, the major networks won a ruling in New York that blocked the FCC from enforcing a strict new rule against the broadcasting of "fleeting expletives."

Bush administration lawyers urged the high court to take up the dispute and to give the FCC a green light to enforce its crackdown on vulgar words. The government says broadcasters who use the public airwaves have a duty to protect children and families from unexpectedly hearing foul language.

The FCC has fined CBS $550,000 for broadcasting Janet Jackson's performance at the 2004 Super Bowl, which included a brief exposure of her breast. The network is appealing the fine in a court in Philadelphia.

The president of the Parents Television Council in Los Angeles applauded the court's announcement. "Such harsh, unedited profanity is unacceptable for broadcast over publicly owned airwaves when children are likely to be watching," said Timothy Winter, the president.

His group claims more than 1.2 million members, and he said many complained when they heard expletives used during Hollywood award shows. "It seems you can't have an awards show without someone dropping an F-bomb," Winter said.

The FCC cited several incidents that led it to issue the new rule. Singer Bono of U2 exulted upon winning a Golden Globe for an original song, calling it "really, really f . . . brilliant." Entertainer Cher described a career achievement award on another

program as a rebuke to her critics. "So, f . . . 'em. I still have a job and they don't," she said.

The major TV networks sued to block the rule. In their defense, they say they have firm policies against the use of vulgar words. They are not included in scripts, for example. But on occasion, they say, these words have slipped past monitors and gone on the air when a guest performer appeared on a live broadcast.

The networks used a five-second delay on several of the live broadcasts cited by the FCC, but a monitor failed to bleep out the expletive.

The stakes for broadcasters increased when Congress voted in 2006 to raise the maximum fines for indecency tenfold. Network executives say they could face millions of dollars in fines for letting a single expletive go on the air during a national broadcast.

In March 2004, shortly after the Janet Jackson incident, the FCC adopted its zero-tolerance policy for "fleeting expletives." The commissioners rejected the defense that Bono had used the F-word as an adjective, not a curse.

The U.S. appeals court in New York, in its ruling last year, agreed with the broadcasters that the FCC had not justified its abrupt change in policy. Its judges also said the policy was unclear because the F-word was permitted in some news shows and in the TV broadcast of "Saving Private Ryan." The commissioners said the profanity on the D-day beaches was integral to depicting the horror of war.

Lawyers for the broadcasters had urged the Supreme Court to steer clear of the case. They said the FCC should be forced to reconsider and clarify its policy.

"I thought there was no chance they would take this case," said Andrew Jay Schwartzman, president of the Media Access Project. "If the FCC is affirmed, the message will be that indecency is whatever the FCC says it is."

It is not clear whether the growth of new media will affect the court's view of what is indecent. Since the court last ruled on the issue, cable TV, the Internet and satellite radio have emerged as competitors to traditional broadcasters. But these new media are not regulated by the FCC because they do not transmit signals over the public airwaves.

Arguments in the ***FCC vs. Fox TV*** will be heard in the fall.

"Decency Ruling Thwarts F.C.C. on Vulgarities"

New York Times
June 5, 2007
Stephen Labaton

WASHINGTON—If President Bush and Vice President Cheney can blurt out vulgar language, then the government cannot punish broadcast television stations for broadcasting the same words in similarly fleeting contexts.

That, in essence, was the decision on Monday, when a federal appeals panel struck down the government policy that allows stations and networks to be fined if they broadcast shows containing obscene language.

Although the case was primarily concerned with what is known as "fleeting expletives," or blurted obscenities, on television, both network executives and top officials at the Federal Communications Commission said the opinion could gut the ability of the commission to regulate any speech on television or radio.

Kevin J. Martin, the chairman of the F.C.C., said that the agency was now considering whether to seek an appeal before all the judges of the appeals court or to take the matter directly to the Supreme Court.

The decision, by a divided panel of the United States Court of Appeals for the Second Circuit in New York, was a sharp rebuke for the F.C.C. and for the Bush administration. For the four television networks that filed the lawsuit—Fox, CBS, NBC and ABC—it was a major victory in a legal and cultural battle that they are waging with the commission and its supporters.

Under President Bush, the F.C.C. has expanded its indecency rules, taking a much harder line on obscenities uttered on broadcast television and radio. While the judges sent the case back to the commission to rewrite its indecency policy, it said that it was "doubtful" that the agency would be able to "adequately respond to the constitutional and statutory challenges raised by the networks."

The networks hailed the decision.

"We are very pleased with the court's decision and continue to believe that the government regulation of content serves no purpose other than to chill artistic expression in violation of the First Amendment," said Scott Grogin, a senior vice president at Fox. "Viewers should be allowed to determine for themselves and their families, through the many parental control technologies available, what is appropriate viewing for their home."

Mr. Martin, the chairman of the commission, attacked the panel's reasoning.

"I completely disagree with the court's ruling and am disappointed for American families," he said. "The court says the commission is 'divorced from reality.' It is the New York court, not the commission, that is divorced from reality."

He said that if the agency was unable to prohibit some vulgarities during prime time, "Hollywood will be able to say anything they want, whenever they want."

Beginning with the F.C.C.'s indecency

finding in a case against NBC for a vulgarity uttered by the U2 singer Bono during the Golden Globes awards ceremony in 2003, President Bush's Republican and Democratic appointees to the commission have imposed a tougher policy by punishing any station that broadcast a fleeting expletive. That includes vulgar language blurted out on live shows like the Golden Globes or scripted shows like "NYPD Blue," which was cited in the case.

Reversing decades of a more lenient policy, the commission had found that the mere utterance of certain words implied that sexual or excretory acts were carried out and therefore violated the indecency rules.

But the judges said vulgar words are just as often used out of frustration or excitement, and not to convey any broader obscene meaning. "In recent times even the top leaders of our government have used variants of these expletives in a manner that no reasonable person would believe referenced sexual or excretory organs or activities."

Adopting an argument made by lawyers for NBC, the judges then cited examples in which Mr. Bush and Mr. Cheney had used the same language that would be penalized under the policy. Mr. Bush was caught on videotape last July using a common vulgarity that the commission finds objectionable in a conversation with Prime Minister Tony Blair of Britain. Three years ago, Mr. Cheney was widely reported to have muttered an angry obscene version of "get lost" to Senator Patrick Leahy on the floor of the United States Senate.

"We find that the F.C.C.'s new policy regarding 'fleeting expletives' fails to provide a reasoned analysis justifying its departure from the agency's established practice," said the panel.

Emily A. Lawrimore, a White House spokeswoman, said Mr. Bush and Mr. Cheney had no comment about the ruling.

Although the judges struck down the policy on statutory grounds, they also said there were serious constitutional problems with the commission's attempt to regulate the language of television shows.

"We are skeptical that the commission can provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster," said the panel in an opinion written by Judge Rosemary S. Pooler and joined by Judge Peter W. Hall. "We question whether the F.C.C.'s indecency test can survive First Amendment scrutiny."

In his dissent, Judge Pierre N. Leval defended the commission's decision to toughen its indecency policy.

"In explanation of this relatively modest change of standard, the commission gave a sensible, although not necessarily compelling, reason," he said.

"What we have is at most a difference of opinion between a court and an agency," Judge Leval said. "Because of the deference courts must give to the reasoning of a duly authorized administrative agency in matters within the agency's competence, a court's disagreement with the commission on this question is of no consequence. The commission's position is not irrational; it is not arbitrary and capricious."

The case involved findings that the networks had violated the indecency rules for

comments by Cher and Nicole Richie on the Billboard Music Awards, the use of expletives by the character Andy Sipowicz on "NYPD Blue" and a comment on "The Early Show" by a contestant from CBS's reality show "Survivor."

The commission did not issue fines in any of the cases because the programs were broadcast before the agency changed its policy. But the networks were concerned about the new interpretation of the rules, particularly since the agency has been issuing a record number of fines.

Two years ago, Congress increased the potential maximum penalty for each indecency infraction to $325,000, from $32,500. Producers and writers have complained that the prospect of stiff fines had begun to chill their creative efforts.

The case, ***Fox et al. v. Federal Communications Commission,*** along with a second case now before a federal appeals court in Philadelphia involving the malfunctioning wardrobe that exposed one of the pop singer Janet Jackson's breasts during the halftime show of the 2004 Super Bowl, have been closely watched by the television industry and its critics for their broad implications for television programming.

Neither cable TV nor satellite programming faces the same indecency rules even though they cover about 85 percent of homes. And as the Bush administration's appointees have taken a tougher view on indecency, the industry has waged a counter-campaign in the courts.

The commission has struggled to consistently explain how it applies the rules. In the Bono case involving the Golden Globe awards, the staff initially ruled in favor of the network. After lawmakers began to complain about that decision, the commission, then led by Michael K. Powell, reversed the staff decision.

But the commission declined to impose a fine because, it noted, "existing precedent would have permitted this broadcast" and therefore NBC and its affiliates "necessarily did not have the requisite notice to justify a penalty."

Broadcast television executives have complained about what they say has been the arbitrary application of the rules. They expressed concern, for instance, that they might be penalized for broadcasting "Saving Private Ryan," a Steven Spielberg movie about the invasion of Normandy during World War II, because of the repeated use of vulgarities.

But the F.C.C. in that case ruled in favor of the networks, finding that deleting the expletives "would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers."

"Court Tosses FCC 'Wardrobe Malfunction' Fine"

Associated Press
July 21, 2008
Joann Lovigold

PHILADELPHIA—A federal appeals court on Monday threw out a $550,000 indecency fine against CBS Corp. for the 2004 Super Bowl halftime show that ended with Janet Jackson's breast-baring "wardrobe malfunction."

The three-judge panel of the 3rd U.S. Circuit Court of Appeals ruled that the Federal Communications Commission "acted arbitrarily and capriciously" in issuing the fine for the fleeting image of nudity.

The 90 million people watching the Super Bowl, many of them children, heard Justin Timberlake sing, "Gonna have you naked by the end of this song," as he reached for Jackson's bustier.

The court found that the FCC deviated from its nearly 30-year practice of fining indecent broadcast programming only when it was so "pervasive as to amount to 'shock treatment' for the audience."

"Like any agency, the FCC may change its policies without judicial second-guessing," the court said. "But it cannot change a well-established course of action without supplying notice of and a reasoned explanation for its policy departure."

The 3rd Circuit judges—Chief Judge Anthony J. Scirica, Judge Marjorie O. Rendell and Judge Julio M. Fuentes—also ruled that the FCC deviated from its long-held approach of applying identical standards to words and images when reviewing complaints of indecency.

"The Commission's determination that CBS's broadcast of a nine-sixteenths of one second glimpse of a bare female breast was actionably indecent evidenced the agency's departure from its prior policy," the court found. "Its orders constituted the announcement of a policy change—that fleeting images would no longer be excluded from the scope of actionable indecency."

In a statement Monday, CBS said it hoped the decision "will lead the FCC to return to the policy of restrained indecency enforcement it followed for decades."

"This is an important win for the entire broadcasting industry because it recognizes that there are rare instances, particularly during live programming, when it may not be possible to block unfortunate fleeting material, despite best efforts," the network said.

The FCC did not immediately respond to a request for comment.

Andrew Jay Schwartzman of the Media Access Project, which filed a friend-of-the-court brief on behalf of a group of TV writers, directors and producers, said the ruling "is an important advance for preserving creative freedom on the air."

"The court agreed with us: the FCC's inconsistent and unexplained departure from prior decisions leaves artists and journalists confused as to what is, and is not, permissible," Schwartzman said in a statement Monday.

The FCC had argued that Jackson's nudity, albeit fleeting, was graphic and explicit and CBS should have been forewarned. Jackson has said the decision to add a costume reveal—exposing her right breast, which had only a silver sunburst "shield" covering her nipple—came after the final rehearsal.

At the time, broadcasters did not employ a video delay for live events, a policy remedied within a week of the game.

In challenging the fine, CBS said that "fleeting, isolated or unintended" images should not automatically be considered indecent.

But the FCC said Jackson and Timberlake were employees of CBS and that the network should have to pay for their "willful" actions, given its lack of oversight.

The $550,000 fine represents the maximum $27,500 levied against each of the network's 20 owned-and-operated stations.

Shortly after the 2004 Super Bowl, the FCC changed its policy on fleeting indecency following an NBC broadcast of the Golden Globes awards show on which U2 lead singer Bono uttered an unscripted expletive. The FCC said at the time that the "F-word" in any context "inherently has a sexual connotation" and can trigger enforcement.

NBC challenged the decision, but that case has yet to be resolved.

In June 2007, a federal appeals court in New York invalidated the government's policy on fleeting profanities uttered over the airwaves in a case involving remarks by Cher and Nicole Richie on awards shows carried on Fox stations. The Supreme Court will hear the case[,***Fox et al. v. Federal Communications Commission,***] this fall.

"Decency over the Airwaves Is a Public Good"

U.S. Federal News
March 28, 2008
Congressman Joe Pitts

The Supreme Court recently announced it will accept a case regarding the government's ability to ban so-called "fleeting expletives." The term, a euphemism used by the broadcast networks, describes accidental uses of words that have been deemed inappropriate for public airwaves.

The case in question is ***FCC vs. Fox Television Stations.*** Fox and other broadcast television networks are arguing that because "fleeting expletives" are accidental and unscripted, they should not be punished by fines. The broadcast networks are basically arguing they have the right to abdicate any responsibility for what is said on their networks. The only problem is that the networks broadcast over public airwaves, and we, as a society, have decided we do not want profane filth polluting those airwaves.

In a decision handed down last summer, the Second District Court of Appeals took the side of the networks and decided the profanity rules enforced by the Federal Communications Commission (FCC) were "arbitrary and capricious." Solicitor General Paul Clement, in arguing for the Supreme Court to hear the case on appeal, noted that the FCC has received hundreds of thousands of complaints from citizens who are angry about profanity on the airwaves. He noted that the FCC has been given the responsibility to regulate the airwaves, but has had their ability to do so taken away by the Second District's ruling.

Perhaps the judges sitting on the Second District Court would do well to review the underlying concept of broadcast television. The major networks broadcast their programming over the airwaves. These airwaves are limited. Only so much information can travel on the spectrum that is able to carry information out to televisions in homes across the country. Thus, we have established these airwaves are part of the public domain.

If these judges were to understand this concept of public good, perhaps they would be more likely to understand why the major television networks do not have a right to send profanity over the public airwaves into people's homes. As a society, we have decided that expletives have no place on broadcast television. Many people do not want their children to be exposed to language they find offensive. Others just don't want to have to be exposed to it themselves. The fact is decency over the airwaves is a public good. Because they are able to use the limited spectrum, broadcast networks have a responsibility to the public, and their local affiliates, to provide appropriate content. And the FCC has been tasked with the goal of maintaining this decency.

One industry group claimed the current indecency policy used by the FCC has "chilled the creative process" for the industry. I have no doubt that the average parent in America is little worried about a chilling of the creative process for Hollywood writers if that requires the ability of celebrities to swear during acceptance speeches at awards ceremonies. If Hollywood requires profanity in order to

produce "creative" programming, perhaps they should rethink their creative process.

Upon hearing the Supreme Court would take up the case, Fox claimed the appeal will give the company "the opportunity to argue that the FCC's expanded enforcement of the indecency law is unconstitutional in today's diverse media marketplace where parents have access to a variety of tools to monitor their children's television viewing." Indeed, today's media marketplace has expanded with the introduction of cable, satellite, and internet to name just a few.

However, the existence of cable television has no bearing on a parent's desire to keep their child from hearing profanity on broadcast television. And in regard to tools available to monitor children's television viewing, the broadcast networks might do well to remember they have a tool they can use to edit out expletives that take place, even on live TV coverage. Indeed, a short delay, which the networks do employ at times, can make the notion of fleeting expletives a thing of the past. In the end, the networks have little ground to stand on beyond the notion that they should have the right to broadcast profanity into your living room. I know the majority of Americans reject this notion. I hope the Supreme Court will find the same.

"A Federal Appeals Court Strikes down the FCC's 'Fleeting Expletives' Policy on Administrative Law Grounds: Was it Right to Do so?"

Findlaw
June 27, 2007
Julie Hilden

Earlier this month, a three-judge panel of the U.S. Court of Appeals for the Second Circuit voted, 2-1, to strike down the policy of the Federal Communications Commission (FCC) sanctioning "fleeting expletives"—that is, expletives used in a quick and isolated way in the course of a television or radio program.

Interestingly, the dissenter, Judge Pierre Leval, is thought to be one of the Second Circuit's leading lights when it comes to free speech and intellectual property matters—making the split decision an especially significant one.

In this column, I'll both discuss the majority's ruling, and explain why I believe Judge Leval dissented.

Chipping Away at the First Amendment: The FCC's Authority to Regulate "Indecent" Speech

The First Amendment is extremely clear that "Congress shall make no law abridging the freedom of speech." Unfortunately, however, the Supreme Court has allowed various federal and state regulations to muddy this crystal-clear command.

First, the Supreme Court unwisely allowed censorship of "obscene" speech, as I discussed in a prior column. Later, the Court trespassed on the First Amendment even further by accepting, in *FCC v. Pacifica*, the doctrine of "indecent" speech—speech which concededly falls short of being obscene, yet still, according to the Court, can somehow be constitutionally censored.

The FCC's justifications for regulating "indecent" speech have always rung hollow and have always seemed impervious to technological change, in two key ways:

First, the FCC has continued to successfully cite the risk that children might be exposed to such speech. Yet the Supreme Court has held in other contexts—for example, when considering Internet censorship in *Reno v. ACLU*—that the First Amendment prevents the government from insisting that adults' speech be watered down to that which is fit for children, whenever children might be exposed to it. And while technology (such as the V-chip) that allows parents to limit what their children watch on TV has not proved very popular, what matters, from a First Amendment perspective, is not its popularity, but the fact that it remains a usable option for concerned parents: No children need be a "captive audience" to shows to which parents object.

Second, the FCC has continued to insist that broadcasting licenses carry with them special responsibilities, even though the initial basis for this claim—media scarcity—has been decimated. Any claim of media scarcity, in this age of fast-blossoming media, is absurd, yet the Supreme Court has yet to put the last nail in the coffin of this archaic claim, and thus the FCC continues to claim that broadcasting somehow remains a special public trust to be exercised

cautiously and within limits set by the government.

It is perhaps this trail of absurdities that motivated the Second Circuit panel majority to finally say, "Enough is enough" and reject as simply irrational the FCC's change of heart regarding fleeting expletives.

The Basis for this Case: The FCC's Change of Policy on "Fleeting Expletives"

Originally, the FCC's policy on "fleeting expletives" had been to decline to sanction networks if the expletive at issue was employed at a live event, on the ground that there had been no opportunity for "journalistic editing."

Also, the FCC made clear that an "isolated use" of expletives—as opposed to "verbal shock treatment"—would not lead to sanctions. It was "deliberate and repetitive use" of expletives to which the FCC objected—or, put another way, material that "dwells on or repeats at length" the expletives used, rather than using them in "fleeting and "isolated" ways.

In 2003, however, that policy changed dramatically. As I discussed in a previous column, the FCC initially declined to penalize one particular fleeting expletive—used by the rock star Bono, who deemed his Golden Globe award "really, really fucking brilliant." The agency reasoned sensibly that Bono hadn't meant to connote anything sexual by his remark; it was simply being using to convey his strong feelings of joy.

However, in time, the FCC reversed itself. It deemed any use of the word "fucking" to inherently have a sexual connotation, and put broadcasters on notice that they could be penalized *even if that word were used only fleetingly.* (It did not, however, penalize Bono's use of the word, since the broadcaster was not yet, at that point, on notice of the change in policy.)

Broadcasters immediately challenged the policy. Rather than timely resolving their petitions, the FCC let them linger unresolved. Meanwhile, it made clear its position that the new policy applied to two more celebrity uses of the word "fucking" or "fuck" in non-sexual contexts. In one, Cher said "fuck 'em" to her past detractors at the 2002 Billboard Music awards. In the other, which occurred at the same event in 2003, Nicole Richie complained that it was "not so fucking simple" to "get cowshit out of a Prada purse."

Neither of these two occurrences was penalized—for, once again, the broadcasters had not yet been on notice of the new policy. However, the FCC made it very clear that in the future, similar uses of fleeting expletives would be subject to sanctions.

The FCC's Policy Is Easy to Criticize, But Is It Outright Irrational?

It is easy to criticize the FCC's fleeting expletives policy as silly, ridiculous, absurd, and utterly antithetical to the First Amendment. But is the policy truly irrational?

That was the question that the Second Circuit had to confront, and the question that ultimately divided the panel, and forced Judge Leval to dissent.

In striking down the policy, the majority of the Second Circuit panel invoked not the First Amendment, but the Administrative Procedures Act (APA)—and therefore declined to resolve a series of other arguments, including First Amendment arguments, that the broadcasters had also

made. Rather than get into any larger thicket, the majority simply held that because the FCC had failed to "articulate a reasoned basis for this change in policy," the new policy violated the APA's prohibition on "arbitrary and capricious" agency behavior.

(In opting to resolve the APA issue first, the majority followed a well-known doctrine, rooted in the Supreme Court's decision in *Ashwander v. Tennessee Value Authority*, that holds that courts should avoid reaching constitutional questions if a case can be resolved on other grounds. But this doctrine seems weakest in the First Amendment context, where the concern for "chilling" speech often compels courts to reach constitutional questions early and not later.)

The majority's reasoning depended in part on internal contradictions within the FCC policy: Why permit the use of an expletive in a live news interview (even though it could be bleeped using a time-delay), yet forbid it at a live awards show? Why allow the repeated expletives in "Saving Private Ryan" to be aired, yet target fleeting expletives in other contexts? In all these instances, the court noted, the risk that children might be exposed to expletives existed—yet in only some of them, would the FCC have put sanctions upon the use of the expletives.

The majority also found dubious the FCC's claim that it would often be hard to tell if the expletive "fucking" was being used figuratively, or used literally, to refer to the sexual act. The majority rightly gave short shrift to this supposed confusion—declaring it contrary to "any commonsense understanding of these words."

Moreover, the majority found no persuasive reason for the FCC's decision to change policy now, after so many years, and with no clear inciting circumstance. Indeed, it decried the total lack of any evidence from the FCC that the use of fleeting expletives caused any harm at all.

This is a very compelling point, in my mind, as it is the rare child who isn't exposed early on to these expletives in a schoolyard or mall, or when a parent stubs a toe or curses at a bad driver. What extra harm is the occasional use of the same expletive on television supposed to create? The FCC has never offered a persuasive answer—or, indeed, any persuasive evidence that expletives are harmful to children in the first place.

The Basis for Judge Leval's Dissent

At first, Judge Leval's decision to dissent from the majority's analysis would seem surprising, given his strong support of copyright protection for creative work. Clearly, this is not a judge on whom the nuances of creative work are lost, or one who undervalues such work.

So why did Judge Leval dissent? In sum, because he believed an even more important principle was at issue in the case: the principle of separation of powers.

Judge Leval clearly felt his colleagues had gone too far in deeming the FCC's change of policy to be "arbitrary and capricious" under the APA. "What we have here is at most a difference of opinion between a court and an agency," he wrote. And he emphasized that a court's mandate, under the APA, is to ensure that an agency gives reasons for its decisions that make minimal sense—not necessarily reasons the court finds especially persuasive or convincing.

After all, if courts' review of agency actions

is too searching, they may impede the mandates Congress has created the agencies to serve—and thus impede the function of a coordinate branch of government.

Perhaps Judge Leval also felt that since the broadcasters would ultimately prevail on the First Amendment issues they had raised, it was unnecessary for the panel to so aggressively interpret the APA. After all, a lot of the irrationality of the FCC's stance comes from the tortured logic by which the Supreme Court has unconvincingly defended indecency doctrine, over the years.

The cleaner outcome here, then, would be for the Court to junk the indecency doctrine, recognizing that it is founded on two extremely unstable supports: supposed media scarcity, and the supposed necessity to protect children from hearing the same words on television that they hear at school, at the mall and at the playground.

Did the Panel Majority Truly Threaten the Separation of Powers?

In the end, was the panel majority's review here truly too searching—exceeding a court's proper role? I believe the answer is no. Judge Leval, in his dissent, did a much better job of defending the FCC policy than the FCC itself had—but still, in my view, not a sufficient one.

For example, with respect to the "Why now?" question, Judge Level noted some reasons why the FCC could have rationally feared that it would face a flood of fleeting expletives if it did not change its policy to crack down on them: Increasingly casual use of expletives in daily conversation, and the increased pressure for networks to compete with unregulated cable channels, where there are no formal limits on the use of expletives (though self-censorship is often employed.).

The problem, though, is that while these recent phenomena might narrowly support a change in the fleeting expletive policy, they broadly take the wind out of the entire indecency policy of which it is a part. As noted above, the more frequently children hear expletives in daily conversation, the more senseless the FCC policy of supposedly protecting them. Moreover, the more frequently expletives are used on cable channels, the more likely it is that parents who subscribe to cable will employ the V-chip to control their children's access to television overall.

Once again exhibiting far better lawyering than the FCC, Judge Leval also tries to justify the FCC's suggestion that the sexual nature of words like "fuck" and "fucking" is inherent, no matter in what context they are used. He points out that even if the speaker does not intend to use these words in a sexual way, some in the community will nevertheless "understand the word as freighted with an offensive sexual connotation."

Fair enough—but First Amendment doctrine has always eschewed the idea of a "listener's veto," or, indeed, any idea that speech can be censored because some find it offensive. Putting obscenity to one side, under the Supreme Court's precedent, speech can be censored only because it is dangerous (for instance, directly inciting violence, or increasing prostitution and other crimes in a red-light district), not because it is offensive. Indeed, nothing could be more antithetical to free speech than a "listeners' veto," which would ensure a society in which everyone preaches to his or her converted, no one hears anything contrary to

his or her views, and no mind ever dares to change on any issue. Thus, once again, Judge Leval shores up the FCC policy only to threaten the First Amendment.

The bottom line is this: The FCC's indecency policing violates the First Amendment. The Second Circuit panel cut this power off at the knees, by rejecting the fleeting expletive policy as irrational. But what the doctrine truly deserves is a stake through the heart. The stake has so far been ineffective, but with both V-chip technology and massive media choice, it has sharpened substantially.

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"FCC Backtracks on 2 Charges of Indecency"

Los Angeles Times
November 8, 2006
Jim Puzzanghera

WASHINGTON—It may be OK to swear on a news show, but profanities on other programs are still verboten, the Federal Communications Commission announced Tuesday.

The agency reversed a ruling it had made that use of the word "bullshitter" on the CBS program "The Early Show" was indecent. That decision in March was particularly controversial because news shows traditionally had wide leeway on language.

The incident involved a live 2004 interview with a contestant on CBS' "Survivor Vanuatu" who had used the word to describe a fellow contestant.

But this week the FCC said it was deferring to a "plausible characterization" by the network that the incident was a news interview, which merits a higher standard for indecency violations.

The agency also rejected a complaint about coarse language on several episodes of ABC's "NYPD Blue" but did so on a technicality because the complaint was made against a TV station by a viewer outside of its market.

Finally, the FCC upheld the main focus of the March ruling: Unscripted profanities uttered during Fox's broadcasts of the "Billboard Music Awards" in 2002 and 2003 were indecent. In the 2002 show, Cher used the "F-word" after accepting an award. In 2003, Nicole Richie used the "F-word" and the "S-word" in presenting an award.

FCC Chairman Kevin J. Martin defended the new rulings.

"Hollywood continues to argue they should be able to say the F-word on television whenever they want . . . the commission again disagrees," he said.

The new ruling, decided on Monday, comes in the wake of a lawsuit by the four major broadcast TV networks challenging the March action. The U.S. 2nd Circuit Court of Appeals in New York handling the suit gave the FCC until Monday to reconsider those indecency decisions because of some unusual circumstances.

Broadcasters, who had challenged the original ruling as unconstitutional, were pleased with the two reversals, but reiterated their long-standing complaint that FCC guidelines remain inconsistent and murky.

And one commissioner, Jonathan S. Adelstein, alleged that the reversals were not made on merit but to improve the agency's chances of winning the broadcasters' lawsuit by jettisoning its weakest parts.

"Litigation strategy should not be the dominant factor guiding policy when 1st Amendment protections are at stake," Adelstein said. Adelstein did not vote against Monday's ruling but dissented to those parts of it, the only one of the five commissioners who raised objections.

Even with the ruling, experts said the FCC still had major problems with its case.

"This makes it all the harder to claim we've got a set of clear consistent rules, which is what the FCC's claim has been all along," said Stuart M. Benjamin, a Duke University law professor and an expert on telecommunications law.

Broadcasters have alleged that the FCC inconsistencies, combined with its more aggressive enforcement and Congress' tenfold hike in maximum indecency fines, to $325,000 per violation, have chilled the industry.

The March ruling stemmed from an earlier reversal of FCC policy. In 2003, the FCC's staff concluded that the "F-word" was allowed as an adjective, rejecting complaints about U2 singer Bono's use of the word in that way during the 2003 Golden Globes Awards telecast.

But in March 2004—amid public outcry after Janet Jackson's breast was briefly exposed during the 2004 Super Bowl halftime telecast—the FCC reversed itself, ruling any variation of the "F-word" referred to sexual activity and was almost always indecent. The FCC used that new standard in March to pronounce the incidents on "The Early Show," "NYPD Blue" and the "Billboard Music Awards" indecent.

"The Price for On-Air Indecency Goes up"

The Washington Post
June 8, 2006 Thursday
Frank Ahrens

The maximum penalty for broadcasting indecent material on radio and television will increase tenfold to $325,000 under legislation passed by the House yesterday that awaits only a promised presidential signature.

The bill, called the Broadcast Decency Enforcement Act, was passed unanimously by the Senate last month and cleared the House by a vote of 379-35. President Bush has vowed to sign the bill into law; it would allow the Federal Communications Commission to powerfully punish over-the-air broadcasters for airing raunchy content. The bill keeps cable and satellite broadcasters outside of the government's authority to police the airwaves.

Yesterday's vote culminates a three-year culture clash among lawmakers, regulators, broadcasters, interest groups, lawyers and ordinary consumers about what can and can't be said on radio and television, and how much authority the government should have over artistic expression and free speech.

"I believe that government has a responsibility to help strengthen families," Bush said in a statement. "This legislation will make television and radio more family friendly by allowing the FCC to impose stiffer fines on broadcasters who air obscene or indecent programming."

Politically and socially conservative groups, such as the Parents Television Council, have pushed for higher fines and flooded the FCC with complaints about objectionable programming.

"We hope that the hefty fines will cause the multibillion-dollar broadcast networks finally to take the law seriously," said L. Brent Bozell, PTC president.

The FCC and most lawmakers largely have concurred.

"All we are doing is adding a few zeroes to the current level of fines; we do not change the current standards one bit," said Rep. Fred Upton (R-Mich.), who introduced the first version of the bill in January 2004, two weeks before singer Janet Jackson's right breast was exposed during the Super Bowl halftime show on CBS, creating the flashpoint of the decency debate.

On the other side, radio and television broadcasters, artists and First Amendment specialists have opposed the increase in fines, saying they will exacerbate what they call the "chilling effect" already underway in the creative community, as the government cracks down on content. For instance, the networks have added delays to live broadcasts that allow them to catch offensive material before it airs. A number of broadcasters have instituted zero-tolerance rules for their on-air personalities, meaning objectionable broadcasts can bring immediate firing.

Currently, the FCC can impose a maximum fine of $32,500 on radio and television stations that broadcast indecent material, defined by the agency as sexual or excretory

content of a "patently offensive nature" between the hours of 6 a.m. and 10 p.m. when children are most likely to be watching.

The FCC can impose one fine per program that may include several indecent incidents, or it may chose to fine each incident within a program, raising the total amount into the low millions. The bill passed yesterday is meant to cap the fine amount at $3 million per incident per day, but lawyers disagreed on whether there is enough wiggle room in the bill's language to allow the FCC to impose fines running into the tens of millions of dollars.

The bill comes as networks are asking the courts to challenge the government's very ability to regulate content on the airwaves, an authority based on two Supreme Court rulings, the most important of which received only a 5 to 4 approval nearly 30 years ago.

ABC, CBS, NBC, Fox and more than 800 affiliated television stations sued in federal court in April to overturn the March indecency rulings, saying the agency had overstepped its authority. The suit could become the test case long awaited by broadcasters to challenge the indecency regulations, the networks privately acknowledge.

Broadcasters argue that the decency rules were put in place when viewers had a choice of only a few television and radio stations and it made some sense that the government should regulate content.

Further, the broadcasters say, cable and satellite channels have an unfair advantage because they can show racier content than the networks—such as HBO's "The Sopranos"—which has contributed to the erosion of the networks' audience.

"In issues related to programming content, NAB believes responsible self-regulation is preferable to government regulation," said Dennis Wharton, spokesman for the National Association of Broadcasters, the industry's trade group. "If there is regulation, it should be applied equally to cable and satellite TV and satellite radio."

Lawmaker and viewer outrage over increasingly vulgar radio and television programming was simmering in 2003, when U2 front man Bono uttered the "f-word" during a live broadcast of an awards show on NBC, former CBS Radio deejays Opie and Anthony aired a couple purportedly having sex in St. Patrick's cathedral in New York, and reality-TV star Nicole Richie used profanity during a Fox awards show.

But the issue boiled over after the 2004 Super Bowl. Twenty CBS-owned stations were fined a total of $550,000 for airing the incident, a penalty the network is appealing in court.

Since then, FCC commissioners and several lawmakers have said the maximum fine was no deterrent to the multibillion-dollar broadcast conglomerates. Various versions of bills that would raise the fines languished in Congress until this year, when Senate Majority Leader Bill Frist (R-Tenn.) picked up one version and pushed it through the Senate. The House acted quickly after the Senate's approval.

"Bush Taps FCC's Martin as Chairman"

Chicago Tribune
March 17, 2005
Bloomberg News

President Bush on Wednesday nominated Federal Communications Commission member Kevin Martin to be the agency's new chairman.

Martin, who broke ranks with agency Republicans over some media and telecommunications rules, will replace Michael Powell, who is leaving this month. Martin has been an FCC commissioner since July 2001.

Bush looked past Martin's decision to side with commission Democrats on local-telephone rules. Martin's promotion signals that the agency may continue efforts to reduce government regulation of media and telephone companies and will keep attacking radio and television indecency.

"Martin is a deregulatory Republican," said Precursor Group analyst Rudy Baca, who was a senior aide to former FCC Chairman James Quello. "He's more likely than Powell to take into account political considerations, and has close ties to the White House."

Because Martin, 38, already is a commissioner, he won't have to be confirmed by the Senate. Powell announced his resignation Jan. 21 and will leave the agency Friday after four years at the helm. Bush must separately nominate a commissioner to fill Powell's vacant slot.

Martin, who worked as an attorney for Bush during the 2000 election, "obviously has a great deal of loyalty to President Bush," said Harold Furchtgott-Roth, a former FCC commissioner who hired Martin as a legal adviser in 1997.

Besides breaking ranks with Powell on competition in the $128 billion local-phone market, Martin dissented from an FCC decision not to fine General Electric Co.'s NBC television network for singer Bono's use of an expletive during the 2003 Golden Globe Awards. Martin advocated stiffer penalties against media companies that broadcast indecent material.

Martin's appointment "is, sadly, a victory for the forces of so-called `decency,'" such as some religious and conservative groups, said Jeff Chester of the Center for Digital Democracy, a consumer advocacy group. "There could be a serious chilling effect on radio and TV."

Martin also cast the sole dissenting vote last month when the other commissioners rejected broadcasters' efforts to require cable television companies to carry all their signals when the U.S. TV system converts to digital technology.

On Martin's watch, the FCC may need to sign off on more than $60 billion in mergers, including planned sales of the two largest U.S. long-distance operators: AT&T Corp. and MCI Inc. to regional Bell carriers SBC Communications Inc. and Verizon Communications Inc., respectively.

"The Bells have to tread a little bit more carefully with him in the office than with Powell," said analyst Tim Gilbert of Principal Global Investors in Des Moines.

"Is he going to have more of a leery eye toward consolidation in general? Yeah, he will."

The FCC also may decide whether to revamp media-merger rules struck down by a federal appeals court last year. Martin sided with the majority in 2003 when the FCC voted to let companies buy more local TV stations and newspapers. The plan drew public criticism and was opposed by Congress before being blocked in court.

"FCC Rules Bono Remark Is Indecent"

Los Angeles Times
March 19, 2004
Jube Shiver Jr.

The Federal Communications Commission on Thursday intensified its crackdown on broadcast indecency by ruling that rock star Bono's use of a sexual expletive during the 2003 Golden Globe Awards was "indecent and profane."

The decision reversed a determination by the FCC's staff and marked a significant shift in the commission's attitude toward even fleeting instances of on-air obscenity. Before Thursday, isolated, nonsexual use of the expletive was not necessarily considered indecent.

Neither Bono nor any of the NBC stations and affiliates that aired the program will face fines.

"Given that today's decision clearly departs from past precedent in important ways, I could not support a fine retroactively" against NBC, FCC Chairman Michael K. Powell said.

Going forward, Powell said, the FCC would treat virtually all use of the word as indecent.

"This sends a signal to the industry that the gratuitous use of such vulgar language on broadcast television will not be tolerated," Powell said.

NBC applauded Thursday's action. "As we have previously said, Bono's utterance was unacceptable and we regret it happened," the network said. "Today's decision confirms that the rules in place at that time did not subject broadcasters to strict liability for fleeting utterances in live broadcasts."

Using the previous rules, FCC staff ruled in October that Bono had not violated broadcast standards. That determination generated more than 230,000 letters and e-mails of protest. The outrage grew in the wake of singer Janet Jackson's baring of her right breast during the Super Bowl half-time show.

At least one group said the FCC didn't go far enough.

"Today's decision . . . does nothing to hold NBC accountable for this obvious breach of common sense decency standards," said Brent Bozell, president of the Parents Television Council in Hollywood. "The decision also does little to restore the notion that a broadcast license represents a public trust, not a corporate entitlement. Once again the FCC has made a mockery of its avowed duty to serve the public interest."

Also Thursday, the commission proposed $89,000 in fines against three other broadcasters—including a radio station accused of carrying an indecent show by shock jock Howard Stern.

The FCC proposed fining a Michigan radio station owned by Infinity Broadcasting Corp. $27,500 for its airing of the Howard Stern show and slapping an Infinity station in Holmes Beach, Fla., with a $7,000 forfeiture for broadcasting a live rap/hip-hop concert that included references to oral sex.

The FCC also fined Clear Channel Communications Inc. $55,000 for a broadcast in Florida in which the radio host conducted an interview with a couple allegedly having sex.

Infinity executives could not be reached for comment.

Andy Levin, Clear Channel's executive vice president for law and government affairs in Washington, said his company had imposed new employee training programs and broadcasts on a time delay.

Levin called the Florida radio interview "an unfortunate incident that occurred two years ago" and vowed, "We're more determined than ever to make sure we don't get violations in the future. Our new zero tolerance policy is working."

Those incidents and others have triggered a drive in Congress to harshen the penalties on radio and TV broadcasters for violations of indecency rules and even caused chagrined network TV executives to propose a range of voluntary reforms to prevent such incidents in the future.

Last month, for instance, Fox Entertainment President Gail Berman told a congressional panel that his network had added staff and new technology to improve its ability to monitor and censor content on live TV programs.

Lawmakers want to go further with legislation that would raise the maximum fine for broadcast indecency from $27,500 to $500,000 per incident.

"Nasty Language on Live TV Renews Old Debate"

Washington Post
December 13, 2003
Frank Ahrens

Nicole Richie of the Fox reality show "The Simple Life," prepared to announce a category of nominees on the Billboard Music Awards on Wednesday night. Standing alongside was her co-star, hotel heiress Paris Hilton, who warned: "Now Nicole, remember, this a live show, watch the bad language."

Richie paid no attention, using a vulgar substitute for the exclamation "shoot." The broadcast, which employed a five-second delay to catch obscenities, bleeped out the offending word. But Richie was one step ahead. Before Fox could hit the "dump" button again, she described her time on "The Simple Life," in which she and Hilton live with an Arkansas farm family. She repeated the word and then added one for good measure. "Have you ever tried to get cow [expletive] out of a Prada purse?" Richie said. "It's not so [expletive] simple."

Richie's bad words come two months after a little-noticed—and, many say, nonsensical—ruling by the Federal Communications Commission that appeared to sanction what government officials called "the F-word," as long as it is used as an adjective. Critics say the decision further unleashed the potty mouths they believe are taking over radio and television.

Members of both parties in Congress are demanding that the FCC crack down harder on broadcasters, while some FCC members want to toughen the penalties the agency imposes. At the same time, lawmakers are grappling with the fact that the government's limited enforcement powers over the public airwaves do not apply to cable channels, which are grabbing more and more viewers.

Parent groups and socially conservative organizations that monitor broadcasts agree that television and radio content is getting racier and raunchier. Members of the Parents Television Council, a group that monitors television broadcasts and whose celebrity advisers include Pat Boone and Jane Seymour, have filed more than 85,000 complaints about broadcast indecency and obscenity at the FCC this year.

Fox apologized for Richie's words. "With the immediacy of live television comes the possibility of action or dialogue that may be offensive to some viewers," the network said in a prepared statement. "We experienced a failure in the system designed to prevent such an occurrence and are working to ensure it does not happen again."

Richie was reading from a telepromter, but sources said the words in question were not in the script. The show's producers probably urged her to be "edgy," said one source, expecting that any obscenities would be caught by the delay.

Richie's language was heard on WTTG-5, the Fox network's station in Washington, and by millions of people on the East Coast and in the Midwest, during what are known as the prime-time television family hours of 8 to 10 p.m. Fox West Coast producers managed to catch the obscenities.

The FCC, charged with enforcing indecency

and obscenity standards on the public airwaves, issued a ruling in October regarding the utterance of the "F-word" during a Fox broadcast in January.

During the live Golden Globe Awards broadcast in January, Bono—frontman for the Irish rock group U2—received an award and exulted, "This is really, really [expletive] brilliant!"

The FCC's enforcement bureau ruled that Bono's utterance was neither indecent nor obscene because it did not describe a sexual function.

Sens. Ernest F. Hollings (D-S.C.) and 11 Republicans, including Pete V. Domenici (R-N.M.), introduced a resolution last week blasting the FCC's ruling on Bono.

The resolution does not demand further FCC regulations against indecency but would direct the agency to consider revoking the broadcast licenses of television stations that repeatedly air indecent material. It also says the FCC should fine programs for each indecency during a show, not levy one fine for the entire show. In other words, if the FCC were to fine Fox for Richie's language, it should impose two fines, one for each curse word, a plan the FCC is likely to adopt.

Rep. Doug Ose (R-Calif.) wants more. He has proposed legislation to effectively overturn the FCC ruling, blasting the agency for relying on a "technicality."

"You want to split hairs? I'm going to shave your head," Ose said, referring to his legislative remedy.

Ose and Rep. Lamar S. Smith (R-Tex.) last week introduced a bill that lists eight words and phrases that could not be spoken on broadcast television without punishment.

In a letter to the Parents Television Council after the enforcement bureau's ruling, FCC Chairman Michael K. Powell wrote: "Personally, I find the use of the 'F-word' on programming accessible to children reprehensible." The five FCC commissioners are reviewing the ruling by David H. Solomon, chief of the enforcement bureau.

The FCC "is doing an indecent job of enforcing indecency," Commissioner Michael J. Copps said in an interview. "If we send one or two of the most egregious cases to license renewal hearings, we'll see it improved quite a bit," meaning that if broadcasters are threatened with losing their licenses, the airwaves would be cleaned up quickly.

First Amendment advocates say the FCC's indecency standards are not only unconstitutional but are too vague to enforce. Much depends on context. For instance, National Public Radio's broadcast of the John Gotti organized crime wiretaps, peppered throughout with the "F-word," were never ruled indecent. But the FCC seems unsure of how to apply its own standards, said one First Amendment lawyer who has asked the FCC for an overhaul, saying the agency risked having a court reject the rules.

The problem is the indecency standard is not a standard. It's basically a test for what people find distasteful and that is entirely in the eyes and ears of the beholder," said Robert Corn-Revere, a lawyer with Davis Wright Tremaine LLP in Washington. "Now we have a growing number of instances where the [FCC] has had to correct itself or

has others looking over its shoulder."

Radio is also under increasing scrutiny. This week, the FCC fined Detroit radio station WKRK-FM $27,500 for airing a listener discussion of sexual practices and techniques.

Copps, who dissented from the majority on the WKRK action, said the fine was insufficient and that the FCC should have started a hearing to revoke the station's license. Commissioner Kevin J. Martin said the station should have been fined $27,500 for each of the nine determined instances of indecency on the WKRK broadcast.

The FCC's decision on Bono's language was quickly spoofed by "South Park," the sometimes-vulgar series starring cartoon children on Comedy Central, a cable channel owned by media giant Viacom Inc., parent of CBS.

In the episode, a teacher is shown saying that students can use a common swear word "only in the figurative noun form or the adjective form." The students, like many lawmakers, are puzzled.

Martin played the "South Park" clip to an audience at the annual meeting of the Institute on Telecommunications Policy & Regulation last week in Washington, apologizing for its content. "There is something wrong when our agency draws technical lines that even the people 'on the edge' find laughable," Martin told attendees.

"Warning Is Upheld on 'Filthy Words'"

The Washington Post
July 4, 1978
Morton Mintz

The Supreme Court ruled 5 to 4 yesterday that the constitutional guarantee of freedom of the press did not prevent the Federal Communications Commission from warning a broadcaster of possible penalties for having broadcast seven words that crudely depict sexual and excretory organs and activities.

Seeking "to emphasize the narrowness of our holding." Justice John Paul Stevens wrote in the decision that "rested entirely on a nuisance rationale in which context is all-important." I also took into account "a host of variables," including the time of day when the words were broadcast and the composition of the audience, he said.

Stevens went back to 1926 to recall that Justice George Sutherland had written that a "nuisance may be merely a right thing in the wrong place—like a pig in the parlor instead of the barnyard. We simply hold that when the commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."

That light note, struck on the final day of the court's term, wasn't echoed by the National Association of Broadcasters.

The decision is "a harsh blow to the freedom of expression of every person in this country," said NAB President Vincent T. Wasiliewski. He stressed that his organization "in no way approves of indecent language on the air as such," but fear that the FCC "will not stop with the seven dirty words."

At the commission, however, Chairman Charles D. Ferris told a reporter that he, and, he believes, his fellow commissioners have "a very strong reluctance" to involve the FCC in program content or to "get into any form of censorship."

Ferris also emphasized the narrowness of the holding saying, for example, that he saw no clear signal that ABC-TV could not do again what it did last Wednesday night; carry a much-praised documentary on juvenile crime that included strong street language hitherto not heard on television.

The case began before an audience in a California theater, where satiric humorist George Carlin recorded a 12-minute monologue entitled "Filthy Words." He began by referring to his thoughts about "the words you couldn't say on the public, ah, airwaves, um, the ones you definitely wouldn't say, ever."

Carlin went on to list the words, which consist of three to 12 letters each, and to repeat them again and again in what Stevens termed "a variety of colloquialisms." The transcript, which indicates frequent laughter from the audience, is appended to the court's opinion.

At about 2 p.m. on Oct. 30, 1973, New York City radio station WBAI, owned by the listener-financed Pacifica Foundation, played excerpts of "Filthy Words" as part of series on social attitudes toward language—after suggesting that some of the audience might care to switch to another station for

about 15 minutes because it was going to air regards [sic] "offensive."

A man and his young son heard the broadcast on a car radio. The father, identified by ABC News yesterday as John Douglas, complained to the FCC. The agency investigated and, in February 1975, told Pacifica that it "could have been the subject of administrative sanctions," and that its order in the case would go into the file.