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The FCC v. Indecency: George Carlin Remembered

by

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Humorist George Carlin died in June of this year, a few days after the announcement that he had been awarded the Mark Twain Prize for American Humor. The Twain Prize was richly deserved; Carlin's acerbic wit and irreverent observations on human nature made him an American original whose death was widely mourned.

Carlin's comedic sense was not to everyone's taste, though. One of his most famous monologues was a riff on "filthy words," or as he explained, "the words you couldn't say on the public, ah, airwaves." When a New York radio station put that proposition to the test by broadcasting a recording of the monologue, the FCC held that Carlin was right – at least in part. In 1975, in the *Pacifica Foundation* case, the FCC ruled that the words were "indecent" – in violation of a federal criminal statute that forbids the broadcast of "obscene, indecent or profane" language. The Commission did not ban the use of the words altogether; it forbade them from being broadcast during a period when children were likely to hear them (a period that was later fixed as the hours

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between 6 a.m. and 10 p.m.). In Pacifica Foundation v. FCC, the Supreme Court in 1978 affirmed that decision, holding that a limited "time zoning" of offensive language, in the context of the broadcast media, did not offend the First Amendment.

Although the *Pacifica* decision was vigorously denounced by many free speech advocates, it did not have the chilling effect on radio and television speech that some predicted because the Commission treated the new indecency rule as a rule of very limited application. Indeed, for more than a score of years following *Pacifica*, the Commission's enforcement was restrained, in deference to the threat to First Amendment values that would be entailed by a vigorous attempt to scrub all "offensive" language (or images) from radio and television. That policy of restraint would ultimately be abandoned. In 2004, the FCC embarked on an aggressive campaign against indecent words and images that has continued, even escalated, in the ensuing years. In pursuit of a policy of protecting children, the Commission embarked on an enforcement program that has all the earmarks of a Victorian crusade. To effectuate its new clean-up-the-airwaves policy, the Commission has expanded radically the definition of indecency beyond its original conception, magnified (with Congress's help) the penalty for even minor, ephemeral images or objectionable language; and targeted respected television programs, movies, and even non-commercial documentaries. Along the way it has also created a jurisprudence of subjective, arbitrary and inconsistent decisions.

The Commission's aggressive new campaign prompted legal challenges from the broadcasters, most notably the major networks. In 2006, they filed appeals from a series of rulings by the FCC -- collectively decided in a so-called "Omnibus Order." In 2007, the Second Circuit Court of Appeals, in *Fox Television Stations, Inc. v. FCC,* reversed the FCC's order on the ground that the agency had violated standards of rational decision-making in failing to justify its departure from its prior enforcement policy in regard to so-called "fleeting expletives." The court went on to state, albeit in *dicta*, that it doubted the FCC could justify its new policy consistent with the First Amendment. The Supreme Court granted certiorari in March of this year.

As an FCC Commissioner at the time, I concurred in the FCC's original *Pacifica* decision. Despite uneasiness about the potential threat to free speech, I believed that the scope of the Commission's new indecency zoning controls could be and would be constrained by a prudent common sense. Unfortunately, the past few years have convinced me that I was wrong in this belief. I had not, it seems, taken account of the fragility of prudence or common sense when confronted by moralistic fervor and political agitation.

In 2006, I was the principal author of two amicus briefs in appeals from FCC indecency actions. One brief was to the Third Circuit in the case involving the Janet Jackson "costume reveal" episode during the Super Bowl XXXVIII halftime. The other was a brief in the Second Circuit in the *Fox* case now before the Supreme Court. Former FCC General Counsel Henry Geller joined me in both. When the Supreme Court granted certiorari in the *Fox* case, we filed an amicus brief to the Supreme Court urging it to affirm the Second Circuit decision. This time Henry Geller and I were joined by former FCC chairmen Mark Fowler, Newton Minow and James Quello, along with former FCC policy advisors Jerald Fritz and Kenneth Robinson.

Our Supreme Court brief urges the Court to recognize that the fleeting expletive

policy is beyond the pale of the very special and limited indecency doctrine the Court approved in *Pacifica*. However, significantly, it also goes on to argue that the Court should overturn *Pacifica* itself. Our reasons for revisiting *Pacifica* are three-fold:

First, merely eliminating the fleeting expletives policy – although a step in the direction of returning to the original *Pacifica* decision -- would leave untouched the larger problem of ascertaining offensiveness. Even apart from the fleeting expletive policy, the Commission's new indecency jurisprudence has been shown to be vague, subjective and arbitrary to the point of incoherence.

Second, there is no credible basis for continuing to single out terrestrial broadcasters from other communications media to which indecency controls do not apply. The same words or images that the FCC deems offensive on broadcast television when heard or viewed between 6 a.m. and 10 p.m. can be heard or seen on cable, satellite and the Internet at all times of the day. (Indeed, some of it is conveniently archived on the Internet: those who missed Bono's spontaneous exclamation, "Fucking brilliant," on receiving a Golden Globe Award can find it conveniently available on YouTube.) The FCC has declined to apply indecency regulations to subscription media such as cable or satellite broadcasting, and the Supreme Court has held that indecency-type regulations cannot constitutionally be applied to telephone, cable or Internet media. These exemptions make a mockery of the entire indecency regime. Although the Court has repeatedly said that each media must be considered according to its own special characteristics, there are no relevant characteristics that can now support this kind of discrimination against broadcast speech. The Court must update its jurisprudence to develop a coherent First Amendment principle for all media platforms.

Third, the indecency controls that began as a limited tool for reining in a small number of provocative broadcast personalities and irresponsible licensees have become a rallying cry for a revival of Nineteenth Century Comstockery. As long as these controls are tolerated, they will encourage new political pressures for increased content regulation. One cannot reasonably expect those pressures to disappear whatever the Court's ruling. But a clear decision of unconstitutionality would at least remove the agency's discretion to respond to them.

I offer no predictions about the outcome in *Fox.* In its brief to the Court the government seeks to divert the Court away from ruling on the constitutional issue and have it decide the issue on a question of administrative law -- whether the FCC adequately justified its change in policy. Our amicus brief argues that refusing to address the constitutional issue would only prolong the uncertainty and increase the chilling effect arising from the vague and incoherent standards the FCC has now adopted. The lower court addressed the First Amendment issue at length, and the question has been presented with sufficient clarity that no purpose would be served by putting the constitutional question off to another day.

Of course, such an argument entails a risk that the Court might take the occasion not only to reaffirm *Pacifica* but also to approve the Commission's new and more aggressive version of indecency regulation. If that happens, it will not be only the broadcasters and program producers who will lose, but the listening and viewing public as well.