



UNC
SCHOOL OF LAW

FIRST AMENDMENT LAW REVIEW

Volume 3 | Issue 2

Article 2

3-1-2005

From Carlin's Seven Dirty Words to Bono's One Dirty Word: A Look at the FCC's Ever-Expanding Indecency Enforcement Role

Faith Sparr

Follow this and additional works at: <http://scholarship.law.unc.edu/falr>



Part of the [First Amendment Commons](#)

Recommended Citation

Faith Sparr, *From Carlin's Seven Dirty Words to Bono's One Dirty Word: A Look at the FCC's Ever-Expanding Indecency Enforcement Role*, 3 FIRST AMEND. L. REV. 207 (2005).

Available at: <http://scholarship.law.unc.edu/falr/vol3/iss2/2>

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in First Amendment Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

FROM CARLIN'S SEVEN DIRTY WORDS TO BONO'S ONE DIRTY WORD: A LOOK AT THE FCC'S EVER-EXPANDING INDECENCY ENFORCEMENT ROLE

FAITH SPARR*

“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”¹

INTRODUCTION

*FCC v. Pacifica Foundation*² is probably best known as the case concerning George Carlin's satiric monologue, “Filthy Words,” otherwise known as the “Seven Dirty Words” bit. Of course, the more lasting effect of the decision is the legal principle that indecent speech, while falling within the ambit of First Amendment protection, can be regulated by the Federal Communications Commission (“FCC” or “Commission”). However, the limited nature of the holding has sometimes been overlooked, especially the caveats and qualifications sprinkled throughout both the majority and concurring opinions.³ The Supreme Court's belief that its decision would not unduly chill broadcasters' speech depended largely on the narrowness of the holding and the Commission's assurance of self-restraint in its enforcement.⁴ Thus, it is critically important to examine the

* Assistant Professor, Hawaii Pacific University. The author would like to thank Nilesh Patel and Colin Theis for their insightful review and assistance with this article, as well as Shelley Koon for her invaluable editorial assistance.

1. *Cohen v. California*, 403 U.S. 15, 26 (1971).
2. 438 U.S. 726 (1978).
3. *See, e.g., id.* at 750 (“It is appropriate, in conclusion, to emphasize the narrowness of our holding.”).
4. *Id.* at 761-62 n.4 (Powell, J., concurring).

decision and subsequent FCC action under this lens. The limited nature of the holding is particularly relevant today, given the Commission's most recent and public push to vigorously punish broadcasters for airing what it views as indecent material.

Part I of this article provides some background to the *Pacifica* case and examines the various Supreme Court opinions, particularly focusing on the narrowness of each opinion. This section also examines the FCC's initial reaction to the decision, including its indecency enforcement actions in the subsequent years. Part II considers the atmosphere during the late 1980s that prompted the FCC's re-examination of its indecency enforcement policy, resulting in a set of orders issued by the FCC in April 1987.⁵ Through these orders, the Commission changed course and instituted a more sweeping enforcement agenda, giving itself more power in the process. Part II also analyzes the string of cases, popularly known as the *ACT* cases,⁶ decided by the United States Court of Appeals for the District of Columbia ("D.C. Circuit"), which addressed the FCC's expanded enforcement policy. Finally, Part III of this article looks at the Commission's enforcement tendencies from the April 1987 orders to the present, including an examination of the FCC's 2001 Policy Statement⁷ that attempted to provide broadcasters with guidance on the indecency issue. Part III culminates with the recent whirlwind of activity, from the *Golden Globe Awards* decision⁸ issued in March 2004 to the recent passage of "broadcast decency" bills in Congress.⁹ Throughout, this article considers whether the Commission has shown the restraint the Supreme Court relied upon in *Pacifica* and, ultimately, concludes it

5. Infinity Broad. Corp., 2 F.C.C.R. 2705 (1987); Regents of the Univ. of Cal., 2 F.C.C.R. 2703 (1987); *Pacifica Found.*, 2 F.C.C.R. 2698 (1987).

6. *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995); *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991); *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

7. Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (2001).

8. *Complaints Against Various Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975 (2004).

9. H.R. 3717, 108th Cong. (2004); H.R. Res. 482, 108th Cong. (2003); S. Res. 283, 108th Cong. (2003).

has not. By failing to do so, the Commission continues to broaden the limited nature of the original holding and, in the process, erode the First Amendment rights of broadcasters.

I. THE STAGE IS SET – THE *PACIFICA* DECISION

A. *Background*

A single FCC complaint gave birth to the *Pacifica* case.¹⁰ The complaint was filed against a Pacifica-owned New York radio station for broadcasting comedian George Carlin's twelve-minute monologue entitled "Filthy Words."¹¹ The monologue, recorded before a live audience in a California theater,¹² consisted of Carlin's use of the following seven words that he believed could not be said on the public airwaves: "shit, piss, fuck, cunt, cocksucker, motherfucker and tits."¹³ The overall tone of the monologue was satirical, poking fun at the words themselves and questioning why certain words are so offensive.¹⁴ Pacifica described the monologue as Carlin's attempt to explore society's attitudes towards these seven words.¹⁵

The Carlin material aired on October 30, 1973, at approximately two o'clock p.m.¹⁶ According to the station, the broadcast was preceded by a warning that the program contained "sensitive language [that] might be regarded as offensive to some."¹⁷ John R. Douglas, a member of Morality in Media, filed a complaint with the FCC. In the complaint, Douglas claimed he heard the broadcast while with his young son who was fifteen years old.¹⁸ There is some speculation that Mr. Douglas was not in the

10. *FCC v. Pacifica Found.*, 438 U.S. 726, 730 (1978).

11. *Id.* at 729-30.

12. *Id.* at 729.

13. *Id.* at 751 (transcript of Carlin's "Filthy Words").

14. *Id.* at 730.

15. *Id.*

16. *Id.* at 729-30.

17. *Id.* at 730.

18. Jeff Demas, *Seven Dirty Words: Did They Help Define Indecency?*, COMM. & L., Sept. 1998, at 43.

broadcast audience that day because he resided in Ft. Lauderdale and because the complaint was filed six weeks after the material aired.¹⁹

On February 21, 1975, the Commission issued a declaratory order granting Mr. Douglas's complaint but did not impose formal sanctions on *Pacifica*.²⁰ The order held that the FCC had the power to regulate "indecent" broadcasting based on two statutes.²¹ The first statute, 18 U.S.C. § 1464, prohibits the utterance of "obscene, indecent, or profane language by means of radio communication,"²² and the second statute, 47 U.S.C. § 303(g), requires the Commission to "encourage the larger and more effective use of radio in the public interest."²³

The Commission's finding asserted that repeating words depicting sexual and excretory activities in a patently offensive manner at a time when children are undoubtedly in the audience amounted to indecency under § 1464.²⁴ While not advocating an outright ban on indecent material, the Commission proposed treating indecent broadcasts as a "nuisance"²⁵ that could be channeled and aired only during certain hours.²⁶

While the Commission ruled against *Pacifica*, not every commissioner was optimistic that a court would uphold the FCC finding of indecency. According to telephone interviews conducted by Jeff Demas with Joseph Marino, the Commission's chief legal counsel during the *Pacifica* case, the FCC believed Congress was forcing them to pursue the complaint because Congress had been concerned with sexually explicit radio shows for some time.²⁷ The commissioners were aware that the case represented an aspect of

19. Robert Corn-Revere, *New Age Comstockery: Exon Vs. The Internet*, POL'Y ANALYSIS No. 232 (Cato Inst., Wash., D.C.), June 28, 1995, at 9 (citing LUCAS A. POWE, JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 186 (1987)).

20. *Pacifica*, 438 U.S. at 730.

21. *Id.* at 731.

22. 18 U.S.C. § 1464 (1970).

23. 47 U.S.C. § 303(g) (1970).

24. *Pacifica*, 438 U.S. at 731-32.

25. *Id.* at 731.

26. *Id.* at 733.

27. Demas, *supra* note 18, at 43.

FCC regulation that had not yet been directly addressed by the courts: FCC regulation of indecency as opposed to obscenity.²⁸ The Commission did not expect a favorable ruling from the Supreme Court on the matter,²⁹ which may explain why it decided not to issue a fine.

Pacifica could have been content to take the Commission's wrist slap, but the station was historically concerned with free speech issues³⁰ and therefore appealed the Commission's order. On appeal, the D.C. Circuit reversed the FCC's order in a two to one decision,³¹ with the majority judges split on the reasoning behind the reversal. One found that the FCC order was an attempt at rulemaking on the indecency issue and considered the rule to be overbroad.³² The other concluded that 18 U.S.C. § 1464 should be narrowly construed to cover obscene language or language not protected by the First Amendment.³³ The dissenting judge held that the only issue at hand was whether the Commission could regulate the language as broadcast, and, given such narrow focus, the Commission had correctly decided that the daytime broadcast was indecent.³⁴

B. Enter Stage Left - The Supreme Court Decision

After a denial by the D.C. Circuit for a rehearing *en banc*,³⁵ the Commission pursued the case to the Supreme Court, which granted the Commission's petition for certiorari.³⁶ While the Court produced a fractured five to four decision in favor of the Commission, even the majority opinion remained cautious in its approach to indecency regulation. This decision has become the main legal rationale for allowing the FCC to regulate indecency.

28. *Id.* at 42.

29. *Id.*

30. *Id.* at 44.

31. *Pacifica Found. v. FCC*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

32. *Id.* at 18 (Tamm, J.).

33. *Id.* at 24-30 (Bazelon, C.J., concurring).

34. *Id.* at 31, 36 (Leventhal, J., dissenting).

35. Demas, *supra* note 18, at 45.

36. *FCC v. Pacifica Found.*, 434 U.S. 1008 (1978).

Accordingly, it is important to note the narrow and limited scope of the opinion.

1. Majority Opinion

Justice Stevens delivered the majority opinion, in which Chief Justice Burger and Justice Rehnquist joined in full and Justices Blackmun and Powell joined in part.³⁷ The majority opinion first addressed whether the FCC order was an effort at formal rulemaking or merely a decision based on the facts. According to the majority, the question of future FCC actions under different circumstances was not addressed by the FCC order, which was carefully confined to the monologue as broadcast.³⁸ Therefore, the Court treated the issue not as an attempt at rulemaking by the Commission but instead as a decision limited to the Carlin material as broadcast in the afternoon.³⁹

This brief portion of the *Pacifica* opinion is significant. From the very outset, the Supreme Court limited the holding to the facts of the case—in particular, a broadcast aired in the afternoon of a pre-recorded monologue that repeatedly used offensive words. In fact, Carlin used the “seven dirty words” a total of 108 times during his twelve-minute monologue. None of the majority justices addressed the implications of extending the FCC’s definition of indecency beyond the Carlin monologue.

The majority also considered *Pacifica*’s argument that the Commission’s definition of indecency under 18 U.S.C. § 1464 was flawed. While the statute does not define indecency, *Pacifica* argued that the material must contain some “prurient interest,”⁴⁰ a

37. *Pacifica*, 438 U.S. 726 (1978). Justice Stevens wrote the opinion for parts I, II, III and IV-C, with Chief Justice Burger and Justice Rehnquist joining in all parts. *Id.* at 729-51. Justices Blackmun and Powell joined in parts I, II, III, and IV-C. *Id.* at 755. Justice Powell wrote a concurring opinion, with which Justice Blackmun joined, voicing their disagreement with Justice Stevens’s rationale in parts IV-A and IV-B of the opinion. *Id.* at 755-62.

38. *Id.* at 734.

39. *Id.*

40. See generally *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (defining prurient for purposes of obscenity as “that which appeals to a

requirement for a finding of obscenity, in order to be considered indecent.⁴¹ Pacifica based its argument on the Supreme Court's decision in *Hamling v. United States*,⁴² which interpreted the meaning of the word "indecent" in a statute forbidding the mailing of "obscene, lewd, lascivious, indecent, filthy or vile"⁴³ material. The Court in *Hamling* held that the statutory words had "different shades of meaning,"⁴⁴ but, when taken as a whole, the statute was clearly limited to prohibiting only material that could be considered obscene.⁴⁵ Pacifica argued that the same reasoning applied to the prohibition against obscene, indecent, and profane broadcasts in 18 U.S.C. § 1464.⁴⁶

The majority rejected Pacifica's argument on two grounds. First, it noted that while prurient interest is a requirement for a finding of obscenity, "the normal definition of 'indecent' merely refers to nonconformance with accepted standards of morality."⁴⁷ Second, the Court distinguished the *Hamling* case from the Pacifica situation, reasoning that the history of the statute in *Hamling* was primarily concerned with the prurient, while the Commission had long interpreted § 1464 to cover more than the obscene.⁴⁸ Thus, the

shameful or morbid interest in sex").

41. *Miller v. California*, 413 U.S. 15, 24 (1973). *Miller* set forth the following guidelines for finding material to be obscene:

- (a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

Id. at 24. See also *Brockett*, 472 U.S. at 504 (defining prurient for purposes of obscenity as "that which appeals to a shameful or morbid interest in sex").

42. 418 U.S. 87 (1974).

43. *Id.* at 112 (quoting 18 U.S.C. § 1461 (1970)).

44. *Id.*

45. *Id.* at 112-14.

46. *FCC v. Pacifica Found.*, 438 U.S. 726, 739-40 (1978).

47. *Id.* at 740. This definition is from Webster's dictionary. *Id.* at 737 n.14.

48. *Id.* at 741.

majority held that “there is no basis for disagreeing with the Commission’s conclusion that indecent language was used in this broadcast.”⁴⁹

Pacifica also argued that the Commission’s order restricted speech protected by the First Amendment because the Commission’s definition of indecency was overbroad.⁵⁰ The majority rejected this argument in part IV-A of its opinion, holding that its review in the case was limited to the particular broadcast in question, not a general rule regarding indecency.⁵¹ Since the FCC order was “issued in a specific factual context,”⁵² the Court declined to invalidate the order on the basis that it might result in some broadcasters’ self-censorship of material protected by the First Amendment.⁵³ Within this discussion, the majority argued that, while the Commission’s definition might lead broadcasters to censor themselves, it would affect only a small area of speech which they believed lay only at the periphery of First Amendment concern.⁵⁴ The majority’s consideration of the speech’s value prompted Justices Powell and Blackmun’s concurring opinion, wherein they disagreed with the Court’s attempt to determine First Amendment protection by placing a value system on the speech involved.⁵⁵

With respect to Pacifica’s argument that the government could not prohibit the broadcast because it was not obscene, the majority, in part IV-B of its opinion, queried “[w]hether the First Amendment denies government any power to restrict the public broadcast of indecent language under any circumstances.”⁵⁶ The majority acknowledged that Carlin’s monologue was entitled to First Amendment protection and that the Commission’s objection to the monologue was based in part on its content.⁵⁷ However, the majority noted that First Amendment protections are not absolute,

49. *Id.*

50. *Id.* at 742.

51. *Id.* at 742-43.

52. *Id.* at 742 (quoting *Pacifica Found.*, 59 F.C.C.2d 892, 893 (1976)).

53. *Id.* at 743.

54. *Id.*

55. *Id.* at 761 (Powell, J., concurring).

56. *Id.* at 744.

57. *Id.*

listing the established exceptions to protected speech ranging from fighting words to obscenity.⁵⁸

Although indecent material generally did not fit within any of the unprotected categories enumerated by the Court, the majority argued that “constitutional protection accorded to a communication containing such patently offensive sexual and excretory language need not be the same in every context.”⁵⁹ Returning to its concern about the value of the speech involved, the Court reasoned that certain utterances are not an essential part of the exposition of ideas and are of such slight social value that their benefit is outweighed by social interest in order.⁶⁰ In particular, the Court believed that the Commission had sanctioned the Carlin monologue for the words chosen rather than its content, and the Court reasoned that those words offend for the same reason that obscenity offends.⁶¹ Implicit in the Court’s discussion was the theory that the speech here was of little value and that this should factor in its decision. Again, the concurring justices disagreed with this portion of the majority opinion.

In the last portion of the majority opinion, part IV-C, the Court set out more specifically its rationale for allowing the Commission’s action in this case. The majority maintained that the broadcasting medium had received limited First Amendment protection in the past and provided two relevant reasons for such limitations in *Pacifica*. First, the majority cited the “uniquely pervasive presence” broadcasting has in the lives of Americans.⁶² Second, it reasoned that broadcasting is “uniquely accessible to children.”⁶³

58. *Id.* at 744-45. The Supreme Court has established several categories of unprotected speech, or speech that is deserving of less protection. *See, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (commercial speech); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamation); *Miller v. California*, 413 U.S. 15 (1973) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words).

59. *Pacifica*, 438 U.S. at 747.

60. *See id.* at 746 (citing *Chaplinsky*, 315 U.S. at 572).

61. *Id.*

62. *See id.* at 746 (quoting *Chaplinsky*, 315 U.S. at 572).

63. *Id.* at 749.

Having pieced together its reasoning for allowing the Commission to regulate speech otherwise protected by the First Amendment, the majority specifically “emphasiz[ed] the narrowness of [its] holding” in its conclusion,⁶⁴ stating “[w]e have not decided that an occasional expletive in [certain other] setting[s] would justify any sanction or, indeed, that this broadcast would justify a criminal prosecution. The Commission’s decision rested entirely on a nuisance rationale under which context is all-important.”⁶⁵

2. Concurring Opinion

As noted above, Justices Powell and Blackmun’s concurring opinion took issue with the majority regarding the relevance of the Carlin material’s value. The majority had reasoned that the Carlin material was of less value and therefore could be viewed as less deserving of First Amendment protection.⁶⁶ The concurring Justices argued the result of the case did not turn on whether Carlin’s monologue had value because that is a decision for each person to make.⁶⁷

Justices Powell and Blackmun agreed that most people would consider the language used to be “vulgar and offensive.”⁶⁸ Notably, however, they specifically limited the category of speech addressed by the Court in *Pacifica*, stating that the language “was chosen specifically for this [vulgar and offensive] quality, and it was repeated over and over as a sort of verbal shock treatment. The Commission did not err in characterizing this *narrow category* of language used here as ‘patently offensive’ to most people regardless of age.”⁶⁹

Furthermore, Justices Powell and Blackmun relied heavily on the Commission’s purported restraint in addressing the overbreadth issue, determining that there would be no undue

64. *Id.* at 750.

65. *Id.*

66. *See id.* at 746 (citing *Chaplinsky*, 315 U.S. at 572).

67. *Id.* at 761 (Powell, J., concurring).

68. *Id.* at 757.

69. *Id.* (emphasis added).

chilling effect on broadcasters' speech in the future. Citing the Commission's own brief to the Court, they declared, "since the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights."⁷⁰

As Justices Powell and Blackmun provided the deciding votes that tipped the Court to uphold the Commission's order, it is extremely important to recognize the limitations their concurring opinion placed on the holding. The Court produced only a plurality opinion in parts IV-A and IV-B, with Justices Powell and Blackmun joining only in part IV-C, that set forth the rationales of pervasiveness of the medium and accessibility to children as the basis for the ruling. In a plurality opinion, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds."⁷¹ Arguably, the concurring opinion's rationale for upholding the Commission's order in light of the overbreadth argument was narrower than the majority's opinion in part IV-A, relying on the Commission's restraint and the fact that the language was used over and over again.

This particular limitation has been eviscerated by the Commission's recent decision in the *Golden Globe Awards* order, discussed later in this article.⁷² In addition, the Commission's restraint since *Pacifica* in pursuing indecency complaints appears to sway back and forth based on the political and social climate of the time, along with the pressure it receives from various advocacy groups and Congress. Based on the limitations expressed in the concurring opinion, such actions by the Commission cannot be the restraint Justices Powell and Blackmun had in mind.

3. Dissenting Opinions

While the majority and concurring opinions certainly limited the *Pacifica* holding, there are also important arguments

70. *Id.* at 761 n.4 (citations omitted).

71. *Coe v. Bell*, 161 F.3d 320, 354 (6th Cir. 1998) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

72. See *infra* notes 206-68 and accompanying text.

worth noting in the two dissenting opinions. The dissent authored by Justice Stewart and joined by Justices Brennan, White, and Marshall claimed that the Court unnecessarily addressed a constitutional issue. According to Justice Stewart, while it was a plausible construction to include more than obscenity in interpreting the word “indecent” in 18 U.S.C. § 1464, it was not a compelled construction.⁷³ Stewart argued that Supreme Court practice is to avoid constitutional confrontation where there is serious doubt as to the statute’s constitutionality.⁷⁴ The Court in *Hamling* construed the word indecent to have the same meaning as obscene, and the statutory context of the *Hamling* statute was closely related to 18 U.S.C. § 1464. Thus, the word indecent should properly be read as meaning no more than obscene.⁷⁵ Because Carlin’s monologue was not obscene, the Commission did not have the authority to ban it.

Justices Brennan and Marshall’s dissent confronted the majority’s opinion on the constitutional issues raised. While agreeing with Justice Stewart that the Court should not have reached the constitutional issues, Justice Brennan explained,

[W]hile I would . . . normally refrain from expressing my views on any constitutional issues implicated in this case[,] I find the Court’s misapplication of fundamental First Amendment principles so patent, and its attempt to impose its notions of propriety on the whole of the American people so misguided, that I am unable to remain silent.⁷⁶

Justice Brennan argued that the Court committed two errors. First, it misconstrued the nature of privacy interests in an individual’s home when the individual has voluntarily chosen to keep a radio or television in the home.⁷⁷ Second, the Court did not consider the constitutionally protected interests of those wishing to transmit and receive broadcasts that the Court or the Commission

73. *Pacifica*, 438 U.S. at 778 (Stewart, J., dissenting).

74. *Id.* at 777-78 n.2.

75. *Id.* at 779-80.

76. *Id.* at 762 (Brennan, J., dissenting).

77. *Id.* at 764.

may find offensive.⁷⁸

On the first account, Justice Brennan noted that an individual's actions in turning on a radio and listening to public airwaves do not implicate fundamental privacy issues. By turning on the radio, Justice Brennan reasoned that the listener chooses to participate in a sort of public discourse carried over the public airwaves.⁷⁹ As Justice Brennan explained,

[W]hatever the minimal discomfort suffered by a listener who inadvertently tunes into a program he finds offensive during the brief interval before he can simply extend his arm and switch stations or flick the "off" button, it is surely worth the candle to preserve the broadcaster's right to send, and the right of those interested to receive, a message entitled to full First Amendment protection.⁸⁰

Secondly, Justice Brennan noted that in the past the Court had not prohibited the distribution or access to children of material otherwise protected by the First Amendment unless such material had some significant erotic appeal.⁸¹ He cited the Court's decision in *Erznoznik v. City of Jacksonville* wherein the Court held that "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks is unsuitable for them."⁸² Justice Brennan claimed that the majority's decision had the "lamentable" side-effect of making "completely unavailable to adults material which may not constitutionally be kept even from children."⁸³ Furthermore, he opined that the Court completely failed to take into account that some parents might actually wish to have their children hear Carlin's monologue and that, instead of facilitating a parent's decision-making rights in

78. *Id.*

79. *Id.* at 765-66.

80. *Id.* at 766.

81. *Id.* at 767.

82. *Id.* at 768 (quoting *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975)).

83. *Id.*

child-rearing, the Court had allowed the Commission to make such decisions for the parent.⁸⁴

Justice Brennan was particularly concerned with the two rationales used by the majority to support the FCC's regulation of indecency in the case: intrusiveness of the medium and children's access to the material.⁸⁵ In particular, he reasoned that, without any limits, the Commission could use the rationales as justification to regulate any material the Commission found offensive.⁸⁶ He acknowledged that the concurring opinion attempted to avoid such an "unpalatable degree of censorship"⁸⁷ by relying on the Commission's assurances of restraint. However, even with a holding limited to the facts of the case, Justice Brennan stated he would still let the public and marketplace decide what was indecent rather than rely on the Commission's tastes.⁸⁸

Noting the trust the Court placed on the Commission's assurances, Justice Brennan wove into his dissent a prescient discussion regarding the FCC's future restraint. In its brief to the Court, the FCC assured the Court that it only desired to reprimand broadcasters on facts similar to the *Pacifica* case: a twelve-minute broadcast that repeated words depicting sexual or excretory activities and organs in a patently offensive manner when children were in the audience.⁸⁹ Based on these assurances, Justice Brennan opined that the FCC should be estopped from using either the *Pacifica* decision or FCC orders in the case as a basis for sanctioning broadcasters unless the broadcast contained the type of verbal shock treatment claimed in the Carlin monologue and, even then, only if the material was broadcast at times other than the late evening.⁹⁰

Whether the limitations of the case are drawn from the majority, concurring, or dissenting opinions, two elements about the *Pacifica* case are clear. First, the decision was limited to the

84. *Id.* at 770.

85. *Id.*

86. *Id.* at 771.

87. *Id.*

88. *Id.* at 772.

89. *See id.* at 772 n.7.

90. *Id.*

specific facts at hand. The Supreme Court did not address a rule promulgated by the Commission for regulating future situations. It merely concluded that, given the repeated use of the kind of words in the Carlin monologue at a time of day when children are likely in the audience, the Commission could act under 18 U.S.C. § 1464. Secondly, because the Court acknowledged that indecent speech is protected under the First Amendment, it relied on the Commission's assurances that it would proceed cautiously in its enforcement duties, thus alleviating concern that enforcement of the statute would have an undue chilling effect on broadcasters' speech. The following discussion illustrates that the FCC's record of "restraint" in indecency enforcement since *Pacifica* has been questionable at best.

C. The FCC Holds Its Applause - Initial Restraint by the FCC

In the immediate aftermath of the *Pacifica* case, many broadcasters feared that the decision would have a detrimental effect on their programming. The FCC quickly tried to assuage these concerns, noting the limited nature of the holding and its own enforcement restraint. In a message to broadcasters, FCC Chairman Charles D. Ferris assured them that the FCC was "far more dedicated to the First Amendment premise that broadcasters should air controversial programming than [they were] worried about an occasional four-letter word."⁹¹ Ferris further tried to calm concerns about the reach of the holding by stating that "the particular set of circumstances in the *Pacifica* case is about as likely to occur again as Halley's Comet."⁹²

The Commission's own order that gave rise to the federal case further limited the *Pacifica* holding by stating that it would be "inequitable for [the FCC] to hold a licensee responsible for indecent language" broadcast during live coverage of a news-

91. Demas, *supra* note 18, at 49 (quoting *Which Way the Wind Blows at the FCC After WBAI*, BROADCASTING, July 24, 1978, at 31).

92. James C. Hsiung, *Indecent Broadcast: An Assessment of Pacifica's Impact*, 9 COMM. & L., Feb. 1987, at 42 (quoting *Which Way the Wind Blows at the FCC After WBAI*, BROADCASTING, July 24, 1978, at 31-32).

making event.⁹³ In addition, an FCC order issued shortly after *Pacifica* demonstrated the narrowness with which the Commission initially viewed the Court's holding. The order was issued in response to a Morality in Media petition to deny a noncommercial educational station its license renewal, claiming that the station had consistently broadcast offensive and vulgar material that was harmful to children.⁹⁴ The Commission granted the license renewal, holding it could not deny the license simply because the material was "offensive to some or even a substantial number of listeners."⁹⁵ According to the Commission, it had to take into account the station's overall programming, and Morality in Media had not provided any evidence that the broadcasts were harmful to children. The Commission stated that it intended "strictly to observe the narrowness of the *Pacifica* holding,"⁹⁶ reasoning that *Pacifica* was limited to language that was "repeated over and over as a sort of verbal shock treatment."⁹⁷

In another instance of early FCC restraint, the Commission denied in 1983 a complaint by the American Legal Foundation ("ALF"), which argued that a radio station's programming violated 18 U.S.C. § 1464 by airing indecent material.⁹⁸ The ALF claimed that the station aired words such as "motherfucker" and "shit" repetitively on its programs.⁹⁹ However, the Commission held that the ALF failed to make a case that the station violated the statute and noted that the complaint showed only isolated use of the alleged language over a three-year license term.¹⁰⁰ As such, the use of the words, although similar to those addressed in the *Pacifica* case, did not "amount to the repetitious 'verbal shock treatment'"¹⁰¹

93. *Pacifica Found.*, 59 F.C.C.2d 892, 893 n.1 (1976).

94. *WGBH Educ. Found.*, 69 F.C.C.2d 1250, 1250-51 (1978).

95. *Id.* at 1252 (quoting *Sonderling Broad. Corp.*, 41 F.C.C.2d 777, 784 (1973)).

96. *Id.* at 1254.

97. *Id.*

98. *Pacifica Found.*, 95 F.C.C.2d 750 (1983).

99. *Id.* at 760.

100. *Id.*

101. *Id.* (quoting *FCC v. Pacifica Found.*, 438 U.S. 726, 760-61 (1978) (Powell, J., concurring)).

found in Carlin's monologue.¹⁰² In particular, the Commission noted that the Supreme Court's ruling in *Pacifica* did not give the Commission the "general prerogative"¹⁰³ to intervene in any case where words similar to those in *Pacifica* were used.¹⁰⁴ The Commission again noted that the Supreme Court relied on the repetitive nature of the Carlin monologue in affirming the Commission's ruling in that case.¹⁰⁵

There is little question that, at least for a brief period of time after the *Pacifica* decision, the Commission adhered to the limited holding the Supreme Court rendered in the case. Of course, Justice Brennan was correct to note that the Court had laid its trust entirely with the FCC to ensure it did not go beyond the confines of the decision. The Court did not make much of an attempt to fashion a definition for use in the future but noted that the particular broadcast at issue could be sanctioned. However, the FCC's initial restraint did not last.

II. THE OTHER ACTORS TAKE THEIR PLACE – CONGRESS, ADVOCACY GROUPS, AND THE D.C. CIRCUIT ADDRESS INDECENCY

A. *Congress, Advocacy Groups and the FCC*

During the 1980s, Congress and the Commission began to see an increase in pressure from advocacy groups angered by what they perceived as the FCC's failure to enforce the indecency statute. These groups were concerned that, so long as the broadcasters did not invoke one of Carlin's seven dirty words, the Commission was allowing broadcasters to air offensive and vulgar material. Based at least in part on this pressure, as well as increased congressional concern, the FCC changed course on its

102. John Crigler & William J. Byrnes, *Decency Redux: The Curious History of the New FCC Broadcast Indecency Policy*, 38 CATH. U. L. REV. 329, 344 (1989).

103. *Id.*

104. *Id.*

105. *Id.*

enforcement policy, taking its first of several steps in expanding the *Pacifica* holding and the FCC's enforcement power.

Some of the initial pressure came from various advocacy groups. In June 1986, Morality in Media ("MIM") organized a picket of FCC offices after President Reagan reappointed Mark Fowler as chairman of the FCC.¹⁰⁶ Mr. Fowler's nomination was resented by various "decency in media" groups because, in their opinion, he had not done enough to curb indecency.¹⁰⁷ In addition to the picketing, the groups also undertook a letter-writing campaign to protest his nomination.¹⁰⁸

In an apparent attempt at damage control, Mr. Fowler met with Brad Curl, a member of the National Decency Forum, in July 1986.¹⁰⁹ Based on a letter summarizing their meeting, Mr. Curl advised Mr. Fowler that his group would discontinue picketing the FCC office.¹¹⁰ Further, Mr. Curl noted his understanding that the FCC General Counsel would cooperate with Mr. Curl's group on indecency investigations in the future.¹¹¹ Mr. Curl also acknowledged the FCC's belief that it had not received enough complaints in the past to act on the indecency issue, and, in response, Mr. Curl's group promised to submit more and better documented complaints.¹¹²

FCC's General Counsel at this time, Jack Smith, apparently followed through on the parties' understanding from the meeting. Around the time of the meeting, MIM began forwarding pointers received from Mr. Smith, who advised MIM members to make tapes or transcripts of the broadcasts they found offensive in order to facilitate action on the complaints.¹¹³ Mr. Smith also directed such advocacy groups away from broadcasts that were unlikely to result in a finding of indecency. In one letter to Donald Wildmon, Executive Director of the National Federation of Decency, Mr.

106. *Id.*

107. *Id.* (quoting WGBH Educ. Found., 69 F.C.C.2d 1250, 1254 (1978)).

108. *Id.*

109. *Id.* at 345.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

Smith warned against pursuing a complaint for the broadcast of the film *The Rose* on a Memphis television station. In this letter, Mr. Smith advised the following:

[A]s we discussed on the phone today I do not believe this presents the kind of air-tight case that you want to push at this time. We are inquiring into a couple of other cases which we think may be more clear violations. I think you should agree with our reasoning on this matter.¹¹⁴

Given this backdrop, it is not surprising that complaints filed by Mr. Wildmon against an Infinity-owned radio station in September and November of 1986¹¹⁵ led to one of the “air-tight” test cases that Mr. Smith referenced in his letter. The *Infinity* case, along with two others,¹¹⁶ would prove to be the FCC’s opportunity to expand its enforcement policy and its discretion in determining the meaning of indecency beyond the confines of the *Pacifica* facts. It is hard to imagine that this push to broaden the indecency net would not have taken place without these advocacy groups’ tenacious pursuit of the FCC.

B. FCC April 1987 Orders

The FCC issued three separate orders in April 1987 against a university-run station in California,¹¹⁷ an Infinity-owned station in Philadelphia,¹¹⁸ and a Pacifica-owned station in Los Angeles,¹¹⁹

114. *Id.* at 346 (quoting Letter from John B. Smith, General Counsel, FCC, to Donald E. Wildmon, Executive Director, National Federation of Decency (Sept. 19, 1986)).

115. *See Infinity Broad., Corp.*, 2 F.C.C.R. 2705, 2707 n.1 (1987).

116. *Regents of the Univ. of Cal.*, 2 F.C.C.R. 2703 (1987); *Pacifica Found.*, 2 F.C.C.R. 2698 (1987).

117. *Regents of Univ. of Cal.*, 2 F.C.C.R. 2703 (1987). The order focused on the airing of a song entitled “Makin’ Bacon” after ten o’clock p.m. As likely discerned from the title, the song concerned sex. The lyrics are set out in the Commission’s order.

118. *Infinity*, 2 F.C.C.R. 2705. The order here examined several excerpts from the Howard Stern show addressing various topics in a tongue in cheek manner from testicle size to lesbian sex. The Stern material aired in the

holding that the stations had broadcast indecent material. The Commission issued no fines as a result of the orders, acknowledging that the orders expanded its previously limited enforcement of the indecency statute. Specifically, the Commission determined that it would no longer limit its understanding of “indecent” to a broadcaster’s repeated use of one of Carlin’s seven dirty words.

The FCC laid out most of the initial reasoning for its policy change in its 1987 *Pacifica Foundation* order. In response to the complaint, *Pacifica* argued to the Commission that the material in question did not allow for a finding of indecency under 18 U.S.C. § 1464 because the Supreme Court’s holding in *Pacifica* limited the finding of indecency to “deliberate, repetitive use of the seven words actually contained in the George Carlin monologue.”¹²⁰ In response, the Commission stated that “[w]hile Commission action subsequent to the *Pacifica* decision may have indicated this to be the Commission’s position, we take this opportunity to state that, notwithstanding any prior contrary indications, we will not apply the *Pacifica* standard so narrowly in the future.”¹²¹

According to the Commission, the definition of indecent material set out in the *Pacifica* case included more than just the words used in the Carlin monologue. The FCC argued that the words used in the Carlin monologue were “more correctly treated as examples of, rather than a definite list of, the kinds of words that, when used in a patently offensive manner as measured by contemporary community standards applicable to the broadcast medium, constitute indecency.”¹²² The Commission acknowledged that the *Pacifica* holding still required complaints focusing solely on the use of the expletives to show “deliberate and repetitive” use of

morning. The excerpts are set out in full in the Commission’s order.

119. *Pacifica Found.*, 2 F.C.C.R. 2698 (1987). The *Pacifica* complaint involved two separate broadcasts. The first contained excerpts from a play on a program targeted to the gay community. The play portrayed a man dying from AIDS. The material aired after ten o’clock p.m. Portions of the excerpted material can be found in the Commission’s order. The second broadcast concerned a live program in which one of the participants used an expletive.

120. *Pacifica Found.*, 2 F.C.C.R. at 2699.

121. *Id.*

122. *Id.*

such language in a patently offensive manner.¹²³ However, the FCC stated that if the complaint went beyond the use of expletives, repetition was not a necessary element to the determination of indecency.¹²⁴ In fact, it ruled that, if the speech involves description or depiction of sexual or excretory functions, the context must be considered when determining whether the material is patently offensive under contemporary community standards.¹²⁵

The Commission also reversed course on its prior position that indecent material could be broadcast if aired after ten o'clock p.m. and was preceded by a warning.¹²⁶ In making the change, the Commission determined that current evidence on the presence of children in the listening audience after ten o'clock p.m. warranted a reexamination of this past position. Based on an audience survey of the Los Angeles metropolitan area that found approximately 112,000 twelve- to seventeen-year olds in the general listening audience between seven o'clock p.m. and midnight on Sundays, the Commission determined that "relying on a specific time for broadcasting indecent material no longer satisfies the requirement that indecent material be channeled to a time when there is not a reasonable risk that children may be present in the broadcast audience."¹²⁷ The FCC made this finding even in light of the ratings provided by Pacifica which confirmed that the Pacifica station's listening audience rarely consisted of children.¹²⁸

Despite its holding that all three stations had broadcast indecent material under the Commission's "new" standards, the Commission did not impose any forfeiture sanctions. Because the orders constituted a change to its prior enforcement habits, the Commission limited its action to warning the stations and all other broadcasters that the material would be actionable under the indecency standards as clarified in the orders. Nowhere in the decision did the Commission explain why the standards previously used were insufficient.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2699-700.

128. *Id.* at 2698.

Along with the April 1987 decisions, the Commission released a general public notice setting forth the new standards for regulating broadcast indecency.¹²⁹ In response to the public notice, several groups petitioned the Commission for a clarification or reconsideration of the orders. The petitioners specifically requested the Commission to: (1) provide a precise guideline to determine what material would be considered patently offensive; (2) consider the artistic merit of a broadcast in judging whether it is indecent; (3) exempt news and informational programming from any indecency ruling; and (4) adopt a fixed time of day after which indecent material could be broadcast without fear of sanction.¹³⁰

The Commission declined to do much of what the petitioners requested. With regard to what constituted patent offensiveness, the Commission noted that context is of the utmost importance but declined to provide a comprehensive index of indecent words or pictorial depictions it would consider patently offensive.¹³¹ According to the Commission, several contextual variables would be considered in the determination of indecent material, including: (1) whether the use was vulgar or shocking; (2) whether the use was isolated or fleeting; (3) the ability of the medium to separate adults from children; (4) whether children were in the audience; and (5) the merit of the work.¹³² However, none of the factors would be dispositive, nor would a finding of merit render the material not indecent per se.¹³³ The Commission was now affording itself wide discretion to determine what would be considered indecent. Although it acknowledged its previous enforcement standard was clearly easier for both the Commission and broadcasters, the Commission argued that the previous standard could lead to unjustifiable and anomalous results.¹³⁴ The Commission did not, however, provide any examples of these so-

129. New Indecency Enforcement Standards to be Applied to All Broadcast and Amateur Radio Licensees, 2 F.C.C.R. 2726 (Apr. 29, 1987) (public notice).

130. Infinity Broad. Corp., 3 F.C.C.R. 930, 931 (1987).

131. *Id.* at 931-32.

132. *Id.* at 932.

133. *Id.*

134. *Id.* at 930.

called anomalous results.

Although the Commission made few clarifications for the petitioners, it did set a new guideline for the time of day after which indecent material could be broadcast. The Commission now believed there was a reasonable risk that children would be in the audience at ten o'clock p.m.¹³⁵ Therefore, the Commission's "current thinking" was that midnight was sufficiently late "to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision."¹³⁶

Looking back at the Supreme Court's decision in *Pacifica*, it is apparent that Justices Powell and Blackmun relied too heavily on the Commission's future restraint. As the concurrence specifically stated, "since the Commission may be expected to proceed cautiously, as it has in the past, I do not foresee an undue 'chilling' effect on broadcasters' exercise of their rights."¹³⁷ Justice Brennan demonstrated greater prescience in his dissent when he noted, "I am far less certain than my Brother Powell that such faith in the Commission is warranted; and even if I shared it, I could not so easily shirk the responsibility assumed by each Member of this Court jealously to guard against encroachments on First Amendment freedoms."¹³⁸

C. The D.C. Circuit Steps into the ACT

Several groups challenged the Commission's new enforcement policy in *Action for Children's Television v. FCC* ("*ACT I*"),¹³⁹ filed in the D.C. Circuit. The petitioners claimed that the Commission's generic definition of indecency was unconstitutionally vague and overbroad and that the Commission's decision to change the time after which indecent material could be broadcast from ten o'clock p.m. to midnight was arbitrary and

135. *Id.* at 937 n.47.

136. *Id.*

137. *FCC v. Pacifica Found.*, 438 U.S. 726, 761 n.4 (Powell, J., concurring) (citations omitted).

138. *Id.* at 769 (Brennan, J., dissenting) (citations omitted).

139. 852 F.2d 1332 (D.C. Cir. 1988) ("*ACT I*").

capricious.¹⁴⁰

Initially, the D.C. Circuit rejected the Commission's position that it should consider the indecency definition only with respect to the specific facts in the April 1987 orders – that is, whether the material in those cases were indecent *as broadcast*. The court quickly noted that the facts at hand presented a very different situation from that confronting the Supreme Court in *Pacifica*.¹⁴¹ According to the court, the Commission had engaged in a form of rulemaking through its April 1987 orders, its public notice, and the Reconsideration Memorandum and Opinion.¹⁴² Contrary to its position in *Pacifica*, the Commission now intended to apply the new enforcement standards to all broadcasts on a prospective basis.¹⁴³

Addressing the petitioners' claim of vagueness, the court concluded it did not have the authority to address the question on its merits.¹⁴⁴ According to the D.C. Circuit, since the Supreme Court's *Pacifica* opinion quoted the FCC's generic definition of indecency with "seeming approval," then implicit in this opinion was the Court's determination that the definition was not inherently vague.¹⁴⁵ Interestingly, the D.C. Circuit explicitly stated in its opinion that, if in reaching that conclusion it had "misunderstood Higher Authority," it welcomed correction from such Higher Authority (*i.e.*, the Supreme Court).¹⁴⁶ The D.C. Circuit's holding on this issue is curious, given that the Supreme Court in *Pacifica* had specifically limited its holding and the reach of the decision to the specific facts of the case. The Supreme Court explicitly declined to address whether the definition used by the Commission in *Pacifica* would be upheld in future situations. In fact, the Supreme Court never addressed whether the indecency definition used by the FCC was vague but instead considered whether to interpret the word indecent in the statute to require a

140. *Id.* at 1334-35.

141. *Id.* at 1336-37.

142. *Id.* at 1337.

143. *Id.*

144. *Id.* at 1338.

145. *Id.* at 1339.

146. *Id.*

finding of obscenity.¹⁴⁷

The D.C. Circuit, however, did consider the overbreadth challenge on its merits.¹⁴⁸ One argument presented by the petitioners was that the FCC could not deem material indecent unless the work taken as a whole lacked serious merit. Because social value entitles otherwise obscene material protection under the *Miller* standard,¹⁴⁹ the petitioners argued, the same should hold true for arguably indecent material at the very least.¹⁵⁰ The FCC countered that it did take merit into consideration in determining whether material is indecent; however, it did not consider it a dispositive factor.¹⁵¹

In the end, the court agreed with the FCC, noting that, although the new enforcement standards would invade protected freedoms of adults, the power of the state to control the conduct of children reached beyond the scope of its authority over adults.¹⁵² As support, the court cited the Supreme Court's decision in *Ginsberg v. New York*,¹⁵³ which upheld a state statute prohibiting the distribution of non-obscene but sexually explicit materials to children. Of course, one key difference between *Ginsberg* and the broadcast indecency arena is that limiting the sale of such materials in *Ginsberg* did not affect the ability of adults to obtain the materials. That is certainly not the case if broadcasters are forced to alter programming to avoid indecency sanctions.

Unfortunately, the D.C. Circuit made the same mistake as the Justices who concurred in *Pacifica*. In a footnote on the overbreadth issue, the D.C. Circuit noted that although the FCC declined to defer completely to broadcasters' judgment on what is indecent, the FCC had assured the court it would continue to consider reasonable licensee judgments when deciding to impose sanctions in a particular case.¹⁵⁴ Because of this "assurance," the

147. See *FCC v. Pacifica Found.*, 438 U.S. 726, 735, 739-40 (1978).

148. *ACT I*, 852 F.2d at 1339.

149. See *supra* note 41.

150. *ACT I*, 852 F.2d at 1339.

151. *Id.*

152. *Id.* at 1340.

153. 390 U.S. 629 (1968).

154. *ACT I*, 852 F.2d at 1340 n.14.

court concluded that the chilling effect of the indecency definition would be “tempered by the Commission’s restrained enforcement policy.”¹⁵⁵ Given that no indecency fines were imposed on broadcasters from 1978 to 1987, the court likely felt safe in relying on the Commission’s purported restraint. This is an exceptional amount of trust to place in five commissioners selected by the President, confirmed by the Senate, and funded by Congress.

The final issue addressed by the D.C. Circuit in *ACT I* was the newly-issued safe harbor hours, which altered the times broadcasters could air indecent material. Because the Commission is an administrative agency, the court held that the FCC must articulate a rational connection between the facts found and the choices made in accordance with established administrative law.¹⁵⁶ According to the court, the Commission failed to do this. As broadcasters were now faced with a less than precise definition of indecency, the court concluded that a failure to provide a clearly defined safe harbor would surely lead broadcasters to avoid such programming altogether.¹⁵⁷ Based on its safe harbor analysis, the court vacated in part the FCC’s reconsideration order and returned the *Pacifica* and *Regents of the University of California* decisions to the Commission for redetermination since the broadcasts at issue in those cases were aired after ten o’clock p.m.¹⁵⁸

It is noteworthy that the court upheld the FCC’s generic definition of indecency without requiring the Commission to demonstrate a need for the new enforcement standards. In remanding the safe harbor hours issue, the D.C. Circuit required the Commission to articulate a rational connection between the facts found and the choices made, yet the D.C. Circuit did not require the Commission to do the same for this important change in its enforcement policy. Moreover, the Commission never provided any evidence of the anomalous results it cited as the reason for the policy change.

Two months after the *ACT I* decision, Congress stepped into the fray by passing the Helms amendment, signed by President

155. *Id.*

156. *Id.* at 1341.

157. *Id.* at 1342.

158. *Id.* at 1344.

Reagan on October 1, 1988,¹⁵⁹ which required the FCC to enforce the indecency prohibition in 18 U.S.C. § 1464 on a twenty-four hour basis starting January 31, 1989.¹⁶⁰ Before introducing the bill, Senator Jesse Helms sought advice from the Heritage Foundation and the former General Counsel of the FCC on the constitutionality of such a twenty-four hour prohibition.¹⁶¹ Helms was advised that, although the bill itself was constitutionally uncertain, strong congressional custom was to enact such an uncertain law if it promoted sound public policy.¹⁶²

The question of the amendment's constitutionality was decided by the D.C. Circuit in *Action for Children's Television v. F.C.C.*¹⁶³ ("ACT II"). The court, relying on ACT I, concluded that the Commission must afford some reasonable period of time for the broadcasting of indecent material.¹⁶⁴ Thus, neither the Commission nor Congress could completely ban the broadcasting of indecent material since it is protected First Amendment speech.¹⁶⁵ The court acknowledged that while Congress's "apparent belief that a total ban on broadcast indecency is constitutional, it is ultimately the judiciary's task, particularly in the First Amendment context, to decide whether Congress has violated the Constitution."¹⁶⁶ With the twenty-four hour ban, Congress had violated broadcasters' First Amendment rights.

The current status of the safe harbor hours was finally determined in 1995 in *Action for Children's Television v. F.C.C.* ("ACT III").¹⁶⁷ In ACT III, the D.C. Circuit considered whether section 16(a) of the Public Telecommunications Act of 1992 was constitutional. The provision provided that indecent materials could only be broadcast between the hours of midnight and six o'clock a.m.¹⁶⁸ However, the Act made an exception for public

159. Crigler & Byrnes, *supra* note 102, at 354.

160. Act of Oct. 1, 1988, Pub. L. No. 100-459, § 608, 102 Stat. 2186.

161. See Crigler & Byrnes, *supra* note 102, at 353.

162. *Id.*

163. 932 F.2d 1504 (D.C. Cir. 1991) ("ACT II").

164. *Id.* at 1509.

165. *Id.*

166. *Id.*

167. 58 F.3d 654 (D.C. Cir. 1995) ("ACT III").

168. *Id.* at 658-59.

radio and television stations that go off the air at or before midnight, allowing such stations to broadcast indecent materials after ten o'clock p.m. instead of midnight.¹⁶⁹

The petitioners in *ACT III* argued the provision violated their First Amendment rights because it imposed restrictions on indecent broadcasts without being narrowly tailored to the purported compelling governmental interest.¹⁷⁰ The court rejected this argument but agreed that a strict scrutiny analysis was the appropriate standard to use in determining whether the Commission and Congress had appropriately regulated indecent speech, as it is protected by the First Amendment.¹⁷¹ However, the court noted that under *Pacifica*, strict scrutiny of broadcast regulations was less exacting than for other forms of media.¹⁷² According to the court, two of the government's proffered reasons for regulating indecent speech were compelling: assisting parents' supervision of their children's exposure to broadcasting and protecting children's psychological health.¹⁷³

The court then turned to whether the regulation employed the least restrictive means necessary to accomplish the compelling governmental interest. Reasoning that fewer children watch television and listen to the radio between midnight and six o'clock a.m. than during the day and that many adults tune in at such hours, the regulation was narrowly tailored in the court's opinion.¹⁷⁴ However, because section 16(a) provided an exemption from the midnight to six o'clock a.m. safe harbor for public stations that go off the air at or before midnight, the court concluded that the section effected disparate treatment among broadcasters.¹⁷⁵ According to the court, Congress did not explain how this disparate treatment advanced the goal of protecting children. Therefore, the court set aside the more restrictive midnight to six o'clock a.m. safe harbor and remanded the case to the Commission with instructions

169. *Id.* at 659.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 660-61.

174. *Id.* at 665.

175. *Id.* at 667.

to limit its ban to the hours of six o'clock a.m. to ten o'clock p.m.¹⁷⁶

The series of *ACT* decisions were a blow to many First Amendment proponents. While the Supreme Court had limited its holding in *Pacifica* to the facts of the case, the D.C. Circuit in *ACT I* considered the definition of indecency as it might be applied in future situations. Unfortunately, the court refused to consider the petitioners' argument that the indecency definition was unconstitutionally vague, based on its belief that the Supreme Court in *Pacifica* had cited the FCC definition with seeming approval. Just as disheartening was that the FCC's purported restraint provided the linchpin of the D.C. Circuit's decision that the indecency definition was not unconstitutionally overbroad.

Notwithstanding these disappointments, it is still important to note that the *ACT* decisions did not give the Commission carte blanche. For one thing, the D.C. Circuit acknowledged that any restriction on indecent speech is content-based and therefore subject to a strict scrutiny analysis by the courts. Although the court noted that more deference would be given to such restrictions in the broadcast medium than in other mediums, it still required that restrictions on indecent speech be narrowly tailored to support a compelling governmental interest.

Furthermore, the court again relied on the Commission's purported enforcement restraint in ruling that the definition used was not unconstitutionally overbroad. In doing so, the court necessarily relied on the FCC's statement that it would still require repetitive use of expletives for a finding of indecency in complaints focused solely on expletives.¹⁷⁷ Given the FCC's fairly restrained history of enforcement at the time of the *ACT I* decision,¹⁷⁸ the court's reliance on the FCC's assurances may have seemed reasonable. Once again, however, the Commission took an inch and turned it into a mile.

176. *Id.* at 669-70.

177. *See supra* text accompanying notes 123-24.

178. No indecency fines were issued between 1978 and 1987. *See* Crigler & Byrnes *supra* note 102.

III. THE FCC AND CONGRESS TAKE CENTER STAGE

A. *FCC Enforcement and the 2001 Policy Statement*

While the Supreme Court and the D.C. Circuit relied on the Commission's promised enforcement restraint in *Pacifica* and the *ACT* cases, broadcasters could not do the same. Based on the number of indecency fines issued since *Pacifica* until 1997, it appears that the vigor with which indecency actions were pursued fluctuated. As such, broadcasters were forced to guess from year to year when the next enforcement crack down would come and to ponder what that year's commissioners would consider indecent.

As previously noted, from *Pacifica* until the FCC's April 1987 orders, indecency sanctions by the Commission were nonexistent.¹⁷⁹ In fact, no indecency fines were issued by the Commission between 1978 and 1987.¹⁸⁰ In contrast, the Commission issued thirty-six indecency fines from 1987 until 1997.¹⁸¹ Thirty-one of those thirty-six fines were issued between 1989 and 1994 during the bulk of Commissioner Chair Alfred Sikes's tenure,¹⁸² whose record at the Commission may have been affected by congressional concern over indecency.

Between 1985 and 1987, not a single FCC nominee was asked about his or her stance on indecency.¹⁸³ However, during three nomination hearings in 1989, including that of Chairman Sikes, the nominees were asked what they proposed to do about the indecency problem.¹⁸⁴ Perhaps this interest from Congress explains the increased number of fines issued between 1989 and 1994. Congress perceived indecency to be a problem; therefore, the

179. JEREMY H. LIPSCHULTZ, *BROADCAST INDECENCY: F.C.C. REGULATION AND THE FIRST AMENDMENT* 29 (1997).

180. Milagros Rivera-Sanchez & Michelle Ballard, *A Decade of Indecency Enforcement: A Study of How the Federal Communications Commission Assesses Indecency Fines (1987-1997)*, 75 *JOURNALISM & MASS COMM. Q.* 143, 144 (1998).

181. *Id.* at 146.

182. *Id.* at 149.

183. *Id.* at 145.

184. *Id.*

Commission perceived indecency to be a problem. Chairman Sikes made enforcement of the indecency statute a prominent feature of his term.¹⁸⁵ The Commission's indecency enforcement, however, slowed after 1994, due in part to the fact that the new FCC Chairman, Reed Hundt, came to the Commission with a focus on children's programming as opposed to indecency policing.¹⁸⁶

In addition to coping with the FCC's changing enforcement habits over the years, broadcasters also had to make programming decisions in light of the amorphous indecency definition approved by the D.C. Circuit in *ACT I*. However, it appeared that broadcasters might get some assistance in understanding the Commission's application of the definition in 1994 when, pursuant to a settlement with Evergreen Media Corporation, the Commission agreed to issue guidelines regarding the Commission's indecency orders.¹⁸⁷ The guidelines were supposed to be released within ninety days of the February 22, 1994, settlement,¹⁸⁸ but broadcasters would not see the actual policy statement until April 6, 2001. Despite the seven-year extension, the policy still provided little actual guidance.

According to the FCC's 2001 Policy Statement¹⁸⁹ ("Guidelines"), an indecency finding requires two determinations. First, the material must describe or depict sexual or excretory organs or activities.¹⁹⁰ Second, the broadcast must be "patently offensive as measured by contemporary community standards for the broadcast medium."¹⁹¹ The Guidelines provide that community standards are measured by the average broadcast viewer or listener, without regard for a particular region or area of the country.¹⁹²

In making an indecency finding, the Guidelines note that

185. *Id.* at 143.

186. *Id.* at 149-50.

187. Milagros Rivera-Sanchez, *How Far is Too Far? The Line Between "Offensive" and "Indecent" Speech*, 49 FED. COMM. L.J. 327, 328 (1997).

188. *Id.*

189. Policy Statement, Industry Guidance on the Commission's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 F.C.C.R. 7999 (Apr. 6, 2001).

190. *Id.* at 8002.

191. *Id.*

192. *Id.*

context is “critically important.”¹⁹³ Even if explicit language is used, that is not the end of the analysis, nor is the fact that the broadcast refrains from using explicit language. Illustrating the importance of context, the Guidelines state that “[e]xplicit language in the context of a *bona fide* newscast might not be patently offensive, while sexual innuendo that persists and is sufficiently clear to make the sexual meaning inescapable might be.”¹⁹⁴

The Commission also set forth the following list of “principal factors” to be relied upon in making a determination of indecency:

- (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; and (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.*¹⁹⁵

Here again, the overall context is crucial and no single factor “generally provides the basis for an indecency finding.”¹⁹⁶

The Guidelines provide thirty-two case examples meant to help broadcasters determine what kind of material the Commission considers indecent.¹⁹⁷ Unfortunately, the Commission took great pains to note that the examples were “intended only as a research tool and should not be taken as a meaningful selection of words and phrases to be evaluated for indecency purposes without the fuller context that the tapes or transcripts provide.”¹⁹⁸ So, from the outset, the examples provide little guidance to broadcasters trying to steer clear of the Commission’s wide net.

Of the examples, only four were television broadcasts, and all four were found not to have aired indecent material. Of the twenty-eight radio broadcast examples, all but five were found to

193. *Id.*

194. *Id.*

195. *Id.* at 8003 (emphasis added).

196. *Id.*

197. *Id.* at 8003-15.

198. *Id.* at 8003.

have aired indecent material. For broadcasters hoping to find clarification on what the Commission would deem indecent, the examples were not particularly instructive. For instance, the Commission found a broadcast of the Howard Stern Show to be indecent based on Stern snippets such as, “God, my testicles are like down to the floor . . . you could really have a party with these Use them like Bocci balls.”¹⁹⁹ However, a radio station broadcast in South Carolina, of “[t]he hell I did, I drove mother-fucker, oh,” was found to be not indecent.²⁰⁰

Because the Commission cautioned against any broadcaster’s definitive reliance on the examples, their usefulness was severely limited. In addition, although the Guidelines outlined three factors the Commission would consider in determining whether material was indecent, the failure of the material to meet one or even all of the factors would still not preclude an indecency finding. Examining each factor, it is clear the Commission must inevitably engage in a highly subjective analysis and, in doing so, must substitute the commissioners’ opinions and tastes for that of “contemporary community standards for the broadcast medium.”²⁰¹ Whether five commissioners can be relied upon to gauge effectively what constitutes contemporary community standards is a crucial question in examining FCC enforcement policy. A recent survey seems to indicate the commissioners are disconnected from much of the community they claim to represent.

In March 2004, Edison Media Research and Jacobs Media polled almost 14,000 listeners of forty active rock, classic rock, and alternative rock music radio stations to gauge their views of indecency over the airwaves.²⁰² The survey posed a series of

199. *Id.* at 8004.

200. *Id.* at 8009.

201. *Id.* at 8002.

202. Cyndee Maxwell & Max Folkoff, *Rated R for Rock*, RADIO & RECORDS MAG., Apr. 9, 2004, at 54, *attached as an exhibit in* Petition for Reconsideration *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975 (Mar. 18, 2004), submitted Apr. 19, 2004 [hereinafter *Petition for Reconsideration*], *available at* http://www.fcc.gov/eb/broadcast/Pleadings/Indecent_Recon.pdf (on file with First Amendment Law Review).

questions, one of which asked whether their morning radio programs offended them.²⁰³ Only 2% of the respondents said they were offended frequently, 9.2% said sometimes, 34.2% said rarely, and over half, 54.6%, said they were never offended by their radio programs.²⁰⁴ Eighty percent of the listeners responded that people who want to listen to Howard Stern on the radio should be able to do so, and nearly 81% agreed that, even if a small group of listeners is offended by a radio show's content, the FCC should not take action against it.²⁰⁵ From the results of the survey, it appears the Commission and listeners of rock music stations have a very different view of what might be considered patently offensive. Given that the question of whether material is patently offensive is one of the linchpins to a finding of indecency, this disconnect is crucial in indecency sanctions.

From the Commission's fluctuating vigor in pursuing complaints and designating material as indecent to its failure to provide real guidance in its 2001 Policy Statement, broadcasters were left guessing after the FCC's April 1987 orders. Unfortunately, just when it seemed the regulatory picture could not get any worse for broadcasters, Bono dropped the F-bomb, Janet flashed some flesh, and the indecency net was cast wider once again.

B. The Golden Globe Awards Decision and Recent Congressional and FCC Action

Given the subjective nature of the Commission's indecency analysis, it is not surprising that the Commission cannot remain consistent with its previously announced policies or decisions. A good example of this inconsistency is the Commission's March 18, 2004, decision regarding U2 lead singer Bono and his acceptance speech at the 2003 *Golden Globe Awards* show.

During a *Golden Globe Awards* program on January 19,

203. *Id.*

204. *Id.*

205. *Id.* at 60. Survey results also available at <http://66.219.105.7/home/archives/Rock%20Radio%20Indecency%20Web%20Poll%20Report.pdf> (on file with the First Amendment Law Review).

2003, Bono said, “[t]his is really, really, fucking brilliant. Really, really great,”²⁰⁶ while accepting an award for “Best Original Song.”²⁰⁷ The FCC received 234 complaints regarding the broadcast, 217 of which were filed by individuals associated with Parents Television Council.²⁰⁸

In October 2003, the FCC’s Enforcement Bureau (the first stop on a complaint’s process through the FCC) issued a decision denying the complaint.²⁰⁹ The decision reasoned that the Commission’s role in overseeing program content was limited and that any action taken against indecent programming must take into account the fact that indecent speech is protected under the First Amendment.²¹⁰ With respect to the specific material broadcast, the Bureau noted that even as a “threshold matter” the material aired did not describe or depict sexual or excretory activities or functions because the word was used as an adjective or expletive for emphasis.²¹¹ Citing its own 2001 Policy Statement, the Bureau explained that in similar circumstances it had found offensive language used as an insult, as opposed to a description of sexual or excretory functions or activities, was not within its scope of prohibiting indecent material.²¹² In addition, the Bureau pointed out that the use was isolated and fleeting and again, based on past decisions, was not actionable.²¹³

As with the congressional activity in the late 1980s, Congress, unhappy with the Bureau’s decision, jumped into the fray. Both the House and the Senate passed resolutions shortly after the Bureau’s decision pushing for the Commission’s full

206. *Id.* (quoting NBC’s Opposition to Application for Review at 3).

207. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 19 F.C.C.R. 4975, 4976 (Mar. 18, 2004).

208. Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, 18 F.C.C.R. 19859, 19859 n.1 (Oct. 3, 2003).

209. *Id.* at 19862.

210. *Id.* at 19860.

211. *Id.* at 19861.

212. *Id.*

213. *Id.*

review and reversal.²¹⁴ This congressional push, coupled with the fallout from the Janet Jackson/Justin Timberlake Super Bowl half-time show, during which Ms. Jackson's breast was briefly exposed, prompted the full Commission to act on March 18, 2004, by reversing its own Enforcement Bureau. In doing so, the Commission contradicted both its 2001 Policy Statement and previous Commission decisions.

The Commission's order acknowledged that the use of the word by Bono was "as an intensifier."²¹⁵ Nonetheless, the Commission concluded that the core meaning of the "F-Word" had a sexual connotation and, therefore, described sexual activities and met the first prong requirement of an indecency finding.²¹⁶ The Commission next considered whether the broadcast was patently offensive. Claiming that the "F-Word" is "one of the most vulgar, graphic and explicit descriptions of sexual activity in the English language," the Commission quickly determined the use was patently offensive.²¹⁷ According to the opinion, the use was "shocking and gratuitous," and the fact that the use was unintentional was irrelevant.²¹⁸

Confronting its obviously contrary precedent on the isolated and fleeting nature of the use, the Commission stated that "[w]hile prior Commission and staff action have indicated that isolated or fleeting broadcasts of the 'F-Word' such as that here are not indecent or would not be acted upon, consistent with our decision today we conclude that any such interpretation is no longer good law."²¹⁹ In particular, the Commission had to repudiate its own words in its 1987 *Pacifica Foundation* order that prompted the *ACT I* case. In that order, the Commission stated that if a complaint focused "solely on the use of expletives, we believe that... deliberate and repetitive use in a patently offensive manner is a

214. H.R. Res. 482, 108th Cong. (2003); S. Res. 283, 108th Cong. (2003).

215. Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 19 F.C.C.R. 4975, 4978 (Mar. 18, 2004) (quoting NBC's Opposition to Application for Review at 5-6).

216. *Id.*

217. *Id.* at 4979.

218. *Id.*

219. *Id.* at 4980.

requisite to a finding of indecency.”²²⁰ The Commission held that it now departed from that portion of its 1987 *Pacifica Foundation* order and any others where the Commission had held that the isolated or fleeting use of the “F-Word” in situations similar to the Bono case would not be considered indecent.²²¹

Not content with holding the broadcast indecent, the Commission also determined that Bono’s use of the “F-Word” was “profane” under 18 U.S.C. § 1464, a contention not even made by the Parents Television Council, the group that launched the appeal to the full Commission.²²² The Commission found that although its previous precedent only focused on profanity under the statute in the context of blasphemy,

[b]roadcasters are on notice that the Commission in the future will not limit its definition of profane speech to only those words and phrases that contain an element of blasphemy or divine imprecation, but, depending on the context, will also consider under the definition of “profanity” the “F-Word” and those words (or variants thereof) that are as highly offensive as the “F-Word.”²²³

The Commission’s departure from precedent and distancing from its 2001 Policy Statement exemplifies the problem inherent in any court’s reliance on Commission restraint in protecting broadcasters’ First Amendment rights. As detailed throughout this article, the Commission has proclaimed to the courts that it will be circumspect in its enforcement of the indecency statute, thus giving the courts the ability to believe that enforcement will not unduly chill protected First Amendment speech. However, each time the courts have relied upon such guarantees, the FCC, prompted by a host of political and social factors, has switched strategies and expanded its enforcement power. Each time, the Commission has done so relying on the Supreme Court’s decision in *Pacifica*.

220. *Id.* (quoting *Pacifica Found.*, 2 F.C.C.R. 2698, 2699 (1987)).

221. *Id.*

222. *Id.* at 4981.

223. *Id.*

In fact, the Commission claimed its decision in the Bono case was not inconsistent with *Pacifica* because the Supreme Court had explicitly left the door open as to whether the occasional utterance of an expletive would be considered indecent.²²⁴ In making this claim, the Commission cited the majority opinion in *Pacifica* but also specifically set forth a portion of the concurring opinion.²²⁵ However, this portion of the concurring opinion was intended to emphasize the limited nature of the Court's holding and the restraint with which the Commission had assured the Court it would act in the future.²²⁶ There is quite a bit of irony in the fact that the Commission used the passage intended to limit the Court's holding, and thus the Commission's authority, in an effort to expand its reach.

The Commission's *Golden Globe* decision came amidst a call for increased regulation of indecency from Congress after the infamous Super Bowl halftime show featuring Janet Jackson and Justin Timberlake.²²⁷ In the wake of this event, each chamber of Congress passed its own version of a bill purporting to crack down on indecent speech. A House bill passed on March 11, 2004, would increase the amount a broadcaster can be fined for each indecency violation from \$27,500²²⁸ to \$500,000.²²⁹ In addition, the bill provides

224. *Id.* at 4982.

225. *Id.* at 4982 n.41.

226. *See* FCC v. *Pacifica Found.*, 438 U.S. 726, 760-61 (1978) (Powell, J., concurring). Justice Powell explained that the holding does not speak to cases involving the isolated use of offensive words. Thus, the ruling would not severely limit broadcasting to that which is only suitable for children. *Id.*

227. The FCC issued a Notice of Apparent Liability against CBS stations owned by Viacom in the amount of \$550,000 for willful violation of 18 U.S.C. § 1464 based on this incident. *See* Complaints Against Various Television Licensees Concerning Their Feb. 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show, 19 F.C.C.R. 19230 (Sept. 22, 2004). CBS has argued the Commission's conclusion supporting the proposed fine is "illogical" and has chosen to contest the fine. Lisa de Moraes, *CBS to FCC: Halftime Show Finale Was a Surprise to Us, Too*, WASH. POST, Nov. 9, 2004, at C7.

228. At the time of the bill's passage, the statutory maximum for an indecency violation was \$27,500. The FCC subsequently amended its rules, increasing the statutory maximum to \$32,500 to account for inflation. Amendment of Section 1.80(b) of the Commission's Rules, 19 F.C.C.R. 10945 (June 18, 2004) (order).

that the Commission can begin licensee revocation proceedings against a broadcaster with three or more indecency violations on its record during any term of its license.²³⁰ On June 22, 2004, the Senate passed portions of a bill originally introduced in January as part of a defense bill.²³¹ The included provisions would increase fines for broadcasters from \$27,500 to \$275,000 per incident and for personalities from \$11,000 to \$275,000 per incident.²³² The fines would increase for each incident until reaching the maximum of \$3,000,000 a day.²³³ In addition, the provisions added would delay for one year the FCC's media ownership rules passed in 2003.²³⁴ As of the last writing of this article, the efforts to increase the fines in the House and Senate had failed, due to the inability of negotiators in the two chambers to reach an agreement on the differences in the two bills. According to congressional aides, the failure resulted from a Senate provision that would have blocked the new media-ownership rules and a Senate requirement that the FCC investigate whether children were being protected from violence on television.²³⁵ Most recently, the House has passed yet another bill increasing indecency fines with provisions quite similar to the bill passed in 2004.²³⁶ A similar bill has been introduced in the Senate.²³⁷

While this recent flurry of activity indicates an ever-increasing willingness by the Commission and Congress to expand the FCC's enforcement authority, it appears that the increased vigor towards indecency enforcement actually began back in 2001 at the outset of Commission Chairman Michael Powell's tenure.²³⁸

229. H.R. 3717, 108th Cong. (2004).

230. *Id.*

231. Jesse J. Holland, *Senate Approves Costlier Fines for Indecent Broadcasts*, CHI. TRIB., June 23, 2004, at 17.

232. *Id.* See also Frank Ahrens, *Legislation Increasing Indecency Fines Dropped*, WASH. POST, Jan. 8, 2004, at E1 (discussing the proposed increase in fines and the partisan struggle to pass the measure).

233. *Id.*

234. *Id.*

235. Ahrens, *supra* note 232.

236. Frank Ahrens, *House Raises Penalties for Airing Indecency*, WASH. POST, Feb. 17, 2005, at E1.

237. *Id.*

238. Chairman Michael Powell announced in January he would resign effective March 2005. President Bush replaced Powell with Kevin Martin on

Since Chairman Powell took office in mid-January 2001, the amount of the FCC's proposed fines has continued to steadily increase. According to the FCC's own records, the dollar amount of proposed fines for indecency violations was \$48,000 in 2000; it increased to \$91,000 in 2001, increasing to \$440,000 in 2003 and again increased to an astounding \$7,928,080 in 2004.²³⁹ In fact, in 2004 the FCC had proposed more fines for broadcast indecency than in the previous ten years combined.²⁴⁰

Under Chairman Powell, the Commission has increased the base amount of the typical fine for indecency violations from \$7,000 to the statutory maximum of \$27,500 per incident "in appropriate cases."²⁴¹ Further, the Commission has notified broadcasters that it may begin license revocation proceedings for "serious" indecency violations,²⁴² but it has not notified broadcasters what it will consider "serious" violations. The Commission has also informed broadcasters that it may "treat multiple indecent utterances within a single program as constituting multiple indecency violations, rather than following its traditional per program approach."²⁴³ The Commission's indecency investigations have also been expanded to cover not only the broadcast station that is the subject of a particular complaint but also to cover co-owned stations, regardless

March 16, 2005. Martin has the support of the Parents Television Council and appears to be very supportive of the recent indecency crackdown. See Frank Ahrens, *FCC's New Standards-Bearer; Bush Picks Vocal Indecency Opponent Kevin J. Martin to Head Commission*, WASH. POST, Mar. 17, 2005, at E1.

239. Fed. Communications Comm'n, INDECENCY COMPLAINTS AND NALS: 1993-2004 (2005), available at <http://www.fcc.gov/eb/broadcast/ichart.pdf>. The 2004 figure includes three consent decrees entered by three separate broadcasters, totaling \$4,270,080, an amount that exceeds the original NALS issued by the FCC. *Id.* at n.3.

240. *Id.*

241. "Can You Say That on TV?": An Examination of the FCC's Enforcement with Respect to Broadcast Indecency: Hearing Before the Subcomm. on Telecomm. and the Internet of the House Comm. on Energy and Commerce, 108th Cong. 23 (2004) (testimony of David H. Solomon, Chief of the Enforcement Bureau, Federal Communications Commission), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_house_hearings&docid=f:91578.pdf.

242. *Id.*

243. *Id.*

of whether any complaint was even received about a co-owned station.²⁴⁴

By all accounts, the Commission's lack of restraint in enforcing the indecency statute has had a real and substantial effect on broadcasters' programming. A week after the Super Bowl show, NBC decided to pull a scene from an *ER* episode showing an eighty-year-old woman's breast while she received medical care.²⁴⁵ ABC decided to darken a sex scene on an episode of *NYPD Blue*, a show that has been airing such fare for a decade.²⁴⁶ Beyond television, radio programmers are now pulling or editing long-aired songs such as Pink Floyd's "Money," Steve Miller Band's "Jet Airliner," The Who's "Who Are You?," and Pearl Jam's "Jeremy," due to infrequent and, in some instances, isolated use of expletives.²⁴⁷ Clear Channel fired disk jockey Todd Clem, the host of *Bubba the Love Sponge*, and permanently pulled Howard Stern from six markets.²⁴⁸ Howard Stern then announced in October 2004 that he would leave terrestrial radio at the end of his contract with Infinity to move to satellite radio, with a debut in January 2006 on Sirius Satellite Radio.²⁴⁹ Stern commented that "the FCC . . . has stopped me from doing business."²⁵⁰ The recent indecency crackdown led one radio insider to claim, "[i]t's as if someone turned the thermostat down [twenty] degrees. It's had a very chilling effect."²⁵¹

Even PBS has not been untouched by the "chilling effect." The producers of a PBS documentary on Emma Goldman agreed

244. *Id.*

245. Scott Collins, et al., *The Decency Debate*, L.A. TIMES, Mar. 28, 2004, at E26, reprinted in *Petition for Reconsideration*, supra note 202, at app., exhibit 2.

246. *Id.*

247. *Stations Are Pruning Their Pink Floyd and Cleaning up Steve Miller's "Jet Airliner,"* INSIDE RADIO, Mar. 23, 2004, reprinted in *Petition for Reconsideration*, supra note 202, at app., exhibit 2.

248. *Petition for Reconsideration*, supra note 202.

249. Don Aucion & Clea Simon, *Stern Says He'll Switch to Satellite*, BOSTON GLOBE, Oct. 7, 2004, at A1.

250. *Id.*

251. David Hinckley, *Across the Dial, Tone-Down*, N.Y. DAILY NEWS, Apr. 1, 2004, at 91, reprinted in *Petition for Reconsideration*, supra note 202, at app., ex. 2.

to cut seconds out of a love scene for fear of showing too much cleavage.²⁵² Ironically, Emma Goldman was a twentieth century anarchist and advocate of free speech.²⁵³ An independently produced film to be aired on PBS about activist/author Piri Thomas also recently came under fire. The film included the author reading excerpts from his novel, "Down These Mean Streets," about his coming of age in the 1930s, 40s, and 50s.²⁵⁴ Based on the FCC's *Golden Globe* decision, PBS was forced to edit out of the film words like "fuck" and "shit," and some PBS affiliates requested words such as "piss," "nigger," and "spic" be removed.²⁵⁵ Nebraska Public Television pulled the show completely from its line-up.²⁵⁶

Perhaps the most telling effect of the FCC's decision in the *Golden Globe* case is last November's controversy over ABC's planned broadcast of Stephen Spielberg's *Saving Private Ryan*. ABC had previously aired this movie about the D-Day invasion on Veterans Day in both 2001 and 2002 with little incident.²⁵⁷ However, since *Saving Private Ryan* contains repeated portrayal of "extreme violence and intense adult language,"²⁵⁸ sixty-six ABC affiliates refused to air the show last year,²⁵⁹ many citing the FCC's increased enforcement activities and, specifically, the *Golden Globe* decision. ABC's contract with Spielberg prohibits any editing of the film. According to Ray Cole, president of Citadel Communications, owner of three ABC affiliates that chose not to air the movie, Citadel's preference would have been to run the

252. Lisa de Moraes, *Even Buttoned-Down PBS Gets Caught in the Wringer*, WASH. POST, Mar. 11, 2004, at C7, reprinted in *Petition for Reconsideration*, *supra* note 202, at app., ex. 2.

253. *Id.*

254. Press Release, When In Doubt Productions, PBS Edits "Offensive" Content From Independently-Produced Documentary *Every Child is Born a Poet: The Life & Work of Piri Thomas* in Order to Comply With New FCC Indecency Rules (Apr. 6, 2004), reprinted in *Petition for Reconsideration*, *supra* note 202, at app., ex. 2.

255. *Id.*

256. *Id.*

257. Lisa de Moraes, 'Saving Private Ryan': A New Casualty of the Indecency War, WASH. POST, Nov. 11, 2004, at C1.

258. De Moraes, *supra* note 252.

259. Frank Rich, *Bono's New Casualty: 'Saving Private Ryan,'* N.Y. TIMES, Nov. 21, 2004, § 2, at 1.

movie.²⁶⁰ However, Cole noted that recent FCC actions and the re-election of President Bush were factors in the company's decision to replace *Saving Private Ryan* with the TV movie *Return to Mayberry*.²⁶¹

The FCC recently issued a Memorandum Opinion and Order in response to complaints over the airing of *Saving Private Ryan*.²⁶² According to the Order, the broadcast did not include indecent material, even though the movie was sprinkled with language, such as "fuck," "asshole," "prick," "bastard," and "shit."²⁶³ The Commission held that while such language certainly depicted or described sexual or excretory activities, the broadcast was not patently offensive because of the context within which the language was used.²⁶⁴ That context included noting the "extraordinary"²⁶⁵ circumstances of war and the "soldiers' strong human reactions to, and, often, revulsion at, those unspeakable conditions and the peril in which they find themselves."²⁶⁶ This distinction, of course, is not to be confused with the strong human reaction of an artist to winning an award and letting the F-word slip in a live broadcast in accepting that award.

The recent activity by Congress and the Commission shows no signs of slowing anytime soon. Unlike commissioner statements immediately after *Pacifica*, which attempted to assure broadcasters that the Commission was still more interested in robust programming rather than the occasional expletive, members of the current Commission have declared it will use all ammunition in its

260. *Id.* ("Under strict interpretation of the indecency rules we do not see any way possible to air this movie. To be put in this position is unfortunate, and reflects the timidity that exists at the commission right now.").

261. *Id.* Cole stated, "We're just coming off an election where moral issues were cited as a reason by people voting one way or another and, in my opinion, the commissioners are fearful of the new Congress." *Id.*

262. Complaints Against Various Television Licensees Regarding Their Broadcast on Nov. 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan," FCC 05-23, File No. EB-04-IH-0589 (Feb. 28, 2005).

263. *Id.* at ¶ 13.

264. *Id.*

265. *Id.* at ¶ 14.

266. *Id.*

armory and put to use any additional quivers in its arrows that Congress may give it to enforce the indecency statute. The effect of such vigorous pursuits of so-called indecency ranges from PBS's deletion of obscenities spoken by American soldiers in Iraq during a Frontline program to an increasing lack of live programming in favor of tape-delayed broadcasts.²⁶⁷ The overall effect is that today broadcasters are increasingly likely to adopt the philosophy to leave it out when in doubt.²⁶⁸

CONCLUSION

The indecency doctrine began simply enough. The Supreme Court's *Pacifica* decision upheld the FCC's finding of indecency for material that repeated certain expletives 108 times during a twelve-minute monologue. What has grown out of that limited holding, however, has become quite unwieldy. From its original enforcement standard of sanctioning broadcasters for repetitive use of one of Carlin's seven dirty words, to the expansion of regulation to double entendre and innuendo, to an indecency finding for the utterance of just one expletive in the midst of a live event, the FCC has moved well beyond *Pacifica*. In doing so, it has taken upon itself the mantle of arbiter of what the average viewer finds patently offensive, inevitably substituting its own judgment of what is "shocking or vulgar" or whether the material "panders or titillates."

Unfortunately, a tidy solution to the indecency conundrum does not appear on the horizon. Over the past several years, the FCC and Congress have paid lip service to First Amendment concerns while not hesitating to use *Pacifica* as a broad justification for restricting broadcasters' First Amendment rights. In doing so, they expand the scope of the *Pacifica* decision much further than it was ever intended. It is this author's opinion that a fresh look at *Pacifica* is warranted by the Supreme Court.²⁶⁹ Such an opportunity

267. Randy Dotinga, *FCC Fines Ruffle Even 'Masterpiece Theatre,'* CHRISTIAN SCIENCE MONITOR, July 13, 2004, at 2.

268. Rich, *supra* note 259.

269. While the *Pacifica* decision seemed to get a boost with *Denver Area Educational Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 728-

may present itself if any of the broadcasters now appealing Notices of Apparent Liability pursue their claims all the way to the Court. Given new technologies that are available to parents, such as the V-chip, the question of whether an absolute ban on protected First Amendment speech during the majority of the time viewers and listeners tune into broadcast programming is the least restrictive means to further a compelling governmental interest seems to warrant another look. In addition, the FCC's recent decisions do not show the restraint that the Court relied upon in *Pacifica* and may cause some of the Justices to consider whether too much protected speech is being sacrificed for the stated governmental interest of protecting the children from such material. In the end, the difficulty in allowing a small governmental body influenced by politics and societal whims to judge the value of speech protected by the First Amendment is probably best summarized by Justice Harlan's admonition: "it is nevertheless often true that one man's vulgarity is another's lyric."²⁷⁰

29, 744-46 (1996), the *Denver* decision was limited to a permissive statute allowing cable operators to block indecent material on leased-access channels, as opposed to a mandated ban on indecent material during certain hours. In addition, the Court's more recent opinion in *United States v. Playboy Entm't Group*, 529 U.S. 803, 815 (2000), while noting differences between broadcast and cable television, asserted that targeted blocking provided a less restrictive means to regulating sexually explicit material and, therefore, an affirmative requirement to fully scramble or block such material by the cable operators did not pass the Court's strict scrutiny test.

270. *Cohen v. California*, 403 U.S. 15, 25 (1971).

