

# Washington University Law Review

---

Volume 90 | Issue 1

---

2012

## To Swear or not to Swear: Using Foul Language During a Supreme Court Oral Argument

Alan E. Garfield

*Widener University School of Law*

Follow this and additional works at: [https://openscholarship.wustl.edu/law\\_lawreview](https://openscholarship.wustl.edu/law_lawreview)



Part of the [Administrative Law Commons](#), [Communications Law Commons](#), and the [First Amendment Commons](#)

---

### Recommended Citation

Alan E. Garfield, *To Swear or not to Swear: Using Foul Language During a Supreme Court Oral Argument*, 90 WASH. U. L. REV. 279 (2012).

Available at: [https://openscholarship.wustl.edu/law\\_lawreview/vol90/iss1/6](https://openscholarship.wustl.edu/law_lawreview/vol90/iss1/6)

This Commentary is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Law Review by an authorized administrator of Washington University Open Scholarship. For more information, please contact [digital@wumail.wustl.edu](mailto:digital@wumail.wustl.edu).

# TO SWEAR OR NOT TO SWEAR: USING FOUL LANGUAGE DURING A SUPREME COURT ORAL ARGUMENT

ALAN E. GARFIELD\*

Swearing is not the first thing that comes to mind when preparing for a Supreme Court oral argument. But for lawyers arguing certain types of cases, it is something they must seriously consider.

The issue comes up when a client claims his First Amendment rights were violated when the government punished him for using foul language. This doesn't happen often because the government doesn't usually police for the use of expletives. But there are rare instances when using foul language can get one into trouble.

Public schools, for instance, can regulate students' use of foul language during class time and at school functions.<sup>1</sup> And the Federal Communications Commission ("FCC") also enforces limits on indecent radio and television broadcasts.<sup>2</sup>

A lawyer representing a defendant in one of these cases inevitably confronts the question of whether to use his client's offensive language when arguing before the Court. After all, if the lawyer doesn't use the words, she might implicitly concede that the words are so horrid they warrant suppression. Yet her job as an advocate is to convince the Court of just the opposite.

The first case in which this issue arose occurred during the Vietnam War era, when a defendant was convicted of disturbing the peace by wearing a jacket that said "Fuck the Draft."<sup>3</sup> The late Professor Melville Nimmer, who represented the defendant, was determined to break the "F" word's taboo by using it in his oral argument.<sup>4</sup> But he also knew that Chief Justice Warren Burger, a stickler for courtroom protocol, would oppose this.<sup>5</sup>

---

\* Distinguished Professor of Law, Widener University School of Law. I am grateful to Stephen Friedman and Laura Ray for their helpful comments.

1. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 685 (1986) (describing the societal interest in having schools teach "students the boundaries of socially appropriate behavior" and upholding a school district's sanction against a student for "his offensively lewd and indecent speech").

2. 18 U.S.C. § 1464 (2011).

3. *Cohen v. California*, 403 U.S. 15, 16 (1971).

4. Geoffrey R. Stone, *The World of the Framers: A Christian Nation?*, 56 *UCLA L. REV.* 1, 2 (2008).

5. *Id.*

Sure enough, as Nimmer rose to speak, the Chief Justice peremptorily intervened: “Mr. Nimmer, . . . the Court is thoroughly familiar with the factual setting of this case and it will not be necessary for you . . . to dwell on the facts.”<sup>6</sup> But Nimmer stuck to his guns and proceeded to tell about a “young man” wearing a jacket that said ““Fuck the Draft.””<sup>7</sup>

Professor Geoffrey Stone of the University of Chicago believes Nimmer won the case the moment he uttered the offending word.<sup>8</sup> And Nimmer did win. In a landmark decision, the Court held that the government has “no right to cleanse public debate” of all offensive language and acknowledged that “one man’s vulgarity is another’s lyric.”<sup>9</sup>

Seven years later, the Court heard another free-speech case involving foul language.<sup>10</sup> The case concerned an FCC indecency action against Pacifica radio for broadcasting the humorist George Carlin’s Filthy Words routine in the middle of the day when minors could hear it.<sup>11</sup>

The lawyer representing Pacifica did not use any of Carlin’s “seven dirty words” in his oral argument and Pacifica lost.<sup>12</sup> The Supreme Court upheld the FCC’s authority to regulate indecent broadcasts, a regime that exists to this day.<sup>13</sup>

The most recent case in this genre was argued before the Supreme Court this past January.<sup>14</sup> Like *Pacifica*, it concerned the FCC’s broadcast

---

6. LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 828 (Phillip B. Kurland & Gerhard Casper eds., vol. 70 1975).

7. *Id.* Thomas Krattenmaker, who had clerked for Justice John M. Harlan and had been asked to write the first draft of the *Cohen* opinion, relays a wonderful story from Professor Nimmer’s son, David Nimmer, in a recent retrospective article on the *Cohen* case. Thomas G. Krattenmaker, *Looking Back at Cohen v. California: A 40-Year Retrospective from Inside the Court*, 20 WM. & MARY BILL RTS. J. 652 (2012). David, who was sixteen years old at the time, had accompanied his father to the oral argument. *Id.* at 654 n.17. He remembers his father telling him on the flight home “that he had expected the Court marshals ‘to jump up, yelling, ‘He said FUCK in the Supreme Court, grab him!’”” *Id.* at 654–55 n.17.

8. Stone, *supra* note 4, at 2. See also Christopher M. Fairman, *Fuck*, 28 CARDOZO L. REV. 1711, 1735 (2007) (saying that “Nimmer was brilliant” and arguing that the “case would have been lost” if “Nimmer had acquiesced to Burger’s word taboo”).

9. *Cohen*, 403 U.S. at 25.

10. Fed. Comm’n Comm’n v. Pacifica Found., 438 U.S. 726 (1978).

11. *Id.* at 729–30.

12. Transcript of Oral Argument, Pacifica Found., 438 U.S. 726 (1978) (No. 77-528), available at [http://www.oyez.org/cases/1970-1979/1977/1977\\_77\\_528](http://www.oyez.org/cases/1970-1979/1977/1977_77_528).

13. *Pacifica*, 438 U.S. at 750–51. The Court issued a narrow decision, holding only that the FCC was within its authority to find the defendant’s broadcast indecent given the specific facts of the case. *Id.*

14. Fox Television Stations, Inc. v. Fed. Comm’n Comm’n, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

indecent regime, but its focus was on a new Commission policy to begin sanctioning “fleeting expletives.”<sup>15</sup>

For years after *Pacifica*, the FCC took the position that a single, non-literal use of an expletive was not a violation of the agency’s indecency policy.<sup>16</sup> But in 2004, after Bono said “fucking brilliant” during a Golden Globes Awards broadcast, the agency announced that a single non-literal use of an expletive could sometimes be actionable (the “Golden Globes Order”).<sup>17</sup> The significance of this change was magnified when Congress, in response to public outcry over Janet Jackson’s “wardrobe malfunction” during the 2004 Super Bowl, ratcheted up the fines for indecency violations tenfold (from \$32,500 to \$325,000).<sup>18</sup>

The January argument concerned fleeting expletives uttered during two Fox Television broadcasts of the Billboard Music Awards.<sup>19</sup> During the 2002 ceremony, Cher accentuated her remarks accepting an award with this comment: “People had been telling me I’m on the way out every year, right? So fuck ‘em.”<sup>20</sup> During the 2003 awards, Nichole Richie added some unscripted zingers to an exchange with fellow award presenter Paris Hilton: “Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”<sup>21</sup>

The FCC initiated an action against Fox even though these broadcasts preceded the Golden Globes Order.<sup>22</sup> The Commission claimed that the broadcasts were actionable under its pre-order policy, which allowed for sanctioning fleeting expletives when used literally.<sup>23</sup> But it also used the cases to highlight how the broadcasts violated its new policy.<sup>24</sup> Nevertheless, the Commission elected not to impose any sanctions on Fox.<sup>25</sup>

Fox appealed the order on both administrative and constitutional grounds. The Second Circuit, without reaching the constitutional question,

---

15. *Id.*

16. *Id.* at 321.

17. Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program (*Golden Globes Order*), 19 FCC Rcd. 4975, 4980–82 (2004).

18. *Fox Television Stations*, 613 F.3d at 322–23.

19. *Id.* at 323.

20. *Id.*

21. *Id.*

22. Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Original Fox Order*), 21 FCC Rcd. 2664, 2690–95 (2006).

23. Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005 (*Second Fox Order*), 21 FCC Rcd. 13299, 13307, 13324 (2006).

24. *Id.* at 13308, 13325.

25. *Id.* at 13321, 13326.

overturned the order for violating the Administrative Procedure Act.<sup>26</sup> The court said that the Commission had failed to adequately explain its reasoning for adopting the new fleeting expletive policy.<sup>27</sup>

This set the stage for the Supreme Court's first brush with the *Fox* case (hereinafter referred to as "Fox I").<sup>28</sup> Carter Phillips of Sidley Austin, who would later represent Fox in the constitutional challenge to the fleeting expletive policy, also represented Fox in this instance.<sup>29</sup>

Phillips had generously used profanities during his argument before the Second Circuit.<sup>30</sup> But neither he nor any of the other lawyers dropped a single bomb during the Supreme Court oral argument. Instead, they used only sanitized versions of the words ("f-word" and "s-word").<sup>31</sup> The best explanation came afterwards when Justice Ruth Bader Ginsburg said that the lawyers had been "alerted that some of the justices might find [the use of profanities] unseemly, so only the letters 'f' and 's' were used in our court."<sup>32</sup>

Maybe Phillips should have sworn because the Court ruled against his client, finding that the FCC had complied with the Administrative Procedure Act.<sup>33</sup> But the Court left for another day the constitutional question of whether the fleeting expletive policy violated Fox's freedom of speech.<sup>34</sup>

---

26. *Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n*, 489 F.3d 444, 462 (2d Cir. 2007).

27. *Id.*

28. *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc. (Fox I)*, 556 U.S. 502 (2009).

29. *Id.* at 504.

30. Tony Mauro, *Ginsburg Clears Up Mystery about "Fleeting Expletives" Case*, THE BLT: THE BLOG OF LEGAL TIMES (June 14, 2009, 9:29 AM), <http://legaltimes.typepad.com/blt/2009/06/ginsburg-clears-up-mystery-about-fleeting-expletives-case.html> (noting that Phillips "repeatedly used the real words—not the sanitized version" during the argument before the Second Circuit panel).

31. *Id.*

32. *Id.* Phillips had acknowledged before the oral argument that he would respect such a request from the Court. He told SCOTUSblog he "would not shy away from using these words," but qualified this remark with "[u]nless the Court tells me not to." Lyle Denniston, *Analysis: Might Vulgarity be Quite Proper?*, SCOTUSBLOG (Oct. 30, 2008, 3:34 PM), <http://www.scotusblog.com/2008/10/analysis-might-vulgarity-be-quite-proper>.

33. *Fox I*, 556 US at 516, 529–30. Adam Liptak has suggested that Phillips may have received some "back-channel instruction" not to use the word "fuck" during oral argument, but noted that, by doing so, Phillips may have implicitly "conceded that the word remained radioactive and thus was fit for regulation." Adam Liptak, *A Word Heard Often, Except at the Supreme Court*, N. Y. TIMES, Apr. 30, 2012, available at <http://www.nytimes.com/2012/05/01/us/a-word-heard-everywhere-except-the-supreme-court.html>. Liptak added this aside for his readers: "It will by now have occurred to you that the force of my argument is undercut by my own failure to say the word. You are right." *Id.* By contrast, this author has fearlessly chosen to use the unsanitized version of the word in his Article. His confidence is born from the knowledge that no one actually reads law review articles.

34. *Fox I*, 556 US at 529–30.

That was the issue argued before the Court in January. The *Fox* case had returned to the Court (hereinafter “Fox II”) after the Second Circuit, on remand from *Fox I*, had found the entire FCC indecency regime—not just the fleeting expletive policy—unconstitutional.<sup>35</sup>

The occasion of this argument presented a rare opportunity to examine how the lawyers would navigate the delicate issue of whether to use profanities in their briefs and oral argument. Would the Fox lawyer again refrain from using the offending language in his oral argument before the Court? Would the Fox lawyers sanitize the profanities used in their briefs? And what would the FCC lawyers, who wanted the Court to uphold the agency’s indecency policy, do?

Before examining what the parties did, however, let’s first see how the Second Circuit, whose decision teed-up the case for the Supreme Court, handled the use of profanities.

#### I. THE SECOND CIRCUIT DECISION: UNASHAMED AND UNEXPURGATED

After the Supreme Court upheld the FCC’s fleeting expletives policy on administrative grounds in *Fox I*, it remanded the case to the Second Circuit for a ruling on the policy’s constitutionality.<sup>36</sup> Upon remand, a three-judge panel unanimously condemned the FCC’s entire indecency regime as unconstitutionally vague.<sup>37</sup>

Judge Rosemary Pooler’s opinion was unabashedly pro-speech. The judge described sex and sexual attraction as “among the most predominant themes in the study of humanity since the Trojan War” and the digestive system and excretion as “important areas of human attention.”<sup>38</sup> Given this orientation, she unsurprisingly showed no hesitation in spelling out profanities in all their offensive glory. This was true not only in the court’s recounting of the facts but also in its lengthy legal analysis.<sup>39</sup>

Thus, the court used unsanitized expletives when describing the arbitrariness of the FCC’s indecency policy. So when it expressed dismay that the FCC found it acceptable for the fictional soldiers in *Saving Private Ryan* to say “fuck” and “shit” but not the real life musicians in the documentary *The Blues*, it spelled out each expletive in full.<sup>40</sup> And when it couldn’t decipher the logic behind an agency ruling that *NYPD Blue*

---

35. *Fox Television Stations*, 613 F.3d at 335.

36. *Fox I*, 556 US at 530.

37. *Fox Television Stations*, 613 F.3d at 319.

38. *Id.* at 335.

39. *See, e.g., id.* at 323.

40. *Id.* at 333.

characters could say “dick” and “dickhead” but not “bullshit,” it didn’t bowdlerize the words.<sup>41</sup>

Notwithstanding this strong free speech orientation, the court still hinted at the end of its opinion that a different indecency policy might pass constitutional muster.<sup>42</sup> But it thought that the current policy, with its vague and arbitrary standards, unduly chilled speech.<sup>43</sup>

The Second Circuit relied on this decision a year later to summarily vacate an FCC indecency order against ABC for broadcasting an *NYPD Blue* episode with a seven second shot of a woman’s buttocks.<sup>44</sup> The FCC sought review of both the *Fox* and *ABC* decisions and the Supreme Court granted certiorari in the combined cases on June 27, 2011.<sup>45</sup>

## II. THE FCC’S BRIEF: SELECTIVELY SANITIZING TO HIGHLIGHT THE REALLY BAD STUFF

In its brief to the Supreme Court, the FCC provided two alternative grounds for overturning the court of appeals decision.

As a procedural matter, the FCC claimed that the lower court erred when it considered a facial challenge to the indecency regime without first requiring Fox and ABC to show that the law as applied to them was unconstitutionally vague.<sup>46</sup> The FCC contended that neither Fox nor ABC could sustain such an “as applied” challenge because both had ample notice from past FCC rulings that their broadcasts would be actionable.<sup>47</sup>

As a substantive matter, the FCC insisted that its indecency regime should survive a facial challenge. It rejected the networks’ argument that the regime is impermissibly vague, countering that numerous agency rulings and a comprehensive policy statement ensure that broadcasters have adequate guidance as to what material is considered indecent.<sup>48</sup> It also refuted the networks’ contention that technological developments had rendered *Pacifica* obsolete.<sup>49</sup> It argued that broadcast programming, even with the rise of cable programming and the Internet, still “maintains a

---

41. *Id.* at 330.

42. *See id.* at 335.

43. *Id.*

44. *ABC, Inc. v. Fed. Comm’n Comm’n*, 404 F. App’x. 530, 535 (2d Cir. 2011).

45. *Fox Television Stations v. Fed. Comm’n Comm’n*, 613 F.3d 317 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2011).

46. Brief for the Petitioners at 24–32, *Fed. Comm’n Comm’n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 3947560, at \*\*24–32.

47. *Id.* at 27–32.

48. *Id.* at 33–36.

49. *Id.* at 36–53.

dominant presence in American life and culture” and continues to be “uniquely accessible” to children.<sup>50</sup> And it rejected the argument that new technologies like the V-Chip are an effective alternative to government regulation of indecency.<sup>51</sup>

The FCC tried to bolster its legal argument through the selective sanitizing of profanities. The court of appeals, for instance, had spelled out the word “bullshit” when it wondered why the FCC had found “bullshit” but not “dick” and “dickhead” to be indecent in an episode of *NYPD Blue*.<sup>52</sup> But when the FCC quoted this passage from the lower court, it sanitized the word “bullshit” while leaving “dick” and “dickhead” untouched, presumably signaling to the justices that the former is qualitatively worse than the latter:

The court of appeals found it problematic that the FCC had “concluded that ‘bull\*\*\*\*’ in a ‘NYPD Blue’ episode was patently offensive” but that “dick,” “dickhead,” “pissed off,” “up yours,” “kiss my ass, and “wiping his ass” were not.<sup>53</sup>

The FCC similarly sanitized the words “fuck” and “shit” wherever they appeared in its brief, implying that the justices (or perhaps their wet-behind-the-ears clerks) needed sheltering from them. Thus, Nicole Richie’s comment at the Billboards Music Awards reads as follows in the FCC brief:

Why do they even call it “The Simple Life?” Have you ever tried to get cow s\*\*\*\* out of a Prada purse? It’s not so f\*\*\*\*ing simple.<sup>54</sup>

Cher likewise says “f\*\*\*\* ‘em” about her critics and Bono describes his Golden Globe Award as “really f\*\*\*\*ing brilliant.”<sup>55</sup>

### III. THE FOX TELEVISION BRIEF: BONO AND CHER UNCENSORED

The lawyers drafting the Fox Television Stations brief had no qualms about giving the justices written material with fully-spelled-out profanities. Whatever concerns might have led Carter Phillips to refrain from using profanities in his *Fox I* oral argument did not constrain him

---

50. *Id.* at 22, 44–47.

51. *Id.* at 47–53.

52. *Fox Television Stations v. Fed. Comm’n Comm’n.*, 613 F.3d 317, 330 (2d Cir. 2010), *cert. granted*, 131 S. Ct. 3065 (2d Cir. 2011).

53. Brief for the Petitioners, *supra* note 46, at 28.

54. *Id.* at 11.

55. *Id.* at 9–10.



from using profanities in his *Fox II* brief.<sup>56</sup> Thus, the expletives used by Bono, Cher, and Nicole were fully spelled out, as was the word “bullshit” from *NYPD Blue*.<sup>57</sup>

Fox’s refusal to sanitize these words was reflected in its claim that the FCC’s indecency rules give the agency “unbounded” discretion:

As the Second Circuit explained, the FCC’s “disparate treatment of [the film] ‘Saving Private Ryan’ and the documentary, ‘The Blues,’” provides one example of the “risk” that the FCC is engaged in “subjective, content-based decision-making.” In “Saving Private Ryan,” the FCC concluded that “the words ‘fuck’ and ‘shit’ were integral to the ‘realism and immediacy of the film experience for viewers,’” and, therefore, were not “shock[ing].” But the FCC found these same words indecent in “The Blues,” a documentary by Martin Scorsese “containing interviews of blues performers and a record producer” intended “to provide a window into [the world of the individuals being interviewed] with their own words.” The FCC found these words in “The Blues” “shocking,” expressly “disagree[ing] that the use of such language was necessary to express any particular viewpoint.”<sup>58</sup>

ABC’s merits brief was similarly unrestrained in spelling out expletives. ABC naturally focused on the FCC’s regulation of broadcast nudity, but like Fox it used the FCC’s disparate treatment of the words “fuck” and “shit” to illustrate the arbitrariness of the agency’s indecency policy.<sup>59</sup>

#### IV. THE BOMBS-FREE ORAL ARGUMENT

While Fox’s lawyers had few qualms about spelling out profanities in their brief, the same was not true when Fox’s counsel of record, Carter Phillips, appeared before the Court. Neither Phillips, nor Seth Waxman who represented ABC, let a single bomb drop.

---

56. Phillips also used fully-spelled-out profanities in the brief he submitted for Fox in *Fox I*. Brief for Respondent Fox Television Stations, Inc. at 3, 11, 13, 25, 27, 31, 40, 41, 42, *Fox I*, 556 U.S. 502 (2009), 2008 WL 3153439, at \*\*3, 11, 13, 25, 27, 31, 40, 41, 42.

57. Brief for Respondents Fox Television Stations, Inc.; NBCUniversal Media, LLC; CBS Broad. Inc.; & FBC Television Affiliates Ass’n at 6–8, *Fed. Comm’n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5373702, at \*\*6–8.

58. *Id.* at 45 (internal citations omitted).

59. Brief for Respondents ABC, Inc., KTRK Television, Inc. and WLS Television, Inc. at 28, *Fed. Comm’n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5373703, at \*28.

Indeed, while there were plenty of references to *Saving Private Ryan*, *The Blues*, the Billboard Music Awards, and *NYPD Blue*, the only speakers to refer to “fuck” and “shit” were Chief Justice John Roberts and Associate Justice Antonin Scalia, both of whom said merely “F-word” and “S-word.”<sup>60</sup> (The transcript index actually has listings for “F” and “S.”)<sup>61</sup>

The only mildly risqué exchange occurred when Seth Waxman mentioned that the FCC was reviewing a complaint brought during the 2008 Olympics about an opening episode that showed a statue “very much like some of the statues that are here in this courtroom, that had bare breasts and buttocks.”<sup>62</sup> This comment apparently prompted Justice Scalia to start scanning the room until Waxman responded:

MR WAXMAN: “[R]ight over here, Justice Scalia.”

(Laughter)

MR. WAXMAN: Well, there’s a bare buttock there, and there’s a bare buttock here. And there may be more that I hadn’t seen. But, frankly, I had never focused on it before. But the point—

JUSTICE SCALIA: Me neither.

(Laughter)<sup>63</sup>

Did Carter Phillips undermine his client’s case by failing to break the profanity barrier? After all, he undoubtedly knew that Nimmer had won in *Cohen* after dropping a bomb and that the Pacifica lawyer had lost when he didn’t. At the same time, Phillips had been previously warned that some justices would be offended by the use of expletives.

Under these circumstances, Phillips was probably wise to refrain from using profanities. This was especially true since there were already strong signals in the *Fox I* decision that the Court was inclined to side with Phillips’ client on the constitutional question. *Fox I* had been decided by a narrow 5–4 majority with Justice Ruth Bader Ginsburg ominously warning in her dissent of “the long shadow the First Amendment casts over what the Commission has done.”<sup>64</sup> More importantly, Justice Clarence Thomas, who had concurred with the majority, wrote separately to “note the questionable viability of the two precedents” supporting “the FCC’s

---

60. Transcript of Oral Argument at 28, 32, Fed. Commc’ns Comm’n v. Fox Television Stations, Inc., 132 S. Ct. 2307 (2012) (No. 10-1293).

61. *Id.* at 61, 67.

62. *Id.* at 47.

63. *Id.* at 47–48.

64. *Fox I*, 556 US 502, 545 (2009) (Ginsberg, J., dissenting).

assertion of constitutional authority” to regulate broadcast indecency.<sup>65</sup> The Roberts Court also had a track record of being strongly protective of free speech rights, even for such loathsome speech as videos displaying animal abuse and protests at military funerals.<sup>66</sup>

Many of the justices also seemed sympathetic to Phillip’s client during the *Fox II* oral argument. Justice Elena Kagan captured the justices’ concern with the indecency policy’s arbitrariness when she openly wondered why the Commission allowed foul language and nudity to be used in *Saving Private Ryan* and *Schindler’s List* but not in *The Blues* and *NYPD Blue*: “[I]t’s like nobody can use dirty words or nudity except for Stephen Spielberg.”<sup>67</sup>

#### V. THE DECISION-FREE SUPREME COURT OPINION

When the Supreme Court finally issued its opinion in June, it was anticlimactic. The networks had sought bold action from the Court. They wanted the Court to overturn its precedent upholding the FCC’s indecency regime by finding that technological advances had rendered the precedent obsolete.<sup>68</sup> Alternatively, they encouraged the Court to follow the Second Circuit’s lead and declare the indecency regime unconstitutionally vague.<sup>69</sup>

But the Court reached neither issue.<sup>70</sup> It never even ruled on the constitutionality of the fleeting expletive rule.<sup>71</sup>

Instead, the Court merely held that the FCC had violated Fox’s and ABC’s due process rights.<sup>72</sup> Neither network, the Court said, had fair notice that their broadcasts would violate the Commission’s indecency policy.<sup>73</sup> To the contrary, their broadcasts aired before the new fleeting expletive policy was adopted and the Commission’s earlier precedent suggested that fleeting expletives and momentary nudity were not actionable.<sup>74</sup>

---

65. *Id.* at 530 (Thomas, J., concurring).

66. *United States v. Stevens*, 130 S. Ct. 1577 (2010) (animal abuse videos); *Snyder v. Phelps*, 131 S. Ct. 1207 (2011) (funeral protests).

67. Transcript of Oral Argument, *supra* note 60, at 54.

68. Brief for Respondents Fox Television Stations, Inc.; NBCUniversal Media, LLC; CBS Broad. Inc.; & FBC Television Affiliates Ass’n at 15–39, *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307 (2012) (No. 10-1293), 2011 WL 5373702, at \*\*15–39.

69. *Id.* at 39–56.

70. *Fed. Commc’ns Comm’n v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2320 (2012).

71. *Id.*

72. *Id.* at 2317–20.

73. *Id.*

74. *Id.*

So, once again, the Court deferred the question of whether the FCC's indecency regime violated the First Amendment. But Justice Kennedy did leave a hint about his own squeamishness toward expletives. In his opinion for the Court he used only sanitized versions of expletives, so Cher, Nicole, and Bono were quoted as saying "f\*\*\*" and "s\*\*\*."<sup>75</sup>

#### CONCLUSION

Without dropping a single bomb during oral argument, the networks' lawyers won the battle for their clients by getting the FCC orders set aside. But the networks' real war over the constitutionality of the FCC's indecency policy was deferred to another day.

When and if that time comes (and we can probably count on celebrities at awards programs to make sure it does), whoever is representing the networks will again have to wrestle with whether to use profanities during oral argument.

"To swear or not to swear," will be the question.

But as for the right answer? Well, who the fuck knows?

Excuse me! I mean, "who the f\*\*\* knows?"

---

75. *Id.* at 2314. Justice Scalia also used sanitized versions of the words in his opinion for the Court in *Fox I. Fox I*, 556 U.S. 502, 508–12 (2009). By contrast, Justice Harlan spelled out the word "fuck" in his *Cohen v. California* decision. *Cohen*, 403 U.S. 15, 16 (1971). In the *Pacifica* decision, Justice Stevens spelled out the word "fuck" in a footnote discussing the *Cohen* case and, more revealingly, attached as an appendix to the Court's decision a verbatim, unexpurgated transcript of George Carlin's Filthy Words routine. *Fed. Comm'n Comm'n v. Pacifica Found.*, 438 U.S. 726, 747 n.25 (1978).