

REGULATING INDECENCY: THE FEDERAL COMMUNICATION COMMISSION'S THREAT TO THE FIRST AMENDMENT

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ABSTRACT

This paper is adapted from a talk given by the author at Duke University School of Law on April 6, 2005. The author argues that the Federal Communication Commission's recent crackdown on television indecency poses a significant threat to First Amendment protections by (1) limiting television viewers' freedom of choice and (2) implying the possibility of punishment for failure to cooperate with the political objectives of the governing party.

INTRODUCTION

¶1 Thanks to Janet Jackson we know now that there is a relationship between a wardrobe malfunction and the revival of American democracy.

¶2 During the 2004 Super Bowl half-time, Justin Timberlake proved that under some circumstances the reach should fall short of the grasp. His hand exposed to the wondering gaze of millions something more metallic than, dare one use the word, titillating. But the major fact of the event was not visual but verbal: Federal Communications Commission (FCC) Chairman Michael Powell announced that he was shocked to the point that he would use the power of government to punish speech² - or at least what lawyers understand to be included within speech: namely, what Joyce called the "ineluctable modality of the visible."

¶3 There are many kinds of shocks: electrical, emotional, intellectual, ideological, causal. In all categories shocks can be divided between silly and serious. You would want to think that Chairman Powell's shock was as silly as the show that shocked him, but sad to say a backwards journey of a million miles begins with a single (albeit silly) step. Similarly, Chairman Powell's shock has led to two very serious alterations in the relationship of the media to democracy.

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² See C. W. Nevius, *FCC Inquiry, Uproar Over Super Bowl Halftime Peep Show*, S.F. CHRON., Feb. 3, 2004, at A1.

¶4 The first is that the FCC has generated the biggest threat to the First Amendment faced by the electronic media since the McCarthy era because it seeks to limit television viewers' freedom of choice. The second is that the federal government has, wittingly or not, obtained and exercised sanctions that can be used to encourage cooperation between private means of publishing information and the political purposes of government. Based on all appearances, the federal government now proposes to alter and limit the independent role of the media in our democratic system. Any government wants to persuade the media, but this one apparently wants to turn broadcasters and cable companies into allies of the Administration's effort to win public support for many political causes. If that fails, at least the electronic media are pressured to constrain both truth telling and investigation.

¶5 All this from a glimpse of forbidden flesh? If it were only a matter of the half-million dollar fine against CBS (currently in litigation), you would not be inclined to agree with me. But that was just, if you excuse the term, the tip of an iceberg of bad government acts curtailing freedom of speech and investigation.

I. LIMITING VIEWERS' FREEDOM OF CHOICE

¶6 Chairman Powell crossed the line between silly and serious not because he disapproved of the Jackson-Timberlake show but because he flip-flopped on his own express commitment to First Amendment values. In a speech to the Media Institute on April 22, 1998 (as a Commissioner before becoming Chairman), he argued for a "single standard of First Amendment analysis that recognizes the reality of the media marketplace and respects the intelligence of American consumers."³ He meant, as all understood, that the rules proscribing indecent broadcast on over the air television but not on cable TV or in print did not withstand First Amendment scrutiny. He also said that "the First Amendment imposes an affirmative obligation [on government] to maximize the number of voices in the marketplace of ideas."⁴

¶7 As Chairman, he did not adhere to either of these principles. As to the latter, he failed to maximize voices by advocating consolidation of ownership in media markets. As to the former, the new FCC Chairman, Kevin Martin, and Senate leaders are now advocating for one rule for all electronic media, just as Michael Powell wanted, but it is an

³ Remarks by Michael K. Powell, Commissioner, Federal Communications Commission, before the Media Institute (April 22, 1998), *available at* <http://www.mediainstitute.org/Speeches/powell-04221998.pdf> (last visited April 6, 2005).

⁴ *Id.*

equally harsh and anti-First Amendment rule they now want applied not just to over-the-air broadcasts, but to cable, as well. Recently, the new Chairman indicated he wanted the cable industry to create a so called "family tier" of programming, and Senate leadership has indicated it may order such programming to be created.⁵ Due to the market power of cable, that tier would then be forced commercially on American consumers.

¶8 This policy is not something that respects the "intelligence of American consumers."⁶

II. PUNISHING BROADCASTERS FOR FAILING TO COOPERATE WITH GOVERNMENT

¶9 In addition to the critique on freedom of choice, government uses now in extraordinary ways the power to punish for alleged indecency. This power acts, many believe, as an implicit threat designed to discourage the news side of the electronic media to broadcast anything, even if true, that would undercut the Administration's efforts to obtain public opinion in favor of their political purposes.

¶10 Imagine the possibility of a television show revealing that the reason there were no accurately stated justifications for invading Iraq was that politics drove the decision. Chairman Powell's distinguished father, former Secretary of State Colin Powell, has publicly acknowledged he misinformed the United Nations about the existence of weapons of mass destruction on the eve of the invasion of Iraq. The Silberman-Robb Report of this March made it clear that Secretary Powell was provided incorrect information as a result of a process that was negligent, perhaps grossly negligent.⁷ The report said it was "hard to deny" that the political pressure of the White House helped produce the incorrect information.

¶11 So it is not beyond supposition that that in real time, in advance of the invasion, a television network wanted to report, based on some investigation, that Secretary of State Powell's claim was bogus, and indeed that Vice President Cheney and President Bush were, wittingly or not, misinforming the country. But imagine also that the FCC had the power to punish any such network not for that report, but for showing content that the FCC considered indecent. And suppose that the FCC would not define the

⁵ See Frank Ahrens, *FCC Head Downplays Regulation, Cable Industry Urged to Handle Decency Issue*, WASHINGTON POST, April 6, 2005, at E1.

⁶ See Powell, *supra* note 3.

⁷ COMMISSION ON THE INTELLIGENCE CAPABILITIES OF THE UNITED STATES REGARDING WEAPONS OF MASS DESTRUCTION, REPORT TO THE PRESIDENT (March 31, 2005) (informally known as the "Silberman-Robb Report"), available at <http://www.wmd.gov/report/> (last visited April 6, 2005).

indecent content in advance and could issue monetary sanctions large enough to bankrupt a station or a producer or even a modest size network. Could that power to punish indecency chill the station's willingness to run the report of its investigation into the weapons issue?

¶12 Let's all stipulate, for the sake of argument, that if fines are big enough and the station's pockets shallow enough, then fines can deter a station from broadcasting something. Moreover, if the station thinks the fine might be very large, because there are no clear rules defining misdeeds, the uncertainty will discourage stations from showing the offending broadcast.

¶13 You might think the FCC would give stations advance notice of whether a particular show would be fined, but that does not happen. The FCC stands on the principle of no prior restraint:⁸ it will threaten fines big enough to discourage a station from putting a show on the air, but it will not be clear about what will draw a fine and it will not help a station by telling it in advance whether broadcasting a particular show would be illegal. This particular approach obviously maximizes the deterrence of anything the FCC might not like. It also turns the prohibition against prior restraint on its head. The FCC, in effect, issues a blanket warning that anything might be offensive, so everything is at least somewhat restrained, and nothing is clearly acceptable prior to being broadcast.

¶14 Now you can look up the FCC rules.⁹ However, their uselessness is revealed by the fact that it took the FCC three months to decide that the movie *Saving Private Ryan* was not indecent!¹⁰

⁸ See *Powell Tackles VoIP, DTV, TV Indecency*, TELEVISION A.M., May 5, 2004 (describing Chairman Powell's presentation at a National Cable & Telecommunications Association convention where he defined censorship and "prior restraint" as "needing advance approval for content").

⁹ FCC indecency rules are promulgated pursuant to 18 U.S.C. § 1464 (2000), which prohibits the utterance of "any obscene, indecent or profane language by means of radio communication." The FCC defines indecent speech as "language that, in context, depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards for the broadcast medium." *In re Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, 19 F.C.C.R. 4975, 4977 (2004). For an overview of FCC indecency regulations, see *id*; FEDERAL COMMUNICATIONS COMMISSION, EB – OBSCENE, PROFANE & INDECENT BROADCASTS (2005), at <http://www.fcc.gov/eb/broadcast/obscind.html> (last visited April 7, 2005).

¹⁰ See *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film "Saving Private Ryan"*, FCC 05-23 (released Feb. 28,

¶15 If you are a TV journalist or a lawyer to a TV journalist and you have some footage from Iraq that contains the actual language of real soldiers putting their lives at risk to fight for freedom, then you know that your broadcast is the *real* reality TV. It is the true-life version of Steven Spielberg's World War Two movie, which was, for all its so-called realism, only based on a true story. But would you dare put that show on the air, if you are not sure whether the FCC will fine you? What if you just do not want to pay lawyers for months or even years to fight for your rights; and, since the rules are so vague and meaningless you could not get a quick win in court? Indeed, you cannot even get the FCC to act quickly. Justice delayed, after all, is justice denied. This is particularly true for the party who is not wealthy enough to pay the bills delay runs up.

¶16 Now suppose that your Iraq footage was part of a story that in general described the American policy as failed, or even worse. In short, suppose you were Michael Moore, or a more restrained and more effective version of Michael Moore. Would you be a little more fearful that the FCC would sanction you for indecency, or at least investigate you in a more costly and detailed way, because your point of view on politics was not acceptable to the government? Suppose further you noticed that a network that is often in alignment with the Administration, rarely fined, but that CBS, for instance, was pressured to fire unceremoniously Dan Rather for running a badly prepared show that reported negatively about George Bush's domestic military service? Does anyone think that unlimited exposure to huge fines for an ill-defined indecency would not deter a network or a station or a producer from news coverage that got on the bad side of the government?

¶17 You might react by saying that the FCC fines only for exposure of certain portions of skin or particular diction, and it would never punish anyone for expressing a political view. I would respond with three facts.

¶18 First, in the 1950s FCC Chairman Doerfer started investigations against TV stations for showing reports done by Edward R. Murrow that were allegedly not sympathetic to famous republican anticommunist Senator Joe McCarthy.¹¹ Doerfer was a McCarthy man. McCarthy was such an important figure in the Republican party, similar to

2005), available at <http://www.fcc.gov/eb/Orders/2005/FCC-05-23A1.html> (last visited April 7, 2005).

¹¹ "President Eisenhower...appointed a McCarthy protégé, John C. Doerfer [to the FCC]. Soon after, when [Senator McCarthy] charged that some stations had refused to carry McCarthy campaign speeches (he called this 'a community symptom'), Doerfer set out, under the guise of regulatory investigation, to substantiate this charge." *McCarthyism, the Red Scare, and the Television Industry*, at 17, available at <http://www.37h3r.net/dev/school%20papers/rosbcc.pdf>.

Representative Tom Delay today, that his behavior was tolerated by the Republican White House. Indeed, President Eisenhower put two McCarthy people on the commission, among one the Chairman.

¶19 Second, while the Washington Post was starting in on the Watergate story, President Nixon's staff, perhaps at his request, apparently caused his appointed Chairman at the FCC to begin investigations into the Washington Post's television stations in Florida. The idea, according to then Post publisher Katherine Graham, was to have the investigations cast a cloud on the Post's continued ownership of the stations, so as to undercut the business model that was supposed to further her initial public offering.¹² Of course, the Post saw this as punishment for its pursuit of the story of the Watergate break-ins.¹³

¶20 Third, in addition to these two instances of using the FCC's power so as to discourage negative reporting, the government has occasionally used other ways to constrain what is on television. For example, the PBS network depends on the Corporation for Public Broadcasting for funding, and that funding, in crucial part, comes from Congress. It would be far better if PBS were funded by an independent trust, but Congress has always preferred to stay involved in PBS's content. So in 2005, as CPB and the PBS stations all hope to get their annual Congressional appropriations, Secretary of Education Margaret Spellings was "shocked" - there's that word again - that a cartoon figure on a PBS show visited a gay couple in Vermont. Under political pressure, PBS told stations that airing the show was optional, and many did not.¹⁴

¶21 A complacent nation did not rise up in protest. However, that is because what is not on TV does not happen in political terms, and keeping things off TV is the point of political pressure. If the country does not know what is not shown, then the loss to the democratic process is incalculable. It may be small; it may be large. However, in the American democracy the government may not discourage free speech, even when the silliest of speech, or action, is the grounds for the discouragement.

¶22 Moreover, when sensible people like Chairman Powell are as beguiled as he was in the Jackson case, or as his father was in the deeply serious incident of the United Nations presentation, then the crucial difference between politics and governing is there for all to see.

¹² See KATHERINE GRAHAM, *PERSONAL HISTORY* (1997).

¹³ See *id.*

¹⁴ See Julie Salamon, *Culture Wars Pull Buster Into the Fray*, N.Y. TIMES, Jan. 27, 2005, at E6; Greg Toppo, *Education Secretary Blasts Children's Show*, USA TODAY, Jan. 27, 2005, at 1D.

CONCLUSION

¶23 We can forgive politicians for wanting to use television as a basis for moral commentary, even if the topics are halftime shows or cartoon characters. However, we should not forgive our political leaders too much. First of all, judges and regulators aren't elected, at least in the federal system, and so they really can follow a purist view of the first amendment, without fear or favor. And so they should.

¶24 Second, even elected officials should set limits to their politicking. After all, it is a privilege to serve in public office. In any post, the temptation exists to turn the power of serving into the power to impose an ideology on others. There are always many reasons why that temptation seems to be the path of righteousness. But the glory of America is that we live the way we want precisely because we let others live the way they want.

¶25 That principle of tolerance is the core value of the First Amendment. The same principle is the central reason why the government should not punish TV stations for content, whether silly or serious. It is the reason why the government should not discourage directly or indirectly anyone from reporting on the Iraq war, and to do so more not less, with all the facts they can find, and without fear that their reports or some other show will draw down on them punitive fines. It is the reason why the next FCC Chairman should take very seriously the campaign against indecency, and constrain the effort before serious harm is done.