

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, Assistant Professor, Hawaii Pacific University

“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantive 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 Given that much of the Supreme Court's belief that its decision would not unduly chill broadcasters' speech depended on the narrowness of the holding, and the Commission's assurance of self-restraint in its enforcement,⁴ it is critically important to examine the 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 pursue broadcasters for airing what it views as indecent material.

¹ *Cohen v. California*, 403 U.S. 15, 26 (1971).

² 438 U.S. 726 (1978).

³ *See, e.g., id.* at 750.

⁴ *See, e.g., id.* at 762 n.4.

Part I of this article will provide some background of the *Pacifica* case and will look at the various opinions penned by the Supreme Court with a particular focus on the narrowness of each opinion. This section will also examine the FCC's initial reaction to the decision, including its indecency enforcement actions in the following years. Part II will consider 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 will also analyze 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 will look at the Commission's enforcement tendencies after the April 1987 orders up to the present, including an examination of the FCC's 2001 Policy Statement, which attempted to provide broadcasters with guidance on the indecency issue. Part III will culminate in the recent whirlwind of activity, from the *Golden Globe Awards* decision issued in March 2004, to the recent passage of "broadcast decency" bills in Congress. Throughout, this article will consider whether the Commission has shown the restraint the Supreme Court relied upon in *Pacifica*, and in the end, concludes it has not. By failing to do so, the Commission continues to erode the limited nature of the original holding and the First Amendment rights of broadcasters in the process.

⁵ *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987); *Regents of the Univ. of Cal.*, 2 FCC Rcd 2703 (1987); *Pacifica Found.*, 2 FCC Rcd 2698 (1987).

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

I. The Stage is Set - The *Pacifica* Decision

A. Background

A single FCC complaint gave birth to the *Pacifica* case.⁷ The complaint was filed against a *Pacifica*-owned New York radio station for broadcasting comedian George Carlin's 12-minute monologue entitled "Filthy Words".⁸ The monologue, recorded before a live audience in a California theater, consisted of Carlin's use of the following seven words that he believed you couldn't say on the public airwaves: shit, piss, fuck, cunt, cocksucker, mother-fucker and tits.⁹ The overall tone of the monologue was satirical, poking fun at the words themselves, and questioning why certain words are so offensive. *Pacifica* described the monologue as an attempt by Carlin to explore society's attitudes towards the words.¹⁰

The Carlin material aired on October 30, 1973 at about 2:00 p.m.¹¹ 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.¹² John R. Douglas, a member of Morality in Media filed a complaint with the FCC claiming he heard the broadcast while

⁷ *Pacifica*, 438 U.S. at 730.

⁸ *Id.*

⁹ *Id.* at 729 and app. at 751. A verbatim transcript of Carlin's "Filthy Words" monologue can be found in an appendix to the decision. *Id.* at 751-55.

¹⁰ *Id.* at 730.

¹¹ *Id.* at 729.

¹² *Id.* at 730.

driving with his young son, who was 15 years old.¹³ Mr. Douglas lived in Ft. Lauderdale, Florida at the time of the broadcast and stated in the complaint that he was traveling in New York with his son.¹⁴ There is some speculation that Mr. Douglas was not in the broadcast audience that day due in part to the fact that he resided in Ft. Lauderdale and because the complaint was filed six weeks after the material aired.¹⁵

On February 21, 1975, the Commission ruled in favor of Mr. Douglas' complaint, but did not issue a fine against Pacifica.¹⁶ The order held the FCC had the power to regulate "indecent" broadcasting based on two statutes.¹⁷ The first statute, 18 U.S.C. § 1464, prohibits the utterance of "obscene, indecent, or profane language by means of radio communication,"¹⁸ and the second, 47 U.S.C. § 303(g), requires the Commission to "encourage the larger and more effective use of radio in the public interest."¹⁹

The Commission's indecency finding rested on the assertion that when certain words depict sexual and excretory activities in a patently offensive manner and are repeated over and over at a time when children are undoubtedly in the audience, the language is

¹³ Jeff Demas, *Seven Dirty Words: Did They Help Define Indecency?* 20 COMM. AND LAW 39, 43 (1998).

¹⁴ *Id.*

¹⁵ Robert Corn-Revere, *New Age Comstockery: Exon Vs. The Internet*, Cato Institute (June 28, 1995), available at <http://www.cato.org/pubs/pas/pa-232.html> (citing LUCAS A. POWE JR., *AMERICAN BROADCASTING AND THE FIRST AMENDMENT* 186 (Berkeley: University of California Press, 1987)).

¹⁶ *Pacifica*, 438 U.S. at 730.

¹⁷ *Id.* at 731.

¹⁸ 18 U.S.C. § 1464.

¹⁹ 47 U.S.C. § 303(g).

indecent.²⁰ While not advocating an outright ban on indecent material, the Commission proposed treating indecent broadcasts as a “nuisance” that could be channeled and aired only during certain hours.²¹

While the Commission ruled against *Pacifica*, not every commissioner was optimistic about a court upholding 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 felt that Congress was forcing them to pursue the complaint because Congress had been concerned with sexually explicit radio shows for some time.²² The commissioners were aware that the case represented an aspect of FCC regulation that had not yet been directly addressed by the courts: FCC regulation of indecency as opposed to obscenity.²³ The Commission did not expect a favorable ruling from the Supreme Court on the matter,²⁴ which may explain why it decided not to issue a fine in the first place.

Pacifica could have been content to take the Commission’s wrist slap, but the station was historically concerned with free speech issues²⁵ and, therefore, appealed the Commission’s order. On appeal, the D.C. Circuit reversed the FCC’s order, in a 2 to 1

²⁰ *Pacifica*, 438 U.S. at 732.

²¹ *Id.* at 731.

²² Demas, *supra* note 13 at 43.

²³ *Id.* at 42.

²⁴ *Id.*

²⁵ *Id.* at 44.

decision.²⁶ 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.²⁷ The other concluded that 18 U.S.C. § 1464 was a narrow statute intended only to cover obscene language or language not protected by the First Amendment.²⁸ 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.²⁹

B. Enter Stage Left - The Supreme Court Decision

After a denial by the D.C. Circuit for a rehearing *en banc*,³⁰ the Commission pursued the case to the Supreme Court, which granted the Commission's petition for certiorari.³¹ The Court produced a fractured 5-4 decision in favor of the Commission. However, 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. Accordingly, it is important to note the narrow and limited scope of the opinion.

1. Majority Opinion

²⁶ *Id.* at 733.

²⁷ *Id.*

²⁸ *Id.* at 733-34.

²⁹ *Id.* at 734.

³⁰ Demas, *supra* note 13 at 45.

³¹ *Pacifica*, 438 U.S. at 734.

Justice Stevens delivered the majority opinion, in which Chief Justice Burger and Justice Rehnquist joined in full, and in which Justices Blackmun and Powell joined in part.³²

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.³³ 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.³⁴

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, the holding was limited to a broadcast aired in the afternoon of a monologue that repeatedly used “vulgar words” for “shock value”.³⁵ In fact, Carlin used the “seven dirty words” a total of 108 times during his 12-minute monologue. None of the majority justices addressed the implications of extending the FCC’s definition of indecency beyond the Carlin monologue.

³² Justice Stevens wrote the opinion for parts I, II, III and IV-C, with Chief Justice Burger and Justice Rehnquist joining in all parts. Justices Blackmun and Powell joined in parts I, II, III, and IV-C. Justice Powell wrote a concurring opinion, with which Justice Blackmun joined, voicing their disagreement with the Justice Stevens rationale in parts IV-A and IV-B of the opinion.

³³ *Pacifica*, 438 U.S. at 734.

³⁴ *Id.*

³⁵ *See id.* at 747.

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 for material to be considered indecent, the material must contain some “prurient interest,”³⁶ a necessary requirement to a finding of obscenity.³⁷ Pacifica based its argument on the Supreme Court’s decision in *Hamling v. United States*,³⁸ which considered the meaning of indecent in a statute forbidding the mailing of “‘obscene, lewd, lascivious, *indecent*, filthy or vile’”³⁹ material. The Court in *Hamling* held that the statutory words had “many shades of meaning,”⁴⁰ but when taken as a whole the statute was clearly limited to prohibiting only material that could be considered obscene. Pacifica argued that the same reasoning applied to the prohibition against obscene, indecent, and profane broadcasts in 18 U.S.C. § 1464.

The majority rejected Pacifica’s argument on essentially two grounds. First, it noted that while prurient interest is a requirement to an obscenity finding, “the normal definition of ‘indecent’ merely refers to nonconformance with accepted standards of morality.”⁴¹

³⁶ See generally *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985) (defining prurient for purposes of obscenity as “that which appeals to a shameful or morbid interest in sex”). *Id.* at 505.

³⁷ *Miller v. California*, 413 U.S. 15 (1973). In *Miller*, the Supreme Court set forth the following guidelines for the trier of fact before finding material indecent: (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 applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.*

³⁸ 418 U.S. 87 (1974).

³⁹ *Pacifica*, 438 U.S. at 740 (quoting 18 U.S.C. § 1462) (alternation in original).

⁴⁰ *Pacifica*, 438 U.S. at 740.

⁴¹ *Id.* This definition is from Webster’s dictionary. *Id.* at 737 n.14.

Additionally, 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. Thus, the majority held that “there is no basis for disagreeing with the Commission’s conclusion that indecent language was used in this broadcast.”⁴²

Pacifica also argued that the Commission’s order restricted speech protected by the First Amendment because the Commission’s definition of indecency was overbroad.⁴³ 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. Since the FCC order was “issued in a specific factual context,”⁴⁴ the Court declined to consider whether the “medicine” prescribed by the FCC would result in some broadcasters self-censorship of material protected by the First Amendment.⁴⁵ 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 lied only at the periphery of First Amendment concern.⁴⁶ The majority’s consideration of the speech’s value is what led to 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.

⁴² *Id.* at 741.

⁴³ *Id.* at 742.

⁴⁴ *Id.* at 742 (quoting *Pacifica Found.*, 59 F.C.C.2d 892, 893 (1976)).

⁴⁵ *Id.* at 743.

⁴⁶ *Id.*

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, couched the question in terms of whether the First Amendment denies the government any power to restrict public broadcast of indecent language under any circumstance.⁴⁷ 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.⁴⁸ However, the majority noted that First Amendment protections are not absolute, listing the established exceptions to protected speech, ranging from fighting words to obscenity.⁴⁹

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.”⁵⁰ Returning to its concern about the value of the speech involved, the Court reasoned, quoting *Chaplinsky*,⁵¹ that certain utterances are not an essential part of the exposition of ideas and are of such slight social value that the

⁴⁷ *Id.* at 744.

⁴⁸ *Id.*

⁴⁹ *Id.* at 745. The Supreme Court has established several categories of unprotected speech, or speech that is deserving of less protection. See *Virginia State Bd. Of Pharmacy v. Virginia 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).

⁵⁰ *Id.* at 747.

⁵¹ *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

benefit from them are outweighed by social interest in order.⁵² In particular, the Court noted that there was no reason to believe the Commission had sanctioned the Carlin monologue for the content it contained, but instead for the words chosen, which the Court reasoned offend for the same reason obscenity offends.⁵³ Implicit in the Court's discussion was the theory that the speech here was of little value and that such factor should be considered 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 broadcasting as a 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"⁵⁴ broadcasting has in the lives of Americans. Second, it reasoned that broadcasting is "uniquely accessible to children...."⁵⁵

Having pieced together its reasoning for allowing the Commission to regulate speech otherwise protected by the First Amendment, the majority concluded by "emphasiz[ing] the narrowness of [its] holding."⁵⁶ The majority went on to limit its holding stating "[w]e

⁵² *Pacifica*, 438 U.S. at 746.

⁵³ *Id.*

⁵⁴ *Id.* at 748.

⁵⁵ *Id.* at 749.

⁵⁶ *Id.* at 750.

have not decided that an occasional expletive in either setting 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.”⁵⁷

2. Concurring Opinion

As noted above, Justices Powell and Blackmun’s concurring opinion took issue with the other three majority Justices 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.⁵⁸ 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.⁵⁹

However, Justices Powell and Blackmun did agree that the language used would be considered by most to be vulgar and offensive.⁶⁰ Notably though, 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 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.”⁶¹

⁵⁷ *Id.*

⁵⁸ *See id.* at 746-47.

⁵⁹ *Id.* at 761.

⁶⁰ *Id.* at 757.

⁶¹ *Id.* at 757 (emphasis added).

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 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."⁶²

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. In fact, there is some argument to be made that on the overbreadth issue, the Court produced only a plurality opinion, as the concurring Justices did not join in parts IV-A and IV-B of the opinion, joining only in part IV-C which 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."⁶³ 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, relying on the Commission's restraint and the fact that the language was used over and over again as a sort of verbal shock treatment. This particular limitation has been eviscerated by the Commission's recent decision in the *Golden Globe*

⁶² *Id.* at 762.

⁶³ *Coe v. Bell*, 161 F.3d 320, 354 (6th Cir. 1998) (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977)).

Awards order, discussed later. 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 still important arguments worth noting in the two dissenting opinions. The first 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, the construction of the word "indecent" in 18 U.S.C. § 1464 to include more than obscenity, while a plausible construction, was not a compelled construction.⁶⁴ Stewart argued that Supreme Court practice is to avoid constitutional confrontation where there is serious doubt as to the statute's constitutionality.⁶⁵ Since 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, the word indecent should properly be read as meaning no more than obscene.⁶⁶ Because Carlin's monologue was not obscene, the Commission did not have the authority to ban it.

⁶⁴ *Id.* at 778.

⁶⁵ *Id.* at 777-78 n.2.

⁶⁶ *Id.* at 779-80.

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 that "while 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."⁶⁷

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.⁶⁸ Second, the Court did not consider the constitutionally protected interests of those wishing to transmit and receive broadcasts which the Court or the Commission may find offensive.⁶⁹

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 chose to participate in a sort of public discourse carried over the public airwaves.⁷⁰ According to Justice Brennan, "[w]hatever the minimal discomfort suffered by a listener who inadvertently tunes into a

⁶⁷ *Id.* at 762.

⁶⁸ *Id.* at 764.

⁶⁹ *Id.*

⁷⁰ *Id.* at 764-65.

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.”⁷¹

Secondly, Justice Brennan noted that in the past the Court had not prohibited the distribution or access to children material otherwise protected by the First Amendment unless such material had some significant erotic appeal.⁷² He cited the Court’s decision in *Erznoznik v. 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.”⁷³ 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.”⁷⁴ 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 child-rearing, the Court had allowed the Commission to make such decisions for the parent.⁷⁵

⁷¹ *Id.* at 766.

⁷² *Id.* at 767.

⁷³ *Id.* at 768 (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 213-14 (1975)).

⁷⁴ *Id.*

⁷⁵ *Id.* at 770.

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 access of the material to children.⁷⁶ In particular, he reasoned that without any limits, the Commission could use the rationales as justification to regulate any material the Commission found offensive.⁷⁷ He acknowledged that the concurring opinion attempted to avoid such an "unpalatable degree of censorship"⁷⁸ 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.⁷⁹

Noting the trust the Court placed on the Commission's assurances, Justice Brennan threads into his dissent a very 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 12-minute broadcast that repeated over and over words depicting sexual or excretory activities and organs, and did so in a patently offensive manner when children were in the audience.⁸⁰ 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

⁷⁶ *Id.*

⁷⁷ *Id.* at 771.

⁷⁸ *Id.*

⁷⁹ *Id.* at 772.

⁸⁰ *See id.* at 768 n.7.

monologue and, even then, only if the material was broadcast at times other than the late evening.⁸¹

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 specific facts at hand. The Supreme Court did not address a rule promulgated by the Commission in 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. Second, 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

⁸¹ *Id.*

broadcasters should air controversial programming than [they] are worried about an occasional four-letter word.”⁸² 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.”⁸³

Further limiting the *Pacifica* holding was the Commission’s own order leading to the case, which stated that it would be inequitable for the FCC to hold a licensee responsible for indecent language broadcast during live coverage of a news making event.⁸⁴ In addition, an FCC order issued shortly after the *Pacifica* case demonstrated the narrowness with which the Commission initially viewed the holding. The order was issued in response to a Morality in Media petition to deny a noncommercial educational station, WGBH-TV, its license renewal claiming that the station had consistently broadcast offensive and vulgar material harmful to children.⁸⁵ The Commission granted the station its license renewal, holding it could not deny the license simply because the material was “offensive to some or even a substantial number of listeners.”⁸⁶ 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

⁸² Demas, *supra* note 13 at 49 (quoting *Which Way the Wind Blows at the FCC after WBAI*, BROADCASTING, July 24, 1978, at 31).

⁸³ James C. Hsiung, *Indecent Broadcast: An Assessment of Pacifica’s Impact*. COMM. AND LAW 41, 42 (1998) (quoting *Which Way the Wind Blows at the FCC after WBAI*, BROADCASTING, July 24, 1978, at 31-32).

⁸⁴ *Pacifica Found.*, 59 F.C.C.2d 892, 893 n.1 (1976)

⁸⁵ *WGBH Educ. Found.*, 69 F.C.C. 2d 1250, 1250-51 (1978).

⁸⁶ *Id.* at 1252.

children. The Commission stated that it intended “strictly to observe the narrowness of the *Pacifica* holding”⁸⁷ reasoning that *Pacifica* was limited to language that was “repeated over and over as a sort of verbal shock treatment.”⁸⁸

In another instance of early FCC restraint, in 1983 the Commission denied a complaint by the American Legal Foundation (“AFL”), which argued that a radio station’s programming violated 18 U.S.C. § 1464 by airing indecent material.⁸⁹ The AFL claimed that the station aired words such as “motherfucker” and “shit” repetitively on its programs.⁹⁰ However, the Commission held that the AFL failed to make a case that the station violated the indecency statute and noted that the complaint showed only isolated use of the alleged language over a three-year license term. 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’”⁹¹ found in Carlin’s monologue. In particular, the Commission noted that the Supreme Court’s ruling in *Pacifica* did not give the Commission the “general prerogative”⁹² to intervene in any case where words similar to those in *Pacifica* were used. The Commission again noted that the Supreme Court relied

⁸⁷ *Id.* at 1254.

⁸⁸ *Id.*

⁸⁹ *Pacifica Found.*, 95 F.C.C.2d 750 (1983).

⁹⁰ *Id.* at 760.

⁹¹ *Id.*

⁹² *Id.*

on the repetitive nature of the Carlin monologue in affirming the Commission's ruling in that case.⁹³

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, since the Court did not make much of an attempt to fashion a definition for use in the future, only noting 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 and increased Congressional concern, the FCC changed course on its enforcement policy, taking its first of several steps in expanding the *Pacifica* holding and its enforcement power.

⁹³ *Id.*

Some of the initial pressure came from various advocacy groups. In June of 1986, Morality in Media (“MIM”) organized a picket of FCC offices after President Reagan reappointed Mark Fowler as chairman of the FCC.⁹⁴ Mr. Fowler’s nomination was resented by various “decency in media” groups because, in their opinion, he hadn’t done enough about indecency.⁹⁵ In addition to the picketing, the groups also undertook a letter writing campaign to protest his nomination.⁹⁶

In an apparent attempt at damage control, Mr. Fowler met with Brad Curl, a member of the National Decency Forum in July 1986.⁹⁷ Based on a letter summarizing their meeting, Mr. Curl advised Mr. Fowler that his group would discontinue picketing the FCC office.⁹⁸ Further, Mr. Curl noted his understanding that the FCC General Counsel would cooperate with Mr. Curl’s group on indecency investigations in the future.⁹⁹ 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 that, in response, Mr. Curl’s group would endeavor to submit more and better documented complaints.¹⁰⁰

⁹⁴ 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).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 345.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

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 advising MIM members to make tapes or transcripts of the broadcasts they found offensive in order to facilitate action on the complaints.¹⁰¹ 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. 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 ““as 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.””¹⁰²

Given this backdrop, it is not surprising that complaints filed by Mr. Wildmon against an Infinity-owned radio station in September and November of 1986¹⁰³ led to one of the “air-tight” test cases that Mr. Smith referenced in his letter. The Infinity case, along with two others,¹⁰⁴ would prove to be the opportunity the FCC was looking for to expand its enforcement policy beyond the confines of the *Pacifica* facts and to greatly expand its discretion in determining the meaning of indecency. There is little question that this push

¹⁰¹ *Id.*

¹⁰² *Id.* at 346 (quoting Letter from John B. Smith, General Counsel, FCC, to Donald E. Wildmon, Executive Director, National Federation of Decency (September 19, 1986) (retrieved through a Freedom of Information Act request made by Pacifica Foundation on May 22, 1987). *Id.* at 344.

¹⁰³ *See* Infinity Broadcasting Corp. of Pa., 2 FCC Rcd 2705, n.1 (1987).

¹⁰⁴ Regents of the Univ. of Cal., 2 FCC Rcd 2703 (1987); Pacifica Found., 2 FCC Rcd 2698 (1987).

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,¹⁰⁵ an Infinity-owned station in Philadelphia,¹⁰⁶ and a Pacifica-owned station in Los Angeles,¹⁰⁷ 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, in the orders the Commission determined that it would no longer limit what it considered indecent to a broadcaster's repeated use of one of Carlin's seven dirty words.

The FCC laid out most of the reasoning for its policy change in its 1987 Pacifica 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 USC § 1464, because the Supreme Court's holding in *Pacifica* limited the finding of indecency to "deliberate,

¹⁰⁵ *Univ. of California*, 2 FCC Rcd 2703 (1987). The order focused on the airing of a song entitled "Makin' Bacon" after 10:00 p.m. As likely discerned from the title, the song concerned sex. The lyrics are set out in the Commission's order.

¹⁰⁶ *Infinity*, 2 FCC Rcd 2705 (1987). 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 morning. The excerpts are set out in full in the Commission's order.

¹⁰⁷ *Pacifica*, 2 FCC Rcd 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 10:00 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.

repetitive use of the seven words actually contained in the George Carlin monologue.”¹⁰⁸

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.”¹⁰⁹

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.”¹¹⁰ 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 such language in a patently offensive manner.¹¹¹ 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.¹¹² In fact, it ruled that context must be considered if the speech involves description or depiction of

¹⁰⁸ *Pacifica*, 2 FCC Rcd 2689, at 2703.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at 2704.

sexual or excretory functions to determine whether the material is patently offensive under contemporary community standards.¹¹³

The Commission also reversed course on its prior position that indecent material could be broadcast if aired after 10:00 p.m. and preceded by a warning.¹¹⁴ In making the change, the Commission determined that current evidence on the presence of children in the listening audience after 10:00 p.m. warranted a reexamination of this past position. Based on an audience survey of the Los Angeles metropolitan area which found that approximately 112,000 12-17 year olds were still in the general listening audience between 7:00 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.”¹¹⁵ The FCC made this finding even in light of the Arbitron ratings provided by Pacifica which confirmed that Pacifica’s KPFK’s listening audience rarely consisted of children.¹¹⁶

In holding that all three stations had broadcast indecent material as determined 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

¹¹³ *Id.*

¹¹⁴ *Id.* at 2705.

¹¹⁵ *Id.* at 2706.

¹¹⁶ *Id.*

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.

Along with the April 1987 decisions, the Commission released a general Public Notice setting forth the new standards for regulating broadcast indecency.¹¹⁷ 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.¹¹⁸

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 or thesaurus of indecent words or pictorial depictions it would consider patently offensive.¹¹⁹ According to the Commission, several variables would be considered in the determination of indecent material, including (1) whether the use was vulgar or shocking, (2) whether the use was

¹¹⁷ Public Notice, New Indecency Enforcement Standards to be Applied to all Broadcast and Amateur Radio Licensees, 2 FCC Rcd 2726 (released April 29, 1987).

¹¹⁸ Infinity Broadcasting Corp., 3 FCC Rcd 930, 931 (1978).

¹¹⁹ *Id.* at 931-32.

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.¹²⁰ However, none of the factors would be dispositive, nor would a finding that the material had merit render the material not indecent per se.¹²¹ The Commission was now affording itself wide discretion to determine what would be considered indecent. Even though it acknowledged its previous enforcement standard was clearly easier, both for the Commission and broadcasters, the Commission argued that it could lead to unjustifiable anomalous results.¹²² The Commission did not, however, provide any examples of these so-called anomalous results.

Although the Commission did not clarify much for the petitioners, it did set forth a new guideline for the time of day after which indecent material could be broadcast. The Commission now believed a reasonable risk existed that children may be in the audience at 10:00 p.m.¹²³ Therefore, the Commission noted its “current thinking” was that midnight was late enough “to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision...”¹²⁴

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. The

¹²⁰ *Id.* at 932.

¹²¹ *Id.*

¹²² *Id.* at 930.

¹²³ *Id.* at 937 n.47.

¹²⁴ *Id.*

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.”¹²⁵ Justices Brennan and Marshall were better prognosticators when they noted in their dissent, “I am far less certain than my Brother Powell that...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.”¹²⁶

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. F.C.C.*¹²⁷ (“ACT I”) 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 10:00 p.m. to midnight was arbitrary and capricious.¹²⁸

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, i.e., whether the material in those cases were indecent *as broadcast*. The court quickly noted that the facts at hand presented a much different situation than that confronting the

¹²⁵ *Pacifica*, 438 U.S. at 762 n.4.

¹²⁶ *Id.* at 769.

¹²⁷ 852 F.2d 1332 (D.C. Cir. 1988).

¹²⁸ *Id.* at 1335.

Supreme Court in *Pacifica*. According to the court, the Commission had clearly engaged in a form of rulemaking through its April 1987 orders, its Public Notice, and the Reconsideration Memorandum and Opinion.¹²⁹ Contrary to the Commission’s position in *Pacifica*, the Commission this time intended to apply the new enforcement standards to all broadcasts on a prospective basis.

Addressing the petitioners’ claim of vagueness, the court concluded it did not have the authority to address the question on its merits. According to the D.C. Circuit, since the Supreme Court in its *Pacifica* opinion quoted the FCC’s generic definition with “seeming approval” then implicit within the Supreme Court’s decision was the determination that the definition was not inherently vague.¹³⁰ 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).¹³¹ 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 finding of obscenity.¹³²

¹²⁹ *Id.* at 1337.

¹³⁰ *Id.* at 1339.

¹³¹ *Id.*

¹³² *See Pacifica*, 438 U.S. at 735 and 739-40.

The D.C. Circuit considered the overbreadth challenge on its merits. 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,¹³³ the petitioners argued at the very least, the same should hold true for arguable indecent material.¹³⁴ The FCC countered that it did take into consideration merit in determining whether material is indecent; however it would not consider it a dispositive factor.¹³⁵

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.¹³⁶ As support, the court cited the Supreme Court's decision in *Ginsberg v. New York*,¹³⁷ 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.

¹³³ See *supra* note 37.

¹³⁴ *Action for Children's Television*, 852 F.2d at 1339.

¹³⁵ *Id.*

¹³⁶ *Id.* at 1340.

¹³⁷ 390 U.S. 629 (1968).

Unfortunately, the D.C. Circuit made the same mistake as the concurring Justices did in *Pacifica*. In a footnote on the overbreadth issue, the D.C. Circuit noted that although it would not completely defer to the FCC's judgment on what is indecent, the FCC had assured the court it would continue to give weight to reasonable licensee judgments when deciding to impose sanctions in a particular case.¹³⁸ Because of this "assurance" the court concluded that the chilling effect of the indecency definition would be "tempered by the Commission's restrained enforcement policy."¹³⁹ Given that no indecency fines were imposed on broadcasters from 1978 to 1987, the court most likely felt safe in relying on the Commission's purported restraint. This is an extraordinary amount of trust to place in five commissioners selected by the President, confirmed by the Senate and funded by Congress.

The last issue confronted by the D.C. Circuit was the newly-issued safe harbor hours, altering the times when broadcasters could air indecent material. Reasoning that the Commission is an agency, the court held that the FCC must articulate a rational connection between the facts found and the choices made.¹⁴⁰ According to the court, the Commission failed to do this. Reasoning that 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.¹⁴¹ Based on its safe harbor analysis, the court vacated in part the FCC's

¹³⁸ *Action for Children's Television v. FCC*, 852 F.2d 1332, 1340 n.14.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1341.

¹⁴¹ *Id.* at 1342.

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 10:00 p.m.

It is noteworthy that the court upheld the 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. However, the D.C. Circuit did not require the Commission to do the same for this very important change in its enforcement policy. 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 Bush on October 1, 1988, which required the FCC to enforce the indecency prohibition in 18 U.S.C. § 1464 on a 24-hour basis, starting January 31, 1989.¹⁴² 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 24-hour prohibition.¹⁴³ 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.¹⁴⁴

¹⁴² Department of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, § 608, 1989 U.S. CODE CONG. & ADMIN. NEWS (102 Stat.) 2186, 2228.

¹⁴³ See Crigler & Byrnes, *supra* note 94 at 353.

¹⁴⁴ *Id.*

The question of the amendment's constitutionality was decided by the D.C. Circuit in *Action for Children's Television v. F.C.C.*¹⁴⁵ (*ACT II*). The court, relying on its initial *ACT I* decision, concluded that the Commission must afford some reasonable period of time for the broadcasting of indecent material.¹⁴⁶ As such, neither the Commission nor Congress could completely ban the broadcasting of indecent material, since it is protected First Amendment speech. Acknowledging that while Congress' "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."¹⁴⁷ With the 24-hour ban, the court held Congress had violated broadcasters' First Amendment rights.

The current status of the safe harbor hours was finally determined in the 1995 case of *Action for Children's Television v. F.C.C.*¹⁴⁸ (*ACT III*). In this case, 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 6:00 a.m.¹⁴⁹ However, the Act made an exception for

¹⁴⁵ 932 F.2d 1504 (D.C. Cir. 1991).

¹⁴⁶ *Id.* at 1509.

¹⁴⁷ *Id.*

¹⁴⁸ 58 F.3d 654 (D.C. Cir. 1995).

¹⁴⁹ *Id.*

public radio and television stations that go off the air at or before midnight, allowing such stations to broadcast indecent materials after 10:00 p.m., instead of midnight.¹⁵⁰

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 government interest.¹⁵¹ The court rejected this argument; although the court agreed that such a strict scrutiny analysis was the appropriate standard to use in determining whether the Commission and Congress had appropriately regulated indecent speech, because it is protected by the First Amendment.¹⁵² However, the court noted that based on *Pacifica*, the analysis under the strict scrutiny test was more deferential than for other forms of media.¹⁵³ According to the court, two of the government's proffered reasons for regulating indecent speech were compelling: assisting parent's supervision of their children's exposure to broadcasting and protecting children's psychological health.¹⁵⁴

The court then turned to whether the regulation employed the least restrictive means necessary to accomplish the compelling government interest. Reasoning that fewer children watch television and listen to the radio between midnight and 6:00 a.m. than during the day, and that many adults tune in at such hours, the regulation was, in the

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 659.

¹⁵² *Id.* at 659.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 659-60.

court's opinion, narrowly tailored.¹⁵⁵ However, because Section 16(a) provided an exemption from the midnight to 6:00 a.m. safe harbor for public stations that go off the air at or before midnight, the court concluded that the section affected disparate treatment amongst broadcasters. According to the court, Congress did not explain how this disparate treatment advanced its goal of protecting children, and therefore, the court set aside the more restrictive midnight to 6:00 a.m. safe harbor and remanded the case to the Commission with instructions to limit its ban to the hours of 6:00 a.m. to 10:00 p.m.¹⁵⁶

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 the Supreme Court in *Pacifica* had cited the FCC definition with seeming approval. Just as disheartening was the D.C. Circuit's reliance on the FCC's purported restraint in enforcing its newfound power as the linchpin of its 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 cart blanche. For one thing, the D.C. Circuit acknowledged that any restriction on indecent speech is content based and therefore subject to a strict

¹⁵⁵ *Id.* at 665.

¹⁵⁶ *Id.* at 668.

scrutiny analysis by the courts. Although the court noted more deference would be given to such restrictions in the broadcast medium than in other mediums, it still required that any restrictions on indecent speech be narrowly tailored to support a compelling government 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.¹⁵⁷ Given the FCC's fairly restrained history of enforcement at the time of the *ACT I* decision,¹⁵⁸ the court's reliance on the FCC's assurance may have seemed reasonable. Once again, however, the Commission took the inch and turned it into a mile.

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, forcing broadcasters to guess from year to year when the next crack down on enforcement would come and pondering what the commissioners that year would consider indecent.

¹⁵⁷ *Pacifica Found.*, 2 FCC Rcd, at 2703.

¹⁵⁸ No indecency fines were issued between 1978 and 1987. *See infra* note 160 and accompanying text.

As previously noted, from *Pacifica* until the FCC's April 1987 orders, indecency sanctions by the Commission were nonexistent.¹⁵⁹ In fact, no indecency fines were issued by the Commission between 1978 and 1987.¹⁶⁰ From 1987 until 1997 the Commission issued thirty-six indecency fines.¹⁶¹ Thirty-one of those thirty-six fines were issued between 1989 and 1994, during the bulk of Commissioner Chair Alfred Sikes' tenure.¹⁶² Chairman Sikes' helm at the Commission, however, 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.¹⁶³ However, during three nomination hearings in 1989, including Chairman Sikes' hearing, the nominees were asked what they proposed to do about the indecency problem.¹⁶⁴ 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 Commission perceived indecency to be a problem. Chairman Sikes himself made it clear that enforcement of the indecency statute would be a prominent feature of

¹⁵⁹ JEREMY H. LIPSHULTZ, *BROADCAST INDECENCY F.C.C. REGULATION AND THE FIRST AMENDMENT* 29 (Butterworth-Heinemann) (1997).

¹⁶⁰ 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).

¹⁶¹ *Id.* at 146.

¹⁶² *Id.* at 149.

¹⁶³ *Id.* at 145.

¹⁶⁴ *Id.*

his term.¹⁶⁵ The Commission’s indecency enforcement, however, slowed after 1994, due in part to the fact that the new FCC Chair, Reed Hundt, came to the Commission with a focus on children’s programming as opposed to indecency policing.¹⁶⁶

In addition to facing 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*. In 1994, however, it appeared that broadcasters might get some assistance in understanding the Commission’s application of the definition when, pursuant to a settlement with Evergreen Media Corporation, the Commission agreed to issue guidelines regarding the Commission’s indecency orders.¹⁶⁷ The guidelines were supposed to be released within 90 days of the February 22, 1994 settlement;¹⁶⁸ however, broadcasters would not see the actual policy statement until April 6, 2001. Even seven years later, it still provided little actual guidance.

According to the FCC’s 2001 Policy Statement¹⁶⁹ (“Guidelines”), an indecency finding requires two determinations. First, the material must describe or depict sexual or excretory organs or activities.¹⁷⁰ Second, the broadcast must be patently offensive as

¹⁶⁵ *Id.* at 143.

¹⁶⁶ *Id.* at 149-50.

¹⁶⁷ Milagros Rivera-Sanchez, *How Far is Too Far? The Line Between “Offensive” and “Indecent” Speech*, 49 FED. COMM. L.J., 327, 328 (1997).

¹⁶⁸ *Id.*

¹⁶⁹ Industry Guidance on the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, *Policy Statement*, 16 F.C.C.R. 7999, 23 Comm. Reg. (P & F) 857 (2001).

¹⁷⁰ *Id.* at ¶ 7.

measured by contemporary community standards for the broadcast medium.¹⁷¹ 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.¹⁷²

In making an indecency finding, the Guidelines note that context is “critically important.”¹⁷³ 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.”¹⁷⁴

Also set forth is the following list of “principal factors” the Commission relies 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 or sexual or excretory organs or activities; (3) *whether the material appears to pander or is used to titillate, or whether the material appears to have been presented for its shock value.*”¹⁷⁵ Here again, the

¹⁷¹ *Id.* at ¶ 8.

¹⁷² *Id.*

¹⁷³ *Id.* at ¶ 9.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at ¶ 10.

overall context is crucial and no single factor “generally provides the basis for an indecency finding.”¹⁷⁶

The Guidelines provide 31 case examples meant to help broadcasters determine what kind of material the Commission would consider indecent. Unfortunately, the Commission took great pains to note that the examples were only “intended 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.”¹⁷⁷ 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 28 radio broadcast examples, all but 5 were found to 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, in one example, the Commission found a broadcast of the Howard Stern show indecent for snippets from Stern such as “God, my testicles are like down to the floor...you could really have a party with these...Use them like Bocci balls.”¹⁷⁸ However, a radio station broadcast in South Carolina of “[t]he hell I did, I drove the mother-fucker, oh.” was found not indecent.¹⁷⁹

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at ¶ 11.

¹⁷⁸ *Id.* at ¶ 13.

¹⁷⁹ *Id.* at ¶ 18.

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 substitutes the commissioners' opinions and tastes for that of "contemporary community standards for the broadcast medium." Whether five commissioners can be relied upon to effectively gauge what constitutes contemporary community standards is a crucial question in examining FCC enforcement policy. A recent survey seems to indicate the commissioners have a serious disconnect with much of the broadcasting community they claim to represent.

In March of 2004, Edison Media Research and Jacobs Media polled almost 14,000 listeners of over 40 alternative rock, classic rock, and alternative music radio stations to gauge their views of indecency over the airwaves.¹⁸⁰ The survey posed a series of questions, one of which asked whether their morning radio programs offended respondents.¹⁸¹ 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

¹⁸⁰ Cyndee Maxwell & Max Folkoff, *Rated R for Rock*, RADIO & RECORDS MAGAZINE, April 9, 2004, at 54.

¹⁸¹ *Id.*

their radio programs.¹⁸² 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.¹⁸³ 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 even remain consistent with its previously announced policies or decisions. A good example of this inconsistency is the Commission's March

¹⁸² *Id.*

¹⁸³ *Id.* at 60.

18, 2004 decision regarding U-2's lead singer, Bono, and his acceptance speech at the 2003 *Golden Globe Awards* show.

During a *Golden Globe Awards* program on January 19, 2003, Bono, in accepting an award for "Best Original Song", said "[t]his is really, really, fucking brilliant. Really, really great."¹⁸⁴ The FCC received 234 complaints regarding the broadcast, 217 of which were filed by individuals associated with Parents Television Council.¹⁸⁵

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.¹⁸⁶ 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 that indecent speech is protected under the First Amendment.¹⁸⁷ 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.¹⁸⁸ 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

¹⁸⁴ *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, FCC 04-43, 2004 WL 540339, ¶ 3, n.4 (FCC Re. Mar. 18, 2004).

¹⁸⁵ *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, 18 F.C.C.R. 19859, n.1 (2003).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* at ¶ 4.

¹⁸⁸ *Id.* at ¶ 5.

its scope of prohibiting indecent material.¹⁸⁹ In addition, the Bureau pointed out that the use was isolated and fleeting, and again based on past decisions was not actionable.¹⁹⁰

As with the Congressional activity in the late 80s, Congress, unhappy with the Bureau's decision, acted by jumping into the fray. Both houses of Congress passed resolutions shortly after the Bureau's decision pushing for the Commission's full review and reversal.¹⁹¹ 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, 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 exemplifier.¹⁹² 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.¹⁹³ 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,"

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at ¶ 6.

¹⁹¹ H.R. Res. 482, 108th Cong. (2003); S. Res. 283, 108th Cong. (2003).

¹⁹² *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program, FCC 04-43, 2004 WL 540339, ¶ 8 (FCC Rel. Mar. 18, 2004).

¹⁹³ *Id.*

the Commission quickly determined the use was patently offensive. According to the opinion, the use was “shocking and gratuitous,” and the fact that the use was unintentional was irrelevant.¹⁹⁴

Confronting its obviously contrary precedent on the isolated and fleeting nature of the use, the Commission stated that “while 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.”¹⁹⁵ In particular, the Commission had to repudiate its own words in its April 1987 *Pacifica* 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 requisite to a finding of indecency.”¹⁹⁶ The Commission held that it now departed from that portion of its 1987 *Pacifica* decision, and any other cases 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.¹⁹⁷

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 which launched the appeal to the

¹⁹⁴ *Id.* at ¶ 9.

¹⁹⁵ *Id.* at ¶ 12.

¹⁹⁶ *Id.* at 12 (quoting *Pacifica Found.*, 2 FCC Rcd, 2689, at 2703).

¹⁹⁷ *Id.*

full Commission.¹⁹⁸ 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’”¹⁹⁹

The Commission’s departure from precedent and distancing from its 2001 Policy Statement exemplifies the problem inherent upon any court’s reliance on Commission restraint in protecting broadcasters’ First Amendment rights. As detailed throughout this article, the Commission proclaims to the courts that it will be circumspect in its enforcement of the indecency statute, thus allowing the courts the ability to claim that enforcement will not unduly chill protected First Amendment speech. However, each time the courts have relied upon such FCC 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*.

In fact, the Commission’s decision in the Bono case claimed that its decision was not inconsistent with *Pacifica*, because the Supreme Court had explicitly left the door open as

¹⁹⁸ *Id.* at ¶ 13.

¹⁹⁹ *Id.* at ¶ 14.

to whether the occasional utterance of an expletive would be considered indecent.²⁰⁰ In making this claim, the Commission cites the majority opinion, but specifically sets forth a portion of the concurring opinion.²⁰¹ But the portion of the concurring opinion to which the Commission cites was specifically attempting to note the limited manner of the Court's holding and the restraint with which the Commission had assured the Court it would act in the future.²⁰² There is quite a bit of irony in the fact that the Commission now uses 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. 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 \$27,500 to \$500,000.²⁰³ In addition, the bill provides that the Commission can begin licensee revocation proceedings against a broadcaster with three or more indecency violation findings on its record during any term of its license.²⁰⁴

On June 22, 2004, the Senate passed portions of a bill originally introduced in January as

²⁰⁰ *Id.* at ¶ 16.

²⁰¹ *Id.* at ¶ 16, n. 41.

²⁰² See *Pacifica*, 438 U.S. at 760-61 (explaining that the ruling would not reduce the adult population to hearing what is only fit for children, as the holding does not speak to cases involving the isolated use of offensive words as distinguished from the verbal shock treatment found in Carlin's monologue).

²⁰³ H.R. 3717, 108th Cong. (2004).

²⁰⁴ *Id.*

part of a defense bill.²⁰⁵ The provisions included in the bill would increase fines for broadcasters from \$27,500 to \$275,000 per incident, and for personalities from \$11,000 to \$275,000 per incident; the fines would increase for each incident until reaching the maximum of \$3,000,000 a day.²⁰⁶ In addition, the provisions added would delay for one year the FCC's media ownership rules passed in 2003.²⁰⁷

While this recent flurry of activity indicates an ever-increasing willingness by the Commission and Congress to expand the Commission'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. Since Chairman Powell took office in mid-January 2001, the FCC has issued 18 proposed indecency forfeitures for a total of \$1.4 million in proposed fines.²⁰⁸ That amount exceeds the total amount of about \$850,000 in indecency forfeitures proposed during the prior seven years under two previous Commissions.²⁰⁹ In fact, as of April 19, 2004, the FCC had proposed more fines for broadcast indecency in 2004 alone than the previous 10 years combined.²¹⁰

²⁰⁵ Associated Press, *Senate OKs Higher Fines for Indecency* (June 23, 2004), available at <http://www.findlaw.com>.

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ John Dunbar, *Indecency on the Air, Shock-radio jock Howard Stern remains 'King of All Fines'*, The Center for Public Integrity (April 9, 2004), available at <http://www.publicintegrity.org/telecom/>.

²⁰⁹ *Id.*

²¹⁰ *Id.*

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.²¹¹ Further, the Commission has notified broadcasters that it may begin license revocation proceedings for “serious” indecency violations,²¹² but has not notified broadcasters what it will consider “serious” violations. The Commission has also informed broadcasters that it may treat multiple utterances within a single program as constituting multiple indecency violations, rather than following its traditional per program approach.²¹³ 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 of whether any complaint was even received about a co-owned station.²¹⁴

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 80-year old woman’s breast while she received medical care.²¹⁵ ABC decided to darken a sex scene

²¹¹ *Can You Say That on TV?: An Examination of the FCC’s Enforcement with Respect to Broadcast Indecency: Hearing Before the Subcomm. On Telecommunications and the Internet, 108th cong. (2004)* (testimony of David H. Solomon, Chief of the Enforcement Bureau for the Federal Communications Commission).

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *The Decency Debate*, L. A. TIMES (March 28, 2004) at E26, *reprinted in*, Petition for Reconsideration *In re* Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program FCC 04-43, 2004 WL 540339, (FCC Rel. Mar. 18, 2004), at app., exhibit 2, submitted April 19, 2004 [hereinafter *Petition for Reconsideration*].

on an episode of NYPD Blue, a show that has been airing such fare for a decade.²¹⁶ 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.²¹⁷ Clear Channel fired disk jockey Todd Clem, the host of *Bubba the Love Sponge* and permanently pulled Howard Stern from six markets.²¹⁸ The recent indecency crackdown led one radio insider to claim "[i]t's as if someone turned the thermostat down 20 degrees. It's had a very chilling effect."²¹⁹

Even PBS has not been untouched by the "chilling effect". The producers of a PBS documentary on Emma Goldman agreed to cut a couple of seconds out of a love scene for fear of showing too much cleavage.²²⁰ Ironically, Emma Goldman was a 20th century anarchist and advocate of free speech. 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 30s, 40s and 50s.²²¹ Based on the FCC's *Golden Globe* decision, PBS was

²¹⁶ *Id.*

²¹⁷ *Stations are pruning their Pink Floyd and cleaning up Steve Miller's "Jet Airliner"*, Inside Radio (March 23, 2004), reprinted in *Petition for Reconsideration*, supra note 215, at app., exhibit 2.

²¹⁸ *Petition for Reconsideration*, supra note 215, at 18.

²¹⁹ *Id.* (quoting David Hinckley, *Across the Dial, Tone-Down*, N.Y. DAILY NEWS, Apr. 1, 2004).

²²⁰ Lisa de Moraes, *Even Buttoned-Down PBS Gets Caught in the Wringer*, WASH. POST (Mar. 11, 2004), reprinted in, *Petition for Reconsideration*, supra note 215, at app., exhibit 2.

²²¹ Press Release, When In Doubt Productions, PBS Edits "Offensive" Content From Independently-Produced Documentary *Every Child is Born a Poet: The Life and Work of Piri Thomas* in Order to Comply With New FCC Indecency Rules (Apr. 6, 2004), reprinted in, *Petition for Reconsideration*, supra note 215, at app., exhibit 2.

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.²²² Nebraska Public Television pulled the show completely from its line up.²²³

The recent activity by Congress and the Commission shows no signs of slowing anytime soon. Unlike commissioner statements immediately after *Pacifica*, attempting to assure broadcasters that the Commission was still more interested in robust programming rather than the occasional expletive, members of the current Commission declare that it will use all ammunition in its 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 pursuit of so-called indecency ranges from PBS’ deletion of obscenities spoken by Iraqi soldiers in a Frontline program to an increasing lack of live programming in favor of tape-delayed broadcasts.²²⁴ The overall effect is that today, broadcasters are increasingly likely to adopt the philosophy of “when in doubt, leave it out.”²²⁵

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 12-minute monologue. What has grown out of that limited holding,

²²² *Id.*

²²³ *Id.*

²²⁴ Randy Dotinga, *FCC fines ruffle even ‘Masterpiece Theatre’*, THE CHRISTIAN SCIENCE MONITOR (July 13, 2004).

²²⁵ Mark Brown, *Hear no evil*, Rocky Mountain News

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". The difficulty in allowing a governmental body to judge speech that is protected by the First Amendment is probably best illustrated by Justice Harlan's admonition that "it is nevertheless often true that one man's vulgarity is another's lyric."²²⁶

²²⁶ Cohen v. California, 403 U.S. 15, 25 (1971).