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CASE COMMENT

BLEEPING EXPLETIVES: ADEQUATE PROTECTION OF THE PUBLIC OR UNJUSTIFIED CENSORSHIP? FCC V. FOX TELEVISION STATIONS, INC., 129 S. CT. 1800 (2009)

Chad M. Muir*

The respondent and its affiliates aired two live television broadcasts in which the “F-Word” and the “S-Word” were fleetingly uttered.¹ In response to the offensive language, the petitioner released Notices of Apparent Liability which deemed the fleeting expletives actionably indecent and held the respondent accountable.² Such action marked a change³ from previous policy which weighed against finding indecency for isolated expletives,⁴ and therefore the petitioner declined to enforce sanctions.⁵ The respondent, in turn, petitioned the Second Circuit Court of Appeals for judicial review of the order.⁶ Following the petitioner’s voluntary remand, which allowed all parties to respond and air objections to the charges,⁷ the Second Circuit Court of Appeals heard

* J.D. Candidate, May 2011, University of Florida Fredric G. Levin College of Law. I dedicate this Comment to my wife, Jennifer, and my daughter, Jayne, in gratitude for their unending love and constant support. Also, I would like to thank my parents and siblings for their continual encouragement over the years.

1. FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1808 (2009) [hereinafter *Fox II*]. The first incident occurred during the 2002 Billboard Music Awards, when singer Cher exclaimed, “I’ve also had critics for the last 40 years saying that I was on my way out every year. Right. So f*** ‘em.” *Id.* The second incident occurred during an award presentation at the 2003 Billboard Music Awards and involved an exchange between Nicole Richie and Paris Hilton, principals in a Fox television series called “The Simple Life.” *Id.* Ms. Hilton began the interchange by reminding Ms. Richie to “watch the bad language.” *Id.* However, despite the reminder, Ms. Richie proceeded to ask the audience, “Why do they even call it ‘The Simple Life?’ Have you ever tried to get cow s*** out of a Prada purse? It’s not so f***ing simple.” *Id.*

2. *In re* Complaints Regarding Various Television Broadcasts Between Feb. 2, 2002 and Mar. 8, 2005, 21 FCC Rcd. 2664, 2692 (2006) [hereinafter *In re* Complaints].

3. *See id.*; *see also* Fox Television Stations v. FCC, 489 F.3d 444, 446-47, 456-57 (2007) [hereinafter *Fox I*] (discussing the agency’s ability to change its policy).

4. *See Fox II*, 129 S. Ct. at 1813 (The Commission could rationally decide [that] it needed to step away from its old policy where non-repetitive use of an expletive was *per se* non-actionable. . . .”); *see also In re* Industry Guidance On the Commission’s Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, 16 FCC Rcd. 7999, 8003 (2001).

5. *In re* Complaints, 21 FCC Rcd. at 2692.

6. *Fox II*, 129 S. Ct. at 1808.

7. *Fox I*, 489 F.3d at 453.

the case.⁸ Upon review, the Court of Appeals reversed the order⁹ on the basis that the petitioner's reasoning was inadequate under the Administrative Procedure Act¹⁰ to support sanctions for fleeting expletives.¹¹ The U.S. Supreme Court subsequently granted certiorari, reversed and remanded the appellate court decision, and held that the petitioner's new policy favoring a context-based approach, and its order finding the broadcasts at issue actionably indecent, were neither arbitrary nor capricious.¹²

Although licensed broadcasters enjoy "free and exclusive use of a limited and valuable part of the public domain,"¹³ this benefit is not without responsibility. Indeed, federal laws regulate the nation's airwaves,¹⁴ and these licensees are burdened by such "enforceable public obligations"¹⁵ as the indecency ban.¹⁶ This particular proscription prohibits "utter[ing] any obscene, indecent, or profane language by means of radio communication,"¹⁷ between the hours of 6 a.m. and 10 p.m.¹⁸ Violations may result in fines, license revocations, and denials.¹⁹

The Supreme Court first addressed the proscription of indecent broadcasts in *FCC v. Pacifica Foundation*.²⁰ In this case, a New York

8. *Id.* at 446.

9. *Id.* at 467.

10. *See* Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1966). The Administrative Procedure Act sets forth the full extent of judicial authority to review executive agency action for procedural correctness. *See* 5 U.S.C. § 706; *see also* *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 35 U.S. 519, 545-47 (1978). The Act allows the setting aside of agency action that is "arbitrary" or "capricious." 5 U.S.C. § 706(2)(A).

11. *Fox I*, 489 F.3d at 446-47. The majority was "skeptical that the Commission [could] provide a reasoned explanation for its 'fleeting expletive' regime that would pass constitutional muster." *Id.* at 462.

12. *FCC v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1819 (2009) (*Fox II*).

13. *CBS, Inc. v. FCC*, 453 U.S. 367, 395 (1981) (quoting Office of Commc'n of the United Church of Christ v. FCC, 35 F.2d 994, 1003 (1966)).

14. *See, e.g.*, 18 U.S.C. § 1464 (1994).

15. *See CBS*, 453 U.S. at 395 (quoting *Office of Commc'n*, 35 F.2d at 1003 (1966)).

16. 18 U.S.C. § 1464.

17. *Id.*

18. *See* Public Telecommunications Act of 1992, 47 U.S.C. § 303 (2009); *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995). The statutory prohibition applicable to commercial radio and television stations extends from 6 a.m. to 12 a.m.; however, the District of Columbia Circuit Court of Appeals ruled that because "Congress and the Commission [had] backed away from the consequences of their own reasoning," by allowing some broadcasters to air profanities after 10 p.m., the court was forced "to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10:00 p.m. and midnight." *Id.* at 109.

19. *See* 47 U.S.C. §§ 309(k), 312(a)(6), 503(b)(1).

20. *See FCC v. Pacifica Found.*, 438 U.S. 726, 729 (1978).

radio station aired George Carlin's "Filthy Words" monologue during a mid-afternoon broadcast.²¹ In the twelve-minute monologue, Carlin, a satiric humorist, listed various profanities and repeatedly used these expletives in a variety of colloquialisms concerning sexual and excretory activities and organs.²²

Upon review, the Federal Communications Commission (FCC or Commission) deemed the monologue actionably indecent because it used "language that describes, in terms patently offensive . . . sexual or excretory activities or organs, at times of the day when there is a reasonable risk that children may be in the audience."²³ While upholding the decision against First Amendment challenges,²⁴ the Court noted that the content and total context of the incident was "all-important" in making its decision.²⁵

In the years following *Pacifica*, the Commission has "cautious[ly], but gradually"²⁶ broadened its statutory enforcement against indecent broadcasts.²⁷ The FCC took this trend²⁸ a step further when it declared that a non-literal use of the "F-Word" could be actionably indecent,²⁹

21. *Id.* at 729-30.

22. *Id.* at 729.

23. *In re Citizen's Complaint Against Pacifica Found. Station WBAI(FM), New York, N.Y.*, 56 F.C.C.2d 94, *4. The FCC still uses this definition of indecent speech today. *Fox II*, 129 S. Ct. at 1806.

24. *See Pacifica*, 438 U.S. at 745-51.

25. *See id.* at 750.

26. *Fox II*, 129 S. Ct. at 1806.

27. *Compare In re Application of WGBH Educ. Found.*, 69 F.C.C.2d 1250, *4 (1978) (explaining the Commission's "inten[tion] strictly to observe the narrowness of the *Pacifica* holding," which "relied in part on the repetitive occurrence of the 'indecent' words" contained in Mr. Carlin's "Filthy Words" monologue"), *with In re Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 (1987) (repudiating the view that the Commission's enforcement power was limited to "deliberate, repetitive use of the seven words actually contained in the George Carlin monologue), and *In re Infinity Broad. Corp. of Pa.*, 3 FCC Rcd. 930, *2 (1987) (explaining that the Commission's "highly restricted enforcement standard . . . was unduly narrow as a matter of law and inconsistent with [the Commission's] enforcement responsibilities under *Section 1464*.").

28. *See, e.g., In re Pacifica Found., Inc.*, 2 FCC Rcd. at 2699 (explaining how the Commission preserved a distinction between literal and expletive uses of graphic language despite expanding beyond the "repetitive use of specific words or phrases."); *In re Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8008 (2001) ("[W]here sexual or excretory references have been made once or have been passing or fleeting in nature, this characteristic has tended to weigh against a finding of indecency."). *See also supra* text accompanying note 27.

29. *See In re Indus. Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd. 7999, 8002-03 (2001). The "principal" factors to determine whether a broadcast is actionably indecent include the "explicitness or graphic nature" of the material, the degree to which the material "dwells on or repeats" the provocative material, and the extent to which the material was presented to

even when used only once.³⁰

In the *Golden Globes Order*, NBC aired a live television broadcast of an award ceremony in which Bono, a musician, used a single “F-Word” while accepting an award.³¹ The expletive was not “bleeped,” or edited out, even though technological advances made such edits easier to accomplish without blocking or disrupting a speaker’s entire message.³²

After review by the full Commission,³³ the broadcast was declared “patently offensive” even though the Commission determined that the word was used as an intensifier and not a literal descriptor.³⁴ The *Golden Globes Order* noted that the “F-Word” was “one of the most vulgar, graphic and explicit descriptions of sexual activity.”³⁵ The Commission reasoned that exemption of such language would “likely lead to more widespread use.”³⁶ Therefore, the FCC acted to “safeguard the well-being of the nation’s children from the most objectionable, most offensive language.”³⁷ The FCC also explicitly acknowledged that prior Commission action which suggested that “fleeting broadcasts of the ‘F-Word’” were not actionable, was “no longer good law.”³⁸

Despite expanding statutory enforcement of indecent expletives, the FCC, an executive agency,³⁹ is not without accountability through judicial review.⁴⁰ This principle of oversight was applied in *Motor Vehicle Manufacturers Ass’n of United States, Inc. v. State Farm*.⁴¹

In this case, the National Highway Traffic Safety Administration (NHTSA), an executive agency, issued an order which required newly sold vehicles to be equipped with passive restraint systems.⁴² However,

“titillate,” “pander,” or “shock” the audience. *Id.* at 8003 (emphases deleted). “No single factor generally provides the basis for an indecency finding.” *Id.*

30. See *In re Complaints Against Various Broad. Licensees Regarding Their Airing of the “Golden Globe Awards” Program*, 19 FCC Rcd. 4975, 4976 (2004) [hereinafter *Golden Globes Order*].

31. *Id.* at 4975-76, 4976 n.4. According to NBC, Bono stated “This is really, really, f***ing brilliant. Really, really great.” *Id.* n.4.

32. *Id.* at 4980.

33. *Id.* at 4975-76.

34. *Id.* at 4979.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 4980.

39. See Administrative Procedure Act, 5 U.S.C. § 551 (1994). See also *supra* text accompanying note 10.

40. See, e.g., *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc.*, 435 U.S. 519, 545-49 (1978).

41. See *Motor Vehicle Mfrs. Ass’n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

42. See *id.*

the order was later rescinded.⁴³ Insurance companies petitioned for judicial review⁴⁴ and the Court found that “the agency . . . failed to offer the rational connection between facts and judgment required to pass muster under the arbitrary-and-capricious standard.”⁴⁵

The *State Farm* Court ruled that a policy change need not be justified by reasons more substantial than those required to adopt a policy in the first place.⁴⁶ Instead, an agency need only acknowledge change⁴⁷ and then scrutinize the relevant data and articulate a suitable explanation.⁴⁸ In reviewing the justification, the Court “must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’”⁴⁹ Indeed, the Court cannot supersede the agency’s judgment in favor of its own.⁵⁰ In fact, the Court should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”⁵¹ In this way, executive agencies are subject to judicial review.⁵²

Similar to *State Farm*, the instant Court reviewed the FCC⁵³ and the adequacy of its explanation for a policy change that made the isolated use of expletives actionable.⁵⁴ However, unlike in *State Farm*, here the Court evaluated the adequacy of the Commission’s explanation⁵⁵ and arrived at a different result.⁵⁶ Ultimately, the Court determined that the FCC’s new policy and its order finding the broadcasts at issue actionably indecent were neither arbitrary nor capricious.⁵⁷

While declining to apply any more searching review to agency change,⁵⁸ the instant Court utilized *State Farm* and clarified what is required for an agency change to pass judicial muster.⁵⁹ The majority held that although an agency may sometimes need to account for certain reliance interests on prior policy, it “need not demonstrate to a court’s

43. *Id.* at 38.

44. *Id.* at 39.

45. *Id.* at 56.

46. *Id.* at 41-42.

47. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 696 (1974).

48. *State Farm*, 463 U.S. at 43.

49. *Id.* (citing *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974)).

50. *Id.*

51. *Id.* (citing *Bowman*, 419 U.S. at 286).

52. *See supra* note 39-40, and accompanying text.

53. *See supra* text accompanying notes 41-52.

54. *See Fox II*, 129 S. Ct. at 1813.

55. *Id.* at 1805.

56. *Id.* at 1819.

57. *Id.* at 1812.

58. *Id.* at 1810. The Second Circuit Court of Appeals seemed to apply a more searching review. *See id.*

59. *Id.* at 1810-11.

satisfaction that the explanation for the new policy is better than the explanation for the old."⁶⁰ It is sufficient that a new policy is lawful under statute, justified by good reasons, and believed to be an improvement over prior policy.⁶¹

Applying this standard, the instant Court reasoned that because the FCC declined to impose sanctions and disavowed all prior agency action as bad law,⁶² the Commission realized it was changing its policy.⁶³ In addition, the instant Court deemed the Commission's rationale—namely the patent offensiveness of even fleeting expletives, the futility of preserving a distinction between literal and non-literal uses of profanity, and the desire to rid offensive language of any safe harbors—reasonable in light of the circumstances.⁶⁴ Indeed, the instant Court acknowledged that providing a safe harbor for fleeting expletives would likely cause such language to become more pervasive.⁶⁵

Finally, the majority reflected upon the public policy implications of its ruling.⁶⁶ The Court pointed to the technological advancements which make editing broadcasts easier.⁶⁷ The majority noted that such advancements further support enhanced enforcement policy.⁶⁸ The Court also focused on the importance that the policy change places on total context.⁶⁹ A consideration of the facts of each case will ensure fairness in applying the policy across various broadcasting markets and in different factual scenarios.⁷⁰ In short, the Court reasoned that the relevant factors justified the decision.⁷¹ As a result, the Court reversed the Second Circuit decision and remanded the case for further proceedings.⁷²

The dissent argued that the Commission needed to justify why its prior policy was no longer sound, before it changed course.⁷³ Concluding that shifting policy without more in-depth explanation imperils broadcasters and the public, the dissent would have found the FCC's policy change impermissible.⁷⁴

60. *Id.* at 1811.

61. *Id.*

62. *Id.* at 1812.

63. *Id.*

64. *Id.* at 1812-13.

65. *Id.*

66. *Id.* at 1813.

67. *Id.*

68. *Id.*

69. *Id.* at 1818.

70. *Id.* at 1818-19.

71. *See id.* at 1810, 1819.

72. *Id.* at 1819.

73. *Id.* at 1824-25 (Stevens, J., dissenting).

74. *Id.* at 1826.

Overall, this interplay of arguments between the majority and dissenting opinions portrays the delicate interchange of public policy values that this decision seeks to balance.⁷⁵ It is the age-old tug-of-war between two ideals: the government's protection of society and the freedom from government intervention. The first ideal is often realized at the expense of the second. In this case, the issue is the adequacy of the government's justification for curtailing the broadcast of certain speech.⁷⁶ This decision will undoubtedly affect many groups in various ways.

Perhaps one of the most obvious organizations affected by the change in the law is the FCC.⁷⁷ The instant Court's decision continues the trend of the FCC's cautiously expanding statutory enforcement of indecent broadcasts⁷⁸ past the point of the *Golden Globes Order*.⁷⁹ Because the Commission need only provide a rational and reasonable justification for a change in policy,⁸⁰ there appears to be little check on the FCC's regulatory power. However, if the Court were to substitute its own reasoning for that of the Commission's,⁸¹ then an entirely different and perhaps even greater separation of powers issue would arise.⁸² Thus, there is an interplay between these constitutional and public policy ideals.⁸³

In addition, while expletives "of a fleeting nature" or "made in a fleeting manner" were not previously *per se* actionable,⁸⁴ this is no longer true.⁸⁵ The removal of any safe harbor⁸⁶ for certain profanities means that the FCC could see an increase in the overall level of complaints, which in turn could affect the level of sanctions. In addition, now that *Pacifica's* context-based approach⁸⁷ is the new policy,⁸⁸ the Commission's reviews could take longer, because the Commission is tasked to weigh various factors.⁸⁹ Overall, the instant Court's decision opens the door to a variety of policy changes by the

75. See, e.g., *Fox II*, 129 S. Ct. at 1812-13, 1824-26 (Stevens, J., dissenting).

76. See *id.* at 1805.

77. See *id.* at 1819.

78. See *supra* text accompanying notes 27-28.

79. See *Golden Globes Order*, 19 FCC Rcd. at 4976.

80. See *Motor Vehicle Mfrs. Ass'n of the United States*, 463 U.S. 29, 42 (1983).

81. See *id.* at 43.

82. See *Fox II*, 129 S. Ct. at 1823 (Kennedy, J., concurring in part and concurring in the judgment).

83. See *id.*

84. See *In re Guidance on the Comm'n's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broad. Indecency*, 16 FCC Rcd. 7999, 8003 (2001).

85. See *Fox II*, 129 S. Ct. at 1812.

86. See *In re Pacifica Found., Inc.*, 2 FCC Rcd. 2698, 2699 (1987).

87. See *FCC v. Pacifica Found.*, 438 U.S. 726, 744 (1978).

88. See *Fox II*, 129 S. Ct. at 1812.

89. See *id.* at 1818; *In re Complaints*, 21 FCC Rcd at 13312.

FCC.

The public is another group affected by the change in the law. The Court's holding in *Pacifica*⁹⁰ and in the *Golden Globes Order*⁹¹ portrays its inclination to protect public interests, especially those of children. The instant case reinforces this principle.⁹² Indeed, by making even fleeting expletives actionable, the instant Court stops a slippery slope that could lead to more pervasive use of profanity in media broadcasts, and thus in society at large.⁹³

Finally, broadcasters who transmit these messages across the airwaves will be affected by the change in the law. The instant Court's decision means that broadcasters will be subject to greater regulation and enforcement.⁹⁴ Even an isolated expletive may be actionable as there is no longer any safe harbor provision.⁹⁵ As a result, broadcasters may need to alter the way they operate, either by updating editing technologies,⁹⁶ increasing the delay in transmissions,⁹⁷ or by changing the programming that they transmit.⁹⁸ This could translate into greater financial costs, which could also have a cascading effect on others. Moreover, the ability of the FCC to change its policy means that broadcasters must be able to adapt and transform to occasionally changing public policy.

Overall, in an effort to protect the public and children,⁹⁹ the instant Court has upheld the Commission's change in policy which made the use of fleeting expletives actionably indecent.¹⁰⁰ The instant Court's holding effectively requires broadcasters to better monitor what they put on the air and holds them accountable for any failure to comply with FCC standards.¹⁰¹ Although the holding balances a variety of public policy issues, the more stringent regulation of broadcast programs provides proper protection for families and gives conscientious parents a relatively safe haven for their children.¹⁰²

90. See *Pacifica*, 438 U.S. at 750-51.

91. See *Golden Globes Order*, 19 FCC Rcd. at 4982.

92. See *Fox II*, 129 S. Ct. at 1812-13.

93. *Id.* at 1813.

94. See *supra* text accompanying note 27.

95. See *Fox II*, 129 S. Ct. at 1812-13.

96. See *id.* at 1818-19.

97. See *id.*

98. See *id.* at 1835 (Breyer, J., dissenting).

99. See *id.* at 1812-13 (Majority opinion).

100. See *id.*

101. See *id.*

102. See *id.* at 1812-13; *Fox II*, 129 S. Ct. at 1824-26 (Stevens, J., dissenting).