

Indecency Challenges Proceed Through the Federal Courts



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The Constitutionalist

The federal courts continue to grapple with several cases in which broadcasters have challenged the Federal Communications Commission's authority to regulate broadcast indecency consistent with the First Amendment. In late April 2009, the United States Supreme Court reversed the United States Court of Appeals for the Second Circuit in a 5-4 decision, upholding on procedural grounds the FCC's decision to impose liability on broadcast stations for airing "fleeting expletives." The case, **FCC v. Fox Television Stations, Inc.**, involved a single utterance of the F-word by Cher during the live broadcast of the 2002 Billboard Music Awards show and Nicole Richie's use of the F-word and S-word the following year during the 2003 Billboard Music Awards show, both broadcast by the Fox television network and its affiliates. The FCC found the utterances to be actionably indecent under the agency's policy prohibiting the broadcast of indecent language (outside the safe harbor between 10 p.m. and 6 a.m.), because the 2003 broadcast involved a literal description of excrement and both broadcasts involved the F-word, which the FCC concluded inherently has a sexual connotation.

The Second Circuit Court of Appeals had earlier held that the FCC failed to offer a "reasoned basis," as the law requires, for changing its prior indecency enforcement policy and imposing liability for the broadcast of even a single, fleeting expletive. The Second Circuit, accordingly, struck down the new policy as a violation of the Administrative Procedure Act (APA) and noted that it was therefore unnecessary to reach the question whether the policy violated the First Amendment.

The Supreme Court majority, like the Second Circuit below, declined to reach the First Amendment implications of

the FCC fleeting expletives policy, observing that its constitutionality “will be determined soon enough, perhaps in this very case.” After concluding that the FCC had adequately explained its newly expanded indecency policy under the APA, the Supreme Court returned the case to the Second Circuit with instructions to that court to determine whether the FCC can regulate “fleeting expletives” without running afoul of the First Amendment. In other words, the constitutional question is now squarely presented in the Second Circuit. Previously, the Second Circuit suggested that it would remand the case to the FCC to give the agency an opportunity to support its new policy on constitutional grounds. Whether the lower court will do so now remains to be seen. Briefing in the Second Circuit is scheduled to close in November, with oral argument expected sometime in 2010.

After **Fox** reached the Supreme Court, the FCC petitioned the Court to review the Third Circuit’s decision in the Super Bowl/Janet Jackson “wardrobe malfunction” case. In that case, the Third Circuit, like the Second Circuit in **Fox**, concluded that the FCC had not adequately explained the change in its enforcement policy regarding the regulation of “fleeting images.” The FCC asked the Supreme Court to hold its petition in abeyance until the court decided the **Fox** case. After it issued its decision in **Fox**, the court vacated the Third Circuit’s decision in the Janet Jackson case and remanded it for further consideration by the Third Circuit in light of **Fox**. Briefing in the Third Circuit – addressing the APA and First Amendment issues in light of **Fox** – is ongoing.

If the **Fox** case does return to the Supreme Court, several Justices appear to have signaled their views on the constitutional issues. On the whole, the separate opinions issued by the Supreme Court Justices suggest that several members of the current court do not view the FCC’s new indecency enforcement policy or the indecency statute to be constitutional. Justice Thomas appears to be willing to strike down the regulation of broadcast indecency outright, while Justices Stevens and Ginsburg appear to believe that the FCC’s fleeting expletives policy may be unconstitutional under **FCC v. Pacifica Foundation** 438 U.S. 726 (1978). Although neither Justice Breyer nor Justice Souter hinted at their views, their willingness to overturn the agency’s fleeting expletives policy on administrative law grounds leaves open the question whether they would overrule **Pacifica** on constitutional grounds. (Since the **Fox** case was decided, Justice Souter has been replaced by Justice Sotomayor, whose views on the indecency issue remain to be seen.)

Finally, the FCC’s decision to fine the ABC television network and 52 owned and affiliated television stations 1.4 million dollars for broadcasting an episode of **NYPD Blue** in which a woman’s bare buttocks were exposed for a total of seven seconds remains pending. That case has been appealed to the Second Circuit Court of Appeals, which held oral argument on Feb. 5, 2009. At press time, the Second Circuit has not yet issued its decision.