

Lawyers For The Talent

Entertainment Law

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First Amendment - Indecency

Just as we get comfortable with the notion that speech is either protected or unprotected under the First Amendment, and that there are certain specific categories of unprotected speech, along comes some speech, George Carlin's

Seven Dirty Words routine, in the 1970s, that the Federal Communications Commission wishes to *regulate* but not *ban*.

The words in Carlin's routine are dirty words, but they are not "prurient" or obscene within the meaning of the *Miller* test. They are not fighting words or incitement, defamatory, or a threat. They are not so-called "crime-facilitating speech," like conspiracy or fraud.

Cohen v. California

- [case at Wikipedia](#)

Seven years before *Pacifica*, the United States Supreme Court said, in [Cohen v. California](#), (US 1969), that California could not arrest a man for wearing a jacket that said, "Fuck The Draft."

Absent a more particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display of this single four-letter expletive a criminal offense. [Cohen](#)

Justice John Marshall Harlan II wrote that the f-word was a matter of taste, not law:

How is one to distinguish this from any other offensive word? Surely the State has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. Yet no readily ascertainable general principle exists for stopping short of that result were we to affirm the judgment below. For, while the particular four-letter word being litigated here is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual. [Cohen](#)

Please listen to [George Carlin's 7 Dirty Words routine](#), which is the subject of the litigation in *FCC v. Pacifica*. It's low comedy, but also wise about how the First Amendment works.

Never mind *why* we have tabooed words. Assume we all know we want to ban some dirty words, or some racist words, or some communist words. Carlin's performance dramatizes how difficult it is to define such word categories with precision. Meaning that any attempt to make a list of prohibited words, or a

“speech code,” will ultimately censor protected speech, including protected speech like Carlin’s comedy routine.

Here in 21st century, Carlin’s routine is funny. The words he uses there have lost their charge. They are barely “dirty” or tabooed here in the 2000s. But we have our own tabooed speech. Imagine a Netflix special with a white male comedian doing a routine called, “The Seven Racist Words You Can’t Say On Television”. Funny? I don’t think so.

With that in mind, Read *Pacifica* with care. It’s not too long. I would download and print the entire Westlaw decision and read it. [Gerald Gunther](#), one of the 20th century’s leading constitutional law scholars, called the *Pacifica* case “startlingly bad news,” because it was the first time in the history of the United States that there was [“majority support on the Court of a prohibition of speech because it is offensive to the audience.”](#).

FCC v. Pacifica Foundation

U.S. Supreme Court (1978)

- [case at Google Scholar](#)
- [case at Westlaw](#)
- [case at Wikipedia](#)

Fleeting Expletives

Pacifica is still with us. It’s why, to this day, we don’t usually hear any of Carlin’s seven dirty words on broadcast radio or television during the hours of 6 a.m. to 10 p.m. When a song pushes the limits like Cardi B’s recent *WAP*, at least two song versions appear, one for cable, Internet, and music subscription services, and a “clean” version for broadcast radio and television.

The FCC still purports to regulate [obscenity, indecency and profanity](#) and purports to know these things [when they see and hear them](#).

Pacifica spoke of Carlin’s “barrage” of dirty words, but by the 2000s, the FCC was threatening fines for the broadcast of even a single dirty word during prime time TV.

Please just read *about Fox I* and *Fox II*, so that we are able to explain why *Pacifica* is still with us, even though it no longer makes any sense to make separate rules for cable TV and broadcast television. Don’t they all arrive on the same fiber optic cable or satellite dish?

The dissents in *Fox I and II* spell *Pacifica*'s doom. The handwriting appears to be on the wall.

***FCC v. Fox Television Stations* (2009) (Fox I)**

- [case at Google Scholar](#)
- [case at Westlaw](#)
- [case at Wikipedia](#)

In 2002 and 2003, Fox television network broadcast two controversial Billboard Music Awards shows. In the 2002 show, presenter Cher said of certain of her critics “fuck ’em”; in the 2003 show, presenter Nicole Richie said of the role she played in a popular television show, “Why do they even call it The Simple Life? Have you ever tried to get cow shit out of a Prada purse? It’s not so fucking simple.”

The FCC had previously taken the position, from *Pacifica* onwards, that such fleeting and isolated expletives did not violate its indecency regime, but this time it issued notices of liability to Fox for broadcasting the profane language. The FCC argued that previous decisions referring to “fleeting” expletives were merely staff letters and dicta and did not accurately represent its position on the matter.

Fox appealed the FCC sanctions to the U.S. Court of Appeals for the Second Circuit. The Second Circuit held that the FCC’s liability order was “arbitrary and capricious” under the governing Administrative Procedure Act because the FCC had completely reversed its position on fleeting expletives without giving a proper justification. The Second Circuit also failed to find any evidence that the expletives were harmful.

The case then went to the United States Supreme Court where in a 5-4 opinion written by Justice Scalia, the Court found that the FCC’s indecency rulings were not “arbitrary and capricious” under the Administrative Procedure Act. The FCC need not prove that its change in policy is “better” than its prior stance. Rather, the FCC need merely prove that its new policy is “permissible” and that there are good reasons for it, as in this case.

Note that the Supreme Court resolved the administrative law questions without ever reaching the question of whether the FCC’s regulations violated Fox’s First Amendment rights.

***FCC v. Fox Television Stations* (2012) (Fox II)**

- [case at Google Scholar](#)

- [case at Westlaw](#)
- [case at Wikipedia](#).

Three years later the case was back and once again the Court dodged the First Amendment question and decided the case on other grounds. The Court ruled 8-0 that the FCC failed to give Fox and ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, the FCC's standards as applied to these broadcasts were vague.

[SCOTUS Blog's Plain English summary](#) of this 8-0 case does the job:

In 2004, the Federal Communications Commission, the government agency that regulates radio and television stations (and, sometimes, those stations' networks), changed its policy on what it considers "indecent" and thus could not be put on radio or TV between 10 a.m. and 6 p.m., because children might be watching or listening. Before 2004, the FCC banned vulgar four-letter words only if they had been repeated over and over again. With the change in policy, the FCC said it would ban even a single, fleeting use of such a word during the daytime hours. It later said that it would also ban even momentary glimpses, on TV, of a nude body if it was shown in a sexually provocative way. The Supreme Court was asked in this case to decide whether it violates the free-speech rights of radio and TV stations, and their networks, for the FCC to impose such a broad ban. In deciding the case, however, the Court did not settle whether the FCC policy violated the First Amendment. Instead, it held only that broadcasters had a constitutional right to be warned in advance of what the new policy prohibited, and the FCC had imposed its changed policy after the broadcasts had aired, rather than before. The FCC has the option now of reconsidering its policy, or keeping it as is, and awaiting a new constitutional challenge in court. The Court's ruling was by unanimous vote, but Justice Sonia Sotomayor did not participate, because she had some involvement with the case earlier when she was a judge on the Second Circuit Court of Appeals in New York.

Along the way, several Justices all but predicted the demise of *Pacifica* and the FCC's regulation of indecency, most notably Justice Ginsburg, who dissented in *Fox I* and wrote separately "only to note that there is no way to hide the long shadow the First Amendment casts over what the Commission has done. Today's decision does nothing to diminish that shadow."

Three years later, in *Fox II*, Justice Ginsburg wrote a separate concurrence to say that in her view, "the Court's decision in *Pacifica* was wrong when it issued.

Time, technological advances, and the Commission's untenable rulings in the cases now before the Court show why *Pacifica* bears reconsideration."

Indecency On The Internet?

47 U.S. Code § 230

aka The Communications Decency Act ("CDA")

The Act was Title V of the Telecommunications Act of 1996. The amendment that became the Communications Decency Act ("CDA") was added to the Telecommunications Act in the Senate by an 81–18 vote on 15 June 1995. It affected the Internet and online communications in two big ways: First, it tried to give the federal government the power to regulate both indecency (when available to children) and obscenity in cyberspace. Second, Section 230 of the CDA provided that Internet Service Providers (ISPs) and other operators of Internet services are not to be construed as publishers who might be liable for the words of third parties who use their services.

In the CDA, Congress found good policy reasons for protecting ISPs:

"The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity ... and have flourished, to the benefit of all Americans, with a minimum of government regulation ...

In short, Congress found good things on the Internet and sought to protect service providers so they could continue to thrive without fear of liability for what others say. But other portions of the Act sought to criminalize "the knowing transmission of obscene or indecent messages to any recipient under 18 years of age."

This was Congress making a regulatory land grab on the Internet, and even in 1996 the Internet was already the Wild West of content. Recall that *Pacifica* allowed the FCC to regulate, but not ban, indecent speech in broadcasting. The government no doubt expected the United States Supreme Court to give it similar authority to regulate indecency and pornography on the Internet, but the Court said no.

In the landmark case of *Reno v. American Civil Liberties Union* (US 1997), the United States Supreme Court struck down the anti-pornography and indecency provisions of the CDA. The Court took pains to distinguish *Pacifica* and *Ginsberg*, by observing that the Internet was more like newspapers than

broadcasting stations. The Court had a long history of striking down content-based regulations of newspapers. [Miami Herald v. Tornillo](#). The Court reasoned that the Internet was much more like a print medium than a radio or a television.

The provisions were vague and overbroad:

We are persuaded that the CDA lacks the precision that the First Amendment requires when a statute regulates the content of speech. In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another. That burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.

Back in those days, I was younger and angrier, and not yet teaching law, when I penned the following Op-Ed piece in the *New York Times*:

[Dooling, Richard “Most Of These Guys Are Lawyers, Right?” *New York Times* 15 June 1996.](#)

I’ll copy it in here, in case you hit a paywall.

Most of These Guys Are Lawyers, Right?

New York Times, June 15, 1996, by Richard Dooling

Just how much Government time and expense went into drafting, debating and passing the Communications Decency Act, which was declared unconstitutional by a Federal district court last week?

Imagine a second-year law student presented with this question on a constitutional law exam:

Q. May the Government make it a crime punishable by two years in prison and a \$250,000 fine to transmit to minors on the Internet “indecent” material – without defining “indecent”?

Trained to be suspicious of the obvious, our student panics. The statute couldn’t be “void for vagueness,” could it? This couldn’t be the “overbreadth doctrine” learned on the first day of class, could it? Too easy! Must be a trick question. It belongs on a high school civics test.

Yet politicians from two branches of government (President Clinton, a Yale law graduate, signed the bill) spent the last year posturing for the camera, providing

sound bites about protecting the nation's children and expressing their antipathy for high-tech pornographers.

Most of these politicians are lawyers; they presumably knew that such a law would violate everything they ever learned about the First Amendment. But apparently, the free publicity was irresistible.

And now we have a 200-plus-page opinion from the third branch of government telling us that an obviously unconstitutional statute is, well, obviously unconstitutional.

Maybe we should have a separate session of Congress every so often so politicians can pass popular bills while pretending that the Constitution doesn't exist. "It's an election year. Aren't we due for another school prayer bill soon?"

And why stop with that one? How about a Workplace Prayer Act? Or a Respect for Mothers Act? Anybody who knowingly conveys or transmits a bad word about moms shall be punished by two years in prison and a \$250,000 fine. ("Bad" shall be defined by the bill's sponsors on an as-needed basis.) As for a way around those interminable death row appeals, why not an Immediate Public Execution for Flag Desecration Act?

Of course, politicians wishing to oppose such important pieces of legislation would be free to go on the Sunday morning talk shows and admit that they are godless, mom-hating traitors.

You get the idea. At least flag-burning presents some thorny First Amendment issues on the differences between speech and conduct. And separation of church and state is as clear as mud, thanks to a slew of Supreme Court opinions on menorahs and Nativity displays.

But banning anything some politician might consider "indecent," with fines and imprisonment for anybody who guesses wrong? How about the Patently Unconstitutional, Obviously Void for Vagueness Political Posturing Act?

Indecency Lives

In January, 2018, a bipartisan team of senators seeking a compromise on an immigration deal met with President Donald Trump in the Oval Office. Trump rejected their proposals and asked, "Why do we want all these people from shithole countries coming here?"

Cable, newspaper, online and print media erupted with news of the comment, but radio and television broadcasters had to proceed with caution, because Title 18 of the United States Code, Section 1464, still prohibits the utterance of any obscene, indecent or profane language by means of radio communication. The

FCC defines indecency as any language that “depicts or describes sexual or excretory organs or activities and be patently offensive as measured by contemporary community standards for the broadcast medium.”

See, e.g. [President Trump’s “S&!%hole” Remark Shines New Light on FCC’s Ambiguous Policy on Profanity/Indecency](#)

Totally Optional Reading

- David L. Hudson Jr., [*Paul Robert Cohen and “his” Famous Free-Speech Case*](#)