The Big Chill? Congress and the FCC Crack Down on Indecency

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The infamous 2004 Super Bowl half-time incident—in which Justin Timberlake ripped open Janet Jackson's bustier and briefly exposed her right breast to the millions of viewers watching the CBS broadcast—triggered an election-year political frenzy to "clean up the airwaves." Calling the half-time broadcast a "classless, crass, deplorable stunt," Federal Communications Commission (FCC) Chairman Michael K. Powell vowed to begin a "thorough and swift" investigation.[1] Television and radio executives summoned before congressional panels were grilled on what steps they would take to make the airwaves more suitable for family viewing. Congress hastened to act on legislation to toughen the FCC's enforcement of its broadcast indecency rules, which prohibit the airing of indecent, obscene, or profane material between 6 A.M. and 10 P.M.

On March 11, 2004, by a vote of 391-22, the House passed its version of the Broadcast Indecency Act of 2004, which would increase the maximum statutory penalty for an indecency violation from $27,500 to $500,000 and authorize the FCC to begin license revocation proceedings against broadcasters with three or more indecency fines.[2] A similar bill pending before the Senate would authorize the FCC to consider extending its indecency rules to programming judged to be gratuitously violent.[3] The proposed legislation would increase the scope of the FCC's enforcement power by, among other things, authorizing the Commission to fine individual speakers as well as broadcast licensees.

Politicians and regulators have been nearly unanimous in their clamor for stronger indecency enforcement. Politics aside, the notion that the federal government can regulate the content of what is said on television and radio is widely accepted as a legal given. But such a content-based speech regime is an anomaly in First Amendment jurisprudence.

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Although the FCC has been given relatively wide latitude to censor broadcast programming, the U.S. Supreme Court has invalidated parallel government attempts to regulate indecency on cable television and the Internet. The history of the FCC's indecency enforcement, notable for its vague standards and inconsistent outcomes, underscores why the courts should be concerned about allowing the government to police program content on the airwaves.

The FCC's historical record on indecency is troublesome enough. In a radical departure from its previous indecency framework, however, the FCC in March 2004 issued a ruling that demonstrates its willingness to restrict program content even further. Reversing an earlier decision of its Enforcement Bureau, the FCC held that NBC violated the indecency rules when it broadcast live the 2003 *Golden Globe Awards* program, during which the singer Bono said "fucking brilliant" while accepting his award. Although it declined to fine NBC in light of the break from FCC precedent, the Commission held that Bono's statements constituted actionable indecency and profanity.

Apparently abandoning its previous contextual approach to indecency, the FCC held that the use of any variant of the objectionable word would essentially be considered indecent and profane per se and suggested a bright-line rule would be applied to other expletives. A wide range of media groups have attacked the FCC's decision, which is vulnerable on numerous fronts under the First Amendment.

The obvious result of the FCC's new approach to enforcement, and of Congress's consideration of tough legislation increasing indecency penalties by orders of magnitude, is to chill speech. Indeed, this effect could be felt immediately after the Super Bowl when several radio and television networks cancelled certain programming and implemented time-delay devices in an effort to protect themselves against potential indecency violations.

Super Bowl Fallout

The Janet Jackson incident provided a well-timed boost to the FCC's ongoing attempts to enforce indecency regulations more stringently. A week before the Super Bowl, the FCC issued a Notice of Apparent Liability for Forfeiture (NAL) against Clear Channel Communications, Inc., proposing to fine the broadcaster $755,000 for airing indecent material on the *Bubba the Love Sponge* show.[4] This fine, which was the largest single penalty for indecency in the FCC's history, followed an October 2, 2003, NAL in which the FCC proposed fining Infinity Broadcasting Operations, Inc., some $357,000 for the broadcast of an *Opie & Anthony* radio show featuring a contest that awarded points for engaging in sexual activity in public places—one of which included St. Patrick's Cathedral in New York.[5] On March 12, 2004, the FCC released an NAL in the amount of $247,500 against Clear Channel for its broadcast of the *Elliott in the Morning* show.[6] Other than the $1.7 million paid by Infinity in 1995 to settle numerous indecency complaints related to Howard Stern's show,[7] these recent fines represent far and away the largest forfeitures the FCC has ever sought for airing material found to be indecent.

The FCC has made clear that these recent large fines are part of a concerted effort to increase the deterrent effect of its indecency rules on broadcasters. Several Commissioners have explicitly stated that the FCC's previous enforcement regime lacked any teeth and that radio and television broadcasters treated the fines as a "cost of doing business."[8] As part of its recent effort to add muscle to its existing statutory authority, the FCC announced plans to impose forfeiture penalties for each individual indecent utterance instead of one fine per program.[9] The pending Senate bill would give the FCC explicit statutory authority for such an approach.[10]

The FCC has also warned that repeat offenders will endanger their licenses if violations continue.[11] Individual Commissioners have also advocated

greater consideration of a broadcaster's record on indecency during license renewal decisions.[12] Increasingly, the full Commission has ignored its own Enforcement Bureau and undertaken review of high-profile indecency cases in an effort to add further gravitas to the FCC's anti-indecency campaign.

The Commissioners are essentially united on the issue of a stricter indecency enforcement regime. Those who have disagreed with the FCC's recent indecency rulings have done so usually on the grounds that they believed the penalties were not stiff enough.[13] Shortly after the Super Bowl, all five Commissioners testified at hearings before the House and Senate in support of the Broadcast Decency Enforcement Act of 2004.[14]

Chairman Powell has been especially vocal, touting the recent large fines imposed on Clear Channel and Infinity and promising to maintain an aggressive stance toward broadcast indecency.[15] He also highlighted a recent ruling imposing the maximum statutory fine on Young Broadcasting in San Francisco for its broadcast of a morning news show featuring the performers from the theater production *Puppetry of the Penis*, in which one performer was inadvertently exposed for less than a second.[16] Noting that this was only the second time in the FCC's history that it enforced an indecency fine against a television station, Powell said that the Commission's action "opened up a new front in our effort to protect children."[17]

Congress Jumps on the Indecency Bandwagon

Not to be outdone, Congress is also considering legislation that would adopt many of the FCC's policy recommendations and—in several instances—go several steps further. Although the Commissioners asked for a tenfold increase in the current maximum statutory fine of $27,500, H.R. 3717, the legislation passed by the House, would increase the maximum to $500,000 for each indecency violation. The Senate version would increase the statutory maximum to $275,000 for the first indecency violation with increasing fines up to $500,000 for the third. The Senate would give the FCC explicit authority to fine violators for each obscene, indecent, or profane utterance, up to a maximum of $3 million during any twenty-four-hour period.[18]

Both bills direct the FCC to consider specific factors in assessing fines for obscene, indecent, or profane utterances, including whether the material was live or scripted; whether the violator had time to review the recorded or scripted material, or in the case of live or unscripted programming, whether the violator had a reasonable basis to believe that it would contain obscene, indecent, or profane material; whether a time-delay mechanism was used; and whether the material was broadcast during programming directed at, or reasonably expected to include, children.[19]

In an obvious response to the Super Bowl incident, the proposed legislation contemplates that fines would increase in proportion to the size of the audience or market served.[20] The bills also authorize the FCC to fine individual artists and speakers in addition to licensees for willful or intentional obscene, indecent, or profane utterances.[21] The proposed legislation directs the FCC to consider past indecency violations in license renewal decisions and directs the FCC to institute license revocation proceedings for licensees that have paid or been ordered by a court to pay fines in three or more indecency proceedings.[22]

The Senate version of the Broadcast Decency Enforcement Act contains even more controversial provisions. One provision directs the FCC to investigate whether technologies such as the V-chip successfully block violent programming, and, if they are found to be deficient, authorizes the FCC to restrict violent programming in the same way it restricts indecent programming.[23] Another would roll back the recent controversial media consolidation rules for one year and direct the FCC to study the relationship between media consolidation and indecent programming.[24]

The *Golden Globe Awards* Decision

Although Janet Jackson received more media coverage, the FCC's Enforcement Bureau unleashed the current political and regulatory campaign to beef up the FCC's indecency regulations by holding that the singer Bono's use of expletives during the live 2003 broadcast of the *Golden Globe Awards* did not constitute actionable indecency. In an October 2003 decision, the Enforcement Bureau held that the broadcast of the U2 front man's use of the word "fuck" twice during his acceptance speech did not violate the FCC's indecency rules.[25] In so holding, the Enforcement Bureau relied on previous FCC decisions holding that "fleeting and isolated" profane remarks did not rise to the level of actionable indecency.[26]

Politicians, however, seized upon the decision's statement that Bono used the word "as an adjective or expletive to emphasize an exclamation"[27] as an example of bureaucratic reasoning gone awry. Both Houses of Congress quickly passed resolutions urging the full Commission to reverse the Bureau's order, and a bill was introduced in the House proposing to amend 18 U.S.C. § 1464 to proscribe eight specific profanities in all their forms, "including verb, adjective, gerund, participle, and infinitive forms."[28]

During the recent congressional hearings, several Commissioners vowed to overturn the Bureau's decision, making good on their promise when the FCC released an opinion and order on March 18, 2004. Rejecting the Bureau's argument that Bono used the expletive for nonsexual emphasis, the full Commission held that the word has an inherent sexual meaning—regardless of the context.[29] The FCC then overturned nearly twenty years of its own precedent holding that isolated or accidental use of the word "fuck" is not actionable indecency.[30] Following its decision, the FCC held that "broadcasters are on clear notice that, in the future, they will be subject to potential enforcement action for any broadcast of the 'F-word' or a variation thereof in situations such as that here."[31] The Commission justified its action by pointing out that the problem could be easily fixed—broadcasters could implement a delay system to censor potentially actionable language.[32]

The FCC also concluded that Bono's utterances constituted profanity, a separate offense under § 1464. Noting that its previous rulings on profane speech were limited to blasphemy, a revelation that surprised many broadcasters and media watchers, the FCC held that it was now extending profanity to cover "vulgar and coarse" language, including the word that attracted so much attention during the *Golden Globe Awards*.[33] Now,

> [b]roadcasters are on notice that the FCC in the future will not limit its definition of profane speech to 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," to the extent such language is broadcast between 6 a.m. and 10 p.m. We will analyze other potentially profane words or phrases on a case-by-case basis.[34]

Although the FCC found that Bono's statements constituted actionable indecency and profanity, the Commission did not fine NBC for the broadcast because its decision represented a departure from FCC precedent.[35]

On April 19, 2004, a coalition of broadcasters and performers—including Viacom, the owner of CBS and MTV; News Corp.; the American Civil Liberties Union; the Screen Actors Guild; the Recording Industry Association of America; and others—petitioned the FCC for reconsideration of the decision.[36] The group argued that the FCC's reversal of scores of cases finding that "isolated" or "fleeting" expletives did not constitute indecency chilled broadcasters' speech and that the newly announced "profanity" regime was hopelessly vague. The group also asked the FCC to require complaints to be supported by credible evidence, to stop imposing fines on a "per utterance" basis, and to "seriously examine" whether the system of content regulation announced in the decision is compatible with the First Amendment.

Self-Censorship Takes Hold

The chilling potential of the FCC's existing indecency rules—and the current effort to make those rules even stricter—was made apparent in the immediate aftermath of the Super Bowl. In the week following that broadcast, NBC announced that it would not air a scene for an upcoming *ER* episode showing the exposed breast of an eighty-year-old woman receiving medical care.[37] NBC made this decision even though the scene would not have violated the FCC regulations for most regions of the country, where it is aired after 10 P.M., during the so-called safe harbor period in which indecency is permitted. For its part, CBS removed Janet Jackson (but not Justin Timberlake) from the list of announcers for the Grammy Awards and implemented a five-second video delay to prevent the broadcast of any potentially risky images.[38] NBC also implemented a ten-second delay during the 2004 *Golden Globe Awards*. Similarly, ABC volunteered to institute a five-second delay during the broadcast of the *Academy Awards* show, to guard against any Bono-like moments—a first in the history of the traditionally live Oscars broadcast.[39] Clear Channel, the subject of several of the largest recent fines, immediately suspended or fired several of its disc jockeys, including Todd Clem, the host of *Bubba the Love Sponge*, and veteran shock jock Howard Stern.[40] Plainly, these events have been driven in large part by the FCC's increased enforcement activity and Congress's apparent intent to increase the penalties significantly.

The FCC and the Seven Dirty Words

Section 1464 of the federal criminal code, which traces its roots to the Radio Act of 1927, makes it a crime to utter any "obscene, indecent, or profane language by means of radio communication."[41] Under 47 U.S.C. § 503(b), the FCC is authorized to impose a forfeiture penalty on broadcast licensees for each violation of § 1464, in an amount not to exceed $27,500.[42] Section 312 of the Communications Act further authorizes the FCC to revoke broadcast licenses for violations of § 1464.[43]

The FCC's regulations prohibit radio and television licensees from broadcasting indecent material between 6 A.M. and 10 P.M.[44] The FCC defines "broadcast indecency" as "language or material, that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs,"[45] a standard that has remained essentially unchanged since the Supreme Court upheld the FCC's authority to enforce indecency restrictions in *FCC v. Pacifica Foundation*.[46]

Pacifica involved the broadcast of George Carlin's "Filthy Words" monologue, in which the comedian discussed the "seven dirty words" that cannot be uttered on the airwaves. A man alleging that he had heard the monologue at 2:00 in the afternoon, while driving with his young son, filed a complaint with the FCC. The FCC found the monologue "patently offensive" and indecent and concluded that it had the authority to regulate indecent speech as a nuisance by "channeling" the times at which it could be broadcast.

By a five-to-four vote, the Supreme Court agreed, holding that the FCC's actions did not violate the First Amendment. Although recognizing that a content-based speech restriction on other media would trigger the strictest constitutional scrutiny, the Court held that the FCC's regulation of indecency on the airwaves was subject to a more lenient standard because of "special problems" associated with broadcasting.[47]

First, according to the Court, the "uniquely pervasive presence" of radio and television in Americans' lives and homes meant that the First Amendment rights of the broadcast speaker must in some circumstances yield to the privacy interests of what the Court viewed as a captive audience.[48] Thus, "[b]ecause the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content."[49] Second, the Court concluded that the government was entitled to restrict indecent broadcast programming to protect children. "The ease with which children may obtain access to broadcast material, coupled with the concerns recognized in *Ginsberg*"—the government's interest in helping parents keep indecent material from their children—"amply justify special treatment of indecent broadcasting."[50]

Outright Ban Not Permissible

Despite the apparent breadth of its rationale, the Court took pains to emphasize that its holding was a "narrow" one.[51] The Court's decision in *Sable Communications v. FCC* further clarified the contours of the FCC's authority over indecent programming, holding that although the FCC could regulate broadcast indecency, a flat-out ban on such material would not be permissible.[52] In *Sable,* the Court struck down FCC regulations implementing a federal statute banning all indecent telephone messages. Noting that "[s]exual expression which is indecent but not obscene is protected by the First Amendment," the Court applied strict scrutiny to the FCC's regulations. In holding that the FCC's total ban on so-called dial-a-porn services was not the least restrictive means to further the government's purported compelling interest, the Court rejected the FCC's argument that its regulations were

consistent with the Court's decision in *Pacifica*. "*Pacifica* is readily distinguishable," the Court explained, "because it did not involve a total ban on broadcasting indecent material."[53]

The precise scope of the FCC's existing indecency rules was hammered out in a series of D.C. Circuit rulings in the late 1980s and early 1990s. In 1988, in response to a D.C. Circuit decision vacating an FCC order that limited the broadcast of indecent programming to a safe harbor period of midnight to 6 A.M., Congress passed a law directing the FCC to restrict indecent programming on a twenty-four-hour basis.[54] The D.C. Circuit responded in kind, striking down FCC regulations that enforced a twenty-four-hour ban on indecent broadcast programming.[55] Congress reacted again, passing legislation requiring the FCC to restrict indecent programming to a safe harbor period between midnight and 6 A.M., but allowing public broadcast stations to broadcast indecent material beginning at 10 P.M.

In *Action for Children's Television v. FCC (Act III)*, the D.C. Circuit, ruling en banc, invalidated the special treatment for public broadcast stations but otherwise upheld the FCC's regulations banning the airing of indecent material between 6 A.M. and 10 P.M. Reiterating that the two "unique characteristics" ascribed to broadcasting—pervasiveness in the home and particular accessibility to children—justified more relaxed First Amendment protection, the court nonetheless purported to review the regulations under strict scrutiny, albeit a strict scrutiny that took into account the "unique context of the broadcast medium."[56] The court concluded that the government had two compelling interests justifying the regulations: an interest in supporting parental authority and an independent interest in the well-being of children. Applying what was essentially a less-than-strict scrutiny, the court held that the FCC's safe harbor period was narrowly tailored to further the government's compelling interests because it adequately balanced the First Amendment rights of adults with the government's interest in protecting children from indecent speech.[57] Since *ACT III,* the FCC has enforced its indecency rule, 47 C.F.R. § 73.3999, which prohibits the broadcast of "any material which is indecent" between 6 A.M. and 10 P.M.

Chief Judge Edwards and Judge Wald authored separate dissents in *ACT III*. Believing that it is "no longer responsible for courts to provide lesser First Amendment protection to broadcasting based on its alleged 'unique attributes,'" Chief Judge Edwards would have invalidated the regulations under the same level of strict scrutiny applicable to cable.[58] As Chief Judge Edwards observed, television cannot rationally be distinguished from other media, especially cable, on the standard grounds advanced to justify reduced First Amendment protection for broadcast speech—spectrum scarcity, pervasiveness, and accessibility to children.

Judge Wald agreed with Chief Judge Edwards and separately emphasized that the FCC's contextual, fact-specific test for indecency was fraught with danger for would-be broadcast speakers:

> Because the FCC insists that indecency determinations must be made on a case-by-case basis and depend upon a multi-faceted consideration of the context of allegedly indecent material, broadcasters have next-to-no guidance in making complex judgment calls. Even an all clear signal in one case cannot be relied upon by broadcasters unless both the substance of the material they aired and the context in which it was aired were substantially similar.[59]

As discussed below, these concerns have been more than borne out in the FCC's indecency enforcement decisions.

What's the Difference?

It is difficult to reconcile the relatively lenient judicial treatment of the FCC's indecency restrictions with the Supreme Court's recent cases rejecting Congress's attempts to regulate indecent speech on cable and the Internet. In *United States v. Playboy Entertainment Group, Inc.,* the Court invalidated a section of the 1996 Telecommunications Act that required cable operators to scramble or restrict hours of access to cable channels primarily dedicated to sexually explicit or indecent programming.[60] Confirming that indecent speech is entitled to full First Amendment protection (at least as to adults), the Court held that the statute imposed a content-based speech restriction subject to strict scrutiny. The Court then concluded that the law's flat ban on indecent speech during certain times—even given concerns about the speech's intrusion into the home—was not the least restrictive means to further the government's interest in promoting parental authority or protecting children.[61]

Further, in *Reno v. ACLU,* the Court struck down provisions of the Communications Decency Act of 1996 (CDA) that criminalized the transmission or display of "indecent" and "patently offensive" material.[62] The Court held that the statutory definitions of *indecency* and *patently offensive*, which mirror the FCC's indecency definitions, were unconstitutionally vague and lacked the constitutional safeguards of the *Miller* obscenity standard. As a result, the Court concluded, enforcement of the CDA would chill constitutionally protected speech, a result that was not justified even by the government's interest in protecting children.[63] As the Court has frequently cautioned, "[t]he Government may not reduce the adult population to only what is fit for children."[64] Although these concerns would appear to apply equally to regulation of indecency on the airwaves, the Court distinguished its holding from *Pacifica* on the "broadcast is different" theory.

Government As Censor

In 2001, the FCC issued a Policy Statement designed "to provide guidance to the broadcast industry" on the FCC's indecency regulations (the policy statement did not apply to obscenity or profane language).[65] The Policy Statement set forth a general test for indecency and gave numerous examples of the FCC's previous rulings in an attempt to provide benchmarks for broadcasters. In many ways, however, the Policy Statement itself illustrates the contradictions inherent in the FCC's indecency standard. Despite the stated intent to provide broadcasters with a map to navigate around potential indecency liability, the FCC's rulings before and after the Policy Statement have only served to muddy the waters.

The Policy Statement articulated the FCC's general framework for making indecency determinations. According to the FCC,

> [i]ndecency findings involve at least two fundamental determinations. First, the material alleged to be indecent must fall within the subject matter scope of our indecency definition—that is, the material must describe or depict sexual or excretory organs or activities. . . . Second, the broadcast must be patently offensive as measured by contemporary community standards for the broadcast medium.[66]

In assessing allegedly indecent programming, the FCC explained that

> [t]he principal factors that have proved significant in our decisions to date are (1) the explicitness or graphic nature of the description of

sexual or excretory organs or activities; (2) whether the material dwells on or repeats at length descriptions of 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.[67]

The FCC nonetheless cautioned that "[n]o single factor generally provides the basis for an indecency finding."[68] To the contrary, the FCC emphasized that each indecency investigation is a highly fact-specific inquiry in which the context of the broadcast is key. As Judge Wald warned in her dissent in *ACT III,* however, this case-by-case, contextual approach is precisely what makes the FCC's indecency rules likely to chill protected speech. Rather than facing "the herculean task of predicting on the basis of a series of hazy case-by-case determinations by the FCC which side of the line their program will fall on,"[69] it is likely that many broadcasters will instead choose to "air" on the side of caution—a scenario that was borne out in the wake of the Super Bowl half-time show.

When Is Nudity Indecent?

The examples used by the FCC in the Policy Statement only serve to highlight the difficulties in applying the FCC's contextual test. For example, in the Policy Statement, the FCC noted that it had declined to sanction as indecent a prime-time broadcast of *Schindler's List*, which included full frontal nudity.[70] The FCC ruled that "full frontal nudity is not *per se* indecent" and concluded that, given the full context of the film and the warnings accompanying the broadcast, the nude scene was not indecent.[71]

By contrast, in its recent decision imposing the maximum statutory fine on a San Francisco television station for a segment on the *Puppetry of the Penis* production, the FCC held that a brief and apparently accidental exposure of a performer's penis was indecent.[72] The show's hosts had informed viewers about the subject matter of the upcoming segment, had warned that parents might want to prevent their children from viewing the interview, and issued several apologies after the accidental exposure. Rejecting the licensee's arguments that these actions, coupled with the extremely brief time of exposure, meant that the indecency complaint should be resolved in the same manner as the *Schindler's List* case, the FCC stated that "although the actual exposure of the performer's penis was fleeting in that it occurred for less than a second, the manner in which the station presented this material establishes, under the third factor, that, in its overall context, the material was apparently intended to pander to, titillate and shock viewers."[73]

The relative merits of *Schindler's List* and *Puppetry of the Penis* are certainly debatable. But the distinction drawn by the FCC appears to be based on an assessment of the quality of the programming—an approach for resolving indecency complaints that is highly subjective and extremely difficult to predict. The FCC candidly admits that the "merit" of a program is one of the factors that it considers in conducting its indecency analysis.[74] In many of its indecency determinations, therefore, the FCC's decision essentially boils down to whether the FCC believes the show is of high or low quality. The FCC makes this determination, moreover, without the safeguards of more stringent constitutional tests, like the "lacks serious literary, artistic, political, or scientific value" requirement of the obscenity standard.[75] If the FCC is permitted to sanction speech that it finds distasteful, the result will be a chilling of protected speech.[76]

Supporters of the FCC's role in policing the airwaves cite to the most extreme examples of shock jock radio as justification for strict indecency rules. But even if such speech were somehow entitled to lesser protection—a view that ignores the value of such shows to the millions of people who listen to them—there is no guarantee that the FCC will be able to distinguish between high- and low- quality speech. More importantly, this view ignores that in some instances, so-called indecency "is inseparable from the ideas and viewpoints conveyed, or separable only with loss of truth or expressive power."[77]

Even if it were permissible in theory to distinguish between "legitimate" and "illegitimate" programming, the FCC's judgments in this area are often questionable. For example, in 1990 the FCC fined a radio station for indecency, based on a program in which the disc jockey read from an interview Jessica Hahn gave to *Playboy Magazine*, detailing her allegations that she was raped by the Reverend Jim Bakker.[78] After reading from the interview, the announcer stated, "'This was rape. Yeah, don't you ever come around here Jim Bakker or we're going to cut that thing off.'" The licensee argued that the broadcast was "newsworthy" and thus not indecent. The Mass Media Bureau rejected this argument, concluding that even if the program concerned an event in the news, "the particular material broadcast was not only exceptionally explicit and vulgar, it was . . . presented in a pandering manner. In short, the rendition of the details of the alleged rape was, in context, patently offensive.'"[79] Judge Wald cited this decision in particular when she observed: "As this one case exemplifies so well, in enforcing the indecency regulations the FCC takes upon itself a delicate and inevitably subjective role of drawing fine lines between 'serious' and 'pandering' presentations. And even a 'serious' presentation of newsworthy material is emphatically not shielded from liability."[80]

The FCC's own confusion over where to draw the line between meritorious and sanctionable is also apparent in a recent case in which the FCC reversed itself on whether the material at issue was actionable indecency. First, in 2001 the FCC issued an NAL against a radio station for the broadcast of the rap song "Your Revolution" by poet and rap artist Sarah Jones.[81] Ms. Jones described the song, which contained explicit as well as implied sexual references, as a parody of rap music that degrades women. The licensee defended the indecency allegation on the ground that the song was a political commentary that was not indecent. The Enforcement Bureau initially rejected that argument, holding that "considering the entire song, the sexual references appear to be designed to pander and shock and are patently offensive."[82] The Enforcement Bureau conceded that the song may have some value as social commentary, but relying on FCC precedent that social value "is not in itself dispositive" in an indecency investigation, issued an NAL for the song's broadcast.[83]

Two years later, however, the Enforcement Bureau rescinded its earlier ruling.[84] None of the underlying facts had changed during the intervening time. Sarah Jones had sued the FCC in federal district court for violation of her First Amendment rights, but the suit was dismissed as unripe. The Enforcement Bureau struggled to explain its reversal: "While this is a very close case, we now conclude that the broadcast was not

indecent because, on balance and in context, the sexual descriptions in the song are not sufficiently graphic to warrant sanction. For example, the most graphic phrase ('six foot blow job machine') was not repeated."[85]

The Enforcement Bureau's later decision does a better job of respecting the First Amendment, but the reversal demonstrates the confusion and ambiguity created by the FCC's current indecency test.[86]

A Shift in FCC Policy?

The FCC's recent decision in *Golden Globe Awards*, coupled with its other efforts to increase indecency enforcement, signals a stricter approach to indecency proceedings that favors bright-line rules over a multifaceted contextual test. In holding that the broadcast of Bono's statements was indecent, the FCC explicitly rejected nearly two decades of its own precedent holding that an isolated or accidental utterance of an expletive, often made in the context of live programming, was not actionably indecent.[87] Now, "[t]he fact that the use of this word may have been unintentional is irrelevant; it still has the same effect of exposing children to indecent language."[88] The FCC stopped just short of holding that any utterance of the word *fuck* is per se indecent, but given the breadth of the FCC's ruling, it is difficult to conceive of a circumstance in which such an utterance would fall outside the rule.[89] In fact, the FCC warned that from now on, any licensee that broadcasts the word will be subject to an indecency proceeding, and suggested that licensees wishing to avoid any potential indecency liability should implement a delay/censoring system for all live broadcasts.[90]

The precise scope of the FCC's new rule is not clear. Although the Commission overruled prior decisions holding that fleeting or accidental utterances were not indecent, the FCC let stand another decision in which it refused to sanction intentional and repeated use of the word *fuck* during a news program. In that case, National Public Radio broadcast wiretap recordings from the John Gotti trial in which the defendant used the expletive both as a noun and an adjective ten times in seven sentences. The FCC concluded that the newscast "was an integral part of a *bona fide* news story" and therefore was not gratuitous, pandering, or "patently offensive."[91]

It is difficult to predict how a similar program would be treated in the wake of the FCC's *Golden Globe Awards* decision. On the one hand, the FCC did not overrule the John Gotti decision; on the other hand, the FCC was careful to state that even a program with political or social value that contained the expletive may be found to be actionably indecent.[92] Although the FCC brushed aside concerns about the potential chilling effect of its new bright-line rule, the uncertainty surrounding the FCC's standard will almost certainly deter broadcasters from airing programs containing any of the "seven dirty words," even if they form an integral part of important political, social, or artistic speech. This represents a radical departure from the Commission's previous approach to indecency, a departure that raises serious constitutional problems.

Protecting Innocent Ears?

The FCC has justified its new bright-line approach as a way to protect children, noting that children are "harmed" by any exposure to indecent material, regardless of whether the word appears in a bona fide news program, an entertainment show, or works of significant social value.[93] Even accepting the empirical assumption that children are so injured, this justification is seriously, if not fatally undermined, by the fact that approximately 85 percent of American households get their television through cable or satellite.[94] As Chief Judge Edwards reasoned in his *ACT III* dissent, "*[i]f* exposure to 'indecency' really is harmful to children, then one wonders how to explain congressional schemes that impose iron-clad bans of indecency on *broadcasters,* while simultaneously allowing a virtual free hand for the real culprits—*cable operators*."[95] Cable television is equally if not more invasive in the lives of Americans, and just as accessible to children. It is therefore difficult to discern any logical basis for treating broadcast and cable differently for purposes of content regulation.

The lack of any principled distinction between the two plainly could cut two ways, however. Although some may argue that the "broadcast is different" rationale should be abandoned and the FCC indecency restrictions invalidated, others will claim that the lack of a real difference means that cable should be regulated as well.[96] Indeed, during the controversy over the Super Bowl, some politicians and Commissioners signaled that they might be willing to extend indecency regulation to cable, and have at the least urged cable operators to develop voluntary standards and offer cable packages limited to "family friendly" programming.[97] Yet even these proponents have acknowledged that extending indecency restrictions to cable would likely face a tough constitutional challenge.

Zero Tolerance Leads to Deep Freeze

The Commission has yet to rule in the Janet Jackson case. As the foregoing discussion makes clear, the FCC's history of indecency enforcement makes it difficult, if not impossible, to predict the outcome of a particular indecency proceeding. Nevertheless, it seems likely—given the FCC's vow to enforce its indecency rules more stringently, political pressure from Congress, and Chairman Powell's personal commitment to shore up indecency enforcement—that the FCC will find the brief exposure of Janet Jackson's breast to be actionably indecent. To reach this result, the FCC will have to work around its previous holding that nudity is not per se indecent. It would not be surprising if the FCC takes the same position as it did in *Golden Globe Awards* and adopts a bright-line rule that any nudity broadcast during the proscribed period will give rise to a potential enforcement action. As with the *Golden Globe Awards* decision, such an approach would impose stiff fines on even accidental or fleeting nudity and would call into question the viability of decisions like that in the *Schindler's List* case, in which the FCC allowed a television network to broadcast the film in its entirety, including a scene featuring full frontal nudity.

The FCC's new zero-tolerance approach to indecency will have a significant chilling effect on speech, an effect that will be magnified if Congress approves the proposed increases in the maximum fine for indecency violations. Coupled with the FCC's intention to impose fines for each separate utterance, the increased maximum fine could translate to an enormous penalty for a single program. For widely broadcast programs, the penalties could be staggering. If the Super Bowl half-time show were found to be indecent, the FCC could conceivably fine each of the nearly 200 televi-

sion stations owned by or affiliated with CBS that broadcast the show. The deterrent effect of such an outcome would be enormous—which essentially is the result sought by the FCC. In its crusade to eradicate "smut" from the airwaves, the FCC has created a regime that will chill significant amounts of protected speech, as demonstrated in the wake of the Super Bowl.

Endnotes

1. News Release, FCC, FCC Chairman Powell Calls Super Bowl Halftime Show a "Classless, Crass, Deplorable Stunt." Opens Investigation (Feb. 2, 2004), *available at* 2004 WL 187406; *see also* News Release, FCC, FCC Commissioner Copps Deplores Outrageous Super Bowl Stunt (Feb. 2, 2004) (stating that thus far the FCC had failed in its duty to "slow down Big Media's race to the bottom"); News Release, FCC, FCC Commissioner Martin Supports the Opening of Investigation Into Broadcast of Super Bowl Halftime Show (Feb. 2, 2004), *available at* 2004 WL 193087 (calling on the FCC to interpret its indecency rules more "stringently").

2. H.R. 3717, 108th Cong. (2004).

3. S. 2056, 108th Cong. (2004).

4. *In re* Clear Channel Broad. Licenses, Inc., Notice of Apparent Liability for Forfeiture, FCC 04–17, 2004 WL 135980 (FCC rel. Jan. 27, 2004).

5. *In re* Infinity Broad. Operations, Inc., Notice of Apparent Liability for Forfeiture, 18 F.C.C.R. 19954 (2003).

6. *In re* AMFM Radio Licenses, L.L.C., Notice of Apparent Liability for Forfeiture, FCC 04–47 (FCC rel. Mar. 12, 2004).

7. Associated Press, *Congress Considers TV, Radio Indecency Fines,* CNN.COM, *at* http://www.cnn.com/2004/ALLPOLITICS/01/28/congress.decency.ap (Jan. 28, 2004). According to the Center for Public Integrity, Howard Stern's show has accounted for half of the $3.95 million in indecency fines imposed by the FCC since 1990. Frank Ahrens, *FCC Says Bono Profanity Violated Standards, but Won't Fine NBC,* WASH. POST, Mar. 19, 2004, at E1.

8. *E.g., In re* Clear Channel, 2004 WL 135980 (dissenting statement of Commissioner Copps) ("'Cost of doing business fines' are never going to stop the media's slide to the bottom.").

9. *E.g., id.* (separate statement of Chairman Powell).

10. S. 2056, 108th Cong. (2004).

11. *See, e.g., The Broadcast Decency Enforcement Act of 2004: Hearing on H.R. 3717 Before the House Comm. on Hearing of the Subcomm. on Telecommunications and the Internet of the House Comm. on Energy & Commerce,* 108th Cong. (Feb. 11, 2004) [hereinafter *Feb. 11 House Hearing*] (statement of Chairman Powell); *In re* Clear Channel, 2004 WL 135980, ¶ 21 ("Particularly in light of Clear Channel's history of violations of the indecency rules, we also take this opportunity to reiterate our recent admonition . . . that serious multiple violations of our indecency rule by broadcasters may well lead to the commencement of license revocation proceedings."); *id.* (dissenting statement of Commissioner Copps) ("I believe the FCC should have designated these cases for a hearing on the revocation of these stations' licenses."); *id.* (separate statement of Commissioner Adelstein) ("[T]his is the type of serious repeated behavior that I believe would warrant initiation of license revocation hearings."); *In re* Infinity Broad. Operations, Inc., 18 F.C.C.R. 19954, ¶ 19 ("We reiterate our recent statement that 'additional serious violations by Infinity may well lead to a license revocation proceeding.'") (citation omitted); *id.* (dissenting statement of Commissioner Copps) ("I believe we should designate these cases for a hearing on the possible revocation of these stations' licenses, as provided for by section 312(a)(6) of the Communications Act.").

12. *Feb. 11 House Hearing*, *supra* note 11 (statement of Commissioner Copps).

13. *E.g., In re* Clear Channel, 2004 WL 135980 (dissenting statement of Commissioner Copps); *id.* (separate statement of Commissioner Martin); *In re* Infinity, 18 F.C.C.R. 19954 (dissenting statement of Commissioner Copps); *id.* (separate statement of Commissioner Martin).

14. *Feb. 11 House Hearing*, *supra* note 11 (statement of Commissioner Abernathy). Commissioners Martin and Copps also linked the increase in indecency with the recent media consolidation rules, stating that increased consolidation deprived local affiliates of the independence to reject programming they considered inappropriate for their communities. *See id.* (written statements of Commissioners Martin and Copps). All five Commissioners submitted substantially the same testimony during a hearing the same day before the Senate Committee on Commerce, Science, and Transportation. *See Protecting Children from Violent and Indecent Programming: Hearing Before the Senate Comm. on Commerce, Science, and Transp.,* 108th Cong. (Feb. 11, 2004).

15. *Id.* (statement of Chairman Powell).

16. *In re* Young Broad. of San Francisco, Inc., Notice of Apparent Liability for Forfeiture, FCC 04–16, 2004 WL 135993 (FCC rel. Jan. 27, 2004).

17. *Feb. 11 House Hearing*, *supra* note 11 (statement of Chairman Powell).

18. S. 2056, 108th Cong. (2004); Jonathan Krim, *Senators Move Forward on Tougher Indecency Standards,* WASH. POST, Mar. 9, 2004, *available at* http://www.washingtonpost.com/wp-dyn/A43113–2004Mar9.html.

19. H.R. 3717, 108th Cong. (2004); S. 2056.

20. *Id.*

21. *Id.*

22. *See* H.R. 3717.

23. *See* News Release, Senate Committee on Commerce, Science, and Transportation, Committee Passes Broadcast Decency Enforcement Act, (Mar. 9, 2004), http://commerce.senate.gov/newsroom/printable.cfm?id = 218845 (summarizing and providing links to amendments to S. 2056 passed by Committee).

24. *Id.* Given the controversy concerning the consolidation rules, it is possible that the latter amendment may delay or even derail the Senate legislation. *See* Jeremy Pelofsky, *Sen. McCain Seeks to Resolve Indecency Bill,* FORBES.COM, Mar. 30, 2004, *at* http://www.forbes.com/markets/newswire/2004/03/30/rtr1317470.html.

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

26. *Id.* ¶ 6.

27. *Id.* ¶ 5.

28. H.R. Res. 482, 108th Cong. (2003) (resolution urging FCC to overturn the Golden Globes decision and step up its enforcement activities); S. Res. 283, 108th Cong. (2003) (same); H.R. 3687, 108th Cong. (2003) (profanity bill).

29. *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).

30. *Id.* ¶¶ 12, 17.

31. *Id.* ¶ 17. Although not quite clear, the "situations such as that here" appear to mean live broadcasts.

32. *Id.*

33. *Id.* ¶¶ 13, 14.

34. *Id.* ¶ 14 (footnote omitted).

35. *Id.* ¶ 15.

36. *See* Petition for Reconsideration of American Civil Liberties Union, et al., FCC File No. ED-03–1H-0110 (filed Apr. 19, 2004), *available at* http://www.pfaw.org/pfaw/dfiles/file_316.pdf.

37. Bill Carter, *After Furor, Janet Jackson Is to Be Cut from Grammy Awards,* N.Y. TIMES, Feb. 5, 2004, at C8.

38. *Id.*

39. Lisa de Moraes, *Flags Keep Dropping on Super Bowl Stunt,* WASH. POST, Feb. 5, 2004, at C1; *see also* Tom Shales, *A Clean and Boring Sweep,* WASH. POST, Mar. 1, 2004, at C1 (criticizing this year's Oscars broadcast as particularly boring, due in part to the political crusade against indecency unleashed by the Super Bowl: "That someone was sitting with a finger poised on a sanitizing switch suggests in itself that we are to have a new wave of heavy-duty censorship in America and all caused by the exposure of one breast."); *see also* Bill Carter, *Pushed on*

Obscenity, Networks Turn to Delays, Even on Sports, N.Y. TIMES, Mar. 15, 2004. Although each of the major networks promised to begin time-delay on many live shows, CBS announced that it would present the NCAA men's basketball tournament live, after reports that CBS would delay broadcast by ten seconds in response to the FCC's increased indecency enforcement. *CBS Says No to Broadcast Delays,* N.Y. TIMES, Mar. 16, 2004, *at* http://www.nytimes.com/2004/03/16/sports/ncaabasketball/16CBS.html.

40. *Clear Channel Suspends Howard Stern's Show,* N.Y. TIMES, Feb. 26, 2004, *at* http://www.nytimes.com/2004/02/26/business/media/26radio.html. Stern's show remains on the air, however, and Infinity Broadcasting has announced that it will continue to broadcast his show on its roughly forty affiliate stations. John Maynard, *Infinity Stations to Keep Howard Stern on the Air,* WASH. POST, Feb. 27, 2004, at C1.

41. 18 U.S.C. § 1464.

42. 47 U.S.C. § 503(b); 47 C.F.R. § 1.80(b)(1).

43. 47 U.S.C. § 312(a)(6).

44. 47 C.F.R. § 73.3999.

45. *In re* Industry Guidance on the FCC's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, ¶ 4 (2001).

46. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

47. The Court also noted that it had previously sanctioned greater regulation of the airwaves based on the scarcity of broadcast spectrum. *Id*. at 731; *see also* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388 (1969) ("Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish."); FCC v. League of Women Voters of Cal., 468 U.S. 364, 377 (1984) ("The fundamental distinguishing characteristic of the new medium of broadcasting that, in our view, has required some adjustment in First Amendment analysis is that '[b]roadcast frequencies are a scarce resource [that] must be portioned out among applicants.'") (quoting CBS, Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 101 (1973)) (alteration in original).

48. *Id*. at 748 ("Patently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder.). *Compare* Cohen v. California, 403 U.S. 15 (1971); Erznoznik v. Jacksonville, 422 U.S. 205 (1975). In dissent, Justice Brennan argued that the captive audience analogy was not tenable. A person who brings a radio or television into their home has made an affirmative decision to expose himself or herself to broadcast speech. *Pacifica,* 438 U.S. at 765 (Brennan, J., dissenting) "[B]ecause the radio is undeniably a public medium, these actions are more properly viewed as a decision to take part, if only as a listener, in an ongoing public discourse." *Id*. Given the small burden imposed on an offended viewer by changing the channel, majoritarian tastes should not be permitted "completely to preclude a protected message from entering the homes of a receptive, unoffended minority." *Id.* at 766 (Brennan, J., dissenting). "I would place the responsibility and the right to weed worthless and offensive communications from the public airways where it belongs and where, until today, it resided: in a public free to choose those communications worthy of its attention from a marketplace unsullied by the censor's hand." *Id*. at 772 (Brennan, J., dissenting).

49. *Pacifica,* 438 U.S. at 748; *see id*. at 748–49 ("To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow.").

50. *Id*. at 750.

51. *Id*.

52. Sable Communications of Cal., Inc. v. FCC, 492 U.S. 115, 127 (1989).

53. *Id*.

54. *See* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) (en banc) (*ACT III*) (summarizing history of FCC's indecency regulations); *see also* Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) (*ACT I*); Action for Children's Television v. FCC, 932 F.2d 1504 (D.C. Cir. 1991) (*ACT II*).

55. *ACT II,* 932 F.2d at 1509.

56. *ACT III,* 58 F.3d at 660.

57. *Id*. at 666–67. The majority in fact held that a midnight to 6 A.M. safe harbor was narrowly tailored, but then found that the government had failed to justify its disparate treatment for public stations, "leaving us with no choice but to hold that the section is unconstitutional insofar as it bars the broadcasting of indecent speech between the hours of 10 P.M. and midnight." *Id*. at 669. Chief Judge Edwards argued that the majority's holding in this regard was incoherent: "While a 6 A.M. to 10 P.M. ban is certainly less speech restrictive than a 6 A.M. to midnight ban, it seems absurd to suggest that they are both *the least restrictive means*." *Id*. at 683 n.36 (Edwards, C.J., dissenting).

58. *Id*. at 671 (Edwards, C.J., dissenting).

59. *Id*. at 685 (Wald, J., dissenting) (internal quotations omitted).

60. 529 U.S. 803 (2000); *see also* Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727 (1996) (invalidating FCC regulation that required cable system operators to segregate "patently offensive" programming and block such programming unless a viewer affirmatively requested access.).

61. *Playboy Entm't,* 529 U.S. at 811–15; *id*. at 814 ("[E]ven where speech is indecent and enters the home, the objective of shielding children does not suffice to support a blanket ban if the protection can be accomplished by a less restrictive alternative.").

62. 521 U.S. 844, 858–59 (1997).

63. *Id*. at 874 ("Given the vague contours of the coverage of the statute, it unquestionably silences some speakers whose messages would be entitled to constitutional protection.").

64. *Id*. at 875 (internal quotations, alterations, and citations omitted).

65. *In re* Industry Guidance on the FCC's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement, 16 F.C.C.R. 7999, ¶ 1 (2001) (Policy Statement).

66. Policy Statement ¶¶ 7–8 (citations omitted). The FCC's "community standards" test does not take into account differences between local communities but instead applies a nationwide broadcast community standard that references the average broadcast viewer or listener. *Id*. ¶ 7; *see also* WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV), 15 F.C.C.R. 1838, 1841 (2000).

67. Policy Statement ¶ 10.

68. *Id*.

69. Action for Children's Television v. FCC, 58 F.3d 125 (D.C. Cir. 1995) (Wald, J., dissenting).

70. *Id*. ¶ 21 (citing WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV), 15 F.C.C.R. 1838 (2000)).

71. *Id*.

72. *In re* Young Broadcasting of San Francisco, 2004 WL 135993. The licensee argued that the "very brief exposure was accidental and unintentional, and that the complained-of material was part of the *bona fide* news coverage of the 'Puppetry of the Penis.'" *Id*. ¶ 4 (footnote omitted).

73. *Id*. ¶ 12.

74. *See In re* WPBN/WTOM License Subsidiary, Inc. (WPBN-TV and WTOM-TV), 15 F.C.C.R. 1838, ¶ 10 (2000); *In re* Industry Guidance on the FCC's Case Law Interpreting 18 U.S.C. § 1464 and Enforcement Policies Regarding Broadcast Indecency, Policy Statement,16 F.C.C.R. 7999, ¶ 20 (2001) ("The apparent purpose for which material is presented can substantially affect whether it is deemed to be patently offensive as aired.").

75. *See* Reno v. ACLU, 521 U.S. 844, 873 (noting that the "societal value" prong "critically limits the uncertain sweep of the obscenity definition").

76. Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Cohen v. California, 403 U.S. 15 (1971).

77. Denver Area Educ. Telecomms. Consortium v. FCC, 518 U.S. 727, 805

(1996) (Kennedy, J., dissenting in part); *id.* ("In artistic or political settings, indecency may have strong communicative content, protesting conventional norms or giving an edge to a work by conveying 'otherwise inexpressible emotions.'") (quoting *Cohen,* 403 U.S. at 26) (Kennedy, J., dissenting in part). It is worth noting that humor in particular is a victim of the FCC's indecency regulations. Comedy often relies on controversial subjects and uses subversion of dominant political and cultural norms, including sexual and scatological taboos, for comic effect (see Lenny Bruce, George Carlin, South Park). It is thus not surprising that many of the programs targeted under the FCC's indecency rules have been humorous. The FCC has imposed fines on licensees for the broadcast of Monty Python's "Sit on My Face" song, and a song known as the "Penis Envy Song." *See* Policy Statement ¶¶ 16, 23. The FCC has explained, however, that "'humor is no more an absolute defense to indecency . . . than is music or any other one component of communication.'" *Id.* ¶ 7 (quoting WIOD, Inc. (WIOD (AM)*),* 6 F.C.C.R. 3704 (MMB 1989)). The FCC is not kidding: in the case of the FCC's indecency rulings, humor appears to be a significant liability.

78. *Id.*

79. *Id.*

80. Action for Children's Television v. FCC*,* 58 F.3d 685 (D.C. Cir. 1995) (Wald, J., dissenting).

81. *In re* KBOO Foundation*,* 16 F.C.C.R. 10731 (EB 2001).

82. *Id.* ¶ 8.

83. *Id.*

84. *In re* KBOO Foundation*,* 18 F.C.C.R. 2472 (EB 2003).

85. *Id.* ¶ 9.

86. In a similar reversal, the Enforcement Bureau in 2002 reversed an earlier NAL based on the airing of the "radio edit" version of Eminem's "Slim Shady" song. *In re* Citadel Broad. Co.*,* 17 F.C.C.R. 483 (EB 2002), *rescinding In re* Citadel Broad. Co.*,* 16 F.C.C.R. 11839 (EB 2001). In the NAL, the Enforcement Bureau found that the "edited version contains unmistakable offensive sexual references . . . that appear intended to pander and shock." 16 F.C.C.R. 11838, ¶ 6. A year later, however, after reviewing the licensee's response to the NAL "and having again reviewed the relevant case law," the Enforcement Bureau disagreed with its original analysis and found that the same words that supported the earlier NAL were not indecent. In direct contrast to its earlier determination, the Enforcement Bureau found that the language in the radio edit version was "oblique," not sufficiently graphic or explicit, and did not appear to be intended to pander to, titillate, or shock the audience. 17 F.C.C.R. 483, ¶¶ 10, 11.

87. *Id.* ¶ 17 (citing L.M. Communications of South Carolina, Inc. (WYBB (FM))*,* 7 F.C.C.R. 1595 (MMB 1992) and Lincoln Dellar, Renewal of License for Stations KPRL (AM) and KDDB (FM)*,* 8 F.C.C.R. 2582, 2585 (ASD, MMB1993)).

88. *In re* "Golden Globe Awards," 2004 WL 540339, ¶ 9.

89. *Id.* ¶ 6.

90. *Id.* ¶ 17.

91. *Id.* ¶ 9 n.25 (citing Peter Branton*,* 6 F.C.C.R. 610 (1991)).

92. *Id.* ("This is not to suggest that the fact that a broadcast had a social or political value would necessarily render use of the 'F-Word' permissible.").

93. *Id.*

94. *See Feb. 11 House Hearing*, *supra* note 11 (statement of Commissioner Copps).

95. Action for Children's Television v. FCC*,* 58 F.3d 654, 672 (D.C. Cir. 1995) (Edwards, C.J, dissenting).

96. For example in *Denver Area Educational Telecommunications Consortium v. FCC,* several Justices observed that the "special characteristics" of television used to justify broadcast indecency regulation are present in the case of cable. 518 U.S. 727, 744 (1996) (Breyer, J., writing for the plurality); *id.* at 774 (Stevens, J., concurring); *id.* at 776 (Souter, J., concurring)

97. *E.g., Feb. 11 House Hearing*, *supra* note 11 (statements of Chairman Powell and Commissioners Copps and Martin).