



July 11, 2007

**VOTE “NO” ON BROWNBACK AMENDMENT TO
RESTORE THE FCC’S INDECENCY ENFORCEMENT
(SUBMITTED AS AN AMENDMENT TO THE FINANCIAL
SERVICES APPROPRIATIONS BILL)**

The Honorable Robert C. Byrd
Chairman, Senate Appropriations Committee
311 Hart Senate Office Building
Washington, DC 20510

The Honorable Thad Cochran
Ranking Member
Senate Appropriations Committee
113 Dirksen Senate Office Building
Washington, DC 20510

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RICHARD ZACKS
TREASURER

Dear Chairman Byrd and Ranking Member Cochran:

On behalf of the ACLU, a non-partisan organization with hundreds of thousands of activists and members and 53 affiliates nation-wide, we urge you to vote “NO” on Senator Brownback’s amendment to restore the FCC’s indecency enforcement when it comes to your committee for a vote. We understand Senator Brownback intends to submit an amendment to the Financial Services appropriations bill that would reinstate the FCC’s ability to prohibit the use of profanity and indecent images from 6 a.m. to 10 p.m. on broadcast television. Because such an amendment would have profound adverse implications for the First Amendment, we urge you to oppose this amendment.

At issue is the decision of the Second Circuit Court of Appeals in *Fox Television Stations v. FCC*, decided June 4, 2007. Prior to 2003, the FCC would not fine for “fleeting expletives” made in the context of a broadcast television show. In 2003, the FCC abruptly changed that policy, finding that any use of certain words presumptively constituted indecency.

The Second Circuit found that the FCC’s policy on “fleeting expletives” was arbitrary and capricious and without foundation. Consequently, the court invalidated the FCC’s findings of indecency imposed on several examples of fleeting expletives, and asked the FCC to provide its basis for changing its policy. Additionally, the court noted that current law made it highly unlikely the FCC would be able to provide a basis for its decision that would withstand First Amendment scrutiny.

The ACLU has long been a guardian of First Amendment values. Our concern with the FCC's indecency regime is that it is vague and unpredictable. This creates the effect of turning down the thermostat on free speech, chilling artists and broadcasters. What is acceptable today may not be acceptable tomorrow. The FCC has also made clear that its determinations will be based on a "contextual" analysis rather than any clear rules. This merely adds to the confusion and increases the chill on speech.

Furthermore, there is no need for indecency standards. The actual number of programs drawing complaints has decreased, and parents now have the tools to protect their children from objectionable content. Finally, the FCC's authority to regulate indecency is on shaky constitutional grounds. The Brownback amendment would only reaffirm an unconstitutional grant of authority to the FCC to regulate indecency on the broadcast airwaves.

The FCC's Vague Standards Have Resulted in Uncertainty About What Constitutes "Indecency."

The uncertainty inherent in the FCC's indecency standard is already having a chilling effect on speech that is clearly protected under the First Amendment. For example, the WB network in March 2006 censored an episode of "The Bedford Diaries" over objections by its creator because of fears that the FCC would impose fines over language and situations contained in the show. Also in 2006, some CBS affiliates refused to air a documentary on the September 11 terrorist attacks because of concerns about language used by firefighters portrayed in the movie. In 2004, various ABC affiliates refused to air "Saving Private Ryan" over concerns that the repeated use of certain expletives would result in fines.

Paradoxically, the FCC found that "Saving Private Ryan" (a fictional work) did not violate indecency standards even with its repeated use of expletives, but found indecent a documentary entitled "The Blues: Godfathers and Sons" in which the interviewees used various expletives. It is little wonder that broadcasters are wary.

Adding to the confusion over indecency was the FCC's change in practice regarding "fleeting" uses of expletives, addressed in the *Fox* case. For nearly thirty years, the FCC appropriately found that the broadcast of a fleeting expletive did not implicate the indecency rules. This was in accord with the Supreme Court's observation in *FCC v. Pacifica Foundation*: "We have not decided that an occasional expletive . . . would justify any sanction. . ."¹ The FCC, however, took a position at odds with the Supreme Court in its *Golden Globe Awards Order* when it concluded that a single utterance of the F-word constituted "profane language." Shortly thereafter, various ABC affiliates refused to air "Saving Private Ryan." When a complaint was filed against the

¹ *FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978).

broadcasters who televised the movie, the FCC found that multiple uses of the F-word contained in the movie were not indecent or profane. The FCC has emphasized, however that “such words may not be profane in specified contexts.” Thus, broadcasters are left with little guidance as to what the FCC will decide about whether particular contexts make certain expletives “profane” or “indecent.” This confusion, and the FCC’s failure to provide a convincing reason for its change in policy, resulted in the Second Circuit’s opinion in *Fox*.

The result of this patchwork, *ad hoc* contextual examination is massive uncertainty about what constitutes indecency or profanity.

Uncertainty as to what is “indecent” leads to a chilling of speech.

As the examples above illustrate, vagueness and uncertainty demonstrably lead to a chilling of speech. Guessing incorrectly whether a program is or is not “indecent” can have important ramifications for a broadcaster, including huge fines and possible loss of its broadcasting license. Vague laws and interpretations create traps for broadcasters because they are unsure what conduct or speech will constitute indecency. Rather than have broadcasters act at their peril, the law should provide reasonable notice of what conduct will give rise to legal consequences, so that the speaker or broadcaster may act accordingly. Vagueness chills communications that may well NOT be indecent or profane, simply because the cost to the broadcaster of being wrong is too great.

Vagueness encourages silence instead of robust debate. “Uncertain meanings inevitably lead citizens to ‘steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”² The bottom line is that broadcasters enjoy First Amendment protection. The uncertainty inherent in the definition (or lack thereof) of “indecency” inevitably leads broadcasters to avoid certain speech. To do otherwise risks a finding of “indecency” and potentially disastrous liability.

All of this is fundamentally inconsistent with the “uninhibited, robust, and wide-open”³ debate contemplated by the First Amendment. This is not just a matter of prohibiting certain words that some might find objectionable. The Supreme Court has noted, “we cannot indulge in the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”⁴

The Alleged Increase in Complaints Do Not Evidence An Increase in “Indecency.”

² *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972).

³ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964).

⁴ *Cohen v. California*, 403 U.S. 15 at 26 (1971).

The FCC has stated that complaints against indecency have dramatically increased,⁵ apparently in an attempt to justify increased indecency enforcement. However, much of the alleged increase results from the change in the way the FCC counts complaints.

Prior to the summer of 2003, the FCC aggregated together identically worded form letters or computer-generated electronic complaints and counted them as a single complaint. Some time during the summer of 2003, without any public notice to announce the change, the FCC quietly changed its methodology to count group complaints as individual complaints.⁶ In early 2004, the FCC began counting *identical* indecency complaints multiple times according to how many Commissioners' offices and other divisions of the FCC receive the complaint.⁷ Examination of the complaints reveals that the vast majority of complaints are duplicate emails generated against a handful of programs targeted by activist groups.⁸ [let's not give them room to call us hypocritical because of our position on grassroots lobbying – please change or delete the previous sentence] Because of these changes, between 2002 and 2004, complaints grew by more than 100 times. However, the *number* of programs that were the subject of complaints actually *dropped* by 20% over the same two-year period.⁹ Thus, the “dramatic” rise in complaints appears *not* to be the result of a rampant “increase” in indecency on broadcast television.

Parents Already Have Sufficient Tools to Protect Their Children

Parents are the appropriate parties to make decisions about protecting their children. Technology has made many tools available that apply to broadcast media as well. For example, approximately 85% of households receive their broadcast television through cable. All of the tools available to cable (channel blocking, program blocking, and so forth) are available for broadcast television.

TV Watch, a coalition of 27 prominent individuals and organizations representing more than 4 million Americans, sponsors initiatives such as the “1-2-3 Save TV” tool kit for parents.¹⁰ These types of initiatives help educate concerned parents about the tools available.

⁵ Federal Communication Commission's March 2006 *Omnibus Order* Resolving Numerous Broadcast Indecency Complaints paragraph 1.

⁶ Thierer, Adam, “Examining the FCC’s Complaint-Driven Broadcast Indecency Enforcement Process,” available at <http://www.pff.org/issues-pubs/pops/pop12.22indecencyenforcement.pdf>

⁷ Id.

⁸ Id.

⁹ Id.

¹⁰ Thierer, Adam, “Parents Have Many Tools to Combat Objectionable Media Content,” available at <http://www.pff.org/issues-pubs/pops/pop13.9contenttools.pdf>

Between technology and education, dramatic advances have occurred. Parents have the tools and the power to protect their children. There is little justification for the FCC to act as the nation's "nanny."

The Foundation of the FCC's Authority to Regulate Indecency Has Crumbled.

In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978), the Supreme Court allowed some limited regulation of an allegedly indecent broadcast (George Carlin's "Seven Dirty Words" Monologue). Despite the FCC's claims that this case provides its authority to regulate indecency, great caution should be exercised in attempting to rely upon this 29-year-old case as precedent for deciding what broadcasts are indecent or the whether the FCC has the power to impose draconian penalties.

Initially, it is important to note that, unlike obscenity, indecent speech is protected under the First Amendment. *Id.*, at 746 ("Some uses of even the most offensive words are unquestionably protected. . . .Indeed, we may assume, *arguendo*, that this monologue would be protected in other contexts.") The ability to regulate indecency in the broadcasting medium is an exception rather than the general rule. In many other contexts, the Supreme Court has invalidated efforts to restrict indecency.¹¹ In *Pacifica*, the Court applied a slightly different standard for broadcasting, but that decision cannot be read too broadly.

First, the decision was a fragmented one (5-4) that neither approved a particular standard for indecency, nor upheld a substantive penalty against the licensee.¹² Since *Pacifica*, the Supreme Court has acknowledged that the

FCC's definition of indecency was not endorsed by a majority of the Justices, and has repeatedly described the decision as an "emphatically narrow holding."¹³

Second, the rationale for the *Pacifica* decision, that "the broadcast media have established a uniquely pervasive presence in the lives of all Americans,"¹⁴ is

¹¹ Print medium: *Butler v. Michigan*, 352 U.S. 380, 383 (1957); *See also Hamling v. United States*, 418 U.S. 87, 113-114 (1974) (statutory prohibition on "indecent" or "obscene" speech may be constitutionally enforced only against obscenity); Film: *United States v. 12 200-ft. Reels of Film*, 413 U.S. 123, 130 n.7 (1973); In the mails: *Bolger v. Youngs Drug Products Corp.* 463 U.S. 60 (1983); In the public forum: *Erzoznik v. City of Jacksonville*, 422 U.S. 205 (1975); Cable Television: *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803 (2000); the Internet: *Reno v. ACLU*, 521 U.S. 844 (1997).

¹² *See Pacifica*, 438 U.S. at 743 (plurality op.) and at 755-56 (Powell, J., concurring) ("[t]he Court today reviews only the FCC's holding that Carlin's monologue was indecent 'as broadcast' at two o'clock in the afternoon, and not the broad sweep of the FCC's opinion"). *See also Carlin Communications, Inc. v. FCC*, 837 F.2d 546, 559 (2d Cir. 1988) ("[t]he *Pacifica* Court declined to endorse the FCC definition of what was indecent"); *ACLU v. Reno*, No. Civ. A. 96-963, 1996 WL 65464 at *3 (E.D.Pa. Feb. 15, 1996) (Buckwalter, J.) ("it simply is not clear, contrary to what the government suggests, that the word 'indecent' has ever been defined by the Supreme Court").

¹³ *Reno*, 521 U.S. at 866-867, 870; *Sable*, 492 U.S. at 127; *Bolger*, 463 U.S. at 74.

¹⁴ *Pacifica*, 438 U.S. at 748.

highly questionable in this era of cable, satellite and the Internet, all of which compete with broadcast television. Despite the pervasiveness of all media in general, the government has been allowed limited content regulation only of the broadcast media.

The Court since *Pacifica* has invalidated government-imposed indecency restrictions on cable television, despite its “pervasiveness.” While *Pacifica* noted the pervasiveness of broadcast television as part of its rationale, the Court in striking down such regulation in the cable television context found specifically that “[c]able television broadcasting, including access channel broadcasting, is as ‘accessible to children’ as over-the-air broadcasting, if not more so.”¹⁵ Thus, the Court undercut the rationale in *Pacifica* by its later decision.

Finally, in *Reno v. ACLU*, the Court for the first time subjected the indecency definition (in the Internet context) to rigorous scrutiny, and by a vote of 9-0, found it to be seriously deficient.¹⁶ *Reno* and other decisions subsequent to *Pacifica* undercut *Pacifica*’s rationale and raise serious questions about its vitality. *Pacifica*’s logic and subsequent developments no longer support the FCC’s authority to regulate indecency.¹⁷

Conclusion

Former FCC Chairman Reed Hundt has described the current FCC’s indecency enforcement as “the biggest threat to the First Amendment faced by the electronic media since the McCarthy era, because it seeks to limit television viewers’ freedom of choice.”¹⁸

Technology and education give parents the tools to protect their children from programs they believe are indecent, regardless of how the FCC defines “indecency.”

The current “indecency” regime as administered by the FCC is vague, leading to confusion among broadcasters and speakers. This leads to a widening chill on First Amendment speech, and a restraint on programs from broadcasters and

¹⁵ *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 744 (1996).

¹⁶ 521 U.S. at 871-881. In the context of obscenity which is not protected under the First Amendment, the work must be reviewed as a whole, the effect of the material is judged based on the average person, and material that has literary, artistic, political or scientific value cannot be restricted. None of these findings are required in determinations of indecency, although indecent speech is protected under the First Amendment. If the Supreme Court requires such findings before speech can be deemed obscene, it makes little sense to apply a lesser standard to speech that is, in fact, protected.

¹⁷ The Second Circuit in *Fox Television Stations v. FCC* specifically noted this crumbling foundation for the indecency regime: “Because *Reno* holds that a regulation that covers speech that ‘in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs’ is unconstitutionally vague, we are skeptical that the FCC’s identically-worded indecency test could nevertheless provide the requisite clarity to withstand constitutional scrutiny.”

¹⁸ Hundt, Reed, “Regulating Indecency: The Federal Communication FCC’s Threat to the First Amendment,” 13 *Duke Law and Technology Review*, 2005, Paragraph 4.

artists to willing listeners. Finally, technology and legal advancements seriously undermine the FCC's authority to regulate "indecenty."

The Brownback amendment represents a step backward for First Amendment freedoms. We therefore urge you to reject it when it comes before your committee for a vote. If you have questions, please feel free to contact Terri Schroeder at 202 675-2324 (tschroeder@dcaclu.org) or Marvin Johnson at 202 675-2334 (mjohnson@dcaclu.org).

Sincerely,

A handwritten signature in black ink, appearing to read "Caroline Fredrickson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Caroline Fredrickson
Director, Washington Legislative Office

cc: Members of the Committee