

The *Fox v. FCC* case will be back in the Supreme Court this term after many appeals and debates between the opposing sides. The main legal issues that have been debated in the case date back to the Communications Act of 1934, which established a legal base for regulating wired and wireless communications nationwide. The Federal Communication Commission was founded because of the act, replacing the Federal Radio Commission. Because of the act, the government could regulate new media technologies such as television and mobile phones and also had the power to license and regulate radio stations. Although the FCC had the power to regulate radio they could not interfere with the right of free speech nor did they have the power to censor radio. This is the current standard as amended by the Telecommunications Act of 1996 which states “nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.” Telecommunications Act of 1996, Pub. LA. No. 104-104, 110 Stat. 56 (1996)

The first incident to go before the Supreme Court regarding the Communications Act of 1934 came in the case *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). On October 30, 1978 a *New York* radio station aired a monologue by comedian George Carlin at about 2 o'clock in the afternoon called “Seven Dirty Words.” Carlin began by referring to his thoughts about the words you couldn't say on the airwaves. He then proceeded to list those words and repeat them over and over again. The FCC said it was impermissible to broadcast “language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when

there is a reasonable risk that children may be in the audience." *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) The Supreme Court ruled that it was not a violation of the First Amendment to disallow indecency during certain times of the day and upheld an FCC ruling that the radio station had violated the law by broadcasting the monologue. In *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) "The ease with which children may obtain access to broadcast material, coupled with other concerns, amply justify special treatment of indecent broadcasting." The Court gave the FCC broad leeway to determine what constituted indecency in different contexts.

"In years following the high court ruling the FCC refined its policies on indecent broadcasts. . . Then in 2001 the commission published a new and fairly comprehensive policy statement relating to the broadcast of indecent matter" (Pember 610). The FCC has defined 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 organs or activities." (<http://www.fcc.gov/guides/obscenity-indecency-and-profanity>) Withholding this definition, the FCC still issued an order in March 2004 that changed their rules, which had previously allowed isolated and fleeting (not repeated or dwelled on) words after U2's lead singer Bono used the F-word during an acceptance speech at the 2003 Golden Globe Awards. Despite the fact that Bono's use of the F-word was both isolated and fleeting and was also not used in a sexual sense, the FCC determined that it was indecent and profane.

Following the FCC's sudden change in policy, several TV networks filed suit, in the case *Fox Television Stations v. FCC* 566 U.S. 502 (2009) which introduced the two main legal issues in the

subsequent *Fox v. FCC* cases. The first claimed that the FCC's decision didn't follow the regulations set forth in the Administrative Procedures Act, which states that a government agency's change in policy can be declared invalid if the change was arbitrary and capricious.

The second issue: Fox claimed the restriction of fleeting was a violation of their First Amendment rights that dates back to the Communications Act of 1934, which states that the Commission cannot censor or interfere with free speech.

When the case was brought before the 2nd U.S. Circuit Court of Appeals In June 2007, the court sided with Fox. They stated that the FCC had in fact violated the rights of the First Amendment in restricting the use of fleeting expletives and also rejected the FCC's current policy for punishing speech that they considered indecent and profane. Furthermore, they determined that their ruling was in violation of the Communications Act of 1934 and that FCC needed to go back and better define what speech was to be considered "indecent" in order to justify their ruling to punish fleeting expletives. That following year CBS also took the FCC to court, in *CBS Corporation v. FCC* 535 F. 3d 167 (3d Cir. 2008), after the FCC fined CBS for the Super Bowl halftime incident where Janet Jackson's breast was shown on national television. Again the Appeals Court ruled against the FCC, concluding that their restrictions were not constitutionally sound. The ruling also stated that the FCC had violated the Administrative Procedures Act for their sudden change in policy concerning fleeting expletives.

In April of 2009, after the FCC appealed the lower courts' rulings, the case was accepted by the Supreme Court in *Fox Television Stations v. FCC* 566 U.S. 502 (2009). The Supreme Court reversed the lower courts' decisions and ruled that the FCC had not violated the

Communications Act of 1934 and further decided that the FCC's restrictions were not in violation of the Administrative Procedures Act. However, the Supreme Court failed to address the issues regarding the First Amendment and free speech issue. Instead the Supreme Court focused on the long going issue of the FCC's rulings to place monetary punishments on those broadcasting companies whose programs had featured fleeting expletives. After determining the FCC's punishments were not "arbitrary and capricious" as stated by the Administrative Procedures Act, the Supreme Court proceeded to send the issue back to the lower courts for further review.

Since the Supreme Court had laid the first legal issue of the case (whether or not the FCC's ruling was cohesive with the Administrative Procedures Act) to rest, they sent the second legal issue (whether the FCC's ruling was constitutionally sound) to be reviewed and determined by the 2nd Circuit Court of Appeals. The Court ruled that the FCC was in direct violation of the First Amendment. In *Fox v. FCC* 613 F.3d 317 (2010) "There was ample record evidence that the policy had chilled protected speech. Even elaborate audio delay systems did not protect a broadcaster against fleeting expletives in live broadcasts. By prohibiting all "patently offensive" references to sex, sexual organs, and excretion without giving adequate guidance as to what "patently offensive" meant, the FCC effectively chilled speech, since broadcasters had no way of knowing what the FCC would find offensive. It had the effect of promoting wide self-censorship of valuable material protected under the First Amendment." Further the ruling commented, "We do not suggest that the FCC could not create a constitutional policy. We hold only that the FCC's current policy fails constitutional scrutiny" (*Fox v. FCC* 613 F.3d 317 (2010)).

The FCC then appealed the Appeals Court ruling, once again, and the Supreme Court accepted the case for a second review on June 27, 2011, where a constitutional definition of “indecentcy” will hopefully be decided.