

## Supreme Court Hears Argument in "Fleeting

### Digital Media and Data Privacy Law Blog

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The United States Supreme Court heard oral argument in *FCC v. Fox Broadcasting* on Election Day 2008. As authors of an amicus curiae brief in the case, three Brooks Pierce correspondents -- Mark Prak, David Kushner, and Julia Ambrose -- made an old-fashioned road trip to Washington to hear the argument. In an ironic twist, our sojourn to the Nation's capital was itself seasoned with some "fleeting" expletives, as we encountered unprecedented and extraordinarily frustrating Election Eve traffic that clogged ingress to the District for nearly an hour. As our car inched across the Potomac, we distracted ourselves with speculation about what we -- and everyone else, from casual observers to the mainstream media -- anticipated would be a sparkling oral argument.

As it turned out, the oral argument was neither titillating nor tantalizing. We expected an expletive-laced shootout at the OK Corral between what one critic described as "the prudish FCC and the worldly Fox," but what we got instead was a relatively somber (and, for at least one Justice, a somnambulistic), plain-vanilla legal argument about the federal Administrative Procedure Act. Both the Justices and the lawyers tiptoed around the very expletives that launched the case, carefully employing the euphemisms "f-word" and "s-word" in place of the (unscripted) profanities that Cher and Nicole Richie used during live broadcasts of the Billboard Music Awards in 2002 and 2003. The Court tiptoed nearly as carefully around the First Amendment implications of the FCC's "fleeting expletives" enforcement policy as well.

Although it is a tricky matter to speculate on the outcome of a case based only on questions posed by the Justices during oral argument, since we braved the rain and the traffic so that we'd have a front-row seat and a birds-eye view of the argument up close, we intend to do precisely that. Here's what we think: The Court will continue to tiptoe around the First Amendment issues lurking behind the APA question (a curiosity, as the Court typically is reluctant to review cases that, like this one as the FCC now postures it, present nothing more than run-of-the-mill application of settled legal principles) and either reverse and remand to the Second Circuit for an exploration of the constitutionality of the agency's fleeting expletives policy or affirm the Second Circuit's APA ruling, allow the agency to take another stab at explaining why it changed its mind about the treatment of fleeting expletives, and then take up the constitutional issues presented by the "new" policy. Either way, there is a significant likelihood that these issues will continue to percolate in the federal courts for the next two or three years -- and that this case (together with your Brooks Pierce correspondents) may well make a return trip to Washington.

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The questions from a relatively active bench (Justice Clarence Thomas, as is his practice, remained silent, as did Justice Samuel Alito) offer the following hints. Chief Justice Roberts and Justice Scalia are sympathetic to the FCC's argument that it offered a reasonable explanation for its change in enforcement policy -- or that, at least in the Chief's estimation, whether the agency has in fact "shifted" its policy at all is irrelevant, since broadcasters now have a reasonable explanation for what the agency currently thinks about regulating even "fleeting" expletives. Justice Ruth Bader Ginsburg telegraphed nearly as clearly that she would be inclined to affirm the Second Circuit, and perhaps even to agree with the Second Circuit's belief (in dicta) that no enforcement policy that penalized fleeting expletives could withstand First Amendment scrutiny. More than once, she characterized the FCC's indecency enforcement regime as lacking "rhyme or reason." Justice Stevens may well be another vote for affirmance, and he might be in agreement with Justice Ginsburg on the underlying First Amendment issue as well; a softball question to Carter Phillips, Fox's counsel, hinted that he'd be receptive to an argument that the First Amendment does indeed distinguish between a "fleeting" expletive and one repeated again and again -- exactly the view he outlined in his opinion in *FCC v. Pacifica Foundation*. (In a humorous aside, Justice Stevens also suggested that he'd be receptive to an argument that profanity is acceptable as long as it is used to make a really, really funny joke.) Justices Souter (who questioned the empirical support for the FCC's shift in policy), Breyer (who questioned the practicalities of expecting small stations to avoid airing unscripted expletives in live broadcasts), and Kennedy (who asked a handful of questions that revealed nothing about his leanings) are harder to read.

Buoyed by what surely seemed like a receptive bench, the Solicitor General closed his initial argument by invoking the spectre of broadcasters run amok absent agency oversight: He envisioned a world in which *Jeopardy* and *American Idol* are overrun with profanity and *Big Bird* "drops the F-bomb" on *Sesame Street*. Whether the Court finds the Government's doomsday scenarios at all plausible, or whether it is troubled by the prospect of five unelected commissioners deciding what broadcast content is acceptable, are questions that won't likely be answered by the opinion to come out of this case -- at least in this first round.

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Coda: One of the most enjoyable aspects of our trip was the opportunity for Julia Ambrose to check in with retired Justice Sandra Day O'Connor, for whom she clerked back in the 1995 Term of Court. Julia enjoyed the chance to introduce Mark and David to Justice O'Connor, and we got a kick out of meeting and talking with her. We were guests of the Justice for the argument and enjoyed the opportunity to spend time in her chambers. Justice O'Connor remains full of vim and vigor. She is keeping busy in her retirement, serving on the Board of the Rockefeller Foundation, working to protect judicial independence, advancing the cause of merit selection of judges in the state courts, and working on an educational civics project for children.

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