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**** INsight! **** *Why the Web Can't Be Ignored* - by John Garziglia



An End to Indecency Rules?

By John Garziglia

Anything could be the result of the Supreme Court's decision to take up this Second Circuit "fleeting expletives" case.

Yes, it could be the end of the FCC's indecency regulation of broadcasters. The Second Circuit's decision makes excellent reading on the Constitutional reasons why the Supreme Court might find against any continuing FCC purview over indecency. In what the Circuit termed "dicta," which is reasoning or statements not directly germane to reaching the actual decision but rather are the more expansive thoughts of the judges, the Circuit all but said that they did not see a way for the FCC to write a decision upholding sanctions against fleeting expletives that would pass Constitutional muster.

But, as everyone knows, as a result of Supreme Court decisions spanning from abortion issues to Bush v. Gore, the Supreme Court is a political body and not a wholly judicial body. The decision reached by the Supreme Court in this fleeting expletives case is likely to be grounded more in whether a majority of justices think that fleeting expletives are appropriate on broadcast TV and radio, and less on whether our federal government under the First Amendment should be regulating broadcasters in a way that no other medium of mass communications is regulated. I believe if the Supreme Court was to decide this case on First Amendment grounds, the further regulation of indecency by the FCC would fail for the reasons given in the dicta to the Second Circuit decision.

Whether the Supreme Court believes broadcasting should continue to be subject to indecency restrictions in this multi-media world of ours, and whether the



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Supreme Court attempts to now extend the power of the federal government to regulate indecency in all media, substantially depends upon whether the justices buy into the special interest groups' desire to have our federal government be a national nanny, or whether the justices recognize that the caliber of human discourse ebbs and flows and it is the audience themselves with the "on-off" button who should control which broadcasts are welcome.

So, the resulting decision of the Supreme Court could be anything from taking the FCC out of the indecency regulation business on First Amendment grounds, to even possibly giving the green light to an extension of the previous reasoning for such regulations, based upon the ubiquity of broadcasting and the need to protect children, to encompass most media and give our federal government vast new powers to regulate what is the minimum level of coarseness for speech and actions on cable, the Internet and satellite radio – that "level playing field" that some broadcasters have for so long coveted.

So, in the next year or so, we will see the Supreme Court taking up both sex and guns under the First and Second Amendments respectively. Thank goodness the Court is not likely to continue in sequential order as the Third Amendment – "No Soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law" – appears to be pretty non-controversial for now.

--John Garziglia is a communications attorney at the Washington, DC firm of Womble Carlyle Sandridge & Rice, PLLC. The views expressed are his own.

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