

Federal Communications Commission v. Pacifica Foundation
438 U.S. 726 (1978)

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In D. Schultz and J. R. Vile,
Encyclopedia of Civil Liberties in America, 358-59.
M.E. Sharpe, 2005.

In *Federal Communications Commission v. Pacifica Foundation* (1978), the U.S. Supreme Court held that the FCC could place a time zone restriction on the radio broadcasting of non-ob-scene speech without violating the First Amendment. The case began with an afternoon broadcast of George Carlin's "seven dirty words" monologue by WBAI, a Pacifica Foundation radio station. The FCC, acting on a listener complaint, found that the monologue depicted sexual and excretory activities and organs in a patently offensive manner prohibited by federal communications law and then issued an order which did not impose any sanctions on Pacifica, but included the complaint in company's license file. After the Court of Appeals reversed the FCC decision, a deeply divided Supreme Court upheld the agency, but its five to four decision did not provide a majority on the First Amendment issue.

Justice Stevens's three justice plurality opinion concluded that the indecent speech had limited social value and for that reason was at the periphery of the First Amendment in a second constitutional tier where its protection would vary according to its context. In the broadcasting context, the FCC had the authority to impose a time regulation on indecent broadcasts. Two characteristics of the broadcast media justified regulation: the impact of the broadcast media on an adult's privacy in the home and the media's easy accessibility to children. Even though physical separation of adults and children in the broadcast audience was impossible, the FCC's action did not violate *Butler v. Michigan*, 352 U.S. 380 (1957), which held that government regulation of speech may not prevent adults from access to protected constitutionally materials and, thereby, limit them to reading only what is acceptable for children. Adults could hear the monologue during late evening hours when fewer children are likely to be in the audience. Nor did the FCC ruling restrict adult use of alternative forums: they could still purchase tapes and records and attend theatres and nightclubs to hear these words in the Carlin monologue.

Justice Powell and Blackmun's concurring opinion disagreed with the Stevens' plurality that offensive non-obscene speech was less deserving of First Amendment protection than other kinds of speech. Instead, they supported the FCC order, because of the unique characteristics of the broadcast medium joined with the government's interest in protecting unwilling adults and children from offensive speech. Justice Brennan and Marshall dissent also objected to Stevens's two-tier First Amendment standard and argued that broadcasting which comes into the home can be turned off with minimum effort and offense and that parents, not government, are responsible for protecting children from indecent language. Justice Stewart and White also dissented arguing that the FCC lacked the statutory authority to ban the Carlin monologue.

In sum, the *Pacifica* decision authorizes the government to restrict non-obscene indecent broadcast material, but later decisions, including *Sable Communications v. Federal Communications Commission*, 492 U.S. 115 (1989), *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), and *United States v. Playboy Entertainment Group*, 529 U.S. 803 (2000), make clear that federal government efforts to limit indecency in phone networks, cable television, and the Internet will be strictly scrutinized by the court.