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Stevens' Ruling Carved Out Broadcasts As A Safe Haven

By **Kelcee Griffis**

Law360 (July 17, 2019, 9:39 PM EDT) -- To many in the communications sector, U.S. Supreme Court Justice John Paul Stevens left behind a legacy that preserved broadcast television and radio stations as safe havens for families, penning an influential opinion four decades ago that still guides programming decisions today.

Justice Stevens, who **died Tuesday** at the age of 99, wrote the 1978 decision that affirmed the Federal Communications Commission has modest power to oversee the content that broadcasters air during daytime hours and can fine stations that promote content unsuitable for children.

Despite arguments that the oversight impinged on stations' First Amendment freedoms, Justice Stevens' decision cast broadcast outlets as a uniquely accessible kind of speech that deserved closer scrutiny.

"It's still the one place where you can have your family watching, knowing there is a legitimate consequence if somebody goes too far," said Tim Winter, president of the Parents Television Council.

As a result, the FCC has been able to warn and fine broadcasters that air "indecent" curse words or nudity during daytime hours, although the agency's attempt to penalize CBS for pop star Janet Jackson's fleeting breast exposure during the 2004 Super Bowl halftime show **flubbed** on a technicality.

In a 5-4 decision in *FCC v. Pacifica Foundation*, Justice Stevens crucially held that the FCC had the statutory authority to regulate indecent content on broadcasts and that such regulations didn't violate the First Amendment.

Similar limitations ultimately did not apply to then-nascent cable programming networks because viewers had to proactively subscribe to them, in contrast to the free over-the-air broadcasts of traditional TV and radio stations.

"Of all forms of communication, broadcasting has the most limited First Amendment protection," Justice Stevens wrote. "Among the reasons for specially treating indecent broadcasting is the uniquely pervasive presence that medium of expression occupies in the lives of our people ... Broadcasting, moreover, is uniquely accessible to children."

The case stemmed from a complaint to the FCC from a Manhattan resident who said he was driving with his 15-year-old son one October afternoon when they heard multiple obscenities blasting from a local WBAI-FM broadcast.

The segment was a recording of comedian George Carlin delivering his classic standup routine about "dirty words." The FCC issued a declaratory order that didn't bar broadcasts like that of Carlin's material but required programmers to shift such content to a more appropriate time slot, outside the hours of 6 a.m. to 10 p.m.

"Obviously, standards change over the course of time ... but I think that the FCC should have that authority" to regulate instances of indecency, said former Democratic FCC Commissioner Michael Copps, who served on the agency for a decade.

A challenge to the FCC's order landed before the Supreme Court, which agreed that the agency can exercise oversight as long as it wields its authority in a "sensitive, delicate" way so as not to fully impinge on what stations are allowed to broadcast, Copps said.

Justice Stevens' approach stands out — and has likely endured — because of his laser focus on the issues of the case, treading middle ground where he could both affirm free-speech values and validate concerned parents who might not want their kids to hear or see "patently offensive references to excretory and sexual organs and activities," as the opinion put it.

"He wrote a very narrow decision, and he worked very hard to get enough votes. It was hard to get even five votes for it," said Angela Campbell, director of Georgetown University Law Center's Institute for Public Representation.

Despite subsequent attempts by broadcasters to loosen the standard, the precedent has stayed intact, with the Supreme Court twice sidestepping the issue of whether FCC policing violates the First Amendment.

"They weren't willing to go to that position and say broadcasting is speech just like any other speech," Campbell said, noting that the high court didn't have an appetite to "completely free [broadcasters] of those kinds of responsibilities."

Although the media landscape has changed drastically, broadcast TV and radio remain the only widely accessible mediums that don't require an internet connection or a cellphone bill, Winter said. Critics argued that limiting broadcast content during daytime hours would tamp down free expression, but the proliferation of outlets in the digital age prove that controversial programs still have room to flourish, according to Winter of the Parents Television Council.

"The chilling effect has been negated entirely by the myriad distribution platforms that exist today," Winter said. "You can say what you want in an infinite number of entertainment platforms, and you can even be indecent on the public airwaves as long as you wait until 10 o'clock to do it."

Ultimately, Justice Stevens affirmed the duty that many broadcasters themselves feel to their local communities to offer family programming, according to Dennis Wharton, a spokesman for the National Association of Broadcasters.

"There's an ethos of the broadcaster. There's an expectation that we have established for our viewers, for our advertisers in this industry, that there are limits," Wharton said.

--Additional reporting by Jimmy Hoover. Editing by Jill Coffey and Kelly Duncan.