FEDERAL COMMUNICATIONS COMMISSION

v.

PACIFICA FOUNDATION, ET. AL. 438 U.S. 726 (1978)

AN ANALYSIS OF LITIGATION STRATEGY

Howard D. Leib, Esq.

CAVEAT

My personal sympathies in F.C.C. v Pacifica Foundation lie with Pacifica/WBAl. As the producer of a radio comedy hour on a non-commercial station, I too have broadcast the "Dirty Words" monologue and have, on other occasions, dealt with listeners who were offended by the language used in some of my broadcasts.

For these reasons, my analysis of the case deals more with what Pacifica did wrong and what else it could have done to win. The Commission's actions are discussed, but not in as minute detail.

This is a case I would truly have enjoyed litigating.

FEDERAL COMMUNICATIONS COMMISSION

v.

PACIFICA FOUNDATION, ET. AL. 438 U.S. 726 (1978)

I. FACTUAL BACKGROUND

It started at about 2:00 p.m. on Tuesday, October 30, 1973, when WBAI-FM, New York broadcast "Dirty Words" (App. 1), a twelve-minute comedy routine by comedian George Carlin. In the listening audience was a Mr. John H. Douglas and his son. Mr. Douglas was not amused by the language in Mr. Carlin's monologue and, on November 28, 1973, he sent a letter of complaint to the Federal Communications Commission (App. 2).

On December 10, 1973, the F.C.C. forwarded the complaint to WBAI for comment. In their comment, (App. 3), the Pacifica Foundation (the licensee of WBAI) indicated that the monologue was "broadcast during the course of a regularly scheduled live program [which] ... consisted of ... commentary as well as analysis of contemporary society's attitudes toward language ... Mr. Gormal (the program host) played the George Carlin segment as it keyed into a general discussion of the use of language in our society." WBAI also indicated that the listeners had been advised as to the sensitive language "which might be regarded as offensive to some".

In March of 1974, the F.C.C. made a further request of WBAI for "a tape of the program, 'Lunchpail', broadcast over WBAI-FM on October 30, 1974 (sic)". WBAI responded that no tape had been made and, as the program was performed live, no script was prepared in advance.

On the basis of these exchanges, the F.C.C. issued, on February 21, 1975, a declaratory order indicating that, although no sanctions were to be imposed, WBAI's actions in airing "Dirty Words " were grounds for imposing sanctions.

The opinion offered several justifications for the ruling. These will be discussed in the next section.

Without requesting a rehearing before the Commission, Pacifica brought suit in the United States Court of Appeals for the District of Columbia, seeking review of the F.C.C. ruling. By a 2-1 majority, the Court of Appeals ruled for Pacifica. The F.C.C.'s motion for rehearing was denied by a 5-4 vote.

On October 7, 1977, the F.C.C. filed an application for certiorari, stating that the questions-presented were:

1. Whether the broadcast medium's unique qualities and the requirement that broadcaster's program in the public interest distinguish broadcasting from other modes of expression so as to warrant giving meaning, for purposes of regulatory action, to the prohibition of indecency in 18 U.S.C. §1464 at times when there is a strong probability that unsupervised children are in the audience.
2. Whether the F.C.C. correctly found that language broadcast in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. §1464.

On January 9, 1978, the Supreme Court granted the petition for certiorari. The Court handed down its opinion on July 3, 1978, reversing the judgement of the Court of Appeals and finding that the F.C.C. did have the authority to impose sanctions on WBAI for its broadcast of "Dirty Words."

This paper explores the various steps in the F.C.C. v. Pacifica litigation. The primary focus will be on the errors, as the author sees them, that were made in the presentation of the case, specifically Pacifica's case, at the various decisional levels.

II. THE LITIGATION

1. Regulatory Background

The issues of obscene and indecent language broadcast over radio is not one unique to F.C.C. v. Pacifica. Although commonly dealing with "obscenity" rather than "indecency", the F.C.C. had issued several rulings in this area prior to the WBAI case.

In In Re WUHY-FM, Eastern Educational Radio, 24 F.C.C. 2d 408 (1970), the Commission ruled that language similar to that used by Mr. Carlin was, while not obscene, indecent and thus prohibitable under the Communications Act (18 U.S.C. 1464 "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.").

A broadcast would be indecent, according to the F.C.C., when "the material broadcast is (a) patently offensive by contemporary community standards; and (b) is utterly without redeeming social value." 24 F.C.C. 2d at 412. In the alternative, the Commission stated that "[t]he matter could also be approached under the public interest standard of the Communications Act ... (Section 315 (a))..... The Standard for such action under the public interest criterion is the same as previously discussed -- namely, that the material is patently offensive by contemporary community standards and utterly without socially redeeming value." 24 F.C.C. 2d at 413.

The Commission did take pains to point out that, while WUHY was not at liberty to broadcast "an expression which conveys no thought, [and] has no redeeming social value," "no segment (of the population), however large its size, may rule out the presentation of unpopular views or language in a work of art which offends some people .... " 24 F.C.C. 2d at 412 (emphasis added).

It is with this background that Pacifica came before the F.C.C.

2. The Broadcast

Whatever else the broadcast of "Dirty Words" may have been, it was not a flagrant violation of the then-current F.C.C. guidelines. It was not obscene, as it did not appeal to prurient interests, see WUHY, supra, at 412. If it was a violation of 18 U.S.C. 1464, it must then have been indecent. The then current standard, though, required that indecent broadcast material be "utterly without redeeming social value." It would be hard to argue that Mr. Carlin's use of the four-and-more letter words, in the context of a discussion of those very words, was "utterly" without socially redeeming value.

Nor can it be said that the material was broadcast with total disregard for the audience. "Immediately prior to the broadcast of the monologue, listeners were advised that it included sensitive language which might be offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes." Pacifica Reply to F.C.C.

For those reasons, WBAI should have felt themselves in a strong position when they received the F.C.C. inquiry.

3. Response to the F.C.C.

WBAI's response to the F.C.C. was very off-handed. It related the facts of the incident in question without putting the matter into a regulatory perspective. While it is possible that WBAI viewed this simply as a routine inquiry by the F.C.C. and not a matter for close attention, by treating this as a routine matter, WBAI passed up an opportunity to shape the litigation that ensued.

Similarly, and less understandably, WBAI passed up another opportunity when the F.C.C. requested a tape of the program in question. WBAI responded that no tape was made and

that no script existed. While this was undoubtedly true, there was another response available. A tape of the monologue itself could have been made directly from the "Occupational Fool" album. This would have accomplished two things. First, it would have shown to the F.C.C. a desire to cooperate. Second, and more important, it may have helped shape the dispute.

In the absence of a tape, the F.C.C. had a staff member make a transcript of the recording, Inevitably, a printed transcript, which can be skimmed in a search for expletives (in the interest of propriety I shall refer to "the seven dirty words" in the Nixonian manner), which will appear more damning than a recording in which the listener must abide by the speaker's timing and delivery. Even a listener who was offended by the expletives used might find himself carried away by the audience laughter. This is surely not the case when one sees "(Laughter)"at the end of a line in the transcript. Additionally, much of the bite of the expletives themselves are removed through Mr. Carlin's delivery and repetition. What on paper appears to be incessant use of various expletives, becomes sanitized by the audio repetition.[1]

While there is no guarantee that, had WBAI sent a tape, the Commissioners would have listened to it or, having listened, would have acted any differently than they did, what is clear is that WBAI again passed up an opportunity to shape the views of the Commissioners in this dispute.

4. Reaction to the F.C.C. Ruling

The F.C.C. was not persuaded to drop the matter by WBAI's response. On February 12,

[1] Judge Leventhal, in his dissenting opinion in the District Court, stated, "This transcript was written, and it may well be more heavy handed than the monologue as heard on the radio. But counsel have not complained that the transcript format distorts or fails to present the issues.

1975, the Commission adopted a memorandum opinion (Released February 21, 1975) finding WBAI potentially liable for broadcasting indecent material. Although the opinion is not a model of clarity, it did serve to set out the issues which would reappear throughout the litigation. 1) What is "indecent" material as opposed to obscene material and may "indecent" material, qua indecent material, be regulated? 2) What is the significance of children in the listening audience? and 3) To what degree may broadcasting be regulated due to its "special qualities which distinguish it from other modes of communication and expression?" 56 F.C.C. 2d at 96.

Having found that "indecent" was identifiable and regulable apart from that which is obscene, that the presence of children in the audience is highly significant and that broadcasting could be regulated in ways impermissible in other media, the Commission issued a declaratory order. This order found that WBAI had violated the F.C.C. standards and that, had the Commission so decided, sanctions could have been imposed.

As the Commission stated:

> A declaratory order is a flexible procedural device admirably suited to terminate the present controversy between a listener and the station, and to clarify the standards which the Commission utilizes to judge "indecent language". See 5 U.S.C. 554 (e), and 47 C.F.R. 1.2. Such an order will permit all persons who consider themselves aggrieved or who wish to call additional factors to the Commission's attention to seek reconsideration. 47 U.S.C. 405. If not satisfied by the Commission's action on reconsideration, judicial review may be sought immediately.

56 F.C.C. 2d at 99.

While the F.C.C.'s explanation sounds noble enough, it is belied by the facts. The Radio Television News Directors Association (RTNDA) filed a petition with the F.C.C. seeking clarification of the Pacifica Ruling. On March 23, 1976, the Commission issued an opinion

stating the "declaratory order was issued in a specific factual context." 59 F.C.C. 2d 892, 893. The Commission went on to point out a "long standing policy of refusing to issue interpretive rulings or advisory opinions when the critical facts are not explicitly stated or there is a possibility that subsequent events will alter them." 59 F.C.C. 2d at 893.

The issuance of the declaratory opinion did serve a strategic purpose in the litigation. It had the effect of shifting the equities in the dispute. Had the F.C.C. imposed sanctions, WBAI would have been in a more sympathetic position as a struggling, listener-sponsored radio station being seriously penalized for airing material admittedly within the protection of the First Amendment. As matters stand, WBAI came to court in the role of a child who, having gotten away with only a warning, went crying to the other parent seeking protection.

At this stage of the proceedings, WBAI could have asked for a rehearing in front of the Commission. They did not do so. This was a big mistake tactically and could have been disastrous legally.

47 U.S.C §405 authorizes any party to "an order, decision, report, or action" by the Commission to petition for rehearing. A further part of the section states:

> The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such order decision, report, or action, except where the party seeking such review.... (2) relies on questions of fact or law upon which the Commission...has been afforded no opportunity to pass.

A broad view of the statute could have gotten WBAI thrown out of Court initially for failure to raise any issue of fact or law before the Commission. The opinion of the D.C. Court (see below) makes no mention of this section; however, the F.C.C. does mention it, in passing, in their Supreme Court brief.

Most importantly, WBAI failed to make use of an opportunity to force the Commission

to focus its opinion or make concrete factual findings. There are several findings of fact inherent in the F.C.C.'s ruling. First, the opinion presumes a large percentage of children in the listening audience at 2:00 p.m. on a school day. The order also presumes that the expletives used are "patently offensive". (Notably absent is any reference to "contemporary community standards.")

The Commission also states, as one of the justifications for its actions, that "[o]bnoxious, gutter language describing these matters (sex and excretory functions) has the effect of debasing and brutalizing human beings by reducing them to mere bodily functions .... " 56 F.C.C. at 98.

All of these factual conclusions are integral to the F.C.C.'s opinion and all are open to question. The number of children in the audience in the middle of a school day (and especially in WBAI's audience) is something which was not documented. Nor was there any real discussion of under what circumstances, and which words were "patently offensive" (and, again, offensive to whom?). Neither was there any explanation of how we are reduced, by words, to mere bodily functions.

The Commission, in their attempt to define indecency, stated: "indecent language is distinguished from obscene language in that (1) it lacks the element of appeal to the prurient interest ... and that (2) when children may be in the audience, it cannot be redeemed by a claim that it has literary, artistic, political or scientific value." 56 F.C.C. 2d at 98.

Had WBAI requested a rehearing claiming that the monologue did, in fact, have literary merit, the F.C.C. would not, later, have been able to assert that they had only held that the monologue, as broadcast, was indecent.

As stated earlier, the Commission's opinion is not a model of clarity. As later turned out to be the case, a muddy opinion can be construed by the Court (and Commission) any way it wants. A request for a rehearing might have caused the Commission to clarify its position and

thus present a more readily attackable target.

This failure to request a rehearing is, in the Author's opinion, one of the biggest mistakes of the litigation.

5. The Court of Appeals

Rather than ask for a rehearing before the Commission, WBAI appealed directly to the Court of Appeals for the District of Columbia, which had the authority to review opinions of the F.C.C.: They drew a panel consisting of Chief Judge Bazelon and Judges Tamm and Leventhal.

Some clues to the opinions of Bazelon and Leventhal can be found in the opinions accompanying Illinois Citizens' Committee for Broadcasting v. F.C.C., 515 F.2d 397 (D.C. Cir. 1975). That case involved what has come to be known as "topless radio", a format in which the disc jockey takes phone calls from listeners, primarily female, and encourages them to discuss intimate details of their sexual experiences and attitudes. The F.C.C., in Sonderling Broadcasting Corporation, 27 R.R.2d 285 (1973), had found that these broadcasts fell into the category of "obscene or indecent" as stated in 18 U.S.C. §1464, 27 R.R.2d at 288.

The opinion of the Court of Appeals was written by Judge Leventhal. In that opinion, Judge Leventhal affirmed the F.C.C.'s finding that the material was obscene. The Judge specifically declined to explore whether the Supreme Court's redefinition of obscenity in Miller v. California, 413 U.S. 15, (1973), had an effect on the validity of the F.C.C.'s ruling which had been reached under the earlier definition of Roth v. United States, 354 U.S. 476 (1957). As Judge Leventhal stated, "[w]e see no point in pursuing in the abstract the question whether the finding of obscenity here survives the narrowing of the second test that was accomplished in Miller, especially since we have the additional elements of titillation and probable exposure to

children .... " 515 F.2d at 405 (emphasis added).

The parties could have well anticipated that Judge Leventhal would be responsive to the argument that the presence of children in the audience justified the Commission's action. As we will see, this was the case.[2]

Judge Bazelon did not agree with Judge Leventhal. Though not part of the panel which heard the Illinois Citizens' case, he was a member of the District of Columbia Court of Appeals. As such, he participated in the vote for a hearing en banc. Although the suggestion for rehearing en banc was denied, Judge Bazelon wrote a lone dissent favoring such a hearing.

A brief excerpt from that opinion will show why Judge Bazelon was likely to side with WBAl:

> [T]he Commission in its decision relied on several of its precedents which are inconsistent with Memoirs (v. Massachusetts, 383 U.S. 413 (1966)) and Roth, most particularly the amazing WUHY decision.... The F.C.C. makes reference to the pervasive, intrusive nature of radio to justify its result, but I do not think that nature alone can justify a retreat from the Memoirs-Roth standard absent some Commission effort to find less drastic means of protecting the unsuspecting listener. The F.C.C. may not wave this argument like a wand and magically alter established legal standards to fit its pre-ordained results ...
>
> . . . . .
>
> I cannot, of course, consider whether the broadcasts are obscene under Miller until we have some evidence of a local community standard (of patently offensive material) and that evidence is applied by a fact-finder.

515 F.2d at 420-21

Judge Bazelon specifically cited the F.C.C.'s Pacifica opinion as an example of the F.C.C.'s use of pervasiveness of radio and exposure to children to "reaffirm its position on obscenity." He went on to state, "the F.C.C. misinterprets Miller on the point about

---

[2] The author has been unable to secure copies of the briefs to the Court of Appeals. It is therefore unknown whether the F.C.C. cited to Judge Leventhal in his own language.

dissemination to children. The possibility of dissemination to children is incorporated into the new test of obscenity and is not grounds for expanding the Miller test." 515 F.2d at 420, n. 53.

Judge Bazelon, in this excerpt, sets out many of the arguments which Pacifica/WBAI would, of necessity, have to make to win their case. He was a likely ally for the broadcasters and did not let them down.

The big question was how Judge Tamm would react. In the only relevant opinion in which he participated, Brandwine-Main Line Radio Inc. v. F.C.C., 473 F.2d 16, (D.C. Cir. 1972), Judge Tamm wrote a majority opinion upholding the F.C.C.'s power to refuse to renew a station's license for failure to observe the personal attack and fairness doctrine rules. While this case is not quite on point with Pacifica, it is the closest we have.

In his opinion, Judge Tamm expresses deep concern for the First Amendment rights of broadcasters. In the introduction to the section entitled "FIRST AMENDMENT CONSIDERATIONS" Judge Tamm states:

> The most serious aspect of this case relates to the basic freedoms of speech and press which are essential guarantees of the first amendment. This is the area of greatest concern to the court. Any shortcomings in this area would necessitate our reversing the decision of the Commission. Not only must the Commission take a hard look at the case in this light but so must this court.

473 F.2d at 52.

The Judge's concern was tempered by a recognition that broadcasters are licensed in the public interest and have an obligation to serve the public by presenting diverse views. Id at 57. Judge Tamm did not find enforcement of the Fairness Doctrine to be constitutionally impermissible, however a fair reading of his opinion would show him less disposed towards rulings which keep material off the air than towards rules which require inclusion of certain

materials. Thus, after Brandywine, Judge Tamm might not be disposed toward the F.C.C.'s position, but this was far from clear.

The oral argument, as reported by Broadcasting Magazine, April 5, 1976, pp. 38-39, did little to change these views of the Judges' positions. Judge Bazelon, in questioning Joseph Marino, the Commission's counsel, pressed him on the fact that appeal to prurient interest is not part of the commission's definition and that the language could not be permitted even in works of "serious artistic merit," and on whether the commission based its ruling on information concerning the effect of the banned words on children.

Mr. Marino, answering the question, indicated that the Commission interpreted the "patently offensive by community standards" test as allowing them to make "common sense ... intuitive" judgements as to what did and did not fall within this standard.

Judge Leventhal, in what might be considered a surprising statement, indicated the possibility that WBAI, with its reputation for presenting "avant-garde" material, might well have an audience that did not find such material "patently offensive."

In a more expected line, Judge Leventhal's questions to Harry Plotkin, counsel for Pacifica, indicated his concern about the presence of children in the listening audience. He asked, for instance, whether it would be unconstitutional to ban offensive language on Saturday morning television, programmed for children. Mr. Plotkin did not answer that directly, and later, when he said children do not come to such words innocently, that they have heard them in their daily lives, Judge Leventhal asked whether there is not a difference "between hearing this in the gutter and through approved institutions," such as radio and television.

Judge Tamm did nothing to indicate his position on the matter, as he did not ask a single question.

There were no real surprises in the Court of Appeals opinion. Judge Tamm, filed the opinion for the Court, invalidated the Commission's order as overbroad. In effect, Judge Tamm ruled that, whatever powers the F.C.C. may have to regulate non-obscene speech, it could not ban words without considering the context of their use. As Tamm stated the issue:

> the Order sweepingly forbids any broadcast of the seven words irrespective of context or however innocent or educational they may be. For instance, the Order would prohibit the broadcast of Shakespeare's The Tempest or Two Gentlemen of Verona. Certain passages of the Bible are also proscribed from broadcast by the Order. Clearly every use of these seven words cannot be deemed offensive even as to minors. In this regard the Order is overbroad.

Pacifica Foundation v. F.C.C., 556 F.2d 9, 17 (1977).

Judge Tamm also found the Order vague for failure to define "children." The intrusive nature of broadcasting did not, in Judge Tamm's opinion, justify the imposition of the Order. "[A]s the Supreme Court noted in Lehman v. City of Shaker Heights, 418 U.S. 288, 302 ... (1974), '[t]he radio can be turned off'."

Judge Tamm's position is well summarized in his conclusion:

> As we find that the Commission's Order is in violation of its duty to avoid censorship of radio communications under 47 U.S.C. Section 326 and that even assuming, arguendo, that the Commission may regulate non-obscene speech, nevertheless its Order is over broad and vague, therefore we must reverse the Order. We should continue to trust the licensee to exercise judgement, responsibility, and sensitivity to the Community's needs, interests and tastes. To whatever extent we err, or the Commission errs in balancing its duties, it must be in favor of preserving the values of free expression and freedom from governmental interference in matters of taste.

556 F.2d at 18.

While Judge Tamm was content to invalidate the Opinion on the facts of the case, Judge Bazelon wished to go further. Stating that this case confirmed his view that "the F.C.C. has demonstrated what one can most charitably describe as total ignorance of the constitutional

definition of obscenity," Id. at 20-21, the Judge went on to find the Commission's actions invalid for attempting to regulate indecent language as something different from obscene speech. He found that "the Commission's definition [of indecent] disregards every Miller requirement but one." Id. at 22.

The Judge went on to review each justification for increased regulation of broadcast media and found each one insufficient to justify the Commission's action. He ends his opinion by calling for continuation of the Court's zealous protection of broadcasting from censorship.

As was to be expected, Judge Leventhal filed a dissenting opinion. Insisting on limiting review of the Order to the language "as broadcast," he went on to find the Order valid. Specifically citing the areas he had mentioned in oral argument, the presence of children in the audience and the pervasiveness of the medium, he found that the Commission's actions were warranted and necessary for the protection of children.

Following their loss before the three judge panel, the F.C.C. moved for a hearing en banc. Though the suggestion was denied, the vote on rehearing was only 5-4 against.

6. The Supreme Court

Before any briefs had been filed or any motions made, each side could be reasonably certain of some votes for their position from the Justices.

The F.C.C. could virtually rely on the votes of Chief Justice Burger and Justice Rehnquist. In my survey of ten cases dealing with regulation of speech and obscenity, (App. 4) Burger and Rehnquist voted in favor of regulation in each of them.
Similarly, Pacifica/WBAI could be reasonably sure of the votes of Justices Brennan, Marshall

and Stewart. In the ten cases, Brennan and Marshall voted against regulation in all ten and Justice Stewart voted against regulation in all but one, Paris Adult Theater v. Slaton, 413 U.S. 49 (1973).

This left four Justices for whom the parties could vie.

Justice Blackmum would, prior to Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), have been counted a firm vote for the conservative wing of the Court and the F.C.C. However, in the three surveyed cases which immediately precede the Pacifica opinion, Southeastern, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975), and Young v. American Mini Theaters, Inc., 427 U.S. 50 (1976), Justice Blackmum voted with the liberal wing.

Southeastern was decided primarily on grounds that the actions of the City of Chattanooga, Tennessee, refusing to give a theater lease to a production of "Hair" on the grounds that is was obscene, were a prior restraint, in that they had not viewed the production nor seen the script.

In their book, The Brethren, Woodward and Armstrong report that Blackmum's vote with the liberal wing "was part of Brennan's 'cultivation of Harry project', as one clerk called it." Brethren at 362. Though it is impossible to judge adequately the reliability of the Woodward/Armstrong book, such a "cultivation" could help explain his votes. Blackmum's dissenting opinion in Young decried the regulation by zoning of "adult theaters" on the grounds that the statutes were vague and over broad, especially in the case where a theater showed adult movies on some occasions and family films on others. There was no question in the record but that the theaters involved in the action were "adult theaters."

This line of reasoning would seem to be at odds with Blackmun's dissenting opinion in Lewis v. City of New Orleans, 415 U.S. 130, (1974), in which he wrote:

> The "overbreadth" and "vagueness" doctrines, as they are now being applied by the Court, quietly and steadily have worked their way into First Amendment parlance much as substantive due process did for the "old Court" of the 20's and 30's. These doctrines are being invoked indiscriminately without regard to the nature of the speech in question, the possible effect the statute or ordinance has upon speech, the importance of the speech in relation to the exposition of ideas, or the purported or asserted community interest in preventing that speech. And it is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus. This is the compulsion of a doctrine that reduces our function to parsing words in the context of imaginary events. The result is that we are not merely applying constitutional limitations, as was intended by the Framers, and, indeed, as the history of our constitutional adjudication indicates, but are invalidating state statutes in wholesale lots because they "conceivably might apply to others who might utter other words." Gooding v. Wilson, 405 U.S. at 535 (dissenting opinion).

415 U.S. at 135-36.

Whatever may have been Justice Blackmun's reason for his flirtation with liberalism, it did not last. As we shall see, he voted with the Chief Justice in Pacifica.

A careful reading of Justice White's past opinions could have given one a preview of how he would vote in the Pacifica case. While willing to allow regulation of obscenity (Paris Theaters, supra, Miller, supra, Hamling, supra, Southeastern, supra (dissenting opinion), and Young, supra) he had voted with the liberal wing in three cases involving the use of the same type of language used in the Carlin monologue (Eaton v. City of Tulsa, 415 U.S. 697 (1974), Lewis, supra, and Hess v. Indiana, 414 U.S. 105 (1973)).

In Erznoznik, supra, Justice White dissented from an opinion which allowed a drive-in to show non-obscene nudity. His dissent, however, made clear only that he was not ready to agree that "the State may not forbid 'expressive' nudity on public streets, in the public parks, or any other place .... " 422 U.S. at 224. As Pacifica was a case where all sides agreed that obscenity was not an issue, per se, White may well have been expected to allow the words to be broadcast. It is an altogether different question as to whether his personal idiosyncracies would cause him

to vote differently in the case of a video broadcast of non-obscene nudity.

Justice Stevens was the least known of the sitting Justices. Although Woodward/ Armstrong state that "Stevens was inclined to join Brennan, Marshall and Stewart on obscenity questions," Brethren at 403, he wrote the majority opinion in Young as well as in Pacifica itself.

It is possible, based on the sometime practice of maintaining a majority by assigning the opinion to the weakest vote, that Stevens was not firmly wedded to the conservative wing in these matters. However, as an appointee of Gerald Ford, it is not likely that he saw himself as a kindred spirit to Brennan, et. al.

Justice Stevens' opinion in Young did not bode well for Pacifica/WBAI. In Part I, he refused to view the possibility of First Amendment infringement except as it related to the facts of the case at bar. In Part II, he viewed prior restraint as something to be judged, not on a theater-by-theater basis, but rather on a market-wide basis. In Part III, for which he was unable to hold a majority, Justice Stevens attempted to justify regulation based on the content of the speech. WBAI.

The final Justice to be considered, Justice Powell, was perhaps the most important of the sitting Justices. In the ten cases surveyed, Justice Powell was in the majority ten out of ten times. Five of these times he voted with the liberals and five times with the conservatives. The dividing line would seem clear - except for Southeastern, in which Powell voted with the liberal wing on procedural grounds, Powell voted with the conservatives to regulate obscenity and with the liberals to disallow the regulation of non-obscenity.

Indeed, Justice Powell's concurring opinion in Young contains language which would seem tailored to the Pacifica case:

In Erznoznik, an ordinance purporting to prevent a nuisance, not a comprehensive

> zoning ordinance, prohibited the showing of films containing nudity by drive-in theaters when the screens were visible from a public street or place. The governmental interests advanced as justifying the ordinance were ... (i) to protect citizens from unwilling exposure to possibly offensive materials; (and) (ii) to protect children from such materials; ... We found the Jacksonville ordinance on its face either over-broad or under-inclusive with respect to each of these asserted purposes. As to the first purpose, the ordinance was over broad because it proscribed the showing of any nudity, however innocent or educational. Moreover, potential viewers who deemed particular nudity to be offensive were not captives: they had only to look elsewhere. Id., at 210-212; see Cohen v California, 403 U.S. at 21. As to minors, the Jacksonville ordinance was over-broad because it "might prohibit newsreel scenes of the opening of an art exhibit as well as shots of bathers on a beach." 422 U.S. at 213.

427 U.S. at 83.

The difference between Erznoznik and Pacifica and the reason for the difference in Powell's vote can be found in Erznoznik itself. Referring to governmental actions designed "to shield the public from some kinds of speech on the grounds that they are more offensive than others," Powell indicated that "[s]uch restrictions have been upheld only when the speaker intrudes on the privacy of the home, ... or the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure." 205 U.S. at 209 (emphasis added). Powell's statements concerning the sanctity of the home make him a likely candidate for the F.C.C.'s position.

Despite this hindsighted view of the Justices' predispositions, there was still the need for a granting of a petition for cert. and briefs to be turned in before any decision would be reached. The F.C.C. filed its petition for cert. on October 7, 1977. They set forth two questions for the Court:

> 1. Whether the broadcast medium's unique qualities and the requirement that broadcasters program in the public interest distinguish broadcasting from other modes of expression so as to warrant giving meaning, for purposes of regulatory

action, to the prohibition of indecency in 18 U.S.C. §1464 at times when there is a strong probability that unsupervised children are in the audience.

2. Whether the F.C.C. correctly found that language broadcast in the early afternoon which described in a patently offensive manner sexual and excretory activities and organs was indecent within the meaning of 18 U.S.C. §1464.

It is significant to note at this point that, since the initiation of these actions, the Republicans had lost the White House, This may explain why the Justice Department, which had been a statutory party to the earlier proceedings on the side of the F.C.C., did not support the petition for cert. and, in fact, filed a brief supporting Pacifica in the Supreme Court.

In their application, the F.C.C. used all the right arguments. For Justice Stevens they stated that they had ruled that the monologue "as broadcast was indecent." Petition at 15. For Justice Powell, they took pains to point out that the difference between broadcast and other media is that broadcast comes into the home, where children can hear it, unsupervised.

In their "Opposition to Petition for Writ of Certiorari", Pacifica attempted to persuade the Court that the issue of authority to regulate was not actually before the Court, as the Court of Appeals had held only that the F.C.C.'s Order "was over broad and vague and thus contravened Section 326 of the Communications Act. Moreover, the opinion does not raise any substantial question of federal law concerning the Commission's regulatory authority." Opposition at 4. Pacifica might have gotten farther with this argument had they not opened the Opposition with the statement, "This case involves the narrow question as to whether the Federal Communications Commission (the "Commission") has the authority to proscribe the broadcast, in any context, of specific words solely on the grounds that they are generally regarded as offensive." Opposition at 1. This internal inconsistency cannot have aided Pacifica in its attempt to persuade the Court.

Pacifica's final point in its Opposition was that the ruling did not conflict with the ruling of any other court. This would undoubtedly have been true if the Supreme Court accepted the argument that the ruling dealt only with over broadness. Pacifica might well have fortified their position by arguing in the alternative that, if the Commission was correct and the Court of Appeals had ruled that the F.C.C. could not regulate the monologue, there was still no dispute between the Circuits.

In their petition, the F.C.C. makes reference to U.S. v. Simpson, 561 F.2d 53 (7th Cir. 1977), as a related case requiring the Court to decide these issues. In fact, in Simpson, the Seventh Circuit ruled that, under Section 1464, the term "indecent" had no meaning separate and apart from the term "obscene" and thus non-obscene speech could not be regulated. This does not conflict with the D.C. Circuit ruling at all. Simpson, which, as we shall see, was not properly utilized by Pacifica, may have been the reason that the F.C.C. put so much effort into reversing the D.C. Circuit Court ruling.

In Simpson, a private individual had broadcast words similar to those used in the monologue over his wife's citizen's band radio. He was criminally prosecuted for violating Section 1464. Had that case been the one to come before the Supreme Court, the equities would have been strongly with Simpson. In that case, an individual, without public interest responsibilities, faced criminal penalties for broadcasting over a far less intrusive medium in violation of the same statute that WBAI was said to have violated.

Simpson showed up in the briefs in interesting ways. The Commission, in addressing the issue of whether "indecency" was subsumed by "obscenity" made statements concluding that, at the time the Order was issued, "[a]lthough the courts had not had opportunity to rule directly on the separate standards for indecency, the Seventh and Ninth Circuits at least had contemplated that such standards might be permissible." Petitioner's brief at 14-15. Simpson was then relegated to a footnote which mentioned, as inconspicuously as possible, that it had decided that question based on a separate standard. See Id. at 7 n. 4, 15 n. 18.

Rather than lead with this point, Pacifica placed it second behind an attempt to convince the Court that the Commission's ruling was not limited to the facts of the case at bar, and thus could not survive as it censored seven words from the airwaves.

I believe this was a mistake.

Firstly, the argument itself is weak. The seven and a half pages of the brief used for that first argument contain only two case citations. The argument attempts to prove that the Order was intended to set out a general standard of "indecency" by relying on the Commission's refusal to clarify the ruling for the RTNDA (see discussion supra). While this may be evidence, it is hardly conclusive enough to base a case on. Additionally, while Pacifica does cite to the Court of Appeals' decision, this is not persuasive as it begs the question of whether that decision was correct.

I think that Pacifica could have made good use of Judge Bazelon's dissent to denial of a hearing en banc in Illinois Citizens, supra. In that opinion he discusses the detrimental effects an F.C.C. Order can have on other stations, such as self-censorship, even if it does not explicitly apply to other stations.

Secondly, to win on this argument, Pacifica needed to convince the Court both that the ruling has a broad reach and that such reach is unconstitutional. Conversely, to win on the Simpson point, they need only convince the Court that Simpson was correctly decided. When Pacifica does finally discuss the division of "indecency" and "obscenity," Simpson is relegated to a single footnote. Indeed, the F.C.C. cited Simpson more than Pacifica did. I am at a loss to explain why this unanimous ruling was not paraded before the Supreme Court and used for all it was worth. Had they done so, they might have been able to get around the "monologue as broadcast" problem.

Pacifica goes on to deal with the problems of children in the audience and intrusion into the home. They never make the argument that the Commission has failed either to identify an acceptable level of children in the audience or to establish that there were, in fact, children in the audience. Instead, they make an argument that the Commission has failed to show that the words are harmful.

Pacifica does not get to the issue of intrusion into the home, the issue so dear to Powell, until the last four pages of the brief. Relying almost exclusively on distinguishing Rowan v. Post Office Department, 397 U.S. 728 (1970), they attempt to show that there is sufficient protection in the homeowner's ability to turn off the radio.

Pacifica did not present a compelling case to the Court, either factually or legally. They never established that the equities were on their side, nor that the Commission's action was unfair or likely to cause a change in broadcast practices. Pacifica gave none of the Justices a reason to vote other than based on their natural predisposition.

7. Supreme Court Ruling

As he had in Young, Stevens' opinion for the majority limited review to the facts of the case before it. He validated the Commission's differentiation between "indecent" and "obscene" and identified the pervasiveness of the medium as justification for regulation. Powell again concurred in only part of Steven's opinion, again dissenting from those aspects which would have extended the rule broadly over varying factual situations. Predictably, Powell made specific reference to the intrusiveness of the medium.

Blackmun, who did not write separately, was once again in agreement with Burger and Renquist. White, still not intimidated by non-obscene speech, voted with Brennan, Marshall and

Stewart. None of these votes was surprising.

8. Conclusion

This case may well have been lost before it began. Ultimately, it was Pacifica's failure to set forth a sympathetic factual record which lost the case. Had the Order been clearer, or established that there was serious literary merit to the monologue, the Court would have had to deal with different issues, such as the propriety of the specific indecency standard set down by the Commission.

Pacifica lost this case, the F.C.C. did not really win it. Had the case come up while Douglas was still on the bench, Pacifica would, almost definitely, have won. However, Pacifica's failure to marshal its arguments and direct them at various Justices, especially Powell, was the deciding factor.

9. Epilogue

In the September-October 1982 issue of Channels magazine, Mark S. Fowler, chairman of the F.C.C., wrote an article entitled 'Congress Shall Make No Law.... In this article, Mr. Fowler made the following remarks:

> The second argument for leaving radio and television vulnerable (to regulation) is the impact of the two media. According to this theory, the electronic media are too powerful, because they may influence decisions in the political arena or shape values in the home.... The more effective the speech, the less protection it needs from the First Amendment.... This logic turns the First Amendment on its head.
>
> The impact theory reached its high-water mark in the 1978 Supreme Court F.C.C. v. Pacifica Foundation case .... Involved was but a single complaint about an FM broadcast heard over a car radio. But the Court used the opportunity to subordinate radio and television to newspapers and radio on the free-speech issue.

Whatever other merit Mr. Fowler's remarks may have, they indicate that this issue is not likely to be before the Court again in the near future.

APPENDIX

The following is a verbatim transcript of "Filthy Words" (Cut 5, Side 2), from the record album "George Carlin, Occupation: Foole" (Little David Records, LD 1005).

"Aruba-du, ruba-tu, ruba-tu.

I was thinking about the curse words and the swear words, the cuss words and the words that you can't say, that you're not supposed to say all the time, cause words or people into words want to hear your words. Some guys like to record your words and sell them back to you if they can, (laughter) listen in on the telephone, write down what words you say. A guy who used to be in Washington knew that his phone was tapped, used to answer, Fuck Hoover, yes, go ahead. (laughter) Okay. I was thinking one night about the words you couldn't say on the public, ah, airwaves, um, the ones you definitely couldn't say, ever, cause I heard a lady say bitch one night on television, and it was cool like she was talking about, you know, ah, well, the bitch is the first one to notice that in the litter Johnie right (murmur) Right. And, uh, bastard you can say, and hell and damn so I have to figure out which ones you couldn't and ever and it came down to seven but the list is open to amendment, and in fact, has been changed, uh, by now, ha, a lot of people pointed things out to me, and I noticed some myself. The original seven words were, shit, piss, fuck, cunt, cocksucker, motherfucker, and tits. Those are the ones that will curve your spine, grow hair on your hands and (laughter) maybe, even bring us, God help us, peace without honor (laughter) um, and a bourbon. (laughter) And now the first thing that we noticed was that the word fuck was really repeated in there because the word motherfucker is a compound word and it's another form of the word fuck. (laughter) You want to be a purist it doesn't really—it can't be on the list of basic words. Also, cocksucker is a compound word and neither half of that is really dirty. The word—the half sucker that's merely suggestive (laughter) and the word cock is a half-way dirty word, 50% dirty—dirty half the time, depending on what you mean by it. (laughter) Uh, remember when you first heard it, like in 6th grade, you used to giggle. And the cock crowed three times, heh (laughter) the cock—three times. It's in the Bible, cock is in the Bible. (laughter) And the first time you heard about a cock-fight remember—What? Huh? Naw. It ain't that, are you stupid? man, (laughter, clapping) It's chickens, you know, (laughter) Then you have the four letter words from the old Anglo-Saxon fame. Uh, shit and fuck. The word shit, uh, is an interesting kind of word in that the middle class has never really accepted it and approved it. They use it like, crazy but it's not really okay. It's still a rude, dirty, old kind of gushy word. (laughter) They don't like that, but they say it, like, they say it like, a lady now in a middleclass home, you'll hear most of the time she says it as an expletive, you know, it's out of her mouth before she knows. She says, Oh shit oh shit, (laughter) oh shit. If she drops something, Oh, the shit hurt the broccoli. Shit. Thank you. (footsteps fading away) (papers ruffling) Read it! (from audience)

Shit! (laughter) I won the Grammy, man, for the comedy album. Isn't that groovy? (clapping, whistling) (murmur) That's true. Thank you. Thank you man. Yeah. (murmur) (continuous clapping) Thank you man. Thank you. Thank you very much, man. Thank, no, (end of continuous clapping) for that and for the Grammy, man, cause (laughter) that's based on people liking it man, yeh, that's ah, that's okay man. (laughter) Let's let that go, man. I got my Grammy, I can let my hair hang down now, shit. (laughter) Ha! So! Now the word shit is okay for the man. At work you can say it like crazy. Mostly figuratively, Get that shit out of here, will ya? I don't want to see that shit anymore. I can't *cut* that shit, buddy. I've had that shit up to here. I think you're full of shit myself. (laughter) He don't know shit from Shinola (laughter) you know that? (laughter) Always wondered how the Shi-

nola people felt about that. (laughter) Hi, I'm the new man from Shinola. (laughter) Hi, how are ya? Nice to see ya. (laughter) How are ya? Boy, I don't know whether to shit or wind my watch. (laughter) Guess, I'll shit on my watch. (laughter) Oh, *the* shit is going to hit *de* fan. (laughter) Built like a brick shit-house. (laughter) Up, he's up shit's creek. (laughter) He's had it. (laughter) He hit me, I'm sorry. (laughter) Hot shit, holy shit, tough shit, eat shit, (laughter) shit-eating grin. Uh, whoever thought of that was ill. (murmer laughter). He had a shit-eating grin! He had a what? (laughter) Shit on a stick. (laughter) Shit in a handbag. I always liked that. He ain't worth shit in a handbag. (laughter) Shitty. He acted real shitty. (laughter) You know what I mean? (laughter) I got the money back, but a real shitty attitude. Heh, he had a shit-fit. (laughter) Wow! Shit-fit. Whew! Glad I wasn't there. (murmur, laughter) All the animals—Bull shit, horse shit, cow shit, rat shit, bat shit. (laughter) First time I heard bat shit, I really came apart. A guy in a Oklahoma, Boggs, said it, man. Aw! Bat shit. (laughter) Vera reminded me of that last night, ah (murmur). Snake shit, slicker than owl shit. (laughter) Get your shit together. Shit or get off the pot. (laughter) I got a shit-load full of them. (laughter) I got a shit-pot full, all right. Shit-head, shit-heel, shit in your heart, shit for brains, (laughter) shit-face, heh. (laughter) I always try to think how that could have originated; the first guy that said that. Somebody got drunk and fell in some shit, you know. (laughter) Hey, I'm shit-face. (laughter) Shit-face, *today*. (laughter) Anyway, enough of that shit. (laughter) The big one, the word fuck that's the one that hangs them up the most. Cause in a lot of cases that's the very act that hangs them up the most. So, it's natural that the word would, uh, have the same effect. It's a great word, fuck, nice word, easy word, cute word, kind of. Easy word to say. One syllable, short u. (laughter) Fuck. (Murmur) You know, it's easy. Starts with a nice soft sound fuh ends with a *kuh*. Right? (laughter) A little something for everyone. Fuck. (laughter) Good word. Kind of a proud word, too. Who are you? I am *FUCK*. (laughter) *FUCK OF THE MOUNTAIN*. (laughter) Tune in again next week to *FUCK OF THE MOUNTAIN*. (laughter) It's an interesting word too, cause it's got a double kind of a life—personality—dual, you know, whatever the right phrase is. It leads a double life, the word fuck. First of all, it means, sometimes, most of the time, fuck. What does it mean? It means to make love. Right? We're going to make love, yeh, we're going to fuck, yeh, we're going to fuck, yeh, we're going to make love, (laughter) we're really going to fuck, yeh, we're going to make love. Right?

And it also means the beginning of life, it's the act that begins life, so there's the word hanging around with words like love, and life, and yet on the other hand, it's also a word that we really use to hurt each other with, man. It's a heavy. It's one that you save toward the end of the argument. (laughter) Right? (laughter) You finally can't make out. Oh, fuck you man. I said, fuck you. (laughter, murmur) Stupid fuck. (laughter) Fuck you and everybody that looks like you, (laughter) man. It would be nice to change the movies that we already have and substitute the word fuck for the word kill, wherever we could, and some of those movies cliches would change a little bit. Madfuckers still on the loose. Stop me before I fuck again. Fuck the ump, fuck the ump, fuck the ump, fuck the ump, fuck the ump. Easy on the clutch Bill, you'll fuck that engine again. (laughter) The other shit one was, I don't give a shit. Like it's worth something, you know? (laughter) I don't give a shit. Hey, well, I don't take no shit, (laughter) you know what I mean? You know why I don't take no shit? (laughter) Cause I don't give a shit. (laughter) If I give a shit, I would have to pack shit. (laughter) But I don't pack no shit cause I don't give a shit. (laughter) You wouldn't shit me, would you? (laughter) That's a joke when you're a kid with a worm looking out the bird's ass. You wouldn't shit me, would you? (laughter) It's an eight-year-old joke but a

good one. (laughter) The additions to the list, I found three more words that had to be put on the list of words you could never say on television, and they were fart, turd and twat, those three. (laughter) Fart, we talked about, it's harmless. It's like tits, it's a cutie word, no problem. Turd, you can't say but who wants to, you know? (laughter) The subject never comes up on the panel so I'm not worried about that one. Now the word twat is an interesting word. Twat! Yeh, right in the twat. (laughter) Twat is an interesting word because it's the only one I know of, the only slang word applying to the, a part of the sexual anatomy that doesn't have another meaning to it. Like, ah, snatch, box and pussy all have other meanings, man. Even in a Walt Disney movie, you can say, We're going to snatch that pussy and put him in a box and bring him on the airplane. (murmur, laughter) Everybody loves it. The twat stands alone, man, as it should. And two-way words. As, ass is okay providing you're riding into town on a religious feast day. (laughter) You can't say, up your ass. (laughter) You can say, stuff it! (murmur) There are certain things you can say its weird but you can just come so close. Before I cut, I, uh, want to, ah, thank you for listening to my words, man, fellow, uh, space travelers. Thank you man for tonight, and thank you also. (clapping, whistling)"

APPENDIX II

[Received by FCC Mail Branch on Dec. 3, 1973]

JOHN H. DOUGLAS,
885 MADISON AVENUE,
New York, N.Y. 10017, November 28, 1973.

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C. 20554

GENTLEMEN: On October 30th, in the early afternoon (from approximately 1:30 p.m. to 2:30 p.m.), while driving in my car, I tuned to radio station WBAI in New York City.

I heard, among other obscenities, the following words:

cocksucker — fuck
cunt — shit

and a whole host of others. This was supposed to be part of a comedy monologue.

Whereas I can perhaps understand an "X-rated" phonograph record's being sold for private use, I certainly cannot understand the broadcast of same over the air that, supposedly, you control. Any child could have been turning the dial, and tuned in to that garbage.

Some time back, I read that "topless" radio stations were fined for suggestive phrases. If you fine for suggestions, should not this station lose its license entirely for such blatant disregard for the public ownership of the airwaves?

Can you say this is a responsible radio station, that demonstrates a responsibility to the public for its license?

I'd like to know, gentlemen, just what *you're* going to do about this outrage, and, by copy, I'm asking our elected officials the same thing.

Incidentally, my young son was with me when I heard the above, and, unfortunately, he can corroborate what was heard.

Yours truly,

JOHN H. DOUGLAS.

cc: Senator James Buckley; Senator John Pastore; Morality in Media

APPENDIX III

PACIFICA WBAI FM 99.5,
359 EAST 62ND STREET,
New York City 10021, January 7, 1974.

WILLIAM B. RAY,
Chief, Complaints and Compliance Division, Broadcast Bureau, Room 353, Federal Communications Commission, Washington, D.C. 20554

Re: 8310-m; C12-47

DEAR MR. RAY: I am writing on behalf of Pacifica Foundation, licensee of non-commercial educational Station WBAI-FM, New York, in response to the above-referenced letter from your office dated December 10, 1973 forwarding a letter of complaint from Mr. John H. Douglas.

Mr. Douglas' complaint is based upon the language used in a satirical monologue broadcast during the course of a regularly scheduled live program "Lunchpail," hosted by Paul Gorman, on October 20, 1973 at approximately 2:00 p.m. The monologue in question was from the album "George Carlin, Occupation: LOOLE," Little David Records, distributed by Atlantic Recording Corporation. On October 20, the "Lunchpail" program consisted of Mr. Gorman's commentary as well as analysis of contemporary society's attitudes toward language. The subject was also discussed with listeners who called-in. Mr. Gorman played the George Carlin segment as it keyed into a general discussion of the use of language in our society.

The selection from the Carlin album was broadcast towards the end of the program because it was regarded as an incisive satirical view of the subject under discussion. Immediately prior to the

broadcast of the monologue, listeners were advised that it included sensitive language which might be regarded as offensive to some; those who might be offended were advised to change the station and return to WBAI in 15 minutes. To our knowledge, Mr. Douglas is the only person who has complained about either the program or the George Carlin monologue.

George Carlin is a significant social satirist of American manners and language in the tradition of Mark Twain and Mort Sahl. Like Twain, Carlin finds his material in our most ordinary habits and language—particularly those "secret" manners and words which, when held before us for the first time, show us new images of ourselves.

His stories of childhood life on New York's city streets, parochial school, have a common purpose—to make us laugh at ourselves so that we may discover the common humanity beneath our social forms. More particularly, Carlin, like Twain and Sahl before him, examines the language of ordinary people. In the selection broadcast from his album, he shows us that words which most people use at one time or another cannot be threatening or obscene. Carlin is not mouthing obscenities, he is merely using words to satirize as harmless and essentially silly our attitudes towards those words.

As with other great satirists—from Jonathan Swift to Mort Sahl—George Carlin often grabs our attention by speaking the unspeakable, by shocking in order to illuminate. Because he is a true artist in his field, we are of the opinion that the inclusion of the material broadcast in a program devoted to an analysis of the use of language in contemporary society was natural and contributed to a further understanding of the subject.

If you have any further questions regarding this matter, please contact Pacifica Foundation's Washington communications counsel, David Tillotson, Esquire, Arent, Fox, Kintner, Plotkin & Kahn, 1200 Federal Bar Building, 1815 H Street NW, Washington, D.C. 20006.

Sincerely,

Edwin A. Goodman,
President, Pacifica Foundation.

Henry S. Hewes,
Program Director, Station WBAI.

CC: David Tillotson

Re: 8310-M C1-579

April 8, 1974.

Mr. William B. Ray,
Chief, Complaints and Compliance Division, Broadcast Bureau, Federal Communications Commission, Washington, D.C. 20554

Dear Mr. Ray: I am writing to you on behalf of Pacifica Foundation, licensee of non-commercial, educational station WBAI, New York, N.Y., in response to the above-referenced letter from your office dated March 28, 1974 which requested a tape of the program, "Lunchpail," broadcast over WBAI-FM on October 20, 1974.

We regret to inform you that no recording of this program was made; and since the program was done live and extemporaneously, no script was prepared in advance.

If you have any further questions with respect to this matter, please contact Pacifica's Washington Communications counsel, David F. Tillotson, Esq., of the firm, Arent, Fox, Kintner, Plotkin, and Kahn; 1815 H Street NW., Washington, D.C. 20003.

Sincerely,

Larry Josephson,
General Manager.

Edwin A. Goodman,
President, Pacifica Foundation.