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# Dropping F-Bombs at the Supreme Court

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# Dropping F-bombs at the Supreme Court

To swear or not to swear, that is the question. At least it is for lawyers arguing certain types of cases before the Supreme Court.

The issue comes up when someone claims that the government violated his First Amendment rights by punishing him for using foul language. This doesn't happen often, because the government doesn't usually police for the use of expletives. (So when you drop that anvil on your foot, feel free to express yourself.)

But there are rare instances when using foul language can get you into trouble. Public schools, for instance, can regulate student use of foul language during class time or at school functions.



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The Federal Communications Commission also enforces limits on indecent speech on broadcast radio and television (the type you can pick up for free with an antenna). In fact, the Supreme Court is scheduled to hear a case Tuesday about whether networks can be fined for broadcasting programs in which the "f" and "s" words were used.

If you were a lawyer representing the networks, you'd have plenty to think about when preparing for the oral argument. And one thing in particular you'd have to consider is whether to use any of the offending words.

After all, if you don't use the words, you're implicitly conceding that the words are so horrid that they can be justifiably suppressed. Yet your job is to convince the Court of just the opposite.

The first case in which this issue arose occurred during the Vietnam War era, when a defendant was convicted of disturbing the peace by wearing a jacket that said "\*\*\*\* the draft."

The late Professor Melville Nimmer, who represented the defendant, was determined to break the "f" word's taboo by using it in his argument. But he also knew that Chief Justice Warren Burger, a stickler for courtroom decorum, would oppose this.

Sure enough, as Nimmer rose to speak, the chief justice peremptorily intervened: "Mr. Nimmer ... the Court is thoroughly familiar with the factual setting of this case, and it will not be necessary for you ... to dwell on the facts."

But Nimmer stuck to his guns and proceeded to tell about a "young man" wearing a jacket that said "\*\*\*\* the Draft."

Professor Geoffrey Stone, a leading First Amendment scholar at the University of Chicago, believes Nimmer won the case at the moment he uttered the offending word. And Nimmer did win. In a landmark decision, the Court said that the government has "no right to cleanse public debate" of all offensive language and acknowledged that "one

man's vulgarity is another's lyric."

Seven years later, the Court heard another free-speech case involving foul language. A Pacifica radio station had played George Carlin's Filthy Words routine in the middle of the day when kids could hear it, and the FCC had concluded that this violated its indecency policy.

The lawyer representing Pacifica never used any of Carlin's "seven dirty words" during his oral argument, and Pacifica lost. The Supreme Court upheld the FCC's authority to regulate indecent broadcasts, a regime that exists to this day.

In the years since, the FCC has used its power with considerable restraint. For many years, for instance, it said that the single, non-literal use of an expletive would not be a violation.

Tuesday's case, however, concerns a recent FCC policy change to start punishing the use of fleeting expletives. It arises out of the use of the "f" and "s" words by Cher and Nicole Richie during

broadcasts of the Billboard Music Awards.

The case was already before the Supreme Court a few years ago when the Court considered whether the FCC's policy change complied with applicable administrative procedures. The lawyer representing the networks in that case did not use any of the offending words during his oral argument. (Justice Ruth Bader Ginsburg later explained that the lawyers had been warned that some justices might find the use of profanities "unseemly.")

The Court found that the new policy had been properly adopted, but left for another day the constitutional question of whether the policy violates the broadcasters' freedom of speech.

That day has now come. And I, for one, am wondering whether any bombs will be dropping during Tuesday's oral argument.

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