STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN
CONCURRING IN PART, DISSENTING IN PART

Re: *Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* Notices of Apparent Liability and Memorandum Opinion and Order

I have sworn an oath to uphold the Constitution[1] and to carry out the laws adopted by Congress.[2] Trying to find a balance between these obligations has been challenging in many of the indecency cases that I have decided. I believe it is our duty to regulate the broadcast of indecent material to the fullest extent permissible by the Constitution because safeguarding the well-being of our children is a compelling national interest.[3] I therefore have supported efforts to step up our enforcement of indecency laws since I joined the Commission.

The Commission's authority to regulate indecency over the public airwaves was narrowly upheld by the Supreme Court with the admonition that we should exercise that authority with the utmost restraint, lest we inhibit constitutional rights and transgress constitutional limitations on government regulation of protected speech.[4] Given the Court's guidance in *Pacifica,* the Commission has repeatedly stated that we would judiciously walk a "tightrope" in exercising our regulatory authority.[5] Hence, within this legal context, a rational and principled "restrained enforcement policy" is not a matter of mere regulatory convenience. It is a constitutional requirement.[6]

Accordingly, I concur in part and dissent in part with today's decision because, while in some ways the decision does not go far enough, in other ways it goes too far. Significantly, it abruptly departs from our precedents by adopting a new, weaker enforcement mechanism that arbitrarily fails to assess fines against broadcasters who have aired indecent material. Additionally, while today's decision appropriately

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[1] U.S. CONST., amend. I.

[2] Congress has specifically forbidden the broadcast of obscene, indecent or profane language. 18 U.S.C. § 1464. It has also forbidden censorship. 47 U.S.C. § 326.

[3] *See, e.g.*, *N.Y. v. Ferber,* 458 U.S. 747, 756-57 (1982).

[4] *See FCC v. Pacifica Foundation*, 438 U.S. 726, 750 (1978) (emphasizing the "narrowness" of the Court's holding); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1344 (D.C. Cir. 1988) ("*ACT I"*) ("Broadcast material that is indecent but not obscene is protected by the [F]irst [A]mendment.").

[5] *See* Brief for Petitioner, FCC, 1978 WL 206838 at *9.

[6] *ACT I, supra* note 4, at 1344 ("[T]he FCC may regulate [indecent] material only with due respect for the high value our Constitution places on freedom and choice in what the people say and hear."); *Id.* at 1340 n.14 ("[T]he potentially chilling effect of the FCC's generic definition of indecency will be tempered by the Commission's restrained enforcement policy."). *See also Complaints Regarding Various Television Broadcasts Between February 2, 2002 and March 8, 2005,* Notices of Apparent Liability and Memorandum Opinion and Order, FCC 06-17 at note 11 (rel. March 15, 2006).

identifies violations of our indecency laws, not every instance determined to be indecent meets that standard.

We have previously sought to identify all broadcasters who have aired indecent material and hold them accountable. In this Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was the subject of a viewer's complaint, even though we know millions of other Americans were exposed to the offending broadcast. I cannot find anywhere in the law that Congress told us to apply indecency regulations only to those stations against which a complaint was specifically lodged. The law requires us to prohibit the broadcast of indecent material, period. This means that we must enforce the law anywhere we determine it has been violated. It is willful blindness to decide, with respect to network broadcasts we know aired nationwide, that we will only enforce the law against the local station that happens to be the target of viewer complaints. How can we impose a fine solely on certain local broadcasters, despite having repeatedly said that the Commission applies a national indecency standard – not a local one?[7]

The failure to enforce the rules against some stations but not others is not what the courts had in mind when they counseled restraint. In fact, the Supreme Court's decision in *Pacifica* was based on the uniquely pervasive characteristics of broadcast media.[8] It is patently arbitrary to hold some stations but not others accountable for the same broadcast. We recognized this just two years ago in *Married By America*.[9] The Commission simply inquired who aired the indecent broadcast and fined all of those stations that did so.

In the *Super Bowl XXXVIII Halftime Show* decision, we held only those stations owned and operated by the CBS network responsible, under the theory that the affiliates did not expect the incident and it was primarily the network's fault.[10] I dissented in part to that case because I believed we needed to apply the same sanction to every station that aired the offending material. I raise similar concerns today, in the context of the instant Order.

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[7] *See, e.g., In re Sagittarius Broadcasting Corporation,* Memorandum Opinion and Order, 7 FCC Rcd 6873, 6876 (1992) (subsequent history omitted).

[8] *See Pacifica Found.*, 438 U.S. at 748-49 (recognizing the "uniquely pervasive presence" of broadcast media "in the lives of all Americans"). In today's Order, paragraph 10, the Commission relies upon the same rationale.

[9] *See Complaints Against Various Licensees Regarding Their Broadcast of the Fox Television Network Program "Married by America" on April 7, 2003,* Notice of Apparent Liability for Forfeiture*,* 19 FCC Rcd 20191, 20196 (2004) (proposing a $7,000 forfeiture against each Fox Station and Fox Affiliate station); *reconsideration pending*. *See also Clear Channel Broad. Licenses, Inc.,* 19 FCC Rcd 6773, 6779 (2004) (proposing a $495,000 fine based on a "per utterance" calculation, and directing an investigation into stations owned by other licensees that broadcast the indecent program). In the instant Omnibus Order, however, the Commission inexplicably fines only the licensee whose broadcast of indecent material was actually the subject of a viewer's complaint to the Commission. *Id.* at ¶ 71.

[10] *See Complaints Against Various Television Licensees Concerning Their February 1, 2004, Broadcast of the Super Bowl XXXVIII Halftime Show,* Notice of Apparent Liability, 19 FCC Rcd 19230 (2004).

The Commission is constitutionally obligated to decide broadcast indecency and profanity cases based on the "contemporary community standard," which is "that of the average broadcast viewer or listener." The Commission has explained the "contemporary community standard," as follows:

> We rely on our collective experience and knowledge, developed through constant interaction with lawmakers, courts, broadcasters, public interest groups and ordinary citizens, to keep abreast of contemporary community standards for the broadcast medium.[11]

I am concerned that today's Order overreaches with its expansion of the scope of indecency and profanity law, without first doing what is necessary to determine the appropriate contemporary community standard.

The Order builds on one of the most difficult cases we have ever decided, *Golden Globe Awards*,[12] and stretches it beyond the limits of our precedents and constitutional authority. The precedent set in that case has been contested by numerous broadcasters, constitutional scholars and public interest groups who have asked us to revisit and clarify our reasoning and decision. Rather than reexamining that case, the majority uses the decision as a springboard to add new words to the pantheon of those deemed to be inherently sexual or excretory, and consequently indecent and profane, irrespective of their common meaning or of a fleeting and isolated use. By failing to address the many serious concerns raised in the reconsideration petitions filed in the *Golden Globe Awards* case, before prohibiting the use of additional words, the Commission falls short of meeting the constitutional standard and walking the tightrope of a restrained enforcement policy.

This approach endangers the very authority we so delicately retain to enforce broadcast decency rules. If the Commission in its zeal oversteps and finds our authority circumscribed by the courts, we may forever lose the ability to protect children from the airing of indecent material, barring an unlikely constitutional amendment setting limitations on the First Amendment freedoms.

The perilous course taken today is evident in the approach to the acclaimed Martin Scorsese documentary, "The Blues: Godfathers and Sons." It is clear from a common sense viewing of the program that coarse language is a part of the culture of the individuals being portrayed. To accurately reflect their viewpoint and emotions about blues music requires airing of certain material that, if prohibited, would undercut the ability of the filmmaker to convey the reality of the subject of the documentary. This

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[11] *In re Infinity Radio License, Inc.,* Memorandum Opinion and Order, 19 FCC Rcd 5022, 5026 (2004).

[12] *In re Complaints Against Broadcast Licensees Regarding Their Airing of the "Golden Globe Awards" Program*, Memorandum Opinion and Order, 19 FCC Rcd 4975 (2004); *petitions for stay and reconsideration pending*.

contextual reasoning is consistent with our decisions in *Saving Private Ryan*[13] and *Schindler's List*.[14]

The Commission has repeatedly reaffirmed, and the courts have consistently underscored, the importance of content *and* context. The majority's decision today dangerously departs from those precedents. It is certain to strike fear in the hearts of news and documentary makers, and broadcasters that air them, which could chill the future expression of constitutionally protected speech.

We should be mindful of Justice Harlan's observation in *Cohen v. California*.[15] Writing for the Court, he observed:

> [W]ords are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[16]

Given all of these considerations, I find that today's decision, while reaching some appropriate conclusions both in identifying indecent material and in dismissing complaints, is in some ways dangerously off the mark. I cannot agree that it offers a coherent, principled long-term framework that is rooted in common sense. In fact, it may put at risk the very authority to protect children that it exercises so vigorously.

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[13] *In the Matter of Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004, of the ABC Television Network's Presentation of the Film,* "*Saving Private Ryan,*" Memorandum Opinion and Order, 20 FCC Rcd 4507, 4513 (2005) ("Deleting all [indecent] language or inserting milder language or bleeping sounds into the film would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers"); *See also Peter Branton*, Letter by Direction of the Commission, 6 FCC Rcd 610 (1991) (concluding that repeated use of the f-word in a recorded news interview program not indecent in context).

[14] *In the Matter of WPBN/WTOM License Subsidiary, Inc*., 15 FCC Rcd 1838 (2000).

[15] 403 U.S. 15 (1971).

[16] *Id.* at 26 ("We cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process").