

*Equal Political Defamation for All:*

Section 315 of the Federal Communications Act

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# EQUAL POLITICAL DEFAMATION FOR ALL:

## SECTION 315 OF THE FEDERAL COMMUNICATIONS ACT

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A parcel of law more frustrating and fascinating than section 315 of the Communications Act is assuredly rare. The congressional, judicial and administrative facets to the section form a veritable carrousel of confusion and contradiction. The fact that political parties and candidates are standing in line to pay for the privilege of soap-box stands in 50,000,000 American homes<sup>1</sup> lends the fascination to what might otherwise be simple frustration.

If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.<sup>2</sup>

### I

Section 315 of the Communications Act of 1934 was an exact transplantation of section 18 of the Radio Act of 1927.<sup>3</sup> The provisions of the section were inserted to insure equality of treatment by radio stations of political parties and candidates. An appreciation of the "political and propaganda" potentialities of radio communication inspired Congress to a provision which would preclude station-owner partisanship and discrimination in political elections.<sup>4</sup>

Congressional endeavor to broaden the section's "equality" provisions to all "public questions" aired was

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<sup>1</sup> 42,000,000 radio homes; 15,000,000 television homes. BROADCASTING-TELECASTING YEARBOOK (1952).

<sup>2</sup> 48 STAT. 1088 (1934), 47 U.S.C. § 315 (1946).

<sup>3</sup> 44 STAT. 1162.

<sup>4</sup> See discussion by Representative Davis, H.R. REP. No. 404, 69th Cong., 1st Sess. (1926), accompanying H.R. REP. No. 9108, 69th Cong., 1st Sess. (1926).

defeated.<sup>5</sup> The concept that broadcasters were to be deemed public utilities or common carriers as to all content communicated was suggested and dismissed.<sup>6</sup> Proposals to ban from the air all political defamation<sup>7</sup> and to relieve broadcasters from liability for political defamation<sup>8</sup> were similarly defeated. Section 18 of the Radio Act emerged a compromise between the legislative desire to regulate the political power of radio communication and the legislative fear of encroaching on freedom of speech.<sup>9</sup> The "common carrier" concept line was drawn at "legally qualified candidate for any public office."<sup>10</sup> For such, broadcasters could *not* discriminate. Even here, however, the common carrier mandate was trimmed, for broadcasters were relieved of the duty to broadcast, in the first instance, any such political fare.

Five years after the passage of the Radio Act the Nebraska Supreme Court handed down the decision of *Sorensen v. Wood*—a decision which was to rule the broadcasters and political broadcasts for sixteen years. In holding a radio station liable for defamatory remarks uttered by a speaker in behalf of a political candidate, the court ruled that section 18's

. . . prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from cen-

<sup>5</sup> H.R. REP. No. 9971, 69th Cong., 1st Sess. (1926); see 67 CONG. REC. 12501 *et seq.* (1926).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, see 67 CONG. REC. 5572-5573 (1926).

<sup>8</sup> H.R. 9971, 69th Cong., 1st Sess., as reported with Senate Amendments (May 6, 1926).

<sup>9</sup> Representative White expressed the view that the proposed bill "was very near censorship." 67 CONG. REC. 12615 (1927). Representative Scott cautioned: ". . . you are trespassing very closely on sacred ground when you attempt to control the right of free speech. It has become axiomatic to allow the freedom of the press, and when Congress attempts by indirection to coerce and place supervision over the right of a man to say from a radio station what he believes to be just and proper, I think Congress is trespassing upon a very sacred principle." 68 CONG. REC. 2567 (1927). See note 83 *infra*.

<sup>10</sup> Compare the CONFERENCE REPORT, H.R. DOC. No. 200, 69th Cong., 2d Sess. (1927) with H.R. 9971, 69th Cong., 1st Sess. (1926); and H.R. REP. No. 404, 69th Cong., 1st Sess. (1926).

soring the words as to their political and partisan trend but does not give a licensee any privilege to join and assist in the publication of a libel nor grant any immunity from the consequences of such action.<sup>11</sup>

Broadcasters accepted this language as their guiding principle on the requirements of section 18. The decision conformed to the congressional intent and was operative until "overruled" in 1948 by the FCC.

In 1934 the Communications Act was passed, retaining intact as section 315, section 18's political provisions.<sup>12</sup> In addition section 153(h) made express pronouncement that broadcasters were not to be deemed common carriers.<sup>13</sup>

The hearings that culminated in the new legislation disclose another attempt to extend the "equality" principle of section 18 to broadcasts by supporters and opponents of political candidates and to broadcasts dealing with public questions. This proposal never saw the light of enactment day.<sup>14</sup> During the Senate Hearings the Chairman of the Legislative Committee of the National Association of Broadcasters reported on the *Sorensen v. Wood* decision and its adoption by broadcasters as their guiding principle to section 18.<sup>15</sup> Since the section was reiterated, word for word, the only feasible inference is legislative acceptance of the *Sorensen* ruling, that broadcasters were forbidden to censor as to partisan or political content, but obligated to delete defamatory material under pain of civil and criminal liability for defamation.<sup>16</sup>

<sup>11</sup> 123 Neb. 348, 243 N.W. 82, 85 (1932), appeal dismissed per curiam sub nom. K.F.A.B. Broadcasting Co. v. Sorensen, 290 U.S. 599 (1933), because the state decision was based on adequate non-federal grounds.

<sup>12</sup> 48 STAT. 1088 (1934), 47 U.S.C. § 315 (1946).

<sup>13</sup> 48 STAT. 1065 (1934), as amended; 47 U.S.C. § 153(h) (1946). ". . . a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

<sup>14</sup> H.R. 7716, 72d Cong., 2d Sess. (1933); SEN. REP. NO. 2910, 73d Cong., 2d Sess. (1934); CONFERENCE REPORT NO. 1850, 73d Cong., 2d Sess. (1934). But see note 57 *infra* for Commission endeavor to "legislate" equality as to "controversial issues" aired.

<sup>15</sup> *Hearings on H.R. 7716*, 72d Cong., 2d Sess. (1932).

<sup>16</sup> The Commission has argued the legislative history to the contrary. See Defendants' Memorandum of Law in *Houston Post Co. v. United States*, set forth in full in *Hearing on H.R. 691*, 80th Cong., 2d Sess. (1948). See also note 40 *infra*.

Nor is there indication of any serious quarrel with this construction of section 315 until the cudgels were taken up by the FCC in 1948. Opportunity in abundance had been supplied the Commission for promulgation of its view of sections 18 and 315 for the section itself provided "the Commission shall make rules and regulations to carry this provision into effect."

In 1938 the Commission decided to implement section 315. In half-hearted compliance it promulgated that year, and has amended since, regulations which give content to the language "legally qualified candidate for any public office." The FCC regulations brought within the folds of this phrase any candidate for *election*, candidate for *nomination*, or *write-in* candidate, in any *general*, *special* or *primary* contest, who was qualified for election under the applicable laws.<sup>17</sup> There can be little doubt but that this amplification rendered intelligent, needed substance to somewhat ambiguous statutory language.

But this effort of the Commission's, if not too late, was assuredly too little. Left untouched were the concepts of "censorship" and "use" of a broadcasting station. No attempt was made to incorporate or renounce the *Sorensen* ruling on "censorship" and no attention was paid the issue of whether broadcasts *in behalf* of candidates were embraced by section 315's terms "use" of a station. The latter question had already been inferentially posed in the *Sorensen* case.<sup>18</sup>

In July of 1940 the Commission sidestepped the "censorship" issue in a renewal proceeding.

The evidence suggests, but is not conclusive, that "equal opportunity" was not afforded such candidates and that censorship

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<sup>17</sup> 47 CODE FED. REGS § 3.190(a) (1949). Other regulations are found in notes 20-24 *infra*. Following passage of the Communications Act of 1934, the Commission re-promulgated *en bloc* the existing Rules and Regulations issued by the old Radio Commission in 1933. The only relevant Rule in existence had been issued October 3, 1933 (Rule No. 178). It merely reprinted Section 18 of the Act and threatened license revocation for "any violation."

<sup>18</sup> *Supra* note 11. The court held the broadcaster liable for defamation uttered in a speech by a supporter of an election candidate, considering § 18 applicable to candidates and supporters alike. See note 48 *infra*.

of the candidates' speeches may have been imposed. However, determination of the question of censorship involves consideration of whether the material was libelous as a matter of law (a subject not within the jurisdiction of this Commission) and whether, if libelous, a licensee possesses the legal right to expunge from a proposed broadcast a libelous statement. In any event, in the light of this record, we do not feel called upon to pass upon these questions.<sup>19</sup>

Perhaps by way of obscuring its lassitude as to implementation of the "censorship" and "use" provisions of section 315, the Commission has steadily implemented the not too-trying "equal opportunity" language. Beginning in 1938 it has ruled by regulations that: rates charged, if any, must be uniform and not rebated;<sup>20</sup> no discrimination or preference whatsoever may be rendered, or prejudice or disadvantage caused by contract or other agreement;<sup>21</sup> a complete record of all requests for broadcast time by or on behalf of candidates must be kept;<sup>22</sup> announcement of the identity of parties furnishing material for political broadcasts must be made;<sup>23</sup> the name and political affiliation of every political candidate making a speech must be entered in the program log.<sup>24</sup> Through case decisions, the Commission has announced that a station's affordance of Saturday evening hours, or week-day daytime hours was not "equal" to the affordance of week-day evening hours;<sup>25</sup> a general overall principle of fairness required that all discretion and partisanship be avoided;<sup>26</sup> once a broadcaster decides (by contract or

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<sup>19</sup> Bellingham Broadcasting Co., 8 F.C.C. 159, 172 (1940).

<sup>20</sup> 47 CODE FED. REGS. § 3.190(c) (1949).

<sup>21</sup> 47 CODE FED. REGS. § 3.190(c) (1949).

<sup>22</sup> 47 CODE FED. REGS. § 3.190(d) (1949).

<sup>23</sup> 47 CODE FED. REGS. § 3.189(b) (1949); 47 CODE FED. REGS. § 3.289(c) (1949).

<sup>24</sup> 47 CODE FED. REGS. § 3.181 (2) (1949). Comparable regulations have been issued for frequency modulation and television stations.

<sup>25</sup> Stephens Broadcasting Co., 11 F.C.C. 61 (1945).

<sup>26</sup> KWFT, Inc., 4 PIKE & FISCHER, RADIO REGULATION 885 (1948). This ruling was made via a public letter. Also maintained was the concept that primary and general elections were to be considered separately under § 315.

otherwise) to carry election speeches, he cannot change his mind:<sup>27</sup> "equal opportunity" means that all candidates are "entitled to listening time of equal value and duration under like conditions."<sup>28</sup>

Section 315's fundamental questions as to "censorship" and "use," however, went unnoticed by the Commission for fourteen years.<sup>29</sup> During this period of Commission non-direction, the broadcasters adhered to the *Sorensen* interpretation by deleting defamatory material from the speeches of political candidates and assuming liability for any defamation uttered.<sup>30</sup>

In 1948, on the "eve" of a national election, came the Commission's amazing *Port Huron* decision.<sup>31</sup> This case did many things, none of which can find easy justification. Neither Congress,<sup>32</sup> court,<sup>33</sup> commentator,<sup>34</sup> nor broadcaster,<sup>35</sup> certainly, has found virtue in the Commission's action.

The Commission flatly pronounced: (1) that broadcasters could *not* delete defamation from political broadcasts, and (2) that broadcasters were relieved from all liability for defamation—state common law and statutes notwithstanding. This monument of legal analysis was erected by means of a renewal decision. The Commission still chose to circumvent its fourteen-year old duty to

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<sup>27</sup> *Port Huron Broadcasting Co.*, 12 F.C.C. 1069 (1948).

<sup>28</sup> *Supra* note 27.

<sup>29</sup> See Chairman Coy's unabashed admission quoted *infra* note 36.

<sup>30</sup> See testimony of Don Petty, General Counsel of the National Association of Broadcasters, *Hearings on H.R. 691*, 80th Cong., 2d Sess. 73 (1948); testimony of Frank Robertson, Chairman, Legislative Committee of Federal Communications Bar Association, *Hearings on S. 1333*, 80th Cong., 1st Sess. (1947).

<sup>31</sup> *Port Huron Broadcasting Company*, 12 F.C.C. 1069 (1948). Only two Commissioners fully concurred with the decision (Coy, Durr); two did not participate (Walker, Webster); two partially concurred (Hyde, Sterling); one dissented (Jones).

<sup>32</sup> *Hearings on H.R. 691*, 80th Cong., 2d Sess. (1948). See note 39 *infra*.

<sup>33</sup> See *Houston Post v. United States*, 79 F. Supp. 199 (S.D. Tex. 1948).

<sup>34</sup> See WARNER, *RADIO AND TELEVISION LAW* § 34c (1948); Comment, *Political Defamation by Radio and the Federal Communications Act*, 46 ILL. L. REV. 626 (1951).

<sup>35</sup> See testimony of Don Petty, General Counsel of the National Association of Broadcasters, *Hearing on H.R. 691*, 80th Cong., 2d Sess. (1948).

fully implement by regulations the provisions of section 315.<sup>36</sup>

Since the radio license involved was renewed, the entire legal fabric was pure, transparent dicta—which, however, gathered all the strength of statutory law<sup>37</sup> and was immune from judicial review.<sup>38</sup>

Nor may the Commission's action be criticized for method alone. On the merits, the ruling stands as an impetuous instance of administrative self-centered legislation.

First, the Commission disrupted a reasonable 20-year industry practice and seated broadcasters on the horns of a dilemma that promised forfeiture of license on the one side, and enforced defamation damages on the other.<sup>39</sup> Second, the legislative intent was overruled.<sup>40</sup> Third,

<sup>36</sup> The provision of § 315 as to the Commission's issuance of implementing rules and regulations is mandatory ("shall"), not discretionary. Chairman Coy appeared innocent of such knowledge at the *Hearings, supra* note 35, at 13-14.

"Mr. Bow: Has the Commission adopted rules on Section 315?

Mr. Coy: It has not. There is a rule, but not on the question of liability.

Mr. Bow: On this particular question you have adopted no rules?

Mr. Coy: That is correct.

Mr. Bow: And you do not consider this Port Huron decision a rule?

Mr. Coy: No."

<sup>37</sup> Broadcasters obeyed. The Commission's action has been termed "Statutory legislation," WARNER, *op. cit. supra* at 362, and "judicial legislation." See Port Huron Broadcasting Co., 12 F.C.C. 1069 (1948) (Comm'r Jones). See note 38 *infra*.

<sup>38</sup> Most serious of all grievances with the Commission is its practice of avoiding judicial review of fundamental broadcasting edicts. The typical device is a license renewal proceeding where the license is renewed but broad policy is pronounced and enforcement threatened. *E.g.*, Mayflower Broadcasting Co., 8 F.C.C. 333 (1941). See the incisive criticism registered by Louis Caldwell, *Hearings on H.R. 691*, 80th Cong., 2d Sess. (1948). Other techniques are competing comparative application decisions on license grants, *e.g.*, Mid-American Broadcasting Corp., 12 F.C.C. 282 (1947), and such vague publications as the "Blue Book," PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946), and the REPORT ON EDITORIALIZING (1949). The "Blue Book" was found judicially unreviewable in *Hearst Radio, Inc. v. F.C.C.*, 167 F.2d 225 (D.C. Cir. 1927).

<sup>39</sup> "As was pointed out in the Committee's public hearings, the effect of the decision was to place a broadcaster in a 'dilemma of self-destruction' inasmuch as they would be required to answer to the Commission if they eliminated defamatory remarks and yet might face criminal and civil prosecution under State laws if they permitted such material to go on the air." *First Interim Report of the Select Committee to Investigate the Federal Communications Commission pursuant to H.R. 691*, H.R. REP. No. 2461, 80th Cong., 2d Sess. (1948).

<sup>40</sup> A proposal to relieve broadcasters from defamation liability was dismissed during the Congressional hearings on the Radio Act of 1927. *Supra* note 8. Proposals to ban all defamation from the air were rejected because state com-

existing judicial interpretation was ignored<sup>41</sup> as was long-established free speech doctrine.<sup>42</sup> Finally, the already established legally sound and practically satisfactory interpretation of section 315 was displaced by a strained construction of dubious merit and more dubious legal validity.<sup>42</sup> Can it matter that the road of distraction might have been paved with the best of intentions?

Congressional irritation descended; judicial admonishment occurred; the Commission faltered but did not fall. Recovery was complete by December 1951.

One month after the *Port Huron* decision, a House Select Committee to Investigate the Federal Communications Commission summoned Chairman Coy and members of the Commission's Law Branch, interrogated them and assailed their *Port Huron* decision.<sup>43</sup> Remedial legislation was finally deemed unnecessary—for the Chair-

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mon law and statutes were deemed sufficient protection. See 67 CONG. REC. 5480 (1926). The interpretation of § 18 established by the Nebraska Supreme Court in *Sorensen v. Wood*, *supra* note 11, was noted in the hearings preceding the 1934 Communications Act, *Hearings, supra* note 15. The failure at this time to change the section appears conclusive on the Congressional intent. Also determinative is § 414 of the Communications Act which holds existing remedies at common law or by statute are to be in no way abridged by any of the Chapter's provisions. See note 80 *infra*. See also Brief of the National Association of Broadcasters in *Port Huron Broadcasting Co.* set forth in *Hearings, infra* note 43.

<sup>41</sup> See *Sorenson v. Wood, supra* note 8; *cf. Rose v. Brown*, 186 Misc. 553, 58 N.Y.S.2d 654 (Sup. Ct. 1945); *Josephson v. Knickerbocker Broadcasting Co.*, 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942). See also the excellent discussion of the legal untenability of the *Port Huron* doctrine by the court in *Houston Post Publishing Company v. United States, supra* notes 33 and 45. This decision was later "overruled" by the Commission in *WDSU Broadcasting Corp. infra* note 51.

<sup>42</sup> Defamation has never, throughout the long judicial history of freedom of speech, been seriously viewed as an element of censorship. The prohibition on defamation was established centuries before the classical doctrine of freedom of speech. Whenever a relation between the two legal doctrines is noticed, the law of defamation is viewed as an established exception to the law of free speech. See the discussion by the court in *Houston Post Publishing Company v. United States, supra* note 33; see also the discussion in the Commission on Freedom of the Press, *A Free and Responsible Press* 123 (1947).

Obscenity is another deep-rooted exception to the doctrine of free speech. It appears noteworthy that the Commission has never suggested that § 315 prohibits broadcasters from deleting indecent language from election speeches. There is presumably no doubt but that a broadcaster *must* delete indecent language to escape liability under § 1464 of New Title 18, Crimes and Criminal Procedure, amending § 326 of the Communications Act, 47 U.S.C. § 326 (1946).

<sup>42</sup> See text discussion *infra* Part II and notes 78-80 *infra*.

<sup>43</sup> *Hearings on H.R. 691*, 80th Cong., 2d Sess. (1948), and *First Interim Report*, H. REP. NO. 2461, 80th Cong., 2d Sess. (1948).

man assured the Committee that "for the time being, at least until the matter is settled, the honest and conscientious broadcaster who uses ordinary common sense in trying to prevent obscene and slanderous statements from going out over the air, need not fear any capricious action."<sup>44</sup>

About the same time the Commission's law department confided to a curious federal court that the Commission, by its *Port Huron* decision, "did not intend to, nor did it . . . add anything either of substance or sanction, to the law." The court, assured of this, and convinced of the legal untenability of the Commission's position, found the *Port Huron* decision unworthy of judicial review.<sup>45</sup>

Congress and court had been satisfied that the Commission meant no harm. Broadcasters disbelieved and began to follow the *Port Huron* edict. They chose to weather defamation liability rather than face the probability of Commission displeasure.<sup>46</sup>

In 1950 a broadcaster found himself perhaps overzealous in adhering to the Commission's wishes. He failed to delete defamation from the speech, not of a

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<sup>44</sup> There appears to be no question but that the House Select Committee recommended no legislation because it felt assured the Commission would not enforce the *Port Huron* decision. Chairman Coy's assurance was deemed to have "substantially resolved" the Broadcasters' dilemma. *First Interim Report Pursuant to H.R. 691*, H.R. REP. 2461, at 2 (1948). See note 50 *infra* as to later Commission avoidance of the "assurance."

<sup>45</sup> *Houston Post Publishing Company v. United States*, *supra* note 33, at 204. In the words of circuit Judge Hutcheson, ". . . the contention that the expression of the Commission's opinion on such a controversial and difficult matter was intended to be and was an order reviewable under Sec. 402(a) seems far fetched. Indeed, in the uncertain and doubtful state of the law as to the intent of Congress, in enacting the section to exclude the operation of libel laws, we think it judicially inconceivable that the Commission, a body of public servants entrusted by Congress with powers of supervision over communications by radio, could, with considerations of fair play and just administration in mind, have so ordered. . . ."

. . . we think it doubtful that the Commission would have power to lay down a binding rule or regulation of the nature of that expressed in its opinion. For, having no power to protect station owners, who comply with the order, if it should be determined that the Commission's guess as to the law was wrong, it ought not to be held to have the power to subject the owner under sanctions to the hazards of its wrong guessing."

<sup>46</sup> See the sampling of letters from broadcasters in Note, *Campaign Speeches on Radio and TV: Impartiality via the Communications Act*, 61 *YALE L. J.* 87, 89-90 n. 8, 9 (1952). See also the discussion between Representative Elston and Louis Caldwell, *Hearings*, *supra* note 43.

candidate, but of a Party Committee Chairman. In defense he asserted the Commission's *Port Huron* decision, but found the court felt only candidates were embraced by section 315's provisions.<sup>47</sup> The broadcaster may have learned, too, that the FCC had again neglected implementation of section 315. It had never, over a period of fourteen years, ruled substantive meaning into the word "use" of a broadcasting station.<sup>48</sup>

For those broadcasters hitherto unaware of this ambiguity, a new problem was created. Granted, obedience to the *Port Huron* ruling and non-deletion of candidate defamation, what was to be done as to candidate spokesmen defamation? The Commission had said nothing. Knowledge of the Commission's broad view of such matters<sup>49</sup> would lead to the decision that speeches by spokesmen should go untouched too. Surely political discrimination and partisanship could be effectively achieved at the lower level of spokesmen's speeches. There was really little doubt as to the Commission's projected view. Yet there was no doubt that one federal court, at least, would hold the broadcaster liable for candidate's spokes-

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<sup>47</sup> *Felix v. Westinghouse Radio Stations*, 186 F.2d 1 (3d Cir. 1950), cert. denied, 341 U.S. 909 (1951).

<sup>48</sup> The ambiguity residing in the phrase "to use a broadcasting station" was certainly evident by 1932 when *Sorensen v. Wood* was decided; see *supra* note 18. An attempt was made in 1933 to extend the equality provisions to supporters and opponents and to all public questions, but was defeated. H.R. 7716, 72d Cong., 2d Sess. (1933), and accompanying CONFERENCE REPORT No. 2106. For a full discussion of the Congressional history, see *Felix v. Westinghouse Radio Stations*, see note 47 *supra*. The Commission, at one time, deemed supporters not included by § 315. "And it is equally clear on the face of the *Sorensen* opinion, that the case did not even present a proper situation requiring any construction of Section 18 of the Radio Act, since the speech containing the alleged libel was not made by a candidate for public office but by a person speaking in behalf of one of the candidates." Defendants' Memorandum of Law in *Houston Post Company v. United States*, set forth in full in *Hearings, supra* note 43, at 31-32. On the other hand, the Commission could well be expected to embrace supporters within § 315 in order to prevent avoidance of the Section's design. At no time, however, despite its statutory obligation to implement § 315, has the Commission issued a rule on the question.

A recent unreported federal district court took the unique view that authorized persons speaking in behalf of a (Communist) candidate *were* entitled to equal opportunity; that broadcasters could not refuse or censor broadcasts by candidates or their supporters. See the court's exchange with counsel, set out in 7 PIKE & FISCHER RADIO REGULATION 2088.

<sup>49</sup> *Ibid.*

men's defamation. The broadcasters had found another rope in their hands aflame at both ends. The Commission appeared to find no cause to assist, to promulgate some sensible regulation.

In December 1951 the Commission, grown bold by three years of freedom from court and Congress, loudly proclaimed its *Port Huron* doctrine to be alive and aggressive.<sup>50</sup> Gone was the temerity induced by angry congressional committee and incredulous federal court.

We take this opportunity to reiterate, that the prohibition is "absolute" and no exception exists in the case of material which is either libelous or which might tend to involve the station in an action for damages.<sup>51</sup>

Again the ruling was made via a license renewal proceeding. This time, however, no search for judicial (or congressional) review was made. The broadcasters had, for the most part, already accepted the ruling. The latest Commission visitation brought no news to the industry. The Commission was doubtless activated by a desire to remove any residue of doubt left in the wake of the *Port Huron* decision. Another bitter national election was in the offing.

Yet the *Port Huron* decision had not only wrenched the broadcasters' policy toward political defamation. It had also stretched section 315 to capture situations where the broadcaster, though not permitting any candidate to use his station, had entered an agreement for use of his station. The broadcaster was disallowed from changing his policy on political broadcasts from one of acceptance to one of complete non-acceptance.<sup>52</sup> The policy behind

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<sup>50</sup> The Commission justified its new utterance, in the face of its "assurance" to Congress in 1948 that it would not enforce the *Port Huron* doctrine, by declaring that subsequent Congressional inaction indicated approval of the *Port Huron* doctrine. The sophistry involved stems from the fact that Congress was assured in 1948 that the dilemma was resolved by Commission assurance on non-enforcement. For this reason was no legislation recommended. See note 44 *supra*.

<sup>51</sup> WDSU Broadcasting Corporation, decided November 26, 1951.

<sup>52</sup> The broadcaster had scheduled broadcasts by three candidates. Finding reason to believe the first scheduled speech to contain untrue assertions, the broadcaster cancelled all the scheduled broadcasts by all three candidates.

this Commission manipulation of the language of section 315 is obscure.<sup>53</sup> What is plain, however, is that the Commission ignored a federal court of appeals case in reaching its conclusions.

The Ninth Circuit Court of Appeals had decided in 1947 that section 315 was applicable, "when, and only when, there are two or more legally qualified candidates for the same public office, and a licensee has permitted one such candidate for that office to use a broadcasting station, and another such candidate for that office seeks equal opportunities in the use of such station."<sup>54</sup> The case was dismissed by the Commission's *Port Huron* decision in a "But see" footnote.<sup>55</sup>

It may be that this aspect of the *Port Huron* case resulted from the Commission's desire to force broadcasters to air the speeches of political candidates.<sup>56</sup> This desire, in turn, is part of the larger Commission policy of forcing broadcasters to air "controversial issues."<sup>57</sup> Both

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<sup>53</sup>The Commission may simply have needed *some* case to utilize for its opportune pronouncement of policy for the approaching election. This suggests mis-use of the quasi-judicial function of the Commission. The Commission may have feared such behavior could itself result from partisan discrimination. See note 52 *supra*. The Commission may have hoped to require more election broadcasts by such a ruling.

<sup>54</sup>*Weiss v. Los Angeles Broadcasting Co.*, 163 F.2d 313 (9th Cir. 1947), *cert. denied*, 333 U.S. 876 (1948).

<sup>55</sup>*Port Huron Broadcasting Co.*, 12 F.C.C. 1069, 1071 (1948).

<sup>56</sup>See note 53 *supra*.

<sup>57</sup>The "controversial issues" doctrine is the core of the Commission's broadcast philosophy. The doctrine attempts to render broadcasters politically powerless. Incidental thereto may be the desire to "educate" the broadcast audience. Manifestations are to be found in the Commission's *Mayflower* decision, 8 F.C.C. 333 (1940), and in its REPORT ON EDITORIALIZING (1949). See note 38 *supra*. The ultimate design of the doctrine is to enforce non-partisan broadcasting, not only as to elections, but as to all issues and ideas of public importance. The only statutory basis for the doctrine is § 315, which, however, is restricted to election broadcasts. The Commission has legislated its own basis through the "public interest, convenience or necessity" language of the Communications Act. See Caldwell, *Legal Restrictions on the Contents of Broadcast Programs in the United States*, chap. III (Report to the Second International Congress on Comparative Law, The Hague, 1937). Since regulation of the broadcasting of public questions was proposed and rejected by Congress in 1926 and 1933 (*supra*, note 5 and 14) there can be no question but that the Commission's "controversial issues" doctrine constitutes legislative usurpation. Since, moreover, the doctrine constitutes substantial governmental interference with broadcast speech, it must be deemed in violation of the First Amendment. For criticism of another aspect of Commission "censorship," see Caldwell, *Comments on the Procedure of Federal Administrative Tribunals, with Particular Reference to the FCC*, 7 GEO. WASH. L. REV. 740, 759-63 (1939).

these elements of Commission policy appear as usurpations of congressional directives.

In 1946 in *Albuquerque Broadcasting Co.* the Commission had announced that a broadcaster was not justified "in adopting a general rule that it will not make time available for the discussion of controversial subjects or for broadcasts by duly qualified candidates for public office."<sup>88</sup>

In *Petition of Homer P. Rainey* during the same year, certain broadcasters had determined in advance to restrict all political broadcasts by primary candidates to a total of thirty minutes for a certain period and to a limited amount of time thereafter. The Commission considered such restrictions as not bearing "a reasonable relationship to the need or public interest in the particular campaign."<sup>89</sup>

Both these decisions were made in the face of section 315's proviso:

No obligation is hereby imposed upon any licensee to allow the use of its station by any such candidate.

The whole fabric of the Commission's "controversial issues" doctrine whereby broadcasters *must* air controversy and must "balance" opposing views, is a story unto itself. Suffice here to point out that legislative attempts to extend section 315's "equal opportunity" doctrine to the whole area of public questions have been rejected time and again.<sup>90</sup>

Reflection upon the Commission's overall administration of section 315 generates the following conclusions. The Commission has steadily neglected its duty under section 315 to implement by (reviewable) rules and reg-

<sup>88</sup> 3 PIKE & FISCHER RADIO REGULATION 1820 (1946) (public letter).

<sup>89</sup> 11 F.C.C. 898 (1947). By dicta in this case, the Commission also broadly suggested that where licensees were controlled by local newspapers that had taken a particular stand against a candidate, broadcasters were under some duty to afford radio time to this candidate, if requested, on the basis of presenting a controversial issue. This stand constitutes further distortion of § 315. See note 57 *supra*.

<sup>90</sup> See note 57 *supra*.

ulations the critical provisions of section 315.<sup>61</sup> It has chosen to engage in judicially surreptitious legislation.<sup>62</sup> It has countermanded the final decisions of Congress.<sup>63</sup> It has ignored the interpretations of section 315 registered by courts of law.<sup>64</sup> It has generated confusion and fastened the broadcasting industry to an unnecessary dilemma. It has done all these things in order to effectuate its own inbred philosophy of broadcast communication.

## II

Section 315 of the Communications Act was born of congressional endeavor to restrain the political power of the new mass media.<sup>65</sup> In its final form it represented perhaps the greatest restriction of broadcast communication possible short of censorship or Constitutional abrogation.<sup>66</sup> At the same time it constituted an experiment in what some like to term effective freedom, and others, freedom to listen.<sup>67</sup> The specific intent was to prevent broadcasters from political discrimination among election candidates.

The FCC, when it got around to dealing with the section 315 provisions, decided that the section would be desecrated were broadcasters permitted to delete defamation. Perhaps the Commission's political experience had taught it that the major portion of all political "stump-

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<sup>61</sup> See note 36 *supra*.

<sup>62</sup> See notes 37 and 38 *supra*.

<sup>63</sup> See note 40 *supra*.

<sup>64</sup> See note 41 *supra*.

<sup>65</sup> See note 4 *supra*.

<sup>66</sup> See note 9 *supra*.

<sup>67</sup> The irony of such "revised" conceptions of freedom of speech lies in the immense contradiction committed. The First Amendment was designed to *obviate* governmental restriction on private speech. The "revised" concept would have government *control* private speech to provide "freedom." For a candid, if bland, expression of the latter doctrine, see Comment, *Old Standards in New Context: A Comparative Analysis of FCC Regulation*, 18 UNIV. OF CHI. L. REV. 78, 87 (1950) ("... the Commission seems finally to have faced the spectre of the First Amendment and held its ground. . . . freedom of speech can best be protected in radio by effective governmental controls, and these controls are but a means by which to secure a more effective freedom.") For its part, the Commission is also fond of alluding to free speech in such reverse-of-the-coin ways. See Address by Wayne Coy, Chairman, January 28, 1952 ("Two precious freedoms which are the common heritage of all the American people: the Freedom to Look and the Freedom to Listen.")

ing" was defamation. More likely, the Commission felt broadcasters could obscure discrimination by defamation deletion practices.<sup>68</sup> Indeed this is the only tenable reason amidst a swelter of indefensible procedures and results for the Commission's *Port Huron* doctrine. Here, too, however, the Commission's efforts appear misdirected.

Under effective *Port Huron* practice, discrimination could be obviated by Commission examination of complaints registered against a broadcaster for deletion of defamatory matter. On the positive side, the arbitrary restraint on broadcasters would discourage all attempts at control of political broadcasts.

The weaknesses of this scheme lie in the facts that broadcasters faithful to the section 315 principle may be ensnared by the Commission's net, defamatory political campaigning is sanctioned, and all broadcasters are subjected to increased liability without fault.

As far as Commission detection of discrimination is concerned, it will always be faced with the unanswerable question of why it should punish a broadcaster for deleting defamation where no partisan political intent or effect exists. Indeed, so unconscionable and capricious an action by the Commission could scarcely be upheld by the courts.<sup>69</sup>

Moreover, since the Commission's doctrine is shrouded in doubt in relation to broadcasts by *supporters* of candi-

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<sup>68</sup> In the *Bellingham* case of 1940, *supra* note 19, the Commission found evidence which "suggests, but is not conclusive" that discrimination in election speeches had been practiced. Allegedly libelous material had been deleted. The record disclosed the existence of a broad political strife involving the radio station and a local newspaper. The Commission may have found itself incapable of sifting such evidence for violation of § 315 and determined to obviate the need to so sift by an absolute ban on defamation deletion. There is, however, no reason why the Commission should be incapable of ascertaining the facts of election candidate discrimination.

<sup>69</sup> See note 45 *supra*. Mere disobedience of Commission dicta as to the requirements of § 315 could not justify forfeiture of license. Disobedience of the actual requirements of § 315 could. The Commission could, however, adduce disobedience of its dicta as to § 315 as one of several minor instances of license malfeasance, which together amount to operation not in the "public interest"; and could therewith preclude the derelict licensee from renewal in a comparative competitive hearing. Such decisions are rarely touched by courts of review.

dates,<sup>70</sup> the Commission would be hard-pressed to castigate broadcasters for deleting defamation from speeches by supporters. Yet, doubtless discrimination may be here practiced too. In such a case, the Commission would have to inquire into all the facts if it cared to discover any existing discrimination. To do anything else would be rank abuse of the law. Once any such discrimination were found, the Commission would have valid grounds for claiming violation of section 315.

In almost any possible case of alleged section 315 violation, it is inconceivable that the Commission will not have to inquire whether political discrimination has transpired. In any conceivable case, the Commission will have to sift all the facts surrounding the alleged abuse; it will have to determine whether partisanship was practiced. Otherwise, it will have placed itself in the position of condemning without knowledge of true guilt, on the basis of dicta, alone.<sup>71</sup>

If it were not for the fact that non-discrimination, not defamation, was the target of section 315, there would be some sense to the Commission's position. But deletion of defamation by a broadcaster has nothing to do with political discrimination and is assuredly no test for the latter. The only test for discrimination is careful evidentiary examination for discrimination itself.

There is no shortcut to the problems posed by section 315. The substitution by the Commission of its own version for that intended by Congress was a mistake at the outset and only aggravated by time.

The Commission should have followed the *Sorensen* case. It should not have embarked on rule by dicta. It should have issued comprehensive regulations which expressly forbade discrimination by broadcasters as to speeches by and on behalf of candidates for election and

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<sup>70</sup> See note 48 *supra*.

<sup>71</sup> See note 69 *supra*.

nomination.<sup>72</sup> It should have said nothing about political defamation. It should have determined, whenever it found reason to believe discrimination had been practiced, to inquire into the alleged facts of discrimination. If it discovered partisan political censorship, it should have instituted license revocation proceedings.<sup>73</sup>

It has been indicated that the Commission's *Port Huron* doctrine constitutes unlawful (and unwise) administration. There is a bill before Congress<sup>74</sup> that would attempt to legalize the doctrine by codifying it into an amended section 315. In addition, supporters of candidates would be embraced. The broadcasters are in support because the bill portends to relieve them of all defamation liability.<sup>75</sup> The Commission is in support because it would vindicate, in some sense, their position.

Such legislation would certainly lend the weight of Congress to the otherwise ludicrous assertion that broadcasters cannot be sued for defamation.<sup>76</sup> It would also largely obviate the possibility of broadcasters running afoul section 315 through mere choice of facing Commission disapproval rather than defamation litigation.<sup>77</sup> It

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<sup>72</sup> Regulations would have been judicially reviewable; would thus have established binding legal precedent one way or the other; would have obviated the confusion and contradiction.

<sup>73</sup> Revocation proceeding is the only proper method of enforcement of Commission policy in such matters. It is, however, strenuously avoided by the Commission, allegedly because of its drastic character. Examination suggests the avoidance to be dictated by the desire to avoid judicial review. See note 38 *supra*. In place of revocation, the Commission supplies threatening dicta.

<sup>74</sup> H.R. 7062, 82d Cong., 2d Sess. (1952).

<sup>75</sup> *Broadcasting-Telecasting Magazine* reports the National Association of Radio and Television Broadcasters has mailed copies of the bill to all industry members (March 31, 1952, at 52).

<sup>76</sup> The only area of state defamation liability affected by the *Port Huron* doctrine is where the broadcaster's liability is dependent upon fault. Ordinarily, in such states, adherence to Commission directive would be construed as obviating fault. See *Campaign Speeches on Radio and TV*, *supra* note 46, at 89-90. Where absolute liability or liability regardless of fault is imposed by state law, the Commission's ruling appears innocuous. As to broadcast defamation law in general, see Remmers, *Defamation by Radio*, 64 HARV. L. REV. 727 (1951).

<sup>77</sup> "(b) The licensee shall have no power to censor the material broadcast by any person who is permitted to use its station . . . and the licensee shall not be liable in any civil or criminal action in any local, state, or federal court because of any material in such a broadcast, except in case such licensee shall willfully, knowingly and with intent to defame participate in such broadcast." H.R. 7062, *supra* note 74. There appears some substantial ambiguity in the exception ending this subsection. It is not at all clear that a broadcaster, who communi-

would remove, however, one of the impediments to promiscuous political defamation.

On the other hand there is some doubt as to the Constitutionality of a provision which would relieve citizens of legal redress without compensation in kind.<sup>78</sup> There is also a serious Constitutional question as to the right of the federal government to interfere with or impede what legally amounts to state police power.<sup>79</sup> Moreover, section 414 of the Communications Act must needs be avoided since it holds that existing remedies at common law or by statute are to be in no way abridged.<sup>80</sup>

A more satisfactory legislative solution to section 315's problems is proposed in the recently introduced O'Hara bill.<sup>80a</sup> By this amendment, broadcasters would be obliged to afford equal opportunities to all candidates, would be forbidden from political or partisan censorship, and would not be obliged to communicate defamatory (or obscene) matter. Enactment of this proposal would in-

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cludes defamatory matter in a political election speech on the basis of this subsection, does not "willfully, knowingly, and with intent to defame participate in such broadcast." The state-of-mind concepts found in defamation law are generally presumed or considered irrelevant. Thus the exception appears to either contradict the liability relief afforded or to be itself meaningless.

<sup>78</sup> The Commission, in urging its *Port Huron* doctrine, argued relief from state defamation liability would be constitutional because (1) federal occupation of the field can preclude state law, and (2) in the common-carrier telegraph field, such occupation has been judicially upheld. The weakness of this argument lies in the facts (1) that mere federal occupation of a field under the Commerce clause does not justify federal usurpation of all state jurisdiction in the field, and (2) in the common-carrier telegraph field, a comprehensive framework of telegraph liability had been established within the federal statute. Moreover, in the telegraph field, telegraph companies need not transmit libel, and are liable for damages where they do so transmit. See Brief of the National Association of Broadcasters in re *Port Huron Broadcasting Company* set forth in *Hearings on H.R. 691, supra* note 43. See also *Political Defamation by Radio and the Federal Communications Act, supra* note 34, at 629-32. In *Sorensen v. Wood, supra* note 11, the court reasoned that to construe § 315 so as to relieve broadcasters from defamation liability would "raise an issue without due process or without payment of just compensation (constitution, fifth amendment)."

<sup>79</sup> The obviation of state criminal libel law surely suggests obstruction of state police power. Nor is this a case of substitution of federal policing for that of the state, since the broadcast of defamation goes unpunished.

<sup>80</sup> 48 STAT. 1099 (1934), 47 U.S.C. § 414 (1946). This section has long been ignored by the Commission and the courts. Chairman Coy made a singularly unsatisfactory distinguishment of the section's bearing on § 315, in *Hearings, supra* note 43. The presence of this section seems decisive as to the error of that interpretation of § 315 which would relieve broadcasters of defamation liability. See note 40 *supra*.

<sup>80a</sup> H.R. 7782, 82d Cong., 2d Sess. (1952).

telligently effectuate the original design of section 315, would resolve the broadcasters' dilemma, and would raise no further constitutional doubt.

Fragmentary solution to the *Port Huron* riddle has been attempted by several states. In the three years since the utterance of the decision, ten states have passed legislation designed to afford relief to faultless broadcasters for political defamation communicated.<sup>81</sup> The effectiveness of such relief is doubtful as well as inextensive.<sup>82</sup>

It may be that section 315 of the Communications Act was an unhappy provision to begin with. We long ago decided that governmental regulation was no answer to the potential power of speech and press.<sup>83</sup> There is no reason to believe this power more susceptible to abuse in radio and television communication than it has been in the nation's press.<sup>84</sup> There is much reason to fear the extension of governmental surveillance from the limited area of political elections to the vast undefinable arena of "controversial issues."<sup>85</sup> The wisest solution to the age-old problems of freedom of expression appears still to be

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<sup>81</sup> California, Colorado, Florida, Georgia, Louisiana, Maine, Montana, Nebraska, Virginia, Wyoming. See Remmers, *supra* note 76, at 743-46. Recently, Maryland enacted legislation which would protect broadcasters from libel suit where a candidate defames his opponent, but not where other persons are defamed. See *Broadcasting and Telecasting Magazine*, April 7, 1952, at 36.

<sup>82</sup> See the discussion in Remmers, *supra* note 76. Statutes of this kind are often tricky and state constitutionally questionable. Moreover, radio broadcasts ignore state lines; a broadcaster may have to abide by conflicting state defamation laws.

<sup>83</sup> Constitution of the United States, First Amendment. It may be that § 315, insofar as it abridges the right of broadcasters to "speak" as they wish during elections, is contrary to the First Amendment.

<sup>84</sup> The ultimate problem is one of concentration of broadcast facilities, best amenable to the anti-trust laws. There is less concentration or "monopoly" in the broadcast field than in the newspaper field. The oft-cited "natural" monopolistic character of the broadcast field is a spectre without valid basis in fact. In 1947 there were 1750 daily newspapers in the United States. About one out of every twelve cities with a daily newspaper has no competing newspaper. An estimated 40% of the total daily newspaper circulation of 48,000,000 is non-competitive. Commission on Freedom of the Press, *A Free and Responsible Press* at 37-38 (1947). In 1951 there were 2300 AM broadcasting stations on the air (100 more under construction), 640 FM stations in operation, and 108 television stations on the air (2000 predicted following the Commission's "freeze"). See Address by Wayne Coy, Chairman Federal Communications Commission, January 28, 1952.

<sup>85</sup> See note 57 *supra*. See also, Caldwell, *Radio Broadcasting and Freedom of Speech*, 177 ANNALS 1 (1935).

the free market in ideas. An enforced "equal" market is not free.<sup>86</sup>

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<sup>86</sup> Nor is it feasible. The physical difficulties alone involved in administrative enforcement of "equality" seem insurmountable. How are speeches by the President of the United States to be treated? How are talks by incumbent public officials to be viewed? By news commentators? By labor unions? By corporations? When does one become a candidate for election? For nomination? Are Socialists to be given time? Communists? How should dramatizations of political issues be treated? As to any such broadcasts, is it to be "balanced" (controversial issues doctrine) or must "equal opportunity" be afforded (§ 315 doctrine)? Must the broadcaster cast about for contrary, conflicting or opposite views or may he await request from proponents of such views? Can television camera coverage at the National Conventions be charged with discrimination because Republican faces received concentration, whereas Democrat antics were revealed?