Censorship of Defamatory Political Broadcasts: The Port Huron Doctrine

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I
THE NEED FOR REGULATION OF POLITICAL BROADCASTING—SECTION 315 OF THE COMMUNICATIONS ACT

The use of radio and television in American election campaigns has paralleled the rapid growth of the broadcasting industry. Congress enacted section 315 of the Communications Act of 1934 to prevent discrimination against any candidate in the use of the broadcasting media. Since the act provides that broadcasters are not common carriers, they are usually free to determine who shall speak over their facilities and to edit all programs. However, section 315 requires a station broadcasting the political speech of one candidate to grant to all other candidates for the same office an equal opportunity to use its facilities. But the section does not obligate licensees

1 Approximately 10 million dollars was spent for radio and television time in the 1956 national election campaign. Brief for the National Association of Radio and Television Broadcasters as Amicus Curiae, p. 6, Farmers Educ. & Co-op. Union v. WDAY, Inc., 89 N.W.2d 102 (N.D.), cert. granted, 358 U.S. 810 (1958). In reply to a recent questionnaire of the National Association of Radio and Television Broadcasters, 849 stations reported a total of 12,772 radio and television speeches by political candidates during the twelve months prior to July, 1958. Petition for Certiorari, p. 9 n.3, Farmers Educ. & Co-op. Union v. WDAY, Inc., supra. It has been estimated that in the 1958 New York gubernatorial election, 50% of the campaign budgets of the two major parties was allocated for radio and television time. N.Y. Times, Oct. 25, 1958, p. 25, col. 1.


5 Section 315 is limited to broadcasts by candidates. Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), cert. denied, 341 U.S. 509 (1951). Licensees are free to grant time to the supporters of one candidate and to refuse equal opportunities to the proponents of his opposition. Therefore, the section should be extended to include broadcasts by supporters of candidates to prevent such discrimination. A candidate within the meaning of section 315 is one who is legally qualified to run for public office. In general, a candidate is legally qualified if he can be voted for in the state or district in which the election is being held, and, if elected, is eligible to serve. See 47 C.F.R. §§ 3.120 (AM broadcasting), 3.290 (FM broadcasting), 3.590 (Non-commercial Educational FM), and 3.657 (TV broadcasting) (1958).


7 Simply giving candidates “equal time” on the air will not satisfy the equal opportunities provision. The day of the week, the time period, and the potential size of the audience must be considered by the licensees in determining what will constitute an equal opportunity to the candidates. E. A. Stephens, 11 F.C.C. 61 (1945). Because of the uncertain character of the concept, no fixed rule can be drawn. In fact,
to carry any political broadcasts.9 Because this guarantee of equal opportunity would be almost meaningless if broadcasters were allowed to determine what the candidates might say over the air, section 315 further provides that broadcasters "shall have no power of censorship over material under the provision of this section."

The first amendment prohibits prior licensing of the press,11 and, therefore, the opportunity to express all political views through this medium is theoretically unlimited.12 But because the airwaves can accommodate only a limited number of signals,13 only those licensed by the FCC may broad-


8 Until recently it appeared that the FCC would classify any appearance by a candidate on radio or television as a use of broadcasting facilities. See Kenneth E. Spengler, 14 P. & F. Radio Reg. 1226 (1957) (letter dated Nov. 19, 1956, ruling that the appearance of a radio announcer in his employed capacity constituted a use when the announcer was a candidate for office); Hon. Allen Oakley Hunter, 11 Id. 234 (1954) (letter dated May 28, 1952, ruling that broadcasts by a congressman in the form of reports from Washington constitute use of station facilities from the time the congressman announces his intention to run for reelection); Columbia Broadcasting System, Inc., 14 Id. 525 (1956) (letter dated Sept. 21, 1956, ruling that a radio or television appeal on behalf of a charitable fund raising campaign by the President while a candidate for reelection would constitute a use of station facilities). However, a change in policy appears to have taken place. See Columbia Broadcasting System, id. 722 (ruling that § 315 was not intended to afford equal opportunities to all presidential candidates when the President reports to the nation on an international crisis). See also Allen H. Blondy, id. 1199 (1957) (declaring that news coverage by a television station of a ceremony in which a group of judges were sworn into office, one of their number being a candidate for another judicial office, did not constitute a use by the candidate). But see 105 U. Pa. L. Rev. 761 (1957).

9 "No obligation is hereby imposed upon any licensee to allow the use of its station by any . . . candidate." 48 Stat. 1088 (1934), as amended, 47 U.S.C. § 315 (1952). Considered alone it would appear that under the provision broadcasters could avoid the many problems created by § 315; but this avoidance does not appear to be harmonious with the broad FCC policy of "public service broadcasting" which requires fair and equal presentation of all responsible positions on important public questions. "[T]he Commission has made clear that in . . . presentation of news and comment the public interest requires that the licensee must operate on a basis of overall fairness, making his facilities available for the expression of the contrasting views of all responsible elements in the community on the various issues which arise." Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1250 (1949). This policy embraces political broadcasting, and stations refusing to grant time for such broadcasting face censure from the Commission and possible loss of license. Homer P. Rainey, 11 F.C.C. 898 (1947); Albuquerque Broadcasting Co., 3 P. & F. Radio Reg. 1820 (1948); Letter From John C. Doerfer, Chairman, FCC to Hon. Samuel E. Stratton, July 30, 1958. But see Costello, Whose Interests Interest the FCC?, The New Republic, Nov. 24, 1958, p. 11, for an appraisal and criticism of the FCC's public service policy.


12 In reality the number of newspapers, and hence the quantity and quality of political discussion, is limited by practical economic considerations. See Poynter, The Economic Problems of the Press and the Changing Newspaper, 219 Annals 82 (1942).

cast. This governmental regulation of the broadcasting medium and the vital importance to a democracy of an unfettered exchange of varied political ideas necessitate the guarantee to all candidates of equal opportunity to express their political views over the existing broadcasting facilities.

II

CENSORSHIP OF DÉFAMATION IN POLITICAL BROADCASTING

A difficult question raised by the application of the section is whether a station is liable for defamatory utterances made by candidates in the course of political broadcasts. The partisan nature of political campaigns creates a greater danger that defamatory remarks will be broadcast during political speeches than during other programs. This danger is intensified since candidates are not subject to any restraint by the station. Ordinarily, broadcasters permit only their own carefully selected and trained employees or the employees of responsible advertising agencies or commercial sponsors to appear. Their actions are restrained by the possibility of economic and professional sanctions for unethical conduct during broadcasts. No such restrictions bind political candidates. Unless stations take precautions against broadcasting defamatory political remarks, candidates are restrained only by the threat of defamation suits and hostile voter reaction.

Some stations have attempted to censor political broadcasts in order to avoid liability as joint publishers of defamation. Despite the apparent clarity of section 315, there is a conflict of authority as to their right to do so. In Sorensen v. Wood, the court held that broadcasters have both


15 Perhaps the equal opportunity concept should be modified. At least one leading observer of the communications industry believes that the underlying assumption of section 315, that granting equal opportunities to all candidates will best serve the public interest, is erroneous. It is his contention that forcing broadcasters to give equal consideration to Prohibitionists and Vegetarians as well as to Democrats and Republicans prevents broadcasters from making free time available to the major candidates to debate effectively the important campaign issues. Gould, Television Notebook: Equal Time Headaches, N.Y. Times, Nov. 16, 1958, § 2, p. 17, col. 1. Gould suggests that a system should be devised whereby the amount of time assigned to a party would bear some relationship to its strength previously registered at the polls.


17 Cf. Taft, Campaign to Stop the Campaign Smear, N.Y. Times, Oct. 12, 1958, § 6 (Magazine), p. 11.

18 In this note the terms "political broadcasts" and "political broadcasting" refer only to broadcasting by the candidates themselves. See note 5 supra.

19 See text accompanying note 10 supra.

a right and a duty to censor defamation. During the course of a political broadcast Wood read defamatory remarks concerning Sorensen, the Attorney General of Nebraska. Sorensen brought a civil action for damages joining the speaker and the licensee as co-defendants. The broadcaster pleaded as a complete defense a general order of the Federal Radio Commission denying licensees any power of censorship over political broadcasts. In holding the broadcaster liable as a joint publisher of defamatory material, the court rejected the defense of the general order on the ground that Congress had not intended to prohibit the censorship of defamation. For sixteen years the Sorensen doctrine remained virtually unchallenged, and

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21 Sorensen was accused of being an atheist, libertine, madman and fool. It was further charged that Sorensen was actually involved in illegal gambling operations while attorney general.

22 Section 18, unlike § 315, was not self-executing but required the issuance of a general order by the Radio Commission to become effective. 44 Stat. 1170 (1927).

23 The wording of § 315, as originally enacted, was very nearly that of § 18. Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1 (3d Cir. 1950), cert. denied, 341 U.S. 909 (1951). The two sections are still very similar.

24 There is a split of authority as to whether broadcasting defamatory material constitutes libel or slander. See Prosser, Torts § 93, at 586-87 (2d ed. 1955). The most significant feature of the decision was the court's theory of liability. The station denied any negligence and raised the defense of due care. Rejecting the idea that liability should be predicated on negligence, the court relied on the theory of strict liability as applied to newspaper publishers. See Peck v. Tribune Co., 214 U.S. 185, 189 (1909). Under this theory, a plaintiff need show only that the material broadcast by the defendant was defamatory to establish a prima facie case. This theory has been championed by Professor Vold. He was amicus curiae in the original appeal and counsel for the plaintiff in a second appeal. His part in the case is detailed in an introductory note in Vold, The Basis for Liability for Defamation by Radio, 19 Minn. L. Rev. 611 (1935). See also Vold, Defamatory Interpolations in Radio Broadcasts, 88 U. Pa. L. Rev. 249 (1940). A synopsis of his amicus curiae brief is printed in 82 A.L.R. 1100 (1933). The theory of strict liability was challenged by Bohlen, Fifty Years of Torts, 50 Harv. L. Rev. 725, 729-31 (1937). Professor Bohlen preferred to base liability on the absence of due care. This is the basis of liability of book sellers and other distributors of printed matter. The early cases followed Sorensen. Coffey v. Midland Broadcasting Co., 8 F. Supp. 889 (W.D. Mo. 1934); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933); Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938) (dictum). But since 1939 the trend has been to reject Sorensen and to apply a theory resembling negligence. Summit Hotel Co. v. NBC, 336 Pa. 182, 38 N.Y.S.2d 985 (Sup. Ct. 1942). See also Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (Ct. Err. & App. 1948); Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942).

25 "[W]e adopt an interpretation that seems in accord with the intent of congress and of the radio commission. We are of the opinion that the prohibition of censorship of material broadcast over the radio station of a licensee merely prevents the licensee from censoring 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. The federal radio act confers no privilege to broadcasting stations to publish defamatory utterances." 123 Neb. at 354, 243 N.W. at 85.

26 Only a New York trial court dealt with the problem during the period. It held that because § 315 created certain legal obligations limiting the power of broadcasters to censor, they must be accorded a corresponding qualified privilege to protect themselves against actions for defamation. Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942).
broadcasters believed that they were legally obligated to edit and to censor defamatory political scripts and to cut candidates off the air if they improvised defamatory remarks.27

However, in 1948, shortly before the first post-war presidential election, the FCC challenged the Sorensen rule. In *Port Huron Broadcasting Co.*,28 Muir, a candidate for reelection to the City Commission of Port Huron, Michigan, made a broadcast in his official capacity, concerning a proposed public bond issue. He was introduced by Black, who began with a bitter attack on Mactaggart, another city commissioner. Mactaggart informed the station that he would sue if it broadcast additional defamatory attacks. Muir subsequently purchased time for a series of political broadcasts in support of his candidacy for reelection. The station submitted Muir's script to Mactaggart who asserted that it contained defamatory and untrue statements about him. Thereupon, the station canceled Muir's entire series of broadcasts and refused to make time available to any candidate during the campaign. Muir complained to the FCC, which, in connection with passing upon renewal of the station's license, held a hearing on the complaint. At the hearing, the station asserted that it had the statutory right to refuse to carry political broadcasts.

The FCC decided that section 315 is operative once a station contracts for any political broadcast, and that the broadcaster then loses his option to refuse to air political broadcasts.29 The Commission further ruled that the refusal to air Muir's speeches constituted censorship for defamation prohibited by section 315.30 Furthermore, there was dictum to the effect

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28 12 F.C.C. 1069 (1948).
29 But see Weiss v. Los Angeles Broadcasting Co., 163 F.2d 313, 315 (9th Cir. 1947), cert. denied, 333 U.S. 876 (1948): "These provisions are 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 . . . seeks equal opportunities in the use of such station." The implication of this language is that the first political broadcast for an elective office is not covered by § 315 and that § 315 only becomes operative after a demand for equal opportunities is made following the first broadcast. It is submitted that the language in the Weiss case is unsound. It is clear that the station's right to censor a candidate's script is circumscribed to a greater degree when the section controls than when it does not. The first candidate to use the station is thus deprived of equal opportunities. Compare 48 Stat. 1038 (1934), as amended, 47 U.S.C. § 315 (1952), with 48 Stat. 1066 (1934), as amended, 47 U.S.C. § 153(h) (1952). Section 315 should be amended to make it clear that it is to be operative whenever there are two or more candidates for the same office and a licensee either announces a policy of allowing political broadcasts for a given office or contracts with one of the candidates for such broadcasts.
30 The Commission relied almost entirely on legislative history to support its decision. For criticism of the Commission's interpretation of that history see Warner, Radio and Television Law § 34e (1948); De Grazia, supra note 27.
31 Technically, the entire opinion is dicta. After deciding that the Port Huron Broadcasting Company had violated the law, the Commission granted the broadcaster's petition for renewal of its license because of the previous confusion in the law and the good faith of the station owners.
that section 315 preempted the entire area of political broadcasting, and that it thereby relieved licensees of responsibility for defamatory statements made during political broadcasts.82

The decision placed the broadcasting industry in a dilemma.83 If broadcasters followed the Port Huron doctrine, they might face civil and criminal actions for defamation in state courts; if they continued to censor defamatory remarks, the Commission might revoke their licenses.84 Condemnation of the Port Huron doctrine by the broadcasting industry, Congress,85 the judiciary,86 and legal commentators87 was immediate and vigorous.88 Nevertheless, the Commission reaffirmed the doctrine in 1951.89

WDAY of Fargo, North Dakota, decided to risk tort liability rather than the loss of its license. During the 1956 campaign, WDAY granted radio and television time to Democratic and Republican senatorial candidates. An independent candidate requested an equal opportunity to use the licensee’s facilities and presented a script. The station believed that the script contained defamatory statements, and it notified the candidate that it would allow the proposed broadcast only if he made a formal demand by invoking section 315. The demand was made, and the candidate was permitted to broadcast the script as submitted.40 Thereafter, the Farmers

32 12 F.C.C. at 1073.
33 During the House investigation of the FCC the problem created by the Port Huron decision was termed a “dilemma of self-destruction” for broadcasters. H.R. Rep. No. 2461, 80th Cong., 2d Sess. 2 (1948).
34 Ibid. It should be noted, however, that the Commission has never refused to renew a broadcaster’s license because of a violation of § 315. But cf. City of Jackson-ville, 12 P. & F. Radio Reg. 113 (1956).
36 See Houston Post Co. v. United States, 79 F. Supp. 199 (S.D. Tex. 1948). The plaintiff, as licensee of a radio station, brought a proceeding pursuant to § 402(a) of the Communications Act to annul the Port Huron doctrine as an order of the FCC. Although the court dismissed the proceeding, holding that the Port Huron doctrine was not an “order” of the Commission within the meaning of § 402(a), it showed hostility to the decision.
37 See Berry & Goodrich, Political Defamation: Radio’s Dilemma, 1 U. Fla. L. Rev. 343 (1948); De Grazia, supra note 27; Snyder, Liability of Station Owners for Defamatory Statements Made by Political Candidates, 39 Va. L. Rev. 303 (1953); Warner, supra note 30; Comment, 46 Ill. L. Rev. 626 (1951). For favorable comment on the doctrine see Donnelly, Defamation by Radio: A Reconsideration, 34 Iowa L. Rev. 12 (1948); Note, 58 Yale L.J. 787 (1949); 16 Geo. Wash. L. Rev. 573 (1948).
38 A major criticism of the Port Huron case was that it was virtually immune to legal attack. Because the doctrine was enunciated while the Commission granted the petition for license renewal, there was no party directly aggrieved by the ruling. Therefore, judicial review was impossible. Furthermore, the opinion was not an order subject to attack under the provisions of § 402(a) of the Communications Act. See note 36, supra; De Grazia, supra note 27.
40 The script contained the following statements: “The Farmers Union program fully carried out as planned, not as it is planned by farmer members, but as it is planned by the Farmers Union dictators, would estab-
Union, the chief target of the candidate's attack, sued the speaker and the station as joint publishers.

The broadcasting company successfully pleaded the defense of privilege under the federal statute. The North Dakota Supreme Court, in affirming the trial court, held that section 315 prohibits censorship for defamation and that no action could be brought against WDAY under state law because of federal preemption of the radio and television field.\textsuperscript{41}

III

\textbf{Construction of Section 315}

In \textit{Sorensen v. Wood} the Nebraska court stated, without citing authority, that Congress had not intended to prevent censorship for defamation.\textsuperscript{42} The FCC in \textit{Port Huron Broadcasting Co.} cited substantial legislative history supporting the contrary position.\textsuperscript{43} However, congressional intent as reflected by the legislative history of the section is unclear.\textsuperscript{44} Therefore, in
construing the section, the courts should look primarily to the object, purpose and policy of the section and of the Communications Act as a whole. Section 315 seems clearly designed to insure equal opportunity in the use of broadcasting facilities for all political candidates, while the underlying policy of the Communications Act is to regulate radio and television communication in the public interest. The effect of the Sorensen rule upon broadcasters, candidates and the public appears inconsistent with the express policy of both section 315 and the entire act.

Only two censorship policies are available to broadcasters under Sorensen. Either they must exclude all serious charges relating to the activities of the candidate's opponent and others, and thereby limit information available to the public, or they must become the sole judges of what is defamatory and untrue. The editing of political speeches by broadcasters is necessarily subject to their prejudices. Therefore, a fair dissemination of all political views would be prevented, and the basic policy of section 315 would be thwarted. Furthermore, the station's interests would be injured since it would be jointly and severally liable for any defamatory statements it fails to suppress. Even obtaining a legal opinion as to what constitutes defamation may not protect the broadcaster since no legal question can be finally determined except by litigation. The risk of liability could be minimized by requiring candidates to transcribe all political speeches. However, this scheme is objectionable because the delay in editing the tape

the committee felt that the immunity was implicit in the section even without the provision. See colloquy between Senators Dill and Fess, 67 Cong. Rec. 12503 (1926). This uncertainty as to congressional intent has been noted. "The Commission ... was faced with the task of divining the legislative intent of Congress when it appears that Congress itself was, and still is, uncertain as to the purpose of the section. Refusal by Congress to face in either direction [on the censorship prohibition] has, of course, precipitated the whole problem." Berry & Goodrich, supra note 37, at 355. But see Sen. Fess' remarks in 67 Cong. Rec. 12503 (1926). Between 1927 and 1955 there have been at least 16 unsuccessful attempts in Congress to grant some form of protection to broadcasters. Petition for Certiorari, pp. 17-21, Farmers Educ. & Co-op. Union v. WDAY, Inc., 89 N.W.2d 102 (N.D.), cert. granted, 358 U.S. 810 (1958).


See Donnelly, supra note 37 at 31-32.

The legality of a candidate's public actions, his political motives, and personal integrity are not only legitimate, but often crucial campaign issues. Because statements relevant to such issues are apt to be slanderous if untrue, the suitability of candidates for office cannot be raised, except in clear cases, if censorship is allowed. See Port Huron Broadcasting Co. (WHLS), 12 F.C.C. 1069, 1072 (1948).

Richard Allen Solomon, then the chief of litigation for the Commission, prepared the majority opinion in the Port Huron case. In his testimony before the House select committee investigating the Commission he said, "The only way you can tell whether a given statement is libelous is by a court decision." H.R. Rep. No. 2461, 80th Cong., 2d Sess. 2 (1948). The committee report contested Mr. Solomon's legal conclusion. Ibid.

There is nothing in the Communications Act or FCC Regulations and policy preventing licensees from requiring all political speeches to be filmed, taped, or in any way transcribed in advance. H. A. I. Rosenberg, 11 P. & F. Radio Reg. 236 (1954).
or film will tend to destroy the spontaneous and current quality of the speech.

Another serious effect of Sorensen is that it would be extremely difficult to decide promptly the subtle question of whether a station's editing constitute's discrimination against particular candidates. Without a prompt decision the candidate would be denied the opportunity of a corrective rebroadcast during the campaign.

In addition, the Sorensen rule is contrary to the American tradition of free expression since it allows the imposition of prior restraints. Although governmental regulation of political broadcasting also departs from this tradition, such regulation is necessary to insure that all shades of political persuasion are publicized. When so viewed, section 315 remains consistent with the rationale of freedom of expression. However, if broadcasters are allowed to determine what may be broadcast, there is a danger that some political opinions may be suppressed to the detriment of the public. Recognition of the fact that Congress was attempting to establish a policy consonant with the ideals of free speech should cause the courts to reject the Sorensen construction.

Finally, the Nebraska decision requires legal liability to be based upon state law. If a defamatory statement is made over a nationwide network, the defamed party could sue in the most favorable jurisdictions. The resulting "forum shopping" would be limited only by the question of whether the proposed forum could gain jurisdiction over the network. Furthermore,

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50 See Prosser, Torts § 92, at 573 (2d ed. 1955). Cf. Near v. Minnesota ex rel. Olson, 283 U.S. 697 (1931) (prior restraints to prevent the publication of scandalous and defamatory material held to be violative of substantive due process under the fourteenth amendment). The first amendment prohibition against censorship of speech and press for defamation applies only to the federal and state governments and does not forbid such activity by private individuals. See also Note, 33 N.Y.U.L. Rev. 989, 1007-10 (1958). Thus, as a legal matter, censorship by broadcasters is limited only by § 315 and the FCC policy of public service broadcasting.

51 See 67 Cong. Rec. 12502 (1926) (remarks relating to the advocacy of communism during political broadcasts).

52 For a recent collection of state statutes specifically governing liability for defamation by radio see Snyder, supra note 37, at 314 nn.55 & 56. For an excellent comparative analysis of several of these statutes see Rammers, Recent Legislative Trends in Defamation by Radio, 64 Harv. L. Rev. 727 (1951).

53 The law of the place where an alleged wrong is committed determines whether a party has a cause of action in tort. Restatement, Conflict of Laws § 378 (1934). The tort of defamation occurs whenever defamatory statements are communicated to third parties. See Prosser, Torts 572 (2d ed. 1955). It would seem, therefore, that the law of the state in which a defamatory radio program is heard would be applied to determine the existence of a cause of action. See Summit Hotel Co. v. NBC, 336 Pa. 182, 8 A.2d 302 (1939). Thus, if a defamatory political broadcast is received in every state, 49 separate suits could be commenced against a network if jurisdiction could be obtained in each state. See Note, 35 N.C.L. Rev. 535 (1957). Cf. Note, 28 N.Y.U.L. Rev. 1005 (1953). The multiple suit problem is illustrated by the case of Congressman Martin Sweeney who was libelled by a syndicated columnist. Sweeney brought suit against the syndicate and against the newspapers carrying the offensive column. The resulting problem is discussed in Donnelly, supra note 37, at 626-31.
the geographical location of stations carrying the broadcast would determine their liability.\textsuperscript{54}

If the interests of the broadcasters, candidates and the public are to be safeguarded, the adoption of the \textit{Port Huron} doctrine and the rejection of the \textit{Sorensen} construction is required.

\section*{IV

THE BROADCASTER'S LIABILITY FOR DEFAMATORY POLITICAL BROADCASTS

If broadcasters are denied the right to censor for defamation, the courts must determine what liability, if any, may be imposed upon them. It is submitted that broadcasters should be given a privilege similar to the qualified privilege\textsuperscript{55} accorded news disseminators reporting governmental activities. Although they have no duty to report governmental proceedings which include defamatory statements, news disseminators are privileged to do so. The public's interest in obtaining accurate and full information concerning public affairs warrants the privilege.\textsuperscript{56} The privilege protects the publisher from liability as long as any defamatory and untrue matter is published in a reasonable manner and only for the purpose of informing the public.\textsuperscript{57} Since the underlying rationale of section 315 and the \textit{Port Huron} doctrine are also founded in the public's need for political information, a similar qualified privilege should be accorded broadcasters.\textsuperscript{58} Indeed, the broad-

\textsuperscript{54} A hypothetical case will best demonstrate the different liabilities of broadcasters under typical state statutes. Before he can be cut off the air T, a vice presidential candidate speaking over a nationwide network, interjects into a carefully censored script: "It is a well-known fact that my opponent's chief supporters, A [a resident of California], B [a resident of Maryland], C [a resident of Virginia] and D [a resident of Washington] are all card-carrying members of the Communist Party seeking the overthrow of our government." The statement is defamatory and untrue, and the named individuals bring actions in their respective states against the network and its local affiliated stations. In California the broadcasters would be liable in an action for damages if they could not show the exercise of due care to prevent publication of the defamation. Cal. Civ. Code § 48.5(1) (Deering 1949). In Maryland the broadcasters would only be liable in an action for damages if the persons defamed are not candidates for the vice-presidency. Md. Ann. Code art. 75, § 6 (1957). In Virginia there would be no liability because the defamation was uttered during a political broadcast. Va. Code Ann. § 8-632.1 (1950). In Washington the broadcasters would not be liable if they required the submission of the script in advance and had cut the speaker off the air as soon as reasonably possible after he began to deviate from the script. Wash. Rev. Code § 19.64.010 (1951).

\textsuperscript{55} An absolute privilege protects a speaker from responsibility regardless of his motive or purpose in defaming another, while the qualified privilege protects the holder only if it is exercised for the purpose for which the privilege was granted. Prosser, Torts § 95, at 606 (2d ed. 1955).

\textsuperscript{56} See Prosser, Torts § 95, at 606 (2d ed. 1955). An example of qualified privilege would be the reporting of congressional committee investigations, in which the parties to the proceeding are absolutely privileged to defame others. News disseminators, as a legitimate exercise of their function, may publish a full account of the proceedings including the defamatory matter. The qualified privilege is derived from the absolute privilege of the proceedings in order that the public can be fully informed as to the work of the committee.

\textsuperscript{57} Prosser, Torts § 95, at 625-29 (2d ed. 1955).

\textsuperscript{58} See note 54, supra.
casters' need of this privilege is greater since their facilities may be used under legal compulsion. The privilege, if pleaded, should be a complete defense to any defamation action unless the station broadcasts a defamatory speech for the purpose of destroying an individual's reputation. This privilege would not limit the defamed person's remedy against the speaker.

Under the supremacy and commerce clauses of the Constitution, the privilege would supersede contrary state tort law. However, the granting of the privilege must not constitute a taking of property in violation of the fifth amendment. Because there is no vested property interest in any rule of the common law, it would appear that legal remedies are not property subject to constitutional protection.

However, petitioners in the WDAY case contend that even if the broadcaster's duty not to censor political speeches was expressly created by Congress, the immunity still would have to be expressly created. Thus, they assert that even if broadcasters may not censor, no correlative privilege is accorded.

59 See Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942). See also 14 ALI Proceedings 161-64 (1936-1937); Vold, Defamatory Interpolations in Radio Broadcasts, 88 U. Pa. L. Rev. 249, 291 (1940): "Whether or not there may be public duty to broadcast on some particular occasion may involve difficult and delicate questions. If there is such a public duty, it would seem to follow that a corresponding privilege attaches to the station." Professor Vold's position is perfectly consistent with his stand in Sorensen v. Wood since the Nebraska court, in construing the provision prohibiting censorship, found no public duty to broadcast defamatory material.


62 Munn v. Illinois, 94 U.S. 113, 134 (1876).

63 See New York Cent. R.R. v. White, 243 U.S. 188, 198 (1917); Shea v. Olson, 185 Wash. 143, 53 P.2d 615 (1936); Kansas City So. Ry. v. Van Zant, 260 U.S. 459 (1923) (by implication). But see majority opinion in Truax v. Corrigan, 257 U.S. 312 (1921) (Holmes, Brandeis, Clarke, Pitney, JJ., dissenting). It might be argued, however, that federal preemption is barred by § 414 of the Communications Act, which provides that nothing in the act shall abridge or alter existing common law or statutory remedies. 48 Stat. 1099 (1934), 47 U.S.C. § 414 (1952). It is submitted that this section is not applicable to the present problem because no remedy is destroyed. Rather, a legal defense is created. But even should preemption be viewed as the abridgment of a remedy, § 414, as a general saving section, should not prevent preemption where it is a necessary concomitant of congressional policy embodied in specific sections within the act. See O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940) (by implication). In fact, the section has been cited by no court as a possible barrier to federal preemption. See O'Brien v. Western Union Tel. Co., supra; Lamb v. Sutton, 164 F. Supp. 928 (M.D. Tenn. 1958); Yates v. Associated Broadcasters, Inc., 7 P. & F. Radio Reg. 2083 (N.D. Cal. 1951); Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.S.2d 985 (Sup. Ct. 1942); Farmers Educ. & Co-op. Union v. WDAY, Inc., 89 N.W.2d 102 (N.D.), cert. granted, 358 U.S. 810 (1958). See also De Grazia, supra note 27.

64 Petition for Certiorari, pp. 11-12, Farmers Educ. & Co-op. Union v. WDAY, Inc., 89 N.W.2d 102 (N.D.), cert. granted, 358 U.S. 810 (1958). The petitioner sug-
Under petitioner's construction, broadcasters would be liable for the wrongful use of their property by persons entirely beyond their control. Thus, the mere ownership of a broadcasting station would be the basis for the imposition of liability. This construction goes far beyond the rationale of strict liability, which is based on the defendant's voluntary creation of a risk where none existed before.65 This imposition of liability arising from a risk not of the broadcaster's volitional making appears contrary to recognized concepts of due process.66 Therefore, the Port Huron doctrine would appear to be constitutional only if the courts imply a correlative privilege to broadcast defamation.

V

THE QUASI-COMMON CARRIER STATUS OF POLITICAL BROADCASTING

O'Brien v. Western Union Tel. Co.67 supplies ample precedent for implying the privilege.68 Both telegraphic and radio communication are regulated by the Communications Act of 1934. The act contains no provision explicitly excluding the operation of state law. Nevertheless, the court of appeals held that Congress necessarily granted the telegraph company a privilege to transmit defamatory telegrams by making it a common carrier.

...
If the telegraph company were liable for the transmission of defamation, it would be forced to read all messages and to investigate questionable statements in order to protect itself. Since such precautions would disrupt the efficient flow of telegraphic communications, implied preemption necessarily resulted.69

It should be recognized that broadcasters occupy a quasi-common carrier status when political speeches are aired.70 The telegraph company has a privilege to transmit any message unless it has reason to believe that it is defamatory.71 And it has no duty to inspect messages for defamation. But under the Port Huron doctrine broadcasters have a duty to transmit even admittedly defamatory political speeches if they contract to carry any political broadcast.72 Furthermore, the FCC asserts that stations have a duty to contract for such broadcasts.73 Thus, broadcasters have at least as great a need for the privilege as the telegraph company. To deny them immunity would be to limit the number of political speeches in interstate commerce because broadcasters would be likely to evade liability by curtailing or even eliminating political broadcasts.74 Therefore, the recognition of an implied privilege is as necessary to the congressional policy of favoring political broadcasting as it is to the policy of an unburdened flow of telegraphic communication.

VI

PROTECTION OF THE INDIVIDUAL FROM DEFAMATORY ATTACKS

Even if licensees are immune from suit, they have a moral obligation—and they should have a legal duty—to minimize the risk of defamation. Under existing law and administrative ruling, broadcasters may require the submission of scripts in advance.75 They should be required to demand scripts in advance and to warn all prospective speakers of their sole liability for defamatory remarks spoken over the air. If a station believes that a script contains defamation, it should require the candidate to invoke section

69 "Congress having occupied the field by enacting a fairly comprehensive scheme of regulation, it seems clear that questions relating to the duties, privileges and liabilities of telegraph companies ... must be governed by uniform federal rules." O'Brien v. Western Union Tel. Co., 113 F.2d 539, 541 (1st Cir. 1940). The above language is equally applicable to broadcasting.


71 See O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940). Judge Magruder suggests, however, that common carriers need not transmit messages that their agents know to be libelous and non-privileged. Id. at 543. See also 14 ALI Proceedings 161 (1937).

72 See Donnelly, supra note 37, at 36.

73 See note 9 supra.

74 Such a policy would bring broadcasters squarely into conflict with the Commission's concept of public service broadcasting. See note 9 supra. Should the FCC attempt to enforce its public service policy when the broadcaster is vulnerable to tort liability in the state courts, it is conceivable that the federal courts, in reviewing a denial of license renewal, might find the Commission's policy unreasonable in the light of the alternatives posed to licensees. The public would suffer most by such a finding.

315 by making a formal written demand. These procedures would dramatize both the gravity of publishing defamation and the sole liability of the speaker. Thus, the broadcaster would be forced to take reasonable steps to protect the public. The FCC has authority to issue regulations requiring broadcasters to take such precautionary measures. If the WDAY case is affirmed by the Supreme Court, the Commission should exercise this authority. If the case is reversed, Congress should amend section 315 to grant broadcasters express immunity from state tort liability, conditioned upon a showing of a good faith attempt to discourage defamatory speeches. Such action would further the goal of section 315 by promoting enlightened self-government through responsible but unfettered political discussion.

Harvey Lyle Zuckman

76 It has not been determined whether a station would be violating § 315 if it refused to allow the broadcast unless a formal demand was made. In the WDAY case, however, a demand was made after a refusal by the station to broadcast the script in the absence thereof. Farmers Educ. & Co-op. Union v. WDAY, Inc., 89 N.W.2d 102 (N.D.), cert. granted, 358 U.S. 810 (1958). Cf. Lamb v. Sutton, 164 F. Supp. 928, 936 (M.D. Tenn. 1958).

77 Because the most diligent efforts to prevent defamation will not always be successful, legislation is needed to help indemnify parties whose reputations are injured during political broadcasts. Because of the social benefits derived from unfettered political discussion, the public should help remedy the wrong. A federal fund should be established by the FCC. Defamed parties who are unable, after diligent efforts, to obtain full satisfaction on a state judgment against the speaker, could make a claim to the Commission for the balance. It would seem that situations requiring resort to the fund would be rare, and, therefore, the fund would not have to be large. Such a plan would have the advantage of making the guilty speaker financially responsible to the extent that his assets are subject to judgment as well as insuring that the injured party is made economically whole.