Hastings Communications and Entertainment Law Journal

Volume 13 | Number 1 Article 1

1-1-1990

The Defamation You Can't Refuse: Section 315's Prohibition on Censoring Political Broadcasts

Martin Kassman

The Defamation You Can't Refuse: Section 315's Prohibition on Censoring Political Broadcasts

by
MARTIN KASSMAN*

Introduction

Justice William O. Douglas was fond of pointing out that the Founding Fathers cast the first amendment "in absolute terms."[1] The first amendment commands as follows: "Congress shall make no law . . . abridging freedom of speech, or of the press . . . ."[2] United States citizens do not, however, enjoy absolute freedom of speech. Subject to certain limitations, Congress and the states may punish certain types of speech. These include obscenity,[3] "fighting words,"[4] defamation,[5] speech aimed at and likely to produce imminent lawless action,[6] and even commercial solicitation by professionals.[7]

A similar disparity exists between the promise of statutory language and the reality of case law regarding broadcasters' freedom of expression. Section 326 of the Communications Act states,

> Nothing in this chapter shall be understood or construed to give the [Federal Communications] Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.[8]

This seems like a hands-off policy. But if the free speech rights of most people are less than absolute, the rights of radio and television broadcasters are even narrower. For example, the Supreme Court held in 1978 that the Federal Communications Commission (FCC) may punish a licensee for broadcasting material that is not obscene but merely

* Associate, Cooper, White & Cooper, San Francisco. B.S., Arkansas State University, 1982; J.D., University of California, Hastings College of the Law, 1988.

1. Branzburg v. Hayes, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting).
2. U.S. CONST. amend. I.
3. *See, e.g.*, Miller v. California, 413 U.S. 15 (1973).
4. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
5. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
6. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969).
7. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).
8. 47 U.S.C. § 326 (1988).

"indecent."[9] In 1987, the FCC issued a Memorandum Opinion and Order adopting an expanded concept of indecency.[10] Since then, the FCC has conducted a vigorous campaign against allegedly indecent broadcasts.[11]

Thus, broadcasters are burdened with a responsibility to censor what they broadcast. If they engage in the aforementioned kinds of speech, or possibly others—for example, revealing military secrets[12]—they may be punished through administrative, civil, and criminal sanctions. Yet in one situation, broadcasters not only do not *have* to censor what they air—they *may not*. That situation, the subject of this Article, arises when a candidate for public office "uses" a station to advertise his campaign pursuant to section 315 of the Communications Act.[13] Section 315 provides, in relevant part,

> 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: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.[14]

The remainder of subsection (a) provides that "bona fide" newscasts, news interviews, news documentaries, and on-the-spot news event cover-

9. FCC v. Pacifica Found., 438 U.S. 726 (1978).

10. *In re* Pacifica Found., Inc., Memorandum Opinion and Order, 2 FCC Rcd 2698, para. 12, 62 RAD. REG. 2d (P & F) 1194, para. 12 (1987). The United States Court of Appeals for the District of Columbia Circuit rejected a constitutional challenge to the FCC's expanded definition. Action for Children's Television v. FCC, 852 F.2d 1332, 1337-40 (D.C. Cir. 1988).

11. *See, e.g., FCC Gets Copy of WGBH-TV Mapplethorpe Broadcast*, BROADCASTING, Aug. 20, 1990, at 59.

12. *Cf.* Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

13. 47 U.S.C. § 315 (1988). The voice or image of the candidate must appear in order for the censorship prohibition to apply. *E.g.*, Letter from William B. Ray, Chief, Complaints and Compliance Division for Chief, Broadcast Bureau, to Mr. Patton Echols, 43 F.C.C.2d 479, 481 (1973). As to political presentations that consist entirely of others appearing on a candidate's behalf, "licensees are free to exercise their good faith judgment as to what particular material will best serve the public interest." *Id.* (refusing action against station that pulled allegedly false political commercial off the air); *see* Felix v. Westinghouse Radio Stations, Inc., 186 F.2d 1, 6 (3d Cir. 1950) (stations that broadcast speeches by candidate's supporters could not assert censorship prohibition as defense in defamation action). This explains the advent of political television commercials in which a tiny image of the candidate appears briefly in a corner of the screen, and political radio commercials in which the candidate's voice is heard at the end stating who paid for the commercial.

14. 47 U.S.C. § 315(a) (1988) (emphasis in original). The FCC has disavowed any authority to itself "censor any material contained within political spots which are deemed a 'use.'" Letter from William B. Ray, Chief, Complaints and Compliance Division for Chief, Broadcast Bureau, to Mr. Alan S. Burstein, 43 F.C.C.2d 590, 591 (1973); *see* Letter from Wallace E. Johnson, Chief, Broadcast Bureau, to Julian Bond, Atlanta NAACP, 69 F.C.C.2d 943, 944 (1978).

age do not constitute "uses" of broadcasting stations. Since broadcasters rarely give free time to politicians except in a news context, that leaves paid political advertisements as the primary focus of section 315.[15]

The FCC and the courts have been faced with a number of questions about the meaning of section 315's censorship prohibition: Must broadcasters permit politicians to air material that is defamatory, or is indecent, or may incite violence? Can a person harmed by a political broadcast sue the broadcaster instead of, or in addition to, the offending politician? This Article examines the interesting cases which have raised such questions and suggests a statutory change to clarify the situation.

I
Defamation

The major case on defamatory political broadcasts, *Farmers Educational & Cooperative Union v. WDAY, Inc.*,[16] did not involve an advertisement. The allegedly defamatory broadcast consisted of a candidate's speech, and the court opinions do not mention any payment for the broadcast.[17]

The WDAY case grew out of a 1956 United States Senate race in North Dakota. Two of the candidates made speeches over WDAY's television airwaves. WDAY felt compelled by section 315 to permit a third candidate, A.C. Townley, to broadcast an uncensored speech as a reply to his opponents' speeches.[18] In the broadcast, Townley accused his opponents of taking orders from the Farmers Union, which he said was trying to "establish a Communist Farmers Union Soviet right here in North Dakota."[19] The union filed a libel complaint in state court against Townley and WDAY. The trial court dismissed the complaint against WDAY, and the Supreme Court of North Dakota affirmed, both on the ground that section 315 compelled WDAY to broadcast Townley's re-

15. This section also applies to cable television systems. 47 U.S.C. § 315(c) (1988). The term "broadcasters," as used in this Article, generally applies to cable operators as well as licensees of radio and television stations, except that cable operators are not subject to FCC sanctions for indecent programming at the present time.

16. 360 U.S. 525 (1959).

17. *Id.* at 526; Farmers Educ. & Coop. Union v. WDAY, Inc., 89 N.W.2d 102, 104 (N.D. 1958), *aff'd*, 360 U.S. 525 (1959). Today, an unpaid broadcast of a candidate's speech might, under certain circumstances, be considered on-the-spot news coverage. *See* Political Primer 1984, 100 F.C.C.2d 1476, paras. 48-59 (1984) (FCC staff update of primer adopted by Commission in 1978). The *WDAY* case arose before Congress exempted news broadcasts from § 315. In any event, the *WDAY* circumstances probably would not qualify for the news exemption.

18. *WDAY*, 89 N.W.2d at 104. The television station, believing that some of Townley's statements were false, refused to broadcast his speech unless he made a demand under section 315. Accordingly, Townley made the demand. *Id.* at 104, 109.

19. *Id.* at 104.

marks and that it immunized WDAY from liability for the alleged defamation.[20] The United States Supreme Court granted certiorari.[21]

By the narrowest possible margin of five Justices to four, the Court handed the Farmers Union another defeat: The North Dakota Supreme Court's judgment was affirmed. Justice Black's majority opinion first held that section 315 required broadcasters to refrain from censoring defamatory remarks in political broadcasts. No evidence existed that Congress intended to give the word "censorship" a narrower meaning in section 315 than the "commonly understood" meaning, which was "*any* examination of thought or expression in order to prevent publication of 'objectionable' material."[22] The Court cited legislative history, including Senate committee comments on section 326,[23] as evidence that Congress harbored "a deep hostility to censorship either by the Commission or by a licensee."[24] The Court emphasized "that permitting a broadcasting station to censor allegedly libelous remarks would undermine the basic purpose for which section 315 was passed—full and unrestricted discussion of political issues by legally qualified candidates."[25] Justice Black wrote persuasively of the dangers such censorship could entail:

> Quite possibly, if a station were held responsible for the broadcast of libelous material, all remarks even faintly objectionable would be excluded out of an excess of caution. Moreover, if any censorship were permissible, a station so inclined could intentionally inhibit a candidate's legitimate presentation under the guise of lawful censorship of libelous matter.[26]

The Court was unanimous on this initial holding; the dissenters agreed "that WDAY could not have lawfully deleted from A.C. Townley's broadcast his defamation of petitioner."[27]

The Justices disagreed on whether section 315 granted licensees immunity from liability for broadcasting defamatory statements they were prohibited from censoring. Disputes abounded regarding the equities involved in determining the existence or nonexistence of station immunity.

Justice Black wrote that denying immunity to licensees would have "the unconscionable result of permitting civil and perhaps criminal liability to be imposed for the very conduct the statute demands of the li-

20. *Id.* at 105-10. One of the five state supreme court judges dissented, arguing that Congress had not intended to prohibit broadcasters from censoring remarks that defamed non-candidates. *Id.* at 110-12 (Morris, J., dissenting).

21. Farmers Educ. & Coop. Union v. WDAY, Inc., 358 U.S. 810 (1958).

22. Farmers Educ. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 527 (1959) (emphasis in original).

23. 47 U.S.C. § 326 (1988), quoted *supra* text accompanying note 8.

24. *WDAY*, 360 U.S. at 528 & n.6.

25. *Id.* at 529.

26. *Id.* at 530.

27. *Id.* at 535-36 (Frankfurter, J., dissenting).

censee."[28] Justice Frankfurter's dissenting opinion, joined by Justices Harlan, Whittaker, and Stewart, admitted that such a result might be unfair. "But there may be unfairness too, after all, in depriving a defamed individual of recovery against the agency by which the defamatory communication was magnified in its deleterious effect on his ability to earn a livelihood."[29] The dissent ignored the possibility that a libel victim still could recover from the candidate who perpetrated the libel.[30]

Justice Frankfurter presented a more solid argument when he pointed out that the issue was statutory interpretation, not fairness. "We are dealing with political power, not ethical imperatives."[31] According to the dissent, the question was not "whether a particular result would be 'unconscionable' but whether the result is or is not barred by federal legislation as construed and applied in accordance with settled principles of statutory and constitutional adjudication."[32] Any adjustments for the sake of fairness, Frankfurter wrote in dissent, should be accomplished by a congressional change in federal law or by changes in state libel laws.[33]

The Court noted that Congress had repeatedly declined to adopt proposed amendments that would have either allowed broadcasters to censor libelous statements or granted them an express immunity. "Thus, whatever adverse inference may be drawn from the failure of Congress to legislate an express immunity is offset by its refusal to permit stations to avoid liability by censoring broadcasts."[34] This reasoning is flawed. It says that because Congress refused to allow censorship, Congress must have believed that stations would not be liable for uncensored broadcasts. In other words, Justice Black's argument *assumes* that Congress could not possibly have *intended* that licensees should have tort liability for acts required by section 315. The Court thereby assumed the very point it was trying to demonstrate. The dissent found the Court's method of arriving at congressional intent particularly inappropriate in this type of case: "As we should go slow to read into what Congress has said the negation of state power, unless it speaks explicitly or there is obvious

28. *Id.* at 531 (opinion of the Court).

29. *Id.* at 545 (Frankfurter, J., dissenting).

30. Of course, where the offending candidate has limited financial resources, the prospect of recovering from him or her may be of little value to the victim. Counsel who argued for the Farmers Union before the United States Supreme Court remembers that Townley had no money, so that the union's only chance of being compensated was to recover from WDAY. Telephone interview with Harriet F. Pilpel, Esq., of Weil, Gotshal & Manges, New York, N.Y. (Sept. 5, 1990) [hereinafter Pilpel Interview].

31. 360 U.S. at 542 (Frankfurter, J., dissenting).

32. *Id.* at 536.

33. *Id.* at 545.

34. *Id.* at 532 (opinion of the Court).

collision, we should even less willingly find such negation in what Congress has frankly refused to say."[35]

The majority wrote that the FCC had "long interpreted [section] 315 as granting stations an immunity."[36] The Court added that "with full knowledge of the Commission's interpretation Congress has since made significant additions to that section without amending it to depart from the Commission's view."[37] The dissent viewed the history differently. Justice Frankfurter wrote that the FCC had not been consistent on this issue.[38] He indicated that even if it had been consistent, a holding that section 315 rendered stations immune from defamation liability would not be an administrative interpretation of an ambiguous statute but would be "a ruling of constitutional law—that the [s]upremacy [c]lause requires that the existence of the Communications Act of 1934 oust the [s]tates of jurisdiction to impose libel laws upon broadcasts made under the provisions of [section] 315. Such constitutional rulings are for this Court and not for administrative agencies."[39] Moreover, according to the dissent, the legislative history negated rather than supported the conclusion that Congress acquiesced in FCC dictum on the immunity question.[40] Evidence existed to support both the majority and the dissent. The Court's summation on this point is appealing: "In light of this contradictory legislative background we do not feel compelled to reach a result which seems so in conflict with traditional concepts of fairness."[41]

The heart of the dissenting opinion in *WDAY* is Justice Frankfurter's conviction that the Court unnecessarily found a conflict between state and federal laws, so that the state law had to bow under the supremacy clause.[42] The dissenters wrote, "States should not be held to have been ousted from power traditionally held in the absence of either a clear declaration by Congress that it intends to forbid the continued functioning of the state law or an obvious and unavoidable conflict between the federal and state directives."[43] Congress had not made such a

35. *Id.* at 540 (Frankfurter, J., dissenting).

36. *Id.* at 533 (opinion of the Court).

37. *Id.*

38. *Id.* at 538-39 (Frankfurter, J., dissenting).

39. *Id.* at 537-38. For the relevant text of the supremacy clause, *see infra* note 42.

40. *Id.* at 539.

41. *Id.* at 533 (opinion of the Court).

42. "[T]he Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2. The majority opinion did not mention the supremacy clause, but that clause provided the authority for the Court's unspoken assumption that Congress had the power to render broadcasters immune from state defamation laws. *See WDAY,* 360 U.S. at 540-41 (Frankfurter, J., dissenting).

43. *WDAY,* 360 U.S. at 541.

clear declaration.[44] As to whether a conflict between federal and state law existed in this case, the dissenters asserted that general principles of libel law would probably have resulted in a verdict for the broadcaster anyway, since "WDAY's compelled broadcast of Townley's speech lacked the necessary intent to communicate the defamation."[45] Even if WDAY's conduct were "prima facie tortious," a state court might rule that WDAY was privileged.[46] Justice Black discredited the latter argument in a footnote:

> The North Dakota District Court . . . struck down a state statute which would have granted WDAY an immunity as in violation of a state constitutional provision saving to "every man" a court remedy for any injury done his "person or reputation." In this situation we do not think that the record justifies the inference that WDAY could have obtained an immunity by calling it a privilege.[47]

The footnote also pointed out that the question was not what North Dakota courts would do but whether or not Congress intended that licensees be liable under state defamation laws for "broadcasting in a way required by federal law."[48]

Justice Frankfurter's arguments about state law were internally inconsistent. In the penultimate sentence of his opinion he wrote, "In this decision a state law is invalidated by hypothesizing congressional acquiescence and by supposing 'conflicting' state law which we cannot be certain exists."[49] If state law did not conflict with section 315, as the dissent asserted, what state law did the Court invalidate? None. The Court did not point to any specific North Dakota statute or court decision and invalidate it. It merely held that section 315 had rendered WDAY immune from liability to the plaintiff in this case. If North Dakota law would also have immunized WDAY, then the Court did not invalidate North Dakota law.

Even assuming that North Dakota law would have rendered WDAY liable, the dissenters did not believe that "displacement of state power" was justified.[50] "If North Dakota were to rule that its libel law applies to broadcasts made under compulsion of [section] 315, it would rule that broadcasters are liable without fault. There is nothing in such liability which conflicts with the necessity of broadcasting imposed by

44. *Id.*

45. *Id.* at 542.

46. *Id.*

47. *Id.* at 534 n.16 (opinion of the Court).

48. *Id.*

49. *Id.* at 546-47 (Frankfurter, J., dissenting).

50. *Id.* at 544.

[section] 315."[51] The point is a poor one. No one, including a broadcaster, should be punished for conduct compelled by law.[52]

The plaintiff union argued that WDAY did not need immunity because it could protect itself either by obtaining insurance or by refusing all politicians' requests for airtime so that section 315 could not be invoked. The Court gave the insurance argument the fleeting attention it deserved.[53] As to refusing all requests for political air time, Justice Black correctly noted that "the thrust of [section] 315 is to facilitate political debate over radio and television" and that the FCC considered carrying political broadcasts to be an important element of the public service required of licensees.[54] "Certainly Congress knew the obvious—that if a licensee could protect himself from liability in no other way but by refusing to broadcast candidates' speeches, the necessary effect would be to hamper the congressional plan to develop broadcasting as a political outlet, rather than to foster it."[55] The repeated failure of Congress to explicitly immunize broadcasters raises some doubt as to whether or not Congress knew the obvious, but the Court's policy argument is sound.

The constitutionality of section 315 could have been questioned in the *WDAY* case. The broadcaster could have argued that forcing it to act in a way that made it liable in tort violated due process. The union could have asserted that depriving it of a recovery against WDAY violated due process.[56] Neither party, however, challenged the statute's constitutionality in the Supreme Court.[57]

51. *Id.* at 545. At the time *WDAY* was decided, some states imposed strict liability for defamation. Today, finding a broadcaster "liable without fault" would be unconstitutional on first amendment grounds. *See* Milkovich v. Lorain Journal Co., 110 S. Ct. 2695, 2704 (1990). It does not follow, however, that broadcaster liability in the *WDAY* circumstances would violate the first amendment. The broadcaster in that case believed that the statements in question were false. Farmers Educ. & Coop. Union v. WDAY, Inc., 89 N.W.2d 102, 104 (N.D. 1958), *aff'd*, 360 U.S. 525 (1959). Thus, WDAY possessed the requisite "malice."

52. *See* Martin v. Wilks, 109 S. Ct. 2180, 2199 (1989) (Stevens, J., dissenting) ("it would be 'unconscionable' to conclude that obedience to an order remedying a Title VII violation could subject a defendant to additional liability"); Lebron v. Washington Metro. Area Transit Auth., 749 F.2d 893, 899 n.11 (D.C. Cir. 1984) (citing *WDAY*, 360 U.S. at 533-35).

53. 360 U.S. at 534. Counsel for the Farmers Union still believes that, as between a broadcaster that can and does insure itself and a defamed plaintiff with no other remedy, the plaintiff should prevail as the innocent party less able to protect itself. Pilpel Interview, *supra* note 30. In the author's view, however, whether or not a party is or can be insured should have no bearing on its liability.

54. 360 U.S. at 534.

55. *Id.* at 535-36. For related argument, see *infra* notes 85-86 and accompanying text.

56. The union had made that argument unsuccessfully in the North Dakota courts. Farmers's Educ. & Coop. Union v. WDAY, 89 N.W.2d 102, 106, 110 (N.D. 1958), *aff'd*, 360 U.S. 525 (1959).

57. M. FRANKLIN, CASES AND MATERIALS ON MASS MEDIA LAW 791 (3d ed. 1987). *But cf.* Morrisseau v. Mount Mansfield Television, Inc., 380 F. Supp. 512, 513-14 (D. Vt. 1974) (court erroneously states that *WDAY* upheld constitutionality of section 315).

Even after *WDAY,* some broadcasters apparently remained in fear of liability for defamation by candidates. In 1972, the Columbia Broadcasting System (CBS) radio and television stations in Los Angeles demanded that Senator Hubert H. Humphrey, a candidate for president in the California primary, submit personally signed "indemnification forms" before CBS would allow him to buy thirty-second spots.[58] Humphrey challenged this requirement, and the FCC's Broadcast Bureau[59] ruled in his favor:

> [W]e believe that an indemnification promise is likely to be inhibiting with respect to the content of the candidate's use, as well as his decision on whether or not to use the station's facilities. In view of the immunity afforded the licensee under *WDAY* for a use by a candidate, a requirement for indemnification appears to serve no appropriate purpose; its attendant effect is therefore an unreasonable burden and restriction on the use of a station which is inconsistent with the no-censorship requirement of [s]ection 315.[60]

CBS petitioned the Commission for review, which was denied.[61] The Commission reiterated the Broadcast Bureau's analysis. CBS argued that, without indemnification, it could incur expenses of defending lawsuits even if there were no liability. The FCC's reply was, in effect, "tough luck."

> We believe that the cost of defending a suit where there is no liability is a part of the normal cost of doing business which a licensee assumes in the operation of its station, whether or not the licensee may later have a cause of action against the candidate whose conduct exposes the licensee to a lawsuit.[62]

A contrary decision arguably could have been consistent with the letter of section 315. Not everyone would agree that requiring an indemnification agreement constitutes "censorship." Like *WDAY*, however, the ruling makes sense in view of the policies behind section 315.

II
Incitement to Violence

While Humphrey was trying to reprise his role as the Democratic presidential nominee, one J.B. Stoner sought the Democratic nomination

58. In addition to defamation, CBS expressed concern about possible liability for copyright infringement, invasion of privacy, or violation of union contracts. *In re* Complaint of D. J. Leary, Memorandum Opinion and Order, 37 F.C.C.2d 576, para. 4 (1972).

59. The Broadcast Bureau no longer exists. Political broadcasting complaints now are handled by the Mass Media Bureau. *See* 47 C.F.R. § 0.61(g) (1989).

60. Letter from William B. Ray, Chief, Complaints and Compliance Division for Chief, Broadcast Bureau, to Gentlemen (In Re Complaint by Senator Hubert H. Humphrey), 35 F.C.C.2d 112, 113 (1972), *review denied sub nom. In re* Complaint of D. J. Leary, Memorandum Opinion and Order, 37 F.C.C.2d 576, para. 8 (1972).

61. *In re Complaint of D. J. Leary,* 37 F.C.C.2d at para. 8.

62. *Id.* para. 5.

for U.S. Senator from Georgia. Stoner wanted to run radio and television announcements with the following text:

> I am J.B. Stoner. I am the only candidate for U.S. Senator who is for the white people. I am the only candidate who is against integration. All of the other candidates are race mixers to one degree or another. I say we must repeal Gambrell's civil rights law. Gambrell's law takes jobs from us whites and gives those jobs to the niggers. The main reason why niggers want integration is because the niggers want our white women. I am for law and order with the knowledge that you cannot have law and order and niggers too. Vote white. This time vote your convictions by voting white racist J.B. Stoner into the run-off election for U.S. Senator. Thank you.[63]

The mayor of Atlanta, Sam Massell, issued an executive order urging broadcast stations not to accept advertising with such language on the ground that it was calculated to incite listeners to violence.[64] The Atlanta office of the National Association for the Advancement of Colored People (NAACP), joined by other organizations, asked the FCC to advise licensees that they could decline to carry Stoner's announcements without violating section 315.[65] The Commission refused:

> The relief requested in your letter would amount to an advance approval by the Commission of licensee censorship of a candidate's remarks. . . . Despite your report of threats of bombing and violence, there does not appear to be that clear and present danger of imminent violence which might warrant interfering with speech which does not contain any direct incitement to violence. A contrary conclusion here would permit anyone to prevent a candidate from exercising his rights under [s]ection 315 by threatening a violent reaction. In view of the precise commands of [s]ections 315 and 326, we are constrained to deny your requests.[66]

It is worth noting that the Commission did not directly hold that section 315 compelled broadcasters to air Stoner's announcements. It merely refused to sanction such censorship in advance. However, the opinion strongly suggests that any licensees heeding the mayor's warning and refusing Stoner's ads would be in violation of section 315. Since that section has no explicit exceptions based on content of the message, the Commission was correct in its refusal to allow anything less than a serious danger of imminent violence to interfere with Stoner's access.

63. Letter from Ben F. Waple, Secretary, by Direction of the Commission, to Mr. Lonnie King, 36 F.C.C.2d 635, 636 (1972).

64. *Id.*

65. *Id.*

66. *Id.* at 637.

III
Indecency/Obscenity

Six years later, Stoner ran for governor. He again ran radio and television ads using the word "nigger."[67] The Atlanta NAACP again asked the FCC to advise stations that they could refuse to carry such announcements.[68] This time the NAACP had a new argument: the word "nigger" was indecent or obscene and therefore could be banned from the airwaves under the then-new Supreme Court decision in *FCC v. Pacifica Foundation.*[69]

The Broadcast Bureau rejected the NAACP's argument. The *Pacifica* holding supported broadcast regulations regarding patently offensive language which dealt with sexual and excretory functions. The FCC intended to interpret *Pacifica* narrowly. Consequently, the FCC did not consider the word "nigger" as falling within the *Pacifica* holding.[70] Moreover, *Pacifica* did not give the Commission general authority to intervene whenever indecent words were broadcast.[71] "Finally, even if the Commission were to find the word 'nigger' to be 'obscene' or 'indecent,' in light of [s]ection 315 we may not prevent a candidate from utilizing that word during his 'use' of a licensee's broadcast facilities."[72]

Despite the FCC's new, tougher stance on indecency, the Bureau's ruling that "nigger" is not an obscene or indecent word appears to be good law today. Though the 1987 indecency order clearly states that indecency is not confined to George Carlin's "seven dirty words,"[73] indecent speech still includes only words describing or depicting "sexual or excretory activities or organs in a patently offensive manner."[74] Obscenity is an even narrower category, including only certain sexual material.[75] The use of the word "nigger" may be patently offensive, but unless the context involves sex or excretion, it is not indecent or obscene by the FCC's standards.

The Bureau's dictum suggesting that section 315 would prevent censorship of obscene or indecent language is doubtful. In 1983, pornographic magazine publisher Larry Flynt declared himself a presidential

67. Letter from Wallace E. Johnson, Chief, Broadcast Bureau, to Julian Bond, Atlanta NAACP, 69 F.C.C.2d 943, 943 (1978).

68. *Id.* at 943-44.

69. 438 U.S. 726 (1978).

70. *Letter to Julian Bond*, 69 F.C.C.2d at 944.

71. *Id.*; *see Pacifica*, 438 U.S. at 750.

72. *Letter to Julian Bond*, 69 F.C.C.2d at 944.

73. *In re* Pacifica Foundation, Inc., Memorandum Opinion and Order, 2 FCC Rcd 2698, para. 12, 62 RAD. REG. 2D (P & F) 1194, para. 12 (1987).

74. *Id.* paras. 10, 13.

75. *Id.* para. 9.

candidate and reportedly intended to use X-rated film clips in television ads.[76] Broadcasters asked the FCC whether or not section 315 required them to use such ads, and an FCC staff analysis concluded that it did not.[77] The Commission never formally ruled, apparently because Flynt abandoned his attempt to run for president.[78] This leaves broadcasters in an uncomfortable position as to political ads that are obscene or indecent. If they refuse to air those spots, they may be violating section 315, according to the Broadcast Bureau letter.[79] If they air them, the broadcasters may be in violation of the prohibitions against obscene and indecent broadcasts.[80]

IV
Conclusion

Section 315's censorship prohibition and the cases decided under it have had salutary results. The section has advanced the cause of free speech by forcing broadcasters to allow politicians to say whatever they want on the air. *WDAY* prevents unfairness to broadcasters by holding that they are immune from tort liability for the broadcasts that they cannot censor. At the same time, section 315 does not immunize offending candidates, so victims can be compensated. Even if offending candidates have no money, victims can sue to help clear their names.

A few problems remain, however. The defamation immunity conferred by *WDAY* should be made explicit in the statute, lest the five-to-four decision be reversed by new Justices with different views. Congress also should clarify whether stations are obligated to run political ads that are indecent or obscene and whether stations may face punishment for doing so.

Recent precedent exists for such congressional action. In the Cable Communications Policy Act of 1984, Congress required large cable systems (those with thirty-six or more activated channels) to set aside some channels for commercial use by persons unaffiliated with the cable operator[81] and authorized local governments to require that channels be set

76. M. FRANKLIN, *supra* note 57, at 793.

77. *What's News—World Wide,* Wall St. J., Jan. 25, 1984, at A1, col. 3.

78. *See* M. FRANKLIN, *supra* note 57, at 793.

79. *See supra* text accompanying note 72.

80. *See* 18 U.S.C. § 1464 (1988). Congress has ordered the FCC to enforce the indecency ban around the clock. Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriation Act of 1989, Pub. L. No. 100-459, § 608, 102 Stat. 2186, 2228 (1988). The twenty-four hour ban is being challenged in court on first amendment grounds. *See FCC Votes for Indecency Ban,* BROADCASTING, July 16, 1990, at 30. Congress also has prohibited obscene cable transmissions. *See* 47 U.S.C. § 559 (1988).

81. 47 U.S.C. § 532(b)(1) (1988).

aside for public, educational, or governmental use.[82] Cable operators are prohibited from exercising any editorial control over the programming on channels set aside pursuant to those provisions.[83] Accordingly, Congress explicitly provided that cable operators shall not incur criminal or civil liability for any program carried on any such channel.[84] The House of Representatives report explicitly tied the exemption from liability to the prohibition on editorial control by cable operators.[85]

A federal appeals court in a recent opinion cogently explained the need for exemption:

> Without this protection, cable operators would face a legislatively-mandated, undeterminable exposure to both civil and criminal liability. Faced with such a threat, operators would likely resist any forced access, either by colluding with unobjectionable, safe programmers to fill up the required percentage of mandatory access channels, or by avoiding being subject to forced access by maintaining less than thirty-six activated channels. This would defeat the basic purpose of the mandatory access provisions by encouraging cable operators to maintain their monopoly over the content of programming transmitted. With the immunity in place, however, the cable programmer's access is more secure, since it removes a strong incentive not to grant access.[86]

Similar reasoning applies to the censorship prohibition of section 315. Without exemption from liability for the content of political broadcasts, radio and television stations (and cable operators) would be forced either to expose themselves to unlimited liability for such content or to reject all requests from candidates for air time. Either option would be unsavory for broadcasters, and the latter would defeat section 315's purpose of giving political candidates access to broadcast media to explain their stand on issues.[87] Admittedly, at present, no pattern of broadcast-

82. *Id.* § 531(b).

83. *Id.* §§ 531(e), 532(c)(2). With respect to the public, educational, or governmental use, franchising authorities and cable operators are permitted to determine that cable services that are obscene or otherwise unprotected by the United States Constitution will not be provided or will be provided subject to conditions. *Id.* §§ 531(e), 544(d).

84. Specifically, cable operators are exempted from criminal and civil liability "pursuant to the [f]ederal, [s]tate, or local law of libel, slander, obscenity, incitement, invasions of privacy, false or misleading advertising, or other similar laws" as a result of "any program carried on any channel designated for public, educational, [or] governmental use or on any other channel obtained under section 532 of this title or under similar arrangements." *Id.* § 558.

85. H.R. REP. NO. 934, 98th Cong., 2d Sess. 95, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 4655, 4732; *see* Playboy Enters. v. Public Serv. Comm'n, 906 F.2d 25, 27 (1st Cir. 1990).

86. *Playboy*, 906 F.2d at 38. Congress stated that the purpose of mandatory commercial access was "to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems." 47 U.S.C. § 532(a) (1988).

87. *See* KVUE, Inc. v. Moore, 709 F.2d 922, 935 (5th Cir. 1983), *aff'd mem. sub nom.* Texas v. KVUE-TV, Inc., 465 U.S. 1092 (1984).

ers refusing to air political commercials has arisen;[88] however, both actual and potential difficulties exist. As to defamation, broadcasters assume that *WDAY* remains viable;[89] however, without an explicit statutory immunity, *WDAY* could be overruled. Moreover, despite *WDAY,* broadcasters often receive legal threats from candidates who claim that they have been defamed on the air by their opponents.[90] Broadcasters could respond more simply and perhaps more persuasively to such threats if they could cite to an explicit statutory exemption rather than a decades-old, five-to-four court decision.[91] As to indecency, most candidates have no desire to offend audiences, so it is rarely a problem;[92] however, lesser-known candidates have been known to resort to unorthodox tactics, such as when Barry Commoner, a Citizens Party candidate for president in 1980, ran radio commercials that repeatedly used the word "bullshit."[93]

Better protection for broadcasters could be accomplished by the addition of a phrase to section 315. The first sentence of subsection (a) could then read as follows, with the proposed addition to the end of the sentence shown in italics:

> 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: *Provided,* That such licensee shall have no power of censorship over the material broadcast under the provisions of this section, *and shall not be subject to any civil, criminal, or administrative sanction based on the content of such material.*

Such language would make it clear to all concerned—including broadcasters, candidates, viewers, listeners, and the FCC—that the responsibility for keeping political discourse truthful and within the bounds of decency rests with the persons who create that discourse: politicians.

88. Some broadcasters have found it necessary to follow political ads with disclaimers stating that the views expressed in the ads are not those of the station. The FCC has not ruled on whether such disclaimers violate the censorship prohibition of section 315, but the Political Programming Branch of the Enforcement Division of the Mass Media Bureau has opined that they do not. Letter from Roy J. Stewart, Chief, Mass Media Bureau, FCC, to Wayne Brewies, President, Southern Arkansas Radio Co., 5 FCC Rcd 4643, 4644, 67 RAD. REG. 2d (P & F) 1653, 1655-56 (1990). In a recent opinion, however, the FCC staff advised broadcasters who choose to use such disclaimers in connection with a particular candidate's advertising that they must do the same with all subsequent advertising on behalf of *every* candidate for the same office. *Id.,* 67 RAD. REG. 2d at 1656.

89. Telephone interview with James P. Riley, Esq., of Fletcher, Heald & Hildreth, Washington, D.C., counsel for broadcasters (Aug. 22, 1990).

90. *Id.*

91. *Id.*

92. *Id.*

93. *See* M. FRANKLIN, *supra* note 57, at 793.