The regulation of political broadcasting in the United States

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THE REGULATION OF POLITICAL BROADCASTING IN THE UNITED STATES

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BY
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DEPARTMENT OF POLITICAL SCIENCE

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CHAPTER I

INTRODUCTION

To begin with, laws governing broadcasting are a political necessity. Indeed, broadcasting may be an instrument of political control or an instrument of political freedom, depending upon the presuppositions, character, and processes of political systems and cultures. Any concept of the role of government in the regulation of broadcasting necessarily reflects a particular political philosophy. Each country has adopted such laws in accordance with its own conceptions of public interest. Therefore many aspects of broadcasting can be understood only in a political context. To a marked degree broadcasting involves the basic political philosophy of a country, and we shall find that the study of the control of broadcasting in the United States will illuminate a number of concepts underlying our own system of government.

This thesis is a study of the regulation of political broadcasting in the United States. It is concerned with the rights and obligations of candidates for public office in relation to the broadcasting media. An analysis of federal statutes, F.C.C. rules and state regulations is performed in order to determine these rights and obligations.

\[1\] Sydney W. Head, Broadcasting in America (Boston, 1956), p. 297.
Materials used in this study were obtained from the Congressional Record, Statutes at Large, books, articles, and rules and regulations of the F.C.C.

The procedure used in this investigation is as follows: (1) a general history of broadcasting regulation, (2) federal statutes specifically relating to political broadcasting, (3) rules and regulations of the F.C.C., (4) state regulation and (5) summary and conclusion. Rules and regulations are discussed in connection with the political background that helped to shape them.

The significance of the study is the insight it provides into the regulations governing the broadcasting media in our democratic society. This study also gives, in an analytical and descriptive manner, the rights and obligations that a candidate for public office has over the broadcasting media.

General History

The Constitution states: "Congress shall have the power to regulate commerce with foreign nations, and among the several states".\(^2\) Thus, without being aware of it, member of the Constitutional Convention bestowed upon the Federal Government the authority to control and regulate, in all its aspects, radio and television broadcasting.

The Constitution does not define the word "commerce". But as the nation grew and developed it became apparent that a definition of the word would have to be made by the courts. John Marshall was the first to state

\(^2\) U. S., Constitution, Art. I, Sec. 8, Clause 3.
the definition in legal terms. Marshall wrote: "Commerce among the state consists of intercourse and traffic among their citizens, in all its branches, and includes the transportation of persons and property and the navigation of public waters for that purpose".3

In 1905, Mr. Justice Brown had this to say: "The commerce clause is perhaps the most benign gift of the Constitution.... Without it the Constitution could not have been adopted".4

As new and better methods of transporting passengers and cargo developed, they too came under Marshall's definition. Traffic and intercourse increased in quantity and were accelerated by technological advances and came to involve more people as the country grew but the basic idea of the undertaking remained the same.

With the advent of the ability to transmit ideas and opinions from one point to another using electricity and wires, the time came for the highest court to answer the question: were telegraphic messages commerce? Did transmission of telegraphic messages between states, involving the movement of nothing concrete, constitute interstate commerce and warrant regulation by Congress under its constitutional powers? The Court's answer was yes.

Congress, in 1866, passed a law to aid the construction of telegraph lines.5 The state of Florida attempted to create a monopoly which would prevent the entrance of telegraphic messages into that state except over

3Gibbons v. Ogden, 9 Wheaton 1 (1824).
514 Statutes At Large, 221 (1865).
the wires of the monopoly so established. The Supreme Court held the
Florida statute to be an unconstitutional burden on interstate commerce.\(^6\)
In rendering its decision the Court called attention to the fact that
Congress could regulate commerce and could establish post offices and postal
routes. The Court also stated that the telegraph was a means of commercial
intercourse crossing state boundaries and was national in scope. Thus,
the Supreme Court said, the transmission of telegraphic messages was inter-
state commerce and was subject to congressional regulation.

Chief Justice Waite, speaking for the Court, said:

The powers thus granted (to the Congress) are not con-
ditioned to the instrumentalities of commerce or the postal
service known or in use when the Constitution was adopted,
but adapt themselves to the new developments of time and
circumstances. They extend from the horse with its rider
to the stagecoach, from the sailing vessel to the steam-
boat, from the coach and the steamboat to the railroad and
the telegraph, as these new agencies are successively
brought into use to meet the demands of increasing popula-
tion and wealth. They were intended for the government of
the business to which they relate, at all times and under
all circumstances. As they were intrusted to the general
government for the good of the nation, it is not only the
right but the duty of Congress to see to it that inter-
course among the states, and the transmission of intelli-
gence are not obstructed or unnecessarily incumbered by
state legislation.

The electric telegraph marks an epoch in the progress
of time.

It has changed the habits of business, and become one
of the necessities of commerce. It is indispensable as a
means of intercommunication, but especially is it so in
commercial transactions.

Under such circumstances, it cannot for a moment be
doubted that this powerful agency of commerce and

\(^6\)Pensacola Telegraph Co. v. Western Union Telegraph Co., 96 U.S. 1
(1877).
intercommunication comes within the controlling power of Congress.\(^7\)

Three years later, the Court declared a state tax on interstate telegraphic messages to be void and reaffirmed that interstate transmission of telegraphic messages was subject to congressional regulation.

A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad does as a carrier of goods. Both companies are instruments of commerce, and their transportation in different ways and their liabilities are in some respects different; but they are both indispensable to those engaged to any extent in commercial pursuits.\(^8\)

In 1887, the Supreme Court once again had an opportunity to reaffirm that telegraphic transmissions across state lines constituted interstate commerce, subject to the jurisdiction of Congress. The Supreme Court said:

It differs not only in the subject which it transmits, but in its means of transmission. Other commerce deals only with persons or with visible or tangible things. But the telegraph transports nothing visible or tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant supervision and attention of the carrier for the safety of the persons and property carried. The message of the telegraph passes at once beyond control of the sender, and reaches the office to which it is sent instantaneously. It is plain, from these essentially different characteristics, that the regulations suitable for one of the kinds of commerce would be entirely inapplicable to the other.\(^9\)

Even as the Supreme Court, through the years, was affirming the right of Congress to regulate wired interstate transmission of telegraphic messages, men were developing the means to do away with wire and to transmit the messages through the air. As early as 1865, a brilliant young English

\(^7\)Ibid.

\(^8\)Western Union Telegraph Co. v. Texas, 105 U.S. 460 (1886).

\(^9\)Western Union Telegraph Co. v. Pendleton, 122 U.S. 347 (1887).
physicist, James Clark Maxwell, a professor at Kings College in London, had predicted the existence of electromagnetic waves. Some 20 years later, between 1885 and 1887, a German, Heinrich Hertz, was to prove this theory correct by a series of experiments based upon Maxwell's theory.\textsuperscript{10} Hertz developed a primitive radio transmitter and receiver when he caused a spark to jump 40 feet through space. Through Hertz's published reports, a 20 year old Italian, Guglielmo Marconi, became interested in the subject and, in 1895, gave a demonstration of "radiotelegraphy" -- transmission of signals without wires.\textsuperscript{11} In 1901, Marconi transmitted a radio signal across the Atlantic from Cornwall, England, to St. John's, Newfoundland. Others were experimenting with techniques for communicating speech and music by wireless rather than simply sending code signals. In 1900, Reginald Fessenden, a teacher of physics at the University of Pittsburgh, partly succeeded in broadcasting vocal tones from one tower to another a mile away.\textsuperscript{12} In 1906, thanks to the development of the Alexanderson Alternator, a machine capable of generating a continuous flow of electrical energy, Fessenden was successful in broadcasting the world's first radio program.\textsuperscript{13} Thus broadcasting was born which created another problem involving the commerce clause.

Is radio broadcasting commerce? There has been little argument, due largely to decisions indicated earlier involving the telegraph, that radio broadcasting is not commerce. A judicial decision from the nation's highest

\textsuperscript{10}Head, \textit{op. cit.}, p. 91.

\textsuperscript{11}Head, \textit{op. cit.}, p. 93.

\textsuperscript{12}Head, \textit{op. cit.}, pp. 103, 104.

\textsuperscript{13}Head, \textit{op. cit.}, p. 85.
court was not even to be handed down on this subject until 1932.  

However, before the Supreme Court could act, it was up to Congress to make the necessary laws to regulate the new medium. Congress had to face the job of establishing a pattern for radio regulation with no previous experience in a comparable field. Congress had to move cautiously so as not to overstep double bounds -- the bounds of controls which the government had set for itself in dealing with private industry, and those bounds which the Constitution established for preserving freedom of speech.

As the highest legislative authority in the country, Congress, in attempting to legislate, became the object of various pressure groups. Their intention was to influence congressional policy on the regulation of radio. These interests fall into three categories: control, program content, and adequacy of service. They are all interrelated in one way or another. The hottest issue at first was that of governmental control because this was a new unregulated medium in the field of commerce. These groups sought different kinds of governmental policy on the power of station,

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15 Carl J. Friedrich and Evelyn Sternberg, "Congress and the Control of Radio Broadcasting", American Political Science Review, XXXVII (1937), 1024.
16 Ibid., p. 1025.
17 Head, op. cit., p. 47.
19 Ibid., p. 94.
licensees, and the purchasing of station. Therefore, because of congressional inexperience and various pressures, several types of legislation evolved.

In 1910, Congress passed the first radio act but that law did not, in reality, regulate radio. It required only that ships at sea be equipped with radio apparatus if they carried 50 or more passengers. The law further required the following four basic points. They were: (1) that the radio apparatus should be capable of transmitting and receiving messages over a distance of 100 miles, (2) that ships at sea should carry on radio communication business with other ships and with shore stations, (3) that any vessel whose master left or attempted to leave any port of the United States without complying with the provisions of the act might have his vessel libeled in any District Court of the United States and (4) that the Secretaries of Commerce and Labor were to administer the law.

In 1912, Congress amended the law. The amendment made three changes: (1) ships plying the Great Lakes were required to meet the conditions of having adequate radio transmitters and receivers, (2) every ship was required to have emergency power service capable of sending messages for four hours in case of failure of the regular power plant; (3) every vessel was required to have two or more persons aboard capable of operating the equipment in order that a continuous watch on distress frequencies might be kept.

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20 36 Statutes At Large, 629 (1910).
21  Ibid.
22 37 Statutes At Large, 199 (1910).
23  Ibid.
During the time Congress was considering legislation for shipboard radio, it had also been considering the general regulation of broadcasting. Within three weeks after the passage of the amendment to the first radio law, Congress approved the Radio Act of 1912.\textsuperscript{24}

The first important requirement of the law was that a license was necessary for the operation of a radio transmitter.

\begin{quote}
Be it enacted...that a person, company, or corporation within the jurisdiction of the United States shall not use or operate any apparatus for radio communication as a means of commercial intercourse among the several states, or with foreign nations, or upon any vessel of the United States engaged in interstate or foreign commerce, or for the transmission of radiograms or signals the effect of which extends beyond the jurisdiction of the State or Territory in which the same are made, or where interference would be caused thereby with the receipt of message or signals from beyond the jurisdiction of said State or Territory, except under and in accordance with the license, revocable for cause, in that behalf granted by the Secretary of Commerce and Labor upon application therefor.\textsuperscript{25}
\end{quote}

Congress clearly indicated that the activity of radio transmission was considered commerce by its use of the phrase "shall not use...any apparatus for radio communication as a means of commercial intercourse among the several states...".

Subsequently, the statute recited that such regulation was confined to the interstate aspects of commerce and thus indicated that Congress believed it was acting under the commerce clause of the Constitution. A continuation of the beginning sentence in Section 1 of the act reads: "...but nothing in this act shall be construed to apply to the transmission and exchange of radiograms and signals between points situated in the same

\textsuperscript{24}37 Statutes At Large, 302 (1912).

\textsuperscript{25}\textit{Ibid.}
Congress possibly could have acted under its constitutional power to enact laws carrying into effect treaties made by the President, with the advice and consent of the Senate. The Radio Act of 1912 was passed after the United States had participated in and ratified the Berlin Radio Convention of 1906. The United States was also represented at the London Radio Conference of 1912. Of this, one writer says:

This statute (Radio Act of 1912) was the culmination of several international conventions relating to radio transmission to which the United States was a party. The scope and condition of the industry of that time were such as to make it appear that the most important jurisdictional power which generated such early legislation was that of the Federal government to make and enforce treaties.  

The Radio Act of 1912 contained other important provisions. Section 2 provided that license for broadcast stations should be issued only to citizens of the United States. This act also set forth what the license would contain. It granted the President authority to seize stations in time of war, upon just compensation to the owners. The Radio Act of 1912 also required that all persons operating radio transmitters should be licensed.

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26Ibid.


28Statutes At Large, Sec. 2 (1912).

29Ibid.

30Ibid.

31Ibid.
The Radio Act of 1912 established penalties for interfering with radio communication and provided for the suspension of an operator's license if he permitted an unlicensed person under his supervision to break the law.

The Secretary of Commerce was given the right to waive provisions of regulations established by the act and this subsequently led to the declaration by one court that if the law were construed to give the Secretary the powers he claimed, it would be unconstitutional as a delegation of administrative power without setting up any standard for administering the law. The Supreme Court of the United States had no occasion to consider the validity of the act.

Perhaps Congress did not foresee the use to which the law would be put (i.e., attempted regulation of commercial broadcasting during the period 1921-1926) and consequently made no provision for such eventuality. When a flood of applications for licenses developed in the early 1920's, the Secretary of Commerce found himself faced with a difficult task. The law made no provisions for the duration of a license. It said only that the license was revocable for certain causes. The Secretary limited all ship and amateur licenses to two years, point-to-point telegraph licenses to one year, and broadcast licenses to 90 days. These renewals help him cope with the situation by requiring changes in frequencies, better apparatus, and other stipulations.

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32Ibid.
33Ibid.
In 1921, the Secretary of Commerce refused to issue a license on the ground that such issuance would cause interference with existing stations. A mandamus proceeding was brought and the Supreme Court of New York held that the Secretary had no discretion in the matter and must issue a license.\(^\text{35}\) The Court of Appeals ruled in favor of the plaintiff and the case went to the Supreme Court of the United States on a writ of error. However, the station ceased operations before the case came up for a hearing and the proceedings were dropped.

Requests for licenses came in increasing numbers. By 1922, there were so many broadcasting stations that a national conference was called in hope that difficulties could be worked out by mutual agreement. The conference accomplished little or nothing. A second conference was called in 1923. By this time there were more than 500 stations on the air.\(^\text{36}\) Again the effect was limited. It was apparent that Congress had to act to correct the situation.

Because of so much confusion and pressures, Congress then passed the Radio Act of 1927.\(^\text{37}\) It was hoped that this law would help clear up the radio situation. However, radio legislation had been under consideration in the House for three or four years and in 1926 the House passed a radio bill. The Senate changed certain provisions and the act, as finally passed, was a composite of the proposals of the two groups.\(^\text{38}\) The major difference in the thinking of the two houses was in what governmental agency should

\(^{35}\) Hoover v. Intercity Radio, 266 U. S. 636 (1923).


\(^{37}\) 44 Statutes At Large, 1166 (1927).

\(^{38}\) Dill, op. cit., pp. 76, 77.
control of broadcasting be lodged.

The House bill called for a Federal Radio Commission, which would act as an appellate body. The Secretary of Commerce was to administer the law and appeals from his decision would be made to the Commission. The Senate proposed to place all authority in the Commission itself but would leave it up to the Secretary to handle the administrative work. The act, upon passage, actually provided for the Commission to have all the powers for one year and after that the Secretary would assume the power for one year. Then the Secretary would assume the power and the Commission would become appellate. Apparently Congress felt the new Commission could clear up the situation within a reasonably short time and there would be little more than routine administrative duties to be handled.\(^\text{39}\) Congress actually continued the Commission in power for some time and, on December 18, 1929, made the Commission a permanent organization with authority to regulate radio.\(^\text{40}\) This move occurred after Congress found out that the situation with the radio needed permanent regulation.\(^\text{41}\) This confusion was created in large part by pressure groups which sought various types of controls and policies.\(^\text{42}\)

\(^{39}\)Ibid.
\(^{40}\)Ibid.
\(^{41}\)Dill, op. cit., p. 79.
\(^{42}\)Dill, op. cit., p. 80.
The Radio Act of 1927 contained seven basic points which merit notation.

1) No property right in a frequency or channel was created by the user.\textsuperscript{43}

2) The test by which the Federal Radio Commission should determine whether or not to grant a license was unique.\textsuperscript{44}

3) Equal treatment of all political candidates for the same office was required.\textsuperscript{45}

4) The Commission was expressly prohibited from censoring broadcasts.\textsuperscript{46}

5) A station was prohibited from rebroadcasting the signal of another station without prior permission.\textsuperscript{47}

6) The secrecy of certain radio communication was required.\textsuperscript{48}

7) Competition in communications was assured by certain restrictions involving retransmission by other electrical means such as telephone and telegraph.\textsuperscript{49}

The act brought a new concept of radio regulation. This was a concept of broad regulatory powers on the part of the national government, with such regulation including the specific provisions indicated above.

Five years passed before the constitutionality of the act was tested. Most of the early cases encountered procedural difficulties because of appellate provisions written into the act itself. The act provided for appeals

\begin{flushright}
\textsuperscript{43} Statutes At Large, 1166 Sec. 5 (1927).
\textsuperscript{44} Ibid., Sec. 9.
\textsuperscript{45} Ibid., Sec. 18.
\textsuperscript{46} Ibid., Sec. 29.
\textsuperscript{47} Ibid., Sec. 28.
\textsuperscript{48} Ibid., Sec. 27.
\textsuperscript{49} Ibid., Sec. 17.
\end{flushright}
to the Court of Appeals of the District of Columbia in cases where the Commission had refused the application for a license modification thereof. Finally, a case reached the Supreme Court for consideration. The highest court refused to rule on the case on the ground that it lacked jurisdiction.\(^{50}\) The Supreme Court set forth the belief that it lacked jurisdiction because powers granted to the FRC were purely administrative. Continuing, the Supreme Court stated that it was not entrusted with such legislative powers.\(^{51}\)

Following this development, Congress revised the provisions of the act in 1930 and indicated that review of Commission procedures by the courts should be limited to the question of law.\(^{52}\) The Supreme Court upheld the constitutionality of the act of 1927 as a constitutional and valid delegation of power on the part of Congress (so far as those portions of the act before it were concerned). The Supreme Court indicated that the phrase "public interest, convenience, and necessity" was not too indefinite and did not confer legislative power upon the Commission.

In 1928, Congress amended the act of the previous year by saying that there should be a "fair and equitable allocation of licenses...within each zone", such zones having been established by the original act.\(^{54}\) The purpose of the amendment was to insure geographical equality in authorizing

\(^{50}\) *General Electric Co. v. F.R.C.*, 281 U. S. 464 (1930).

\(^{51}\) *Ibid.*

\(^{52}\) *Statutes At Large*, 844 (1930).


\(^{54}\) *Statutes At Large*, 373 (1928).
broadcasting stations over the country. The Supreme Court also held in \textit{F.R.C. v. Nelson Bros. Bond and Mortgage Co.}, 289 U. S. 266 (1938), that the amendment was constitutional.

In 1933, after considering reorganization procedures for the national government, President Franklin Roosevelt asked Congress to centralize all authority to regulate interstate, foreign wire and radio communications. This Congress did with the Communications Act of 1934.\footnote{48 Statutes At Large, 1064 (1934).} This act was also intended to relieve some of the ambiguities of the previous act and to eliminate some of the various pressure groups.\footnote{Summers, \textit{op. cit.}, p. 87.} However, to a certain extent this act accomplished some of its purposes. Several pressure groups seeking governmental control policies went out of existence but new groups seeking different types of control policies arose.\footnote{Summers, \textit{op. cit.}, p. 77.}

The new law delegated the regulation of all communication services in the United States to the Federal Communication Commission. The new act embodied the same power and provided for their exercise according to the same standards as the 1927 act.\footnote{Socolow, \textit{op. cit.}, p. 21.}

The new act included a definition of radio communication as "the transmission by radio of writing, signs, signal, pictures and sounds of all kinds, including all instrumentalities, facilities, apparatus, and services (among other things the receipt, forwarding and delivery of communications)
 incidental to such transmission". 59

The new governing body was to be composed of seven members, each appointed by the President with the advice and consent of the Senate. Members hold office for seven years and no more than four members can be of the same political party. 60

In the present study the Communications Act of 1934 will be examined only in the light of the provision of Section 315 dealing with "Facilities for Candidate for Public Office". While the provision of this section is embodied in only a few words it will be seen that interpretation of the section is considerably more involved.

59 Statutes At Large, Sec. 3 (1934).

60 Ibid.
CHAPTER II

FEDERAL STATUTES RELATING TO POLITICAL BROADCASTING

In both the 1927 and the 1934 Communications Acts, the principle was laid down that in the case of political broadcasts, stations permitting one candidate to make use of their facilities must make time available to all opposing candidates, on the same basis.¹ In other words, in regard to political broadcasting, radio is bound by statute to a policy of "equal opportunity" for both sides or all sides.²

The same policy is widely advocated in regard to all controversial questions. Most persons who have expressed themselves on the subject, according to H. B. Summers, favor a general policy of complete freedom of discussion on the air -- permitting free expression of opinion on all policies of government, on all important social, political or economic questions.³ Summers also stated that several pressure groups adopted this policy of equal opportunity for both sides. This idea was therefore inherent in both Communication Acts.

The Communications Act of 1934 also, with its subsequent amendments, laid down the basis by which the Federal Communication Commission can and

²Ibid.
³Ibid.
⁴Ibid.
does regulate broadcasting in the United States. In any examination of
the rules and regulations which the Commission may be empowered to formulate,
some consideration should be given to determining whether the standards
established by Congress are sufficient to sustain the Commission's power,
if such powers are attacked in a competent court of law.

The Act of 1934 is substantially the same as the one passed in 1927. The primary purpose of the new act is to centralize control of both wire
and radio communications in one body. Hence the 1934 act embodies the same
powers and provides for the exercise of these powers according to the same
general standards as before.

It would appear, then, that the ruling in *F.R.C. v. Nelson Bros. Bond
and Mortgage Co.*, 5 previously considered, would support the validity of the
same provisions in the later act.

The Communications Act itself set forth only a few restrictions upon
the content of broadcast programs. These restrictions upon the prohibition
of obscene, indecent, or profane language; 6 prohibition of the broadcasting
of lottery information; 7 requirements that all sponsored programs be

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6 *48 Statutes At Large*, 1091 (1948). It should be noted at this point
that Congress, in 1948, repealed and recodified certain sections of the
Communications Act of 1934. Section 1464 of the Criminal Code (18 U.S.C.
1464) prohibited the use of obscene language on the air. Section 1304 of
the Criminal Code (18 U.S.C. 1304) prohibited the broadcasting of lottery
information on the air.

7 *48 Statutes At Large*, 1088 (1945).
identified as such; prohibition of the unauthorized rebroadcast of programs; equal treatment of political candidates; and prohibition of censorship by the Commission of any program. With such limited restrictions in the law and with the specific provision of the law that the Commission may not censor programs, it would appear that primary responsibility for program content and standards would rest with the broadcaster. Indeed, the Commission itself has indicated as much.

The Commission does, however, indirectly control program content. From the Congressional mandate that stations should "operate in the public interest, convenience, and necessity" the Commission can and does carefully consider the programming of a station. Prior to the granting of a license the Commission considers the programming which the applicant proposes to carry out. Upon application for renewal the Commission considers

8 Statutes At Large, 1089 (1945).
9 Statutes At Large, 1091 (1945).
10 Statutes At Large, 1087 (1945).
11 Statutes At Large, 1092 (1945).
12 Federal Communication Commission, Public Service Responsibility of Broadcast Licensees, (Washington, 1946). The Commission said, in part: "primary responsibility for the American system of broadcasting rests with the licensee of broadcast stations and network organizations. It is to the stations and network rather than to federal regulation that listeners must primarily turn for improved standards of program service. The Commission, as licensing agency established by Congress, has a responsibility to consider overall program interest determinations, but affirmative improvement of program service must be the result primarily of other forces".
13 Statutes At Large, 1064 (1934).
the programming or studies such programming as has been done. Thus is the Commission able to prescribe minimum standards governing program content. In some instances the Commission has prescribed standards for future operations.\textsuperscript{14}

In other ways, the Commission influences and guides program content. In one instance the Commission set forth basic policy for renewal of licenses\textsuperscript{15} and individual Commissioners have tended to maintain these policies.

Congress has, from time to time, taken part in establishing program standards.\textsuperscript{16} The Commission has also urged the public to become more vocal in regard to programming.\textsuperscript{17}

The foregoing discussion regarding programming control and regulation is included in this study of federal statutes relative to political broadcasting because any degree of program control may, in some manner, affect all broadcasting of a political nature carried by a radio or television station.

Section 315 of the Communications Act of 1934, which set forth legal requirements regarding political broadcasting, was referred to earlier. This is the only statutory provision in the U. S. Code dealing specifically with this problem. The purpose of this section is to give a firm legal base to

\textsuperscript{14}F.C.C., Public Service Responsibility of Broadcast Licensees, op. cit., p. 16.

\textsuperscript{15}Ibid.

\textsuperscript{16}Carl J. Friedrich and Evelyn Sternberg, "Congress and the Control of Radio Broadcasting", American Political Science Review, XXXVII (1934), 814.

\textsuperscript{17}F.C.C., Public Service Responsibility of Broadcast Licensees, op. cit., p. 20.
the "policy of equal opportunity". Most of the detailed determinations regarding political broadcasting are to be found in the rules and regulations of the Commission itself or in court decisions affecting political broadcasting. These matters will be dealt with in later chapters.

Section 315 of the Act, as amended by Public Law 554, 82nd Congress (1952) reads:

(a) If any licensee shall permit a candidate who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all 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 upon any licensee to allow the use of its station by any such candidate.

(b) The charge made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes.

(c) The Commission shall prescribe appropriate rules and regulations to carry out the provisions of this section.

Subsections (b) and (c) are new and the historical background of these provisions will be dealt with subsequently. Subsection (a) was originally enacted as Section 18 of the Radio Act of 1927.

Bills regarding broadcasting were introduced into the 68th and 69th Congresses. None of these proposals contained a provision such as is to be found in the present statute covering political broadcasting. Early

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18 Summers, op. cit., p. 207.

19 HR 7357 (68th Congress), HR 5589 (69th Congress).
discussion centered on failure to provide facilities reasonable for the transmission of radio communications. Soon, however, the subject of political broadcasting entered the picture.\textsuperscript{20} In large part, the controversial issue of political broadcasting arose because of the failure of several facilities (radio stations) to provide equal opportunities.\textsuperscript{21} There were other reasons but this one tends to stand out.\textsuperscript{22}

HR 5589\textsuperscript{23} made provision that if the Interstate Commerce Commission or any other federal agency certified that a broadcasting station charged unreasonable rates, made unreasonable regulations, carried out unreasonable practices, which tended to be discriminatory or failed to provide reasonable facilities for the transmission of information, the Secretary of Commerce was empowered to revoke license of that station.

Another provision was added and became Section 14 of the Radio Act of 1927. This was the provision that the Secretary of Commerce could revoke the license of any licensee guilty of making any unjust or unreasonable charge or who was guilty of any discrimination.\textsuperscript{24} No enforcement of this provision was ever made. In one instance, the Interstate Commerce Commission held that this section applied only to common carriers and that the I.C.C. had no jurisdiction it could apply to broadcasting

\begin{itemize}
\item \textsuperscript{20}E. E. Willis, \textit{Foundations in Broadcasting} (New York, 1951), p. 12.
\item \textsuperscript{21}Ibid.
\item \textsuperscript{22}Ibid.
\item \textsuperscript{23}HR 5589 (68th Congress).
\item \textsuperscript{24}44 \textit{Statutes At Large}, 1166, Sec. 14 (1927).
\end{itemize}
rates or practices. In the Act of 1934, Section 14 was dropped and provisions were made that radio stations used for broadcast purposes were not common carriers.

Harry P. Warner had this to say in regard to events subsequent to passage of the 1927 Act:

Both defamation by radio and equality of treatment for political candidates was discussed on the floor of both houses. Representative Blanton of Texas on two occasions averred that the bill should regulate and control defamatory charges made in the course of political attacks. Representative White of Maine replied that the Common law and state statutes would protect any individual and that the proposed federal regulation or control was 'very near censorship'. Mr. Blanton attempted to amend the bill providing for the Radio Act of 1927 so as to forbid defamation by radio but his proposal did not carry. On the Senate side Mr. Howell of Nebraska voiced similar criticism.

After the passage of the 1927 Act some members of Congress still felt that Section 18 needed attention. Such feeling ultimately resulted in 1933 in the passage of a bill to broaden the provisions covering political broadcasting but a pocket veto by the President prevented the measure from becoming law. This would have amended Section 18 to read as follows:

(a) If any licensee shall permit any person who is 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 station; and if

25StaShine Products Co. v. WGBB, 188 I.C.C. 271 (1928).
2648 Statutes At Large, 1064 (1934).
28Ibid.
any licensee shall permit any person to use a broadcasting station in support of or in opposition to any candidate for public office, or in the presentation of views on a public question to be voted upon at any election, or by a governmental agency, he shall afford equal opportunity to an equal number of other persons to use such station in support of an opposing candidate for such public office, or to reply to a person who has used such broadcasting station in support of or in opposition to such a candidate, or for the presentation of opposite views on such public questions.

(b) The Commission shall make rules and regulations to carry this provision into effect. No such Licensee shall exercise censorship over any material broadcast in accordance with the provisions of this subsection. No obligation is imposed upon any licensee, or for the presentation of views on any side of a public question.

(c) The rates charged for the use of any station for any of the purposes set forth in this section shall not exceed the regular rates charged for the use of said stations to advertisers furnishing regular programs, and shall not be discriminatory as between persons using the station for such purposes.29

In commenting upon the proposal quoted above Warner said:

At the Senate Hearing on HR 7716, Mr. Bellows, Chairman of the National Association of Broadcasters... stated that the present section, Section 18 of the Act of 1927 which precluded any exercise of censorship by the station over 'political broadcasters' had been interpreted by the Supreme Court of Nebraska to hold the licensee jointly responsible with the speaker for any libelous or slanderous utterances. (See 30 below). He asserted that broadcasters were ready to accept the responsibility for libel and slander 'but in that case we must have the right to go over the speeches in advance and see what is in them, for we cannot wait until they are on the air'. Senator Couzens, Chairman of the Senate Committee,

29HR 7716 (72nd Congress).

30Sorenson v. Wood, 123 Nebraska 348 (1948).
concurred in this suggestion. He was of the opinion that a station should protect itself to the same extent as newspapers which examine articles and advertisements for libelous statements before publications.31

In spite of all attempts to amend the provisions of Section 18 of the Act of 1927, none succeeded and with the passage of the Act of 1934 the section was left unchanged.

In 1952, Congress amended Section 315 of the 1934 act to provide fair and equitable charges to political candidates as compared with other advertisers. The amendment simply provided that broadcasters could not charge politicians more than regular commercial broadcasters for air time or facilities.32

Efforts are continuing today to modify provisions of this important section (315) of the Communication Act of 1934. HR 3789 of the 84th Congress would amend Section 315 so as to withdraw from individuals convicted of subversive activities and members of certain subversive organizations the right of equal opportunity for use of broadcasting facilities in political campaigns. This bill, however, was not passed.

The passage of HR 3789, would have caused the F.C.C. to ask Congress to give jurisdiction to Federal District Courts in determining the right of political candidates who have been denied "equal time" under Section 315 (a).

The above suggestion was made in the F.C.C. comments on the bill. F.C.C. Chairman, George C. McConnaughey, told the House Commerce Committee's

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32 66 Statutes At Large, 717 (1952).
Transportation and Communications Subcommittee the Commission "does not wish to express an opinion on the advisability or necessity of such legislation". He said the F.C.C. believed such a bill would be constitutional but determination of whether a person belongs to a subversive group would be difficult and complicated for the F.C.C. and delay would be inevitable. In deciding these matters when an election is taking place, time is of essence, he said.

The Commissioner said the F.C.C. believes all determination made under Section 315 should be made by a federal court, which, he continued, is the most appropriate forum for securing the necessary prompt and effective review of these questions.

HR 4814, also under consideration by the 84th Congress, would have amended the Communications Act of 1934 so as to prohibit liability from being imposed upon a licensee because of defamatory statements made in a broadcast by a political candidate unless such licensee participates in such broadcast with intent to defame.

The Commission has given its endorsements to this proposed legislation. Chairman McConnaughey told the subcommittee considering the measure that the Commission has taken the view that because of the prohibition against censorship, licensees' are immune from liability for defamatory statements broadcast by candidates, but that there has never been any final determination by the Supreme Court of this point. According to Chairman

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34Ibid.
35HR 4814 (84th Congress).
McConnaughey, many states have passed libel protection laws in varying degrees. These laws are not consistent and there remain several states with no protective libel laws at all. Inconsistency in state laws is very unfortunate, the Commissioner said, particularly where a station's programs may be heard in several states.

The Chairman implied that the F.C.C. would like to see Congress require stations to warn candidates in advance concerning the consequences of uttering statements that are clearly libelous or slanderous.  

A third bill, which proposes to change Section 315, HR 6810, would allow a radio or television broadcaster or a network to present a political candidate on news, interviews, forums, panels and debate programs without being required to make "equal time" available to a candidate's opponents, as is now required.

A similar bill was presented to the 86th Congress to amend the Communications Act of 1934. It provided that the equal time provisions with respect to candidates for public office shall not apply to news and similar programs. In this amendment Congress stated that Section 315 (a) of the Communications Act of 1934 is amended by inserting at the end thereof the following sentence:

Be it enacted...Appearance by a legally qualified candidate on any---
1) bona fide newscast,

36 See Chapter IV of the present work.
38 HR 6810 (84th Congress).
39 S 2426 (86th Congress).
2) bona fide news interviews,
3) bona fide news documentary (if the appearance of
the candidate is incidental to the presentation of the
subject or subjects covered by the news documentary), or
4) on-the-spot coverage of bona fide news events
(including but not limited to political conventions and
activities incidental thereto), shall not be deemed to
be use of a broadcasting station within the meaning of
this subsection. Nothing in the foregoing sentences
shall be construed as relieving broadcasters, in
connection with the presentation of newscast, news in-
terviews, news documentaries and on-the-spot coverage
of news events, from the obligation imposed upon them
under this act to operate in the public interest and to
afford reasonable opportunity for the discussion of
conflicting views on issues of public importance.40

This bill was fully accepted and recommended by the F.C.C. It
was hoped that this bill would help the F.C.C. to handle some of the
erroneous questions that it had been receiving regarding this matter.

Still another bill, which would amend Section 315's equal time
provisions, has been introduced in Congress. This bill, S. 3308, would
leave the section unchanged as regards all candidates except those
for the Presidency and the Vice-Presidency. For the latter, broadcasters
would have to furnish equal time for the presidential and vice-presidential
candidates of the major political parties only. Provisions are made for
candidates of parties other than the Democratic and Republican parties by
a requirement that any other party, in order to qualify for equal time
with the two major parties, must have polled 4% of the votes in the last
presidential election or must present a petition with names totaling 1%
of the vote at the last presidential election.

Another bill, introduced by the then Senator Lyndon B. Johnson (D.,
Texas), was designed to relieve broadcasters of the requirements that they
furnish equal time to candidates of small minority parties or splinter

4073 Statutes At Large, 557 (1959).
groups. It would also revise the legal amount a national political party committee may spend in any presidential election and elections for members of the Senate and the House of Representatives. Spending in the presidential election would be legalized upward from the present $3 million to $12.3 million. The bill would also authorize income tax deductions for political campaigns only up to $100. This bill never came up for consideration.

The late Senator Richard L. Neuberger (D., Oregon) introduced a bill, S. 3242, that would provide government financing of federal election campaigns. It would allow equal payment by the government to both major parties. For 1960 the total amount would have been $11,065,985. Allocations to each party in a presidential election year would amount to twenty cents for each voter based upon the average vote for the past two presidential elections. In non-presidential election years, the amount would be fifteen cents per voter, based on the average total votes in the two previous off-year elections.

Senator Neuberger's bill would also limit individual campaign contributions to $100. Each party would be allowed to raise from private sources an amount no larger than the governmental payment.

The Oregon Senator said he introduced his bill to avoid the "evils" of large private campaign donations. He indicated that large campaign expenses have come about because of the "tremendous cost of reaching people through the modern media of communication, particularly through radio and television". Even though a similar bill, HR 9488, was introduced

41S. 3308 (84th Congress).
into the House, neither bill has ever come up for consideration.

Finally, in regard to Section 315, the 86th Congress on August 24, 1960, enacted a joint resolution.\(^{42}\) This resolution suspended for the 1960 presidential campaign the equal opportunity requirement of Section 315 (a). This resolution was especially for the President and Vice-President nominees. It stated:

Resolved...that that part of Section 315 (a) of the Communication Act of 1934, as amended, which required any licensee of a broadcast station who permits any public office to use a broadcasting station to afford equal opportunities to all other such candidates for that office in the use of such broadcasting stations, is suspended for the period of the 1960 presidential and vice-presidential campaigns with respect to nominees for the office of President and Vice-President of the United States. Nothing in the foregoing shall be construed as relieving broadcasters from the obligation imposed upon them under this act to operate in public interest.\(^{43}\)

This joint resolution took form and came into being for several reasons. First of all, it was backed by the F.C.C. because of the increased requests brought to it by the numerous candidates for the Presidency and Vice-Presidency. Secondly, because of the rising public interest in politics and pressures upon local radio stations by candidates seeking public offices. Also the tremendous number of candidates for Presidency and Vice-Presidency (some 15 or more) tended to cause public confusion. The bill was passed, according to Gilman Udell, to enhance the public's


\(^{43}\)74 Statutes At Large, 554 (1960).
interest and eliminate some of the confusion taking place around these two high offices.\textsuperscript{44}

All these bills mentioned in this chapter sought in one way or another to give "equal opportunity and fairness" to all candidates and groups involved in seeking public office.

\textsuperscript{44}Udell, \textit{op. cit.}, p. 210.
CHAPTER III

RULES AND REGULATIONS OF THE FEDERAL COMMUNICATIONS
COMMISSION CONCERNING POLITICAL BROADCASTING

A network may give equal time to two speakers, taking opposing points of view on some important political question. But member stations are not required to carry sustaining programs, unless they wish to do so and this is sometimes the case. For instance, the representative of one side of a political question may be put on the air by 30 or 40 stations of the same network, while the representative of the opposite viewpoint finds himself appearing on only 8 or 9 stations of the same network.¹

Because of this very aspect, broadcasters cannot reserve their facilities for the presentation of a single political viewpoint or creed. It must be an instrumentality by which the public can be reached in the presentation of the pro and the con of issues and views.² Since radio must present both sides, the rules and regulations of the F.C.C. arose largely to protect and provide for this fairness on the air.³

However, the Communications Act of 1934 was also designed to provide a broad administrative base by which the Federal Communications Commission might be guided in the regulation of broadcasting in the United States.

²Ibid.
³Summers, op. cit., p. 205.
The law empowered the Commission to "perform any and all acts, make such rules and regulations, issue such orders, not inconsistent with this act, as may be necessary in the execution of its functions".\textsuperscript{4}

To fulfill its responsibility to Congress, the Commission had to promulgate and enforce many rules and regulations for the conduct of broadcasting in this country. Such rules and regulations actually had their beginning in the early days of the Federal Radio Commission and were released from time to time as "General Orders". In 1930, the Commission issued its first formal, comprehensive set of regulations.\textsuperscript{5}

At irregular intervals since that time the Commission has modified, changed, and reissued such rules and regulations as it deemed advisable. Such rules and regulations may be catalogued in any number of ways. One such listing showed rules covering the following topics:

1) Allocations and assignments  
2) Antenna sites  
3) Censorship  
4) Channel utilization  
5) License renewals  
6) Lotteries  
7) Multiple ownership  
8) Network rules  
9) Operating schedules  
10) Operator requirements  
11) Political broadcast  
12) Power and antenna heights  
13) Rebroadcasts  
14) Recordings and transcriptions  
15) Reports to be filed  
16) Revocations; modifications; suspensions  
17) Sponsored programs  
18) Station identification  
19) Studio location  
20) Transfers and assignments

\textsuperscript{4}48 Statutes At Large, 1064, Sec. 4 (1934).
All the above classifications are of interest to broadcasters and could be dealt with at great length and in great detail. We will deal, however, only with such rules and regulations as the Commission has established regarding political broadcasting.

Section (3.190) of the rules for AM (amplitude modulated) covers radio covers political broadcasting; Section (3.290) of the rules covers political broadcasting by FM (frequency modulated) radio and is identical with Section (3.190); Section (3.657) deals with political broadcasting on television and is virtually identical with Section (3.190). The first named Section (3.190) is quoted here since its provisions are representative of all types of broadcasting:

Section (3.190) Definition. (a) A 'legally qualified candidate' means any person who has publicly announced that he is a candidate for nomination or election in a primary, special or general election, municipal, county, state or national, and who meets the qualifications prescribed by the applicable to hold the office for which he is a candidate, so that he may be voted for by the electorate directly or by means of delegates or electors.
(b) General Requirements—No station licensee is required to permit the use of its facilities by any legally qualified candidate for public office but if any licensee shall afford equal opportunities to all other such candidate for that office to use such facilities.
(c) Rates and Practices—(1) the rates, if any charged all such candidates for the same office shall be uniform and shall not be rebated by any means, direct or indirect.
(d) Records, Inspections—Every licensee shall keep and permit public inspection of a complete record of all requests for broadcast time made by or on behalf of candidates for public office, together with an appropriate notation showing the disposition made by the licensee of such request, and the charges made, if any request is granted.

Some of the provisions of the Commission's rules and regulations bear close examination. In so far as can be determined, the term "legally
qualified" candidate has never been judicially tested. The individual states are empowered to establish election laws by state statute and such statutes generally provide for determination of legally qualified candidates. Among the 50 states there is, unfortunately, no uniform definition. One authority has this to say regarding the matter:

The words 'legally qualified' manifestly limit the word 'candidate'. In the Federal Constitution there are certain familiar qualifications prescribed for those who seek federal elective office.

But it is within the competency of the States to control the matter of election, so even with regard to legal qualifications in addition to those found in the Constitution.

Each State has statutory prerequisites to printing a candidate's name on the ballot. The prerequisites differ widely among the states, and in several states the conditions precedent to being placed on the primary ballot are distinct from those governing the final election. In Maryland, for example, a person is not a 'legally qualified' candidate who is not on the ballot.

In several States, however, the voter may write on the ballot his choice for the office (or use a 'poster' or 'sticker') and if a majority follow suit the candidate so honored would be elected. Thus, although not a legally qualified candidate in the sense of having met the ballot or filing for office (unless not qualified in some other respect, such as residence, citizenship, etc.) and he probably could invoke the rights conferred by the Communications Act. But, as shown above, some states do not allow any amendments on the printed ballot, so in fact the provision of the Communication Act has limited application and in practice may result in unequal situation. In any event, to avoid confusion, and set a definite standard, it would seem desirable to promulgate a rule which would apply uniformly and not depend for interpretation upon the myriad election laws.


7 Ibid.
As indicated earlier, Congress has pending a bill which would bar subversives from taking advantage of the time provision of the act.\textsuperscript{8} Some states, including Georgia, have outlawed membership in the Communist party, but others have not.\textsuperscript{9} What then would be the status of a broadcaster confronted with a request for equal time for a Communist candidate? The Commission has indicated that under the present rule the Communist candidate, if legally qualified, would be entitled to equal opportunities.\textsuperscript{10}

In an effort to give all broadcasters the benefit of its interpretation of rules and regulations concerning political broadcasting, the Commission, on September 14, 1954, published a series of questions and answers. Publication was made in the Federal Register of that date and copies were distributed to broadcasters for their guidance. These rules and regulations of the Commission are to insure fair and equal opportunities to candidates for public office.\textsuperscript{11}

\textsuperscript{8}HR 3789 (84th Congress).


\textsuperscript{10}Federal Register (Washington, 1962).

\textsuperscript{11}Summers, \textit{op. cit.}, p. 205.
CHAPTER IV

STATE REGULATION

In the absence of federal control of defamation by the broadcast media, existing state law had to protect the candidate from defamatory remarks and protect his civil rights.\(^1\) Congress foresaw this when it passed the Radio Act of 1927. The House defeated a proposal that defamation be regulated and controlled by federal statute.\(^2\) This was done on the theory that the common law and state statutes were ample to protect any individual. An unsuccessful attempt was made to get the bill amended so as to prohibit defamation.\(^3\)

However, laws covering defamation by the broadcast media vary widely from state to state. Greatest variations come in areas of statutory determination of whether such defamation is libel or slander and in the area of responsibility regarding political broadcasts during which defamation is uttered.\(^4\) Is broadcast defamation libel or is it slander? Common law divides defamation into two classes.\(^5\) Slander is

\(^2\)HR 9971 (69th Congress).
\(^4\)Ibid.
used to describe oral defamation, while libel is the actionable form for written defamation.  

According to Summers, any answer to the question posed earlier regarding whether broadcast defamation is libel or slander cannot be found in common law. Only a few courts have dealt with the problem and their rulings were very different due to the wide variances among states in regard to statutory requirements. An Iowa court, for instance, held that, on the basis of an Iowa statute, a defamatory statement over the radio was slander.

The case of Sorenson v. Wood is considered an authoritative statement on the proposition that broadcast defamation is libel. However, in this particular case the contention may have been based upon the fact that the tort was committed by reading from a prepared script. What the outcome might have been if the action had resulted from an ad lib remark is a matter for conjecture. Just what have the courts indicated to be regarded as ad lib remarks, extemporaneous speeches which were defamatory, or defamatory remarks inserted by the speakers? They appear to agree on no common ground in this area. Some indicated that such remarks are libel, while others insist that they are slander.

In the case of Locke v. Gibbons, the Supreme Court of New York said that words interpolated into a prepared script were slander. The

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6Summers, op. cit., p. 123.


8Sorenson v. Wood, 123 Nebraska 348 (1948).

opinion said, in part: "the schism in the law of defamation between the older wrong of slander and the answer the newer one of libel cannot be erased by the courts".

In the case of *Irwin v. Ashurt*\(^\text{10}\) the Supreme Court of Oregon said "the person who hears defamatory matter over the air ordinarily does not know whether or not the speaker is reading from a manuscript. Furthermore, what difference does it make to such a person, so far as the effect is concerned". Thus the issue remains confused. Finally, a third classification is found in the case of *Summit Hotel Co. v. National Broadcasting Company*.\(^\text{11}\) The opinion in this case defined defamation by radio as a new tort "with a distinct form of action...which possess many attributes of both libel and slander but differs from each".

The problem of broadcast defamation is a complex and detailed one and would require an entire study to do it justice.\(^\text{12}\) Our concern here, however, is defamation occurring as a part of political broadcasting. Under these circumstances the problem becomes more troublesome. Defamation occurs when an opposing candidate for public office tries to defame the character of the other candidate in the public eye.\(^\text{13}\) It is an attempt to destroy the public image of the other candidate and raise one's own image.\(^\text{14}\)

\(^{10}\) *Irwin v. Ashurt*, 158 Oregon 61 (1951).

\(^{11}\) *Summit Hotel Co. v. N.B.C.*, 336 Pa. 182 (1950).


\(^{13}\) Summers, *op. cit.* , p. 40.

\(^{14}\) Ibid.
Federal statutes, as well as rules and regulations of the F.C.C., prohibit prior censorship of political broadcasts. Yet, in many states, broadcasters are caught on the horns of a dilemma because of state statutes imposing liability for all materials broadcast.

Such a situation immediately raises the question of whether stations are required to permit political broadcasts containing material that is clearly defamatory. Such a requirement would immediately subject the station to liability under many state defamation statutes.

The leading case in this regard is Sorenson v. Wood, previously referred to in another connection. In this case a candidate for public office made a political address over station KFAB in Nebraska. According to Sorenson, the plaintiff, Wood, in the course of his speech uttered some defamatory remarks. Therefore, one of the defenses urged by the radio station was that according to provisions of the Communications Act of 1934, radio stations have the obligation of providing equal facilities on the air to all candidates for public office. Since such an obligation is mandatory under the law, KFAB argued that it should be relieved of any liability for defamatory remarks made in a speech over which it has no control. The station contended further that Section 315 of the Act prohibiting censorship of political broadcasting conferred an absolute privilege with respect to the speech.

The Supreme Court of Nebraska rejected these contentions. The Court held that the federal statute gave the broadcasting station no privileged position in the matter of transmission of libelous material, even though

15 Ibid.
16 Sorenson v. Wood, 123 Nebraska 348 (1940).
the station had no right of censorship, and that it was no defense to an action for defamation by radio.

The Supreme Court of Nebraska reasoned that the prohibition against censorship was concerned only with "word as their political and partisan trend." The decision said in part:

We do not think that Congress intended by this language in the Radio Act of 1927, (as reenacted in the Act of 1934) to authorize or sanction the publication of libel and thus raise an issue without due process or without just compensation (Constitution, fifth amendment). This is particularly true where any argument for the exercise of police power and for any argument for to be derived would seem to be against any such interpretation rather than to be served by it. So far as we adopt the 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 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.17

A further defense offered in the above case was that the radio station is, in reality, a common carrier and is protected by the traditional exemption of common carrier from liability for defamation. The Supreme Court of Nebraska rejected this argument, too, on the ground that a station could choose, to a large extent, whom it would permit to broadcast over its facilities. The Court said a station was not bound to permit a political candidate to talk but was only required to give permission to all when it gave permission to one.

The F.C.C. has taken the view of the situation that is directly opposed to that taken by the Nebraska Supreme Court in the Sorenson v. Wood case. The Commission discussed the question for the first time in 1948

17 Ibid.
when it reviewed the application of the Port Huron Company for renewal of its license.\textsuperscript{18} In this instance the Commission said that a broadcaster's censorship or rejection of a political speech because it contains defamatory material is a violation of Section 315 of the Communications Act. The Commission said further that it believed Section 315 relieved licensees from liability under state law for the broadcast of defamatory material contained in political speeches.

In any consideration of views of the Commission, it would be well to point out that the Commission has full authority to decide the first point, i.e., that any censorship of political speeches, even for the purposes of removing defamatory material is prohibited by federal statute and regulations of the Commission itself. Thus a station could well be denied renewal of its license for violation of this edict.

The second point made by the Commission, indicated that it believed broadcasters are relieved of liability under state laws, because in this area the Commission itself is without authority. Such a determination is left solely to the courts of the several states by their interpretations of the mandate of the various legislatures.

Thus the broadcaster, in some instances, finds himself in an almost impossible position. In order to solve this dilemma several steps could be taken:

1) Adoption of federal statutes permitting stations to delete defamatory material from political scripts.

2) Adoption of federal statutes imposing criminal sanctions on broadcast speakers.

3) Adoptions of federal statutes covering broadcast defamation by political candidates.

4) Uniform state action in this regard.

Congress has been fully cognizant of the problem for a number of years, and has undoubtedly been aware of the current broadcasting practice, concurred in by the Commission,20 of broadcasters examining scripts prior to broadcasts by political candidates. Stations, of course, may not delete nor require changes but they are free to suggest. Thus it might be desirable on the part of Congress to extend statutory provision for deletion of defamatory material during such review.

Criminal sanctions could be imposed against speakers which make it unlawful for persons using broadcast facilities to do so with the intent to utter defamatory statements. This might tend to eliminate potentially defamatory statements by financially irresponsible parties.

A federal statute covering broadcasting defamation by political candidates has been proposed. Such a statute has been introduced in Congress.20 This would amend the present Section 315 so as to prohibit liability from being imposed upon a licensee because of defamatory statements made in a broadcast by a political candidate unless the licensee participated in the broadcast with an intent to defame. Warner says it is an open question whether such a law would be constitutional.21 He indicates that while Congress might enact such a statute under its

19Warner, op. cit., p. 32.
20HR 4814 (84th Congress).
authority to regulate and control interstate commerce. The problem would arise whether Congress could "create, extend or abridge existing state laws governing civil rights of defendants" is one to consider. Warner also indicates such a law may have a tendency to abridge civil rights and the right of free speech.22

However, individual state action seems to be another method of giving broadcaster's relief from their dilemma. The Council of State Governments has been seeking such action for some time and in 1945 drew up a model statute and sent it to state and federal agencies and legislators.23

The Council's model statute reads:

The owners, licensee of operator of a visual or aural radio broadcasting station or network or stations, or the agents of such stations or network of stations, shall not be liable for any damages for any defamatory statement uttered over the facilities of such station or network by any candidate for public office, but this section shall not apply in the event said owner, licensee or operator, agent or employee shall willfully, knowingly, and with intent to defame, participate in such broadcast.24

Virtually all of the fifty states have enacted some form of broadcast libel relief, although not necessarily in the same form as indicated above by the Council.25 Some utilized wording as proposed by the National Association of Radio and Television Broadcasters in their efforts to

\[22\text{ Warner, op. cit., p. 451.}\]

\[23\text{ J. G. Moser, Radio and the Law (Los Angeles, 1947), p. 42.}\]

\[24\text{ Ibid.}\]

\[25\text{ HR 4814 (84th Congress).}\]
achieve standardized state action. State legislatures, in varying degrees, have lessened the chances of a broadcaster being held liable for defamation.

In Georgia, broadcasters have a model defamation statute which is similar to the statute proposed by the National Association of Radio and Television Broadcasters. The Georgia statute reads as follows:

Sec. 105-712: Radio Broadcasting Stations; Liability For Defamatory Statements

The owner, licensee or operator of a visual or sound radio broadcasting station or network of stations, and the agents or employees of such owner, licensee, or operator shall not be published or uttered in or as a part of a visual or sound radio broadcast, by one other than such owner, licensee, operator, or such agent or employee has to exercise due care to prevent the publication or utterance of such statement in such broadcast.

Sec. 105-713: Same: Liability for Political Broadcasts

In no event, however, shall any owner, licensee or operator or the agents or employee of any such owner, licensee or operator of such a station be held liable for any damages for any defamatory statement uttered over the facilities of such station or network by or on behalf of any candidate for public office.

Sec. 105-714: Same: Damages Allowable

In any such action for damages for any defamatory statement published or uttered in or as a part of a visual or sound radio broadcast, the complaining party shall be allowed only such actual consequential, or punitive damages as have been alleged and proved.

The Georgia statute has never been tested in the courts insofar as can be determined.

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26 Moser, op. cit., p. 47.
CHAPTER V

SUMMARY AND CONCLUSIONS

Primary control of the broadcast media in the United States rests with the national government. Congress, acting under the commerce clause of the Constitution, passed the first radio act in 1910, but this did little more than to establish regulations requiring radio on board ships at sea. In 1912, Congress passed the first act designed to regulate this new medium. In 1927, the Radio Act passed by Congress created the first regulatory commission for broadcasting. Congress named the agency the Federal Radio Commission and established standards for the regulation of broadcasting operations in this country. In 1934, as part of a sweeping reorganization of the government, Congress brought regulation of telephone and telegraph (with the exception of tariffs) under a new body, the Federal Communications Commission. This body was also given regulatory authority over broadcasting in all its forms.

In regulating broadcasting in the United States, Congress set up several requirements which were relatively unique. Unlike property rights under common law, Congress decreed that no property right in a radio frequency or a channel was created through use. Congress set up a unique standard for determination of whether broadcast licenses should be granted. This standard was that such action must be in the public interest or convenience and for public necessity. Congress also required that
political candidates for the same office be accorded equal treatment by broadcast licensees. Censorship of political speeches was prohibited, as was censorship of any type by the federal government. The type of censorship referred to here is action taken by any governing authority to prevent the dissemination of false statements, inconvenient facts, or displeasing opinions.\(^1\) Congress also stipulated that no alien could be licensed as a broadcaster in the United States.

While no direct programming control is carried out by the federal government, some indirect control may be shown. Acting under the congressional mandate, this control is imposed to insure that stations must operate in the public interest and necessity. Therefore, the Federal Communications Commission is able to insure the public that stations will carry a reasonable number of "public service" type programs. Also stations must maintain well-balanced programming, free from obscene or indecent materials.

Federal statutes, implemented by rules and regulations of the Federal Communications Commission, require equal treatment of political candidates. Determination of who is actually a **bona fide** candidate is a difficult process because of the variety of state election laws.\(^2\) The requirement is that all legally qualified candidates for the same office must be afforded equal opportunities in the use of station facilities. There is no requirement that any licensee allow the use of his own personal station by any other candidate. If such use is permitted, however,
all charges and requirements must be identical.

A number of bills which would alter the present status of political candidates, insofar as broadcasting is concerned, are pending in Congress. One such bill would deny individuals convicted of subversive activities the privileges of equal treatment. A second bill would exempt broadcasters of programs by political candidates from liability for defamatory statements uttered by such candidates. This has reference to news, interviews, forums, panels and debate programs without being required to make equal time available to the candidate's opponents. Another proposal put before Congress would relieve broadcasters of the requirement that they furnish equal time to presidential and vice presidential candidates of small minority parties or splinter groups. A bill proposed by the late Senator Neuberger (D., Oregon) would provide government financing of federal election campaigns because of the high cost of reaching people today through radio and television.

The Federal Communications Commission, in interpreting its rules and regulations covering political broadcasting, has indicated that the equal time requirement applies only to the candidate himself and not to those speaking for him or in his behalf. They have indicated that if a candidate is also a public official and appears in his official capacity his opponents are entitled to equal time. Equal time involves not only the same amount of time on the air but also time at periods of the day or night when audiences will be similar in size. The Commission has

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3Summers, op. cit., p. 208.

4Summers, op. cit., p. 209.
indicated that stations must give up commercial time if necessary in order to meet the equal time requirement during election campaign. A determination of whether or not to grant equal time may not be made on the basis of the licensee's opinion concerning the candidate's chances of election. The Commission requires that stations keep a public record of all requests for time by political candidates. The Commission also indicated therein the action to be taken regarding such requests.

Control of defamation by broadcast media rests primarily with the states. Whether defamation by the broadcast media is libel or slander has never been adequately determined with conflicting indications being given by courts of different jurisdictions. Some authorities have suggested a new form of defamation. According to them, defamation by the broadcast media is different from both libel and slander. Some states have acted to prevent broadcasters from being caught on one hand by the federal requirement prohibiting censorship of political broadcasts and the common law statutes covering defamation. Such action has generally been in the form of laws exempting broadcasters from action brought as a result of political broadcasts unless such broadcaster knowingly participated in the defamation and was a party to it. Georgia has passed such legislation.

In Georgia broadcasters have what could be called a "model defamation law", model in the sense that they are relieved of responsibility for defamatory statements by a person appearing over their facilities (except employees). However, this is the case only if it can be shown that they exercised due care to prevent the defamation. No determination has yet been made judicially of just exactly what constitutes due care.
From a political point of view, perhaps the most vital function of broadcasting is as an instrument of information and persuasion in connection with the election of public officials. Congress has not overlooked this factor; accordingly, congressional legislation has sought to give the public free and full discussion over the broadcast media. Free speech has occupied an exalted position because of the high service it has given our society. Its protection is then essential to the very existence of democracy. The airing of ideas releases pressures which otherwise might become destructive. So Congress, in regulating broadcasting, has adhered to the idea that full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilizations apart. This is the main reason why Congress and the Federal Communication Commission had to enforce "equal opportunities" for any controversial issue dealing with public affairs. All sides must be heard in every controversial issue. Another reason for this is that free and full discussion is the first article of our faith. We established our political system on it.

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5Head, op. cit., p. 350.
6Ibid.
7Ibid.
8Ibid., p. 351.
9Ibid., p. 352.
10Ibid., p. 350.
11Ibid., p. 351.
The next great principle in the regulation of American broadcasting is to keep it forever keyed to the needs of our democracy, that of "fairness of the air". By this is meant that no discussion must ever be one-sided so long as there can be found anyone to take the other side. For one of the cornerstones of democracy is that the minority has a right to be heard as well as the majority.\textsuperscript{12} This principle, therefore, must be inherent in any regulation of broadcasting as well as regulation of the press.\textsuperscript{13}

\textsuperscript{12}Ibid.

\textsuperscript{13}Ibid., p. 350.
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