The abolition of the one year time limit on other clauses of 60(b) would do much to improve the current Rules.[48] Experience under the "reasonable time" limitation in all clauses of 60(b) indicates that courts maintain a scrupulous regard for the aims of finality. They carefully consider the hardship that a modification of judgment might visit on other parties[49] and demand that a petitioner show good cause for having failed to take appropriate action sooner.[50] And they do not tolerate motions aimed at protracting litigation needlessly.[51] Few situations requiring relief are normally before courts more than one year from judgment.[52] And even if the abolition of a time limit were to encourage spurious litigation, judicial discretion would promptly squelch it. Since finality can be ensured without a time limit, courts should not be forced to choose between circumvention or injustice.

48. Since the abolition of the one year time limit would indefinitely extend a plenary power of the court to correct judgments, a differentiation of stated grounds for relief would be unnecessary. Rule 60(b) might contain only a general directive on the use of this power, see Moore & Rogers, at 693. However, separate grounds might be retained as a guide for judicial discretion, by using Rule 6(b) to extend the stated time limits in present Rule 60(b), see First Preliminary Draft of Proposed Amendments etc., Note following Rule 6(b), or by removing the one year limit of the current Rule.

49. Thus relief has been denied where many persons have relied upon a judgment, *e.g.*, Albion-Idaho Land Co. v. Adams, 58 F. Supp. 579, 582 (S.D. Idaho 1945); or where many actions were taken on the strength of the judgment, *e.g.*, Menashe v. Sutton, 90 F. Supp. 531, 533 (S.D. N.Y. 1950); or where a party would be unable to obtain his witnesses for a new action, *e.g.*, McCawley v. Fleischman Transportation Co., 10 F.R.D. 624 (S.D. N.Y. 1950).

50. *E.g.*, Ackermann v. United States, 340 U.S. 193 (1950); M. Lowenstein & Sons v. American Underwear Mfg. Co., 11 F.R.D. 172 (E.D. Pa. 1951); Ledwith v. Storkan, 2 F.R.D. 539 (D. Neb. 1942).

51. The moving party must at least assert that he has a valid claim or defense to the judgment, *e.g.*, Fernow v. Gubser, 136 F. 2d 971 (10th Cir. 1943); Sebastiano v. United States, 15 FED. RULES SERV. 60 b.29 Case 2 (N.D. Ohio 1951). And in the event of newly discovered evidence, he must demonstrate that the new evidence is likely to change the result of the challenged judgment. See cases cited note 19 *supra*.

52. It is unlikely that people will sit back and permit judgments to operate against them for long periods of time without attempting to secure any available relief. This is especially true since a longer delay decreases the chance for relief. Other parties are apt to rely on judgments in the interim, see note 49 *supra;* and a longer delay is undoubtedly more difficult to justify, see note 50 *supra*.

CAMPAIGN SPEECHES ON RADIO AND TV: IMPARTIALITY VIA THE COMMUNICATIONS ACT*

SECTION 315 of the Communications Act of 1934[1] attempts in two ways to secure impartial treatment of candidates during political campaigns. First, a licensee—radio or television—who allows a legally qualified candidate for public office[2] to use his station must afford equal opportunities[3] to all such

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

1. 48 STAT. 1064-1105 (1934), as amended, 47 U.S.C. §§ 151-5, 201-22, 301-29, 351-62, 401-16, 501-6, 601-9 (1946), 47 U.S.C. §§ 154, 326, 402 (Supp. 1951).

Section 315 reads: "If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station, and the Commission shall make rules and regulations to carry this provision into effect: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate." 48 STAT. 1088 (1934), 47 U.S.C. § 315 (1946). An identical provision was contained in the Federal Radio Act of 1927, which directly preceded the Communications Act. 44 STAT. 1170 (1927), 47 U.S.C. § 98 (1946).

2. The FCC has defined a "legally qualified candidate" as "any person who has publicly announced that he is a candidate for nomination by a convention of a political party or 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 laws 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, and who: (1) has qualified for a place on the ballot or (2) is eligible under the applicable law to be voted for by sticker, by writing in his name on the ballot, or other method, and (i) has been duly nominated by a political party which is commonly known and regarded as such, or (ii) makes a substantial showing that he is a bona fide candidate for nomination or office, as the case may be." 47 CODE FED. REGS. §§ 3.190(a) (AM), 3.290(a) (FM), 3.690(a) (TV) (1949). On definitional problems raised by the phrase, consult Peterson, *Political Broadcasts*, 9 JOURNAL OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION 20, 21-5 (1948). Criticism of the FCC definition can be found in Port Huron Broadcasting Co., 4 PIKE & FISCHER RADIO REG. 1, 15-6 (1948) (separate Opinion of Commissioner Jones). For a judicial reaction, see, Weiss v. Los Angeles Broadcasting Co., 163 F.2d 313 (9th Cir. 1947), *cert. denied*, 333 U.S. 876 (1947).

For a novel suggestion that § 315 is inapplicable to presidential and vice-presidential candidates because only electors are selected under the Constitution, see Note, 11 TEMP. L. Q. 213 (1937).

3. The FCC has interpreted this to mean no discrimination as to charges, practices, regulations, facilities, or services. 47 CODE FED. REGS. §§ 3.190(c) (AM), 3.290(c) (FM), 3.690(c) (TV) (1949). A statutory definition to replace this agency interpretation was once proposed. S.1333, Section 15(g), 80TH CONG., 1ST SESS. (1947). However, it was not adopted.

For Commission interpretation of the regulation, see Stephens Broadcasting Co., 3 PIKE & FISCHER RADIO REG. 1 (1948) (equal quantity of time not alone sufficient to satisfy requirements); KWFT, Inc., 4 *id.* 885 (1948) (time offered in primary and general elections are independent of each other); Bellingham Broadcasting Co., 8 F.C.C. 159 (1940) (cancellation and rescheduling of time alloted candidates, in absence of evidence

candidates for the same office. Section 315, however, does not obligate stations to accept campaign speeches initially.[4] Second, the licensee may not censor speeches made under this section of the statute.[5]

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of treatment accorded opposition candidates, suggests, but not conclusively, that equal opportunity was denied); Albuquerque Broadcasting Co., 3 PIKE & FISCHER RADIO REG. 1820 (1946) (more stringent investigation of one candidate to determine the identity of sponsor not denial of equal opportunity). See Peterson, *supra* note 2, at 26-7, and second paragraph of note 4 *infra*.

To aid in the enforcement of the rules, every licensee must keep and permit public inspection of all requests for broadcast time made by or on behalf of candidates and the disposition of those requests. 47 CODE FED. REGS. §§ 3.190(d) (AM), 3.290(d) (FM), 3.690(d) (TV) (1949). Also: "If a speech is made by a political candidate, the name and political affiliations of such speaker shall be entered [in the station log]." 47 *id.* §§ 3.181(a) (2) (AM), 3.281(a) (2) (FM), 3.681(a) (2) (TV) (1949). And see the regulations relating to the announcement of sponsorship during broadcasts. 47 *id.* §§ 3.189(AM), 3.289(FM), 3.689(TV) (1949).

4. Despite the "no obligation" clause, it is doubtful if the FCC would condone a policy of not permitting candidates to speak. See Albuquerque Broadcasting Co., 3 PIKE & FISCHER RADIO REG. 1820 (1946); Homer P. Rainey, 3 *id.* 737 (1948); Stephens Broadcasting Co., 3 *id.* 1 (1948); KWFT, Inc., 4 *id.* 885 (1948)—all expressing the view, in dicta, that such a policy would be inconsistent with the licensee's responsibility to broadcast in the public interest. The possibility that such a policy might result in loss of a license was raised in Peterson, *supra* note 2, at 21-2.

The FCC has taken the position that once the licensee agrees to accept campaign speeches by candidates, it cannot rely on the "no obligation" clause to excuse a cancellation of all the speeches before the first one is made. When portions of the first speech were suspected of being libelous, such a cancellation was held to constitute censorship. Port Huron Broadcasting Co., 4 PIKE & FISCHER RADIO REG. 1, 4 (1948). But a dissenting opinion in this case attacked this interpretation as nullifying the "no obligation" clause. *Id.* at 14 (Separate Opinion of Commissioner Jones). *Cf.* Weiss v. Los Angeles Broadcasting Co., 163 F.2d 313 (9th Cir. 1947), *cert. denied*, 333 U.S. 876 (1947) (§ 315 can be applied only when one candidate has already spoken and another seeks time), critically noted in 61 HARV. L. REV. 552 (1948). See also 21 So. CALIF. L. REV. 292 (1948).

5. The censorship ban has been given conflicting interpretations. In Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Sorenson, 290 U.S. 599 (1933), involving the same clause in the Radio Act of 1927, the court held freedom from censorship applied to the "political and partisan trend" only—with the licensee retaining the right to delete defamatory material. Approved: Berry and Goodrich, *Political Defamation: Radio's Dilemma*, 1 U. FLA. L. REV. 343 (1948); Note, 4 AIR L. REV. 80 (1933). Disapproved: Donnelly, *Defamation by Radio: A Reconsideration*, 34 IOWA L. REV. 12 (1948); Nash, *The Application Of The Law Of Libel And Slander To Radio Broadcasting*, 17 ORE. L. REV. 307 (1938). An opposite result, denying the right to censor even defamatory material, was reached in Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.Supp. 2d 985 (Sup.Ct. 1942). The strongest judicial statement of this view is in Felix. v. Westinghouse Radio Stations, 89 F. Supp. 740 (E.D. Pa. 1950), *rev'd on other grounds*, 186 F.2d 1 (3d Cir. 1950).

The latter view coincides with that of the FCC. ". . . [T]he prohibition of Section 315 against censorship by licensees of political speeches by candidates for public office is absolute, and no exception exists in the case of material which is either libelous or might tend to involve the station in an action for damages." Port Huron Broadcasting Co., 4 PIKE & FISCHER RADIO REG. 1, 7 (1948). However, the force of this statement has been considerably weakened. Challenged in the courts, it was held to be just an expression of

Licensees have been faced by at least three major uncertainties in 315:[6] its coverage, the extent of the censorship ban, and the section's effect on liability for defamation. As to the coverage problem, legal observers, as well as the FCC, have interpreted the section to apply only to candidates and not to their supporters.[7] Despite this, many licensees have operated on the assumption that supporters are also included.[8] They have made equal time available to opposing supporters, parties and candidates. Also, speeches of both supporters

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opinion as to what the law is and not a regulation with the effect of law. Houston Post Co., 79 F.Supp. 199 (S.D. Tex. 1948). Later, FCC Chairman Wayne Coy was quoted by Chairman Harness of a House committee investigating the Commission as telling the committee that "the honest and conscientous broadcaster who uses ordinary common sense in trying to prevent obscene or slanderous or libelous statements from going over the air need not fear any capricious action." 17 U.S.L.W. 2078 (1948).

Thus lawyers have advised their licensee-clients not to carry political speeches if parts suspected of being defamatory are not removed. *Hearings before a Senate Subcommittee of the Committee on Interstate and Foreign Commerce on S.1333*, 80th Cong., 1st Sess. 103-4 (1947) (hereafter cited as *1947 Hearings*); Donnelly, *supra*, at 31. Some licensees have followed this advice. For example, see Communication to YALE LAW JOURNAL from Willard Schroeder, WOOD-Grand Rapids, dated April 14, 1951, in Yale Law Library (station *insists* on changing slanderous statements or those in bade taste); Bellingham Broadcasting Co., 8 F.C.C. 159 (1940). But NAB Counsel offer as the best "practical advice," pre-broadcast examination of scripts and moral suasion to convince the speaker that suspect portions of the script should be deleted. NAB GENERAL COUNSEL'S MEMORANDUM, SPEECHES BY OR FOR CANDIDATES FOR PUBLIC OFFICE 7 (1949). Bills have been introduced to enable licensees to censor defamatory matter, but were not adopted. S.1520, 76th Cong., 1st Sess. § 15 (1939) and S.814, 78th Cong., 1st Sess. § 11 (1943).

Recently, the FCC announced that doubt and uncertainty in the law would no longer justify licensee censorship. In reaffirming its *Port Huron* doctrine, the Commission declared its intention to enforce the ban strictly regardless of state libel laws. WDSU Broadcasting Corp., 20 U.S.L.W. 2228 (1951).

As to when the ban on censorship takes effect, see second paragraph of note 4 *supra*. For the relationship between the interpretation of the censorship ban adopted and the rule of liability imposed by the courts see notes 13 and 14 *infra*.

6. The problems arising under § 315 are not limited to those treated in this Note. See notes 2, 3 and 4 *supra*. Also, Weiss v. Los Angeles Broadcasting Co., 163 F.2d 313 (9th Cir. 1947), *cert. denied*, 333 U.S. 876 (1947), raised, and left undecided, the question of whether an action for damages would lie in favor of a candidate against a licensee who violated § 315.

7. *Hearings before the Senate Committee on Interstate Commerce on S.814*, 78th Cong., 1st Sess. 60 (1943) (statement of Commissioner Fly) (hereafter cited as *1943 Hearings*). Communication to the YALE LAW JOURNAL from Wayne Coy, Chairman of the FCC, dated May 14, 1951, in Yale Law Library. See Haley, *The Law on Radio Programs*, 5 GEO. WASH. L. REV. 157, 173 (1937); Peterson, *supra* note 2, at 26; Vold, *Defamation By Radio*, 2 JOURNAL OF RADIO LAW 673, 698 (1932).

8. Communications to the YALE LAW JOURNAL from: Carl George, WGAR-Cleveland, dated April 13, 1951; Willard Schroeder, WOOD-Grand Rapids, dated April 14, 1951; Elliot M. Sanger, WQXR-New York, April 20, 1951; Carl Mark, WTTM-Trenton, dated April 16, 1951; Willard L. Kline, KEPO-El Paso, dated April 23, 1951; in Yale Law Library. See Peterson, *supra* note 2, at 26.

and candidates have gone uncensored.[9] These practices have contributed to a fine industry record of fair treatment in past political campaigns.[10] In regard to the censorship and defamation problems, industry spokesmen, legal writers and the FCC have urged that the ban on censorship requires immunity from liability for the licensee.[11] But this assumes that the ban is absolute—forbidding deletion of even defamatory material. However, neither the Supreme Court nor Congress has authoritatively determined the limits of the ban.[12] As a result, in the few cases that have arisen, courts have split on the issue of whether section 315 is a defense to defamation liability. In states adopting an absolute liability rule for radio defamation, it has not been a defense.[13] A

9. Communications to the YALE LAW JOURNAL from: Leon Goldstein, WMCA-New York, dated April 13, 1951; George Patterson, WAVE-Louisville, dated April 16, 1951; James H. Neu, Columbia Broadcasting System Legal Department, dated May 3, 1951; Frank P. Schreiber, WGN-Chicago, dated April 17, 1951; on file in Yale Law Library.

10. Only twice in its annual reports has the FCC mentioned receiving complaints against licensees. In both instances, uncertainty as to the meaning of 315's provisions apparently caused the trouble. FCC, ANNUAL REPORT 40 (1937); ANNUAL REPORT 56 (1940). And when one of radio's severer critics underlined the various types of discrimination in the discussion of controversial issues, there was no mention of biased treatment of candidates. Seipmann, RADIO'S SECOND CHANCE 104-15 (1947).

11. The FCC's view is that the prohibition against censorship "relieve[s] the licensee of responsibility for any libelous matter broadcast in the course of a speech coming within Section 315." Port Huron Broadcasting Co., 4 PIKE & FISCHER RADIO REG. 1, 7 (1948). This view has been urged consistently by the FCC in support of various bills to amend the Act. See *1947 Hearings, supra* note 5, at 552; *1943 Hearings, supra* note 7, at 64; FCC, COMMENTS ON TITLE I OF THE SADOWSKI BILL-H.R. 6949, 81ST CONG., 1ST SESS. 6 (1950) (hereafter cited as SADOWSKI COMMENTS).

The industry view may be found in the statement of Edgar Kobak, President of Mutual Broadcasting System, in *1947 Hearings, supra* note 5, at 355; Broadcasting-Telecasting, April 30, 1951, p. 48.

For the reaction of legal writers, see Donnelly, *supra* note 5, at 40; Note, 16 GEO. WASH. L. REV. 573 (1948).

12. See note 5 *supra* and note 19 *infra*.

13. Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932), *appeal dismissed sub nom.* KFAB Broadcasting Co. v. Sorenson, 290 U.S. 599 (1933). This is the only case to appear in a strict liability jurisdiction. Other state courts adopting a strict liability rule for radio defamation generally have relied on the reasoning of the *Sorenson* case. Presumably, they will also follow that case in holding 315 no defense in cases arising under this section. However, it is conceivable that a court may adopt a strict liability rule and yet recognize certain defenses. *Cf.* Irwin v. Ashurst, 158 Ore. 61, 74 P.2d 1127 (1938) (strict liability adopted [though later changed by statute] but defense of privilege upheld).

States either adopting or leaning toward strict liability include: Massachusetts, Bander v. Metropolitan Life Ins. Co., 313 Mass. 337, 47 N.E.2d 595 (1943); Missouri, Coffey v. Midland Broadcasting Co., 8 F.Supp. 889 (W.D. Mo. 1934); McDonald v. R.I. Polk & Co., 346 Mo. 615, 142 S.W.2d 635 (1940); Edwards v. Nulsen, 347 Mo. 1077, 152 S.W.2d 28 (1948); Ohio, Ohio Public Service Co. v. Myers, 54 Ohio App. 40, 6 N.E.2d 29 (1934); Washington, Miles v. Louis Wasmer Inc., 172 Wash. 466, 20 P.2d 847 (1933) (later changed by statute, but due care test made so narrow as to be equivalent to strict liability in § 315 cases); Wisconsin, Singler v. Journal Co., 218 Wis. 263, 260 N.W. 431 (1935).

majority of states, however, adopting the liability with fault principle, regard 315 as a good defense.[14]

For support of the strict liability rule see: Vold, *The Basis For Liability For Defamation by Radio*, 19 MINN. L. REV. 611 (1935); Keller, *Federal Control of Defamation by Radio*, 12 NOTRE DAME LAW. 15 (1936), 134 (1937); Nash, *supra* note 5, at 307; Note, 39 MICH. L. REV. 1002 (1941). On the compatibility of a strict liability rule for radio defamation with immunity for the licensee in political broadcasts, see Donnelly, *supra* note 5, at 14-28, 38-40. See also, Note, 10 U. OF PITTS. L. REV. 375 (1945).

For the law on radio defamation generally consult: Haley, *supra* note 7, at 171-97; Remmers, *Recent Legislative Trends In Defamation By Radio*, 64 HARV. L. REV. 727 (1951); SOCOLOW, 2 THE LAW OF RADIO BROADCASTING 847-70 (1939); NAB GENERAL COUNSEL'S MEMORANDUM, LIABILITY OF BROADCASTER FOR DEFAMATION (1949).

14. Josephson v. Knickerbocker Broadcasting Co., 179 Misc. 787, 38 N.Y.Supp.2d 985 (Sup. Ct. 1942). But the leading case on the fault principle for radio defamation did not involve 315. Summit Hotel Co. v. National Broadcasting Company, 336 Pa. 182, 8 A.2d 302 (1939). When such a case did arise under the law of that jurisdiction, the courts upheld the validity of 315 as a defense. Felix v. Westinghouse Radio Stations, 89 F.Supp. 740 (E.D. Pa. 1950), *rev'd on other grounds*, 186 F.2d 1 (3d Cir. 1950). But the possibility remains that even a fault principle state, if it adopts the view that 315 permits the censorship of defamatory material, note 5 *supra*, could hold the licensee liable. Such a view was urged by plaintiff in the *Felix* case. Brief for Appellant, pp. 14-7.

States that have either adopted or lean toward a fault principle for radio defamation include: CAL. CIV. CODE ANN. § 48.5 (Deering 1949); COLO. STAT. ANN. c. 138B, § 1 (Repl. 1949); FLA. STAT. ANN. § 770.04 (Supp. 1950); GA. CODE ANN. § 105-712 (Supp. 1949); ILL. REV. STAT. c. 38, § 404.2 (1951) (criminal liability); IOWA CODE ANN. § 659.5 (1950); KAN. GEN. STAT. c. 60, § 746a (1949); MICH. STAT. ANN. § 27.1405 (Supp. Aug., 1951); LAWS OF NEB. c. 316 (1949); New Jersey, Kelly v. Hoffman, 137 N.J.L. 695, 61 A.2d 143 (1948); N.C. GEN. CODE ANN. § 99-5 (1950); North Dakota, Haggard v. First National Bank of Mandan, 72 N.D. 434, 8 N.W.2d 5 (1942); ORE. COMP. LAWS ANN. § 1-909A (Supp. 1943); VA. CODE ANN. § 8-632.1 (1950); WASH. REV. STAT. ANN. § 998-1 (Supp. 1943) (see note 13 *supra*); WYO. COMP. STAT. ANN. § 3-8203 (Mills Supp. 1951).

For journal literature supporting the fault principle see: Bohlen, *Fifty Years of Torts*, 50 HARV. L. REV. 725 (1937); Farnum, *Radio Defamation And The American Law Institute*, 16 B.U.L. REV. 1 (1936); Royce, *Defamation Via Radio*, 1 OHIO ST. L. J. 180 (1935).

A number of states, largely those adopting a fault principle by statute, have legislated on the particular problem of the campaign speaker. CAL. CIV. CODE ANN. § 48.5(3) (Deering 1949), MICH. STAT. ANN. § 27.1406 (Supp. Aug., 1951); and Colorado, *supra* (no liability when licensee cannot censor because of federal statute or regulation); Florida, *supra* (due care means compliance with federal law and regulation); MONT. REV. CODE tit. 64, § 205 (1949) and UTAH CODE ANN. § 104-11-9 (Supp. 1951) (no liability for candidates' speeches in absence of malice); WYO. COMP. STAT. ANN. § 3-8204 (Mills Supp. 1951) (no liability for candidates' speeches); GA. CODE ANN. § 105-713 (Supp. 1949), Virginia and Nebraska, *supra* (no liability for speeches by or on behalf of candidates); Illinois, *supra* (no criminal liability for candidates' speeches). The due care statutes with special provision for campaign speeches are based on a model law proposed by the NAB. NAB GENERAL COUNSEL'S MEMORANDUM, LIABILITY OF BROADCASTER FOR DEFAMATION 8 (1949). Some statutes, *e.g.* Washington and Montana *supra*, have the same general purpose of protecting the broadcaster but differ materially in their provisions. Still other states have statutes which do not fall into either of the two main categories, *e.g.* IND. STAT. ANN. §§ 2-518, 2-519 (Burns Cum. Repl. 1946).

Felix v. Westinghouse Radio Stations [15] illustrates how the narrow view of 315's coverage broadens defamation liability for innocent licensees, thereby inviting discriminatory treatment of political speakers. Arising in a fault jurisdiction, this case was a by-product of the October 1949 municipal election campaign in Philadelphia. Non-candidate William F. Meade, Chairman of the Republican Central Campaign Committee, contracted with the defendant radio stations for time to broadcast two campaign speeches personally. The theme of Meade's speeches was that the Democratic Party in Philadelphia was supported, and more or less controlled, by a communist group. Plaintiff was named as one of the group. Consequently, he sued for libel. The district court, assuming for purposes of the decision that Meade's statements were libelous, granted defendants' motion for summary judgment.[16] It held that 315 applied to supporters and candidates, and since it barred defendants from deleting defamatory material in Meade's speeches, they were not at fault in broadcasting the libelous statements.[17] On appeal, the Third Circuit reversed, holding that Congress intended 315 to apply only to candidates personally and not to their supporters. The defendants, therefore, did have a right to censor and were at fault in failing to exercise that right. Thus, they were liable for Meade's defamatory utterances.[18] The Supreme Court denied certiorari.[19]

The legislative history of 315 supports the appellate court's holding.[20] But the resulting distinction is unrealistic. Normally, all speeches are part of a

15. 186 F.2d 1 (3d Cir. 1950), *cert. denied,* 341 U.S. 909 (1951). Diversity of citizenship gave the federal courts jurisdiction.

16. 89 F.Supp. 740 (E.D. Pa. 1950).

17. Kirkpatrick, C.J., based his decision on a strong policy argument. He reasoned that the obvious purpose of the section is to insure full and free discussion of both sides of issues which affect the voters' choice. That purpose would be frustrated unless a candidate's "use" of facilities is construed to include speeches by authorized supporters. *Id.* at 742.

18. As to the policy argument raised by the district court, note 17 *supra,* the Court of Appeals conceded that there were strong reasons for the lower court's construction, but concluded that the public policy question must be left to Congress. 186 F.2d 1, 3, 6 (3d Cir. 1950).

19. 341 U.S. 909 (1951). For criticism of the Court's refusal to review the case, see Rodell, *Our Not So Supreme Court,* Look, July 31, 1951, p. 60.

20. See the circuit court opinion for a detailed and accurate review of the legislative history of 315 and its verbatim predecessor, § 18 of the Radio Act of 1927. In the Senate debate on the compromise measure that was to become § 18, Senator Howell, a member of the committee handling the bill, observed, without dispute, that "under the provisions of . . . [18] if a candidate is allowed to use a station, other candidates for the same office must be allowed the same privilege, however, if a representative of a candidate is allowed to use a station, there is no provision that the representatives of other candidates must likewise be allowed to broadcast." 68 Cong. Rec. 4152 (1927). As the court points out, an amendment expressly covering supporters was passed by Congress in 1932 but killed by a presidential pocket veto. A similar amendment was passed by the Senate when the Communications Act was being considered, but was stricken out by House-Senate conferees. As a result, § 18 was re-enacted as § 315 of the new Act. 186 F.2d 1, 4, 5 (3d Cir. 1950).

comprehensive campaign plan.[21] And supporters of candidates may be as effective campaigners as candidates themselves.[22] The court s distinction succeeds only in giving partisan licensees a tool for frustrating the broader aim of Congress—impartial treatment during campaigns.

Without the statutory standard of equal opportunity for supporters, the licensee could deny equal access to his station to the supporters of disfavored candidates.[23] They could be barred completely or be given less favorable broadcasting or telecasting hours. And without the censorship ban, the licensee could reduce the effectiveness of disfavored speakers by deleting the hard-hitting portions of their speeches under the guise of censoring defamatory material. Moreover, unless the ban is absolute, even candidates admittedly within 315's coverage could be hindered the same way.[24]

The FCC has only one alternative standard by which to judge treatment accorded non-candidates: "fairness." [25] This standard was promulgated by the FCC for use in policing discussion of other controversial issues. Under it, controversial issues may be freely discussed on the air,[26] and the licensee may express his views on all issues;[27] but the overall treatment of any issue must represent all viewpoints fairly. "Fairness," however, has not been an effective barrier to licensee discrimination in discussion of controversial issues—for several reasons. First, the standard is so vague that it is difficult to prove a clear-cut violation.[28] Second, the FCC has been reluctant to punish violators.

21. See Smith, Campaign Communications Media, 259 ANNALS 90 (1948); Walsh, *How to Use a Speakers Bureau in a Political Campaign*, 3 PUBLIC OPINION QUARTERLY 92 (1939).

22. The FCC used this argument to urge the extension of 315's coverage. SADOWSKI COMMENTS, *op. cit. supra* note 11, at 6.

23. Recognition of this danger was the crux of the district court's argument in holding supporters within the scope of 315. 89 F.Supp. 740, 742 (E.D. Pa. 1950). It is shared by the FCC. SADOWSKI COMMENTS, *op. cit. supra* note 11, at 6. This fear is also voiced in Notes, 21 So. CALIF. L. REV. 292 (1948); 24 TEMP. L. Q. 236 (1950). See also Kaltenborn, Is Radio Politically Impartial?, 62 American Mercury 665, 669 (1946).

24. The FCC's position is that the right to censor is a power which may be readily influenced by the licensee's own sympathies and allegiances. Such a power would give "to radio stations a positive weapon of discrimination between contesting candidates." Port Huron Broadcasting Co., 4 PIKE & FISCHER RADIO REG. 1, 5 (1948). The FCC is not alone in this fear. See Donnelly, *supra* note 5, at 32; Nash, *supra* 5, at 307, 310-1; Note, 61 HARV. L. REV. 552 (1948).

25. "Freedom of speech on the radio must be broad enough to provide full and equal opportunity for the presentation to the public of all sides of public issues. Indeed, as one licensed to operate in a public domain the licensee has assumed the obligation of presenting all sides of important public questions, fairly, objectively and without bias." Mayflower Broadcasting Corp., 8 F.C.C. 333, 340 (1941). See also Editorializing by Broadcast Licensees, 1 PIKE & FISCHER RADIO REG. 91: 201-2 (1949).

26. *Id.* at 91:205.

27. *Id.* at 91:207.

28. "It should be recognized that there can be no one all embracing formula which licensees can hope to apply to insure the fair and balanced presentation of all public issues. . . . The licensee will in each instance be called upon to exercise his best judg-

The only sanctions available—license revocation or refusal to renew—are so severe, constituting a business death sentence, that they have been used only once by the FCC in a case of objectionable program content.[29] Moreover, whenever the FCC has tried to use program content as a basis for license renewal, the industry and its congressional advocates protested vigorously.[30] This has furthered the FCC's reluctance to enforce the standard rigidly.

Realistically then, the licensee is capable of partisanship by "weighting" the expression of opinion in favor of a chosen candidate or party without fear of punishment.[31] Political partisanship in other media, particularly the press, is

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ment and good sense . . ." *Id.* at 91:206. "The question is necessarily one of the reasonableness of the station's actions, not whether any absolute standard of fairness has been achieved." *Id.* at 91:209. Meanwhile, Commissioner Jones said, in his dissent, "outside the context of particular circumstances, I do not believe that an a priori standard so broad and vague has significant meaning." *Id.* at 91:218.

29. See *id.* at 91:224 (Dissenting Views of Commissioner Hennock). See also Comment, 60 YALE L.J. 78, 106-9 (1950); Note, 59 YALE L.J. 759 (1949).

The FCC refused to renew one license because the entire afternoon period of this daytime-only station was devoted to sports programs, chiefly horse-race results. Port Frere Broadcasting Co., 5 PIKE & FISCHER RADIO REG. 1137 (1950). The possibility of license denial for a more controversial reason arose when the FCC considered the application for license renewal and transfer of three stations under the control of G. A. Richards. He was accused, inter alia, of ordering the slanting, distortion and suppression of news on his stations. This much publicized case was first brought to the Commission's attention early in 1948. Notice of Richard's death on May 28, 1951 ended proceedings. KMPC, The Station Of The Stars, Inc., 7 *id.* 313 (1951). However, the FCC has frequently refused to renew licenses for reasons other than program content, *e.g.* misrepresentation, financial or technical inadequacy.

The Federal Radio Commission, predecessor of the FCC, successfully refused to renew two licenses because of objectionable program content. KFKB Broadcasting Ass'n, Inc. v. Federal Radio Commission, 47 F.2d 670 (C.C.A. D.C. 1931) (unethical medical advice to aid licensee's pharmaceutical business); Trinity Methodist Church, South, v. Federal Radio Commission, 62 F.2d 850 (C.C.A. D.C. 1932), *cert. denied*, 288 U. S. 599 (1933) (recurring broadcasts of false and defamatory matter).

30. Popularly referred to as the "Blue Book", a 1946 report was the Commission's most ambitious attempt to erect positive standards for program content. FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (1946). The protests from Congress and the industry were immediate and indignant. See WHITE, THE AMERICAN RADIO 197-8 (1947). "The Blue Book . . . is considered by the industry as a dead letter. Its requirements of the licensee have been repeatedly overlooked in Commission practice with reference to license renewal." SIEPMANN, RADIO, TELEVISION, AND SOCIETY 336 (1950). See Comment, *supra* note 29, at 105-6 n. 134 (references to repeated congressional investigations and torrents of industry criticism).

31. A recognized form of licensee partisanship is through news analysts and commentators whose views parallel or mirror those of their employers. The FCC has recognized this and presumably contemplates a balancing of the views expressed by these speakers too. Editorializing by Broadcast Licensees, 1 PIKE & FISCHER RADIO REG. 91:206-8 (1949). But see the dissenting views of Commissioner Jones, at 91:221-4. For a good analysis of the problem and documentation of the record of licensee discrimination in discussion of controversial issues, see SIEPMANN, RADIO'S SECOND CHANCE 84-115 (1947).

already well established.[32] But if all candidates are to have an equal opportunity to present their views to the electorate, they must be treated with a modicum of impartiality by the mass communications media. This is particularly necessary since modern campaigning relies so heavily on these media.[33] Radio has proven itself a most effective campaign device;[34] and television is expected to wield even greater influence.[35] By requiring them to treat candidates and their supporters impartially, a counterbalance to partisanship and bias in other areas of mass communications can be maintained.

A first step has already been taken to plug the loophole in section 315. A bill to extend its coverage to supporters has been introduced in the Senate.[36]

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32. Surveyists Lazarsfeld and Kendall found that, at best, a bare majority of those polled thought the press fair in giving both sides of public questions (1945—39%; 1947—55%); a substantial majority, however, thought radio stations fair (1945—81%; 1947—79%). They explain the difference in attitude this way: "After all, newspapers are entitled, by tradition, to editorial opinion and they do not claim to present both sides of every argument." LAZARSFELD & KENDALL, RADIO LISTENING IN AMERICA 53-8, at 58 (1948). For attitudes toward magazines see, LAZARSFELD & FIELD, THE PEOPLE LOOK AT RADIO 78-9 (1946).

The tendency of a paper's news coverage to reflect its editorial bias, as well as the disproportionate support given Republican candidates in past campaigns was cited in KEY, POLITICS PARTIES AND PRESSURE GROUPS 592-3 (1942). See also Smith, *supra* note 21, at 93.

For a statistical examination of the alarming decline in the number of newspapers and the increasing concentration of ownership and control of all the communications media, see ERNST, THE FIRST FREEDOM (1946). Also consult SIEPMANN, RADIO'S SECOND CHANCE 129-30 (1947).

33. Lack of money, apparently, is the major factor limiting the politician's use of the communications media during campaigns. Smith, *supra* note 21, at 90. For the substantial sums spent by the major parties in 1944 and 1948, see Newsweek, Nov. 1, 1948, p. 52.

34. Radio has generally been considered the most effective campaign medium by the politicos. FARLEY, BEHIND THE BALLOTS 318-20 (1938); Smith, *supra* note 21, at 93-4, 96-7.

35. Television was not relied on very much in the 1948 campaign. Expense, limited audience, and unpredictable results were the suggested causes. Newsweek, Nov. 1, 1948, p. 52. But now, only expense remains an obstacle to its widespread use. U.S. News & World Report, June 23, 1950, p. 14. For a description of its effective use in the 1950 New York gubernatorial race see 67 CHRISTIAN CENTURY 1381 (1950). It has been suggested that during the peak listening hours, television will eventually displace radio. WARNER, RADIO AND TELEVISION LAW 670 (1948).

36. S.1379, 82nd Cong., 1st Sess. (1951). The bill extends coverage to any person authorized by a candidate to speak for and on his behalf. It was introduced by Senator Ed Johnson of Colorado, Chairman of the Committee on Interstate and Foreign Commerce. For the origin of the bill see Berlyn, Libel Dilemma, Broadcasting-Telecasting, April 30, 1951, p. 23. The bill was referred to Johnson's committee.

The advantage of the bill, even with the extensions suggested in this Note, over similar bills in the past, is its modesty. Previously, the same proposals were linked to other more ambitious amendments—like extending the principle of "equal opportunity" to all controversal issues—or have been only a small part of bills envisaging major changes in radio regulation. *E.g.* S.1333, 80th Cong., 1st Sess. (1947); H.R.6949, Section 202, 81st Cong., 1st Sess. (1950). Since it stands alone, the suggested bill can be

The FCC has consistently advocated such legislation. And indications are that much of the industry will favor this bill.[37] But if Congress acts to extend 315's coverage, it should use that same opportunity to resolve the defamation problem. By granting licensees a blanket immunity for defamation in section 315 speeches, Congress could assure licensees uniform treatment in libel suits. As a corollary, the uncertainty over the scope of the censorship ban should be removed by explicitly forbidding all censorship, including the deletion of defamatory material.

The most familiar objection to the proposed immunity[38] is the possibility that a defamed person may have no remedy because the speaker is impecunious.[39] This highlights a basic conflict in policy objectives—protection of the innocent versus encouragement of free political thought and expression. But the necessity of the latter in a democratic society is already reflected in our libel laws by the defense of privilege to make fair comment on matters of public interest.[40] This doctrine, coupled with public disapproval of libel suits brought by politicians, makes it so difficult to maintain an action against a candidate, or a licensee standing in his shoes, that few suits are brought.[41] Thus, the policy

judged on its merits. Opposition to either unrelated or more extreme amendments will not obstruct passage.

37. *1943 Hearings, supra* note 7, at 60; *1947 Hearings, supra* note 5, at 52; SADOWSKI COMMENTS, *op. cit. supra* note 11, at 6. The industry trade magazine has supported the bill. Public Service Perils, Broadcasting-Telecasting, April 30, 1951, p. 48. In fact, the Johnson bill was suggested by a licensee. Berlyn, *supra* note 36, at 40. Also, licensees wishing to avail themselves of state laws that exempt them from liability when they are not allowed to censor, note 14 *supra*, will probably support the bill—particularly those who are not protected by libel insurance or indemnity agreements. These devices are now used by many licensees. Communications to YALE LAW JOURNAL cited in notes 8 and 9 *supra*.

38. In addition to the objection noted in the text, the argument has often been raised that a federal grant of immunity would be unconstitutional. This is based on the theory that the citizen could not be deprived of a remedy at law in state courts by the federal government without providing a federal substitute. This objection, however, has been effectively rebutted by the argument that the federal government has occupied the field legitimately and, in the interests of national uniformity, may define the rights, privileges, and liabilities of those regulated. See *1943 Hearings, supra* note 7, at 950-1 (FCC Memorandum); Donnelly, *supra* note 5, at 33-7.

39. See the exchange of views of Commissioner Fly and Senators McFarland and Wheeler in *1943 Hearings, supra* note 7 at 64-5.

40. Each person has a qualified privilege to publish matters affecting the interest of the general public. A narrow majority of states limits the privilege to comment or opinion but not to false statements of fact. However, there is a strong minority view that false statements of facts concerning candidates are privileged if made for the public interest with an honest belief in their truth. The modern trend is toward this broader interpretation of the privilege, but limited even here, to facts which bear upon official conduct or fitness for office. PROSSER, TORTS 839-44 (1941); HARPER, TORTS 542-6 (1933).

41. See Noel, *Defamation of Public Officers And Candidates*, 49 COL. L. REV. 875 (1949). The paucity of suits should not be taken to mean that licensee immunity is really not important or necessary. The possibility of suit, however slight, can be used to excuse licensee censorship of political scripts. See note 5 *supra*. Granting the licensee immunity is necessary to justify and effectuate an absolute censorship ban. But the absence