Denver Law Review

Volume 37 | Issue 3 Article 4

May 2021

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CONSTITUTIONAL LAW: LIABILITY OF A STATION OWNER FOR DEFAMATION OVER HIS FACILITIES BY A POLITICAL CANDIDATE

A North Dakota senatorial candidate, during the course of a campaign speech over the facilities of the defendant television station, accused the plaintiff of conspiring to "establish a Communist Farmers Union Soviet right here in North Dakota." The Farmers Union brought an action against the candidate and the station in a North Dakota state district court. That court dismissed the action as to the defendant station on the ground that provisions of the Federal Communications Act rendered the station immune from prosecution for the alleged defamation. At the same time, the court held a North Dakota immunity statute to be unconstitutional. This point was not assigned as error and hence was not before the North Dakota supreme court by its grant of certiorari. The supreme court affirmed, holding that the applicable provision of the Federal Communications Act prevented any censorship by the station of political broadcasts and that Congress had thereby granted an implied immunity from prosecution. The Supreme Court of the United States affirmed in a five-four decision and held in accord with the state courts of North Dakota that §315 grants a licensee an immunity from liability for libelous material, the subject of a political candidate's speech, which it broadcasts. *Farmers Educational & Cooperative Union v. WDAY, Inc.*, 360 U.S. 525 (1959).

With the advent of radio on the national scene, Congress at an early date recognized that it could either be extremely beneficial or harmful as a means of swaying or informing the populace during political campaigns. In an attempt to insure that this new instrumentality would be used for only legitimate political ends, Congress enacted the Radio Act of 1927 which provides, among other things, that any radio station granting time to a political candidate must grant equal time under the same conditions to all other candidates for the same office.[1] A provision was included which ostensibly prevented any censorship by a station owner. This provision was for the avowed purpose of preventing any favoritism toward any one candidate. No provision was included nor was there an express grant of immunity against prosecution for defamation committed by a political candidate. A clause similar to the provision in the Radio Act was included in the Federal Communications Act of 1934[2] as follows:

> (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship *over the material broadcast under the provisions of this section. No obligation is im-*

1 44 Stat. 1170 (1927), 47 U.S.C. Sec. 315 (1946).
2 *Ibid.*

posed upon any licensee to allow the use of its station by any such candidate.

The legislative history of this Act indicates that Congress intended the no-censorship provision to be absolute and to prevent the censorship of even very obviously defamatory material from political broadcasts.[3] The basic reason for this no-censorship provision was reiterated in later congressional hearings[4] where it was stated that the mere threat of a law suit could be used to force a radio station to censor an opponent's speech unduly. Also, a station could use the threatened law suit as an excuse for being partisan.[5] In view of the above no-censorship provision, it seems strange that Congress made no provision for granting of immunity to a station subjected to an action for defamation as a result of a political broadcast under the Act. Provisions which would have had this effect were discussed and discarded by Congress at the time of the original Act and subsequently. It has been suggested that the reason for the failure of Congress to act along this line stems from a doubt as to its authority to do so.[6]

In one of the first cases arising under Sec. 315 of the Act,[7] a state court held that the no-censorship provision applied only to words of a political or partisan nature and granted no privilege to join and assist in the publication of a libel nor granted any immunity from the consequences of such action. Appeal to the United States Supreme Court was denied on the ground that the case had become moot through settlement.[8] This was the first and for many years the only judicial decision on the no-censorship provision of the Act.[9] The effect of this decision was to give station owners limited censorship powers over the scripts of political candidates. Of course, there could be no implied immunity with the existence of this censorship power.

Then came the much cited and often maligned[10] decision of the FCC of *In Re Port Huron Broadcasting Co.*[11] In this case, the station owner, after examining the script of a political candidate as was the practice at that time as a result of the previously mentioned Nebraska decision, discovered certain remarks of an alleged libelous nature. Rather than censoring these remarks from the script, the station owner denied all political candidates access to his facilities in order to protect himself. This would seem to be allowed by the language of Sec. 315 of the Communications Act. Two of the candidates then complained to the Commission. Probably because the station owner had already permitted his facilities to be used by one candidate, the Commission treated the owner's action as censorship and ruled that the "no-censorship" provision of the Act was absolute and meant no censorship of any variety. In order to remove some of the "sting" from this decision, the FCC then held that Congress

3 Donnelly, *Defamation by Radio; A Reconsideration*, 34 Iowa L. Rev. 12 (1948).
4 Hearings on S. 1333 Before Senate Committee on Interstate Commerce, 80th Cong. 1st Sess. 528 (1947).
5 *Ibid.*
6 *Ibid.*
7 Sorenson v. Wood, 123 Neb. 348, 243 N.W. 82 (1932).
8 KFAB Broadcasting Co. v. Sorenson, 290 U.S. 599 (1933).
9 Farmers Educational and Cooperative Union et al. v. WDAY, Inc., 360 U.S. 525 (1959).
10 Snyder, *Liability of Station Owners for Defamatory Statements Made by Political Candidates*, 39 Va. L. Rev. 303 (1953).
11 12 F.C.C. 1069 (1948).

had granted an implied immunity from prosecution under the terms of the Act. In the words of one writer on the subject:

> (The FCC) attempted to skip blithely out of this confinement by gratuitously holding that the federal government had pre-empted the field of responsibility of station owners for the broadcast of defamatory statements and had thus relieved licensees of potential liability for any defamatory matter broadcast in a political speech.[12]

A Texas station owner, aware of the uncertainties inherent in the Port Huron decision, appealed to the federal court[13] under the provisions of Section 402 (a) of the Communications Act. The action was dismissed on the ground that the commission's ruling was not an appealable order under the Act. In doing so, however, the court voiced strong disapproval of the FCC decision that a station owner could not exercise any censorship power over the script of a political candidate. The dicta of the court in this case[14] appears even more interesting in view of Mr. Justice Frankfurter's dissent in the principal case.

In spite of this criticism, the FCC action of declaring the censorship provision of the Act to be absolute was in apparent agreement with the congressional intent as indicated by the legislative history of the Act.[15] However, the commission's action of declaring a broad area of tort law to be pre-empted by the federal government was a problem of constitutional law which could only be properly decided by the courts or Congress. Although the commission's ruling was not appealable to the courts and was not binding upon them, it possessed the practical enforcement power of being able to revoke the license of a station owner who did not comply with its orders. At the same time, the ruling that Congress granted an implied immunity from prosecution was a mere gratuitous action and the station owner could rely upon it only at his peril. The magnitude of this hazard was illustrated very graphically by the five-four decision in the principal case. This state of affairs led to congressional hearings on the Port Huron decision, but Congress still refused to specifically enact an immunity clause into the Communications Act. The FCC, reinforced by this congressional non-action, reaffirmed its position in yet another case.[16]

This was the state of the law when the defamation occurred in North Dakota. It was obvious that a clarification was necessary. Congress had refused to act so it appeared to be up to the courts to do so. The issues were clearly drawn. On the one side stood fair play, common sense and that sometimes-fleeting concept called justice. On the other side stood the Constitution with its formidable array of technical roadblocks which must be overcome in order to

12 Snyder, *supra* note 10, at 309.
13 Houston Post Co. v. United States, 79 F. Supp. 199, 203 (S.D. Tex. 1948).
14 Id. at 204. ". . . we think it judicially inconceivable that the Commission, a body of public servants* * *, with considerations of fair play and just administration in mind, have so ordered."
15 Donnelly, *supra* note 3.
16 The Matter of the Application of WDSU Broadcasting Corp. File No. BR 449, 7 Pike and Fischer Radio Reg. 769 (1952).

pre-empt a field of state law. In fairness, however, one must realize that the justice was not all on one side in this matter. The innocenet victim of the defamation would also be wronged by losing his remedy against the station owner. True, the victim would still have a right of action against the source of the defamation, but in many situations, this remedy could be woefully inadequate.

The majority opinion in the principal case based its decision that the censorship provision was absolute and that Congress had granted an implied immunity from prosecution, on substantially the same ground as the FCC in the Port Huron case. The dissenting opinion opposed the pre-emption of state law which granted an implied immunity and at the same time agreed with the majority that the censorship provision was absolute. This proposition had apparently never been seriously considered by any other writer on the subject. It was stated that there was no such direct or positive repugnancy so as to justify a striking-down of state law.

It is submitted that the majority opinion is the only one which could have been rendered under the circumstances of this case and that the minority opinion, although perhaps correct on technical grounds, would have been manifestly unfair to those station owners who, in good faith, relied upon the ruling of the governing body of their business. At the same time, it would seem that a more liberal policy of allowing appeals from administrative agencies to the courts should be adopted in order to prevent such a dilemma as confronted a station owner before the decision in the principal case.

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