

Repeal of Political Editorial and Personal Attack Rules

By Peter Gutmann

A United States Court of Appeals has ordered the Commission to repeal immediately its personal attack and political editorial rules. The Order effectively overrides a Commission decision to suspend the rules for 60 days and to request the submission of comments.

The Court's directive was sharply worded, and clearly reflects frustration over Commission delays. Unless successfully challenged, its order culminates a 20 year old proceeding. Last year, the Court found that the rules interfere with journalists' editorial judgment, entangle the government in media operations, and therefore raised First Amendment concerns. The Court afforded the Commission one year until September 29 within which to justify the rules in light of these problems.

The deadline passed without action. On October 4, though, the Commission suspended the rules for 60 days surrounding the upcoming election so that their effect could be assessed. The Court rejected this step, noting that the rules, although still unjustified, would be reinstated following the period of suspension and that, in view of the extreme delays encountered so far, it had no assurance that final Commission action would then be imminent.

Even though its patience had been exhausted by the current proceeding, the Court observed that no decision had been made as to whether the personal attack and political editorial rules were warranted by the public interest consistent with Constitutional constraints. Therefore, it mentioned that the Commission could initiate a new rule making proceeding to study and decide the matter.

The Court's order is the latest step in a long and, until now, inconclusive history. The two rules were adjuncts to the Fairness Doctrine, which the Commission repealed in 1987. They required notification and a response opportunity if a licensee broadcast an editorial endorsing or opposing a legally qualified candidate or an attack upon someone's integrity. Yet, these rules did not wither along with the Fairness Doctrine, and were formally challenged in a lawsuit brought by the Radio-Television News Directors Association (RTNDA) and the National Association of Broadcasters (NAB), which remained dormant for over a decade. More recently, under pressure of the lawsuit, the Commission twice considered a request to delete the rules, but Chairman Kennard (who had worked on this matter while at the NAB) recused himself and the Commission deadlocked each time. Last year, the court required the Commission to determine whether the rules could be justified in the absence of the Fairness Doctrine and whether they should be modified in the current environment. Although the Court ordered the Commission to act expeditiously, more than a year passed. On October 4, the Commission (including the Chairman) decided to temporarily suspend the rules in order to test the effect of how broadcasters would act in their absence. The Commission felt that the current election season would be likely to yield particularly meaningful results.

For now, at least, the personal attack and political editorial rules are to be repealed.

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