Merger, Monopoly & A Free Press

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The old journalistic saw that "newsmen don't make news" sounds quaint these days. With reporters jailed for refusing to identify their confidential sources, with the government accusing newsmen of "ideological plugola" and being accused in turn of seeking to control both public and private television, with the press and broadcasting caught up in public controversy at almost every turn, the news media are installed as one of the major beats in the land.

But not all issues involving the media have attracted the coverage they deserve. One hears much about reporters' subpoenas and the threat they pose to the public's right to know, but considerably less about other controversies involving the media, the government and the First Amendment. The whole subject of media concentration somehow eludes the nation's newspapers and TV stations. Two years ago, for example, when Congress made its own contribution to newspaper monopoly by passing the Newspaper Preservation Act, the publishers' lobbying campaign was backed up by studied blandness in the nation's press (see "The 'Failing' Newspaper Probe: The Press Dummies Up," by Arthur E. Rowse, *The Nation*, June 30, 1969). Last summer, when the industry took another major step toward monopoly by killing major newspapers in Boston, Washington and Newark, the help provided by the Justice Department was overlooked in the media. At present, the leading nonstory is the proposal of the Federal Communications Commission to break up common ownerships of newspapers and broadcast stations in cities throughout the country—an uncommonly important and controversial issue that may be unrivaled for the thoroughness with which the media have blacked it out.

Newspaper-Killing Mergers and the Justice Department

Death came last summer to the Boston *Herald-Traveler*, the Washington *Daily News* and the *Newark News*. With a slight variation of technique in Newark, each paper was sold to a competing publisher and closed down. Boston and Washington are thus reduced to two newspapers each, making New York the only U.S. city with three separately owned, general circulation dailies. Newark now has one-publisher monopoly, as do 96 per cent of the daily-newspaper cities in the country. (Another twenty-two cities have two-publisher monopolies—"joint-operating agreements," exempted from the antitrust laws by the Newspaper Preservation Act, whereby two publishers agree to fix prices, split profits and otherwise pool their economic interests, while supposedly still competing in the news and editorial spheres. Real newspaper competition survives in only some thirty-five cities, less than 3 per cent of the total.)

Press coverage of the three recent newspaper deaths followed the established pattern for such occasions—long stories quoting the tear-stained statements of the publishers involved, nostalgic obituaries, farewell editorials citing the lesson for labor unions. Fingers were pointed at television competition, at the growth of the suburbs, at increased labor costs. Missing, as usual, were inquiries into the actual causes and circumstances of death. No one suggested that the three cases were classic illustrations of what some consider a primary cause of newspaper monopoly in this country—simple violations of the antitrust laws, acquiesced in by the Justice Department out of deference for the political power of newspaper publishers.

The media offered a special explanation for the death of the *Herald-Traveler* in Boston. They blamed it on the FCC, which in the celebrated *WHDH* case had lifted the *Herald-Traveler*'s TV license in the interest of reducing concentration of control. The indictment of the FCC was spelled out on the editorial page of *The Wall Street Journal* on July 17 by Louis M. Kohlmeier, a member of the paper's Washington bureau and author of a book on the regulatory agencies:

> The case of the *Herald-Traveler* began with the FCC attempting to provide Bostonians with a greater diversity of broadcast and printed information and opinion. "It is important in a free society," the commission nobly declared, "to prevent concentration of control of the sources of news and opinion." It ended, 14 years later, with Bostonians left with the same number of broadcast stations and one less newspaper. . . .

The same line had been aired by the CBS radio network in a March 19th broadcast of *CBS Views the Press* (a program supposedly designed to criticize the media, but commonly used to voice the corporate position of CBS on issues of government regulation). Noting the turnover of Boston's Channel 5 to its new proprietors and the publicity that the *Herald-Traveler* would fold, CBS concluded that the case "has brought to light an ironic contradiction in federal communications policy." It explained:

> In the *WHDH* ruling, the FCC was implementing a policy designed to reduce media monopoly and ensure that the American people are provided with diverse and competitive sources of news, information and entertainment. If the *Herald-Traveler* does fold, however, the action against WHDH will have an effect precisely opposite that goal.

That the FCC had dealt a blow to the people of Boston was not as evident as the media made out. If the owners of the *Herald-Traveler* had not lost their TV license, they might indeed have kept the newspaper alive. But they might have folded it anyhow—as the Scripps-Howard chain folded its Washington *Daily News* a month later, while continuing to hold five TV licenses. Moreover, even if the *Herald-Traveler* had survived, it does not follow that Boston would not have lost a newspaper. If the *Herald-Traveler* had not folded, the paper that bought it out, Hearst's *Record-American*, probably would have. As Boston newsman Jack Thomas, writing in the *Columbia*

Journalism Review, has described the scene: "The *Herald* and the *Record-American* were like two tired prizefighters, battering each other in the middle of the ring, hoping to God the other would collapse first." The death of the *Herald-Traveler* was followed a month later by the similar killing of the *Daily News* in Washington, and then by the expiration of the *Newark News*. Neither of these losses could be blamed on the FCC. And there was not much effort by *The Wall Street Journal*, CBS, or the rest of the media to place the blame elsewhere.

It might have been placed on the Department of Justice. In fact, it is not clear that any of the three cities had to lose a newspaper. In each case the paper was sold to a competitor, and the public had no way of knowing whether it could have been sold instead to someone who would keep it alive. That was not the concern of the selling publishers, who doubtless could get a better price from the competitor, but it should have been the concern of the Justice Department, which is supposed to enforce the antitrust laws. Under those laws, the Supreme Court has ruled, even a "failing" newspaper may not be sold to a competitor "unless it is established" that he "is the only available purchaser." The Department has expressly adopted this standard in its own "merger guidelines," which insist on "good faith efforts by the failing firm . . . to elicit a reasonable offer of acquisition" from a noncompetitor. The Department's role—or lack of one—in each of the three newspaper-killing mergers deserved more attention than it got.

In Boston, the *Herald-Traveler* was sold on June 18, for $8.5 million, to the rival Hearst Corporation, which of course immediately closed it down. The Justice Department had been asked to "clear" the transaction, and did so, announcing in a three-paragraph press release, issued June 15, that it had informed the *Herald-Traveler* and Hearst it would not sue to block their plan, which "has been under study by the Antitrust Division since early in May." The release stated that the *Herald-Traveler* had recently lost its TV license and that the newspaper "has suffered substantial operating losses in recent years." It avoided the crucial question of whether a different purchaser might have been found, and simply recited *Herald-Traveler*'s claim that "if the sale of the *Herald-Traveler* to the *Record-American* did not go through the assets of the newspaper would be liquidated." Justice said nothing about the credibility of this threat, about whether the requirement of "good faith efforts" to find another purchaser had been met, or about anything else its study had found. As is customary, there had been no public disclosure that the Department was considering the matter, much less any sort of hearing for the Boston public.

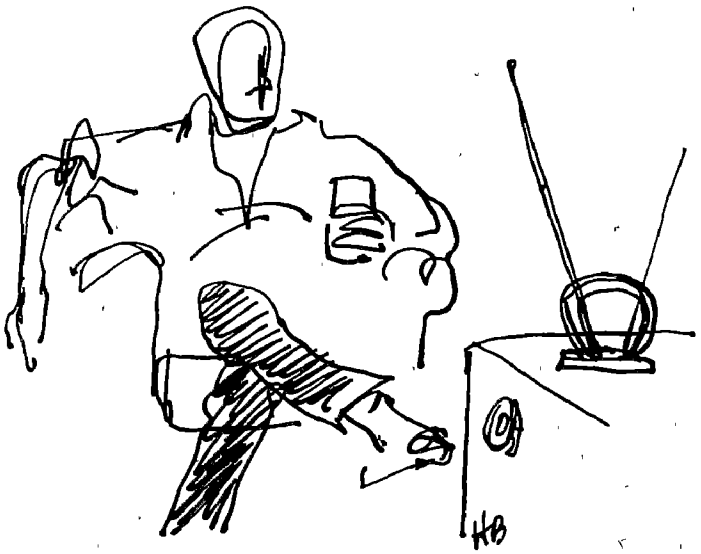
In Washington a month later, when Scripps-Howard's *Daily News* was sold to the *Evening Star* for the reported price of $5 million, Justice was even more passive and the public even less informed. The death of the *Daily News* came with suspicious suddenness—the announcement was made on the morning of July 12, the last edition was printed that same afternoon—and the involvement of the Justice Department has been the subject of conflicting reports. At the July 12th press conference, according to *The Wall Street Journal*, the president of the *Star*, John H. Kauffmann, "declined to say whether antitrust clearance had been obtained from the Justice Department." Both *The New York Times* and *The Washington Post* quoted an unidentified Justice spokesman as saying that no clearance had been requested or obtained.

Nonetheless, Joseph C. Goulden, writing in the October issue of *The Washingtonian*, quotes Kauffmann as telling him: "The Justice Department was an obstacle in terms of the amount of information we had to give to the Antitrust Division. They went over the deal with a fine comb, and said, 'O.K., go ahead.' " In a recent telephone interview with me, Kauffmann denied this quote, and at the Antitrust Division, Gerald A. Connell, chief of the General Litigation Section, confirms that clearance for the deal was never sought or given.

Asked why Justice was not asked to clear the deal, or at least informed of it, Kauffmann points out that there is no legal obligation to give the Department notice. "It is a right the papers have, not an obligation." He claims the Department did investigate the legality of the deal after it happened, "and properly so." Asked what the Department or the courts could have done at that point if the deal had proved illegal, Kauffmann concedes that resurrection of the *Daily News* would have been impossible, but suggests that "they could have gotten an injunction to prevent us from using the *Daily News* masthead or subscription lists." He says the secrecy and suddenness were motivated mainly by upcoming labor negotiations, and denies they reflected any fear that the Justice Department might stop the merger—"I knew I could convince them of the rightness of the decision." Kauffmann admits, however, that procedure did reflect fear lest the Department seek to postpone consummation of the deal until its legality could be investigated.

Kauffmann is right that publishers have no legal obligation to let the government know ahead of time when they plan to kill a paper through merger. In the case of bank mergers, the law requires thirty days' advance notice to the Justice Department, and the Federal Trade Commission requires advance notice of essentially any merger whose asset value exceeds $250 million. Few if any newspaper mergers will meet the latter test, even though their importance to the public—especially when they involve loss of a paper—is apt to be much greater than that of most mergers worth $250 million, and of most bank mergers as well.

Under present law, the Antitrust Division is expected to maintain its own guard against the consummation of possibly illegal mergers. Indeed, the head of the division has recently noted the problem of "midnight mergers," and has voted to stop them by having "available, in advance, sufficient information concerning the market structures in our economy and sufficient data concerning firms within the market. . . ." Such information was scarcely needed in the case of the *Daily News* and the *Star*. Their deal was plainly illegal, unless justified by evidence that another purchaser could not be found, and the burden of showing that was on the publishers. Moreover, rumors of the merger were rife in Washington—some in published form—for a good while before July 12. A minimally alert Antitrust Division would have asked the *Star* and Scripps-Howard what was going on, or taken



other precautions to avoid being caught flatfooted. Failing that, the Department, if it had tried, might have succeeded in getting a court to stay consummation of the merger even within the few hours available after the announcement on July 12. At best, the Antitrust Division was asleep at the switch, but it may have been called off the case by higher authority. The Administration's fondness for the *Evening Star*, rival of the hated *Post*, is no secret, as illustrated by the exclusive interview Mr. Nixon gave the paper on the eve of the election.

In Newark, the sellout of the *News* to the competing *Star-Ledger*, owned by the Newhouse chain, was accomplished in a more subtle, two-step maneuver. In September 1971, while the *News* was closed by a strike, Media General, Inc., a freewheeling conglomerate that had bought the paper only the year before, sold the *News*'s Sunday edition and most of its physical assets to Newhouse for $20 million. As pointed out recently by *Business Week*, in this "sweet deal" Media General got "more cash than the *News* seemed to be worth," and kept not only the paper's daily edition but $8 million worth of presses and a paper-recycling company whose annual cash flow exceeds $30 million. Richard Reeves, writing in the *Columbia Journalism Review*, estimates that the 1971 deal left Media General "at worst, coming out very close to even" on its $50 million investment in Newark.

With the *News* gutted, the *Star-Ledger* strengthened and Media General bailed out, the latter's determination to keep the *News* alive after the strike was widely questioned. Reeves finds indications "that Media General was willing to make at least a halfhearted effort to keep the paper alive"; *Business Week* says "Newspapermen and analysts who have studied the Newark situation doubt Media General really intended to make a go of the paper." Sure enough, the *News* lasted only four months after resuming publication. The beauty of the arrangement was that when the end came, it was simply a matter of ceasing publication and leaving Newhouse with a monopoly. There was nothing left of the *News* for Media General to sell, and thus there was no transaction for even a vigilant Justice Department to study.

The 1971 deal that condemned the *News* did have the blessing of the Department, which apparently could not see what was plain to other observers. In October 1971 Justice issued a press release saying it had informed the Newark publishers that it would not sue to block their agreement. The release noted the strike and said that the paper "has experienced operating losses in 1970 and the first five months of 1971." (No reference was made to the Department's merger guidelines, which state that the Department "does not regard a firm as failing merely because the firm has been unprofitable for a period of time. . . .") The release also noted, optimistically: "The agreement contemplates that the two papers will continue to operate their weekday editions on a competitive basis."

In thus clearing the agreement, the Department followed its normal practice of giving no public notice that the matter was being considered, no opportunity for a hearing, and no reasons for its decision other than the cryptic notations in the press release. In the Newark case, however, a correspondence ensued between the Department and the Institute for Public Interest Representation at the Georgetown University Law Center. Victor H. Kramer, the institute's director, wrote Attorney General Mitchell asking to know the "criteria or standards of law or policy" on which the Department had based its decision, and asking to see, under the Freedom of Information Act, the relevant internal memoranda.

Richard Kleindienst, then Deputy Attorney General, replied magisterially that the Department had decided "prosecution would not be appropriate," and that "the reasons for this determination are suggested in the press release." More informatively, he went on to reveal that "a preliminary form of the Newark agreement and certain background data were informally submitted by counsel for the Newark papers to the Antitrust Division in the summer of 1971," and that "Naturally, there are certain staff memoranda analyzing and commenting upon the various considerations involved. . . ." He further disclosed that "Meetings were held with counsel for the Newark papers, these matters were discussed, and the tentative views of the division were orally communicated to them. Thereafter, major changes were made by the parties in the form of the Newark agreement." Kleindienst refused, however, to produce any of the Department's papers on the case, claiming them to be exempt from the requirements of the Freedom of Information Act.

The death by purchase of newspapers in Boston, Washington and Newark, and the role of the Justice Department in letting it happen, raise a number of questions. It does not appear that the Department in any of these cases enforced the legal requirement that the publishers show the impossibility of finding a different purchaser. Perhaps the Department considered the requirement inapplicable to the Newark deal, on the theory that the *News* would survive to provide the *Star-Ledger* with competition on weekdays. If so, the Department was naive.

One cannot know for sure, however, what standards the Department did apply, or failed to apply, as it acquiesced in these mergers. In fact, one can know scarcely anything about what happens in these cases. The secrecy

of the Department's procedures gives the public no word that anything is going on, much less an opportunity to be heard, when a deal to kill a newspaper is presented to the Antitrust Division, is secretly negotiated, and is declared immune from government challenge.

We have here an instance of the secret proceedings and the "secret law" that characterize so many dealings between federal agencies and interested parties. The phenomenon has proved all but impervious to the Freedom of Information Act, as is shown by Kleindienst's position on the Newark case. During the election campaign Senator McGovern proposed a seven-point "Federal Code of Ethics" to deal with governmental secrecy, but even his program was wide of this mark. He proposed the obligatory disclosure of private overtures to the White House and of contacts between regulatory agencies and the executive branch, but said nothing about dealings between interested parties and the Justice Department, the Internal Revenue Service, or other regulatory agencies.

At least in the case of local-newspaper mergers (and joint-operating agreements as well), the problem should not be difficult to solve. These events are important to the public, they are irreparable and they are relatively rare (indeed, there are not many competing newspapers left to merge). They ought to be subject to advance notice to the Justice Department, to public notice and a public hearing before the Department reaches a decision, and to a public statement by the Department of the reasons for its decision.

Another question springs from the fact that the publishers involved in the three newspaper sellouts—Scripps-Howard and the *Evening Star* in Washington, the *Herald-Traveler* and Hearst in Boston, and at least Newhouse in Newark—are all friends and supporters of the Nixon Administration. The secret, mute, pliant role of the Justice Department in letting the mergers go through is thus more than a little reminiscent of the ITT affair. President Kauffmann of the *Star* denies "categorically" that the White House was apprised in advance of the *Star-News* deal, but such contact may well have been unnecessary, given the record of this Administration.

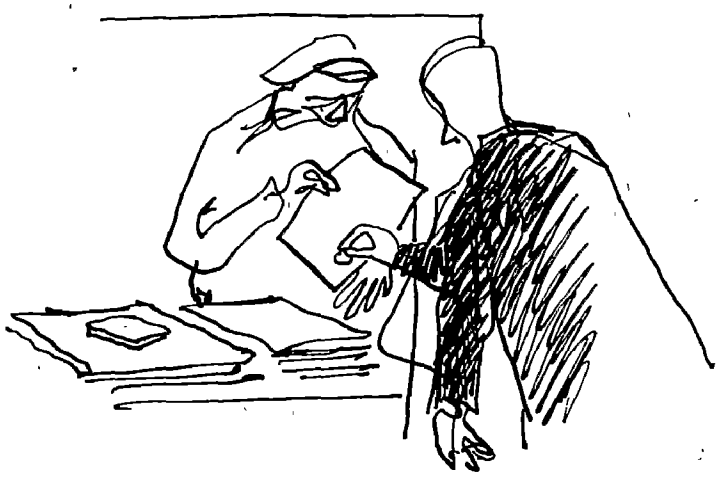
Finally, there is the question why the press and the broadcast media showed no curiosity about the Justice Department's handling of these matters. These are the same media that covered rather thoroughly the ITT affair (at least after Jack Anderson brought it to light), and that flayed the FCC at length for *its* role in the death of the *Herald-Traveler*. It may be, of course, that the subject was unnoticed or was not considered newsworthy, but other explanations suggest themselves. Jack Anderson, for example, might have been expected to pick up the rather fragrant aroma of the midday merger in Washington, but his column is distributed nationally by United Feature Syndicate, owned by Scripps-Howard. Senator McGovern, in his "Federal Code of Ethics" campaign speech, might well have cited the newspaper deals among his examples of the Nixon Administration's "abuse of government power on behalf of special interests." If he had, it would have been interesting to see what coverage he received in the numerous newspapers owned by the publishers involved. If he had cited the Washington deal, it would have been especially interesting to check the coverage by the UPI wire service, owned by Scripps-Howard. The answer thus may be that some "special interests" are more special than others. There are some that benefit not only from abuse of governmental power but also from abuse of the media power they command.

Media Monopoly, the FCC and the Public Interest

The public's stake in media diversity figured prominently in media commentary on the death of the *Herald-Traveler*. Commentators attacked the FCC for its *WHDH* decision, which allegedly killed the paper, and claimed the commission was in fact undermining the policy it purported to promote. What is curious in this is that critics of the *WHDH* decision fastened on that case, and that case alone, as an occasion to invoke the value of fending off monopoly from the mass media. Yet in fact the *WHDH* decision was a unique and aberrational action by the FCC. While the media assailed the commission for failing in that case to promote media diversity in Boston, they have ignored the FCC's far more typical approach to the problem of media monopoly, which is to feign concern and do nothing. Even more obstinately than the FCC itself, the media ignore the whole subject of media concentration.

Concentration of ownership is a dominant fact of press and broadcasting operations in this country. Newspaper chains now control more than half the nation's daily newspapers (and more than 60 per cent of the circulation) and are fast acquiring the rest. At the local level, daily-newspaper monopoly prevails almost everywhere. And there are some ninety-three instances in some eighty-five cities where the owner of a daily newspaper also owns a local TV station.

The existing antitrust laws, even assuming the Justice Department enforced them against the media, would have a limited effect on concentration. They do not apply to the chains, since their newspapers are in different cities, and they do not reach newspaper monopolies unless the monopoly is created or maintained by improper means. Their impact on newspaper-TV combinations at the local level has never been tested. Almost every attempt in recent years to create a *new* combination of this kind has been met with threats to sue by the Justice Department, whereupon the companies involved have backed down



rather than go to court and establish a precedent. (This happened most recently in Portland, Ore. where Newhouse, owner of the two dailies and a half-interest in a TV station, won FCC approval to acquire the other half-interest but gave up the plan when Justice threatened a suit.) But the Department has never under the antitrust laws challenged the *renewal* of a TV license held by a newspaper in the same city, and it is not likely to start now. Such attempts might fail in any event, and at best they would have to be fought out through long trials on a city-by-city basis.

The FCC, in contrast, almost certainly has authority to decline to grant TV licenses or license renewals, to the owners of local daily papers. In fact, for more than four years the FCC has been considering adoption of a general rule to that effect. This is the most significant attempt to deal with media concentration in this country since 1941-44, when the FCC similarly examined newspaper ownership of radio stations (and ultimately declined to adopt a rule banning such ownership, promising instead to deal with the problem on a case-by-case basis—which it has rarely done). The FCC's handling of the newspaper-TV issue deserves attention, and so does the news media's coverage of that handling.

In the thirty years since the FCC last inquired into newspaper-broadcast cross-ownership, two developments have transformed the media landscape. The rise of the colossus of television and the almost total envelopment of newspaper monopoly have made it obvious that any concern over media concentration must focus on newspaper-TV combinations. FCC Chairman Dean Burch, concurring in the commission's rule-making proposal (but without indicating how he would eventually vote), has put the problem succinctly: "There are only a few daily newspapers in each large city and their numbers are declining. There are only a few powerful VHF stations in these cities and their numbers cannot be increased. Equally important, the evidence shows that the very large majority of people get their news information from these two limited sources. Here then are the guts of the matter."

(In fact, newspaper-TV cross-ownership has probably done much to promote newspaper monopoly. If the Boston *Herald-Traveler* was kept alive by subsidies from its TV station—as the media were at pains to point out—the more typical effect of newspaper-TV combinations has been to kill off competing papers that lacked a local TV affiliation. This was illustrated most recently—without media notice—by the death of the *Daily News* in Washington, where both surviving dailies own local TV stations. Goulden suggests in his *Washingtonian* article that the *Fort Worth Press*, another Scripps-Howard paper, may soon follow the *Daily News* into the graveyard. That would not be surprising, since the *Press* is the only one of four dailies in Dallas-Fort Worth without a local TV affiliate.)

Concern over media concentration, and local newspaper-TV combinations in particular, was not a bureaucratic figment of the FCC. Vice President Agnew, his political motivation notwithstanding, raised a real issue in his speech at Montgomery, Ala., in November 1969. "The American people should be made aware of the

trend toward monopolization of the great public information vehicles and the concentration of more and more power over public opinion in fewer and fewer hands," Agnew declared, and went on to attack newspaper-broadcast combinations specifically (albeit only those of *The Washington Post* and *The New York Times*). The President's Commission on Violence recommended in its 1969 report that "private and governmental institutions encourage the development of competing news media and discourage increased concentration of control over existing media." Hubert Humphrey—who, like Agnew, has since dropped the subject—wrote in a syndicated newspaper column in December 1969 that "the really serious questions involving the media should be continually raised," and included among those questions, "Is there too much concentration of media ownership?" and "Should newspapers be prevented from owning broadcast stations in the same city?"

Congress itself, by passing the Newspaper Preservation Act of 1970, espoused a policy designed to preserve individual ownership of the two newspapers in a city in order to provide "separate and independent voices"; the policy applies at least as strongly to separate ownership of a newspaper and a TV station, where there is no need to sacrifice economic competition through an antitrust exemption. (Nonetheless, many of the publishers who led the lobbying for the Newspaper Preservation Act—such as Scripps-Howard, Newhouse, Hearst and other chains—hold TV licenses in cities where they publish newspapers and are now lobbying equally hard to defeat the FCC's proposed rule.)

The public's opinion on this subject has gone strangely unsolicited. In the fall of 1970, however, a Gallup poll on public attitudes toward the media, commissioned by *Newsweek*, contained some questions on concentration. The story was rather vague, and there is no guarantee

it was not affected by the corporate bias of the magazine's owners—proprietors also of *The Washington Post* and a TV station in Washington. Nonetheless, the reported results were interesting, especially since the media have not exactly drilled the subject into the public's consciousness.

Newsweek began, "But people did not seem to be of a mind to tamper very much with how the press is run —or owned." It went on to report what seemed to be a different story: "Should newspaper chains—joint ownership of several papers in different cities—be permitted? Sixty-four per cent say yes, only twenty-four no. Should a chain also be allowed to control broadcasting stations? Half of those approving of chains said yes, 35 per cent no." *Newsweek* did not say it, but this seems to mean that 46 per cent, a majority of those responding, either would not permit chains or would not allow them to control broadcast stations. (Twenty-four per cent opposed chains entirely, while 35 per cent of the 64 per cent who approved of chains amounts to another 22 per cent.) A final item was reported by *Newsweek* without comment: "What about joint ownership of the newspaper and a TV station in a city with only one paper? Forty-four per cent said no, forty-one per cent yes."

The most potent expressions of concern over media concentration have come from the Department of Justice and, in response, from the FCC. In August 1968 the Department, in a filing with the FCC, pointed to "the existing concentration of media ownership in many of the major cities," and recommended that the commission do something about it—namely, adopt a rule divorcing the ownership of daily newspapers and TV stations in the same city. The proposal was a bombshell which the newspaper and broadcast industries have been striving ever since to defuse. The FCC entertained "comments" on the proposal for a prolonged period. Four times it extended the deadline at the request of the National Association of Broadcasters (NAB). Finally, in April 1970, instead of making a decision, the commission simply repeated the proposal, this time as its own, for more comments.

Specifically, the FCC suggested a rule requiring the owners of daily newspapers and TV stations in the same city—and likewise of daily newspapers and radio stations, of which there are some 230 instances—to sell either the station or the newspaper within five years. Far from being Draconian, the proposal would have a gentle, cushioned impact. By allowing divestiture within five years, it would "forfeit" no broadcast licenses—unlike the FCC's maligned decision in the *WHDH* case. By banning only *local* combinations, it would allow trades between combination owners in different cities. A special dispensation would waive the capital gains tax on sales or exchanges resulting from the rule. In addition, the rule would be subject to waiver in individual cases, specifically if it was shown that the newspaper (or the TV station, as in the case of UHF) could not survive without subsidies from its local cross-media affiliate.

(Few if any of the affected newspapers, however, will need such subsidies. Most of the papers are, of course, monopolies. Of the approximately ninety-three newspaper-TV combinations, some sixty-three involve the only daily newspaper publisher in town. In eight others, the TV licensee is one of two publishers who share a monopoly through a joint-operating agreement. In all the remaining cases except New York City—where the paper involved is the *Daily News*, which seems solvent—there are now only two competing publishers, each of whom typically has the morning or evening market all to himself, a situation in which the paper should be profitable if it even remotely deserves to be. Even the Washington *Star*, which according to Joseph Goulden was "losing money in box-car lots" before buying out the *Daily News*, says it expects miraculously to be in the black on newspaper operations for the fourth quarter of 1972.)

The proposed rule would do little to bring new or independent owners into the mass media—as the *WHDH* decision did—but it would at least break up control of the dominant media outlets in each city. The result would be greater diversity and competition in local news coverage, in editorial points of view on local issues, in concepts of media service, and of course in the economic sphere. There would be a freer flow of news, commentary and criticism on the many stories in which one of the local outlets, or its owner, was interested. One can see advantages at both ends, for example, if *The Washington Post* were to swap its TV station in Washington for the one in Chicago owned by the Chicago *Tribune*, or for one of the newspaper-owned stations in Dallas or Houston.

After reiterating in April 1970 the proposal made by the Justice Department in August 1968, the FCC started all over again with another protracted process of receiving comments. This included four *more* extensions of time granted to the NAB and the American Newspaper Publishers Association (ANPA), before the process finally came to an end in August 1971. It is now more than a year since then, more than two and a half years since the FCC first aired the rule, and more than four years since the original nudge by the Justice Department. Yet the FCC still has not acted, and according to reports last fall in *Television Digest*, an authoritative

trade journal, it has put the newspaper-broadcast proposal "on the back burner."

The reasons for the delay are not hard to find. The FCC's proposal has been the target of all-out opposition by the newspaper and broadcast industries. NAB alone has raised and spent more than $300,000 in the fight. It has hired Lee Loevinger, who resigned as an FCC commissioner in 1968 to represent broadcast interests, as special counsel to present its case to the FCC. Numerous "studies" opposing the rule have been commissioned from the academic world and elsewhere (conspicuously absent is a public opinion poll), and scores of opposing comments prepared by Washington lawyers have descended on the FCC. (ANPA tells the commission that opposing comments have come from "more than 150 responsible and informed publishers, broadcasters, press associations, and other spokesmen for the nation's newspapers and broadcast stations"; while the proposed rules "have been supported so far by a *total* of only five pleadings.") Meanwhile, the industries have lobbied extensively to arouse opposition to the proposal from Congress and the White House.

And through it all the nation's news outlets, with only the fewest exceptions, have somehow overlooked the story. The FCC's proposal to break up some ninety newspaper-TV combinations in cities throughout the country, and some 230 newspaper-radio combinations, has received scant notice nationally and even less on the local level where its effect would be felt. As those legions of "responsible and informed publishers [and] broadcasters" have filed comments with the FCC opposing the breakup of their local combinations, one wonders why so few of them have found their actions worth reporting by the newspapers and broadcast stations involved.

Under cover of the blackout, the industry's lobbying campaign has paid off handsomely at the White House. The Administration's two chief spokesmen on media matters, Herbert Klein, communications director, and Clay T. Whitehead, director of the Office of Telecommunications Policy, have made the circuit of broadcasters' and publishers' conventions expressing White House opposition to the FCC's proposal. At an NAB convention in 1970, for example, Klein "praised newspaper ownership of stations." Whitehead told the ANPA convention last April that adoption of the proposal "would be a great mistake," adding: "We are much more concerned about performance than who gets to own what." President Nixon himself may have conveyed the same message during the private meeting he held with thirty leading broadcast executives at the White House on June 22. By supporting the industry and opposing the FCC's proposal, the White House is repudiating the position of its own Justice Department, which has continued to urge the FCC to adopt the rule.

Meanwhile, local media concentration is kept in suspension—and the status quo preserved—by a game of legal salugi whereby the FCC and the courts keep a resolution of the issue away from the public. With the unique exception of the *WHDH* case, the commission and the courts have been taking the position that challenges to the renewal of broadcast licenses held by local daily newspapers should not be considered on a case-by-case basis, since nonrenewal would mean "forfeiture" of the license. The issue should be considered instead, they have declared, in the context of an across-the-board rule such as the FCC has proposed, since that would allow for sale or exchange of the license involved (or of the newspaper).

In February 1970, for example, the Federal Court of Appeals in Washington sustained the FCC's renewal of one of the broadcast licenses held by the media empire of the Mormon Church in Salt Lake City, but only because the FCC "is seriously engaged in a sweeping policy review" of local media concentration. Last June, more than two years later, another panel of the same court similarly upheld the FCC's action in renewing, without a hearing on the concentration issue, the TV license held by the *Evening Star* in Washington. Again the court relied on the fact that "the FCC is currently investigating —in the context of the rulemaking proceeding—whether it should adopt rules which would require divestiture by newspapers or other multiple owners in a given market." But the FCC, after four years, continues to stall.

The apparent objective of those who oppose the rule, both within and outside the commission, is to keep the proceeding on ice at least until next summer. By then the FCC will have lost Commissioner Nicholas Johnson, who strongly favors the rule (his term ends in June), and probably also Chairman Burch, who may favor it (he is expected to resign). Nixon replacements can be expected to be safe for the industry on this issue. (So, probably, can Commissioner Benjamin L. Hooks, whom Nixon appointed last summer to fill one of the Democratic seats on the commission. Hooks, who is black, has stood up vigorously for the interests of minorities, while voting the industry line on other issues.)

Case-by-Case Approach: The Saga of KRON-TV

Turning to the arguments on the proposed rule, one finds—with a certain dizzy feeling—that while the FCC has rejected the case-by-case approach to renewal proceedings on the ground that the newspaper-broadcast issue should be handled by rule making, the chief ground on which the commission is urged to reject the proposed rule is that the issue should be handled through the case-by-case approach. As ANPA puts it, "The commission's asserted objectives of promoting diversification of viewpoints and economic competition in local markets can best be achieved on an *ad hoc* basis." And Herbert Klein of the White House, addressing an NAB meeting, chimes in: "While there is always a danger in having too much power in the hands of a few, cases ought to be examined individually. A blanket rule applying to everyone is not the answer."

Until recently, the case-by-case approach was easy to advocate because it had never been tried. It may now be examined, however, in the one case where the FCC has undertaken that kind of inquiry into alleged abuses of media cross-ownership. KRON-TV of San Francisco is owned by the Chronicle Publishing Co., publisher of the city's only morning newspaper (and partner, since 1965, in a joint-operating agreement with the only evening news-

paper, the Hearst-owned *Examiner).* The case that has been brought charges distortion of news on the TV station to advance the owner's newspaper interests; distortion of the newspaper's contents to promote the owner's TV interests; and distortion of TV news to promote the owner's interest in obtaining cable-TV franchises in the San Francisco area.

Ordinarily, allegations that a broadcast licensee has distorted the news to further his own interests will not be given a hearing by the FCC. It is not that the commission condones such conduct; on the contrary, it has declared that "slanting of the news amounts to a fraud upon the public and is patently inconsistent with the licensee's obligation to operate his facilities in the public interest." The reason lies, rather, in the FCC's declaration that it will "eschew a censor's role, including efforts to establish news distortion in situations where government intervention would constitute a worse danger than the possible rigging itself." The FCC therefore will not inquire into charges of news distortion unless presented with a special sort of evidence—"substantial extrinsic evidence of motives inconsistent with the public interest." To illustrate the kind of "extrinsic evidence" that would meet this test, the commission has regularly offered one example: "testimony of a station employee concerning his instructions from management," or documentary evidence of such instructions. "For example, if it is asserted by a newsman that he was directed by the licensee to slant the news, that would raise serious questions as to the character qualifications of the licensee. . . ."

Given this evidentiary threshold, it becomes apparent that if cases can only be "examined individually," as Herbert Klein suggests, they are unlikely to be examined at all, and not necessarily because abuses do not exist. Not many newsmen will be willing to blow the whistle on their employer by presenting the FCC with evidence of improper directives from management, an act that must be done publicly and is very likely to ruin the career of the newsman who does it.

However, in the *KRON* case that is what happened. Albert Kihn, a news cameraman who worked for KRON for eight years, became disenchanted with events in the newsroom, kept a diary and collected evidence, and in the fall of 1968, when the station's license was up for renewal, told his story to the FCC. (Kihn has not since been regularly employed in broadcast journalism.) On the basis of Kihn's allegations, the FCC held up renewal of the license and ordered a hearing to determine whether "the licensee has attempted to slant news and public affairs programs to serve its business interests."

The hearing was held in San Francisco for thirty-seven days in 1970. On March 1, 1971, the FCC's hearing examiner, Chester F. Naumowicz, Jr., resolved all the issues in favor of the KRON management and recommended renewal of the license. The FCC must review this recommendation and make the final decision (subject to court appeal), but as yet—almost two years later—it has not done so. Meanwhile, KRON continues to operate on the license issued in 1965 and not removed in 1968. When another three-year renewal period fell due in the fall of 1971, the station did not even file a renewal application. It thus avoided the "petitions to deny" filed against all the other major San Francisco TV stations by citizens' groups complaining of discrimination in hiring and programming. KRON has also avoided, by virtue of the FCC's hearing, any competing applications for its license that might have been filed in 1968 or 1971. The lesson seems to be that, the way the FCC runs things, not having a license is better than having one.

The facts in the *KRON* case, as determined by the hearing examiner, have a good deal of relevance to the FCC's proposed rule on newspaper-broadcast combinations. Notwithstanding his conclusion in favor of the station owner, the examiner's report demonstrates two things: *(1)* common ownership of more than one media outlet in the same city, and of a daily newspaper and a TV station in particular, does have harmful effects; and *(2)* the case-by-case approach is ill-suited to dealing with them.

Even while exonerating the KRON management of any "abuse" of its newspaper-TV cross-ownership, the examiner determined that the public had been harmed by the common control in at least one important instance. This occurred in September 1965, when the *Chronicle* and Hearst were about to put into effect the joint-operating agreement between their San Francisco newspapers. The agreement, signed in October 1964 but kept secret, not only stipulated joint publication of the *Chronicle* in the morning and the *Examiner* in the afternoon (with a 50-50 split of all profits from both papers), but also eliminated what was then San Francisco's third daily, the *News-Call Bulletin,* also published by Hearst.

As the hearing examiner found, the story of the up-

coming merger began to break in the week before its announcement by the two publishers on September 10, 1965. During this period two TV stations and various radio stations in San Francisco covered the story, reporting "such things as meetings of unions which might be affected, and alterations on the physical plants of the newspapers involved." But there was no coverage in any of San Francisco's three newspapers prior to the September 10th announcement, with the single exception that on September 5, "the *Chronicle* published a reference to it [the impending merger] based on a story from *The New York Times* wire service." Meanwhile, "no mention of the matter was made on KRON-TV" before the publishers' announcement.

The examiner found, as indeed was admitted, that KRON stayed mum on orders from the station's chief executive. When the story began to break elsewhere, KRON newsmen "importuned their superiors for permission to cover the story," but were denied. The station's chief executive, though a vice president of the Chronicle Publishing Co., was not aware of the joint-operating agreement, and at this point telephoned the *Chronicle*'s publisher to "ascertain the validity of the rumors." But the publisher "refused to comment," whereupon the station chief "issued the instructions which blocked the KRON newsmen from broadcasting the story until the newspapers issued a statement on the matter."

The examiner concluded that this was "a reasonable reaction to a unique and delicate situation, rather than an attempt to suppress news." While "obviously a local newspaper merger was highly newsworthy," any coverage by KRON "would be publicly regarded as based on 'inside' information," and since the station had no inside information, the public would have been misled. It was a situation "where neither course was free of hazards," and therefore "a decision to say nothing was not unreasonable."

It follows, then, that the newspaper-broadcast tie was necessarily harmful to the public's interest in the news. Whichever course the station took, the public would suffer—either through not hearing of a "highly newsworthy" story, or through being misled into thinking it was getting inside information when it wasn't. The situation, moreover, may well have been deliberate, but it was not unique. A similar problem arises whenever a broadcasting station is confronted with a potential news story involving a commonly owned newspaper, or vice versa—occasions by no means rare in these days of public interest in the mass media and the frequent controversies involving them.

Several other incidents in the *KRON* case show the difficulties of proving that common ownership had any effect on the station's news coverage. Even when management has plainly ordered special treatment for stories affecting its other media interests, the motive for the order may be impossible to prove, or it may be argued that no harm was done because there is no proof that the order was carried out. Thus, Kihn produced for the FCC two memoranda issued to the KRON news staff. The first required clearance by one of the station's three top executives before the broadcasting of any story "relating to the public relations image of any radio or television station in the 50 states and their parent companies and/or networks . . .," adding that the order did not apply to any publishing company "except, of course, the Chronicle Publishing Company." The second stated:

> You are all aware of company policy regarding the reporting of labor strife within the broadcasting industry and/or local newspapers. However, it has become apparent that some of you do not understand the full intent of this policy. It is therefore mandatory that any story relating to broadcast industry labor problems and/or local newspaper problems be cleared with the News Director *before* airing. . . .

KRON witnesses testified that the motive behind the memos was something other than self-interested news distortion. (The first was designed "to promote accuracy in stories concerning that with which [the management] was personally familiar," the second to counteract the feared pro-labor bias of the news staff.) The hearing examiner, however, found it unnecessary to consider the issue. Although a former KRON assignment editor testified "that the existence of these memos resulted in self-censorship by newsmen," the examiner dismissed them from consideration because "the record does not identify any story that was not covered, or that was covered differently, because these memos were extant."

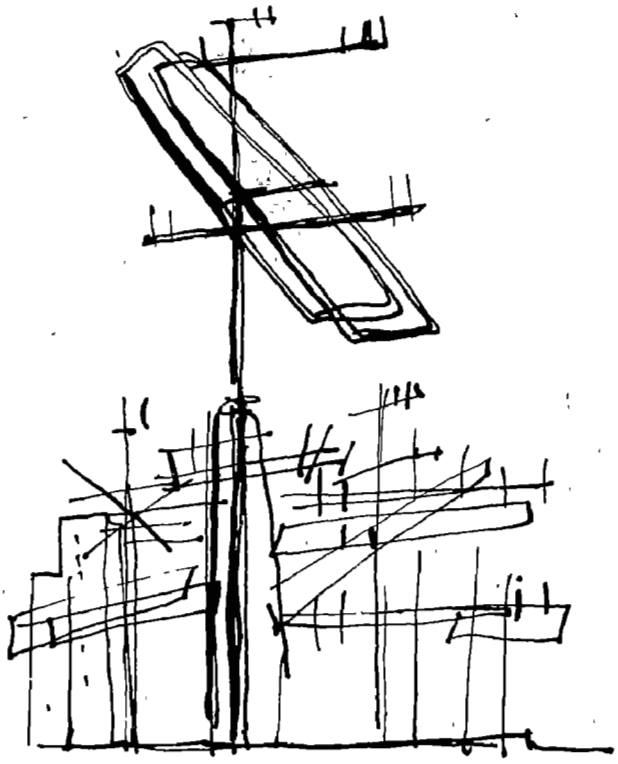
In other situations it was clear enough that a story was covered, not covered, or covered in a particular way under orders from management (lacking "extrinsic evidence" of this fact, the FCC would not have set the issue for hearing). The problem was to prove that management had given an order from improper, self-interested motive. The examiner laid down a strict burden of proof, approaching the standard for conviction of a crime. Since the FCC eschews "the role of a censor imputing improper motivation for programming of which it disapproves," he said, "adverse conclusions under this issue are to be reached only if KRON's improper motives have been established by the most clear, convincing and unambiguous evidence." Several incidents illustrated the problems of showing improper motive by this standard, and perhaps by any other.

One involved the municipality of South San Francisco, at a time when the *Chronicle* was competing there for the CATV franchise. KRON newsmen were told, in a memo from the news director dated December 20, 1966:

> Between now and the first of February, let us concentrate a little heavier on *South* San Francisco—if warranted. HPS would like to make those people happy. . . . ["HPS" was Harold P. See, president of KRON-TV and also of the *Chronicle*-owned cable-television company.]

A second memo from the news director, dated February 6, 1967, ordered coverage of a library dedication in South San Francisco and added: "HPS wants to make sure that the mayor of South SF is prominent in any film we do!" KRON covered the dedication, but most of the film it took was ruined by the laboratory, a fact that led See to write a letter of explanation to the Mayor of South San Francisco. See admitted the letter "was motivated by CATV considerations," but denied that "the dedication coverage was related to a CATV interest."

Weighing this evidence, the examiner found that it



demonstrated "an unusual interest in a political figure," but did not prove that See's motive in ordering the coverage arose from the CATV interest. See denied such a motive, and there was "no direct evidence in contradiction," the examiner said. "While such an intention might be inferred from . . . [the] February 6 memo, the inference could only be based on a conjectural choice of possible motives for See's interest in South San Francisco. If KRON is to be convicted on circumstantial evidence, the circumstances should be considerably less ambiguous."

Proof of the motive for a news decision is not supplied, moreover, by a statement of the news director. Several KRON newsmen testified that, in the South San Francisco incident and on another occasion when KRON's president ordered unusual news coverage to coincide with the *Chronicle*'s application for a CATV franchise, they asked the news director the reason for the special treatment, and he "responded that the coverage was relative to the seeking of a CATV franchise in that area." The examiner held this evidence to be "without probative weight." He explained:

> The individuals to whom [the statements] were attributed were middle management personnel whose duties were related to the operation of KRON as a television station, not the business activities of either the station or its owners. If, in fact, KRON programming was being used to advance *Chronicle*'s business interests, it would have been necessary to issue appropriate orders to these people, but it would have been neither necessary nor natural to have informed them of the motives for such orders. Hence, there is no presumption that their statements in this area are based on actual knowledge.

Proof of the business motive for a news directive can come, then, only from an executive high enough on the corporate ladder to be involved in the business activity. And as the examiner says, it would be "neither necessary nor natural" for such an executive to declare his improper motive. As long as top executives have the minimal prudence not to incriminate themselves out of their own mouths when they dictate news decisions, there is apparently no way to produce the necessary "direct proof" that their motive was improper.

The examiner's analysis of newsroom procedures also disclosed a dismal view of the professional journalist. In the examiner's opinion, when a newsman assigned to a story asks the reason for the coverage, and is given a reason by the news director, there is no basis for assuming the answer to be honest. As he explained:

> . . . If a newsman disagrees with an assignment or editing he can voice his objection with some assurance that his opinion will be considered. While final decision remains in the hands of a supervisor, he will tend not to simply give orders to a disagreeing employee but to provide some explanation for his action. Only thus can friction be avoided when the newsman, who is his own boss while covering the story, is obliged to conform to the decisions of others with respect to assignment and editing. However, since the supervisor's motive is usually not to conduct an exchange of ideas, but to secure the cooperation of his subordinate, his explanation for his actions may or may not be candid.

Thus, it is no part of the journalist's function to know the reason for what he is doing. If he asks, he may have to be given a reason, but only to avoid "friction" and "secure [his] cooperation." The journalistic process will work just as well, the management and the news director will be acting just as legitimately, regardless of whether the reason given is "candid."

Even if a top executive is foolhardy enough to admit an improper motive in the hearing of someone who will testify to the fact, he still has a line of protection. In two incidents in the *KRON* case, newsmen testified that they had indeed heard such statements from the mouths, or in the presence, of members of top management. Not surprisingly, the executives denied it, so the issue became a conflict of credibility between them and the newsmen. The examiner in both cases believed the executives and discredited the newsmen. One may wonder whether the contrary result would ever be reached, given the FCC's reluctance to declare a broadcaster a liar, especially as to his own motive, and given also the steep burden of proof the examiner adopted.

In any event, this is the issue the case will come down to. Even after the initial hurdle is surmounted by employee testimony as to questionable news orders from management, and after the other obstacles embedded in the case-by-case approach are overcome, the FCC will have to determine which of two witnesses is lying as to the motive for a news decision.

A final example involved alleged distortion of *Chronicle* editorial material to promote the owner's interest in the TV station. The FCC, in its hearing order, had cited an allegation that a *Chronicle* column by Charles McCabe "had been censored because the article urged 'citizens to contact the FCC about violence on television.'" At the hearing, McCabe testified that in his ten years of writing a daily column for the *Chronicle*, "perhaps a total of less than one hundred words has ever been censored from the content of my column, with one exception":

a column on TV violence, written after the death of Robert Kennedy, which urged readers to complain to the FCC and which the newspaper had "killed outright." McCabe's entire testimony was stricken from the record by the hearing examiner—notwithstanding inclusion of the item in the FCC's hearing order—on the ground that inquiry into what a newspaper prints would be inconsistent with the First Amendment.

If this ruling was correct, it may be asked how the FCC, using the case-by-case approach, can ever protect the public against the various possible abuses of newspaper-broadcast cross-ownership that may affect the content of the newspaper. The FCC has not hesitated to denounce in principle the slanting of content to promote an owner's ancillary interests, and has considered newspaper content in a number of such cases. For instance, it has frequently considered (but always found a pretext for rejecting) charges that a newspaper discriminates in favor of its own broadcast stations in its TV and radio listings and related material. Also, the commission has considered whether the two daily newspapers in Minneapolis-St. Paul used their sports coverage to coerce professional ball clubs into granting their broadcast rights to a local radio station jointly owned by the papers.

Yet in refusing to hear such testimony, the examiner had a point. Even though a newspaper's right to publish does not include the right to hold a broadcast license, and even though the FCC correctly insists that distortion by a newspaper to promote the interests of the station would be improper action by the licensee, and even though the FCC will hold a hearing only in the rare case presenting "extrinsic evidence" of such an abuse, a governmental inquiry into what a newspaper prints or does not print, and into its motive for doing so, must still cause discomfort. Whether or not it would be unconstitutional, such an inquiry should be avoided unless there is no other way to protect the public's interest in an undistorted flow of news (an interest sharpened, of course, by the absence of competing newspapers in the city).

The objections to such a proceeding are not limited, however, to issues involving the content of the newspaper. If it is undesirable for the FCC to probe the news decisions and underlying motives of a newspaper, it is undesirable for it to do the same thing with respect to a broadcast station. Yet that is what the *KRON* hearing mainly consisted of. Whatever one thinks of the facts of the *KRON* case or of the hearing examiner's decision, that kind of inquiry is at best a necessary evil, being difficult to square with the constitutional freedoms of the broadcast press. But under the case-by-case approach, such hearings are the only protection the public has against the most flagrant abuses of power by the owners of the dominant media outlets in cities throughout the country. As the *KRON* case illustrates, it is not much protection. In short, such hearings seem the worst of all possible worlds. Yet this is the case-by-case approach, so strongly touted by broadcasters, publishers and the White House as the preferred alternative to the FCC's proposed rule on newspaper-broadcast combinations.

What we have, in sum, is a shell game. Outraged by the *WHDH* decision, broadcasters and publishers have persuaded the FCC to renounce the case-by-case approach to media concentration in favor of rule making. Accordingly, the commission and the Court of Appeals have been refusing, out of deference to the pending rule-making proceeding, to consider the concentration issue when licenses come up for renewal. This has now gone on for more than four years, with no rule-making decision yet in sight. Meanwhile, the ground is prepared for the FCC eventually to abandon the proposed rule on the basis that the case-by-case approach—the approach illustrated by the *KRON* proceeding—is better after all.

It is improbable that the Court of Appeals will tolerate the FCC's inaction indefinitely, and the industry is therefore working on a permanent solution for its problem. It will be pushing in the new Congress for a license-renewal bill that would extend the license period from three to five years and require renewal—regardless of any "petitions to deny" or competing applications—if only the licensee has made a "good faith effort" to serve the public. The bill would prevent the FCC from considering media concentration in renewal proceedings, and would thus knock out permanently the case-by-case approach. It would leave a compliant FCC free to abandon the rule-making proposal, and hence to walk away from the problem of media concentration in American cities. While waiting for the bill to pass, however, the industry will find it useful to keep the rule-making proceeding alive, lest it lose its shield against case-by-case action. The FCC can be expected to accommodate this desire.

The Nixon Administration's license-renewal bill, announced by Clay Whitehead in December, is similar to the industry's own proposal. It would give the broadcasters the five-year renewal period and essentially what they want in the form of nearly ironclad protection against challenges or protests at renewal time. In return for this financial security, it cleverly seeks to require the station owners to censor network news to rid it of "ideological plugola" and "elitist gossip." While the controversies over news censorship and renewal standards are apt to get most of the attention, the Administration bill, like the industry's own, would also prohibit the FCC from pursuing the case-by-case approach to media concentration. It would thereby assure perpetuation of the monopolized status quo in the control of the nation's newspapers and TV stations. □