The Power of the FCC To Regulate Newspaper-Broadcast Cross-Ownership: The Need for Congressional Clarification

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Who art thou that judgest another man's servant? To his own master he standeth or falleth.

Romans 14:4

I. INTRODUCTION

The degree of concentration of ownership and control of the mass communications media has been the subject of intense debate in recent years. In February 1975, the Federal Communications Commission (FCC), which is vested with the responsibility of regulating the broadcast media to promote the public interest, responded to this issue by adopting its Second Report and Order. In the Second Report and Order, which was announced after several years of rulemaking activity that aroused considerable interest among

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2. In this Note, the Federal Communications Commission is referred to variously as the "FCC" or as the "Commission."

3. The broadcast media consists of television (UHF and VHF) and radio (AM and FM).


6. See, e.g., Notice of Proposed Rule Making, 33 Fed. Reg. 5315 (1968) (proposed rules prohibiting common ownership of broadcast stations in different broadcast services within the same market); Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, First Report and Order, 22 F.C.C.2d 306 (1970) ("one-to-a-customer" rules prohibiting common ownership of VHF-TV stations and radio stations in the same market, allowing ownership of AM-FM radio combinations in one market but severely limiting the creation of such combinations, and leaving the issue of common ownership of UHF-TV stations and radio stations in the same
governmental officials and the media, the Commission amended its rules concerning multiple ownership of broadcast stations so that an owner of a daily newspaper could not acquire a license to operate a broadcast station in the same market where the newspaper is published. The amendments also required a broadcast licensee market to be decided on a case-by-case basis; Amendment of §§ 73.35, 73.240, and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, Further Notice of Proposed Rulemaking, 22 F.C.C. 2d 339 (1970) (proposed prohibition of ownership, operation, or control of co-located broadcast outlets by newspapers, in order to limit ownership in any market to one or more daily newspapers, one television station, or one AM-FM radio combination). See also Comment, Media Cross-Ownership—The FCC's Inadequate Response, 54 Texas L. Rev. 336, 337-42 (1976).

Prior to 1968, FCC “duopoly” rules prohibited common ownership in a single market of more than one FM radio station, Rules Governing Standard and High Frequency Broadcast Stations, 5 Fed. Reg. 2382, 2384 (1940), more than one AM radio station, Multiple Ownership of Standard Broadcast Stations, 8 Fed. Reg. 16065 (1943), or more than one television station, Rules Applicable to Stations Engaged in Chain Broadcasting, 6 Fed. Reg. 2282, 2284-85 (1941). These rules were amended by both the First and the Second Report and Order and are codified at 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976). Several further amendments to these rules have been made. See Multiple Ownership of Standard, FM and Television Broadcast Stations, 42 Fed. Reg. 16145, 16148 (1977).


9. The term “owner” refers to anyone who “directly or indirectly owns, operates, or controls.” See 47 C.F.R. §§ 73.35(a), 73.240(a)(1), 73.636(a)(1) (1976); Second Report & Order, supra note 5, at 1099, 1101, 1103. The definition of “control” is “not limited to majority stock ownership, but includes actual working control in whatever manner exercised.” 47 C.F.R. §§ 73.35 Note 1, 73.240 Note 1, 73.636 Note 1 (1976); Second Report & Order, supra note 5, at 1099, 1102, 1104.

10. “[A] daily newspaper is one which is published four or more days per week, which is in the English language, and which is circulated generally in the community of publication.” 47 C.F.R. §§ 73.35 Note 10, 73.240 Note 10, 73.636 Note 10 (1976); Second Report & Order, supra note 5, at 1101, 1103, 1106.

11. Broadcast stations and newspapers are in the same market if they serve the same service area, defined by reference to a broadcast facility’s ground wave contours. Thus, if the 2 mV/m contour of an AM station, the 1 mV/m contour of an FM station, or the Grade A contour of a television station completely encompasses the community in which the newspaper is published, the broadcast station and the newspaper are in the same market. A radio or television station meeting one of these standards is said to have a “city-grade signal.” Second Report & Order, supra note 5, at 1106-07.

12. In effect, the amendments preclude all applications by daily newspaper pub-
who subsequently acquires a co-located newspaper to divest one of
the two properties within one year or before the expiration of his
license, whichever period is longer. In addition, the FCC ordered
the divestiture of newspaper-broadcast combinations in sixteen small
markets where the publisher of the only daily newspaper also di-
rectly or indirectly owned, operated, or controlled the only radio or
television station. Existing newspaper-broadcast combinations not
ordered to divest were not affected by the rules unless subsequently
sold, in which case the newspaper and the broadcast station must
be sold to different parties.

The Second Report and Order was appealed both by parties who
argued that the FCC lacked the statutory and constitutional authority
to promulgate newspaper-broadcast cross-ownership rules and by
parties who believed that the rules did not go far enough. On
March 1, 1977, the Court of Appeals for the District of Columbia
Circuit, in National Citizens Committee for Broadcasting (NCCB)
v. FCC, affirmed those rules forbidding the future formation or
transfer of co-located newspaper-broadcast combinations but vacated
the rules affecting existing combinations, holding that there should
be a presumption favoring divestiture. The court viewed divesti-
ture as the “most promising method for increasing diversity that does
not entail governmental supervision of speech.” Thus, with re-

13. Id. at 1107.
14. The markets were Anniston, Alabama; Hope, Arkansas; Albany, Georgia; Eff-
fingham, Illinois; Macomb, Illinois; Mason City, Iowa; Arkansas City, Kansas;
Owosso, Michigan; Meridian, Mississippi; Norfolk, Nebraska; Watertown, New York;
Findlay, Ohio; DuBois, Pennsylvania; Texarkana, Texas; Bluefield, West Virginia;
and Janesville, Wisconsin. Id. at 1098 apps. D & E.

The new rules required divestiture by January 1, 1980, if the only daily newspaper
of general circulation published in a community and the only radio or television sta-
tion(s) placing a city-grade signal over the entire community in daytime hours are
under common ownership. The owner of the combination must divest either the
newspaper or the broadcast station. Waivers may be granted on proper showing. Id. at
1106. Pursuant to this rule, nine newspaper-radio and seven newspaper-television
combinations were ordered broken up before January 1, 1980. Id. at 1098.

15. See 47 C.F.R. §§ 73.35, 73.240, 73.636 (1976), as amended by Multiple
Ownership of Standard, FM and Television Broadcast Stations, 42 Fed. Reg. 16145, 16148
(1977); Second Report & Order, supra note 5, at 1099-104.
17. See Broadcasting, Feb. 10, 1975, at 70.
18. 555 F.2d 938 (D.C. Cir. 1977).
19. Prior to the decision in NCCB, the FCC reconsidered its rules concerning
multiple ownership of broadcast stations and newspapers but did not materially alter
them. 53 F.C.C.2d 589 (1975).
20. 555 F.2d at 965.
pect to the retroactive aspects of the rule, Chief Judge Bazelon's opinion for the court concluded:

The Commission has sought to limit divestiture to cases where the evidence discloses that cross-ownership clearly harms the public interest. . . . [We] believe precisely the opposite presumption is compelled, and that divestiture is required except in those cases where the evidence clearly discloses that cross-ownership is in the public interest.21

The United States Supreme Court recently granted certiorari in NCCB.22

The controversy surrounding the FCC's Second Report and Order, its appeal, and the subsequent decision in NCCB raises basic questions concerning the statutory authority of the FCC to promulgate rules concerning newspaper-broadcast cross-ownership. This Note suggests that the FCC, notwithstanding judicial affirmation in NCCB of the Commission's authority to adopt such rules, might well be exercising more authority than Congress intended it to possess under the Communications Act of 1934.23 This Note therefore concludes that, irrespective of the merits of the Second Report and Order, Congress should reexamine and clarify the scope of the FCC's power in this regard.

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21. 555 F.2d at 966. This ruling would force the breaking up of over 50 newspaper-television station combinations and 120 newspaper-radio station combinations. N.Y. Times, Oct. 4, 1977, at 25, col. 1.


The petitions for certiorari appear most concerned with the issue of whether the NCCB court exceeded its proper reviewing role.
II. THE FCC'S PURPORTED RULEMAKING AUTHORITY FOR REGULATION OF NEWSPAPER-BROADCAST CROSS-OWNERSHIP

In the Second Report and Order, the FCC claimed authority to adopt rules prohibiting cross-ownership of newspapers and broadcast stations in the same market area pursuant to its "long standing policy of promoting diversification of ownership of the electronic mass communications media."²⁴ Although it did not cite any statute that specifically authorized the adoption of rules prohibiting newspaper owners from acquiring broadcast licenses, the Commission claimed that it derived general rulemaking authority from several provisions of the Communications Act, including section 4(i), which provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions,"²⁶ and section 303(r), which states that "the Commission from time to time, as public conve-

²⁴. Second Report & Order, supra note 5, at 1048. The FCC, citing Associated Press v. United States, 326 U.S. 1 (1945), affg. 52 F. Supp. 362 (S.D.N.Y. 1943), claimed that its diversification policy is derived from both the first amendment and antitrust law. In the district court opinion for Associated Press, Judge Learned Hand, in holding that certain bylaws of the Associated Press violated the antitrust laws because they restricted access to news, stated that

one of the most vital of all general interests [is] the dissemination of news from as many different sources, and with as many different facets and colors as is possible. That interest is closely akin to, if indeed it is not the same as, the interest protected by the First Amendment; it presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all. Associated Press v. United States, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). The Supreme Court affirmed the district court's opinion, stating that the first amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." 326 U.S. at 20. See generally Citizens Comm. to Save WEFM v. FCC, 506 F.2d 246, 270-83 (D.C. Cir. 1974) (Bazelon, C.J., concurring); Howard, Multiple Broadcast Ownership: Regulatory History, 27 Fed. Com. B.J. 1 (1974).

Although it noted that newspaper-broadcast cross-ownership rules are supported principally by first amendment considerations, the FCC in the Second Report & Order also cited antitrust policy "as a correlative source of authority for [a] diversification policy because requiring competition in the market place of ideas is, in theory, the best way to assure a multiplicity of voices." 50 F.C.C.2d at 1049. Even though the Supreme Court has held that the FCC is not empowered to decide antitrust issues, United States v. Radio Corp. of America, 358 U.S. 334 (1939), antitrust policy may be considered by the Commission in its determination of whether the public interest standard will be met in a particular situation. 358 U.S. at 351. In this regard, the Court has declared that

in a given case the Commission might find that antitrust considerations alone would keep the statutory standard from being met, as when the publisher of the sole newspaper in an area applies for a license for the only available radio and television facilities, which, if granted, would give him a monopoly of that area's major media of mass communications.

358 U.S. at 351-52. See also Bennett, Media Concentration and the FCC: Focusing with a Section Seven Lens, 66 NW. U.L. REV. 159 (1971).

nience, interest, or necessity requires, shall . . . [m]ake such rules and regulations, and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter."²⁶ In addition, the Commission found statutory authority for promoting diversification in its mandate to grant licenses in the public interest.²⁷ In this regard it cited section 309(a) of the Communications Act, which provides that

the Commission shall determine, in the case of each application filed with it . . . , whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.²⁸

Since the Communications Act gives the FCC the power to promulgate rules and appears to authorize the promotion of the policy of diversification of ownership, the FCC concluded in the Second Report and Order that it possesses the statutory authority to regulate newspaper-broadcast cross-ownership through rulemaking.

Although the Communications Act authorizes the FCC to grant or to deny a license to an individual in an ad hoc proceeding, the statute does not explicitly empower the Commission to make rules that prevent a particular class of applicants from acquiring broadcast licenses. It is clear from the Act that the FCC must regulate the broadcast media in a manner that promotes the public interest;²⁹ indeed, this standard has emerged as "the touchstone for the exercise of the Commission's authority."³⁰ Moreover, the long-standing policy of promoting diversification of ownership of the broadcast communications media, which was cited by the Commission as the principal justification for the Second Report and Order,³¹ has been deemed to be an important element of the public interest by both the Commission and the courts.³² However, section 309(a),³³ the provision governing the procedure for granting broadcast licenses,

²⁷ See Second Report & Order, supra note 5, at 1048.
²⁹ The statutory standard of "public interest, convenience, and necessity" is typically referred to as the "public interest." See FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940). The term "public interest," according to the Commission, encompasses many factors, including "the widest possible dissemination of information from diverse and antagonistic sources." Second Report & Order, supra note 5, at 1048 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).
³¹ Second Report & Order, supra note 5, at 1048.
allows the Commission to allocate licenses only by considering the public interest on a case-by-case basis in the context of each license application. Although courts have upheld FCC efforts to promote diversification in comparative ad hoc proceedings, in which the Commission must choose between two or more applicants for the same license, section 309(a) neither authorizes nor expressly prohibits the Commission from adopting rules that prevent an entire class of applicants from acquiring broadcast licenses.

III. Storer: Judicial Approval of Promoting Diversified Ownership

In United States v. Storer Broadcasting Co., the Supreme Court confronted the ambiguity of section 309(a) and recognized the authority of the FCC to promote diversified ownership through rule-making proceedings. In Storer, the petitioner challenged FCC multiple-ownership rules that prohibited broadcast licensees from acquiring more than a certain number of stations. Storer had earlier convinced the Court of Appeals for the District of Columbia that these rules emasculated section 309 of the Communications Act by denying Storer's application for a new television station without an

34. See, e.g., Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), cert. denied, 342 U.S. 830 (1951). In this case, Scripps-Howard owned one newspaper in Cleveland, where five AM radio stations and two daily newspapers existed entirely independent of Scripps-Howard control. Scripps-Howard was denied a broadcast license by the FCC, and the Court of Appeals for the District of Columbia, in upholding the FCC's denial, stated:

In considering the public interest the Commission is well within the law when, in choosing between two applicants, it attaches significance to the fact that one, in contrast with the other, is dissociated from existing media of mass communication in the area affected. . . . This is not to say a permit should be withheld from an applicant because it is otherwise engaged in the dissemination of news. . . . But where one applicant is free of association with existing media of communication, and the other is not, the Commission, in the interest of competition and consequent diversity, which as we have seen is a part of the public interest, may let its judgment be influenced favorably toward the applicant whose situation promises to promote diversity.

189 F.2d at 683.


36. See "duopoly" rules cited in note 6 supra. In 1953, these rules limited a licensee to one station within a service area and to a total of seven AM, seven FM, and five television stations. They also provided that ownership of 1% or more of the voting stock of a broadcast corporation would be considered equivalent to ownership, operation, or control of the station. When Storer applied to the FCC for licensing of a new television station in 1953, it was already licensed to own and operate three television stations, and its wholly owned subsidiaries were licensed to own and operate two more. In light of these facts, the FCC dismissed Storer's application as being inconsistent with the multiple-ownership rules. See Storer Broadcasting Co. v. United States, 220 F.2d 204, 205-06 (D.C. Cir. 1955), rev'd., 351 U.S. 192 (1956).

ad hoc hearing in which the company would have the opportunity to demonstrate that the acquisition of an additional station would not impair the public interest. The court of appeals stated:

The Commission freezes into a binding rule a limitation upon its consideration of the public interest in a respect in which the facts and circumstances may differ widely from case to case. It has decided in vacuo that there can never be an instance in which public interest, convenience and necessity would be served by granting an additional license to one who is already licensed for five television stations. The power so to decide has not been committed to the Commission.

In effect, the court of appeals concluded that whether a particular degree of concentration of control is compatible with the public interest is a matter that must be determined on a case-by-case basis with consideration of all of the factors embraced by the public interest standard. Thus, it held that the arbitrary limits imposed by the multiple-ownership rules were inconsistent with the hearing provisions of section 309(b).

On appeal the Supreme Court reversed, holding that the multiple-ownership rules were consistent with the powers accorded the FCC by the Communications Act. The Court noted that "[t]he challenged Rules contain limitations against licensing not specifically authorized by statute. But that is not the limit of the Commission's rulemaking authority. 47 U.S.C. § 154(i) and § 303(r) grant general rulemaking powers not inconsistent with the Act or law." Unlike the lower court, it did not read section 309 as a limitation upon the Commission's rulemaking authority. Instead, the Court stated that Congress intended the Communications Act "to assure fair opportunity for open competition" and that section 309(b) should not be interpreted to bar "rules that declare a present intent to limit the number of stations consistent with a permissible 'concentration of control.' " The Court said that the multiple-ownership rules simply "announce[d] the Commission's attitude on

38. See 220 F.2d at 209.
39. 220 F.2d at 208 (footnote omitted).
40. See 220 F.2d at 209. In 1960, the hearing provision was moved from § 309 (b) to § 309(e). Act of Sept. 13, 1960, Pub. L. No. 86-752, 74 Stat. 889, 891 (codified at 47 U.S.C. § 309(e) (1970)); see Citizens Communications Center v. FCC, 447 F.2d 1201, 1203 n.4 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972). Section 309(e) provides that a hearing must be held if a substantial and material question of fact arises in any application to which § 309(a) applies or if the Commission is unable to make a finding from the application alone of whether the public interest, convenience, and necessity would be served by granting the application.
42. 351 U.S. at 202-03.
43. 351 U.S. at 203.
44. 351 U.S. at 203.
public protection against such concentration,"\textsuperscript{45} and the Court was willing to defer to the FCC's judgment on this matter.\textsuperscript{46}

In response to the argument found crucial by the court of appeals—that the rules limited the Commission's consideration of the public interest in an area where facts and circumstances vary widely—the Court concluded that the Act's waiver provisions afforded the FCC ample opportunity to consider whether the applicant's request is consistent with the public interest. The Court stated that, for those applicants who have acquired the maximum number of stations allowed by the rules, the Act requires a full hearing only if the applicant presents adequate reasons why the rules should be waived or amended.\textsuperscript{47} In such a case, the FCC must necessarily decide whether the application of the rule in that specific instance serves the public interest; in the Court's view, the nature of this decision approximates the kind of choice made by the FCC when an applicant unaffected by any rule seeks a license. Thus, under the Court's analysis, the Commission, whether evaluating the merits of a request for the waiver of a rule or deciding whether to grant a license to an applicant who already satisfies the rule, must consider the public interest: \emph{"In each case that comes before it the Commission must still exercise an ultimate judgment whether the grant of a license would serve the 'public interest, convenience, or necessity.'"}\textsuperscript{48}

The result in \textit{Storer} is unassailable.\textsuperscript{49} By allowing the Commission to promulgate rules that prohibit a class of applicants—that is, those broadcasters already owning a certain number of stations—from obtaining broadcast licenses, the practical effect of the decision is to reduce the number of situations in which the FCC must engage

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\item \textsuperscript{45} 351 U.S. at 203.
\item \textsuperscript{46} See 351 U.S. at 203-04.
\item \textsuperscript{47} 351 U.S. at 205. An adequate reason for waiver, according to the Court, is one "sufficient if true, to justify a change or waiver of the Rules." 351 U.S. at 205. The FCC, however, strictly limits waiver grants. For example, in 1975 the FCC, without holding a hearing on the matter, announced that it would not grant a waiver of the newspaper-broadcast cross-ownership rules to Joseph Allbritton and the \textit{Washington Star}. According to one trade publication, in this announcement [the FCC . . . met the first real-world test of its newspaper-broadcast cross-ownership rules with a clear sign that it will be slow to grant the waivers it had left itself for hardship cases. . . . [T]he FCC's action contained a message that was presumably being read with interest in offices far from Washington: that the Commission will not be easily persuaded to grant waivers of its crossownership rules, particularly now, with the Star case as precedent. Broadcasting, Aug. 4, 1975, at 23. \textit{See generally} 46 Geo. L.J. 166, 168 (1957). In this light, it will probably become increasingly difficult to make a showing of "sufficient justification" to obtain a waiver hearing.
\item \textsuperscript{48} 351 U.S. at 205 (emphasis added) (quoting National Broadcasting Co. v. United States, 319 U.S. 190, 225 (1943)). In \textit{National Broadcasting}, the Court upheld the FCC's chain broadcasting regulations under which licenses were denied without individual hearings, which created a waiver issue identical to the one in \textit{Storer}.
\item \textsuperscript{49} \textit{But see} 46 Geo. L.J. 166, 169 (1957).
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in a comprehensive, particularized appraisal of all the factors that might affect the public interest. Although a broadcaster may still

50. By utilizing rulemaking rather than adjudicatory proceedings, see generally B. SCHWARTZ, ADMINISTRATIVE LAW 183-90 (1976), the FCC can reduce the number of situations in which a particularized appraisal must be made of all the factors that might affect the public interest. Of course, the FCC must consider all of these factors when deciding to grant or to deny a license application in an adjudicatory proceeding. See McClatchy Broadcasting Co. v. FCC, 239 F.2d 15 (D.C. Cir.), modified, 239 F.2d 219 (D.C. Cir. 1956), cert. denied, 353 U.S. 918 (1957); cf. Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677 (D.C. Cir.), cert. denied, 342 U.S. 830 (1951) (failure to make specific findings on each factor does not invalidate a ruling so long as the findings on the factors considered are sufficient to support the result). Similarly, the FCC must consider these factors when it promulgates a rule. See Radio Relay Corp. v. FCC, 409 F.2d 322, 326 (2d Cir. 1969). Once promulgated, however, such a rule might require the applicant to satisfy certain conditions before the agency will hold an adjudicatory hearing to consider all factors in the public interest. Such conditions precedent might mandate that the applicant show both the presence of particular factors deemed to be of special public importance that favor the approval of his application and the absence of certain factors that especially support the denial of the application. See, e.g., Second Report & Order, supra note 5, at 1074-75 (after considering how newspaper ownership of broadcast stations might affect the public interest by limiting media diversity, the Commission concluded that diversification of ownership was such an important factor that FCC rules should provide that newspaper owners are precluded from acquiring broadcast stations located in the newspaper's market). Thus, a rule limits the number of instances in which all of the factors need be considered.

In short, it is clear that in an adjudicatory proceeding the FCC must consider all factors relevant to the public interest in determining whether to grant or deny an application for a broadcasting license. Yet no hearing is required if an application does not satisfy a rule validly enacted by the FCC, which must have considered all the relevant factors in promulgating the rule. Moreover, a waiver of the rule is not called for by the applicant's showing that in his case the public interest would best be served by discounting the factor deemed to be of special importance in the FCC rule. See note 51 infra.

In contrast to the FCC rules that disqualify a particular group of applicants for broadcasting licenses—such as the multiple-ownership rules in Storer and in the Second Report and Order, supra note 5—Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), clarified, 463 F.2d 822 (D.C. Cir. 1972), concerned an FCC policy statement that favored renewal applicants and, in effect, rejected other fully qualified applicants without a hearing. See Policy Statement on Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424 (1970). Petitioners challenged this policy statement on the ground that it violated the hearing provision of § 309(e) of the Communications Act, see note 40 supra, and that its method of enactment did not comply with the Administrative Procedure Act, 5 U.S.C. § 551(4) (1970), which requires that certain procedures be followed in rulemaking proceedings. Petitioners did not challenge the propriety of the FCC's action. 447 F.2d at 1204 n.5. The court did scrutinize the § 309 challenge and held that the policy statement violated that provision because it failed to provide license applicants with a full hearing in which all the relevant criteria are considered:

The Commission cannot ignore a material difference between two applicants and make findings in respect to selected characteristics only. * * * It must take into account all the characteristics which indicate differences, and reach an over-all relative determination upon an evaluation of all factors, conflicting in many cases.

447 F.2d at 1213 (quoting Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 356-57 (D.C. Cir. 1949)) (emphasis added). The Court stated that this result was not inconsistent with Storer.

Whatever the power of the Commission to set basic qualifications in the public
request a waiver of the FCC rule and force the agency to consider all of the factors relevant to the public interest, the rule does create a presumption against the applicant in this situation that does not exist in an ad hoc proceeding.\textsuperscript{51} It is patently reasonable that the FCC, vested with the authority to regulate the broadcast media, may create such presumptions against broadcasters,\textsuperscript{52} since no benefit can be derived from conducting hearings in situations where a particular factor—in this case, diversity of ownership—is so important that it almost always overrides all other considerations.

IV. \textbf{NCCB: Judicial Approval of FCC's Rulemaking Authority}

Certainly the Communications Act as interpreted in \textit{Storer} vests interest and to deny hearings to unqualified applicants, the cases cited above [including \textit{Storer}] cannot be read as authorizing the Commission to deny qualified applicants their statutory right to a full hearing on their own merits. 447 F.2d at 1212 n.34 (emphasis original). \textit{See also} 447 F.2d at 1213 n.36; note 63 infra and accompanying text. The court also noted that the FCC in a rulemaking proceeding—as opposed to adjudicatory hearings or policy statements—could specify standards for renewal if such rules were consistent with the public interest. 447 F.2d at 1213 n.35. The court also "note[d] with approval that such rule making proceedings may soon be under way." 447 F.2d at 1213 n.35. For the status of the proceedings on renewal standards, see Docket No. 19154, 43 F.C.C.2d 1043 (1973).

\textsuperscript{51} For example, suppose five factors determine whether the FCC grants a broadcasting license in each case. Suppose further that factor A, diversity of media ownership, usually has a weight of 10, while the other four factors usually have a weight of one each. In the absence of rules prohibiting concentration of media ownership, the FCC is forced in every case to make a particularized appraisal and showing that 10 is greater than the combined weights of factors B, C, D, and E. However, when the FCC in a rulemaking proceeding determines that 10 is usually greater than the combined weights of B, C, D, and E, an applicant requesting a waiver to the rule bears the burden of proving that in his case diversification of ownership is not the dominant consideration. Thus, even if waivers are occasionally granted, the establishment of a rule nevertheless reduces the number of instances of particularized appraisal by the FCC.

\textsuperscript{52} The judiciary has recognized that the license applicant who must request a waiver hearing in order to seek a license is subject to greater burdens than the applicant who is barred by no rule and thus can move directly to the ad hoc proceeding. The applicant desiring waiver must plead "specific facts and circumstances which would make the general rule inapplicable." Tucson Radio, Inc. (KEVT) v. FCC, 452 F.2d 1380, 1382 (D.C. Cir. 1971). Reviewing courts are reluctant to order agencies to carry out waiver proceedings; "[i]t is a heavy burden traditionally has been placed upon one seeking a waiver to demonstrate that his arguments are substantially different from those that have been carefully considered at the rulemaking proceeding." Industrial Broadcasting Co. v. FCC, 437 F.2d 680, 683 (D.C. Cir. 1970). \textit{See also} American Tel. & Tel. Co. v. FCC, 539 F.2d 767, 775 (D.C. Cir. 1976). \textit{See generally} Washington Util. & Transp. Commn. v. FCC, 513 F.2d 1142, 1160-65 (9th Cir.), \textit{cert. denied}, 423 U.S. 836 (1975).

Although it is not implausible that Congress sought to vest the FCC, which is charged with the authority to regulate the broadcast industry, with the power to relegate certain broadcasters to the waiver procedure, it can be disputed, in view of the burdens imposed, whether Congress intended the FCC to be able to require nonbroadcasters to forgo the hearing requirement of \textsection 309(a) and use the waiver procedure.
the FCC with the general power to pursue the policy of diversification of ownership by adopting rules that prohibit certain broadcasters from obtaining licenses. Moreover, the policy considerations discussed earlier with respect to the multiple-ownership rules in *Storer* are equally indicative of the need for rules to regulate media cross-ownership. It is questionable, however, whether the Act enables the FCC to make rules that prohibit the licensing of all members of a group who are not broadcasters, since broadcasting is the only media expressly covered by the Act and *Storer* involved rules that regulated only the holdings of broadcasters. Thus, it is by no means certain that the Act allows the FCC to adopt a rule preventing newspaper owners from obtaining licenses for co-located broadcast stations.

53. *Storer* contains language suggesting that a narrow reading of the case is not unreasonable. In discussing whether Storer had standing to challenge the FCC rules, the Court stated: "The regulations here under consideration presently aggrieve the respondent. The Commission exercised a power of rulemaking which controls broadcasters." 351 U.S. at 199 (emphasis added).

That the FCC can consider a broad range of factors unrelated to broadcast communication itself—such as newspaper ownership—in the context of ad hoc hearings is clear. See note 54 infra.

54. See Reply Comments of the American Newspaper Publishers Association in Opposition, at 7 (filed August 18, 1971), *In re Amendment of Sections 73.35, 73.240 and 73.636 of the Commission's Rules Relating to Multiple Ownership of Standard, FM and Television Broadcast Stations, FCC Docket No. 18110*, Congress, the courts, and the FCC all agree, however, that the Commission "can consider the fact that a broadcast applicant is a newspaper . . . in the context of ad hoc licensing proceedings." *Id.* See, e.g., McClatchy Broadcasting Co. v. FCC, 239 F.2d 15, 18 (D.C. Cir.), modified, 239 F.2d 19 (D.C. Cir. 1956), *cert. denied*, 353 U.S. 918 (1957); Orlando Daily Newspapers, Inc., 11 F.C.C. 760, 767-68 (1946) ("[I]n considering conflicting applications between an applicant having no newspaper interests and one controlling newspapers, particularly where no other daily papers are published in the community, the Commission has on numerous occasions favored the former."); See also Massachusetts Bay Telecasters, Inc. v. FCC, 261 F.2d 55, 63 (D.C. Cir. 1958), *modified*, 295 F.2d 131 (D.C. Cir.), *cert. denied*, 366 U.S. 918 (1961); Scripps-Howard Radio, Inc. v. FCC, 189 F.2d 677, 683 (D.C. Cir.), *cert. denied*, 342 U.S. 830 (1951); Easton Publishing Co., 17 F.C.C. 942, 973-74 (1953); Lubbock County Broadcasting Co., 16 F.C.C. 293, 323-24 (1951); Heckman, *Diversification of Control of the Media of Mass Communication—Policy or Fallacy?*, 42 Geo. L.J. 378 (1954).

The Commission has acknowledged that "there is no basis in fact or law for finding newspaper owners unqualified as a group for future broadcast ownership." *Second Report & Order*, supra note 5, at 1075. For this reason the Commission limited the geographic effect of its cross-ownership rules. *Id.* Moreover, the Communications Act does not exclude newspaper publishers from eligibility for broadcast licenses; it excludes only aliens, foreign controlled corporations, and those whose licenses have previously been revoked for violations of the antitrust laws in the communications field. 47 U.S.C. §§ 310(a), 313(b) (1970 & Supp. V 1975). *But cf.* the statement of Senator Clarence Dill, author of the Communications Act of 1934, quoted in Note, *Antitrust—"Cross-Media" Ownership and the Antitrust Laws—A Critical Analysis and a Suggested Solution*, 47 N.C.L. Rev. 794, 810 n.97 (1967):

If I had dreamed that newspapers would acquire radio and television stations, I would have written a prohibition into the act. Certainly newspapers which occupy monopoly positions in a city should not be permitted also to own radio and television stations. This country cannot afford to have monopoly over public opinion any more than it can afford to have monopoly in industry.
Furthermore, although a newspaper owner can force the FCC to conduct a waiver hearing to consider all the factors affecting the public interest, it is not clear that Congress intended to empower the FCC to promulgate rules that create presumptions against nonbroadcasters and that relegate them to the waiver process for obtaining licenses.

The FCC concluded in the Second Report and Order that it did possess the power to regulate newspaper-broadcast cross-ownership, and, in NCCB, the Court of Appeals for the District of Columbia Circuit was quick to agree with the Commission's conclusion. The court cited those provisions of the Communications Act—sections 4(i), 57 303(r), 58 and 309(a) 59—that authorize the FCC to regulate broadcast licensing and then stated:

In United States v. Storer Broadcasting Co., the Supreme Court upheld a portion of the Commission's multiple ownership rules promulgated under these provisions. In essence, Storer permits the Commission to codify in rule its understanding, if reasonable, of the public interest licensing standard. . . . Here, the Commission has determined the public interest would not be served by granting broadcast licenses to newspapers and [earlier in the opinion] we held this policy was reasonable. It requires no extension of Storer to conclude the Commission possessed statutory authority to impose the prospective ban. 60

The ease with which the court concluded that Storer was dispositive of the appeal of the Second Report and Order is somewhat troublesome. Certainly the rules upheld in Storer and those affirmed in NCCB are grounded on the same policies—promoting diversification of mass media ownership and, concomitantly, furthering "the widest possible dissemination of information from diverse and antagonistic sources." 61 Yet it is not clear that the Communications Act authorizes the FCC to pursue such policies by regulating nonbroadcasters. In effect, the reasoning of NCCB would allow the Commission to adopt a rule prohibiting newspaper owners, dentists, or any other specified group from obtaining a broadcast license if the Commission can demonstrate in a valid rulemaking proceeding that such a rule would be in the public interest. It is not obvious that Congress intended the Act to reach this far.

The NCCB court recognized this difficulty of statutory breadth when it stated that "the rules under review [do not] involve regula-

55. See text at notes 24-28 supra.
56. 555 F.2d 938 (D.C. Cir. 1977).
60. 555 F.2d at 951 (citation and footnote omitted).
tion of an industry over which the Commission lacks jurisdiction. The prospective ban simply imposes qualifications for broadcast licenses.\textsuperscript{62} Literally speaking, the court is correct: its opinion simply reflects the position that newspaper owners as a class are "unqualified" to own co-located broadcast stations.\textsuperscript{63} Yet it is possible that Congress never intended to vest the FCC with the authority to make this type of qualification. Even if Congress intended to allow the FCC to consider newspaper ownership as one factor among many others in an ad hoc proceeding,\textsuperscript{64} it does not necessarily follow that Congress meant to give the FCC the power to deem all co-located newspaper-broadcast combinations to be ipso facto contrary to the public interest.\textsuperscript{65} It therefore is necessary to consider directly the extent of power Congress intended to vest in the FCC in order to determine whether the Commission has the power to prescribe the rules affecting newspaper owners announced in the Second Report and Order.

V. \textsc{Congressional Intent Regarding FCC Rulemaking Power}

Resolution of the question whether Congress intended the FCC to be able to prescribe rules affecting newspaper owners as a class is aided by examination of the history of FCC actions involving newspaper ownership and of the congressional response to these actions. In January 1937, three years after the adoption of the Communications Act, Senator Burton Wheeler, Chairman of the Senate

\textsuperscript{62} 555 F.2d at 952 n.41.

\textsuperscript{63} The court declared that "it is reasonable for the Commission [through rule-making] to consider newspapers as 'unqualified' to acquire licenses in the city of publication." 555 F.2d at 955 n.52. \textit{See note 54 supra.}

\textsuperscript{64} \textit{See note 54 supra.}

\textsuperscript{65} This analysis is subject to criticism, however. The Court in \textit{NCCB} asserted that no extension of \textit{Storer} was required to uphold the Second Report and Order, \textit{see text at note 60 supra}, and thus the arguments used to validate the multiple-ownership rules in \textit{Storer} can be used to criticize the position that the rules in the Second Report and Order are invalid. Thus, the waiver provisions, to the extent that they were found sufficient to protect broadcasters in \textit{Storer}, arguably are adequate to protect newspaper owners affected by the Second Report and Order. \textit{See} 555 F.2d at 955 n.51. In addition, \textit{Storer} held that, notwithstanding the absence of express authorization in the Act, the FCC can promote diversification by promulgating rules that limit the number of stations a licensee may own; this holding suggests that the Act's lack of express language authorizing newspaper-broadcast cross-ownership rules should not bar FCC regulatory efforts. However, both of these arguments suffer from a weakness noted earlier, \textit{see text at notes 60-62 supra}, in that they assume that the Communications Act was intended to authorize the FCC to regulate newspaper owners and all other nonbroadcasting groups. Although it may be that the opportunity for waivers in fact does adequately protect the interest of newspaper owners, it is not certain that Congress intended to allow the FCC to require nonbroadcasters to resort to the waiver procedure as the sole method for acquiring a license.
Interstate Commerce Committee, asked for "an opinion from the Chief Counsel of the [FCC] on the question as to whether or not the Commission has the authority, at the present time, to deny an application of a newspaper for radio facilities, on the ground that it is against public policy." The FCC, in an opinion prepared by Hampson Gary, the Commission's first General Counsel, concluded that

the Commission does not have the authority, under the existing law and in the absence of an expression of public policy on the subject by the Congress, to deny an application to a newspaper owner for radio facilities solely upon the ground that the granting of such an application would be against public policy.

The opinion went on to state that the Commission had the duty to examine all the facts concerning a license application, including "the business connections of the applicant, newspaper or other," and that the Commission could deny a newspaper owner a broadcast license if upon all the facts it could not find that granting a license would serve the public interest.

Although the Gary opinion can be interpreted in several ways,


Opponents of the newspaper-broadcast cross-ownership rules have cited the Gary opinion as a long-standing administrative interpretation that took a restrictive view of the Commission's authority. They have argued that the opinion is entitled to great authoritative weight because it involved an early construction of the Communications Act by the FCC's first General Counsel, who should have been uniquely aware of Congress' intent in passing the Act. See Comments of American Newspaper Publishers Association in Opposition, supra note 66, at 16-17. See generally Norwegian Nitrogen Prod. Co. v. United States, 288 U.S. 294, 315 (1933); 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 5.06 (2d ed. 1958).

However, in Second Report & Order, supra note 5, at 1051, the FCC developed four reasons to justify its decision to treat the Gary opinion as irrelevant to the question whether the Commission could prohibit newspaper-broadcast cross-ownership. First, the Gary opinion dealt with ad hoc comparative proceedings rather than rule-making proceedings. Second, the opinion was concerned with denying licenses to all
a proper analysis indicates that the opinion is not relevant to a determination of the FCC's authority to prohibit newspaper-broadcast cross-ownership. Critics of the Second Report and Order can argue that the Gary opinion intimates that the FCC cannot deny broadcast licenses to individuals solely because they own newspapers, which in turn suggests that a rule prohibiting newspaper-broadcast cross-ownership is invalid. However, Gary was responding to the question whether the FCC had the power to deny a license application to a newspaper owner on the ground that granting the license would violate a public policy standard, not whether the FCC may promulgate a rule affecting all such owners based on the Communication Act's public interest standard. Thus, as the court in NCCB correctly observed, the Gary opinion does not provide any relevant insight into how the FCC viewed its mandate at an early stage in the Commission's development.

The Commission next focused on cross-ownership in 1941, when it initiated an extensive three-year investigation of newspaper ownership of broadcast facilities. After compiling a massive record, the Commission dismissed the proceedings without promulgating any new rules: “The Commission has concluded, in the light of the record in this proceeding and of the grave legal and policy questions involved, not to adopt any general rule with respect to newspaper ownership of radio stations.” Although the Commission did not elaborate upon the nature of the “grave legal and policy questions.”

newspaper owners rather than just to those who seek licenses for broadcasting stations existing in the same locale as the newspapers they own. Third, prior statements by a regulatory agency regarding its jurisdiction are not determinative of the legality of any subsequent efforts to assert jurisdiction, see, e.g., United States v. Southwestern Cable Co., 392 U.S. 157, 169-70 (1968). Fourth, the problems of cross-ownership and concentration of media ownership are much different today than they were in 1937.

71. 555 F.2d at 951-52.
72. FCC Order No. 79, 6 Fed. Reg. 1580 (1941); FCC Order No. 79-A., 6 Fed. Reg. 3302 (1941). The Commission undertook this investigation, which was the only inquiry dealing with newspaper-broadcast cross-ownership prior to the proceedings that resulted in the Second Report and Order, as part of its early efforts to formulate policies for the licensing of FM stations. The study was subsequently expanded to cover the general problem of newspaper ownership of radio stations. See Legal Memoranda in Support of Comments of American Newspaper Publishers Association, supra note 67, Memorandum F, at 6.
73. The investigation lasted three years, during which time the Commission took extensive written and oral testimony from leading experts in the fields of news dissemination and the law. The record of the proceedings consisted of over 3500 pages and 400 exhibits. See Legal Memoranda in Support of Comments of American Newspaper Publishers Association, supra note 67, Memorandum F, at 6; Foley, supra note 69, at 11, 13.
one contemporaneous account of the investigation suggested that the FCC feared encroaching upon the freedom of the press. This indication that the FCC at one point questioned its own authority to promulgate a newspaper-broadcast cross-ownership rule, though seemingly relevant to a determination of the validity of the Second Report and Order, was not mentioned by the court in NCCB.

At the conclusion of its investigation, the Commission forwarded a summary of the evidence accumulated during the proceedings to appropriate congressional committees. As a result of the Commission's investigation, various proposals to prohibit the FCC from "discriminating" against newspapers when granting broadcast licenses were introduced in Congress during the 1940s. The legislative history suggests that Congress failed to enact these proposals because it thought the FCC lacked the authority to adopt a rule that prohibited approving license applications from newspaper owners.

The first proposal was the White-Wheeler bill, which, as subsequently incorporated into the White-Wolverton bill, sought to add a new section to the Communications Act prohibiting the Commission from making a rule "to effect a discrimination between persons based upon race, religious or political affiliation or kind of lawful occupation or business association." The principal intent of this section was to prohibit the FCC from promulgating a rule that prevented newspaper owners from obtaining broadcast licenses.

75. Foley, supra note 69, at 15, stated that "[t]here was a general agreement among several of the witnesses that a general rule excluding newspapers from the obtaining of licenses to operate radio stations would be a limitation on a free press.

76. Although the FCC's hearings ran only from July 1941 to February 1942, the Commission did not officially close the proceedings and send a summary of the evidence to Congress until January 1944. According to the Commission, it forwarded the evidence to Congress "in order to inform them of the facts developed by the investigation and for any consideration which they may decide to give the matter." Fed. Reg. 702-03 (1944). However, Congress had already commenced hearings on the White-Wheeler Bill, S. 814, 78th Cong., 1st Sess. § 32 (1943), discussed in text at notes 79-84 infra, by the time it received the summary of evidence from the FCC. See Hearings on S. 814 Before the Senate Comm. on Interstate Commerce, 78th Cong., 1st Sess. 406 (1943).


81. Id.

82. See S. Rep. No. 741, 81st Cong., 1st Sess. 2 (1949). See also Hearings on S. 1973 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 81st Cong. 1st Sess. 20-21 (1949) (quoting remarks of acting FCC Chairman Rosel Hyde on the subsequent 1949 McFarland proposal, which contained relevant language identical to the White-Wolverton bill: "The principal intent of the section is, of course, to outlaw the possibility of any rule excluding newspaper owners from owning radio stations").
In testimony before a Senate subcommittee, acting FCC Chairman Charles Denny stated that the proposed section merely reflected current Commission practice and that a newspaper owner was qualified to become a radio station licensee.\(^83\) Consideration of the proposal was subsequently terminated in 1947.\(^84\)

In 1949 a virtually identical antidiscrimination proposal was introduced by Senator Ernest McFarland as part of a bill intended to revise several sections of the Communications Act.\(^85\) Testifying before a Senate subcommittee, acting FCC Chairman Rosel Hyde stated that, although the Act contained no language expressly prohibiting the Commission from adopting a rule preventing all persons engaged in a particular business—such as publishing newspapers—from obtaining a license, the Commission nevertheless did not have the authority under the Act to promulgate such a rule even if it were believed to be in the public interest.\(^86\) The subcommittee, persuaded by Chairman Hyde's testimony,\(^87\) subsequently eliminated the antidiscrimination proposal from the bill. In its report on the bill ultimately sent to the Senate floor, the full committee explained the decision to delete the antidiscrimination proposal as follows:

It should be distinctly understood that in eliminating the section the committee has done so solely because the Commission is now following the procedure which was outlined in the section, has testified that it intends to follow that procedure, and that it is of the opinion that it has no legal or constitutional authority to follow any other procedure.\(^88\)

The Senate approved the committee's recommended amendments to the Communications Act,\(^89\) and the bill then went to the House of Representatives for consideration. The House committee to which the bill was assigned added an antidiscrimination provision, the so-called "newspaper amendment,"\(^90\) similar to the amendments

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\(^83\). See Hearings on S. 1333 Before the Subcomm. of the Senate Comm. on Interstate and Foreign Commerce, 80th Cong., 1st Sess. 44 (1947).

\(^84\). See Comments of American Newspaper Publishers Association in Opposition, supra note 66, at 18.

\(^85\). Section 14 of S. 1973, 81st Cong., 1st Sess. (1949), as originally proposed, was intended to add § 332 of the Communications Act. It provided:

Sec. 332. No sanction shall be imposed or substantive rule or order be issued except within jurisdiction delegated to the Commission and as authorized by law. The Commission shall make or promulgate no rule or regulation of substance or procedure, the purpose or result of which is to effect a discrimination between persons based upon race, religious or political affiliation or kind of lawful occupation or business association.


\(^87\). See S. REP. No. 741, 81st Cong., 1st Sess. 2-3 (1949).

\(^88\). Id.

\(^89\). 95 Cong. Rec. 11048-52, 11090 (1949).

\(^90\). See Comments of American Newspaper Publishers Association in Opposition,
that had been considered by the Senate committee. During debate on the House floor, Congressman Oren Harris explained that the purpose of the antidiscrimination provision was "to make it clear beyond any reasonable doubt that the Communications Act does not authorize adoption by the Commission of any blanket rule or any arbitrary policy with respect to the granting of radio or television stations to newspapers."91 The package of amendments to the Communications Act subsequently passed by the House included the newspaper amendment.92 The Senate-House conference committee handling the bill, however, deleted the newspaper amendment, concluding that an antidiscrimination provision was unnecessary. In the committee's view, the existing Act did not authorize the Commission to promulgate a rule that would deny an individual a broadcast license because he owned a newspaper.93

It is difficult to discern why Congress concluded that the Communications Act did not authorize the Commission to promulgate rules regulating newspaper ownership of broadcast stations.94 The clearest expression of Congress' reasoning exists in a Senate committee report of that time: referring to the FCC's efforts in the 1940s to promulgate a newspaper-radio cross-ownership rule, the committee noted that the FCC's "threatened action was of questionable constitutional validity, particularly in the absence of specific authority in the basic act to adopt such a rule."95 Although the committee failed to indicate which portions of the Constitution such a rule might violate, presumably the fifth and first amendments are the most logical provisions upon which to challenge the rule.

The committee might have believed that a cross-ownership rule applicable only to newspaper owners would violate the equal protection requirement inherent in the due process clause of the fifth amendment. The Communications Act does not permit the FCC to construct "arbitrary and capricious classification[s] of entities by irrelevant standards."96 Thus, if Congress believed that no rational

91. 98 Cong. Rec. 7420 (1952).
92. Id. at 7421.
93. The conference committee expressed the opinion that "under the present law the Commission is not authorized to make or promulgate any rule or regulation the effect of which would be to discriminate against any person because such person has an interest in, or association with, a newspaper or other medium for gathering and disseminating information." H.R. Rep. No. 2426, 82d Cong., 2d Sess. 18-19 (1952).
96. Comments of the United States Department of Justice, at 17 (filed May 19,
reason existed to apply special rules to newspaper owners, it would have assumed that the Commission had no power to make a newspaper-broadcast cross-ownership rule. It is unlikely, however, that Congress was thinking in these fifth amendment terms. Even as the congressional committee hearings on the various Communications Act amendments were being held, the Commission was taking newspaper ownership into consideration when denying broadcast license applications in ad hoc comparative proceedings. Because courts had upheld the results of these proceedings, Congress presumably realized that the standards used by the FCC to determine whether to grant a license—including newspaper ownership—were not irrelevant, arbitrary, or capricious, and therefore not violative of the fifth amendment.

A more plausible explanation of congressional concern is that Congress believed that a rule denying broadcast licenses to newspaper owners might violate the first amendment's protection of the freedom of the press. Clearly the principal thrust of the antidiscrimination amendments proposed in Congress was to prevent discrimination against newspapers, and this may imply that first amendment considerations prompted Congress' narrow view of FCC authority. Moreover, concern for freedom of the press was emphatically raised in the course of committee hearings.

Although the congressional rationale for concluding that the Communications Act did not authorize the FCC to promulgate newspaper-broadcast cross-ownership rules is unclear, a decision of the Court of Appeals for the District of Columbia, which was announced during the FCC's 1941-1944 investigation of newspaper ownership of broadcast facilities, reached the same conclusion and implicitly based this determination on the first amendment grounds. In *Stahlman v. FCC*, the appellant, a newspaper publisher, re-
fused to comply with an FCC subpoena on the ground that it was issued in connection with an investigation that the Commission was not authorized to undertake. The court concluded that the FCC did possess the general power to conduct the proceeding, and therefore the court required the appellant to respond to the subpoena. In dicta, however, the court stated that, if the investigation had been undertaken solely for the purpose of considering or adopting a rule rendering newspaper owners ineligible to receive broadcast licenses, the inquiry would have been "wholly outside of and beyond any of the powers with which Congress has clothed the Commission." The court then suggested that a rule banning newspaper ownership of broadcast stations would violate the first amendment because it "would be in total contravention of that equality of right and opportunity which Congress has meticulously written into the Act, and likewise in contravention of that vital principle that whatever fetters a free press fetters ourselves." Unwilling to press its constitutional analysis further, the court declined to consider whether Congress possessed the authority to legislate such a prohibition. Although the court did not elaborate upon the scope accorded the free press right in the context of broadcast licensing, it was obviously concerned about the constitutional implications of a newspaper-broadcast cross-ownership rule. Having already determined that the Communications Act did not authorize the FCC to make such a rule, the court concluded that, putting aside potential constitutional difficulties, any extension of the FCC's power in this area must be expressly authorized by Congress:

Hence it is that in the present state of the law a newspaper owner who is also the owner of a broadcast station may very well say to whoever challenges this dual right: "Who art thou that judgest another man's servant. To his own master he standeth or falleth."
VI. THE NEED FOR CONGRESSIONAL CLARIFICATION

The reluctance of the FCC in the 1940s to promulgate a newspaper-broadcast cross-ownership rule and the history of congressional inaction between 1943 and 1952 are hardly conclusive support for the position that the Communications Act does not empower the FCC to adopt rules such as those found in the Second Report and Order. Certainly an agency's view of its own authority can evolve over the years, and an agency should not be bound to opinions expressed in earlier times and under different circumstances.\(^\text{108}\) Moreover, post-adoption history has minimal weight for purposes of statutory construction, since statutes are usually construed "with reference to the circumstances existing at the time of the passage."\(^\text{109}\) The court in \textit{NCCB}, therefore, correctly refused to conclude on the basis of this evidence alone that the FCC lacked the authority to promulgate a newspaper-broadcast cross-ownership rule.\(^\text{110}\) Nevertheless, it is unfortunate that the \textit{NCCB} court refused to consider why Congress first proposed and then rejected legislation barring the FCC from adopting rules affecting newspaper-broadcast combinations. The court's reluctance to address the crucial question—whether Congress intended the Communications Act to authorize the FCC to pursue the policy of diversification of ownership through a rule barring co-located newspaper-broadcast combinations—undercuts the legitimacy of the \textit{NCCB} decision.

The Supreme Court will have an opportunity to resolve this matter when it reviews \textit{NCCB}.\(^\text{111}\) It might behoove the Court to address this question in light of the previously discussed evidence that Congress might not have intended the Communications Act to authorize the FCC to adopt rules such as those found in the Second Report and Order.\(^\text{112}\) This legislative history, however, is admittedly sketchy, and, given this uncertainty, the Supreme Court would encounter some difficulty in attempting to determine how much authority Congress has given the FCC to promulgate newspaper-broadcast cross-ownership rules.

Congress can more easily resolve this issue—regardless of whether the Supreme Court determines the Commission's authority under the


\(^{110}\) 555 F.2d at 951.

\(^{111}\) This question is among those raised by the petitions for certiorari growing out of the \textit{NCCB} case. \textit{See note 23 supra}.

\(^{112}\) The Supreme Court's resolution of this question is crucial in reviewing
current statute—by explicitly endorsing the Second Report and Order and the NCCB decision or by stating expressly that the FCC lacks the power to make such rules and that such regulations must be statutorily prescribed by Congress. In any event, since various congressional committees are currently reviewing the Communications Act in its entirety, Congress now has a most timely opportunity to address the issues posed by newspaper owners controlling or acquiring broadcast stations.

NCCB, for if the FCC is found not to have authority to promulgate such rules, the other questions raised by petitioners for review are moot. But as in the court of appeals decision, the Court could assume this FCC authority.

A congressional pronouncement in this regard would also be preferable to the FCC's assertion of its own authority. See generally Wright, Book Review, 81 Yale L.J. 575 (1972), where Judge J. Skelly Wright expressed the view that Congress itself should articulate public policy rather than delegate this responsibility to commissions not subject to the democratic process.

Congress is capable of legislating with sufficient specificity to make a clear pronouncement of the FCC's authority to regulate cross-ownership of media. See generally Jaffe, The Illusion of the Ideal Administration, 86 Harv. L. Rev. 1183, 1189-90 (1973):

It does not make sense to say that the burdens of the congressional workload and the pressure exerted by opposing political forces preclude a detailed legislative solution to a given problem, so that vague, general delegation is the better or the only alternative. The monumental detail of the tax code suggests that Congress can, and does, legislate with great specificity when it regards a matter as sufficiently important. Nor can a political conflict be avoided by delegating a problem to the care of an agency and invoking the talisman of "expertise." The effect of such a transfer of function is simply to shift the legislative process to a different level, and there is no reason to believe that the agency will be able to rise above power conflicts to achieve solutions that the legislature itself cannot or does not choose to provide.


Congressional clarification of the role of the FCC in this area is also required because of rapidly changing technologies in the mass communications media. It is significant that, in construing the Communications Act, the court in NCCB was limited to considering the circumstances existing at the time of passage. 555 F.2d at 952 n.41 (quoting United States v. Wise, 370 U.S. 405, 411 (1961)). The assumptions made in 1934 about regulatory needs in the communications area were of course based on the circumstances existing at that time, and many of them are no longer valid in light of modern technologies.

Some of these new technologies have a direct impact upon newspaper-broadcast combinations. The cross-ownership rules are based on the Commission's long-standing policy that "diversification of media sources is of central importance." 555 F.2d at 963; see Second Report & Order, supra note 5, at 1048. Diversification, however, is based on the assumption that the available broadcast spectrum is a limited resource. 555 F.2d at 948, 950 n.31. See National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943). As noted by Chief Judge Bazelon in NCCB, "currently available technology could eliminate this scarcity. . . . Alleviating scarcity would . . . eliminate the need for promoting diversity." 555 F.2d at 950 n.31. Although Chief Judge Bazelon emphasized that such "hopes for the future do not diminish the importance
of encouraging diversity today," 555 F.2d at 950 n.31, it would seem appropriate that Congress should consider whether the new technology has undermined the basis of the fundamental national policy of encouraging diversity to such an extent that newspaper-broadcast cross-ownership rules are not necessary to protect the public interest. Cf. United States v. Midwest Video Corp., 406 U.S. 649, 676 (1972) (Burger, C.J., concurring) (arguing that the advent of cable television calls for a congressional re-examination of the Communications Act).