Networks: Antitrust Suit Political

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For the second time this year, major media organizations are claiming that a Justice Department antitrust suit ostensibly directed against illegal monopoly concentration is really a case of politically motivated harassment in violation of the First Amendment.

In a 409-page brief filed last Monday in Los Angeles, lawyers for CBS and ABC charged that the lawsuit brought in April, 1972, to force television networks to give up financial interests in the product on and syndication of prime-time entertainment programs was really orchestrated by the White House as part of the anti-network campaign first disclosed last fall by the Senate Watergate committee.

In January, three newspaper publishers with broadcast holdings made similar allegations about another antitrust action in which the government seeks to prohibit newspaper-broadcast cross ownership in localities with few competing news media.

At that time, a spokesman for the Des Moines Register and Tribune, one of the defendants, termed the suit "political intimidation" directed at the paper's editorial policy.

Charges Not Substantiated

However, an investigation by The Washington Post found that those charges could not be substantiated. The cross-ownership suit inquiries revealed, originated with career attorneys in the Justice Department antitrust division, and came as a surprise to the White House.

The April, 1972, lawsuit, on prime-time television programming, similarly is the work of career trustbusters, many of whom consider themselves liberal Democrats.

But there are also several differences, which provide at least circumstantial evidence that political considerations could have been a factor.

Unlike the cross-ownership case, the White House was well aware of the 1972 lawsuit on prime-time programming. At least two presidential aides were closely involved in the election-year decision to revive the suit, which had been lying dormant since the late '60s.

A hand-written confidential memo from former antitrust chief Richard W McLaren to then-Attorney General John N. Mitchell, which was released by the government last March 25 but given little attention, discloses that both Herbert Klein, then White House director of communications, and White House special counsel Richard Moore were in regular contact with antitrust aides about the decision to file the suit.

Reason for Involvement

The Justice Department says there is an innocent explanation for the unusual White House involvement: the motives behind an election-year suit against the networks could have been misunderstood, and Klein was brought in precisely to assure the networks that "the forthcoming suits were based on antitrust considerations and not upon any political motivation," according to the government's brief.

The more cynical view, held by the networks, is that the suit was used by the White House as a club, held over their heads in just the fashion advocated by Jeb Stuart Magruder's 1969 memorandum, entitled "the Shotgun versus the Rifle." The memo urged H. R. Haldeman to "utilize the antitrust division" against the media. "Even the possible threat of antitrust action I think would be effective in changing their views," Magruder wrote.

The reality is difficult to sort out.

The Justice Department, as the government brief says, has been investigating network vertical integration "intermittently" for 20 years. According to one well-placed source, the attorneys promoting the suit repeatedly "ran into a stone wall" prior to 1971. No Attorney General had been willing to proceed with a complaint.

FCC ACTION OVERLAPS

Complicating the picture is the fact that the Federal Communications Commission in 1970 issued new prime-time regulations which overlap the Justice Department's antitrust suit.

Curiously, when the suit finally was filed in April, 1972, the data supporting the antitrust allegations was several years old. And one company prominently figuring in the suit, Viacom International, had already been "spun off" by CBS more than a year earlier, in order to comply with the new FCC regulation.

Deputy Assistant Attorney General Bruce Wilson warns against jumping to the conclusion that a stale case was dusted off because it happened to coincide with the administration's immediate political needs.

"It is not at all unusual for us to file a case using data developed years ago," Wilson says, "if we believe the monopoly practice is continuing." Wilson would not comment further, because the question of political motivation is itself in litigation before the court.

'Routine' View Supported

Other antitrust specialists, many of whom served under Democratic Attorneys General, support Wilson's view. "You keep trying to sell a case," said one, "and when you find an Attorney General willing to buy it, you go with it."

But these present and former lawyers in the antitrust division expressed surprise that two White House public relations aides should have been involved.

This was the sequence of events:

In September, 1971, Attorney General John Mitchell, who was soon to resign in order to head the Nixon re-election campaign, signed the proposed antitrust complaints against the three networks. Mitchell acted on the recommendation of antitrust chief McLaren.

However, the complaints were not filed. According to McLaren's memorandum, they were "held in abeyance pursuant to the Attorney General's direction" until Herbert Klein could meet with network executives.

Klein, Executives Meet

According to the government's brief, the idea was for Klein to assure the executives that the suits were non-political. But McLaren's memo dated Jan. 10, 1972, indicates he was not sure just what Klein's purpose was. "In the course of the meetings," McLaren wrote, "Klein warned the networks that the (Justice) Department is concerned about their controlling too much programming, and he urged them to keep this in mind in arranging programs for fall."

McLaren added, "You can speculate as well as I on the interpretation which is probably being placed on this by the networks."

As Klein recalls his mission, contrary to the Justice Department's representation, his purpose was not to advise the network of a fait accompli, but to give them "a chance to examine their policies and make an adjustment." Klein, who is now a television executive himself, added, "I tried to be an intermediary so that they could settle this thing without a suit."

Not surprisingly, just as McLaren surmised, the network executives viewed Klein's visit not as a courtesy call, but as a threat.

Role Called Curious

One former ranking antitrust official, who sked that his name not be used, says he considers Klein's role very curious.

"It's very odd to have Klein pay that call," this former official observes, "if the purpose is to say, 'Let's tr y and settle without a suit. That's a very ordinary thing, but the people who handle it are the government lawyers, not the White House PR man."

"How do the networks know what Klein really is after? The risk is that he's using this for other purposes."

This former official is quick to point out that he believes the su t itself has merit. "I hate to see every defendant in a perfectly good suit claiming political harassment."

Another antitrust specialist still in the Justice Department adds, "The most you can fairly say is that this admin stration was more willing to take antitrust actions against the networks than previous ones."

The suit, which was finally filed by acting Attorney General Richard G. Kleindienst after Mitchell resigned, also apparently served st ll another administration purpose. It conveyed the impression of a vigorous antitrust division at a time when the credibility of antitrust policy had been badly damaged by the ITT affair. On the day the suit was filed, April 14, 1972, Kle ndienst was in the middle of an awkward second round of hearings on ITT.

And the White House official coordinating public relations on the Kleindienst nominationhwas Richard Moore, the other Wh te House aide working on the network antitrust suit.

Despite the political overtones in the dcision to file this suit, however, the networks appear unlikely to have the case dismissed on those grounds.

Justice Department officials point out that the decision to file any antitrust suit contains heavy elements of discretion, and that motive is irrelevant.

In the most recent filing, dated May 7, the governnent argues that before the antitrust action can ge thrown out as politically tainted, the networks must prove "that these cases were filed only because of that improper purpose or motive."

That will be extremely difficult to prove. In fact, the defense's argument that the suit should be rejected because it was politically motivated appears to be aithout precedent.

The networks' request to take sworn depositions from 13 present and former officials in order to prove their charge of political influence is still pending before Judge Robert J. Kelleher at U.S. District Court in Los Angeles.