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Newspaper Preservation Act: A Critique

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NEwspaper Preservation Act: A Critique

The Newspaper Preservation Act of 1970¹ while purporting to advance the public interest of "... maintaining a newspaper press editorially and reportorially independent..." is another step toward the disturbing trend of special legislation following governmental antitrust victories. In 1969, the Supreme Court held as violative of the antitrust laws a joint operating arrangement by two newspapers in Tucson, Arizona.² The Congressional response was passage of the NPA with a provision for retroactive application. Thus, it permits the Tucson arrangement as well as similar operations in other localities.³

Congress has considered it necessary to exempt certain joint newspaper operating arrangements⁴ from the antitrust laws.⁵ Typically,

2. Id. § 2.
3. Citizen Publishing Co. v. United States, 394 U.S. 131 (1969) [hereinafter cited as Citizen Pub.]. This disturbing trend was recognized in the House hearings on the NPA:

   Government antitrust victories affirmed by the Supreme Court have been followed by other types of special relief for the defendants. Special provision for tax relief was granted to shareholders disposing of General Motors stock after the Government's victory in the DuPont-General Motors case. After the Electrical Equipment price fixing cases, General Electric Co., Westinghouse and other manufacturers were permitted by the Internal Revenue Service to deduct antitrust treble damage payments as "ordinary and necessary" business expense.

   These successive encroachments on the sweep of the antitrust laws following Government victories in the Supreme Court are disturbing. Each time this happens the effectiveness of the policies that seek to preserve and continue a competitive economy is diminished.

4. See note 9, infra; and see text accompanying note 93 infra.
5. (2) The term "joint newspaper operating arrangement" means any contract, agreement, joint venture (whether or not incorporated), or other arrangement entered into by two or more newspaper owners for the publication of two or more newspaper publications, pursuant to which joint or common production facilities are established or operated and joint or unified action is taken or agreed to be taken with respect to any one or more of the following: printing; time, method, and field of publication; allocation of production facilities; distribution; advertising solicitation; circulation solicitation; business department; establishment of advertising rates; establishment of circulation rates and revenue distribution: Provided, That there is no merger, combination, or amalgamation of editorial or reportorial staffs, and that editorial policies be independently determined.

NPA, § 3(2).
6. "(1.) The term 'antitrust law' means the Federal Trade Commission Act and each statute defined by Section 4 thereof (15 U.S.C. 44) as 'Antitrust Acts' and all
the newspapers enter into a joint operating arrangement providing for a pooling of production facilities and commercial functions while the news reporting and editorial functions of the newspapers remain separate. Consequently, for commercial purposes, the joint operating arrangement is essentially indistinguishable from a merger of the newspaper into a single business enterprise. The acclaimed need for exempting joint newspaper operating arrangements from the antitrust laws and the effects of such an exemption will be analyzed in evaluating the effectiveness of the NPA's objectives in promoting diverse, independent and competing sources of news.

amendments to such Act and such statutes and any other Acts in pari materia." Id., § 3(1).

7. The joint newspaper operating arrangement established by the Star and Citizen in Tucson, Arizona, provides an excellent example of the type of joint operations which § 3(2) of the NPA contemplates since one of the objectives of the NPA is to allow that arrangement to be reinstated. See notes 9 and 93, infra. Under this arrangement, the two newspapers put their production equipment into joint ownership. Tucson Newspapers, Inc. (TNI), a third corporation, was formed to manage the jointly owned property and operate joint production, advertising, circulation, and business departments. TNI receives all advertising and circulation revenues and pays all production and operating costs except for salaries and expenses connected with the news and editorial departments of each newspaper. Revenues in excess of these costs are distributed to the Star and Citizen according to a predetermined ratio. Under this arrangement, the editorial and news departments remain separate and are not subject to joint control by TNI, Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 6-7 (1967) (statement of W. Small). For a copy of the Tucson agreement, see Appendix to Appellee's Brief at 30-47, Citizen Pub., note 3 supra.


9. The Committee on the Judiciary of the House of Representatives stated that H.R. 279 (now the NPA) was designed to accomplish the following objectives:

1. To declare a public policy applicable to certain joint newspaper operating arrangements in the interest of maintaining a newspaper press editorially and reportorially independent and competitive in all parts of the United States.

2. To grant a limited exemption from the antitrust laws for joint newspaper operating arrangements that have been entered into prior to the effective date of this Act in twenty-two cities, communities, or metropolitan areas of the United States.

3. To provide a limited exemption from the antitrust laws for joint newspaper operating arrangements entered into in the future with the prior written consent of the Attorney General of the United States after the Attorney General has made certain determinations defined in the Act.


5. To declare that the limited antitrust exemption provided in the Act shall apply to the determination of any civil or criminal antitrust action pending in any district court of the United States on the date of enactment wherein it is alleged that a joint newspaper arrangement is unlawful under any antitrust law.

The antitrust exemption embodied in the NPA may only be justified upon a clear showing that it is essential to the preservation of an independent and competitive press. In determining whether there is sufficient economic need to justify this exemption, it is necessary to examine the recent trends in newspaper ownership, the financial condition of the newspaper industry and the financial status and interests of the parties to such arrangements.

**Economic Need**

In the last sixty years, the newspaper industry has experienced a sharp increase in concentration of newspaper ownership and a corresponding decrease in the number of cities with competing newspapers. As of June 1, 1967, newspaper chains owned 49.3 per cent of the daily newspapers in this country. In cities with population over 100,000 and only one daily newspaper, 73.4 per cent of these dailies are owned by newspaper chains. While competition between daily newspapers has been decreasing, chain ownership of daily newspapers has continued to grow.

<table>
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<th>Rate of Daily Newspaper Chain Growth, 1910-67</th>
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<tr>
<td>Number of Chain Dailies</td>
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<tr>
<td>Increase</td>
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<tr>
<td>Percentage Rate of Annual Increase</td>
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12. In 1910, there were 2,202 English language dailies in the United States. Approximately 40% of the communities served by these newspapers had only one newspaper. By 1945, the number of dailies had fallen to 1,744. There has been little change in the total number of dailies since then. In 1968, the number was 1,746. However, the percentage of communities served by newspapers with a single owner increased to over 95%.

Id.

13. A newspaper chain, as defined by Raymond B. Nixon, “consists of two or more dailies in different cities with the same ownership or control.” R. Nixon, *Trends in Daily Newspaper Ownership Since 1945*, 31 JOURN. Q. 7, 8 (1954).


15. *Id.*, at 21.

16. While competition between daily newspapers has declined, the number of dailies has stabilized. *House Hearings*, at 130 (statement of R. Nixon).
at an impressive rate. If the present trend of chain growth continues, they would own all of the daily newspapers in the United States within twenty years.  

The proponents of the NPA contend that this concentration of newspaper ownership is a clear indication that variety in news reporting and analysis is being imperiled because of economic conditions making it difficult if not impossible for two or more newspapers to remain commercially viable in the same city. They maintain that increased costs and competition for advertising revenue with radio and television have contributed to the trend away from multiple newspaper cities. The American Newspaper Publishers Association, one of the principal advocates for the NPA, attributes a unique relationship between circulation volume and advertising revenues as rendering commercial competition between daily newspapers precarious. The proponents of the NPA maintain that in response to these conditions joint newspaper operating arrangements were instituted in the newspaper industry to reduce costs

18. House Hearings, at 10 (statement of 59 sponsors of the NPA). Proponents of the NPA place heavy reliance on the fact that the percentage of communities served by single owner newspapers has increased from 40% in 1910 to 95% in 1968. Id.; see note 12, supra.
19. The cost of newsprint alone in many newspapers is greater than the price charged the subscriber. House Hearings, at 10 (statement of 59 sponsors of the NPA). Depending upon the circulation of a newspaper, the cost of newsprint accounts for 16% to 50% of total costs. Editor & Publishers, Mar. 26, 1966, at 14. For a more detailed analysis of the impact which the cost of newsprint has upon daily newspapers see Roberts, Antitrust Problems in the Newspaper Industry, 82 Harv. L. Rev. 319, 342-44 (1968).
20. House Hearings, at 10 (statement of 59 sponsors of the NPA). The importance of advertising revenue to daily newspapers is great since it accounts for an average of 70 to 80 percent of newspaper revenues. Id., at 141. However, radio and television advertising does not pose much of a threat to the demand for newspaper advertising or newspaper advertising revenues. In Tucson, Arizona, the combined advertising revenue and advertising lineage of the Star and Citizen increased from approximately $400,000 to $5,500,000 and from 720,167 inches to 3,511,282 inches respectively during the period 1941 through 1964 despite advertising competition from local broadcast media. United States v. Citizen Publishing Co., 280 F. Supp. 978, 989 (Ariz. 1968) [hereinafter cited as U.S. v. Citizen Pub.].
21. House Hearings, at 141 (statement of A. Hanson, General Counsel of the American Newspaper Publishers Association). The American Newspaper Publishers Association maintains that advertising revenue and circulation are directly related. As one of the competing newspapers gains an edge in circulation, his advertising revenues increase since the prospective advertiser realizes that his ad will reach more people. Furthermore, as one newspaper continues to make gains in circulation, it may still be cheaper to advertise in the paper with greater circulation even if the competing newspaper offers a lower advertising rate. See also the statement, Counsel for Tucson Newspapers, Inc. Id., at 111. This means that the paper with greater circulation will become dominant since newspapers are so dependent upon advertising revenue. Id. However, such a trend in circulation does not appear to be irreversible. If anything, it would serve to promote rigorous news and editorial competition in the struggle for greater circulation.
while maintaining editorial independence.\textsuperscript{22} As a result, advocates of the NPA assert that the preservation of these arrangements is necessary in order to prevent communities with newspapers under separate ownership from losing editorial diversity.\textsuperscript{23} Far from supporting these arguments of economic necessity for the antitrust exemption of joint newspaper operating arrangements, general indications of prosperity in the newspaper industry and particularly of the newspapers participating in joint operations reveal that the proponents of the NPA have failed to make a clear showing of overriding financial need sufficient to justify this exemption.\textsuperscript{24}

Statistics showing a substantial decline in the number of daily newspapers published in the United States since 1910 do not adequately support the contention that the characteristics peculiar to the publication of newspapers necessitate exempting joint newspaper operating arrangements from the antitrust laws.\textsuperscript{25} Because publishers of most newspapers do not issue annual reports, it is difficult to determine precisely how profitable they are. Nevertheless, there is sufficient evidence of newspaper profitability to discount the claim of newspaper poverty. In fact, the newspaper industry appears to be financially sound, and newspapers promise to become more profitable in the future.\textsuperscript{26} Since the end of World War II, advertising revenues for the industry have increased from approximately $1.9 billion to $5.25 billion and circulation has increased from 51 million to 62.5 million.\textsuperscript{27} Statistical analysis by Editor and Publisher\textsuperscript{28} reveals

\textsuperscript{22} House Hearings, at 11. For a list of these proponents in the House of Representatives see id. at 7, 8. If reducing costs and maintaining editorial independence were the only objectives of joint newspaper operating arrangements, there would be no reason for the proponents of the NPA to seek this legislation. The final order in U.S. v. Citizen Pub., note 20 supra entered on Jan. 26, 1970, specifically permits joint printing, joint distribution, a joint clerical and administrative staff, an optional fully cost justified combination rate, a joint Sunday edition, and a single advertising staff to handle combination advertising. House Report, at 13. (Individual views of Rep. C. MacGregor and Rep. A. Mikva). Joint newspaper operating arrangements as permitted by this order can realize substantial cost savings through the permissible avoidance of duplicating these activities.


\textsuperscript{24} See note 10, supra.

\textsuperscript{25} See note 12, supra.

\textsuperscript{26} For an analysis of the prospective cost saving potential of recent technological advancements in newspaper production equipment which is currently available or presently being developed, see Roberts, Antitrust Problems in the Newspaper Industry, 82 Harv. L. Rev. 319, 357-59 (1968). See also B. Rucker, The First Freedom, 57-59 (1968).

\textsuperscript{27} House Report, at 12 (individual views of Congressmen MacGregor and Mikva on H.R. 279).

\textsuperscript{28} 116 Cong. Rec. 929 (daily ed. Jan. 30, 1970) (remarks of Senator McIntyre). The International Typographical Union has translated these figures for the “Average
that in 1966, medium-city newspapers netted close to a fourteen per cent return on revenues, and newspapers with circulation over 250,000 realized a 22.4 per cent return on revenues. These average figures, when contrasted with the average 5.8 per cent return on revenues for all manufacturing industries and when viewed in the light of stabilization in the number of daily newspapers since World War II, suggest that the proponents of the NPA have failed to establish clear necessity for the antitrust exemption.

Consideration of the beneficiaries of the NPA further indicates that the acclaimed need for an antitrust exemption is unsubstantiated. Newspaper chains participate in fifteen out of the twenty-two present

| Medium City Newspaper into the following table which indicates a marked increase in profitability during the period of 1958 to 1966: |
|---|---|
| Profit as Percent of Gross Operating Revenue |
| Before Taxes | After Taxes |
| 1966 | 25.0% | 13.5% |
| 1965 | 23.0 | 11.3 |
| 1958 | 20.7 | 9.6 |

Hearings on S. 1312 Before the Subcommittee on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 90th Cong., 1st Sess., pt. 1, at 171 (1967). The average net paid circulation of this “Medium City Newspaper” was 37,000 in 1958, 50,200 in 1965, and 50,700 in 1966. Id.

30. Id.
31. R. Nixon and J. Ward, Newspaper Ownership and Intermedia Competition, 38 Journ. Q. 6, 7 (1961). In the period between 1945 and 1967, 449 dailies were merged or suspended and 449 new dailies were established. House Hearings, at 130 (statement of R. Nixon). For a graphical representation of this stabilization see id., 133.
32. The legislative history indicated that the term antitrust exemption is to include: .. exemption from the Federal Trade Commission Act (38 Stat. 717, P.L. 203, 63d Cong. (1914), as amended) and from the antitrust laws as defined in the Federal Trade Commission Act (15 U.S.C. 44), specifically, the Act entitled “An Act to protect trade and commerce against unlawful restraint and monopolies,” approved July 2, 1890 (the Sherman Act); section 73-77, of an Act entitled “an Act to amend sections 73 and 76 of the Act of August 27, 1894, entitled “An Act to reduce taxation, to provide revenue for the Government, and for other purposes,” approved February 12, 1913 (the Wilson Tariff Act); and the Act entitled “an Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,” approved October 15, 1914 (the Clayton Act)....


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<thead>
<tr>
<th>Chain</th>
<th>City</th>
<th>Paper</th>
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<tr>
<td>Block newspapers.............. Pittsburgh, Pa.............. Post Gazette Publishing Co.</td>
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<tr>
<td>James M. Cox newspapers..... Miami, Fla.............. Miami Daily News, Inc.</td>
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<td>Hearst newspapers............. San Francisco, Calif..... Examiner</td>
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<tr>
<td>Knight newspapers............. Miami, Fla.............. Miami Herald Publishing Co.</td>
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<tr>
<td>Lee newspapers, Midwest.... Lincoln, Neb.............. Star Publishing Co.</td>
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<td>Newhouse newspapers....... Birmingham, Ala............. Birmingham News Co.</td>
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<td>Scripps-Howard newspapers... Birmingham, Ala............. Birmingham Post Co.</td>
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</tr>
<tr>
<td>City</td>
<td>Year</td>
<td>Participants</td>
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<td>-----------------------------</td>
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<td>-------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Columbus, Ohio</td>
<td>1959</td>
<td>Dispatch Printing Co.; E. W. Scripps Co. (Columbus Citizen-Journal)</td>
</tr>
<tr>
<td>Tulsa, Okla.</td>
<td>1941</td>
<td>Tulsa Tribune Co.; World Publishing Co.; Newspaper Printing Corp.</td>
</tr>
<tr>
<td>Madison, Wis.</td>
<td>1948</td>
<td>Wisconsin State Journal Co.; Madison Newspapers, Inc.; Capital Times Co.</td>
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joint newspaper operating arrangements, wherein recent transactions of these chains indicate considerable financial strength. An example of profits earned by newspaper chains is provided by two joint operating arrangement newspapers: Madison Newspapers, Inc., in Madison, Wisconsin, and the Journal-Star Printing Co., in Lincoln, Nebraska. These two arrangements earned a 22 and 16.4 per cent return on owners' equity respectively in 1968.

Absence of sufficient financial need to warrant antitrust exemption is further illustrated by the fact that in nineteen of the twenty-two cities having populations exceeding 200,000 and where joint newspaper operations are conducted there is no trend toward the loss of competing papers. In light of these indications of financial strength, newspapers participating in joint operations do not appear to be dependent upon an antitrust exemption for their continued existence.

In terms of antitrust policy, it is incumbent upon those seeking antitrust exemption to clearly establish the necessity. Since the proponents of the NPA have not shown a clear economic need for this exemption, having failed to demonstrate that a substantial number of newspapers would fail without it, the Congressional conclusion that the antitrust exemption embodied in the NPA is necessary for the preservation of independent and competing sources of news is unwarranted. Contrary to preventing a reduction of news sources, joint newspaper operating arrangements constitute substantial barriers to the entry of new competitors since the Act explicitly bars the addition of another paper to an existing arrangement. Consequently, the NPA will perpetuate the anti-competitive practices of those joint arrangements now in existence.

35. For example, in 1968, the Post-Dispatch, which participates in joint operations with the Newhouse chain in St. Louis, purchased two television stations for a combined price of $18 million. 116 Cong. Rec. S929 (daily ed. Jan. 30, 1970) (remarks of Rep. McIntyre). Newhouse, in 1967, paid a record price of $53.4 million for a single newspaper. The Cox chain, which has entered into a joint operating arrangement with the Knight chain in Miami, Florida, paid $20.5 million for WIIC-TV in Pittsburg. Id. Knight bought the Macon, Ga., Telegraph and News for $3 million. Id. With such financial strength, there was little prospect that newspaper chains would be forced into bankruptcy if joint newspaper operating arrangements were not exempted from the antitrust laws.

36. The operating figures for these newspapers were available because both of these newspapers are owned by Lee Enterprises, Inc., a publicly owned corporation. Id.


38. See note 10, supra.

39. Section 4(a) of the NPA specifically denied antitrust exemption where the amendment of an existing arrangement adds another newspaper publication. For the full text of § 4(a) see note 79, infra.
Anti-Competitive Effects of Joint Newspaper Operating Arrangements

Joint operations enable the participating newspapers to eliminate the costly duplication of printing facilities, distribution points, delivery vehicles, circulation departments, advertising departments, and business departments. Cost savings from these joint arrangements make the establishment of competing newspapers difficult since they must duplicate these facilities, thus bearing proportionately higher costs.

One of the purposes of entering into joint operations is to control the prices charged for advertising space. This is generally accomplished through the establishment of a joint advertising department offering a combined advertising rate for the newspapers privy to the arrangement. An examination of the effects of joint advertising in San Francisco between the morning Chronicle and the Examiner reveals the particularly detrimental effects of combined advertising rates on newspaper competition. The Chronicle and Examiner raised their advertising rates immediately after entering into joint operations. The basic open display advertising rate for the Chronicle increased from $1.20 per line in January, 1965, to $2.32 per line in October, 1965. The Examiner's increase in its basic advertising rate from $1.03 to $1.55 per line for the same period was proportionately smaller because, as an evening paper, it was competing with the Oakland Tribune. However, for only $.26 more per line than the Chronicle rate, advertising could be purchased in both

40. Since one of the declared objectives of the NPA is to allow the joint operating arrangement in Tucson, Arizona, to be reinstated, that arrangement is particularly illustrative of the type of joint newspaper operations contemplated by § 3(2) of the NPA. See note 9, supra. The district court in U.S. v. Citizen Pub., note 20 supra, found that one of the purposes of entering into joint operations was to control prices charged for advertising space. In Tucson, the Star and Citizen raised their advertising rates within the first year after entering into joint operations, and during the period between 1941 and 1964, advertising rates increased approximately 307% and revenue on each inch line display increased approximately 312%. Id. at 989, 991. Further evidence of price control by joint operating arrangements is provided by the fact that generally, as in one newspaper towns, the advertising rates in cities with such arrangements are about 15% higher than in cities where competition between papers exists. 116 CONG. REC. S894 (daily ed., Jan. 30, 1970) (statement by Rep. McIntyre from an unpublished study by the Brookings Institute). Therefore, the portion of § 3(2) dealing with the establishment of advertising rates could be reasonably interpreted as permitting such control.

41. Combined advertising rates, whereby advertising can be procured in the second paper at a nominal rate, are made possible partially by the cost savings realized by use of the same advertising plates in joint printing facilities. Usually, the basic ad rate is the inflated rate of the newspaper not facing competition. House Hearings, at 256 (statement of R. Barnett).

42. The agreement provided that Hearst discontinue publishing the News Call, switch the Examiner to afternoon publication, and publish jointly with the Chronicle. Id., at 254.

43. Id.

44. Id.
NEWSPAPER PRESERVATION ACT

the Examiner and the Chronicle. This combined advertising rate for both papers of $2.50 per line was disastrous for would-be competitors. Persons desiring to advertise in both a morning and an evening paper would realistically opt for the combination Chronicle-Examiner rate, otherwise they would pay considerably more for advertising. Consequently, far from preserving independent sources of news, the antitrust exemption embodied in the NPA, by permitting combined advertising rates, will serve to eliminate small competing newspapers excluded from these arrangements and bar the entry of new competitors.

In addition to the combined advertising rates which result in price fixing, the antitrust exemption provided by the NPA for joint newspaper operating arrangements permits other anticompetitive practices such as profit pooling and market allocation. Passage of the NPA was in fact stimulated by the Supreme Court decision in Citizen Publishing Co. v. United States, declaring these practices to be in violation of the Sherman Act. In Citizen Publishing, the Star and Citizen, two Tucson, Arizona newspapers, entered into a joint operating agreement and formed Tucson Newspapers Inc. to manage all aspects of their newspapers except the news and editorial departments. The district court, finding a violation of the Sherman Act, stated that the purpose of the agreement was to eliminate all commercial competition between the newspapers through the use of

45. It is customary in the newspaper industry to measure the dollar cost of an ad in terms of the number of readers to derive the "true cost" or "milline rate" which reflects the cost of a line of advertising per million circulation. The large circulation provided by the combined advertising rate yields a lower milline rate and thus, provides yet another advantage over the smaller competitor. House Hearings, at 256 (statement of R. Barnett).

46. The Argonaut, formerly the San Francisco Shopping News, went out of business after 45 continuous years of publishing because of declining ad volume attributable to the combined advertising rate of the Chronicle and Examiner. Id. at 255.

47. Those desiring to advertise in the morning Chronicle would have to pay far more than $.26 per line to advertise in an afternoon newspaper other than the Examiner. Id., at 254.

48. The importance of advertising cannot be overstressed since approximately 75% of a newspaper's income is derived from advertising revenues. Editor & Publisher, Apr. 1, 1967, at 14 (79.1%); Id., Apr. 8, 1967, at 13 (75.6%); Citizen Publishing Co. v United States, 280 F. Supp. 978, 989 (Ariz. 1968) (Approximately 75% in Tucson, Ariz.).

49. See note 3 supra.

50. Most of the 22 so called 'Joint Newspaper... Operating Arrangements]' in the U.S. bring together joint printing, joint distribution, joint advertising rates and sales, pooling and distribution of profits, and division of their newspaper markets.

50. See note 3 supra; note 9, supra.
three types of controls: price fixing, profit pooling, and market control.\textsuperscript{51} The Supreme Court affirmed the judgment by holding:

The § 1 violations are plain beyond peradventure. Price fixing is illegal \textit{per se}. . . . Pooling of profits pursuant to an inflexible ratio at least reduces incentives to compete for circulation and advertising revenues and runs afoul of the Sherman Act. . . . The agreement not to engage in any other publishing business in Pima County was a division of fields also banned by the Act. . . . \textsuperscript{52}

Therefore, the scope of permissible activities encompassed within the definition of joint newspaper operating arrangement in § 3(2) of the NPA\textsuperscript{53} will, according to the Supreme Court, substantially lessen newspaper competition and contribute to the monopolization of the local newspaper business.\textsuperscript{54}

Another provision of the NPA, section 4(c), purports to protect competing newspapers from "predatory practices" which are explicitly declared not to be exempt from the antitrust laws.\textsuperscript{55} However, the scope of activities set forth in § 3(2), which are exempted from the antitrust

\begin{itemize}
\item \textsuperscript{51} U.S. v. Citizen Pub., note 20 \textit{supra}, at 993. In affirming the district court's holding, the Supreme Court indicated that price fixing, profit pooling, and market control were clearly established since: (1) Newspapers were sold and distributed by the jointly owned TNI and advertising was similarly sold by TNI which set the prices, (2) Profits were pooled and distributed by TNI to the \textit{Star} and \textit{Citizen} according to an agreed ratio; (3) Market control was established by the agreement by the \textit{Star} and \textit{Citizen} not to engage in any other business which would conflict with the agreement. Citizen Pub., note 3 \textit{supra}, at 134.
\item \textsuperscript{52} Citizen Pub., note 3 \textit{supra}, at 135.
\item \textsuperscript{53} See note 5, \textit{supra}.
\item \textsuperscript{54} "... the joint operating agreement in purpose and effect monopolized the only newspaper business in Tucson..." Citizen Pub., note 3 \textit{supra}, at 135. Furthermore, the availability of radio and television newscasts does not provide suitable competition as a news source to the daily newspaper. The district court in \textit{Citizen} made the following findings which illustrate the distinct character of news reporting by daily newspapers (1) radio and television stations in Tucson do not report news with the same depth and coverage as do the \textit{Star} and \textit{Citizen}; (2) wire services received by the \textit{Star} and \textit{Citizen} report the news in greater detail than those received by radio and television stations; (3) newspapers constitute a permanent record of the news whereas news broadcasts are transitory; (4) aside from advertising, the \textit{Star} and \textit{Citizen} are primarily news media whereas television and radio are primarily media of entertainment; (5) readers of the \textit{Star} and \textit{Citizen} do not consider newscasts to be a substitute for these newspapers. These findings reveal that the public needs competing newspapers in order to have diverse and competing sources of news. U.S. v. Citizen Pub., note 20 \textit{supra}, at 986-87.
\item \textsuperscript{55} Nothing contained in the Act shall be construed to exempt from any antitrust law any predatory pricing, any predatory practice, or any other conduct in the otherwise lawful operations of a joint newspaper operating arrangement which would be unlawful under any antitrust law if engaged in by a single entity. Except as provided in this Act, no joint newspaper operating arrangement or any party thereto shall be exempt from any antitrust law.
\end{itemize}
laws, include price fixing, profit pooling, and market allocation. By specifically allowing these anticompetitive practices, the NPA gives newspapers participating in joint operating arrangements the means to drive their competitors out of business. Consequently, the predatory practice clause of § 4(c) provides no effective protection for competing newspapers. As a result, the over-all impact of this Act will be to legalize and perpetuate the effective monopolization of local newspaper business through joint newspaper operations.

Eligibility For Antitrust Exemption Under the NPA

The standards established by the NPA to determine whether newspapers participating in joint operating arrangements qualify for an antitrust exemption are designed to encompass newspapers formerly unable to qualify as a “failing company.” Newspapers so qualifying may engage in the same activities permitted a single newspaper, but which were previously denied those participating in joint operations. While the standards applicable to joint newspaper arrangements entered into before the effective date of the Act differ from those applicable to such arrangements entered into thereafter, they share the common objective of enabling newspapers participating in joint operations to conduct their business affairs as a single entity.

Parties to a joint arrangement entered into after the effective date must obtain prior written consent of the Attorney General of the United States in order to qualify for the antitrust exemption. Section 4(b) requires the Attorney General to determine “. . . that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this Act.” The definition of

56. Id., § 3(2).
57. The definition of joint newspaper operating arrangement in § 3(2) of the NPA makes the creation of a valid arrangement dependent upon establishing common or joint production facilities. Therefore, the establishment of a common plant is a prerequisite to all other permissible action under the NPA. Senate Report, at 4.
58. NPA, § 4(b).
59. Id.
60. It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this Act.

NPA, § 4(b).
a "failing newspaper" in § 3(5) of the NPA60 is a departure61 from the "failing company" doctrine62 enunciated by the Supreme Court in International Shoe Co. v. FTC.63 The Court in International Shoe defined a "failing company" as one whose resources were so depleted and the prospects of its rehabilitation so remote that "it faced the grave probability of a business failure."64 The Court further stated that for an acceptable acquisition of a "failing company" by a competitor, there must be "no other prospective purchaser."65 The Supreme Court applied this "failing company" doctrine in Citizen Publishing Co. v. United States66 to hold that neither newspaper operating within the joint operating agreement was a failing newspaper so as not to render their conduct violative of the antitrust laws.

In contrast, the definition of "failing newspaper" under § 3(5) of the NPA establishes a less stringent test: "The term 'failing newspaper' means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure."67 Legislative history indicates that a determination of "probable danger of financial failure" does not necessitate a showing of irreversibility of the company's financial plight, rather it is sufficient if a trend in that direction is established.68 Furthermore, the phrase "regardless of its ownership or

60. "The term 'failing newspaper' means a newspaper publication which, regardless of its ownership or affiliations, is in probable danger of financial failure." NPA, § 3(5).
61. This departure is limited to the term "failing newspaper" and
64. Id., at 302.
65. Id.
67. NPA, § 3(5).
68. According to the Senate Committee on the Judiciary, the term "is in probable danger of financial failure" used in the definition of "failing newspaper" contained in § 3(5) of the NPA is taken from the Bank Merger Act of 1966. Senate Report, at 2. It is worth noting at the outset that little other mention of the Bank Merger Act of 1966 in reference to the definition of "failing newspaper" has been made in the legislative history of the NPA. Furthermore, the reference contained in the above mentioned report is embodied in only a single sentence in the entire report without any additional elaboration. The Supreme Court has interpreted this phrase in the Bank Merger Act of 1966 as requiring a danger of collapse not so great as to call for application of the "failing company" doctrine but a "danger of becoming before long financially unsound." United States v. Third National Bank, 390 U.S. 171, 187 (1968). It is difficult, however, to clarify the NPA's standard of "in probable danger of financial failure" through analogy with the standard embodied in the Bank Merger Act of 1966 since the latter Act expressly provides for weighing a merger's anticompetitive effects against the asserted benefits of the merger to the community in determining whether the merger best serves the public
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affiliations" is designed to focus inquiry upon the financial strength of the newspapers desiring to establish joint operations rather than upon their related business enterprises. However, this phrase does not preclude examination of the transactions between the newspapers and the related companies which are customers or which supply goods and services to these publications. Such inquiry is necessary to preclude the possibility of creating a "failing newspaper" through the use of artificial and manipulative bookkeeping entries.

The Attorney General must, in addition to finding that not more than one of the publications is other than a failing newspaper, determine that approval of the joint operating arrangement "would effectuate the policy and purpose of this Act." The declaration of policy, contained in § 2 of the NPA, states:

[I]n the public interest of maintaining a newspaper press editorially and reportorially independent and competitive . . . it is hereby declared to be public policy of the United States to preserve the publication of newspapers in any city, community, or metropolitan area where a joint operating arrangement . . . is hereafter effected in accordance with the provisions of this Act. This policy statement, therefore, evidences a legislative determination that the public interest in independent and competing sources of news is best served by the preservation of existing newspapers. Accordingly,

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interest. 12 U.S.C. § 1828(c) (1964 ed., Supp. 11). The NPA contains no such express provision for balancing the anticompetitive effects of proposed joint newspaper operating arrangements with prospective benefits to the public. It is arguable, however, that such a requirement could be read into that portion of § 4(b) requiring the Attorney General of the United States to determine that approval of the joint newspaper operating arrangement would effectuate the policy and purpose of this Act. Such a requirement should be based upon interpretation of the language and legislative history of the NPA with little weight being given to construction of the Bank Merger Act of 1966 since there is only minimal reference to this Act in the legislative history of the NPA, the operative provisions of the two acts are substantially different, and the public's interest in having access to independent and competing sources of news is radically different from its interest in banking safety, convenience, and competition.

69. Senate Report, at 5. Consequently, determination of whether a newspaper is failing should be on the basis of the paper's operations within the particular city which is to be the situs of joint operations without consideration of the newspaper owner's other business interests. Id.

"Newspaper owner" is defined as follows:
The term "newspaper owner" means any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications.

NPA, § 3(3).
70. Senate Report, at 5.
71. Id.
72. NPA, § 4(b).
73. NPA, § 2.
the legislative history of the NPA indicates that the purpose of this Act is "to prevent communities with newspapers having editorial voices under separate corporate control from losing one of the established editorial voices."\textsuperscript{74}

The establishment of antitrust exemptions for joint newspaper operating arrangements as an effective means of insuring newspaper stability and editorial independence is based upon two assumptions as to the nature and functioning of the newspaper industry. The first of these assumptions is that:

\[
\ldots \text{the economics of the newspaper industry make it more likely for newspapers to fail when faced with competition than other businesses; that when a newspaper is failing it is harder to reverse the process and it is almost impossible to find an outside buyer.} \ldots
\]

The second assumption is that financially strong newspapers, uninhibited by commercial pressures, have greater ability to take "courageous and unpopular" editorial positions on public issues.\textsuperscript{76} These assumptions would appear to require the Attorney General to evaluate the prospective effect upon the financial status of the newspapers desiring to enter into joint operations under § 4(b). Although this section gives no express authority to the Attorney General to formulate regulations establishing guidelines for his determinations under § 4(b), the legislative history of this section indicates that he will promulgate such regulations as are appropriate for the discharge of his responsibilities.\textsuperscript{77} In addition, since

\textsuperscript{74} Senate Report, at 3.

\textsuperscript{75} Id., at 4. For an analysis of this assumption see notes 18-24, supra and text accompanying.

\textsuperscript{76} Id., at 3-4. See text accompanying notes 95-99 infra.

\textsuperscript{77} House Hearings, at 11. The delegation of authority under § 4(b) to the Attorney General, who is responsible for enforcing the antitrust laws, to approve or disapprove any proposed joint newspaper operating arrangement after July 24, 1970 appears on its face to establish a viable safeguard against monopolization of the newspaper business in a particular metropolitan area. However, the Attorney General's determinations pursuant to § 4(b) presumably would be judicially reviewable under the Administrative Procedure Act, 5 U.S.C. § 701(a). (It should be acknowledged that analysis of the availability of judicial review of the Attorney General's actions under any section of this Act is beyond the scope of this note.) Furthermore, once the Attorney General gives his written consent to the joint newspaper operating arrangement under § 4(b), the participating newspapers may engage in all of the specifically approved practices enumerated in § 2 of the NPA including the anticompetitive practices of establishing joint advertising and circulation rates, joint revenue distribution, and market allocation. These practices in and of themselves may lead to the effective monopolization of the newspaper business in the locality where such joint operations are conducted. See notes 51-54 and accompanying text, supra. The NPA contains no provision granting the Attorney General direct regulatory authority subsequent to giving his consent to a joint
these assumptions serve as the foundation for the antitrust exemption, they should be considered by the Attorney General in his determination of whether a particular joint newspaper operating arrangement will effectuate the policy and purpose of the NPA.\textsuperscript{78}

Section 4(a) of the NPA\textsuperscript{79} reveals that the Act is designed primarily to benefit those newspapers participating in joint newspaper operating arrangements prior to its passage. This is apparent since the test for eligibility for an antitrust exemption under this section is whether at the time the arrangement was entered into not more than one of the newspapers "... was likely to remain or become a financially sound publication. ..."\textsuperscript{80} According to the legislative history, this test is less stringent than the "failing newspaper" test of § 4(b).\textsuperscript{81} In determining whether a newspaper is "likely to remain or become financially sound," the courts may consider:

... the operating results of the newspaper and other relevant factors such as a return on invested capital, cost and income trends, advertising-news ratios and trends, competitive factors, availability of capital from shareholders, investment in fixed assets, population of the relevant market area, the population trends, and all other relevant economic evidence.\textsuperscript{82}

The phrase "regardless of ownership or affiliations" included in § 4(a) is designed, as in § 3(5), to focus the courts' attention on the newspaper operating arrangement which could be exercised to regulate the effects of these anticompetitive practices.

78. This test is essentially identical to the standard which the Attorney General is to apply in determining whether a particular publication is a "failing newspaper." See note 69, supra and accompanying text.

79. It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to the effective date of this Act, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: Provided, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement.

NPA, § 4(a).

80. Id.


financial status of the business entity and preclude consideration of the availability of capital from any related business enterprises.\textsuperscript{83} Thus, the availability of capital from sources other than the newspaper itself would not show that a newspaper was likely to remain or become financially sound. However, reliance upon the stockholders or parent company rather than upon the inherent strength of the paper itself should be considered, among other factors, as tending to show that the paper was not a financially sound publication.

Application of this test is to be made as of the time such arrangement was first established.\textsuperscript{85} Consequently, changes in the local newspaper market since the start of the arrangement, such as increased population, circulation, or advertising demand are deemed irrelevant. As a result, joint operations initially satisfying the test would qualify indefinitely for an antitrust exemption.\textsuperscript{86} The only limitation § 4(a) places upon renewing or amending joint operating arrangements is that no other newspaper may be added to such an arrangement.\textsuperscript{87} Furthermore, unlike § 4(b), § 4(a) does not grant the Attorney General any authority to disapprove the joint operating arrangement in question.\textsuperscript{88} Eligibility


\textsuperscript{84} 116 CONG. REC. H6461 (daily ed. July 8, 1970) (question by Rep. Lloyd and answer by Rep. Railsback). The availability of additional capital from the newspaper owner's other business interests to perpetuate a newspaper which has been operating at a loss will not be considered as showing that the newspaper was likely to remain financially sound. Nevertheless, the courts should consider the availability of capital at the time the newspaper was established along with reasonable expectations of necessary capital for a successful publication to prevent deliberate undercapitalization by a wealthy owner to create a "failing newspaper." Subsequent reliance on the owner's capital, however, could not be considered as evidence of undercapitalization.

\textsuperscript{85} SENATE REPORT, at 5. Since the test of whether a newspaper was likely to remain or become financially sound is to be made as of the date the arrangement was entered into, subsequent profitability of the newspaper in question should not be considered. Consequently, the Supreme Court's reasoning in United States v. E. I. Dupont and Co., 353 U.S. 586, 593 (1956) to the effect that what in fact happened is probative of what was likely to happen would not be applicable to the determination of whether a newspaper was likely to remain or become financially sound under § 4(a) of the NPA.

\textsuperscript{86} Therefore, the parties to such an arrangement established before the effective date of this Act may continue to engage in the joint operations enumerated in § 3(2) indefinitely, regardless of how profitable their operations become or changes in the local newspaper market making newspaper competition commercially feasible and desirable. Consequently, § 4(a) of the NPA will enable newspaper participating in such an arrangement to reap monopoly profits and perpetuate effective monopolization of the newspaper market.

\textsuperscript{87} This limitation provides little protection against continued monopolization of the newspaper business in a metropolitan area where existence of the joint operating arrangement constitutes a substantial barrier to the establishment of competing newspaper publications.

\textsuperscript{88} The legislative history states that § 4(a) will:

\ldots prevent the Department of Justice or any private party from \ldots suing
for an antitrust exemption is to be determined by the courts, and the requirement that the terms of any renewal or amendment be filed with the Attorney General is designed solely to insure that no additional newspapers are included in the arrangement.

Section 5(a) and (b) also supports the conclusion that the NPA is designed primarily to benefit newspapers with joint operating arrangements in existence prior to its passage. Section 5(a) "allows judgments against joint operating arrangements to be reopened. ... A new trial at which the standards of this [Act] would apply may then be sought." Congressional intent to permit a joint newspaper operating arrangement to be reinstated notwithstanding a final judgment that such an arrangement in effect monopolizes a local newspaper business is illustrated in the following statement:

Section 5(a) permits the participants ... to reinstitute the joint newspaper operating arrangement which was in effect on January 1, 1965, in Tucson, Arizona, notwithstanding the judicial rulings in the... case.

Similarly § 5(b) provides that the antitrust exemption embodied in § 4(a) shall apply in the determination of any civil or criminal action under any antitrust law which is pending as of July 24, 1970.

Editorial Independence of Newspapers Participating In Joint Operating Arrangements

Section 2 states that once the eligibility requirements of § 4(a) and

under the antitrust laws, and would prohibit any department or regulatory agency of the United States Government from imposing sanctions or taking any other action on the ground that entering into, performing, enforcing or renewing such a joint operating arrangement violates or is inconsistent with the antitrust laws or is contrary to the public interest ... [emphasis added].

SENATE REPORT, at 5.

89. Id.

90. Thus, if the terms of a renewal or amendment filed with the Attorney General pursuant to § 4(a) revealed that the addition of another newspaper was contemplated, he could maintain an action to enjoin this expansion of the arrangement.

91. § 5(a) Notwithstanding any final judgment rendered in any action brought by the United States under which a joint operating arrangement has been held to be unlawful under any antitrust law, any party to such final judgment may reinstitute said joint newspaper operating arrangement to the extent permissible under section 4(a) hereof.

(b) The provisions of Section 4 shall apply to the determination of any civil or criminal action pending in any district court of the United States on the date of enactment of this Act in which it is alleged that any such joint operating agreement is unlawful under any antitrust law.

NPA, § 5(a), (b).

92. SENATE REPORT, at 6.

93. HOUSE REPORT, at 11.

94. Where it is alleged that any such joint operating agreement is unlawful under any antitrust law. NPA, §4(a), 5(b).
(b) have been satisfied, it is the policy of the NPA to preserve the editorial and news reporting independence of the newspaper publications participating in joint operations.\textsuperscript{95} It is questionable whether in fact the NPA achieves this objective. In San Francisco, the performance of the \textit{Examiner},\textsuperscript{96} in reporting on the \textit{Chronicle}'s struggle to obtain renewal of its broadcasting license\textsuperscript{97} reveals that little editorial independence can be expected on issues in which either of the participating newspapers have a vested interest. The \textit{Examiner}'s coverage of this controversy culminating in the FCC's announcement to withhold renewal of the \textit{Chronicle}'s license, was delayed and minimal.\textsuperscript{98} Since the public relies upon local newspapers for detailed and complete news reports, the preservation of joint newspaper operating arrangements, such as found in San Francisco, does not serve the public interest.\textsuperscript{99}

\textbf{Conclusion}

The courts have considered numerous competing sources of news to be essential to a democratic society as the following excerpt from Judge Learned Hand's opinion in \textit{United States v. Associated Press}\textsuperscript{100} illustrates:

[The newspaper] industry serves one of the most vital of all general interests: the dissemination of news from as many different sources and with as many different facets and colors

\textsuperscript{95} NPA, \S 2.

\textsuperscript{96} The \textit{Chronicle} and \textit{Examiner} participate in a joint newspaper operating arrangement in San Francisco. \textit{See} notes 41-47, \textit{supra}.

\textsuperscript{97} The charges were made to the FCC by Albert Kihn, a television cameraman, that the news staff of KRON-TV, which is owned by the Chronicle Publishing Co., was ordered not to report the story about the joint newspaper operating agreement except in a statement dictated by the Chronicle Publishing Co.. He also charged that KRON-FM and KRON-TV managed the news for the purpose of advancing the interests of the Chronicle Publishing Co.. \textit{House Hearings}, at 261, 262 (statement of S. Barnett).

\textsuperscript{98} One of the more sensational developments, stemming from this controversy, was the use of private detectives by the \textit{Chronicle} in an attempt to impeach the integrity of the person making these charges. \textit{Id.}, at 262, 263. When the president of General Motors admitted that his company had hired private detectives, the \textit{Examiner} ran the story near the top of the first page under a two-column headline. \textit{Id.}, at 262. However, when the president of the \textit{Chronicle} made a similar admission, involving a local controversy, the \textit{Examiner} ignored the story. \textit{Id.}

\textsuperscript{99} Even though the proviso to \S 3(2) states \textit{inter alia} that "editorial policies be independently determined" it is highly unlikely that this can be achieved in cases where any or all of the participants in the joint operating arrangement have a vested interest. The common financial interest inherent in price fixing and profit sharing which are allowed joint operating arrangements under this section may, in fact, lessen the likelihood of conflicting or divergent editorial positions on matters of local economic importance. \textit{Senate Report}, at 12 (individual views of Senators Hart, Kennedy, Burdick and Tydings).

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 the right conclusions are more likely to be
gathered out of a multitude of tongues, then through any
kind of authoritative selection. To many this is, and always
will be, folly; but we have staked upon it our all.101

The NPA will not serve the public's interest in an independent and
competitive press. There is no demonstrable economic need for exempting
joint newspaper operating arrangements from the antitrust laws since
there has been no showing that a significant number of newspapers would
fail without the exemption. Moreover, this Act will insure the effective
monopolization of the newspaper business in the twenty-two cities where
newspapers are participating in joint operations. This monopolization
is likely to effectively cripple the growth of small newspapers and prevent
the successful establishment of new competing dailies in these com-
101. 

101. Id., at 372. In affirming the district court, the Supreme Court indicated that
the First Amendment freedom of press is designed to protect the public's interest in
having access to independent and competing sources of news and that amendment:

. . . far from providing an argument against application of the Sherman Act,
here provides powerful reasons to the contrary. That 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, that a
free press is a condition of a free society. Surely a command that the
government itself shall not impede the free flow of ideas does not afford non-
governmental combinations a refuge if they impose restraints upon that con-
stitutionally guaranteed freedom. Freedom to publish means freedom for all
not for some. Freedom to publish is guaranteed by the constitution, but freedom
to combine to keep others from publishing is not. Freedom of the press from
governmental interference under the First Amendment does not sanction re-
pression of that freedom by private interests. The First Amendment affords not
the slightest support for the contention that a combination to restrain trade in
news and views has any constitutional immunity.


102. The Joint operating agreement in purpose and effect monopolized the only
newspaper business in Tucson. Citizen Pub., note 3 supra, at 135. In this case, the
Supreme Court held that

[the restraints on competition which . . . [have resulted from this joint
newspaper operating arrangement] . . . comport neither with the antitrust laws
nor with the First Amendment.

In view of his holding, it is arguable that the Act is constitutionally suspect since it may
facilitate such monopolization.
peting sources of news would be better served by application of the antitrust laws.

John H. Carlson