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Antitrust and the Newspapers -- A Comment on S. 1312

John J. Flynn

LEGISLATION

Antitrust and the Newspapers
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I. INTRODUCTION

The American newspaper industry, often called "The Fourth Estate," apparently believes it has fallen on hard times. The aristocrats of the Fourth Estate, the daily newspapers, came to the Ninetieth Congress seeking a boon: relaxation of the rigors of antitrust policy as applied to mergers and joint agency operations by otherwise competing newspapers. A bill has been introduced, S. 1312, which is sponsored by fifteen Senators of diverse political and economic views, all save one having one thing in common—the presence of newspaper joint agency operations in their home states.[1] The very fact that Senators of such conflicting viewpoints could be brought together on an issue surely indicates that America's Fourth Estate has political power far in excess of that normally associated with aristocracies in a democracy. Consequently, the political facts of life with regard to the power of newspaper publishers over the political fortunes of their communities suggest that S. 1312 is a bill that cannot be treated as special interest legislation which one might expect to see shunted aside in the committee process after a pro forma performance for the benefit of constituents. Happily, the Fourth Estate includes enough independent and responsible publishers who are concerned with the broad responsibilities of the press and the deeper implications of a free press so that there has been ample debate upon the pros and cons of S. 1312.

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* Associate Professor of Law, College of Law, University of Utah, B.S. Boston College, LL.B. Georgetown University, S.J.D. University of Michigan.

1. S. 1312, 90th Cong., 1st Sess. (1967) was introduced by: Senators Hayden (D.) and Fannin (R.) of Arizona (joint agency in Tucson); Senator Kuchel (R.) of California (joint agency in San Francisco); Senators Hartke (D.) and Bayh (D.) of Indiana (joint agencies in Evansville and Fort Wayne); Senators Bennett (R.) and Moss (D.) of Utah (joint agency in Salt Lake City); Senators Fong (R.) and Inouye (D.) of Hawaii (joint agency in Honolulu); Senators Monroney (D.) and Harris (D.) of Oklahoma (joint agency in Tulsa); Senator Randolph (D.) of West Virginia (joint agency in Charleston); Senator Scott (R.) of Pennsylvania (joint agencies in Franklin—Oil City and Pittsburgh); Senator Thurmond (R.) of South Carolina (no joint agencies in South Carolina); and, Senator Tower (R.) of Texas (joint agency in El Paso).

II. THE BACKGROUND OF S. 1312

The statistical history of the American newspaper industry provides some insight into the reason for the current attempt by some of the press to shed their mantle of rugged individualism and seek to relax the rule of competition in the industry. Newspapers witnessed a spectacular growth in the latter half of the nineteenth century and the early twentieth century.[2] In total numbers, circulation and revenues of daily and weekly newspapers achieved phenomenal growth between 1850 and 1910. In 1850 there were 254 daily newspapers with a total circulation of 758,000.[3] By 1890, there were a total of 1,610 dailies with a total circulation of 8,387,000. In 1909, there were 2,600 daily newspapers with a total circulation of 24,212,000.[4] Thereafter, the total number of daily newspapers gradually declined while total circulation continued its steady growth. In 1920, there were 2,042 dailies with a total circulation of 27,790,656; in 1940, 1,878 dailies with a total circulation of 41,131,611;[5] in 1960, 1,763 dailies with a total circulation of 58,882,000;[6] and, in 1965, there were 1,751 dailies with a total net paid circulation of 60,358,000.[7] Thus, while total circulation and revenues have been steadily increasing, the total number of dailies has been steadily decreasing. Between 1940 and 1965 the total number of morning dailies declined from 380 to 320, and during the same period the total number of evening dailies fell from 1,498 to 1,444.[8] Only Sunday newspapers have shown a growth in total numbers during this period—from 525 to 578.[9]

A superficial glance at these statistics and the realization that population, literacy, and affluence have been steadily increasing might suggest that the decline of the total number of daily newspapers is inexplicable. Inherent economic factors, competition of other media, and business practices especially peculiar to the newspaper industry, however, make the decline of the total number of dailies, in the face of increased circulation and revenues, understandable if not defensible.

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2. *See generally* KREPS, THE NEWSPAPER INDUSTRY, THE STRUCTURE OF AMERICAN INDUSTRY 509 (2rd ed. 1961); Note, *Local Monopoly In the Daily Newspaper Industry*, 61 YALE L.J. 948 (1952). For an excellent survey of the growth and concentration of all major forms of mass communication media, see B. W. RUCKER, THE FIRST FREEDOM (1968).

3. HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1957, at 500 (1957).

4. *Id.*

5. *Id.*

6. STATISTICAL ABSTRACT OF THE UNITED STATES 1957, at 519 (1957).

7. *Id.*

8. *Id.*

9. *Id.*

Inherent economic factors make modern, daily newspaper publishing an expensive process. Capital cost outlays in fixed assets for a modern, metropolitan, daily newspaper are quite high,[10] in part at least because of the relative technological backwardness and oligopolistic control of the production equipment business. Newsprint has shown a steady and rigid increase in price,[11] and wages have also been subject to steady increase, even though newspapers are still probably the largest employers of child labor in the form of "Horatio Alger" type newspaper boys.[12] Although newspapers continually fight to maintain the illusion

10. Estimates of plant replacement costs and start-up costs for a major metropolitan newspaper vary considerably, depending upon the location, size of the newspaper, and technology adopted. Replacement costs for the Newspaper Agency Corporation of Salt Lake City, which prints two dailies of over 100,000 circulation each, were estimated to exceed $7,000,000. *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. pt. 2, at 879 (1967) (statement of J. W. Gallivan) [hereinafter cited as *Hearings*]. A paper was started in McAlister, Oklahoma, with a circulation of 8,500 and a photo offset cost of $150,000. 1 *Hearings* at 379 (statement of Gene Stipe). William D. Rinehart, Assistant General Manager of the American Newspaper Publisher's Ass'n (ANPA) Research Institute, presented a general description of the technology available for new newspapers and its costs. *See* 2 *Hearings* 788, 809.

The exact status of the desirability, utility, and cost of equipment to operate a newspaper were never clearly settled in the hearings. Some witnesses argued that improved technology and an inproved labor relations policy could substantially lower the start-up costs for new newspapers. 2 *Hearings* 936-53 (statement of Dr. Harry Kelber); 2 *Hearings* 953-87 (statement of John R. Malone); 3 *Hearings* 1253-64 (statement of the International Typographical Union (ITU)). *See also* COMM. ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 30-37 (1947) (reprinted in 3 *Hearings* 1124-31).

It is interesting to note that the Report of the Royal Commission on the Press 1947-1949, perhaps the most thorough examination of the newspaper industry undertaken by any country, generally concluded that the greatest barriers to entry in the newspaper industry were finding a sure and reasonably priced supply of newsprint and achieving a stable and adequate number of advertisers early in the life of the new venture. REPORT OF THE ROYAL COMM. pt. 2, at 158-64.

11. The major cost of publishing a newspaper is newsprint. The average price per short ton of imported newsprint has risen from $93.13 in 1950 to $124.89 in 1965. STATISTICAL ABSTRACT OF THE UNITED STATES 354 (1967). The ITU reported that newsprint costs rose 236% between 1935 and 1961 and that newsprint costs accounted for 29.7% of the income of a paper with 250,000 circulation. 3 *Hearings* 1251. The price a buyer pays for a newspaper usually does not cover the cost of the paper on which the news is printed. *See* 2 *Hearings* 876-77 (statement of J. W. Gallivan). There have been several investigations of the newsprint industry probing pricing practices of sellers and the purchase of newsprint plants by large newspapers and chains. *See generally* ELLIS, NEWSPRINT: PRODUCERS, PUBLISHERS, POLITICAL PRESSURES (1960).

12. 2 *Hearings* 811-39 (testimony of the Metropolitan Route Dealers' Association). Tort litigation over the agency or independent contractor status of "newspaper boys" has been occurring with increasing frequency. For tort purposes, the degree of control exercised by newspapers over their delivery boys has led to more and more courts applying respondeat superior. *See generally* Annot., 52 A.L.R. 2d 287 (1957); Annot., 53 A.L.R. 2d 183 (1957); Note, *The Independent Contractor Status of Newspaper Carriers: Some Antitrust Questions*, 2 VALP. L. REV. 157 (1967). For antitrust purposes, at least, the Supreme Court seems willing to treat newsboys and route dealers as independent businessmen entitled to run their own business and set their own prices. *See* Albrecht v. The Herald Co., 389 U.S. 910 (1968).

that their under-age "independent contractors" are not even entitled to minimum-wage law benefits, there can be little doubt that overall wage costs have increased significantly.[13]

Heavy reliance upon advertising for revenue has also influenced the decline of the total number of newspapers. It is presently estimated that up to 70 per cent of the revenue of most newspapers is realized from advertising revenues.[14] One estimate has been made that the subscription rate for most newspapers does not even cover the cost of the paper comprising the newspaper purchased.[15] The discerning reader of almost any daily newspaper may already have realized this fact of modern newspaper publishing simply by glancing at the daily offering served up for a dime. Many dailies are 70 per cent advertising, and the cynic might suggest that newspapers are not "news" papers; rather, they are "advertising" papers with news features inserted here and there. Even the 30 per cent of a modern daily paper devoted to "news" cannot justify calling a newspaper a "news" paper unless one includes comic strips, advice to the lovelorn, canned editorials, and the remaining smorgasbord of "features" within the definition of "news."[16]

13. The average wage of production workers in the newspaper industry has risen from $2.88 per hour in 1960 to $3.44 per hour in 1966. STATISTICAL ABSTRACT OF THE UNITED STATES 227 (1967). In the Senate subcommittee hearings, there seemed to be little debate about the claims of non-production workers, particularly reporters, that they are woefully underpaid. 1 *Hearings* 416-25 (statement of B. McNamara); 1 *Hearings* 389 (statement of Prof. W. L. Rivers). There was considerable dispute as to the exact relationship of wages and labor practices to the vitality of the newspaper industry. *See e.g.*, 1 *Hearings* 196 (statement of L. M. Loeb). On this question the ANPA presented a statement prepared initially for a 1963 house antitrust subcommittee investigation of the newspaper industry and entitled: NEWSPAPERS 1963. Those House hearings were mysteriously aborted and no trace of the proceedings has ever been found. 3 *Hearings* 1415-16. The unions vigorously protested the allegations that exhorbitant wages and archaic union practices have contributed to the demise of newspapers. 3 *Hearings* 1244-52 (statement of ITU); 2 *Hearings* 936-53 (statement of Prof. H. Kelber); 1 *Hearings* 387-408 (statement of Prof. W. L. Rivers). Perhaps the only conclusion that can be drawn from this phase of the testimony is that one cannot place much value on the self-serving statements by both sides in protracted disputes in the newspaper industry. Labor relations in the industry are medieval, and there is a general need for an objective investigation of labor relations practices by both management and the unions. *See generally* 2 *Hearings* 953-87 (statement of J. R. Malone).

14. In 1945, 51.5% of newsprint consumption by newspapers went for advertising and 48.5 went for "other content." By 1966, 61.7% of newspaper newsprint consumption went for advertising and 38.3% went for "other content." STATISTICAL ABSTRACT OF THE UNITED STATES 517 (1967). *See also Id.* at 518 (Newspapers—circulation and receipts: 1958 and 1963).

15. *See* note 11 *supra*.

16. *See* 1 *Hearings* 322-23 (statement of Ben. Bagdikian); COMM. ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS 52-59 (1947); Engberg, *A Free and Responsible Press: Where Are They Now?*, THE CENTER MAG. 22 (1967). It has been said that, "[J]ournalism has shifted emphasis from information to entertainment, from objective debate on vital issues to partisan propaganda, from enlightenment to comic strips." KREBS, THE NEWSPAPER INDUSTRY, THE STRUCTURE OF AMERICAN INDUSTRY 526-27 (3d ed. 1961).

Reliance upon advertising revenue has a more invidious effect, however, than that of causing the reader eyestrain as he hunts for the news and feature columns in the daily newspaper. A "news" paper's success in obtaining high advertising revenue is directly linked with the size of the newspaper's circulation. The paper with a large circulation can offer lower line rates per customer exposure, since the cost of setting up the advertising is spread over a much larger base. Increments in printing additional copies of the same advertising do not entail additional large expenditures, since the only added costs are more ink and newsprint and additional press time.[17] In some respects, the interrelationship of circulation and advertising makes the newspaper industry an industry of increasing returns. In the words of Henry Carter Adams, an industry of increasing returns is one where the "increment of product from an expending enterprise is greater than the increment of capital and labor required to secure its expansion."[18] Consequently, a competitor with a smaller circulation is at an inherent competitive disadvantage, particularly with national advertisers, since his use of mechanical equipment is less efficient and his base for allocation of advertiser cost is narrower. Moreover, smaller circulation and necessarily higher advertising rates make the smaller competitor less attractive to the advertiser, since the advertiser's cost per potential

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One of the underlying assumptions often stated in favor of S. 1312 is the proposition that local affairs will be better served by two contending editorial viewpoints rather than one. The assumption is based upon the premise that local newspapers cover local news and provide local citizens with in-depth information about major problems facing the community. Aside from a few noteworthy exceptions, this premise is patently false, since: most "news" in local papers is provided by national wire services; most editorial comment is provided by nationally syndicated columnists or canned editorials; and the balance of non-advertising material is directed at entertaining rather than informing, by providing glimpses at the future through daily horoscopes for the idealists and racing forms for the realists, advice to the lovelorn and beauty hints for the lonely, sporting news for those who gain vicarious pleasure from identifying with athletes, comics for those who can't read, and free advertising or adulation for those local citizens recognized as the local captains of industry or the commercial establishment. The gradual concentration and reliance of the industry upon advertising for revenue, thereby causing a shift to reliance upon the use of material that sells newspapers, bears a striking resemblance to the evolution of the radio and television industry. *See* Cox and Johnson, Broadcasting In America and the FCC's License Renewal Process: An Oklahoma Case Study (Mimeo 1968).

17. In 1951 John R. Malone wrote an incisive article exploring this peculiarity of newspaper competition. *Economic-Technological Bases for Newspaper Diversity*, JOURNALISM Q. (Summer 1951, *reprinted in* 4 *Hearings* 1770. Dr. Malone predicted that the inevitable consequence of the present form of newspaper competition and technology would be further concentration of the industry. His analysis has been proven correct and his testimony before the Committee proved to be the most sophisticated and incisive testimony on the economic laws and consequences of newspaper competition. 2 *Hearings* 953-87.

18. H. ADAMS, RELATION OF THE STATE TO INDUSTRIAL ACTION (1887).

customer reached will necessarily increase. Consequently, heavy reliance upon advertising for revenue, the more efficient use of advertising dollars per exposure by advertisers, and the direct relationship between size of circulation and the efficiency of the use of advertising dollars have all been combined to give the larger circulation competitor an inherent advantage in the struggle for survival. It is therefore not surprising that the twentieth century has witnessed a gradual decline in the total number of daily newspapers, even though newspaper circulation and revenues have been steadily increasing.

Given the foregoing economic facts of newspaper competition, high capital costs, difficulty of achieving market acceptance, difficulties in establishing an efficient distribution system, and competition by other media, it is not unusual to expect that there are high barriers to new market entry in the newspaper business.[19] In many areas those barriers have been made insuperable by the following facts: restrictive practices in the newsprint business;[20] acquisition by existing papers of used production equipment and the intangible assets of failing newspapers in order to keep them out of the market for potential newcomers;[21] restrictive practices in the sale of syndicated features and wire services;[22] pooling a chain newspaper's resources to fight competition;[23] and by the creation of joint newspaper agencies whereby existing competitors form a new corporation to handle printing, distribution, advertising, and all other commercial operations of their newspapers through one corporation.[24] The creation of joint newspaper agency corporations has been

19. *See* Malone, *supra* note 17; 1 *Hearings* 41 (statement of Arthur B. Hanson); 2 *Hearings* 788 (statement of W. D. Rinehart). While no empirical economic research has been done on this question, the decline of the total number of newspapers and the experience of new entrants with artificial, as well as inherent, barriers to entry justify the conclusion that entry barriers are high, particularly where there are existing competitors. *See* 2 *Hearings* 721-38 (statement of M. G. Dworkin); 1 *Hearings* 371-85 (statement of Hon. G. Stipe). Even established newspapers have difficulty in establishing a new newspaper in a different product market. *See* 1 *Hearings* 195-97 (statement of L. M. Loeb).

20. *See generally* L. ELLIS, NEWSPRINT: PRODUCERS, PUBLISHERS, POLITICAL PRESSURES (1960); Note, *Local Monopoly in the Daily Newspaper Industry*, 61 YALE L. J. 948, 959-66 (1952).

21. 2 *Hearings* 973-74 (statement of J. R. Malone); 1 *Hearings* 211 (statement of W. J. Farson).

22. United States v. Chicago Tribune—N.Y. News Syndicate, Inc., 5 TRADE REG. REP. ¶ .45067 at 52, 662 (S.D.N.Y. 1967). *See also* 1 *Hearings* 297-308, 315-18 (statement of N. Cherniss).

23. 2 *Hearings* 915-35 (statement of Fred Martin); 3 *Hearings* 1307-43 (statement of ITU); 1 *Hearings* 281-95 (statement of Prof. B. W. Rucker); 2 *Hearings* 1022-34 (statement of E. Elfstrom).

24. 1 *Hearings* 328-69 (statement of J. Flynn); 2 *Hearings* 841 (statement of J. M. Cornwell); 1 *Hearings* 249 (statement of R. McDonald); 1 *Hearings* 83 (statement of E. Mecham); 2 *Hearings* 634-81 (statement of J. H. Clinton).

done in the name of preserving independent editorial voices in communities where there is existing competition between regularly published newspapers. Since the first newspaper agency corporation was created in Albuquerque in 1928,[25] 27 other communities have seen the creation of agency arrangements.[26] A significant portion of the industry is currently operating under agency operations.[27]

III. THE GENESIS OF S. 1312

On January 4, 1965, the Antitrust Division of the Justice Department filed a civil antitrust suit to block the merger of the Arizona Daily Star and the Tucson Daily Citizen, the two daily newspapers in Tucson, Arizona.[28] The suit also challenged the validity of the joint operating agreement by which the two papers had been conducting joint printing, advertising, and circulation operations since 1940. Similar joint operations exist in 21 other American cities, and the prospect that Antitrust Division success in Tucson would place the other joint operations in jeopardy was the primary factor which produced S. 1312.[29] The United States District Court for Arizona found the merger unlawful under section 7 of the Clayton Act and held that the 1940 joint operating agreement constituted monopolization in violation of section 2 of the Sherman Act.[30] The court specifically held: that the joint operation "constitutes a price fixing, profit pooling and market allocation agreement illegal per se under Section 1 of the Sherman Act;" that the defendants

25. For a history of joint agency operations in various parts of the country, see Tassin, *Daily Newspaper Semi Mergers: A Study of Separately Owned, Editorially Competitive Newspapers Published in Jointly Operated Printing Plants Under Unified Business Management*, 1957 (unpublished M.A. thesis, U. of Okla.). The Albuquerque, N.M., and El Paso, Tex., joint agency arrangements have served as models for many subsequent joint agency arrangements. *See, e.g.*, 1 *Hearings* 6 (statement of W. Small).

26. Tassin, *supra* note 25.

27. Twenty-two cities, if Tuscon is included, have joint agency operations to varying degrees: Birmingham, Ala.; Tucson, Ariz.; San Francisco, Cal.; Miami, Fla.; Honolulu, Hawaii; Evansville and Fort Wayne, Ind.; Shreveport, La.; St. Louis, Mo.; Lincoln, Neb.; Albuquerque, N. M.; Columbus, Ohio; Tulsa, Okla.; Franklin—Oil City and Pittsburgh, Pa.; Nashville and Knoxville, Tenn.; El Paso, Tex.; Salt Lake City, Utah; Bristol, Va.; Charleston, W. Va.; and Madison, Wis. The ITU claimed joint agency operations exist in 25 cities. *See* 1 *Hearings* 135 (statement of the ITU). The ANPA claimed joint agencies exist in 22 cities. 1 *Hearings* 63 (statement of A. Hanson). One witness, Roy McDonald, president and publisher of the Chattanooga News—Free Press, broke up a joint agency in which his newspaper participated. 1 *Hearings* 249-63.

28. United States v. Citizen Publishing Co., 5 TRADE REG. REP. ¶45,065, at 52, 58F (D. Ariz. 1965), *decided*, 280 F. Supp. 978 (1968), *prob. jur. noted*, 37 U.S.L.W. 3151 (U.S. Sept. 21, 1968).

29. 1 *Hearings* 3 (statement of Hon. Carl Hayden (D-Ariz.)). *See also 15 Senators Ask Law to Okay Agency Plan*, EDITOR AND PUBLISHER, March 25, 1967, at 10.

30. United States v. Citizen Publishing Co., 280 F. Supp. 978, 994 (1968).

"acquired monopoly power over the daily newspaper business in Tucson, in violation of Section 2 of the Sherman Act;" that the defendants combined and conspired to monopolize interstate trade and commerce in violation of section 2 of the Sherman Act; and that the government is "entitled to a decree directing divestiture of [the] Star and modification of the operating agreement."[31]

S. 1312 was introduced by fifteen senators—representing about all schools of political thought currently found in the two major political parties and representing states where joint newspaper arrangements have been operating—approximately eight months before the Citizen Publishing Company decision was handed down by the district court.[32] A cursory reading of the bill should demonstrate that the proponents of the legislation were not bashful about seeking an "exemption" approaching immunity.

Section 1 of the bill would allow the Act to be cited as the "Failing Newspaper Act." Like "right to work" and "fair trade" legislation, the popular name for the bill is somewhat misleading. In the case of S. 1312, the popular name of the bill infers that many newspapers are failing, that their failure is due to inherent and uncontrollable economic factors, and that the bill will only exempt newspapers that are failing because of inherent and uncontrollable economic factors. The first inference assumes a fact that never has been proved,[33] the second is patently false,[34] and the third is simply not true since the bill by definition applies to more than "failing newspapers."[35]

Section 2 of the bill, the declaration of congressional policy, broadly states that it is the policy of the United States to preserve

31. *Id.* at 993.

32. The district court filed its opinion January 31, 1968, and S. 1312 was filed March 16, 1967.

33. If anything, the claims of the ANPA that the industry was never healthier and the future never brighter were clearly established by the hearings. The ANPA's claims were made in a report issued by the ANPA two weeks after S. 1312 was filed. *See* ANPA, Daily Newspapers in 1966, Highlights of a Record Year (April 1967), reprinted in 1 *Hearings* 509-27. Essentially the same claims were made by the ANPA in 1963 in a massive report prepared for the mysterious House Antitrust Subcommittee Hearings on Newspapers in 1963. Although all records of the House hearings have disappeared, the ANPA published and distributed its statement at those hearings. ANPA, NEWSPAPERS 1963 (1963), reprinted in 3 *Hearings* 1407-1546. The ITU also prepared a massive report for the 1963 House hearings: ITU, FEDERAL RESPONSIBILITY FOR A FREE AND COMPETITIVE PRESS (1963), reprinted in 3 *Hearings* 1235-1406.

34. *See generally* 2 *Hearings* 953-87 (statement of John R. Malone).

35. Section 3(6) of the proposed bill provides: "The term 'failing newspaper' means a newspaper publication which, regardless of its ownership or affiliations, appears unlikely to remain or become a financially sound publication." The gap between failing and "unlikely to remain or become a financially sound publication" is equivalent to the gap between the incipiency standards of

publication of newspapers in any area where a joint operating arrangement or combination has been or may be entered into because of "economic distress."[36] The term "economic distress" is not used or defined elsewhere in the act and promotes confusion, since it implies that the bill embraces a broader range of newspapers in trouble than that covered by the popular name of the bill found in section 1. Moreover, the legal status of the legislative declaration of policy is unclear. If the affirmative effect of a statutory declaration of policy is clear it is of aid in determining the substantive scope and purpose of the statute.[37] The substantive scope and purpose of S. 1312, in light of this declaration of policy and the exemption sections, is to cut as wide a swath of antitrust immunity as possible for newspaper combinations formed under the conditions stated in section 4 of the bill. But the negative implications of the statutory declaration of policy are less clear. One implication of section 2 of the proposed bill is that a court faced with the question of whether state antitrust and special newspaper industry laws could be applied to a newspaper combination formed pursuant to S. 1312 would, in all likelihood, hold that the strong affirmative declaration of policy found in section 2 evidences a congressional intent to pre-empt conflicting state legislation.[38] If such proves to be the case, S. 1312 would not only override the application of most major federal antitrust laws, but would also remove the application of state antitrust policy to anticompetitive newspaper arrangements formed within a state's borders. One wonders why several of the sponsors, normally super-sensitive to "states' rights," were willing to introduce a bill so obviously destructive of independent state antitrust policy.

Sections 3 and 4 of the proposed bill, the definition section and the operative exemption section, are the heart of the bill and are so closely

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the Clayton Act and the achievement standards of the Sherman Act. *Compare* Brown Shoe Co. v. United States, 370 U.S. 294 (1962), *with* United States v. Columbia Steel Co., 334 U.S. 495 (1948). For an examination of the various definitions of the failing company defense, see Low, *The Failing Company Doctrine: An Illusive Economic Defense Under Section 7 of the Clayton Act*, 35 FORDHAM L. REV. 425, 437-42 (1967).

36. Section 2 of the proposed bill provides: "In the public interest of maintaining the historic independence of the newspaper press in all parts of the United States, it is hereby declared to be the public policy of the United States to preserve the publication of newspapers in any city, community or metropolitan area where a joint operating arrangement or combination has been or may be entered into because of economic distress."

37. Campbell v. Hussey, 368 U.S. 297 (1961); San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959); Garner v. Teamsters Union, 346 U.S. 485 (1953); Hill v. Florida, 325 U.S. 538 (1945); Hines v. Davidowitz, 312 U.S. 52 (1941).

38. 2 *Hearings* 892-906 (statement of Hon. Phil Hansen). *See generally* J. FLYNN, FEDERALISM AND STATE ANTITRUST REGULATION 109-200 (1964).

intertwined as to require joint examination. Section 3 (1) of the Act defines the words "antitrust law" to include the Federal Trade Commission Act and each statute defined by section 4 of the Federal Trade Commission Act as an "Antitrust Act."[39] Section 4 of the Federal Trade Commission Act defines "antitrust laws" as including the Sherman Act,[40] the FTC Act,[41] the Clayton Act[42] including its pre-Norris-LaGuardia restrictions against labor unions,[43] the Wilson Tariff Act,[44] the Robinson-Patman Act Amendments to the Clayton Act,[45] and the Celler-Kefauver amendments to section 7 of the Clayton Act.[46] The dimensions of the exemption must be measured against all the major federal antitrust laws, since section 4 states: "It shall not be unlawful under *any antitrust* law for any person to propose, enter into, perform or enforce," an arangement or combination exempted by the Act under the conditions stated for the exemption.[47]

The remaining definitions follow the same expansive and all-inclusive course. "Newspaper owner" is defined to mean "any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications;"[48] "person" is defined to include any individual, corporation, partnership,

39. Section 4 of the Federal Trade Commission Act does not define "Antitrust Act" but does define "Antitrust Acts," 15 U.S.C. § 44 (1964). The definition may not include the Robinson-Patman Act and the 1950 Celler-Kefauver amendments to § 7 of the Clayton Act since § 4 refers to the Clayton Act as originally enacted in 1914 and does not incorporate its subsequent amendments. It might even be argued that the Robinson-Patman and Celler-Kefauver amendments to the Clayton Act are intentionally excluded since another section of the 1938 statute, defining acts to regulate commerce, expressly includes "[a]ll acts amendatory thereof and supplementary thereto." 15 U.S.C. § 44 (1957). Express inclusion in one section would indicate an intent to exclude from a similar and companion section. Since newspaper joint agencies and newspaper mergers raise serious Clayton Act § 7 questions and many newspapers charge discriminatory advertising rates, it seems clear that the proponents of S. 1312 intended to add the Robinson-Patman Act and the Celler-Kefauver amendments to § 7 of the Clayton Act. The ambiguity should be removed, however, if the bill is adopted.

40. 26 Stat. 209 (1890), *as amended*, 15 U.S.C. § 1 et seq. (1964).

41. 38 Stat. 717 (1914), *as amended*, 15 U.S.C. § 41 et seq. (1964).

42. 38 Stat. 730 (1914), *as amended*, 15 U.S.C. § 12 et seq. (1964).

43. 29 U.S.C. § 52(4) (1964).

44. 15 U.S.C. §§ 8-11 (1964).

45. 15 U.S.C. § 13 (1964).

46. 15 U.S.C. § 18 (1964).

47. Emphasis added. Section 4 of S. 1312 provides: "It shall not be unlawful under any antitrust law for any person to propose, enter into, perform, or enforce the provisions of any contract, agreement, or arrangement for any newspaper combination or any joint newspaper operating arrangement if, at the time at which such contract, agreement, or arrangement is proposed or entered into, not more than one of the newspaper publications affected by such combination or operating arrangement is a publication other than a failing newspaper."

48. S. 1312, § 3(4).

association or other juridical person organized under or recognized by any state or nation;[49] and "newspaper publication" is defined to include a "publication produced on newsprint paper which is published in one or more issues weekly, and in which a substantial portion of the content is devoted to the dissemination of news and editorial opinion."[50] Included among those who may avail themselves of the bill, therefore, is any individual or legal entity owning or controlling, no matter how indirectly, a newspaper printed at least once per week.

The key definitions of the bill are "newspaper combinations," "joint operating arrangments," and "failing newspaper," since the exemption is conditioned upon "not more than one of the newspaper publications affected" by the arrangement being a "publication other than a failing newspaper" and is limited to a "newspaper combination" or "joint newspaper operating arrangement" as defined by the Act.[51] The peculiar negative phrasing of the condition needed to activate the exemption—that not more than one of the newspapers be other than a failing newspaper—is somewhat confusing, since it seems to infer that combinations and arrangements may only be made by one non-"failing newspaper" and one or more "failing newspapers," but not by two or more "failing newspapers" without a non-"failing newspaper" being party to the combination or arrangement. The confusion should be attributed to poor draftsmanship rather than evil design, since it seems apparent that the drafters at least intended to foreclose the possibility of the bill being used as a device for mergers by two or more healthy newspapers through the medium of a "failing newspaper."[52]

The conditioning of a merger and joint operating arrangement upon only the status or lack of status of a "failing newspaper" seems to incorporate into the bill the failing company defense developed in Clayton Act section 7 cases. The definition of "failing newspaper," however, is significantly broader than the vague definitions of that term which have been developed in antitrust lore.[53] Section 3 (6) of the

49. S. 1312, § 3(7).

50. S. 1312, § 3(5).

51. S. 1312, § 4.

52. 1 *Hearings* 78 (statement of A. Hanson).

53. Low, *supra* note 35 at 437-42; Hale & Hale, *Failing Firms and the Merger Provisions of the Antitrust Laws,* 52 KY. L.J. 597 (1964); Dept. of Justice, Antitrust Div. Merger Guidelines, TRADE REG. REPORTS (No. 363, June 3, 1968). The Merger Guidelines adopt the following standards:

"A merger which the Department would otherwise challenge will ordinarily not be challenged if (i) the resources of one of the merging firms are so depleted and its prospects for rehabilitation so remote that the firm faces the clear probability of a business failure, and (ii) good faith efforts by the failing firm have failed to elicit a reasonable offer of acquisition more consistent with the purposes

proposed bill defines "failing newspaper" to mean "a newspaper publication which, regardless of its ownership or affiliations, appears unlikely to remain or become a financially sound publication." The definition broadens the "failing company" defense, if it is a defense,[54] by: (1) importing an incipiency test into the definition; (2) equating verbiage foreign to the defense, "unlikely to become or remain financially sound," with the concept of failing; (3) excluding consideration of the other assets of the owners or its affiliates; (4) excluding consideration of those factors contributing to the "financial" un-"soundness" of the "failing" newspaper; and (5) excluding investigation into the anticompetitive effects of one firm rather than another acquiring the failing firm.[55] In light of such a definition it is generous to call the bill "The Failing Newspaper Act;" it is dangerous to think that the bill is designed to preserve the struggling and crusading editor of yesteryear whose only devotion is to the non-commercial aspects of journalism.[56] It is ridiculous to think that the bill is anything other than an open invitation to further concentrate an already over-concentrated industry, thereby destroying the few remaining independent editorial voices.

The danger of the bill's vague and loophole-ridden definition of "failing newspaper" becomes apparent upon examining the dimensions of the exemption from all federal antitrust legislation created by the merger and joint operating arrangement definitions in sections 3 (2) and 3 (3). "Newspaper combinations" are defined as the merger or

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of Section 7 by a firm which intends to keep the failing firm in the market. The Department regards as failing only those firms with no reasonable prospect of remaining viable; it does not regard a firm as failing merely because the firm has been unprofitable for a period of time, has lost market position or failed to maintain its competitive position in some other respect, has poor management, or has not fully explored the possibility of overcoming its difficulties through self-help.

"In determining the applicability of the above standard to the acquisition of a failing division of a multi-market company, such factors as the difficulty in assessing the viability of a portion of a company, the possibility of arbitrary accounting practices, and the likelihood that an otherwise healthy company can rehabilitate one of its parts, will lead the Department to apply this standard only in the clearest of circumstances."

54. *See generally* Connor, *Section 7 of the Clayton Act: The "Failing Company" Myth*, 49 GEO. L.J. 84 (1960).

55. *See* United States v. Diebold, 369 U.S. 654 (1962); Merger Guidelines, *supra* note 53.

56. Many newspapers are a part of a much larger chain or conglomerate corporation. For example, the ITU reported in 1963 the vast holdings of the Chandler, Hearst and Newhouse interests spreading aeross all forms of communications and related industries. *See* 3 *Hearings* 1276-1307. Professor Rucker described the growth of newspaper chains and newspaper ownership of AM and FM broadcasting stations and television stations. 1 *Hearings* 283. The general shift from performing the task of transmitting information to the role of entertaining is further evidence of the demise of the crusading editor of yesteryear. *See* note 16 *supra*. There are still some around, however. For a particularly good example, see the testimony of Eugene Cervi, editor and publisher of Cervi's Rocky Mountain Journal, 1 *Hearings* 25-41.

consolidation of two or more newspaper owners, or the acquisition by one newspaper owner, directly or indirectly, of one or more newspaper owners by stock or asset acquisitions in whole or part. One can only speculate as to why the draftsmen felt compelled to include a merger provision in a bill purportedly designed to save joint operating arrangements. The heavy involvement of some chain newspapers in joint operating arrangements[57] and the protection of consummated mergers between newspapers in many communities, bringing total control under one hand, seem to be the prime reasons. The retroactive effect of the bill[58] and the phrasing of the exemption lend support to this speculation, since the legality of the merger is to be judged "at the time at which such contract, agreement, or arrangement is proposed or entered into." Consequently, the doctrine of *United States v. E.I. Dupont de Nemours & Co.*,[59] permitting attack upon a merger many years after its consummation, would not be available for attacking newspaper mergers if the merger met the lax standards of S. 1312 at the time it was proposed or entered into. Thus, subsequent changes in market conditions, the rehabilitation of the failing firm, technological changes making it possible for a second and independent paper to exist in the same market, and the anticompetitive effects of the merger occurring in subsequent years could not lift the veil of antitrust immunity if at the time the merger was "proposed or entered into[,] not more than one of the newspaper publications affected by such combination or operating arrangement is a publication other than a failing newspaper."

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57. For example, the Scripps-Howard chain is involved in joint agency arrangements in Albuquerque, N. M.; El Paso, Tex.; Evansville, Ind.; Birmingham, Ala.; Knoxville, Tenn.; Columbus, Ohio; and Pittsburgh, Pa. 1 *Hearings* 265 (statement of J. Howard). Merger trends in the newspaper industry are a substantial cause for concern. For a survey of recent events, see Flackett, *Newspaper Mergers: Recent Events in Britain and the United States*, 12 ANTITRUST BULL. 1033 (1967).

58. S. 1312, § 5 provides: "(a) Any civil action in any district court of the United States in which a final judgment or decree has been entered, under which a newspaper combination or a joint newspaper operating agreement has been held to be unlawful under any antitrust law shall be reopened and reconsidered upon application made to such court within ninety days after the date of enactment of this Act by any party to the contract, agreement, or arrangement by which such combination or operating agreement was placed in effect, whether or not such party was a party to such action. Upon the filing of any such application with respect to any such action, any final judgment or decree theretofore entered therein shall be vacated by the court. The provisions of section 4 shall apply to the determination of such action by such court upon such reconsideration. (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 combination, or any such operating agreement, is unlawful under any antitrust law."

59. 353 U.S. 586 (1957). *See generally The Backward Sweep Theory and the Oligopoly Problem* 32 ABA ANTITRUST L.J. 306 (1967) (special report to the ABA Antitrust Law Subcommittee on § 7 of the Clayton Act).

"Joint newspaper operating arrangement" is defined to allow any or all combined activity and to involve every commercial aspect of the newspaper business. The definition sanctions combined activity for any one or combination of the following aspects of newspaper publication: (1) "joint or common facilities for publication;" (2) "unified operations for the performance of one or more of the following functions: printing, distribution, advertising and circulation solicitation, and bookkeeping;" and (3) "joint or common establishment of advertising rates, circulation rates, and revenue distribution."[60] In effect, therefore, "joint newspaper arrangements" is so defined by the bill as to permit a partial or total merger of all commercial phases of newspaper operations without the necessity of a formal merger, if at the time the arrangement "is proposed or entered into, not more than one of the newspaper publications affected by such combination or operating arrangement is a publication other than a failing newspaper." The dimensions of the exemption approach total immunity from antitrust liability, since the operative language of the exemption states: "It shall not be unlawful under *any* antitrust law for any person to propose, enter into, perform, or enforce the provisions of *any* contract, agreement, or arrangement for *any* newspaper combination or *any* joint newspaper operating arrangement. . . ."[61] If the word "any" is given its normal meaning and the definitions of "joint newspaper operating arrangement," "newspaper combination," and "antitrust laws" are followed, it is readily apparent that the exemption is one of total immunity from antitrust liability rather than the limited exemption the sponsors claimed for the bill.

Following in the footsteps of other special interest legislation,[62] S. 1312 proposes to exempt previous transactions from antitrust liability. Quite simply, S. 1312 provides that all final judgments and decrees in civil cases against "newspaper combinations" and "joint newspaper operating arrangements" holding them to be unlawful under any antitrust law shall be "reopened and reconsidered" upon application of a party to the arrangement or combination and its validity shall be readjudicated under S. 1312.[63] Pending civil and criminal actions against "newspaper combinations" and "joint newspaper operating arrangements," where it is alleged that the combination or arrangement is un-

60. S. 1312, § 3(3).

61. S. 1312, § 4 (emphasis added).

62. *See, e.g.*, 12 U.S.C. § 1828(2) (Supp. 1967) (Bank Merger Act amendment of 1966). One court has considered the impact of the retroactive application of the statute. *See* United States v. First Nat'l Bank & Trust Co., 5 TRADE REG. REP. (1968 Trade Cas.) ¶ 72,332, at 84,903 (E.D. Ky. Dec. 29, 1967).

63. S. 1312, § 5.

lawful under "any antitrust law," are to be adjudged under the standards of S. 1312 as well. By making S. 1312 retroactive, the proponents of the measure raise several complicated constitutional issues, as well as the unpopular spector of special interest legislation. The most immediate constitutional issues, aside from the general due process questions raised by retroactive legislation, are whether the legislation violates the general principle of separation of powers by reopening litigated judgments and whether the legislation deprives litigants of due process by destroying vested causes of action and rights vested pursuant to litigated and final judgments.[64] While extended discussion of these issues will not be attempted here, suffice it to say that the legislative process is already suspected by many to be the bailiwick of special interests. Passage of retroactive legislation for the obvious benefit of special interests only confirms such suspicions.

S. 1312 presents a number of antitrust law and constitutional law issues, as the above brief outline points out. Thus, even though the process of analyzing the bill may be a rewarding method for reviewing several areas of substantive law, the merit of S. 1312 is that it forces one to grapple with vital matters of public policy and the future of the expanding communications media. The hearings on S. 1312 proved to be of major public significance, since they revealed a massive amount of substantive information concerning the state of the communications industry in general and newspapers in particular that heretofore has been beyond public notice.

IV. THE HEARINGS ON S. 1312

The hearings on S. 1312 raised several major issues with regard to competition in the newspaper business. The key question was the recurring issue of whether the bill would grant immunity to newspaper mergers and joint operating arrangements permitting predatory anti-competitive activity, or whether the bill would only amount to a limited

64. The closest case to the issues presented by S. 1312 is United States v. First Nat'l Bank & Trust Co., 5 TRADE REG. REP. (1968 Trade Cas.) ¶ 72,332, at 84,903 (E.D. Ky. Dec. 29, 1967). The Bank Merger Act of 1966 provides that "Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consumated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act . . . , shall be conclusively presumed to have not been in violation of any antitrust laws other than Section 2 of the [Sherman Antitrust Act] . . . ." 12 U.S.C. § 1828 (Supp. II, 1967). The District Court in *First Nat'l Bank & Trust* avoided the constitutional issues by holding that the litigation was not final when the Bank Merger Act was passed, even though a decree ordering divestiture had been entered.

exemption for activity otherwise subject to antitrust attack, not including "predatory activity." Senator Hayden, chief sponsor of the bill, took the position that the bill was an "exemption," equivalent to the many exceptions heretofore enacted for regulated industries or other fields of economic endeavor where competition has been assumed or proved to be unworkable or impracticable.[65] Senator Hayden's position was supported by Arthur B. Hanson, general counsel of the American Newspaper Publisher's Association (ANPA).[66] Mr. Hanson cited as analogous exemptions from antitrust liability the Webb-Pomerene Export Trade Act,[67] the Small Business Act of 1958,[68] the Bank Merger Act of 1966,[69] and exemptions for pooled television broadcasting rights in professional football.[70] Others mentioned the McCarren-Ferguson exemption,[71] exemptions for agricultural cooperatives, and the labor exemptions.[72] Each of the exemptions cited are specifically limited either by being narrowly defined to cover a specific type of conduct or by being limited to extraterritorial effects, or by the fact that the particular industry is otherwise affirmatively regulated by federal or state administrative agencies. There is no limiting language on the scope of the exemption in S. 1312, nor is their any quid pro quo in the form of affirmative administrative regulation of predatory practices from price fixing to price discriminations in return for the gift of antitrust immunity. The argument was made that the exemption extended only to the "*act of combining* by way of a joint arrangement or merger and the jointness of the activities thereafter engaged in by the joint arrangement or the merged companies. . . . The *activities* undertaken by the newly formed entity would remain subject to the antitrust laws just as the conduct of any other lawfully created entity is subject to the antitrust laws."[73] The simple answer to this proposition is that the bill immunizes

65. 1 *Hearings* 3-5, 445-49 (statement of Senator Hayden (D-Ariz.)).

66. Mr. Hanson's time was paid for by the ANPA, but his viewpoints, apparently, were not intended to represent the official views of the Association, 1 *Hearings* 60, a posture some members of the ANPA found both objectionable and confusing, 1 *Hearings* 79.

67. 40 Stat. 516 (1918), *as amended*, 15 U.S.C. §§ 61-65 (1964). *See generally* Pogue, *Webb-Pomerene Export Trade Act*, 33 ANTITRUST L.J. 105 (1967).

68. 15 U.S.C. §§ 631 et seq. (1964). *See generally* Schramm, *Small Business*, 33 ANTITRUST L.J. 94 (1967).

69. 12 U.S.C. § 1828 (Supp. II, 1967). *See generally* Hammond, *The Philadelphia Nat'l Bank Doctrine—A Verification*, 36 ANTITRUST L.J. 13 (1967).

70. 75 Stat. 732 (1961), *as amended*, 15 U.S.C. §§ 1291-93 (Supp. II, 1967). *See generally* Eppel, *Professional Sports*, 33 ANTITRUST L. J. 69 (1967).

71. 59 Stat. 33 (1945), *as amended*, 15 U.S.C. §§ 1011-15 (1964). 1 *Hearings* 77 (statement of P. Chumbris). *See generally* Myrter & Gorman, *Insurance*, 33 ANTITRUST L. J. 28 (1967).

72. 1 *Hearings* 178-80 (statement of Prof. R. Day). *See generally* Noakes, *Agricultural Cooperatives*, 33 ANTITRUST L.J. 7 (1967); Fried and Crabtree, *Labor, Id.* at 38.

73. 1 *Hearings* 190 (letter to the Committee by Prof. R. Day) (emphasis added).

total merger or joint or common action for any or all commercial activity engaged in by a modern newspaper and contains no language limiting the scope of the exemption. Consequently, the argument that predatory activities pursuant to a joint arrangement or merger are not exempt from antitrust policy is incomprehensible, since the language providing for exemption makes any joint arrangement for unified activity embracing any or all commercial activity of the newspapers involved "not . . . unlawful under any antitrust law."[74]

A second major issue before the committee was a determination of the economic health of the newspaper industry in general and of specific newspapers in particular. The debate generally raged in the realm of speculation and generalities, with few instances of specifics. Newspapers have been generally exempt from income reporting requirements,[75] and, since most newspapers are close corporations and no annual reports to stockholders are issued , there is no general fund of information with regard to their financial affairs. Although several publishers made unsubstantiated pleas of poverty or of increasing cost pressures upon profit rates, the overall impact of the hearings established that most newspapers are exceptionally profitable, that newspapers operated on a joint arrangement basis are very profitable, and that monopoly town newspapers are extremely profitable.

Indeed, it would be hard to understand how the general economic health of the industry could be other than good. Between 1945 and 1966, daily newspaper circulation increased by almost 11 million, the total number of pages in an average daily newspaper almost doubled,[76] and total newspaper revenues increased from 846 million dollars in 1939 to 3,458 million dollars in 1958.[77] Advertising revenues alone totalled 4,876 million dollars in 1966.[78] In an industry with a rapidly expanding customer market, high barriers to entry, and consistent and high gains in revenues it is difficult to believe that the industry in general is suffering from a case of economic malnutrition. Indeed, an American Newspaper Publisher's Association report on the state of the industry in April, 1967, described "the unprecedented economic vigor of daily newspapers."[79]

The economic vigor of joint agency and recently merged newspapers, perhaps the key factual issue before the committee, was

74. S. 1312, § 4.

75. 1 *Hearings* 287-88 (statement of Prof. B. Rucker); 1 *Hearings* 388 (statement of Prof. Rivers).

76. ANPA, Daily Newspapers in 1966 (April, 1967), *published in* 1 *Hearings* 513-15.

77. 3 *Hearings* 1265 (statement of ITU).

78. ANPA, Daily Newspapers in 1966 (April, 1967), *published in* 1 *Hearings* 511.

79. *Id.* at 509-27.

never clearly established. However, several witnesses produced evidence indicating the newspapers can be lucrative enough even to cause the drug industry to be envious. Prices paid for large newspapers[80] and for small newspapers[81] indicate that buyers believe newspapers are an exceptional investment. It was reported that a survey of a large daily, with an average circulation of 240,000, and a medium daily, with a circulation of 50,000, showed the former had before-tax profits of 3,296,179 dollars or a profit of 22 per cent of its total revenues, and that the latter had a before tax profit of 27 per cent of revenues and an after-tax profit of 14 per cent of revenues.[82] The Times-Mirror Company, a diversified holding company which owns the Los Angeles Times and has "large interests in newspaper publishing, book publishing and commercial printing,"[83] showed 1963 revenues of 196,537,000 dollars on 165,162,000 dollars of total assets.[84] The Sun Company, owners and operators of daily newspapers in San Bernardino, California, and the acquired company in the aborted Times-Mirror merger case,[85] had total assets of 4,551,261 dollars and net income from its newspaper operations in 1964 that "exceeded 1,000,000 dollars."[86] The International Typographical Union reported that the Tucson Star and the Tucson Mirror, participants in a joint agency venture and partners in the merger attacked by the Antitrust Division[87] which led to the introduction of S. 1312, showed profits of 2,914,036 dollars on a total income of 8,170,780 dollars in 1963.[88]

It seems clear that proponents of the proposed legislation did not carry the burden of establishing the central factual issue before the committee—that the newspaper industry in general or in particular cases is in ailing circumstances. If anything, the evidence submitted to the committee indicated a marked reluctance by newspaper owners to disclose detailed and independently audited profit statements and many

80. The Cleveland Plain Dealer was sold for $50 million and the New Orleans Times Picayune was sold for $42 million to the Newhouse chain. The Chandler interests paid $15 million for the San Bernardino Sun. 1 *Hearings* 115 (statement of the ITU).

81. A paper with 7,000 circulation in Athens, Georgia, was recently sold for $1.7 million. 1 *Hearings* 115 (statement of the ITU).

82. 1 *Hearings* 206 (statement of W. J. Farson).

83. United States v. Times-Mirror Co., 274 F. Supp. 606 (C.D. Cal. 1967), *aff'd per curiam*, 390 U.S. 712 (1968). For a description of the Times Mirror Company's "large holdings," see 3 *Hearings* 1298-1301 (statement of the ITU).

84. 274 F. Supp. at 609. 1966 Profits of the Times-Mirror Company were reported to be $18,455,500. 1 *Hearings* 170 (statement of ITU).

85. 274 F. Supp. at 609.

86. *Id.*

87. United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968).

88. 1 *Hearings* 153.

witnesses indicated that profits in the newspaper industry and related enterprises are exceptionally high.[89]

The third major issue before the committee was whether competing newspapers could survive only in communities with over 650,000 population and whether joint agency operations were the only means for maintaining two newspapers in communities with less than 650,000 population. Several subsidiary issues were also involved: the cause of the demise of large urban dailies; the effects of newsprint and equipment manufacturer prices; the evolution of printing, data transmission and distribution technology; barriers to entry erected by restrictive wire service and syndicated column practices; concentration of ownership of other forms of communications media by newspaper owners; the growth of chains; and predatory practices by existing newspapers against actual and potential competitors.

No empirical research was produced to show the minimum market capable of supporting two independent and competing daily newspapers. Proponents of S. 1312 claimed 650,000 population as a minimum market for newspaper competition;[90] opponents offered several instances of much smaller markets supporting competing dailies.[91] Proponents offered several examples of large urban dailies failing in recent years;[92] opponents countered with allegations that the failures were due to poor management,[93] failure to relate to citizens of the urban area,[94] conspiratorial arrangements to divide markets,[95] illegal competitive tactics by larger competitors,[96] or other conduct, thereby laying failure on factors other than inherent lack of economic support.[97] Out of the

89. 1 *Hearings* 387-407 (statement of Prof. W. L. Rivers).

90. 1 *Hearings* 44 (statement of A. Hanson); 2 *Hearings* 883 (statement of J. Gallivan).

91. 1 *Hearings* 359 (statement of J. Flynn); 1 *Hearings* 371 (statement of G. Stipe); 1 *Hearings* 291 (statement of Prof. B. Rucker).

92. 1 *Hearings* 47, 71 (statement of A. Hanson); 2 *Hearings* 592 (statement of G. O. Markuson).

93. 1 *Hearings* 308 (statement of B. Bagdikian); 1 *Hearings* 405 (statement of Prof. W. L. Rivers).

94. *Id.*

95. 1 *Hearings* 201 (statement of W. J. Forson); 1 *Hearings* 416 (statement of B. McNamara).

96. 1 *Hearings* 25 (statement of E. Cervi); 2 *Hearings* 915 (statement of F. J. Martin); 1 *Hearings* 297, 315 (statement of N. Cherniss); 2 *Hearings* 634 (statement of J. H. Clinton); 2 *Hearings* 841 (statement of J. M. Cornwell). *See also* Kansas City Star Co. v. United States, 240 F. 2d 643 (8th Cir.), *cert. denied*, 354 U.S. 923 (1957); Barber, *Newspaper Monopoly In New Orleans: The Lessons for Antitrust Policy*, 24 LA. L. REV. 503 (1964).

97. *Id. See also* 2 *Hearings* 721 (statement of M.G. Dworkin); 2 *Hearings* 989 (statement of W. Loeb). *Cf.* Greenspun v. McCarran, 105 F. Supp. 662 (D. Nev. 1952); Indiana Farmer's Guide Pub. Co. v. Prairie Farmer Pub. Co., 293 U.S. 268 (1934).

welter of conflicting testimony some facts clearly emerged. No competent research has been done to establish a generally acceptable figure indicating where a natural monopoly newspaper market begins and a competitive market ends. Also it appeared that there is a shocking degree of concentration in the communications industry in the United States, and the government agencies—principally the Antitrust Division, FCC and FTC—have done little to prevent or undo the concentration which presently exists.[98] Finally, it is evident that the newspaper industry in particular and the communications industry in general are rich sources of potential antitrust litigation in view of their concentrated structure and anticompetitive tactics reminiscent of the captains of industry of the nineteenth century.

The hearings before the Senate Antitrust and Monopoly Subcommittee proved to be a public service, the potential dimensions of which can be evaluated only from the hindsight provided by the passage of time. It seems clear, however, that Senator Hart, the committee, the committee staff, and unwittingly the sponsors of S. 1312 have provided a wealth of heretofore unknown, and perhaps suppressed, information about the state of the Fourth Estate. The hearings evidently provided enough adverse information to cause even the most zealous servants of constituent interests to postpone further Senate action on S. 1312 in its present form for the remainder of this session of Congress. It will be a tragedy for freedom of speech and freedom of the press if government action is limited to a negative response of burying the bill in committee. The information revealed thus far indicates that the newspaper industry together with the other forms of communication media need further examination in the harsh glare of full publicity, and could use a healthy dose of competition, a remedy most of them are continually advocating for others but which few of them practice.

V. CONCLUSION

The newspaper industry does have peculiar competitive problems. The interrelationship of circulation and advertising and the almost total dependence upon advertising revenue for economic success means that newspaper publishing is an industry of increasing return. The greater the circulation the more efficient the expenditure of advertising dollars, since the buyer of space reaches a greater number of readers and the seller of space need not make any additional expenditure of consequence once

98. *See generally* 3 *Hearings* 1276-96 (statement of ITU); 1 *Hearings* 281 (statement of Prof. B. Rucker). *See also* M. ERNST, THE FIRST FREEDOM (1946).

type and plate are set, to serve the larger circulation. Accordingly, once a significant circulation gap opens between competing daily newspapers, an irreversible trend is likely to set in, with advertisers going to the larger circulation newspaper, assuming rates are relatively competitive, to obtain the greatest efficiency in advertising expenditure. Consequently, the best method of preserving competing dailies, where they still exist, is to prevent the creation of a circulation gap of significant magnitude to start the snowballing effect of advertisers rushing to the paper with the largest circulation.

The cause of a circulation gap can arise from a myriad of factors. Superiority of product in the minds of the consuming public is, of course, the basic factor. Product superiority, however, does not necessarily arise from laudatory performance. The hearings disclosed that several newspapers gained a competitive edge by predatory practices, by leverage gained from the ownership of other forms of media in the same community, by exclusive contracts for syndicated features, by resources derived from other members of a chain of newspapers, by price discrimination, and by unfair competitive advantages with large advertisers. Insofar as preventing a gap from arising because of unfair competitive tactics or power gained from deeper economic resources, it would seem that judicial awareness of the interrelationship of advertising and circulation in newspaper competition could have a salutary effect, if a declining paper charged a larger competitor with an attempt to monopolize under section 2 of the Sherman Act.[99] In effect, such a claim based on section 2 is a form of an "incipiency" charge,[100] and judicial sensitivity to the advertising-circulation relationship to viable newspaper competition should minimize the degree of evidence necessary to prove an attempt to monopolize and minimize the degree of circulation gap necessary to establish a trend toward monopolization. Proof of a circulation gap, or proof of a trend toward the creation of a circulation gap, plus minimal evidence of predatory conduct, unfair trade practices, price discrimination, or use of leverage from other product or geographic markets should be sufficient to establish an attempt to monopolize in violation of section 2 of the Sherman Act. Thus, in those cases where a circulation gap is accompanied by any factor extrinsic to the legitimate

99. 15 U.S.C. § 2 (1964).

100. *See, e.g.*, Kansas City Star Co. v. United States, 240 F.2d 643 (8th Cir. 1957); Lorain Journal Co. v. United States, 342 U.S. 143 (1951); United States v. Griffith, 334 U.S. 100 (1948); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc., 365 F.2d 478 (5th Cir. 1966); Packaged Programs, Inc. v. Westinghouse Broadcasting, Inc., 255 F.2d 708 (3d Cir. 1958); Gamco, Inc. v. Providence Fruit & Produce Bldg., 1952 Trade Cas. ¶67,219 (1st Cir. 1952).

competitive capabilities of the protagonists, the firm with a smaller circulation will have a potent weapon to deter the firm with a larger circulation from pushing its advantage too far.

Antitrust policy should also be vigilant in those cases where a firm with a smaller circulation is losing the competitive struggle because of its own internal deficiencies. Acquisition by a competitor in the same market, rather than by new investors in the community or outside interests, can have undesirable effects. Where the competing paper has acquired its competitor, future market entry is usually foreclosed, excess machinery and equipment are either junked or removed from the scene as far as possible to prevent their acquisition by potential local competitors, combination rates are employed, and the community is left with a single source for editorial viewpoints and a single source of news from the printed media. If the acquiring firm also owns other forms of media in the community, the economic, political, and social effects of the acquisition are compounded. At the very least, antitrust policy should prohibit a single newspaper in a community from owning other forms of competing media, prevent the sale of excess equipment outside the community, and prevent the use of combination rates.

Beyond this, Congress should investigate means of breaking the advertising-circulation relationship, which gives great economic impetus to the growth of a newspaper, enabling it to gain the upper hand in circulation. Factors responsible for newspaper costs, particularly newsprint and equipment costs, contribute heavily to the need for newspapers to rely upon advertising for revenue. Paring newsprint and equipment costs could alleviate the pressure to rely upon advertising revenues to a limited extent. But a frontal attack must be made upon the interrelationship of advertising and circulation, either by legislation easing the standards for establishing monopolization in newspaper cases or by mandatory equalization of advertising costs per exposure where the disparity in circulation reaches a point that makes survival of the newspaper with the smaller circulation marginal. Without some kind of remedy for the advertising-circulation syndrome, continued concentration in the newspaper industry is unavoidable.[101]

101. 4 *Hearings* 1770; 2 *Hearings* 953 (statement of J.R. Malone). Dr. Malone advances several proposals aimed at alleviating the anticompetitive effects of a circulation gap which drains a smaller competitor of advertising revenue because of the inter-relationship of advertising and circulation. If Congress is seriously interested in preserving competing and independent editorial voices, it should investigate the merits of Dr. Malone's proposals and enact legislation which would regulate the revenue pressure caused by a circulation gap, rather than passing measures like S. 1312 which would eliminate all competition. In essence, a circulation advantage permits price discrimination in advertising rates and it is usually compounded by volume discounts and price

Finally, Congress must forcefully assert itself as guardian of the public interest. The executive and administrative agencies charged with this responsibility, particularly the FCC,[102] have failed to carry out effectively their responsibility. In part, the failure of executive and administrative agencies to preserve competition and prevent concentration in the communications media is attributable to the political power of the communications media, which in turn has intimidated Congress. Ultimately, Congress, with its hands on the purse strings and its political leverage on executive and administrative agencies, must bear the responsibility for the present state of the communications industry. Future efforts to restore competition to the industry must begin with the rejection of S. 1312 and a congressional willingness to provide adequate appropriations to executive and administrative agencies. It is not too much to say that the time has come for Congress to show some intestinal fortitude and protect the linchpin of any democratic society from private domination by insuring a free, competitive, and independent multitude of voices in the communications industry. The electors should settle for no less; our future as a democratic society is dependent in part upon a courageous and meaningful stand by Congress in favor of decentralizing the communications industry.[103]

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discrimination between national, local, and classified advertising. At the very least, the courts should not follow the simplistic view of the economics of newspaper competition implicit in *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953). *See generally* Barber, *Newspaper Monopoly in New Orleans: The Lessons For Antitrust Policy*, 24 LA. L. REV. 503 (1964).

102. *See generally* Cox & Johnson, *supra* note 16; GOULDEN, MONOPOLY (1968); Drew, *Is the F.C.C. Dead?*, THE ATLANTIC MONTHLY, July, 1967 at 29; Johnson, *The Media Barons and the Public Interest*, THE ATLANTIC MONTHLY, June, 1968 at 43; Flackett, *supra* note 57.

103. *See generally* B.W. RUCKER, *supra* note 2; *Symposium, Antitrust and Monopoly Policy in the Communications Industry*, 13 ANTITRUST BULL. 871 (1968).