IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

NOS. 57, 58 AND 59

THE ASSOCIATED PRESS, PAUL BELLAMY,
GEORGE FRANCIS BOOTH, ET AL., *Appellants,*

vs.

THE UNITED STATES OF AMERICA.

TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK,
Appellants,

vs.

THE UNITED STATES OF AMERICA.

THE UNITED STATES OF AMERICA, *Appellant,*

vs.

THE ASSOCIATED PRESS, PAUL BELLAMY,
GEORGE FRANCIS BOOTH, ET AL.

PETITION FOR REHEARING ON BEHALF OF TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK

Tribune Company and Robert Rutherford McCormick, appellants, respectfully petition for a rehearing of this cause on the following grounds:

I.

FIRST AMENDMENT—"CLEAR AND PRESENT DANGER DOCTRINE" (Our Br. p. 57; Reply Br. p. 17).

At no time did we contend, as stated in the majority opinion (Op. p. 4), that the "clear and present danger doctrine" "exempts publishers from the provisions of the summary judgment statute," nor did we contend that it gives "partial immunity" to a "publisher who engages in business practices made unlawful by the Sherman Act" (Op. pp. 4, 13). That the majority should attribute such an obviously fallacious position to us indicates that our arguments have been misconstrued.

Our argument on the First Amendment and the "clear and present danger doctrine" had two aspects and two aspects only:

First, we pointed out (Br. p. 55) that the District Court in its substantive holding of illegality had discriminated against the press. The "full illumination theory," as it has been sometimes designated [otherwise called the public utility theory by Justice Douglas (Op. p. 17); and Judge Swan below (R. 2601)], was the sole theory on which the District Court held the defendants to have violated the Sherman Act. Judge Hand, below, and Justice Frankfurter (Op. p. 18) plainly and unequivocally wrote the defendants down as violators of law solely because they were dealing in news reports. The theory disregards whether the contractual ancillary restraints of trade were unreasonable or undue, appraising their effect on trade, commerce, competition, production or prices as in the case of fungibles like "steel, machinery, clothes or the like" (R. 2954). This more rigorous application of the Sherman Act to defendant publishers, we contended, was pure discrimination in violation of the First Amendment (Our Br. p. 55).

The majority of this Court has repudiated Judge Hand's theory of "full illumination" and the concomitant discrimination against the press. Hence, this discriminatory aspect of our constitutional argument, while applicable to the judgment of the court below and to Justice Frankfurter's special concurrence, does not apply to the majority opinion.

The second aspect, appearing on page 52 of our brief, relates solely to the relief granted. We pointed out that the judgment lent itself to the construction that AP was affirmatively ordered to furnish its news reports to applicants to whom AP desired not to furnish them, or that the judgment was so vague that in practice AP, under fear of contempt, would be required to do so (Our Br. p. 46 et seq. especially p. 50); that the judgment went far beyond "cancelling agreements held to be in unreasonable restraint of trade" (idem 50) as in the ordinary Sherman Act case; that instead of cancelling such unreasonable restraints or disestablishing the union of defendants engaging in them, this judgment affirmatively ordered AP to furnish its information, thoughts and ideas to all those who might apply for them.

Based upon this construction of the judgment and on its practical effect, we contended that AP was ordered, coerced and forced to "utter when it would remain mute," there being "no clear and present danger."

No exemption or special privilege of the publishers or of the press was or is advocated by us. The argument applies to all citizens—all are endowed with the right to communicate or not to communicate their ideas, information or thoughts. The majority says that our position would "degrade the clear and present danger doctrine" (Op. p. 4); whereas, in fact, our position has suffered debasement through misapprehension.

The "clear and present danger doctrine" in this second aspect applies to the relief granted by the District Court as we interpreted the judgment. The argument applies in full force to the interpretation of the decree by the majority of this Court, which said at page 15:

> "* * * Interpreting the decree to mean that AP news is to be furnished to competitors of old members without discrimination through By-Laws controlling membership, or otherwise, we approve it."

If this means that this Court interprets the judgment of the District Court to require AP to communicate its information to applicants conforming to certain standards of membership approved by the judiciary, it follows that AP will be affirmatively required to communicate its information to many to whom AP wishes not to communicate it. It affirmatively orders men to speak, utter and communicate their knowledge when they would remain silent. The fact that AP is held to be a commercial enterprise makes no difference—the publisher as well as the preacher or the ordinary citizen enjoys the right of speaking or remaining silent for any reason or for no reason in the absence of some "clear and present danger" as defined in the prior decisions of this Court.

Inasmuch as our argument on this point has been entirely misapprehended, we respectfully urge a reconsideration of this case so that the point may be fully explored.

II.

RESTRICTIVE COVENANTS GRANTING TERRITORIAL EXCLUSIVITY (Our Br. p. 19; Our Reply Br. p. 8).

The District Court stated, as is admitted by everybody, that the restrictive ancillary or "collateral" (Op. p. 28) covenants in this case restrained trade and restricted com-

merce and competition *to a degree,* but it is likewise recognized by everybody that such statement without any additional factors does not connote violation of the antitrust laws: there must be "unreasonableness" "in the sense that the common-law understood that word" (R. 2588, 2598), or the covenants must be of such a nature (e. g. price fixing, etc.) that they are unlawful *per se.*

The District Court did not state or find that the restrictive covenants were "unreasonable" "in the sense that the common-law understood that word," i. e. considering their impact on competition, prices, production, "on the competitive system and on purchasers and consumers" as in the case of ordinary goods, wares and merchandise (Our Br. p. 25). The District Court canvassed "settled instances" in which restrictive covenants have been held unlawful *per se* and held that "these covenants did not fall within one of them" (R. 2519).

The District Court instead proceeded to set up a "new instance" of contractual restrictions unlawful *per se*—namely, any and all contractual restrictions and exclusive territorial grants entered into by purveyors of news reports, and only those entered into by purveyors of news reports. This was done by the District Court on the "full illumination theory," or, as Justice Douglas calls it (Op. p. 17), the "public utility theory," or, as it might be designated, the theory of the national public interest in the noncommercial aspects of AP news reports (Justice Frankfurter, Op. p. 20).

Whatever the theory be designated, the majority of this Court plainly did not hold these covenants (admittedly restraints of trade) illegal *per se;* but, purporting to apply the same principles applicable to goods, wares and merchandise, has held them to be unlawful, hence "unreasonable" "in the sense the common-law understood that

word." The District Court made no finding whatsoever that these restrictive covenants were "unreasonable" in the sense of unduly restraining trade or unduly hampering competition in goods, wares and merchandise. The District Court, in its opinion, makes this plain when it says (R. 2594):

> "* * * and so even if this were a case of the ordinary kind: the production of fungible goods like steel, machinery, clothes or the like, it would be a nice question * * *."

But the District Court never settled this "nice question": it proceeded on the particular and unique nature of news reports. The District Court in its formal Findings of Fact, made after oral argument, included no single word or phrase from which it can be implied that these restraints were found to be "unreasonable" from the viewpoint of the ordinary antitrust case in their impact on trade, commerce, competition, etc.

Thus the District Court wrote its opinion and made its Findings of Fact on the theory that the restrictive covenants were unlawful *per se*—the public utility or national interest concept: this Court wrote its opinion on the theory that the restrictive covenants were "unreasonable" and hence violative of the antitrust laws.

The District Court's theory, if valid, was sustained by the admitted and undisputed facts: that is to say (a) the restrictive covenants restrain and restrict trade and competition, and (b) they concern news reports, hence *per se* they were held to be unlawful. The majority's theory is not sustained by the admitted or undisputed facts: although it is admitted that (a) the restrictive covenants restrain and restrict trade competition, it is not admitted that (b) such restrictive covenants are "unreasonably" restrictive—in fact this is and always has been disputed by the defendants.

When the majority repudiated the "public utility" theory and purported to decide this case under the ordinary rules applicable to goods, wares and merchandise, it became necessary for this Court to treat of the factor of "reasonableness." In so doing, we submit, this Court has misapprehended and misapplied the findings and statements of the District Court, and has mistaken the import and scope of the issues and evidence below in the following respects:

IN THE FIRST PLACE the majority opinion states without qualification or explanation time and time again that the District Court found these restrictive covenants to "constitute restraints of trade" (Op. p. 8) thus conveying the impression that the District Court found these covenants to be "unreasonable" and hence violative as in the ordinary case of fungibles. Nothing is wider from the truth. The District Court recognized, as all admit, that every ancillary covenant restrains trade and competition *to some degree,*— that is all. The District Court went no further and needed, under its theory, to go no further.

This misconception of the District Court's findings runs through the entire majority opinion. For example at page 7 it is said:

> "The District Court found that the By-Laws in and of themselves were contracts in restraint of commerce in that they contained provisions designed to stifle competition in the newspaper publishing field."

The District Court at no time used the word "stifle" or word of similar import; nor did it find that the By-Laws were "contracts in restraint of commerce" save in the lesser sense that every contractual restriction is in restraint of commerce. This was sufficient for the District Court's peculiar theory. This Court has converted the lesser sense into something the District Court did not mean.

Again at page 7 this Court said: "The [District] court also found that AP's restrictive By-Laws had hindered and impeded the growth of competing newspapers." But this Court continues in a vein which clearly implies that the District Court found AP's restrictive By-Laws had "unduly or unreasonably hindered or impeded the growth of competing newspapers"—which is not true: for the District Court knew and recognized the difference between "hampering and impeding" and "unreasonably hampering and impeding." If the District Court had intended the second meaning, it would have made that meaning clear and certain.

Again at page 8 this Court quotes Finding 70 (R. 2616) as follows:

> "The growth of news agencies has been fostered to some extent as a result of the restrictions of The Associated Press' services to its own members, but other restrictions imposed by The Associated Press have hampered and impeded the growth of competing news agencies and of newspapers competitive with members of The Associated Press,"

and continues:

> "* * * This latter finding, as to the *past* effect of the restrictions, is challenged." (Italics are the Court's.)

Inasmuch as the finding related solely to the past, it is difficult to see how it could have been challenged as to the future. Our Assignment of Error 10 (R. 2649-50) asserted Finding 70 to be erroneous in that

> "* * * the undisputed evidence does not warrant the finding that the other restrictions imposed [fol. 3246] by AP, singly and together, have hampered or impeded, or unreasonably hampered or impeded, the growth of competing news-agencies or of newspapers competitive with AP members."

We feared that this Court might fall into the very error into which it has fallen, namely, to construe the words "hampered and impeded" to mean "unreasonably hampered and impeded."

IN THE SECOND PLACE, the opinion of the majority states several times that this entire case is to be considered in the background of a scheme or plan deliberately designed by the defendants and aimed at "stifling" competition between member and non-member newspapers:

> (a) Page 7 "The District Court found that the By-Laws * * * contained provisions designed to stifle competition in the newspaper publishing field."
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> (b) Page 9 "Trade restraints of this character, aimed at the destruction of competition * * *"
>
> (c) Page 9 "* * * utilized as essential features of a program to hamper or destroy competition."
>
> (d) Page 16 "It [the exclusive arrangement] might be a part of the machinery utilized to effect a restraint of trade in violation of § 1 of the Act. * * * I think the exclusive arrangement * * * had such a *necessary effect.*" (Italics ours.)

That there existed such a scheme, plan or program is not admitted. It is disputed. The dispute is not feigned: many witnesses for the defense swore that there was no such scheme, plan or program in that the aims of the defendants were entirely otherwise; and that the restrictions never had such an effect in the past and therefore would not have such effect in the future.*

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*That the restrictive covenants were not a part of any such scheme, plan, program, design or aim, see McCormick, R. 1309; Cooper, R. 1433; Noyes, R. 1415; McLean, R. 1432; Bellamy, R. 1454; Thomason, R. 1315 and others.

That said restrictive covenants would not have a baneful effect in the future see the twelve affidavits filed on behalf of these defendants (R. Index Volume p. xix), and more than eighty-five affidavits filed on behalf of the other defendants (R. Index Volume p. xx et seq.).

Nor did the District Court, after oral argument and after the government had had its full say, enter any such Finding of Fact.* No such Finding has been or can be pointed to.

IN THE THIRD PLACE, this Court, on motion for summary judgment, has found that these restrictive covenants will have the "necessary effect" of restraining trade in violation of the Act (Op. pp. 16-17; p. 8; p. 9). This the majority assumes to do "exclusively on the basis of their [the By-Laws'] terms and the background of facts which the appellants admitted (Op. p. 4)." Witness after witness denied that the restrictive covenants had ever had such an effect in the past and on parity of reasoning they could not have such an effect in the future. The only testimony of the government regarding "necessary effect" was that of The Chicago Sun which was completely exploded and effectively denied (Our Br. p. 15 et seq.); and which is therefore not now to be weighed and accepted.

Furthermore, the majority opinion assumes to find that the restrictive covenants will "necessarily" have an unlawful *future* effect although unwilling and apparently unable to sustain a finding that they have had an unlawful *past* effect.**

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*It is unprecedented for this Court to depart from the formal Findings of Fact, and to base its fundamental conclusion that there was a concerted design to "stifle" competition on a single phrase ("plainly designed in the interests of preventing competition") employed in the District Court's opinion to characterize in an entirely different connection the money payments required of applicants upon election. (Op. p. 7.)

**"The court also found that AP's restrictive By-Laws had hindered and impeded the growth of competing newspapers. This latter finding, as to the *past* effect of the restrictions, is challenged. We are inclined to think that it is supported by undisputed evidence, but we do not stop to labor the point. For the court below found, and we think correctly, that the By-Laws on their face, and without regard to their past effect, constitute restraints of trade." [Emphasis the court's.]

It is difficult to understand how any court, trying facts, could conclude that restrictions not found to have had unlawful effects for 44 years *in the past* would "necessarily" have unlawful effects *in the future.* Without overwhelming expert evidence, no trier of facts would do so. There is no such overwhelming expert testimony in this case—the testimony is all to the contrary; this Court is not sitting as a trier of facts; and, finally, if there were such expert testimony, it could not in any event be taken as admitted or undisputed on motion for summary judgment (*Sartor* v. *Arkansas Nat. Gas Co.,* 321 U. S. 620, cited Op. p. 3).

We respectfully submit therefore that the majority has, without supporting evidence, determined the future effects of these restrictions in opposition to the experience of the past and in contradiction of sworn testimony.

IN THE FOURTH PLACE, to appraise the effect of contractual restraints of trade ancillary to a lawful main contract the following factors are to be considered, as we maintained in our brief below:

> "* * * the situation of the parties, the subject-matter, the nature of the business restrained, the condition of the business before and after the imposition of the restraint, the nature of the restraint and its effect, actual and probable; likewise, the history of the restraint, the evil it is supposed to correct, the object to be obtained by it, are all relevant, 'not because good intention will save an otherwise illicit restraint but because knowledge of the facts and circumstances will aid the court in arriving at a conclusion.' Thornton, *Combinations in Restraint of Trade,* p. 339c, citing *Chamber of Commerce* v. *Federal Trade Commission,* 13 F. 2d 673, which in turn paraphrased Brandeis, J., in *Chicago Board of Trade* v. *U. S.,* 246 U. S. 231, 238 (1918); see also *Sugar Institute Inc.* v. *U. S.,* 297 U. S. 553 (1936), mod. 15 F. Supp. 817, and *U. S.* v. *Corn Products Refining Co.,* 234 Fed. 964 (D. C. S. D. N. Y. 1916), appeal dismissed 249 U. S. 261."

Such a broad field of exploration can hardly be covered on motion for summary judgment. Not only the past, but the future, must be appraised in all of the ramifications just mentioned.

The record does not contain sufficient undisputed and admitted facts to warrant this Court in holding that the future effect will be illicit. The majority says on page 8 that it will not "stop to labor the point" as to the *past* deleterious or unlawful effects of the restrictions but proceeds to say that "the course of conduct will necessarily restrain or monopolize a part of trade or commerce" *in the future.* This Court therefore, without stopping "to labor the point" of the effect of these restrictive covenants in the past (from the date of the incorporation of AP, 1900, to the date of the Judgment, January 13, 1944) proceeds as if it were undisputed or admitted or found by the court below from admitted or undisputed facts that the restrictive covenants are "unreasonable" because of the effect they will necessarily have in the future. There is no evidence whatsoever that the effect in the future will be more harmful than the effect in the past.

No expert could possibly appraise the future "necessary effect" of the By-Law provisions without weighing certain *undisputed* facts set forth in our Assignment of Error No. 11 (a) to (m), R. 2650-2—undisputed facts which the District Court omitted from its Findings undoubtedly because on the Court's "public utility" theory they were considered immaterial. But on the theory of this Court they are of the greatest materiality. How can the necessary effect be gauged without knowing of the realm of exclusivity in the competitive newspaper field (Assignment 11 (a)); or of the almost universal prevalence of exclusivity contracts in the furnishing of news-reports,

news-pictures and features (idem (b)); or of the fact that a small number of metropolitan newspapers can feasibly start another comprehensive news-agency (idem (d)); or that some of the smaller news-agencies could expeditiously enlarge to grant comprehensive coverage (idem (e))?

In addition to the undisputed facts of record mentioned in Assignment 11, there are many more which have not been touched by the evidence of either party. Defendants on motion for summary judgment are not supposed to put in their whole case: they are supposed to deny by sworn testimony such facts adduced by movant which are controvertible. There are doubtless hundreds of facts which would appear on the trial of this case which have not appeared on this summary motion.

One example of facts adducible on trial but not here adduced are those relating to the 26 cities mentioned in the majority opinion (pp. 8 and 9) where existing newspapers, it is said, "already have AP news and the same newspapers have contracts with UP and INS under which new newspapers would be required to pay the contract holder large sums to enter the field." The record is silent as to the knowledge and participation of AP, its officers and directors, in these situations; nor is it shown how many of such situations came about through the non-success of the AP, UP or INS newspaper and its consolidation with the survivor; nor how many came about during the 1929 depression; nor in how many of such situations the AP newspaper was first in that field; nor other facts which would tend to show that these 26 situations could be adequately remedied, if all parties were before the court, by holding void the exclusory provisions of the contracts latest in point of time or most desired by the newcomer or least desired by the established publisher.

There is no better guide to the future than the history of the past. If, on summary motion for judgment, the *past* effects of these restrictions are not to be appraised, we respectfully submit that the *future* effect should not be.

IN THE FIFTH PLACE, this Court has misapprehended the role which "indispensability" plays in this case. At all times the government has kept in readiness several distinct theories of the law of the case into which it sought to fit the admitted or undisputed facts. Altogether it has trotted out five (Our Reply Memo. p. 10 et seq.). On at least two and perhaps three of the government's basic legal theories it was essential for it to prove (as an admitted or undisputed fact) that AP's news reports were "indispensable," or "absolutely necessary" (Complnt. Par. 103, R. 33) (idem Par. 48, R. 10) or "particularly important" (Mo. for Sum. Jdmt., R. 961). This the government sought to sustain by the Sun witnesses (Our Br. p. 15 et seq.) and others; these witnesses were contradicted by defendants' proof. This Court places the "indispensability" test at defendants' doorstep (Op. p. 12) whereas it was sired by plaintiff.

But the mistake goes deeper. We presented certain arguments against plaintiff's "indispensability" theory. We also presented arguments against the District Court's "full illumination" theory (R. 2595)—arguments that the judgment banefully will hinder the dissemination of news "from as many different sources and with as many different facets and colors as possible" (Our Br. p. 37 et seq.). The majority of this Court mistakenly discusses our arguments directed against the "full illumination" theory as if we had directed them against plaintiff's "indispensability" theory (Op. p. 12). Thus the majority has not considered either theory in the light of the arguments against it.

We respectfully submit that no appraisal of the effect of defendants' conduct should be attempted without full consideration in their proper light of all the material facts after a trial on the merits.

These petitioners therefore pray for a rehearing of this case.

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Attorney for the Petitioners,

Tribune Company and
Robert Rutherford McCormick.

I hereby certify that the foregoing petition is presented in good faith and not for delay.

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September 7, 1945.