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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.

Appeals From the District Court of the United States for the Southern District of New York

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REPLY BRIEF FOR TRIBUNE COMPANY AND ROBERT RUTHERFORD McCORMICK.

The opening brief of the other defendants discusses the validity of the by-law relating to the return of local spontaneous news and the validity of the Canadian Press con-

tract. Therefore, to prevent unnecessary duplication, we shall reply to the government's brief only in respect of the three main points presented in our original brief.

I.

THE RESTRICTIONS ON ADMISSION TO MEMBERSHIP ARE LAWFUL ANCILLARY AGREEMENTS FOR TERRITORIAL EXCLUSIVITY.

In our original brief we contended that the restrictions on admission to membership in the fields of members fell within the class of agreements for territorial exclusivity ancillary to a main contract of purchase and sale and no broader than necessary to protect that which the purchaser obtained in the main contract (our Brief p. 19, et seq.); we pointed out that the restrictions on admissions to membership constituted in effect no more than a covenant for territorial exclusivity ancillary to the main contract, i. e., to the contract for the furnishing of news dispatches to customer-members.* We pointed out the universality of such ancillary restraints for territorial exclusivity in many branches of trade and their recognition by Congress in contemporary legislation.

The government now seems to admit that AP is not in the category of callings required to serve all comers, as innkeepers, etc.; that its restrictions on admissions to membership have enhanced competition in the news agency field; that AP has not obtained a monopoly and is not indispensable to the publication of a newspaper and that the doctrine of ancillary restraints for territorial exclusivity as

*The territorial exclusivity granted by AP is, as we pointed out (Br. p. 19), qualified: AP retains the right to sell to an applicant in the city and field of a customer-member or members without the customer-member's consent under conditions set forth in the by-laws.

announced in the *Addyston* case is a correct statement of the law (Br. p. 106).

But the government says in its brief that the doctrine of ancillary covenants for territorial exclusivity, although unobjectionable in the abstract does not apply in this case for three reasons: *First,* because AP deals in news reports; *second,* because AP is a cooperative membership corporation, not a single trader; and *third,* because AP's customer-members are independent newspaper units which gain a trade advantage unlawful unless shared with all competitive newspapers. We shall consider these contentions seriatim.

A. Ancillary Agreements for Territorial Exclusivity in the Case of News Agencies.

We have said that AP and the other news agencies (as producers of goods, wares and merchandise) may contract to sell their news reports to a newspaper in a given community for a given length of time and concomitantly agree with the customer or member not to sell such news reports to another newspaper in that field and city during that period of time. While the government's brief attempts to avoid the ancillary restraint doctrine by a new proposition of law (namely, that no mutual association engaged in trade of any kind may grant ancillary territorial exclusivity, which we shall discuss below), it nevertheless retains to a degree the district court's theory that news agencies, and probably only news agencies, are not allowed to covenant for territorial exclusivity because of the general public interest in the wide dissemination of news.

The government states (Br. p. 95): "To eliminate the right to exclude newspapers for competitive reasons is not to introduce a new or untried principle into the structure

of AP." This statement, of course, flatly contradicts the government's argument devoted to proving the membership by-laws unlawful. That argument is based entirely on the proposition that AP's present membership by-laws will give to members exclusive territorial rights in AP news reports. The government supports this proposition by pointing to the veto power granted newspapers by AP of Illinois; by asserting that the right of protest and the four-fifths vote granted by the early AP by-laws were equivalent to such veto power; by charging that the present by-laws are even more effective to protect the member in the field, and by referring to the rejection of two applications under the present by-laws. It states that AP "by closing the doors to new members" has given AP memberships great value.

The fact that AP in a few cities has always had more than one member in the same field (Gov. Br. pp. 49 and 94) does not sustain the contention that exclusivity is unimportant. The explanation of these few situations lies in AP's history. In order that AP (Ill.) could get a start at all in the face of the unfair tactics of the old United Press, it was necessary for AP (Ill.) to recruit as many metropolitan adherents as could be found (Noyes, R. 418-421). Thus in a few cities there has always been what might be termed "group exclusivity." But the principle of exclusivity and of the qualified exclusivity now granted by AP are of the greatest importance (idem 1421), and the court below properly found that AP had never held itself out to serve all comers (Finding 8, R. 2607).

In addition to AP, UP and INS sell to many newspapers under exclusive and asset value contracts; smaller news agencies agree to sell their news reports exclusively to one newspaper in a city and field; news-picture and feature agencies almost uniformly grant territorial exclusivity in

their contracts of sale (Our Br. 10, 11). The principle of territorial exclusivity is used almost universally throughout every phase of the news industry.

The government states that the elimination of the principle of territorial exclusivity would not destroy any attribute essential to the successful operation of AP as a cooperative news agency (Br. p. 95). We believe the record shows beyond doubt that this principle is of vital importance in the news industry and to AP. If, however, this ultimate fact should be in doubt, then certainly this case should not have been decided on motion for summary judgment.

As bearing in some respect on the doctrine of ancillary restraints, the government states that there are 26 cities in which there is only one newspaper or in which all of the newspapers are under common ownership and such paper or papers hold an AP membership and also have asset value contracts with both UP and INS. It states that the same situation prevails in either the morning or afternoon field in 18 other cities (Br. 41). There is no showing that these situations were brought about illegally or that trade is monopolized or unlawfully restrained in such cities. It is not suggested that AP or the defendants have participated in any respect in fostering such situations. The following facts are pertinent:

> *First:* In over 90% of these instances the AP member subscribed to AP service alone for a great many years—from 1900 until the 1929 depression in most cases.
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> *Second:* In many instances the joinder of the three services in one newspaper or in one owner of two or more newspapers came about through the failure of the weaker paper and its sale or transfer of its assets and services to the stronger. In some cases the unsuccessful newspaper was AP, in others UP and in still

others INS. The failure of such newspapers was undoubtedly caused in some degree by the 1929 depression or by increased costs of operation due to many factors ("Small Daily Newspapers Under The Fair Labor Standards Act," U. S. Department of Labor, June, 1942; Editor and Publisher International Yearbooks).

Third: It is impossible in the present record to equate any UP asset value with more than three or four of these situations. UP's asset values in six places are less than $10,000; in twenty from $10,000 to $20,000; in fifteen from $20,000 to $30,000; in six from $30,000 to $40,000; in four from $40,000 to $50,000, and in two in excess of $50,000. Whether the asset value is fair and reasonable in such cities depends upon circumstances unrevealed in this record, e. g. the length of time the UP member has built up the good will of UP in the vicinity, the length of time the UP member has enjoyed such contract, the potentialities of newspaper competition in that field, etc.

However, these few unexplored situations should not be here seized upon to outlaw ancillary restraints throughout the entire news agency industry. In a proper case, proper parties being present, and upon a showing of monopoly brought about unlawfully, specific relief could be granted: the publisher and the news agencies being present, the court might hold void the exclusory provisions in the contract latest in point of time, or most desired by the new comer, or least desired by the established publisher.

Before leaving this point, we wish to show that the government has misapprehended the significance of the *International Harvester* case (Our Br. p. 20; Gov. Br. p. 78), of the *National Broadcasting* case (Our Br. p. 24; Gov. Br. p. 79), and of the cases listed in our Appendices A, B and C. No industry is exactly like any other. Yet when ancillary restraints for territorial exclusivity have been upheld in all others, and when the need and prev-

alence therefor is at least as great in the realm of news agencies as in all others, and when such ancillary restraints have been outlawed in none,—then the conclusion seems inescapable that they should not be outlawed in the single case of news agencies. The requirement of selling to but one outlet in the community was required by the consent decree in the *International Harvester* case; and was allowed by the Federal Communications Commission in the chain broadcasting case. While vertical in form, the entire industries knew of the policy and adjusted their affairs in reliance thereon. Surely the widest possible use of farm machinery is in the public interest and admittedly the Congress commanded "the maximum utilization of radio facilities"; both were attained by "territorial exclusivity" for each outlet or dealer.

The government further contends that the doctrine of ancillary restraints does not apply to news reports because territorial exclusivity is opposed to the general public interest (Br. pp. 89-92). It refers only briefly to the opinion of the district court and apparently does not place great weight on this contention. The government undoubtedly realizes that any balancing of the general public interest in the wide dissemination of news requires the determination of genuinely disputed issues of fact (Our Br. p. 36 et seq.). For example, the government now admits that the purpose and immediate effect of the decree below will be to increase the size of AP (e. g. p. 107); and that opinion evidence is not available on motion for summary judgment (Br. p. 10). It makes no attempt to discuss the ultimate effect of the judgment on the dissemination of news. Therefore the government found it necessary to advance a new principle of anti-trust law, which we discuss below.

B. Ancillary Restraints for Territorial Exclusivity in the Case of Mutual Associations.

We have said that AP, like UP, INS, Feature Syndicates, manufacturers and producers of fungible goods may contract to sell to a customer-member its news reports in a given field and city for the given length of time and concomitantly therewith bind itself not to sell its news dispatches to any others newspaper in that field and city for the term of that contract. The government first responds (Br. p. 97 et seq.) that AP is a cooperative membership corporation differing in vital respects from a commercial news agency:

> 1. In that AP is backed by the resources of all members—which is not true—and can recoup costs of operation by assessment. Presumably if AP's costs of operation became excessive, members would refuse to pay the assessments, compel a reduction in costs, or subscribe for the services of a commercial agency. AP's resources have no bearing on its right under the Sherman Act to agree to sell its customer-members on an exclusive basis.
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> 2. The government infers that the members of AP realize income tax savings by the cooperative set-up. This inference has no support in the record. If true, it would not affect the determination of AP's right to sell its services exclusivly to its customer-members.
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> 3. It is said AP's cooperative form of organization enables it to obtain exclusively the local spontaneous news of its members. If this were illegal—which we dispute—the remedy would be to cancel the by-law relating to the exclusive return of local spontaneous news—not to invalidate AP's right to sell its reports under normal ancillary covenants.
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> 4. AP, if organized for profit, the government asserts, would seek to increase its profits by expanding its newspaper clientele. This conclusion is likewise

speculative and unsupported by any evidence of record. AP, if organized for profit, might well prefer to sell to its present members, or even fewer newspapers, for a higher rate. This assumption appears reasonable particularly in view of the fact that many of AP's members are small newspapers located in small towns scattered throughout the United States and contribute relatively little to AP's cost of operation. It is stated that in such event AP's coverage of local spontaneous news would be increased. This is contrary to the record. But what AP might do if transformed into a corporation for profit in either of the respects mentioned, is clearly immaterial in determining the terms on which AP as a cooperative may sell its news reports to members.

5. Finally the government states that because AP's member-newspapers have a voice in its management and control, AP has produced a news report of superior and peculiar value (Br. p. 99). Surely the Sherman Act was not designed to penalize efficiency.

The "important differences" between AP as a cooperative and UP and INS as commercial, non-cooperative news agencies are, therefore, wholly immaterial on the question of AP's right under the Sherman Act to sell its news reports, news pictures and features to its customer-members on a territorially exclusory basis, qualified in the respects mentioned.

The government next urges that even if UP, INS, other agencies and syndicates and producers of fungible goods may, because they are single traders, enter into contracts with subscribers and purchasers granting territorial exclusivity nevertheless AP may not do so because of its cooperative form of organization. It is not inconceivable, it says, "that there should be one rule for AP and another for UP and INS" (Br. p. 100). Here, it will be noted, the government again departs from the reasoning of the district court. The district court states that, whatever might

be the application of the doctrine in a case involving fungible goods, it is not applicable in the news industry because the general public interest in "full illumination" requires the elimination of competitive factors by all services "of first rating."

The government's attempted distinction between commercial and cooperative news agencies is without substance and entirely artificial. As this Court held in *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 377, the corporate form, whether cooperative or otherwise, is unimportant: "The question in either case is whether there is an unreasonable restraint of trade or an attempt to monopolize."

AP by-laws are no different from an agreement between a small number of newspaper owners, 25 for example, jointly to defray the expenses of foreign or domestic reporters, each owner agreeing to publish the reports only in his own newspaper. The consent of all 25 owners would be necessary for an additional newspaper to become a party to the agreement or to obtain the news reports. Such an agreement would unquestionably be legal. If so, the contracting parties might lawfully provide that another newspaper could participate with the consent of less than all, whether it be 5, 10 or 20.

The assumed combination of 25 publishers differs in no substantial way in its effect on competition and trade from a commercial agency which agrees to sell news to the same 25 newspapers with covenants granting territorial exclusivity. The difference is merely one of form resulting from the different nature of the two corporations. In the case of the cooperative, the agreement is authorized by the action of the members—the normal natural way for a cooperative entity to act. In the case of the commercial agency the contract is authorized by the board of directors

—the normal natural way for such a corporation to act. The result, however, is the same in both instances. The issue remains the same: Is the covenant for territorial exclusivity ancillary to a main lawful contract?

The government must demonstrate the illegality of the basic contract. For plainly, if 25 publishers may jointly hire correspondents, then 50, 100 or 1,000 may do so unless the mere increase in the number of the contracting parties imparts some new element which is itself illegal e. g. monopolization. The district court found no additional elements. If found that AP had not monopolized trade and commerce in news, news pictures and features; it found that AP's services were not necessary to the successful publication of a newspaper; and it found that AP's restrictions to membership had fostered the growth of competitive news agencies. The district court made no finding that any of AP's by-law restrictions had unreasonably or unduly restrained competition: it held that AP, being an agency of "first rating," was under an obligation of some kind to serve all.

C. The Government's New Principle of Law.

To support the holding of the court below that AP's by-laws are unlawful restraints of trade, the government advances a new theory which it urged below and which the district court rejected. This principle is stated at page 81:

> "C. The defendants, by Agreeing to Gather, Distribute and Interchange News Jointly and Collectively and to Deny to Competitors Opportunity to Participate in the Advantages in Trade Derived from such Collective Action, have Illegally Restrained Trade."

Such collective action, the government repeatedly asserts, illegally restrains trade because the parties to the agree-

ment enjoy "a trade advantage" over a newspaper not a party (Br. pp. 56, 57-61, 66, 81-85, 96 et seq.).

This principle is clearly a recent invention. As pointed out in our brief, the Attorney General of the United States in 1915 stated: "* * * it is no violation of the Anti-Trust Act for a group of newspapers to form an association to collect and distribute news for their common benefit, and to that end to agree to furnish the news collected by them only to each other or to the Association." Numerous cases so hold (Our Br. p. 26 et seq.). The new principle is without foundation.

1. It is wholly divorced from size, dominance or monopolization. The joint enterprise is to be unlawful merely if the members "thereby obtain an advantage over persons from whom the fruits of such joint action are withheld" (Br. p. 81). The test of comprehensiveness of news coverage, the basis of the judgment, gives way to "trade advantage" and includes within its scope all cooperative news agencies, large and small. For the same reason, the principle applies to all cooperative agencies serving newspapers: news, news picture and feature agencies alike.

Further the principle, if correct, is not limited in its application to the news industry; it embraces all fields. The government recognizes this throughout its argument (Br. p. 81 et seq.) by citing (erroneously as we shall point out below) as instances of the application of the principle the trade association cases involving sugar, linseed oil and lumber. Thus this principle outlaws joint action for trade advantage in every field whether conducted in the form of a partnership, association or otherwise, unless such advantage is shared with all.

2. The new principle is likewise divorced from any factor of "indispensability." The government extols the virtues of AP's news service; it minimizes the value of

the services of UP and INS and ignores all others; but it contends that the new principle is not dependent on a finding of AP's superiority or indispensability.

3. The new principle is divorced from the commission of any predatory acts such as driving or excluding a competitor from the trade or from any segment or part of the trade. AP and its members have not excluded and do not intend to exclude anyone from the news agency field or from the newspaper field and they do not have the power to exclude. They are not engaged in a boycott. Concededly no joint adventurers may combine to drive a competitor from the market or to prevent him from entering the market or any part thereof. But when they establish a joint agent for the production of news reports and direct the agent to furnish the reports to each of them under normal agreements for territorial exclusivity, then they are not boycotting, or monopolizing, or engaging in any unlawful agreement (Our Br. p. 30 et seq.).

To bolster its new principle, the government says at page 66:

> " * * * if a stock corporation organized for profit made an identical agreement with each of its stockholders that it would not, without the stockholder's consent, sell its product to the latter's competitors, this would at once be recognized to be a boycotting combination made for the purpose of suppressing competition and within the ban of the Sherman Act."

Let us add one factor: suppose the stockholders are customers of the corporation and the corporation sells harvesting machinery to them, agreeing at the same time to sell to no other dealer in the same community. Then we have a case which at least bears some semblance to this one.

4. The new principle necessarily permits UP, INS and other non-mutual news agencies to sell under normal cove-

nants for territorial exclusiveness. The principle therefore disenables mutual associations of newspapers to compete on even terms with the commercial services: the commercial agencies would enjoy the immense advantage of granting territorial exclusivity or asset value contracts or price differentials, whereas the mutuals would be unable to do so.

5. The cases cited by the government in support of its new principle are far from the point. The *Sugar Institute, Maple Flooring, American Linseed Oil* and *American Column & Lumber Co.* cases (Br. pp. 81-84) all involved combinations and agreements to collect trade data which was allegedly used for the purpose of fixing prices. Without secrecy the "gentlemen's agreements" for price fixing could not have been effectuated, hence the secret dissemination was enjoined. The *Interstate Circuit* case (Br. p. 101) involved overt price fixing together with elements of boycott, monopolization, dominance and coersion of competitors to their injury through the imposition of abnormal restraints. Likewise not in point, the cases cited by the government, such as the *Montague* v. *Lowry* (Br. p. 70), *Ramsay* v. *Associated Bill Posters* (Br. p. 71), *Anderson* v. *Shipowners' Association* (Br. p. 71) and others in which the conspirators sought to preempt for themselves trade, or a segment of trade, or sought to exclude others from trade or a segment of trade—there being no similarity between such cases and those in which the main lawful contract of purchase and sale is supplemented by a covenant for territorial exclusivity designed to protect the purchaser in the enjoyment of that which he has purchased. Nor are cases like *Binderup* v. *Pathe Exchange, Paramount Famous* v. *United States,* and *United States* v. *First National Pictures* (Br. p. 72, 3 et seq.) in point, where distributors of films having dominance, monopoly or near monopoly, combine together to force exhibitors to accede to unreasonable standard-form contracts.

The new principle is an attempt by the government to erect a new classification of restraints illegal *per se,* permitting "of no justification" (Br. p. 68 et seq.); and thus to eliminate genuine issues of fact concerning the reasonableness or unreasonableness of the ancillary agreement for territorial exclusivity. Yet even in the statement of the new principle, the government necessarily has included the factor of "trade advantage" or "competitive advantage." Whether or not AP's ancillary covenants for qualified territorial exclusivity confer such "trade advantage" or "competitive advantage" is a genuine issue of fact. We believe, as stated in our brief, that the ancillary covenants are affirmatively shown not to confer such advantage in any degree forbidden by the anti-trust acts or the concepts of common law.*

II.

THE SCOPE OF THE RELIEF

We pointed out (Our Br. pp. 43-51) that the unexpressed conclusion of law on which the relief is based is that the major news agencies should be required, like innkeepers, etc., to serve all comers on equal terms. We said (p. 43) " * * * the Judgment goes far beyond cancelling agreements held to be in unreasonable restraint of trade";

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*We are sure the government will wish to correct the implications of its footnote at pages 34-35. The answer to plaintiff's Interrogatory No. 7 (R. 519) was not "self serving." It required these defendants to list the names of those from whom they requested proxies against the Sun's admission and to state "the substance of the request [for proxies] and of the responses thereto." These defendants, therefore, listed the names of those from whom proxies were requested and set forth the responses to such requests. Some of the responses were statements unfavorable to the Sun (R. 538) and some were unfavorable to these defendants (R. 539). The statements of the members are obviously not "the statements" of these defendants.

that it in effect compels news agencies of "first rating" to serve all those who apply; hence that AP is required to take into membership all those who apply for membership and to furnish them with the appropriate service on the same basis that others are served.

As above pointed out, the government may have abandoned the general theory that *all news agencies* of first rating are and should be required to render indiscriminate service to all comers. *Cooperative news agencies* alone now seem to be put in that category.

But the government's suggestions for modification of the judgment makes it clear that AP is to be required (as innkeepers, etc.,) to furnish its dispatches to all comers on equal terms. While stating (p. 52) that all that is required is for AP to pass by-laws imposing no other or different restrictions on the admission of applicants in the fields of members from those in fields in which there are no members, it is also made clear that the rejection of an applicant, previously rejected, would be prima facie evidence of violation of the decree (p. 127); and that the innocence of the defendants will depend upon a judicial determination of the elimination of proscribed motives from their minds (p. 120). Under the suggested modifications, the "searching of men's minds" and the inquest into motives would subject the defendants to the dangers of contempt just as the judgment entered below.

We also urged that Judgment ¶¶ II B, III B and IV B should be stricken (Our Br. p. 45) because of the district court's holding that they involved items held independently lawful when segregated from the restrictions on membership, which restrictions were cancelled by ¶ IB. This is countered by the assertion that the by-law for the return of local spontaneous news exclusively to AP (¶ III B) and the exclusive provisions of the Canadian Press con-

tract (¶ IV B) are illegal in and of themselves. This avoidance raises substantive points of law discussed in the brief of the other defendants.

We also pointed out that the elimination of the first sentence of Section 3 of Article III of the by-laws (relating to admission of applicants not in the fields of members) was illogical in that the district court made no holding of illegality with respect thereto (Our Br. p. 44); its holdings and conclusions related only to admissions of applicants in the fields of members. That the district court made no such underlying holding is not denied. But the government now attempts to rationalize the cancellation of this severable by-law by asserting that it too should be held illegal, unless and until all the by-laws relating to admission of applicants (both in and not in fields of members) shall meet with approval (Br. p. 128).

All of which goes to show that the Judgment, as rendered and as the government asks it to be modified, will go further than cancelling agreements held in unreasonable restraint of trade—it requires and will affirmatively require AP under penalty of contempt to utter when it would remain mute.

III.

THE FIRST AMENDMENT

In answer to arguments concerning the First Amendment, the government relies upon *Associated Press* v. *National Labor Relations Board* (Br. p. 130), which holds, as did the court below, and as we stated in our brief (p. 56), that newspapers are subject to the municipal laws. But newspapers are not subject to discriminatory interpretation of the laws; and neither newspapers nor individuals may be required to utter when they would remain mute.

The government states "that it does not seek the indiscriminate distribution" of local spontaneous news but "only to have the member papers free themselves from the agreement whereby they have" bound themselves to furnish it exclusively to AP (Br. p. 134). By parity of reasoning the government should not seek to require AP to distribute its own news reports indiscriminately but, assuming arguendo an unlawful contractual inhibition, it should seek only to have AP free itself from such assumed unlawful agreement. But the Government will not be satisfied with mere removal of contractual inhibitions in the case of AP's dispatches. It seeks affirmative relief whereby AP will in effect be compelled to furnish its dispatches indiscriminately.

The government professes that AP by the Judgment (and the suggested modifications) will not be required to admit or serve any or all applicants (Br. pp. 55, 56); or be transformed into a public utility (p. 122); or be required to distribute its copy to nonmembers (p. 134). Yet it is now clearer than formerly that the Judgment (and the suggested modifications) will have the effect and is intended to have the effect sought for in Government Assignment No. 3 (R. 2667), namely, that the court should have entered a final judgment enjoining the defendants from observing any amended by-laws authorizing denial of membership:

> "* * * for any reason other than (1) that the applicant is not the sole owner of a bona fide newspaper published in the United States, (2) that the applicant has not assented in writing to the lawful by-laws of The Associated Press, or (3) that the applicant has not paid to The Associated Press any money contribution which its by-laws may require new members to pay and which is based upon the new member's equitable proportion of the value of the net tangible assets of The Associated Press and is applicable irrespective of whether the new member's newspaper is or is not published in the same city and 'field' (morning, evening or Sunday) as the newspaper of an existing member."

Every newspaper can meet these requirements and therefore every newspaper that wishes may become a customer-member. AP must admit to membership and therefore "utter" its news dispatches to every applicant newspaper.

This is exactly what we pointed out in our brief (p. 52) and that no "clear and present danger" justifies such a compulsive decree. The government makes no answer to the "Flag Salute" cases and the other cases we have cited. We submit that there is no answer.

We therefor pray that the Judgment be reversed and the case dismissed.

Respectfully submitted,

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