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PROCEEDINGS BEFORE  
THE SUPREME COURT  
OF THE  
UNITED STATES

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**CAPTION:**

MICHIGAN CITIZENS FOR AN INDEPENDENT PRESS, ET AL.,  
Petitioners v. DICK THORNBURGH, ATTORNEY GENERAL  
OF THE UNITED STATES, ET AL.

**CASE NO:**

88-1640

**PLACE:**

WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

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MICHIGAN CITIZENS FOR AN :  
INDEPENDENT FREE PRESS, ET AL., :  
Petitioners :  
v. : No. 88-1640  
DICK THORNBURGH, ATTORNEY GENERAL :  
OF THE UNITED STATES, ET AL. :  
-----x

Washington, D.C.  
Monday, October 30, 1989

The above-entitled matter came on for oral argument  
before the Supreme Court of the United States at 1:35 p.m.

APPEARANCES:

WILLIAM B. SCHULTZ, ESQ., Washington, D.C.; on behalf of the  
Petitioners.  
THOMAS W. MERRILL, ESQ., Deputy Solicitor General, Department  
of Justice, Washington, D.C.; on behalf of the  
Respondents.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

WILLIAM B. SCHULTZ, ESQ.

On behalf of the Petitioners

3

THOMAS W. MERRILL, ESQ.

On behalf of the Respondents

24

REBUTTAL ARGUMENT OF

WILLIAM B. SCHULTZ, ESQ.

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1 operating agreement here is not consistent with the purposes,  
2 structure and policies of the Newspaper Preservation Act.

3 Second, the record here does not support the Attorney  
4 General's finding that the Free Press was in probable danger  
5 of financial failure.

6 And third, the court of appeals erred in not applying the  
7 rule that antitrust exemptions must be narrowly construed.

8 Before I get to those legal issues, there are three  
9 critical facts that I would like to highlight that distinguish  
10 this case from every other JOA application. Each of these  
11 facts was either adopted by the Attorney General or by the  
12 administrative law judge whose fact-findings the Attorney  
13 General accepted, and, therefore, they are established facts  
14 for purposes of the legal issues here.

15 QUESTION: Mr. Schultz, we review this under an arbitrary  
16 and capricious standard?

17 MR. SCHULTZ: Your Honor, the factual issues would be  
18 reviewed under an arbitrary and capricious standard. The  
19 legal --

20 QUESTION: So when we're talking about facts are  
21 established by record, we're not quite in the same ball park  
22 as if you're appealing from a jury verdict or findings of a  
23 court.

24 MR. SCHULTZ: Well, and these are facts about which I  
25 don't believe there is dispute. They're facts that were --

1 QUESTION: Well, but the overall standard of review is  
2 arbitrary and capricious, not supported by  
3 substantial record -- evidence considered on the record as a  
4 whole.

5 MR. SCHULTZ: That's correct. It's arbitrary and  
6 capricious or otherwise --

7 QUESTION: So you -- you have a much greater burden to --  
8 to upset a determination here where you're just under the  
9 arbitrary and capricious standard.

10 MR. SCHULTZ: Or otherwise not in violation of law.

11 QUESTION: Yeah.

12 MR. SCHULTZ: So on the factual issues it would be  
13 arbitrary and capricious. On the legal issues it would be  
14 whether there's a violation of law.

15 The first of these critical facts is that the newspapers  
16 fought the competitive battle in Detroit to a virtual draw.  
17 Those are their words as they described the competitive  
18 situation at the time they announced the JOA. And this  
19 assessment establishes that the papers considered themselves  
20 to be competitive equals.

21 The -- Free -- the record shows that the Free Press had  
22 been losing money and that the News -- the News had been  
23 losing almost as much. It shows that the daily circulation of  
24 the two papers was roughly equal, and in other areas each had  
25 advantages. The News was ahead in advertising, but on the

1 other hand, this was offset by the fact that the Free Press  
2 had the morning franchise, had clear dominance in the morning  
3 franchise, which was considered a major advantage.

4 And also important is the fact for at least ten years  
5 there had been no movement in the relative market position of  
6 these two papers. This situation, this whole set of facts,  
7 distinguishes the JOA here from every one -- other one  
8 previously considered and approved by the Attorney General.

9 In each of those other situations, there was one paper  
10 that was dominant and profitable and a second paper that was  
11 junior, losing money and had been losing both circulation and  
12 advertising.

13 QUESTION: Well, the only difference here from that fact  
14 that if -- you just recited is that it wasn't losing  
15 circulation but it was losing money year after year, was it  
16 not?

17 MR. SCHULTZ: The Free Press was losing money, but the  
18 News here was also losing almost as much, whereas in the other  
19 situations the paper not designated failing was profitable.

20 QUESTION: So you consider that a stable situation, in  
21 which both newspapers are losing money every year?

22 MR. SCHULTZ: Well, I didn't say --

23 QUESTION: That is stability?

24 MR. SCHULTZ: I didn't say -- I didn't mean to say it was  
25 stable, but I'm saying that they are -- they are equals. They

1 are at the same level, and that it hadn't changed, that the  
2 circulation and advertising had not changed over ten years.  
3 They'd been fighting for that, and -- and that's very  
4 different from what we see --

5 QUESTION: It's different, but maybe I was jumping ahead  
6 of you. I thought the reason you thought it was different is  
7 that it indicates in this situation a stable, you know, a  
8 stable competitive arrangement, whereas in the other  
9 situations there was not a stable arrangement. It -- it  
10 seemed to be deteriorating.

11 MR. SCHULTZ: Well, let me say in the --

12 QUESTION: Don't you think it's deteriorating if --if one  
13 paper's losing a lot of money every year, year after year,  
14 despite the fact that there's no difference in circulation?

15 MR. SCHULTZ: Well, the papers obviously don't want to  
16 lose money. That's not a good thing. But the question is, is  
17 the Detroit Free Press in probable danger of failing  
18 financially? Is it in probable danger of -- of closing?

19 And I am simply saying that the fact that they're  
20 competitive equals suggests that -- that that's not the case,  
21 particularly when you consider the reason that the Free Press  
22 and the News are losing money. They're not losing money  
23 because of any problem with the market in Detroit. The  
24 Attorney General found that the market in Detroit could  
25 support two healthy newspapers. Instead, everyone has agreed



1 that they are losing money because their prices are too low.

2 The -- the newsstand price for the Detroit News is 15  
3 cents. The newsstand price for the Free Press is 20 cents.  
4 Similarly, advertising prices are the lowest in the country.  
5 And so this is not a -- a situation as we've seen in other  
6 cities where, again, where one's making money and one's  
7 losing. They're losing money because the prices are too low.

8 And just to highlight this, the fact that they regarded  
9 each other as competitive equals, when they drew up the joint  
10 operating arrangement they made a decision to split profits  
11 50-50. This, in our view, is further and very strong evidence  
12 that the papers regarded themselves as competitively equal.

13 It's strong evidence that the News did not think that the  
14 Free Press was likely to go out of business anytime soon  
15 because, after all, if it viewed the Free Press as being  
16 likely to close down in the near future, it would have made no  
17 sense for it to have split these enormous possible monopoly  
18 profits evenly.

19 Again, the profit split here contrasts dramatically with  
20 the profit split that was evident in other JOAs approved by  
21 the Attorney General. Each one of those involved a lopsided  
22 profit split, where the dominant profitable paper took most of  
23 the profits and the junior paper took a much smaller  
24 percentage, under 30 percent in every case.

25 QUESTION: On that kind of reasoning, you would

1 automatically invalidate any -- any JOA that's approved by the  
2 Justice Department which ends up in a -- in a 50-50 split, I  
3 suppose?

4 MR. SCHULTZ: I don't know that I would automatically  
5 invalidate it, but I would be very skeptical of it.

6 There is one situation I can think of where it might be  
7 appropriate, and that would be the situation where there was a  
8 finding that the market could support only one paper, and also  
9 if there was a -- there might be some other facts that were  
10 different here, but if there was kind of finding it would be a  
11 stronger place.

12 But I -- I do regard --

13 QUESTION: What is the usual split? I don't -- I don't  
14 know what these -- how these things -- I mean, is it -- is it  
15 unusual to have a 50-50 split like that?

16 MR. SCHULTZ: In terms of the JOAs after 1970, which is -  
17 - those are the only ones that have been approved by the  
18 Attorney General, the profit splits have been between 80/20  
19 and, I think, 68/32. That's the range of the other JOA. So  
20 this is very unusual.

21 Now there were some 50-50 profit splits in the old JOAs,  
22 but, of course, those are evaluated under a much different  
23 standard, and they were entered at a time when there was no  
24 requirement that there be a showing that one of the newspapers  
25 be in probable danger of -- of financial failure.

1           So, in the circumstances of a market that can support two  
2 newspapers, we would argue that where there's a 50-50 profit  
3 split and other evidence that the papers are competitively  
4 equal, that the newspapers cannot qualify for approval of a  
5 joint operating agreement.

6           QUESTION: If we're intending to ensure some competition  
7 before a JOA agreement, it's hard for me to understand how you  
8 criticize the fact that the Knight-Ridder operation fought the  
9 other newspaper to a draw. I think that's exactly what you  
10 want to encourage.

11          MR. SCHULTZ: Your Honor, I don't think, Justice Kennedy  
12 --

13          QUESTION: I mean, what's wrong with each newspaper  
14 fighting hard? I thought that's exactly what you're supposed  
15 to do before a JOA agreement?

16          MR. SCHULTZ: You want the papers to fight hard, but  
17 Congress also required that there be: (a) a finding that one  
18 of the papers is in probable danger of financial failure, and  
19 in that view that does not envision fighting to a draw; and  
20 secondly, that it be consistent with the purposes of the  
21 statute.

22          And one of the troubling -- one of the most troubling  
23 aspects of the JOA here is that its approval, the approval of  
24 the JOA in Detroit, the one at issue in this case, will result  
25 in a loss of competition in other healthy competitive markets

1 in the United States, which would be contrary to the purpose  
2 of the Newspaper Preservation Act.

3 After the statute, there are three possibilities  
4 that can occur in competitive newspaper markets. They can end  
5 up with full competition. They could end up with a JOA, or  
6 they could end up with a monopoly, single monopoly paper and  
7 no competition.

8 And Congress clearly set an order for those  
9 priorities. The statute expresses the view that the most  
10 desirable result would be a situation of competition where the  
11 papers are competing in terms of price and news and so on.

12 The second choice is a JOA which retains two  
13 newspapers but eliminates commercial competition, and the  
14 least desirable outcome is a single monopoly paper where  
15 competition is eliminated altogether.

16 QUESTION: May I interrupt you, Mr. Schultz? You  
17 said you had three critical facts. One of them was that two  
18 papers were relative equals. What were the other two that you  
19 --

20 MR. SCHULTZ: The other two, when I got to them, in  
21 answer to Justice Scalia's question, are the 50-50 profit  
22 split --

23 QUESTION: Right.

24 MR. SCHULTZ: Which is the newspaper's own  
25 recognition that they're competitive equals, and the third one

1 is the fact that the Attorney General found that the Detroit  
2 market can support two profitable newspapers.

3 QUESTION: Okay.

4 MR. SCHULTZ: And so the losses here are not caused  
5 by a depression or problem in the market. Rather, they're  
6 caused by their prices being so low.

7 QUESTION: You don't attach any special significance  
8 to the fact that the production costs of the News are higher  
9 than those of the Free Press?

10 MR. SCHULTZ: We have not. If anything, I guess  
11 they -- they cut somewhat in our favor, but the -- I believe  
12 that was noted by the administrative law judge. It's not  
13 something we've highlighted, because he didn't either.

14 The Newspaper Preservation Act expresses a strong  
15 policy preference for full competition over a JOA in several  
16 respects. First of all, Congress adopted a very narrow  
17 definition for the term "failing paper."

18 Secondly, in the purpose section of the statute it  
19 refers to the interest in newspapers that are competitive in  
20 all parts of the United States, and then it explicitly  
21 required the Attorney General to find that any JOA he approved  
22 was consistent with those purposes.

23 And, finally, the antitrust rule that exemptions  
24 from the antitrust laws be narrowly construed has the effect  
25 of retaining the full force of the antitrust laws as much as

1 possible where the exemptions don't apply.

2           Therefore, one of the underlying policies of the  
3 Newspaper Preservation Act is that it cannot be interpreted.  
4 It may not be interpreted in a way that will give incentives  
5 in other markets and result in healthy competitive markets  
6 being converted into markets where newspapers operate under  
7 JOAs approved by the Attorney General.

8           Here the Attorney General's decision violates that  
9 policy because essentially it creates a road map under which  
10 newspapers in healthy competitive markets can obtain a JOA,  
11 and all they have to do under that decision is the following.

12           The first step is for one of the papers to cut  
13 prices as happened in Detroit. That presumably will be  
14 followed by a price cut by the other paper, by the second  
15 paper, which would be necessary in order not to lose  
16 circulation in advertising, and those price cuts would be  
17 followed by several years of losses.

18           That was precisely the situation in Detroit when the  
19 application was made. Then the papers filed their application  
20 for a joint operating agreement. They have to identify one  
21 newspaper as failing. Presumably they would identify the  
22 paper that was behind in circulation or advertising or if one  
23 newspaper had substantially more losses, they would find a  
24 junior paper. But if the papers are equal, they can identify  
25 either one under the Attorney General's decision because that

1 was the situation here.

2 Accompanying the application would have to be the  
3 testimony from officials of the paper not designated as  
4 failing that they will not raise their prices even if the  
5 exemption is not granted. Well, that testimony should not be  
6 hard to get, given the interest that those officials have, and  
7 for good measure they can add the testimony from officials of  
8 the failing paper that that paper will close if the JOA isn't  
9 granted. That testimony also was presented in the case of the  
10 Detroit application.

11 And, thus, the risk of the decision is that it will  
12 result in the artificial generation of joint operating  
13 agreements in other markets around the country.

14 Newspapers have -- the problem is -- is enhanced by  
15 the fact that newspapers have a terrific incentive to try and  
16 obtain approval of joint operating arrangements, and this can  
17 also be seen from the facts of Detroit.

18 In Detroit neither of these newspapers has ever made  
19 more than \$15 million a year, and of course there are many  
20 years during which each has made far less. Yet Gannett  
21 predicts that if the JOA is approved, by the fifth year the  
22 newspapers jointly will be making \$100 million a year. So,  
23 you can see that the profit possibilities are enormous and  
24 thus, if newspapers in -- in other markets are given a way  
25 that they can obtain a JOA through something as simple as

1 price cuts --

2 QUESTION: All -- all they have to do is lose money  
3 for -- how many years were these papers losing money?

4 MR. SCHULTZ: They both lost money for five years.  
5 The --

6 QUESTION: All they have to do is lose money for  
7 five years and gamble on the fact that having lost that many  
8 million, some attorney general will approve the JOA?

9 MR. SCHULTZ: Well --

10 QUESTION: Would you invest in that paper? You know  
11 --

12 MR. SCHULTZ: Well --

13 QUESTION: -- that seems to be a pretty risky  
14 gamble. I -- I think --

15 MR. SCHULTZ: But -- yeah, except -- except what  
16 happened here is Knight-Ridder -- and this would typically be  
17 the situation -- Knight-Ridder's first choice wasn't a JOA.  
18 Their first choice was to drive the News out of business, and  
19 that's what they hoped to do.

20 But when you know that as a fall-back you can get a  
21 joint operating agreement or that you have a good chance of  
22 getting one, it makes it -- it makes it much more likely and -  
23 - and -- and -- and much more possible.

24 I -- I realize that it's a gamble --

25 QUESTION: So -- so -- so it would have -- so, it



1 would have been better in your view if Knight-Ridder hadn't  
2 entered the market at all?

3 MR. SCHULTZ: Well, if -- if Knight-Ridder hadn't --

4 QUESTION: Under your view, there's no chance of  
5 getting into a joint operating agreement, so you just don't  
6 compete at all.

7 MR. SCHULTZ: If Knight-Ridder had not kept prices  
8 so low in the '80s that they were losing money --

9 QUESTION: Well, but that's not the -- that's not  
10 the logical extension of the principle you're just arguing.  
11 That's another point altogether. They lost \$81 million in  
12 five years, and you say that it would have -- since they can't  
13 get a joint operating agreement, that all other newspapers  
14 should be warned not to do this.

15 MR. SCHULTZ: Well, what we say is that they should  
16 not be given a joint operating agreement here because --  
17 that's right, because to do so under this argument is going to  
18 jeopardize the situation in other healthy markets.

19 I don't believe that there's likely to ever be a  
20 stronger case than -- than the case in Detroit, both because  
21 the papers were competitive equals and because of the enormous  
22 evidence -- enormous amount of evidence in the record in the  
23 form of memos generated by the papers that the prospect of a  
24 JOA was an important factor in the losses the papers had --  
25 had taken.

1           The papers met in 1981 and in a memo wrote that --  
2           that the officials from Knight-Ridder said a few more years  
3           with such losses, and the prospects of a JOA will be iron-  
4           clad.

5           Moreover, the -- the administrative law judge found  
6           that in the mid-'80s when Gannett tried to increase prices so  
7           that both papers could make money, Knight-Ridder rebuffed  
8           those attempts. Knight-Ridder was uninterested in doing  
9           anything but losing money because it hoped that either it  
10          would drive the News out of the market or force the News into  
11          entering a JOA.

12          The purpose of the statute was not to foster this  
13          kind of competition. The purpose of the statute was to save  
14          papers that were failing due to normal market sources.

15          QUESTION: Well, when you -- when you say, Mr.  
16          Schultz, that one paper rebuffed the effort of another paper  
17          to raise prices, I mean, that isn't -- the -- had it not  
18          rebuffed it, that wouldn't have been entirely consistent with  
19          the antitrust laws, would it?

20          MR. SCHULTZ: Well, given that the only way either  
21          of these papers was -- it -- when I say rebuffed, I'm not  
22          saying that there were discussions, but given that the only  
23          way either of these papers is going to make money is by  
24          raising prices. They can't make money as long as they charge  
25          15 and 20 cents for the weekday paper, and have the lowest

1 advertising prices in the country.

2           Given that, the fact that Knight-Ridder -- and I'm  
3 saying Knight-Ridder had opportunities to become profitable.  
4 It had those opportunities because Gannett tried to edge the  
5 prices up. It didn't take those opportunities, so given that  
6 it's refused to -- refused the opportunities given it to  
7 become profitable in the past, it shouldn't qualify for a JOA  
8 under the standards of the statute.

9           There is also evidence in the record that the  
10 administrative law judge relied on and quoted --

11           QUESTION: Mr. Schultz, I may be wrong, but I  
12 thought it was Knight-Ridder that took the initiative in  
13 raising the prices and Gannett that didn't follow. Am I wrong  
14 on that?

15           MR. SCHULTZ: I -- I believe you are, Justice  
16 Stevens.

17           QUESTION: It was --

18           MR. SCHULTZ: It was Gannett -- it wasn't Gannett,  
19 but it was Gannett's predecessor, the Evening News  
20 Association.

21           QUESTION: The News?

22           MR. SCHULTZ: It was the News that tried to raise  
23 prices. I'm talking about '83 and '84.

24           QUESTION: What is the most recent price increase on  
25 the daily paper?

1 MR. SCHULTZ: Well, in terms of the weekday paper in  
2 Detroit, Knight-Ridder hasn't -- I don't believe either of  
3 them --

4 QUESTION: Didn't one of the papers go from 15 cents  
5 to 20 cents?

6 MR. SCHULTZ: Yes, for the out-of-state papers.

7 QUESTION: And it was not followed?

8 MR. SCHULTZ: And that may have been Knight-Ridder  
9 in that case. And it -- and -- well, there have been a number  
10 of price rises. In terms of the weekday, I believe it was  
11 followed. There was a weekend -- a Sunday price rise that was  
12 not followed immediately. It was followed (inaudible) --

13 QUESTION: And which one took the initiative on the  
14 Sunday paper?

15 MR. SCHULTZ: I believe that was Knight-Ridder.  
16 That was Knight-Ridder on the Sunday paper. But this is now  
17 later in the '80s.

18 In addition, when Gannett bought the News  
19 Association in 1986, it -- the administrative law judge found  
20 that it had considered a price rise, but decided not to raise  
21 its prices because that might make the Free Press profitable  
22 and jeopardize the prospects of the JOA.

23 I only say this to say this is a -- this is a very  
24 strong case for this kind of argument, and if it doesn't work  
25 here, it's not likely to work in another case.

1           In addition, on this record, the Free Press is not  
2 in probable danger of financial failure. The Attorney  
3 General's theory that it is goes as follows: the Free Press  
4 has been losing millions of dollars a year. This is due to  
5 low prices. But the Free Press cannot raise its prices unless  
6 the News follows, because to do so would risk losing  
7 circulation and advertising. And therefore, the critical  
8 question before the Attorney General was, will the News raise  
9 its prices if the JOA was denied?

10           He found that the answer to that question was no,  
11 even though a price rise for the News was its only route to  
12 profitability.

13           And he made this finding even though the papers,  
14 under the Justice Department's regulations, have the -- have  
15 the burden of proof of proving that the News won't raise its  
16 prices.

17           QUESTION: Well, and even though the ALJ had not  
18 credited the testimony that they would maintain -- that the  
19 News would maintain the low price.

20           MR. SCHULTZ: That's correct. Even though --

21           QUESTION: So --

22           MR. SCHULTZ: As a matter of fact, the -- in making  
23 this finding, the only evidence in the record that the  
24 Attorney General relied was the fact finding of the ALJ where  
25 he explained why the News officials' testimony could not be

1 relied on. That was -- that's the -- that's the only evidence  
2 in the record cited.

3 QUESTION: In your view, is it essential to sustain  
4 the Attorney General's position that we accept the credibility  
5 of the News executives who said they would maintain the low  
6 price until the other paper was driven out of business?

7 MR. SCHULTZ: Yes. Absolutely. Because that's the  
8 only evidence that the Attorney General referred to. He -- he  
9 simply referred to News officials and cited that portion of  
10 the administrative law judge's opinion.

11 Another problem with his finding is that essentially  
12 what the Attorney General is -- is saying is that the News --  
13 it's rational, and that the News will engage in conduct that  
14 essentially amounts to predatory pricing.

15 The cases of this court take a very different view,  
16 which is that firms, in the long run, will not choose to lose  
17 money in order to drive a competitor out of business. And the  
18 court has said that predatory pricing schemes are rarely  
19 tried, and even more rarely successful. At a minimum, this  
20 places a heavy burden on the applicant to demonstrate why the  
21 situation in Detroit should be different from the situation  
22 everywhere else.

23 QUESTION: Well, you had a five-year track record  
24 that seemed to look just like that, though, didn't it? I  
25 mean, they're both -- both taking losses for five years.

1 MR. SCHULTZ: Yes, Justice Scalia, they -- they  
2 were, but during those five years, there were continual  
3 discussions about the prospects of a JOA, and the question has  
4 to be, what would happen if they're told they can't get a JOA  
5 with this kind of conduct.

6 We agree that this conduct may be rational -- it is  
7 rational if at the end of the road you can be assured or even  
8 have a good chance of getting a joint operating arrangement.

9 Again, the only evidence relied on by the Attorney  
10 General was the testimony of -- of the News, and that simply  
11 cannot be sufficient under the applicable standards.

12 I'd like to say just a word about the Chevron issue,  
13 since that was one of the questions presented. The panel  
14 majority held that Chevron -- the panel majority below held  
15 that Chevron requires so much deference to the Attorney  
16 General as to make a difference in the outcome of the case.  
17 We regard that holding as wrong. At its heart, Chevron is  
18 nothing more than a way of determining legislative intent.  
19 And essentially it says that Congress, in a typical  
20 administrative statute, intends for the agencies to take the  
21 primary role in interpreting the statutes.

22 That presumption can obviously be overridden by  
23 explicit statutory language, for example, requiring de novo  
24 review. Here it's overridden by the long-standing rule of  
25 statutory construction, requiring narrow -- narrow .

1 interpretation of antitrust laws; it's overridden by the  
2 traditional role that the courts have taken in interpreting  
3 antitrust laws; and finally, it's overridden by clear  
4 indications in the legislative history.

5 QUESTION: 'I'm not sure we've applied Chevron to  
6 factual determinations by agencies. I mean, you got the APA  
7 and normal deference to that. Have we applied Chevron to  
8 that? We're talking about a factual determination here,  
9 aren't we? Or are we talking about an issue of law?

10 MR. SCHULTZ: Well, I think we have both.

11 QUESTION: What's the issue of law?

12 MR. SCHULTZ: The issue of law is whether granting  
13 the JOA in the -- in the undisputed circumstances here, is  
14 going to be inconsistent with the policies of the statute  
15 because of the adverse impact on otherwise healthy competitive  
16 markets.

17 But the court of appeals --

18 QUESTION: If that's a question of law, everything  
19 is a question of law.

20 MR. SCHULTZ: Maybe -- I can answer the question  
21 this way. Because the court of appeals seemed to say that  
22 even as a factual issue, Chevron so narrowed its role that it  
23 wasn't entitled to overrule the Attorney General. If there  
24 are no further questions, I'll reserve the remainder of my  
25 time.



1 QUESTION: Very well, Mr. Schultz.

2 Mr. Merrill, we'll hear now from you.

3 ORAL ARGUMENT OF THOMAS W. MERRILL

4 ON BEHALF OF RESPONDENTS

5 MR. MERRILL: Mr. Chief Justice, and may it please  
6 the Court:

7 Mr. Schultz started by giving you three facts; I'm  
8 going to give you four facts. The difference between my four  
9 facts and his three facts are that mine are the facts that the  
10 Attorney General relied upon in making his decision in this  
11 case to approve the joint operating agreement between the two  
12 newspapers.

13 Before I do that, though, let me make two general  
14 remarks about the nature of the argument that you've heard  
15 today and that Petitioners advance in their briefs.

16 First of all, the Newspaper Preservation Act makes  
17 it clear that Congress delegated authority to the Attorney  
18 General to approve or disapprove a joint operating agreement,  
19 not to the antitrust division, nor to the administrative law  
20 judge. Thus, the decisions -- the decision of the Attorney  
21 General and not the ALJ, which is entitled to deference.

22 And it's clear, as the Petitioners have conceded,  
23 that the applicable standard of review is a highly deferential  
24 one, whether or not that decision was arbitrary, capricious,  
25 or an abuse of discretion.

1           QUESTION: Mr. Merrill, it is true, though, that the  
2 Attorney General did accept all the factual findings of the  
3 ALJ, did he not?

4           MR. MERRILL: I -- I think that that's not a fair  
5 inference, Justice Stevens.

6           QUESTION: He said so in so many words, didn't he?

7           MR. MERRILL: He said that he -- he said in the  
8 conclusion of his decision, there's one sentence that says  
9 that he accepts the fact findings as accurate, but that he has  
10 differed with the conclusions reached by the ALJ. He also  
11 said that he had based his decision on the review of the  
12 entire record. He said that essentially twice. And in the  
13 body --

14           QUESTION: I understand. But supposing -- supposing  
15 the ALJ says I don't credit the testimony of witness X, would  
16 you say we should accept that testimony or not?

17           MR. MERRILL: I would think that if the Attorney  
18 General had adopted the findings of the ALJ, that then perhaps  
19 you should stop with the ALJ's findings. But the Attorney  
20 General here never said I adopt the findings of -- the  
21 administrative law judge. He said -- he said that he accepted  
22 the fact findings as accurate, but differed with the  
23 conclusions.

24           And given that in the body of his opinion, in the  
25 analysis section, he specifically disagreed with the

1 administrative law judge in a number of critical junctures,  
2 about the types of factual determinations that could be made  
3 on this record, I think that the most you can say is that the  
4 -- what the Attorney General was saying -- is that he accepts  
5 the findings of evidence, but not necessarily the inferences  
6 that are being drawn from the evidence.

7 I'll admit that the sentence is not a model of  
8 (inaudible) --

9 QUESTION: When you say a witness is not telling --  
10 I don't credit a witness, is that an inference or is that a  
11 fact?

12 MR. MERRILL: This was -- are you referring  
13 specifically now to the question about the Gannett --

14 QUESTION: The testimony of the -- the Gannett  
15 executive who says they will maintain the low prices until  
16 they drive the competitor out of business.

17 MR. MERRILL: Right. Well, with respect to that  
18 point, the administrative law judge said that, you know, he  
19 did not give great credence to that testimony, not because he  
20 thought that the -- the witness's demeanor was improper or  
21 that he had sweaty palms --

22 QUESTION: He just thought it was highly improbable?

23 MR. MERRILL: -- whether for some reason he -- he  
24 disagreed with it basically because he thought as a matter of  
25 economic theory that what the CEO of Gannett was testifying to

1 was improbable. And the Attorney General, in contrast, said  
2 that it was -- did not reflect unsound business judgment for  
3 the Gannett chairman to testify as he did.

4 Because what he was testifying to was entirely  
5 consistent with what Congress had found to be the economic  
6 circumstances of the newspaper industry and what the record in  
7 the cases the Attorney General construed it, suggested to be  
8 the economic condition of the newspaper industry.

9 QUESTION: Is it your view we should accept that  
10 testimony?

11 MR. MERRILL: I think that that testimony is simply  
12 one of several factors that the Attorney General was relying  
13 upon --

14 QUESTION: That's not my question. Do you think we  
15 should accept that testimony as true, that the chief executive  
16 of a large newspaper, which has been losing money for five  
17 years, millions and millions of dollars, would continue to  
18 lose money until he is successful in driving his competitor  
19 out of the market? That's the substance of what he testified  
20 to.

21 MR. MERRILL: I don't -- I do not think that the  
22 Court either needs to accept or not accept that testimony as  
23 true --

24 QUESTION: What is the position of the government as  
25 to the truth or falsity of that testimony?

1 MR. MERRILL: Our position is that the -- the  
2 testimony is entirely consistent with what this record in this  
3 case and what Congress found about the economics of the  
4 newspaper industry.

5 QUESTION: And if that testimony is the truth and if  
6 that program were carried out after a JOA were turned down,  
7 would that be lawful or unlawful conduct in the opinion of the  
8 United States?

9 MR. MERRILL: The claim has been made here that  
10 somehow it would constitute predatory pricing. Let me -- let  
11 me address that directly.

12 QUESTION: I'd like an answer to the question.

13 MR. MERRILL: Hm?

14 QUESTION: I'd like an answer to the question.

15 MR. MERRILL: I will try to answer the question.

16 QUESTION: Yeah.

17 MR. MERRILL: There is absolutely no evidence in  
18 this record about predatory pricing. Predatory pricing, I  
19 take it, would mean --

20 QUESTION: The testimony I've just described is  
21 strong evidence of an intent to engage in predatory pricing  
22 for the purpose of acquiring a monopoly.

23 MR. MERRILL: Well, the testimony is that -- is that  
24 the Detroit News would not raise its prices --

25 QUESTION: And that it's been consistently losing

1 millions of dollars for several years.

2 MR. MERRILL: But -- there is no suggestion --

3 QUESTION: And it would continue to lose them until  
4 it was successful in driving its competitor out of the market.

5 MR. MERRILL: There is no suggestion that the News  
6 is going to engage in -- in pricing below marginal cost,  
7 pricing below average variable cost, or any other measure of  
8 predatory pricing. There is nothing in the record about that.  
9 You can't -- excuse me -- draw any inferences from that, from  
10 what the Gannett chairman has testified.

11 They're losing money, but that could simply mean  
12 that the newspaper industry has high fixed costs, and  
13 therefore, at the pricing that they're -- that they're engaged  
14 in, they don't recover the totality of their fixed costs.

15 I don't think that would necessarily constitute  
16 predatory pricing.

17 If, in fact, any newspaper is engaged in -- in what  
18 constitutes predatory pricing, yes, I think the Justice  
19 Department would look at that quite seriously. But the record  
20 in this case does not suggest predatory pricing; the antitrust  
21 division, which looked at this very carefully, never once  
22 suggested predatory pricing --

23 QUESTION: Gannett --

24 MR. MERRILL: -- the administrative law judge  
25 acknowledged there was no predatory pricing. The first time

1 it came up was on the -- in Judge Wald's opinion, with respect  
2 to the denial of rehearing it back, and Judge Silberman  
3 pointed out in his separate opinion that that claim was simply  
4 barred by principles of exhaustion.

5 It had not been raised in either the administrative  
6 proceedings or in the district court or the court of appeals  
7 by the Petitioners, and it would be quite unfair to the  
8 parties in this case to consider at this point in time the --  
9 the prospect that some type of predatory behavior is being --  
10 is going on here, when the record basis for that had simply  
11 not been established.

12 The Petitioners did not take part in the  
13 administrative proceedings in this case. And no one that did  
14 take part in the administrative proceedings raised any claim  
15 about predatory pricing.

16 Furthermore, I think there's some inconsistencies  
17 here because on the one hand the Petitioners claim that  
18 maintaining low prices would be predatory and therefore  
19 unlawful, but on the other hand they say that of course  
20 predatory pricing almost never happens and so it would be  
21 wildly improbable to imagine that the News is not going raise  
22 prices if a JOA is denied. I don't think they can quite have  
23 it both ways.

24 Let me -- let me try if I might just to go back  
25 again to what I think the Attorney General relied on, but to

1 point out that the findings of the Attorney General, he made  
2 what I believe to be four critical factual determinations in  
3 this case, were -- were reviewed by the district court --  
4 United States District Court -- and by the court of appeals  
5 and were upheld by both of those courts, and it's quite well  
6 established that this Court does not ordinarily undertake to  
7 review the factual determinations of two concurrent lower  
8 courts obvious -- absent some very obvious or exceptional  
9 showing of error, and we don't think that anything the  
10 Petitioners have presented in this case can constitute  
11 something of that magnitude.

12 Let me mention briefly the four facts that the  
13 Attorney General relied on. First, which has already been  
14 mentioned, the Detroit Free Press, which was indicated to be  
15 the failing newspaper, had lost consistently over a seven-year  
16 period substantial sums of money amounting in total to some  
17 \$83 million from 1979 to 1986.

18 The losses went up during that period every year  
19 except one, so they are steadily mounting. That's undisputed.  
20 The ALJ found that -- the Attorney General found that.  
21 Petitioners don't challenge that.

22 Second, the Attorney General agreed with the  
23 conclusion of both the antitrust division, which testified to  
24 this point, and the ALJ that the Free Press had no way  
25 unilaterally to extricate itself from this pattern of ever-



1 deepening losses.

2 The Attorney General in fact specifically instructed  
3 the administrative law judge to look into the options that the  
4 Free Press had. The administrative law judge devotes 18 pages  
5 of his opinion to an analysis of all the various courses of  
6 action that might be available to the Free Press in order to  
7 extricate itself from the situation.

8 He concludes that none of those options -- raising  
9 prices of the newspaper, raising advertising rates, changes in  
10 management, anything else -- none of it was realistic. And  
11 that's really undisputed, too. Petitioners, despite their  
12 quibbling, have not directly challenged that finding.

13 Third, and we've already touched on this, the  
14 Attorney General disagreed with the ALJ with respect to the  
15 probability that the News would not raise its prices in the  
16 future. He thought that given everything in the record, that  
17 it would hardly reflect unsound business judgment for the News  
18 not to raise its prices with so many indications that the Free  
19 Press had already abandoned any hope of -- of maintaining  
20 market dominance --

21 QUESTION: Mr. Merrill, isn't it true that that  
22 finding depends on an assumption that the papers are not of  
23 equal strength, that the Free Press is already decided or  
24 predestined to fail if the two continue the struggle?

25 MR. MERRILL: I think the Attorney General -- yes,

1 the Attorney General's opinion clearly indicates that he  
2 regards the News as the stronger paper, as the paper with the  
3 greater reserves and the greater ability to -- to outlast the  
4 Free Press at this point in time.

5 There's not a finding that the News was dominant in  
6 the sense in which you talk about a dominant paper versus a  
7 failing newspaper, nor is there any finding here of a downward  
8 spiral, but the Attorney General indicates that the News, in  
9 his opinion, is clearly in a superior position. I think the  
10 record evidence amply supports that.

11 If you look beyond the total circulation numbers,  
12 total daily circulation throughout the state, and look at the  
13 various factors that go into -- to revenue-raising ability,  
14 the --

15 QUESTION: Doesn't it also mean that the reason the  
16 decision of the News to keep their prices low is a reasonable,  
17 rational business decision is that they can predict that they,  
18 by losing money for a determinate period of time they will  
19 drive the failing paper out of business?

20 MR. MERRILL: Well, I think the News was -- would --  
21 would look at two things. First of all, they would look at  
22 the fact that they have -- earn 60 percent of the total  
23 advertising revenues in this market and the Free Press only 40  
24 percent, that they have real strengths in the revenue -- and  
25 that's -- 75 percent of the newspaper's revenue, is

1 advertising -- and they have considerable strengths. For  
2 example, the News has consistently maintained 70 percent of  
3 the classified advertising in this market.

4 But it's not just the fact that they have those  
5 strengths, it's also the fact, you must recall, that  
6 throughout this period, and I'm talking now from '83-'84 to  
7 '85-'86, when the Free Press has basically broken off JOA  
8 discussions with Evening News Association, the closely-held  
9 company that then ran the News, and has initiated this thing  
10 called Operation Tiger, where the Free Press is trying  
11 everything it possibly can to improve the quality of its  
12 newspaper in order to improve its position in the Detroit  
13 market.

14 The Free Press has throughout this period has -- it  
15 brought in a new management team. They brought in their team  
16 from Philadelphia that in fact had won the newspaper war  
17 there. They invested \$22 million in a new publishing plant in  
18 the Detroit riverfront, which is designed to go out and get  
19 papers out faster and with better quality.

20 They do many things to improve the quality of the  
21 papers. They have more sports coverage, more international  
22 coverage, more color graphics and so forth. They put a total  
23 -- the Chairman testifies they put a total of \$176 million of  
24 cash from 1977 through 1985 or '86 into the Free Press.

25 What happens? They don't really put -- they don't

1 really change the numbers at all. If you look at the various  
2 tables in the ALJ's opinions that -- that talk about  
3 circulation, circulation in the primary market area,  
4 circulation on Sunday, the advertising revenue figures,  
5 they're all quite constant throughout this period.

6           The relative percentages of the News and the Free  
7 Press basically don't budge, and this is at a time when the  
8 Free Press is pulling out all the stops competitively to try  
9 to do everything it can to obtain a dominant position in this  
10 market, so the Free Press having done that and not succeeded  
11 and then all of a sudden having Gannett show up and purchase  
12 the Evening News Association with -- with all of the resources  
13 that Gannett has and its reputation for aggressive marketing  
14 and so forth, it seems to me that it's not illogical in that  
15 situation for both the News to assume that if it stays the  
16 course for a while longer the Free Press is going to exit the  
17 market. And it's not illogical for the Free Press, as its  
18 Chairman testified in this case, to decide that it's going to  
19 close if the joint operating agreement is not approved.

20           The fourth fact that the Attorney General found, and  
21 I think this is also important to the discussion here, is that  
22 he found that the papers' behavior was -- reflected entirely  
23 proper marketing strategies and entirely responsible conduct.  
24 He rejected the claim that poor management or -- or some type  
25 of improper conduct was in any way responsible for the paper's

1 behavior. As he put it, the papers had engaged in energetic  
2 but entirely responsible --

3 QUESTION: Mr. Merrill, isn't it correct that that  
4 finding was basically saying that it was not improper for them  
5 to consider the option of a JOA as -- as an alternative in the  
6 long run? Did he consider the possibility that the pricing  
7 was predatory and therefore was not proper business behavior?

8 MR. MERRILL: No, the Attorney General did not  
9 consider that possibility because no one had raised it in the  
10 administrative proceeding.

11 QUESTION: But isn't it obvious, on its face, that  
12 there's a question there?

13 MR. MERRILL: Not necessarily, because as I tried to  
14 explain before, it's -- it's conceivable that the papers could  
15 be losing money and yet not being engaged --not engaged in  
16 anything that would be described as predatory in terms of  
17 pricing below marginal cost, pricing below average variable  
18 cost, or anything of that sort. Predatory pricing is --

19 QUESTION: I appreciate that, but after it has been  
20 -- been identified that one of the papers will go out of  
21 business if you don't get a JOA, would it then be permissible  
22 to continue with that kind of pricing?

23 You see, this is -- there are two different  
24 situations. One, before you have the testimony that if we  
25 don't get our JOA, Knight-Ridder will fold up the Free Press,

1 and is it then permissible for the other paper to say well, in  
2 order to ensure that result, we will continue to lose money  
3 for whatever period of time it takes to achieve that result?  
4 Do you think that raises a question that even warrants  
5 inquiry?

6 MR. MERRILL: That is a different question -- I  
7 hadn't thought about that, Justice Stevens. I think that is a  
8 distinct question. I mean, what we have here of course is --  
9 the newspapers negotiated JOA in 1985. At that time they  
10 hadn't exchanged complete financial data. They really didn't  
11 know what each other's circumstances --

12 QUESTION: Also, there was then no statement that  
13 either one would go out of business if they didn't have a JOA.

14 MR. MERRILL: That's correct, and the reason why  
15 they agreed upon this 50-50 profit split -- which, by the way,  
16 is not at all unusual. Fully 50 percent of the JOAs that were  
17 negotiated --

18 QUESTION: It's unusual in the post-Act?

19 MR. MERRILL: Of the four preceding applications  
20 prior to this one in the post-Act period, none of them had a  
21 50-50 split, but if you --

22 QUESTION: And none of them had the dominant paper  
23 been losing money either, had they?

24 MR. MERRILL: I think that's correct. I'm not  
25 absolutely sure about that.

1           But anyway, in 1985, at the time the negotiations  
2 takes place, the News doesn't know what the Free Press'  
3 intentions are and vice versa; the Free Press doesn't know  
4 what the News' intentions are.

5           It makes sense under those circumstances, I think,  
6 to reach the type of agreement they had, and I don't think  
7 that any conclusion could be drawn at all at that point in  
8 time about the intentions of -- of the parties that -- that  
9 you're speaking of.

10           Now, now -- whether the Attorney General sua sponte  
11 thought that something -- some inquiry should have been made  
12 based on this -- this later testimony or not, I just don't  
13 think that that was presented to him, nor was it particularly  
14 relevant to the question of whether or not the JOA, given the  
15 circumstances under which it --

16           QUESTION: Well, you say it's not relevant, but --  
17 assuming the fact were that the program -- the post-JOA denial  
18 program would be unlawful -- assume for the purpose of  
19 argument that it's unlawful to drive your competitor out of  
20 business by selling your papers below cost for a prolonged  
21 period of time, would then -- would it then be permissible to  
22 grant the JOA because you can predict that that's exactly  
23 what's going to happen?

24           I mean, in other words, if the -- if the fail -- the  
25 reason for the failure is unlawful conduct, is that something

1 that should prevent the JOA from being granted?

2 MR. MERRILL: Yes, I will agree with that  
3 statement.

4 QUESTION: All right.

5 MR. MERRILL: I think that -- it's quite consistent  
6 with what the Attorney General has said here. I think that in  
7 terms of analyzing this -- this rather illusive question about  
8 the mixed motives that the petitioners have presented, that it  
9 -- it's very important to distinguish between vigorous,  
10 energetic, lawful competitive activity and anticompetitive  
11 activity.

12 It seems to me that it's safe to infer from the  
13 Attorney General's decision and safe, based on everything I  
14 know about what the Justice Department has done in this area  
15 in the past, that if the parties have engaged in any kind of  
16 anticompetitive activity in order to try to secure a JOA, that  
17 that would be sufficient grounds under the policies and  
18 purposes inquiry to deny it.

19 For example, if there were any evidence that they  
20 had conspired or colluded in order to get a JOA, which is  
21 really what the road map suggestion amounts to, that somehow  
22 papers are going to see this decision and think that they can  
23 go out and enter into some kind of agreement to lose money for  
24 five or six years and then one of them will testify that he  
25 won't raise prices and so forth and he'll go get the JOA.



1           If there's any suggestion of that, I think it's  
2 quite clear that it would be proper to deny the application.  
3 If there was a suggestion that predatory pricing had, in fact,  
4 been responsible for these losses or for driving one of the  
5 papers out of business, I think it would be proper to deny the  
6 JOA and --

7           QUESTION: I'm not suggesting predatory pricing in  
8 the past, but the point would be that the only way in which  
9 the predicted result would take place is if it's depending on  
10 predatory pricing in the future when there's already been a  
11 declaration by one paper that I'm not going to stick in the  
12 market if you keep pricing this way, and the other one says  
13 well, I'll continue to lose money until I achieve my goal.

14          MR. MERRILL: If -- if I --

15          QUESTION: If you consider that to be unlawful --  
16 and I accept your point that you don't know enough about costs  
17 and so forth to draw that in --

18          MR. MERRILL: I want to be careful about what I say  
19 here.

20          QUESTION: Yeah.

21          MR. MERRILL: I will not concede that it would have  
22 been predatory, it was predatory or anything like that. I  
23 think that that kind of claim is completely barred by  
24 principles of exhaustion of remedies. It's not in this case  
25 at all.

1           However, if you did have reason to believe that the  
2           only reason the paper was going to go out of business was  
3           because of post-agreement predatory activity, I would agree  
4           with you, yes. That would be sufficient circumstance, but  
5           that's not this case -- at least that's not the record that  
6           was made in this case. And I think it would be quite unfair  
7           to these newspapers to send the case back because of some  
8           possibility that not what we know now after three rounds of  
9           appeals and so forth -- maybe that little aspect of the case  
10          needs further exploration.

11           QUESTION: Mr. Merrill, you don't strictly speaking  
12          defend the reasoning of the court of appeals' opinion -- at  
13          least insofar as it relied on Chevron, do you?

14           MR. MERRILL: Well, let me -- let me try to clarify  
15          that, Justice Rehnquist. It seems to me that before you get  
16          into --

17           QUESTION: Could you answer the question perhaps and  
18          then clarify your answer.

19           (Laughter.)

20           MR. MERRILL: I think we do agree with basic -- the  
21          basic thrust --

22           QUESTION: Do --

23           MR. MERRILL: -- of what Judge Silberman said about  
24          the Chevron doctrine. I think that was essentially correct.  
25          Our position, however, is that we don't -- the court need not

1 really get into this matter in this particular case. It seems  
2 to me that the first thing you'd want to ask yourself before  
3 you plunge down some road examining the nuances of the Chevron  
4 doctrine is, is there a disputed question of law in this case  
5 wherein the administrative decision-maker decided that the  
6 statute meant one thing, and the petitioners are claiming it  
7 means something else.

8 And petitioners obviously disagree with this  
9 decision. They think it's arbitrary and capricious, but I'm  
10 having great difficulty -- a great deal of difficulty --  
11 ascertaining exactly wherein they think the Attorney General  
12 adopted a construction of the Newspaper Preservation Act which  
13 is contrary to the intent of Congress.

14 Judge Silberman, interestingly enough, thought that  
15 the point of disagreement was that petitioners were  
16 maintaining that you couldn't get a joint operating agreement  
17 unless you were in a downward spiral. He thought that they  
18 were advocating a kind of per se rule, that you construe the  
19 statute that way. The fact the petitioners disavowed that  
20 construction in the court of appeals in their reply brief --  
21 and they don't seem to press it in this particular -- in this  
22 court, so that the issue that Judge Silberman used as his  
23 jumping off point for engaging in this Chevron discussion is  
24 based on what petitioners have said so far, really not  
25 presented in this particular case.

1           And so I think the court before it starts talking  
2 about Chevron -- I think this is perhaps where Judge Silberman  
3 made his mistake -- first ought to identify the legal issue,  
4 in fact, that requires that kind of treatment.

5           I would say the same thing about the canons of  
6 construction. The exceptions to the antitrust laws should be  
7 narrowly construed. Canons of construction are used for  
8 resolving legal issues, questions of legal interpretation.  
9 They're not sort of general standards of review that we apply  
10 in -- in cases involving questions of the application of law  
11 to particular factual circumstances.

12           Just to go back very briefly to the Attorney  
13 General's factual determinations, the four determinations that  
14 the papers are losing money, the Free Press has no unilateral  
15 way out, the News is unlikely to raise its prices, and the  
16 paper's engaged in entirely proper activity.

17           It seems to me that if you accept those four factual  
18 determinations -- and under the two court rule I think the  
19 court really has to accept those two factual determinations --  
20 there can't be any really serious contention that this  
21 decision was arbitrary and capricious. The first three  
22 findings, I think, establish really without any doubt, that  
23 the Free Press has to be regarded as a failing newspaper.

24           The act defines a failing newspaper as one which,  
25 regardless of its ownership and affiliations, is in probable

1 danger of financial failure. The only previous court to have  
2 considered what that language means, the Ninth Circuit  
3 decision in the Hearst case, said that that should be  
4 interested to mean that the newspaper is suffering losses  
5 which more than likely cannot be reversed. The Attorney  
6 General specifically adopted that as his understanding of what  
7 the statute means.

8 Well, if the Free Press has lost money for seven  
9 years, if they have no way unilaterally to get out of the  
10 situation, and if their arch rival, the News, is not going to  
11 let them off the hook, it seems to me that you can't draw any  
12 conclusion except that they are in a probable danger of  
13 financial failure.

14 And with respect to policies and purposes, I think  
15 the finding by the Attorney General that the newspapers had  
16 engaged in entirely lawful, responsible competition really  
17 defeats any claim that they -- that the application should be  
18 denied on policies and purposes grounds.

19 Obviously if the Free Press is going to fail, the  
20 primary policy and purpose of the statute is to preserve  
21 independent editorial voices, and that policy is clearly  
22 fulfilled by granting the application in this case.

23 The Attorney General went beyond the -- the one  
24 policy and purpose that the statute mentions. He also said  
25 that it was -- that the general considerations of competition

1 policy should be taken into account also, and I think that  
2 also has been satisfied here by his finding because I think it  
3 should be taken to mean that no anticompetitive conduct was  
4 responsible for the losses that these newspapers incurred in  
5 this particular case.

6 QUESTION: I think you missed -- you overstated what  
7 the Attorney General said. He didn't say it was entirely  
8 lawful.

9 MR. MERRILL: No, you're correct.

10 QUESTION: They're primarily the result of  
11 acceptable competitive strategies.

12 MR. MERRILL: You're right.

13 QUESTION: He expressed no opinion on the  
14 lawfulness.

15 MR. MERRILL: You're correct, Justice Stevens. I  
16 overstated.

17 Let me -- let me just try to bring up one final  
18 point here, which I don't think has gotten enough emphasis in  
19 the argument this morning or this afternoon, excuse me. The  
20 petitioners talk a lot about the importance of the policy of  
21 the antitrust laws, pro-competition policy, the economic  
22 efficiency objectives that are obviously reflected in those  
23 statutes.

24 But there's another policy, I think, that Congress  
25 was concerned about in this case, and I think it's one that

1 Congress thought was more important than the policies of  
2 economic competition. That, of course, is the policy of  
3 trying to preserve two or more editorial voices, independent  
4 editorial voices in communities that otherwise would be denied  
5 them.

6 Congress heard a lot of evidence about the decline  
7 of the newspaper industry, the decline of junior newspapers,  
8 which is really quite distressing in this case. In 1910, 60  
9 percent of American communities had two or more independent  
10 competing daily papers. By 1968, shortly before this act was  
11 passed, that had fallen to below 5 percent.

12 And the record in this case indicates that if  
13 anything, the trend has simply continued.

14 We now in this country have about 1,500 cities with  
15 one newspaper owner and 25 cities with two or more newspapers  
16 that are independently owned and competing.

17 And so, I think when the Attorney General was making  
18 his decision, he was very cognizant of the fact that Congress'  
19 primary concern here was to make sure that wherever possible -  
20 - and there's not very many places where it's still possible -  
21 - but wherever possible, that two or more editorial voices be  
22 maintained, even if that means giving up a little bit on the  
23 otherwise unalloyed economic competition that would exist.

24 QUESTION: Well, that's precisely what troubles me  
25 about this decision. I mean, apart from whether it's right or

1 wrong, you begin with the finding that this city will support  
2 two separate newspapers. And it seems to me once you make  
3 that finding, why would you ever want to grant a joint  
4 operating agreement. I mean, usually you're dealing with a  
5 city that can't.

6 Here you go in and say, this city can have two  
7 completely independent newspaper, but since it can't have two  
8 independent newspapers, we'll grant a joint operating  
9 agreement. I don't understand that.

10 MR. MERRILL: Sad to say, Justice Scalia, but there  
11 are a lot of cities in this country that could support two  
12 newspapers, but that do not have two newspapers.

13 For example, since this Act was passed in 1970, its  
14 second newspaper, junior newspapers have gone out of business  
15 in Washington, D.C., Baltimore, Cleveland, Philadelphia,  
16 Buffalo -- all fairly large cities -- not that different from  
17 Detroit.

18 QUESTION: Well, what is "could" mean then. I don't  
19 understand what "could support" means. I thought "could  
20 support" meant that in full and fair competition, more than  
21 one would survive.

22 MR. MERRILL: No. A "could support," I think, in  
23 the petitioner's use of it means that if there was some kind  
24 of pricing czar who was able to somehow intercede and  
25 determine what the prices of these newspapers ought to be.



1 There are circulation prices and advertising prices, then they  
2 could make money.

3 Unfortunately, there is no such thing in the  
4 competition situation, where the two newspapers are  
5 desperately trying to avoid the downward spiral; to avoid  
6 having their circulation begin to slip, and have their  
7 advertising revenue start to fall off and all of sudden, they  
8 are out of the picture.

9 In that sort of situation, the competitive reality  
10 is that the papers will not price at levels which are  
11 sufficient for the two of them to last.

12 That was true, for example -- if Congress was aware  
13 that in New York City, which is the biggest newspaper market  
14 in the country, there had been quite a number of newspaper  
15 failures, notwithstanding the fact that clearly that's not a  
16 situation where there's not sufficient revenues to sustain at  
17 some level pricing, more than one newspaper.

18 QUESTION: Mr. Merrill, in any of these other  
19 markets, did the -- when they got down to two and a then one  
20 survived, was it the afternoon paper that survived at the  
21 expense of the morning? Isn't this somewhat unusual?

22 MR. MERRILL: It is unusual, Justice Stevens. In  
23 Philadelphia, is the situation that both the news and the free  
24 press were looking at over their shoulders.

25 In Philadelphia you had, at one time, a dominant

1 evening paper, The Bulletin, I think it was, and a struggling  
2 morning paper.

3 The morning paper, incidentally, was owned by  
4 Knight-Ridder. Knight-Ridder was able to turn that situation  
5 around after six years of losses, and the Bulletin eventually  
6 went into a tailspin and went out of business.

7 So I think there were certain clear parallels  
8 between Philadelphia and Detroit, that both these papers were  
9 looking at throughout this period of time, and it explains, I  
10 think, largely why they were competing the way they were in  
11 order to try and maintain at all costs their market shares,  
12 and that led to the losses that made them unprofitable.

13 If there are no further questions, I thank the  
14 Court.

15 QUESTION: Thank you, Mr. Merrill.

16 Mr. Schultz, do you have a rebuttal? You have two  
17 minutes.

18 REBUTTAL ARGUMENT OF WILLIAM B. SCHULTZ

19 ON BEHALF OF THE PETITIONERS

20 MR. SCHULTZ: Yes. Just three points, Your Honor.

21 First of all, these various facts that the Attorney  
22 General and Mr. Merrill have picked out of the record are all  
23 rebutted by the 50-50 profit split. They can't get away from  
24 the fact that the newspapers themselves describe their equal  
25 competitive positions and how they divided profits.

1           Second, on the issue of whether Detroit can support  
2 two profitable newspapers, the Attorney General found this is  
3 not a situation where one of these papers is failing because  
4 it's on a downward spiral or losing advertising and  
5 circulation. He didn't find any of the situations that  
6 typically accompany a failing newspaper.

7           He found that Detroit can support two profitable  
8 newspapers if prices are at market, so that focuses the whole  
9 case on the issue of price and nothing else.

10           And thirdly, the statute has an explicit requirement  
11 that the Attorney General find that the joint operating  
12 agreement is consistent with the policies of the Newspaper  
13 Preservation Act. So this is not the situation of having so  
14 many cases where you're arguing about the agency's policies  
15 versus the Court's policies.

16           Congress here identified what the policies are, and  
17 they identified the policy of competition in all parts of the  
18 United States, and the policy that they identified is  
19 consistent with the canon of anti-trust law that requires that  
20 exceptions being narrowly construed. And if that canon is  
21 applied, as the court of appeals held, then the Attorney  
22 General's decision must be overturned.

23           Thank you.

24           CHIEF JUSTICE REHNQUIST: Thank you, Mr. Schultz.

25           The case is submitted.

1 (Whereupon, at 2:34 p.m., the case in the above-  
2 entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

Michigan Citizens for an Independent Press, et al., -v- Dick Thornburgh,

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Attorney General of the United States, et al.

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Lena M. May

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