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## CAN A FREE PRESS SURVIVE ITS POSTAL NIGHTMARE?

Barry M. Goldwater\*

### I. INTRODUCTION

The most pressing current threat to the survival of a free press in the United States is not the possibility of enactment of a State Secrets Act,<sup>1</sup> nor labor strikes by pressmen whose jobs are being lost to new technology.<sup>2</sup> Nor is it the invocation of Executive privilege,<sup>3</sup> the obligation of reporters to testify before grand juries,<sup>4</sup> nor even "gag" orders of trial courts restricting information the news media can print about criminal cases before trial.<sup>5</sup> Rather it is the financial plight of the press which endangers its very existence as a diverse, numerous and independent institution.

The printed media can rightfully be concerned about statutory laws or judicial rulings that may limit a narrow portion of the information it may obtain or print, but a financially failing industry cannot print at all. When major publications upon which a large segment of the population depends for a significant sum of its general information collapse, such as *Life* and *Look* magazines did, then it is time for the general public to become aware of their own stake in this phenomenon.

The most serious and immediate threat to the interest of the vast American reading public has gone almost unnoticed among the general citizenry. The news media, possibly out of self-consciousness, has conveyed little information to the public about the problem until now, treating it more as an in-house business matter than as the legitimate news story it really is. Haunting the printed media is a postal nightmare of monstrous increases in the cost of sending its product in the mails.

As a result of the reform of the old Post Office Department from a normal governmental unit into a quasi-independent, private business, known as the United States Postal Service, the postage rate for mailing publications has shot up drastically.<sup>6</sup> At one point in 1975, the ruling of a single administrative law judge for the Postal Rate Commission threatened to increase the already mandated rates for the mailing of local newspapers by 250%, books 96%, magazines 121%, and non-profit publications 132%.<sup>7</sup>

Although the Rate Commission did not adopt the recommendations of the law judge in full,<sup>8</sup> stunning increases are scheduled under two decisions already made by that body. For example, the rates currently paid by magazines and metropolitan newspapers have doubled since 1971, when the Postal Service began operations. As a

\* U. S. Senator (R., Arizona).

1. E.G., S. 1, 94th Cong., 1st Sess. (1975), which would recodify the entire Federal criminal law, has been attacked by the American Society of Newspaper Editors as constituting, in effect, an Official State Secrets Act. Letter from Michael E. Pulitzer, editor and publisher of *The Arizona Daily Star*, to Barry M. Goldwater, May 12, 1975 (unpublished).

2. The strike in 1975-76 against *The Washington Post* by the pressmen's union typifies this problem.

3. E.g., *United States v. Nixon*, U.S. 418 U.S. 683 (1974), the so-called "Nixon tapes" case, arising out of the invocation of the claim of executive privilege as a ground for not complying with a subpoena directing President Nixon to produce certain tape recordings and documents relating to his conversations with aides and advisers.

4. E.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which it was held that the First Amendment does not relieve a newspaper reporter of the obligation that all citizens have to respond to a grand jury subpoena and answer questions relevant to an investigation into the commission of a crime.

5. The Supreme Court has agreed to hear arguments in 1976 on the issues presented in *Nebraska Press Association v. Stuart*, pending, 44 U.S. L.W. 3357 (Dec. 12, 1975). This case arises out of a "gag" order by a Nebraska trial court forbidding the news media to publish certain facts about a pending murder trial, certain statements the defendant may have made, and testimony by witnesses made during an open hearing.

6. This reform was brought about by the Postal Reorganization Act of 1971 (Public Law 91-375, Aug. 12, 1970, incorporated into 39 U.S.C.).

7. 121 Cong. Rec. S 10205 (daily ed. June 10, 1975).

8. 1 Opinion and Recommended Decision, U.S. Postal Rate Commission, Docket R 74-1, Aug. 28, 1975.

result of the most recent rate decision and new Postal Service proposals, the average rate paid by these publications will be nearly *four* times greater than what they were in 1971. In dollar terms, these magazines and newspapers paid \$128 million to the Postal Service in 1971, and they will pay more than \$450 million in 1979. <sup>9</sup> Average rate increases for non-profit publications, such as this Journal, will be up 700% to 1000% by 1981. <sup>10</sup>

The impact of these postage increases can be disastrous to publications trying to keep their economic heads above water. This explains why the true group who will suffer the most from this situation is not a particular segment of the publications world, but the general reading public who will be affected across the board.

What is at stake here is the opportunity for the American reading public to enjoy the widest possible circulation of news, information and opinions in the mails, a privilege which has been a part of the fundamental heritage of all citizens since the founding of the nation. It should be noted that the total circulation of newspapers and magazines in the mails is almost *nine billion* issues a year. <sup>11</sup> Moreover, half of the books purchased by American libraries are being delivered by mail, on top of which many libraries operate a book-by-mail program for their patrons. <sup>12</sup>

Given the enormous size and suddenness of postage increases, it is obvious these costs will have a serious adverse affect on the economic viability of publications. Many non-profit and profit magazines and newspapers that depend on mail delivery will simply fold up. Libraries will be forced to curtail their book-by-mail services and their book purchases.

Any time the public is deprived of a broad range of sources of culture and information that it is now receiving, we cannot know what drastic changes may be set in motion. If churches find it too expensive to distribute religious materials in the mails, if retired persons' groups are unable to meet the cost of mailing news bulletins to their membership, if schools must trim mail purchases of classroom publications because of higher rates, or if small circulation newspapers that meet the special needs of local communities disappear, who can predict what the impact upon the culture of the American people might be?

## II. PHASING POSTAGE INCREASES (Public Law 93-328)

Having the above considerations in mind, I sponsored legislation with other Members of Congress, eventually enacted as Public Law 93-328, <sup>13</sup> phasing large postal rate increases on mailers of publications over a longer period of time than originally mandated by the Congress when it changed the postal structure. The law's real effect is to help preserve a wider choice of educational, informational and literary matter for the public. Under the law, "for profit" magazines, newspapers and books are given until 1979 to adjust to the rising costs of rampant postage rates. Non-profit publications are allowed until 1988 to cope with these increases. In other words, mailers of publications will pay the full rate of all postage increases by the end of their respective adjustment times, but instead of having to meet what is in effect several years of increases in a single year, publications will be given a reasonable period of time for absorbing the

9. Magazine Publishers Association.

10. Catholic Press Association.

11. Magazine Publishers Association; American Newspaper Publishers Association; National Newspaper Association.

12. American Library Association.

13. 39 U.S.C. Sect. 3626.

costs. During the phasing period, Congress is to appropriate for the Postal Service budget the amount of difference between the rate actually paid by mailers and the rate which would have been paid absent the phasing.

The bill's sponsors had inserted language in the legislation which they believed would make the annual appropriations process nearly automatic, but did not count on the resourcefulness of the Office of Management and Budget in defending what they believe is an executive prerogative. Section 3 of the law states that the President shall include the amounts needed for the phasing program "in the budget transmitted to Congress under section 11 of title 31," which is the President's annual budget submitted to Congress. But what happens in practice is that the President does not include these amounts "in" his budget. Instead he submits them "together with" the budget. The difference is that the dollar figures which are included in the budget totals of the President's own budget do not carry the phasing or "revenue foregone" funds. That money appears in a separate column indicating that it has no official status, making it more difficult to move through the appropriating process. There is a lesson in this for legal draftsmen who think they can write "air-tight" provisions of law.

The law was enacted in 1974 and funds for implementing the phasing program were appropriated for both fiscal years 1975 and 1976. Congress is currently considering appropriations under the law for fiscal year 1977, which happens to be the peak year of funding with about \$300 million being required. It shall be my aim to persuade Congress and the President to carry out the commitment we made in putting the law on the books by funding the phasing program each year until it ends.

How can a political conservative who ordinarily is skeptical of more public spending support this program? Basically there are six grounds which appear compelling.

First, no permanent federal payments are provided. By 1988, all publications will be paying the entire amount of all postage increases.

Second, the rate increases were unanticipated and unforeseeable consequences of action taken by the government when it transformed the Post Office Department into the Postal Service. Instead of stabilizing postal costs as Congress expected, it created a postal nightmare in the form of alarming rate increases.

Third, the increases are beyond the control of mailers and are not of their making. The government created the situation by altering the traditional postal structure, and thus the trouble does not result from the bad business judgment of publishers.

Fourth, there is solid proof that mailers have made every feasible effort they could to cope with increased mailing rates by implementing numerous and substantial cost-cutting measures which verge on affecting the very nature and quality of the publication being mailed.

Fifth, the circulation of the printed word in the mails has historically been treated as a public service which should be promoted by the government.

Sixth, this is an area in which the subject of free speech, and all that means to the general public and our way of life, is truly involved.

#### **A. Temporary Nature of Governmental Relief**

Neither magazines, newspapers, book publishers nor legislators have claimed that publications should not pay their fair share of postage costs. Mailers have not said that they should forever be given relief, but only that they should have time to adjust to overwhelming increases in their class of mail which occurred contrary to the best judgment of experts who had led the country to believe that postal costs would be reduced and the burden of higher postal rates stabilized if postal reform were approved in 1970. Providing for the spacing-out of these huge rate increases over an extended,

but limited, period is clearly a fair way to handle increases of such magnitude, so that severe disruptions causing a number of publishers, large and small, to cease operations would not occur. As indicated, phasing will cease for all profit-making magazines and newspapers in 1978 and for all non-profit mailings in 1987.

### B. Unanticipated Consequences of Postal Reform

The 1974 report of the Senate Committee on Post Office and Civil Service on extending postal rate increases contains revealing explanations of the benefits Congress expected from postal reform. The Committee indicated that when it considered the subject in 1969 and 1970, it gave great weight to the then recently released report by the President's Commission on Postal Organization and representations made to it by the Postmaster General. Trusting in these representations of improved postal service for all mail users at reduced postal costs, that Committee and Congress as a corporate entity approved a reform bill.<sup>14</sup>

Rather than achieving postal savings which the President's Commission had estimated would be a minimum of \$1 billion a year, Postal Service expenditures have increased at an annual rate of more than 10%<sup>15</sup> In the Senate Committee's words, the "expert" views and projections which led to its earlier decisions "were wrong."<sup>16</sup> The Committee stated that "it certainly did not anticipate and, based upon representations made to it, had no reason to foresee postal cost increases and corresponding rate increases of the magnitude that have occurred since the passage of the (Postal Reform) Act."<sup>17</sup> If Congress itself, which made the policy decisions to alter the earlier postal structure, could not anticipate that drastically increased postal rates would result from its action, how could mailers have any better way of knowing what would happen? In effect, mailers were misled by the miscalculations and false promises of Congress, expert witnesses and the Executive Branch, all of whom endorsed the step of postal reform.

### C. The Financial Problem of Media Mailers Is Not Of Their Own Making

Unlike situations where a private business falls into financial straits as a result of its own poor business judgment, the increases in postage, a major cost center of total manufacturing and distribution expenses, are beyond the control of mailers. Not only is the sudden leap in postage costs the result of confusion by the government about the consequences of enacting a postal reform law, but the increases have occurred at the same time that the publishing industry is struggling to handle growing increases in other costs, such as paper, printing and labor. The burden of meeting the rising price of paper, such as that upon which these printed words appear, alone would represent a strong challenge to the best business manager. Magazine paper costs in America have risen by an average of more than 50% in just the last four years and presently constitute about 35% of total manufacturing and distribution costs.<sup>18</sup> Newsprint, the paper used for newspapers, has increased more than 87% in price since 1970 and represents from 10 to 36% of total publishing costs.<sup>18a</sup> The added disarray caused by false governmental projections of stable postal costs could not have happened at a worse time for the

14. Report of the Senate Committee on Post Office and Civil Service on S. 411, S. Rep. No. 93-765, 93rd Cong., 2d Sess. at 2 (1974).

15. *Id.*, at 3.

16. *Id.*, at 2.

17. *Id.*, at 3. A knowledgeable critic recently wrote: "Simply put, the results (or reorganization) have been less for more--less service at much higher costs." R. Myers, *The Coming Collapse of the Post Office* vii (1975).

18. Direct testimony of David Jensen, chairman, Production Committee, Magazine Publishers Association, before the Postal Rate Commission, Docket No. R 76-1 (Jan. 7, 1976), at 3. Printing and bindery costs also increased 32.5% in just two years, 1973 and 1974. *Id.*

18a. American Newspaper Publishers Association.

media.

Indeed, the impact of steep rises in paper and labor costs has nearly brought the press to its knees in Western Europe. There is a grave financial crisis affecting the publications field throughout the free world, and the governments of most Western European nations have already established programs providing various forms of assistance to help keep a varied and free press alive.<sup>19</sup> These programs include direct subsidizing of the costs of purchasing newsprint,<sup>20</sup> free or reduced air fares and rail transport for media personnel, newspapers and periodicals,<sup>21</sup> preferential reductions for telegram, telex and telephone communications with priority privileges in transmission,<sup>22</sup> low interest loans for plant construction and modernization,<sup>23</sup> exemption from taxes other businesses must pay,<sup>24</sup> paid governmental advertisements,<sup>25</sup> outright production subsidies for general purposes,<sup>26</sup> and sharing in money received from television commercials.<sup>27</sup> Demands of the media for even greater assistance are being made in Europe as the financial crisis continues.

While reduced postal rates for the press are provided in all Western European countries surveyed, with the exception of Ireland, the benefit of this form of aid is minimal. Unlike the American situation, there is little distribution of newspapers and periodicals in the mails in Europe, other than of academic journals. The bulk of publications are sold at thousands of small newsstands, generally operated as independent enterprises.

The implications of this aid to the press in Europe will be discussed below. The

19. After making a study which lasted for more than three years, a committee of specialized experts established by the Council of Europe determined that it is indeed true that grave "economic difficulties were being encountered by the press in general." The effect of the major economic difficulty was manifest in the findings of the Committee that over the period 1955 to 1973, the number of newspapers with independent editorial units had declined by 35% in member countries, with cities having more than one such newspaper losing 50% over the period under review. *Report of the Committee of Experts on Press Concentrations* (Dec. 1974), at 9, 10, 54.  
In general, my statements regarding press support in Europe are based upon the findings compiled for me by my legal counsel, J. Terry Emerson, during extensive interviews he had with several reporters and news managers in Europe in late 1975. Also, my references draw upon data contained in a research paper prepared for the Dublin Newspapers Managers' Committee (July, 1975), and a series of country reports prepared at my request by the Office of the Law Librarian of Congress (Jan. 16, 1976) (unpublished), hereinafter cited by name of individual researcher compiling the respective report.
20. Eg. direct financial support is provided to the publishing industry by the Government of Italy to help daily newspapers afford the price of newsprint. *Report on Italy* prepared by Dr. Virgiliu Stoicou, Law Library of Congress, at 2. In comparison, French law provides a direct subsidy to enterprises which produce and sell paper to newspapers and periodicals in order to lower the cost to them of paper. *Report on France* prepared by Timothy Cayton, Law Library of Congress, at 4-5.
21. At least Belgium, France, Finland, Ireland and Italy provide favorable rates for media rail or air transport and freight. Dublin Newspapers Managers' Committee, *supra* note 19, appendix III; *Report on Scandinavia* prepared by Dr. Finn Henriksen, Law Library of Congress, at 15.
22. Reduced telecommunications costs are provided for the press in at least Belgium, France, Finland and Italy. *Id.*
23. Special low interest loans are provided to newspapers for modernizing their physical plants and equipment in Denmark, Italy, Norway, Sweden and West Germany. *Id.*, at 10, 12, 14.
24. Tax concessions of various kinds are provided the press in all nine member countries of the European Community, and in Austria, Finland, Norway, Sweden and Switzerland. Usually tax relief takes the form of an exemption, or a zero rating, for the press, from the value added tax on sales revenue or the purchase of paper, ink and other materials and supplies. In Austria, a tax refund is granted. Also, import duties on newsprint are often waived to nil. *Dublin Newspapers. id.*; Henriksen, *id.*, at 8, *Report on Switzerland* by Edmund C. Jann, Law Library of Congress, at 2 note 2; *Der Osterreich-Bericht, April 25, 26 (1975)*.
25. It appears that nearly all governments of Western Europe engage in placing paid advertisements in the printed media for commercial or informational purposes. Several governments have distributed or increased their advertising so as to help publications whose competitive position is weak, or with a conscious purpose of aiding the press generally. Henriksen, *id.*, at 12 (Denmark) 14 (Sweden); *Report of the Committee of Experts on Press Concentrations. supra* note 19, at 28.
26. Production subsidies for general purposes are provided to the press in Belgium and Sweden. Henriksen, *id.*, at 13; *Report on Belgium* prepared by Dr. Virgiliu Stoicou, Law Library of Congress, at 2-4.
27. The Dutch Cabinet formed an agreement in 1965 by which newspapers would share in revenues received from television commercials. The agreement was originally valid for three years and later extended. *Report on the Netherlands* prepared by Joyce Darilels, Law Library of Congress at 2.

point being made here is that the financial difficulty of the press is not an isolated situation peculiar to the United States, but is a worldwide phenomenon. Domestic publishers cannot be accused of falling into bad times while their colleagues abroad are demonstrating a superior wisdom in financial matters. The opposite is the truth, and the United States media, as serious as its economic circumstances may be, is in a stronger position than its foreign counterparts.

#### **D. Postal Increases Cannot Be Offset By Ordinary Business Measures**

There is ample and solid evidence that the publications industry has made and is making every feasible effort to offset the effect of postage increases through its own cost reduction measures. These steps have included using cheaper paper, trimming page sizes, reducing paper weight, cutting back on the frequency of publication, reducing the number of pages, eliminating unprofitable circulation, curbing free distribution, and dropping the number of full-color pages.<sup>28</sup> The problem is that these reductions have a one-shot benefit in coping with the effect of a single postage increase. Cost-saving measures taken to ease the impact of one step of a rate increase cannot be used to offset the cumulative effect of a second, third, fourth or fifth increase piled upon each other year after year. A new cost reduction measure must be found for each separate increase as it occurs, and there simply are no more feasible reductions of this kind immediately in sight.

Any further cost-saving steps must alter the very nature and quality of the printed product. For example, the number of overseas correspondents of a newspaper or magazine must be cut. Or fees paid to obtain the writings of the best free-lance authors must drop. Next the editorial staff is cut. Finally, the publication must cater to a new kind of reader, changing its format from topics of general interest to a specialized interest or hobby of an affluent few, who can afford higher priced publications and the higher prices of postage.<sup>29</sup>

Nor can rate increases be avoided by alternative means of delivery. There really is no alternative to the Postal Service for most publications. They have tested, and will continue to test, private delivery systems, but cannot yet envision this on a massive national scale. Should postage costs continue to increase, private delivery systems may become feasible in certain parts of metropolitan areas, but will remain doubtful for use in rural areas, small towns or many apartment houses.<sup>30</sup>

There is a special problem of delivery access to apartment residences because it is against the law for any private delivery service to place any item in a mail box. Should

28. As other cost savings measures, many newspapers and periodicals have converted to photocomposition, in which raw type is converted by a computerized process into text, and to offset printing, an easier way of printing copies. Community newspapers in particular have also saved money by banding together and using a single central printing plant, instead of each newspaper having its own plant. Magazine Publishers Association; National Newspaper Association. Daily newspapers report that their industry's newsprint conservation measures achieved a total savings during 1975 of 459 thousand tons. They anticipate saving an additional 146 thousand tons in 1976. Jon G. Udell, *Dynamics of U.S. Daily Newspapers and Newsprint Consumption*, American Newspaper Publishers Association, at 17, 18 (Jan. 21, 1976).
29. S. Rep. on S. 411, *supra* note 14, at 10-11. The Senate Committee on Post Office and Civil Service concluded that high postage rates will rapidly accelerate the trend toward magazines devoted to blatant sex and "lessen the number of low-cost, large-circulation magazines devoted to topics of general interest to most Americans." *Id.* at 11.
30. Brief of the Magazine Publishers Association to the Postal Rate Commission, Docket No. 74-1 (June 17, 1975), at 66-69; U.S. Postal Rate Commission, *supra* note 8, at 233. For example, the American Newspaper Publishers Association makes the point that "(m)ore than half of all the newspapers in the second-class mail go to readers on rural routes. Newspapers under 5,000 daily circulation still depend on the mail for more than 30 percent of their circulation and newspapers of 5,000 to 10,000 daily circulation depend on the mail for more than 20% of their circulation. These smaller daily newspapers and their readers have no feasible alternative to the Postal Service." Direct testimony of J. Friedheim, vice president and general manager, American Newspaper Publishers Association, before the U.S. Postal Rate Commission, Docket No. R 76-1 (Jan. 7, 1976), at 5.

mailers of publications ultimately be compelled by economic reasons to choose the alternative of private deliveries in those limited areas where it becomes feasible, simultaneously reducing or eliminating mail circulation in other areas as a further cost savings measure, this would have a drastic impact upon readers in localities where service is cut off. Another important dimension of the problem is the fact that when the point is reached where a substantial diversion of newspaper, book or magazine volume to private delivery systems occurs, this exodus will cause revenue of the Postal Service to decline more than it will reduce the Service's fixed costs.<sup>31</sup> But for the moment the point to be understood is that since it is not currently a viable option for most publishers to use alternative means of delivery, the problem of massive postage rates is a real one that cannot be avoided except by legislative help.

Nor can publications easily apportion the burden of rate increases to advertisers and subscribers. Based on surveys made for the magazine industry, of every \$5 obtained from a subscriber some \$3, or 60%, is used up for solicitation, billing, mailing and other related costs. This is due to the fact that only a percentage of potential readers solicited by a publisher actually respond to a new or renewal offer. The cost of soliciting those who do not accept the offer must be borne by the publisher and charged as an expense against subscription income actually received. Accordingly, it would be necessary to actually boost the subscription price by \$7.50 in order to clear \$3 of added postage costs from the subscriber.<sup>32</sup> A \$5 subscription would go to \$12.50! As described in a Time magazine article: "To survive, publications would need not simply loyal but also rich readers."<sup>33</sup>

In all likelihood, volume would decline as subscription prices rose. If the circulation base of a publication is not maintained, however, advertising rates must be reduced because of the failure of the publication to provide a guaranteed readership. This would be disastrous for the press, as advertising typically accounts for about 60% of total magazine revenues. Further compounding the situation is the fact that the consumer magazine industry has seen little advertising growth in the past five years. What small increases have been recorded have had to be used to defray normal cost increases in paper, printing and personnel, as well as postage. Without phasing appropriations to help cover scheduled and requested postage hikes, net advertising revenues would have to suddenly grow by an amount that is far larger than has been the actual case for the industry in any recent year.<sup>34</sup> Based on all its past experience, the magazine industry makes a persuasive case that it would be virtually impossible to recover from subscribers or advertisers, or both, the higher postal costs already scheduled or planned unless these increases are spaced out over several years.

31. Brief of the American Newspaper Publishers Association and the National Newspaper Association to the Postal Rate Commission, Docket No. R 74-1 (June 17, 1975), at 16; Magazine Publishers Association brief, *supra* note 30, at 69. A specific example will illustrate the impact that a drop in volume of mail will have upon the Postal Service. Inland Carriers of Los Angeles already distributes more than 50 thousand monthly copies of the Reader's Digest at prices below the ultimate second class postal rates proposed by the Postal Service in a pending rate case. Agreement has been reached to expand this private delivery service to 200 thousand copies. Based on this experience, it may eventually be practical for Reader's Digest to take at least half of its magazine delivery business away from the Postal Service. At that time, the post office would lose up to \$13 million in revenue, with almost no reduction in costs. Rebuttal testimony of Coleman W. Hoyt submitted to the Postal Rate Comm., Docket No. R 76-1 (March 1, 1976), at 3,4.
32. Brief of the Magazine Publishers Association, *supra* note 30, at 56-57; direct testimony of Henry R. Turner, chairman, Circulation Committee, Magazine Publishers Association, before the Postal Rate Commission, Docket No. R 76-1 (January 7, 1976), at 7.
33. *Time*, June 16, 1975, at 45. Nor can a magazine simply decide to raise the price of newsstand copies. The average consumer magazine only gets about one-fifth of its circulation from newsstand sales and these sales are being developed to the maximum already. Most consumers chose to subscribe rather than buy single copies. Turner, *supra* note 32, at 4, 6, 7.
34. Brief of the Magazine Publishers Association, *supra* note 30, at 58-60.

The newspaper industry also makes the argument that in order for newspapers to stay in the mail, prices would of necessity have to be raised to the point where many readers would not be able to afford the cost of a newspaper.<sup>35</sup> Information supplied the Postal Rate Commission in 1975 by U.S. newspaper associations proved that the greatest burden of postal increases will be carried by those newspapers with the fewest subscribers, meaning those which already have a difficult time surviving.<sup>36</sup> As the total circulation of newspapers in the mails is more than 39 million copies each week,<sup>37</sup> it is obvious that this segment of the printed media cannot be allowed to dwindle or collapse as the result of a callous disregard of the disastrous impact caused by increased postage rates.

Libraries would not fare any better than newspapers and magazines. Already hard-pressed by voter resistance to governmental bond issues, the only recourse libraries would have is in restricting purchases of books or curtailing book-by-mail service to elderly or handicapped patrons or persons without easy access to transportation.<sup>38</sup> Publically funded libraries are inherently the major source of official aid to books, providing an essential reservoir of knowledge which more than a hundred million Americans use to keep abreast of, or supplement, their literary and news reading without having to buy every book published. Their loss is the loss of anyone who can read.

#### **E. Mail Delivery in America Has Historically Been Treated as a Public Service.**

When the Postal Reform Act was enacted, there were other considerations which Congress had in mind than raising revenue in a one dimensional quest for self-sufficiency of the Postal Service. Since the origins of the United States, the principle was accepted that the post ought to foster union and disseminate knowledge.<sup>39</sup> This principle will be discussed further below.

Congress affirmed this historic role for the mails in section 101(a) of the 1970 Reform Law, which states that the "U.S. Postal Service shall be operated as a basic and fundamental service to the people by the Government of the United States . . ."<sup>40</sup> The provision further mandates that the Postal Service "shall have as its basic function the obligation to provide postal services to bind the Nation together through personal, educational, literary, and business correspondence of the people."<sup>41</sup> Again, in section 101(b) there is a specific directive by Congress that "effective and regular postal services" shall be provided in "rural areas, communities and small towns where post offices are not self-sustaining."<sup>42</sup> Also, section 3622, which relates to changing rates of postage or fees, requires that in proposing any such changes the Postal Rate Commission must take account of "the effect of rate increases upon the general public . . ."<sup>43</sup>

These provisions are clear evidence that Congress placed a higher value on the benefits of communication than it did on achieving a strict self-sustaining basis for the Postal Service. The fundamental principle which flows through the entire Postal

35. Brief of Newspaper Associations, *supra* note 31, at 15.

36. *Id.*, at 12-15.

37. American Newspaper Publishers Association; National Newspaper Association.

38. American Library Association.

39. S. Rep. on S. 411, *supra* note 14, at 4.

40. 39 U.S.C. Sect. 101(a).

41. *Id.*

42. 39 U.S.C. Sect. 101(b).

43. U.S.C. Sect. 3622.

Reorganization Act is that whenever there is a plain danger to the communications needs of the public, it is the good of the people which is supposed to be served.

#### F. Circulation Of the Printed Word

##### Serves the Fundamental Role of the Free Press

The widespread availability of news, ideas and knowledge in the mails has contributed to the success of our self-government since the founding of the nation. For example, the 40 or so newspapers of the American Revolution were an effective force working towards the unification of the people by awakening a consciousness of common purpose among the separate colonies and a determination to see the war through to its successful conclusion.<sup>44</sup> By the time of the country-wide debate preceding the adoption of the Constitution, about 100 newspapers were being published in the United States. Nine out of ten supported ratification.<sup>45</sup> The early magazines of America also helped to build a receptive public audience for the Constitution. These magazines devoted hundreds of pages to current events designed to convince readers of the advantages of a strong Federal constitution.<sup>46</sup> As many readers, including editors who routinely borrowed information from each other, obtained these publications in the mails, the printed word, carried by the post, deserves much of the credit for the remarkable fact that 11 states had approved the Constitution within less than a year after the Constitutional Convention ended. Since then, the printed word has helped to serve as a guardian of the liberties it helped attain.<sup>47</sup>

The communication of knowledge through the mails was of fundamental importance to George Washington. In his first annual address as President, he explained the various ways in which the spread of knowledge contributes to the security of a free Constitution:

"By convincing those who are entrusted with the public administration, that every valuable end of Government is best answered by the enlightened confidence of the people, and by teaching the people themselves to know and to value their own rights to discern and provide against invasions of them; to distinguish between oppression and the necessary exercise of lawful authority; between burdens proceeding from a disregard to their convenience, and those resulting from the inevitable exigencies of society, to discriminate the spirit of liberty from that of licentiousness, cherishing the first, avoiding the last, and uniting a speedy but temperate vigilance against encroachments, with an inviolable respect to the laws."<sup>48</sup>

In the context of the purpose served by the circulation of publications in the mails -- what Arthur Schlesinger, Jr., calls "a fundamental weapon in the armory of self-government"<sup>49</sup> -- the widespread availability of the printed word in the United States takes on a notable aspect requiring public concern. For indeed the printed word is widely available. In all, there are approximately 10,000 for-profit and non-profit magazines published in the United States.<sup>50</sup> The total circulation of these magazines in the mails annually is approximately six billion issues.<sup>51</sup> In addition, there are some

44. 2 *The Cambridge History of American Literature* 176-178 (1933).

45. R. Rutland, *The Neumongers* 58-59 (1973).

46. L. Richardson, *A History of Early American Magazines 1741-1789*, 3-4, 238, 250-252, 260-62, 317-19 (1931).

47. Address of Associate Justice Potter Stewart at Yale Law School, reprinted in 120 Cong. Rec. S 19595-97 (daily ed. Nov. 19, 1974).

48. 1 *Annals of Congress* 970 (Gales & Seaton ed. 1834).

49. Testimony of Arthur M. Schlesinger, Jr., before the Postal Rate Commission, Docket No. R 74-1, at 4.

50. Magazine Publishers Association.

51. *Id.*

1,800 daily newspapers. More than 2.4 million copies are circulated daily in the mails.<sup>52</sup>

More than 7,600 weekly newspapers are also printed, of which 23 million copies a week are mailed.<sup>53</sup> On the average about half the books acquired by libraries also are delivered by mail.<sup>54</sup>

In 1970, the French philosopher Jean-Francois Revel credited the remarkable achievement of America in making the printed word available to a mass reading public as being the secret of the inventiveness and creative power of our people.<sup>55</sup> According to this view, a basic component of America's technological and economic leadership is tied to our concern with keeping the greatest number of people abreast of varied ideas and information. Thus, it is the American public at large, and the premise that our Republic will be self-governed by an informed citizenry, that will suffer if the burden of postage costs stifles the circulation of the printed word through the mails.

### III. EFFECT OF GOVERNMENTAL AID TO THE PRESS

Concurrent with consideration of the advantages and justification for providing governmental relief to the publishing industry from its economic ailments, the question must be asked whether or not such aid will injure the press more than it helps. In other words, will the independence of the press suffer to the extent that it relies upon support from the government whose operation and policies it must inform about? At what point will various direct and indirect financial props for the press soften its resolve freely to report about and criticize the governmental hand that feeds it?

The question has not arisen in the United States. The provision of temporary relief from the effects of a financial problem that the government has brought on by its own actions in a reversal of the historic role of the post as a public service, rather than a public burden, is not viewed within the industry as government assistance. Hopes of receiving the benefits of this temporary relief have not resulted in any signs of a weakening of the adversary relationship of our press to the government. Magazines and newspapers with heavy reliance upon distribution in the mails have shown equal vigor in the role of being a check on official power as that part of the press that is primarily circulated by other means.

All current evidence indicates that the battle of the press against secrecy in government, and as an organized institution for scrutiny of government, has never been waged with any greater intensity. Daily revelations of CIA and other intelligence agency operations and published distrust of executive decision-making in the field of foreign policy, approaching a reckless disregard by some of the press of national security interests,<sup>56</sup> show that the same skeptical and probing attitude that marked the Watergate investigations has not abated. American periodicals and newspapers have proven that, should the choice arise, they would rather risk failing than cater to the government in the slightest degree.

52. American Newspaper Publishers Association.

53. National Newspaper Association.

54. American Library Association.

55. J. F. Revel, *Without Marx or Jesus* 36 (1970).

56. It is my belief that freedom of the press includes responsibility of the press. In the words of Justice Frankfurter, "the public function which belongs to the press makes it an obligation of honor to exercise this function only with the fullest sense of responsibility." *Pennekamp v. Florida*, 328 U.S. 331, 365 (1946). As explained by the Supreme Court in *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972), "the contention that the freedom of the press is the freedom to do wrong with impunity . . . implies the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all, including that of the press depends. . . . It suffices to say that, however complete is the right of the press to state public things and discuss them, that right, as every other right enjoyed in human society, is subject to the restraints which separate right from wrong-doing." (Quoting from *Toledo Newspaper Co. v. United States* 247 U.S. 402, 419-420 (1918)).

What if government aid were not temporary? Not limited to a single cost component? What if trends in Europe moved here? Suppose American publishers received a subsidy for the replacement and modernization of plant and equipment? Suppose the government paid a direct share of the cost every time a publisher bought newsprint? Assume writers and journalists could travel anywhere in the nation at free or greatly reduced rates on airlines and railroads? Suppose reporters were allowed to make all the telephone calls and send all the telegram and telex dispatches they wished at reductions of up to 84% below the normal rate? Suppose a subsidy were provided publications for salaries of trainee journalists? Or that the federal government placed paid advertising on a regular basis in publications for the express purpose of boosting media revenue? Imagine a law being enacted that would prohibit commercial advertising on television competition for advertising revenue?<sup>57</sup>

These and other forms of assistance for the press are already on the books in one or more countries of Europe.<sup>58</sup> The trend in these countries is for even greater press support.<sup>59</sup> Negotiations are currently underway between the press and the governments of various European nations on the provision of further aid. Is there a kiss of death in all this kindness? How will the growing dependence of the press upon an expanding package of governmental support influence publications, as their business managers become accustomed to infusions of public financing on a regular schedule for meeting a specific share of overall costs?

In the United States, mail delivery costs represent only one to five percent of the total cost of publishing newspapers.<sup>60</sup> Postage costs now constitute about 15% of total manufacturing and distribution costs in the magazine industry.<sup>61</sup> The governmental aid toward meeting these costs, which is represented by proposals to space out postage rate increases over a longer period of years than presently scheduled, represents only a tiny portion of these percentages. The government would not pick up the tab for the entire postage bill, but only the difference between the postage actually being paid by the mailer and the higher rate which would have been paid except for the phasing. Even the amount of this difference will only be paid during a temporary number of years.

While this difference between what mailers currently pay and what they would otherwise pay may represent as much as half of the current profit of certain publishers<sup>62</sup> and may put others in the red, it does not constitute anywhere near what the amount of support has reached or is likely to reach in Europe. The American publisher knows postal relief will be continued only for a limited time and this fact alone contributes to preventing the development of a routine dependence upon public aid. Moreover, the United States law only covers a single set segment of production costs, whereas the typical European situation is one of press aid in a variety of ways, making public

57. *E.g.*, "none of the radio and television networks in Scandinavia are allowed to carry paid advertisements." Henniken, *supra* note 21, at 8.

58. See generally text at notes 19 to 27, *supra*.

59. Dublin Newspapers, *supra* note 21. Believing that the "the existence of a large diversity of sources of news and views available to the general public is of capital importance" to implementation of the rights of freedom of expression, the Committee of Ministers of the Council of Europe, meeting at Strasbourg, France, adopted a resolution on December 16, 1974 recommending to the governments of member states that "certain measures of public aid to the press, if suitably adapted, could ensure . . . the survival of newspapers with their own complete editorial units threatened with disappearance or with being taken over as a result of financial difficulties." Council of Europe, Resolution on Press Concentrations, Res (74) 43 (Dec. 1974), at 1.

60. U.S. Postal Rate Commission, *supra* note 8, at 241-42, notes 1.

61. *Id.*, at 236, note 1.

62. S. Rep. on S. 411, *supra* note 14, at 11, notes 1, 2.

support more pervasive there.<sup>63</sup>

With the historic acceptance of freedom of the press by the American people as an essential and fundamental component of our liberty, a principle which is engraved in our written Constitution, there can be no serious fear that our press would yield its independence for a chance to feed at the public trough. It is my firm conviction that the press in the United States would reject public aid long before it reached the magnitude and extensive reach provided in Europe. The American public would never accept press aid at a level where it could approach the danger point, even if a rare publication could be found that would accept it.<sup>64</sup>

#### IV. CONCLUSION

Thomas Jefferson once wrote that "were it left to me to decide whether we should have the government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." His words do not end there, as is commonly thought, but with the added warning that "I should mean that every man should receive those papers, and be capable of reading them"<sup>65</sup> John Tebbell, who has written eleven books on communications and is among the media's leading historians, writes: "Jefferson understood that the effectiveness of the press in a democracy is in proportion to the number of people who are able to read its publications and take the time to do it."<sup>66</sup>

This brings us back to the basic point of my support for a limited and temporary public solution to the financial emergency of the printed media. What is at stake is the opportunity for the American reading public to enjoy the widest possible circulation of news, information and opinions in the mails. Everyone who reads and everyone who cares about the success of our self-government has a direct, significant interest in the successful resolution of this serious problem. The relatively small amount of public funds which are needed to provide time in which American publications can adjust to steep increases in postage rates will carry on the historic role of the public mails as promoting public enlightenment and the security of a free people. Surely this end is deserving of the support of all who support freedom.<sup>67</sup>

63. Public assistance to press enterprises in France already represents 12% of the income of newspapers and periodicals based on gross sales figures. The Economic and Social Council of France, *The Economic Equilibrium Of Press Enterprises*, Jan. 24, 1974, quoted in *Report on France* prepared by T. Cayton, Law Library of Congress, at 1.

64. Those elements of the European media that have been asked the question insist that they will not be influenced by the already sizable extent of their public aid. One can only share the hope that this is true.

65. Quoted in J. Tebbel, *The Media in America* 83 (1974).

66. *Id.*

67. After this article was written, the House Budget Committee made a tentative decision, subsequently reversed, to omit the phasing money from the 1977 fiscal year appropriations. The initial vote was influenced by the mistaken belief that first class mail users are being "taxed" for the benefit of other mailers. The *Wall Street Journal*, March 30, 1976, at 4, col. 1. The Committee apparently was unaware that the U.S. Postal Rate Commission has emphatically refuted this idea. In its decision of August 28, 1975, the Commission squarely said that there is "no reason to find that first-class mailers are being overcharged." Moreover, the Commission held that "it would be improper to conclude that first-class mailers are subsidizing other mailers." U.S. Postal Rate Commission, *supra* note 8, at 5. In contrast, there is strong evidence that second-class mailers of magazines and newspapers are being over-charged. My personal investigations prove that most magazine and newspaper publishers engage in extensive and costly preparations to pre-sort their mail before it reaches the post office. More than 60% of second class publications are dropped off *directly* at destination post offices. This mail is normally bundled in sequence by five digit zip code zone, bagged by zip code, then trucked from the printing house to final delivery point, all at the publisher's expense. This preparation may save the Postal Service as much as \$100 million a year in processing costs, but no rate reduction is granted for it.