Catholic University Law Review

Volume 19 | Issue 2 Article 3

1969

How to Succeed by Failing

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COMMENTARY/How to Succeed by Failing

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On January 31, 1968, Chief Judge James A. Walsh, sitting in the United States District Court in Tucson, Arizona, decided that newspapers are not sacred cows and, like most business enterprises in this country, may not agree to fix prices and pool profits. The case, *United States v. Citizen Publishing Co.*,[1] had nationwide consequences because the kind of agreement used in Tucson had been used by competing newspapers to maintain advertising monopolies in 21 other substantial metropolitan areas for many years. The Supreme Court affirmed the district court on March 10, 1969,[2] and the shock waves are still traveling through the newspaper industry. The mere filing of the suit by the Justice Department in 1965 caused the initial tremor and resulted in the introduction of a Failing Newspaper Bill in the 90th Congress[3] which would have exempted such newspaper advertising agreements from the antitrust laws. The subsequent adverse district court and Supreme Court decisions produced the similar, soon to be enacted, Newspaper Preservation Bill,[4] which would overturn those decisions. This commentary will show how a commendable exhibition of judicial independence in dealing with a powerful communications medium has provoked a weak-kneed response in the legislative and executive departments.

The District Court Condemns

In 1940, Tucson was a city of 100,000 people with two daily newspapers, the evening *Arizona Star* and the morning *Arizona Citizen.* Although their circulation was about even, the *Citizen* was losing money and the *Star* was

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1. 280 F. Supp. 978 (D. Ariz. 1968).
2. Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).
3. S. 1312, 90th Cong., 1st Sess. (1967).
4. S. 1520, 91st Cong., 1st Sess. (1969).

making it; but nobody was getting rich. The owner of the *Star* saw a way to benefit both papers, without fighting for added circulation or advertising revenue, by duplicating in Tucson an agreement that had proved successful in El Paso, Texas. He proposed an arrangement under which each paper would retain its own editorial staff but combine the business operations. The operating agreement provided for production of both papers in a single plant, combined circulation and advertising departments, and shared profits at a fixed ratio. Although the operating economies of this arrangement were modest, the added income from the ensuing advertising monopoly was sensational. The combined before tax profits of the two papers climbed from less than $28,000 in 1940 to more than $1,725,000 in 1964.[5] This increase was partly due to added circulation resulting from the doubling of Tucson's population.[6] However, as the district court found, 75 percent of all newspaper income comes from advertising. The price per inch of their advertising rose from $0.55 to $1.82[7] over that period and with this added income the papers became an outstanding financial success.

In 1965 an out of state publisher offered the owner of the *Star* $10 million for his paper provided, of course, that the agreement with the *Citizen*, which pooled profits and fixed advertising prices, remained in effect. At that time the owner of the *Citizen*, the pre-1940 money loser, himself exercised his right under the *Star-Citizen* agreement to buy the *Star* for $10 million. Upon his proposal to merge the two papers, the Justice Department brought suit to enjoin the merger as a violation of Section 7 of the Clayton Act.[8] The complaint also charged that the price fixing and profit sharing provisions of the 1940 agreement violated Sections 1 and 2 of the Sherman Act.[9] The *Star* and *Citizen* merged on the same day the Government's plea to delay the merger pending trial was denied.[10]

At trial, one aspect of the defense, in addition to the anticipated argument that the papers had no advertising monopoly because they faced television and radio competition, was especially noteworthy. The defense called as an expert witness a newspaper broker who had formulated in other cities a number of operating agreements similar to the Tucson agreement. This

5. 280 F. Supp. at 982. Finding 37 specifically states that "[d]uring the period 1940 through 1964, the combined revenues of Star and Citizen have increased each year, excepting only in 1942." *Id.*

6. Although Tucson's population increased, the papers' combined circulation per living unit fell from .85 in 1940 to .80 in 1964. *Id.* at 988. If more subscriptions per household means better reader service, these papers did not even hold their own. Instead of succeeding, both were failing by this public interest standard.

7. *Id.* at 989, Finding 130.

8. 15 U.S.C. § 18 (1964).

9. 15 U.S.C. §§ 1, 2 (1964).

10. 280 F. Supp. at 983, Finding 52.

expert attempted to persuade the court that no one except an unprofitable newspaper's direct competitor would buy its assets no matter how much circulation it might have.

The district court was easily persuaded that no reasonable businessman would sell his losing paper for the low price it would bring from a purchaser who would have to survive by competitive merit, if the loser could join with his only competitor to exploit a lucrative newspaper advertising market. The conversion of the *Citizen* from a newspaper loser in 1940 to a $10 million newspaper buyer in 1965 was an obvious case in point. The district court may also have observed the penchant of newspaper owners for subsidizing newspaper losses from other sources of income, simply because they like the public influence a newspaper provides. In any event, the court found that the *Citizen* would not have gone out of business, absent the 1940 operating agreement with the *Star*,[11] and held the agreement illegal. More importantly, the court found that: the two papers' advertising and net operating revenues had greatly increased during the period 1956-64;[12] the market, Pima County, was substantial;[13] and the monopolized product, daily newspaper advertising, was unique.[14] The competition was direct and Section 7 of the Clayton Act was plainly violated by the merger. The price fixing and profit pooling provisions of the operating agreement were voided and divestiture of the *Star* by the owner of the *Citizen* was ordered. An appeal to the Supreme Court by the defendants promptly followed.

The Supreme Court Affirms

The El Paso idea had spread far beyond Tucson. There were 42 other newspaper owners with similar operating agreements in 21 cities, including cities as large as Pittsburgh and San Francisco and as far apart as Miami and Honolulu. Because of the wide effect which an affirmance of the decision would have, the American Newspaper Publishers Association filed an amicus brief, as did newspaper owners with similar joint operating agreements in 14 other cities. These friends of the Court were not prepared to associate freedom of the press with free enterprise in the newspaper business. The gist of their argument was that commercial competition between daily newspapers was so unprofitable that the only practical choice came down to single ownership of all the daily papers in a city or separate ownership with an operating agreement that would relieve them of this competitive

11. *Id.* at 980, Finding 17.
12. *Id.* at 991-92, Findings 173-75.
13. *Id.* at 992, Findings 182-89.
14. *Id.* at 985, Findings 68-71.

hardship.[15] Only in this way could the public have the benefit of the diverse editorial opinions and news coverage that diverse ownership of newspapers makes possible. According to the newspaper publishers, the rule of reason should therefore accommodate a holding that such agreements do not violate the antitrust laws. Carried to its logical limits, this argument rejecting commercial competition as determining newspaper survival would lead to regulation of newspapers as public utilities. Apparently, these publishers regarded their own survival, rather than the survival of newspapers distinguished by public service, as a social goal more worthy of consideration by the Court.

Their argument nevertheless raised important policy questions that should have received some attention from the Supreme Court. Is a community necessarily better served by the separate editorial voices of two owners who have eliminated commercial competition than by single ownership of two papers? A single owner can also gain maximum circulation by letting his afternoon paper appeal to Democrats and his morning paper cater to Republicans, or vice versa. Indeed, every large metropolitan daily seeks maximum circulation by carrying columnists with opposing views. But is the kind of journalistic ventriloquism provided by two economically united publishers, speaking with different voices, the free speech equivalent of economically clashing newspaper owners? Unfortunately, these questions were ignored in Mr. Justice Douglas' brief majority opinion. It simply assumed that newspaper enterprises are subject to the antitrust laws and rejected the policy argument for a judicial exemption of newspapers without mentioning it. The majority opinion merely noted that Congress had not passed the exemption bills.[16]

An oddity of the Supreme Court's decision in *Citizen Publishing* is that it treats the 1940 operating agreement as if it were a merger, apparently to clarify a "failing company" doctrine that was scarcely in the case. Thus, instead of an opinion dealing with the legality of a 1965 acquisition of one profitable newspaper by another, the Court discussed an entirely theoretical 1940 merger between the two papers. This happened despite the Court's insistence that it renders no advisory opinions and decides only the questions it must settle to dispose of a case.[17] The only issue the Court actually had to decide was whether the district court had correctly held that the 1965 acquisition of the *Star* by the owner of the *Citizen* violated Section 7 of the Clayton Act.

In his concurring opinion, Mr. Justice Harlan noted that both papers were

15. Brief for American Newspaper Publishers Association as Amicus Curiae at 70, Citizen Publishing Co. v. United States, 394 U.S. 131 (1969).
16. 394 U.S. at 138-39 n.4.
17. *See, e.g.*, United States v. Fruehauf, 365 U.S. 146, 157 (1961).

financially sound immediately prior to the acquisition.[18] Since they were the only daily papers in a substantial, rapidly growing city, the acquisition seemed to be a clear suppression of competition condemned by Section 7, the antimerger provision of the Clayton Act. Yet, Mr. Justice Stewart dissented because he thought the case should be remanded to the district court to reconsider whether the *Citizen* was or was not a failing enterprise in 1940.[19] Mr. Justice Douglas, writing for the six man majority, said that the *Citizen* did not meet the requirements of a "failing company" in 1940 as that term is used in antitrust merger cases.[20] Discussion of the "failing company" defense was hardly necessary, since there was no claim that either paper was failing when they merged in 1965, but his rejection of this defense dominated the majority opinion. Discussion of the "failing company" defense, moreover, followed a declaration that the 1940 joint operating agreement's price fixing and profit sharing provisions made it a per se violation of Section 1 of the Sherman Act.[21]

How did a case involving a merger of two financially healthy competitors become a "failing company" case? The argument that provoked this result is difficult to understand, but is as follows: Instead of making a joint operating agreement in 1940 that merged their business departments and gave them a newspaper advertising monopoly, the respective owners of the two papers might have produced the same kind of restraint of competition by merging the ownership of the two papers. Therefore, the 1940 operating agreement should be analyzed for antitrust enforcement purposes as if it were the 1965 merger agreement.

This argument is the kind of conceptual thinking about business problems that is taught in our most respected law schools and was taken seriously by the Justice Department. No one but a lawyer whose mind has been honed to a fine edge would argue that a 1965 acquisition of one competitor by another could be defended on the ground that one of them was failing in 1940. Common sense tells us that if a failing condition is to justify a 1965 merger the relevant evidence would concern what happened after 1960, not twenty years before. In this instance, however, the Supreme Court, which is frequently criticized for its common sense approach to antitrust cases, went out of its way to dispose of a factually nonexistent "failing company" defense.

The Court did not, of course, center its decision around this "failing company" argument simply because skilled lawyers on both sides made and answered it. The Supreme Court does not take cases to decide what lawyers

18. 394 U.S. at 142.
19. *Id.* at 145-46.
20. *Id.* at 138-39.
21. *Id.* at 134-35.

choose to argue but to declare what the Court deems to be important principles of law. The issue apparently thought most worthy of consideration here was whether a "failing company" defense may be made by expert opinion, as Mr. Justice Stewart said it could,[22] or whether an actual effort to sell to a noncompetitor or to reorganize the failing enterprise must be made. The majority of the Court decided that the latter was needed.[23] Only Mr. Justice Harlan preferred not to deal with the question,[24] but even he did not choose to decide a 1965 merger case on current evidence. He insisted on analyzing the operating agreement as if it were a merger, but avoided the "failing company" argument by focusing on the 1953 renewal of the agreement, when both papers were in a sound condition, instead of the 1940 original negotiation, when one was in shaky financial condition. The eight voting Justices thus assumed that an operating agreement could be treated as a merger.

The businessmen who made the agreement did not confuse contractual arrangements with changes in ownership. The business consideration that prompted the merger in 1965 was a threatened purchase of the *Star* by interests regarded as undesirable partners by the *Citizen* ownership. Instead of being the business equivalent of the 1965 merger, the 1940 agreement was actually only a motivating circumstance. The use of such legal fictions by judges as an aid to the declaration of legal principles has been a leading feature of Anglo-American law for a good many centuries. Abstruse arguments that lawyers deem persuasive will also continue to be made even if their actual effect is only to widen for judges the choice of decisional grounds. And the fate of this spurious "failing company" argument in the Supreme Court did not deter the newspaper publishers from resting their Newspaper Preservation Bill on equally specious grounds.

The Congress Threatens Reversal

The arguments made for the Newspaper Preservation Bill at congressional hearings may be summarized as follows: (1) most of the 21 advertising, price fixing, and profit pooling agreements in other cities had been in effect for a long time without a challenge from the Justice Department;[25] (2) if these agreements were terminated, one of the two newspapers involved in each city would not be able to continue publication on a competitive basis;[26]

22. *Id.* at 143-44.
23. *Id.* at 137-38.
24. *Id.* at 141-43.
25. *Hearings on S. 1520 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 151 (1969) [hereinafter cited as *Hearings on S. 1520*]; S. REP. No. 535, 91st Cong., 1st Sess. 15 (1969).
26. *Hearings on S. 1520*, at 151; S. REP. No. 535, 91st Cong., 1st Sess. 13 (1969).

and (3) in order to keep these papers in existence the Supreme Court's *Citizen Publishing* decision must be overturned.[27]

An amendment offered by Senator Brooke of Massachusetts[28] would allow a future condemnation of the price fixing and profit sharing provisions of the other 21 agreements in equity suits brought by the Justice Department. But it would preclude antitrust suits by private plaintiffs injured by these agreements, either for damages or equitable relief. This "Brooke compromise" was supported by Assistant Attorney General McLaren,[29] the Antitrust Division head, who opposed the outright exemption offered by the "preservation" bill.[30]

The Senate hearings on how to keep newspapers from failing take up more than seven printed volumes,[31] cover a period of three years, and are a gold mine of information about what's wrong with our metropolitan dailies. The pitfalls in general legislative solutions to special problems are evident upon a brief look at San Francisco,[32] one of the cities allegedly in need of antitrust exemption to enjoy diverse daily news.

In San Francisco the surviving daily papers are the *Examiner*, published by the extensive Hearst chain, and the *Chronicle*, owned by the same interests as the leading television station, KRON. These two publishers married the *Examiner* to the *Chronicle* by an agreement like the one made in Tucson, a few months after the *Citizen Publishing* suit was brought. They disclosed this liaison to the Justice Department and were told that the Antitrust Division would not sue to stop them. They knew, of course, that a divorce might be required if the government won the *Citizen Publishing* suit. As in Tucson, readers in San Francisco were not told that business competition between the two papers had been eliminated. San Francisco readers continued to receive the benefit of such diverse news and political views as the two papers had provided before. But those who placed classified ads were soon aware of a sharp increase in rates. San Francisco is a large enough city to support two competing papers. Each publisher had extraordinary additional resources that would make them exceptionally strong competitors, but these resources were cited at the hearings as tending to discourage rather than promote competition. The *Chronicle's* position was that Hearst could subsidize the *Examiner* with profits from the Hearst chain. The *Examiner* con-

27. *Hearings on S. 1520*, at 151.
28. Amendment No. 46 to S. 1520, 91st Cong., 1st Sess. (1969).
29. *Hearings on S. 1520*, at 297.
30. Statement of Richard W. McLaren, Assistant Attorney General, Antitrust Division, Department of Justice, *id.* at 294.
31. *Hearings on S. 1312 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 90th Cong., 1st Sess. (1967); *Hearings on S. 1520.*
32. *Hearings on S. 1520*, at 29-146.

tended that KRON profits could subsidize the *Chronicle.* If these circumstances prevented fair competition between the two papers, the *Chronicle* logically should be divorced from KRON and the ownership of the *Examiner* should be separated from the rest of the Hearst chain. These special advantages could not legally or equitably justify the two publishers' partnership agreement.

The founder, editor, and publisher (all one man) of the weekly *San Francisco Bay Guardian* claimed the reason that there was no adequate newspaper competition in big cities was that publishers for many years had been acting as though the antitrust laws did not apply to them. He concluded his fusillade against the bill with the following burst:

> If you plant a flower on University of California property, or loose an expletive on Vietnam, the cops are out of the chutes like broncos. But if you are a big publisher and you violate antitrust laws for years and you emasculate your competition with predatory practices and you drive hundreds of newspapers out of business, then you are treated as one of nature's noblemen.[33]

Whether the general public regards newspaper publishers as "nature's noblemen" may be doubted but this appears to be a fair description of the way the United States Senate treats them.

When congressional exemption from either public or private antitrust liability is sought, the financial results thought to justify the exemption are normally made public. It would therefore seem requisite that some or all of the publisher-beneficiaries in the other 21 cities show precisely how they would fail if forced to compete with each other. As we have seen, the figures revealed in the *Citizen Publishing* litigation made no case at all for exemption. Yet the profit and loss figures for these other papers were submitted to the Antitrust-Monopoly Subcommittee of the Senate Judiciary Committee on the condition that no one but the members of the Subcommittee and their staffs could have access to them. When the bill reached the House for hearings, Chairman Celler of the House Judiciary Committee alluded to this information gap by calling the bill a "pig in a poke" but expressed hope for a compromise.[34] At the Celler Committee hearings, Walter Hamilton, a representative of the Commerce Department, supported the bill.[35] Assistant Attorney General McLaren repeated his opposition[36] but admitted that

33. *Hearings on S. 1520,* at 31.
34. *Hearings on H.R. 279 Before the Subcomm. on Antitrust of the House Comm. on the Judiciary,* 91st Cong., 1st Sess. 230 (1969).
35. *Id.* at 227.
36. *Id.* at 358, 361.

Hamilton spoke for the President[37] and that he, McLaren, spoke only for the Justice Department.[38]

Spiro Agnew Meet John Mitchell!

When, on November 18, 1969, the Senate Judiciary Committee reported out the Newspaper Preservation Bill it contained two significant amendments. First, no joint operating agreement sanctioned by the bill is to be set up "except with the prior written consent of the Attorney General of the United States."[39] No longer need the Vice-President rail in public against the lords of the press. Suggesting to the Attorney General in a lowered voice whose agreements shall be approved should get the needed job done. Any dissenting private citizen who questions the Attorney General's judgment will be driven from the courts to the polls for relief. So long as Mr. Nixon's silent majority exists, peaceful journalism will reign.

The second amendment provided that private antitrust causes of action accruing before passage of the bill may still be prosecuted.[40] The committee report states that the purpose of both these amendments is to "make it possible for the Justice Department to regulate future agreements" and to limit the bill's antitrust exemption for defendants in private suits to those accruing after its passage.[41] Senators Hart, Kennedy, Burdick, and Tydings filed a separate statement opposing the bill as amended,[42] and Senator Hruska filed a separate statement opposing the amendment permitting prosecution of existing private actions.[43]

These amendments did not alter what the committee reported as the basic purpose of the bill, *i.e.*, to grant antitrust exemption to certain arrangements

37. *Id.* at 369, 380.

38. *Id.* at 380.

39. S. 1520, 91st Cong., 1st Sess. § 4(b) (1969), as amended and reported out by the Senate Comm. on the Judiciary [hereinafter cited as S. 1520 of the Judiciary Comm.]. Section 4(b) provides:

> It shall be unlawful for any person to propose, enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the performance of such an arrangement was a publication other than a failing newspaper: *Provided, however,* That any publication may at any time propose, enter into, perform, or enforce an agreement with any person if such agreement was not prohibited by law prior to the effective date of this Act.

40. S. 1520 of the Judiciary Comm. § 5(c):

> The provisions of section 4 shall have no application to any action for the recovery of damages brought before the date of enactment of this Act by any party other than the United States upon a cause of action arising under any of the antitrust laws which accrued before the date of enactment of this Act.

41. S. REP. No. 91-535, 91st Cong., 1st Sess. 2 (1969).

42. *Id.* at 12-14.

43. *Id.* at 15-18.

worked out between newspapers "in competitive financial difficulty." The policy cited in support of these arrangements is that of providing failing newspapers with the "financial security and stability necessary for independent behavior."[44] However, this policy of independent behavior through financial security applies only to newspapers that achieve such security through price fixing agreements. If "related business enterprises" under common ownership with the paper provide such security these enterprises must be ignored in appraising the merits of an operating agreement.[45] Readers of the report are supposed to assume that financial security achieved by violating the antitrust laws is publicly more desirable than financial security resting on a newspaper owner's legitimate financial resources.

This committee report leaves no doubt as to the true purpose of the bill. The publisher sponsors want from Congress a renewal of the antitrust immunity that they got from inaction by the Justice Department from 1933 to 1965 simply because they can make more money by violating the antitrust laws than by complying with them. These publishers are likely to get this bill passed only because congressmen are just as susceptible to newspaper pressure as are other public officials. In the vast majority of congressional districts there is heavy newspaper support and no newspaper opposition.

The legislation repealing the Tucson decision has passed in the Senate[46] and if the Senate's conduct is any reflection of House sentiment, our representatives will promptly do what the publishers want. Not content with the elimination of all future damage liability for past illegal conduct provided in the Senate bill, Senator Hruska, prior to the Senate vote, offered an amendment eliminating the possibility of any recovery of substantial damages in pending actions.[47] His amendment was specifically aimed at San Francisco, where class suits are pending, and provides that in those suits only the individual plaintiffs (whose damage claims are insignificant) may recover. Wiping out the claims of the injured classes represented by these plaintiffs is an outright gift of ill-gotten gains to the San Francisco publisher defendants.

By a vote of 62 to 20 the Senate adopted the Hruska amendment[48] and thereby affirmed the bill's purpose to reward wrongdoers and punish their victims. They voted that these publishers, who created their advertising monopoly after the Tucson suit was filed, should be relieved of substantially all their liability to the bilked advertisers. No other enterprises have been

44. *Id.* at 4.
45. *Id.* at 5.
46. S. 1520, 91st Cong., 1st Sess. (1969). *See* 116 CONG. REC. S 950 (daily ed. Jan. 30, 1970).
47. S. 1520, 91st Cong., 1st Sess. § 5(c) (1969). *See* 116 CONG. REC. S 889 (daily ed. Jan. 29, 1970).
48. 116 CONG. REC. S 890 (daily ed. Jan. 29, 1970).

rescued by the Congress from the adverse consequences of such a deliberately calculated business risk.

The Antitrust Division Reverses Itself

In the meantime the Antitrust Division had filed with the district court in Tucson a document called "Plaintiff's Response to Defendants' Plan for Modification of the Operating Agreement and for Divestiture of the Arizona Daily Star." This document clearly told the publishers they now have nothing to fear from the Antitrust Division, and that their problems would be solved by the "Brooke compromise," which takes care of damage-greedy plaintiffs. While this performance was not the first time the Antitrust Division had converted a clear cut legal victory into a losing consent decree, it appears to be the first such loss for the Nixon administration. The defendants' plan provides for modification of the operating agreement that eliminated all commercial competition between the *Star* and the *Citizen* and proposes a sale of the *Star* conditioned on continuance of the modified operating agreement. The Division's response, ten pages long, gives the substance of the case away with a striking economy of words. After citing Supreme Court decisions making unconditional and complete divestiture the required remedy in similar cases,[49] the Antitrust Division then agrees with defendants that unconditional divestiture is not required here. No reason is offered for this about-face. Instead of responding to the defendants' proposal with a simple insistence that divestiture be unconditional, leaving the existence and scope of any future operating agreement with the *Citizen* up to the *Star's* new owner, the Antitrust Division is now telling the district court how two papers can retain their existing operating agreement. The fact that this may continue to suppress commercial competition between the *Star* and *Citizen* is seen as relatively unimportant. The key objective, according to the administration, is that "the profitability of Star and of Citizen should, to the maximum extent feasible, be dependent upon the performance of each."[50] Since the Supreme Court rejected the defense that profitable competitive operation of the two papers was not feasible,[51] the "maximum extent feasible" qualification invites relitigation of the case.

The Antitrust Division recognizes that defendants are proposing to continue lessening competition between *Star* and *Citizen* "by the use of common

49. *See, e.g.*, United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 334 (1961); United States v. Paramount Pictures, Inc., 334 U.S. 131, 152-53 (1948).
50. Plaintiff's Response to Defendants' Plan for Modification of the Operating Agreement and for Divestiture of the Arizona Daily Star at 3, United States v. Citizen Publishing Co., 280 F. Supp. 978 (D. Ariz. 1968) [hereinafter cited as Plaintiff's Response].
51. Citizen Publishing Co. v. United States, 394 U.S. 131, 140 (1969).

advertising sales personnel."[52] It then ventures to suggest that this "should not be approved unless the defendants are able to make a clear showing that the economies resulting from the sharing of personnel are in whole or in part essential to the preservation of one of the newspapers. Because plaintiff is not satisfied that defendants can make this showing, we believe it would be appropriate for the Court to hold a hearing on this question."[53] In blunter language, defendants are invited to show that this suppression of advertising competition should be approved if needed to preserve either the *Star* or the *Citizen*. This is an unprecedented position for the Antitrust Division to take with respect to such trade restraining arrangements. No authority is cited to justify this survival test of legality. If a business enterprise cannot survive without making a monopoly agreement with its only competitor, exit from the business is the result contemplated by antitrust doctrine. The notion that newspapers are exempt from this doctrine seems to have been derived from the pending Newspaper Preservation Bill rather than existing law.

Then we learn that the Division is agreeable to the continuance of *Star-Citizen* combination advertising rates. The rationale for this conclusion is succinctly stated in a single sentence: "Since each newspaper would set its own rate, and the combination rate would simply reflect cost savings objectively calculated, no agreement on price would be involved."[54] Competitors can apparently agree on a single price for their two products without agreeing on what the share of each will be. This is also a novel antitrust doctrine, apparently applicable only to newspapers. Defendants also proposed a formula for sharing revenues that would not reflect the actual revenue generated by each paper. The Division's conclusion: "This is an artificial method of allocation and, unless the defendants can establish that it is the only practical method, it should not be approved."[55] Anything newspaper publishers find practical is apparently lawful; this is merely the feasibility test again in different words. The Antitrust Division finally joins defendants in insisting that divestiture of the *Star* be subject to a new owner's acceptance of the existing joint operating agreement, as approved by the court.[56]

Conclusion

On January 23, 1970 Judge Walsh ordered the *Star* sold within 21 months.[57] The sale is conditioned upon maintenance of the *Star-Citizen* operating agree-

52. Plaintiff's Response at 4.
53. *Id.* at 5.
54. *Id.* at 6.
55. *Id.* at 7.
56. *Id.* at 9-10.
57. Washington Post, Jan. 24, 1970, § A, at 7, col. 2. In any event, the House will act this session and Judge Walsh's 21 month grace period provides ample time to overturn the extremely mild ultimate result of his initially strong opinion.

ment and the Court has now held, after the evidentiary hearing suggested by the Justice Department, that the two papers may combine their business and advertising departments. Whether this sale and modified operating agreement will result in any newspaper advertising competition in Tucson is an interesting question unlikely to be answered. Judge Walsh could hardly have been expected to carry the flag for free enterprise in newspaper publishing all by himself. If the Government wants to give in, there is no party to the Tucson litigation with an interest in carrying on the fight. In the Congress, only Senator Hart, Chairman of the Antitrust-Monopoly Subcommittee, has spoken out against the Newspaper Preservation Bill in unequivocal terms.[58] As noted above, Congressman Celler of New York has expressed doubts but has wondered aloud why a compromise couldn't be worked out.[59]

Regardless of the form in which the bill is passed, newspaper publishers will have lost whatever standing they may have had as opponents of special interest legislation. As Mr. McLaren pointed out in his Senate testimony, those who ask special legislation for themselves cannot argue against similar favors for others "in an objective fashion."[60]

Legislative favors for communications media are now in style. Senator Pastore of Rhode Island has introduced a bill that would relieve television station owners of the risk of a comparative hearing when they ask for renewal of their licenses.[61] If you haven't noticed editorial opposition to this bill in papers that want their joint operating agreements exempted from the antitrust laws, don't worry. By 1984 television and the press will be one fat family in every city and no owner will risk his money to back any conviction he may have about anything.

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58. *See, e.g.*, Address by Senator Hart, Headline Club of Chicago, Oct. 13, 1969, wherein he said:

> In general, the newspaper industry is healthy, and the Failing Newspaper Act was, in fact, a poverty program for the rich . . . . The Newspaper Preservation Act [identical to the Failing Newspaper Act] raises an awkward question about the relationship of government to the press. To the extent that Congress votes to protect incumbents against the judgment of the market place, it can be said that Congress is "establishing" a press.

59. *Hearings on H.R. 279*, *supra* note 34, at 230-33.

60. *Hearings on S. 1520*, at 298.

61. S. 2004, 91st Cong., 1st Sess. (1969). It provides for renewal if the FCC finds "upon the record and representations of the licensee" that renewal would serve the public interest. *Id.* at 1. The FCC would be prohibited from making any comparative appraisal of the licensee and another applicant unless it first determines "after a hearing" that renewal would not be in the public interest. *Id.* at 2. In practical effect, the bill would encourage automatic renewal.

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Law Review

VOLUME XIX WINTER 1969 NUMBER 2