January 29, 1970

Because of the unique status of newspapers, the bill is designed to reverse the Supreme Court in the Citizens Publishing Co. case and apply a more realistic test. Some of the factors a court would consider in determining whether a newspaper was failing are: first, net loss or declining net income; second, whether accounting ratios show an instability, including net income as a percentage of operating expenses; third, whether the circulation is increasing or declining; fourth, the extent of the newspaper's ownership; fifth, whether the newspaper is on a nonprofit basis; sixth, the amount of investment in fixed assets; seventh, the extent of the newspaper's production costs; eighth, the extent of the newspaper's capital; ninth, the extent of the newspaper's operating expenses; tenth, the extent of the newspaper's advertising revenue; eleventh, the extent of the newspaper's current liabilities; and twelfth, the extent of the newspaper's long-term indebtedness.

In other words, the court should be able to recognize the trend toward failure and not be required to wait until it is irreversible. Third, declining circulation trends; fourth, increasing cost trends, including operational costs, circulation, and subscription costs; fifth, increasing advertising rates without corresponding increases in revenue; sixth, declining trends in the percentage of newspaper columns used for advertising purposes; seventh, factors showing strengthening of a competitor's position; and eighth, increased circulation and advertising trends; eighth, price war conditions, promotional activities and premiums used as a means to maintain circulation, advertising, demonstrating inherent instability; ninth, instability and insecurity of personnel, including rapid increase of employee turnover, loss of key personnel, and so forth; tenth, the extent of investments required in fixed assets, equipment, and machinery, which, in turn, are capital assets on which the newspaper relies for income; eleventh, the extent of the newspaper's capital; and twelfth, the extent of the newspaper's advertising revenue.

With respect to the last factor mentioned, the availability of capital from shareholders would not show that a newspaper was failing. Rather, it is the fact that it had been necessary for shareholders to make additional capital available. A failing newspaper would indicate basic instability, in that the newspaper had to rely upon the financial strength of shareholders rather than upon the newspaper's own viability. In short, the onus of proof in the pending bill would shift the burden of proof to the newspaper, which would consider those factors which would determine whether a newspaper could continue to operate or become viable.

Thus, the Newspaper Preservation Act provides a realistic and practical test of failing—'if you will,' a businessman's test. Because it is necessary on business considerations, that a publisher makes a decision as to the continuation of publication when the newspaper is no longer profitable, and when the President, the hearings on this bill fully document the need for the limited relief provided. The Senate should recognize that the economic facts of newspaper publishing and this legislation are such that a publisher makes a decision as to the continuation of publication when the newspaper is no longer profitable, and when the President, the hearings on this bill fully document the need for the limited relief provided. The Senate should recognize that this is not an isolated case; this is not a unique newspaper, this is not a unique circumstance. This is a pattern followed by many other newspapers throughout the country. This pattern is not limited to a single state or a single city. It is a pattern that is followed by many newspapers throughout the country. This pattern is not limited to a single state or a single city. It is a pattern that is followed by many newspapers throughout the country. This pattern is not limited to a single state or a single city. It is a pattern that is followed by many newspapers throughout the country. This pattern is not limited to a single state or a single city. It is a pattern that is followed by many newspapers throughout the country. This pattern is not limited to a single state or a single city. It is a pattern that is followed by many newspapers throughout the country.
In determining whether a newspaper publication is "likely to remain or become financially feasible," the Court may consider, among the other factors, the operating results of the newspaper and other relevant factors such as return on investment, capitalization, circulation trends, advertising news-rates and trends, competitive factors in the relevant market, availability of capita! funds, in available capital, availability of capital to other newspapers in the same community, and all other relevant economic evidence.

The bill also contains language intended to preclude artificial creation of "failing" newspapers by fancy bookkeeping devices. Section 4(a) describes the antitrust exemption allowed under the bill. Under this section, one or more failing newspapers may enter an agreement with each other or with a financially sound newspaper. The agreement may only include a single successful newspaper. If the agreement would result in the suspension of a morning or afternoon newspaper, then it is not exempted.

The purpose of this section is to provide that joint operating arrangements permitted by the bill shall not constitute a violation of the antitrust laws. This section would prevent the Department of Justice or any private party from suing under the antitrust laws. It would also prohibit any department or regulatory agency from the U.S. Government from imposing sanctions or taking any other action on the ground that such a joint operating arrangement violates or is inconsistent with the antitrust laws or contrary to the public interest.

Section 4(c) is to protect the competitive position of newspapers which share the market with a joint operating arrangement. It provides that nothing in the bill should be construed to exempt any predatory pricing or any other predatory practice of conduct.

This section also provides that nothing in the bill should be construed to exempt any person or joint newspaper operating arrangements from the monopolize or attempt to monopolize prohibitions of section 2 of the Sherman Antitrust Act. It is the intention of this section that the antitrust exemption in no way change the Federal antitrust laws as they apply to joint operating parties—considered a single entity—for conduct affecting others under the antitrust laws.

Mr. President, these provisions evolved from a series of hearings on S. 1312 and S. 1350 in the 90th and 91st Congresses, conducted very ably by the distinguished Senator from Michigan (Mr. Hart), as chairman of the Subcommittee on Antitrust and Monopoly. The hearings were thoroughgoing in the investigation of this very complex problem. Considerable evidence was presented showing that, although the total number of newspapers in operation has not changed radically during the years, nevertheless, economic conditions created a situation in which a very large majority of American communities have already become one-newspaper communities.

In 1960, the English language dailies in the United States, an all-time high. By 1968, while the population more than doubled only 1,753 daily newspapers remained.

The number of one-newspaper towns had risen sharply by then, reflecting an important change in competitive conditions. Of the 1,500 cities served by a daily newspaper 38.6 percent were one-newspaper towns. Although another 115 communities were served by two dailies, these dailies were under single ownership.

Thus, in total, over 95 percent of the communities of the country by the beginning of 1968 had newspapers that were controlled by a single owner.

As of early 1968, only 45 of the 1,500 daily newspaper cities had two or more competing dailies. Editorial competition between different publishers has been maintained in 22 cities only by resort to joint operating arrangements. Thus, only by resort to these joint arrangements have separate editorial voices been preserved in the 22 communities, including Honolulu in my State.

The subcommittee hearings also revealed that this startling trend away from multiple-newspaper cities and the trend toward centralization of control of newspapers have been produced by economic conditions which have made it increasingly difficult for many newspapers to coexist in the same community under conditions of all-out economic competition.

ECONOMIC FLIGHT OF NEWSPAPERS

One of the witnesses before the Senate Antitrust and Monopoly Subcommittee, on which I serve, described the plight of newspapers in a community particularly different from most other businesses. Mr. Thurston Twigg-Smith, publisher of the Honolulu Advertiser, told me in the 1967 hearings:

A newspaper's economic strength depends largely on its advertising revenues, which in turn depend on readership. Since readership is dependent on content and advertising as well as news matters, the process is almost a vicious circle: a drop in advertising causes a drop in readership. The newspaper then spends more money for promotion and editorial content which leads in turn to a drop in circulation. This leads to a fall in advertising and so forth. Thus, if you examine the trend lines for an otherwise well-managed newspaper you will find the curve in the key indicator areas of percentage of the field for advertising and circulation, you know it is going to be only a matter of time before the death knell sounds, unless of course the situation can be corrected with massive and continuing infusion of capital.

A newspaper, once dead, is really dead. There is nothing to rejuvenate it, it can easily see among the ashes in New York.

NEwsPaper exports to overcome cost-price squeeze

In response to these economic pressures, the newspaper industry developed the joint newspaper operating arrangement in order to achieve two goals—one, to reduce costs and thus eliminate potential losses, and two, to maintain editorial independence. In this way the 2,002 English language daily newspapers in the United States, all
CONGRESSIONAL RECORD - SENATE 1789

January 29, 1970

The joint arrangement permitted a substantial reduction in costs by eliminating duplicate equipment and manpower and especially the expensive printing plant facilities.

Mr. President, the then dean of the U.S. Senate, Carl Hayden, the original sponsor of S. 1329, testified as this bill was introduced July 15, 1967. This excerpt is most pertinent at this point:

Should be made clear that for a quarter of a century, the newspaper publishing industry has striven to meet the situation through the joint publication of local newspapers. It has been equally clear that these two newspapers have not always been equally successful and that this situation is not unique to Tucson. Indeed, the situation has been repeated in many other cities and presumably the Department of Justice has long been aware of this fact.

No reason has been given why the Department decided that the Tucson newspapers in particular were in violation of the antitrust laws.

I do not believe this is a healthy situation for our competitive society. It is the purpose of the antitrust laws to foster competition rather than stifle it.

Mr. President, I agree that the action of the Department of Justice strikes me as so illogical, I echo Senator Hayden's words and his statement that this bill is needed to remove the legal cloud that hangs over these cities having joint newspaper agreements, especially since they have been permitted by our Government to operate since 1933.

My publishers relied on such precedents, one of which was Mr. Thurston Twigg-Smith's, whose testimony is a perfect and succinct example of what causes a newspaper publisher to consider a joint operating agreement, not only in 1933, but as late as the 1960's. He told the subcommittee candidly that he had three choices: First, liquidation; second, sale to his competitor, the Star-Bulletin; or third, the formation of a joint operating arrangement.

In May of 1969, this decision was made. He noted that there was a profit of $236,581 in 1959, which was due almost entirely to the $50,171 profit made from a special statehood edition that year. He further noted that both advertising and circulation were down on a June 27, 1968, 2 percent Star-Bulletin to 32 percent Honolulu Advertiser, that the Advertiser's circulation was about 2 percent below that of the Star-Bulletin and that the circulation was down in the last year, which, however, caused substantial deterioration in the advertising and circulation position of the Honolulu Star-Bulletin, newspaper. He also noted that there was a profit of $236,581 in 1959, which was due almost entirely to the $50,171 profit made from a special statehood edition that year.

He further noted that both advertising and circulation were down on a December 30, 1968, 8 percent Star-Bulletin to 32 percent Honolulu Advertiser, that the Advertiser's circulation was down 8 percent and that it was almost impossible to obtain a long-term loan. On top of this, the Advertiser's equipment was antiquated and required a minimum of $1.5 million for replacement costs.

It should be noted that this same type of story was told by the publisher of the Tucson, Ariz., and Tulsa, Okla., newspapers in the early 1940's. There are 22 cities in the United States that have had two newspapers. These cities are: Boston, Mass.; Atlanta, Ga.; Chicago, Ill.; Cleveland, Ohio; Detroit, Mich.; Kansas City, Mo.; St. Louis, Mo.; Minneapolis, Minn.; St. Paul, Minn.; Denver, Colo.; San Francisco, Calif.; Los Angeles, Calif.; Portland, Ore.; Seattle, Wash.; Portland, Maine; Baltimore, Md.; Pittsburg, Pa.; Cleveland, Ohio; Kansas City, Mo.; St. Louis, Mo.; St. Paul, Minn.; Detroit, Mich.; Philadelphia, Pa.; New York, N.Y.; Miami, Fla.; and New Orleans, La.

Mr. President, it was suggested at the hearings that it would be better to permit a failing newspaper to die than to enact the exemption because a new daily newspaper would enter the void created by the demise of that failing newspaper.

The fallacy of that argument is reflected by the hearing record, which reveals that there are more than a dozen cities where a failing newspaper has ceased operations. Let me cite from that record:

Page 274 of the printed hearings (1967), on S. 1312:

Mr. CHAMBERLAIN. For example, let us say two newspapers wanted to get together and they were not able to consummate an agreement and for that reason one of the papers either failed or was taken over by a merger. What has been your experience with other newspapers moving in under those circumstances?

Mr. HOWARD. (President of Scripps-Howard Newspapers, Inc.) Well, we own the Houston, Texas, and despite a lot of talk, nothing has happened in four years. No new paper has started. And in little markets, like where we beat the business literally trying to find somebody who would buy the paper and nobody wanted it, and nobody had started (a new one). In New York City, I do not think any outsider is going to come in. It does not happen.

At page 592 of the printed hearings, 1964, Mr. G. O. Markuson, executive vice president of Hearst Corporation, stated:

I have been suggested by some witnesses at these hearings that there are many new potential entrants anxious to establish newspapers in urban areas where existing newspapers are declining or failing. This is a myth. New publishers have neither the necessary nor actively sought entry into a distressed urban newspaper market and, in the few instances where attempted, failure usually has resulted. A major metropolitan newspaper is not born solely of good wishes and fond expectations—in addition to able personnel, considerable financial resources are required. There is no more reason to think that many in this country will be able to buy an offset press and publish a suburban paper, but the metropolitan paper is a far different and much different phenomenon. In the New York World Journal Tribune announced its demise would-be entrants are not interested in a losing market.

Mr. President, there is more that I could say today in reviewing the testimony of 24 days of public hearings, in which I actively participated in the colloquies. However, as there will be other sponsors who will speak urging passage of this bill, in the interest of time I ask unanimous consent that the attached and all other others be printed in the Record and that the discussion be continued through by Chairmanחס and colleagues through questions by Chairman Harris and me, as noted on pages 611 to 635, be printed at the conclusion of my remarks. Answers to key issues are clearly revealed as reasons why S. 1520 should be enacted into law.

The PRESIDING OFFICER. Without objection, it is so ordered.

(See page 180.)

Mr. FONG. Mr. President, I can speak from firsthand knowledge of the results of a joint operating agreement such as the one proposed in S. 1520. Such an agreement has existed since June 1963 between the Honolulu Star-
CONGRESSIONAL RECORD — SENATE

January 29, 1970

BULLETIN, an evening daily, and the Honolulu Advertiser, a morning daily. Both publications are the official organ of the State of Hawaii, not just Honolulu.

BENEFICIAL RESULTS FROM JOINT OPERATIONS IN HONOLULU

The operations and economics permitted under the joint agreement have resulted in survival for the Advertiser, which could not have continued to publish in competition. The agreement has been sustained. Not only has the joint agreement permitted the Advertiser to remain alive, but it also has resulted in profits instead of losses for this paper as well as the Star-Bulletin.

According to Mr. Twigg-Smith:

Newspaper profits for the years of the plan, before taxes, were as follows: 1962: $45,912, all of it in the last 3 months incidentally; 1963: $53,066, and in that year we had a 44-day strike; 1964: $66,758; 1965: $300,122, the drop coming about because we adopted a double declining depreciation process on our machinery program; 1966: $394,749.

Economic strength means the Advertiser can provide jobs for reporters, editors, editorial writers, and other staff. Had the Advertiser folded, these employees would have been out of work. Where would they have found jobs? As it is, the Advertiser has been able to hire more editorial people than before.

Economic strength means the Advertiser could attract high caliber reporters, even those well regarded as mainland newspapers—and it did.

Economic strength means national and international news coverage could be expanded by the Advertiser—and it did, by providing second wire service to its basic UPI service.

Economic strength means an average of two additional pages of news daily in the Advertiser.

What is more, economic strength means there has been no diminution of competition in advertising or in editorial writing. There continues an aggressive struggle for advertising dollars among the Advertiser and Star-Bulletin, the small neighborhood newspapers, the many radio stations and television outlets.

Actually, economic strength fostered greater editorial independence. The two papers maintain very vigorous editorial positions, often differing sharply, as they constructively scrutinize government operations, business, and life in our island community, in our Nation, and in the world.

Competition shows up not only in the editorial columns but also in the news pages. For the Star-Bulletin and Advertiser journalists are keenly competitive. Competition keeps them on their toes and the result is better news coverage for the people of my State.

As Mr. Twigg-Smith told the Antitrust and Monopoly Subcommittee:

Where newspapers are stagnant, there you will find a stagnant community. Where newspapers are vibrant, their coverage fair-minded, and their editorial pages alive, there are vital factors in community advancement.

I can testify here today that Hawaii is a viable, dynamic, alert, progressive State, thanks in large measure to the invaluable services of our two Honolulu daily newspapers, who compete in every phase of the field of operation, advertising, and distribution.

I am convinced the people of Hawaii are better served by the arrangement between the two newspapers than they would be by a monopoly of a single major newspaper.

Enactment of S. 1520 is essential to the progress and future of the Honolulu Advertiser, as well as other newspapers of the Nation.

Mr. President, the thrust of our antitrust laws is against monopoly and in favor of competition.

As properly construed by Department of Justice and the courts, however, these antitrust laws applied to joint operating arrangements promote monopoly in newspapers—an effect quite contrary to the basic intent of these laws.

S. 1520 PROMOTES COMPETITION IN IDEAS

On the other hand, the effect of S. 1520 is to promote vital competition, instead of monopoly. S. 1520 is thoroughly consistent with the purpose of the antitrust laws.

Mr. President, in closing I want to say this. Our complicated republican, representative form of government, with its delicate checks and balances and its precious freedoms for its citizens, is the most difficult form of government to operate. It is, therefore, to be built upon an enlightened and informed citizenry.

In today's complex and technical society, no man is an expert on all subjects. To understand public issues, it is essential that citizens have ready access to different ideas, different analyses, and different points of view on these issues.

America is a pluralistic society. We believe in economic choice in the marketplace. We believe in political choice at the election polls. Freedom of choice is a hallmark of the American system.

By fostering differing news and editorial services, as would occur under S. 1520, we give our citizens a choice in the marketplace of ideas. I truly believe therefore that enacting S. 1520 strengthens our system of government.

I strongly urge my colleagues to support this measure and to pass it overwhelmingly.

EXHIBIT I

THE FAILING NEWSPAPER ACT

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 1114, New Senate Office Building, Senator Philip A. Hart (chairman) presiding.

Present: Senators Hart and Fong.

Also present: Senator Inouye.

Also present: S. Jerry Cohen, staff director and chief counsel; Jack Elum, assistant counsel; Peter N. Chamber, chief counsel for the minority; James C. Schultz, counsel for the minority; Gladys E. Montier, clerk; and Patricia Raso, editorial director.

Senator Hart. The committee will be in order.

We welcome our first witness who is better defended and presented than any other witness we have had in this whole series of hearings.

Senator Fong. Mr. Chairman, I wish to welcome warmly Mr. Thurston Twigg-Smith as a witness before this subcommittee, and I am pleased to have this distinguished citizen of the State of Hawaii to you.

Mr. Twigg-Smith is the president and publisher of the major daily newspaper in my State, the Honolulu Advertiser, a newspaper which has more than 100 years of tradition. It was established in 1856. Mr. Twigg-Smith is a fifth generation descendant on one of the most eminent families of Hawaii who helped to found the buildings of our native Hawaiian. He is a first-rate lawyer and one of the most respected and widely read public figures in my community.

Mr. Twigg-Smith, appears before the subcommittee this morning representing both his newspaper and the Honolulu Star-Bulletin, a joint operating arrangement between the Advertiser and the other great Honolulu daily, the Honolulu Star-Bulletin. This highly successful joint operating arrangement has existed since 1962.

Mr. Twigg-Smith, I am pleased and delighted to welcome you to these proceedings, and on behalf of the subcommittee, let me assure you of our full support in this matter. I am sure we will be of significant assistance to the subcommittee in consideration of the important piece of legislation before us.

Mr. Chairman, I am also very happy that my colleague, Senator Inouye, is here, to give us moral support in this matter. I am quite sure that he would like to say something.

Senator Hart. Senator Inouye.

Senator Inouye. Senator Hart, I wish to join my distinguished colleague to present to this subcommittee a very distinguished witness. I think Mr. Twigg-Smith is a co-sponsor of this measure, am especially pleased because Mr. Thurston Twigg-Smith is here in support of this measure and I do hope that this subcommittee will give this bill not only serious consideration but very favorable consideration. It is very important to Hawaii.

Thank you very much, sir.

Senator Hart. Thank you, Senator.

If Senator Inouye is free to stay, we would be delighted to have him sit through the knowledge of his schedule.

Senator Fong. Mr. Chairman, I wish to show you how very well regarded Mr. Twigg-Smith is, he has an audience here with him. Mr. and Mrs. Twigg-Smith. Will you stand, Mr. Twigg-Smith and family?

STATEMENT OF THURSTON TWIGG-SMITH, PRESIDENT AND PUBLISHER OF THE HONOLULU ADVERTISER

Senator Hart. Sir, we welcome you and have heard about you now, we await your testimony.

Mr. Twigg-Smith. I appreciate all the kind comments. Mr. Chairman and members of the subcommittee, my name is Thurston Twigg-Smith and I am the publisher of the Honolulu Advertiser. It is a privilege and an honor to appear before you and I have listened carefully to my views on S. 1312. As my statement will show, I think this proposed legislation is the logical course of action to face the problem of preserving independent, competitive newspaper voices in major American cities.

This statement will give some of the background that led the Advertiser into becoming one of the 44 newspapers now engaged in joint operating arrangements in 22 cities.

I have given some of the questions that have been asked of us and in summary will set forth some thoughts that have evolved to this writer in many years of worrying about survival and 5 years of living with such a joint operating arrangement.

The Advertiser was founded in 1856 and had survived as an independent voice