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Antitrust--Relevant Market of Championship Bouts Does Not Include All Professional Boxing Contests (International Boxing Club v. United States, 358 U.S. 242 (1959))

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tion in this process is a purely advisory one,[19] was apparently permitted to do the same thing.

The case seems to apply a new concept of finality to board decisions, making them irreversible even by the boards themselves without new evidence. While this seems a radical departure from the *laissez faire* attitude with which the courts have viewed the conscription process in the past,[20] the burden placed on the boards does not seem an unreasonable one. It is a basic principle that a deferment is to be granted only when, under the unusual circumstances present, the registrant clearly establishes his right to it.[21] If it is conceded that there are such circumstances present, it seems only reasonable that the same facts cannot support a reversal by which the board denies the deferment.

There is, however, the danger that the boards would react to such an imposition of finality by arbitrarily refusing to grant a deferment in the first instance, thus securing for themselves the advantage of the Department of Justice's recommendation before making a final decision.[22] In that event, the effect would be precisely what the courts have tried to avoid—an abdication by the board of its function, permitting the Department of Justice alone to all but classify the registrants.

ANTITRUST — RELEVANT MARKET OF CHAMPIONSHIP BOUTS DOES NOT INCLUDE ALL PROFESSIONAL BOXING CONTESTS.—Defendants were engaged in the promotion of professional boxing matches in the United States. The Government in bringing this action alleged violation of sections 1 and 2 of the Sherman Act[1] in that

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[19] Exec. Order No. 10363, 17 Fed. Reg. 5456 (1952).

[20] For a review of the limitations placed on judicial review of draft board decisions, see concurring opinion of Justice Frankfurter, Estep v. United States, 327 U.S. 114, 134 (1946).

[21] "It must be observed . . . that we are dealing with an exemption, and that under familiar rules of statutory construction, the appellant must bring himself clearly within the exempted class." Rase v. United States, 129 F.2d 204, 207 (1942).

[22] The Department of Justice inquiry is made only when a registrant appeals from a denial of the conscientious objector classification. Thus, where a board desires a more thorough exposition of the facts before making a final decision, the simple expedient would be to refuse the classification and allow the registrant to appeal.

[1] 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2 (1952).

"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. . . .

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any

defendants, by combination and conspiracy in unreasonable restraint of trade and commerce in the promotion, broadcasting and televising of professional world championship boxing contests, had effected a conspiracy to monopolize and did achieve the subsequent monopolization of those activities. The Supreme Court *held* that the district court was not clearly erroneous [2] in finding the relevant market to be professional *championship* boxing as opposed to all professional boxing events and had not abused its discretion in granting relief, which included dissolution of the two corporate appellants, directing divestiture of certain stock owned by the individual appellants and granting injunctive relief designed to open up the market in the business of promoting professional world championship boxing matches. *International Boxing Club v. United States,* 358 U.S. 242 (1959).

For many years professional boxing was thought to be immune from the antitrust laws.[3] In 1955 the Supreme Court ruled otherwise in reversing the district court's dismissal of the complaint in the principal case.[4] The Court then stated that:

> A boxing match—like the showing of a motion picture . . . or the performance of a vaudeville act . . . "is of course a local affair." But that fact alone does not bar application of the Sherman Act to a business based on the promotion of such matches, if the business is itself engaged in interstate commerce or if the business imposes illegal restraints on interstate commerce.[5]

The stage was thus set for other professional sports to be subjected to the antitrust laws.[6]

The principal case is the culmination of an action begun in 1952. It raises the important question of definition of "relevant market," [7]

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part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . ."

[2] FED. R. CIV. P. 52(a), provides that: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

[3] Federal Baseball Club v. National League, 259 U.S. 200 (1922) held that baseball was not subject to the antitrust laws. This case was generally regarded as authority for the immunity of all professional sports. See O'Dea, *Professional Sports and the Anti-Trust Laws,* 9 HASTINGS L.J. 18, 22 (1957). In Toolson v. New York Yankees, 346 U.S. 356 (1953) baseball once again was assured of its immunity.

[4] United States v. International Boxing Club, 348 U.S. 236 (1955).

[5] *Id.* at 241.

[6] See O'Dea, *Professional Sports and the Anti-Trust Laws,* 9 HASTINGS L.J. 18, 35 (1957).

[7] In order to determine whether monopoly power for purposes of § 2 exists, a definition of the market within which it is to be measured is essential, for the distinction between competition and monopoly turns on power in a relevant market, *i.e.,* the market within which the monopoly is alleged to operate. Although the word "market" does not appear in the statute, it is a necessary element of the concepts of monopoly and certain restraints of

in that the "appellants launch a vigorous attack on the finding [of the district court] that the relevant market was the promotion of *championship* boxing contests in contrast to *all* professional boxing events." [8] A cursory review of the concept of relevant market as applied in the past is essential to place this case in proper perspective.

A convenient means of approaching the relevant market concept, as promulgated by the Supreme Court, is best achieved by an examination of the leading cases prior to *United States v. E. I. du Pont de Nemours & Co.*,[9] hereinafter referred to as the *Cellophane* case. Prior to the *Cellophane* case most of the decisions were concerned primarily with attempts, combinations and conspiracies to monopolize in violation of section 2 of the Sherman Act.[10] In other decisions, where the charge was *realized* monopolization, the courts considered the uses, qualities and prices of each product to be included in the relevant market.[11] The practical application of the relevant market doctrine prior to *Cellophane* is best illustrated in *United States v. Corn Prods. Ref. Co.*[12] The company was charged with being a combination that had illegally monopolized trade in starch glucose and related end products. It contended that the relevant market should encompass various competing products. Judge Learned Hand, in determining the market issue with reference to substitute products, held starch syrup made from corn to be separate and distinct from starch syrup made from other raw material.

> [W]here the two commodities compared are indistinguishable in use, [a monopoly] is limited by the actual differential in the cost of production between them. Such a monopoly is therefore only a limited one, but within the limits it may be a true one.[13]

The jurist explained that since the products are physically distinguishable (though indistinguishable in use) their inclusion would have to depend upon comparative costs of production.[14] Once the

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trade upon which the statute rests. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 44 (1955).

[8] International Boxing Club v. United States, 358 U.S. 242, 249 (1959).

[9] 351 U.S. 377 (1956).

[10] See, *e.g.*, United States v. Yellow Cab Co., 338 U.S. 338 (1949); United States v. Columbia Steel Co., 334 U.S. 495 (1948); American Tobacco Co. v. United States, 328 U.S. 781 (1946); Swift & Co. v. United States, 276 U.S. 311 (1928).

[11] See Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); Standard Oil Co. v. United States, 283 U.S. 163, 176 (1931); United States v. Corn Prods. Ref. Co., 234 Fed. 964, 975 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1918). If the products had virtually identical end uses, qualities and prices, they would be included in the same market. See Note, 54 COLUM. L. REV. 580 (1954).

[12] 234 Fed. 964 (S.D.N.Y. 1916), *appeal dismissed*, 249 U.S. 621 (1918).

[13] *Id.* at 975.

[14] *Id.* at 976. The court went on to say that ". . . sago, potato, corn, and wheat starches [are not to be considered a part of the relevant market] . . .

market is defined, percentage share of the market must be considered in determining whether defendants charged with a realized monopoly had actual monopoly power.[15]

The *Cellophane* case indicated a departure from the established approach in dealing with relevant market. Whereas, in the past, a slight differentiation in uses, qualities and prices would exclude a product from the market, in the *Cellophane* case flexible packaging materials having a wide range of uses, qualities and prices were included in the same market.[16] Since the courts, before *Cellophane,* had included in the same market only products that were fungible and selling at the same price, it was argued that cellophane should have been excluded from the flexible packaging materials market. This argument was rejected by the Court in declaring that

> . . . where there are market alternatives that buyers may readily use for their purposes, illegal monopoly does not exist merely because the product said to be monopolized differs from others. If it were not so, only physically identical products would be a part of the market. . . . What is called for is an appraisal of the "cross-elasticity" of demand in the trade. . . . In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal.[17]

The Court distinguished prior decisions by indicating that the earlier cases were concerned with combinations, conspiracies or attempts to monopolize in violation of section 2, whereas the *Cellophane* case was concerned with realized monopolization. The Government sought to

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because those have both a distinguishable use . . . and a higher cost of production." *Ibid.*

[15] Judicial searches for monopoly power generally start with the primary fact of relative size, that is, the percentage of supply controlled. Size is of course an indication of monopoly power. See United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945), wherein the court, sitting as a court of last resort because of the non-availability of a quorum in the Supreme Court, remarked that 90% of supply "is enough to constitute a monopoly; it is doubtful whether sixty or sixty-four per cent would be enough; and certainly thirty-three per cent is not." *Id.* at 424. The apparent force of this comment was qualified in a statement which applies equally to §1 and § 2 cases, in United States v. Columbia Steel Co., 334 U.S. 495 (1948). The Supreme Court in that case said: "We do not undertake to prescribe any set of percentage figures by which to measure the reasonableness of a corporation's enlargement of its activities by the purchase of the assets of a competitor. The relative effect of percentage command of a market varies with the setting in which that factor is placed." *Id.* at 527-28.

[16] United States v. E. I. du Pont de Nemours & Co., 118 F. Supp. 41, 64 (D. Del. 1953). The trial court compared the use, qualities and price of cellophane with other packaging materials and found that in qualities and price there was a wide disparity among the various flexible packaging materials.

[17] United States v. E. I. du Pont de Nemours & Co., 351 U. S. 377, 394 (1956).

take the case out of the relevant market area by contending that the prohibitions of section 2 have often been extended to producers of single products and to businesses of limited scope. This attempt was rejected because *Cellophane,* being concerned with realized monopolization, presented relevant market as the critical issue.[18]

The question is thus presented as to the effect of the instant case upon *Cellophane* in so far as relevant market is concerned. Defendants maintained that if *Cellophane* is the law the relevant market must be all of professional boxing as opposed to the championship boxing market as urged by the Government.[19] The Court, in reject-

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[18] *Id.* at 395-96 n. 23 (1956). Where the would-be monopolist has conspired or attempted to bring under his control a particular area of trade, his own conduct constitutes an appraisal that, if he can attain this end, outside competitive forces will not negate the exercise of monopolistic power. But specific intent of this kind is not an element of the offense of realized monopolization, which lacks this guidepost furnished by the defendant's own conduct. An interesting aspect of the instant case was the Government's attempt once again to remove the case from the scope of the relevant market, based upon the Court's remarks in the *Cellophane* decision. The Government maintained that "Since the Court regarded these precedents [as cited in *Cellophane*] as not applicable when the sole issue was monopolization, it necessarily held that there is a distinction between monopolization, on the one hand, and conspiracy or attempt to monopolize, on the other hand, as to the market determinative of possession of monopoly power. The instant case, where both conspiracy to monopolize and monopolization have been found, is therefore governed by the decisions applying Section 2 to single products or businesses of limited scope." Brief for Respondent, pp. 37-38, International Boxing Club v. United States, 358 U.S. 242 (1959). The Supreme Court ignored this argument for what would seem to be the reason urged by the appellants: "The plaintiff's concept of a variable market, if adopted, would make a meaningless formality out of the market test and automatically convert section 1 restraints into section 2 conspiracies or attempts to monopolize. The attempt to monopolize and conspiracy cases enjoin defendants from engaging in previously proved efforts to obtain powers which would eventually lead to monopolization. The actual point at which monopolization would be achieved is therefore unimportant. Here, however, the District Court decided that the defendants not only aspired to but actually succeeded in monopolization, and it bottomed its decree on this conclusion. Such a conclusion of necessity required an evaluation of the relevant market." Reply Brief for Appellants, p. 6, International Boxing Club v. United States, 358 U.S 242 (1959).

[19] "The nature and use of boxing programs show that championship programs taken alone do not meet the test of a separate market expressed in *United States v. du Pont & Co.* . . . as having 'sufficient peculiar characteristics and uses to constitute them products sufficiently distinct from all other' boxing programs. . . .

"The products in this case are identical—professional boxing programs presenting a number of contests, each of which has two boxers in a ring with a referee. They fight under the same rules, all under state or local regulation and protection, and they are presented to an audience personally present or listening or viewing through radio or television broadcasts and motion picture films. . . . This physical identity of the products here would seem necessarily to put them in one and the same market." Brief for Appellants, p. 14, International Boxing Club v. United States, 358 U.S. 242 (1959).

ing the defendants' position, used the language of *Cellophane,* holding that in applying the *Cellophane* test,

> the "market" . . . will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered.[20]

The Court went on to say that the lower court had found that there existed a separate identifiable market for championship boxing contests and in view of these findings "we cannot say that the lower court was 'clearly erroneous' in concluding that nonchampionship fights are not 'reasonably interchangeable for the same purpose' as championship contests." [21] The evidence offered by the Government consisted of comparisons of average dollar income, the average audience ratings and testimony of representatives of the broadcasting, motion picture and advertising industries to the effect that a special demand exists among radio broadcasting and telecasting industries for rights to championship contests.[22] It should be borne in mind that in the *Cellophane* case the facts that cellophane cost the public two to three times more than most of the other products, that the consumer-cost of many of the other products in the market ranged from one-seventh to one-half less than cellophane, that the average dollar volume of cellophane sales was higher than other flexible wrappings, and that du Pont produced 75 per cent of all cellophane, were insufficient to differentiate cellophane from the rest of the market of flexible wrapping materials.[23]

In *International Boxing Club,* the Court, while applying the *Cellophane* test of the relevant market, stated that "the case which most squarely governs this case is *United States v. Paramount Pictures,* 334 U.S. 131 (1948)." [24] The dissent in *Cellophane*

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[20] International Boxing Club v. United States, 358 U.S. 242, 250 (1959).

[21] *Id.* at 251.

[22] "[T]he average revenue from all sources for appellants' championship bouts was $154,000, compared to $40,000 for their nonchampionship programs. . . . 'Nielsen' [average audience] ratings over a two-and-one-half-year period were 74.9% for appellants' championship contests, and 57.7% for their nonchampionship programs. . . ." *Id.* at 250.

[23] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

[24] International Boxing Club v. United States, *supra* note 19, at 251. In *Paramount* the district court had found that the five major defendants did not have a purpose to achieve a national monopoly in the exhibition of motion pictures and that they did not, collectively or individually, have a monopoly of exhibition. The Supreme Court held these findings deficient in that there was no finding as to the presence or absence of monopoly in the *first-run* field for the entire country, in the *first-run* field in the 92 largest cities of the country, or in the *first-run* field in separate localities. The *Paramount* Court pointed out that the *first-run* field, which constitutes the cream of the exhibition business, was the core of that case. The cause was remanded to the district court for the purpose, among other things, of making the findings which had not been made, and which could be of importance only if mo-

maintained that the majority had in effect disregarded *Paramount Pictures* and other cases in their handling of the market-definition problem, and thus equated reasonable interchangeability with the theory of interindustry competition.[25] In the instant case, while the defendants did not explicitly rely on the equation, they did suggest that even the business of promoting all boxing contests cannot be monopolized since boxing is only a part of the entertainment field generally.[26] Professor Turner, in discussing the *Cellophane* case, observes:

> It is difficult to determine whether or to what extent the majority and the dissenters were disagreeing on the law to be applied in defining the market with regard to substitutes, because it is not entirely clear just what legal tests each opinion employed. The majority's formula of "reasonable interchangeability . . . price, use and qualities considered," does not by its terms permit consideration of differences in cost of production.[27]

Taken on its face, the *Cellophane* test would clearly differ from that followed in *Paramount* in that it might permit a finding of no monopoly whenever a producer, though having a cost advantage sufficient to exclude competition, chose to price his product high enough to create a high "cross-elasticity of demand" and thus permit substitutes to compete. Professor Turner is of the opinion that this interpretation is doubtful.[28] His view would seem to be substantiated in light of the Court's reaffirmation of the *Paramount* case while applying a conservative interpretation of the *Cellophane* test.

It would appear that the instant case should serve to quiet the fears that *Cellophane* may have caused among advocates of a strong antitrust policy. If *Cellophane* was thought to have opened the door to easy avoidance of our antitrust laws, *International Boxing Club* would seem to have the effect of closing it.

Another interesting aspect of the principal case is the relief ordered by the court. Aside from injunctive relief designed to

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nopolization in the limited fields indicated would violate § 2 of the act. The district court then found that the five major defendants had power to exclude competition in the markets constituting *first-run* exhibition in the country's 92 largest cities. 85 F. Supp. 881, 894 (S.D.N.Y. 1949).

[25] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 423 (1956) (*dissenting opinion*). The dissent contended that the majority's position would do away with *Paramount*: "The majority approach would apparently enable a monopolist of motion picture exhibition to avoid Sherman Act consequences by showing that motion pictures compete in substantial measure with legitimate theatre, television, radio, sporting events and other forms of entertainment. Here, too, 'shifts of business' undoubtedly accompany fluctuations in price and 'there are market alternatives that buyers may readily use for their purposes.'" *Ibid.*

[26] See Brief for Defendants, pp. 11-12, International Boxing Club v. United States, 150 F. Supp. 397 (S.D.N.Y. 1957).

[27] Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281, 302 (1956).

[28] *Ibid.*

open up the aforementioned market, the court directed divestiture of certain stock owned by the individual appellants and directed dissolution of the two corporate appellants.[29]

Injunctions constitute the primary equity remedy in antitrust cases. Other devices which may be utilized include divorcement, dissolution and divestiture.[30] Since the end to be served in an equity suit is not punishment of past transgressions, but the opening of a market that has been closed by the defendant's illegal restraints, these devices will not be used indiscriminately "without regard to the type of violation or whether other effective methods, less harsh, are available." [31] In the sixty years of Sherman Act history, decrees requiring divorcement, divestiture or dissolution have been entered in only 24 litigated cases.[32] Of course there were divestiture provisions in numerous consent decrees. In the instant case the Court reiterates:

> [T]he yardstick which the trial court should apply in monopolization cases is well stated by the Court in *Schine Chain Theatres v. United States*. . . . The decree should (1) put "an end to the combination or conspiracy when that is itself the violation"; (2) deprive "the antitrust defendants of the benefits of their conspiracy"; and (3) "break up or render impotent the monopoly power which violates the act." [33]

In *International Boxing Club* the majority sustained the finding of the district court that the "great evil" was caused by the combination of Norris and Wirtz, stockholders of the defendant corporation, with Madison Square Garden, and the "only effective means at

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[29] See International Boxing Club v. United States, 358 U.S. 242, 253-63 (1959). The divestiture ordered in this case consisted of compelling Norris and Wirtz to sell their stock in Madison Square Garden within five years to court-approved persons under court-approved conditions. Pending such sale the stock is to be held by court-appointed trustees who are given all rights in the stock, except retention of cash dividends and right to vote on a sale of assets or liquidation or merger without court instruction.

[30] Divestiture refers to situations where the defendants are required to divest themselves of property, securities or other assets. Divorcement is used to indicate the effect of a decree where certain types of divestiture are ordered. The term dissolution is generally used to refer to any situation where the dissolving of an allegedly illegal combination or association is involved, including the use of divestiture and divorcement as methods of achieving that end. See Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws*, 19 GEO. WASH. L. REV. 119, 120 (1950).

[31] Timkin Roller Bearing Co. v. United States, 341 U.S. 593, 603 (1951), where the Court said: "There are no specific statutory provisions authorizing courts to employ the harsh remedy of divestiture in civil proceedings to restrain violations of the Sherman Act. Fines and imprisonment may follow criminal convictions . . . and divestiture of property has been used in decrees, not as punishment, but to assure effective enforcement of the laws against restraint of trade." *Id.* at 602-03. See also International Salt Co. v. United States, 332 U.S. 392, 401 (1947).

[32] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 354 (1955).

[33] International Boxing Club v. United States, 358 U.S. 242, 253 (1959).

hand by which competition in championship events might be restored"[34] is through divestiture. The dissent took strong issue with this point, contending that the five-year trusteeship of the stock would have the effect of removing Norris and Wirtz from control over the operations of Madison Square Garden.[35] The majority did however recognize the fact that the order of divestiture went far beyond the subject matter of the action. It permanently removed Norris and Wirtz from all interest in the Garden, in which over 90 per cent of the activities are entirely unrelated to professional boxing.[36]

In *Schine Chain Theatres, Inc. v. United States*,[37] decided over ten years ago, the Court, in affirming the granting of divestiture by the district court, distinguished between physical properties acquired lawfully and those acquired unlawfully. In the instant case, unlike the situation in *Schine Theatres*, Madison Square Garden was lawfully acquired. The Court, in refusing to make the distinction again, said "it may be that the stock in Madison Square Garden was not the fruit of the conspiracy; but even if lawfully acquired it may be utilized as part of the conspiracy to effect its ends."[38]

What had appeared to be a growing conservative trend toward denying divestiture relief seems, by virtue of the principal case, to be heading in the opposite direction.[39] The dissent took notice of this in stating:

> Unless past pronouncements of this Court cautioning against the indiscriminate use of divestiture as a remedy in antitrust cases, see Timken Co. v. United States . . . are to be taken less seriously than they should be, it seems to me

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[34] *Id.* at 258.

[35] Mr. Justice Harlan speaking for the minority said: "Indeed the record can be read as indicating the court's belief that the five-year trusteeship of the stock, though designed to alleviate some of the hardships of a forced sale, would at the same time effectively remove Norris and Wirtz from control over the Garden's affairs and therefore in conjunction with the other provisions of the decree result in restoring competitive conditions, whether or not the correlative requirement of sale was carried out within the five-year period." *Id.* at 265.

[36] The Court stated that "sometimes 'relief, to be effective, must go beyond the narrow limits of the proven violation'. . . . [However] when this sort of relief is granted, we must of course be especially wary lest the trial court overstep the correspondingly narrower limits of its discretion. . . ." *Id.* at 262.

[37] 334 U.S. 110 (1948).

[38] International Boxing Club v. United States, 358 U.S. 242, 256 (1959).

[39] In 1951 Professor Adams said that "the case of [Timken Roller Bearing Co. v. United States] . . . is significant because it indicates a growing trend against the liberal granting of divestiture by the Supreme Court. Moreover, the case is important because it demonstrates . . . [that] the Court can refuse—and, in the foreseeable future, is likely to refuse—divestiture in any manner or form." Adams, *Dissolution, Divorcement, Divestiture: The Pyrrhic Victories of Antitrust*, 27 IND. L.J. 1, 15 (1951).

that the Court has too lightly given approval to the use of that drastic measure here.[40]

In the light of *International Boxing Club,* it may be appropriate that the words of Judge Wyzanski be reiterated:

> In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. . . . They would not have been given, or allowed to keep, such authority in the anti-trust field . . . if courts were in the habit of proceeding with the surgical ruthlessness that might commend itself to those seeking absolute assurance that there will be workable competition. . . .[41]

CONSTITUTIONAL LAW—COURTS-MARTIAL—TRIAL OF CIVILIAN EMPLOYEE OF THE MILITARY OVERSEAS BY COURT-MARTIAL HELD UNCONSTITUTIONAL. — Defendant, a civilian employee of the Air Force, was convicted of larceny by a military court-martial in Morocco. In granting the defendant's petition for habeas corpus the Court of Appeals for the District of Columbia Circuit *held* that article 2(11) of the Uniform Code of Military Justice[1] could not constitutionally bring civilian employees of the Armed Forces, stationed overseas during peacetime, under military jurisdiction. *United States ex rel. Guagliardo v. McElroy,* 259 F.2d 927 (D.C. Cir. 1958), *cert. granted,* 359 U. S. 904 (1959).

Article 2(11) provides for military jurisdiction over "all persons serving with, employed by, or accompanying the armed forces [overseas]. . . ."[2] The constitutionality of article 2(11) was passed upon by the Supreme Court in *Reid v. Covert.*[3] In that case the Court did not deny the exercise of military jurisdiction over accompanying civilians during time of war,[4] but held article 2(11) unconstitutional insofar as it applied to civilian dependents (by implication "persons accompanying") in capital cases during peacetime. The invalidation followed from the Court's holding that the civilian dependent was entitled to a jury trial as a matter of constitutional

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[40] International Boxing Club v. United States, *supra* note 36, at 265.

[41] United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 348 (D. Mass. 1953), *aff'd per curiam,* 347 U.S. 521 (1954).

[1] 10 U.S.C. § 802(11) (Supp. V, 1958).

[2] *Ibid.*

[3] 354 U.S. 1 (1957), *reversing on rehearing* 351 U.S. 487 (1956), and Kinsella v. Krueger, 351 U.S. 470 (1956).

[4] Reid v. Covert, 354 U.S. 1, 33 (1957) (as exercise of governmental "War Powers"); *accord,* Perlstein v. United States, 151 F.2d 167 (3d Cir. 1945), *cert. dismissed as moot,* 328 U.S. 822 (1946); Hines v. Mikell, 259 Fed. 28 (4th Cir.), *cert. denied,* 250 U.S. 645 (1919).