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THE APPLICABILITY OF THE ANTITRUST PROCEDURES AND PENALTIES ACT OF 1974 TO VOLUNTARY DISMISSALS

In 1974, Congress passed the Antitrust Procedures and Penalties Act (APPA), providing for judicial review of proposed consent decree settlements in public, civil antitrust actions. Consent decrees have been a valuable enforcement technique for the Justice Department—between 1955 and 1974, the Antitrust Division terminated approximately eighty percent of its complaints with consent decree settlements. Reacting to several improper consent decrees in the past, particularly the controversial settlement of antitrust cases against the International Telephone and Telegraph (ITT) corporation in 1971, Congress attempted to

3. Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding . . . under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment.
5. United States v. International Tel. & Tel. Corp. (Hartford), 1971 Trade Cas.
prevent future abuses through the reform of government antitrust enforcement procedures. The APPA was designed to increase public awareness and participation in these procedures, and provide a greater degree of judicial control over the consent decree process.

The APPA requires, prior to the entry of a proposed consent decree as a judgment, a determination by the district court that the consent decree is in the public interest. The Act provides discretionary standards and procedures to facilitate this de-

(CCH) ¶ 909,766 (D. Conn. 1971); United States v. International Tel. & Tel. Corp. (Canteen), 1971 Trade Cas. (CCH) ¶ 90,530 (N.D. Ill. 1971); United States v. International Tel. & Tel. Corp. (Grinnell), 324 F. Supp. 19 (D. Conn. 1970). ITT was forced to divest the Canteen and Grinnell corporations, but was allowed to retain its most profitable and liquid subsidiary, the Hartford Fire Insurance Company. There were allegations that the Justice Department agreed to settle with ITT in exchange for the corporation's financial backing of the 1972 Republican National Convention. See Note, The ITT Dividend: Reform of Department of Justice Consent Decree Procedures, 73 COLUM. L. REV. 594, 604-05 (1973). Without reaching the merits of these allegations, a federal district court refused to set aside the consent decree on the basis of fraud. United States v. International Tel. & Tel. Corp., 349 F. Supp. 22 (D. Conn. 1972), aff'd sub nom. Nader v. United States, 410 U.S. 919 (1973). The link between the ITT settlement and the APPA can be seen at 119 CONG. REC. 24,598 (1973) (remarks of Sen. Tunney).

6. Senator Tunney, the APPA's sponsor, cited several "blatantly inequitable and improper antitrust settlements" of the past, and then explained that the provisions of his bill would "change certain specifics in the manner in which consent decrees in civil antitrust cases are formulated . . . ." 119 CONG. REC. 24,598 (1973) (remarks of Sen. Tunney).

7. The APPA provides for public notice and comment procedures relating to proposed consent decree settlements. See infra notes 25-33 and accompanying text.

8. The APPA provides for judicial review procedures relating to proposed consent decree settlements. See infra notes 34-42 and accompanying text.

9. [A] consent decree, once it has been accepted by a court, has the same legal effect as a judgment in a fully litigated action. After entry, the legal effect of an antitrust consent decree on the rights of the parties, including the rights of the Government, are adjudicatory rather than contractual in nature. 1959 H.R. REP., supra note 2, at 2-3. See also United States v. Armour & Co., 402 U.S. 673, 681 (1972).

10. "Before entering any consent judgment proposed by the United States under this section, the court shall determine that the entry of such judgment is in the public interest." 15 U.S.C. § 16(e)(1982).

11. For the purpose of such determination, the court may consider—

(a) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;

(b) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

termination. The American Telephone and Telegraph Co. (AT&T) divestiture demonstrates the APPA's significant potential for affecting the substantive terms of a consent decree settlement.\textsuperscript{13}


In making its determination under subsection (e) of this section, the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance amicus curiae, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate;

(4) review any comments including any objections filed with the United States under subsection (d) of this section concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

The APPA's applicability to cases voluntarily dismissed by the Antitrust Division, under Federal Rule of Civil Procedure 41(a)(1), has recently been a topic of both antitrust literature and congressional hearings. Recent case law suggesting that the APPA does not apply to voluntary dismissals has engendered this debate. On the same day it filed its AT&T consent decree settlement, and after thirteen years of litigation, the Justice Department voluntarily dismissed its antitrust case against the International Business Machines (IBM) corporation. Two months later, the Antitrust Division similarly dismissed its case against Mercedes-Benz of North America. Because of Rule 41(a)(1)'s provision for dismissal without court approval, and the APPA's apparent inapplicability to voluntary dismissals, courts in both the IBM and Mercedes-Benz cases held that the government's dismissal was effective without prior judicial review procedures. Both cases, despite their significant public impact, escaped APPA procedures. These cases have thus

14. FED. R. CIV. P. 41(a)(1) provides in part that:
   [s]ubject to the provisions of Rule 23(e), of Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action.


20. See infra notes 53-77 and accompanying text.


22. The United States sued IBM, one of the nation's largest industrial concerns, for alleged monopolization of the market for general purpose electronic digital computer systems in violation of section two of the Sherman Act. In re International Business Machines Corp., 687 F.2d 591, 593 (2d Cir. 1982). At the time of dismissal, IBM held a 58% market share in the American market for mainframe computer systems. N.Y. Times, Jan. 9, 1982, at 37, col. 2 (city ed.). The Reagan Administration estimated that the IBM litigation, spanning nearly thirteen years, cost the government approximately $13.4 mil-
given rise to congressional proposals to amend the APPA.\(^{23}\)

This Note argues that Congress should amend the APPA to require a judicial public interest determination prior to the entry of a voluntary dismissal in government-initiated civil antitrust actions.\(^{24}\) Part I of this Note briefly describes the APPA and Federal Rule of Civil Procedure 41(a)(1). Part II asserts that APPA procedures do not currently apply to voluntary dismissals under Rule 41(a)(1). Part III concludes that the purposes underlying the APPA and general policy considerations support the legislative extension of the Act to dismissals. Part IV responds to objections to this proposal. Finally, Part V presents a specific amendment to the APPA and examines recent congressional proposals.

In the Mercedes-Benz case, the United States alleged an illegal tying arrangement based on the defendant’s dealer agreements with its four hundred domestic dealers. United States v. Mercedes-Benz of N. Am., Inc., 517 F. Supp. 1369 (N.D. Cal. 1981). The defendant required each dealer to purchase all of its replacement parts from Mercedes-Benz of North America (MBNA) itself, thus foreclosing other competitors from this “aftermarket.” Id. at 1373-74. By 1979, MBNA had sold $110 million of these parts to its dealers, at prices that dealers described as “consistently higher than parts from other sources.” Id. at 1385. The Mercedes-Benz case was filed on August 15, 1979, United States v. Mercedes-Benz of N. Am., Inc. No. C-79-2144 MHP (N.D. Cal., filed Aug. 15, 1979), and therefore required much less public investment than did the IBM case. Nevertheless, the dismissal created controversy because the government had already proven two-thirds of the allegations in the complaint. 1982 House Hearings, supra note 16, at 65 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group). Indeed, less than a year before the case was dismissed, the court that considered both parties’ motions for summary judgment found that the defendant was tying together its automobiles and replacement parts through its dealer agreements, and that this tie-in affected a not insubstantial amount of interstate commerce. 517 F. Supp. at 1391.


24. This Note considers only civil actions brought by the Antitrust Division of the Department of Justice and focuses solely on the public interest provisions of the APPA, 15 U.S.C. § 16(e)-(f)(1982). Extension of other APPA sections is not directly considered. In addition, for the purposes of the major thesis, this Note does not distinguish between voluntary dismissals by notice and those by stipulation. See infra text accompanying notes 44-47.
I. DESCRIPTION OF THE APPA AND FEDERAL RULE OF CIVIL PROCEDURE 41(a)(1)

A. The APPA

The APPA is largely a procedural statute. It attempts to expose to public and judicial scrutiny the settlement procedures taking place between the government and private attorneys. It requires the Antitrust Division to file consent decree proposals with the district court where the case is pending. It also requires the government to publish the proposal's terms in the Federal Register sixty days prior to its effective date. Public comments concerning the proposed settlement are filed with the district court and published in the Federal Register, along with the government's responses to such comments. A list of the documents that were important in the negotiation of the consent decree, as well as a description of all written and oral communications between the government and each defendant regarding the settlement, is filed with the district court and made available to the public. The Antitrust Division must also file with the court, and publish in the Federal Register, a competitive impact statement—a summary of the litigation and the likely competitive effects of the proposed settlement. The terms of the settle-

25. The APPA's "substantive effect" is considered infra notes 94-106 and accompanying text.
26. See 119 Cong. Rec. 24,598 (1973) (remarks of Sen. Tunney): "[The APPA] would transform a procedure which was generally accomplished in a series of private, informal negotiations between antitrust lawyers and attorneys for the defendant, into one that is exposed to the full light of public awareness and judicial scrutiny."
27. See supra note 3.
28. See supra note 3.
30. Id. § 16(d). These notice and comment provisions were a codification of 28 C.F.R. § 50.1 (1973), which was promulgated by the Justice Department following a 1959 congressional investigation into alleged improprieties in the entry of the 1956 consent decree against Western Electric. 1959 H.R. Rep., supra note 2.
32. Id. § 16(b), which reads in part:
Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—
(1) the nature and purpose of the proceeding;
(2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
(3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or
ment and the competitive impact statement are then published in newspapers of general circulation in the district where the case is pending and in the District of Columbia.  

In addition to these procedural provisions, the APPA requires a substantive determination by the district court that the entry of a consent decree is in the public interest. Although Congress left the definition of the "public interest" to judicial construction on a case-by-case basis, the statute does provide factors to facilitate the court's determination. The court may take into account both the strictly competitive effects of the decree and the general impact of the proposal on the public. Relevant fac-

any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
(4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
(5) a description of the procedures available for modification of such proposal; and
(6) a description and evaluation of alternatives to such proposal actually considered by the United States.

33. *Id.* § 16(c).
34. *Id.* § 16(e), *supra* notes 10-11.

As originally expressed [in the bill], district courts were charged with determining that the entry of a proposal for a consent judgment was "in the public interest as defined by law." The four words, "as defined by law" were deleted: as a recognition that the content of the phrase, "public interest," is a product of judicial [sic] construction in the context of particular statutes, as evidenced by the lack of definition of the "public interest" in legal dictionaries and encyclopedias; to clarify the intention not to change case law construing the "public interest" in cases involving the antitrust laws or antitrust provisions of other laws; and to provide illumination and consistency in the usage of the phrase, the "public interest," in section 2(f)(5) of the bill. Preservation of antitrust precedent rather than innovation in the usage of the phrase, "public interest," is, therefore, unambiguous.

This Note similarly leaves the definition of the "public interest" in voluntary dismissals to judicial construction on a case-by-case basis, with particular focus on three factors: the sufficiency of evidence against a defendant, the available enforcement resources of the Antitrust Division, and the overall public impact of the defendant's alleged antitrust violations. *See infra* Part V.

36. *See* supra note 11. The factors listed in 15 U.S.C. § 16(e)(1)(1982) reflect the information provided by the United States in the competitive impact statement. *See supra* note 32. The House Judiciary Committee replaced the word "public" in the phrase "public impact statement" with the word "competitive" because "(a) the antitrust laws protect and promote competition; (b) the expertise the Antitrust Division is charged by the Congress with institutionalizing focuses on 'competitive' effects . . . ." 1974 H.R. Rep., *supra* note 4, at 12, *reprinted* in 1974 U.S. Code Cong. & Ad. News, at 6535, 6542. This explanation apparently reflects the congressional intent to evaluate proposed consent decree settlements, in part, based on whether they are "in the public interest as expressed by the antitrust laws." 1973 S. Rep., *supra* note 4, at 4.

37. *See* supra note 11. These factors were included so that "in addition to weighing
tors include the adequacy of relief, provisions for enforcement, and the potential benefit of a determination of the issues at trial. If the court finds that the consent decree is not in the public interest, it may refuse to enter the decree as a judgment and force the parties to renegotiate.

The court may use a variety of methods to obtain sufficient information upon which to base its public interest determination. These include expert testimony, the appointment of a special master, and amicus curiae participation. The court may also take other action in the public interest that it deems appropriate.

B. Federal Rule of Civil Procedure 41(a)(1)

Federal Rule of Civil Procedure 41(a)(1) provides two methods for a plaintiff to voluntarily dismiss a case without court approval. The first, dismissal by notice, requires a plaintiff to file a notice of dismissal prior to a defendant's answer or motion for summary judgment, whichever occurs first. The second, dismissal by stipulation, requires a stipulation of dismissal signed by each party in the action. Stipulations of dismissal may be filed with the district court at any time in the litigation. Both the dismissal by notice and the dismissal by stipulation typically operate as dismissals without prejudice, allowing a plaintiff to subsequently reinstate an action. If a plaintiff fails to meet the

the merits of [a] decree from the viewpoint of the relief obtained thereby and its adequacy, [a court would also consider] the effect of entry of the decree upon private parties aggrieved by the alleged violation and upon the enforcement of the antitrust laws generally." 118 Cong. Rec. 31,675 (1972).

38. Resolution of the disputed issues at a government trial is particularly important for subsequent private plaintiffs suing the same defendant. See infra notes 151-53 and accompanying text. See also 118 Cong Rec. 31,675 (1972) (Senator Tunney suggesting that the public interest would be served by litigating a government case if it presented potential precedential value, or if the government was the only party with sufficient resources to litigate a case to judgment).

39. In the AT&T divestiture, Judge Greene refused to enter the proposed consent decree unless the parties agreed to incorporate several modifications into the settlement. United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 225-26 (D.D.C. 1982).

43. See supra note 14.
44. Id.
45. Id.
47. Fed. R. Civ. P. 41(a)(1) provides, in part:
requirements of Rule 41(a)(1), an action may be voluntarily dismissed only by court order under Federal Rule of Civil Procedure 41(a)(2). 48

Rule 41(a)(1) has three exceptions. First, Rule 23(e) requires court approval of all dismissal proposals in class action suits. 49 Second, Rule 66 requires judicial approval of dismissals in actions with court appointed receivers. 50 Third, the provisions of Rule 41(a)(1) are subject to federal statutes that provide for court approval of voluntary dismissals. 51 Currently, there are two such statutory exemptions, in the areas of regulation of aliens and actions for false claims. 52

II. THE APPA DOES NOT CURRENTLY APPLY TO VOLUNTARY DISMISSELS

As originally enacted, the APPA does not apply to voluntary dismissals. The APPA is not a statutory exemption to Rule 41(a)(1), 53 and the Antitrust Division may dismiss cases without prior judicial approval. This is apparent from the statutory language of the APPA, its legislative history, and recent case law on this issue.

Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal [under Rule 41(a)(1)] operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

This exception is known as the “two-dismissal” rule. See 9 C. WRIGHT & A. MILLER, supra note 46, § 2368, at 187.

48. FED. R. Civ. P. 41(a)(2) provides, in part: “Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper.”

49. FED. R. Civ. P. 23(e) states: “A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”

50. FED. R. Civ. P. 66 reads, in part: “An action wherein a receiver has been appointed shall not be dismissed except by order of the court.”

51. See supra note 14.

52. 8 U.S.C § 1329 (1982), a statute regulating the entry of aliens into the United States, provides that “[n]o suit or proceeding for a violation of any of the provisions of this subchapter shall be settled, compromised, or discontinued without the consent of the court in which it is pending and any such settlement, compromise, or discontinuance shall be entered of record with the reasons therefor.” (emphasis added). Similarly, 31 U.S.C. § 3730(b)(1)(1982), which allows private parties to bring civil actions in the name of the government for false claims, provides that “[a]n action may be dismissed only if the court and the Attorney General give written consent and their reasons for consenting.” (emphasis added).

53. See supra note 52 and accompanying text.
A. Language of the APPA

To interpret the APPA's applicability to voluntary dismissals, analysis must begin with the language of the statute itself. The language of the Act refers solely to consent decrees and does not mention dismissals. Despite the canon of construction that remedial legislation should be broadly interpreted to effectuate its purposes, the fact that the two current statutory exemptions to Rule 41(a)(1) explicitly mention dismissals demonstrates the significance of the lack of similar language in the APPA. Without a clear legislative intent to apply the Act to voluntary dismissals, the absence of such language "must ordinarily be regarded as conclusive." The legislative history of the APPA must therefore be examined.

B. Legislative History of the APPA

The APPA's legislative history clearly indicates Congress's intent to restrict the scope of the Act to consent decree settlements. Because of their significance as an enforcement tool for the Antitrust Division, consent decrees were the major focus of reform in 1974. The legislative history repeatedly refers to consent decrees and their importance and never implies that the proposed Act would apply to voluntary dismissals. In fact, Sen-

54. "We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself." Consumer Prod. Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108 (1980).
55. See, e.g., supra notes 3, 10, 11, 12, & 32.
56. "[W]e are guided by the familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." Tcherepnin v. Knight, 389 U.S. 332, 336 (1967). The fact that the statute explicitly refers only to consent judgments does not a fortiori exclude its applicability to dismissals:
A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur in the mind . . . . The major premise of the conclusion expressed in a statute . . . may not be set out in terms, but it is not an adequate discharge of duty for the courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before. United States v. Hutcheson, 312 U.S. 219, 235 (1941)(quoting Johnson v. United States, 163 F. 30, 32 (1st Cir. 1908)). In particular, the antitrust laws should be interpreted by looking to more than the literal meaning of their words. Cf. United States v. American Trucking Ass'ns, 310 U.S. 534 (1940).
57. See supra note 52.
59. See supra note 4 and accompanying text.
60. 1974 H.R. Rep., 1973 S. Rep., supra note 4. See also Consent Decree Bills: Hear-
ator Tunney, the sponsor of the APPA, testified during congres-
sional hearings that the proposed bill would not apply to volun-
tary dismissals. In addition, the rejection of an earlier bill that
would have applied the Act's procedural requirements to dismis-
sals strongly suggests that Congress did not intend such a re-
sult. Both the language of the APPA itself and its legislative
history therefore demonstrate the Act's inapplicability to volun-
tary dismissals.

C. Case Law

Recent case law also indicates that the APPA does not apply
to dismissals. In both *In re International Business Machines
Corp.* and *United States v. Mercedes-Benz of North America,
Inc.*, the courts held that APPA procedures did not apply to
the government's dismissals under Rule 41(a)(1). Both courts
relied primarily on the language of the APPA and its legislative
history.

The *Mercedes-Benz* court did, however, assert a limited judi-
cial role in cases of dismissal. Apart from any statutory author-
ity, it cited the "inherent power" of the federal courts to look
behind stipulations of dismissal for possible collusion between
the parties. After requiring both parties to certify to the court
that no secret deal or agreement existed between them, the
court concluded that no such collusion existed. Yet because the
APPA did not apply, this inquiry into possible collusion consti-
tuted the full extent of the court's review of the stipulation of
dismissal.

United States v. American Telephone and Telegraph Co. seems to suggest that APPA procedures do apply to dismissals,
but it is not strong precedent for this suggestion. Judge Greene
stated in a footnote that all major antitrust actions, whether set-
tled or dismissed, should be evaluated under APPA proce-
dures. Yet this language is mere dicta because the court did
not technically rule on the applicability of the APPA—instead,
both parties agreed to comply with the procedures. In addition,
this case did not involve a stipulation of dismissal, but rather
involved the proposed consent decree defining the AT&T divest-
iture. The parties had initially characterized their settlement
proposal as a dismissal, but Judge Greene criticized this as a

69. "[I]t is appropriate and within this court's power to look behind the stipulated
dismissal to determine whether there is any settlement, agreement, or understanding be-
tween the parties." 547 F. Supp. at 400.
70. The court gave no indication of any independent investigation, stating merely
that "[t]he parties have filed certificates and satisfied this court that there are no such
agreements." Id.
72. [W]hile Fed. R. Civ. P. 41(a)(1) provides that the parties may file a dismissal
without leave of court under certain circumstances, this may not be done where
a statute provides otherwise. In the view of the Court, the Tunney Act is just
such a statute.

73. [T]he parties have now stated . . . that, irrespective of their opinion of the tech-
nical applicability of the Tunney Act, they are willing to have the Tunney Act
procedures applied by this Court. In view of those representations, it became
unnecessary for the Court to pass specifically upon the technical applicability of
the Act.

74. The government and AT&T initially filed a modification of the 1956 consent
judgment against Western Electric and AT&T in the District Court of New Jersey, Civil
Action No. 17-49, and a dismissal of the AT&T litigation in the District of Columbia. Id.
at 144. For a summary of both cases, see id. at 135-47.
“mere act of labelling”\textsuperscript{75} and proceeded to evaluate the public interest impact of the divestiture under APPA procedures. Therefore, despite Judge Greene’s refusal to give the initial stipulation of dismissal immediate effect,\textsuperscript{76} he did not exceed the “inherent powers” limitation of \textit{Mercedes-Benz}.\textsuperscript{77}

This inherent power to look for collusion between the parties therefore represents the full extent of judicial review over the Antitrust Division’s decisions to dismiss cases. The case law interpreting the APPA, as well as the statutory language and legislative history of the APPA, clearly demonstrates that the APPA does not currently apply to voluntary dismissals.

75. Judge Greene stated:

In the opinion of this Court, [the reasoning of the parties] may most charitably be described as disingenuous. If that reasoning were deemed acceptable, the parties here—and in similar antitrust actions—could subvert the clearly expressed will of Congress by a mere act of labelling. The Tunney Act was designed to expose to public scrutiny and to a judicial public interest determination the settlements negotiated between the Department of Justice and the various antitrust defendants. The instant agreement, whatever the label the parties chose to affix, settled two such lawsuits. That settlement, moreover, not only disposed of what is the largest and most complex antitrust action brought since the enactment of the Tunney Act but the settlement itself [also] raises what may well be an unprecedented number of public interest questions of concern to a very large number of interested persons and organizations. . . . As the Court made clear from the very day the settlement was announced, it was not and is not prepared to allow this circumvention of the congressional purpose.

\textit{Id.} at 145 (footnote omitted).

76. \textit{Id.} at 144 n.52. Judge Greene apparently refused to dismiss the case in order to persuade both parties to comply with APPA procedures. After oral arguments on the issue, he stated:

I will temporarily retain the status quo. The trial will remain in recess. The dismissal notice will remain lodged, not filed, and the case is not at this time dismissed.

The parties should advise me not later than next Monday whether their settlement is being submitted here for application of the Tunney Act procedures. If that is not done, I will ask the parties for briefing and I will make a formal decision at that time, both on the right to dismissal without leave of Court, and on the application of the Tunney Act.

\textit{United States v. American Tel. & Tel. Co.}, 1982-1 Trade Cas. (CCH) ¶ 64,465 (D.D.C. Jan. 12, 1982), at 72,611.

77. This notion is supported by a subsequent AT&T case, \textit{Gregg Communications Sys., Inc. v. AT&T}, 98 F.R.D. 715 (N.D. III. 1983). The \textit{Gregg} case was a private action by five competitors of AT&T in the automatic telephone answering machine market. One of the major issues in \textit{Gregg} was the effect of the government case against AT&T on the statute of limitations for private actions. The court held that Judge Greene properly exercised the “court’s inherent powers” by refusing to immediately file the stipulation of dismissal, and that the government case was therefore still pending until August 24, 1982. \textit{Id.} at 718. Thus, the plaintiffs in \textit{Gregg} were not time-barred by 15 U.S.C. § 15b (1982). The court also specifically held that the APPA does not apply to voluntary dismissals. \textit{Id.}
III. THE APPA SHOULD BE AMENDED TO APPLY TO VOLUNTARY DISMISSALS

Because the APPA does not currently apply to voluntary dismissals, Congress should amend the Act to require a judicial public interest review prior to the entry of a voluntary dismissal in government-initiated civil antitrust actions. Such a requirement would be consistent with the purposes of the APPA's public interest provisions relating to civil antitrust settlements, and with the purposes of judicial review procedures in criminal antitrust dismissals. Sound policy considerations also support such an amendment.

A. Purposes of the APPA's Public Interest Provisions Apply to Voluntary Dismissals

In passing the APPA in 1974, Congress attempted to increase the role of the judiciary in antitrust enforcement procedures by requiring an independent public interest determination by the district court prior to the entry of a consent decree. Congress recognized the significant economic and political power of highly concentrated industries and the increasing importance of the antitrust laws, and sought to protect the public interest through the reform of existing enforcement procedures. The environment of "secrecy" in which parties negotiated consent

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78. This Note argues only for the application of 15 U.S.C. § 16(e)-(f)(1982) to voluntary dismissals, as described in Part V; it does not advocate extensions of, or changes in, any other section of the APPA.
80. "By definition, antitrust violators wield great influence and economic power. They often bring significant pressure to bear on government, and even on the courts, in connection with the handling of consent decrees. The public is properly concerned whether such pressure results in settlements which might shortchange the public interest." 1973 S. REP., supra note 4, at 5. "In short, enforcement of the antitrust laws may have a very profound effect on the lives of every citizen . . . . But beyond the economic effect, there is a political effect. Increasing concentration of economic power . . . carries with it a very tangible threat of concentration of political power." 119 CONG. REC. 3451 (1973)(remarks of Sen. Tunney).
81. "[W]e have learned a great deal about the importance of the Nation's antitrust laws in recent months . . . crystalizing[ing] the rather vague concept of antitrust into a very tangible reality." 119 CONG. REC. 3451 (1973)(remarks of Sen. Tunney).
82. See supra note 6. See also 1974 H.R. REP., supra note 4, at 6, reprinted in 1974 U.S. CODE CONG. & AD. NEWS, at 6536: "Given the high rate of settlement in public antitrust cases, it is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured."
83. In introducing his bill, Senator Tunney denounced "the excessive secrecy with
decrees and the "judicial rubber stamping"\textsuperscript{84} of proposed settlements by district courts were primary targets of reform. In particular, the controversial ITT settlement raised a variety of public concerns suggesting the need for reform.\textsuperscript{85}

Although Congress failed to extend the APPA's public interest provisions to voluntary dismissals,\textsuperscript{86} these provisions are equally justified in such cases.\textsuperscript{87} The "risk of abuse"\textsuperscript{88} of antitrust enforcement procedures is as great in dismissals as it is in settlements.\textsuperscript{89} The public interest impact is similar in both cases.\textsuperscript{90} In fact, the justification for judicial review is stronger in cases of dismissal, where the United States obtains no relief, than in cases of settlement, where a portion of the relief originally sought in the complaint is usually obtained.\textsuperscript{91}

Both the \textit{IBM} and \textit{Mercedes-Benz} courts recognized this equally compelling public interest in cases of dismissal. Despite ruling that the APPA does not apply to voluntary dismissals,\textsuperscript{92} both courts stated that the legislative intent and policy considerations underlying the APPA did apply to dismissal cases.\textsuperscript{93}

\[\textit{Which many consent decrees have been fashioned . . . .} \textsuperscript{119} \textit{Cong. Rec.} 24,598 (1973)(remarks of Sen. Tunney). \textit{See also} 1973 \textit{House Hearings, supra} note 60, at 38 (statement of Sen. Tunney).

84. "One of the abuses sought to be remedied by the bill has been called 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department. The bill resolves this area of dispute by requiring district court judges to determine that each proposed consent judgment is in the public interest." 1974 H.R. Rep., \textit{supra} note 4, at 8, \textit{reprinted in} 1974 U.S. Code Cong. & Ad. News, at 6538. \textit{See also} 119 \textit{Cong. Rec.} 24,598 (1973)(remarks of Sen. Tunney).

85. \textit{See supra} note 5.

86. \textit{See supra text accompanying notes} 53-77.

87. Congress's initial decision to exempt voluntary dismissals from the APPA merely reflects the relative importance of consent decree settlements, \textit{see supra} note 4, not the impropriety of applying the APPA's public interest provisions to dismissals.

88. Lasker, \textit{supra} note 15, at 940: "By the phrase 'risk of abuse,' I mean, of course, a disposition which is satisfactory to the parties but against the public interest."

89. \textit{See Mercedes-Benz}, 547 F. Supp. at 400: "The evils of secrecy and ineffective enforcement of the antitrust laws which the bill was intended to address can arise from any settlement of a case, regardless of its form." In recent congressional hearings, it was noted that the risk of undue political influence is also present in cases of dismissal. "The possibility for political abuse is at least as great in the case of dismissals . . . as in other consensual terminations of cases." 1982 \textit{House Hearings, supra} note 16, at 3 (introduction of H.R. 6361 by Chairman Rodino). \textit{See also} Lasker, \textit{supra} note 15, at 940.

90. The public interest questions involved in the dismissal of the IBM case, for example, \textit{see supra} note 22, were surely of the same magnitude as those involved in the AT&T divestiture and were more important than those involved in more typical antitrust settlements.


92. 687 F.2d at 603; 547 F. Supp. at 401.

93. The \textit{IBM} court admitted that "many of the considerations present which prompted Congress to legislate in the area of consent decrees [may] also [be] present
Some argue that the purposes behind the APPA do not apply to voluntary dismissals because the APPA is merely a procedural statute. Prior to the APPA, the entry of a consent decree was considered a judicial act requiring the court's approval. Some courts, in evaluating proposed settlement terms, went beyond the recommendations of the Justice Department and independently determined their public interest impact. Therefore, the legislative history suggests that the APPA is merely "procedural"—that it does not expand the judicial review power over consent decrees, but simply ensures that judges take seriously their existing obligations. Some argue, therefore, that any application of the APPA's public interest provisions to dismissals would conflict with the original purposes of the Act by expanding the judicial review power over dismissals. The public

where dismissals are involved." In re International Business Machines Corp., 687 F.2d at 603. In the Mercedes-Benz opinion, the court stated "that in passing the APPA 'Congress was concerned with protection of the public interest in settlement of antitrust actions in general' . . . [and] that '[t]he effect and public interest is as great whether resolved by stipulation or dismissal.'" Mercedes-Benz, 547 F. Supp. at 400 (quoting its own court order of Mar. 16).


95. In United States v. Automobile Mfr. Ass'n, 307 F. Supp. 617, 621 (C.D. Cal. 1969), aff'd per curiam sub nom. City of New York v. United States, 397 U.S. 248 (1970), the court considered the enforceability of the proposed decree, the extent to which requested relief in the complaint was obtained, the rights of parties not before the court, and "whether the consent decree, on the whole, [was] against the public interest." Similarly, in United States v. Carter Products, Inc., 211 F. Supp. 144, 147-48 (S.D.N.Y. 1962), the court evaluated the "equity" of the consent decree, balancing the benefits to the public against the harm to a third-party opponent. In United States v. Radio Corp. of Am., 46 F. Supp. 654 (D. Del. 1942), appeal dismissed, 318 U.S. 796 (1943), the court considered a motion by the government to vacate an earlier consent decree. The court declared that

[a] consent decree . . . is a judicial act . . . and, therefore, involves a determination by the [court] that it is equitable and in the public interest. The fact that the court may consider the opinion of the Department of Justice to the same effect does not mean that the court has abdicated its power, or failed to carry out its responsibility, to make an independent determination of the propriety and equity of the decree proposed by the parties . . . .

Id. at 655.


97. See Mercedes-Benz, 547 F. Supp. at 401:

[T]o apply the APPA to dismissals would be to disregard the apparent understanding of Congress as to the then-existing judicial practice regarding consent decrees and the effect of the changes being made. Prior to the passage of the APPA, entry of consent decrees was already considered to be a judicial act requiring the judge’s approval . . . . In contrast, stipulated dismissals are ordinarily entered without the need for court approval . . . . Congress’ understanding
interests involved in dismissal cases, it is argued, are sufficiently protected by the inherent powers of the judiciary and the congressional oversight function.

There are two problems with this argument. First, although prior to 1974 some courts did scrutinize proposed settlements for their public interest impact, the authority for such judicial review was uncertain. In 1961, the Supreme Court declared in *Sam Fox Publishing Co. v. United States* that "sound policy [dictates the acceptance of a consent decree] . . . in the absence of any claim of bad faith or malfeasance . . . ." This deferential standard, adopted by the vast majority of courts, obviously precluded a vigorous public interest inquiry. Codification of a public interest determination thereby expanded the role of the judiciary allowed under *Sam Fox*. Because the APPA actually expanded existing judicial power over consent decrees, a similar expansion of the judicial role in dismissals would be consistent with the congressional purposes underlying the APPA.

Second, assuming that the APPA is "procedural" and did not alter existing judicial power, the primary purpose of the Act's public interest provisions still supports their application to voluntary dismissals. Congress characterized the deferential standard in reviewing consent decrees as "judicial rubber stamping," and sought to increase the role of the judiciary in order that no major changes were being made cannot be reconciled with inclusion of dismissals within the coverage of the APPA.

98. "The concerns involving the good faith enforcement of the antitrust laws through voluntary dismissals are adequately and constitutionally addressed by the inherent power of the court to look behind the dismissal 'to determine whether there is collusion or other improper conduct giving rise to the dismissal.'" McDavid, *supra* note 15, at 913 (quoting *Mercedes-Benz*, 547 F. Supp. at 401).

99. "[T]here exists today an effective safeguard against the possibility that the Government may be less than candid in such explanations, a safeguard that does not place the Judiciary in the position of having to oversee prosecutorial decisionmaking. This . . . is close congressional scrutiny in the context of public hearings." 1982 *House Hearings*, *supra* note 16, at 38 (statement of Asst. Att'y Gen. Lipsky).


101. *Id.* at 689.


103. *See supra* note 84.
to avoid "blatantly inequitable and improper" settlements in the future. Whatever the legal scope of judicial review prior to the APPA, the Act sought to increase the actual scope by requiring an independent public interest determination by the district court. This judicial independence was considered necessary to adequately protect the public interest; existing procedures were considered insufficient. Because existing judicial and legislative procedures are insufficient to protect the public interests involved in dismissal cases, a similar increase in the role of the judiciary in dismissals is justified. Application of the APPA's public interest provisions to voluntary dismissals is consistent with the purposes of the Act.

B. Public Policy Considerations

Paralleling the pre-APPA concerns regarding improper consent decree settlements, there is concern today that existing procedures regarding voluntary dismissals do not sufficiently protect the public interest. First, the congressional oversight function, although used in the past, is a poor alternative to judicial review. Oversight committees operate after the fact and serious separation of powers problems may exist. Because of

105. The legislative history is replete with examples of Congress's intent to require a greater degree of judicial independence. See, e.g., 1973 S. Rep., supra note 4, at 4: "The first Section [of the bill] is to provide that district courts make an independent determination as to whether or not the entry of a proposed consent judgment is in the public interest . . . ."; 119 Cong. Rec. 3542 (1973) (statement of Sen. Tunney):

The mandate is a highly significant one because it states as a matter of law that the role of the district court in a consent decree proceeding is an independent one. The court is not to operate simply as a rubber stamp, placing an imprimatur [sic] upon whatever is placed before it by the parties. Rather, it has an independent duty to assure itself that entry of the decree will serve the interests of the public generally.
106. See infra notes 107-17 and accompanying text.
109. [The Justice Department suggests that] we can always have congressional hearings, but these also are after the fact. If you are worried about separation of
these difficulties, the Justice Department has often refused to provide oversight committees with the requisite information for an informed public interest judgment.\textsuperscript{110} Second, the inherent powers of a court to look for collusion cannot protect against improper dismissals that occur without express collusion.\textsuperscript{111} The extremely limited review of the \textit{Mercedes-Benz} court under its inherent power\textsuperscript{112} makes it clear that the public interest cannot rest on such a "slender reed"\textsuperscript{113} of authority. A vigorous public interest review by an independent judiciary more adequately protects the public concerns involved in cases of voluntary dismissal.

In addition, the very existence of the APPA's procedures for judicial review of consent decrees without corresponding proce-

\begin{itemize}
  \item powers problems, I shudder to think of them in the context of a committee of the Congress supervising the activities of the executive branch in connection with specific litigation.
  \item 1982 \textit{House Hearings}, supra note 16, at 48 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group). The separation of powers questions arising from judicial review of decisions to dismiss are discussed infra notes 176-205 and accompanying text.
  \item 110. The 1959 House Committee, see supra note 2, at 40-42, failed to obtain certain files of the Justice Department, despite allegations of improper negotiations between the government and Western Electric. Note, supra note 5, at 601 n.43 and accompanying text. In addition, the 1982 joint oversight committee, see supra note 108, encountered difficulty in obtaining information regarding the opinions of the government's trial staff on the IBM dismissal:
    \begin{itemize}
      \item Mr. Rodino: [T]he failure of the Department to make available to us through interviews with your staff this kind of information creates a more troublesome kind of climate in that there is a question as to whether or not the division has been forthcoming . . . .
      \item Mr. Baxter: I certainly agree . . . that the oversight role of the committee is an important one that must be given a great deal of weight. I feel with equal emphaticness [sic] that the consultative process within the division must also be respected . . . direct interviews of the career staff . . . or the surrender of documents which constitute advice to me within the Antitrust Division would not be consistent with departmental policy, and in my view would constitute a violation of the separation of powers. . . .
    \end{itemize}
  \item 1982 \textit{AT&T Hearings}, supra note 108, at 117-19. Baxter indicated that he would provide information that was screened and prepared for release and allow the committee to question himself or another high official on the views of the trial staff. \textit{Id.} Baxter took a similar position on information resulting from meetings between the government and IBM's trial staff. \textit{Id.} at 129-30.
  \item 111. An improper dismissal may be the result of unilateral action, for example, or of very subtle collusion between the parties. \textit{See, e.g.}, \textit{Hearings Pursuant to H.R. 803 Before the House Comm. on the Judiciary}, 92d Cong., 2d Sess., book V, pt.1, at 311-20 (1974), for conversations between President Nixon and his advisors on the ITT cases.
  \item 112. \textit{See supra} note 70 and accompanying text.
  \item 113. \textit{Lasker, supra} note 15, at 940:
    In any event, it seems to me that it would be an unwise policy for courts to attempt to extend control of consent dismissals for civil government antitrust suits simply on the basis of inherent authority. The issue is too questionable and the subject matter too important to rest on such a slender reed.
dures in cases of dismissal provides a “perverse incentive”\textsuperscript{114} to circumvent the Act. If a judge refuses to enter a consent decree and orders the Antitrust Division to bring the case to trial or modify the settlement terms, this judicial order may currently be circumvented through a voluntary dismissal under Rule 41(a)(1).\textsuperscript{115} This voluntary dismissal, if not the result of express collusion between the parties nor sufficiently controversial to attract legislative attention, can take effect without judicial or congressional review.\textsuperscript{116} This surely constitutes a “manifest loophole”\textsuperscript{117} in the APPA.

Finally, the Reagan Administration’s antitrust enforcement policy has raised public concerns and controversies similar to those that existed prior to the passage of the APPA.\textsuperscript{118} The An-

\begin{footnotesize}
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\item\textsuperscript{114} 1982 House Hearings, supra note 16, at 57-58: 
[Allowing dismissal without public participation creates a perverse incentive for the Justice Department to accept no relief at all. While I was not a party to any of the negotiations that took place over many years between IBM and the Justice Department, there are sufficient indications in the public press to lead me to believe that at various times settlement offers were made, involving some forms of relief, and that IBM would have agreed to undertake some pro-competitive measures in order to conclude the litigation. Yet, that sort of decree would surely have been subject to the Act. But the Department says that because it wants to get rid of the IBM case entirely, the APPA requires no public or judicial scrutiny. Surely, it should not be “easier”—i.e., not complying with the APPA—for the government to obtain no relief rather than to secure some added public protection. If there are reasons for the government to abandon a suit, it should have the burden of explaining them in public before the dismissal becomes effective, and should not be able to avoid the burden of the APPA entirely by simply dismissing an action. (statement of Alan B. Morrison, Director, Public Citizen Litigation Group).

\item\textsuperscript{115} This kind of circumvention occurred in United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 70 Civ. 2079 (S.D.N.Y.), cited in Branfman, Antitrust Consent Decrees—A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act, 27 ANTITRUST BULL. 303, 349 n.174 (1982). After two revisions of a consent decree, in accordance with the judge’s suggestions, the court demanded that the United States take steps to bring the case to trial. The Justice Department then dismissed the case without prejudice under Rule 41(a)(1). Branfman, supra, at 349. Judge Greene, in the AT&T case, characterized the initial stipulation of dismissal filed by the parties as a circumvention of the APPA. See supra note 75.

\item\textsuperscript{116} This lack of review results because the inherent powers of a court to look for collusion and the congressional oversight function are the sole restraints on the Antitrust Division’s ability to voluntarily dismiss civil cases. See supra text accompanying notes 53-77.

\item\textsuperscript{117} Sullivan, supra note 15, at 948-49: “From the perspective that moved Congress originally, the Act’s failure to protect against dismissals is a manifest loophole.”

\item\textsuperscript{118} 1982 House Hearings, supra note 16, at 1-2 (remarks of Chairman Rodino): The current administration has certainly not been hesitant about dismissing cases brought by prior administrations. While such decisions to dismiss major cases may have been appropriate, or even courageous, there is a significant national interest in clarifying the procedures to be employed in cases of reversals of policy with such dramatic consequences . . . . Past experience has demonstrated that the Department may not be immune from the massive political influence
\end{enumerate}
\end{footnotesize}
titrust Division has been criticized for exceeding the traditional boundaries of prosecutorial discretion and entering into the realm of economic policymaking. In addition, the recent IBM and Mercedes-Benz dismissals have raised a variety of questions regarding the politicization of the Antitrust Division. In IBM, despite solid grounds for dismissal, the government's trial staff disagreed with Assistant Attorney General Baxter's decision to drop the case. Baxter also encountered conflict of in-

119. See Sullivan, supra note 15, at 950:
If a prosecutor may seek to make the law expand to cover new situations when he regards that as being in the public interest, why should he not be equally free to seek to make the law contract? [Because] prosecutorial discretion . . . has to do with resource allocation decisions and decisions about whether a particular case can be won or lost—decisions made within the context of conventional presuppositions about what the law itself requires. Even aggressive prosecutors seldom attempt to rewrite the law categorically . . . . A prosecutor who simply stops enforcing those parts of the law which he does not approve faces no [adequate check on his discretion].

120. Id. at 949-50:
The Division [under the Reagan Administration] seems to regard itself primarily as a policy-making agency—as the maker of antitrust policy for the time being in office. For example, on the basis of its own economic predictions, it claims power to decide categorically what parts of the law ought to be enforced and what parts ought not . . . . My criticism of the Division as it now functions . . . [is that] [i]t shows little sense of the limits of its role as the current custodian of an ongoing tradition. It shows little capacity to resolve questions which, if antitrust is to function, ought to be seen not as ideological imperatives, but as matters of degree . . . . With shifts and starts, the Division for some years has been moving away from the old conception of its role—that of a law enforcement agency—toward a new conception—that of a microeconomic policymaker. The present administration has grasped [this] new role firmly and [has] attempted to express, across the board and in a consistent manner, the particular economic policy to which it is politically congenial.

Immediately after the IBM dismissal, Assistant Attorney General Baxter commented that under his direction, the Division was “backing off” from antitrust policies of the past. N.Y. Times, Jan. 9, 1982, at 34, col. 3.

121. The government faced significant problems with market definition, evidence of predatory conduct by IBM, and structural relief. See 1982 AT&T Hearings, supra note 108, at 88-95. The IBM case, in Baxter's opinion, was not a case the government “should win . . . [or] was likely to win, and was one consuming the resources both of IBM and of the Antitrust Division at a very rapid rate . . . .” Id. at 128 (testimony of Asst. Att’y Gen. Baxter).

122. Although meetings with his trial staff were "enormously helpful" to Baxter, id. at 129-30, he agreed that there were disagreements with his decision. "I was virtually certain that some number of the trial staff would not agree with my action. I did not poll the trial staff. I did not ask what their views were on that matter." Id. at 117. One trial staff attorney who disagreed with the IBM dismissal commented that Baxter had been critical of the government's strategy and theories. "When you go through so many assistant attorneys general," he said, "you are bound to get one who disagrees with what you've done." N.Y. Times, Jan. 9, 1982, at 34, col. 2. Baxter refused, however, to permit a subsequent congressional oversight committee to personally interview members of the trial staff. See supra note 110.
interest allegations subsequent to the IBM dismissal.\textsuperscript{123} In Mercedes-Benz, Baxter dismissed the case after the government had proven approximately two-thirds of the allegations in the complaint.\textsuperscript{124} The public reaction to these developments, like the controversy surrounding the ITT settlement,\textsuperscript{125} prompted legislative proposals designed to extend the APPA's public interest provisions to cases of voluntary dismissal.\textsuperscript{126}

C. Judicial Review of Criminal Antitrust Dismissals Under Federal Rule of Criminal Procedure 48(a)

In addition to the underlying purposes of the APPA and general policy considerations, the judicial review of criminal antitrust dismissals under Federal Rule of Criminal Procedure 48(a)\textsuperscript{127} supports the extension of the APPA to civil antitrust dismissals. Rule 48(a) requires judicial approval of decisions to dismiss criminal indictments.\textsuperscript{128} All criminal cases brought by the Antitrust Division are therefore subject to judicial review prior to the entry of a dismissal.\textsuperscript{129} Of course, certain differences between criminal and civil cases justify greater restrictions on the government's ability to dismiss criminal indictments. Because of the greater degree of "stigma" involved,\textsuperscript{130} judicial review of criminal dismissals focuses primarily on protecting the

\textsuperscript{123} In the late 1960's, Baxter received a grant from IBM for research, and as a Stanford Law School professor in 1970, he received $1,500 from a law firm defending IBM for his assistance in evaluating expert witnesses. In 1976, he wrote a letter to the Carter Administration transition team indicating his opposition to the case. In addition, in the fall of 1981, while in the process of deciding to dismiss the case, Baxter argued on behalf of IBM in an antitrust case brought by the European Economic Community. N.Y. Times, June 18, 1982, at D4, col. 4.

\textsuperscript{124} See 1982 House Hearings, supra note 16, at 65 (statement of Alan B. Morrison, Director, Public Citizen Litigation Group).

\textsuperscript{125} See supra note 5.

\textsuperscript{126} See supra note 23.

\textsuperscript{127} FED. R. CRIM. P. 48(a) provides that "(t)he Attorney General or the United States attorney may by leave of court file a dismissal of an indictment, information or complaint and the prosecution shall thereupon terminate."

\textsuperscript{128} Id. See generally 3A C. WRIGHT, FEDERAL PRACTICE & PROCEDURE § 811-12 (1982).


\textsuperscript{130} As one commentator has observed, "[w]hat distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition." Hart, The Aims of the Criminal Law, 23 LAW & CONTEMP. PROBS. 401, 404 (1958).
Voluntary Dismissals

defendant by preventing prosecutorial harassment. Nevertheless, another purpose of Rule 48(a) is to "protect the public interest in the fair administration of criminal justice." More specifically, the court must examine the sufficiency of the evidence against a defendant and the possibility of prosecutorial corruption. Therefore, the judicial review of criminal antitrust dismissals under Rule 48(a) focuses, in part, on the public interests involved in such dismissals. Because the public interests may be just as great in a civil antitrust action as in a criminal prosecution, there is no sound reason for distinguishing be-


132. "It seems to us that the history of the Rule belies the notion that its only scope and purpose is the protection of the defendant . . . [We] think it manifestly clear that the Supreme Court intended to clothe the federal courts with a discretion broad enough to protect the public interest in the fair administration of criminal justice." United States v. Cowan, 524 F.2d 504, 512 (5th Cir. 1975), cert. denied sub nom. Woodruff v. United States, 425 U.S. 971 (1976). See also Rinaldi v. United States, 434 U.S. 22, 29-30 n.15 (1977): "But the Rule has also been held to permit the court to deny a Government dismissal motion to which the defendant has consented if the motion is prompted by considerations clearly contrary to the public interest." See also United States v. Hamm, 659 F.2d 624 (5th Cir. 1981); United States v. Hastings, 447 F. Supp. 534 (E.D. Ark. 1977).

133. See 3A C. WRIGHT, supra note 128, § 812 n.10 and cases cited therein.

134. "[R]ule 48(a) also provides opportunity for judicial oversight to guard against prosecutorial corruption or imprudence." Sullivan, supra note 15, at 948.


The indictment in this case alleges a criminal conspiracy which, concerning as it does an essential lifesaving drug, directly threatens the public weal. The effects of the alleged conspiracy have been described by the late Senator Hart as "literally a matter of life and death" . . . . The court finds . . . that to allow the government unilaterally to terminate a nine-year old indictment of the greatest public significance would be "clearly contrary to [the] manifest public interest." (footnotes omitted).

136. The government decides to proceed by criminal indictment or by civil action not on the basis of the public harm involved in a case, but on the basis of the defendant's conduct. Criminal actions typically arise from instances of outrageous conduct or undoubted illegality by the defendant—where the defendant's conduct displays a specific intent to violate the antitrust laws or where the offense is considered per se illegal. P. AREEDA & D. TURNER, ANTITRUST LAW § 309 (1978). Such conduct may arise in cases involving either tremendous or insignificant impact on the consumer. Horizontal price fixing is per se illegal, United States v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150, 218 (1940), and will typically be prosecuted by the Antitrust Division through criminal proceedings. Yet if the price fixing occurs in a very small industry with little economic impact, the public interests involved will be of no great magnitude. On the other hand, there are many civil antitrust cases with a significant public impact; the IBM and Merce-
between a judicial public interest review in a criminal case and a similar procedure in a civil case. The similarities between the two support the application of the APPA’s public interest provisions to civil antitrust dismissals.\footnote{137}

IV. OBJECTIONS TO THE EXTENSION OF THE APPA TO VOLUNTARY DISMISSALS

There are several arguments against applying the APPA to voluntary dismissals. Certain arguments focus on the added burdens such a proposal would impose upon the Antitrust Division and the judiciary, and on the potential for circumvention through the government’s refusal to litigate. Other arguments focus on the constitutional aspects of such an amendment.

A. Resources of the Antitrust Division

Civil antitrust cases voluntarily dismissed by the government under Rule 41(a)(1) are dismissed without prejudice\footnote{138} and may be reinstated by a subsequent administration.\footnote{139} Consent decrees, on the other hand, bind both parties\footnote{140} and are subject only to modification.\footnote{141} In allocating its limited resources,\footnote{142} the

des-Benz cases are two examples. See supra note 22. In addition, all of the merger cases brought by the Antitrust Division under 15 U.S.C. § 18 (1982), popularly known as section 7 of the Clayton Act, are civil cases because the Clayton Act is an exclusively civil statute. There have obviously been a number of merger cases in which tremendous public interests were at stake. See, e.g., Brown Shoe Co. v. United States, 370 U.S. 294 (1962); United States v. E.I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (General Motors).

137. One court, in fact, using language similar to that used in the subsequent APPA legislative history, stated that a district court in a Rule 48(a) motion is not to be a “mere rubber stamp and must exercise independent discretion.” United States v. Bettinger Corp., 54 F.R.D. 40, 41 (D. Mass. 1971).

138. FED. R. CIV. P. 41(a)(1), supra note 47.

139. “[A]s we all know, administrations come and go, and even if, for base political reasons, one administration leaves corruption undetected and unpunished, the next administration can act, not only to punish the malefactor, but to correct his action.” Carr, supra note 15, at 957. Of course, reinstatement of claims previously dismissed by notice under Rule 41(a)(1)(i) is subject to the “two-dismissal rule.” See supra note 47 and accompanying text.

140. See supra note 9.

141. The standard for modification of a previously entered consent decree is rigorous. “Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed after years of litigation with the consent of all concerned.” United States v. Swift & Co., 286 U.S. 106, 119 (1932). The result has been few modifications of existing decrees. See Note, Construction and Modification of Antitrust Consent Decrees: New Approaches After the Antitrust Procedures and Penalties Act of 1974, 77 COLUM. L. REV. 296, 304-05 (1977).

142. “Every executive agency . . . must allocate its resources to promote the public
Justice Department may wish to occasionally dismiss a case in order to concentrate its efforts on a higher priority. This flexibility enhances the public interest by allowing the Antitrust Division to focus on priority cases without impairing its ability to subsequently prosecute dismissed cases.\(^4\) In addition, dismissal of a government action does not preclude private actions against a defendant.\(^4\) Some argue, therefore, that judicial control over the resource allocation of the Antitrust Division would impose unnecessary costs on the government.\(^4\)

It is clear, however, that the benefits of judicial review of voluntary dismissals would outweigh any costs imposed upon the Antitrust Division. First, such costs would be less in cases of dismissal than in consent decree cases because dismissals are rela-

interest to the maximum possible extent, given the constraints imposed by Congress in authorizing and appropriating funds." Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 25 CORP. PRAC. COMMENTATOR 155, 182 (1983)(footnote omitted). This duty requires the Antitrust Division to balance the social costs and benefits of its enforcement activity. Id. at 182-84.

143. "The reasoning [in the APPA's legislative history] was that if a case was dismissed without prejudice, it could be reinstituted and vigorously pursued by a later administration. That was preferable to an inadequate consent decree that could hinder subsequent attempts to regulate the defendant's practices." *Mercedes-Benz*, 547 F. Supp. at 400-01, (citing 1973 House Hearings, supra note 60, at 43; 1973 Senate Hearings, supra note 60, at 76-77). Proponents of a strict public interest standard for judicial review of consent decrees have advocated the use of this dismissal option to mitigate the "resource allocation" problems presented by such a standard. See, e.g., Note, *Scope of Judicial Review of Consent Decrees*, supra note 13, at 175-76. Cf. supra notes 114-17 and accompanying text (circumvention of APPA procedures through voluntary dismissal).

144. One commentator states:

The private action remains, and those who believe themselves most severely injured—presumably those who would press most strenuously for judicial reversal of the prosecutor's judgment—are free, within the rule of standing, to seek remedies themselves. Indeed, the existence of the private action suggests that the need for judicial review of prosecutorial decisions in antitrust is less than in many areas of our law in which the enforcement power is confided to the government alone.


145. This was actually a major argument raised by the Antitrust Division against the APPA in 1974. See 119 CONG. REC. 24,601 (1973) (letter of Thomas E. Kauper, Asst. Att'y General, Antitrust Division, to Sen. Jacob K. Javits).
Because the costs of consent decree proceedings have been minimal, the potential cost from dismissal proceedings is insignificant. Second, as the APPA's legislative history indicates, the question of resource allocation is clearly part of a court's public interest determination. If it becomes necessary to shift resources from one case to another, a reviewing court will recognize the public interest in doing so. The Justice Department itself, on the other hand, may allocate its resources on the basis of a narrower self-interest in bureaucratic objectives.

Third, despite the alternative of private enforcement actions, government actions remain beneficial to the extent they provide

146. Consent decrees represent a dominant percentage of terminated government antitrust actions. See supra note 4 and accompanying text.

147. The APPA has not forced the Antitrust Division to litigate a larger percentage of cases or inhibited the Division from initiating claims. Branfman, supra note 115, at 352-53. This is likely due to the deferential standard employed by most courts in reviewing consent decrees under the APPA. See supra note 13.

148. The public interest includes "compromises made for non-substantive reasons inherent in the process of settling cases through the consent decree procedure." 1974 H.R. REP., supra note 4, at 12, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6542. Therefore, "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 CONG. REC. 24,598 (1973) (statement of Sen. Tunney). See also 1973 S. REP., supra note 4, at 6-7.

149. See, e.g., United States v. Greater Blouse, Skirt & Neckwear Contractors Assoc., 228 F. Supp. 483 (S.D.N.Y. 1964), in which the court was considering a government motion to dismiss an indictment under Rule 48(a):

Other factors come into play. A trial of ten or more weeks involves a considerable expenditure of effort and money. Apart from the actual period of trial, months of intensive preparation and the exclusive services of a substantial staff of attorneys and others would be required. To be sure, the heavy cost of enforcement of law in terms of manpower and money is of no consequence when necessary to insure the integrity of our laws, but needless expenditure of public funds is not justified.

(footnote omitted). Id. at 489. This Note advocates a judicial public interest standard for voluntary dismissals that takes into account the Antitrust Division's available resources. See infra Part V.


[There is a] bureaucratic tendency to establish a good paper record of enforcement, most easily attainable through numerous court decrees, and sometimes achieved at the expense of the substance of compliance. [Also], an agency may be affected with an institutional myopia: its decisions concerning its resource-allocation, while perhaps rational from a narrow agency perspective, fail to take into account a broader public interest. This latter possibility is especially likely where the governing statute may be enforced through private as well as agency action, and agency attention to all factors, including the potential squandering of judicial resources through numerous private suits, would dictate a different result in any given case.
a collateral estoppel effect for subsequent private actions. Under section 5(a) of the Clayton Act, a litigated judgment or decree in favor of the government provides a private plaintiff with prima facie evidence against a defendant. Finally, despite the Justice Department's claim to the contrary, judicial control over the power of dismissal is not tantamount to control over the power to initiate actions. The filing of a complaint is a significant act representing a major commitment of resources. Judicial review over the Antitrust Division's power to reverse that commitment therefore differs from control over the government's investigatory power. A judicial public interest review in cases of voluntary dismissal would not impair the Antitrust Division's ability to allocate its substantial pre-litigation resources.

151. 15 U.S.C. § 16(a)(1982) provides in part:

A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws, as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto...

The issues raised by the application of this provision are discussed in P. Areeda & D. Turner, Antitrust Law § 324 (1978).


153. Id.

154. 1982 House Hearings, supra note 16, at 88: "A decision to dismiss a case... is thus tantamount to a decision not to bring a case at all." Id. (Justice Department's analysis of H.R. 6361).

155. The filing of a complaint is a significant act requiring a major decision by at least the head of the Antitrust Division, and often by higher officials in the Department of Justice. The filing of a complaint in the federal court is hardly an insignificant act: it tolls the statute of limitations; causes the defendants to formally gear up for actual litigation; and requires the courts to allocate resources to handle the case.


156. See Sullivan, supra note 15, at 947-48:

"[O]nce an action has been brought, a Division claim of need for untrammeled discretion is vastly weaker than it would be at the pre-litigation stage. Once the Division has brought an action, the range of questions that must be dealt with are [sic] much narrower than those about resources and priorities that were faced earlier. The investigation has been completed, the imponderables evaluated, the resource commitment made. The remaining questions are conventionally judicial in nature.

157. "[D]ecisions to dismiss cases are relatively rare compared with pre-complaint decisions not to institute investigations or to terminate investigations without prosecution." 1982 House Hearings, supra note 16, at 88 n.2 (Justice Department's analysis of H.R. 6361).
B. Resources and Impartiality of the Judiciary

Similar arguments exist with respect to the added burdens potentially imposed upon the federal courts. Judges typically lack expertise in antitrust law, and requiring a public interest assessment of the facts of a case prior to their full development at trial would exacerbate this problem. Yet judges should be more qualified to review dismissal proposals than settlement proposals. The question of whether sufficient evidence exists to bring a case to trial is more suited for judicial resolution than is the question of whether a consent decree provides an adequate remedy. In addition, the APPA provisions for expert testimony and amicus curiae intervention ensure the availability of requisite information for a court's public interest determination.

The more troublesome problem of a judge's impartiality in later proceedings could arise following a refusal to enter a stipulation of dismissal. Some have argued that such a refusal would destroy the subsequent impartiality of the tribunal. Absent a showing of personal bias or prejudice, however, participation

158. "[A]ntitrust litigation is very complex litigation. Most Federal judges serve a lifetime on the bench without trying one [antitrust] case and, consequently, they are really ignorant of the issues and even the law, to some extent, involved in antitrust cases." 1973 Senate Hearings, supra note 60, at 151 (testimony of Judge Skelly Wright).

159. "[T]he court, in assessing the public interest in light of collateral factors, will have to gauge the necessity of the relief in view of the available alternatives and their effects, both on the plaintiff's and the defendant's interests, and on the interests of others. And this is a kind of judgment that, on occasion, the court may feel unable to make without the full elucidation provided by trial." Carr, supra note 15, at 959. Indeed, "courts may feel reluctant to make the determinations . . . without at least some significant factual and legal reassurances." 1982 House Hearings, supra note 16, at 90 (Justice Department's analysis of H.R. 6361).

160. This is a major focus of judicial review of criminal dismissals under Rule 48(a). See supra note 133 and accompanying text. Sufficiency of the evidence should also be a primary focus of review of civil dismissals under an amended APPA. See infra Part V.

161. This is the primary focus of judicial review of consent decrees under the APPA. See supra notes 36-38 and accompanying text.

162. See supra note 12.


The integrity of the judicial process . . . requires that decisions by prosecutor and judge be independent of one another. Certainly, all would agree that a prosecutor placed on the bench should have nothing to do with decisions in cases that he instituted. Yet I think that requiring courts to second-guess a prosecutorial decision to dismiss a case would create an uncomfortably similar situation.

See also id. at 46 (exchange between Mr. Polk and Mr. Lipsky).

164. The federal recusal statute provides in part:

Whenever a party to any proceeding in a district court makes and files a timely
in previous hearings will not disqualify a judge from presiding over a case. Adverse rulings against a party in earlier hearings are also insufficient for disqualification. Most significantly, the apparent lack of complaints of judicial bias following refusals to enter criminal dismissals under Rule 48(a) suggests that a similar procedure in civil antitrust actions would not create problems of bias. If such problems did arise, of course, a judge could be replaced under the federal recusal statute.

C. Failure to Litigate and Potential Circumvention

Another problem that might arise following a judge’s refusal to enter a stipulation of dismissal is the government’s refusal to continue the litigation. The separation of powers doctrine dictates that a judge cannot compel the Antitrust Division to litigate and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

28 U.S.C. § 144 (1982)(emphasis added). Cf. 28 U.S.C. § 455 (1982), which requires a judge to disqualify himself where, inter alia, “he has a personal bias or prejudice concerning a party.” 28 U.S.C. § 455(b)(1) (1982) (emphasis added). These statutes “use similar language, and are intended to govern the same area of conduct, they have been construed in pari materia, and the test of the legal sufficiency of a motion for disqualification is the same under both statutes.” United States v. Kelley, 712 F.2d 884, 889 (1st Cir. 1983). See also In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 965 (5th Cir.), cert. denied, 449 U.S. 888 (1980).

165. “The Supreme Court has held, ‘The alleged bias and prejudice to be disqualifying must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge has learned from his participation in the case.’” In re International Business Machines Corp., 618 F.2d 923, 927 (2d Cir. 1980) (quoting United States v. Grinnell Corp., 384 U.S. 563, 583 (1966)). See also United States v. Kelley, 712 F.2d 884, 889 (1st Cir. 1983); In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 964 (5th Cir. 1980).

166. “[W]e cannot agree that adverse rulings by a judge can per se create the appearance of bias under section 455(a). A trial judge must be free to make rulings on the merits without the apprehension that if he makes a disproportionate number in favor of one litigant, he may have created the impression of bias.” In re International Business Machines Corp., 618 F.2d 923, 929 (2d Cir. 1980). See also Davis v. Fendler, 650 F.2d 1154, 1163 (9th Cir. 1981); In re Corrugated Container Antitrust Litigation, 614 F.2d 958, 964-66 (5th Cir. 1980).


169. For a discussion of the separation of powers issues arising from a judge’s initial ruling on a dismissal motion, see infra notes 176-205 and accompanying text.
gate a case. The judicial refusal to enter a voluntary dismissal could thus be circumvented by the Antitrust Division through a refusal to litigate followed by a Rule 41(b) involuntary dismissal.

It is unlikely, however, that such circumvention would occur under an amended APPA. Subsequent to a judge's refusal to dismiss a case, the Antitrust Division would probably obey the judicial order and continue the litigation. Yet assuming the Justice Department did refuse to litigate, the case could still be pursued by outside counsel—appointed either by the court or outside counsel-appointed either by the court or outside counsel appointed by the court.

170. See, e.g., United States v. Greater Blouse, Skirt & Neckwear Contractors Ass'n, 228 F. Supp. 483, 489-90 (S.D.N.Y. 1964). Although the court approved the government's application to dismiss under Fed. R. Crim. P. 48(a), it stated that when such motions are dismissed, courts are "without power to issue a mandamus or other order to compel prosecution of the indictment, since such a direction would invade the traditional separation of powers doctrine." Id. at 489. (footnote omitted).

171. Fed. R. Civ. P. 41(b) reads in part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him." The standard for a Rule 41(b) involuntary dismissal is a "clear record of delay or contumacious conduct" by the plaintiff. See, e.g., Martin-Trigona v. Morris, 627 F.2d 680, 682 (5th Cir. 1980); Von Poppenheim v. Portland Boxing and Wrestling Comm'n, 442 F.2d 1047, 1049 (9th Cir. 1971), cert. denied, 404 U.S. 1039 (1972). See generally 9 C. WRIGHT & A. MILLER, supra note 46, § 2369 n.70-71 and accompanying text. Assuming that the government could meet this standard by refusing to litigate following denial of a motion for dismissal, the defendant could successfully move for dismissal under Rule 41(b). Alternatively, the court could dismiss the action for want of prosecution without a motion from the defendant. Link v. Wabash Railroad Co., 370 U.S. 626, 629-32 (1926).

172. "[I]t is the Assistant Attorney General's responsibility under the law to take the instruction from the judge and carry it forward in a professional manner ... [and] I think, for example, if Mr. Baxter were instructed to go back to court and litigate [a] case that he would ... ." 1982 House Hearings, supra note 16, at 22 (testimony of Sen. Arlen Specter). See also Sullivan, supra note 15, at 948:

[T]here is no more reason to fear a judicial-executive confrontation upon judicial oversight of dismissals than upon judicial oversight of consent decrees. As Professor Goldstein has said, judges are not eager to appoint special prosecutors, nor are government attorneys eager to do battle with judges. In the routine case, the judge will be obeyed.

This is also the opinion of the Assistant Attorney General in charge of the Antitrust Division between 1972-76. Interview with Thomas E. Kauper, Professor, University of Michigan Law School, in Ann Arbor (Feb. 6, 1985). At least in the IBM litigation, such a response would not have been barred by problems of unenthusiastic counsel; the government trial staff disagreed with Baxter's decision to dismiss the case. See supra note 122.

173. "If the Assistant Attorney General does not [continue litigating upon judicial instruction to do so], special counsel can be appointed ... courts have inherent authority [to do so]." 1982 House Hearings, supra note 16, at 22 (testimony of Sen. Arlen Specter). In his 1982 congressional testimony, Sen. Specter noted a law review comment that he authored in 1955 supporting the appointment of private counsel by courts in order to continue prosecutions. The authority for such judicial appointments derives from either state statute or the "inherent powers" of a court to prevent injustice. See Comment, Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction, 65 Yale L.J. 209, 216-17 (1955). At least one federal court has exercised this inher-
by the Antitrust Division itself.\textsuperscript{174} Either voluntary compliance by the Justice Department or the appointment of outside counsel will eliminate the potential for circumvention under an amended APPA.

\textbf{D. Constitutional Objections to Extension of the APPA}

The primary objection to amending the APPA in order to apply its public interest provisions to voluntary dismissals is that such an amendment would be unconstitutional.\textsuperscript{175} This argument focuses upon two different considerations: the separation of powers between the executive and judicial branches of government, and the case or controversy requirement of Article III.

1. \textit{Separation of powers}— The power to enforce the antitrust laws is vested in the Attorney General,\textsuperscript{176} an executive officer, and this power is necessarily broad.\textsuperscript{177} This power includes the discretion to investigate possible antitrust violations\textsuperscript{178} and to file civil or criminal actions.\textsuperscript{179} Prosecutorial discretion also includes, some argue, the power to terminate an antitrust action through voluntary dismissal.\textsuperscript{180} Judicial review of executive deci-
sions to dismiss antitrust actions may therefore violate the traditional separation of powers between the three branches of government. 181

The separation of powers doctrine, however, requires something less than "a complete division of authority between the three branches [of government]." 182 In Nixon v. Administrator of General Services, 183 the Supreme Court declared a two-part test. First, an act of Congress must not unduly "[prevent] the Executive Branch from accomplishing its constitutionally assigned functions." 184 Second, if the potential for such infringement exists, it must then be determined "whether that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." 185 Analysis of the APPA's public interest provisions and their application to voluntary dismissals shows that such an application would not violate these two parts of the separation of powers test.

First, a judicial public interest review of voluntary dismissals would not prevent the Antitrust Division from performing its function of enforcing the antitrust laws. Judicial review of decisions to dismiss would leave the Antitrust Division with a great degree of prosecutorial discretion in further litigation. 186 In addition, a judicial order to continue litigation in a case would not unduly strain the enforcement resources required for the prosecu-


184. Id. at 443 (citing United States v. Nixon, 418 U.S. 683, 711-12 (1974)).


186. For example, the Antitrust Division could choose between continuing the litigation on a different theory, attempting to settle the case via consent decree, or attempting another voluntary dismissal at a later date.
Voluntary Dismissals constitute a small percentage of terminated government antitrust suits, whereas consent decrees constitute a large percentage. Judicial review of the dismissal process is therefore less of a potential infringement on the Antitrust Division than is the current judicial review of the settlement process. Because the existing APPA procedures have not significantly infringed on the Antitrust Division's ability to successfully litigate or settle cases, similar procedures in dismissal cases would not impose significant burdens on the Antitrust Division.

The existing APPA judicial review procedures have been upheld on constitutional grounds. In Maryland v. United States, the Supreme Court summarily affirmed the consent decree in the AT&T divestiture. Three Justices dissented, asserting that Judge Greene's public interest review violated the separation of powers doctrine. The majority, however, ratified the APPA's public interest provisions. Judicial review of consent decree settlements is therefore valid. Again, because judicial review of voluntary dismissals would impose a lesser infringe-

187. See supra notes 138-57 and accompanying text.
188. See supra note 4 and accompanying text.
189. See supra note 147.
191. Id.
192. Justice Rehnquist, joined by Chief Justice Burger and Justice White, dissented from the summary affirmance. 460 U.S. at 1001-06.
193.

The question whether to prosecute a lawsuit is a question of the execution of the laws, which is committed to the Executive by Art. II. There is no standard by which the benefits to the public from a “better” settlement of a lawsuit than the Justice Department has negotiated can be balanced against the risk of an adverse decision, the need for a speedy resolution of the case, the benefits obtained in the settlement, and the availability of the Department's resources for other cases. How is a court to decide whether a better settlement in a case involving one industry is more important to the public than the benefits that might be gained by immediately working on an antitrust problem in another industry? Finally, the decision requires an evaluation of an initial policy decision—whether the benefits that might be obtained in a lawsuit are worth the risks and costs—that is clearly for nonjudicial discretion.

194. Although the Justice Department initially opposed the APPA, in part on constitutional grounds, see 1973 Senate Hearings, supra note 60, at 91-92 (statement of Asst. Att'y Gen. Kauper), the Antitrust Division today “does not question the constitutionality of the Tunney Act when construed literally to limit oversight to instances where the Division settles by consent decree.” Sullivan, supra note 15, at 946.
ment on the Antitrust Division,195 an amended APPA applying to dismissals should also be found constitutionally valid.

Second, assuming the potential for disruption of the Antitrust Division's enforcement activity exists, this impact could be justified by the overriding importance of protecting the public interest in antitrust enforcement procedures. As the APPA's legislative history indicates, vital public interest concerns are inherent in government antitrust suits.196 These concerns are as significant in cases of voluntary dismissal as in cases of consent decree settlement.197 Protection of the public interest is just as much an "overriding need"198 in dismissals as in settlements. Thus, the fact that the APPA is constitutionally valid is again strong evidence that applying the Act to voluntary dismissals would also be constitutional. Similar to the judicial review of consent decrees, judicial review of voluntary dismissals would meet both parts of the separation of powers test set forth in Nixon.199

In addition to these general standards, Federal Rule of Criminal Procedure 48(a) specifically demonstrates the validity of judicial review of executive decisions to dismiss cases. Rule 48(a) requires judicial approval of decisions to dismiss criminal indictments200 and has been upheld by several courts on constitutional grounds.201 It does not violate the separation of powers doctrine.202 As previously noted, differences between criminal and

195.  See supra notes 146-47 and accompanying text.
197.  See supra notes 86-106 and accompanying text.
199.  See id. See also Sullivan, supra note 15, at 947:
   However, separation of powers does not involve looking only at the interest of the executive and the interest of the courts. A process of triangulation is involved. One must consider also the interest of Congress. Tunney Act procedures are not directed merely at seeing whether decree supervision will be unduly burdensome to the court . . . . Rather, [they respond] to the congressional concern that the Division might settle cases badly. The court must determine whether the settlement is in the public interest. As to this matter, the distinction between a consent decree and a consent dismissal—significant perhaps for other purposes—becomes a mere matter of form. The congressional interest is as great whether the settlement is executed by a consent dismissal or a consent decree.
200.  See supra note 127.
202.  "The effect of Rule 48(a) necessarily turns what was once solely the prerogative of the executive into a shared responsibility between the executive and judicial branches of government . . . . The government's contention that the court is constitutionally con-
civil cases probably justify a greater degree of judicial involvement in criminal dismissals.\textsuperscript{203} The similarities, however, justify a judicial review procedure similar to Rule 48(a) in civil antitrust dismissals.\textsuperscript{204} Because Rule 48(a) does not violate the separation of powers doctrine, a comparable procedure in civil antitrust dismissals should also be valid.\textsuperscript{205}

2. \textit{Case or controversy requirement}— The case or controversy requirement of Article III\textsuperscript{206} restricts the scope of justiciable questions to those presenting a substantial conflict between two adversaries.\textsuperscript{207} Without a "definite and concrete"\textsuperscript{208} dispute, no case or controversy exists requiring judicial resolution. Those opposing the application of the APPA to voluntary dismissals assert that when the Antitrust Division dismisses a complaint against a defendant, no substantial controversy exists between the parties and judicial review of the dismissal constitutes an advisory opinion.\textsuperscript{209} Because the case or controversy requirement

strained to grant leave to dismiss the indictment is without merit." United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 75 F.R.D. 473, 475 (S.D.N.Y. 1977). In fact, one court concluded that Rule 48(a) did not violate the separation of powers doctrine in light of the \textit{Nixon} case:

That authoritative reasoning should be our guide here. We think the rule should and can be construed to preserve the essential judicial function of protecting the public interest in the evenhanded administration of criminal justice without encroaching on the primary duty of the Executive to take care that the laws are faithfully executed.

\textit{United States v. Cowan}, 524 F.2d 504, 512-13 (5th Cir. 1975).

\textsuperscript{203} \textit{See supra} note 130 and accompanying text.

\textsuperscript{204} \textit{See supra} notes 127-37 and accompanying text.

\textsuperscript{205} "These thoughtful observations strongly suggest to me that either legislation or an amendment of Rule 41 of the Federal Rules of Civil Procedure to contain provisions on the civil side parallel to those contained in Rule 48(a) of the Federal Rules of Criminal Procedure, would be constitutionally valid." Lasker, \textit{supra} note 15, at 942 (citing \textit{United States v. Cowan}, 524 F.2d 504, 512-13 (5th Cir. 1975)).

\textsuperscript{206} U.S. Const. art. III, § 2, cl. 1:

\textit{The judicial Power shall extend to all Cases, in Law and Equity, arising under the Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; ... to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to controversies between two or more States; ...}

\textsuperscript{207} "The basic inquiry is whether the 'conflicting contentions of the parties ... present a real, substantial controversy between the parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.'" Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)(citations omitted). \textit{See also Flast v. Cohen}, 392 U.S. 83, 95 (1968): Justiciability limits "the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."

\textsuperscript{208} Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979).

\textsuperscript{209} McDavid, \textit{supra} note 15, at 913-14: "Once the complaint has been dismissed, there is no longer a real or substantial controversy presented in an adversary context. The continuation of the litigation in a non-adversary form would involve an advisory opinion."
limits the congressional power to control federal court jurisdiction,\textsuperscript{210} some argue that amending the APPA to require a judicial public interest review prior to the entry of a stipulation of dismissal would be unconstitutional.

Like the separation of powers doctrine, however, the case or controversy requirement is a flexible principle not "susceptible to scientific verification."\textsuperscript{211} Questions of justiciability involve both "constitutional requirements and policy considerations."\textsuperscript{212} The strong policy considerations in favor of increasing the judicial role in voluntary dismissals\textsuperscript{213} are therefore relevant and support the constitutionality of an amended APPA applying to dismissals.

The flexibility of the case or controversy requirement is apparent in both civil and criminal dismissals. Federal Rule of Civil Procedure 41(a)(1)\textsuperscript{214} demonstrates the limitations on a plaintiff's ability to dismiss a case without the order of a court. Rule 23(e),\textsuperscript{215} Rule 66,\textsuperscript{216} and two statutory exemptions\textsuperscript{217} to Rule 41(a)(1) all empower courts with continuing jurisdiction subsequent to a plaintiff's dismissal of charges against a defendant. These provisions protect the parties and the public from unjust dismissals.\textsuperscript{218} Courts have found these limitations on

\textsuperscript{210} 13 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3526 (1984). Congress cannot, therefore, grant jurisdiction over moot cases or advisory opinions.

\textsuperscript{211} "Justiciability is . . . not a legal concept with a fixed content or susceptible to scientific verification. Its utilization is the resultant of many subtle pressures . . . ." Poe v. Ullman, 367 U.S. 497, 508 (1961)(Frankfurter, J., concurring).

\textsuperscript{212} "Justiciability is itself a concept of uncertain meaning and scope . . . [particularly because it] has become a blend of constitutional requirements and policy considerations." Flast v. Cohen, 392 U.S. 83, 95-97 (1968).

\textsuperscript{213} See generally supra Part III.

\textsuperscript{214} See supra note 14.

\textsuperscript{215} See supra note 49.

\textsuperscript{216} See supra note 50.

\textsuperscript{217} See supra note 52.

\textsuperscript{218} "The purposes of Rule 23(e) are to discourage the use of the class action device to secure an unjust private settlement, and to protect the absent class members against prejudice from discontinuance." Larkin Gen. Hosp. Ltd. v. American Tel. & Tel. Co., 93 F.R.D. 497, 500 (E.D. Pa. 1982)(citing 3 H. NEWBERG, CLASS ACTIONS § 4910, at 402 (1977)). Rule 23(e) is thus designed to protect other plaintiffs' interests in the litigation. See also 1982 House Hearings, supra note 16, at 45-46 (statement of Asst. Atty Gen. Lipsky). The purpose of Rule 66's requirement of judicial approval of dismissals is to protect the court's investment of time and effort in administering the property involved in a case. 12 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 2981 (1973). The provisions of 31 U.S.C. § 3730(b)(1)(1982), supra note 52, are "intended to discourage the repeated bringing of suits which are without merit but which might be brought merely to satisfy complainant's . . . desire for revenge, and also to discourage private compromise settlements." United States ex. rel. Laughlin v. Eicher, 56 F. Supp. 972, 973 (D.D.C. 1944).
Voluntary Dismissals

In addition, Federal Rule of Criminal Procedure 48(a) provides a judicial review procedure in criminal cases that has also been upheld. Therefore, despite prohibitions against ruling on the merits of a dismissed case, there are few limitations on a court's ability to rule solely on questions concerning the public interests in maintaining an action. Applying the APPA's public interest provisions to voluntary dismissals would not violate the case or controversy requirement.

V. PROPOSED AMENDMENT TO THE APPA

A BILL

To amend the Clayton Act to require judicial approval of voluntary dismissals in cases brought by or on behalf of the United States under the antitrust laws.

SEC. 1. Section 5(b)-(g) of the Clayton Act (15 U.S.C. § 16(b)-(g)(1982)) is amended by striking out "consent judgment" and "judgment" and inserting in lieu thereof "consent judgment or voluntary dismissal".

SEC. 2. Section 5(e) of the Clayton Act (15 U.S.C. § 16(e)(1982)) is amended—
(1) by striking "For the" and all that follows through


220. See supra note 127.

221. See supra note 201.

222. This is the crux of the case or controversy requirement. See, e.g., 13A C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE & PROCEDURE § 3533.2 (1982): "Mootness problems arise from a wide array of circumstances in which the plaintiff has secured the requested relief by some means other than final decision of the litigation, or has abandoned the quest ... . The common question in all of these cases is whether any need remains to decide the merits." (emphasis added). Because the APPA public interest provisions should not require a judicial determination of the merits of a dismissed case, but only a consideration of the sufficiency of evidence against a defendant, see infra Part V, the case or controversy objections are not directly relevant.
"may consider—", and inserting in lieu thereof "For the purpose of such a determination in the entering of a consent judgment, the court may consider—".

(2) by inserting after subsection (e)(2) the following paragraph:

"For the purpose of such a determination in the entering of a voluntary dismissal, the court may consider the sufficiency of evidence against the defendant, the available enforcement resources of the government, and the overall public impact of the defendant's alleged antitrust violations."

Comment

Because the rationale for judicial review of voluntary dismissals reflects the purposes underlying judicial review provisions of the APPA and Federal Rule of Criminal Procedure 48(a), the judicial review standard under an amended APPA applying to dismissals should resemble both of these provisions. Similar to the Rule 48(a) standard, the sufficiency of evidence against a defendant should be a primary consideration. If sufficient evidence exists to proceed to trial, the public interest should normally require the rejection of a proposed dismissal. But this should not be the sole factor. A reviewing court should also weigh the enforcement resources of the Antitrust Division against the overall importance of the case to the public. These three factors reflect all affected interests: those of the defendant, the government, and the public. Section 16(f) should be applied to dismissals as it is to consent decrees in order to provide courts with sufficient information concerning these relevant factors. The propriety of applying other APPA provisions to volun-

223. See supra notes 79-106, 127-37 and accompanying text.
224. See supra note 133 and accompanying text.
225. See supra notes 138-57 and accompanying text.
226. The overall public importance of the case should be defined in terms of harm to the public resulting from the defendant's alleged antitrust violations.
227. This three-factor approach is similar to the approach of Judge Edelstein in United States v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 428 F. Supp. 114 (S.D.N.Y. 1977). In a Rule 48(a) motion for entry of dismissal, the government did not contest the sufficiency of evidence against the defendant. In denying the government's motion, however, the court did not rest solely on this ground. The court also discussed the public impact of the defendant's antitrust violations and the public expense involved in continuing the litigation. Id. at 116-17.
228. See supra note 12.
tary dismissals is not directly considered by this amendment.\footnote{229} Legislation substantially similar to this amendment was introduced by Representative Peter W. Rodino (D-New Jersey) in both the 97th and 98th Congresses.\footnote{230} Both the 1982 bill and the 1983 bill would have applied the APPA public interest provisions to voluntary dismissals as well as to consent decree proposals.\footnote{231} Both bills proposed a stringent public interest standard for dismissals, requiring a district court to enter a stipulation of dismissal unless "there is substantial reason to believe that the United States would prevail on the merits of any of the claims in [the] action."\footnote{232} Yet if the court did refuse to enter the stipulation, both bills preserved the Attorney General's final authority to enter the dismissal subsequent to filing a reevaluation statement.\footnote{233} These provisions apparently reflect constitutional concerns regarding the proposal.\footnote{234}

The proposed amendment thus differs from these bills in two significant respects. First, the three factor public interest standard focuses on more than the sufficiency of evidence against a defendant and the government's chances of prevailing on any claim in the action. Instead, the gravity of the defendant's alleged violations and the strain on the Antitrust Division's resources from proceeding with the litigation are also considered.\footnote{236} Second, the proposed amendment mandates judicial

\footnote{229} Other APPA provisions are considered only to the extent that "consent judgment" is replaced with "consent judgment or voluntary dismissal." This change provides for the general applicability of the Act to voluntary dismissals.

\footnote{230} See supra note 23. These bills were never adopted.

\footnote{231} "Any proposed stipulation submitted by the United States for entry to terminate any civil action . . . under the antitrust laws shall be filed with the district court before which such action is pending . . . ." H.R. 2244, supra note 23, at 872 (emphasis added); H.R. 6361, supra note 23, at 4-5 (emphasis added).

\footnote{232} H.R. 2244, supra note 23, at 876; H.R. 6361, supra note 23, at 8. Such a standard reflects a narrow focus on the sufficiency of evidence against a defendant, and would apparently require the government to continue litigating in pursuit of insignificant claims, irrespective of the resulting costs.

\footnote{233} [If the court finds that the entry of the stipulation of dismissal is against the public interest],

the district court shall order the Attorney General to reevaluate the substance of the stipulation and to file a statement describing the results of the reevaluation . . . . If the Attorney General determines that the United States will not request the withdrawal of the stipulation . . . then the district court shall enter the stipulation.

H.R. 2244, supra note 23, at 878; H.R. 6361, supra note 23, at 11.

\footnote{234} The constitutional arguments regarding judicial review of voluntary dismissals are examined supra notes 175-222 and accompanying text.

\footnote{235} Proposed Amendment, Sec. 2(2). This language would also avoid potential problems with the word "any" in H.R. 2244 and H.R. 6361. Both bills seemed to mandate the continuance of a suit if the government has a good chance of winning a trivial claim in the action, regardless of the resulting resource costs.
approval prior to the entry of a stipulation of dismissal. Under the 1982 and 1983 bills, the Attorney General retained the constitutional authority to dismiss an antitrust action despite a judge’s objections. Because a mandatory judicial approval provision would be constitutional,\(^{236}\) this retention of executive power is unnecessary.\(^{237}\)

**CONCLUSION**

The APPA does not currently apply to voluntary dismissals of civil antitrust actions. Congress intended to limit the Act to consent decree settlements. This is apparent from the language of the statute itself, its legislative history, and recent case law interpretation. Nevertheless, applying the APPA to voluntary dismissals would be consistent with the underlying purposes and policy of the APPA and with the judicial review of criminal antitrust dismissals under Federal Rule of Criminal Procedure 48(a). Congress should therefore amend the APPA to require a judicial public interest determination prior to the entry of a voluntary dismissal in public, civil antitrust actions. Judicial review should focus upon the sufficiency of evidence against a defendant, the available enforcement resources of the Antitrust Division, and the overall public impact of the defendant’s alleged antitrust violations. Such an amendment would not unduly strain the resources of the Antitrust Division or the judiciary. Despite constitutional objections, such an amendment would not violate either the separation of powers doctrine or the case or controversy requirement.

—Jon B. Jacobs

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236. *See supra* notes 175-222 and accompanying text.
237. Retention of executive power to dismiss a case would also be undesirable because it would create problems of potential circumvention of the Act’s judicial public interest provisions.