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Modifications of Antitrust Consent Decrees: Over a Double Barrel

INTRODUCTION

A court that enters an initial antitrust consent decree¹ has the inherent power to modify² that decree.³ This power derives from the fact that a consent decree is an injunction, over which a court has continuing equity jurisdiction.⁴ Motions requesting modifications of this decree can be made by either the defendant or the Justice Department.⁵ Often one party will file a motion to modify, to which the

1. An antitrust consent decree is "an order of the court agreed upon by representatives of the Attorney General . . . in proceedings instituted under the Sherman Act, the Clayton Act, or related statutes." ANTITRUST SUBCOMM., COMM. ON THE JUDICIARY, 86TH CONG., 1ST SESS., REPORT ON THE CONSENT DECREE PROGRAM OF THE DEPT. OF JUSTICE, ix (Comm. Print 1959) [hereinafter cited as 1959 REPORT]. Consent decrees are attractive to antitrust defendants because § 5(a) of the Clayton Act states that a consent decree "entered before any testimony has been taken" cannot be used as evidence in a private treble damage action. 15 U.S.C. § 16 (a) (1982). Conversely, a decree entered through litigation "shall be prima facie evidence against [the] defendant in any [private] action" against that defendant. 15 U.S.C. § 16(a) (1982).

The Justice Department also favors consent decrees because they allow the Department to settle a case quickly and to direct its manpower to the prosecution of the most serious antitrust violations. The Department settles a "very high percentage" of its antitrust cases through consent decrees. *The Antitrust Procedures and Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 93d Cong., 1st Sess. 2 (1973) [hereinafter cited as *Senate Hearings*]. Between 1955 and 1967, consent decrees were entered in 81% of the Department's antitrust actions. *Id.* at 7.

For a discussion of the entry of consent decrees, see Note, *The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974*, 82 MICH. L. REV. 153 (1983).

2. Unless otherwise noted, "modification" refers to modification or termination of extant antitrust consent decrees. Some of the cases and literature use the term "modify" in reference to modification of an initial proposal for a consent decree. This Note refers to such situations as "amendments."

3. *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932).

4. "We are not doubtful of the power of a court of equity to modify an injunction in adaptation to changed conditions though it was entered by consent. . . . A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *United States v. Swift & Co.*, 286 U.S. 106, 114 (1932); see also *System Fedn. v. Wright*, 364 U.S. 642, 647 (1961) ("The source of the power to modify is of course the fact that an injunction often requires continuing supervision by the issuing court and always a continuing willingness to apply its powers and processes on behalf of the party who obtained that equitable relief."); Handler, *Twenty-Fourth Annual Antitrust Review*, 72 COLUM. L. REV. 1, 24 (1972) (The power to modify comes from

the historic role of the Courts of Chancery and from the unique nature of injunctive relief itself. Traditionally, the courts have recognized that because an injunctive proceeding is "of a continuing nature," and because the power of a court of equity to enforce injunctions and to punish for their violation "continues for all time," there must also exist a correlative power to refuse to punish, and to modify or vacate injunctions. . . . (footnotes omitted)).

5. In the case of government-filed antitrust suits, the Justice Department is the acting plaintiff. This Note will use "Justice Department" and "government" interchangeably.

other will consent.⁶ On occasion, however, the nonmoving party will withhold its consent.⁷ The standard for modification in contested cases is different and significantly more difficult to meet than the standard in consented-to cases.⁸

In 1974, Congress passed the Antitrust Procedures and Penalties Act⁹ ("APPA" or the "Act"). The APPA requires that the government and the defendant follow certain procedures¹⁰ before a court may consider an initial consent decree. After these procedures have been complied with, the court must make an independent public interest determination before entering the decree.¹¹ There is some ques-

6. In recent years, the Justice Department has taken an active role in modifying consent decrees. In a 1984 press release, the Department announced a desire to modify decrees that it feels "may no longer be in the public interest." United States Dept. of Justice Release at 2 (Apr. 27, 1984). The release invited any defendants "who believe their judgments ought to be modified or terminated" to contact the division, noting that since 1981 "some 400 outstanding judgments have been reviewed for possible termination or modification." *Id.* at 2-3.

A Justice Department official, in an interview reported in 1981 ANTITRUST & TRADE REG. REP. (BNA) No. 1032, at A-16 (Sept. 24, 1981), explained the Department's position on extant consent decrees and noted that "Justice plans to look with suspicion on decrees over 10 years old. 'After 10 years, a decree is either going to work or it is not going to work.'" The official estimated that about 1,000 decrees were more than 10 years old. *Id.* (quoting Jeffrey I. Zuckerman, Special Assistant, Antitrust Division of the Justice Dept.).

7. See, e.g., *United States v. Radio Corp. of Am.*, 46 F. Supp. 654 (D. Del. 1942) (defendant contested government attempt to vacate decree), *appeal dismissed*, 318 U.S. 796 (1943).

8. In contested cases, at least where the defendant seeks modification, the stringent *Swift* standard applies. "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). For a fuller description of contested modifications, see notes 42-58 *infra* and accompanying text.

In consented-to cases, the courts have been fairly deferential to the parties. In most cases, the court will follow the Justice Department's lead and modify a decree in accordance with the Department's wishes. See, e.g., *United States v. Aerofin Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,598 (S.D.N.Y.); *United States v. First Natl. City Bank*, 1978-2 Trade Cas. (CCH) ¶ 62,223 (S.D.N.Y.); *United States v. United Fruit Co.*, 1978-1 Trade Cas. (CCH) ¶ 62,001 (E.D. La.). See also Zimmerman, *The Antitrust Division's Decree Review and Private Litigation Programs*, 51 ANTITRUST L.J. 105, 113 (1982) (Courts generally approve consented-to modifications without significant comment.); 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 n.71 (1977) ("Where the parties have agreed to modification, judicial approval tends to be *pro forma*."); notes 59-63 *infra* and accompanying text.

9. 15 U.S.C. § 16(b)-(h) (1982) (also called the "Tunney Act").

10. The Act makes the government responsible for evaluating the competitive act and notifying the public of the proposed decree. The government must then accept public comment for 60 days.

For a description of the Justice Department's current procedures, see ABA ANTITRUST SECTION, ANTITRUST CONSENT DECREE MANUAL (1979).

11. The APPA provides that:

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

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

(2) the impact of entry of such judgment upon the public generally and individuals alleg-

tion, however, whether the Act's requirements must be followed in cases in which a modification of a consent decree is sought,¹² or whether these requirements serve merely as a guide to such modifications.

This Note will attempt to determine the correct standard of review for all modifications of existing consent decrees. Part I. A. examines the current standards for modifications of consent decrees. It concludes that the APPA does not apply to such orders. Part I. B. then examines the differing standards that are currently applied to defendant-initiated modification motions without the government's consent, government-initiated modification motions without the defendant's consent, and consented-to modifications. Part II argues that these varying standards have little justification since the same substantive concerns exist in all modification cases. Part III explores the two major concerns — (1) the public interest and (2) the integrity of judicial orders — and urges courts to evaluate modification motions in light of these concerns. Part IV contends that courts making decisions under this "two-prong standard" should give deference to the government's view of the modification's propriety. The Note concludes by illustrating how courts should apply this double-barrel analysis to modification requests.

I. CURRENT JUDICIAL STANDARDS FOR MODIFICATIONS OF CONSENT DECREES

Since the passage of the APPA,¹³ the standards for modifications

ing 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.

15 U.S.C. § 16(e) (1982).

12. See notes 13-41 *infra* and accompanying text.

13. Congress adopted the APPA after years of negative publicity surrounding consent decrees. In 1959, the House antitrust subcommittee issued a report severely criticizing the Justice Department's use of consent decrees. 1959 REPORT, *supra* note 1. The report was largely inspired by the events surrounding *United States v. Western Elec. Co.*, 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J.). There, a consent decree was entered amidst accusations of collusion between the Justice Department and AT&T. The subcommittee twice requested the AT&T files, but the Attorney General refused, claiming that the files were confidential and could not, in the interests of the case, be disclosed. 1959 REPORT, *supra* note 1, at xi. The subcommittee, however, was not persuaded:

The extent to which the Department of Justice went to withhold information from the committee in this investigation is unparalleled in the committee's experience. The Department's attitude implied that the reluctance to provide information to the committee resulted from a desire to cover up those facts which the Department considered to be embarrassing.

Id. at 13.

After a lengthy examination of the *Western Electric* case (and of *United States v. Atlantic Ref. Co.*, No. 14060 (D.D.C. Dec. 23, 1941), *vacated*, No. 14060 (D.D.C. Dec. 13, 1982)), the subcommittee concluded that "[t]he element of secrecy that surrounds the entire consent decree program is contrary to the general policy established by Congress . . . that antitrust enforcement proceedings shall be public." 1959 REPORT, *supra* note 1, at 304. The subcommittee's recommendation was that the "Department of Justice . . . should provide notice to the public [of the proposed consent decree and establish] a waiting period after there has been agreement between the Government and the defendant." *Id.* The Justice Department responded by implementing a

of consent decrees have been unclear.¹⁴ Most courts have not discussed whether the Act applies to modifications. A few courts seem to be avoiding the issue.¹⁵ However, at least one court,¹⁶ and arguably a second,¹⁷ have held that the APPA *does* apply to modifications of existing consent decrees.

This section argues that both the plain language and the legislative history of the APPA suggest that the Act does not apply to modifications of consent decrees. In addition, this section contends that different standards currently apply to the different types of modifications.

A. *Applicability of the APPA*

The only case expressly holding that the APPA does apply to modifications is *United States v. Motor Vehicle Manufacturers Association*.¹⁸ However, the district court offered no reasons for why the APPA should apply in this case. Instead, it merely mandated, in a single sentence, that the parties comply with the Act.¹⁹ In so doing,

30-day waiting period between government/defendant consent and judicial entry of the decree during which the public could comment on the proposed decree. See *Senate Hearings*, *supra* note 1, at 2.

In 1972, Congress again became dissatisfied with the Justice Department's consent decree program. After extensive hearings — citing the same issues as were explored in the 1959 Report — Congress passed the APPA. The Act addressed Congress' primary concerns by requiring the Justice Department, before obtaining a consent decree, to: (1) issue a competitive impact statement (CIS), (2) publish notice of the proposed consent decree in the *Federal Register* and newspapers of general circulation, and (3) accept — for 60 days before entry — public comments. The court, in turn, is required to make a public interest determination before entering the decree. 15 U.S.C. § 16(b)-(h) (1982). The Act explicitly applies only to the initial entry of a consent decree, see notes 28-30 *infra*, and contains no reference to modifications.

For a more thorough inquiry into the APPA and the initial construction of consent decrees, see Branfman, *Antitrust consent decrees — a review and evaluation of the first seven years under the Antitrust Procedures and Penalties Act*, 27 ANTITRUST BULL. 303 (1982); Kalodner, *Consent Decrees as an Antitrust Enforcement Device*, 23 ANTITRUST BULL. 277 (1978); Note, *supra* note 8; Note, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility With Executive Discretion*, 35 HASTINGS L.J. 133 (1983); Note, *supra* note 1.

14. See generally Note, *supra* note 1; Note, *supra* note 8; Note, *Flexibility and Finality in Antitrust Consent Decrees*, 80 HARV. L. REV. 1303 (1967) [hereinafter cited as Note, *Flexibility and Finality*].

15. See, e.g., *United States v. General Motors Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,614, at 69,093 (N.D. Ill.) ("In the instance of a modification of a consent decree, [the APPA] may or may not [apply]; but fortunately for me, I don't have to decide that in this instance. [However, i]n the instance of termination or vacation of a decree it is my conclusion that it does not."); *American Express Co. v. United States Dept. of Justice*, 453 F. Supp. 47 (S.D.N.Y. 1978) (*American Express* argued that "the APPA is as applicable to a 'consented-to motion to vacate or modify an existing consent decree' as it is to a 'proposal for a consent decree'"; the court held that the issue was not properly before it.) (quoting Plaintiff's Reply Memorandum at 3).

16. *United States v. Motor Vehicle Mfrs. Assn.*, 1981-2 Trade Cas. (CCH) ¶ 64,370 (C.D. Cal.). The Court held that the APPA did apply to modification of an existing consent decree but did not explain the reasons underlying its decision.

17. See *United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982) (discussed at notes 21-26 *infra*), *affd. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (mem.).

18. 1981-2 Trade Cas. (CCH) ¶ 64,370 (D.D.C.).

19. "[T]he parties hereto shall comply with the provisions of the Antitrust Procedures and

the court ignored a substantial body of cases that have utilized the APPA's public interest standard as a guide but have stopped short of holding that the actual requirements of the Act apply to modifications.²⁰

A series of decisions in the government's antitrust suit against AT&T (*United States v. AT&T*)²¹ also suggests that the APPA applies to modifications. In particular, Federal District Judge Greene, the author of several of these decisions,²² has indicated that the APPA should apply to *consented-to* modifications. Although Judge Greene was never required to decide whether the APPA applies to modifications because the parties before him agreed to follow the Act, his language suggests that he would require parties modifying consent decrees to comply with APPA procedures.²³

Judge Greene's opinions were, unfortunately, confused. Although the action was clearly one involving a modification of an existing decree, he did not make this clear. Indeed, Greene obscured the difference between a modification and an *initial* proposal. For instance, when he certified the case for direct appeal to the Supreme Court,²⁴ Greene stated that one of the issues presented by the case was "the extent of the power of a district court to require modifications of a

Penalties Act as therein provided before the modified final judgment be presented to the court for approval." 1981-2 Trade Cas. (CCH) ¶ 64,370, at 74,704.

20. See note 59 *infra*.

21. There are a number of cases entitled "*United States v. AT&T*," most of which are connected and many of which this Note will examine.

22. The original AT&T action began in 1949 when the government brought a civil antitrust action. The action led to a 1956 consent decree in the District Court of New Jersey. The government then filed a new action against AT&T in 1974. On January 10, 1982, the government and the defendant agreed to settle the case with a modification of the 1956 decree. That modification was approved by the New Jersey court the very next day. However, before filing the approved modification, the New Jersey court transferred the matter to the District Court for the District of Columbia (where Judge Greene assumed control of the case). For a good description of the case's history, see *United States v. AT&T*, 522 F. Supp. 131, 135-40 (D.D.C. 1982), *affid. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (mem.).

23. *United States v. AT&T*, 1982-1 Trade Cas. (CCH) ¶ 64,476 (D.D.C.). In this particular opinion, Judge Greene allowed the parties to use the APPA, but he did not hold whether it applied. In a discussion with the counsel for both sides, Judge Greene argued that the reasons for passing the APPA seemed applicable to modifications. And, he said, "[I]t appears to me now that the Tunney Act procedures apply." *United States v. AT&T*, 1982-1 Trade Cas. (CCH) ¶ 64,465, at 72,611 (D.D.C.). Also, in a later opinion, Greene said "the parties here — and in similar antitrust actions — could subvert the expressed will of Congress by a mere act of labeling." *United States v. AT&T*, 552 F. Supp. 131, 145 (D.D.C. 1982), *affid. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (mem.).

See also Lasker [District Judge, S.D.N.Y.], *The Tunney Act Revisited: The Role of the Court*, 52 ANTITRUST L.J. 937, 939 (1983) ("[I]n my opinion there is no reason to believe that [the APPA] does not apply as much to the consent modification of a decree, as to the framing of the original decree.").

24. This case was certified for direct appeal under 15 U.S.C. §§ 28-29 (1982) (the Expediting Act).

consent decree in the exercise of its jurisdiction under" the APPA.²⁵ However, Greene later commented that "[b]efore the Court could approve the parties' *proposed* consent decree, it was *required* by the [APPA] . . . to determine whether the decree was 'in the public interest.'"²⁶ Thus, it is unclear whether Greene made the necessary distinction between initial (proposed) decrees and modifications.

Although judges in *Motor Vehicles* and *AT&T* would apply the APPA to modifications, neither the language of the Act nor the circumstances leading to its enactment warrant such a result. Rather, the proper conclusion drawn from examining the APPA and its history is that Congress did not intend the Act to apply to modifications.²⁷

The most obvious argument supporting this conclusion is that the APPA does not prescribe procedures for modifications of consent decrees.²⁸ The Act mandates that "[a]ny *proposal* for a consent judgment" must be filed with the district court.²⁹ The Act also indicates that "[b]efore entering any consent judgment *proposed* by the United States," the court must determine its impact on the public interest.³⁰ Nowhere in the Act, however, is there a provision governing procedures for the modification of existing decrees. Thus, two doctrines of statutory construction, the "plain meaning" rule and *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion of another"³¹), defeat the argument that the Act applies to modifications.

First, the plain meaning rule dictates that when the words of a statute are unambiguous, there is no room for extrastatutory interpre-

25. *United States v. Western Elec. Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,130, at 71,311-12 (D.D.C. 1982).

26. *United States v. AT&T*, 592 F. Supp. 846, 856 (D.D.C. 1984) (emphasis added).

27. The Justice Department is also of the opinion that the APPA does not apply to modifications: "We believe the decision [in *Motor Vehicles*] was incorrect because the APPA operates only when an initial consent decree is presented to a court for approval." *Consent Decree Termination — Licensing Agreements*, [1969-1983 Current Comment Transfer Binder] TRADE REG. REPT. (CCH) ¶ 50,443, at 56,017 n.4 (Jan. 10, 1983). Nevertheless, the Justice Department's current modification policy is to comply with the APPA at least in spirit. This "in spirit" compliance basically consists of filing a public impact statement and waiting for 60 days before proceeding further with the action. See *id.* at 56,017 ("[O]ver the years, the department has adopted the refined policy of consenting to motions to modify or terminate judgments in antitrust actions only on the condition that an appropriate effort be undertaken to notify potentially interested persons of the pendency of the motion."); see also Baker, *Antitrust in the Sunshine*, *United States Dept. of Justice Release* at 6-7 (Jan. 26, 1977) (mentioning that the Department issued a competitive impact statement in connection with the modification in *United States v. General Elec. Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,659 (E.D. Penn.)).

28. The APPA does, however, mention the need for the competitive impact statement (CIS) to include "a description of the procedures available for modification of such proposal." 15 U.S.C. § 16(b)(5) (1982).

29. 15 U.S.C. § 16(b) (1982) (emphasis added).

30. 15 U.S.C. § 16(e) (1982) (emphasis added).

31. BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

tation.³² The Supreme Court has indicated that "the meaning of the statutes must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms."³³ The language of the APPA is plain: it mandates certain procedures for consent decree proposals, but not for modifications of existing consent decrees.

A second maxim of statutory construction is that a statute that refers to enumerated items must be interpreted to exclude all items not mentioned.³⁴ The APPA's inclusion of only proposed consent decrees, therefore, provides strong support for the argument that the Act does not apply to modifications.³⁵ Thus, there are forceful arguments based solely on the language of the APPA for concluding that the Act does not apply to modifications of consent decrees.

The legislative history of the APPA lends further support to the contention that the Act does not apply to modifications. While neither the House³⁶ nor the Senate³⁷ hearings significantly discuss modifications,³⁸ (concentrating instead on the initial proposal and entry of consent decrees³⁹), there is evidence that Congress was aware of the distinction between modifications and initial proposals. The congressional drive to enact the APPA, for example, was based partly on a 1959 committee report that addressed consent decree modifications.⁴⁰ The fact that Congress addressed the issue of modifications

32. "If the language is plain, unambiguous, and uncontrolled by other parts of the act or other acts upon the same subject the court cannot give it a different meaning." 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 46.01, at 49 (1973).

33. *Caminetti v. United States*, 242 U.S. 470, 485 (1917). See also Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527, 534 (1947) ("An omission at the time of enactment, whether careless or calculated, cannot be judicially supplied however much later wisdom may recommend the inclusion.").

34. 2A C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 47.23, at 123 (1973).

35. But see *id.* at 132 ("[W]here an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, is a necessary incidental to power or right, or is the established custom, usage or practice, the maxim will be disregarded and an expanded meaning given.") (footnotes omitted).

36. *Consent Decree Bills: Hearings on H.R. 9203, H.R. 9947 and S. 782 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 93d Cong., 1st Sess. (1973) [hereinafter cited as *House Hearings*].

37. *Senate Hearings*, *supra* note 1.

38. The hearings do contain some scattered references to modifications. See, e.g., *Senate Hearings*, *supra* note 1, at 89 (statement of T. Kauper, Asst. Atty. Gen., Antitrust Div.) (The APPA could involve court inquiry into "the procedure and standards to be applied for modification of the judgment . . ."); *id.* at 463 (letter of R. Kleindienst, Acting Atty. Gen.) (describing the procedure used in *United States v. Swift & Co.*, 1971-1 Trade Cas. (CCH) ¶ 73,760 (N.D. Ill.), a case that involved a modification).

39. See, e.g., *House Hearings*, *supra* note 36, at 38 (The act "would require that the Justice Department file and publish, along with the consent decree, a 'public impact' statement which explains the nature and purpose of . . . the proposed consent decree . . .") (emphasis added).

40. A discussion of the modification of consent decrees can be found in 1959 REPORT, *supra* note 1, at 2-6. The House and Senate Hearings and the APPA were partly a result of this report. See note 13 *supra*.

but chose not to mention them in the Act is persuasive evidence that Congress did not intend to bring modifications under the APPA.⁴¹ *Motor Vehicle's* (and perhaps *AT&T's*) extension of the APPA to modifications is therefore not supported by either the wording of the statute or the relevant legislative history.

B. *Differing Standards*

Since the APPA does not apply to modifications, the relevant inquiry is what standards *do* guide the courts in entering consent decree modifications. In answering this question, it is important to take account of the varying situations in which courts are asked to consider proposed modifications. Consent decree modifications most often come about in situations in which both parties consent to the changes. Occasionally, however, a court will modify a decree when one party — either the Government or the defendant — does not consent to the modification. This subsection will survey the differing standards that courts presently apply to defendant-initiated motions without the government's consent, government-initiated motions without the defendant's consent, and proposals consented to by both parties.

1. *Defendant-Initiated Motions Without the Government's Consent: The Swift Doctrine*

In the leading case of *United States v. Swift & Co.*,⁴² the Supreme Court recognized a court's authority to modify a consent decree.⁴³ In that case, the defendants — a group of meatpackers subject to a twelve-year-old consent decree — petitioned the district court to modify the decree. The court agreed to do so, despite the government's objection, and the case was appealed directly to the Supreme Court.⁴⁴

The Court established a strict standard that a defendant must meet in order to obtain a modification of an existing decree. The standard is whether the changes [in circumstances] are so important that dangers,

41. Bills that would have extended the APPA to consented-to modifications have been introduced in Congress. See, e.g., *The Tunney Act: Oversight Hearing Before the House Subcomm. on Monopolies and Commercial Law of the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982). These bills have never gotten beyond the committee stage.

42. 286 U.S. 106 (1932).

43. 286 U.S. at 114. The consent decree in *Swift* provided that "jurisdiction of the cause was retained for the purpose of taking such other action or adding at the foot such other relief 'as may become necessary or appropriate for carrying out and enforcement' thereof, 'and for the purpose of entertaining . . . any application which the parties may make'" 286 U.S. at 111-12 (quoting the consent decree issued below). But the Court stated that a district court has equity power to modify a decree whether or not the decree includes a retention of jurisdiction clause. "If the reservation had been omitted," said the court, "power there still would be by force of principles inherent in the jurisdiction of the chancery." 286 U.S. at 114.

44. Under the Expediting Act, in force at the time of *Swift*, antitrust cases bypassed the courts of appeals and went directly to the Supreme Court. The Act was amended when the APPA was passed. 15 U.S.C. § 29(b) (1982) now requires the district judge to certify the case for direct appeal to the Supreme Court. Otherwise the case goes to the court of appeals.

once substantial, have become attenuated to a shadow. . . . Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead [a court] to change what was decreed after years of litigation with the consent of all concerned.⁴⁵

A moving defendant, therefore, must demonstrate *each* of the following conditions in order to obtain modification: (1) a change of circumstances sufficient to render "dangers, once substantial . . . attenuated to a shadow"; (2) extreme hardship; and (3) unforeseeability.⁴⁶ *Swift's* stringent criteria have led one court to remark that "modification is only cautiously to be granted."⁴⁷

2. Government-Initiated Motions Without the Defendant's Consent

The present standard for modifying a consent decree in contested, government-initiated cases is not clear.⁴⁸ Arguably, the language in *Swift* is broad enough to cover all types of modifications. In *Chrysler Corp. v. United States*,⁴⁹ however, the Supreme Court did not apply the stringent *Swift* standard to government-initiated modifications. Rather, the Court held that government-initiated motions for modification should be granted or denied based on "whether the change [would serve] to effectuate or to thwart the *basic purpose* of the original consent decree."⁵⁰

45. 286 U.S. at 119. *Swift* is still good law. One commentator has remarked that "the *Swift* doctrine is accepted today without question." Note, *Flexibility and Finality*, *supra* note 14, at 1303. See also *United States v. American Socy. of Composers*, 586 F. Supp. 727, 728 (S.D.N.Y. 1984) ("[T]here can be no doubt that this Court is empowered to modify the Consent Judgment in response to changed conditions, regardless of the government's opposition. . . . The proper exercise of this power is, however, strictly limited. . . ." (citing *Swift*)); *United States v. Connecticut Packaging Stores Assn.*, 1975-1 Trade Cas. (CCH) ¶ 60,174 (D. Conn.) (applying the *Swift* test where the defendant sought to modify a consent decree without the government's consent).

46. "[T]he impropriety of merely relieving a party from the foreseeable detrimental consequences of its consent, after it has enjoyed or speculated upon its favorable consequences or possibilities by avoiding the litigation and the hazards of a less favorable outcome, is quite manifest." *United States v. Lucky Lager Brewing Co.*, 209 F. Supp. 665, 668 (D. Utah 1962).

47. *Humble Oil & Ref. Co. v. American Oil Co.*, 405 F.2d 803, 813 (8th Cir.), *cert. denied*, 395 U.S. 905 (1969). For an example of a case in which the defendant secured a modification without the government's consent, see *United States v. Continental Can Co.*, 128 F. Supp. 932 (N.D. Cal. 1955). In this case, the court modified a consent decree to allow defendant "reasonable" instead of merely "compensatory" return on the rental of certain equipment. The court stated the relevant standard to be whether the change is "consistent with the aims of the decree." 128 F. Supp. at 935. This statement of the standard seems wrong, and the court did not even mention *Swift*.

48. See generally Zimmerman, *supra* note 8, at 116-17 (1982); Note, *supra* note 8; Note, *Flexibility and Finality*, *supra* note 14, at 1303; Note, *Requests by the Government for Modification of Consent Decrees*, 75 YALE L.J. 657 (1966) [hereinafter cited as Note, *Requests by the Government for Modifications*].

49. 316 U.S. 556 (1942).

50. *Chrysler*, 316 U.S. at 562 (emphasis added). The consent decree in *Chrysler* was set to lapse on Jan. 1, 1941, unless the government obtained similar relief against General Motors. The government later realized it could not obtain relief by that date, and it petitioned the court to extend the date to Jan. 1, 1942. Chrysler opposed the modification.

It is unclear, however, whether this "basic purpose" standard survives the Supreme Court's decision in *Ford Motor Co. v. United States*.⁵¹ *Ford* involved the same consent decree that the government had been successful in modifying just six years earlier in *Chrysler*. In *Ford*, however, the Court refused to grant the modification, despite the government's claim that such a modification would carry out the purpose of the original decree.⁵² This seemingly contradictory decision led one commentator to note that "whatever liberalization [in the standard for government-initiated modifications] one reads into *Chrysler* must be largely read out of *Ford*. . . ."⁵³

Despite the *Ford* decision, the Justice Department has urged that a standard similar to the one enunciated in *Chrysler* apply to government-initiated modifications. In a 1959 congressional report, the Department cited *Hughes v. United States*⁵⁴ and *Liquid Carbonics Corp. v. United States*⁵⁵ for the proposition that a consent decree may not be converted into "a license to a defendant to continue in violation of the law."⁵⁶ If the government is able to demonstrate that "additional relief [is] absolutely necessary to preserve competition and prevent monopoly,"⁵⁷ modification should be permitted over the defendant's objections. This standard is akin to *Chrysler*'s "basic purpose" standard, and is far removed from *Swift*'s requirement that changed circumstances, extreme hardship, and unforeseeability be demonstrated.⁵⁸ In light of *Ford*, however, it is unclear whether the present Court would apply a test similar to the one advocated by the Justice Department.

3. Consented-To Modifications

Most courts that have granted consented-to modifications have

51. 335 U.S. 303 (1948).

52. *Ford*, 335 U.S. at 321.

53. Note, *Flexibility and Finality*, *supra* note 14, at 1313.

54. 342 U.S. 353 (1952). *Hughes* involved a consent decree that required Howard Hughes either to dispose of certain stock or to deposit it with a trustee. Hughes decided to deposit the stock with a trustee. The district court, on a government motion and without a hearing, ordered Hughes to divest. The court claimed that it was merely construing the decree. The Supreme Court reversed, asserting that the "construction" was in reality a modification. In dicta, however, the court added that "[w]e entertain no doubt concerning the District Court's power to require sale of Hughes' stock after a proper hearing." 342 U.S. at 357 (emphasis added).

55. 350 U.S. 869 (1955). The Justice Department claimed that *Liquid Carbonic* "was on all fours with *Hughes*." 1959 REPORT, *supra* note 1, at 6 (quoting *Consent Decree Program of the Dept. of Justice, 1958: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 3749 (1958)). In *Liquid Carbonic*, the Court (per curiam) cited *Hughes* in reversing and remanding for a hearing on the modification issue.

56. 1959 REPORT, *supra* note 1, at 6 (quoting *Consent Decree Program of the Dept. of Justice, 1958: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary*, 85th Cong., 2d Sess. 3749 (1958)) (emphasis in original omitted).

57. *Id.* (emphasis in original omitted).

58. See notes 45-47 *supra* and accompanying text.

used a public interest standard,⁵⁹ at least for those decrees modified after enactment of the APPA.⁶⁰ The standard is extremely deferential to the Justice Department's determination of the public interest.⁶¹ The decisions typically indicate that the court has considered all the papers submitted and found the modifications to be in the public interest.⁶² The cases do not, however, reflect any intense inquiry into the public interest.⁶³

59. See, e.g., *United States v. Owens-Illinois, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 66,060 (N.D. Cal.); *United States v. Safeway Stores, Inc.*, 1984-1 Trade Cas. (CCH) ¶ 65,824 (N.D. Tex. 1983); *United States v. Chrysler Corp.*, 1983-2 Trade Cas. (CCH) ¶ 65,710 (N.D. Ind.); *United States v. Aerofin Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,598 (S.D.N.Y.); *United States v. General Elec. Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,660 (E.D. Pa.).

The public interest standard is the standard that the APPA requires a court to use in entering an initial consent decree. See notes 10-11 *supra* and accompanying text. Regular use of a public interest standard for consented-to modifications is a relatively new development, probably in response to the APPA. In *Motor Vehicles* and *AT&T*, courts used the public interest standard by applying the APPA. See notes 18-26 *supra* and accompanying text. Other courts simply apply a public interest standard on their own. See *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201, at 65,703 (N.D. Ill.) ("[T]he court is empowered to implement a procedure designed to produce, in the public interest, an agreed modification that 'enjoy[s] a solid presumption that it was founded in fact and supported by reason.'" (quoting *Swift & Co. v. United States*, 189 F. Supp. 885, 906 (N.D. Ill. 1960))).

The APPA appears to have influenced the 1975 *Swift* decision. In addition to examining the public interest, the court required publication of the proposed modification, arguing that "the court is . . . obligated to insure that the public . . . [has] received adequate notice of the proposed modification. . . ." 1 Trade Cas. (CCH) ¶ 60,201, at 65,703. Though the court's insistence on publication might have been based on the APPA, the mandated procedures were not as demanding as those established by the APPA.

In 1980, *Swift* again came back for modification. The case went before the same judge, but on this occasion the court did not order publication. Instead, "having considered the matter and being duly advised," it modified the decree. 1980-1 Trade Cas. (CCH) ¶ 63,185, at 77,907 (N.D. Ill.). Finally, in 1981, the parties moved for termination of the decree, which the court granted. It is not clear what (if any) publication procedures the court required or what information the court considered. The court terminated the decree "following full and adequate notice to all parties in interest and to the public of the proposed entry . . . and after hearing duly held . . . and the Court being duly advised and having considered the matter. . . ." *Swift*, 1982-1 Trade Cas. (CCH) ¶ 64,464, at 72,602 (N.D. Ill. 1981).

60. Courts that ordered consented-to modifications before the APPA generally did not mention the public interest. See, e.g., *United States v. Paramount Pictures, Inc.*, 1974-2 Trade Cas. (CCH) ¶ 65,378 (S.D.N.Y.); *United States v. Kelsey-Hayes Co.*, 1974-2 Trade Cas. (CCH) ¶ 75,391 (E.D. Mich.); *United States v. Libbey-Owens-Ford Glass Co.*, 1973-2 Trade Cas. (CCH) ¶ 74,794 (N.D. Ohio). This does not mean that no court used a public interest standard. See *United States v. Radio Corp. of Am.*, 46 F. Supp. 654 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). Prior to the APPA, however, a public interest standard was not nearly as widespread.

61. This may be partly a result of the Justice Department's current procedures. Though the APPA does not apply, the Department has nevertheless been complying substantially with the Act's procedures in consented-to modifications. See note 27 *supra*.

62. The courts that come under this category have used remarkably similar language. See, e.g., *United States v. Witco Chem. Corp.*, 1982-1 Trade Cas. (CCH) ¶ 64,591 (W.D. Penn. 1981) (The court modified the decree after considering "the defendant's Motion . . . and the papers submitted . . . and having determined that it is in the public interest that the Final Judgment be modified . . .").

63. See cases cited at note 59 *supra*.

II. THE UNIFORM CONCERNS

As Part I of this Note demonstrates, courts have applied considerably different standards to consented-to modifications⁶⁴ than to either government-sought⁶⁵ or defendant-sought⁶⁶ modifications. This Part argues that there is little justification for these differing standards. First, the section compares consented-to with government-sought modifications. Second, it compares government-sought with defendant-sought modifications. Finding no differences that warrant the application of three distinct substantive standards, this Note recommends that courts focus on the same concerns in deciding whether to modify *any* consent decree.

A. *Consented-To and Government-Sought Modifications*

There is no compelling reason for drawing a distinction between consented-to and government-sought modifications. Consented-to modifications, it is true, are sought with the defendant's consent; whereas government-initiated modifications may be granted in the absence of such consent. Because of the nature of antitrust defendants, however, it can be strongly argued that the presence or absence of the defendant's consent should not be considered in deciding whether to modify a consent decree. As a general proposition, an antitrust defendant puts its own interest first and is primarily concerned with escaping judicial sanction.⁶⁷ Therefore, the defendant's consent should be factored out, and the focus should be placed on the justifications for modification proffered by the government. The government's desire for modification, after all, is the common element in consented-to and government-sought modifications. In both types of cases, it is assumed that the Justice Department is participating in order to advance the public interest.⁶⁸ If a court refuses to consider the defendant's self-interested position, the public interest is made the paramount concern,

64. See notes 59-63 *supra* and accompanying text.

65. See notes 48-58 *supra* and accompanying text.

66. See notes 42-47 *supra* and accompanying text.

67. Cf. *Senate Hearings*, *supra* note 1, at 91 (statement of T. Kauper, Asst. Atty. Gen., Antitrust Div.):

Congress did not determine that the public interest would be best protected by the employees of the defendant, by the stockholders or creditors of the defendant, by the suppliers or customers of the defendant, by its competitors or by interest groups — all of whom have from time to time sought to intervene in consent decree proceedings. Each of these groups, after all, has a very particularized interest, an interest frequently far different from that of the public.

68. Congress determined . . . that this crucial law enforcement role should be vested in the chief law enforcement officer of the land — appointed subject to the advice and consent of the Senate — and accountable to the President. This is recognized by the courts, which have said that it is the "United States which must alone speak for the public interest" in antitrust matters.

Id. (footnotes omitted).

and it becomes unnecessary to distinguish between the two types of modifications.

The argument for a more cursory examination in consented-to cases rests on the notion that a consent decree is a *contract* between the government and the defendant, and that parties to a contract are free to modify the provisions of an agreement between them. To be sure, a consent decree does resemble a contract.⁶⁹ The parties to the action negotiate the decree, with either party free to withdraw from negotiations and go to trial. The defendant bargains to accept the decree in exchange for the government settling the case; the government bargains to settle the case in response to the defendant's acceptance and its waiver of a right to trial.⁷⁰

When the consent decree is entered by the court, however, it becomes much more than a mere agreement. Where the parties were once free to negotiate, they are now held to the terms of the decree.⁷¹ Thus, by entering a consent decree, a court solidifies that decree and gives it the stamp of judicial authority.

In *United States v. Swift & Co.*,⁷² the Supreme Court explicitly rejected the notion that a consent decree should be treated as a contract and not as a judicial act.⁷³ Demonstrating the proper respect for a judicial act, the Court declined to alter "what was decreed after years of litigation with the consent of all concerned."⁷⁴ Since a consent decree is a judicial act, rather than a contract, it should not matter whether the defendant consents to the modification. A judicial act must be treated as the edict of the court, not as an agreement subject to modification according to the desires of the original parties.

B. *Government-Sought and Defendant-Sought Modifications*

There is also little justification for distinguishing between contested modifications on the basis of whether they are sought by the government or the defendant.⁷⁵ This proposition follows from the logic of the Supreme Court's decision in *United States v. Swift & Co.*,⁷⁶ which

69. See Handler, *supra* note 4, at 33 ("[A] consent decree partakes of the features of both contract and judicial act. It is not to be treated as merely one or the other, but rather as a hybrid of the two.").

70. "[T]he defendant has, by the decree, waived his right to litigate the issues raised, a right guaranteed to him by the Due Process Clause. . . ." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971).

71. *Armour*, 402 U.S. at 682.

72. 286 U.S. 106 (1932).

73. 286 U.S. at 115.

74. 286 U.S. at 119.

75. See Handler, *supra* note 4, at 19-34; Note, *The Modification of Antitrust Consent Decrees*, 63 HARV. L. REV. 320 (1949).

76. 286 U.S. 106 (1932).

involved a defendant-sought modification.⁷⁷ *Swift*'s mandate that a court refuse to modify a consent decree without the appropriate showing of changed circumstances, grievous harm, and unforeseeability⁷⁸ was responsive to the judicial nature of a decree.⁷⁹ But a judicial act is no less so because the government, rather than the defendant has sought the modification.

The Justice Department asserts that the Supreme Court's decisions in *Hughes v. United States*⁸⁰ and *Liquid Carbonic Corp. v. United States*⁸¹ relaxed the standard for government-sought contested modifications.⁸² Reliance on these cases to support the Department's position is misplaced. The Court's statement in *Hughes* acknowledging the power of the district court to modify a decree at the behest of the government⁸³ was merely dicta, and the case did not even mention *Swift*. *Liquid Carbonic* relied solely on *Hughes* and was a mere one paragraph *per curiam* opinion.⁸⁴

Finally, the Justice Department's position cannot be justified by reference to the Court's decision in *Chrysler Corp. v. United States*,⁸⁵ which held that a government-initiated modification is appropriate if it would "effectuate or . . . thwart the basic purpose of the original consent decree."⁸⁶ First, as noted above, *Ford Motor Co. v. United States*,⁸⁷ severely limits (and possibly overrules) *Chrysler*.⁸⁸ In addition, *Chrysler*'s "basic purpose" test is entirely inconsistent with *United States v. Armour & Co.*,⁸⁹ in which the Court expressly rejected the notion that a consent decree can even have a purpose.⁹⁰ Only a litigated decree, not a consent decree, can be said to have a "purpose."

77. See notes 42-47 *supra* and accompanying text.

78. *Swift*, 286 U.S. at 119.

79. See notes 72-74 *supra* and accompanying text.

80. 342 U.S. 353 (1952). See note 54 *supra*.

81. 350 U.S. 869 (1955). See note 55 *supra*.

82. See 1959 REPORT, *supra* note 1, at 5-6 (quoting *Consent Decree Program of the Dept. of Justice, 1958: Hearings Before the Antitrust Subcomm. of the House Comm. on the Judiciary, 85th Cong., 2d Sess. 3749 (1958)*).

83. See note 54 *supra*. The Court may only have meant that a district court is empowered to modify a consent decree *after* a hearing that has addressed the *Swift* concerns.

84. The Court remanded the case for a hearing and did not reach the merits of the dispute. 350 U.S. 869 (1955).

85. 316 U.S. 556 (1942). See notes 49-50 *supra* and accompanying text.

86. *Chrysler*, 316 U.S. at 562. See also text at notes 48-50 *supra*.

87. 335 U.S. 303 (1948).

88. See notes 51-53 *supra* and accompanying text.

89. 402 U.S. 673 (1971).

90. 402 U.S. at 681-82 ("[T]he decree itself cannot be said to have a purpose; rather the parties have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve.") (footnote omitted) (emphasis in original). As one author points out, "it may be concluded that in such a case the only true purpose of the decree is in settlement of the government action." Handler, *supra* note 4, at 32 n.202.

In *United States v. United Shoe Machinery Corp.*,⁹¹ the government sought to modify a litigated decree. In that context the Supreme Court was willing to hold that the *Swift* standard did not apply. *United Shoe*, the Court argued, was the obverse of *Swift*. In *Swift*, the defendants had "sought relief not to achieve the purposes . . . of the decree, but to escape [its] impact."⁹² Since, in *United Shoe*, the government sought to *effectuate* the purposes of the decree, modification was proper.⁹³

United Shoe is inapposite, however, to modifications of consent decrees. A litigated decree is forced on the defendant without his or her consent, after the defendant has been found guilty. There is a record with which to find a purpose for the decree. A consent decree, however, has no purpose⁹⁴ and no record. Moreover, the defendant has exchanged his right to trial for settlement of the case.⁹⁵ A consent decree is therefore *not* like a litigated decree, and different standards should apply in the two contexts.

III. THE DOUBLE-BARREL STANDARD

Given that uniform concerns exist in all modification cases, it becomes necessary to define exactly what these concerns should be. This section argues that even though the APPA does not apply to modifications, its concern for the public interest is important and should be integrated into the adopted standard. On the other hand, this section contends that considering the public interest alone is insufficient. It proposes a new standard — the double-barrel standard — that considers both the public interest and the necessary respect for judicial acts.⁹⁶

91. 391 U.S. 244 (1968).

92. 391 U.S. at 249.

93. See *King-Seeley Thermos Co. v. Aladdin Indus., Inc.*, 418 F.2d 31 (2d Cir. 1969) (it is unnecessary to show changed circumstances to win modification of a litigated decree).

94. See notes 89-90 *supra* and accompanying text.

95. See *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). See also *Handler, supra* note 4, at 33:

To open the floodgates for modification would be, in effect, to invite the government to make concessions in order to induce the defendant to enter a consent decree and then, subsequently, to renege on its bargain by attempting to add to the decree the very restrictions that the defendant opposed.

96. The *Swift* standard — that "[n]othing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead [a court] to change what was decreed after years of litigation with the consent of all concerned," 286 U.S. 106, 119 (1932) — is an example of a standard that represents respect for a judicial act. Cf. Note, *Requests By the Government for Modifications of Consent Decrees*, *supra* note 48, at 659 ("To some extent, [the policies underlying *Swift*] are the same considerations that underlie the doctrine of *res judicata*.").

A. *The Desirability of a Public Interest Test*

Although the APPA does not apply to modifications,⁹⁷ some of the assumptions evident in the Act and expressed in the legislative history are relevant in evaluating modifications. One of these assumptions is that the Justice Department handles antitrust matters with an eye toward the public interest.⁹⁸ Many of the courts that have modified consent decrees⁹⁹ after enactment of the APPA have borrowed its public interest standard.¹⁰⁰ Even before the adoption of the APPA, one court held that the public interest should be considered in all modification proceedings.¹⁰¹

There are problems, though, with focusing solely on the public interest. One of these problems is that a court is not in a good position to make an independent public interest determination. A court must therefore rely to a great extent on the Justice Department's conception of the public interest. Reliance on the Justice Department, however, ignores the judicial nature of consent decrees.

1. *Court-Initiated Public Interest Determinations*

Requiring a court to make a public interest determination presents a potential separation of powers problem.¹⁰² The dissent in *Maryland*

97. See notes 13-41 *supra* and accompanying text.

98. See *House Hearings*, *supra* note 36, at 38 (statement of Sen. Tunney) ("The clandestine nature of [consent decree] negotiations and the unsatisfactory results in many antitrust cases, both from the standpoints of economics and law, has contributed to the severe erosion of public confidence in the governmental process, has produced undesirable economic consequences, and ultimately has hurt the public pocketbook."); *Senate Hearings*, *supra* note 1, at 1 (statement of Sen. Tunney) (The Act "focuses on the process by which antitrust suits are settled and consent judgments entered by providing specific standards and procedures to assure that the decision to settle and the settlement itself are in fact in the *public interest*." (emphasis added).

99. At least consented-to modifications.

100. See *United States v. Swift & Co.*, 1975-1 Trade Cas. (CCH) ¶ 60,201 (N.D. Ill.), for a case that applied a public interest standard in a more than cursory way; see also *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 n.7 (2d Cir. 1983) ("Although, by its terms, the [APPA] is not applicable to a termination proceeding, it provides useful guidance to the courts in deciding how modification procedures should be addressed."), *cert. denied*, 104 S. Ct. 1596 (1984).

Most courts, however, use a public interest standard that defers to the Justice Department's determination of the public interest. See notes 61-63 *supra* and accompanying text.

101. *United States v. Radio Corp. of Am.*, 46 F. Supp. 654, 656 (D. Del. 1942) ("[T]he modification or vacation of a consent decree previously entered involves the same duty of the court independently to determine that the action is equitable and in the public interest."), *appeal dismissed*, 318 U.S. 796 (1943).

102. Some of the legislative history behind the APPA reflects a concern for the separation of powers problem. See, e.g., H.R. REP. NO. 1463, 93d Cong., 2d Sess. 21 (1974) ("[T]o require federal courts to determine whether a consent decree is in the public interest is to transfer an 'executive' question to the courts for resolution."); *Senate Hearings*, *supra* note 1, at 71 (statement of R. Hammond, atty.):

Our judicial system is well designed and performs well with regard to a particular function, that is, deciding controversies on an adjudicated record. I don't think the courts have any special expertise, which absent a record, enables them to second guess the Department [of Justice] . . . and make a judgment whether a consent decree is in the public interest.

*v. United States*¹⁰³ asserted that a public interest standard "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 non-judicial discretion."¹⁰⁴ Policy determinations, the dissent argued, are normally reserved for other branches of the government.¹⁰⁵

Maryland v. United States dealt with the public interest review mandated by the APPA. The APPA, however, does not apply to the modification of consent decrees.¹⁰⁶ It is one thing for a court to undertake a public interest determination when instructed to do so by Congress. However, in the absence of statutory authority a judicially initiated public interest review raises serious separation of powers concerns.¹⁰⁷

2. Government-Controlled Public Interest Determinations

There are also problems with using a government-controlled public interest determination as the sole basis for modification. Such a standard would require the courts to defer to the Justice Department's

See also Senate Hearings, supra, at 77 (statement of J. Campbell, atty.) ("[T]he court's role in approving settlements is, in the nature of things, a very limited one. In the first place, the court can only go so far in second-guessing the [Justice Department's determination] that a proposed consent decree is [in the public interest]."); *House Hearings, supra* note 36, at 41 (statement of Rep. Hutchinson) ("I am troubled by the suggestion that a federal judge act as guardian of the 'public interest.' I wonder whether in our system of government a federal judge can, or should, make such decisions.").

103. 460 U.S. 1001 (1983) (mem.), *affg. sub nom. United States v. AT&T*, 552 F. Supp. 131 (D.D.C. 1982).

104. 460 U.S. at 1004 (Rehnquist, J., dissenting).

105. *See Green v. Frazier*, 253 U.S. 233, 240 (1920) ("Questions of policy are not submitted to judicial determination, and the courts have no general authority of supervision over the exercise of discretion which under our system is reposed in the people or other departments of government."); *United States v. Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring) ("Formation of policy is a legislature's primary responsibility, entrusted to it by the electorate. . . ."). *But see In re Penn Cent. Transp. Co.*, 384 F. Supp. 895, 911-12 (Regional Rail Reorg. Ct. 1974) (The Regional Railroad Reorganization Act required a court to find that "the public interest would be better served by [reorganization under bankruptcy laws] than by a reorganization under this act" in order to utilize the Bankruptcy Act. The trustee in bankruptcy claimed that such a finding was legislative and not judicial. Judge Friendly rejected the argument.).

106. *See* notes 18-41 *supra* and accompanying text.

107. In *Baker v. Carr*, 369 U.S. 186, 208-37 (1962), the Supreme Court discussed at length the notion that certain questions are "political" and thus best left to the executive and legislative branches. The Court said that "prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department. . . ." 369 U.S. at 217. The Court also listed several other factors that render a question "political" and hence nonjusticiable. Two of these are directly relevant to public interest determinations: (1) "a lack of judicially discoverable and manageable standards for resolving [the issue];" and (2) "the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion." The judiciary has no special expertise in determining "the public interest" and cannot ever establish criteria to apply. It should therefore allow the political branches of government to make such determinations.

assessment of what the public interest requires.¹⁰⁸ Though partial reliance on the Department's superior resources and expertise is desirable, complete reliance ignores the fears that led Congress to enact the APPA.

The executive branch (and by implication the Justice Department) is under a duty to assure that "the laws [of the United States] be faithfully executed."¹⁰⁹ It is unrealistic for a court to ignore the Justice Department's duty to protect the public interest¹¹⁰ and to forget that the Justice Department has superior policymaking resources. Courts should be somewhat deferential to the Department's assessment of the public interest.

Too much deference, however, might violate the policies and principles underlying the APPA. Congress passed the APPA partly in response to consent decrees entered in *United States v. Western Electric Co.*,¹¹¹ *United States v. Atlantic Refining Co.*,¹¹² and *United States v. ITT*.¹¹³ Members of Congress believed that courts were giving too much deference to Justice Department determinations of whether to sign consent decrees.¹¹⁴

The danger that judicial deference to the government may lead to unfair modifications is partly mitigated by current Department procedures in modification cases. The Justice Department substantially complies with the APPA procedures.¹¹⁵ As long as the Department

108. This is what most courts do when they order consented-to modifications. See notes 59-63 *supra* and accompanying text.

109. U.S. CONST. art. II, § 3.

110. See Baxter, *Separation of Powers, Prosecutorial Discretion, and the "Common Law" Nature of Antitrust Law*, 25 CORP. PRAC. COMMENTATOR 155, 181 (1983):

Of course, each branch of government must give due regard to the constitutional functions of its coordinate branches. Thus, executive agencies must be highly respectful of the views of the courts, the interpretative body in government. But the judiciary must also carefully consider the executive branch's views. The courts must remember that, unlike private litigants, the executive branch is obligated to use its prosecutorial discretion to bring only cases that promote the public interest When the executive branch brings a case, it represents not only its belief that the courts should examine the challenged conduct for possible illegality, but also that the rules of law it seeks to apply are in the public interest both for the instant case and for subsequent prosecutions.

(emphasis in original).

111. 1956 Trade Cas. (CCH) ¶ 68,246 (D.N.J.).

112. No. 14060 (D.D.C. Dec. 23, 1941), *vacated*, No. 14060 (D.D.C. Dec. 13, 1982).

113. 349 F. Supp. 22 (D. Conn. 1972), *affd. sub nom.* Nader v. United States, 410 U.S. 919 (1973); see generally note 13 *supra*.

114. See, e.g., *House Hearings*, *supra* note 36, at 39 (testimony of Sen. Tunney) ("I feel that [consent decrees are] subject to the possibility of abuse unless you have a complete ventilation of what is going on behind closed doors, and unless the public is made aware of what the nature of the . . . agreement is."); *Senate Hearings*, *supra* note 1, at 147 (statement of Judge Wright) ("By definition, antitrust violators wield great influence and economic power. They can often bring significant pressure to bear on Government . . . in connection with the handling of consent decrees."). By forcing the government to follow the APPA procedures, courts would have more control over the entry of a consent decree.

115. See note 27 *supra*.

continues this policy, the fears that led to the enactment of the APPA are allayed. But since the APPA does not apply¹¹⁶ the Department is free to disregard its current policy. There is a need, then, for some judicial review to act as a check on the Department's practices.

B. *Respect for a Judicial Act*

Though it is necessary to take account of the public interest before modifying a consent decree,¹¹⁷ considering only the public interest ignores the judicial nature of consent decrees. A consent decree is a judicial act,¹¹⁸ and a court should modify it only if the modification will respect the judicial nature of the decree.¹¹⁹ This is so regardless of whether the modification serves the public interest.¹²⁰

"Respect for a judicial act" is not mere verbiage or rhetoric. In order to preserve respect for its prior orders, a court should modify a decree only if the decree is operating inequitably. This proposition accords with the concerns enunciated in *Swift*.¹²¹ Hardship to the parties is the most important element,¹²² and a court should be most sensitive to it. No modification should be granted without a showing of hardship.

IV. APPLYING THE DOUBLE-BARREL STANDARD

As illustrated in the previous sections, courts should consider the same factors in all modification cases. They should, borrowing from *Swift*, show respect for consent decrees as judicial acts,¹²³ and at the same time consider the public interest, as suggested by the APPA.¹²⁴ These concerns place initial responsibility for determining the public interest on the government, but make the courts ultimately responsible

116. See notes 18-41 *supra* and accompanying text.

117. See notes 97-101 *supra* and accompanying text.

118. *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932).

119. See *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983) ("[M]odification . . . always requires court approval due to [the] quasi-judicial nature [of consent decrees]. Such approval would be meaningless if the court were to serve merely as a rubber stamp of modifications agreed to by the parties."), *cert. denied*, 104 S. Ct. 1596 (1984).

120. See *United States v. Radio Corp. of Am.*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943):

The fact that the court may consider the opinion of the Department of Justice to the same effect [that the decree is in the public interest] 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.

121. *Swift*, 286 U.S. at 119. See notes 42-47 *supra* and accompanying text.

122. Although *Swift* discussed changed circumstances and unforeseeability, it is clear that the Court looked more toward hardship. "No doubt the defendants will be better off if the injunction is relaxed, but they are not suffering hardship so extreme and unexpected as to justify us in saying that they are the victims of oppression." *Swift*, 286 U.S. at 119.

123. See notes 72-74 *supra* and accompanying text.

124. See note 11 *supra* and accompanying text.

for ensuring respect for judicial acts. The focus is uniform and should be applied to all types of consent decree modifications.¹²⁵

The previous section sets out the substantive issues courts should examine in deciding whether to modify consent decrees. Though they present uniform concerns, consented-to, government-sought, and defendant-sought modifications should not necessarily receive identical treatment from the courts. Indeed, the Justice Department's position concerning the propriety of modification should be critical in determining whether modification is granted. After all, the antitrust division of the Justice Department is charged with protecting the public interest.¹²⁶ Since the double-barrel standard requires courts to consider whether a modification is in the public interest, courts should give presumptive weight to the government's view on this issue.¹²⁷ The defendant, on the other hand, is only concerned with its own profitability, and thus its position as to the propriety of the modification should not be accorded any deference.¹²⁸ Therefore, while courts should examine the same factors in all modification cases, the presumptions should vary depending on whether the Justice Department supports the motion.

Under the double-barrel standard, then, the Justice Department's action will create a rebuttable presumption that the modification is or is not in the public interest. The court, in turn, will look to the continuing equity of the decree. Below is an analysis of how the standard would work with regard to the different types of modifications:

Consented-To Modifications. (1) The Justice Department's consent will establish a presumption that the modifications are in the public interest. Since the defendant in consented-to cases will not attempt to rebut this presumption, the court should be willing to hear the views of third parties. (2) The Department and/or the defendant must show hardship. The Department would show hardship to the public. The defendant would show hardship to itself.

Government-Sought, Without Defendant's Consent. (1) The Department's action will again establish a presumption that the modification is in the public interest, which the defendant (and third parties) will be free to rebut. (2) The Department must also show hardship.

Defendant-Sought, Without the Government's Consent. (1) The Justice Department's lack of consent will create a presumption that the modification would not be in the public interest. The defendant

125. See Part II *supra*.

126. See note 68 *supra* and accompanying text.

127. The superior resources of the Justice Department in making such determinations mandates such deference. See notes 109-10 *supra* and accompanying text. In addition, granting such a presumption is logical due to the lack of expertise courts have in making public interest determinations. See note 105 *supra*.

128. See note 67 *supra* and accompanying text.

has the burden of showing otherwise. (2) The defendant must also establish hardship.

From the foregoing, it is clear that consented-to modifications will be easiest to obtain; government-sought less easy; and defendant-sought, relatively difficult. This accords with what courts have been doing under the guise of different standards.¹²⁹ However, while suggesting presumptions identifying uniform concerns may not lead to different results, it does serve the salutary purpose of describing how courts should decide whether to grant any type of consent decree modification.

CONCLUSION

The Justice Department and the courts seem to be at odds regarding the correct standard for granting modifications of antitrust consent decrees. This Note has proposed a new standard — the double-barrel standard — to guide courts in deciding whether to modify an existing decree. Under this standard, a court should modify a decree only if the modification advances the public interest and demonstrates respect for a prior judicial act.

— *John D. Anderson*

129. See generally Part I.B. *supra*.