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The Scope of Judicial Review of Consent Decrees Under the Antitrust Procedures and Penalties Act of 1974

INTRODUCTION

The Antitrust Procedures and Penalties Act of 1974 (APPA) opens to public scrutiny and comment consent decrees filed in federal district court by the government as proposed settlements of public, civil antitrust suits. The APPA also requires a district court to determine that such a consent decree is in the public interest before the court enters the decree as a judgment.


5. The consent decree is a "judicial act," United States v. Swift & Co., 286 U.S. 106, 115 (1932), which must be entered by the court, S. Rep. No. 298, 93d Cong., 1st Sess. 5 (1973) [hereinafter cited as 1973 Senate Report], and which has the same legal effect on the defendant as a judgment in a fully litigated action. 1959 Report, supra note 2, at 2. See also notes 100-01 infra and accompanying text. This Note will not discuss the post-judgment enforcement aspect of a court's review of consent decrees. For a discussion of that topic, see Note, Nonparty Enforcement of Antitrust Consent Decrees Through Contempt Proceedings, 64 Geo.
Courts faced with this task have used differing standards of judicial review. Some have been deferential, expressing their reluctance to question the Justice Department's wisdom in formulating each settlement, at least in the absence of any showing of bad faith or malfeasance. However, in one recent decision, United States v. American Telephone and Telegraph Co., a district court subjected a consent decree to intense review. The AT&T court independently determined the conditions necessary to protect its own view of the public interest. Then, after closely evaluating the individual terms of the proposed settlement, it conditioned approval of the decree on the parties' acceptance of modifications that satisfied the court's criteria for protecting the public interest. This more intense review by the AT&T court has created uncertainty over the proper scope of judicial review. See also Duncan, Post-Litigation Resulting from Alleged Non-Compliance with Government Antitrust Consent Decrees, 8 W. Res. L. Rev. 45 (1956).

See notes 32-52 infra and accompanying text.
In the wake of this uncertainty, this Note analyzes the proper scope of judicial review of consent decrees. The Note argues that to further the policies embodied in the APPA, courts should undertake intense review of proposed settlements before entering them as final judgments. Both the congressional intent in enacting the APPA and the public's interest in effective enforcement of the antitrust laws support intense judicial review. The Note then demonstrates that the deferential standard that some courts have applied is derived mainly from a case that is inapplicable to the review of consent decrees. Finally, the Note argues that intense review will not entail any significant disadvantages.

I. THE CURRENT STATUS OF JUDICIAL REVIEW OF CONSENT DECREES UNDER THE APPA

A. Description of the APPA

The APPA requires the Justice Department to follow certain procedures when it files a proposed consent decree with the court. Any proposed settlement must be accompanied by a "competitive impact statement" (CIS), which describes the proposal and its anticipated effects on competition. The CIS must also explain the reasons for bringing the suit and the violations originally alleged, state the

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11. Congress designed the competitive impact statement to help focus the attention of the negotiating parties on the factors that Congress has determined should be considered in formulating a decree. 118 CONG. Rec. 31,674 (1972) (statement of Sen. Tunney). In this respect, the CIS is much like the environmental impact statement (EIS) required from government agencies by the National Environmental Policy Act of 1969 (NEPA), § 102, 42 U.S.C. § 4332 (1976). Both the EIS and the CIS require the government to take account of the public interest in the early stages of its decisionmaking process. 118 CONG. Rec. 31,676 (1972). In contrast with the NEPA EIS, however, the APPA CIS is prepared by the government without the benefit of public input, which under the APPA comes after the CIS is filed. The CIS serves as a point of departure for public comment rather than as an informed assessment of the public interest as does the EIS. Congress intended the APPA CIS to educate interested members of the public about the proposed decree, thereby enabling them to make informed comments on and objections to the proposal. 118 CONG. Rec. 31,674 (1972). The public's response, in turn, "may well serve to provide additional data, analysis, or alternatives which could improve the [proposed decree]." Id. at 31,675.


remedies available to potential private claimants in the event the decree is entered, and give a description and evaluation of alternatives to the proposal actually considered by the Justice Department. Both the proposal and the CIS must be filed with the district court and published in the Federal Register at least sixty days before the effective date of the decree. A summary of the proposal and the CIS must be published in newspapers of general circulation for seven days over a period of two weeks beginning at least sixty days before the effective date of the decree. The public may submit written comments regarding the proposal during this period, and the Justice Department must file with the court and publish in the Federal Register responses to such comments.

At the close of the public comment period, and before entering the consent decree, the court is required to determine whether the entry of the judgment would be in the “public interest.” The statute authorizes the court in its discretion to take testimony of government officials or expert witnesses, to appoint a special master, to allow intervention or appearance of amicus curiae, and to take any other action it deems appropriate to help it determine whether the settlement is in the public interest.

Although the phrase “public interest” is not clearly defined, the statute lists factors that the court may consider in making its public interest determination. The first group, listed in 15 U.S.C.

22. Congress recognized “that the content of the phrase, ‘public interest,’ is a product of judicial construction . . . ,” thereby granting to courts the power and responsibility to develop the definition of “public interest” on a case-by-case basis. 1973 House Report, supra note 3, at 11-12, reprinted in 1974 U.S. Code Cong. & Ad. News at 6542. See also Zimmer & Sullivan, supra note 3, at 186 (although the APPA does list factors for the court to consider (see text accompanying notes 32-37 infra), “it nevertheless provides the court with no guidance as to when a settlement is in the public interest — that is, how the relevant factors are to be weighed in the balance.”).
23. The section provides that in making its public interest evaluation, 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 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. 15 U.S.C. § 16(e) (1982).
§ 16(e)(1), contains "competitive" factors: the competitive impact of the judgment, the anticipated effects of alternative remedies that the Department actually considered, and any other considerations that bear on the adequacy of the judgment. Subsection (e)(2) contains "general public impact" factors: the effect of the judgment on the public generally and on potential private claimants, including consideration of the public benefit to be derived from a determination of the issues at trial. Finally, the APPA does not constrain the court to consider the public interest only from the standpoint of particular antitrust statutes. The court may also take into account "non-substantive reasons inherent in the process of settling cases through the consent decree procedure."
B. Judicial Review of Consent Decrees

Courts have approached their statutory duty\textsuperscript{29} to determine whether a proposed decree is in the public interest with varying degrees of independence and vigor. Where no objections have been raised during the comment period, courts have generally entered the judgment as proposed by the parties.\textsuperscript{30} Some courts faced with third party objections have prodded the parties to deal with the objections by offering “suggestions” for modification.\textsuperscript{31} When pressed to make the public interest determination, however, most courts have applied a passive standard of review.\textsuperscript{32} These courts have shown considerable deference to the Justice Department’s conclusions regarding the public interest,\textsuperscript{33} particularly in cases where the relief embodied in the decree mirrors that sought in the original complaint.\textsuperscript{34} The court, under this approach, must assure only that the Justice Department has acted in good faith in reaching a settlement.\textsuperscript{35} The “balancing of competing social and political interests” involved in settling an antitrust suit is thus “left, in the first instance, to the discretion of the Attorney General.”\textsuperscript{36}

In sharp contrast to this deferential approach, the AT&T\textsuperscript{37} court engaged in a more exacting scrutiny of the terms of the proposed settlement.\textsuperscript{38} After reviewing comments, briefs, and oral arguments phrase might be interpreted to mean public interest as defined by the antitrust laws, which “as such would not admit of compromises made for non-substantive reasons inherent in the process of settling cases through the consent decree procedures.” \textit{Id.} (emphasis added).

\textsuperscript{29} 15 U.S.C. § 16(e) (1982) (“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.”) (emphasis added).

\textsuperscript{30} See Branfman, \textit{Antitrust Consent Decrees — A Review and Evaluation of the First Seven Years Under the Antitrust Procedures and Penalties Act}, 27 \textit{Antitrust Bull.} 303, 349 (1982). \textit{But see id.} at 349 n.179 (Two courts requested more information from the parties in light of the paucity of public comment).


\textsuperscript{32} See, e.g., Branfman, supra note 30, at 350 n.182; cases cited in note 6 supra.

\textsuperscript{33} See cases cited in note 6 supra.


\textsuperscript{35} See cases cited in notes 6, 8 supra.

\textsuperscript{36} United States v. American Tel. & Tel., 1982-2 Trade Cas. (CCH) ¶64,979 (D.D.C. 1982), aff’d mem. sub nom. Maryland v. United States, 103 S. Ct. 1240 (1983).

\textsuperscript{37} United States v. Bechtel Corp., 648 F.2d 660, 666 (9th Cir.), cert. denied, 454 U.S. 1083 (1981). \textit{See also} cases cited in note 6 supra.

from numerous third parties concerning the proposed settlement, as well as voluminous submissions from the parties themselves, the court refused to accept the proposal unless the parties agreed to its independently developed series of modifications. In evaluating the proposal, the court purported to follow a relatively deferential standard requiring the settlement to be "within the reaches of the public interest." The court, however, did not interpret this standard as requiring deference to the Justice Department; rather, it followed the congressional admonition to eliminate "judicial rubber stamping of proposals submitted to the courts." by the Justice Department. The AT&T court therefore displayed little deference to the Justice Department's views, stating that it would not accept the Department's settlement just because the settlement "somehow, and however inadequately, dealt with the antitrust and other public policy problems . . . ." Rather, the court demanded a decree that "meets the requirements for an antitrust remedy — that is, . . . effectively [opens] the relevant markets to competition and [prevents] the recurrence of anticompetitive activity, all without imposing undue and unnecessary burdens upon other aspects of the public interest . . . . ."

After applying this test to the individual terms of the proposed decree, the court concluded that the relief negotiated by the Justice Department in several specific areas did not adequately protect the public interest. For instance, the proposed decree had prohibited

39. AT&T, 1982-2 Trade Cas. at 73,088 n.88, 73,084 n.65.
40. 1982-2 Trade Cas. at 73,148-49.
41. 1982-2 Trade Cas. at 73,087 (quoting United States v. Gillette Co., 406 F. Supp. 713, 716 (D. Mass. 1975)). The Gillette case displayed less deference than the Bechtel and National Broadcasting decisions, see note 6 supra, which the AT&T court also cited in support of its standard of review. However, the Gillette court did not go as far as AT&T; the Gillette court adopted an equivocal rather than an intense standard of review. It found that on the one hand, "The legislative history shows clearly that Congress did not intend the court's action to be merely pro forma, or to be limited to what appears on the surface. Nor can one overlook the circumstances under which the act was passed, indicating Congress' desire to impose a check . . . on the government's expertise . . . ." 406 F. Supp. at 715. But the court also found support for a deferential approach in the congressional admonition to review in "the least complicated and least time-consuming means possible." 406 F. Supp. at 715 (quoting 1973 HOUSE REPORT, supra note 3, at 8, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6539). Faced with what it regarded as conflicting commands, the Gillette court adopted an equivocal standard of review:

It is not the court's duty to determine whether this is the best possible settlement that could have been obtained if, say, the government had bargained a little harder. The court is not settling the case. It is determining whether the settlement achieved is within the reaches of the public interest.

406 F. Supp. at 716. The court's further resolution to "look at the overall picture not hypercritically, nor with a microscope, but with an artist's reducing glass," id., may be picturesque, but it too fails to offer much guidance.

42. AT&T, 1982-2 Trade Cas. at 73,085.
43. 1982-2 Trade Cas. at 73,087.
44. 1982-2 Trade Cas. at 73,089.
Bell Operating Companies\textsuperscript{45} from marketing equipment for use on customers' premises.\textsuperscript{46} Although the \textit{AT&T} court agreed that in theory such a restriction would operate to prevent anticompetitive behavior,\textsuperscript{47} the court disagreed with the Justice Department's prediction that such anticompetitive behavior would actually occur \textit{in this case} in the absence of such a restriction.\textsuperscript{48} The court modified the decree to exclude the marketing restriction and required the Justice Department to accept the modification as a condition of the court's approval of the decree.\textsuperscript{49} The court imposed this condition even though it made no finding of bad faith or abuse of discretion on the part of the Justice Department in including the marketing restriction in the decree.\textsuperscript{50} The court thus engaged in a much more intense review than merely determining whether the proposed decree was "within the reaches of the public interest,"\textsuperscript{51} it abandoned the established practice of according deference to the Justice Department in reviewing proposed consent decrees.\textsuperscript{52}

II. THE JUSTIFICATION FOR INTENSE AND INDEPENDENT JUDICIAL REVIEW OF PROPOSED CONSENT DECREES

In enacting the APPA, Congress sought to establish "independent"\textsuperscript{53} judicial review of proposed consent decrees. As the previous

\textsuperscript{45} The most significant provision of the decree removed from the Bell System the function of supplying local telephone services by divesting \textit{AT&T} of its twenty-two Operating Companies that performed that function. 1982-2 Trade Cas. at 73,095-101. This divestiture "will make it impossible, or at least unprofitable, for \textit{AT&T} to engage in anti-competitive practices," because \textit{AT&T} will no longer be able to disadvantage competitors in the inter-exchange and equipment markets by its close ties with the local Operating Companies. 1982-2 Trade Cas. at 73,099. The divestiture will also further the antitrust goal of preventing excessive concentration of economic power in one company. 1982-2 Trade Cas. at 73,097-98.

\textsuperscript{46} 1982-2 Trade Cas. at 73,120.

\textsuperscript{47} 1982-2 Trade Cas. at 73,120.

\textsuperscript{48} 1982-2 Trade Cas. at 73,120. The court felt justified under the APPA to substitute its own judgment for that of the Justice Department, an indication of the intensity of its review. \textit{See} note 8 \textit{supra}.

\textsuperscript{49} The fact that the court removed a restriction from the Operating Companies' burden is relevant in evaluating the low degree of deference that Judge Greene displayed to the Justice Department. Several courts have questioned whether the Justice Department negotiated enough relief, \textit{see}, e.g., United States v. Blue Chip Stamp Co., 272 F. Supp. 432, 434 (C.D. Cal. 1967) (second proposed decree), \textit{affd. mem. sub nom.} Thrifty Shoppers Scrip Co. v. United States, 389 U.S. 580 (1968), but the \textit{AT&T} case may be the first time a court has questioned the Justice Department for negotiating too much relief. Judge Greene evaluated each provision of the decree from the standpoint of the public interest without regard to whether his modifications would be "more lenient" on the defendants than the Justice Department's proposal. This approach supports the conclusion that his evaluation was truly independent of the Justice Department's and highlights the low degree of deference paid to the views of the Department.

\textsuperscript{50} Compare the cases cited in note 6 \textit{supra} (suggesting a deferential, good faith standard for judicial review).

\textsuperscript{51} \textit{See} note 41 \textit{supra}.

\textsuperscript{52} \textit{See} cases cited in note 6 \textit{supra}.

\textsuperscript{53} 1973 \textit{Senate Report}, \textit{supra} note 5, at 4; \textit{see also} 119 \textit{Cong. Rec.} 3452 (1973) (state-
section illustrates, however, most courts faced with proposed settlements have instead deferred in large degree to the Justice Department's conclusions regarding the public interest. Such a deferential approach ignores the legislative history of the APPA and runs contrary to the goals of APPA public interest review. The protection of the public interest through APPA review can best be accomplished by a completely independent, intense, and thorough judicial assessment of the proposed settlement.

A. The Legislative History of the APPA

The legislative history of the APPA contains a congressional mandate to increase the intensity of judicial review of proposed consent decrees. Congress was dissatisfied with the prior consent decree practice and sought to improve it by correcting several specific abuses. The first major abuse was the "excessive secrecy" that shrouded the negotiation of consent decrees. This secrecy generally undermined public confidence in the consent decree process, and specifically covered up errors or improprieties committed by the Justice Department.


57. Regardless of the ability and negotiating skill of the Government's attorneys, they are neither omniscient nor infallible. The increasing expertise of so-called public interest advocates and for that matter the more immediate concern of a defendant's competitors, employees, or antitrust victims may well serve to provide additional data, analysis, or alternatives which could improve the outcome.

119 CONG. REC. 3452 (1973) (statement of Sen. Tunney); see also 118 CONG. REC. 31,675 (1972) (statement of Sen. Tunney). Judge Skelly Wright, in his testimony during congressional hearings on the APPA, articulated the same concern:

The Antitrust Division of the Department of Justice, while no doubt among the most competent and dedicated groups of professionals in Government service, nevertheless is made up of human beings and, unfortunately, human beings occasionally make mistakes. In approving a particular decree, the Justice Department attorneys may overlook certain issues, ignore certain concerns, or misunderstand certain facts.

S. HEARINGS ON APPA, supra note 25, at 146.

In addition to the possibility of mistake, the Justice Department might be swayed by the "great influence and economic power" wielded by the parties with whom it negotiates. 1973 SENATE REPORT, supra note 5, at 3; 1973 HOUSE REPORT, supra note 3, at 6, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6537. See also 120 CONG. REC. 36,341 (1974) (statement of Rep. McClory).
scribed above were designed to remedy the problem of secrecy.

Eliminating the problem of secrecy would have been only half a solution without also addressing the problem of "judicial rubber stamping" of proposed settlements. A major purpose of the public comment procedures is to provide an opportunity to correct innocent or culpable errors of the Justice Department, an opportunity that is wasted by a deferential court. Instead, the APPA casts the court in an independent role as legal guardian of the public interest. The APPA public notice and comment procedures do not come into play until after the government and the defendant have concluded their negotiations and have lodged a proposed settlement with the court. As a result, the statute does not require the government to consider specific interests or complaints of third parties and of the public generally during the negotiation stage. Only after a settlement has been reached can the public voice its objections. Although in several cases the Justice Department has responded to public comments by renegotiating a particular decree, only the court has the power to force the Department to consider the public's comments by refusing to enter a decree until the concerns are assuaged. If the court sim-

58. "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." 1973 HOUSE REPORT, supra note 3, at 8, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6538.

59. Senator Tunney complained that "too often in the past district courts have viewed their rules [sic-roles] as simply ministerial in nature — leaving to the Justice Department the role of determining the adequacy of the judgment from the public's view." 119 CONG. REC. 3452 (1973).

60. The mandate is phrased first in general terms: Before entering any consent judgment, the court shall determine that entry of that judgment is in the public interest. 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.


62. The requirement of a competitive impact statement puts some pressure on the negotiating parties to consider the public interest during the negotiations. See note 63 infra and accompanying text. Without the benefit of public commentary, however, their ability to assess accurately the many facets of the public interest may be limited.

63. One witness during the House APPA hearings suggested that Congress provide for public comment to be directed toward the Justice Department rather than the court. See H. HEARINGS ON APPA, supra note 54, at 168 (testimony of Miles W. Kirkpatrick, attorney and former chairman of the FTC). Representative Polk countered that such an arrangement could not ensure that the Justice Department would seriously consider the public comments, id. at 177, and the idea was ultimately rejected.

64. See Branfman, supra note 30, at 330-31; H. HEARINGS ON APPA, supra note 54, at 85.

65. The only power the court is given in equity and under the APPA is to refuse to enter a decree that is not in the public interest. Some courts, however, have used this power as leverage to prod the parties into renegotiating. See note 31 supra and accompanying text. At least one court, namely Judge Greene in the AT&T case, overcame the limits on this power by stating that he would only accept a decree that included his specific modifications. See notes 37-52 supra and accompanying text.
ply defers to the Justice Department, it abrogates its duty as protector of the public interest. Congress thus required the court "to make a positive finding that the decree is in the public interest" in order to remedy the abuse of judicial rubber stamping.66

B. Judicial Protection of the Public Interest

In addition to the specific concerns emphasized in the legislative history of the APPA, several inherent features of the consent decree process also support independent and thorough judicial review. Consent decrees may have a great impact on the public at large through their regulation of industrial conduct, deterrence of antitrust violations, and permanence. Given this importance, it is imperative that proposed consent decrees receive intense judicial scrutiny.

First, consent decrees often create a "follow-the-leader"67 effect in a particular industry, effectively setting the standard of conduct for the entire industry.68 Senator Tunney recognized that the widespread use69 of consent decrees to enforce our antitrust laws could "have a very profound effect on the lives of every citizen of this country," since "[t]he decision to settle a case, and the components of that settlement, may affect the price, the quantity, and the quality of the most basic commodities."70

Second, consent decrees have a significant effect on the deterrence of antitrust violations. A consent decree all but eliminates the possibility that a company engaged in practices of doubtful legality will be held liable for resulting injuries to competitors in private treble damages suits.71 Under section 5 of the Clayton Act,72 a final judgment entered after trial in a public antitrust case may be used by private claimants in treble damage suits as prima facie evidence against the defendant as to all matters that would be estopped between the government and the defendant.73 Consent decrees entered

66. District court judges shall be required to find that each proposed consent judgment is in the public interest. The courts will thus be required to make a positive finding that the decree is in the public interest . . . . The committee believes this requirement will serve to remedy the so-called rubber-stamping practice. It is hoped that flexible judicial procedure will evolve in the process of correcting judicial rubberstamping.


67. Kalodner, supra note 3, at 278-79: "When industry leaders have entered consent decrees, others in the affected industry tend to conform to the decree . . . ."

68. 1959 REPORT, supra note 2, at 3.

69. See note 3 supra.


71. 1959 REPORT, supra note 2, at 22.


73. 1959 REPORT, supra note 2, at 22.
before testimony is taken do not have this prima facie effect. Without the aid of the government's judgment as prima facie evidence, a private claimant will find it extremely difficult to succeed in his treble damage action. Thus, with the entry of a consent decree society loses the strongest deterrent in the antitrust laws. Finally, the loss of the prima facie effect concomitantly deprives private citizens of a means for recouping their losses that result from the antitrust violations. Since a consent decree may in practice constitute the only remedy against an antitrust defendant's conduct, a court should be certain that it sufficiently protects the public interest. No other means of protection are likely to be forthcoming.

The third reason for intense judicial scrutiny of proposed settlements serves to reinforce the first two. Consent decrees are permanent and have the same collateral estoppel and res judicata effects against the government as do litigated judgments. If the government later wishes to modify a consent decree over the objection of the defendant, the government must satisfy the stringent standard established in United States v. Swift & Co.

Nothing less than a clear showing of grievous wrong evoked by new and unforeseen conditions should lead us to change what was decreed.

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Consent decrees will typically state that the parties have consented to entry without admitting any facts or legal conclusions. See, e.g., United States v. Halliburton Co., 1976-1 Trade Cas. (CCH) ¶ 60,954, at 69,225 (S.D.N.Y. 1976).

75. See, e.g., 1959 REPORT, supra note 2, at 24. ("Because of the protracted nature of antitrust litigation, with the expense and complexity of proof of the legal and economic issues involved, it is difficult at best for a private citizen to prosecute to conclusion an action under the antitrust laws. When the private litigant is deprived of the use of the Government's decree as prima facie evidence, moreover, a private action becomes virtually impossible to maintain."); see also 119 CONG. REC. 3451 (1973) (statement of Sen. Tunney) ("As a practical matter because of the protracted nature of antitrust litigation, and the deep pockets of many corporate defendants, few private plaintiffs are able to sustain a case in the absence of parallel litigation by the Justice Department."); M. GOLDBERG, supra note 3, at 68.

76. 1959 REPORT, supra note 2, at 22-24. Society also loses the value of a litigated judgment as precedent for future antitrust cases. 118 CONG. REC. 31,675 (1972) (statement of Sen. Tunney). Although potential violators within an industry may adjust behavior to account for policies articulated through a consent decree against a competitor, the incentive to conform anticompetitive conduct would presumably be greater in the face of legal precedent.

77. Senator Tunney expressed concern that "a bad or inadequate consent decree may as a practical matter foreclose further review of a defendant's practices both inside and outside the scope of the decree." 119 CONG. REC. 3451 (1973).

78. As Senator Tunney argued, "[g]iven the enormous amount of time and resources devoted to the prosecution of most antitrust suits, it is both logical and necessary that the end result be as carefully considered as possible." 119 CONG. REC. 3452 (1973).

79. See, e.g., Curry v. Curry, 79 F.2d 172, 174 (D.C. Cir. 1935) ("For a consent decree, within the purview of the pleadings and the scope of the issues, is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack. 'A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree.' ") (quoting Nashville, Chattanooga & St. Louis Ry. v. United States, 113 U.S. 261, 266 (1885)); see also 1959 REPORT, supra note 2, at 2-3.

80. 286 U.S. 106 (1932).
after years of litigation with the consent of all concerned. 81 This rigorous standard has made the modification of decrees after entry virtually impossible. 82 Because any error is likely to be irreversible, a court should intensely scrutinize proposed settlements to ensure that they adequately protect the public interest. 83

C. The Inapplicable Rationale for Judicial Deference

Courts applying a deferential standard of review have ignored relevant provisions in the legislative history of the APPA and the policy reasons favoring intense review. Instead, these courts have relied on Supreme Court dictum in *Sam Fox Publishing Co. v. United States* 84 as support for their reluctance to add their independent judgment to the settlement process. 85 In *Sam Fox*, the Supreme Court upheld a district court's decision to deny intervention as of right to private parties who claimed that the government, in negotiating and accepting a consent decree, had inadequately protected their interests. 86 The Court said:

[S]ound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. 87

Although *Sam Fox* predated the APPA and dealt with intervention rather than review of consent decrees, some courts have concluded that its policy of deference to the Justice Department also applies to APPA cases. 88

81. 286 U.S. at 119.
83. Senator Tunney was sensitive to this concern when he proposed the APPA:

[The] submission of the proposed decree to the court and its subsequent embodiment in a judgment lends a permanence that endures long after the passing of a particular administration of the Department.

118 CONG. REC. 31,675 (1972). See also note 77 supra.
85. See note 88 infra.
86. 366 U.S. at 689.
87. 366 U.S. at 689.
88. The court in *United States v. Associated Milk Producers, Inc.*, 394 F. Supp. 29 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976), concluded that its duty under the APPA to determine whether the proposed settlement was in the public interest was merely "an accurate codification of the existing case law." 394 F. Supp. at 44. The court was thus "convinced that lower federal courts must follow the guidance of the dictum of [Sam Fox]." 394 F. Supp. at 41; see note 87 supra. It was "equally convinced that Swift & Co. v. United States, 276 U.S. 311, 331-32, 48 S.Ct. 3.11, 317, 72 L.Ed. 587 (1928), still states the applicable standard in regard to the broad scope of the Attorney General's discretion, i.e., 'His authority to make determinations includes the power to make erroneous decisions as well as correct ones.' " 394 F. Supp. at 41. The *Milk Producers* court believed that this interpretation
A close reading of *Sam Fox*, however, reveals that its holding and primary rationale do not apply to approval of proposed consent decrees. The *Sam Fox* court based its denial of the appellants' request to intervene on the ground that the appellants were not bound by the parts of the decree to which they objected and sought intervention to challenge. Hence, they could enforce their rights in private litigation. This holding on the standard for third-party intervention does not control or address the proper judicial role in reviewing proposed consent decrees, and its rationale also loses force when taken out of context. The general public is deeply affected by consent decrees, and it is the public interest that the court is charged with determining before it enters a decree. Moreover, the Supreme Court itself recognized in *Sam Fox* that, as a practical matter, even any further private relief is highly unlikely.

was supported by the legislative history of the APPA, but the passages it cited merely help delineate the boundaries of the court's inquiry without addressing the scope of that review. *See* 394 F. Supp. at 44-45. Furthermore, the *Milk Producers* court totally ignored the repeated mentions in the legislative history that the APPA was designed to correct the abuse of judicial rubber-stamping, which was equated with judicial deference to the Attorney General. *See* notes 58-60 supra.

The court in United States v. National Broadcasting Co., 449 F. Supp. 1127 (C.D. Cal. 1979), similarly concluded that the *Sam Fox* policy of deference "continues to apply with equal force even after enactment of the [APPA]." 449 F. Supp. at 1141. In addition to relying on the district court's opinion in *Milk Producers* for this conclusion, the *NBC* court also cited part of the Eighth Circuit's *Milk Producers* opinion (449 F. Supp. at 1141-42):

It is axiomatic that the Attorney General must retain considerable discretion in controlling government litigation and in determining what is in the public interest. Thus, in our view, the intervention standard remains that which was stated in *Sam Fox*: "[B]ad faith or malfeasance on the part of the government in negotiating and accepting a consent decree must be shown before intervention will be allowed. 366 U.S. at 689.

United States v. Associated Milk Producers, 534 F.2d 113, 117 (8th Cir. 1976) (emphasis added), aff'd 394 F. Supp. 29, 44 (W.D. Mo. 1975), cert. denied, 429 U.S. 940 (1976). This passage certainly conveys a deferential tone, but reliance on it for the appropriate scope of review is misplaced. First, it only speaks to the standard for a third party to intervene, not to the scope of a court's review of a proposed consent decree. Second, the Eighth Circuit passage itself reflects confusion of *Sam Fox*'s intervention holding and its policy dictum. Compare *Sam Fox*, 366 U.S. at 689, with id. at 690-93.

Contrary to these conclusions by the *Milk Producers* and *NBC* courts, the *AT&T* court correctly observed that in enacting the APPA "Congress rejected case law to the effect that courts should not 'assess the wisdom of the Government's judgment in negotiating and accepting [a] consent decree.'" *AT&T*, 1982-2 Trade Cas. at 73,085 n.74 (quoting *Sam Fox*, 366 U.S. at 689). *See also* Zimmer & Sullivan, supra note 3, at 208, 210 ("Until recently, courts routinely rubber-stamped proposed decrees . . . largely due to doubts about the wisdom of reviewing Justice Department determinations. [The APPA], however, establishes a contrary public policy." (footnotes omitted) . . . The *Milk Producers* "court's approach seems fundamentally misconceived.").

89. 366 U.S. at 689.
90. 366 U.S. at 689.
91. For example, in the *AT&T* case the structural relief negotiated by the Justice Department and approved by the court will have enormous impact on consumer phone rates nationwide. *See e.g.* N.Y. Times, Sept. 29, 1983, at 29, col. 1; id., Feb. 12, 1983, at 29, col. 1; *see also* notes 67-70 supra and accompanying text.

92. *Appellants argue that even should they not be legally precluded from bringing a private action, nevertheless the very existence of the outstanding decree would as a matter
although private parties are technically not bound by consent decrees. Thus, a decision to enter a proposed decree, unlike a denial of intervention, is a final disposition of the rights of the public.

The dictum in Sam Fox, however, suggests an additional rationale for deference: deference because the decisionmaker is another branch of the government. The government’s decision to enter into a consent decree is “an administrative decision and . . . a part of the implementation of the general policy of the Executive branch of government.” Courts have historically been reluctant to review intensely the discretionary decisions of administrative bodies, including the decisions of the Justice Department to settle antitrust cases via consent decrees.

of comity either preclude further relief or operate to limit the relief some future equity court might decree. Although there is no reason why such a court need consider the present decree as anything but a minimum towards insuring broader representation and more favorable income distribution should a claim for further relief be made out, there is considerable weight to the argument that the court will feel constrained as a matter of comity to at least build on the foundations of the present decree.

366 U.S. at 694.

93. A consent decree bars private parties from suing for injunctive relief, but does not bar private treble damage suits. Thus competitors will be bound to the structural relief approved in the decree, and the defendant’s conduct will also be effectively insulated from private damage claims. See notes 76-78 supra.

94. Once a consent decree is entered, it is not subject to modification without the consent of the parties absent some unusual change of circumstance. See notes 80-83 supra and accompanying text.


97. See ITT Dividend, supra note 96, at 600, 610. This absence of judicial involvement in the consent decree process prompted the 1959 House Subcommittee on Antitrust and Monopoly to remark:

[T]he judicial function has been superseded by an administrative procedure in which there are no administrative rules to safeguard the interests of the public or the interest of parties not privy to the Government’s case. The consent decree practice has established an orbit in the twilight zone between established rules of administrative law and judicial procedures.

1959 REPORT, supra note 2, at 15.

During congressional hearings on the APPA, several critics of the proposed act questioned the propriety of empowering a judicial body to engage in the traditionally “executive” function of determining the public interest. See, e.g., H. HEARINGS ON APPA, supra note 54, at 205 (testimony of Milton Handler, Professor of Law, Columbia Univ.). Representative Hutchinson objected that the APPA “imposes on the courts what is essentially a nonjudicial function. In short, the courts will have to decide whether the Department of Justice has exercised its prosecutorial discretion to settle antitrust cases as well as it should. . . . In my opinion, such a process is foreign to the judicial function.” 120 CONG. REC. 36,340 (1974). Representative Hutchinson further objected:

[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. The question for the court will be whether the Department of Justice has exercised its prosecutorial discretion well or, perhaps, as well as possible. The question will not be whether the Department has violated some legal standard. For none is established by this legislation. Rather, the court is given a plenary and unqualified authority to re-decide an executive decision.
This argument for deference, based on separation of powers, is flawed, however, because it fails to distinguish between the Justice Department's negotiation of a proposed settlement and a court's entry of a consent decree. Although negotiations involve "administrative decisions" by the Justice Department, a court's entry of a consent decree is an exercise of a constitutional and statutory judicial power.

1973 House Report, supra note 3, at 21, reprinted in 1974 U.S. Code Cong. & Ad. News at 6545 (Additional Views of Rep. Hutchinson) (emphasis in original). Representative Hutchinson argued that the legislative and executive branches, which are accountable to the electorate rather than the courts, should determine what is "wise or good for the American people." Id. In dissenting from the Supreme Court's summary affirmance of the AT&T decision, Justice Rehnquist agreed with Representative Hutchinson that the "question assigned to the district courts by the Act is a classic example of a question committed to the Executive." Maryland v. United States, 103 S. Ct. 1240, 1243 (1983), affg. United States v. American Tel. & Tel., 1982-2 Trade Cas. (CCH) ¶64,979 (D.D.C. 1982).

This objection concerning delegation of an executive function to the judiciary goes beyond the issue of the appropriate scope of judicial review. It goes to the constitutionality of the APPA. If the Supreme Court found the objection persuasive, it would declare the public interest determination required by the APPA unconstitutional, regardless of the standard of review. The fatal flaw, if any, lies in the question the APPA asks the courts to answer, not in the way in which the courts go about answering that question. Since under Justice Rehnquist's view the judiciary cannot constitutionally make the public interest determination, neither the standard of the AT&T court nor "any other standard the District Court could have devised, admits of resolution by a court exercising the judicial power established by Article III of the Constitution." 103 S. Ct. at 1242 (Rehnquist, J., dissenting).

The separation of powers doctrine prohibits one branch of government from acting in such a way as to prevent another branch from accomplishing its constitutionally assigned functions. Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977). The separation of powers doctrine was originally premised on the notion that "each of the three general departments of government [must remain] entirely free from the control or coercive influence, direct or indirect, of either of the others." Humphrey's Ex'r. v. United States, 295 U.S. 602, 629 (1935). The Supreme Court took a "more pragmatic, flexible approach" to separation of powers in Nixon, supra, "reject[ing] the argument that the Constitution contemplates a complete division of authority between the three branches." 433 U.S. at 442-43. Rather, as the Court held in Nixon, the test of whether the proper balance between the coordinate branches is disrupted by particular action focuses on the "extent to which it prevents the [other] Branch from accomplishing its constitutionally assigned functions." 433 U.S. at 443.

Three arguments militate against the application of the separation of powers doctrine here. First, the Supreme Court had a chance to strike down the public interest provision of the APPA in the AT&T case but refused to do so, summarily affirming the district court instead. See note 97 supra. Second, judicial review of proposed consent decrees does not necessarily "prevent[] the Executive Branch from accomplishing its constitutionally assigned functions." Nixon, 433 U.S. at 443. If a court refuses to enter a consent decree, the Justice Department merely loses but one enforcement option. The Department may still litigate the case, dismiss the case, or settle the case by contract with the defendant. More importantly, the Department can still renegotiate the decree and resubmit it for court approval. Thus, the court does not prevent the Justice Department from enforcing the antitrust laws.

Third, the decree is subject to the court's inherent equitable power. See notes 101-03 infra. In reviewing a proposed settlement, the court exercises its inherent power. Unless this power is meaningless, the court's exercise of it cannot be an encroachment on the executive branch.

Indeed, a denial of the court's power to refuse to enter decrees that do not protect the public interest might itself represent an unconstitutional infringement on judicial power under the standard laid down in Nixon. Such a denial would arguably prevent the court from accom-
dicial function. Since entry of a consent decree is a judicial act, the decree is subject to the court's equitable power to refuse to enter any judgment not "equitable and in the public interest." Thus, even apart from the APPA, the court's inherent equitable power "over [its] own process, to prevent abuse, oppression and injustice" obviates the need for deference to the executive branch. The court inherently possesses the power to review consent decrees intensively in making its public interest determination.

By entering a consent decree, a court concludes, pursuant to its equitable responsibility, that the decree protects the public interest. A Sam Fox standard, whereby a court would refuse to enter a decree only if there were some evidence of bad faith on the part of the government, would be an abdication of that responsibility. For a con-


Presumably, the Justice Department could settle its cases by contract with the defendant. The Department insists, however, that all agreements be embodied in a court order. See ITT Dividend, supra note 96, at 613. In one case, the Department informed the court that "it was its policy not to accept stipulations unless "So Ordered" [although] [t]he Government does not question the sincerity, willingness or ability of [the defendant] to carry out the terms of the stipulation." United States v. United Artists Theatre Circuit, Inc., 1971 Trade Cas. (CCH) ¶ 73,751, at 91,183 (E.D.N.Y. 1971).

101. United States v. Radio Corp. of America, 46 F. Supp. 654, 655 (D. Del. 1942), appeal dismissed, 318 U.S. 796 (1943); see also Chrysler Corp. v. United States, 316 U.S. 556, 570 (1942) (Frankfurter, J., dissenting) ("A court of equity is not just an umpire between two litigants. In a very special sense, the public interest is in its keeping as the conscience of the law."); United States v. Morgan, 307 U.S. 183, 194 (1939) ("It is familiar doctrine that the extent to which a court of equity may grant or withhold its aid, and the manner of moulding its remedies, may be affected by the public interest involved."); 1959 REPORT, supra note 2, at 3 ("As a judicial act, the consent decree constitutes determination by the court that its content is equitable and in the public interest.").


103. The fact that the court is to protect the public interest rather than some private interests provides additional support for intense review, since the court's inherent equitable powers reach a maximum when the public interest is involved. See Virginian Ry. v. System Fedn., No. 40, 300 U.S. 515, 552 (1937) ("Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved.").

104. Additional support for the proposition that the Sam Fox standard would be inappropriate to consent decree approval can be found by analyzing the wording of the statute itself. First, the public interest determination is mandatory. 15 U.S.C. § 16(e) (1982); see also 119 CONG. REC. 3453 (1973) (statement of Sen. Tunney). Neither the statute nor the congressional reports indicate that a court should only evaluate a decree in instances where "bad faith" is claimed. Second, the general phrasing of the statutory mandate, which requires a court to deny entry of any Justice Department proposal not in the public interest, is inconsistent with an approach that would limit judicial review to decrees allegedly negotiated in bad faith.
sent decree that violates the public interest as a result of an error by
the Justice Department does not become less undesirable merely be­
cause the government negotiated it in good faith.

III. POTENTIAL DISADVANTAGES OF INTENSE JUDICIAL REVIEW

Commentators\(^{105}\) and courts\(^{106}\) have posited two disadvantages
that could ensue from intense judicial review. First, they have ar­

gued that intense review will undermine the consent decree’s effec­

tiveness as a device for the enforcement of the antitrust laws by

destroying the incentives to settle without trial.\(^{107}\) Second, they have

argued that, as a practical matter, the courts lack the ability to make

an independent determination of the public interest.\(^{108}\) Neither of

these objections provides a sufficient reason to reject intense judicial

review of proposed decrees. Indeed, intense judicial review may ac­

tually improve the effectiveness of antitrust enforcement.

A. Reduced Incentives To Settle

If the incentive for settlement actually decreased as the intensity

of judicial review of proposed settlements increased, judicial defer­

tence to the Justice Department would be appropriate. The Depart­

ment’s antitrust enforcement depends heavily on the consent decree
devices.\(^{109}\) Because it involves a settlement, a consent decree can fur­

ther the goals of antitrust policy\(^{110}\) at a significant savings of time

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105. See, e.g., Handler, Antitrust—Myth and Reality in an Inflationary Era, 50 N.Y.U. L.
REV. 211, 239 (1975).

106. See note 107 infra; cf. City of Burbank v. General Elec. Co., 329 F.2d 825, 835 (9th
Cir. 1964) (discussing administrative advantages of nolo contendere pleas in criminal cases and
classifying such pleas with consent decrees).

ler, supra note 105, at 243 (expressing the concern that the elaborate APPA procedures “cannot
but have a chilling effect on the normal processes of settling a civil action”).

108. See, e.g., S. HEARINGS ON APPA, supra note 25, at 71 (statement of Robert A. Ham­
mond III, attorney).

109. See note 3 supra.

110. The Judgments Section of the Antitrust Division follows these broad purposes in de­
veloping decrees:

(1) To prohibit past illegal activities; (2) To prevent future violations of the antitrust laws;
(3) To restore competitive conditions; and (4) To deprive the defendants of the fruits of
their illegal acts.

Kilgore, Antitrust Judgments and Their Enforcement, in AN ANTITRUST HANDBOOK 331, 338
(Section of Antitrust Law, ABA 1958). In light of the APPA provisions, the purpose “to pro­
tect the public interest” might be an appropriate addition to this list.

The consent decree is unique as an antitrust enforcement device because it can actually “go
beyond sheer prohibition; it can attempt to shape remedies to the requirements of industrial
order. . . . It can reach beyond the persons in legal combat to comprehend all the parties to
an industry.” W. HAMILTON & I. TILL, supra note 3, at 88. See also 1959 REPORT, supra note
2, at 19.
and resources for the Department and for the judiciary. Thus, the costs to the public of disincentives to settle would be substantial.

1. Settlement Risks and Costs

The relative effects of independent and thorough judicial review on incentives to settle are, however, minimal. For defendants, consent decrees represent a less costly, less time consuming, and less disruptive alternative to litigation. Further, by negotiating a settlement, the defendant avoids the risks associated with litigation, most significantly, the prima facie effect of a government judgment in subsequent private treble damage suits. These incentives to settle will be largely unaffected by the intensity of the court's review.

Nor does intense judicial review in itself increase the costs of settlement, thereby reducing the incentive to settle. The APPA public notice procedures may increase the cost that accompanies a consent settlement, but these procedures must be complied with regardless of the scope of the court's review. Any additional costs unique to intense judicial review are not likely to be substantial.

2. Equivalency of Relief

A disincentive to settle might also arise if the court substituted its view of what would be proper final relief after a litigated judgment for the Department's view of proper negotiated relief. Were the court to condition its approval of a consent decree on the defendant's acceptance of the court's relief, the defendant, from the point of view of relief, would be no worse than if it had litigated and lost. The defendant might therefore prefer to litigate instead of settle, gaining

111. One study suggests that consent decrees are entered in less than half the time it takes fully to litigate an action. Barnes, supra note 3, at 237.
112. Kalodner, supra note 3, at 285; see also M. Goldberg, supra note 3, at 3.
114. Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1982), provides that a judgment against a defendant in a public civil antitrust suit shall be prima facie evidence of antitrust violations in subsequent private treble damage actions. This prima facie effect does not apply to decrees entered before any testimony is taken. Consent decrees normally are entered with no record and typically state that no evidence has been taken. See Kalodner, supra note 3, at 320 n.22; note 74 supra.
115. See Branfman, supra note 30, at 352-53; see also id. at 329 n.94 (Branfman notes that the filing of comments by third parties increased the time between filing and approval by over two months on the average. Presumably, defendants would incur costs during the delay.).
117. According to one study, consent decrees are entered in less than half the time it takes to litigate an action fully. See note 111 supra. Given this enormous time differential, it is unlikely that intense judicial review will greatly reduce the cost advantages of settlement, since a court's review of a proposed decree is unlikely to take a long time. See also S. Hearings on APPA, supra note 25, at 116 (statement of Sen. Gurney).
This argument, however, overlooks three considerations. First, a proper application of an intense scope of review would not contain this fault. Although Congress intended courts to be able to substitute their views of the public interest in the decree for the Department's, it did not intend courts to insist on litigated rather than negotiated relief. Accordingly, it commanded that the court "preserve the consent decree as a viable option." Second, the strongest incentive to settle — freedom from the prima facie effect of a fully litigated government judgment in future private treble damage actions — is unaffected by the scope of judicial review. Thus, even if a defendant were confronted with the equivalent of a litigated judgment in the consent decree, the absence of the prima facie effect, coupled with the cost saving of settlement, would often lead the defendant to opt for settlement instead of trial. Third, the goal of settlement is not an absolute one. The very purpose of judicial review is to ensure that settlements in conflict with the public interest are not entered. If the Justice Department can negotiate only a bad settlement, then the public interest will be better served by a trial on the merits. Congress has nowhere expressed an intention to encourage a court to accept an improper settlement as a means of preserving the consent decree as a settlement option.

118. Handler, supra note 105, at 241.
119. See notes 53-66 supra and accompanying text. Of course, the court cannot make changes in the proposed decree without the consent of the parties. See note 2 supra; cf. text at note 9 supra (court conditioned its approval of consent decree on parties' acceptance of modifications).
120. 1973 HOUSE REPORT, supra note 3, at 8, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6539 (quoting 1973 SENATE REPORT, supra note 5, at 6). The phrase "public interest" as used in the APPA includes "compromises made for non-substantive reasons inherent in the process of settling cases through the consent decree procedure." 1973 HOUSE REPORT, supra note 3, at 12, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6542.
121. M. GOLDBERG, supra note 3, at 3; 1959 REPORT, supra note 2, at 23 ("It is clear that the substantial immunity from private antitrust actions is a primary consideration in defendants' willingness to negotiate consent decrees.").
122. See, e.g., United States v. Gillette Co., 406 F. Supp. 713, 716 n.2 (D. Mass. 1975), where the parties "agreed that the court was not to weigh as one element of the settlement the possibility that the government might have lost on the merits at trial. The decree is to be tested on the basis of the relief provided, on the assumption that the government would have won."

Indeed, some defendants have consented to decrees that went beyond the relief the government could have obtained at trial, given the judicial precedents at that time. 1959 REPORT, supra note 2, at 19; see, e.g., United States v. A.B. Dick Co., 1948-1949 Trade Cas. (CCH) ¶ 62,233, at 62,559 (N.D. Ohio 1948). In A.B. Dick Co., the consent decree contained a provision for royalty-free patent licensing, even though courts did not grant such relief in a litigated judgment until several years later. See Peterson, Consent Decrees: A Weapon of Anti-Trust Enforcement, 18 U. KAN. CITY L. REV. 34, 49-50 (1950). This phenomenon suggests that factors other than the severity of the relief embodied in the decree play a major role in defendants' decisions to settle.
124. The Senate and the House recognized that: [T]he court must have broad discretion to accommodate a balancing of interests. On the
Intense judicial review does not affect the defendant's incentives to settle. Thus, close judicial scrutiny of the terms of proposed consent decrees will not eviscerate the viability of consent decrees as an alternative to trial.

B. Inadequate Knowledge

A second reason advanced against intense judicial review is the court's inability, as a practical matter, to determine accurately the public interest. Not only does the court typically lack expertise in the complex field of antitrust law, but it may also be ignorant of certain administrative factors that motivated the Justice Department to settle its case. Given the paucity of the court's knowledge, the argument goes, judicial deference is the better part of judicial wisdom.

1. Substantive Knowledge

The argument concerning the court's lack of knowledge fails at the start by ignoring the effect of the APPA; the Act enables a court, with the cooperation of the Justice Department, to obtain enough knowledge to stand as an informed representative of the public interest. Congress designed the APPA public comment procedures specifically to remedy any lack of judicial expertise. A court can use the public comments received during the APPA public notice period.

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one hand, the court must obtain the necessary information to make its determination that the proposed decree is in the public interest. On the other hand, it must preserve the consent decree as a viable settlement option.


125. See, e.g., S. HEARINGS ON APPA, supra note 25, at 71 (statement of James S. Campbell, attorney).

126. See S. HEARINGS ON APPA, supra note 25, at 151 (testimony of J. Skelly Wright, Judge, United States Court of Appeals, D.C. Circuit) (“On the other hand... antitrust 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.”); see also United States v. Ling-Temco-Vought, Inc., 315 F. Supp. 1301 (W.D. Pa. 1970) (court forced to rely on stipulations of parties and the assurances of the Justice Department that proposed decree protected the public interest in accordance with congressional design).

127. These factors typically include

the strength of the case on the law and the facts; the amount of resources that would be tied up in full preparation for trial and in subsequent legal proceedings; the desirability or necessity of obtaining significant relief rapidly; the value of any added increment of relief that full litigation might produce as compared to the value of the alternative enforcement efforts that could be carried out instead; and the effect that consent to a particular decree might have on other cases, present and future, that are or might be arguably similar.


128. See 119 CONG. REC. 24,600 (1973) (statement of Sen. Gurney). The public comment procedure is designed to generate information that will improve the court's ability to evaluate the decree from the perspective of the public interest. See note 11 supra.
to educate itself about the effects of a proposed decree.\textsuperscript{129} Congress also provided various discretionary\textsuperscript{130} procedural devices, such as calling expert witnesses or appointing a special master,\textsuperscript{131} which the court can freely use to assist itself in making a competent determination of the public interest.\textsuperscript{132}

Although a court will be able to use the APPA procedures to evaluate the \textit{effectiveness} of the relief negotiated by the parties, critics of intense judicial review urge that the court lacks the knowledge to determine whether a proposed decree is a good \textit{settlement} without investigating the relative strengths of the parties’ legal positions.\textsuperscript{133} Such an investigation of the government’s chances of success at trial might result in an extensive “minitrial” of the issues.\textsuperscript{134} The court might then frustrate the goal of rapid relief\textsuperscript{135} and might reduce incentives to settle.\textsuperscript{136}

These effects, however, will probably be minimal. A “minitrial” still will be less costly and less time consuming than a full-scale trial.\textsuperscript{137} The defendant’s strongest incentive to settle — avoidance of the prima facie effect\textsuperscript{138} — remains intact. Also, the problem does not even arise when the Justice Department reveals to the court the reasons behind its willingness to accept less than the remedy it had originally sought.\textsuperscript{139} Presumably, the Department would be even more diligent in doing so in the face of intense judicial review.

2. \textit{Resource Allocation}

The court’s lack of knowledge may create a second problem. The court cannot match the expertise of the Attorney General in the management and allocation of the Justice Department’s resources.\textsuperscript{140}

\begin{footnotesize}
\begin{itemize}
\item\textsuperscript{129} Senator Gurney stated that “[t]he extra time and additional information that the bill thus requires is for the purpose of encouraging, and in some cases soliciting additional information and public comment that will assist the court in deciding whether the decree should be granted.” 119 CONG. REC. 24,600 (1973).
\item\textsuperscript{130} 118 CONG. REC. 31,675 (1972) (statement of Sen. Tunney).
\item\textsuperscript{131} 15 U.S.C. § 16(f)(1)-(2) (1982).
\item\textsuperscript{132} Senator Tunney emphasized the importance of the interplay between these procedures and the court’s public interest review when he stated that “in a very few complex cases, failure to use some of the procedures might give rise to an indication that the district court had failed to exercise its discretion properly.” 119 CONG. REC. 3453 (1973).
\item\textsuperscript{133} See notes 125-27 supra and accompanying text.
\item\textsuperscript{134} S. HEARINGS ON APPA, supra note 25, at 78 (statement of James S. Campbell, attorney).
\item\textsuperscript{135} Id.
\item\textsuperscript{136} See text at note 118 supra.
\item\textsuperscript{137} See note 117 supra.
\item\textsuperscript{138} See notes 121-22 supra and accompanying text.
\item\textsuperscript{139} See SECTION OF ANTITRUST LAW, ABA, ANTITRUST CONSENT DEGREE MANUAL 5 (1979).
\item\textsuperscript{140} H. HEARINGS ON APPA, supra note 54, at 142 (statement of Miles W. Kirkpatrick, attorney).
\end{itemize}
\end{footnotesize}
Factors such as the potential strain on the Department’s capabilities of litigating a particular case might prompt the government to accept a less-than-ideal settlement in order to free its resources for use elsewhere. A settlement that appears inadequate in isolation could produce a net gain for society by improving the overall efficiency of antitrust enforcement. A court’s denial of approval could frustrate the Department’s efficiency.

Even granting the theory of this argument, any misallocation of resources caused by intense judicial review is likely to be insignificant. A court’s denial of approval will result in substantial reallocation of resources only if a trial ensues. But the court’s denial of approval does not necessarily mean that a trial must follow. Each of the parties to a proposed consent decree manifests its willingness, if not its desire, to settle the case, and renegotiation of the settlement by the parties to make the decree compatible with the public interest would remain a viable alternative to litigation.

If renegotiation proves unproductive, the Justice Department could dismiss a case in the face of a court’s denial of a proposed decree. Such dismissals need not jeopardize effective antitrust en-

141. H. HEARINGS ON APPA, supra note 54, at 127 (statement of Howard R. Lurie, Professor of Law).
142. Zimmer and Sullivan, supra note 3, at 207, point out that there are numerous theoretical and practical defects in the administrative process that at least make it doubtful whether the Justice Department is the best judge of its own resource allocation. Intense judicial review, therefore, conceivably would improve the efficiency of the enforcement of the antitrust laws. Nevertheless, there is no necessary dichotomy between decisions made by the courts and by the Justice Department: The legislative history of the APPA should make the courts sensitive to the efficient allocation of the Department’s resources in making their public interest determinations. The phrase “public interest” as used in the APPA includes “compromises made for nonsubstantive reasons inherent in the process of settling cases through the consent decree procedure.” 1973 HOUSE REPORT, supra note 3, at 12, reprinted in 1974 U.S. CODE CONG. & AD. NEWS at 6542. The courts should regard the proper allocation of the Justice Department’s resources as one such nonsubstantive factor.
143. See ITT Dividend, supra note 96, at 614 n.132.
144. For examples under the APPA where the parties have returned to the bargaining table at the request of the court and have come back with an acceptable settlement, see Branfman, supra note 30, at 350 n.180.
145. Two courts recently held that the APPA procedures do not apply to stipulated dismissals. In In re International Business Machs. Corp., 687 F.2d 591 (2d Cir. 1982), the circuit court granted a writ of mandamus directing the district court to cease consideration of the question whether the APPA applies to a stipulated dismissal. The circuit court found no indication in the Act itself or in the legislative history that Congress intended the APPA to apply to dismissals. 687 F.2d at 601-02. Indeed, as the following dialogue indicates, the bill’s sponsor thought of stipulated dismissals as an alternative to settlements falling within the scope of the APPA:

MR. HUTCHINSON. Would any kind of consent decree need to have the court’s approval?
MR. TUNNEY. Right.
MR. HUTCHINS. Would any kind of agreement made outside the court privately stand?
MR. TUNNEY. Well, I certainly do not think so. I suppose the Justice Department could drop the suit. That would be a third alternative. Otherwise the Justice Department could proceed with the litigation or come in with a new consent [decree] and attempt to get the judge's approval of that decree.
forcement. Dismissals entered without prejudice do not prevent subsequent administrations from initiating litigation to regulate and restrain continuing anticompetitive behavior of the defendant.\footnote{146} But the reluctance of courts to modify any consent decree once it is entered\footnote{147} means that inadequate injunctive provisions embodied in a decree will operate in perpetuity and may in effect foreclose further regulation of the defendant's practices.\footnote{148} On balance, then, a dismissal might be preferable to entry of an ineffective consent decree.\footnote{149}

In fact, the prospect of judicially imposed renegotiations or subsequent "voluntary" dismissal could improve the Justice Department's performance in effectuating antitrust policies. The knowledge that a court will closely scrutinize the terms of a proposed settlement provides an incentive for the Justice Department to exercise care\footnote{150} in arriving at a settlement in the first place.\footnote{151} The

\footnote{H. HEARINGS ON APPA, supra note 54, at 43 (emphasis added). Several other witnesses testified to the same effect. 687 F.2d at 602.}

In United States v. Mercedes-Benz of North America, Inc. 547 F. Supp. 399 (N.D. Cal. 1982), the district court similarly concluded that the APPA did not apply to a stipulated dismissal. Besides relying on the legislative history of the APPA, the court advanced three additional arguments. First, the court explained that "to 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." 547 F. Supp. at 401; see 1973 SENATE REPORT, supra note 5, at 5. In contrast, stipulated dismissals are ordinarily entered without the need for court approval. FED. R. CIV. P. 41(a)(1). Congress' understanding that no major changes were being made cannot be reconciled with inclusion of dismissals within the coverage of the APPA. 547 F. Supp. at 401. Second, dismissals entered without prejudice do not bar later administrations from reinstituting suit. An effective suit later is preferable to approval of an inadequate settlement now, a settlement that could hinder subsequent attempts by different administrations to regulate the defendant's behavior. 547 F. Supp. at 400-01. Finally, application of the APPA to dismissals could violate the constitutional separation of powers. Nothing less than a clear congressional mandate should lead a court to wade through such a "constitutional morass." 547 F. Supp. at 401.

\footnote{146. United States v. Mercedes-Benz of North America, Inc., 547 F. Supp. 399, 400-01 (N.D. Cal. 1982).}

\footnote{147. See United States v. Swift & Co., 286 U.S. 106, 119 (1932) ("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."). See also notes 79-83 supra and accompanying text.}

\footnote{148. See 119 CONG. REC. 3451 (1973) (statement of Sen. Tunney).}

\footnote{149. See S. HEARINGS ON APPA, supra note 25, at 76-77 (statement of James S. Campbell, attorney).}

\footnote{150. The Justice Department, for instance, may be less likely to "compromise[ ] its economic objectives for the sake of expediency," 1959 REPORT, supra note 2, at 303, if it thinks the court would not approve of such concessions. The Department might also be less likely to "knuckle[ ] under" to the defendants, as the Supreme Court found the Department had done in Cascade Natural Gas Corp. v. El Paso Natural Gas Corp., 386 U.S. 129, 141 (1967) (decree completely failed to remedy the situation found to violate the antitrust laws). See also United States v. First Natl. Bank & Trust Co., 280 F. Supp. 260, 263 (E.D. Ky. 1967) ("about a ninety percent capitulation" by the Justice Department), affd. mem. sub nom. Central Bank & Trust Co. v. United States, 391 U.S. 469 (1968). When it enacted the APPA, Congress was particularly concerned about decrees that commentators deemed "devoid of merit" (referring to the..."}
court's status as a disinterested party in the litigation allows it objectively to assess the relationship between the decree and the public interest. And the resources available to it under the APPA\textsuperscript{152} enable the court to educate itself about the decree to ensure that the decree promotes the goals of antitrust policy by protecting the public interest.

**Conclusion**

No practical or theoretical obstacle limits a court's power or ability to evaluate intensely and independently consent decrees proposed as settlements of public, civil antitrust suits. By using the tools at its disposal under the APPA, the court can stand as an informed representative of the public and as an effective check against errors made by the Justice Department in negotiating settlements. The congressional intent for the APPA, the importance of consent decrees in antitrust enforcement, and the significance of antitrust settlements to the public at large all demand that courts accept their equitable and statutory responsibility to enter as judgments only consent decrees that protect the public interest. This responsibility calls for independent and intense review of proposed decrees.

\textsuperscript{infamous AT&T-Western Electric decree entered in 1956) and “blatantly inequitable and improper.” See 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney).}

\textsuperscript{151. See S. Hearings on APPA, supra note 25, at 148.}

\textsuperscript{152. See 15 U.S.C. § 16(f) (1982).}